

# THE RIGHT TO SEEDS IN EUROPE

**THE UNITED NATIONS DECLARATION ON THE RIGHTS OF PEASANTS  
AND OTHER PEOPLE WORKING IN RURAL AREAS  
AND THE PROTECTION OF THE RIGHT TO SEEDS IN EUROPE**

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# KEY FINDINGS AND RECOMMENDATIONS

## FINDINGS

For over 10,000 years, peasants have freely saved, selected, exchanged and/or sold seeds, as well as used and reused them to produce food. Today, these customary practices remain essential to peasants' right to food, as well as to global food security and biodiversity. But the protection of intellectual property rights over seeds at the World Trade Organization (WTO) and the International Union for the Protection of New Varieties of Plants (UPOV), and the promotion of commercial seed systems have posed serious challenges to the protection of these customary practices, and to the maintenance of peasant seed systems and agrobiodiversity.

In the European Union and EU Member States, the focus of this study, seed laws and regulations have been designed with the aim to further develop the agricultural industry in the continent, and the rights of peasants have been largely neglected. Peasant seed systems and traditional knowledge have not been adequately supported. European seed diversity has suffered a drastic decay in recent decades, largely as a result of a normative framing that outlaws the marketing of peasant seeds. National seed catalogues and the EU Common Catalogue have been designed in tune with industrial seeds and agriculture standards, largely excluding peasant seeds, and in a number of countries, peasant seed saving, exchange and selling have been outlawed. This has discouraged, and in some cases hindered the continuation of peasant agricultural activities.

To respond to these challenges, among others, the United Nations adopted the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP), in which peasants' right to seeds is recognized. The Human Rights Council adopted the UNDROP on 28 September 2018, followed by the UN General Assembly on 17 December 2018. According to the UNDROP, UN Member States shall, inter alia, 'elaborate, interpret and apply relevant international agreements and standards to which they are party, in a manner consistent with their human rights obligations as they apply to peasants'; 'ensure that seed policies, plant variety protection and other intellectual property laws, certification schemes and seed marketing laws respect and take into account the rights, needs and realities of peasants'; and 'support peasant seed systems, and promote the use of peasant seeds and agrobiodiversity'.<sup>1</sup>

The implementation of the UNDROP represents a unique opportunity to rebalance the lack of support given to peasant seed systems worldwide, Europe included, compared to the support given to industrial seed systems in recent decades. This

<sup>1</sup> Arts 2(4), 15(5) and 19(8), UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP).

is essential for the protection of the lives and livelihoods of hundreds of millions of peasants, as well as the interest of all in the preservation of crop biodiversity.

In 2018, the European Parliament (EP) called for EU Member States to support the adoption of the UNDROP, and the European Economic and Social Committee called on European institutions and EU Member State governments to actively support the UNDROP in all future work leading up to its realization. Following these calls, and in accordance with the priority to be given to human rights norms in international and national laws, reflected in Articles 2(4), 15(5) and 19(8) of the UNDROP as well as Articles 55 (c), 56 and 103 of the UN Charter, the EU and EU Member States shall ensure that their laws and policies, as well as the international agreements to which they are party, do not lead to violations, but to a better protection of peasants' right to seeds.

## RECOMMENDATIONS

In accordance with the UNDROP, and with the binding international treaties on which it is based, including the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on Biological Diversity and its Protocols and the International Treaty on Plant Genetic Resources for Food and Agriculture:

- The EU and EU Member States shall disseminate the UNDROP and promote understanding of and respect for its provisions. They shall provide or support technical training for government officials, members of the legislative branch, judicial authorities, national human rights institutions, EU institutions, organizations of peasants and other people working in rural areas, non-governmental organizations and all other relevant actors.
- The EU and EU Member States shall elaborate, interpret and apply international agreements and standards in a manner consistent with the right to seeds. This implies that they shall, inter alia, ensure that the negotiation, interpretation and implementation of WTO and UPOV instruments, as well as any other international agreement protecting intellectual property rights, do not violate, but facilitate the realization of the right to seeds, including peasants' right to freely save, use, exchange and sell farmed-saved seeds.
- The EU and EU Member States shall consult and cooperate in good faith with peasants, through their own representative institutions, before adopting and implementing international agreements that may affect their right to seeds.
- The EU and EU Member States shall ensure that free trade agreements to which they are party do not lead to violations of the right to seeds of European peasants or peasants in other countries. This implies that they shall, inter alia, stop requiring developing countries to adopt UPOV's 1991 Act, as a condition for concluding Economic Partnership Agreements with the EU.
- The EU and EU Member States shall establish mechanisms to ensure the coherence of their agricultural, economic, social, cultural and development policies with the realization of the right to seeds. The reform of the common agricultural policy should include provisions and conditionality requirements that support and protect peasants' right to seeds and seed systems. And the EU and EU Member States shall engage in international cooperation and assistance to support national efforts aimed at implementing the right to seeds.
- The EU and EU Member States shall ensure that seed policies, plant variety protection and other intellectual property laws, seed marketing laws, variety registration and certification schemes respect and take into account the rights, needs and realities of peasants. The EU and EU Member States shall, inter alia, revise their legal frameworks on registration, certification and marketing of seeds, largely designed to meet the needs and interests of the agricultural industry and, in doing so, imposing industry-specific production standards. The revisions shall respect and take into account peasants' right to seeds, as well as their needs and realities.
- The EU and EU Member States shall respect, protect and fulfil the main elements of peasants' right to seeds, in particular their right to maintain, control, protect and develop their own seeds and traditional knowledge; their right to the protection of traditional knowledge relevant to seeds; their right to participate in the making of decisions on matters related to seeds; their right to equitably participate in the sharing of benefits arising from the utilization of seeds; and their right to save, exchange and sell farm-saved seeds or propagating material. They shall ensure that the prior informed consent or approval and involvement of farmers and their communities are obtained before access to seeds and benefit-sharing modalities are prescribed in mutually agreed terms.
- The EU and EU Member States shall ensure the full and meaningful participation of peasants in decision-making on matters relating to seeds. They shall also respect and support the establishment and growth of strong and independent organizations of peasants and other people working in rural areas.
- The EU and EU Member States shall ensure the participation of peasants, directly and/or through their representative organizations, in the elaboration, interpretation and application of international agreements and standards, and in the elaboration of national and regional laws and policies, to make sure that they do not infringe, but facilitate the realization of the right to seeds.
- The EU and EU Member States shall support peasant seed systems, promote the use of peasant seeds and agrobiodiversity and guarantee the right of peasants to maintain, control, protect and develop their own seeds and traditional knowledge. They shall modify their normative framework so that peasants' seed systems not only exist, but fully operate and thrive as production and conservation systems. They shall encourage equitable and participatory peasant-scientist partnerships, such as peasant field schools and participatory plant breeding. They could also promote a fair, impartial and appropriate system of evaluation and certification of the quality of peasant seeds, and promote peasants' participation in its formulation.

- The EU and EU Member States shall ensure that agricultural research and development integrates the needs of peasants and other people living in rural areas with their active participation. They shall, inter alia, invest more in research on and development of orphan crops, local varieties and seeds that respond to the needs of peasants, and they shall ensure peasants' active participation in the definition of priorities and the undertaking of research and development of orphan crops and local varieties, taking into account their experience in such research and development.
- The EU and EU Member States shall take all appropriate measures to eliminate all forms of discrimination against peasant women and other women working in rural areas, to promote their empowerment and to ensure that they enjoy the right to seeds without discrimination.
- The EU and EU Member States shall take all necessary measures to ensure that non-state actors that they are in a position to regulate, such as private individuals and organizations, and transnational corporations and other business enterprises, respect and strengthen the right to seeds. They shall, inter alia, prevent risks arising from the development, handling, transport, use, transfer or release of genetically modified organisms, including by protecting peasants against crop contamination.
- The EU and EU Member States shall recognize the rights of peasants to rely either on their own seeds or on other locally available seeds of their choice, and to decide on the crops and species that they wish to grow. The EU and EU Member States shall ensure that seeds of sufficient quality and quantity are available to peasants, at the most suitable time for planting, and at an affordable price.

# 1. INTRODUCTION

The United Nations Human Rights Council adopted the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP) on 28 September 2018, and the UN General Assembly adopted it on 17 December 2018.

Several articles of the UNDROP describe measures that states shall take to better protect peasants' right to seeds.<sup>2</sup> These provisions recognize, inter alia, the rights to food, seeds and biological diversity, and define correlative states' obligations. They provide that UN Member States shall respect, protect and fulfill the right to seeds, and that they shall engage in international cooperation and assistance with the same purpose. Like other UN Member States, European Union Member States are also requested to ensure that their laws and policies, as well as the international agreements to which they are party, do not lead to violations, but to a better protection of the right to seeds.

In July 2018, the European Parliament called for the EU Member States to support the adoption of the UNDROP, and in February 2018, the European Economic and Social Committee called on the European institutions and EU Member State governments to actively support the UNDROP in all future work leading up to its realization. Following these calls, and in accordance with the need to apply international instruments adopted by the UN General Assembly in good faith, the EU and EU Member States shall take all necessary steps to implement the UNDROP and its Article 19, which enshrines the right to seeds.

This guide aims to support the implementation of the UNDROP. It focuses on the steps that the EU and EU Member States shall take to better protect the right to seeds in Europe.<sup>3</sup> It starts with a presentation of the protection of the right to seeds and intellectual property rights in international law, their potential tensions, different monitoring mechanisms and unequal implementation (Part 2). It then introduces the UNDROP (Part 3), outlines its definition of the right to seeds and states' obligations and explains why it shall prevail over other international instruments, as well as national and regional laws and policies (Part 4). It ends with a presentation of the challenges to the protection of the right to seeds in European law (Part 5) and proposals to better protect the right to seeds in the EU and EU Member States (Part 6).

<sup>2</sup> By 'seed' we mean any plant reproductive organ, including plants.

<sup>3</sup> In April 2018, the Geneva Academy organized a workshop in Geneva on the UNDROP and the protection of the right to seeds in Europe. Participants included UN and EU experts, lawyers, lobbyists and leaders of European peasant organizations and seed networks. During the workshop, participants shared their views and concerns regarding EU and EU Member States' laws and regulations on seeds, and identified challenges and opportunities in using the UNDROP to better protect the right to seeds in Europe.

## 2. THE RIGHT TO SEEDS AND INTELLECTUAL PROPERTY RIGHTS IN INTERNATIONAL LAW<sup>4</sup>

International law offers a number of opportunities for and challenges to the protection of the right to seeds. This section begins with a brief history of the right to seeds and intellectual property rights in international law (Sections A and B). It then presents their inherent tensions (Section C), different monitoring mechanisms and unbalanced implementation at national level (Section D).

### A. THE RECOGNITION OF THE RIGHT TO SEEDS IN INTERNATIONAL LAW (1992–2008)

For over 10,000 years, peasants have freely saved, selected, exchanged and/or sold seeds, as well as used and reused them to produce food.<sup>5</sup> At the end of the twentieth and the start of the twenty-first century, states affirmed these customary rights by adopting the Convention on Biological Diversity (CBD) and its Protocols, the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) and the UN Declaration on the Rights of Indigenous Peoples.

The CBD was adopted in 1992 and entered into force in 1993. Today, it has acquired almost universal acceptance, with 196 states parties.<sup>6</sup> The CBD protects important elements of the right to seeds of indigenous and local communities, including peasants, through provisions aimed at ensuring the protection of indigenous and local communities' traditional knowledge and practices, and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to these resources.<sup>7</sup> In the Cartagena Protocol on Biosafety, adopted

4 This part is largely inspired by C. Golay, *The Right to Seeds and Intellectual Property Rights. Legal Analysis on the Rights of Peasants and Other People Working in Rural Areas*, Geneva Academy of International Humanitarian Law and Human Rights (Geneva Academy), 2016, pp 11–20, [https://www.geneva-academy.ch/joomla-tools-files/docman-files/Publications/Other%20publications/The%20rights%20of%20peasants%20and%20other%20people%20working%20in%20rural%20areas%20-%20Legal%20Analysis%20-%20Right%20to%20Seeds%20and%20IPRs%20-%20C\\_%20Golay%2019\\_5\\_2016%20\(FINAL%20TO%20BE%20PUT%20ON%20WEBSITES\).pdf](https://www.geneva-academy.ch/joomla-tools-files/docman-files/Publications/Other%20publications/The%20rights%20of%20peasants%20and%20other%20people%20working%20in%20rural%20areas%20-%20Legal%20Analysis%20-%20Right%20to%20Seeds%20and%20IPRs%20-%20C_%20Golay%2019_5_2016%20(FINAL%20TO%20BE%20PUT%20ON%20WEBSITES).pdf) (last accessed 2 April 2019). See also C. Golay, *The Right to Seeds and Intellectual Property Rights*, Research Brief, Geneva Academy, 2017, pp 2–3, [https://www.geneva-academy.ch/joomla-tools-files/docman-files/Resarch%20Brief\\_web.pdf](https://www.geneva-academy.ch/joomla-tools-files/docman-files/Resarch%20Brief_web.pdf) (last accessed 2 April 2019).

5 R. Andersen, *The History of Farmers' Rights: A Guide to Central Documents and Literature*, Fridtjof Nansen Institute, 2005.

6 For the list of States Parties to the Convention on Biological Diversity (CBD), see <https://www.cbd.int/information/parties.shtml> (last accessed 2 April 2019).

7 On the protection of the rights of indigenous and local communities, see Art 8j, CBD.

in 2000 and to which more than 170 states are parties,<sup>8</sup> states have also agreed to take measures to protect biological diversity and indigenous and local communities from the potential risks posed by genetically modified organisms (GMOs).<sup>9</sup> And, in the Nagoya Protocol on Access to Genetic Resources and Benefit-Sharing (Nagoya Protocol), adopted in 2010 and ratified by more than 110 states,<sup>10</sup> states have further defined benefit-sharing obligations arising from the use of traditional knowledge associated with genetic resources (Article 5(5)), and from research and development on genetic resources held by indigenous and local communities (Article 5(2)).<sup>11</sup> 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' (Article 12(4)).

When the CBD was adopted, the Food and Agriculture Organization of the UN (FAO) was tasked with transforming a non-binding instrument it adopted in 1983 – the International Undertaking on Plant Genetic Resources – into a more specific treaty on the management of plant genetic resources for food and agriculture.<sup>12</sup> The ITPGRFA was negotiated for 20 years and it was adopted by consensus at FAO in 2001. It has more than 140 states parties today<sup>13</sup> and is the most important international treaty in terms of its recognition and protection of farmers'/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.<sup>14</sup> Importantly, it recognizes farmers' rights in many of its provisions, in a way that aims to respond to threats posed by intellectual property rights and to 'draw attention to the unremunerated innovations of farmers that were seen as the foundation of all modern plant breeding'.<sup>15</sup>

8 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. See <http://bch.cbd.int/protocol> (last accessed 2 April 2019).

9 See in particular, Art 26, Cartagena Protocol.

10 The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (Nagoya Protocol) was adopted on 29 October 2010. It entered into force on 12 October 2014. See [www.cbd.int/abs](http://www.cbd.int/abs) (last accessed 2 April 2019).

11 A. Bessa, 'The Draft Declaration on the Rights of Peasants and Other People Working in Rural Areas: Reflections on Benefit-Sharing', *BeneLex Blog*, 8 December 2014, <https://benelexblog.wordpress.com/2014/12/08/the-draft-declaration-on-the-rights-of-peasants-and-other-people-working-in-rural-areas-reflections-on-benefit-sharing/> (last accessed 2 April 2019).

12 Andersen, *The History of Farmers' Rights*, supra fn 5, pp v–vi. In its Resolution 8/83 adopted on 23 November 1983, the FAO Conference adopted the International Undertaking on Plant Genetic Resources, [http://www.fao.org/wiews-archive/docs/Resolution\\_8\\_83.pdf](http://www.fao.org/wiews-archive/docs/Resolution_8_83.pdf) (last accessed 2 April 2019).

13 For a list of States Parties to the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), see [http://www.planttreaty.org/list\\_of\\_countries](http://www.planttreaty.org/list_of_countries) (last accessed 2 April 2019).

14 In his report on seed policies presented in 2009, Olivier De Schutter described the added value of the treaty. For him, the ITPGRFA '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.' Report of the Special Rapporteur on the Right to Food, UN doc A/64/170, 23 July 2009, §22.

15 Andersen, *The History of Farmers' Rights*, supra fn 5, pp v, 3–10. South Centre, *Interrelations Between the International Treaty, Especially its Article 9, and Relevant Instruments of UPOV and WIPO, Pursuant to Resolution 8/2013*, 2014, <http://www.fao.org/3/a-bb926e.pdf> (last accessed 19 April 2019).

In the ITPGRFA's Preamble, states affirmed 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 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'. 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' (Article 9(3)). It is therefore very clear that these provisions aim to protect customary rights that farmers/peasants have always had.

Finally, in adopting the UN Declaration on the Rights of Indigenous Peoples in 2008, states 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 their ownership of these seeds (Article 31(1)).

## B. ENTRENCHING INTELLECTUAL PROPERTY RIGHTS IN INTERNATIONAL LAW (1961-1994)

The creation of intellectual property rights over seeds and plant varieties began in European countries and the United States in the twentieth century, through the protection of breeders' rights and patents.<sup>16</sup> This legal development was intrinsically linked to the development of a commercial breeding sector separate from farming and, more recently, of a biotechnology sector.<sup>17</sup> Today, binding international treaties and effective monitoring mechanisms offer strong protection to these two forms of intellectual property rights.

16 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, [http://www.farmersrights.org/pdf/sementences\\_reglementations\\_EN.pdf](http://www.farmersrights.org/pdf/sementences_reglementations_EN.pdf) (last accessed 2 April 2019).

17 Report of the Special Rapporteur on the Right to Food, supra fn 14, §1. See also N. Louwaars, 'Seed Science in the 21st Century: Rights That Scientists Have to Deal With', 22 *Seed Science Research* S1 (2012).

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), adopted as Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization (WTO) on 15 April 1994, defines how patent laws should protect innovation. The TRIPS Agreement requires WTO members<sup>18</sup> 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 the WTO must protect intellectual property rights over plant varieties either by patents, an effective *sui generis* system (a system of its own kind) or a combination of both (Article 27(3.b)).

