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**FOOD SECURITY,  
FOOD INSECURITY,  
AND  
INTERNATIONAL LAW**

**JOEL BELINGA EWOTI**

**GCILS.ORG**

## **Abstract**

The argument in this paper is that international law is one major factor among several, which constituted the structural causes of food insecurity in Sub-Saharan Africa (SSA) during the period of colonialism. I further argue that international law provides a legal framework which maintains and perpetuates the unavailability of food, insufficient purchasing power and inappropriate distribution of food to this day. I demonstrate this with the example of the Agreement on Agriculture (AoA) since the agricultural sector provides livelihood for 64 % of the population in SSA. By justifying exploitation practices such as land expropriation and forced labour for cash-crop cultivation, international law contributed to a decline in staple food production and traditional staple sources in SSA. The resulting unavailability of food and the dismantling of distribution systems laid the foundation for the region's dependency on food imports from the international market. This international market for food was constituted by international law through the institutionalisation of European legal mechanisms and relations. These include ownership rights, legal exchange, capital and notably the establishment of food as a commodity, from which people can be excluded without regard to their nutritional needs. That is what makes 'insufficient purchasing power' a cause of food insecurity in the first place. What is more, the international legal framework forced countries in SSA to submit to agricultural trade liberalisation under the AoA through structural adjustment policies. Furthermore, the regulatory framework of the AoA institutionalised power structures, in which the industrialised countries can protect their market through 'dirty tariffication' and subsidies, and the countries in SSA cannot. Thus, the AoA deepens and consolidates the unavailability of food, insufficient purchasing power and inappropriate distribution of food in SSA that international law has constituted.

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## Chapter 1

### Introduction

#### **1.1 Food Security, Food Insecurity, and International Law**

The definition of food security was adopted at the FAO World Food Summit in 1996 and supplemented by the social aspect in 2001: ‘Food security exists when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food which meets their dietary needs and food preferences for an active and healthy life.’<sup>1</sup> This definition comprises four dimensions: Food availability, accessibility, utilisation and stability of the first three dimensions.

Consequently, and according to FAO, IFAD and WFP, food insecurity 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. It may be caused by the unavailability of food, insufficient purchasing power, inappropriate distribution or inadequate use of food at the household level.’<sup>2</sup> In the following, I focus on the first three causes, as the use of food at the household level is not linked to the international legal framework for food.

In any case, there is enough food available worldwide to create food security according to the above definitions.<sup>3</sup> Nevertheless, between 690 and 783 million people were affected by hunger in 2022, 262 millions of them in Sub-Saharan Africa (SSA), which corresponds to 22.5% of

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<sup>1</sup> FAO, *Trade Reforms and Food Security: Conceptualizing the Linkages*. (Food and Agriculture Organization of The United Nations 2003) 29.

<sup>2</sup> FAO, IFAD and WFP (n 6) 50.

<sup>3</sup> Uwe Hoering, *Agrar-Kolonialismus in Afrika: Eine Andere Landwirtschaft Ist Möglich* (Forum Umwelt und Entwicklung 2007) 131.

the region's population and represents an increase of 9 million people compared to 2021.<sup>4</sup> As the development economist Amartya Sen puts it: 'Starvation is the characteristic of some people not having enough food to eat. It is not the characteristic of there being not enough food to eat.'<sup>5</sup> This shows that beyond the mere availability of food, food security is inextricably linked to a market for the distribution of food and – since food is a commodity that is bought and sold for profit – to sufficient income for populations to purchase it.<sup>6</sup> As Anna Chadwick emphasizes, '[t]he vast networks and complexities of the modern global food system, the fortunes and fates of billions of people, and of billion-dollar companies, are reduced, determined, and put into relation by a single numerical measure of the value of food: its price.'<sup>7</sup>

International law predominantly presents itself as a solution to hunger and food insecurity. For example, the right to adequate food is enshrined in international law as a human right in Art. 11 (1) and (2) of the International Covenant on Economic, Social and Cultural Rights.<sup>8</sup> Additionally, food security is a central component of the United Nation's 2030 Agenda for Sustainable Development and is explicitly mentioned in the Sustainable Development Goal (SDG) 2: 'End hunger, achieve food security and improved nutrition and promote sustainable agriculture.'<sup>9</sup> With regard to SDG 2, the World Trade Organization (WTO) states that 'eliminating subsidies that cause distortions in agriculture markets will lead to fairer more competitive markets helping both farmers and consumers while contributing to food security.'<sup>10</sup>

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<sup>4</sup> FAO and others, *The State of Food Security and Nutrition in the World. Urbanization, Agrifood Systems Transformation and Healthy Diets across the Rural–Urban Continuum* (FAO 2023) vii, 9f.

<sup>5</sup> Amartya Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation* (Oxford University Press 1981) 1.

<sup>6</sup> Anna Chadwick, *Law and the Political Economy of Hunger* (Oxford University Press 2019) 45.

<sup>7</sup> Ibid.

<sup>8</sup> International Covenant on Economic, Social and Cultural Rights 1966 (OHCHR).

<sup>9</sup> United Nations, 'Transforming Our World: The 2030 Agenda for Sustainable Development' (*United Nations* 2015) <https://sdgs.un.org/2030agenda> accessed 12 July 2023.

<sup>10</sup> WTO | 'The WTO and the Sustainable Development Goals' (*Wto.org* 2017) [https://www.wto.org/english/thewto\\_e/coher\\_e/sdgs\\_e/sdgs\\_e.htm](https://www.wto.org/english/thewto_e/coher_e/sdgs_e/sdgs_e.htm) accessed 14 August 2023.

However, in the words of Chadwick, '[law] is a collection of ideas, principles, practices, and institutions. It is iterated in texts ranging from treaties to contracts; it is legislated, regulated, negotiated, and challenged; it is performed by people – sometimes consciously, other times not.'<sup>11</sup> In my analysis, I draw on her reflections on shifting the focus away from law as the solution to food insecurity. This is because the solution-oriented regulatory dimension of law understands the deeper, structural causes of food insecurity as given characteristics.<sup>12</sup> Hence, the regulation only starts at this point, tending to be ineffective in addressing the causes.<sup>13</sup> On this basis, I will explore the constitutive dimension of international law in which the structural causes of food insecurity are its outcome.<sup>14</sup>

## **1.2 Methodology and Aims**

The methodology applied is a law and political economy approach, combined with a Third World approach to international law (TWAIL): I analyse the role of international law in the structural causes of food insecurity in SSA in a historical, political, and socio-economic context.

Scholars such as Bjornlund et al. argue that prior to the time of colonialism in SSA, 'highly developed and complex socio-economic and political systems [...] provided food security [...] and adapted to local biophysical conditions.'<sup>15</sup> How did the 262 million people affected by food insecurity in SSA come about a good 400 years later? What role did colonial practices,

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<sup>11</sup> Chadwick (n 6) 7.

<sup>12</sup> Ibid 4, 194.

<sup>13</sup> Ibid 4, 194.

<sup>14</sup> Ibid 194.

<sup>15</sup> Vibeke Bjornlund, Henning Bjornlund and Andre F Van Rooyen, 'Why Agricultural Production in Sub-Saharan Africa Remains Low Compared to the Rest of the World – a Historical Perspective' (2020) 36 *International Journal of Water Resources Development* 25.

institutions and structures play in its emergence, perpetuation, and maintenance? Thus far, most of the relevant literature on this topic comes from the political, historical, economic, or social sciences, whereas legal studies are rare. The main writers of the legal studies on this topic are Anna Chadwick, Anne Orford, and Carmen Gonzales. This paper, therefore, attempts to make a jurisprudential contribution in this context by analysing, in particular, the role of international law.

Generally, in this paper, I find that international law constituted the structural causes of food insecurity in SSA, and that international law provides a framework which maintains and perpetuates these causes. I do not attempt to demonstrate how food security in SSA can be achieved through international law. Rather, I aim to examine how the structural causes of food insecurity could come about in the first place. I do not accept the unavailability of food, insufficient purchasing power, and inappropriate distribution as natural characteristics of SSA that need to be regulated by law.

### **1.3 Structure and Scope of Research**

In Chapter 2 of this paper, I seek to elicit the significance of international law for the origins of food insecurity in SSA. For that, I discuss the colonial practices of securing land and labour, the institutionalisation of food as a commodity, and the colonial control of trade. I then extend this analysis by examining how those legal mechanisms have contributed to the region's dependency on food imports.

