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UNDROP and the Right to Seeds

Looking for the (Seed) Sovereigns

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Abstract

Following in the footsteps of the Nyéléni Declaration, the transnational agrarian movement La Via Campesina (LVC) secured recognition for the right to food sovereignty within the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas. Alongside this, the academic community and the agrarian movement itself have developed the concept of "seed sovereignty". Although it has not followed the same normative trajectory as food sovereignty, it has served (i) to bring together a range of issues scattered throughout the biodiversity "regime complex" (industrial property, concentration, seed regulation, GMO regulation, biopiracy, conservation); (ii) to establish a coherent and integrative intellectual framework, the high point of which was undoubtedly the enshrinement of the "right to seeds" in Article 19 of the Declaration.

This chapter traces the history of the concept and the genealogy of Article 19, showing that seed sovereignty, through its appeal to permanent sovereignty over natural resources (which was also clearly visible during the drafting process), sought to anchor the prerogatives granted to peasants and farmers over their seeds in international human rights law. More fundamentally, in its alliance with the right to food sovereignty, it represents a significant attempt to challenge the Westphalian sovereignty – a hallmark of the transnational agrarian movement.

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1 Introduction

1.1 *The Context: Self-Determination and Calls for Sovereignty over Natural Resources*

In one of the founding acts of the food sovereignty political movement, the Declaration of Nyéléni (2007), La Via Campesina (henceforward noted LVC) and its allies defined food sovereignty as "the right of peoples to healthy and culturally appropriate food produced through ecologically sound and sustainable methods, and their right to define their own food and agriculture systems".[1] Far from being the only definition outlined by the movement, in particular LVC – the transnational agrarian movement founded in 1993 to which it can be credited – others have entered the semantic discussion, and as a result the concept has evolved significantly in keeping with political engagements and strategic needs.

Whereas, for example, at the 1996 World Food Summit, food sovereignty was defined as "the right of each nation to maintain and develop its own capacity to produce its basic foods respecting cultural and productive diversity",[2] since the 2000s it has more frequently been understood, in alignment with the Declaration of Nyéléni's seminal delineation, as the "every community's fundamental right".[3]

Much ink has been spilled over the proper scope and *telos* of food sovereignty as a political concept.[4] Christina M. Schiavoni is correct in asserting that it

1 'The Declaration of Nyéléni, Nyéléni Village, Sélingué, Mali, February 2007' in by Nyéléni Steering Committee, *Nyéléni 2007. Forum for Food Sovereignty*.

2 LVC, 'The Right to Produce and Access to Land: Food Sovereignty – a Future without Hunger', *Statement on the Occasion of the World Food Summit*, (Rome, 1996). https://viacampesina.org/en/wp-content/uploads/sites/2/2021/11/1996-Rom-en.pdf. Also see, 'Statement by the NGO Forum to the World Food Summit', in FAO, *Report of the World Food Summit. 13–17 November 1996* [*WFS 96/REP Part One*] (FAO 1996) para 6.

3 LVC, 'Position Via Campesina Cancun', (s.l.: LVC, 2003). https://viacampesina.org/en/position-via-campesina-cancun/. Also see Forúm Mundial sobre soberanía alimentaria, 'Pour Le Droit Des Peuples à Produire, à s'alimenter et à Exercer Leur Souveraineté Alimentaire', *Déclaration Finale Du Forum Mondial Sur La Souveraineté Alimentaire. La Havane, Cuba, 7 Septembre 2001*, (Havana, Cuba, 2001). <base.socioeco.org/docs/doc-792_en.pdf>.

4 There is a large body of literature, part of which is reviewed below.

"(...) is a moving target, a reflection, in part, of the shifting terrain of global agrifood politics and of the new actors who have taken it up".[5] One may add that it is at least a reflection on the shifting sites of struggles, the reconfiguring of the international agenda, political expediency, as well as the heterogeneity of the agrarian movement itself (primarily LVC),[6] which could only persist in its form because it could integrate the new inputs and claims that it was being fed by its reticular organisation. Many of the inconsistencies that seem to run through the aforementioned texts can certainly be attributed to the gradual reorientation of the movement from the initial fight against the agricultural dumping of rich countries organised by the World Trade Organisation (WTO), the impact of structural adjustment policies on local agriculture,[7] to a struggle in favour of small-scale farming, local markets and community control over local food production systems.[8]

To be sure, "food sovereignty" is now recognised as a right in approximately fifteen national legislations,[9] enshrined in the operative text of the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas[10] (UNDROP, Art. 15.4), and increasingly mobilised by special procedures, particularly the Special Rapporteur on the Right to Food.[11]

5 C.M. Schiavoni, 'The Contested Terrain of Food Sovereignty Construction: Toward a Historical, Relational and Interactive Approach', 44:1 *The Journal of Peasant Studies* (2017) p. 1. DOI:10.1080/03066150.2016.1234455.

6 S.M. Borras Jr, 'La Vía Campesina and Its Global Campaign for Agrarian Reform', 8: 2–3 *Journal of Agrarian Change* (2008) p. 274. DOI:10.1111/j.1471-0366.2008.00170.x.