Patents represent the most comprehensive form of protection that can be granted.<sup>19</sup> They ultimately give the right-holders – in many cases corporations – exclusive rights over plant-related inventions. When they use a patented product or process, peasants (like breeders) are considered to be licensees of the patent holder, and they are frequently requested to sign agreements not to save, resow or exchange the seeds that they buy from sellers, which may be the patent-holders or their licensees.<sup>20</sup>

While some countries have protected intellectual property rights over plant varieties through patents, the great majority have chosen to protect them through breeders' rights.<sup>21</sup> In doing so, few countries have developed their own *sui generis* system, through which they seek to find a balance between the protection of breeders' rights and peasants' rights – an often-cited example is that of India (see Part 2.D below).<sup>22</sup> Most countries adopted the model proposed by the International Union for the Protection of New Varieties of Plants (UPOV) and its Convention (UPOV Convention).<sup>23</sup> The first version of the UPOV Convention was adopted in 1961 and it entered into force in 1968. It 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-thirds of them have ratified the 1991 Act. Members include all large commercial powers with the notable exception of India.<sup>24</sup> The EU has been party to the UPOV Act of 1991 since 2005, and has operated a plant breeders' rights system that covers the territory of its Member States since 1994.<sup>25</sup>

18 The World Trade Organization (WTO) has over 160 Members. For a full list, see [www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last accessed 2 April 2019).

19 Louwaars, 'Seed Science in the 21st century', supra fn 17.

20 Report of the Special Rapporteur on the Right to Food, supra fn 14, §12. See also Réseau Semences Paysannes, *Seeds and Farmers' Rights*, supra fn 16, p 31.

21 Oxfam, *The Status of Patenting Plants in the Global South*, 2018, <https://oxfam.app.box.com/s/f510b0wtcko2ifeksm9xuaso4dhbpg9r> (last accessed 2 April 2019).

22 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*, Association for Plant Breeding for the Benefit of Society (APBREBES), 2015, <http://www.apbrebes.org/files/seeds/ToolEnglishcompleteDez15.pdf> (last accessed 2 April 2019).

23 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.

24 Report of the Special Rapporteur on the Right to Food, supra fn 14, §13. In addition to 72 states, the EU 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](http://www.upov.int/export/sites/upov/members/en/pdf/pub423.pdf) (last accessed 2 April 2019).

25 EU Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights.



The UPOV Convention 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.<sup>26</sup> The uniformity and stability requirements imply that the UPOV Convention cannot offer any protection to peasant varieties, which are inherently unstable and in permanent evolution.<sup>27</sup>

The UPOV Act of 1991 grants 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 them from exchanging these seeds, and they can save and reuse 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 the case of the protection of plant breeders' rights – allowing access to others for breeding.<sup>28</sup> However, experts have argued that excessive protection of breeders' rights and patents may discourage innovation instead of rewarding it.<sup>29</sup> For the former UN Special Rapporteur on the right to food, Olivier De Schutter, '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'.<sup>30</sup>

### C. WHERE ARE THE TENSIONS?

There are no direct tensions between peasants' right to seeds and intellectual property rights when peasants fully operate in peasant seed systems – a situation that states shall support in implementing the UNDROP (see Part 4.D.3 below) – but there are tensions when peasants use farm-saved seeds of varieties protected by intellectual property rights. An additional set of tensions arises in the case of so-called native traits patents, where the protected innovation relates to identified

26 Réseau Semences Paysannes, *Seeds and Farmers' Rights*, supra fn 16, pp 32–33. See also R. Tripp, N. Louwaars and D. Eaton, 'Plant Variety Protection in Developing Countries: A Report from the Field', 32 *Food Policy* 3 (2007) 358.

27 Report of the Special Rapporteur on the Right to Food, supra fn 14, §13.

28 UPOV, *UPOV Report on the Impact of Plant Variety Protection*, 2005, [www.upov.int/edocs/pubdocs/en/upov\\_pub\\_353.pdf](http://www.upov.int/edocs/pubdocs/en/upov_pub_353.pdf) (last accessed 2 April 2019). See also Report of the Special Rapporteur on the Right to Food, supra fn 14, §26; International Seed Federation, *ISF View on Intellectual Property*, 2012, [http://www.worldseed.org/wp-content/uploads/2015/10/View\\_on\\_Intellectual\\_Property\\_2012.pdf](http://www.worldseed.org/wp-content/uploads/2015/10/View_on_Intellectual_Property_2012.pdf) (last accessed 2 April 2019).

29 Report of the Special Rapporteur on the Right to Food, supra fn 14, §28.

30 Ibid, §39.

characteristics in plants, which may be found in peasants' fields without their knowledge, in the local plant varieties and seeds they have been using and saving, at times even before the grant of the patent. In these cases, intellectual property rights create limitations to the customary rights of peasants to save, select, exchange and sell farm-saved seeds, and use and reuse 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,<sup>31</sup> or as stated by R. Andersen, 'for conduct that should be deemed legitimate and which is functional to society's interest in a sustainable agriculture and the attainment of food security'.<sup>32</sup>

The protection of intellectual property rights under TRIPS and the UPOV Convention and the promotion of the commercial seed system also pose serious challenges to the maintenance and development of peasant seed systems, and to the protection of peasants' right to seeds.<sup>33</sup> 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 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.<sup>34</sup>

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

31 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 ITPGRFA on the relation between the ITPGRFA, UPOV and TRIPS. See <http://www.fao.org/plant-treaty/areas-of-work/farmers-rights/submissions-by-the-contracting-parties-and-stakeholders/en/> (last accessed 2 April 2019).

32 R. Andersen, 'Some Considerations on the Relation Between Farmers' Rights, Plant Breeders Rights and Legislation on Variety Release and Seed Distribution', Input Paper for the Second Meeting Ad Hoc Technical Committee on Sustainable Use of Plant Genetic Resources for Food and Agriculture, Rome, 2–3 March 2015. See also *Right to Food and Nutrition Watch Consortium, Right to Food and Nutrition Watch: Keeping Seeds in Peoples' Hands*, Issue 8, 2016, [https://www.righttofoodandnutrition.org/files/R\\_t\\_F\\_a\\_N\\_Watch\\_2016\\_ENG\\_WEB.pdf](https://www.righttofoodandnutrition.org/files/R_t_F_a_N_Watch_2016_ENG_WEB.pdf) (last accessed 2 April 2019).

33 Tripp, Louwaars and Eaton, 'Plant Variety Protection in Developing Countries', supra fn 26; C. S. Srinivasan, 'Concentration in Ownership of Plant Variety Rights: Some Implications for Developing Countries', 28 *Food Policy* 5–6 (2003).

34 Report of the Special Rapporteur on the Right to Food, supra fn 14, Summary.

protection schemes, but also through the use of input subsidies and via the diffusion of selected seeds in rural extension networks. ... The end result is a progressive marginalization or disappearance of local varieties<sup>35</sup>

In the EU and EU Member States, an additional factor contributes to the exclusion of peasant seeds: the fact that the criteria chosen to determine which seed varieties can be registered in seed catalogues are the same as those used to grant intellectual property rights – distinctness, uniformity and stability (DUS). This implies that plant varieties protected by intellectual property rights are the only ones that can be registered in catalogues, and therefore – with only few exceptions – the only ones that can be put on the market.<sup>36</sup>

## D. MONITORING MECHANISMS AND IMPLEMENTATION

Peasants' right to seeds and intellectual property rights are both recognized in binding international treaties, but the monitoring mechanisms associated with these treaties are very different, and their implementation is very unbalanced at national level. At the WTO, dispute settlement mechanisms include an Appellate Body composed of judges who can adopt binding decisions, and the 164 members are obliged to protect intellectual property rights over plant varieties in their national laws (as TRIPS is part of the WTO Agreement). As we have seen, to do so, some states have opted for patents, and the great majority have adopted laws to protect breeders' rights that are UPOV-compliant, often on the basis of technical advice provided to developing countries, or as part of trade agreements they have concluded.<sup>37</sup> In the EU, patents are used, inter alia, to protect intellectual property rights over GMOs, and a UPOV-compliant plant breeders' rights system has covered the territory of the 28 EU Member States since 1994. It is also worth noting that many developing countries are required to adopt UPOV's 1991 Act, as a condition for concluding Economic Partnership Agreements with the EU.

On the other hand, monitoring mechanisms associated with international treaties protecting peasants' right to seeds are very weak, and these treaties are poorly implemented at national level. National implementation of the principle of benefit-sharing as conceived in the CBD is too slow and often unclear, peasants' traditional knowledge, innovations and practices have not been adequately protected and the vast majority of peasants remain uncompensated for their contribution to the maintenance and improvement of genetic resources.<sup>38</sup> Also, the ITPGRFA has

35 Ibid, §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, [http://www.twn.my/title2/intellectual\\_property/info.service/2015/ip151003/457628655560ccf2b0eb85.pdf](http://www.twn.my/title2/intellectual_property/info.service/2015/ip151003/457628655560ccf2b0eb85.pdf) (last accessed 2 April 2019).

36 B. Magarinos-Rey, *Semences hors-la-loi. La biodiversité confisquée*, Éditions Alternatives, 2015, pp 74–91.

37 Report of the Special Rapporteur on the Right to Food, supra fn 14, §16.

38 Ibid, §47.

not led to a significant increase in the protection of the right to seeds at national level, essentially because Article 9, defining farmers' rights, has not been interpreted as obliging states to protect farmers' rights in national law.<sup>39</sup> The overwhelming majority of states have not adapted their laws and policies, nor have they adopted new ones to better promote and protect peasants' right to seeds. Violations of peasants' right to seeds are therefore not monitored and remain unpunished.<sup>40</sup>

Few exceptions exist, as some states have adopted laws through which they seek to find a balance between the protection of peasants' rights and breeders' rights.<sup>41</sup> The 2001 Protection of Plant Varieties and Farmers Rights Act in India is one of these exceptions.<sup>42</sup> Through this law, India – which is a member of the WTO and a state party to TRIPS but not a member of UPOV – has protected plant varieties and breeders' rights as well as peasants'/farmers' rights to save, use, sow, resow, exchange, share and sell farm produce, including seeds of varieties protected by plant breeders' rights (Article 39).<sup>43</sup> 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'.<sup>44</sup> Norway offers another interesting example, as it decided not to adopt a new law in 2005 that would have 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.<sup>45</sup>

Given the very unbalanced national implementation of, and tensions between peasants' right to seeds and intellectual property rights, there was a need to rebalance protection both at international and national levels, including through the recognition of peasants' right to seeds in the UNDROP.<sup>46</sup>

39 Ibid, §43.

40 For information on the implementation of Art 9 of the ITPGRFA, see [www.farmersrights.org](http://www.farmersrights.org) and <http://www.fao.org/plant-treaty/areas-of-work/farmers-rights/submissions-by-the-contracting-parties-and-stakeholders/en/> (last accessed 2 April 2019).

41 These states include Ethiopia, Bangladesh, India, Nepal, Thailand and the Philippines. See the Farmers' Rights Project, 'Farmers' Rights Legislation & Policy Database', [www.farmersrights.org/database/index.html](http://www.farmersrights.org/database/index.html) (last accessed 2 April 2019).

42 The Protection of Plant Varieties and Farmers' Rights Act was adopted by the Indian Parliament in 2001 and it entered into force in 2005. See [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=128109](http://www.wipo.int/wipolex/en/text.jsp?file_id=128109) (last accessed 2 April 2019).

43 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 (Art 42).

44 The Farmers' Rights Project, 'Best Practices: India's Protection of Plant Varieties and Farmers' Rights Act', [www.farmersrights.org/bestpractices/success\\_seed\\_1.html](http://www.farmersrights.org/bestpractices/success_seed_1.html) (last accessed 2 April 2019).

45 The Farmers' Rights Project, 'Best Practices: Norway's "No" to Stricter Plant Breeders' Rights', [http://www.farmersrights.org/bestpractices/success\\_seed\\_2.html](http://www.farmersrights.org/bestpractices/success_seed_2.html) (last accessed 2 April 2019).

46 Report of the Special Rapporteur on the Right to Food, supra fn 14, §43.

### 3. THE UN DECLARATION ON THE RIGHTS OF PEASANTS AND OTHER PEOPLE WORKING IN RURAL AREAS (UNDROP), 2018

This part starts with a brief history of the negotiation and adoption of the UNDROP at the UN Human Rights Council and UN General Assembly (Section A). It then outlines the definition of the rights-holders of the UNDROP – peasants and other people working in rural areas (Section B) – and presents the holistic vision promoted by the UNDROP (Section C). It ends by explaining why, in international law, human rights and the UNDROP shall prevail over other international instruments (Section D).

#### A. A BRIEF HISTORY OF THE UNDROP

As human beings, peasants and other people working in rural areas are entitled to all human rights that have been recognized by the UN General Assembly since the adoption of the Universal Declaration of Human Rights in 1948, including those enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR).<sup>47</sup> More than 50 years after these two instruments were adopted in 1966, however, peasants and other people working in rural areas remain unusually vulnerable and at risk. Peasants, landless people, rural workers, herders, pastoralists and fisherfolk represent 70 percent of all people who live in extreme poverty<sup>48</sup> and 80 percent of the world's hungry.<sup>49</sup> Hundreds of millions of peasants and other people working in rural areas are victims of discrimination and human rights violations, and most

47 This is recognized in Art 3(1), UNDROP, according to which '[p]easants and other people working in rural areas have the right to the full enjoyment of all human rights and fundamental freedoms recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and all other international human rights instruments, free from any kind of discrimination in the exercise of their rights based on any grounds such as origin, nationality, race, colour, descent, sex, language, culture, marital status, property, disability, age, political or other opinion, religion, birth or economic, social or other status'.

48 International Fund for Agriculture and Development, *Rural Poverty Report 2011*, 2010, p 3, [http://www.fao.org/fileadmin/user\\_upload/rome2007/docs/IFAD%20Rural%20Poverty%20Report%202011.pdf](http://www.fao.org/fileadmin/user_upload/rome2007/docs/IFAD%20Rural%20Poverty%20Report%202011.pdf) (last accessed 2 April 2019).

49 The UN Millennium Project has estimated that 50% of the world's hungry are smallholder farmers, 20% landless people and 10% herders, pastoralists or fisherfolk. UN Millennium Project, Task Force on Hunger, *Halving Hunger: It Can Be Done: Summary Version*, UN Development Programme, 2005, pp 4–6, [https://vtechworks.lib.vt.edu/bitstream/handle/10919/66358/1768\\_Having\\_Hunger.pdf?sequence=1](https://vtechworks.lib.vt.edu/bitstream/handle/10919/66358/1768_Having_Hunger.pdf?sequence=1) (last accessed 2 April 2019).

of them are not effectively protected by conventions of the International Labour Organization (ILO) because they do not work in the formal sector.<sup>50</sup>

To respond to this situation, in 2008 La Via Campesina, a network of peasant organizations that is one of the world's largest transnational social movements, adopted its *Declaration on the Rights of Peasants – Women and Men*.<sup>51</sup> Two years later, the UN Human Rights Council instructed its Advisory Committee, composed of 18 independent experts, to propose ways to better protect the rights of peasants and other people working in rural areas. The Advisory Committee presented its final study, including a draft declaration, in 2012. Adopting one of the Committee's main recommendations, the Human Rights Council decided in September 2012 to create an open-ended intergovernmental working group (the working group) to negotiate the UNDROP.

Five sessions of the working group took place between 2013 and 2018,<sup>52</sup> and in 2018 the UNDROP was presented for adoption to the Human Rights Council and UN General Assembly. On 28 September 2018, the Human Rights Council (with its 47 Member States) adopted the UNDROP by a vote of 33 states in favour, 3 against and 11 abstentions.<sup>53</sup>

50 On the International Labour Organisation's (ILO) work on rural employment and development, see L. de Luca, M. Fernando, E. Crunel and L. O. Smith, *Unleashing the Potential for Rural Development Through Decent Work – Building on the ILO Rural Work Legacy 1970s–2011*, ILO, 2012, [https://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/documents/publication/wcms\\_176668.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_176668.pdf) (last accessed 2 April 2019). See also ILO, *The Informal Economy and Decent Work: A Policy Resource Guide*, 2013, [https://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_policy/documents/publication/wcms\\_212689.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_policy/documents/publication/wcms_212689.pdf) (last accessed 2 April 2019).

51 This declaration, adopted by La Via Campesina in 2008, is available at <https://viacampesina.net/downloads/PDF/EN-3.pdf> (last accessed 2 April 2019).

52 For information about the negotiation that took place during the five sessions of the working group, see <https://www.ohchr.org/EN/HRBodies/HRC/RuralAreas/Pages/WGRuralAreasIndex.aspx> (last accessed 2 April 2019).

53 Human Rights Council Res 39/12 adopted on 28 September 2018, by a vote of 33 states in favour, 3 against and 11 abstentions. States that voted in favour: Afghanistan, Angola, Burundi, Chile, China, Côte d'Ivoire, Cuba, Democratic Republic of the Congo, Ecuador, Egypt, Ethiopia, Iraq, Kenya, Kyrgyzstan, Mexico, Mongolia, Nepal, Nigeria, Pakistan, Panama, Peru, Philippines, Qatar, Rwanda, Saudi Arabia, Senegal, South Africa, Switzerland, Togo, Tunisia, Ukraine, United Arab Emirates, Venezuela (Bolivarian Republic of); states that voted against: Australia, Hungary and the United Kingdom of Great Britain and Northern Ireland; states that abstained: Belgium, Brazil, Croatia, Georgia, Germany, Iceland, Japan, Republic of Korea, Slovakia, Slovenia and Spain.

And on 17 December 2018, the UN General Assembly (composed of all UN Member States) adopted it by a vote of 121 states in favour, 8 against and 54 abstentions.<sup>54</sup>

At the UN General Assembly, where all EU Member States voted, 23 of them abstained when the UNDROP was adopted, 2 voted in favour – Portugal and Luxembourg – and 3 voted against – Hungary, Sweden and the United Kingdom.<sup>55</sup>

## B. THE DEFINITION OF PEASANTS AND OTHER PEOPLE WORKING IN RURAL AREAS

The UNDROP aims to protect the rights of some of the most marginalized people, who together represent around 2 billion people in the world: peasants, landless people, people living from traditional fishing, herding, and hunting activities and rural workers.

The definition of the rights-holders in Article 1 of the UNDROP is based on the work of the Advisory Committee of the UN Human Rights Council and the UN Special Rapporteur on the right to food, as well as on a number of international instruments, including the ILO Rural Workers' Organisations Convention, 1975 (No.

