Geneva Academy of International Humanitarian Law and Human Rights
Académie de droit international humanitaire et de droits humains à Genève
Geneva Academy

Legal analysis on the rights of peasants and other people working in rural areas

The Right to Seeds and Intellectual Property Rights

Prepared for the third session of the United Nations Human Rights Council working group mandated to negotiate a Declaration on the rights of peasants and other people working in rural areas
(17-20 May 2016)

19 MAY 2016

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Acknowledgements

The author would like to thank Dr. Adriana Bessa, Dr. Joanna Bourke Martignoni, Prof. Olivier De Schutter, Ms. Caroline Dommen, Prof. José Esquinas, and Mr. François Meienberg for their valuable comments on an earlier draft. The funding of this legal analysis by the Human Security Division of the Swiss Federal Department of Foreign Affairs is gratefully acknowledged.

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KEY FINDINGS AND RECOMMENDATIONS

For over 10,000 years, peasants have saved, selected, exchanged and sold seeds, as well as used and reused them to produce food. Today, the overwhelming majority of people living in rural areas, particularly in developing countries, still rely on peasant food and seed systems, which are essential to their own food security and to global food security and biodiversity.

In this context, the recognition of the right to seeds in the UN Declaration is central for the realization of the human rights of peasants as well as of the entire world population. As proposed in the draft declaration presented by Ambassador Navarro Llanos in 2015, the UN Declaration should include both the right to food, adapted to peasants and other people working in rural areas' specific needs and vulnerabilities, and a self-standing right to seeds of peasants. The formulation of this right should build upon the Convention on Biological Diversity and its Protocols, the International Treaty on Plant Genetic Resources for Agriculture, the FAO Right to Food Guidelines, and the UN Declaration on the rights of indigenous peoples.

In drafting peasants' right to seeds in the UN Declaration, negotiators should include the following core elements of this right, possibly using agreed language that can be found in other international instruments:

- Peasants' rights to save, exchange, donate, sell, use and reuse farm-saved seeds of peasants' varieties, and to maintain, control, protect and develop these seeds and property over these seeds (and states obligations to protect these rights in their national laws)

- States' obligations to respect, protect and support peasant seed systems

- States' obligation to support research and development that contribute to the full realization of peasants' right to seeds, including by ensuring the active participation of peasants in research and development, and by investing more into research on and development of orphan crops and seeds that respond to the needs of peasants in developing countries

- Peasants' rights to save, use, exchange and sell at local level (but not commercialize) farm-saved seeds of varieties protected by intellectual property rights

Property rights over seeds protected by the UPOV Convention and TRIPS (in many cases held by corporations) are not human rights. Tensions between those particular interests protected by international law and peasants' rights to food and seeds – which only exist in relation to the fourth core element of the right to seeds (peasants rights over seeds protected by intellectual property rights) – should be resolved accordingly, both in the UN Declaration and outside the human rights system. The protection of the rights to health and access to medicines by the Human Rights Commission, and the solution found at WTO in 2001, offers a relevant precedent.

Once the UN Declaration is adopted, states should revise national laws and trade agreements accordingly. As human rights are higher order norms, national laws and trade agreements must be adapted to ensure the ongoing protection of human rights guarantees.

INTRODUCTION

From the start, one of the biggest challenges to drafting a United Nations Declaration on the rights of peasants and other people working in rural areas (UN Declaration) has been to find agreement on the need to recognize rights that are considered to be new in international human rights law, such as the right to seeds.

A specific article on the right to seeds has been included in the draft declaration proposed by the Advisory Committee of the Human Rights Council in 2012, as well as in the draft declaration proposed in 2015 by Ambassador Navarro Llanos, Chairperson-Rapporteur of the first two sessions of the open-ended intergovernmental working group established by the UN Human Rights Council to negotiate the UN Declaration (working group). This inclusion was welcomed by a number of states, by experts, and by representatives of peasants and civil society organizations. But a number of other states contested the need to include the right to seeds, or some of its elements in the drafts. Some have argued that this right would be in contradiction with intellectual property rights (IPRs), or that IPRs should be taken into account when recognizing peasants' right to seeds in the UN Declaration.

In this context, the Geneva Academy of International Humanitarian Law and Human Rights (supported by the Swiss government and in cooperation with the Permanent mission of Bolivia to the UN in Geneva) hosted two expert seminars with panels on the topic in April 2014 and November 2015. The expert seminar that took place in April 2014 was attended by 35 diplomats including Ambassador Navarro Llanos, 10 representatives of civil society, and 19 experts, including Olivier De Schutter, former UN Special Rapporteur on the right to food, José Esquinas, former Secretary General of the Intergovernmental Commission on Genetic Resources for Food and Agriculture, and former Secretary of the International Treaty on Plant Genetic Resources for Food and Agriculture (the Plant Treaty)[2], and representatives of the World Intellectual Property Organization (WIPO), La Via Campesina, and the World Farmers' Organization. 27 diplomats, including the new Permanent Representative of Bolivia to the UN in Geneva, Ambassador Nardi Suxo Iturry, 17 representatives of civil society, and 11 experts, including Olivier De Schutter, José Esquinas, and representatives of the International Union for the Protection of New Varieties of Plants (UPOV) and the Bern Declaration attended the November 2015 seminar.

This legal analysis draws on those discussions, as well as the working group's first two sessions, expert panels organized during these sessions, relevant UN reports, and informal consultations. This analysis begins by discussing the need to recognize the right to seeds in the UN Declaration (I). It then presents the recognition of the right to seeds and intellectual property rights in international and national law, exposes their tensions, and proposes ways to resolve these in the UN Declaration and outside the human rights system (II). Finally, it identifies potential core elements of peasants' right to seeds and makes links with the provisions of the draft proposed by Ambassador Navarro Llanos in 2015 (III). Its purpose is to complement and update studies published in 2013 and 2015[3], which all aim to help negotiators to successfully draft and finalize the UN Declaration successfully.

[2] José Esquinas was also the Chair of the FAO Committee on Ethics for Food and Agriculture from 1999 to 2007.
[3] C. Golay, *Negotiation of a United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas*, Geneva Academy In-Brief No. 5, January 2015, available at http://www.geneva-

I. DO WE NEED TO INCLUDE A RIGHT TO SEEDS IN THE UN DECLARATION ON THE RIGHTS OF PEASANTS AND OTHER PEOPLE WORKING IN RURAL AREAS?

1. Draft declarations and positions expressed at the Human Rights Council

A specific article on the right to seeds has been included in both draft declarations proposed by the Advisory Committee and by Ambassador Navarro Llanos[4], and its inclusion and content have been discussed during the working group first two sessions in 2013 and 2015. The Advisory Committee explained its choice by analysing new threats that peasants face with respect to seeds, and concluded that peasants' access to seeds needs stronger protection in international law.[5] The former UN Special Rapporteur on the right to food, Olivier De Schutter, devoted a whole report to this issue in 2009[6], and reached the same conclusion. For him, the adoption of the UN Declaration would be important to recognize rights that are new in international human rights law, such as the right to seeds.[7]

During the working group's first two sessions, a number of states, representatives of peasants and non-governmental organisations (NGOs), and panellists stressed that recognition of the right to seeds in the UN declaration was crucial for peasants and humankind.[8] A number of states, civil society organizations and social movements presented similar views during informal consultations in 2014.[9]

At the same time, a number of other states did not wish the UN Declaration to recognize new rights,[10] and included the right to seeds in this category.[11] These states were concerned that the draft declaration "set out new rights on which there [is] no broad consensus", and that "existing human rights [provide] adequate protection to peasants".[12]

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academy.ch/docs/publications/Briefings%20and%20In%20breifs/InBrief5_rightsofpeasants.pdf; C. Golay, *Legal reflections on the rights of peasants and other people working in rural areas*, Background paper prepared for the first session of the UN working group (15-19 July 2013), Geneva Academy, 2013, available at www.ohchr.org/Documents/HRBodies/HRCouncil/WGPleasants/Golay.pdf.

[4] See Declaration on the rights of peasants and other people working in rural areas (Advisory Committee), UN Doc. A/HRC/15/1/2, 20 June 2013, article 5; Draft UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (A. Navarro Llanos), Advanced Version, 27 January 2015, article 22 and relevant provisions of article 23 on the right to biological diversity.

[5] Final study of the Human Rights Council Advisory Committee (on the advancement of the rights of peasants and other people working in rural areas), UN doc. A/HRC/19/75, 24 February 2012, §36-37, 69-74.

[6] See report of the Special Rapporteur on the right to food, Olivier De Schutter (on seed policies and the right to food), UN doc. A/64/170, 23 July 2009.

[7] Final study of the Human Rights Council Advisory Committee, UN doc. A/HRC/19/75, 24 February 2012, §70.

[8] Report of the first session of the UN working group, Chairperson-Rapporteur: A. C. Navarro Llanos, UN doc. A/HRC/26/48, 11 March 2014, §14, 22, 25, 36; Report of the second session of the UN working group, Chairperson-Rapporteur: A. C. Navarro Llanos, UN doc. A/HRC/30/55, 22 July 2015, §20, 31, 61, 63, 78, 81.

[9] C. Golay, *Negotiation of a United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas*, Geneva Academy In-Brief No. 5, January 2015, pp. 65-66.

[10] Report of the first session of the UN working group, A/HRC/26/48, 11 March 2014, §29, 35.

[11] Report of the second session of the UN working group, UN doc. A/HRC/30/55, 22 July 2015, §61.

[12] Report of the first session of the UN working group, UN doc. A/HRC/26/48, 11 March 2014, §29, 35; Report of the second session of the UN working group, UN doc. A/HRC/30/55, 22 July 2015, §29.

Some of the questions facing negotiators are therefore the following: should the UN Declaration reaffirm the right to food? If so, would this be sufficient, or should the UN Declaration also include a self-standing right of peasants to seeds?

2. The right to food and peasants' right to seeds

a. Do we need a combination of existing and new rights to better protect peasants?

The balance to be found between the reaffirmation of existing rights and the recognition of new rights in the UN Declaration is one of the major challenges facing negotiators.

Both draft declarations presented by the Advisory Committee and by Ambassador Navarro Llanos propose to reaffirm existing rights and to recognize rights that are new in international human rights law.[13] As we have seen, some states have criticized this approach. During the working group's first two sessions, these states have argued that the draft declaration includes new rights on which there is no broad consensus, and that existing human rights provide adequate protection to peasants.[14] Responding to these arguments, other states explained that "at some point in history all rights were new, and that the 'new rights' contained in the draft declaration were essential to further promoting and protecting peasants and other people working in rural areas".[15] These states, together with other participants at the working group added that "many provisions in the draft declaration were in fact not new, but reflected the application of existing rights to the specific needs and vulnerabilities of peasants, or reflected provisions existing in other international instruments that it was important to recognize and reaffirm in the human rights framework".[16]

The proposal to include both existing and new rights in the UN Declaration is in conformity with UN practice.[17] All human rights declarations and conventions adopted by the UN in the last 40 years to protect specific categories of people have always had the effect of reaffirming existing rights and recognizing new rights in international human rights law.[18] This means that in

[13] Final study of the Human Rights Council Advisory Committee, UN doc. A/HRC/19/75, 24 February 2012, §72; Report of the second session of the UN working group, UN doc. A/HRC/30/55, 22 July 2015, §21.
[14] Report of the first session of the UN working group, UN doc. A/HRC/26/48, 11 March 2014, §29, 35; Report of the second session of the UN working group, UN doc. A/HRC/30/55, 22 July 2015, §29.
[15] Report of the first session of the UN working group, UN doc. A/HRC/26/48, 11 March 2014, §28, 40; Report of the second session of the UN working group, UN doc. A/HRC/30/55, 22 July 2015, §31.
[16] Report of the first session of the UN working group, UN doc. A/HRC/26/48, 11 March 2014, §28, 35; Report of the second session of the UN working group, UN doc. A/HRC/30/55, 22 July 2015, §14, 27, 63.
[17] See the Convention on the Elimination of All Forms of Discrimination Against Women, adopted on 18 December 1979; the Convention on the Rights of the Child, adopted on 20 November 1989; the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted on 18 December 1990; the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted on 18 December 1992; the Declaration on Human Rights Defenders, adopted on 9 December 1998; the Convention on the Rights of Persons with Disabilities, adopted on 13 December 2006; and the Declaration on the Rights of Indigenous Peoples, adopted on 13 September 2007.
[18] For a list of new rights recognized for specific categories of people in UN human rights instruments in the last 40 years, see C. Golay, *Negotiation of a United Nations Declaration on the Rights of Peasants and Other People*

developing these instruments, states have always felt that it was important to reaffirm existing rights and recognize new rights in order to better protect those they had identified as particularly vulnerable and subject to discrimination.