In Chapter 3, I move to consider the correlation between the Agreement on Agriculture (AoA) as a treaty under international law, and the persistent structural causes of food insecurity in

SSA. I chose to focus on the AoA because the agricultural sector provides livelihood for 64 % of the population in SSA. This means a high level of dependency on the sector regarding the availability and distribution of food, as well as for income. Furthermore, the sector contributes about one-fifth of the total gross domestic product and about 12 % of the total export earnings for the region.<sup>16</sup> In this chapter, I analyse how the AoA institutionalized unequal power structures in market access, domestic support, and export subsidies in international agricultural trade. I further demonstrate how the international legal framework imposed these structures on the countries in SSA.

In Chapter 4, I conclude that international law has been a crucial causal factor in the unavailability of food, inappropriate distribution of food, and insufficient purchasing power in SSA. What is more, international law provides a framework which maintains and perpetuates these causes of food insecurity, as demonstrated in the example of the AoA.

Given the size and diversity of SSA, as well as the relevant time span of several hundred years, the arguments put forward are illustrated with selected examples from West, East, Central and Southern Africa between 1888 and 1940.

Although climate change already has a drastic impact on food insecurity in SSA and will do so to an even greater extent in the future, this paper deliberately excludes this factor. The reason for this is that vulnerability to climate change is largely determined by the structures underlying food insecurity, as not all people in the region affected by climate change are affected in the same way. Finally, it is to be clarified that neither colonialism in SSA nor international law can

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<sup>16</sup> Martha Belete Hailu, 'Food Security and Agricultural Trade Liberalization' (Society of International Economic Law 2010) <https://dx.doi.org/10.2139/ssrn.1633965> accessed 4 July 2023 2.



be conceived as unitary concepts, but must be understood as complex, shifting relations and dynamics of ideology, practice, and reciprocal (geo-)political and (socio-)economic influences.<sup>17</sup>

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<sup>17</sup> Chadwick (n 6) 26.

## Chapter 2

### International Law and the Origins of Food Insecurity

In this chapter, I seek to elicit the significance of international law for the origins of food insecurity in SSA.

#### **2.1 Unavailability of Food, Insufficient Purchasing Power and Inappropriate Distribution**

##### **2.1.1 Securing Land and Labour**

The main argument in this section is that international law rationalised and legitimised the exploitative colonial practices of securing land and labour for export crop production through the ‘dynamic of difference’ and the ‘white man’s burden’. As a result, staple food production and local food distribution suffered, laying the foundation for dependence on food imports. Moreover, the colonies specialised in individual cash crops, on whose export they still depend today to secure their purchasing power.

The colonial powers secured land and labour for the cultivation of two or three export crops in each colony, such as maize and cattle, groundnuts, or palm oil. Meanwhile, most of the export crops were not edible or did not provide a sufficient food base, such as coffee, tea and cocoa, cotton, sisal, rubber, tobacco, or sugar.<sup>18</sup> European access to resources was achieved through the displacement of Africans and the transfer of land to colonial administrations.

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<sup>18</sup> Bjornlund and others (2020) (n 15) 30.

For instance, in the Union of South Africa, land alienation was made possible by the Natives Land Act of 1913, adopted by the Parliament of South Africa.<sup>19</sup> The Act segregated white-only and black-only areas respectively after white farmers complained about labour shortages and market competition from native peasants in the agricultural sector.<sup>20</sup> Section 10 of the Act defined a ‘native’ as ‘any person [...] who is a member of an aboriginal race or tribe of Africa; and [...] any company or other body of persons, corporate or unincorporate, if the persons who have a controlling interest therein are natives.’<sup>21</sup> The Act prohibited Africans from buying or leasing land outside their allocated areas, which only accounted for about 7 % of the national territory, stating in Section 1 (a) that ‘a native shall not enter into any agreement or transaction for the purchase, hire, or other acquisition from a person other than a native, of any such land or of any right thereto, interest therein, or servitude thereover.’<sup>22</sup>

By eliminating competition from black farmers in the agricultural sector, the law went beyond simply dispossessing people of their land. It largely excluded livelihood options for Africans other than working for European farmers and industrialists, who controlled 62% of cultivable land by 1934.<sup>23</sup> In Southern Rhodesia, today’s Zimbabwe, the Land Apportionment Act of 1930 created a similar legal zone for Europeans where it was made illegal for Africans to purchase land.<sup>24</sup> The Act was passed by the Southern Rhodesian legislature in 1930 and assented by the Imperial British government in 1931.<sup>25</sup> As a result, over 60% of fertile land was brought under European control.<sup>26</sup>

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<sup>19</sup> Act No. 27 1913.

<sup>20</sup> Sheryl Hendriks, ‘Food Security in South Africa: Status Quo and Policy Imperatives’ (2014) 53 *Agrekon* 2.

<sup>21</sup> Act No. 27 1913 Sec. 10.

<sup>22</sup> *Ibid* Sec. 1.

<sup>23</sup> South African History Online, ‘The Natives Land Act of 1913’ (2013)

<https://www.sahistory.org.za/article/natives-land-act-1913> accessed 2 August 2023; Bjornlund and others (2020) (n 15) 34.

<sup>24</sup> *Ibid*.

<sup>25</sup> Joseph Mujere and Admire Mseba, ‘The Politics of African Freehold Land Ownership in Earlycolonial Zimbabwe, 1890–1930’ (2019) 47 *African Economic History* 46f.

<sup>26</sup> *Ibid*.

With less land available for staple food production due to land alienation for the production of export crops, and prices falling due to the increasing volume of exports, many Africans gave up production or changed their occupations to focus on the production of staple crops for food security.<sup>27</sup> As a result, there was an increase in coercive measures to force African farmers to produce export crops.<sup>28</sup> For example, local processing and small manufacturing businesses were stopped, and direct taxes per native adult or household were introduced.<sup>29</sup> Thus, African farmers had to engage in wage labour to meet their direct tax obligations.<sup>30</sup> In addition, deforestation and land degradation as well as limited access to land forced farmers into wage labour.<sup>31</sup>

The colonial practices transferred fertile land and labour to the production of export crops in SSA. This was done regardless of household's food needs and prevented the diversification and development of agricultural and marketing systems geared towards local development and regional markets.<sup>32</sup> As a result, food availability, economic stability, and the ability to distribute and purchase food declined, which laid the foundation for the dependency on staple food imports.<sup>33</sup>

As Anthony Anghie points out, these colonial practices of unequal and exploitative legal treatment of indigenous peoples and their resources at the lowest possible cost were justified

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<sup>27</sup> Allen F Isaacman, *Cotton Is the Mother of Poverty: Peasants, Work, and Rural Struggle in Colonial Mozambique, 1938-1961* (James Currey 1996) 209f.

<sup>28</sup> Bjornlund and others (2020) (n 15) 32.

<sup>29</sup> Ewout Frankema and Marlous Van Waijenburg, 'Structural Impediments to African Growth? New Evidence from Real Wages in British Africa, 1880–1965' (2012) 72 *The Journal of Economic History* 916f.

<sup>30</sup> *Ibid.*

<sup>31</sup> Vibeke Bjornlund, Henning Bjornlund and André van Rooyen, 'Why Food Insecurity Persists in Sub-Saharan Africa: A Review of Existing Evidence' (2022) 14 *Food Security* 852.

<sup>32</sup> *Ibid* 847.

<sup>33</sup> *Ibid* 847.

by a ‘dynamic of difference’.<sup>34</sup> According to this, the African population was ‘uncivilised’ and therefore not entitled to the same rights as ‘civilised’ Europeans.<sup>35</sup> This dichotomy, as Kumar illustrates, has its origins in the Christian-Jewish conviction of a predetermined and unchanging universal path of all humanity.<sup>36</sup> The approach was solidified in the Age of Enlightenment, with social evolutionism arguing that all societies were on a single, gradual successive path to civilisation.<sup>37</sup>

During colonization, this Western belief that development could only be achieved through a single, universal process of civilizing all of humanity was used to justify the moral responsibility of colonizers based on cultural superiority and supremacy. This is commonly referred to as ‘the famous white man’s burden,’ as Kumar notes.<sup>38</sup> Consequently, the white man was ‘obliged to help’ the natives to productively use the abundant raw materials in their territories that lay ‘wasted and ungarnered’ because they ‘did not know their use and value’.<sup>39</sup>

‘We know better than you what is good for you’ – an idea that is also inherent to the entire legal concept of development that has emerged in the Global North. It strives for conformity with the idealised social, economic, and political model of the Global North, thereby justifying its ongoing exercise of control, which I will discuss in detail later in connection with the mandate system.<sup>40</sup> The ‘white man’s burden’ was adopted in the postcolonial concept of development, and the dichotomy between colonizer and colonised, or ‘civilised’ and ‘uncivilised’, was replaced by the dichotomy between ‘developed and underdeveloped’,

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<sup>34</sup> Anthony Anghie, ‘Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law’ (1999) 40 *Harvard International Law Journal* 29.