54 UNGA Res 73/165 adopted on 17 December 2018, by a vote of 121 states in favour, 8 against and 54 abstentions. States that voted in favour: Afghanistan, Algeria, Angola, Antigua-Barbuda, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belize, Benin, Bhutan, Bolivia (Plurinational State of), Botswana, Brunei Darussalam, Burundi, Cabo Verde, Cambodia, Central African Republic, Chad, Chile, Comoros, Congo, Costa Rica, Côte d'Ivoire, Cuba, Democratic People's Republic of Korea, Democratic Republic of the Congo, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Eritrea, Gabon, Gambia, Ghana, Grenada, Guinea, Guinea-Bissau, Guyana, Haiti, India, Indonesia, Iran (Islamic Republic of), Iraq, Jamaica, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Lao People's Democratic Republic, Lebanon, Liberia, Libya, Luxembourg, Madagascar, Malawi, Malaysia, Maldives, Mali, Mauritania, Mauritius, Mexico, Monaco, Mongolia, Morocco, Mozambique, Myanmar, Namibia, Nepal, Nicaragua, Niger, Nigeria, Oman, Pakistan, Panama, Papua New Guinea, Peru, Philippines, Portugal, Qatar, Republic of Moldova, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Sao Tome and Principe, Saudi Arabia, Senegal, Serbia, Seychelles, Sierra Leone, Solomon Islands, Somalia, South Africa, South Sudan, Sri Lanka, Sudan, Suriname, Switzerland, Syrian Arab Republic, Tajikistan, Thailand, Timor-Leste, Togo, Trinidad and Tobago, Tunisia, Uganda, United Arab Emirates, United Republic of Tanzania, Uruguay, Uzbekistan, Venezuela (Bolivarian Republic of), Viet Nam, Yemen, Zambia and Zimbabwe; states that voted against: Australia, Guatemala, Hungary, Israel, New Zealand, Sweden, United Kingdom of Great Britain and Northern Ireland and United States of America; states that abstained: Albania, Andorra, Argentina, Armenia, Austria, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Cameroon, Canada, Colombia, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Ethiopia, Fiji, Finland, France, Georgia, Germany, Greece, Honduras, Iceland, Ireland, Italy, Japan, Kiribati, Latvia, Lesotho, Liechtenstein, Lithuania, Malta, Montenegro, Netherlands, Norway, Palau, Poland, Republic of Korea, Romania, Russian Federation, Samoa, San Marino, Singapore, Slovakia, Slovenia, Spain, the former Yugoslav Republic of Macedonia, Turkey, Tuvalu, Ukraine and Vanuatu. It is important to mention that China declared that it did not participate in the vote at the UN General Assembly on 17 December, but that it was in favour of the adoption of the UNDROP. China also recalled that it voted in favour of the UNDROP at the UN Human Rights Council and at the UN General Assembly Third Committee. See <https://www.un.org/press/fr/2018/ag12107.doc.htm> (last accessed 2 April 2019).

55 EU Member States that abstained are Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Malta, Netherlands, Poland, Romania, Slovakia, Slovenia and Spain. In Europe, Monaco, Serbia and Switzerland (non-EU member states) also voted in favour of the UNDROP.

141), the FAO Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries<sup>56</sup> (small-scale fisheries guidelines) and the CBD and its Protocols.

This definition identifies several key characteristics of peasants and other people working in rural areas (that may not apply to all rural workers), such as their special relationship with land, the way they work and produce and their specific situation, combining economic vulnerability and a desire for autonomy.<sup>57</sup>

Article 1(1) of the UNDROP defines a peasant as 'any person who engages or who seeks to engage alone, or in association with others or as a community, in small-scale agricultural production for subsistence and/or for the market, and who relies significantly, though not necessarily exclusively, on family or household labour and other non-monetized ways of organizing labour, and who has a special dependency on and attachment to the land'.

Describing the activities in which a peasant can be engaged, Article 1(2) provides that the UNDROP applies to any person engaged in artisanal or small-scale agriculture, crop planting, livestock raising, pastoralism, fishing, forestry, hunting or gathering and handicrafts related to agriculture or a related occupation in a rural area. The fact that a peasant can be engaged in these activities 'alone, or in association with others or as a community' (Article 1(1)) gives a clear collective dimension to the rights enshrined in the UNDROP.

Article 1(2 and 3) adds that the UNDROP also applies to dependent family members of peasants, indigenous peoples and local communities working on the land, transhumant, nomadic and semi-nomadic communities and the landless, engaged in the above-mentioned activities. And Article 1(4) provides that the UNDROP also applies to rural workers, defined as 'hired workers, including all migrant workers, regardless of their migration status, and seasonal workers, on plantations, agricultural farms, forests and farms in aquaculture and in agro-industrial enterprises'.

## C. A HOLISTIC VISION OF THE PROTECTION OF THE RIGHTS OF PEASANTS AND OTHER PEOPLE WORKING IN RURAL AREAS

José Esquinas-Alcázar, former Secretary of the ITPGRFA, former Secretary General of the Intergovernmental Commission on Genetic Resources for Food and Agriculture and former Chair of the FAO Committee on Ethics for Food and Agriculture, noted during the first session of the UN working group that in elaborating the UNDROP, it was essential to take a holistic approach to the protection of the rights of

56 Food and Agriculture Organization of the UN (FAO), *Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication* (small-scale fisheries guidelines), endorsed on 10 June 2014 by the FAO Committee on Fisheries, <http://www.fao.org/3/a-i4356en.pdf> (last accessed 2 April 2019).

57 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, pp 36–42, [https://www.geneva-academy.ch/joomlatools-files/docman-files/InBrief5\\_rights\\_of\\_peasants.pdf](https://www.geneva-academy.ch/joomlatools-files/docman-files/InBrief5_rights_of_peasants.pdf) (last accessed 2 April 2019).

peasants in order to fill gaps in international law, and to ensure that the UNDROP builds upon existing instruments, rather than weakening them.<sup>58</sup> International law is fragmented on the matter, and the elaboration of the UNDROP represented a unique opportunity to recognize the rights of peasants, local communities, indigenous peoples, fisher people, pastoralists, nomads, hunters, gatherers, landless people, rural women and rural workers in one single instrument.<sup>59</sup>

The majority of negotiators accepted this holistic vision, with the UNDROP building on and complementing other standard-setting initiatives in the UN. They also agreed that the main added values of a human rights instrument include its capacity to recognize individual and collective rights that can be transformed into legal entitlements in national and regional laws and can become enforceable before judicial or quasi-judicial bodies at national, regional or international levels,<sup>60</sup> and its capacity to define states' obligations in a way that is more precise than those that are contained in other international instruments.<sup>61</sup>

In relation to the right to seeds, the UNDROP has built on a number of binding international instruments, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW Convention), the CBD and its Protocols, and the ITPGRFA. It has also built on the UN Declaration on the Rights of Indigenous Peoples, the right to food guidelines adopted by states at FAO in 2004<sup>62</sup> and the reports presented by the UN Special Rapporteurs on the right to food, including the report on seed policies presented by Olivier De Schutter in 2009.<sup>63</sup>

58 Report of the Working Group on the Draft United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas, UN doc A/HRC/26/48, 11 March 2014, §16.

59 See Golay, *Negotiation of a United Nations Declaration*, supra fn 57.

60 See also A. Bessa, 'Traditional Local Communities: What Lessons Can Be Learnt at the International Level from the Experiences of Brazil and Scotland?', 24 *RECIEL* 3 (2015) 330–340.

61 C. Golay, *The Implementation of the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas*, Geneva Academy Research Brief, 2019, <https://www.geneva-academy.ch/joomla-tools-files/docman-files/The%20Implementation%20of%20the%20UN%20Declaration%20on%20the%20rights%20of%20peasants%20and%20other%20people%20w.pdf> (last accessed 2 April 2019).

62 FAO, *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security* (right to food guidelines), 2004, and in particular guideline 8D on genetic resources for food and agriculture, <http://www.fao.org/3/a-y7937e.pdf> (last accessed 2 April 2019).

63 In this report, the former UN Special Rapporteur identified three ways in 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 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. Report of the Special Rapporteur on the Right to Food, supra fn 14, Summary.

## D. THE PRIMACY OF HUMAN RIGHTS AND THE UNDROP OVER OTHER INTERNATIONAL INSTRUMENTS<sup>64</sup>

In international law, in accordance with the UN Charter, international human rights instruments take precedence in the hierarchy of norms over other international instruments, such as those protecting intellectual property rights.<sup>65</sup>

According to the UN Charter, the promotion and protection of human rights is one of the main purposes of the UN (Article 1(3)), and UN Member States pledged to take joint and separate action to promote universal respect for human rights (Articles 55(c) and 56). The UN Charter also provides that '[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail' (Article 103). It is also relevant to mention that in the Vienna Declaration and Programme of Action, all UN Member States reaffirmed that the promotion and protection of human rights is the first responsibility of governments.<sup>66</sup>

The clear recognition of this primacy in international law did not preclude, during the negotiation of the UNDROP, a debate and the expression of divided positions on the relationship between the right to food and peasants' right to seeds on the one hand, and intellectual property rights on the other.

As we have seen, a majority of states, with all experts and representatives of peasants and non-governmental organizations (NGOs), agreed that it was essential to recognize peasants' right to seeds in the UNDROP. In expressing that position, they did not mention intellectual property rights at all.<sup>67</sup> At the same time, a group of other states noted that a right to seeds could potentially conflict with many national policies (on seed or intellectual property), trade agreements and intellectual property rights.<sup>68</sup>

During the rest of the negotiation, the majority of states – together with all experts and representatives of peasant organizations and NGOs – reached the conclusion that this was not a potential contradiction or conflict between two sets of human rights guarantees. While peasants' right to seeds is intrinsically linked to the right to food of billions of people, including the most vulnerable living in rural

64 This part is largely inspired by Golay, *The Right to Seeds and Intellectual Property Rights* (2016), supra fn 4, pp 21–25. See also Golay, *The Right to Seeds and Intellectual Property Rights* (2017), supra fn 4, pp 2–3.

65 See, for example, D. A. Yigzaw, 'Hierarchy of Norms: The Case for the Primacy of Human Rights Over WTO Law', 38 *Suffolk Transnational Law Review* (2015).

66 UN General Assembly (UNGA), *Vienna Declaration and Programme of Action*, UN doc A/CONF.157/23, 12 July 1993, §1.1 (endorsed by UNGA Res 48/121, 20 December 1993).

67 Report of the Working Group, supra fn 58, §§14, 22, 25, 36, 37; Report of the Open-Ended Intergovernmental Working Group on the Draft United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas, UN doc A/HRC/30/55, 22 July 2015, §§20, 31, 61, 63, 78, 81. See also Golay, *Negotiation of a United Nations Declaration*, supra fn 57, pp 65–66.

68 Report of the Working Group, supra fn 58, §37; Report of the Open-Ended Intergovernmental Working Group, supra fn 67, §61.

areas, the fact of granting temporary monopoly privileges to plant breeders and patent-holders – in many cases corporations – through intellectual property rights cannot be placed at the same level. Many 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.<sup>69</sup>

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 ICESCR, the UN Committee on Economic, Social and Cultural Rights (CESCR) reached the same conclusion when it drew a clear distinction between this human right and intellectual property rights protected outside the human rights system:

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.

<sup>69</sup> Golay, *The Right to Seeds and Intellectual Property Rights* (2016), supra fn 4, pp 21–25; Golay, *The Right to Seeds and Intellectual Property Rights* (2017), supra fn 4.

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.<sup>70</sup>

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.<sup>71</sup> When states adopted the UNDROP, they decided to place the rights and needs of some of the most marginalized groups – peasants and other people working in rural areas – at the centre of their efforts, not corporations.<sup>72</sup>

The primacy of human rights over commercial interests protected through intellectual property rights is reflected in two articles of the UNDROP, which provide that states shall elaborate, interpret and apply relevant international agreements and standards to which they are party in a manner consistent with their human rights obligations as they apply to peasants (Article 2(4)), and shall ensure that seed policies, plant variety protection and other intellectual property laws, certification schemes and seed marketing laws respect and take into account the rights, needs and realities of peasants and other people working in rural areas (Article 19(8)).

These two provisions reflect the fact that as higher order norms, human rights do not have to be adapted to trade agreements and national laws and policies; it is trade agreements and national laws and policies that must be adapted to ensure the ongoing protection of human rights.<sup>73</sup>

<sup>70</sup> Committee on Economic, Social and Cultural Rights (CESCR), General Comment no 17: 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 (article 15, paragraph 1 (c), of the Covenant), UN doc E/C.12/GC/17, 12 January 2006, §§1, 2, 7. It is also interesting to note that the CESCR 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 (§9).

<sup>71</sup> International Assessment of Agricultural Knowledge, Science and Technology for Development (IAASTD), *Agriculture at a Crossroads: Global Report*, 2009, <https://www.weltagrabericht.de/fileadmin/files/weltagrabericht/IAASTDBerichte/GlobalReport.pdf> (last accessed 2 April 2019), pp 109–110; Report of the Special Rapporteur on the Right to Food, supra fn 14, §1.

<sup>72</sup> Report of the Special Rapporteur on the Right to Food, supra fn 14, §3.

<sup>73</sup> A useful precedent in this respect is the recognition of the rights to health and access to medicines by the Human Rights Commission in 2001, and the agreement that states came to within the WTO in connection with intellectual property. In November 2001, WTO members adopted the Doha Declaration on the TRIPS Agreement and Public Health, which clarified that the rights to health and access to medicines shall prevail over intellectual property rules, i.e. that the TRIPS Agreement does not and should not prevent WTO 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. It is easy to see how this reasoning, used to protect the rights to health and access to medicines in 2001, could be replicated to protect the right to food and peasants' right to seeds within the WTO, in the context of the implementation of the UNDROP. For a more detailed analysis, see Golay, *The Right to Seeds and Intellectual Property Rights* (2016), supra fn 4, pp 23–25.

## 4. THE RIGHT TO SEEDS AND STATES' OBLIGATIONS IN THE UNDROP<sup>74</sup>

This part starts by explaining why the right to seeds has been included in the UNDROP (Section A). It then describes the protection afforded to the right to seeds of peasant women (Section B), and presents the main elements of peasants' right to seeds (Section C) and correlative states' obligations (Section D) in the UNDROP.

### A. THE INCLUSION OF THE RIGHT TO SEEDS

A specific article on the right to seeds was included in all drafts discussed during the negotiation of the UNDROP, from the first draft presented by the Advisory Committee in 2012<sup>75</sup> to the final draft presented for adoption to the UN Human Rights Council and General Assembly in 2018.<sup>76</sup>

During the working group's five sessions, several states, panellists and representatives of peasants and NGOs stressed that the recognition of the right to seeds in the UNDROP was crucial for peasants and humankind. They underlined that peasants' right to seeds is intrinsically linked to everyone's right to food<sup>77</sup> and to the rights of humanity to biodiversity, and therefore to survival.<sup>78</sup> UN experts also pushed negotiators to include the right to seeds in the UNDROP. Both the Advisory Committee and the former UN Special Rapporteur on the right to food, Olivier De Schutter, argued that the adoption of the UNDROP represented a unique opportunity to fill a gap in international human rights law by recognizing peasants' right to seeds.<sup>79</sup>

74 This part is partially inspired by *ibid*, pp 6–11 and 26–36.

75 See Art 5, 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.

76 See Art 19, UNDROP.

77 See, for example, Report of the Working Group, *supra* fn 58, §§13, 28. It is estimated that peasants and other people working in rural areas as defined in the UNDROP provide 50–70% 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 Web*, 2014, p 3, [http://www.etcgroup.org/files/030913\\_ETC\\_WhoWillFeed\\_AnnotatedPoster.pdf](http://www.etcgroup.org/files/030913_ETC_WhoWillFeed_AnnotatedPoster.pdf) (last accessed 2 April 2019). See also K. D. Maass Wolfenson, *Coping with the Food and Agriculture Challenge: Smallholders' Agenda*, FAO, 2013, <http://www.fao.org/3/a-ar363e.pdf> (last accessed 2 April 2019). For similar figures at the regional level in Sub-Saharan Africa, see IAASTD, *Agriculture at a Crossroads. Volume V: Sub-Saharan Africa*, p 22.

78 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, <http://www.fao.org/3/i1500e/i1500e.pdf> (last accessed 2 April 2019). See also FAO, *The State of the World's Biodiversity for Food and Agriculture*, 2019, <http://www.fao.org/3/CA3129EN/ca3129en.pdf> (last accessed 2 April 2019).

79 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, §§69–74.

On the other hand, a minority of states did not wish the UNDROP to recognize new rights, and included the right to seeds in this category. These states argued that existing human rights provide adequate protection to peasants.<sup>80</sup> As we have seen, a group of states also noted that peasants' right to seeds could potentially conflict with national policies on seed or intellectual property, trade agreements and intellectual property rights.<sup>81</sup>

During the final stage of negotiation, a large majority of states – supported by all experts and representatives of peasant organizations and NGOs – agreed to include peasants' right to seeds in Article 19 of the UNDROP. As we have seen, they also decided to reaffirm the primacy of international human rights law and peasants' right to seeds over intellectual property rights, by providing in Articles 2(4) and 19(8) of the UNDROP that states 'shall elaborate, interpret and apply relevant international agreements and standards to which they are party, in a manner consistent with their human rights obligations as they apply to peasants and other people working in rural areas', and that they 'shall ensure that seed policies, plant variety protection and other intellectual property laws, certification schemes and seed marketing laws respect and take into account the rights, needs and realities of peasants'.

### B. THE RIGHT TO SEEDS OF PEASANT WOMEN

Peasant women play a key role in local and global food security – producing food crops worldwide and earning incomes to feed their families.<sup>82</sup> Their role is also central in peasant seed systems, where it is estimated that up to 90 percent of planting material used in peasant agriculture are seeds and germ plasm produced, selected and saved by women.<sup>83</sup> Yet women and girls represent 70 percent of the world's hungry, and are subject to multiple discriminations in access to productive resources, including seeds.<sup>84</sup>

In international human rights law, the rights of rural women have been recognized in Article 14 of the CEDAW Convention and, in a very similar way, in Article 4 of the UNDROP. Read together with the UNDROP's Article 19 on the right to seeds, Article 4 provides that states shall eliminate all forms of discrimination against peasant women and other women working in rural areas, promote rural women's empowerment and ensure that peasant women enjoy the right to seeds without discrimination.

80 See, for example, Report of the Working Group, *supra* fn 58, §29, 35; Report of the Open-Ended Intergovernmental Working Group, *supra* fn 67, §29.

81 See, for example, Report of the Working Group, *supra* fn 58, §37; Report of the Open-Ended Intergovernmental Working Group, *supra* fn 67, §61.