In the UN Declaration on the Rights of Indigenous Peoples[19], states have for example reaffirmed indigenous peoples' right to life – adapting it to their specific needs and vulnerabilities (article 7) – and recognized indigenous peoples' collective right to land and territory (article 26, among others), and their right to maintain, control, protect and develop their seeds and property over these seeds (article 31.1). Almost 10 years after the adoption of this instrument, it is hard to contest that by adopting it, the Human Rights Council made an important contribution to the enhanced protection and implementation of the rights of indigenous peoples.[20]

Building on these examples, it seems logical for the UN Declaration being negotiated to include both existing rights, such as the right to food, adapting them to the specific needs and vulnerabilities of peasants and other people working in rural areas, and new rights that are necessary to better protect peasants and other people working in rural areas, such as the right to seeds. It is the combination of both that will ensure that the UN Declaration will contribute to a better protection of peasants and other people working in rural areas.

b. The importance of the right to food and the centrality of the right to seeds

Since the start of the negotiation, participants agree that it is important to reaffirm the right to food in the UN Declaration, the main argument being that peasants and other people working in rural areas are the first victims of right to food violations. During the second session of the working group, a number of delegations stressed that peasants and others people working in rural areas represent 80 per cent of those in the world that are hungry[21], and that the right to food was regularly denied in rural areas because states had often underinvested in facilities for peasant communities.[22] The point was also made that one of the key elements of peasants' right to food must be the right to produce food, and that this aspect should be reinforced in the drafting of the UN Declaration.[23]

As we have seen, many agree that it is also important to recognize peasants' right to seeds in the UN Declaration. During the expert seminars in 2014 and 2015, many participants underlined that peasants always used seeds and need seeds to produce food and feed themselves, as well as half

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Working in Rural Areas, Geneva Academy In-Brief No. 5, January 2015, footnote 59; C. Golay, *Legal reflections on the rights of peasants and other people working in rural areas*, Geneva Academy, 2013, pp. 14-15.

[19] The UN Declaration on the Rights of Indigenous Peoples has been adopted on 13 September 2007.

[20] See the report that the former UN Special Rapporteur on the rights of indigenous peoples, S. James Anaya, presented to the Human Rights Council in 2008, UN doc. A/HRC/9/9, 11 August 2008. See also Inter-Parliamentary Union et al., *Implementing the UN Declaration on the Rights of Indigenous Peoples*, Handbook for Parliamentarians No. 23, 2014; Indigenous Bar Association, *Understanding and Implementing the UN Declaration on the Rights of Indigenous Peoples. An Introductory Handbook*, 2011; C. Charters and R. Stavenhagen (eds), *Making the Declaration Work. The UN Declaration on the Rights of Indigenous Peoples*, International Work Group for Indigenous Affairs, 2009.

[21] Report of the second session of the UN working group, UN doc. A/HRC/30/55, 22 July 2015, §57.

[22] Report of the second session of the UN working group, UN doc. A/HRC/30/55, 22 July 2015, §32.

[23] Report of the second session of the UN working group, UN doc. A/HRC/30/55, 22 July 2015, §57.

of the world population.[24] They described the centrality of the right to seeds among the rights of peasants as "self-evident". They also noted that peasants' right to seeds was intrinsically linked to everyone' right to food[25] as well as the right of humanity to biodiversity, and therefore its right to survival.[26]

Despite the fact that access to seeds has been recognized has a core element of the right to food by states and UN experts[27], both the Advisory Committee and the former UN Special Rapporteur, Olivier De Schutter agree that this is no longer sufficient, and that the drafting of the UN Declaration represents a unique opportunity to fill a gap in international human rights law by recognizing peasants' right to seeds.[28] Many participants in the expert seminars in 2014 and 2015 shared this position. They pointed out that today's world presents new challenges for peasants' access to seeds. These challenges, which include factors relating to recent progress in biological sciences, and the enhanced protection of intellectual property rights over seeds (see chapter II below), appeared long after the recognition of the right to food in the Universal Declaration on Human Rights (1948) and the International Covenant on Economic, Social and Cultural Rights (1966). Thus the current situation with regard to access to seeds and the obstacles to such access not only justifies but also reinforces the need to recognize the right to seeds in the UN Declaration, to complement the protection that the right to food can offer.[29]

c. The rights to food and to seeds of peasant women

The Committee on the Elimination of Discrimination Against Women (CEDAW Committee) reached very similar conclusions in its General Recommendation No. 34 on the rights of rural women, adopted in March 2016. In its interpretation of article 14 of the CEDAW Convention, the CEDAW Committee described new threats facing peasant women's access to seeds, and recommended measures that states parties to the CEDAW Convention need to take in order to better protect both their right to food and their right to seeds.

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[24] It is estimated that peasants and other people working in rural areas, as defined in the draft declaration proposed by Ambassador Navarro Llanos, provide 50 to 70% of the total food eaten in the world (10-15% from hunting and gathering, 5-10% from fishing, and 35-50% from farms). In addition, 10-15% is provided by small-scale agriculture in urban settings. ETC Group, *With Climate Chaos, Who Will Feed Us? The Industrial Food Chain or The Peasant Food*, 2014, p. 7. See also K. D. Maass Wolfenson, *Coping with the food and agriculture challenge: smallholders' agenda*, FAO, 2013. For similar figures at the regional level in Sub-Saharan Africa, see IAASTD, *Agriculture at a Crossroads. Volume V. Sub-Saharan Africa*, p. 22.

[25] Report of the first session of the UN working group, UN doc. A/HRC/26/48, 11 March 2014, §13, 28.

[26] According to FAO, 75% of crop diversity was lost between 1900 and 2000, which will have a major impact on the ability of humankind to feed itself in the future, with the poorest in the world most affected. FAO, *The Second Report on State of the World's Plant Genetic Resources for Food and Agriculture*, 2010. See also Report of the Special Rapporteur on the right to food, Olivier De Schutter, UN doc. A/64/170, 23 July 2009, §38.

[27] See FAO, *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*, notably guideline 8D on genetic resources for food and agriculture; General Comment no. 12 of the Committee on Economic, Social and Cultural Rights, on the right to adequate food, UN doc. E/C.12/1999/5, 12 May 1999; Report of the Special Rapporteur on the right to food, Olivier De Schutter, UN doc. A/64/170, 23 July 2009.

[28] Final study of the Human Rights Council Advisory Committee, UN doc. A/HRC/19/75, 24 February 2012, §69-74.

[29] See Part II below for a description of some of these threats linked with the creation of intellectual property rights by the TRIPS and UPOV Convention.

Peasant women play a key role in local and global food security – producing food crops worldwide and earning incomes to feed their families.[30] Their role is also central in the peasant seed systems, where it is estimated that "up to 90 per cent of planting material used in peasant agriculture are seeds and germ plasms produced, selected and saved by women".[31] Yet women and girls represent 70 per cent of the world's hungry, and are subject to multiple discriminations in access to productive resources, including seeds, as well as remunerated jobs, credit, education and training.[32]

In its general recommendation No. 34, the CEDAW Committee underlined that "rural women are critical to achieving food security, reducing poverty, malnutrition and hunger, and in promoting rural development, yet their contribution is often unpaid, unacknowledged, and poorly supported" (§63). It then described the measures that state parties to the CEDAW Convention should take to better protect rural women's right to food.[33] These include measures to ensure that they have the authority to manage and control their natural resources, within the framework of food sovereignty (64), and the adoption of effective policies to ensure that they have access to adequate food and nutrition (65).

In an important statement, the CEDAW Committee recognized that rural women's right to seeds is a fundamental human right (§ 56). It then described new threats affecting peasant women's right to seeds:

> 60. The consequences of industrial agriculture have often been detrimental to rural women farmers, and have included (…) use of cash crops to the detriment of local food crops. The controversial use of genetically modified organisms and the patenting of genetically altered crops are also linked to increased agricultural industrialization. Rural women, however, are more often engaged in organic and sustainable farming practices.

The CEDAW Committee made a number recommendations to state parties to the CEDAW Convention in relation to the protection of peasant women' right to seeds:

> 62. States parties should implement agricultural policies which support rural women farmers, recognize and protect the natural commons, promote organic farming and protect rural women from harmful pesticides and fertilizers. They should ensure that rural women have effective access to agricultural resources, including high quality seeds, tools, knowledge and information, as well as equipment and resources for organic farming.
> Additionally, States parties should:

[30] According to FAO, women comprise, on average, 43 per cent of the agricultural labour force in developing countries, ranging from 20 per cent in Latin America to 50 per cent in Eastern Asia and sub-Saharan Africa. FAO, *State of Food and Agriculture 2010-2011. Women in Agriculture. Closing the gender gap for development, losing the gender gap for development*, Rome, FAO, p. 5.
[31] Report of the Special Rapporteur on the right to food, Olivier De Schutter, UN doc. A/64/170, 23 July 2009, §42; Report of the Special Rapporteur on the right to food, Hilal Elver, UN doc. A/HRC/31/51, 14 December 2015.
[32] A.C. Bellows et al., *Gender, Nutrition, and the Human Right to Adequate Food. Towards an Inclusive Framework*, Routledge, 2015.
[33] CEDAW Committee, General Recommendation No. 34 on the rights of rural women, UN doc. CEDAW/C/GC/34, 4 March 2016, §§63-66.

(a) Respect and protect rural women's traditional and eco-friendly agricultural knowledge and particularly the right of women to preserve, use, and exchange traditional and native seeds;
(b) Protect and conserve native and endemic species and plant varieties of food and medicinal resources, and prevent patenting by national and transnational companies to the extent that it threatens the rights of rural women. States parties should prohibit contractual requirements on the mandatory purchase of sterile (i.e. terminator) seeds, which prevent rural women from seed saving;

66. States parties should adopt laws, policies and measures to promote and protect rural women's diverse local agricultural methods and products, and their access to markets. They should ensure diversity of crops and medicinal resources to improve rural women's food security and health, as well as access to livestock.

The protection of gender equality and the rights of rural women are central in the draft declaration presented by Ambassador Navarro in 2015. Many participants welcomed this protection during the second session of the working group in 2015[34], and informal consultations in 2014.[35] In finalizing the UN Declaration, it will be important to reinforce it by including a stronger gender dimension in the substantive articles of the UN Declaration, including on the right to food and peasants' right to seeds.

II. PEASANTS' RIGHT TO SEEDS AND INTELLECTUAL PROPERTY RIGHTS

This chapter begins with a brief history of the right to seeds and intellectual property rights in international law (1). It then presents their unbalanced implementation at national level (1.d), and identifies inherent tensions (1.e). It ends by presenting possible solutions to resolve these tensions in the UN Declaration and outside the human rights system (2).

1. From a freedom to contradictory norms in international and national law

a. Customary rights of peasants to seeds

For over 10,000 years, peasants have saved, selected, exchanged and sold seeds, and used and reused them to produce food.[36] Today, the overwhelming majority of people living in rural areas in developing countries still rely on peasant food and seed systems, which are essential to their own food security and to global food security and biodiversity.[37]

[34] Report of the second session of the UN working group, UN doc. A/HRC/30/55, 22 July 2015, §17, 26, 32, 35, 44, 47, 66, 67 and 77.
[35] C. Golay, *Negotiation of a United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas*, Geneva Academy In-Brief No. 5, January 2015, p. 46.
[36] R. Andersen, *The History of Farmers' Rights. A Guide to Central Documents and Literature*, The Fridtjof Nansen Institute, 2005.
[37] Report of the Special Rapporteur on the right to food, Olivier De Schutter, UN doc. A/64/170, 23 July 2009, Summary and §42; ISSD Africa, *Introduction to Integrated Seed Sector Development and its guiding principles*, Centre for Development Innovation Wageningen UR, 2013; FAO, Commission on Genetic Resources for Food and Agriculture, *Draft Guide for National Seed Policy Formulation*, FAO doc. CGRFA-14/13/Inf.20, 2013, §72.

The customary rights of peasants to seeds[38] are of the same nature as customary rights of indigenous peoples to their land and territory, which were formally recognized by states outside the human rights system – with the ILO Convention No. 169 adopted in 1989[39] – before being recognized in the UN Declaration on the Rights of Indigenous Peoples in 2007. They correspond to a freedom that is close to the notion of natural, or inalienable rights enshrined in the 1776 Declaration of Independence of the United States, the 1793 French Declaration of the Rights of Man and Citizen, and the 1948 Universal Declaration of Human Rights.[40]

Beyond a millenary practice, states affirmed these customary rights to seeds in adopting the International Treaty on Plant Genetic Resources for Food and Agriculture (the Plant Treaty).[41] In the Preamble of this international treaty negotiated during 20 years, and adopted by consensus in 2001, states affirmed that "the rights recognized in this Treaty to save, use, exchange and sell farm-saved seed and other propagating material (…) are fundamental to the realization of Farmers' Rights, as well as to the promotion of Farmers' Rights at national and international levels". They also recognized in article 9 of the same instrument that provisions of the treaty shall not be interpreted to limit "any rights that farmers have to save, use, exchange and sell farm-saved seed or propagating material".

b. Entrenching intellectual property rights through the TRIPS and UPOV Convention

The creation of intellectual property rights over seeds and plant varieties began in European countries and the United States of America (USA) in the 20th century, through the protection of breeders' rights and patents.[42] This legal development was intrinsically linked to the development of a commercial breeding sector separate from farming, and, more recently, of a biotechnological sector.[43] Today, binding international treaties and effective monitoring mechanisms offer strong protection to these two forms of intellectual property rights.