<sup>35</sup> *Ibid.*

<sup>36</sup> M Satish Kumar, ‘Development - the Story of an Idea’ in Tony Daly, Ciara Regan and Colm Regan (eds), *80-20 Development in an Unequal World* (2016) 36.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> Frederick D Lugard, *The Dual Mandate in Tropical Africa* (Frank Cass 1965) 615.

<sup>40</sup> Sundhya Pahuja, *Decolonising International Law* (Cambridge University Press 2011) 3, 37.

according to Kumar.<sup>41</sup> The role of the AoA within that context will be discussed in more detail in Chapter 3.

Moreover, the role of international law in justifying colonial practices in the 19th century goes hand in hand with the belief that both sides benefit from ‘civilisation’: industrial benefits for the Europeans and progress for the colonies.<sup>42</sup> As Chadwick argues, the AoA also creates the illusion of a ‘win-win’ situation: that it is possible to simultaneously maintain the benefits of liberalised trade in agricultural commodities and protect vulnerable populations from price volatility.<sup>43</sup>

What is more, the agreement creates the illusion that food as a commodity can be used to make economic profits on the international market while ensuring availability and access to food for vulnerable populations. As Cypher puts it: „It was almost taken as a truism by the colonizing powers that their presence in those ‘uncivilized’ countries could not help but be beneficial to the natives, who so often seemed to be ungrateful for the sacrifices made by the colonizers.”<sup>44</sup>

In conclusion, the colonial powers secured large areas of land in SSA and cultivated mainly non-edible crops for export on a large scale, such as cocoa, coffee and rubber. Today, these very crops, together with fruits and vegetables, account for more than 80 % of SSA’s total exports.<sup>45</sup> Consequently, there is a high dependence of the countries on these products to generate income on the world market and thus secure their purchasing power, i.e. access to food. In addition, the dwindling availability of land as well as colonial coercive measures

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<sup>41</sup> Kumar (n 36) 37.

<sup>42</sup> Lugard (n 39).

<sup>43</sup> Chadwick (n 6) 194.

<sup>44</sup> James M Cypher, *The Process of Economic Development* (4th edn., Routledge 2014) 85.

<sup>45</sup> J Alexander Nuetah and Xian Xin, ‘Global Agricultural Trade Liberalization: Is Sub-Saharan Africa a Gainer or Loser?’ (2016) 26 *The Journal of International Trade & Economic Development* 77.

forced many farmers to grow cash crops instead of staple foods. This reduced the availability of staple foods in SSA and laid the foundation for dependency on imports of these staples. This dependency continues to this day, especially for cereals, dairy products, and meat products, as I will explain later.

The role of international law was to rationalise and legitimise these practices. This was done through a combination of cultural superiority and moral responsibility: the ‘dynamic of difference’ that placed the ‘white man’s burden’ on the ‘civilised’ Europeans, to bring progress to the ‘uncivilised’ Africans.

### **2.1.2 Turning Food into Commodities**

The main argument in this section is that international law constituted a legal system in which ownership rights to food can be established. Therefore, others can be excluded from access to food. Access to food then depends on being able to provide consideration for the commodity in the market. This is how ‘insufficient purchasing power’ became a cause of food insecurity in the first place.

European administrators introduced domestic restructuring and new agricultural production methods in SSA, which paved the way for an increasing global trade in food commodities. The Beti villages of Central Cameroon, for instance, had a self-sufficient food economy during the pre-colonial era.<sup>46</sup> As Guyer describes, there were two types of food barter: First, the redistribution of cultivated crops and hunted meat among members of the same village community took place through kinship and loyalty ties, without the development of market

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<sup>46</sup> Jane I Guyer, ‘The Food Economy and French Colonial Rule in Central Cameroun’ (1978) 19 *The Journal of African History* 579.

institutions for the purchase or exchange of staple foods.<sup>47</sup> And secondly, food was used to accompany trade in prestige goods.<sup>48</sup> ‘Neither of these exchanges involved anything resembling markets.’<sup>49</sup>

From the first days of European penetration in 1888, the German and later the French administrators had serious problems supplying their military posts, the non-agricultural population of Yaoundé town and the workers building roads and railways, reporting to the League of Nations Permanent Mandate Commission in 1924:<sup>50</sup> ‘The difficulties of provisioning the Yaoundé Market are the object of the concern of the administration.’<sup>51</sup> The report further states that ‘a total reorganization of the system of delivery to the market, following a pre-established schedule, by region and by village, is under study.’<sup>52</sup> The key figures in the food requisition system were the indigenous chiefs, who were incentivised by remuneration through salary or tax rebates, and threatened by the use of force.<sup>53</sup> They were given seasonal quotas for production for the railway construction sites, were responsible for feeding labourers working in their areas, and were given regular quantities to deliver to the Yaoundé market according to a set schedule.<sup>54</sup>

In the following, I build on Chadwick's argument that the international legal framework has laid the foundation for using agricultural products not only to provide food for the population, but as objects that some can afford and others cannot, creating vast material inequity.<sup>55</sup>

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<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid 581.

<sup>51</sup> League of Nations, ‘French Mandate over Cameroon - Annual Report on the Administration of This Territory for 1924’ (1925) 170.

<sup>52</sup> Ibid.

<sup>53</sup> Guyer (n 46) 583.

<sup>54</sup> Ibid.

<sup>55</sup> Chadwick (n 6) 9.



By assigning a material equivalent to the required food, and by the French administration claiming the food for itself on payment of the price, and enforcing this claim if it was not delivered, the food was framed as ‘commodities.’ This is because food became the subject of ownership rights in the first place. This means that ownership rights could be established over it, through which others could be excluded from using and consuming the food. And that in turn means that they acquired a legal status in the sense that food could be sold and bought.

Sen’s work demonstrates that famine is often a product of the legal system, creating entitlements for some people that exclude others from access to food.<sup>56</sup> Therefore, in addition to the economic, political and social characteristics of a society, the granting or denial of access to food is also largely determined by its legal system – a system in which famine ‘reflects legality with a vengeance.’<sup>57</sup> This highlights the constitutive dimension of law in relation to access to food. Chadwick understands constitutive law as a ‘prerequisite to the very possibility of a market transaction.’<sup>58</sup> According to her, the crucial difference to regulatory law is that regulatory law ‘typically seeks to change how people act in markets [and] to say what can be done, when, by whom, and according to what rules.’<sup>59</sup> In contrast, constitutive law ‘*brings what is there into being.*’<sup>60</sup>

I agree with the argument in principle but argue that the constitutive dimension of law itself already creates a framework for how people act in markets, what can be done, when, by whom and according to what rules. It is true that the concrete shaping takes place through regulative

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<sup>56</sup> Ibid.

<sup>57</sup> Sen (n 5) 166.

<sup>58</sup> Chadwick (n 6) 15.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

law. But the legal framework created by constitutive law already brings power structures into the market that are decisive for how, who and when legal action is taken. For the elements created by law provide a framework for how rights work. And with the creation of the right of ownership and the legal allocation of food to this right of ownership, a very specific framework of legal effects for food is constituted: the owner can control his property as he pleases and exclude others from affecting the property (general principle of law). And already from this framework, by virtue of the function of ownership rights, a relationship of superiority and subordination arises between the owner of a foodstuff and all others, i.e. a power structure.

Regarding the food market, this means that the framework of legal effects of a right creates power structures in the market. For this, I build on the argument of Sen that market forces operate '*through* a system of legal relations (ownership rights, contractual obligations, legal exchanges, etc.),'<sup>61</sup> that is they '*cannot operate without*' a legal system.<sup>62</sup> However, the legal system is not a natural, neutral technical instrument. And the created elements and relations of trade are not mere mechanisms of a neutral law, merely filled in by a political will.

Rather, the framework conditions and legal effects of a right decisively determine which political will can be carried out at all. For there is a will to be the owner of food, to exclude other people from it and to trade with it in order to make economic profit. But for a market to exist in which this will can be implemented at all, ownership rights are needed. As elaborated above, ownership rights have an exclusionary function. This creates relationships of superiority and subordination, i.e. power structures that are transferred to the market. This means that the

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<sup>61</sup> Sen (n 5) 166.