82 According to FAO, women comprise, on average, 43% of the agricultural labour force in developing countries, ranging from 20% in Latin America to 50% in Eastern Asia and sub-Saharan Africa. FAO, *The State of Food and Agriculture 2010–2011. Women in Agriculture: Closing the Gender Gap for Development*, p 5, <http://www.fao.org/3/i2050e/i2050e.pdf> (last accessed 2 April 2019).

83 Report of the Special Rapporteur on the Right to Food, *supra* fn 14, §42; Report of the Special Rapporteur on the Right to Food, UN doc A/HRC/31/51, 14 December 2015.

84 A. C. Bellows, F. L. S. Valente, S. Lemke and M. D. Núñez Burbano de Lara, *Gender, Nutrition, and the Human Right to Adequate Food: Towards an Inclusive Framework*, Routledge, 2015.

In its General Recommendation No. 34 adopted in 2016, in which it interpreted Article 14 of the CEDAW Convention, the UN Committee on the Elimination of Discrimination Against Women (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’.<sup>85</sup> It then described the measures that States Parties to the CEDAW Convention should take to better protect rural women’s right to food.<sup>86</sup> These include measures to ensure that they have the authority to manage and control their natural resources, within the framework of food sovereignty, and the adoption of effective policies to ensure that they have access to adequate food and nutrition.<sup>87</sup>

In an important statement, the CEDAW Committee recognized that rural women’s right to seeds is a fundamental human right.<sup>88</sup> It then made a number of recommendations to States Parties to the CEDAW Convention in relation to the protection of peasant women’s 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:

(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.

These recommendations should be followed by the 189 States Parties to the CEDAW Convention, as well as by UN Member States when they take steps to implement Articles 4 and 19 of the UNDROP.

<sup>85</sup> CEDAW Committee, General Recommendation No. 34 on the rights of rural women, UN doc CEDAW/C/GC/34, 4 March 2016, §63.

<sup>86</sup> Ibid, §§63–66.

<sup>87</sup> Ibid, §§64–65.

<sup>88</sup> Ibid, §56.

## C. THE MAIN ELEMENTS OF PEASANTS’ RIGHT TO SEEDS

As we have seen, in defining the right to seeds in Article 19 of the UNDROP, states built on a number of binding international instruments, in particular the CBD and its Protocols, and the ITPGRFA. They also built on the UN Declaration on the Rights of Indigenous Peoples, the right to food guidelines adopted by states at FAO in 2004<sup>89</sup> and the reports presented by the UN Special Rapporteurs on the right to food, including the report on seed policies presented by Olivier De Schutter in 2009.<sup>90</sup>

This section describes the main elements of peasants’ rights to seeds that have been included in the UNDROP. These are: peasants’ right to maintain, control, protect and develop their own seeds and traditional knowledge (Section 1); their right to the protection of traditional knowledge, innovation and practices relevant to seeds (Section 2); their right to participate in the making of decisions on matters relating to seeds (Section 3); their right to equitably participate in the sharing of benefits arising from the utilization of seeds (Section 4); and their right to save, use, exchange and sell farm-saved seed or propagating material (Section 5).

### 1. PEASANTS’ RIGHT TO MAINTAIN, CONTROL, PROTECT AND DEVELOP THEIR OWN SEEDS AND TRADITIONAL KNOWLEDGE

#### UNDROP

Article 19(2)

Peasants and other people working in rural areas have the right to maintain, control, protect and develop their own seeds and traditional knowledge.

We have 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. We have also seen that the protection of intellectual property rights over seeds and the promotion of commercial seed systems have posed serious challenges to the maintenance of peasant food and seed systems and agrobiodiversity.<sup>91</sup>

<sup>89</sup> FAO right to food guidelines, supra fn 62, in particular guideline 8D on genetic resources for food and agriculture.

<sup>90</sup> Report of the Special Rapporteur on the Right to Food, supra fn 14.

<sup>91</sup> Ibid, Summary and §42; ISSD Africa, *Introduction to Integrated Seed Sector Development and its Guiding Principles*, Centre for Development Innovation, Wageningen University & Research, 2013, <https://www.wur.nl/web/file?uuid=e43709be-cf55-4ac2-b897-87a83b2225be&owner=1a616bd7-d3c1-493f-9533-d5d61aa53e4a> (last accessed 2 April 2019); 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.



To respond to these challenges, the UNDROP recognizes peasants' right to maintain, control, protect and develop their own seeds and traditional knowledge (Article 19(2)) – similarly to the way in which the UN recognized this right of indigenous peoples in the UN Declaration on the Rights of Indigenous Peoples adopted in 2007<sup>92</sup> – and it defines states' obligations to support peasant seed systems and to promote the use of peasant seeds and agrobiodiversity (Article 19(6)) (see Section 4.D.3 below).

## 2. THE RIGHT TO THE PROTECTION OF TRADITIONAL KNOWLEDGE, INNOVATION AND PRACTICES RELEVANT TO SEEDS

### UNDROP

#### Article 19(1)

Peasants and other people working in rural areas have the right to seeds ... including:

- (a) The right to the protection of traditional knowledge relevant to plant genetic resources for food and agriculture ...

#### Article 20(2)

States shall take appropriate measures to promote and protect the traditional knowledge, innovation and practices of peasants and other people working in rural areas, including traditional agrarian, pastoral, forestry, fisheries, livestock and agroecological systems relevant to the conservation and sustainable use of biological diversity.

As we have seen, the CBD requests states parties to 'respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity'.<sup>93</sup> The protection of traditional knowledge relevant to seeds has also been reaffirmed in the ITPGRFA,<sup>94</sup> the Nagoya Protocol<sup>95</sup> and the FAO right to food guidelines.<sup>96</sup> It includes traditional knowledge, innovation and practices concerning the selection, conservation and use of seeds and propagating materials.

In Articles 19(1.d) and 20(2), the UNDROP clarifies the international standards for the protection of the traditional knowledge, innovation and practices of peasants,

<sup>92</sup> See Art 31(1), UN Declaration on the Rights of Indigenous Peoples.

<sup>93</sup> Article 8(j), CBD.

<sup>94</sup> Art 9(2.a), ITPGRFA.

<sup>95</sup> Art 7, Nagoya Protocol.

<sup>96</sup> Guideline 8.12, FAO right to food guidelines, supra fn 62.

including in relation to seeds, and calls upon states to adopt all possible measures at law and policy levels for their preservation and protection.<sup>97</sup>

## 3. THE RIGHT TO PARTICIPATE IN DECISION-MAKING ON MATTERS RELATING TO SEEDS

### Article 19(1)

Peasants and other people working in rural areas have the right to seeds ... including: ...

- (c) The right to participate in the making of decisions on matters relating to the conservation and sustainable use of plant genetic resources for food and agriculture ...

The UNDROP shows deep concern with structural discrimination against peasants and other people working in rural areas, and recognizes, inter alia, their right to participation in decision-making processes to reverse that discrimination.

Concretely, the UNDROP provides that peasants 'have the right to active and free participation, directly and/or through their representative organizations, in the preparation and implementation of policies, programmes and projects that may affect their lives, land and livelihoods' (Article 10(1)). In relation to the right to seeds, building on existing instruments, including the ITPGRFA, it provides that peasants have the 'right to participate in the making of decisions on matters relating to the conservation and sustainable use of plant genetic resources for food and agriculture' (Article 19(1.c)).

## 4. THE RIGHT TO EQUITABLY PARTICIPATE IN THE SHARING OF BENEFITS ARISING FROM THE UTILIZATION OF SEEDS

### UNDROP

#### Article 19(1)

Peasants and other people working in rural areas have the right to seeds... including: ...

- (b) The right to equitably participate in sharing the benefits arising from the utilization of plant genetic resources for food and agriculture ...

<sup>97</sup> See also Arts 26(1) and 26(3), UNDROP.

In addition to protecting seed-related traditional knowledge, and to ensuring peasants' participation in decision-making on matters relating to seeds, states have also undertaken, under the CBD, the ITPGRFA, the Nagoya Protocol and the FAO right to food guidelines, the responsibility to take measures to protect and promote the rights of peasants to equitably participate in the sharing of benefits arising from the utilization of plant genetic resources for food and agriculture, including seeds.<sup>98</sup> Article 19(1.b) of the UNDROP recognizes the human rights nature of this right.

As clarified in the text of the Nagoya Protocol, states must also take all measures to ensure that the prior informed consent or approval and involvement of peasants and their communities are obtained before access to seeds and benefit-sharing modalities are prescribed in mutually agreed terms.<sup>99</sup>

## 5. THE RIGHT TO SAVE, USE, EXCHANGE AND SELL FARM-MADE SEED OR PROPAGATING MATERIAL

### UNDROP

#### Article 19

1. Peasants and other people working in rural areas have the right to seeds ... including: ...

(d) The right to save, use, exchange and sell their farm-saved seed or propagating material.

We have seen that for over 10,000 years, peasants have freely saved, selected, exchanged and/or sold farm-saved seeds, as well as used and reused them to produce food.<sup>100</sup> We have also seen that these customary rights of peasants to seeds have been recognized by states when they affirmed in the Preamble of the ITPGRFA 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'.<sup>101</sup>

98 See Art 8(j), CBD; Art 5, Nagoya Protocol; Art 9, ITPGRFA; and Guideline 8.12, the FAO right to food guidelines, *supra* fn 62.

99 Arts 5(5) and 6(2), Nagoya Protocol.

100 Andersen, *The History of Farmers' Rights*, *supra* fn 5.

101 Andersen (*ibid*) also defines customary rights to seeds, as well as customary practices of farmers to save, reuse, share and develop seeds. See also Z. Goodman, *Seeds of Hunger: Intellectual Property Rights on Seeds and the Human Rights Response*, 3D, 2009, p 9, <http://www.ideaspaz.org/tools/download/47066> (last accessed 3 April 2019), defining farmers' rights as customary rights of farmers to save, use, exchange and sell farm-saved seeds.

In the ITPGRFA, states recognized these rights of peasants over farm-saved seeds, without making any distinction between farm-saved seeds of peasant varieties and farm-saved seeds of varieties protected by intellectual property rights. As the ITPGRFA was adopted by consensus at FAO in 2001, after 20 years of negotiation, negotiators of the UNDROP decided to recognize the same entitlements in Article 19 of the UNDROP.

As a consequence, one of the main elements of peasants' right to seeds in the UNDROP is their right to save, use, exchange and sell farm-saved seed or propagating material (Article 19(1.d)), which creates entitlements over farm-saved seeds of both peasant varieties and varieties protected by intellectual property rights.

To support the inclusion of rights of peasants over farm-saved seeds of varieties protected by intellectual property rights in the UNDROP, negotiators placed emphasis on the need to apply the right to equitably participate in the sharing of benefits arising from the utilization of genetic resources for food and agriculture, and the right of everyone to enjoy the benefits of scientific progress enshrined in Article 15 of the ICESCR.<sup>102</sup>

In Article 9 of the ITPGRFA, states 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 applying the right to equitably participate in the sharing of benefits arising from the utilization of plant genetic resources for food and agriculture, it has been argued that peasants should be given rights over the seeds that they have contributed to developing.

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

[a]lthough 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.<sup>103</sup>

In the same report, 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, including by facilitating peasants' access to

102 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', 33 *Human Rights Quarterly* 2 (2011).

103 Report of the Special Rapporteur on the Right to Food, *supra* fn 14, §46.

commercial seeds.<sup>104</sup> 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'.<sup>105</sup>

In the implementation of peasants' rights over farm-saved seeds of peasant varieties and varieties protected by intellectual property rights, states could draw inspiration from examples of good practice at regional and national levels. 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,<sup>106</sup> 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)). As we have seen, a good example at national level is the 2001 Protection of Plant Varieties and Farmers Rights Act,<sup>107</sup> through which India recognized peasants' rights to save, use, sow, resow, exchange, share and sell farm produce, including seeds of varieties protected by plant breeders' rights (Article 39).<sup>108</sup>

If states adopt such a legislative and policy framework, and tensions remain with intellectual property rights, one way to resolve them would be to ensure that peasants do not commercialize seeds of varieties protected by intellectual property rights.<sup>109</sup> As explained by Robert Tripp, Niels Louwaars and Derek Eaton, the main objective of intellectual property rights systems is to control unauthorized commercial production of protected varieties.<sup>110</sup> Taking that objective into account, in the implementation of the UNDROP, states 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 compromise acceptable for all parties engaged in the elaboration of international, regional or national laws and policies.

104 Ibid, Summary.

105 De Schutter quotes the jurisprudence of the CESCR 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', UN doc E/C.12/IND/CO/5, §69, cited in Report of the Special Rapporteur on the Right to Food, supra fn 14, §5.

106 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.

107 The Protection of Plant Varieties and Farmers' Rights Act, supra fn 42. See also Correa, *Plant Variety Protection in Developing Countries*, supra fn 22; The Farmers' Rights Project, 'Best Practices: India's Protection of Plant Varieties and Farmers' Rights Act', supra fn 44; S. Koonan, 'Developing Country *Sui Generis* Options: India's *Sui Generis* System of Plant Variety Protection', Briefing Paper no 4, Quaker United Nations Office, 2104; Tripp, Louwaars and Eaton, 'Plant Variety Protection in Developing Countries', supra fn 26, 362–363.

108 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 (Art 42).

109 Golay, *The Right to Seeds and Intellectual Property Rights* (2016), supra fn 4, p 36.

110 Tripp, Louwaars and Eaton, 'Plant Variety Protection in Developing Countries', supra fn 26, 360.

## D. STATES' OBLIGATIONS

States have defined their obligations in relation to the right to seeds in several articles of the UNDROP.<sup>111</sup> In these articles, they have committed to ensure the consistency of their national laws and policies, and of international agreements and standards to which they are party with the right to seeds (Section 1). They have also committed to respect, protect and fulfil the right to seeds (Section 2), support peasant seed systems and promote the use of peasant seeds and agrobiodiversity (Section 3), ensure the participation of peasants in decision-making processes in relation to seeds (Section 4) and ensure that agricultural research and development integrate the needs of peasants, with their active participation (Section 5).

### 1. THE OBLIGATION TO ENSURE THE CONSISTENCY OF NATIONAL LAWS AND POLICIES AND INTERNATIONAL AGREEMENTS AND STANDARDS WITH THE RIGHT TO SEEDS

In accordance with the primacy to be given to human rights norms in international and national laws (see part 3.D above), states shall ensure the consistency of their national laws and policies, and international agreements and standards to which they are party, including those protecting intellectual property rights, with the rights of peasants, including their right to seeds.

As we have seen, this obligation is defined in two articles of the UNDROP, which provide that states shall elaborate, interpret and apply relevant international agreements and standards to which they are party, in a manner consistent with the rights of peasants (Article 2(4)), and ensure that seed policies, plant variety protection and other intellectual property laws, certification schemes and seed marketing laws respect and take into account the rights, needs and realities of peasants and other people working in rural areas (Article 19(8)). It is also important to note that in accordance with Article 15(5), states shall establish mechanisms to ensure the coherence of their agricultural, economic, social, cultural and development policies with the realization of the rights contained in the UNDROP.

The UNDROP also provides that – without disregarding specific legislation on indigenous peoples – states shall consult and cooperate in good faith with peasants and other people working in rural areas, through their own representative institutions, before adopting and implementing legislation and policies, international agreements and other decision-making processes that may affect their rights, engaging with and seeking the support of those who could be affected by decisions before those decisions are made, and responding to their contributions, taking into consideration existing power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes (Article 2(3)).

111 See also Golay, *The Implementation of the United Nations Declaration*, supra fn 61.

## 2. OBLIGATIONS TO RESPECT, PROTECT AND FULFIL THE RIGHT TO SEEDS

In international human rights law, it is generally accepted that states have the obligation to respect, protect and fulfil all human rights.<sup>112</sup> The respect, protect and fulfil typology can also be used to define states' extraterritorial obligations.<sup>113</sup>

The CESCR and the UN Human Rights Committee (in charge of monitoring the implementation of the two international covenants adopted by the UN in 1966) have both made use of the respect, protect and fulfil typology.<sup>114</sup> States have also agreed to define their obligations using the respect, protect and fulfil (promote, facilitate and provide) typology in the FAO right to food guidelines adopted in 2004. The introduction to these declares:

States have obligations under relevant international instruments relevant to the progressive realization of the right to adequate food. Notably, States Parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR) have the obligation to respect, promote and protect and to take appropriate steps to achieve progressively the full realization of the right to adequate food. States Parties should respect existing access to adequate food by not taking any measures that result in preventing such access, and should protect the right of everyone to adequate food by taking steps so that enterprises and individuals do not deprive individuals of their access to adequate food. States Parties should promote policies intended to contribute to the progressive realization of people's right to adequate food by proactively engaging in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security. States Parties should, to the extent that resources permit, establish and maintain safety nets or other assistance to protect those who are unable to provide for themselves.<sup>115</sup>

The inclusion in the UNDROP of states' obligations to respect, protect and fulfil the rights of peasants in general (Article 2(1)), and the right to seeds in particular (Article 19(3)), is therefore in conformity with international human rights law.

112 See M. Sepúlveda, *The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights*, School of Human Rights Research Series, vol 18, Intersentia, 2003, pp 13–14, 115–156, 397–400. M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd revised edn, Engel Verlag, 2005, pp XX–XXI.

113 ETO Consortium, *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, adopted in September 2011 by 40 international law experts, including current and former UN Special Procedure mandate holders and members of UN treaty and regional human rights bodies, [https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx\\_drblob\\_pi1%5BdownloadUid%5D=23](https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23) (last accessed 2 April 2019). The CESCR, for example, has systematically defined states' extraterritorial obligations to respect, protect and fulfil the rights of the Covenant, since it published General Comment no 12 on the right to adequate food (1999). The Committee on the Rights of the Child began defining states' extraterritorial obligations in its General Comment no 5 (2003): General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), UN doc CRC/GC/2003/5, 27 November 2003, §57, 60–64.

114 For the CESCR, '[t]he right to adequate food, like any other human right, imposes three types or levels of obligations on States parties: the obligations to respect, to protect and to fulfil. In turn, the obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide.' CESCR, General Comment no 12: The right to adequate food (art. 11), UN doc E/C.12/1999/5, 12 May 1999, §15.