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[38] R. Andersen also defines customary rights to seeds, as well as customary practices of farmers to save, reuse, share and develop seeds. R. Andersen, *The History of Farmers' Rights. A Guide to Central Documents and Literature*, The Fridtjof Nansen Institute, 2005. Z. Goodman also defines farmers' rights as customary rights of farmers to save, use exchange and sell farm-saved seeds. Z. Goodman, *Seeds of Hunger: Intellectual Property Rights on Seeds and the Human Rights Response*, 3D, 2009, p. 9.

[39] The ILO Convention No. 169 on Indigenous and Tribal Peoples was adopted in 1989, and it entered into force in 1991. It has more than 20 states parties.

[40] For R.A. Brac de la Perrière and G. Kastler, "few decades ago almost every seed belonged to the category of "farmer seed", and so the term did not exist. These were seeds of varieties gathered, picked out, maintained or enhanced through selection, conserved, multiplied and exchanged by the men and women who grew them in gardens or fields. The idea of restricting the grower's liberty to use a part of his own harvest to resow a new crop was entirely alien". Réseau Semences Paysannes, *Seeds and Farmers' Rights. How International Regulations Affect Farmer Seeds*, 2011, p. 3.

[41] The Plant Treaty has been adopted at the FAO in 2001 and it entered into force in 2004. It has more than 130 state parties. A list of states parties to the Plant Treaty is available at http://www.planttreaty.org/list_of_countries.

[42] G. Dutfield, *Intellectual Property Rights and the Life Science Industries. Past, Present and Future*, World Scientific, 2009. See also Réseau Semences Paysannes, *Seeds and Farmers' Rights. How International Regulations Affect Farmer Seeds*, 2011, pp. 14-19.

[43] Report of the Special Rapporteur on the right to food, Olivier De Schutter, UN doc. A/64/170, 23 July 2009, §1. See also N. Louwaars, "Seed science in the 21st century: rights that scientists have to deal with", *Seed Science Research*, 22, 2012, pp. 9-14.

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), adopted as annex 1C of the Marrakesh Agreement Establishing the WTO on 15 April 1994, defines how patent laws should protect intellectual property. The TRIPS agreement requires WTO members[44] to provide for a minimum patent protection of 20 years for all inventions in almost all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application (article 27). Protection is optional for plants and animals, but members of WTO must protect plant varieties either by patents, or by an effective *sui generis* system (a system of its own kind), or a combination of both (article 27(3.b)).

In the seed sector, patents have grown with the development of genetically modified crops that have been commercialized since 1996.[45] They represent the most comprehensive form of protection that can be granted.[46] They ultimately give the right-holders – in many cases corporations – exclusive rights over newly created plants. In the view of the former UN Special Rapporteur on the right to food, Olivier De Schutter, patents imply that "[f]armers cultivating patented seeds do not have any rights over the seeds they plant. They are considered to be licensees of a patented product, and they frequently are requested to sign agreements not to save, resow or exchange the seeds which they buy from patent-holders".[47]

While some countries have protected plant varieties through patents, others have chosen to protect them through breeders' rights. In doing so, few countries have developed their own *sui generis* system – an oft-cited example is that of India (see below, II.1.d).[48] Most countries adopted the model proposed by the International Union for the Protection of New Varieties of Plants (UPOV) and its International Convention for the Protection of New Varieties of Plants Plant.[49] The first version of the UPOV Convention was adopted in 1961 and it entered into force in 1968. The Convention was then revised in 1972, 1978, and 1991. Since 1999, new members are obliged to become parties to the 1991 version. Today, more than 70 states are members of UPOV, and two third of these have ratified the 1991 Act. UPOV members include all large commercial powers with the notable exception of India.[50]

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[44] The WTO has over 160 Members. The full list of WTO Members is available at www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

[45] Report of the Special Rapporteur on the right to food, Olivier De Schutter, UN doc. A/64/170, 23 July 2009, §12. See also G. Dutfield, *Intellectual Property Rights and the Life Science Industries. Past, Present and Future*, World Scientific, 2009.

[46] N. Louwaars, "Seed science in the 21st century: rights that scientists have to deal with", *Seed Science Research*, 22, 2012, pp. 9-14.

[47] Report of the Special Rapporteur on the right to food, Olivier De Schutter, UN doc. A/64/170, 23 July 2009, §12. See also Réseau Semences Paysannes, *Seeds and Farmers' Rights. How International Regulations Affect Farmer Seeds*, 2011, p. 31 (in which the authors state that patents give the rights-holders a monopoly on reproduction, by preventing peasants from freely gathering the seeds of plants cultivated in their fields, to reproduce them the following year).

[48] See C. M. Correa, with contributions from S. Shashikant and F. Meienberg, *Plant Variety Protection in Developing Countries. A Tool for Designing A Sui Generis Plant Variety Protection System: An Alternative to UPOV 1991*, 2015.

[49] UPOV, *Guidance for the Preparation of Laws based on the 1991 Act of the UPOV Convention*, UPOV doc. UPOV/INF/6/4, 29 October 2015.

[50] Report of the Special Rapporteur on the right to food, Olivier De Schutter, UN doc. A/64/170, 23 July 2009, §13. In addition to 72 states, the European Union and the African Intellectual Property Organization are also members of UPOV. The list of UPOV members is available at www.upov.int/export/sites/upov/members/en/pdf/pub423.pdf.

UPOV protects the rights of plant breeders who have developed plant varieties that are new, distinct, uniform and stable (article 5(1)). It is important to note that the novelty criterion does not mean that the plant variety was not already known or used (by peasants, for instance). Rather, novelty under UPOV means that the variety was never commercialized in the formal market, or listed in an official seed catalogue.[51] In addition, the uniformity and stability requirements imply that the UPOV Convention does not protect the varieties that peasants often breed and use, which tend to be inherently unstable and in permanent evolution.[52]

The UPOV Act of 1991 grant breeders at least 20 years of rights over novel, distinct, uniform and stable plant varieties (article 19). If previous versions already prohibited peasants from selling protected seeds, the 1991 Act also prohibits peasants from exchanging these seeds, and peasants can save and re-use protected seeds only if their government has enacted an optional exception to the 1991 Act (articles 14 and 15).

Intellectual property rights aim at encouraging innovation, by allowing the patent-holder or the breeder to be rewarded for the investment made in the development of a new plant variety, while at the same time – in particular in the case of the protection of plant breeders' rights – allowing access to others for breeding.[53] For the International Seed Federation (ISF):

> Strong and effective Intellectual Property (IP) protection encourages further breeding and research required to meet increasing food, feed, fiber, and fuel needs whilst preserving the planet. Both Plant Breeder's Rights (PBR), also referred to as Plant Variety Protection (PVP) or Plant Variety Rights (PVR), and patents are needed to stimulate the full scope of innovation in agricultural sciences. The most effective IP system balances protection as an incentive for innovation and access to enable others to further improve plant varieties. Therefore, ISF considers that the preferred form of protection for varieties per se is through Plant Breeders Rights. PBR includes the breeder's exception, the objective of which is to allow access to and use for further breeding of commercial varieties that are protected under PBR. The breeder's exception is one of the cornerstones of the PBR system. When patents are used in the field of plant breeding, this balance can be achieved through attention to the definition of patentable subject matter, the scope and quality of patent claims, the duration of patent protection, and exceptions to the patent right for research and breeding.[54]

However, it has also been argued, that "excessive protection of breeders' rights and patents may discourage innovation instead of rewarding it".[55] Experts in the field Robert Tripp, Niels

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[51] Réseau Semences Paysannes, *Seeds and Farmers' Rights. How International Regulations Affect Farmer Seeds*, 2011, pp. 32-33. See also R. Tripp, N. Louwaars, D. Eaton, "Plant variety protection in developing countries. A report from the field", *Food Policy* 32, 2007, p. 358.

[52] Report of the Special Rapporteur on the right to food, Olivier De Schutter, UN doc. A/64/170, 23 July 2009, §13.

[53] UPOV, UPOV Report on the Impact of Plant Variety Protection, 2005, available at www.upov.int/edocs/pubdocs/en/upov_pub_353.pdf. See also Report of the Special Rapporteur on the right to food, Olivier De Schutter, UN doc. A/64/170, 23 July 2009, §26.

[54] ISF, "ISF View on Intellectual Property", 2012, available at http://www.worldseed.org/wp-content/uploads/2015/10/View_on_Intellectual_Property_2012.pdf.

[55] Report of the Special Rapporteur on the right to food, Olivier De Schutter, UN doc. A/64/170, 23 July 2009, §28. Olivier De Schutter further explains that "[a]pplied research and crop improvement is a cumulative process, based on pre-existing plant material. Each incremental improvement that involves a new technology therefore faces the constraints of intellectual property and germ plasm which accumulate in the plant material. In jurisdictions such as the United States or the European Union where patents can be granted on life forms, there is a risk that further research will be impeded, rather than encouraged, as it would depend on the possibility to use patented material. The

Louwaars and Derek Eaton have summarized the potential benefits and dangers of intellectual property rights in the seed sector:

> The standard argument (for providing intellectual property protection in national laws) is that an IPR regime for plant varieties will stimulate investments in research, help develop the domestic seed sector, and allow countries to take advantage of foreign technology. Many observers, however, are more cautious about the possible benefits and see potential dangers in the concentration of technology ownership and restrictions on famer seed systems. Additional concerns are raised when bilateral trade negotiations (…) oblige developing countries to accept so-called "TRIPS-Plus" agreements establishing IPR regimes beyond the minimum required by the WTO. Many NGO campaigns draw further attention to issues such as the "patenting of food crops" by portraying small farmers as in imminent danger of being denied access to their seed.[56]

For N. Louwaars, "it is important not to lose sight of the fact that IPR regimes such as PVP are established to help achieve societal goals",[57] and that "too strong a focus on exploiting the economic benefits of research impinges on potential societal benefits".[58] In his report on seed policies, the former UN Special Rapporteur on the right to food added that "intellectual property rights reward and encourage standardization and homogeneity, when what should be rewarded is agrobiodiversity, particularly in the face of the emerging threat of climate change and of the need, therefore, to build resilience by encouraging farmers to rely on a diversity of crops".[59]

c. The recognition of the rights of indigenous peoples, local communities and farmers in the CBD, the Plant Treaty and the Declaration on the Rights of Indigenous Peoples

The main objectives of the Convention on Biological Diversity (CBD) and its Protocols are the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including seeds (article 1, CBD). The CBD was adopted in 1992 and it entered into force in 1993. Today, it has reached almost universal acceptance, with 196 states parties.[60] The CBD protects the right to seeds of indigenous and local communities, including peasants, through provisions aimed at ensuring the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to these resources, and the protection of indigenous and local communities traditional knowledge and practices.[61] In the Cartagena Protocol on

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growing importance in recent years of patents on life forms, itself the result of the progress of biotechnology, may result in increasing restrictions to both farmers' and research exemptions, which plant variety protection (PVP) regimes generally include". *Ibid.*

[56] R. Tripp, N. Louwaars, D. Eaton, "Plant variety protection in developing countries. A report from the field", *Food Policy* 32, 2007, p. 355. References omitted.

[57] R. Tripp, N. Louwaars, D. Eaton, "Plant variety protection in developing countries. A report from the field", *Food Policy* 32, 2007, p. 370.

[58] B. De Jonge and N. Louwaars, "Valorizing science : whose values ?", European Molecular Biology Organization (EMBO) reports, Vol. 10, No. 6, 2009, pp. 535-539.

[59] Report of the Special Rapporteur on the right to food, Olivier De Schutter, UN doc. A/64/170, 23 July 2009, §39.

[60] The list of states parties to the CBD is available at https://www.cbd.int/information/parties.shtml.

[61] On the protection of the rights of indigenous and local communities, see article 8j of the CBD.

Biosafety, adopted in 2000 and to which 170 states are parties[62], states have accepted to take measures to protect biological diversity and indigenous and local communities from the potential risks posed by genetically modified organisms (GMOs).[63] And in the Nagoya Protocol on Access to Genetic Resources and Benefit-Sharing, adopted in 2010 and ratified by more than 70 states[64], states have further defined benefit-sharing obligations arising from the use of traditional knowledge associated with genetic resources (art. 5(5)), and from research and development on genetic resources held by indigenous and local communities (art. 5(2)).[65] They have also committed, "as far as possible, not to restrict the customary use and exchange of genetic resources and associated traditional knowledge within and amongst indigenous and local communities" (art. 12(4)).

When the CBD was adopted, FAO was tasked with developing a more specific treaty on the management of plant genetic resources for food and agriculture.[66] The International Treaty on Plant Genetic Resources for Food and Agriculture (the Plant Treaty) was negotiated for 20 years and it has been adopted by consensus at the FAO in 2001. It has more than 130 states parties today.[67] It is the most important international treaty in terms of its recognition and protection of peasants' right to seeds. The treaty establishes a multilateral system to facilitate access to seeds and planting material and to share benefits deriving from these in a fair and equitable way.[68] Importantly, it recognizes farmers' rights in many of its provisions, in a way that aims to respond to threats posed by intellectual property, and to "draw attention to the unremunerated innovations of farmers that were seen as the foundation of all modern plant breeding".[69]

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[62] The Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Cartagena Protocol) was adopted on 29 January 2000. It entered into force on 11 September 2003. Information is available at http://bch.cbd.int/protocol.

[63] See in particular article 26 of the Cartagena Protocol.