7 The movement particularly took aim at the Uruguay Round Agreement on Agriculture (Annex 1A of the Marrakesh Agreement Establishing the World Trade Organisation, Concluded at Marrakesh on 15 April 1994, WTO Treaty Series No. 1,11 GATT Publication VI-1994). Also see, UN General Assembly, *Interim Report of the Special Rapporteur on the Right to Food. The Right to Food in the Context of International Trade Law and Policy*, UN Doc A/75/219.

8 P. Claeys, *Human Rights and the Food Sovereignty Movement: Reclaiming Control* (Routledge, London, 2015) p. 20.

9 C. Golay, 'The Rights to Food and Food Sovereignty in the UNDROP' in M. Alabrese *et al.* (eds), *The United Nations' Declaration on Peasants' Rights* (Routledge, London, 2022) pp. 134–147. DOI:10.4324/9781003139874-12.

10 United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas, Res 17 December 2018, Seventy-third session, A/RES/73/165. "Food sovereignty" is also defined in the preamble.

11 UN Human Rights Council, *Report of the Special Rapporteur on the Right to Food, Michael Fakhri*, UN Doc A/HRC/49/43, para. 96; UN General Assembly, *Interim Report of the Special Rapporteur on the Right to Food, Michael Fakhri. The Right to Food and the Coronavirus Disease Pandemic*, UN Doc A/77/177, para. 46; UN Human Rights Council, *Report of the Special Rapporteur on the Right to Food, Michael Fakhri*, UN Doc A/HRC/52/40, para. 37; UN General Assembly, *Interim Report of the Special Rapporteur on the Right to Food, Michael Fakhri. Right to Food for Food System Recovery and Transformation*, UN Doc A/78/202, paras 73, 99, 100.

Furthermore, the recent decision by the Human Rights Council (HRC) to establish a new special procedure, specifically aimed at "promoting effective and comprehensive dissemination and implementation",[12] should provide clarity on the scope of the right to food sovereignty while bolstering the overall legal significance of the Declaration. Notably, the instrument has been invoked not only by special procedures,[13] but also by treaty bodies[14] and recently in the jurisprudence of the Human Rights Committee[15] and the Inter-American Court of Human Rights.[16] However, ambiguities remain.

On the surface, tensions persist between the rather unspecified definition of food sovereignty provided in the preamble of the UNDROP, which potentially encompasses various broad categories of rights-holders (*e.g.*, peasants as defined in the UNDROP and associated categories,[17] each State, every citizen, every natural person), and Article 15.4, which seems to restrict the right to food sovereignty to peasants and other people working in rural areas. This ambiguity is not new and has been pervasive throughout the history of the concept. It could be argued that food sovereignty seeks to capture the "layering of different jurisdictions over which rights can be exercised"[18] and has its own geographies shaped by specific histories and contours of resistance. After all, upholding the state as a significant agent in overhauling the food and agricultural system is inevitable. There are issues addressed at both national and global levels, and envisioning a concept of food sovereignty devoid of this state-centric and external dimension is challenging.[19] At the same time, while the concept challenges the notion of the state's paramount authority by highlighting the multivalent hierarchies of power and control within the world food system, the language of rights, particularly that of "human rights",

12 Res 54/9, A/HRC/RES/54/9.

13 See, e.g., UN General Assembly, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, David R. Boyd*, UN Doc A/76/179, para. 73.

14 See, e.g., CESCR, *Concluding Observations: Guinea*, UN Doc E/C.12/GIN/CO/1, para. 40; UN CEDAW, *Concluding Observations: Colombia*, UN Doc CEDAW/C/COL/CO/9, para. 42.

15 UN Human Rights Committee, *Portillo Cáceres and Others v. Paraguay*, Communication No. 2751/2016, UN Doc CCPR/C/126/D/2751/2016, para. 7.8.

16 *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v Argentina*, 6 February 2020, IACtHR, Merits, Reparations and Costs, Series C, No. 400.

17 UNDROP, Article 1.

18 R. Patel, 'Food Sovereignty', 36:3 *The Journal of Peasant Studies* (2009) p. 668. DOI:10.1080/03066150903143079.

19 On the distinction between the internal and external dimension of the right to food sovereignty, see Claeys, *supra* note 8, pp. 23–25; O. Hospes, 'Food Sovereignty: The Debate, the Deadlock, and a Suggested Detour', 31:1 *Agriculture and Human Values* (2014) p. 124. DOI:10.1007/s10460-013-9449-3.

reinstates the *State* as the entity and focus of authority that makes such rights possible.[20]

These are particularly complex issues. However, as will be argued in this paper, the debate on seeds, which emerged within the broader discussion on food sovereignty, and which has sometimes led to demands for "seed sovereignty", illuminates the concept of sovereignty at the heart of the right to food sovereignty. This is because seed sovereignty speaks to the ambition of the food sovereignty movement – taking here its cue from the indigenous movements which culminated in the adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007[21] – to challenge the State-centric approach to sovereignty *by building on the doctrines of self-determination and sovereignty over natural resources and give new impetus to the right to development*.