<sup>62</sup> Chadwick (n 6) 10.

market forces fill the power structures that the constitutive law has already brought into the market through its legal framework.

However, law could also create framework conditions and legal relationships in which food is not accessible to ownership rights at all. Law could thus constitute a system in which the right to use and consume food does not go hand in hand with an ownership right but, for example, with the individual human need for food. Or law could constitute a system in which no rights to food can be established at all, but rather, for example, redistribution remains through kinship and loyal ties in a self-sufficiency system.

Of course, in a legal system where food is amenable to ownership rights, there need not be unequal access and unequal distribution. After all, there could be politically controlled redistribution (for which law would then be used as an instrument). But since and as long as there is the institution of ownership in food, and as long as there is a legal exchange of that ownership with an economic consideration, access to that property (in food) will depend on the provision of the consideration in a market - and this regardless of a political will in one way or the other.

Orford argues similarly, but on a more abstract level, understanding the role of international law in relation to trade as ‘project of international economic integration through law.’<sup>63</sup> She emphasises that for centuries international law has been about securing certain vital systems of resource exploitation and constituting ownership relations.<sup>64</sup> Therefore, she argues that international law ‘offers a particular way of approaching the government of modern states and

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<sup>63</sup> Anne Orford, ‘Food Security, Free Trade, and the Battle for the State’ (2015) 11 *Journal of International Law and International Relations* 21.

<sup>64</sup> *Ibid* 24.

a set of practices designed to entrench particular forms of the state.’<sup>65</sup> Thus, the law excludes certain other forms and practices of administration and state.<sup>66</sup> This means that law has not merely been an instrument to translate the colonial supply and economic policies of the administration in Yaoundé, but as Chadwick points out, law has exerted its own influence on events: norms of property, contract and sovereignty, general principles of international law, international rules of trade law and domestic legal concepts, as well as mediated legal consciousness, structure food markets in ways that subordinate people’s needs for access to food – ‘dismantling meaningful opportunities for [them] to shape their lives, cultures, social practices, and food systems in accordance with their wants.’<sup>67</sup>

With the ability to establish ownership rights over food, others can be excluded from access. At the same time, this creates a market for food in which food has a price that must be paid. In this way, food was turned into commodities. Some can afford these commodities, others cannot.

It has been demonstrated that the constitutive dimension of law already creates power structures because it attributes certain legal effects to a right. Although the power structures can be filled in one way or another by a political will, the structures themselves already create power relations and dependencies. Independent of a political will, they ensure that only those who have the purchasing power can afford food. This is what makes ‘insufficient purchasing power’ a cause of food insecurity in the first place. Finally, alternative forms of food distribution are excluded by the constitutive law.

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<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

<sup>67</sup> Chadwick (n 6) 47.

### **2.1.3 Controlling Trade**

The main argument in this section is that international law legitimised discrimination against the domestic agricultural sector and created structural inequalities in access to resources and access to the market. Through abundant access to resources and labour as well as economic policies such as protective tariffs and subsidies, the metropolitan powers industrialised their economies at the expense of the colonies. This constituted power structures to the detriment of SSA that international law upholds to this day.

The domestic economy declined in the absence of rural economic development, the lack of investment in industrialisation and the oppression of the colonial trading system to protect European peasants against African competition.<sup>68</sup> The infrastructure built in the colonies was geared towards facilitating exports. Railways and roads were built to transport products from the interior to the coast, not to promote or facilitate trade within the region.<sup>69</sup> With a few exceptions, such as sisal, the extracted raw materials, products and profits were relocated to Europe.<sup>70</sup>

Therefore, the colonial powers had little financial reason to invest in the processing industry, the research and development of local crops or the promotion of agricultural inputs in the colonies.<sup>71</sup> Rather, according to Msindo, this would have required massive investment in higher education and skilled labour, which would have increased the financial viability of the colonies, making them more competitive and independent, and thus increasing the pressure towards

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<sup>68</sup> Bjornlund and others (2022) (n 31) 852.

<sup>69</sup> Ibid.

<sup>70</sup> Bjornlund and others (2020) (n 15) 35.

<sup>71</sup> Ibid.

independence.<sup>72</sup> Where local farmers accounted for a substantial part of colonial revenues, which is why settlers had to compete in the market, the colonial trading system disadvantaged them through subsidies and protective tariffs.<sup>73</sup> This economic policy was continued under the trusteeship of the mandate system, although the latter was supposed to give legal status to the peoples in the colonies and set them on the path to integration into the international system as sovereign, independent states after the First World War.<sup>74</sup>

As explained earlier, the moral responsibility for development has been inherent in international law from the outset and was also declaratorily enshrined with the founding of the League of Nations in 1920. Accordingly, Article 22 of the Covenant of the League of Nations states that

‘those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world [...] should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility.’<sup>75</sup>

At the same time, however, mandate holders diverged in their desire to secure supremacy in trade and access to resources and labour in the territories. This led to fundamental tensions within the legal system, which from the very beginning of colonialism led European jurists to use the development of ‘uncivilised’ peoples as justification for exploitation.<sup>76</sup>

It appears that the sovereignty and independence of the mandated territories clearly lost out in the legal resolution of this tension, as mechanisms that originally served to legitimise

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<sup>72</sup> Enocent Msindo, ‘Colonial Africa and the West’ in Martin S Shanguhya and Toyin Falola (eds), *The Palgrave Handbook of African Colonial and Postcolonial History* (Palgrave Macmillan 2018) 537.

<sup>73</sup> Bjornlund and others (2020) (n 15) 33.

<sup>74</sup> Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005) 115.

<sup>75</sup> Covenant of the League of Nations 1920 Art. 22.

<sup>76</sup> Anghie (2005) (n 74) 144.

colonialism and exploitative practices continued to be used both rhetorically and institutionally. Notably, according to Anghie, the metaphor of ‘wardship’ over the indigenous peoples, who were compared to infants in need of protection in the colonial imagination, reinforced the idea that the development of the mandated territories could only be achieved through a unified and universal process of civilisation.<sup>77</sup> It was claimed that the colonised peoples first had to be led towards this path, while the European states had already successfully completed it.<sup>78</sup> This is evident, for instance, in the division of the mandate areas into A, B and C according to their level of economic and political development.<sup>79</sup> It follows that the premises that justified the occupation of the territories during colonisation were now used to justify the continued presence and political and economic influence of the colonial powers under the mandate system, except that the function of exploitation was replaced by that of civilisation.<sup>80</sup> Hence, Anghie argues that while peoples were formally given sovereignty and their own government, these governments were geared towards integrating the mandated territories into the metropolitan economy to the detriment of the former, so that control over the political economy remained de facto with the metropolises.<sup>81</sup>

In Kenya, for instance, African agricultural production accounted for about 75% of total exports in 1914.<sup>82</sup> However, after the introduction of economic policy measures, the settlers had an export revenue share of 80% by 1921.<sup>83</sup>

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<sup>77</sup> Ibid 145.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid 148.

<sup>80</sup> Ibid 145.

<sup>81</sup> Ibid 179f.

<sup>82</sup> Levi I Izuakor, ‘Kenya: The Unparamount African Paramountcy, 1923-1939’ (1983) 12 *Transafrican Journal of History* 38.

<sup>83</sup> Ibid 38.

The settlers had received exclusive rights for large areas of the country in 1902, including the fertile highlands, and were exempted from the payment of income tax.<sup>84</sup> Thereafter, ‘it had been wrongly assumed that the indigenous people, left on their own, were incapable of making any meaningful economic progress.’<sup>85</sup> Therefore, the ‘development of Africans’ under the Trusteeship Doctrine came into conflict with European domination, and the settlers ‘resisted it with all vigour.’<sup>86</sup> They argued cogently ‘that by virtue of their “superior civilization” relative to the African, every European had a moral responsibility to exercise the trust’<sup>87</sup> and, ‘erroneously though, that the local officials emphasized African interests while minimising theirs.’<sup>88</sup> Subsequently, the colonial government assisted settlers in recruiting workers and banned Africans from producing certain crops, notably sisal, pyrethrum and coffee, arguing that ‘Africans would not manage them properly.’<sup>89</sup> Coffee alone accounted for 32.5 % of the total value of agricultural exports in 1926.<sup>90</sup> Further, protective import duties on grains, meat, timber and dairy products were raised in 1923 to curb external competition on commodities produced by the settlers.<sup>91</sup> Izuakor argues that the actions of the colonial government purported to defend the self-imposed ‘white man’s burden’ of trusteeship, but in fact, supported European settler supremacy who used the principle of trusteeship to secure their continued domination of land and trade.<sup>92</sup>

The lack of investment and the systemic disadvantage of the indigenous agricultural sector through the colonial trading system created power relations in favour of the colonial powers. These continue to operate today and are entrenched by international law, as I demonstrate in

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<sup>84</sup> Ibid 38.