[64] The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (Nagoya Protocol) was adopted on 29 October 2010. It entered into force on 12 October 2014. Information is available at www.cbd.int/abs.

[65] A. Bessa, *The Draft Declaration on the Rights of Peasants and Other People Working in Rural Areas: reflections on benefit-sharing*, 2014, available at www.benelexblog.law.ed.ac.uk/2014/12/08/the-draft-declaration-on-the-rights-of-peasants-and-other-people-working-in-rural-areas-reflections-on-benefit-sharing.

[66] R. Andersen, *The History of Farmers' Rights. A Guide to Central Documents and Literature*, The Fridtjof Nansen Institute, 2005, pp. v-vi.

[67] A list of states parties to the Plant Treaty is available at http://www.planttreaty.org/list_of_countries.

[68] In his report on seed policies presented in 2009, Olivier De Schutter described the added value of the treaty. For him, the ITPGRA "seeks to establish a novel system of governance for global commons, ensuring permanent access to a large pool of genetic resources for the development of new and improved plant resources. (…) This global pool comprises 64 food crops that make up more than 1 million samples of known plant genetic resources. The Multilateral System, which applies to these resources, is based on the idea that, while states have sovereign rights over their own plant genetic resources for food and agriculture, they agree to facilitate access to such plant genetic resources for the purpose of "utilization and conservation for research, breeding and training for food and agriculture" (article 12 (3) (a)), and to share, in a fair and equitable way, the benefits arising from the utilization of these resources." Report of the Special Rapporteur on the right to food, Olivier De Schutter, UN doc. A/64/170, 23 July 2009, §22.

[69] R. Andersen, *The History of Farmers' Rights. A Guide to Central Documents and Literature*, The Fridtjof Nansen Institute, 2005, pp. v, 3-10. For R. Andersen, the "idea of farmers' rights came up in the early 1980s as a countermove to the increased demand for plant breeders' rights, as voiced in international negotiations. The purpose was to draw attention to the unremunerated innovations of farmers that were seen as the foundation of all modern plant breeding". *Ibid.* For the South Centre, the "relationship between Farmers' Rights and intellectual property rights was, hence, at the very inception of that concept". South Centre, *Interrelations between the International*

In the Plant Treaty's preamble, states affirm that "the rights recognized in this Treaty to save, use, exchange and sell farm-saved seed and other propagating material, and to participate in decision-making regarding, and in fair and equitable sharing of the benefits arising from, the use of plant genetic resources for food and agriculture, are fundamental to the realization of Farmers' Rights, as well as to the promotion of Farmers' Rights at national and international levels". In article 9, they further recognize "the enormous contribution that the local and indigenous communities and farmers of all regions of the world, particularly those in the centres of origin and crop diversity, have made and will continue to make for the conservation and development of plant genetic resources which constitute the basis for food and agriculture production throughout the world". The same article requires states parties to take measures to protect and promote farmers' rights, by: "(a) protecting traditional knowledge relevant to plant genetic resources for food and agriculture, and affirming (b) the right to equitably participate in sharing benefits arising from the utilization of plant genetic resources for food and agriculture, and (c) the right to participate in making decisions, at national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture". It is important to note that article 9 provides that a state party will do this "as appropriate and subject to its national legislation". But it also states that its provisions shall not be interpreted "to limit any rights that farmers have to save, use, exchange and sell farm-saved seed or propagating material".

Finally, it is important to note that by adopting the UN Declaration on the Rights of Indigenous Peoples in 2008, states have recognized the right to seeds in international human rights law for the first time, by recognizing indigenous peoples' right to maintain, control, protect and develop their seeds and property over these seeds (article 31.1).

d. Unbalanced implementation at national level

Peasants' right to seeds and intellectual property rights are both recognized in binding international treaties, but their implementation is very unbalanced at national level.

As noted above, the 162 members of the World Trade Organization (WTO)[70] are obliged to protect intellectual property on plant varieties in their national laws (as TRIPS is part of the WTO Agreement). Some states have opted for patents, and others have adopted laws to protect breeders' rights. As we have seen, TRIPS' article 27.3(b) allows different kinds of *sui generis* systems, and does not mention the UPOV's model. But very few states have developed their own *sui generis* laws for plant variety protection, through which they could have find a balance between the protection of breeders' rights and peasants' rights.[71] In practice, the majority of countries have adopted laws on plant variety protection that are UPOV-compliant, on the basis of

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Treaty, especially its Article 9, and relevant instruments of UPOV and WIPO, 2014, available at www.planttreaty.org/sites/default/files/SouthCentre-Submissions-on-interrelations-UPOV-WIPO.pdf. Z. Goodman adds that the "concept of farmers' rights was coined to counterbalance the expansion of [plant breeders' rights] and patents, which threaten to restrict the ability of farmers to maintain and develop agricultural biodiversity and fail to recognize farmers' contributions to the breeding of plant varieties – including varieties now protected by [intellectual property rights]".

[70] The list of WTO members is available at www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

[71] C. M. Correa, with contributions from S. Shashikant and F. Meienberg, *Plant Variety Protection in Developing Countries. A Tool for Designing A Sui Generis Plant Variety Protection System: An Alternative to UPOV 1991*, 2015.

technical advice provided to developing countries, or as part of trade agreements they have concluded.[72] For example, many countries are required to adopt UPOV's 1991 Act, as a condition for concluding Trade Agreements with the USA or Economic Partnership Agreements with the European Union.

If intellectual property rights are well protected in national laws in many countries, international treaties protecting peasants' right to seeds are poorly implemented at national level. Experts agree that national implementation of the principle of benefit sharing as conceived in the CBD has failed, and that the vast majority of peasants remain uncompensated for their contribution to the maintenance and improvement of genetic resources.[73] They also agree that the Plant Treaty has not led to a significant increase in the protection of the rights of peasants at national level, essentially because article 9 defining farmers' rights has not been interpreted as obliging states to protect farmers' rights in national law.[74] The overwhelming majority of states have not adopted legislation protecting farmers' rights, which means that violations of peasants' right to seeds are not monitored and remain unpunished.[75]

Few exceptions exist, with some states that have adopted laws in which they found an appropriate balance between the protection of peasants' rights and breeders' rights.[76] The 2001 Protection of Plant Varieties and Farmers Rights Act in India is one of the best examples.[77] Through this law, India – which is a member of WTO and a state party to TRIPS but not a member of UPOV – has protected plant varieties and breeders' rights as well as farmers' rights to save, use, sow, re-sow, exchange, share and sell farm produce, including seeds of varieties protected by plant breeders' rights (article 39).[78] For the Farmers Rights Project, "this stands as the most liberal legislation to date in this sphere, allowing farmers all the customary rights they previously enjoyed".[79] Norway offers another interesting example, as it decided not to adopt a new law in 2005 that would have

[72] Report of the Special Rapporteur on the right to food, Olivier De Schutter, UN doc. A/64/170, 23 July 2009, §16. As we have seen, 72 states, as well as the European Union and the African Intellectual Property Organization are members of UPOV. The list of UPOV members is available at www.upov.int/export/sites/upov/members/en/pdf/pub423.pdf.

[73] Report of the Special Rapporteur on the right to food, Olivier De Schutter, UN doc. A/64/170, 23 July 2009, §47. See also C. Frison, F. Lopez, and J. Esquinas-Alcazar (eds), *Plant Genetic Resources and Food Security. Stakeholder Perspectives on the International Treaty on Plant Genetic Resources for Food and Agriculture*, FAO and Bioversity International with Earthscan, 2011.

[74] Report of the Special Rapporteur on the right to food, Olivier De Schutter, UN doc. A/64/170, 23 July 2009, §43.

[75] Information on the implementation of article 9 of the ITPGFA is available at www.farmersrights.org, and at www.planttreaty.org/content/farmers-rights-submissions. It is relevant to note that a global consultation on farmers' rights will take place later in 2016 within the framework of the Plant Treaty, to discuss good practices in the implementation of farmers' rights at national level.

[76] These states include Ethiopia, Bangladesh, India, Nepal, Thailand, and the Philippines. See The Farmers' Rights Project, "Farmers' Rights Legislation & Policy Database", available at www.farmersrights.org/database/index.html.

[77] The Protection of Plant Varieties and Farmers' Rights Act was adopted by the Indian Parliament in 2001 and it entered into force in 2005. It is available at http://www.wipo.int/wipolex/en/text.jsp?file_id=128109.

[78] It is also interesting to note that safeguards have been provided against innocent infringement by farmers, as farmers who unknowingly violate the rights of a breeder are not to be punished if they can prove that they were not aware of the existence of such a breeder's right (article 42).

[79] The Farmers' Rights Project, "Best Practices: India's Protection of Plant Varieties and Farmers' Rights Act", available at www.farmersrights.org/bestpractices/success_seed_1.html. See also S. Koonan, "Developing country *sui generis* options. India's *sui generis* system of plant variety protection", Briefing Paper No. 4, Quaker United Nations Office (QUNO), 2104; R. Tripp, N. Louwaars, D. Eaton, "Plant variety protection in developing countries. A report from the field", *Food Policy* 32, 2007, pp. 362-363.

reinforced the protection of breeders' rights – and allow Norway to become a member of UPOV 1991 (instead of UPOV 1978) – because it would have been detrimental to the existing protection of farmers' rights in the country.[80]

It is also important to note that the African Union developed an African Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources[81], which aimed at contributing to the implementation of the CBD and the Plant Treaty in its members states. Even if very few African states enacted laws protecting farmers' rights[82], it is worth mentioning the model law as it could help them to better protect peasants' right to seeds in the future. Two objectives of the African model law are to "recognize, protect and support the inalienable rights of local communities including farming communities over their biological resources, knowledge and technologies" and to "recognize and protect the rights of breeders" (article 1). In defining farmers' rights, the model law provides that they shall be implemented with due regard for gender equity, and shall include the right to: "a) the protection of their traditional knowledge relevant to plant and animal genetic resources; b) obtain an equitable share of benefits arising from the use of plant and animal genetic resources; c) participate in making decisions, including at the national level, on matters related to the conservation and sustainable use of plant and animal genetic resources; d) save, use, exchange and sell farm-saved seed/propagating material of farmers' varieties; e) use a new breeders' variety protected under this law to develop farmers' varieties, including material obtained from genebanks or plant genetic resource centres; and f) collectively save, use, multiply and process farm-saved seed of protected varieties" (article 26).

e. Where are the tensions?

The protection of intellectual property rights under the TRIPS and UPOV Convention and the promotion of the commercial seed system have posed serious challenges to the maintenance and development of peasant seed systems and the protection of customary rights of peasants to seeds.[83] The former UN Special Rapporteur on the right to food, Olivier De Schutter, summarized these challenges in his report presented to the UN General Assembly in 2009:

> The professionalization of breeding and its separation from farming leads to the emergence of a commercial seed system, alongside the farmers' seed systems through which farmers traditionally save, exchange and sell seeds, often informally. This shift has led to grant temporary monopoly privileges to plant breeders and patent-holders through the tools of intellectual property, as a means

[80] The Farmers' Rights Project, "Best Practices: Norway's 'no' to stricter plant breeders' rights", available at http://www.farmersrights.org/bestpractices/success_seed_2.html.
[81] The African Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources was adopted by the African Union in 2000.
[82] One of the very few examples of an African piece of legislation protecting peasants' rights is the Ethiopian Access to Genetic Resources and Community Knowledge, and Community Rights Proclamation No. 482/2006, which recognizes that local communities shall have "an inalienable right to use or exchange among themselves their genetic resources or community knowledge in the course of sustaining their livelihood systems in accordance with their customary practices or norms", and that "[no] legal restriction shall be placed on the traditional system of local communities on the use and exchange of genetic resources and community knowledge".
[83] R. Tripp, N. Louwaars, D. Eaton, "Plant variety protection in developing countries. A report from the field", *Food Policy* 32, 2007, pp. 354-371; C.S. Srinivasan, "Concentration in ownership of plant variety rights: some implications for developing countries", *Food Policy* 28, 2003, pp. 519-546.

> to encourage research and innovation in plant breeding. In this process, however, the poorest farmers may become increasingly dependent on expensive inputs, creating the risk of indebtedness in the face of unstable incomes. Private-led research may seek to satisfy the needs of farmers in industrialized countries, while neglecting those of poor farmers in developing countries. The farmers' seed systems may be put in jeopardy, although most farmers in developing countries still rely on such systems, which, for them, are a source of economic independence and resilience in the face of threats such as pests, diseases or climate change. Finally, agrobiodiversity may be threatened by the uniformization encouraged by the spread of commercial varieties.[84]
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> The standard argument against the risk of increased dependency of smallholders towards commercial seed varieties is that farmers are not obliged to purchase plant variety protection (PVP)-protected seed just because it is made available. This, however, presupposes that farmers have real alternatives to acquiring their seed from the commercial system. Yet the coexistence between farmers' seed systems — operating at local or community levels between farmers, and mostly informal — and commercial seed systems is sometimes problematic. Public authorities have supported the expansion of commercial seeds not only through plant variety protection schemes, but also through the use of input subsidies and via the diffusion of selected seeds in rural extension networks. Farmers often receive commercial varieties as part of a package that includes credit (often vouchers), seed, fertilizer and pesticide. In many cases, acceptance of such packages is the only way farmers can access credit in rural areas. They need to accept the whole package in order to do so. In addition, traditional varieties circulating in farmers' seed systems — and on which the vast majority of farmers in developing countries still rely for most crops — are often excluded from government-approved seed lists that countries maintain under their seed regulations, and they are seldom included in seed distribution programmes subsidized by governments. The end result is a progressive marginalization or disappearance of local varieties.[85]

If there are no tensions between peasants' right to seeds and intellectual property rights when peasants use farm-saved seeds of peasants' varieties, or when states take measures to protect these rights, support peasant seed systems, or support research and development that contribute to the realization of peasants' right to seeds, there are strong tensions when peasants use farm-saved seeds of varieties protected by intellectual property rights.