115 FAO right to food guidelines, supra fn 62, Preface and Introduction, §17.

In his report on seed policies, Olivier De Schutter defined violations of the obligations to respect, protect and fulfil the rights to food and seeds. For him, the obligation to respect would be violated if states were to introduce legislation or other measures that create obstacles to the reliance of peasants on informal seed systems, as this would deprive peasants from a means of achieving their livelihood.<sup>116</sup> 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.<sup>117</sup> 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.<sup>118</sup> 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'.<sup>119</sup>

## 3. THE OBLIGATION TO SUPPORT PEASANT SEED SYSTEMS AND TO PROMOTE THE USE OF PEASANT SEEDS AND AGROBIODIVERSITY

As stated by 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'.<sup>120</sup> This obligation was included in Article 19(6) of the UNDROP, which provides that '[s]tates shall take appropriate measures to support peasant seed systems, and promote the use of peasant seeds and agrobiodiversity'.

The inclusion of this obligation in the UNDROP echoes the view of many seed and agricultural system experts, who underline that it is important to support peasant seed systems, as they are dominant in most countries.<sup>121</sup> The FAO Commission on Genetic Resources for Food and Agriculture has underlined that

[i]n most countries, the informal sector – symbolized by farmer-saved seeds, 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 infor-

116 Report of the Special Rapporteur on the Right to Food, supra fn 14, §4.

117 De Schutter quotes the jurisprudence of the CESCR 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', UN doc E/C.12/IND/CO/5, §69, cited in Report of the Special Rapporteur on the Right to Food, supra fn 14, §5.

118 Report of the Special Rapporteur on the Right to Food, supra fn 14, §6.

119 Ibid, §48.

120 Ibid, §44.

121 ISSD Africa, *Introduction to Integrated Seed Sector Development*, supra fn 91; N. P. Louwaars and W. S. de Boef, 'Integrated Seed Sector Development in Africa: A Conceptual Framework for Creating Coherence Between Practice, Programs, and Policies', 26 *Journal of Crop Improvement* 1 (2012).

mal 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.<sup>122</sup>

The implementation of the UNDROF represents a unique opportunity to rebalance the support given to peasant seed systems, compared to the support given to industrial seed systems in recent decades. This is essential to protect the rights of hundreds of millions of peasants, as well as the interest of all in the preservation of biodiversity.<sup>123</sup>

#### 4. THE OBLIGATION TO ENSURE THE PARTICIPATION OF PEASANTS IN DECISION-MAKING PROCESSES IN RELATION TO SEEDS

As we have seen, the UNDROF shows deep concern with structural discrimination against peasants, and recognizes, among others, their right to participation in decision-making processes to reverse that discrimination. To guarantee that right, the UNDROF provides, inter alia, that states shall ensure the participation of peasants, directly and/or through their representative organizations, in decision-making processes related to seeds (Articles 2(4), 10(1), 11(3) and 19(8)), as well as their right to information (Article 11(2)). States shall also encourage equitable and participatory farmer-scientist partnerships to respond to the challenges that peasants face (Article 2(3)). The UNDROF also provides that UN specialized agencies, funds and programmes, and other intergovernmental organizations, shall contribute to the full realization of the UNDROF, and consider ways to ensure peasants' participation on issues affecting them, which include issues affecting their right to seeds (Article 27(1)).

#### 5. THE OBLIGATION TO ENSURE THAT AGRICULTURAL RESEARCH AND DEVELOPMENT INTEGRATE THE NEEDS OF PEASANTS, WITH THEIR ACTIVE PARTICIPATION

In addition to supporting peasant seed systems and ensuring peasants' participation in decision-making processes in relation to seeds, it is important that states support research and development that contribute to the full realization of peasants' right to seeds. During the negotiation of the UNDROF, support and protection given to three innovation circles that coexist in relation to seeds were discussed: (1) innovation through biotechnology and (2) innovation by plant breeders, which are protected by patents and plant breeders rights, and (3) innovation by peasants, which is not protected by international law, but represents the most important innovation circle in order to realize peasants' rights and protect biodiversity.<sup>124</sup>

<sup>122</sup> FAO, Commission on Genetic Resources for Food and Agriculture, *Draft Guide for National Seed Policy Formulation*, supra fn 91, §72.

<sup>123</sup> See also Report of the Special Rapporteur on the Right to Food, supra fn 14, Summary.

<sup>124</sup> Golay, *The Right to Seeds and Intellectual Property Rights* (2016), supra fn 4, p 32. See also Report of the Special Rapporteur on the Right to Food, supra fn 14.

During the negotiation, a discussion also took place on the definition of the obligation to support research and development that contribute to the realization of peasants' right to seeds. In a draft of the UNDROF presented in 2015, the definition of this obligation built on provisions of the CBD, the Nagoya Protocol and the ITPGRFA on the right to participate in making decisions on matters related to the conservation and sustainable use of seeds.<sup>125</sup> While this definition was welcomed, many negotiators 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, particularly in developing countries (tropical maize, sorghum, millet, banana, cassava, groundnut, oilseed, potato or sweet potato and thousands of neglected and underutilized species (NUS)); 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.<sup>126</sup>

The former UN Special Rapporteur on the right to food, 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.<sup>127</sup>

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.<sup>128</sup>

De Schutter 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

<sup>125</sup> See Art 8(j), CBD; Art 5, Nagoya Protocol; and Art 9, ITPGRFA.

<sup>126</sup> Golay, *The Right to Seeds and Intellectual Property Rights* (2016), supra fn 4, p 32. See also Report of the Special Rapporteur on the Right to Food, supra fn 14, Summary. See also the Cordoba Declaration on Promising Crops for the XXI Century, adopted in 2012, [http://www.fao.org/fileadmin/templates/food\\_composition/documents/Cordoba\\_NUS\\_Declaration\\_2012\\_FINAL.pdf](http://www.fao.org/fileadmin/templates/food_composition/documents/Cordoba_NUS_Declaration_2012_FINAL.pdf) (last accessed 2 April 2019).

<sup>127</sup> Report of the Special Rapporteur on the Right to Food, supra fn 14, §34.

<sup>128</sup> *Ibid*, §35.

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.

In Article 19(7) of the UNDROP, states agreed that they

shall take appropriate measures to ensure that agricultural research and development integrates the needs of peasants and other people working in rural areas, and to ensure their active participation in the definition of priorities and the undertaking of research and development, taking into account their experience, and increase investment in research and the development of orphan crops and seeds that respond to the needs of peasants and other people working in rural areas.

In implementing this provision, it will be important both to invest more into research on and development of orphan crops and seeds that respond to the needs of peasants, and to ensure their active participation in such research and development.

## 5. CHALLENGES TO THE PROTECTION OF THE RIGHT TO SEEDS IN THE LAW OF THE EUROPEAN UNION

In the implementation of the UNDROP, a number of challenges will have to be faced. In Europe, this may be particularly true for the implementation of the right to seeds. This part focuses on two of the most important legal challenges to the protection of the right to seeds in the EU and EU Member States: the weak protection granted to the right to seeds of peasants/farmers, compared with the extensive protection offered to international property rights (Section A), and the fact that laws and regulations on registration, certification and marketing of seeds favour the interests of the agricultural industry, and largely neglect peasants' right to seeds and seed systems (Section B).

### A. PATENTS, UPOV REGULATIONS AND FARMERS' RIGHTS

#### 1. THE EUROPEAN PATENT CONVENTION

The Convention on the Grant of European Patents (European Patent Convention) was adopted in 1973 with the aim of establishing one single normative framework and procedure for the grant of patents in the countries of the continent. Today it has 38 states parties, including all EU Member States.<sup>129</sup>

By virtue of this convention, any 'European patents shall, in each of the Contracting States for which it is granted, have the effect of and be subject to the same conditions as a national patent granted by that State'.<sup>130</sup> This convention and implementing regulations have been subject to a number of amendments and revisions. The most recent version of the Convention is dated June 2016.<sup>131</sup>

The purpose of the patenting regime is to provide exclusive commercial rights and financial rewards derived therefrom to creators of inventions in all fields of technology that observe a three-pronged criteria: inventions must be new, involve an inventive step and be susceptible to industrial application.<sup>132</sup> In the field of food and agriculture, the patent regime has been deemed a fundamental tool in the development of GMOs.

129 For the list of States Parties to the European Patent Convention and therefore to the European Patent Office, see <https://www.epo.org/about-us/foundation/member-states.html> (last accessed 2 April 2019).

130 Art 2(2), European Patent Convention (1973).

131 Full text available at <https://www.epo.org/law-practice/legal-texts/epc.html> (last accessed 2 April 2019).

132 See Art 52(1), European Patent Convention (as consolidated in 2016).

In Europe, patents apply to ‘microbiological processes and the products obtained by these processes’.<sup>133</sup> But according to the European Patent Convention and European Directive 98/44/EC on the legal protection of biotechnological inventions, plant varieties and essentially biological processes for the production of plants (crossing and selection) are not patentable.<sup>134</sup> European patents shall therefore relate to genetic sequences (biological material), ‘genetic information’ or particular qualities of plants or products derived from harvest obtained by technical or microbiological processes.<sup>135</sup> There is no definition of an essentially biological process, and the patentability requirements are thus interpreted by the internal appeal procedure of the European Patent Office (EPO), the practice of which shows that new genetic traits of plants may be patented, but varieties are protected in accordance with UPOV norms.

In reaction to the granting by the EPO of around 200 patents on food plants such as tomatoes, broccoli, peppers and lettuce derived from conventional breeding and not genetically engineered, social mobilization led the Administrative Council of the EPO – composed of the 38 states parties – to reaffirm the prohibition of patenting on plants derived from ‘essentially biological’ breeding processes in 2017.<sup>136</sup> But this decision was contested by the Technical Boards of Appeal of the EPO and the debate is still ongoing.

## 2. UPOV REGULATIONS IN EUROPE

Adopted in 1994, European Council Regulation (EC) No 2100/94<sup>137</sup> implements the UPOV Convention.<sup>138</sup> It establishes the system of plant variety rights in the form of ‘Community industrial property rights for plant varieties’, which has uniform effect in all EU Member States.<sup>139</sup> Concretely, the norm clarifies the specific requirements for granting intellectual property rights over plant varieties, which will be granted for 30 years for perennial plants, such as vines and tree species, and 25 years for other plant varieties.<sup>140</sup> To be eligible for legal protection, a plant vari-

133 Art 53(b), European Patent Convention. See also G. Kastler, *La réglementation européenne sur les semences: D’où vient-elle? Où va-t-elle?*, FIAN Belgium, September 2015, <https://www.fian.be/IMG/pdf/note-semences-septembre-2015-web.pdf> (last accessed 2 April 2019).

134 Art 4, Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions; Art 53(b), European Patent Convention. See also Kastler, *La réglementation européenne sur les semences*, supra fn 133.

135 Kastler, *La réglementation européenne sur les semences*, supra fn 133.

136 See ‘International Appeal to the President of the European Patent Office, António Campinos: Call for an Immediate Moratorium of Patents on Plants and Animals’, 29 January 2019, <https://www.no-patents-on-seeds.org/en/node/527> (last accessed 2 April 2019), sent by 40 civil society organizations.

137 Council Regulation (EC) No 2100/94, supra fn 25.

138 For a historical review of plant variety protection laws in European states and the conception of Council Regulation (EC) No 2100/94, see G. Würtenberger, P. van der Kooij, B. Kiewiet and Martin Ekvad, *European Union Plant Variety Protection*, Oxford University Press, 2015, Chapter 1.

139 Arts 1 and 2, Council Regulation (EC) No 2100/94, supra fn 25.

140 Art 19, *ibid.* It is noteworthy that the European Council may extend these terms by up to five years upon request of the Commission (Art 19(2)).

ety must meet the DUS criteria referred to earlier in this study, in addition to the criterion of novelty. A plant variety is considered new whenever its constituents or harvested material ‘have not been sold or otherwise disposed of to others, by or with the consent of the breeder’, with the aim of exploiting the variety within the following time lapse: (a) earlier than one year, if within the EU, (b) earlier than four years or, in the case of vines and trees, earlier than six years outside the EU.<sup>141</sup>

The notions of farmers’ privilege and breeders’ exemption, prescribed in the UPOV Conventions, have been internalized in the EU normative framework. As for the former, Council Regulation (EC) No 2100/94 establishes that, ‘for the purposes of safeguarding agricultural production, farmers are authorized to use for propagating purposes in the field, on their own holding the product of the harvest which they have obtained by planting, on their own holding, propagating material of a variety other than a hybrid or synthetic variety, which is covered by a Community plant variety right’.<sup>142</sup> This derogation of plant variety rights, however, may be limited with regard to the number of species listed in the normative framework and the area of cultivation.<sup>143</sup> And, as noted earlier, while the first versions of the UPOV Convention only protected the production and marketing of commercial seeds, without restricting the rights of peasants to save and use farm-saved seeds, this protection now extends to the reproduction of commercial seeds, and thus severely restricts peasants’ rights over farm-saved seeds.<sup>144</sup>

With respect to the breeders’ exemption, the regulation reaffirms the UPOV rule concerning free access to protected plant varieties for the development of new ones and clarifies the specific cases to which plant variety rights do not apply: ‘acts done privately and for non-commercial purposes’, ‘acts done for experimental purposes’ and ‘acts done for the purpose of breeding, or discovering and developing other varieties’.<sup>145</sup>

## 3. FARMERS’ RIGHTS IN EUROPE

In sharp contrast with the protection granted to intellectual property rights, the main elements of the right to seeds of farmers/peasants are poorly protected in the laws and regulations of the EU and EU Member States. The implementation of the principle of benefit-sharing as conceived in the CBD is too slow and often unclear, peasants’ traditional knowledge, innovations and practices have not been adequately protected and the vast majority of peasants remain uncompensated for their contribution to the maintenance and improvement of seeds.<sup>146</sup> As we have

141 Art 10(1), Council Regulation (EC) No 2100/94, supra fn 25.

142 Art 14(1), *ibid.*

143 Art 14(2 and 3), *ibid.* See also detailed conditions to give effect to this derogation in Commission Regulation (EC) No 1768/95 of 24 July 1995 implementing rules on the agricultural exemption provided for in Article 14 (3) of Council Regulation (EC) No 2100/94 on Community plant variety rights.

144 Kastler, *La réglementation européenne sur les semences*, supra fn 133.

145 Art 15, Council Regulation (EC) No 2100/94, supra fn 25.

146 Report of the Special Rapporteur on the Right to Food, supra fn 14, §47.

seen, the ITPGRFA has also 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.<sup>147</sup> The EU and EU Member States are also not adequately promoting and protecting peasants' right to seeds and seed systems.

In that overall context, small progress has been achieved, when protection has been granted to the rights of peasants, in the form of exceptions to the general rules that favour industrial seed systems. In addition to Council Regulation (EC) No 2100/94, which upheld the notion of farmers' rights and prescribed exceptions to the enforcement of plant variety rights in the EU (see above), seed marketing laws, especially EU Directives 98/95/EC<sup>148</sup> and 2008/62/EC have also opened the way to new, tiny regulatory spaces that allow for EU Member States to implement farmers' rights.<sup>149</sup>

Concretely, Directive 98/95/EC establishes that '[t]rade in seed not aimed at commercial exploitation of the variety ... shall not be regarded as marketing'.<sup>150</sup> It thus theoretically excludes from the scope of the norm the exchange of seeds between peasants and amateur gardeners who self-consume their produce, which is therefore not constrained by the requirements of registration and certification of seeds and plant varieties.<sup>151</sup> This prerogative has been reaffirmed in the subsequent Council Directive 2008/90/EC, which allows EU Member States to exempt 'small producers all of whose production and sales of propagating material and fruit plants is intended for final use by persons on the local market who are not professionally involved in plant production (local circulation)' from general seed marketing requirements.<sup>152</sup> These prerogatives nonetheless need to be transposed at national level, and their implementation has been unequal at best. Only a handful of EU Member States have exploited this derogation in their national legislations, such as Austria<sup>153</sup> and Denmark.<sup>154</sup>

147 Ibid, §43. For information on the implementation of Art 9, ITPGFA, see [www.farmersrights.org](http://www.farmersrights.org) and <http://www.fao.org/plant-treaty/areas-of-work/farmers-rights/submissions-by-the-contracting-parties-and-stakeholders/en/> (last accessed 2 April 2019).

148 Council Directive 98/95/EC of 14 December 1998 amending, in respect of the consolidation of the internal market, genetically modified plant varieties and plant genetic resources, Directives 66/400/EEC, 66/401/EEC, 66/402/EEC, 66/403/EEC, 69/208/EEC, 70/457/EEC and 70/458/EEC on the marketing of beet seed, fodder plant seed, cereal seed, seed potatoes, seed of oil and fibre plants and vegetable seed and on the common catalogue of varieties of agricultural plant species.

149 See also Kastler, *La réglementation européenne sur les semences*, supra fn 133.

150 Art 1(2), Council Directive 98/95/EC, supra fn 148.

151 Kastler, *La réglementation européenne sur les semences*, supra fn 133.

152 Art 10(1.a), Council Directive 2008/90/EC of 29 September 2008 on the marketing of fruit plant propagating material and fruit plants intended for fruit production.

153 See Austrian Seed Regulation, 1997 (2016 Version), §4(3).

154 See Ministry of Environment and Food of Denmark, Seeds 2, Instructions for amateur breeders, seed savers and companies about rules and practice of trade and transfer of seeds for non-commercial use and conservation (2015), especially Section 7.

## B. SEED REGISTRATION, CERTIFICATION AND MARKETING

The registration, certification and marketing of seeds and propagating materials in the EU are governed by a myriad of laws and regulations. These comprise one horizontal directive, Directive 2002/53 establishing the EU Common Catalogue of varieties of agricultural plant species, compiled on the basis of the national catalogues of the EU Member States, eleven vertical directives regulating the marketing of seed and propagating material of specific crops and an array of legal acts.<sup>155</sup>

One of the major points of contention regarding this legal framework lies in the fact that it has been designed to meet the needs and interests of the agricultural industry and, as such, imposes industry-specific production standards. In this context, the rights, needs and interests of peasants have been largely neglected.

The strict requirements for registering, certifying and marketing seeds illustrate this assertion. Concretely, the DUS criteria – the same as those used to grant intellectual property rights – and the requirement that in the case of agricultural crops' new varieties, seeds and propagating materials have satisfactory agronomic value for registering seeds in the EU Common Catalogue, do not reflect the reality of peasant seed systems operating in Europe, and do not respond to the specific needs of low-input agricultural systems such as organic.<sup>156</sup> They outlaw the marketing of innumerable seeds and plant varieties used and traded daily among peasants and amateur gardeners.