In other words, if, as astutely suggested, "(…) the right to food sovereignty more or less reiterates peoples' right to self-determination",[22] the seed sovereignty concept, which aided in shaping the rights-talk on seed in the UNDROP, has close links with the doctrine of peoples' sovereignty over natural resources. In any case, as a claim to local autonomy and self-governance, food sovereignty could hardly leave unaddressed those very resources on which agricultural production depends. After all, "[g]iven the position of the seed as part of the irreducible core of agricultural production, it is difficult to imagine any form of 'food sovereignty' that does not include a necessary and concomitant dimension of what might be called 'seed sovereignty'".[23] One available route to legally translate this ambition was to rely on the right to freely dispose of natural resources and the right to development. It will be seen that this is what the text implicitly does, after a failed attempt at enshrining a peasants' right to sovereignty over natural resources in the instrument. However, this presupposes an initial examination of how the concept of "seed sovereignty" consolidated various issues that were scattered within the regime complex governing seed systems, while bringing out meeting points between issues of industrial property, concentration in seed market, seed regulation,

20 P. Clark, 'Food Sovereignty, Post-Neoliberalism, Campesino Organizations and the State in Ecuador', Food Sovereignty: A Critical Dialogue. International Conference Yale University September 14–15, 2013. Conference Paper #34, (Yale: Yale University, 2013), p. 4. <www.tni.org/files/download/34_clark_2013_0.pdf>.

21 United Nations Declaration on the Rights of Indigenous Peoples, Res 13 September 2007, A/RES/61/295.

22 Claeys, *supra* note 8, p. 22.

23 J.R. Kloppenburg, 'Re-Purposing the Master's Tools: The Open Source Seed Initiative and the Struggle for Seed Sovereignty', 41:6 *The Journal of Peasant Studies* (2014) p. 1225. DOI:10.1080/03066150.2013.875897.

GMO regulation, biopiracy, crop diversity conservation and cultural protection. Additionally, it necessitates an exploration of how "seed sovereignty" has contributed defining a coherent and integrative intellectual framework within which rights-talk on seeds in the UNDROP could take shape and be given a firmer foothold in international human rights law, notably through appeals to the principle of sovereignty over natural resources and implied reliance on the right to freely dispose of natural resources.

1.2 *Negotiating within a Regime Complex: Playing the Inconsistency Card*

Before proceeding to outline the next paragraphs, a few theoretical and methodological observations are in order.

For LVC and the transnational agrarian movements, the adoption of the UNDROP undoubtedly represented what has aptly been described as the "globalisation of the vernacular",[24] *i.e.*, a strategy whereby peasant movements "(…) sought to inject their own conception of human rights back at the core of the UN human rights system to radically expand its boundaries".[25] Right-claiming was "constitutive" rather than "reactive" insofar as peasant movements strove to "(…) shift the contours of human rights themselves, by advocating for the recognition of new rights or the reconfiguration of existing ones".[26] While all of this is true, it should be remembered that the UNDROP – and especially the provisions pertaining to seeds – had to be negotiated within a so-called "regime complex".[27] Originating within international relations scholarship, the concept of "regime complex" or "institutional complex"[28] seeks to encapsulate the dynamics wherein "regimes", defined as "sets of norms, decision-making procedures, and organisations coalescing around functional issue-areas",[29]

24 C. Rodríguez-Garavito, 'The Globalization of the Vernacular: Mobilizing, Resisting, and Transforming International Human Rights from Below', *NYU School of Law, Public Law Research Paper No. 21–42*, (Rochester, NY, 2021). <papers.ssrn.com/abstract=3921809>.

25 P. Claeys and K. Peschard, 'Transnational Agrarian Movements, Food Sovereignty, and Legal Mobilization' in Marie-Claire Foblets *et al.* (eds), *The Oxford Handbook of Law and Anthropology* (Oxford University Press 2020).

26 L. Cotula, 'Between Hope and Critique: Human Rights, Social Justice and Re-Imagining International Law from the Bottom Up', 48:2 *Georgia Journal of International & Comparative Law* (2020) p. 484.

27 K. Raustiala and D.G. Victor, 'The Regime Complex for Plant Genetic Resources', 58:2 *International Organization* (2004) pp. 277–309. DOI:10.1017/S0020818304582036.

28 S. Oberthür and J. Pożarowska, 'Managing Institutional Complexity and Fragmentation: The Nagoya Protocol and the Global Governance of Genetic Resources', 13:3 *Global Environmental Politics* (2013) pp. 100–118. DOI:10.1162/GLEP_a_00185.

29 M.A. Young, 'Introduction: The Productive Friction between Regimes' in M.A. Young (ed.), *Regime Interaction in International Law* (Cambridge University Press, Cambridge, 2012) p. 9. DOI:10.1017/CBO9780511862403.001.

are positioned to engender conflicts amidst fragmentation.[30] In the absence of overarching principles of authority, termed by Dunoff as "redemptive narratives",[31] or a clear hierarchy among the sources of international law, such conflicts may persist. The issue of seed serves as an exemplar, situated at the focal point of a complex regime acknowledged in academic discourse. This regime encompasses numerous international institutions, including but not limited to the Conference of the Parties to the Convention of Biological Diversity (CBD),[32] the Food and Agriculture Organisation (FAO), the World Trade Organisation (WTO), the International Union for the Protection of New Varieties of Plants (UPOV), the World Intellectual Property Organisation (WIPO), and various human rights treaty bodies, demonstrating interdependence and overlapping jurisdictions within the realm of international relations.[33]