As we have seen, intellectual property rights create new limitations to the customary rights of peasants to save, select, exchange and sell farm-saved seeds, and used and reused them to produce food. In a number of countries that have adopted laws compliant with the UPOV Act of 1991, peasants face civil, and in some cases, even criminal sanctions, for saving, reusing and exchanging farm-saved seeds of commercial varieties[86], or as stated by R. Andersen, "for conduct

[84] Report of the Special Rapporteur on the right to food, Olivier De Schutter, UN doc. A/64/170, 23 July 2009, Summary.
[85] Report of the Special Rapporteur on the right to food, Olivier De Schutter, UN doc. A/64/170, 23 July 2009, §36. Footnotes omitted. See also S. Shashikant and F. Meienberg, *International Contradictions on Farmers' Rights: The interrelations between the International Treaty, its Article 9 on Farmers' Rights, and Relevant Instruments of UPOV and WIPO*, Third World Network and Berne Declaration, 2015.
[86] Examples of countries and national laws can be found in information sent by civil society representatives and the seed industry in response of the resolution of the Governing body of the IIPGRFA on the relation between the Plant Treaty, UPOV and TRIPS (no government has yet sent any response). Information is available at http://www.planttreaty.org/content/farmers-rights-submissions.

that should be deemed legitimate and which is functional to society's interest in a sustainable agriculture and the attainment of food security".[87]

At the expert seminars that took place at the Geneva Academy of International Humanitarian Law and Human Rights in 2014 and 2015[88], many participants concluded that given the very unbalanced implementation of, and tensions between peasants' right to seeds and intellectual property rights at national level, there is a need to rebalance protection both at international and national levels, including through recognition of the right of peasants to seeds in the UN Declaration. The former UN Special Rapporteur on the right to food, Olivier De Schutter, ably summarized this need, three years before the decision taken by the Human Rights Council to elaborate the UN Declaration:

> One means to restore an adequate balance between the rights of plant breeders and the needs of farmers is by strengthening the protection of farmers' rights under domestic and international law. The recognition of farmers' rights, as under article 9 of the International Treaty on Plant Genetic Resources for Food and Agriculture, is vital to the preservation of agrobiodiversity. However, article 9 of the Treaty by itself will not suffice. These so-called farmers' « rights » remain rights without remedies: they are rights only by name. The provision remains vague, and implementation of this provision is highly uneven across the states parties. This is in sharp contrast with the enforcement at international level, of plant breeders' rights and biotech-industry patents.[89]

2. Human rights guarantees vs. commercial interests protected by international law

a. Why should the right to food and peasants' right to seeds prevail at the Human Rights Council?

During the first two sessions of the working group, informal consultations, and the two expert seminars, a number of states, representatives of peasants and NGOs, as well as panellists and experts agreed that it was essential to recognize peasants' right to seeds in the UN Declaration. At that time, there was no mention made of the intellectual property rights regime.[90] A group of other states, however, noted that a right to seeds could potentially conflict with many national policies (on seed or intellectual property), trade agreements, and intellectual property rights.[91] These states proposed that seed rights could be discussed in a different multilateral forum, and

[87] R. Andersen, *Some Considerations on the Relation Between Farmers' Rights, Plant Breeders Rights and Legislation on Variety Release and Seed Distribution*, 2015.
[88] See introduction above.
[89] Report of the Special Rapporteur on the right to food, Olivier De Schutter, UN doc. A/64/170, 23 July 2009, §43. Footnotes omitted.
[90] Report of the first session of the UN working group, UN doc. A/HRC/26/48, 11 March 2014, §14, 22, 25, 36, 37; Report of the second session of the UN working group, UN doc. A/HRC/30/55, 22 July 2015, §20, 31, 61, 63, 78, 81. See also C. Golay, *Negotiation of a United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas*, Geneva Academy In-Brief No. 5, January 2015, pp. 65-66.
[91] Report of the first session of the UN working group, UN doc. A/HRC/26/48, 11 March 2014, §37; Report of the second session of the UN working group, UN doc. A/HRC/30/55, 22 July 2015, §61.

some suggested WIPO.[92] Other states noted that it was important to include the right to seeds in the UN Declaration, adapting the wording to take other international instruments into account.[93]

During the expert seminars, these different positions were discussed, and many reached the conclusion that it was not a competition between two sets of human rights guarantees. While peasants' right to seeds is intrinsically linked to the right to food for billions of people, including the most vulnerable living in rural areas in developing countries, the fact of granting temporary monopoly privileges to plant breeders and patent-holders – in many cases corporations – through intellectual property rights cannot be put at the same level. Many participants described this situation as a competition between international human rights guarantees on the one hand, and commercial interests protected by international law on the other.

In its general comment on the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (right to enjoy the benefits of scientific progress), recognized in article 27(2) of the Universal Declaration of Human Rights, and article 15(1.c) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the UN Committee on Economic, Social and Cultural Rights (ESCR) reached the same conclusion, when it drew a clear distinction between this human right and intellectual property rights protected outside the human rights system. For the UN Committee on ESCR:

> 1. The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author is a human right, which derives from the inherent dignity and worth of all persons. This fact distinguishes article 15, paragraph 1 (c), and other human rights from most legal entitlements recognized in intellectual property systems. Human rights are fundamental, inalienable and universal entitlements belonging to individuals and, under certain circumstances, groups of individuals and communities. Human rights are fundamental as they are inherent to the human person as such, whereas intellectual property rights are first and foremost means by which States seek to provide incentives for inventiveness and creativity, encourage the dissemination of creative and innovative productions, as well as the development of cultural identities, and preserve the integrity of scientific, literary and artistic productions for the benefit of society as a whole.
>
> 2. In contrast to human rights, intellectual property rights are generally of a temporary nature, and can be revoked, licensed or assigned to someone else. While under most intellectual property systems, intellectual property rights, often with the exception of moral rights, may be allocated, limited in time and scope, traded, amended and even forfeited, human rights are timeless expressions of fundamental entitlements of the human person. Whereas the human right to benefit from the protection of the moral and material interests resulting from one's scientific, literary and artistic productions safeguards the personal link between authors and their creations and between peoples, communities, or other groups and their collective cultural heritage, as well as their basic material interests which are necessary to enable authors to enjoy an adequate standard of living, intellectual property regimes primarily protect business and corporate interests and investments. Moreover, the scope of protection of the moral and material interests of the author provided for by article 15, paragraph 1 (c), does not necessarily coincide with what is referred to as intellectual property rights under national legislation or international agreements.

[92] Report of the second session of the UN working group, UN doc. A/HRC/30/55, 22 July 2015, §61.
[93] Report of the second session of the UN working group, UN doc. A/HRC/30/55, 22 July 2015, §61.

> 7. (…) Under the existing international treaty protection regimes, legal entities are included among the holders of intellectual property rights. However, as noted above, their entitlements, because of their different nature, are not protected at the level of human rights.[94]

In the context of the negotiation of the UN Declaration, the imperative nature of human rights guarantees when compared with the commercial interests protected through intellectual property rights led the participants of the expert seminars to the conclusion that states must protect the rights of peasants to food and to seeds through the UN Declaration, while retaining the freedom to refer to intellectual property rights or not. It was also underlined that once the UN Declaration is adopted, states should revise national laws and trade agreements accordingly. During the first two sessions of the working group, some states suggested that it could be the contrary, maybe with the reasoning that international instruments and national laws adopted before the recognition of peasants' rights to food and seeds should prevail. But as higher order norms, human rights do not have to be adapted to national laws and trade agreements, it is national laws and trade agreements that must be adapted to ensure the ongoing protection of human rights.

In its final report presented in 2009, the International Assessment of Agricultural Knowledge, Science and Technology for Development concluded that technologies linked with intellectual property rights, such as high-yielding crop varieties, agrochemicals and mechanization have primarily benefited the better resourced groups in society and transnational corporations, rather than the most vulnerable people.[95] It is the responsibility of the Human Rights Council to place the needs of the most marginalized groups, including peasants at the centre of its efforts.[96]

b. Proposals to resolve tensions with intellectual property rights in the UN Declaration and outside the human rights system - Inspiration from discussions on the rights to health and access to medicines

As discussed above, a group of states has proposed holding the discussion on seed rights (or the right to seeds) within another UN setting.[97] But the recognition of peasants' right to seeds in the UN Declaration would not preclude states from resolving remaining tensions outside the human rights system. In this part, we will see how states can start resolving tensions between peasants' right to seeds and intellectual property rights in the UN Declaration, and resolve remaining tensions outside the human rights system.

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[94] General Comment no. 17 of the Committee on Economic, Social and Cultural Rights, on the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author, UN doc. E/C.12/GC/17, 12 January 2006, §1, 2, 7. It is also interesting to note that the UN Committee on ESCR stated in the same general comment that in implementing the right of everyone to benefit from science, states must respect and protect knowledge, innovations and practices of indigenous and local communities, which by definition include knowledge, innovations and practices related to seeds. *Ibid*, §9.

[95] International Assessment of Agricultural Knowledge, Science and Technology for Development, *Global Report. Agriculture at a Crossroads*, 2009, pp. 109-110; Report of the Special Rapporteur on the right to food, Olivier De Schutter, UN doc. A/64/170, 23 July 2009, §1.

[96] Report of the Special Rapporteur on the right to food, Olivier De Schutter (on seed policies and the right to food), UN doc. A/64/170, 23 July 2009, §3.

[97] Report of the second session of the UN working group, UN doc. A/HRC/30/55, 22 July 2015, §61.

The first objective could be achieved by clearly distinguishing the core elements of peasants' right to seeds that imply tensions with intellectual property rights, from those that do not imply such tensions. As we have seen, there are no tensions with intellectual property rights when peasants exercise their customary rights to save, select, exchange and sell farm-saved seeds of peasants' varieties, and used and reused them to produce food. The same is true when states take measures to protect these rights, support peasant seed systems, or support research and development that contribute to the realization of peasants' right to seeds.

These rights and states obligations could therefore be included in the UN Declaration, without any reference to intellectual property rights (see Part III below for a definition of these rights and obligations). This would already represent a major contribution to the enhanced protection of peasants' right to seeds, as the overwhelming majority of people living in rural areas in developing countries rely on peasant food and seed systems.

Peasants' rights over farm-saved seeds of varieties protected by intellectual property rights are therefore the only proposed core element of peasants' right to seeds that implies tensions with intellectual property rights. As we will see, wording could be found to start resolving these tensions in the UN Declaration (see Part III.5 below). In addition, states could resolve remaining tensions or clarifying the consistency with intellectual property rights outside the human rights system.

A useful precedent in this respect is the recognition of the rights to health and access medicines by the Human Rights Commission[98], and the agreement that states were able to find within the WTO in connection with intellectual property. In April 2001, at a time when concerns had been growing that intellectual property rules might restrict access to medicines[99], the Human Rights Commission adopted a new resolution on access to medicine in the context of pandemics such as HIV/AIDS, in which it recognized access to medicines as an essential human right.[100] In parallel, states were preparing a declaration on the same topic that was later adopted by WTO: the Doha Declaration on the TRIPS Agreement and Public Health that clarified that the rights to health and access to medicines should prevail over intellectual property rules was adopted in November 2001. In this Ministerial Declaration, WTO members affirmed that "the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health", and accordingly, "that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all".[101] As a result, countries like Brazil, India, South Africa and Thailand began

[98] The Human Rights Commission is the predecessor of the Human Rights Council.
[99] The South Centre reminds us of the context then prevailing in South Africa: "In 2000, when 39 drug companies took the South African government to court to challenge the legislation that sought to use the TRIPS flexibilities (…), there were mass public protests. After an intense international campaign backing the South African government - especially the work of the Treatment Action Campaign (TAC) - the issue finally arrived before the WTO on 20 June 2001, as a result of an initiative by a group of African countries. This was the genesis of discussions in the WTO that culminated in the Doha Declaration". South Centre, "The Doha Declaration on TRIPS and Public Health Ten Years Later: The State of Implementation", Policy Brief 7, 2011, available at http://www.southcentre.int/wp-content/uploads/2013/06/PB7_-Doha-Declaration-on-TRIPS-and-Health_-EN.pdf.
[100] Resolution 2001/33 of the Human Rights Commission, on access to medication in the context of pandemics such as HIV/AIDS, adopted on 23 April 2001.
[101] WTO, Declaration on the TRIPS Agreement and Public Health, WTO doc. WT/MIN(01)/DEC/W/2, 14 November 2001.

to use the flexibilities under TRIPS Agreement to produce generic versions of patented medicines under compulsory licence (that is, without the consent of the patent holder) for export to countries that cannot manufacture the medicines themselves.[102] As a result, prices for many treatments have fallen significantly since 2001 – the price of the first generation of antiretrovirals to combat HIV was reduced by 99% in few years – and access to medicines has improved for millions of people.[103]

Public health, poor countries' health budgets and most importantly, the life of millions of people affected by HIV were at stake when states adopted the WTO Declaration on the TRIPS Agreement and Public Health. By explicitly recalling that states can use the flexibilities of the TRIPS Agreement to protect the rights to health and access to medicines, WTO members sent an important signal to the world, signifying that intellectual property should not dominate other public interest objectives. Parallel efforts in human rights fora recalled that the public interest objectives find legal expression in human rights law.