European civil society associations engaged in collecting ancient and orphan seeds and fighting the erosion of seed diversity within and beyond the continent have been sued for selling seeds that are not registered in the official seed catalogues (a practice that has been carried out by peasants since time immemorial), and therefore for not complying with the requirements prescribed in EU Directive 98/95/EC for seed marketing.<sup>157</sup>

155 For a detailed appraisal of this regulatory system, see T. Winge, 'Seed Legislation in Europe and Crops Genetic Diversity', 15 *Sustainable Agriculture Reviews* (2015).

156 See the LIVESEED project, which – among other goals – aims to adapt the criteria to make sure that organic seeds can have better access to the market, <https://www.liveseed.eu> (last accessed 3 April 2019).

157 See the cases *Kokopelli v France and Kokopelli v Baumaux*, in Magarinos-Rey, *Semences hors-la-loi*, supra fn 36, especially pp 119–149.



## 1. REGISTRATION

EU Council Directive 2002/53/EC establishes the European Common Catalogue of agricultural plant and vegetable species that can be marketed within the EU. Other types of crops are governed by specific directives.<sup>158</sup>

Registration in national plant variety catalogues is the first step toward marketing authorization in the EU zone. The EU Common Catalogue serves as a database of registered plant varieties based on national catalogues and lists the varieties of agricultural plant and vegetable species allowed to be marketed within the continent. Plant varieties may only be officially registered if they meet a number of technical criteria. The new varieties have to be tested for DUS. Furthermore, in the case of agricultural crops, their value for cultivation and use (VCU) must also be assessed.<sup>159</sup>

A plant variety is considered distinct if it holds clearly distinguishable characteristics, as a result of a particular genotype or combination of genotypes, when compared to any other varieties ‘whose existence is a matter of common knowledge’ at the date of the application.<sup>160</sup> The existence of a variety is considered to be ‘a matter of common knowledge’ if it has been subject to a plant variety right or included in an official register in the EU or EU Member States, in a non-EU Member State or in a competent intergovernmental organization.<sup>161</sup>

The criterion of uniformity refers to the expected degree of variation of the plant variety features of its propagation.<sup>162</sup> As for stability, a plant variety will be deemed to be

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158 Forest trees are governed by Council Directive 1999/105/EC of 22 December 1999 on the marketing of forest reproductive material and Commission Regulation EC 1597/2002 of 6 September 2002 laying down detailed rules for the application of Council Directive 1999/105/EC as regards the format of national lists of the basic material of forest reproductive material. The database FOREMATIS (Forest Reproductive Material Information System) ‘provides access to the data of the national registers, containing the details of approved basic material including data on areas or geographic location – essential for determining if a particular material is suitable for a site’. See <http://ec.europa.eu/forematis> (last accessed 3 April 2019). Specifically on fruit plants, refer to Council Directive 2008/90/EC, *supra* fn 152, and Commission Implementing Directive 2014/97/EU implementing Council Directive 2008/90/EC as regards the registration of suppliers and of varieties and the common list of varieties. The database FRUMATIS (Fruit Reproductive Material Information System) provides information on fruit genera and species registered in EU Member States that can be marketed in the EU. See [https://ec.europa.eu/food/sites/food/files/plant/docs/plant-variety-catalogues\\_frumatis-eu-list.xlsx](https://ec.europa.eu/food/sites/food/files/plant/docs/plant-variety-catalogues_frumatis-eu-list.xlsx) (last accessed 3 April 2019). Council Directive 68/193/EEC of 9 April 1968 on the marketing of material for the vegetative propagation of the vine and Commission Implementing Decision (EU) 2017/478 of 16 March 2017 releasing certain Member States from the obligation to apply to certain species Council Directives 66/401/EEC, 66/402/EEC, 68/193/EEC, 1999/105/EC, 2002/54/EC, 2002/55/EC and 2002/57/EC on the marketing of fodder plant seed, cereal seed, material for the vegetative propagation of the vine, forest reproductive material, beet seed, vegetable seed and seed of oil and fibre plants respectively, and repealing Commission Decision 2010/680/EU regulate the marketing of vine species. The EU Common Catalogue of Vine Varieties, with data on national catalogues of the vine varieties that can be marketed in the EU is available at [https://ec.europa.eu/food/sites/food/files/plant/docs/plant\\_variety\\_catalogues\\_db\\_eu-list-var-vine.xls](https://ec.europa.eu/food/sites/food/files/plant/docs/plant_variety_catalogues_db_eu-list-var-vine.xls) (last accessed 3 April 2019).

159 See European Commission, ‘EU Marketing Requirements’, [https://ec.europa.eu/food/plant/plant\\_propagation\\_material/legislation/eu\\_marketing\\_requirements\\_en](https://ec.europa.eu/food/plant/plant_propagation_material/legislation/eu_marketing_requirements_en) (last accessed 3 April 2019).

160 Art 7(1), Council Regulation (EC) No 2100/94, *supra* fn 25.

161 Art 7(2), *ibid.*

162 Art 8, *ibid.*

stable if the particular features that characterize its distinctness ‘as well as any others used for the variety description, remain unchanged after repeated propagation or, in the case of a particular cycle of propagation, at the end of each such cycle’.<sup>163</sup>

The value for cultivation and use of agricultural crops is assessed on the basis of the performance of the variety on yield, resistance to harmful organisms, response to the environment and quality characteristics.<sup>164</sup>

It must be restated here that the fact that the DUS criteria chosen to determine if seed varieties can be registered in the European Common Catalogue are the same as those used to grant intellectual property rights implies that seed varieties protected by intellectual property rights are the only ones that can be registered in the catalogue, and therefore the only ones – with few exceptions – that can be put on the market, while peasant seeds are marginalized and disappear.

## 2. CERTIFICATION

Certification of seed lots and lots producing plant propagating materials aims at guaranteeing the identity, health and quality of seeds and propagating material that are put in the market.<sup>165</sup> For commercial crops and potatoes, certification is a mandatory step before their commercialization. Certification and inspections are carried out by official bodies or under official supervision.<sup>166</sup> Likewise, ‘accreditation or registration of suppliers is required for vegetable propagating and planting material other than seed, fruit-plant propagating material and fruit plants intended for fruit production, forest reproductive material and propagating material of ornamental plants’.<sup>167</sup>

## 3. MARKETING

The marketing of fruit-plant propagating material and fruit plants intended for fruit production is governed by Council Directive 2008/90/EC of 29 September 2008.<sup>168</sup> Other applicable texts include Council Directive 2002/55/EC on the marketing of vegetable seed, Council Directive 2008/72/EC on the marketing of vegetable propagating and planting material other than seed, Council Directive 1999/105/EC of 22 December 1999 on the marketing of forest reproductive material and Council Directive 68/193/EEC of 9 April 1968 on the marketing of material for the vegetative propagation of the vine.

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163 Art 9, *ibid.*

164 See European Commission, ‘Plant Variety Catalogues, Databases and Information Systems’, [https://ec.europa.eu/food/plant/plant\\_propagation\\_material/plant\\_variety\\_catalogues\\_databases\\_en](https://ec.europa.eu/food/plant/plant_propagation_material/plant_variety_catalogues_databases_en) (last accessed 3 April 2019).

165 See European Commission, ‘EU Marketing Requirements’, *supra* fn 159.

166 For a detailed appraisal of these regulatory systems, see Winge, ‘Seed Legislation in Europe and Crops Genetic Diversity’, *supra* fn 155, 8.

167 For a detailed appraisal of these regulatory systems, see *ibid.*

168 Council Directive 2008/90/EC, *supra* fn 152, which repeals Council Directive 92/34/EEC of 28 April 1992 on the marketing of fruit plant propagating material and fruit plants intended for fruit production and successive amendments.

To illustrate this complex crop-by-crop system, we can take the example of Council Directive 2008/90/EC on the marketing of fruit-plant propagating material and fruit plants intended for fruit production. According to this directive, seeds and propagating materials are only allowed to be marketed if the following criteria are observed: ‘(a) the propagating material has been officially certified as “pre-basic material”, “basic material” or “certified material” or if it meets the conditions to be qualified as CAC material; and (b) the fruit plants have been officially certified as certified material or they meet the conditions to be qualified as CAC material’.<sup>169</sup> Seeds falling under the ‘CAC material’ (*conformitas agraria communitatis*) category can follow a simplified registration and may be commercialized without certification. This category comprises propagating material and fruit plants which ‘(a) have varietal identity and adequate varietal purity [and] (b) are intended for: the production of propagating material, the production of fruit plants, and/or the production of fruits, and (c) satisfy the specific requirements for CAC material established [in law]’.<sup>170</sup> Otherwise, seeds that do not observe these criteria can only be placed on the market for trials or scientific purposes, for selection work or to help preserve genetic diversity.<sup>171</sup>

#### 4. SPECIAL PROVISIONS

##### a. Conservation and amateur varieties

EU Member States are allowed to apply partial derogation from the prescriptions of DUS for registering new plant varieties and to create special marketing conditions for peasants and gardeners who use conservation and amateur varieties.<sup>172</sup> Conservation varieties are ‘landraces and varieties which are naturally adapted to the local and regional conditions and threatened by genetic erosion’.<sup>173</sup> Amateur varieties in turn are vegetable varieties with no intrinsic value for commercial crop production.<sup>174</sup> Commission Directive 2008/62/EC clarifies that ‘[i]n order to ensure in situ conservation and the sustainable use of plant genetic resources, landraces and varieties which are naturally adapted to local and regional conditions and threatened by genetic erosion (conservation varieties) should be grown and marketed even where they do not comply with the general requirements as regards the acceptance of varieties and the marketing ...’<sup>175</sup>

169 Art 3(1), Council Directive 2008/90/EC, supra fn 152.

170 Art 2(8), *ibid.*

171 Art 3(4), *ibid.*

172 Art 1(24), Council Directive 98/95/EC, supra fn 148; Commission Directive 2008/62/EC of 20 June 2008 providing for certain derogations for acceptance of agricultural landraces and varieties which are naturally adapted to the local and regional conditions and threatened by genetic erosion and for marketing of seed and seed potatoes of those landraces and varieties; Council Directive 2008/90/EC, supra fn 152; and Commission Directive 2009/145/EC of 26 November 2009 providing for certain derogations, for acceptance of vegetable landraces and varieties which have been traditionally grown in particular localities and regions and are threatened by genetic erosion and of vegetable varieties with no intrinsic value for commercial crop production but developed for growing under particular conditions and for marketing of seed of those landraces and varieties. On this point, see also Kastler, *La réglementation européenne sur les semences*, supra fn 133.

173 Art 1(1.a), Commission Directive 2008/62/EC, supra fn 172.

174 Commission Directive 2009/145/EC, supra fn 172, especially Arts 21–32.

175 Preamble, Commission Directive 2008/62/EC, supra fn 172.

As noted, ‘the objective of conservation is achieved by the tool of derogation from the present-day seed system on the one hand to allow these varieties to be registered in the [EU Common] Catalogue, and on the other to establish a minimum of procedures for the sale of the seeds. The intention, therefore, is for these varieties to fall into the category of seed marketability creating an area of legitimacy for varieties that could only be exchanged between farmers.’<sup>176</sup>

In practice, legal derogation allows for registering conservation and amateur varieties without official assessment of technical requirements. The following are sufficient: ‘(a) the description of the conservation variety and its denomination; (b) the results of unofficial tests; (c) knowledge gained from practical experience during cultivation, reproduction and use, as notified by the applicant to the Member State concerned; (d) other information, in particular from the plant genetic resource authorities or from organisations recognised for this purpose by the Member States’.<sup>177</sup> In addition, for conservation varieties, the ‘region of origin’, i.e. ‘the region or regions in which the variety has historically grown and to which it is naturally adapted’<sup>178</sup> must be identified, the seed or propagating material ‘shall descend from seed produced according to well defined practices for maintenance of the variety’<sup>179</sup> and ‘shall have sufficient varietal purity’.<sup>180</sup> Last, a number of marketing restrictions apply: conservation varieties may only be marketed if produced in their region of origin or approved additional regions;<sup>181</sup> marketing is restricted to their region of origin or approved additional regions;<sup>182</sup> and the quantity of seed marketed must not exceed 0.5 percent of the seed of the same species used in the member state where the derogation applies in one growing season.<sup>183</sup>

The registration of conservation and amateur varieties in the EU and EU Member States was allowed with a view to contributing to the conservation and sustainable use of genetic resources. However, the geographical limits, quantitative restrictions and administrative burden that accompanied this approach have led to very little success, especially when it came to conservation varieties. In France, for example, there are 17 conservation varieties listed in the national catalogue, compared to 306 amateur varieties in a catalogue that registers thousands of varieties.

176 R. Bocci, ‘Seed Legislation and Agrobiodiversity: Conservation Varieties’, 103 *Journal of Agriculture and Environment for International Development* 1/2 (2009) 35.

177 Art 5, Council Directive 98/95/EC, supra fn 148: ‘Varieties previously registered in the common Catalogue of varieties but which have been absent from it for less than 2 years, or which are protected by Plant Breeders Rights (PBRs) cannot be considered conservation varieties (Art. 6). In this way, legislation has sought to reduce the risk of an indiscriminate passage of varieties from the common Catalogue to that of conservation as a strategy to derogate from certain requisites of seed rules’. Bocci, ‘Seed Legislation and Agrobiodiversity’, supra fn 176, 40.

178 Art 8, Commission Directive 2008/62/EC, supra fn 172.

179 Art 10(2), *ibid.*

180 Art 10(3), *ibid.*

181 Art 13(1.a), *ibid.*

182 Art 13(1.b), *ibid.*

183 Art 14, *ibid.*

### b. Organic seeds

Organic seeds are subject to further rules, in addition to those applied to conventional seeds. Organic seeds have to comply with European Commission Regulation (EC) No 889/2008,<sup>184</sup> which lays down the rules for organic production and labelling of organic products.

In May 2018, the EU Council passed a new regulation on organic production. The new regulation aims at encouraging ‘the sustainable development of organic production in the EU and aims at guaranteeing fair competition for farmers and operators, preventing fraud and unfair practices and improving consumer confidence in organic products’.<sup>185</sup> The new regulation will apply from 2021 onwards.

This new regulation is an important step towards the increase and diversification of the seeds and plants reproductive material available for organic farmers. For Arche Noah,

the most welcome development is that ‘organic heterogeneous material’ may, from 2021, be marketed in the organic sector without being a registered variety, but instead following a relatively simple prior notification to the national authority. These provisions should open the door to: (i) the marketing of a much wider variety of seeds and PRM on the market, thereby increasing the use of agro-biodiversity in agriculture; and (ii) a rise in the supply of organic seeds, reducing the widespread dependency on non-organic seeds and PRM in the organic sector.<sup>186</sup>

### c. Genetically modified seeds

As for GM seeds, further rules for the certification and marketing apply. Seeds and other propagating materials, as well as fruit-plant varieties that consist of a genetically modified organism can only be commercialized if the genetically modified organism has been authorized pursuant to Directive 2001/18/EC<sup>187</sup> or Regulation (EC) No 1829/2003. Directive 2001/18/EC requires specific environmental risk assessment, risk management and monitoring of GMOs or products containing, which are to be placed on the market, as well as adequate labelling of packages and making all assessment reports available to the public. Regulation (EC) No 1829/2003 in its turn details specific procedures for traceability and labelling requirements for products consisting of or containing GMOs.

<sup>184</sup> European Commission (2008) Regulation (EC) No 889/2008 of 5 September 2008 laying down detailed rules for the implementation of Council Regulation (EC) No 834/2007 on organic production and labelling of organic production, labelling and control [2008] OJ L250/1.

<sup>185</sup> European Council, ‘Organic Farming: New EU Rules Adopted’, <http://www.consilium.europa.eu/en/press/press-releases/2018/05/22/organic-farming-new-eu-rules-adopted> (last accessed 3 April 2019).

<sup>186</sup> Arche Noah, *Seeds in the New EU Organic Regulation 2018/848*, Information Note, October 2018, [https://www.arche-noah.at/files/arche\\_noah\\_information\\_note\\_seeds\\_in\\_new\\_the\\_eu\\_organic\\_regulation\\_-\\_october\\_2018\\_web.pdf](https://www.arche-noah.at/files/arche_noah_information_note_seeds_in_new_the_eu_organic_regulation_-_october_2018_web.pdf) (last accessed 3 April 2019).

<sup>187</sup> See especially, Arts 12–24, Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC.

In a recent decision, the European Court of Justice expressed its view that organisms obtained by mutagenesis fall within the category of GMOs and are thus subject to the European GM regulations.<sup>188</sup> For the court, ‘certain of those techniques/methods involve the use of chemical or physical mutagenic agents, and others involve the use of genetic engineering, those techniques/methods alter the genetic material of an organism in a way that does not occur naturally’ and therefore fall within the meaning of GM entrenched in Directive 2001/18/EC.<sup>189</sup> The debate has been settled on the basis of the potential risks of these organisms to human health and the environment.<sup>190</sup>

<sup>188</sup> European Court of Justice (ECJ), *Confédération paysanne and Others v Premier ministre and Ministre de l’agriculture, de l’agroalimentaire et de la forêt*, Case C-528/16, Judgment, 25 July 2018.

<sup>189</sup> *Ibid*, §29.

<sup>190</sup> Art 2(2), Directive 2001/18/EC, *supra* fn 187, defines a GMO as ‘an organism, with the exception of human beings, in which the genetic material has been altered in a way that does not occur naturally by mating and/or natural recombination’. This notion has been developed bearing in mind organisms obtained by transgenesis, i.e. the direct modification of the genome through the introduction of a foreign gene. Mutagenesis is not defined in the European GMO legislation. It refers to techniques developed in the 1960s in which genome modification is induced through the exposure of an organism to natural or industrial mutagens, such as ultraviolet light and chemicals, respectively, techniques existing when the first directive was adopted in 1990. If recognized as a technique leading to GMOs, mutagenesis is excluded from the scope of the directive (cf. Annex IB, Directive 2001/18/EC.). The introduction of new techniques of genetic modification has allowed for the production of genetically modified plant varieties similar to those obtained through transgenesis (e.g. herbicide-resistant varieties). Biotechnologies industries try to benefit from the exclusion of the scope of Directive 2001/18/EC. However, these techniques imply direct modification of DNA and the potential effects of these new plants to human health and the environment remain subject to controversies. The final decision of the ECJ clarified the legal status of new genetic engineering techniques: new genetic engineering techniques are GMOs and without a ‘long record of safety’, must be regulated as GMOs. ECJ, *Confédération paysanne and Others* judgment, *supra* fn 188, ruling §1.