In contrast to the prevailing focus in international law literature on the activities of international courts and judicial bodies in resolving treaty conflicts, scholarly inquiry into regime complexity and interplay has expanded the scope of investigation along two key avenues. Firstly, it has encompassed international "instruments" beyond treaties, referring to formally non-legally binding international agreements that receive intergovernmental endorsement within a treaty framework.[34] Secondly, it has delved into law-making processes, exploring questions of "jus-generative power".[35]

This body of literature possesses significant explanatory power in understanding the specific strategies employed by peasant movements in asserting their rights. Notably, they were unable to start from scratch, as there exists "No Clean Slate"[36] in a regime complex. Instead, they had to navigate pre-existing frameworks, including the longstanding recognition of intellectual property rights (IPRs) over genetic resources, the sovereign rights of States over natural resources, and the tensions between these rules and indigenous peoples' rights over their lands, territories, resources, and

30 M. Koskenniemi and ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (UN, 2006) UN Doc A/CN.4/L.682.

31 J.L. Dunoff, 'A New Approach to Regime Interaction' in M.A. Young (ed.), *Regime Interaction in International Law*, (Cambridge University Press, Cambridge, 2012) pp. 146 *seq*. DOI:10.1017/CBO9780511862403.008.

32 Convention on Biological Diversity, Rio de Janeiro, 5 June 1992 (entry into force 29 December 1993), UNTS vol. 1760, p. 79, Articles 8(j) and 10(c).

33 See Raustiala and Victor, *supra* note 27; Oberthür and Pożarowska, *supra* note 28.

34 E. Morgera *et al.*, *Study Into Criteria to Identify a Specialized International Access and Benefit-Sharing Instrument, and a Possible Process for Its Recognition*, CBD/SBI/2/INF/17 (CBD, Montreal, 2018), para. 19.

35 Young, *supra* note 29, p. 10.

36 Raustiala and Victor, *supra* note 27, p. 296.

traditional knowledge (TK), alongside cultural rights.[37] Additionally, they encountered the rights provided under the "hortatory" stipulations of the Seed Treaty on farmers' rights[38] and the qualified stipulations regarding indigenous and local communities in the CBD.

Within this context, various strategies (not necessarily mutually exclusive) were available. One approach could involve efforts to disentangle and demarcate conflicting elements, utilising mechanisms such as "saving clauses" or "self-standing conflict clauses".[39] Another strategy entailed leveraging inconsistencies and conflicts to provoke changes in other regimes. This is a multifaceted strategy that can involve discrediting claims of purportedly self-contained regimes (said to be immune to interference from human rights and general international law).[40] Additionally, it may seek to advance the recognition of a human rights-based hierarchy within international law.[41] Its overall aim is to promote "mutual supportiveness"[42] through effective interplay management and the balancing of competing rights with a view to strengthening synergies amongst the different regimes at stake.

The peasant movement utilised this broad register: an examination of the UNDROP reveals that tensions between farmers' rights and the IP regime – exacerbated by the removal of the carve-outs or qualifications surrounding the former – are now particularly acute. This situation underscores a clear imperative for enhanced regime interplay management and mutual supportiveness in legal interpretation and international negotiations.

37 B. Saul *et al.*, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press, Oxford, 2016) pp. 1175 *seq*.

38 International Treaty on plant genetic resources for food and agriculture, Rome, 3 November 2001 (entry into force 29 June 2004), UNTS vol. 2400, p. 303, Article 9. See, G. Moore and W. Tymowski, *Explanatory Guide to the International Treaty on Plant Genetic Resources for Food and Agriculture* (IUCN-The World Conservation Union, Gland, 2005) pp. 67–78.

39 R. Pavoni, 'Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the "WTO-and-Competing-Regimes" Debate?', 21:3 *European Journal of International Law* (2010) p. 654. DOI:10.1093/ejil/chq046.

40 Such as that of international trade law: see, P. Van Den Bossche and W. Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases, and Materials* (Cambridge University Press, Cambridge, 2021), pp. 68–71. DOI:10.1017/9781108784542. Also see A.R. Ziegler and B. Boie, 'The Relationship between International Trade Law and International Human Rights Law' in E. De Wet and J. Vidmar (eds.), *Hierarchy in International Law. The Place of Human Rights* (Oxford University Press, Oxford, 2012) p. 292. DOI:10.1093/acprof:oso/9780199647071.001.0001.

41 E. De Wet and J. Vidmar, 'Conclusions' in E. De Wet and J. Vidmar (eds.), *Hierarchy in International Law. The Place of Human Rights* (Oxford University Press, Oxford, 2012) pp. 306–307. DOI:10.1093/acprof:oso/9780199647071.001.0001.

42 Pavoni, *supra* note 39.

Moreover, the mobilisation of international human rights law – including the right to food, the right of peoples to freely dispose of their natural wealth and resources, and cultural rights – points towards a more straightforward solution for addressing persistent conflicts in the future. The entrenchment of peasants' rights in international human rights law substantiates the concept of an "international community" bound by a core set of fundamental values,[43] lending credence to the notion that these norms now enjoy hierarchical superiority within international law[44] and that regime conflicts and collisions must be resolved in favour of peasants.