<sup>85</sup> Ibid 38.

<sup>86</sup> Ibid 40.

<sup>87</sup> Ibid 39.

<sup>88</sup> Ibid 39.

<sup>89</sup> Ibid 43.

<sup>90</sup> Ibid 43.

<sup>91</sup> Ibid 45.

<sup>92</sup> Ibid 40.



Chapter 3. International law served to legitimise the practices that created structural inequalities between Africans and Europeans in access to resources and access to the market. This has decimated the local economy, which has a negative impact on the purchasing power of people in SSA. In addition, the international legal order allows the countries of the Global North to maintain their influence on economic affairs in the South and systematically disadvantages the people there in their access to food.<sup>93</sup> International law not only regulates the structures for this but also constitutes them through concepts of moral responsibility for development, ‘wardship’ and ‘civilisation’.

## **2.2 Dependency on Food Imports**

This section extends the analysis of international law in the origins of food insecurity by examining how the legitimised practices and legal institutions contributed to the region’s dependency on food imports.

Colonial practices, rationalised and legitimised by international law, led to an exponential increase in export crops for the colonialists. In the period between 1870 and 1940, West Africa’s exports to Britain increased fivefold and exports to France tripled.<sup>94</sup> The area under export crops across SSA increased by 45% between 1800 and 1900 and by a further 136% between 1900 and 1960.<sup>95</sup> This development was causal for food insecurity in several ways, as discussed below.

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<sup>93</sup> Chadwick (n 6) 5.

<sup>94</sup> Bjornlund and others (2022) (n 31) 848.

<sup>95</sup> Kees Klein Goldewijk and others, ‘Anthropogenic Land Use Estimates for the Holocene – HYDE 3.2’ (2017) 9 Earth System Science Data <https://doi.org/10.5194/essd-9-927-2017> accessed 17 July 2023 938.

On the one hand, the expansion of export crops led to a decline in food production for households due to a declining labour force. In the course of land appropriation for export crop production, millions of people and livestock were displaced or resettled.<sup>96</sup> In some cases, these resettlements led to a significant population decline, as in the case of the Maasai who were resettled in the Engare Ng'iro swamp area.<sup>97</sup> There, farmers and their livestock contracted sleeping sickness and malaria and their population declined by 35 %.<sup>98</sup>

Similarly, the gathering of slaves for export had negative impacts on local population levels which undermined food production as the great majority of the exported slaves were able-bodied men.<sup>99</sup> Bjornlund argues that it was about 12-20 million slaves missing for food production as a result of the European slave trade on the African west coast, which led to widespread famine in many already sparsely populated inland areas.<sup>100</sup>

In addition, coercive measures such as stopping local processing and cottage industries and introducing head taxes discouraged farmers in some colonies from growing edible crops. Instead, they were forced to grow mainly non-edible crops such as cotton, which increased their labour requirements and further reduced the labour force for local food production. In Mozambique for example, officials prohibited cropping basic staples in the cotton fields to prevent labour time competition, and the peasants could only grow food in the late afternoons or on those Sundays they were not forced to work.<sup>101</sup> To secure labour for cotton production, peasants were after 1940 increasingly forced to cultivate cotton in specifically marked areas

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<sup>96</sup> Bjornlund and others (2020) (n 15) 33; Lotte Hughes, 'Moving the Maasai: A Colonial Misadventure' (University of Oxford 2002) 94ff.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

<sup>99</sup> Robin Law, *The Slave Coast of West Africa, 1550-1750* (Oxford University Press, USA 1991) 220f.

<sup>100</sup> Bjornlund and others (2020) (n 15) 28.

<sup>101</sup> Allen Isaacman, 'Coercion, Paternalism and the Labour Process: The Mozambican Cotton Regime 1938-1961' (1992) 18 *Journal of Southern African Studies* 501.

far away from their villages, which cost them even more critical labour time for food production in their gardens.<sup>102</sup> In some colonies in Central Africa, food production declined because of forced labour and fixed quotas for rubber extraction to such an extent that in the Congo, for example, Hochschild argues that an estimated ten million people died of hunger and abuse between 1880 and 1920.<sup>103</sup>

The decline in population levels and the coercive measures led to a decline in food production, inadequate food supplies and a dismantling of distribution systems.<sup>104</sup> These dynamics resulted in a dependence on food imports such as rice, flour, milk, and canned fish in the growing cities after the First World War.<sup>105</sup>

On the other hand, the increasing cultivation of export crops meant the entrenchment of agricultural products that do not naturally grow in Africa, such as maize, wheat and cassava. These replaced traditional staple food sources, because they had higher calorific content, grew faster and required less labour.<sup>106</sup> ‘It was a circle. Encouraging and enforcing the growth of cash crops fed the one-way dendritic trade pattern [of extraction and export], and the trade pattern in turn encouraged the growth of even more cash crops.’<sup>107</sup> This resulted in the displacement of many food and utility crops as farmers abandoned them for cash crops, which increased the unavailability of food.<sup>108</sup> Since the plants do not grow there naturally, there is a need for seeds, fertiliser, knowledge and technology. This inevitably leads to a dependency

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<sup>102</sup> Ibid.

<sup>103</sup> Jan Vansina, *Being Colonized: The Kuba Experience in Rural Congo, 1880-1960* (1st edn., University of Wisconsin Press 2010) 58.

<sup>104</sup> Jonathan E Robins, ‘“Food Comes First”: The Development of Colonial Nutritional Policy in Ghana, 1900–1950’ (2018) 4 *Global Food History* 171.

<sup>105</sup> Ibid.

<sup>106</sup> Bjornlund and others (2022) (n 31) 850.

<sup>107</sup> Olatunji Olaigbe, ‘Colonialism Still Haunts African Agriculture’ (*Inkstick* 11 January 2023)

<https://inkstickmedia.com/colonialism-still-haunts-african-agriculture/> accessed 28 July 2023.

<sup>108</sup> Ibid.

relationship on the basis of which the countries in SSA are exposed to global competition with the industrialised former colonial powers, be it in terms of importing the products themselves, the seeds, the fertiliser or the knowledge.<sup>109</sup>

As a result of food unavailability and inappropriate distribution, countries in SSA are doubly dependent on the market for their access to food: On the one hand, the countries depend on the cash crops they have specialised in producing since colonialism to generate sufficient income on the global food market. Income in turn determines purchasing power on the market, and access to food is linked to this, as Chadwick and Sen have demonstrated.<sup>110</sup> On the other hand, countries depend on being able to buy the food they do not produce themselves on the market. On the first level, this affects the availability of food. Ultimately, however, it is also a matter of having enough purchasing power to be able to offer the required price on the market, i.e. to guarantee access to food.

Between 1966 and 1973, 15 out of 32 countries in Sub-Saharan Africa relied on a single commodity for 50% or more of their export income.<sup>111</sup> For instance, Mali, Chad, and Benin depended on cotton, Burundi on coffee, and Malawi on tobacco, which made their economies susceptible to fluctuations in commodity prices.<sup>112</sup> Meanwhile, intra-African trade remains low at only 10-12 %, compared to 40 % within North America and 60 % within Europe.<sup>113</sup> Consequently, only 20 % of African food exports stayed in Africa between 2004 and 2007, which is reflected in the fact that 88% of all agricultural imports came from outside the continent.<sup>114</sup>

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<sup>109</sup> Chadwick (n 6) 44.

<sup>110</sup> Sen (n 5) 1; Chadwick (n 6) 45.

<sup>111</sup> Bjornlund and others (2020) (n 15) 38.

<sup>112</sup> Ibid.

<sup>113</sup> Ibid 40.

<sup>114</sup> Ibid.

The significance of these dependencies for SSA becomes particularly clear with regard to state sovereignty that international law (supposedly) seeks. 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'.<sup>115</sup>

### **2.3 Conclusion**

International law has been a crucial causal factor in the structural causes of food insecurity in SSA at various levels. On the one hand, it rationalised and legitimised the exploitative colonial practices of securing land and labour for export crop production through the 'dynamic of difference' and the 'white man's burden'. As a result, staple food production and local food distribution suffered, laying the foundation for dependence on food imports. Moreover, the colonies specialised in individual cash crops, on whose export they still depend today to secure their purchasing power.