We see a parallel in the context of peasants' right to seeds. The right to food of the huge numbers of peasants living in rural areas in developing countries could be at risk should peasant community's practices in saving, exchanging and breeding farm-saved seeds be limited. This could also result in loss of biological diversity and knowledge associated with plant breeding, which could have adverse effects on long-term and sustainable access to food of rich and poor inhabitants of this planet alike.[104] It is easy to see how the reasoning adopted to protect the rights to health and access to medicines in 2001 could be replicated with regard to the right to food and peasants' right to seeds. For example, the WTO could declare that "the TRIPS Agreement does not and should not prevent Members from taking measures to protect the right to food", and accordingly, "that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect the right to food and, in particular, to protect peasants' rights over farm-saved seeds (including of protected varieties), to promote biodiversity and guarantee the survival of humanity". This WTO Declaration could then encourage members to fully use the possibilities provided in the TRIPS Agreement to design *sui generis* plant variety systems, that suit their country's agricultural and social specificities, using to the full the flexibilities allowed by UPOV 1991. The 2001 Protection of Plant Varieties and Farmers Rights Act in India, which found an appropriate balance between the protection of plant varieties, breeders' rights, and peasants' rights, could serve as an example for other countries.[105] A similar initiative with the same objectives could also be initiated within UPOV.

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[102] WTO, "Millennium Development Goals. Access to Medicine", available at https://www.wto.org/english/thewto_e/coher_e/mdg_e/medicine_e.htm.

[103] Report of the UN Special Rapporteur on the right to health, Anand Grover (on right to health in the context of access to medicines and intellectual property rights), A/HRC/11/12, 31 March 2009.

[104] As stated above, according to FAO, 75 % of crop diversity was lost between 1900 and 2000, which will have a major impact on the ability of humankind to feed itself in the future, with the poorest in the world most affected. FAO, *The Second Report on State of the World's Plant Genetic Resources for Food and Agriculture*, 2010. See also Report of the Special Rapporteur on the right to food, Olivier De Schutter, UN doc. A/64/170, 23 July 2009, §38.

[105] The Indian Parliament adopted the Protection of Plant Varieties and Farmers' Rights Act in 2001; it entered into force in 2005. It is available at http://www.wipo.int/wipolex/en/text.jsp?file_id=128109. See also C. M. Correa, with contributions from S. Shashikant and F. Meienberg, *Plant Variety Protection in Developing Countries. A Tool for Designing A Sui Generis Plant Variety Protection System: An Alternative to UPOV 1991*, 2015; The Farmers' Rights Project, "Best Practices: India's Protection of Plant Varieties and Farmers' Rights Act", available at www.farmersrights.org/bestpractices/success_seed_1.html; S. Koonan, "Developing country *sui generis* options.

III. POTENTIAL CORE ELEMENTS OF PEASANTS' RIGHT TO SEEDS

1. A holistic approach to the protection of the rights of peasants and other people working in rural areas

As José Esquinas (former Secretary General of the Intergovernmental Commission on Genetic Resources for Food and Agriculture, former Chair of the FAO Committee on Ethics for Food and Agriculture, and former Secretary of the Plant Treaty) noted during the first session of the UN working group mandated to negotiate a UN Declaration on the rights of peasants and other people working in rural areas, in finalizing the UN Declaration, it will be important to take a holistic approach to peasants' rights in order to fill the gaps in international law and to ensure that the UN Declaration builds upon existing instruments, rather than weakening them.[106] International law is fragmented on the matter, and the elaboration of the UN Declaration represents a unique opportunity to recognize the rights of farmers, local communities, indigenous peoples, fisher people, pastoralists, nomads, hunters, gatherers, landless people, rural women and rural workers in one single instrument.[107]

The UN Declaration will complement other standard-setting initiatives in the United Nations.[108] As underlined by many participants during the two expert seminars in 2014 and 2015, the main added value of a human rights instrument is its capacity to recognize individual and collective rights that can be transformed into legal entitlements in national laws, and can become enforceable before judicial or quasi-judicial bodies at national, regional or international levels.[109] A human rights instrument can also define states' obligations in a way that is more precise than those that are contained in other international instruments.[110]

In relation to the right to seeds, the UN Declaration can build on existing instruments, including the Plant Treaty, the CBD and its Protocols, and the UN Declaration on the rights of indigenous peoples. It can also build on the Right to Food Guidelines adopted by states at FAO in 2004[111], and on the report on seed policies presented by the former UN Special Rapporteur on the right to food, Olivier De Schutter, in 2009. In this report, the former UN Special Rapporteur identified three ways through which seed policies can contribute to the full realization of human rights: (1) by supporting peasant seed systems (in order to serve the interest of all in the preservation of biodiversity); (2) by investing in research and development that best serve the poorest peasants in

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India's *sui generis* system of plant variety protection", Briefing Paper No. 4, Quaker United Nations Office (QUNO), 2104; R. Tripp, N. Louwaars, D. Eaton, "Plant variety protection in developing countries. A report from the field", *Food Policy* 32, 2007, pp. 362-363.

[106] Report of the first session of the UN working group, UN doc. A/HRC/26/48, 11 March 2014, §16.

[107] See C. Golay, *Negotiation of a United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas*, Geneva Academy In-Brief No. 5, 2015.

[108] Report of the first session of the UN working group, UN doc. A/HRC/26/48, 11 March 2014, §25.

[109] See also A Bessa, "Traditional Local Communities: What Lessons Can Be Learnt at the International Level from the Experiences of Brazil and Scotland?", *RECIEL* 24 (3), 2015, pp. 330-340.

[110] States obligations have been defined in many international human rights instruments that are similar to the UN Declaration being negotiated, including the 2007 UN Declaration on the rights of indigenous peoples (arts. 8-17, 19, 21-22, 24, 26-27, 29-32 and 36), the 1998 UN Declaration on human rights defenders (arts. 2, 9 and 12-15), and the 1992 UN Declaration on the rights of persons belonging to minorities (arts. 1, 4, 5, 7, 8).

[111] FAO, *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*, 2004, and in particular guideline 8D on genetic resources for food and agriculture.

developing countries (which includes the need to ensure the participation of peasants in research and development); and (3) by regulating commercial seed systems so that they serve the right to food and ensure the right of all to enjoy the benefits of scientific progress.[112]

During the 2015 expert seminar, many participants underlined that in addition to these three elements, two core elements of peasants' right to seeds are their rights to save, exchange, donate, sell, use and reuse farm-saved seeds of peasants' varieties, and to maintain, control, protect and develop these seeds and property over these seeds; and their rights over farm-saved seeds of varieties protected by intellectual property rights, in application of the right of everyone to enjoy the benefits of scientific progress, and the principle of fair and equitable sharing of the benefits arising from the use of plant genetic resources for food and agriculture.

This last part of our legal analysis will present these core elements, and link them with the provisions of articles 22 and 23 of the draft declaration proposed by Ambassador Navarro Llanos in 2015, in which peasants' rights to seeds and biological diversity are defined (see Annex).

2. Peasants' rights over farm-saved seeds of peasants' varieties

We have seen that for over 10,000 years, peasants have saved, selected, exchanged and sold farm-saved seeds, and used and reused them to produce food.[113] We have also seen that today, the overwhelming majority of people living in rural areas in developing countries still rely on peasant food and seed systems, which are essential to their own food security and to global food security and biodiversity.[114]

As noted previously, these customary rights of peasants to seeds were recognized by states when they affirmed in the Preamble of the Plant Treaty that "the rights recognized in this Treaty to save, use, exchange and sell farm-saved seed and other propagating material (…) are fundamental to the realization of Farmers' Rights, as well as to the promotion of Farmers' Rights at national and international levels", and when they stressed in its article 9 that provisions of the treaty shall not be interpreted to limit "any rights that farmers have to save, use, exchange and sell farm-saved seed or propagating material".[115]

Likewise, it was highlighted earlier in this study that states defined related rights for indigenous peoples, when they adopted the UN Declaration on the rights of indigenous peoples in 2007, in

[112] Report of the Special Rapporteur on the right to food, Olivier De Schutter, UN doc. A/64/170, 23 July 2009, Summary.
[113] R. Andersen, *The History of Farmers' Rights. A Guide to Central Documents and Literature*, The Fridtjof Nansen Institute, 2005.
[114] Report of the Special Rapporteur on the right to food, Olivier De Schutter, UN doc. A/64/170, 23 July 2009, Summary and §42; ISSD Africa, *Introduction to Integrated Seed Sector Development and its guiding principles*, Centre for Development Innovation Wageningen UR, 2013; FAO, Commission on Genetic Resources for Food and Agriculture, *Draft Guide for National Seed Policy Formulation*, FAO doc. CGRFA-14/13/Inf.20, 2013, §72.
[115] R. Andersen also defines customary rights to seeds, as well as customary practices of farmers to save, reuse, share and develop seeds. R. Andersen, *The History of Farmers' Rights. A Guide to Central Documents and Literature*, The Fridtjof Nansen Institute, 2005. See also Z. Goodman, *Seeds of Hunger: Intellectual Property Rights on Seeds and the Human Rights Response*, 3D, 2009, p. 9, defining farmers' rights as customary rights of farmers to save, use exchange and sell farm-saved seeds.

which they recognized indigenous peoples' right to maintain, control, protect and develop their seeds and property over these seeds (article 31(1)). In the same article, they provided that "in conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights" (article 31(2)).

Other norms that are relevant to define this first core element of peasants' right to seeds include the provisions of the CBD, the Cartagena Protocol, the Plant Treaty, and the Right to Food Guidelines on the protection of traditional knowledge and practices relevant to seeds, the right to participate in making decisions on matters related to the conservation and sustainable use of seeds, and the protection of biological diversity and indigenous and local communities from the potential risks posed by GMOs.[116]

During the working group's first session, some delegations strongly supported peasants' right to preserve and develop their local knowledge in agriculture, and their rights to grow and develop their own varieties of seeds and to exchange, to give or to sell farm-saved seeds of peasants' varieties.[117] Given the lack of implementation of peasants' right to seeds at national level, many participants at the 2015 expert seminar insisted on the need to reinforce the protection of these rights in the UN Declaration, including with a provision mandating states to protect them in their national laws. It has also been underlined that active participation of peasants should be ensured in decisions related to the elaboration of legislation covering seed certification or the protection of plant varieties, to ensure that an appropriate balance is found between breeders' rights and peasants' rights, and that peasant seed varieties are also recognized in national law.[118]

During the working group second session, a panellist and a number of NGOs also highlighted the need to protect peasants' rights to save farm-saved seed and to be able to take decisions not to use genetically modified organisms.[119] And a number of NGOs argued that the right to seeds was key in the UN Declaration, because peasants were subjected to pressure from business enterprises or compelled by patent laws to use genetically modified seeds or seeds of specific companies rather than seeds that they had traditionally used.[120]

Using agreed language that can be found in other international instruments, it will therefore be important to include the rights of peasants to save, exchange, donate, sell, use and reuse farm-saved seeds of peasants' varieties, and to maintain, control, protect and develop these seeds and property over these seeds, in recognizing the right to seeds in the UN Declaration. It will also be important to clearly define correlative states' obligations, including by provisions mandating states to protect these rights in their national laws, and stressing that, in conjunction with peasants, states shall take effective measures to recognize and protect the exercise of these rights.

[116] See article 8j of the CBD, article 26 of the Cartagena Protocol, article 9 of the Plant Treaty, and FAO Right to Food Guideline 8D.
[117] Report of the first session of the UN working group, UN doc. A/HRC/26/48, 11 March 2014, §37.
[118] See also report of the Special Rapporteur on the right to food, Olivier De Schutter, UN doc. A/64/170, 23 July 2009, §57.
[119] Report of the second session of the UN working group, UN doc. A/HRC/30/55, 22 July 2015, §20, 83.
[120] Report of the second session of the UN working group, UN doc. A/HRC/30/55, 22 July 2015, §61.

The following provisions of articles 22 and 23 of the draft UN Declaration proposed by Ambassador Navarro Llanos in 2015 are relevant to these rights and obligations.

ARTICLE 22 – RIGHT TO SEEDS

2. Peasants and other people working in rural areas have the right to conserve, use, maintain and develop their own seeds, crops and genetic resources, or those of their choice. (…)

3. Peasants and other people working in rural areas have the right to save, store, transport, exchange, donate, sell, use and re-use farm-saved seeds, crops and propagating material. States should take appropriate measures to respect, protect and fulfil these rights.

5. States should (…) recognize the validity of peasants' seed certification systems.

6. States should take steps to ensure that planting material of sufficient quality and quantity are available to peasants that need them at the right time for planting, and for an affordable price.