Notably, this broad register could be utilised because of the forum shopping enabled by a regime complex.[45] The choice of the Human Rights Council – fiercely opposed by some States that would have preferred to have these issues referred, for example, to the FAO or WIPO[46] – was a strategic move intended to have a body giving more space to NGOs and civil society while mobilising the more favourable environment of the UN human rights treaty system. This move proved particularly successful in securing the support of two special reports on the right to food (past and then-present), in focusing the debate on human rights (rather than on economic issues, innovation, and the "governance" of

43 F. Francioni, 'Genetic Resources, Biotechnology and Human Rights: The International Legal Framework' in Francesco Francioni (ed.), *Biotechnologies and International Human Rights* (Hart Publishing, Oxford, 2007) pp. 17–18.

44 The issue of hierarchy in international law and the existence of peremptory norms is controversial. On this, one may consult, D. Shelton, 'Normative Hierarchy in International Law', 100:2 *American Journal of International Law* (2006) pp. 291–323. DOI:10.1017/S0002930000016675; E. De Wet and J. Vidmar, 'Introduction' in E. De Wet and J. Vidmar (eds.), *Hierarchy in International Law. The Place of Human Rights* (Oxford University Press, Oxford, 2012) pp. 1–12. DOI:10.1093/acprof:oso/9780199647071.001.0001; J. Vidmar, 'Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?' in E. De Wet and J. Vidmar (eds.), *Hierarchy in International Law. The Place of Human Rights* (Oxford University Press, Oxdord, 2012) pp. 13–41. DOI:10.1093/acprof:oso/9780199647071.001.0001; Ziegler and Boie, *supra*, note 40.

45 Raustiala and Victor, *supra* note 27, p. 299.

46 See, e.g., UN Human Rights Council, *Report of the Open-Ended Intergovernmental Working Group on a Draft United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas*, UN Doc A/HRC/26/48, para. 29; *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, paras 61, 72; *Report of the Open-Ended Intergovernmental Working Group on a United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas*, UN Doc A/HRC/36/58, para. 259; *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*, A/HRC/39/67, paras 35, and Annex III, p. 51. Hereafter, these documents are cited by their UN document number only.

nature), and in creating a negotiating environment that was exceptionally accommodating to peasants' movements.[47]

On the methodological front, this article is based on a systematic review of the *travaux préparatoires* to the UNDROP, including the Report of the open-ended intergovernmental working group for each session, other Statements and presentations by experts, and statements from States and the NGOs.[48] The paper also draws on the vast scholarly literature that has been produced on the transnational LVC movement, focusing on work that has specifically examined how the mobilisation around food sovereignty was progressively converted into a rights-claiming strategy, alongside papers relying on first-hand accounts of the movement and/or the negotiation process that include ethnographic data.[49] The article also makes extensive use of the grey literature produced by LVC and its allies.

The article is organised in four sections. The first discusses the notion of food sovereignty. Although the term was not used during the UNDROP negotiations, it has powerful explanatory value in terms of the framework of collective action that enabled the emergence of the issue of seed autonomy within the transnational agrarian movement. Gradually, it received coherent treatment within the broader debates on food sovereignty. The second section aims to describe the introduction of rights-talks into the seed complex regime. It demonstrates how LVC sought to build on farmers' rights as provided for in the Seed Treaty and reinterpret them in the light of international human rights law; and how, by doing so, they successfully increased tensions between regimes, while proposing a resolution by foregrounding the idea of a peasant-friendly hierarchy of international law. This section establishes the legitimacy of such a re-reading and mutual supportiveness by aligning them with the

47 On the work of the HRC Advisory Committee prior to the Human Rights Council, Res. 21/19 (2012) A/HRC/RES/21/19, see UN Doc A/HRC/13/32, UN Doc A/HRC/16/63 and UN Doc A/HRC/19/75 (study on discrimination in the context of the right to food). LVC's partnership with FIAN International and CETIM, two NGOs with ECOSOC consultative status, allowed the transnational movement to anticipate a more direct influence at meetings and elevate peasants' profile at the UN. This being said, throughout the five sessions of the open-ended intergovernmental working group (2013, 2015, 2016, 2017, 2018), civil society organisations and representatives of peasants and rural works did not require accredited NGOs to speak on their behalf, as it was determined that negotiations would not necessitate ECOSOC consultative status (see C. Hubert, *The United Nations Declaration on the Rights of Peasants: A Tool in the Struggle for Our Common Future* (CETIM, Geneva, 2019) p. 38).

48 https://www.ohchr.org/en/hr-bodies/hrc/rural-areas/wg-rural-areas-index.

49 In addition to the literature quoted throughout the article, see references in Claeys and Peschard, *supra* note 25.

current state of development of international human rights law, which supports many aspects of the right to seeds. Nevertheless, an examination of the normative support for the provision on the right to seeds reveals that there seems to be less backing for the right of peasants to maintain, control, protect, and develop their seeds. The fourth section then examines LVC's endeavour to ground the declaration in the principle of peoples' full sovereignty over their natural wealth and resources. As demonstrated in this section, the concept of seed sovereignty is relevant because it elucidates the strategy of the transnational agrarian movement to establish the right to control and protect seeds within the broader right to free disposal of natural resources. Regional human rights courts' case law, along with the quasi-jurisprudence of human rights monitoring bodies and standard setting of special procedures, highlight the widespread recognition of this right. These developments have led to the establishment of standards such as Free, Prior and Informed Consent (FPIC) and benefit-sharing for both indigenous peoples and non-indigenous communities.