## 6. THE IMPLEMENTATION OF THE UNDROP IN THE EU AND EU MEMBER STATES

The UNDROP adopted by the UN Human Rights Council and by the UN General Assembly in 2018 is a reflection of existing international law. It builds on and includes agreed language taken from a number of binding international treaties ratified by EU Member States, including human rights conventions (such as the ICESCR, the ICCPR and the CE-DAW Convention), the CBD and its Protocols and the ITPGRFA.

As we have seen, in international law, human rights and the UNDROP shall prevail over other international instruments, including those protecting intellectual property rights, and over national and regional laws and policies (see Part 4.D above). This is true even for states that abstained or voted against the adoption of the UNDROP.<sup>191</sup>

In this part, we will see that in implementing the UNDROP, the EU and EU Member States shall make sure that international agreements and standards to which they are party (Section A.1), as well as their national and regional laws and policies, are consistent with the right to seeds (Section A.2). Particular emphasis is then placed on the EU and EU Member States' obligations to respect, protect and fulfil the right to seeds (Section B.1); support peasant seed systems and promote the use of peasant seeds and agrobiodiversity (Section B.2); protect peasants' rights to traditional knowledge, innovation and practices, and to equitably participate in the sharing of benefits arising from the utilization of seeds (Section B.3); ensure the participation of peasants in decision-making processes in relation to seeds (Section B.4); and ensure that agricultural research and development integrate the needs of peasants, with their active participation (Section B.5).

<sup>191</sup> According to the UN Charter, the promotion and protection of human rights is one of the main purposes of the UN (Art 1(3)), and UN Member States pledged to take joint and separate action to promote universal respect for human rights (Arts 55(c) and 56). The UN Charter also provides that '[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail' (Art 103). It is also relevant to mention that in the Vienna Declaration and Programme of Action, all UN Member States reaffirmed that the promotion and protection of human rights is the first responsibility of governments. UN General Assembly, Vienna Declaration and Programme of Action, endorsed by UNGA Res 48/121, 20 December 1993. It is also worth mentioning that when it adopted the UNDROP, the UN General Assembly invited 'Governments, agencies and organizations of the United Nations system and intergovernmental and non-governmental organizations to disseminate the Declaration and to promote universal respect and understanding thereof', without making any distinction according to the votes of states during this adoption (UNGA Res 73/165, supra fn 54, §2).

### A. THE OBLIGATION TO ENSURE THE CONSISTENCY OF INTERNATIONAL AGREEMENTS AND STANDARDS, AND NATIONAL AND REGIONAL LAWS AND POLICIES WITH THE RIGHT TO SEEDS

#### 1. THE ELABORATION, INTERPRETION AND IMPLEMENTATION OF INTERNATIONAL AGREEMENTS AND STANDARDS

##### UNDROP

###### Article 2(4)

States shall elaborate, interpret and apply relevant international agreements and standards to which they are a party in a manner consistent with their human rights obligations as applicable to peasants and other people working in rural areas.

Seeds are subject to a number of international legal instruments dealing with diverse branches of law, including human rights, environmental conservation, trade and intellectual property rights. The human rights dimension of seeds collection, saving, use and marketing has more often than not been neglected in the elaboration and implementation of these international instruments. States have tended to privilege the development of the seed industry with little if any concern for the crucial role of seeds in peasants' survival and livelihoods as well as sociocultural aspects intertwined with the seeds' exchange and commercialization among peasants and communities.

To reverse this trend, and clarifying that human rights and the UNDROP shall have primacy over other international instruments, Article 2(4) provides that states shall elaborate, interpret and apply relevant international agreements and standards to which they are party, in a manner consistent with the rights of peasants, including their right to seeds. In other words, in elaborating new international instruments, and in interpreting and implementing the international obligations that they have already undertaken, including at the WTO and UPOV, the EU and the EU Member States shall privilege the rights of peasants and ensure that peasants' right to seeds is not infringed, but respected, protected and fulfilled. In accordance with Article 2(3) of the UNDROP, they shall also consult and cooperate in good faith with peasants, through their own representative institutions, before adopting and implementing international agreements that may affect their right to seeds.

As we have seen, in the EU and EU Member States the implementation of international agreements protecting intellectual property rights have posed serious challenges to the protection of peasants' right to seeds. One of these challenges lies in the limitations of peasants' right to freely save, use, exchange and sell farmed-saved seeds enshrined in Article 19(1.d) of the UNDROP. In order to protect this

right of peasants in elaborating new international instruments, and in interpreting and implementing existing ones, including at the WTO and UPOV, the EU and EU Member States could draw inspiration from the 2001 Protection of Plant Varieties and Farmers Rights Act in India, through which India protected plant varieties and breeders' rights, as well as farmers' rights to save, use, sow, resow, exchange, share and sell farm produce, including seeds of varieties protected by plant breeders' rights (Article 39).<sup>192</sup> They could elaborate new rules, or reinterpret existing flexibilities of the patent and plant variety protection systems, such as the farmers' privilege, private and non-commercial use and the breeders' exception, to ensure that they support and protect peasants' right to seeds.

The UNDROP also provides that the EU and EU Member States shall recognize the rights of peasants not only to rely on their own seeds but also on seeds available locally, including commercial seeds (Article 19(5)). In practice, this entails that notwithstanding any property rights industrial seed companies might hold, seed availability and access shall be guaranteed. The final retribution deriving from seed research and development shall not prevent farmers from having access to them. Industrial seed prices must be fair and adequate for local contexts.

Finally, it is important to underline that in negotiating free trade agreements, the EU and EU Member States shall make sure that these will not lead to violations of peasants' right to seeds in the EU and in other countries. This implies that they shall, *inter alia*, stop requiring developing countries to adopt UPOV's 1991 Act as a condition for concluding Economic Partnership Agreements with the EU.

## 2. NATIONAL AND REGIONAL LAWS AND POLICIES

### UNDROP

#### Article 15(5)

States shall establish mechanisms to ensure the coherence of their agricultural, economic, social, cultural and development policies with the realization of the rights contained in this Declaration.

#### Article 19(8)

States shall ensure that seed policies, plant variety protection and other intellectual property laws, certification schemes and seed marketing laws respect and take into account the rights, needs and realities of peasants and other people working in rural areas.

<sup>192</sup> The Protection of Plant Varieties and Farmers' Rights Act, *supra* fn 42. 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 (Art 42).

In the EU, a number of laws and policies challenging the protection of, or restricting the exercise of the right to seeds shall be changed, in accordance with Articles 15(5) and 19(8) of the UNDROP. According to these two provisions, the EU and EU Member States shall establish mechanisms to ensure the coherence of their agricultural, economic, social, cultural and development policies with the realization of the right to seeds (Article 15(5)), and they shall ensure that seed policies, plant variety protection and other intellectual property laws, certification schemes and seed marketing laws respect and take into account the rights, needs and realities of peasants (Article 19(8)). For example, the reform of the Common Agricultural Policy should include provisions and conditionality requirements that support and protect peasants' right to seeds and seed systems. And the EU and EU Member States shall engage in international cooperation and assistance to support national efforts aimed at implementing the right to seeds (Article 2(6)).

In accordance with Article 2(3) of the UNDROP, the EU and EU Member States shall also consult and cooperate in good faith with peasants, through their own representative institutions, before adopting and implementing legislation and policies and other decision-making processes that may affect their right to seeds.

## B. FOCUS ON SPECIFIC RIGHTS AND STATES' OBLIGATIONS

### 1. OBLIGATIONS TO RESPECT, PROTECT AND FULFIL THE RIGHT TO SEEDS

#### UNDROP

#### Article 2(1)

States shall respect, protect and fulfil the rights of peasants and other people working in rural areas. They shall promptly take legislative, administrative and other appropriate steps to achieve progressively the full realization of the rights of the present Declaration that cannot be immediately guaranteed.

#### Article 19 (3)

States shall take measures to respect, protect and fulfil the right to seeds of peasants and other people working in rural areas.

As we have seen, the inclusion in the UNDROP of states' obligations to respect, protect and fulfil the rights of peasants in general (Article 2(1)), and the right to seeds in particular (Article 19(3)) is in conformity with international human rights law (see Part 4.D.1 above).

In the UNDROF, examples of ways through which the EU and EU Member States shall respect the rights of peasants to seeds include the obligation – in accordance with Articles 2(4), 10(1) and 19(8) of the UNDROF<sup>193</sup> – to ensure the participation of peasants, directly and/or through their representative organizations, in the elaboration, interpretation and application of international agreements and standards and in the elaboration of national and regional laws and policies, to make sure that they do not infringe the realization of the right to seeds.

The obligation to protect is defined in Article 2(5) of the UNDROF. According to this provision, the EU and EU Member States shall take all necessary measures to ensure that non-state actors that they are in a position to regulate, such as private individuals and organizations, and transnational corporations and other business enterprises, respect and strengthen the rights of peasants, including their right to seeds.

In the UNDROF, measures that the EU and EU Member States shall take to protect the right to seeds include the prevention of risks arising from the development, handling, transport, use, transfer or release of any living modified organisms (Article 20(3)). This obligation is close to the commitment that the EU and EU Member States have taken, upon the ratification of the Cartagena Protocol on Biosafety, to take due account of ‘socio-economic considerations arising from the impact of living modified organisms on the conservation and sustainable use of biological diversity, especially with regard to the value of biological diversity to indigenous and local communities’.<sup>194</sup>

The coexistence of GM crops and conventional and organic farming has been subject to fierce debates in Europe. The EU Commission Recommendation of 23 July 2003 enacted the guidelines for the development of national strategies and best practices to ensure the coexistence of GM crops with conventional and organic farming.<sup>195</sup> The guidelines departed from the premise that ‘[n]o form of agriculture, be it conventional, organic or agriculture using genetically modified organisms (GMOs), should be excluded in the European Union’. But in 2015, EU Directive 2001/18 was modified, and while before 2015 it was already possible to ban GMOs on the basis of potential risks of these organisms to human health and the environment, such a ban can now also be justified for non-scientific reasons, including the need to protect conventional or organic agriculture. On the basis of this new legislation, 17 EU Member States and 4 regions have decided to ban GMO cultivation on their territory.<sup>196</sup>

193 Arts 2(4), 10(1) and 19(8), UNDROF, provide that peasants have the right to active and free participation, directly and/or through their representative organizations, in the preparation and implementation of policies, programmes and projects that may affect their lives, land and livelihoods (Art 10(1)); that states shall elaborate, interpret and apply relevant international agreements and standards to which they are party, in a manner consistent with the rights of peasants (Art 2(4)); and that states shall ensure that seed policies, plant variety protection and other intellectual property laws, certification schemes and seed marketing laws respect and take into account the rights, needs and realities of peasants (Art 19(8)).

194 Art 26(1), Cartagena Protocol.

195 EU Commission, Recommendation on guidelines for the development of national strategies and best practices to ensure the coexistence of genetically modified crops with conventional and organic farming, 2003/556/EC.

196 See inf’OGM, *Moratoires sur les OGM en France et en Europe*, <https://www.info-ogm.org/-Moratoires-sur-les-OGM-en-France-et-en-Europe-> (last accessed 8 April 2019).

Overall, however, too little attention has been paid to the vulnerability of conventional and organic agriculture to cross-fertilization between GM and non-GM crops.<sup>197</sup> The presence of unwanted GM material in non-GM crops, usually referred to as adventitious presence, usually occurs through ‘outcrossing, the growth of volunteer plants from stray seeds and admixture after harvest’.<sup>198</sup> The cases *Monsanto Canada Inc v Schmeiser* and *Marsh v Baxter*,<sup>199</sup> for instance, have exposed the complexities of this issue and the vulnerability of peasants to crop contamination. In Europe, Spanish peasants have abandoned organic maize production due to the high risk of contamination with GM crops, resulting in decertification and income loss.<sup>200</sup>

Finally, according to the UNDROF, examples of ways through which the EU and EU Member States shall fulfil peasants’ right to seeds include the obligations to ensure that seeds of sufficient quality and quantity are available to peasants at the most suitable time for planting, and at an affordable price (Article 19(4)), to recognize the rights of peasants to rely either on their own seeds or on other locally available seeds of their choice, and to decide on the crops and species that they wish to grow (Article 19(5)), and to ensure the conservation and sustainable use of biodiversity (Article 20(1)).

## 2. OBLIGATIONS TO SUPPORT PEASANT SEED SYSTEMS AND TO PROMOTE THE USE OF PEASANT SEEDS AND AGROBIODIVERSITY

### UNDROF

#### Article 11(3)

States shall take appropriate measures to promote the access of peasants and other people working in rural areas to a fair, impartial and appropriate system of evaluation and certification of the quality of their products at the local, national and international levels, and to promote their participation in its formulation.

#### Article 19(6)

States shall take appropriate measures to support peasant seed systems, and promote the use of peasant seeds and agrobiodiversity.

197 IFOAM EU (the European umbrella organization for organic food and farming) and FiBL, *Socio-Economic Impacts of GMOs on European Agriculture*, 2017, [https://www.ifoam-eu.org/sites/default/files/ifoam\\_eu\\_project\\_keeping\\_gmos\\_socioeconomic\\_study\\_final.pdf](https://www.ifoam-eu.org/sites/default/files/ifoam_eu_project_keeping_gmos_socioeconomic_study_final.pdf) (last accessed 3 April 2019). For the authors of this study, ‘[c]o-existence in breeding and seed production is considered to be unfeasible’, p 6.

198 K. Ramessar, T. Capell, R. M. Twyman and P. Christou, ‘Going to Ridiculous Lengths – European Coexistence Regulation for GM Crops’, 28 *Nature Biotechnology* 2 (Feb 2010) 133.

199 Supreme Court of Western Australia, *Monsanto Canada Inc v Schmeiser*, 2004, and *Marsh v Baxter*, 2014.

200 IFOAM – Organics International, *The Use of Organic Seed and Plant Propagation Material in Organic Agriculture*, Position Paper, 2011, p 23, [https://www.ifoam.bio/sites/default/files/position\\_seeds.pdf](https://www.ifoam.bio/sites/default/files/position_seeds.pdf) (last accessed 3 April 2019).

As we have seen, the former UN Special Rapporteur on the right to food, Olivier De Schutter, rightly stated that ‘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’.<sup>201</sup> This obligation was included in Article 19(6) of the UNDROP, which provides that states shall take appropriate measures to support peasant seed systems and promote the use of peasant seeds and agrobiodiversity.

In Europe, the implementation of this obligation represents an opportunity to rebalance the support given to peasant seed systems, compared to the support given to industrial seed systems in recent decades. In practice, this entails the development by the EU and EU Member States of normative frameworks that allow the peasants’ seed systems not only to exist, but to fully operate and thrive as production and conservation systems.<sup>202</sup> This is essential to protect the right of millions of European peasants to maintain, control, protect and develop their own seeds, enshrined in Article 19(2) of the UNDROP, as well as the interest of all in the preservation of biodiversity.<sup>203</sup>

As provided in Article 11(3) of the UNDROP, the EU and EU Member States shall also promote the access of peasants to a fair, impartial and appropriate system of evaluation and certification of the quality of their products, including seeds, at the local, national and international levels, and to promote their participation in its formulation.

### 3. THE OBLIGATION TO PROTECT PEASANTS’ RIGHTS TO TRADITIONAL KNOWLEDGE, INNOVATION AND PRACTICES, AND TO EQUITABLY PARTICIPATE IN THE SHARING OF BENEFITS ARISING FROM THE UTILIZATION OF SEEDS

#### UNDROP

##### Article 19(1)

Peasants and other people working in rural areas have the right to seeds ... including:

- (a) The right to the protection of traditional knowledge relevant to plant genetic resources for food and agriculture;
- (b) The right to equitably participate in sharing the benefits arising from the utilization of plant genetic resources for food and agriculture ...

<sup>201</sup> Report of the Special Rapporteur on the Right to Food, *supra* fn 14, §44.

<sup>202</sup> There are numerous ways to support peasants’ seed systems, including by supporting peasant field schools, participatory plant-breeding programmes, or modifying seed marketing rules.

<sup>203</sup> See also Report of the Special Rapporteur on the Right to Food, *supra* fn 14, Summary.

##### Article 19(2)

Peasants and other people working in rural areas have the right to maintain, control, protect and develop their own seeds and traditional knowledge.

##### Article 20(2)

States shall take appropriate measures to promote and protect the traditional knowledge, innovation and practices of peasants and other people working in rural areas, including traditional agrarian, pastoral, forestry, fisheries, livestock and agroecological systems relevant to the conservation and sustainable use of biological diversity.

##### Article 26(1)

Peasants and other people working in rural areas have the right to enjoy their own culture and to pursue freely their cultural development, without interference or any form of discrimination. They also have the right to maintain, express, control, protect and develop their traditional and local knowledge, such as ways of life, methods of production or technology, or customs and tradition. No one may invoke cultural rights to infringe upon the human rights guaranteed by international law or to limit their scope.

##### Article 26(3)

States shall respect, and take measures to recognize and protect, the rights of peasants and other people working in rural areas relating to their traditional knowledge, and eliminate discrimination against the traditional knowledge, practices and technologies of peasants and other people working in rural areas.

According to Articles 19(1) and 20(2) of the UNDROP, the EU and EU Member States shall protect the right of peasants to traditional knowledge, innovation and practices relevant to seeds, and their right to participate in the sharing of benefits arising from the utilization of seeds.

As we have seen, a predecessor of the UNDROP, the CBD requested states parties to ‘respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity’.<sup>204</sup> This prescription has been reaffirmed in the ITPGRFA<sup>205</sup> and the Nagoya Protocol.<sup>206</sup> This includes traditional knowledge concerning selection, conservation and use of seeds and propagating materials.

<sup>204</sup> Art 8(j), CBD.

<sup>205</sup> Art 9(2.a), ITPGRFA.

<sup>206</sup> Art 7, Nagoya Protocol.

The EU and EU Member States are all parties to these international agreements. But most of the countries in the region do not recognize the application of the right to traditional knowledge, innovations and practices to European peasants, and rather confine it to indigenous communities. In France, for example, traditional knowledge of indigenous communities in Guyana and Nova Caledonia is recognized, but not peasants' traditional knowledge.<sup>207</sup>

The UNDROP clarifies the international standards for the protection of peasants' traditional knowledge and calls upon states to adopt all possible measures at law and policy levels for their preservation and protection.<sup>208</sup> The preservation and promotion of traditional agricultural techniques and innovations, including seed handling practices, must be fully integrated in the European laws and policies.