Second, on another level, international law constituted a legal system in which ownership rights to food can be established. Therefore, others can be excluded from access to food. Access to food then depends on being able to provide consideration for the commodity in the market. This is how 'insufficient purchasing power' became a cause of food insecurity in the first place.

Finally, international law legitimised discrimination against the domestic agricultural sector and created structural inequalities in access to resources and access to the market. Through

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<sup>115</sup> Susan George, *How the Other Half Dies: The Real Reasons for World Hunger* (Rowman & Littlefield Publishers 1989) 233.

abundant access to resources and labour as well as economic policies such as protective tariffs and subsidies, the metropolitan powers industrialised their economies at the expense of the colonies. This constituted power structures to the detriment of SSA that international law upholds to this day.

## Chapter 3

### The Agreement on Agriculture and the Persistent Structural Causes of Food Insecurity

“It is a vulgar of prudence for him who has reached the pinnacle of power to cast down the ladder by which he mounted, that others may not follow [...]. A nation which by protective duties and maritime restrictions has built up a manufacturing industry and a merchant marine to such a point of strength and power as not to fear the competition of any other, can pursue no safer policy than to thrust aside the means of elevation, to preach to other nations the advantages of free trade, and to utter loud expressions of repentance for having walked hitherto in the way of error, and for having come so lately to the knowledge of truth.”<sup>116</sup>

In this chapter, I consider the correlation between the Agreement on Agriculture (AoA) as a treaty under international law, and the persistent structural causes of food insecurity in SSA.

The WTO was established on 1 January 1995 as a result of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT).<sup>117</sup> It replaced GATT as an international organization.<sup>118</sup> The aim of the WTO is to liberalize international trade.<sup>119</sup> Trade liberalization is ‘the process of reducing or removing restrictions on international trade.’<sup>120</sup> The Agreement on Agriculture (AoA) is a special provision to the GATT rules. In the Uruguay Round, rules for international agricultural trade were included in the GATT for the first time with AoA, which entered into force in 1995.<sup>121</sup>

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<sup>116</sup> Friedrich List, *National System of Political Economy* (J B Lippincott & Company 1856) 440.

<sup>117</sup> WTO | ‘Understanding the WTO - What Is the World Trade Organization?’ (*Wto.org*2019) [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact1\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm) accessed 14 August 2023.

<sup>118</sup> Ibid.

<sup>119</sup> Ibid.

<sup>120</sup> Oxford Reference, ‘Trade Liberalization’ <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803105212327> accessed 6 July 2023.

<sup>121</sup> Melaka Geboye Desta, ‘Legal Issues in International Agricultural Trade: The Evolution of the WTO Agreement on Agriculture from Its Uruguay Round Origins to Its Post Hong Kong Directions’ (2006) 55 *FAO Legal Papers Online* <https://www.fao.org/3/bb088e/bb088e.pdf> accessed 9 July 2023 3.

According to the WTO, ‘the objective of the Agreement [...] is to reform trade in the sector and to make policies more market-oriented. This would improve predictability and security for importing and exporting countries alike.’<sup>122</sup> The three pillars of the AoA are market access, domestic support, and export subsidies.<sup>123</sup>

### **3.1 Inequities of Institutionalized Power Structure in Market Access, Domestic Support and Export Subsidies in International Agricultural Trade**

The main argument in this section is that the AoA institutionalises power structures in international agricultural trade, in which the industrialised countries can protect their market through ‘dirty tariffication’ and subsidies, and the others cannot.

First, Art. 4 (2) AoA contains the obligation to convert all non-tariff barriers into tariffs, and in principle prohibits non-tariff measures, including ‘quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties.’<sup>124</sup> Furthermore, each WTO member has a list within the meaning of Art. 4 (1) AoA, which sets the maximum tariff rate for all agricultural products.<sup>125</sup> According to this list, industrialised countries have agreed to reduce their tariffs on all agricultural products by an average of 36% over six years from 1995.<sup>126</sup> Meanwhile, the

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<sup>122</sup> WTO | ‘Understanding the WTO - Agriculture: Fairer Markets for Farmers’ (*Wto.org*2019) [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm3\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm3_e.htm) accessed 14 August 2023.

<sup>123</sup> Ibid.

<sup>124</sup> Art. 4 (2) AoA Footnote 1.

<sup>125</sup> WTO | ‘Agriculture - Explanation of the Agreement - Market Access’ (*Wto.org*2019) [https://www.wto.org/english/tratop\\_e/agric\\_e/ag\\_intro00\\_contents\\_e.htm](https://www.wto.org/english/tratop_e/agric_e/ag_intro00_contents_e.htm) accessed 6 July 2023.

<sup>126</sup> Ibid.



average tariff reduction for developing countries is 24% over ten years from 1995, and the least developed countries are not obliged to make any reductions, Art. 15 (2) AoA.<sup>127</sup>

However, the lack of specific guidelines for the conversion of quantitative restrictions and other non-tariff barriers into tariffs led many of the developed countries to engage in ‘dirty tariffication’ by grossly overstating the tariff value of the relevant non-tariff barriers.<sup>128</sup> This means the imposition of tariffs that are far more trade-restrictive than the non-tariff barriers they replace.<sup>129</sup> The highest tariffs were applied to sugar, tobacco, meat, dairy products and cereals, and to a lesser extent fruits and vegetables, which are precisely the products whose export is of particular interest to SSA’s countries.<sup>130</sup>

Meanwhile, Art. 8 and Art. 9 (1) AoA allow countries that were subsidising at the time to continue to do so, but with the condition that they reduce the subsidies. Furthermore, they prohibit the introduction of new subsidies. This granted the wealthy states of the Global North, which were already doing so, the exclusive right to subsidise agricultural products and offer their products far below the local production price on the market in countries in SSA.<sup>131</sup>

This depressed domestic food production, lowered global commodity prices and undermined the ‘comparative advantages’ of African producers.<sup>132</sup> In 2002, for example, Burkina Faso and Chad lost US\$ 13.7 million in cotton export earnings due to US cotton subsidies.<sup>133</sup> This was equivalent to 21% and 33% of their debt payments respectively, which in turn led to the

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<sup>127</sup> Ibid.

<sup>128</sup> Hailu (n 16) 10.

<sup>129</sup> Carmen G Gonzales, ‘Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security, and Developing Countries’ (2002) 27 *Columbia Journal of Environmental Law* 458.

<sup>130</sup> Ibid.

<sup>131</sup> Ibid 461.

<sup>132</sup> Bjornlund and others (2022) (n 31) 855.

<sup>133</sup> Ibid.

structural adjustment measures of the International Monetary Fund (IMF) and the World Bank, which I will discuss later.<sup>134</sup> These dynamics hinder SSA's countries' market access, even when the tariff transformation process results in low tariffs, furthering market inequality.<sup>135</sup>

With its mechanisms, the AoA aims to regulate the international market for agricultural products. This regulatory dimension of law initially takes the market as given, as it was constituted by international law during colonialism. In the words of David Campbell, the constitution took place 'ex-ante' and addressed 'the establishment of a framework for economic activity'.<sup>136</sup> This framework of legal relations, as argued in section 2.1.2, includes in particular the exclusionary function of the ownership right over food. Furthermore, elements such as capital, legal exchange, contractual obligations, and money were created through constitutive law.<sup>137</sup>

Only in the second step does the regulation of agricultural trade seek to influence what is already there. As Campbell puts it, this is done 'ex-post' and addresses the maintenance of the framework for economic activity.<sup>138</sup> Since this is not the constitutive dimension of the law, it means that there is no change in the power structures that the constitutive law has already brought into the market. The power structures constituted by law depend on the effects that certain rights can have. The legal effects in turn determine how power can be distributed and what dependencies can exist between the parties. These power structures are filled by market forces because market forces operate through law, as Sen has demonstrated.<sup>139</sup>

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<sup>134</sup> Ibid.

<sup>135</sup> Gonzales (n 129) 461.

<sup>136</sup> David Campbell, 'The "Market" in the Theory of Regulation' (2017) 27 *Social & Legal Studies* 545 <> accessed 11 August 2023 10.

<sup>137</sup> Sen (n 5) 166.

<sup>138</sup> Campbell (n 136).

<sup>139</sup> Sen (n 5) 166.