ARTICLE 23 – RIGHT TO BIOLOGICAL DIVERSITY

2. Peasants and other people working in rural areas, individually or collectively, have the right to conserve, maintain and develop agricultural biodiversity, and their right to associated knowledge, including in crops and animal races. This includes the right to save, exchange, sell or give away the seeds, plants and animal breeds they develop. States shall recognize the collective use and rights to agricultural biodiversity and the right to associated knowledge established and managed by peasants and other people working in rural areas.

4. Peasants and other people working in rural areas have the right to exclude from intellectual property rights genetic resources, agricultural biological diversity and associated knowledge and technologies that are owned, discovered or developed by their own communities.

6. States shall ensure that peasants and other people working in rural areas are free to conserve and develop their knowledge in agriculture, fishing and livestock rearing.

7. Peasants and other people working in rural areas have the right to be protected from measures threatening biological diversity and traditional knowledge, including forms of intellectual property that might adversely affect their traditional knowledge and use of genetic resources.

8. Peasants and others working in rural areas have the right to participate in decision-making on matters related to the conservation and sustainable use of agricultural biodiversity.

3. States obligations to respect, protect and support peasant seed systems

As stated by the former UN Special Rapporteur on the right to food, Olivier De Schutter, "merely removing barriers to the saving, exchange or selling of seeds will not suffice: for farmers' rights to be truly realized, Governments should accept that they have duties to support farmers' seed systems".[121] Panellists reached the same conclusion during the working group first session, when they underlined that "governments should implement policies to support farmers' seed systems".[122] This view echoes the view of many seed and agricultural system experts, which underline that it is important to support peasant seed systems, as they remain dominant in developing countries.[123] The FAO Commission on Genetic Resources for Food and Agriculture has underlined that:

> In most countries, the informal sector – symbolized by farmer-saved seeds, in-kind seed in-kind seed exchanges and seed sales in local markets – is the most important source of seed for traditional crops and others not commercially attractive to the formal sector. Since this is likely to remain the case for the foreseeable future, national seed policies must recognize the informal sector's important role and help mobilize support of the government and development partners in areas such as extension, training schemes for farmers, community seed banks, germplasm conservation, seed quality control and sourcing of emergency seed stocks. The role of women in these various functions should be given particular attention.[124]

One of the most important messages to emerge from the 2015 expert seminar was that the UN Declaration represents a unique opportunity to rebalance the protection of peasants' right to seeds in international and national law as compared to the protection of the rights of breeders and patent-holders. To reach this balance, many participants felt, it is important to define states' obligations to respect, protect and support peasant seed systems in the UN Declaration. It was also said that supporting peasant seed systems was essential to protect the rights of hundreds of millions of peasants, as well as the interest of all in the preservation of biodiversity.[125]

In his report on seed policies, Olivier De Schutter defined states obligations in relation to both the support to peasant seed systems, and to the regulation of commercial seed systems, using the typology of states' obligations to respect, protect and fulfil (the right to food). This typology, well established in international human rights law, is followed in article 2 of the draft UN Declaration proposed by Ambassador Navarro Llanos.[126] For Olivier De Schutter, the obligation to respect

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[121] Report of the Special Rapporteur on the right to food, Olivier De Schutter, UN doc. A/64/170, 23 July 2009, §44.
[122] See also report of the first session of the UN working group, A/HRC/26/48, 11 March 2014, §25.
[123] ISSD Africa, *Introduction to Integrated Seed Sector Development and its guiding principles*, Centre for Development Innovation Wageningen UR, 2013; N.P. Louwaars and W.S. de Boef, "Integrated See Sector Development in Africa: A Conceptual Framework for Creating Coherence Between Practice, Programs, and Policies", *Journal of Crop Improvement* 26(1), pp. 39-59.
[124] FAO, Commission on Genetic Resources for Food and Agriculture, *Draft Guide for National Seed Policy Formulation*, FAO doc. CGRFA-14/13/Inf.20, 2013, §72.
[125] See also report of the Special Rapporteur on the right to food, Olivier De Schutter, UN doc. A/64/170, 23 July 2009, Summary.
[126] Report of the Special Rapporteur on the right to food, Olivier De Schutter, UN doc. A/64/170, 23 July 2009, §4-7. On the fact that this typology of states' obligations is well-established in international human rights law, see C. Golay, *Negotiation of a United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas*, Geneva Academy In-Brief No. 5, January 2015, pp. 43-45.

would be violated if states would introduce legislation or other measures that create obstacles to the reliance of peasants on informal seed systems, since it would deprive peasants from a means of achieving their livelihood.[127] The obligation to protect would be violated if a state failed to regulate the activities of patent-holders or of plant breeders, so as to prevent them from violating the right to food of the peasants depending on those inputs in order to be able to continue to farm.[128] According to the obligation to fulfil, states must proactively strengthen peasants' access to and utilization of resources and means to ensure their livelihood; they must also improve methods of production of food by making full use of technical and scientific knowledge.[129] He added that, "[i]n the absence of proactive policies aimed at preserving and encouraging the development of farmers' seed systems and associated traditional knowledge and practices, such systems risk disappearing".[130]

It would therefore be important to include and define states' obligations to respect, protect and support peasant seed systems in drafting an article on the right to seeds in the UN Declaration.

The following provisions of articles 22 and 23 of the draft UN Declaration proposed by Ambassador Navarro Llanos in 2015 are relevant to the definition of these states obligations.

Article 22 – RIGHT TO SEEDS

5. States should respect, protect and promote peasant seed systems, and recognize the validity of peasants' seed certification systems.

Article 23 – RIGHT TO BIOLOGICAL DIVERSITY

3. States shall ensure that peasants' seeds and livestock systems are protected from genetic contamination, biopiracy and theft. Peasants and other people working in rural areas have the right to maintain their traditional agrarian, pastoral and agro-ecological systems upon which their subsistence and their renewal of agricultural biodiversity depend.

5. Peasants and other people working in rural areas have the right not to accept certification mechanisms established by transnational corporations. They have the right to use certification mechanisms established or adopted by their governments. Guarantee schemes run by peasants' organisations with government support should be promoted and protected.

[127] Report of the Special Rapporteur on the right to food, Olivier De Schutter, UN doc. A/64/170, 23 July 2009, §4.
[128] Olivier De Schutter quotes the jurisprudence of the UN Committee on Economic, Social and Cultural Rights in which the Committee recommended that India provide "State subsidies to enable farmers to purchase generic seeds which they are able to reuse, with a view to eliminating their dependency on multinational corporations" (E/C.12/IND/CO/5, §69). Report of the Special Rapporteur on the right to food, Olivier De Schutter, UN doc. A/64/170, 23 July 2009, §5.
[129] Report of the Special Rapporteur on the right to food, Olivier De Schutter, UN doc. A/64/170, 23 July 2009, §6.
[130] Report of the Special Rapporteur on the right to food, Olivier De Schutter, UN doc. A/64/170, 23 July 2009, §48.

4. States' obligation to support research and development that contribute to the full realization of peasants' right to seeds

In addition to supporting peasant seed systems, it is important that states support research and development that contribute to the full realization of peasants' right to seeds. At the 2015 expert seminar, participants discussed support and protection given to three innovation circles that co-exist in relation to seeds: innovation through biotechnology and innovation by plant breeders, which are protected by patents and plant breeders rights, and innovation by peasants, which is not protected by international law, but represents the most important innovation circle in order to realize peasants' rights and respond to challenges linked to the right to food and biodiversity.[131]

During the same 2015 expert seminar, a discussion took place on the definition of the obligation to support research and development that contribute to the full realization of peasants' right to seeds in the draft declaration presented by Ambassador Navarro Llanos. This definition builds on provisions of the CBD, the Nagoya Protocol, and the Plant Treaty on the right to participate in making decisions on matters related to the conservation and sustainable use of seeds.[132] While the inclusion of this obligation was welcomed, many participants agreed that it could be improved through a better identification of two complementary objectives: the need to invest more into research on and development of orphan crops and seeds that respond to the needs of peasants in developing countries (tropical maize, sorghum, millet, banana, cassava, groundnut, oilseed, potato or sweet potato, etc.); and the need to ensure the active participation of peasants in research and development, including through participatory plant breeding, to ensure that research and development are connected to the realization of peasants' right to seeds.[133]

The former UN Special Rapporteur, Olivier De Schutter, described these two objectives in his report on seed policies, presented in 2009:

> The marked increase in intellectual property protection has (…) created an imbalance between the private and the public sectors in agricultural research (…). [T]his has led to orientate research and development towards meeting the needs of farmers in rich countries, while the needs of poor farmers in developing countries have been comparatively neglected. Very little research has benefited tropical maize, sorghum, millet, banana, cassava, groundnut, oilseed, potato or sweet potato, for example. These are referred to as "orphan crops": public research centres have not made up for the lack of interest of the private sector in these crops.[134]
>
> It is therefore vital either that the capacity of the public research centres and associated funding be increased, or that incentives be developed in order to reorient research and development in the private sector towards the real needs of poor farmers in developing countries. Participatory plant breeding, if sufficiently supported through domestic public policies, could partially compensate for the existing imbalance.[135]

[131] See also report of the Special Rapporteur on the right to food, Olivier De Schutter, UN doc. A/64/170, 23 July 2009.
[132] See article 8j of the CBD, article 5 of the Nagoya Protocol, and article 9 of the Plant Treaty.
[133] See also report of the Special Rapporteur on the right to food, Olivier De Schutter, UN doc. A/64/170, 23 July 2009, Summary.
[134] Report of the Special Rapporteur on the right to food, Olivier De Schutter, UN doc. A/64/170, 23 July 2009, §34.
[135] Report of the Special Rapporteur on the right to food, Olivier De Schutter, UN doc. A/64/170, 23 July 2009, §35.

Olivier De Schutter then concluded his report by recommending that states support innovation both in the commercial seed system and in peasant seed systems to ensure that they will both contribute to the realization of peasants' right to seeds:

> States should promote innovation in both the commercial seed system and in farmers' seed systems, ensuring that innovation in both systems works for the benefit of the poorest and most marginalized farmers, particularly in the developing countries. Only by managing the coexistence of these systems can we hope to arrive at a system which adequately balances the needs for innovation, for the preservation and enhancement of crop diversity, and for improving the livelihoods of small-scale farmers in developing countries, who overwhelmingly still rely on seeds which they save from their own crops and which they donate, exchange or sell, often informally.

It will be important to better define the obligation to support research and development that contribute to the full realization of peasants' right to seeds in the drafting of the UN Declaration, by distinguishing the need to invest more into research on and development of orphan crops and seeds that respond to the needs of peasants in developing countries, and the need to ensure the active participation of peasants in research and development.

The following provisions of articles 22 and 23 of the draft UN Declaration proposed by Ambassador Navarro Llanos in 2015 are relevant to the definition of this states' obligation.

Article 22 – RIGHT TO SEEDS

7. States should ensure that agricultural research and development is directed towards the needs of peasants and other people working in rural areas. To this end (…), and in accordance with peasants' rights to participate in making decisions on matters related to the conservation and sustainable use of plant genetic resources, States should ensure that peasants' experience and needs are effectively reflected when priorities for agricultural research and development are defined.

Article 23 – RIGHT TO BIOLOGICAL DIVERSITY

8. Peasants and others working in rural areas have the right to participate in decision-making on matters related to the conservation and sustainable use of agricultural biodiversity.

5. Peasants' rights over seed varieties protected by intellectual property rights

In addition to peasants' rights over farm-saved seeds of peasant varieties (see part III.2 above), it is important to recognize peasants' rights over seeds of varieties protected by intellectual property rights, or commercial seeds, in the UN Declaration. And in defining these rights, it will be important to find wording that will contribute to resolving tensions with intellectual property rights.

During the working group's first session in 2013, some delegations and other participants strongly supported peasants' rights to choose the seeds they wished to sow and to determine the varieties of seeds they want to plant. They have also stated that peasants should have the right to access high-quality seeds in view of coming challenges, such as climate change and depletion of biodiversity.[136] During the 2015 expert seminar, many participants underlined that the rights of peasants over commercial seeds should be recognized in the UN Declaration, and that they should be based on the principle of fair and equitable sharing of the benefits arising from the use of genetic resources for food and agriculture defined in the CBD, the Nagoya Protocol, the Plant Treaty, and the FAO Right to Food Guidelines[137], and on the right of everyone to enjoy the benefits of scientific progress enshrined in article 15 of the ICESCR.[138]

As we have seen, the CBD protects the rights of indigenous and local communities, including peasants, to the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including through appropriate access to these resources.[139] In the Nagoya Protocol, states have further defined benefit-sharing obligations arising from the use of traditional knowledge associated with genetic resources (art. 5(5)), and from research and development on genetic resources held by indigenous and local communities (art. 5(2)).[140] They have also committed, "as far as possible, not to restrict the customary use and exchange of genetic resources and associated traditional knowledge within and amongst indigenous and local communities" (art. 12(4)).