The final section explores this latest development within the context of the transnational agrarian movement's struggle to challenge the conventional understanding of Westphalian sovereignty. It emphasises the ongoing efforts required to establish peasant sovereignty and highlights the vulnerability of a peasants' right to freely dispose of their resources in the face of permanent sovereignty of the State over the resources of its territory and the doctrine of eminent domain. This concluding section ends by examining the potential of a mutually supportive interpretation of international human rights law and international environmental rights law. It does so by leveraging the concept of peasants as "stewards" of biodiversity and by drawing in the debates the doctrine of biocultural rights. This approach has the advantage of strengthening several aspects of the right to seeds (such as the right to resow and the right to freely exchange seeds among farmers) that are currently relatively inadequately protected in international human rights law.

2 Seed Sovereignty or the Struggle for Seed Autonomy

2.1 *From a Rallying Cry to a Counter-Project*

Talking about "seed sovereignty" warrants some preliminary remarks. While the syntagm is self-evidently modelled upon that of "food sovereignty", it has not had the same political and normative journey. Seed sovereignty is not a legal concept, let alone a right or a principle. There was no mention of it in the work of the open-ended intergovernmental working group, and this is

barely a term of art that is to be found somewhere on the political agenda of an international forum.[50] That said, mentions were far from absent in LVC's rhetoric up to the adoption of the UNDROP, even though they never featured in policy documents or statements, and more frequent occurrences can be found in recent years, particularly among LVC's allies.[51] In addition, the concept has been mainstreamed in the academic literature.[52]

There are some compelling reasons for bringing "seed sovereignty" into the discussion. As will be shown, it has been a discreet but recurrent theme in debates around food sovereignty and has been used as an overarching term to encompass a series of difficulties and demands of peasants in relation to their seeds. It has facilitated the convergence of various disparate issues within the regime complex, shedding light on the nexus (and collisions) between IPRs, seed market concentration, seed regulation, GMO regulation, biopiracy, crop diversity conservation, and cultural protection. Seed sovereignty has played a pivotal role in establishing a cohesive and comprehensive intellectual framework anchored in human rights, against which conflicts between regimes could be viewed from a fresh perspective. Finally, the concept of seed sovereignty speaks to what the transnational agrarian movement, once equipped with a panoramic view of the problems and their root causes, has set out to achieve with the UNDROP in terms of natural and productive resources. If anything, "sovereignty" encapsulates LVC's demand for the restoration of peasants' autonomy over productive resources and development pathways.

The origin of the syntagm is convoluted. Excluding a brief mention in a RAFI's (today etc Group)[53] 1999 campaign of letters to 140 national governments calling them to ban Terminator patents[54] and Navdanya's "Bija Satyagraha" campaign[55] from the late 1990s, launched by Vandana Shiva's Indian-based NGO, focused on Beej (or Bija) Swaraj ("seed sovereignty" or "seed

50 See a brief mention, concerning an NGO-led initiative called "Zimbabwe Seed Sovereignty Programme", in T/GB-9/AHTEG-FR-4/21/Inf.2.1, April 2021.

51 LVC and GRAIN, 'Seed Laws That Criminalise Farmers. Resistance and Fightback' (LVC 2015) p. 31 <hviacampesina.org/en/wp-content/uploads/sites/2/2015/04/2015-Seed%20laws%20booklet%20EN.pdf>; LVC, 'La Via Campesina 2013 Annual Report' (LVC 2014) p. 13 <viacampesina.org/en/wp-content/uploads/sites/2/2014/03/EN-annual-report-2013.pdf> referring to this article posted in a mainstream media outlet: 'Via Campesina and the Fight for Seeds' (*HuffPost*, 18 June 2013) < www.huffpost.com/entry/via-campesina-fights-for-_b_3447145>.

52 See relevant references in this section.

53 To which we shall turn our attention to later.

54 RAFI, 'Call for "Seed Sovereignty" Ban on Terminator Patents', (etc Group, s.l., 29 May 1999). <etcgroup.org/content/call-seed-sovereignty-ban-terminator-patents>.

55 V. Shiva, 'Satyagraha: The Highest Practise of Democracy and Freedom', 51:1 *Social Change* (2021) pp. 80–91. DOI:10.1177/0049085721993160.

freedom"),[56] there is limited evidence as to how the term was incorporated into the LVC's rhetoric in the early 2000s.[57] Even more intriguingly, the concept resurfaced and was lent academic credence through a paper that Jack Kloppenburg had prepared for a workshop on food sovereignty held at the University of Saskatchewan in 2008.[58] Here, Kloppenburg did not draw on any informational or advocacy material (from LVC or allies) engaging directly with "seed sovereignty". Contrarily, he wrote that "(…) what we might call 'seed sovereignty' has not yet been explicitly formulated by Vía Campesina or any of its affiliated organisations".[59] Despite this, he argued, the term could be used to describe LVC's undertakings of "resistance" and "creativity" around seeds since its inception, and that it was important to do so, at least analytically, to reveal the centrality of seeds and biodiversity to achieving food sovereignty. After all, LVC has recognised seeds as "the fourth resource (…) after land, water and air", adding that "biodiversity should be the basis to guarantee food security as a fundamental non-negotiable right of all peoples".[60]