The filling in of the power structures is now done according to the rules of the AoA. However, as analysed above, the power structures are filled in a way that is to the detriment of the availability of and access to food in SSA countries. This is demonstrated by the ‘dirty tariffication’ of developed countries under Art. 4 AoA and by the unequal treatment in subsidies under Art. 8, 9 (1) AoA. Consequently, the AoA perpetuates power structures in international agricultural trade, in which the industrialised countries can protect their market through tariffs and the others cannot. And in which the industrialised countries can subsidise their products and the others cannot.

Moreover, the AoA entrenches power structures in which countries specialise in exporting individual products and need a ‘comparative advantage’ in trade to afford food availability and accessibility. This ‘comparative advantage’ in SSA consists of cash crops and unprocessed commodities.<sup>140</sup> With this structure comes the dependency to generate enough revenue (i.e. purchasing power) on the international market with the specialised export products to be able to buy the required food imports. However, this perpetuates the structural disadvantages of cash crop-oriented agriculture in SSA, which colonial practices produced under the legitimacy of international law.

The perpetuation is demonstrated in an analysis of the potential impact of agricultural trade liberalisation on countries in SSA by J. Alexander Nuetah and Xian Xin.<sup>141</sup> In 2016, the scholars concluded that the prices of SSA’s main import commodities are rising in the wake of the AoA’s trade liberalisation, while the prices of its main export commodities are staying the

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<sup>140</sup> Chadwick (n 6) 43.

<sup>141</sup> Nuetah and Xin (n 45).

same or falling.<sup>142</sup> Nuetah and Xin note that this conclusion is in line with the findings of other researchers such as Ackerman and Gallagher<sup>143</sup>, and Arce et al.<sup>144</sup>

For example, an average price increase of 12 % is expected for dairy products, for which SSA recorded a trade deficit of around 2,256 million US dollars in 2013, i.e. more was imported than exported on a net basis.<sup>145</sup> SSA is also a net importer of cereal products, with a trade deficit of US\$119 billion between 1995 and 2013, where prices are expected to rise by 3 %.<sup>146</sup> For meat products, an average price increase of about 2.42 % is expected with a trade deficit of 3.2 billion US dollars.<sup>147</sup> Thus, the regulation of the market by the AoA results in the staple foods that SSA imports becoming more expensive. Therefore, more purchasing power needs to be created in the international market to ensure availability and access to food.

On the other hand, Nuetah and Xin conclude in their analysis that SSA's main export commodities, where the region enjoys a 'comparative advantage', either experience a price decline or no change.<sup>148</sup> The most important export commodities are cocoa, coffee, vegetables, fruits, and rubber – the very crops whose large-scale cultivation at the expense of staple foods was established in colonial times. Their value accounted for about 82 % of all the region's exports from 1995 to 2013.<sup>149</sup> Prices for vegetables and fruits are expected to increase by about

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<sup>142</sup> Ibid 73.

<sup>143</sup> Frank Ackerman and Kevin P Gallagher, 'The Shrinking Gains from Global Trade Liberalization in Computable General Equilibrium Models: A Critical Assessment' (2008) 37 *International Journal of Political Economy*.

<sup>144</sup> Rafael de Arce and others, 'Trade Liberalization and Poverty Reduction in Africa: Computable General Equilibrium Models Approach' (2014) 2 *Literature review, International Journal of Political Science and Development*.

<sup>145</sup> Nuetah and Xin (n 45) 73.

<sup>146</sup> Ibid 74.

<sup>147</sup> Ibid.

<sup>148</sup> Ibid 73.

<sup>149</sup> Ibid 77.

0.13 % on average, while green coffee and cocoa bean prices will decrease and the price of rubber will remain unchanged.<sup>150</sup>

As a result, the trade liberalisation of the AoA thus leads to an increase in the prices of SSA's imports, while the prices of the most important export goods decrease or remain the same.<sup>151</sup> This means a net loss of SSA in agricultural trade.<sup>152</sup> That in turn means less purchasing power and thus less access to food for 64% of the population in SSA whose livelihood is agriculture.

These implications highlight the shortcomings of the WTO's regulatory contribution to achieving SDG 2 by 'eliminating subsidies' as outlined in the introduction.<sup>153</sup> Furthermore, the implications demonstrate that when assessing the role of the AoA in the structural causes of food insecurity, the law must not be dismissed 'as a passive reflexion of economic and political forces.'<sup>154</sup> Rather, the law itself creates power structures and dependencies that adversely impact food availability and access in SSA. Moreover, it perpetuates and entrenches these power structures and dependencies by forcing trade in specialised products where market participants have a 'comparative advantage'.

Gonzales concludes that the AoA institutionalised the unfair competitive advantage of producers in developed countries.<sup>155</sup> On a more abstract level, distinguishing between constitutive and regulative law, it can be concluded that the Agreement has institutionalised the power structures *in which* producers of industrialised countries have a competitive

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<sup>150</sup> Ibid.

<sup>151</sup> Ibid.

<sup>152</sup> Ibid.

<sup>153</sup> WTO | 'The WTO and the Sustainable Development Goals' (*Wto.org*2017)

[https://www.wto.org/english/thewto\\_e/coher\\_e/sdgs\\_e/sdgs\\_e.htm](https://www.wto.org/english/thewto_e/coher_e/sdgs_e/sdgs_e.htm) accessed 14 August 2023.

<sup>154</sup> Martti Koskenniemi and Marja Lehto, 'The Privilege of Universality: International Law, Economic Ideology and Seabed Resources' (1996) 65 *Nordic Journal of International Law* 533.

<sup>155</sup> Gonzales (n 129) 464.

advantage. For it could also be that within the power structures provided by the constitutive dimension of the legal framework of international agricultural trade, the global South has a competitive advantage. The legal effects of the created legal elements, such as ownership rights, do indeed specify how power can be distributed and what dependencies can exist between parties. However, according to my argumentation, they can be filled in one direction or the other.

Instead, what the regulative dimension of law can regulate is limited to what has been previously constituted. With what has been constituted, rights have been created that provide a certain framework of legal effects. These legal effects create legal relations, such as the relationship of superiority and subordination in ownership. Consequently, they create power structures that are filled by political and economic forces. Therefore, the power structures are inherent in law.

The regulative dimension of law can regulate what political and economic forces are allowed to do and what they are not. However, it cannot change the fact that the power structures exist. In concrete terms, this means that the human right to food can regulate access to food, and the UN's 2030 Agenda can aim to end hunger by regulation. However, the possibilities for regulation are limited to what the legal effects of capital, legal exchange and ownership brought to the market: Food is a commodity that some people can afford, and others cannot.

### **3.2 Imposed Integration of SSA into Unequal Conditions of International Agricultural Trade**

The main argument in this section is that the international legal order has forced countries in SSA to liberalise trade under the AoA through international institutions such as the World Bank, the International Monetary Fund, and the World Trade Organization.

In the colonial period, the metropolitan powers, which had access to abundant raw materials and cheap to unpaid labour, industrialised and developed their economies on the backs of the colonies. This means structural economic disadvantages for the former colonies in integrating into the global trade and economic system.<sup>156</sup> These concern industrialised economy versus agriculture, staple foods versus cash crops, investment in infrastructure, innovation and technology versus exploitation, and subsidies versus debt repayments. According to Duncan Kennedy, newly independent nations needed to adhere to the already existing legal rules in order to participate in the global economy trade, or ‘starve in the dark.’<sup>157</sup> By legitimising colonial practices, international law was a key factor in constituting these disadvantageous structures and inequalities in the international trade of goods.

As argued in Section 2.1.3, the colonial self-understanding of cultural superiority, knowledge dominance and moral responsibility of the Global North continued in the development doctrine of international law, as well as the understanding of development based on civilisational stages. This became evident by an analysis of Article 22 of the Covenant of the League of Nations. In the process, the establishment of the mandate system in international law resulted in the

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<sup>156</sup> Michael Fakhri, *Sugar and the Making of International Law* (Cambridge University Press 2014); Liz Young, *World Hunger* (Routledge 1997) 173.