The Plant Treaty establishes a multilateral system to facilitate access to seeds and planting material and to share their benefits in a fair and equitable way. This multilateral system "is based on the idea that, while states have sovereign rights over their own plant genetic resources for food and agriculture, they agree to facilitate access to such plant genetic resources for the purpose of "utilization and conservation for research, breeding and training for food and agriculture" (article 12 (3) (a)), and to share, in a fair and equitable way, the benefits arising from the utilization of these resources".[141] In article 9 of the Plant Treaty, states have recognized "the enormous contribution that the local and indigenous communities and farmers of all regions of the world, particularly those in the centres of origin and crop diversity, have made and will continue to make for the conservation and development of plant genetic resources which constitute the basis for food and agriculture production throughout the world". In recognition of this contribution, and in application of the right to equitably participate in sharing benefits arising from the utilization of plant genetic resources for food and agriculture, also recognized in the same article 9 of the Plant Treaty, peasants should be given rights over the seeds that they have contributed to develop.

[136] Report of the first session of the UN working group, UN doc. A/HRC/26/48, 11 March 2014, §37.
[137] See article 8j of the CBD, article 5 of the Nagoya Protocol, article 9 of the Plant Treaty, and the FAO Right to Food Guideline 8D.
[138] See also O. De Schutter, "The Right of Everyone to Enjoy the Benefits of Scientific Progress and the Right to Food : From Conflict to Complementarity", *Human Rights Quarterly*, 33(2), 2011, pp. 304-350.
[139] On the protection of the rights of indigenous and local communities, see article 8j of the CBD.
[140] A. Bessa, *The Draft Declaration on the Rights of Peasants and Other People Working in Rural Areas: reflections on benefit-sharing*, 2014, available at www.benelexblog.law.ed.ac.uk/2014/12/08/the-draft-declaration-on-the-rights-of-peasants-and-other-people-working-in-rural-areas-reflections-on-benefit-sharing.
[141] Report of the Special Rapporteur on the right to food, Olivier De Schutter, UN doc. A/64/170, 23 July 2009, §22.

As explained by the former UN Special Rapporteur on the right to food, Olivier De Schutter, in his report on seed policies:

> Although article 9 (2) (b) of the Treaty concerns the right to participate equitably in the sharing of benefits arising from the utilization of plant genetic resources for food and agriculture, such benefits should not only accrue to those few farmers who happen to have plant varieties that are utilized by commercial breeding companies: in recognition of the fact that genetic resources constitute a common heritage which generations of farmers across the globe have contributed to, they should be shared with farmers in all countries engaged in the conservation and sustainable use of agrobiodiversity.[142]

In the same report, Olivier De Schutter concluded that states should regulate commercial seed systems so that they serve the right to food and ensure the right of all to enjoy the benefits of scientific progress[143], including by facilitating peasants' access to commercial seeds. He also underlined that in the cases in which such access is essential for peasants' right to food, states' obligation to protect the right to food "would be violated if a state failed to regulate the activities of patent-holders or of plant breeders, so as to prevent them from violating the right to food of the peasants depending on those inputs in order to be able to continue to farm.[144]

As we have seen, in the Preamble and article 9 of the Plant Treaty, states have also recognized peasants' rights to save, use, exchange and sell farm-saved seeds, without making a distinction between farm-saved seeds of peasants and commercial varieties. It seems therefore possible to recognize peasants' rights to save, use, exchange and sell farm-saved seeds of varieties protected by intellectual property rights in the UN Declaration.

Examples of good practice at regional and national levels support this conclusion. In the African Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources[145], the African Union recognized that peasants should have the right to use a new variety protected by breeders' rights to develop farmers' varieties, and the right to collectively save, use, multiply and process farm-saved seed of protected varieties (article 26(e) and (f)). At national level, a good example is the 2001 Protection of Plant Varieties and Farmers Rights Act[146], through which India recognized peasants' rights to

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[142] Report of the Special Rapporteur on the right to food, Olivier De Schutter, UN doc. A/64/170, 23 July 2009, §46.
[143] Report of the Special Rapporteur on the right to food, Olivier De Schutter, UN doc. A/64/170, 23 July 2009, Summary.
[144] Olivier De Schutter quotes the jurisprudence of the UN Committee on Economic, Social and Cultural Rights in which the Committee recommended that India provide "State subsidies to enable farmers to purchase generic seeds which they are able to reuse, with a view to eliminating their dependency on multinational corporations" (E/C.12/IND/CO/5, §69). Report of the Special Rapporteur on the right to food, Olivier De Schutter, UN doc. A/64/170, 23 July 2009, §5.
[145] The African Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources was adopted by the African Union in 2000.
[146] The Protection of Plant Varieties and Farmers' Rights Act was adopted by the Indian Parliament in 2001 and it entered into force in 2005. It is available at http://www.wipo.int/wipolex/en/text.jsp?file_id=128109. See also C. M. Correa, with contributions from S. Shashikant and F. Meienberg, *Plant Variety Protection in Developing Countries. A Tool for Designing A Sui Generis Plant Variety Protection System: An Alternative to UPOV 1991*, 2015; The Farmers' Rights Project, "Best Practices: India's Protection of Plant Varieties and Farmers' Rights Act", available at www.farmersrights.org/bestpractices/success_seed_1.html; S. Koonan, "Developing country *sui generis* options. India's *sui generis* system of plant variety protection", Briefing Paper No. 4, Quaker United Nations Office (QUNO),

save, use, sow, re-sow, exchange, share and sell farm produce, including seeds of varieties protected by plant breeders' rights (article 39).[147]

How should tensions with intellectual property rights be resolved in defining these rights in the UN Declaration?

One way to resolve these tensions would be to ensure that peasants do not commercialize seeds of varieties protected by intellectual property rights. As explained by R. Tripp, Niels Louwaars and Derek Eaton, the main objective of intellectual property rights systems is to control unauthorized commercial production of protected varieties.[148] Taking that objective into account, the UN Declaration could recognize peasants' rights to save, use, exchange and sell at local level farm-saved seeds of varieties protected by intellectual property rights, but prohibit the commercialization of these seeds by peasants. Given that peasants are by definition active at small-scale level, this could represent a wording on which many negotiators could agree.

The following provisions of articles 22 and 23 of the draft UN Declaration proposed by Ambassador Navarro Llanos in 2015 are relevant to the definition of these rights of peasants.

Article 22 – RIGHT TO SEEDS

1. Peasants of all regions of the world have made, and will continue to make, enormous contributions to the conservation and development of plant genetic resources, which constitute the basis of food and agricultural production throughout the world.

2. Peasants and other people working in rural areas have the right to conserve, use, maintain and develop their own seeds, crops and genetic resources, or those of their choice. They also have the right to decide which crops to cultivate.

Article 23 – RIGHT TO BIOLOGICAL DIVERSITY

1. States recognize the enormous contribution that local, indigenous peoples and peasants of all regions of the world have made and will continue to make to the conservation and development of agricultural biodiversity, which constitutes the basis of food and agricultural production throughout the world.

2104; R. Tripp, N. Louwaars, D. Eaton, "Plant variety protection in developing countries. A report from the field", *Food Policy* 32, 2007, pp. 362-363.

[147] It is also interesting to note that safeguards have been provided against innocent infringement by farmers, as farmers who unknowingly violate the rights of a breeder are not to be punished if they can prove that they were not aware of the existence of such a breeder's right (article 42).

[148] R. Tripp, N. Louwaars, D. Eaton, "Plant variety protection in developing countries. A report from the field", *Food Policy* 32, 2007, p. 360.

CONCLUSION

For over 10,000 years, peasants have saved, selected, exchanged and sold seeds, as well as used and reused them to produce food. These customary rights have been formally recognized in international instruments adopted since 2001, in response to the new challenges posed by the protection of intellectual property rights over seeds through the WTO and UPOV agreements.

Today, the overwhelming majority of people living in rural areas, particularly in developing countries, still rely on peasant food and seed systems, which are essential to their own food security and to global food security and biodiversity. In this context, the recognition of the right to seeds in the UN Declaration is central for the realization of the human rights of peasants as well as of the entire world population.

As proposed in the draft declaration presented by Ambassador Navarro Llanos in 2015, the UN Declaration should include both the right to food, adapted to peasants and other people working in rural areas' specific needs and vulnerabilities, and a self-standing right to seeds of peasants. The formulation of this right should build upon the Convention on Biological Diversity and its Protocols, the International Treaty on Plant Genetic Resources for Agriculture, the FAO Right to Food Guidelines, and the UN Declaration on the rights of indigenous peoples.

In drafting peasants' right to seeds in the UN Declaration, negotiators should include the following core elements of this right, possibly using agreed language that can be found in other international instruments:

- Peasants' rights to save, exchange, donate, sell, use and reuse farm-saved seeds of peasants' varieties, and to maintain, control, protect and develop these seeds and property over these seeds (and states obligations to protect these rights in their national laws)

- States' obligations to respect, protect and support peasant seed systems

- States' obligation to support research and development that contribute to the full realization of peasants' right to seeds, including by ensuring the active participation of peasants in research and development, and by investing more into research on and development of orphan crops and seeds that respond to the needs of peasants in developing countries

- Peasants' rights to save, use, exchange and sell at local level (but not commercialize) farm-saved seeds of varieties protected by intellectual property rights

Property rights over seeds protected by the UPOV Convention and TRIPS (in many cases held by corporations) are not human rights. Tensions between those particular interests protected by international law and peasants' rights to food and seeds – which only exist in relation to the fourth core element of the right to seeds (peasants rights over seeds protected by intellectual property rights) – should be resolved accordingly, both in the UN Declaration and outside the human rights system. The protection of the rights to health and access to medicines by the Human Rights Commission, and the solution found at WTO in 2001, offers a relevant precedent.

Once the UN Declaration is adopted, states should revise national laws and trade agreements accordingly. As human rights are higher order norms, national laws and trade agreements must be adapted to ensure the ongoing protection of human rights guarantees.

Hopefully, the very rich protection of human rights that has developed since the adoption of the Universal Declaration of Human Rights in 1948 will be completed by a new instrument protecting the rights of some of the most vulnerable and discriminated people in the world. We can also hope that negotiators tasked with elaborating the UN Declaration will find a creative way to recognize peasants' right to seeds, a right that is central for the protection of everyone's right to food, biodiversity, and humanity's survival.

ANNEX

Draft UN Declaration on the Rights of Peasants and Other People Working in Rural Areas

ADVANCED VERSION

27/01/2015

ARTICLE 22 – RIGHT TO SEEDS

1. Peasants of all regions of the world have made, and will continue to make, enormous contributions to the conservation and development of plant genetic resources, which constitute the basis of food and agricultural production throughout the world.

2. Peasants and other people working in rural areas have the right to conserve, use, maintain and develop their own seeds, crops and genetic resources, or those of their choice. They also have the right to decide which crops to cultivate.

3. Peasants and other people working in rural areas have the right to save, store, transport, exchange, donate, sell, use and re-use farm-saved seeds, crops and propagating material. States should take appropriate measures to respect, protect and fulfil these rights.

4. States should take measures to respect, protect and promote traditional knowledge relevant to plant genetic resources.

5. States should respect, protect and promote peasant seed systems, and recognize the validity of peasants' seed certification systems.

6. States should take steps to ensure that planting material of sufficient quality and quantity are available to peasants that need them at the right time for planting, and for an affordable price.

7. States should ensure that agricultural research and development is directed towards the needs of peasants and other people working in rural areas. To this end, in accordance with Article 12.3 above, and in accordance with peasants' rights to participate in making decisions on matters related to the conservation and sustainable use of plant genetic resources, States should ensure that peasants' experience and needs are effectively reflected when priorities for agricultural research and development are defined.

ARTICLE 23 – RIGHT TO BIOLOGICAL DIVERSITY

1. States recognize the enormous contribution that local, indigenous peoples and peasants of all regions of the world have made and will continue to make to the conservation and development of agricultural biodiversity, which constitutes the basis of food and agricultural production throughout the world.

2. Peasants and other people working in rural areas, individually or collectively, have the right to conserve, maintain and develop agricultural biodiversity, and their right to associated knowledge, including in crops and animal races. This includes the right to save, exchange, sell or give away the seeds, plants and animal breeds they develop. States shall recognize the collective use and

rights to agricultural biodiversity and the right to associated knowledge established and managed by peasants and other people working in rural areas.

3. States shall ensure that peasants' seeds and livestock systems are protected from genetic contamination, biopiracy and theft. Peasants and other people working in rural areas have the right to maintain their traditional agrarian, pastoral and agro-ecological systems upon which their subsistence and their renewal of agricultural biodiversity depend.

4. Peasants and other people working in rural areas have the right to exclude from intellectual property rights genetic resources, agricultural biological diversity and associated knowledge and technologies that are owned, discovered or developed by their own communities.

5. Peasants and other people working in rural areas have the right not to accept certification mechanisms established by transnational corporations. They have the right to use certification mechanisms established or adopted by their governments. Guarantee schemes run by peasants' organisations with government support should be promoted and protected.

6. States shall ensure that peasants and other people working in rural areas are free to conserve and develop their knowledge in agriculture, fishing and livestock rearing.

7. Peasants and other people working in rural areas have the right to be protected from measures threatening biological diversity and traditional knowledge, including forms of intellectual property that might adversely affect their traditional knowledge and use of genetic resources.

8. Peasants and others working in rural areas have the right to participate in decision-making on matters related to the conservation and sustainable use of agricultural biodiversity.