As with early approaches to food sovereignty, seed sovereignty is first a rallying cry against what is described, in rather generic terms, as "the neoliberal project of restructuring the social and natural worlds around the narrow logic of the market".[61] Within academic circles focused on plant breeding and seed management, the litany of grievances against this paradigm shift is well-documented and extensive. These concerns are intricately linked to several legal and regulatory developments: the advent of hybrid varieties marked a pivotal moment, delineating a new paradigm where breeders and geneticists became the architects of elite cultivars, while farmers transitioned into mere end-users relegated to the tasks of sowing and harvesting.[62]

56 M. Singh Decosas, *Ways of Seeing the Seed: Navdanya's Seed Satyagraha* (PhD, Simon Fraser University, Burnaby, 2010) p. 202.

57 The earliest mention on LVC's website dates back from 2006 (LVC, 'India: KRRS Observes Black Day on August 15th' (LVC 2006) <viacampesina.org/en/india-krrs-observes-black-day-on-august-15th/>), which reports on the mobilisation of the Indian movement Karnataka Rajya Raitha Sanga (KRRS) on 15 August 2006 against, among other things, the Seed Bill 2004 and the authorisation for field trials of the Bt aubergine variety Bollgard II.

58 J.R. Kloppenburg, 'Seeds, Sovereignty, and the Vía Campesina: Plants, Property, and the Promise of Open Source Biology' (Workshop on Food Sovereignty: Theory, Praxis and Power November 17–18, 2008, University of Saskatchewan, Saskatoon, Saskatchewan, 2008).

59 *Ibid.*, p. 5.

60 LVC, 'The Position of Via Campesina on Biodiversity, Biosafety and Genetic Resources', 44:4 *Development* (2001) p. 48. DOI:10.1057/palgrave.development.1110291.

61 Kloppenburg, *supra* note 58, p. 1.

62 C. Bonneuil, 'Seeing Nature as a "Universal Store of Genes": How Biological Diversity Became "Genetic Resources", 1890–1940', 75 *Stud Hist Philos Biol Biomed Sci.* (2019) pp. 1–14. DOI:10.1016/j.shpsc.2018.12.002.

Traditional varieties and landraces, once stewarded by farming communities, have increasingly been turned into gene pools utilised primarily for *ex situ* germplasm collection.[63] The evolution of IPRs in in plant breeding was initially crystallised through limited protections under the US Plant Patent Act of 1930 for asexually reproducing varieties only,[64] and further expanded with the inception of the UPOV Convention in 1961, culminating in landmark precedents such as the *Diamond v. Chakrabarty* case in 1980.[65] This trajectory ultimately led to the incorporation of IPRs within the international trade regime,[66] facilitating the proliferation of patents on various plant-related innovations amidst the rapid advancement of biotechnology.[67] This trajectory also gave rise to the proliferation of seed laws, *i.e.*, regulations pertaining to variety registration and seed and propagating material certification. These regulations adhere to the specific criteria of Distinctness, Uniformity and Stability (DUS) and Agronomic and Technological Value (ATV) to facilitate their market placement. This process first began in Europe following World War II[68] and have since permeated agricultural landscapes in the global South over the past two decades,[69] at the expense of peasants' varieties, exacerbating the marginalisation of traditional farming communities.

Overall, the strengthening of plant breeders' rights through the passing of UPOV[70] 1991-compliant legislations (which many developing countries were forced to adopt via TRIPS-plus agreements),[71] together with the broad

63 C. Juma, *The Gene Hunters: Biotechnology and the Scramble for Seeds* (Princeton University, Princeton, N.J, 1989) chap. 3; R. Pistorius, *Scientists, Plants and Politics: A History of the Plant Genetic Resources Movement* (IPGRI, Rome, 1997) pp. 1–18.

64 Plant Patent Act of 1930 (35 U.S.C. Ch. 15). See, M. Llewelyn and M. Adcock, *European Plant Intellectual Property* (Hart Publishing, Oxford, 2006) pp. 78–80.

65 *Diamond v. Chakrabarty*, 447 U.S. 303 (1980).

66 Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organisation (Concluded at Marrakesh on 15 April 1994, WTO Treaty Series No. 1,11 GATT Publication VI-1994).

67 F. Girard and C. Frison (eds.), *The Commons, Plant Breeding and Agricultural Research: Challenges for Food Security and Agrobiodiversity* (Routledge, Abingdon, 2018).

68 N. Louwaars and F. Burgaud, 'Variety Registration: The Evolution of Registration Systems with a Special Emphasis on Agrobiodiversity Conservation' in Michael Halewood (ed.), *Farmers' Crop Varieties and Farmers' Rights* (Routledge, Abingdon, 2016) pp. 181–211.

69 T. Wattnem, 'Seed Laws, Certification and Standardization: Outlawing Informal Seed Systems in the Global South', 43:4 *The Journal of Peasant Studies* (2016) pp. 850–867. DOI:10.1080/03066150.2015.1130702.

70 International Convention for the Protection of New Varieties of Plants of December 2, 1961, as Revised at Geneva on November 10, 1972, on October 23, 1978, and on March 19, 1991.