<sup>157</sup> Duncan Kennedy, ‘Three Globalizations of Law and Legal Thought’ in David Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press 2006) 58.

universalizing Western model of law and behavior being viewed as inevitable, while appearing to liberate non-European peoples.<sup>158</sup>

This can be seen, for example, in the fact that the nation-state within the borders drawn by the colonial powers was seen as the only way for the colonized peoples to achieve self-determination within the pre-existing international system.<sup>159</sup> This legal system precluded the emergence of alternative social, economic or legal systems, as in the age of colonialism.<sup>160</sup> Moreover, the legal system forced the former colonies in SSA into submission to the European legal norms already implemented at the time of Colonialism, which conceptualise land, resources, labour and food as exclusive ownership, entitlements and commodities. From this perspective, 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.’<sup>161</sup>

However, by imposing the legal system of liberalised trade on countries in SSA, the WTO fails to recognise the entirely different starting point in a world where the countries of the Global North are already industrialised. As Rist argues, industrialization according to the Western model was pursued ‘as if the existence of industrial countries did not radically alter the context in which candidates for industrialization have to operate.’<sup>162</sup>

The necessary loans were granted by the World Bank and the International Monetary Fund (IMF).<sup>163</sup> According to Article 3 (5) of the Agreement on Establishing the World Trade Organization, the WTO shall cooperate with the IMF and World Bank to achieve ‘greater

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<sup>158</sup> Anghie (2005) (n 74) 182.

<sup>159</sup> Pahuja (n 40) 56f.

<sup>160</sup> Anghie (2005) (n 74) 182.

<sup>161</sup> Gilbert Rist, *The History of Development: From Western Origins to Global Faith* (Zed Books 2002) 75.

<sup>162</sup> Ibid.

<sup>163</sup> Bjornlund and others (2020) (n 15) 39.



coherence in global economic policy-making.’<sup>164</sup> However, the decline in commodity prices in the early 1980s made it impossible for the former colonies to service their loans.<sup>165</sup> As a result, the IMF and the World Bank required structural adjustment measures (SAPs) before granting further loans.<sup>166</sup> In Africa, agricultural liberalisation was a condition for 80% of World Bank adjustment loans, ‘including [...] reduction of import tariffs and removal of import restrictions; removal of internal market regulations [...] and reduction in public production and infrastructure services.’<sup>167</sup> To maximise the revenue available to service the debt, developing countries were further instructed to increase exports of agricultural commodities.<sup>168</sup> They were also required to devalue their currencies to make their exports more competitive.<sup>169</sup> In parallel to colonialism as outlined in Section 2.1.3., the Global North exerted control over the trade of countries in SSA through the SAPs. However, almost all countries in the Global South were pushed towards a similar strategy at the same time – to boost the production of commodities for which they had a ‘comparative advantage’ in the world market.<sup>170</sup> This led to an oversupply of the exports they were specialised in – cash crops and raw materials.<sup>171</sup> ‘Economists call this phenomenon the *fallacy of composition* – less income is earned as more commodities are produced.’<sup>172</sup>

According to Art. 20 (c) AoA, further negotiations on agricultural trade must also consider non-trade concerns such as food security. The Doha Round that was subsequently launched stated accordingly in the Ministerial Declaration: ‘We agree [...] to enable developing countries to effectively take account of their development needs, including food security [...]

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<sup>164</sup> WTO, ‘Agreement Establishing the World Trade Organization’ (1995) Art. 3 (5).

<sup>165</sup> Bjornlund and others (2020) (n 15) 39.

<sup>166</sup> Ibid.

<sup>167</sup> Ibid.

<sup>168</sup> Gonzales (n 129) 469.

<sup>169</sup> Peter Robbins, *Stolen Fruit: The Tropical Commodities Disaster* (Zed Books 2003) 29.

<sup>170</sup> Ibid 30.

<sup>171</sup> Ibid.

<sup>172</sup> Ibid.

as provided for in the Agreement on Agriculture.’<sup>173</sup> However, the understanding of the AoA as a solution-oriented regulatory instrument has the consequence that the discussed inequitable market structures are legitimised by the illusion of a ‘win-win’ situation: that it is possible to simultaneously maintain the benefits of liberalised trade in agricultural commodities and protect vulnerable populations from price volatility.<sup>174</sup>

What is more, it creates the illusion that food as a commodity can be used to make economic profits on the international market while ensuring availability and access to food for vulnerable populations. It seems that colonialism’s justifying belief that both sides benefit from ‘civilisation’ is reproduced.

### **3.3 Conclusion**

By replacing the concept of ‘civilisation’ with the concept of ‘development’, international law was a crucial part of the power complex through which influence over the countries of the Global South was maintained, as Pahuja, Anghie and Kumar have demonstrated previously.<sup>175</sup>

The evidence presented shows that the international legal order has forced countries in SSA to liberalise trade under the AoA – the term ‘free trade’ seems ironic given the measures under discussion. In parallel to the mandate system, the analysis demonstrates that despite their legal status as sovereign nation-states, the economic policies of the former colonies in SSA continue to be dictated by the Global North acting through newly created international institutions such as the World Bank, IMF, and WTO. The generic term for such practices is ‘Neocolonialism’.<sup>176</sup>

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<sup>173</sup> WTO ‘Ministerial Declaration WT/MIN(01)/DEC/1’ (2001) para 13.

<sup>174</sup> Chadwick (n 6) 194.

<sup>175</sup> Pahuja (n 40) 7; Kumar (n 36) 37.

<sup>176</sup> Chadwick (n 6) 30.

The possibilities for regulation are limited to the constituted legal status of food as a commodity that some people can afford, and others cannot. The legal mechanisms of the AoA institutionalise power structures in international agricultural trade, in which the industrialised countries can protect their market through ‘dirty tariffication’ and subsidies, and the others cannot. In the words of List, the ‘ladder’ of protective tariffs and trade restrictions that once built the industrialised economies of the Global North is now ‘cast down’.<sup>177</sup> This nullifies the ‘comparative advantage’ in cash crops of the countries in SSA in the global market, because the trade liberalisation of the AoA leads to an increase in the prices of SSA’s imports, while the prices of the most important export goods decrease or remain the same. Therefore, the AoA entrenches the unavailability of food, insufficient purchasing power and inappropriate distribution of food in SSA.

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<sup>177</sup> List (n 112).

## **Chapter 4**

### **Conclusion**

The colonial practices of securing land and labour for large-scale cash crop production for export included the eviction of Africans from their land as well as forced labour. Thus, between 1800 and 1900, the area under export crops across SSA increased by 45% and by a further 136% between 1900 and 1960. This led to the unavailability of food and inappropriate distribution because fertile land and labour force were lacking for the cultivation and distribution of staple foods. The decline in food production and the loss of traditional staple food sources laid the foundation for the dependency on food imports, notably cereals, dairy products, and meat products. On the other hand, cash crops account for more than 80 % of SSA's total exports today, making the region dependent on these products to generate income and thus secure its purchasing power for food. Furthermore, the domestic economy declined in the lack of investment and systematic discrimination through protective tariffs and subsidies for settlers. Meanwhile, the metropolitan powers industrialised their economies at the expense of the colonies.

International law has been a crucial causal factor in the unavailability of food, inappropriate distribution, and insufficient purchasing power in SSA. On the one hand, international law constituted a legal system of power structures, in which food became the subject of ownership rights. With the ability to establish ownership rights over food, others can be excluded from access. Law created further legal elements and relations such as capital, labour, legal exchange, and contractual obligations, constituting a market for food – in this way, food was turned into commodities that some people can afford, and others cannot. This is what makes 'insufficient purchasing power' a cause of food insecurity in the first place.

What is more, international law legitimised the exploitative practices of colonialism by a ‘dynamic of difference’, according to which the African population was ‘uncivilised’ and therefore not entitled to the same rights as ‘civilised’ Europeans. The law further rationalised colonial exploitation by the concept of a universal path of civilization. Accordingly, it justified the exercise of colonial control through the coloniser’s ‘white man’s burden’ to develop the Africans within that path, based on cultural superiority and supremacy. Finally, the legitimisation of the practices by international law was also done through the belief that both sides benefit from ‘civilisation’: industrial benefits for the Europeans and progress for the colonies.

The purpose of the Agreement on Agriculture is to liberalize international agricultural trade through regulation of market access, domestic support, and export subsidies. However, the agreement perpetuates power structures that were constituted during colonialism, in which the industrialised countries can protect their market through ‘dirty tariffication’ and subsidies, and the others cannot. This removes the economic policy tools for SSA that metropolitan powers once used to build their economies. Moreover, the agreement perpetuates the structural disadvantages of cash crop-oriented agriculture in SSA, because it leads to an increase in the prices of SSA’s imports, while the prices of the most important export goods decrease or remain the same. As a result, this nullifies the ‘comparative advantage’ in cash crops, which means less purchasing power for 64% of the population in SSA whose livelihood is agriculture. Despite their legal status as sovereign nation-states, the international legal order has forced countries in SSA to liberalise trade under the AoA through structural adjustment policies. This continued influence of the Global North over the economic policies of the former colonies is legitimised by the illusion of mutual profit – then as now.