In accordance with Article 19(1.b) of the UNDROP – and with the ITPGRFA and the Nagoya Protocol – laws and policies of the EU and EU Member States shall also protect and promote the rights of peasants to equitably participate in the sharing of benefits arising from the utilization of seeds and propagating materials. As clarified in the text of the Nagoya Protocol, the EU and EU Member States must take all necessary measures to ensure that the prior informed consent or approval and involvement of peasants and their communities are obtained before access to seeds and benefit-sharing modalities are prescribed in mutually agreed terms.<sup>209</sup>

In practice, EU Regulation 511/2014 on compliance measures to be adopted by EU Member States to implement the Nagoya Protocol remains very weak on traditional knowledge and prior informed consent of indigenous and local communities. And the official Guidance document C/2016/5337 on the scope of application and core obligations of Regulation 511/2014 confirms that 'traditional knowledge associated with genetic resources needs to be related to the utilisation of those resources and it must be covered by the relevant contractual agreements'.<sup>210</sup> Therefore, for peasants' right to traditional knowledge to be acknowledged as relevant in the EU compliance mechanism and due diligence obligations, it needs to be included in the contract establishing mutually agreed terms. This is a serious limitation to the realization of the rights of peasants to traditional knowledge and to equitably participate in the sharing of benefits arising from the utilization of seeds.

207 Confédération Paysanne, *Où en est l'application en France des droits des agriculteurs définis à l'article 9 du TIRPAA?*, 26 June 2018. See also C. Brenni, *Souveraineté alimentaire et semences: Questions autochtones et paysannes dans la gouvernance de la biodiversité agricole internationale (1970-2013)*, Éditions Alphil-Presses universitaires suisses, Neuchâtel, 2019, <https://www.alphil.com/freedownload.php?sku=978-2-889302-40-6> (last accessed 8 April 2019).

208 See Arts 20(2), 26(1) and 26(3), UNDROP.

209 See Arts 5(5) and 6(2), Nagoya Protocol.

210 EU Commission, Guidance document on the scope of application and core obligations of Regulation (EU) No 511/2014 of the European Parliament and of the Council on the compliance measures for users from the Nagoya Protocol in the Union, C/2016/5337, pp 1-19, point 2.3.2.

#### 4. THE OBLIGATION TO ENSURE THE RIGHT OF PEASANTS TO PARTICIPATION IN DECISION-MAKING PROCESSES IN RELATION TO SEEDS

##### UNDROP

###### Article 10(1)

Peasants and other people working in rural areas have the right to active and free participation, directly and/or through their representative organizations, in the preparation and implementation of policies, programmes and projects that may affect their lives, land and livelihoods.

###### Article 10(2)

States shall promote the participation, directly and/or through their representative organizations, of peasants and other people working in rural areas in decision-making processes that may affect their lives, land and livelihoods; this includes respecting the establishment and growth of strong and independent organizations of peasants and other people working in rural areas and promoting their participation in the preparation and implementation of food safety, labour and environmental standards that may affect them.

###### Article 11(2)

States shall adopt appropriate measures to ensure that peasants and other people working in rural areas have access to relevant transparent, timely and adequate information in a language and form and through means adequate to their cultural methods so as to promote their empowerment and to ensure their effective participation in decision-making in matters that may affect their lives, land and livelihoods.

###### Article 11(3)

States shall take appropriate measures to promote the access of peasants and other people working in rural areas to a fair, impartial and appropriate system of evaluation and certification of the quality of their products at the local, national and international levels, and to promote their participation in its formulation.

###### Article 19(1)

Peasants and other people working in rural areas have the right to seeds ... including: ...

- (c) The right to participate in the making of decisions on matters relating to the conservation and sustainable use of plant genetic resources for food and agriculture ...



## Article 25(3)

States shall encourage equitable and participatory farmer-scientist partnerships, such as farmer field schools, participatory plant breeding, and plant and animal health clinics to respond more appropriately to the immediate and emerging challenges that peasants and other people working in rural areas face.

## Article 27(1)

The specialized agencies, funds and programmes of the United Nations system, and other intergovernmental organizations, including international and regional financial organizations, shall contribute to the full realization of the present Declaration, including through the mobilization of, inter alia, development assistance and cooperation. Ways and means of ensuring the participation of peasants and other people working in rural areas on issues affecting them shall be considered.

Peasants are the major actors in seed development and use and the most affected by seeds laws, policies and regulations. The EU and EU Member States have a long tradition of democratic and inclusive governance, in which all social groups are encouraged to participate in public affairs. However, gaps still remain in the possibility for peasants to effectively participate in decision-making on matters related to seeds.

Building on existing instruments, including the ITPGRFA, the UNDROP recognizes the right of peasants to participate in the making of decisions on matters relating to seeds (19(1.c)). To guarantee that right, it provides, inter alia, that the EU and EU Member States shall ensure that peasants 'have access to relevant, transparent, timely and adequate information in a language and form and through means adequate to their cultural methods' (Article 11(2)). They shall also ensure the active participation of peasants in the elaboration of legislation covering the evaluation and certification of their products (Article 11(3)), and encourage equitable and participatory farmer-scientist partnerships, such as farmer field schools and participatory plant breeding (Article 25(3)).

In accordance with Articles 2(4), 10(1) and 19(8) of the UNDROP,<sup>211</sup> the EU and EU Member States shall also ensure the participation of peasants, directly and/or through their representative organizations, in the elaboration, interpretation and application of international agreements and standards and in the elaboration of national and regional laws and policies, to make sure that they do not infringe, but facilitate the realization of the right to seeds.

<sup>211</sup> Arts 2(4), 10(1) and 19(8), UNDROP, provide that peasants have the right to active and free participation, directly and/or through their representative organizations, in the preparation and implementation of policies, programmes and projects that may affect their lives, land and livelihoods (Art 10(1)); that states shall elaborate, interpret and apply relevant international agreements and standards to which they are party, in a manner consistent with the rights of peasants (Art 2(4)), and that states shall ensure that seed policies, plant variety protection and other intellectual property laws, certification schemes and seed marketing laws respect and take into account the rights, needs and realities of peasants (Art 19(8)).

It is also important to underline that Article 27(1) of the UNDROP requests regional organizations, such as the EU, to contribute to the full realization of the UNDROP, and to consider ways to ensure the participation of peasants on issues affecting them, which include issues affecting their right to seeds.

## 5. THE OBLIGATION TO ENSURE THAT AGRICULTURAL RESEARCH AND DEVELOPMENT INTEGRATE THE NEEDS OF PEASANTS, WITH THEIR ACTIVE PARTICIPATION

### UNDROP

## Article 19(7)

States shall take appropriate measures to ensure that agricultural research and development integrates the needs of peasants and other people working in rural areas, and to ensure their active participation in the definition of priorities and the undertaking of research and development, taking into account their experience, and increase investment in research and the development of orphan crops and seeds that respond to the needs of peasants and other people working in rural areas.

In addition to supporting peasant seed systems and ensuring peasants' participation in decision-making processes in relation to seeds, the EU and EU Member States shall also support research and development that contribute to the full realization of peasants' right to seeds.

According to Article 19(7) of the UNDROP, the EU and EU Member States shall ensure that agricultural research and development integrates the needs of peasants. In doing so, they shall invest more in research on and development of orphan crops, local varieties and seeds that respond to the needs of peasants, and they shall ensure peasants' active participation in the definition of priorities and the undertaking of research and development of orphan crops and local varieties, taking into account their experience in such research and development.

## 7. CONCLUSION

The normative framework of the EU and EU Member States on seeds has largely contributed to the fast development of European industrial agriculture and the increase in food production post-World War II. Nonetheless, these laws and regulations have largely neglected peasant systems and have contributed to the critical genetic erosion of seed diversity and associated traditional knowledge in the continent through the championing of crop uniformity and ex-situ seed banks.<sup>212</sup>

The UNDROP has been adopted to rebalance power relations in rural areas and to guarantee that states respect, protect and fulfil the rights of peasants who have been long left out of regional and national policies. In its mission to strengthen the rights of peasants, the UNDROP addresses a number of questions that are of fundamental importance to society at large, including the preservation and more democratic governance of biological and seed diversity.

The implementation of the UNDROP is therefore key for redressing distortions of laws and policies that have negatively affected European peasants and non-industrial farming systems as well as the rural environment and seed diversity. It is also a powerful tool to better protect peasants' right to seeds and seed systems in Europe.

<sup>212</sup> Bocci, 'Seed Legislation and Agrobiodiversity', supra fn 176, 32.

## ANNEX: RELEVANT ARTICLES OF THE UNITED NATIONS DECLARATION ON THE RIGHTS OF PEASANTS AND OTHER PEOPLE WORKING IN RURAL AREAS

### ARTICLE 1

1. For the purposes of the present declaration, a peasant is any person who engages or who seeks to engage alone, or in association with others or as a community, in small-scale agricultural production for subsistence and/or for the market, and who relies significantly, though not necessarily exclusively, on family or household labour and other non-monetized ways of organizing labour, and who has a special dependency on and attachment to the land.
2. The present declaration applies to any person engaged in artisanal or small-scale agriculture, crop planting, livestock raising, pastoralism, fishing, forestry, hunting or gathering, and handicrafts related to agriculture or a related occupation in a rural area. It also applies to dependent family members of peasants.
3. The present declaration also applies to indigenous peoples and local communities working on the land, transhumant, nomadic and semi-nomadic communities, and the landless, engaged in the above-mentioned activities.
4. The present declaration further applies to hired workers, including all migrant workers, regardless of their migration status, and seasonal workers, on plantations, agricultural farms, forests and farms in aquaculture and in agro-industrial enterprises.

### ARTICLE 2

1. States shall respect, protect and fulfil the rights of peasants and other people working in rural areas. They shall promptly take legislative, administrative and other appropriate steps to achieve progressively the full realization of the rights of the present declaration that cannot be immediately guaranteed.

...

3. Without disregarding specific legislation on indigenous peoples, before adopting and implementing legislation and policies, international agreements and other decision-making processes that may affect the rights of peasants and other people working in rural areas, States shall consult and cooperate in good faith with peasants and other people working in rural areas through their own representative institutions, engaging with and seeking the support of peasants and other people working in rural areas who could be affected by decisions before those decisions are made, and responding to their contributions, taking into consideration existing power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes.

4. States shall elaborate, interpret and apply relevant international agreements and standards to which they are party, in a manner consistent with their human rights obligations as they apply to peasants and other people working in rural areas.

5. States shall take all necessary measures to ensure that non-State actors that they are in a position to regulate, such as private individuals and organizations, and transnational corporations and other business enterprises, respect and strengthen the rights of peasants and other people working in rural areas.

6. States, recognizing the importance of international cooperation in support of national efforts for the realization of the purposes and objectives of the present Declaration, shall take appropriate and effective measures in this regard, between and among States and, as appropriate, in partnership with relevant international and regional organizations and civil society, in particular organizations of peasants and other people working in rural areas, among others. Such measures could include:

(a) Ensuring that relevant international cooperation, including international development programmes, is inclusive, accessible and pertinent to peasants and other people working in rural areas;

(b) Facilitating and supporting capacity-building, including through the exchange and sharing of information, experiences, training programmes and best practices;

(c) Facilitating cooperation in research and in access to scientific and technical knowledge;

(d) Providing, as appropriate, technical and economic assistance, facilitating access to and sharing of accessible technologies, and through the transfer of technologies, particularly to developing countries, on mutually agreed terms;

(e) Improving the functioning of markets at the global level and facilitating timely access to market information, including on food reserves, in order to help to limit extreme food price volatility and the attractiveness of speculation.

## ARTICLE 4

1. States shall take all appropriate measures to eliminate all forms of discrimination against peasant women and other women working in rural areas and to promote their empowerment in order to ensure, on the basis of equality between men and women, that they fully and equally enjoy all human rights and fundamental freedoms and that they are able to freely pursue, participate in and benefit from rural economic, social, political and cultural development.

2. States shall ensure that peasant women and other women working in rural areas enjoy without discrimination all the human rights and fundamental freedoms set out in the present Declaration and in other international human rights instruments, including the rights:

(a) To participate equally and effectively in the formulation and implementation of development planning at all levels; ...

(d) To receive all types of training and education, whether formal or non-formal, including training and education relating to functional literacy, and to benefit from all community and extension services in order to increase their technical proficiency;

(e) To organize self-help groups, associations and cooperatives in order to obtain equal access to economic opportunities through employment or self-employment;

(f) To participate in all community activities;

(g) To have equal access to financial services, agricultural credit and loans, marketing facilities and appropriate technology ...

## ARTICLE 10

1. Peasants and other people working in rural areas have the right to active and free participation, directly and/or through their representative organizations, in the preparation and implementation of policies, programmes and projects that may affect their lives, land and livelihoods.

2. States shall promote the participation, directly and/or through their representative organizations, of peasants and other people working in rural areas in decision-making processes that may affect their lives, land and livelihoods; this includes respecting the establishment and growth of strong and independent organizations of peasants and other people working in rural areas and promoting their participation in the preparation and implementation of food safety, labour and environmental standards that may affect them.

**ARTICLE 11**

1. Peasants and other people working in rural areas have the right to seek, receive, develop and impart information, including information about factors that may affect the production, processing, marketing and distribution of their products.
2. States shall adopt appropriate measures to ensure that peasants and other people working in rural areas have access to relevant transparent, timely and adequate information in a language and form and through means adequate to their cultural methods so as to promote their empowerment and to ensure their effective participation in decision-making in matters that may affect their lives, land and livelihoods.
3. States shall take appropriate measures to promote the access of peasants and other people working in rural areas to a fair, impartial and appropriate system of evaluation and certification of the quality of their products at the local, nation and international levels, and to promote their participation in its formulation.

**ARTICLE 15**

...

4. Peasants and other people working in rural areas have the right to determine their own food and agriculture systems, recognized by many States and regions as the right to food sovereignty. This includes the right to participate in decision-making processes on food and agriculture policy and the right to healthy and adequate food produced through ecologically sound and sustainable methods that respect their cultures.
5. States shall formulate, in partnership with peasants and other people working in rural areas, public policies at the local, national, regional and international levels to advance and protect the right to adequate food, food security and food sovereignty and sustainable and equitable food systems that promote and protect the rights contained in the present declaration. States shall establish mechanisms to ensure the coherence of their agricultural, economic, social, cultural and development policies with the realization of the rights contained in this Declaration.

**ARTICLE 19**

1. Peasants and other people working in rural areas have the right to seeds, in accordance with article 28 of the present Declaration, including:
  - (a) The right to the protection of traditional knowledge relevant to plant genetic resources for food and agriculture;
  - (b) The right to equitably participate in sharing the benefits arising from the utilization of plant genetic resources for food and agriculture;

(c) The right to participate in the making of decisions on matters relating to the conservation and sustainable use of plant genetic resources for food and agriculture;

(d) The right to save, use, exchange and sell their farm-saved seed or propagating material.

2. Peasants and other people working in rural areas have the right to maintain, control, protect and develop their own seeds and traditional knowledge.
3. States shall take measures to respect, protect and fulfil the right to seeds of peasants and other people working in rural areas.
4. States shall ensure that seeds of sufficient quality and quantity are available to peasants at the most suitable time for planting, and at an affordable price.
5. States shall recognize the rights of peasants to rely either on their own seeds or on other locally available seeds of their choice, and to decide on the crops and species that they wish to grow.
6. States shall take appropriate measures to support peasant seed systems, and promote the use of peasant seeds and agrobiodiversity.
7. States shall take appropriate measures in order to ensure that agricultural research and development integrates the needs of peasants and other people working in rural areas; they shall take appropriate measures in order to ensure their active participation in the definition of priorities and the undertaking of research and development, take into account their experience, and increase investment into research and development of orphan crops and seeds that respond to the needs of peasants and other people working in rural areas.
8. States shall ensure that seed policies, plant variety protection and other intellectual property laws, certification schemes and seed marketing laws respect and take into account the rights, needs and realities of peasants and other people working in rural areas.

**ARTICLE 20**

1. States shall take appropriate measures, in line with relevant international obligations, to prevent the depletion and ensure the conservation and sustainable use of biodiversity, in order to promote and protect the full enjoyment of the rights of peasants and other people working in rural areas.
2. States shall take appropriate measures in order to promote and protect the traditional knowledge, innovation and practices of peasants and other people working in rural areas, including traditional agrarian, pastoral, forestry, fisheries, livestock and agroecological systems relevant to the conservation and sustainable use of biological diversity.

3. States shall prevent risks of violation of the rights of peasants and other people working in rural areas arising from the development, handling, transport, use, transfer or release of any living modified organisms.

## ARTICLE 25

...

3. States shall encourage equitable and participatory farmer-scientist partnerships, such as farmer field schools, participatory plant breeding, and plant and animal health clinics to respond more appropriately to the immediate and emerging challenges that peasants and other people working in rural areas face.

...

## ARTICLE 26

1. Peasants and other people working in rural areas have the right to enjoy their own culture and to pursue freely their cultural development, without interference or any form of discrimination. They also have the right to maintain, express, control, protect and develop their traditional and local knowledge, such as ways of life, methods of production or technology, or customs and tradition. No one may invoke cultural rights to infringe upon the human rights guaranteed by international law or to limit their scope.

...

3. States shall respect, and take measures to recognize and protect, the rights of peasants and other people working in rural areas relating to their traditional knowledge, and eliminate discrimination against the traditional knowledge, practices and technologies of peasants and other people working in rural areas.

## ARTICLE 27

1. The specialized agencies, funds and programmes of the United Nations system, and other intergovernmental organizations, including international and regional financial organizations, shall contribute to the full realization of the present Declaration, including through the mobilization of, inter alia, development assistance and cooperation. Ways and means of ensuring the participation of peasants and other people working in rural areas on issues affecting them shall be considered.

2. The United Nations and its specialized agencies, funds and programmes, and other intergovernmental organizations, including international and regional financial organizations, shall promote respect for and the full application of the present Declaration, and follow up on its effectiveness.

## ARTICLE 28

1. Nothing in the present Declaration may be construed as diminishing, impairing or nullifying the rights that peasants and other people working in rural areas and indigenous peoples currently have or may acquire in the future.

2. The human rights and fundamental freedoms of all, without discrimination of any kind, shall be respected in the exercise of the rights enunciated in the present Declaration. The exercise of the rights set forth in the present Declaration shall be subject only to such limitations as are determined by law and that are compliant with international human rights obligations. Any such limitations shall be non-discriminatory and necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others, and for meeting the just and most compelling requirements of a democratic society.

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