71 S. Ghimire *et al.*, 'Plant Variety Protection Law and Farmers' Rights to Save, Exchange and Breed Seeds: The Case of Indonesia', 16:9 *Journal of Intellectual Property Law & Practice* (2021) pp. 1013–1025. DOI:10.1093/jiplp/jpab085.

patentability of plant innovation and technology, the internationalisation of intellectual property, and the large diffusion of seed legislation, has furthered plant and seed commodification that has been underway since the 1970s.[72] Today, the seed market is an oligopoly, dominated by a tiny handful of companies[73] which, through the number of patents they hold and the cross-licensing agreements and research collaborations that bind them, are able to impose barriers of entry to newcomers, define trajectories of innovation, and even control the agrarian model and the agri-food system.[74]

There is now very little room left for peasant seeds and peasant-like ways of breeding and maintaining crop diversity on farm and in the field. Where UPOV 1991-compliant laws apply, farmers' privilege (*i.e.*, farmers' right to save seed from protected varieties)[75] is narrowly contained, and the situation is compounded with patent law under which farm-saved seeds are generally prohibited.[76] Furthermore, since landraces do not meet the (DUS and VAT) criteria to be entered onto an official catalogue of plant varieties, seed regulations effect a ban on farmer-to-farmer seed exchange – and some seed laws go as far as to combine the prohibition afflicting nonregistered varieties with criminal sanctions.[77] The wide dissemination of elite varieties (including GM plants) and their associated technology package facilitated by this enabling environment for the formal seed system has led to a high dependence of farmers on multinational seed companies and it has been one of the main drivers of the "widespread losses of landrace diversity over the past century, continuing to the present".[78] Ultimately, in a matter of a few decades, the autonomy of farmers to decide which seeds to plant, which seeds to save, and to whom to pass them on, has been granted to "the boardrooms of the five transnational firms known as the 'Gene Giants'".[79] Seed sovereignty should be understood in this context as a counter-project, aiming to grant farmers regained control and autonomy over seeds that they have gradually been stripped of.

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72 HRC Advisory Committee, 'Preliminary Study', UN Doc A/HRC/13/32, paras 34–35.

73 OECD, *Concentration in Seed Markets: Potential Effects and Policy Responses* (OECD Publishing, Paris, 2018); Sylvie Bonny, 'Corporate Concentration and Technological Change in the Global Seed Industry', 9:9 *Sustainability* (2017) p. 1632. DOI:10.3390/su9091632.

74 UN Human Rights Council, *Report ... Michael Fakhri*, *supra* note 11, paras 18–19.

75 Llewelyn and Adcock, *supra* note 64, pp. 190–193.

76 A notable exception is provided under Directive 98/44/EC of 6 July 1998 on the legal protection of biotechnological inventions (*OJ* L 213, 30.7.1998, p. 13–21), Art. 11. On which, see Llewelyn and Adcock, *supra* note 64, pp. 383–384.

77 Wattnem, *supra* note 69.

78 C.K. Khoury *et al.*, 'Crop Genetic Erosion: Understanding and Responding to Loss of Crop Diversity', 233 *New Phytologist* (2022) p. 92. DOI:10.1111/nph.17733.

79 Kloppenburg, *supra* note 58, p. 4.

This counter-project, as argued by Kloppenburg, was clearly articulated in two of LVC's policy documents published in 2001[80] and in 2008,[81] addressing issues related to biosecurity, seeds, and genetic resources. The strategic approach closely mirrors the methodology employed in delineating the content of food sovereignty. Initially, it involves pinpointing the array of threats faced by peasants and the challenges they must confront ("resistance"),[82] spanning from IPRS on life forms to bioprospection, from the marketing of GMOS to the privatisation of agricultural research. Subsequently, a comprehensive catalogue of actions and measures to restore lost autonomy ("creativity")[83] is proposed. This includes the recognition of farmers' rights, collective rights which inherently conflict with IPRS; the acknowledgment that seeds are a collective heritage of peasant communities that they have the right to bequeath to future generations; the reaffirmation of the right to save, use, exchange and sell seeds reproduced on the farm; the rejection of patents over life forms; the right to define the control and use of benefits derived from the use, preservation, and management of crop genetic resources; the right to develop models of sustainable agriculture; the right to appropriate technology, to more equitable application of research benefits, to participate in the design and conduct of research, along with a call for participatory plant breeding.[84]

2.2 *The Control of Peasant Seeds as a Global Issue*

In the aftermath of the 2007–2008 global food crisis, two events[85] contributed to the elevation of these seed-related problems to a set of closely intertwined

80 LVC, 'The Position of Via Campesina …', *supra* note 60.

81 LVC, 'Biodiversity and Genetic Resources: Protocol on Biosecurity and the Convention on Biodiversity: No to the Privatisation of Biodiversity!', *La Via Campesina Policy Documents. 5th Conference Mozambique, 16th to 23rd October, 2008*, (Jakarta – Indonesia: LVC, 2008), pp. 134–141.

82 Kloppenburg, *supra* note 58, p. 5.

83 *Ibid.*, p. 5.

84 See *Ibid.*, pp. 5–6.

85 The "Sowing the Future, Harvesting Diversity" campaign, organised by German and Austrian associations close to Navdanya in response to the European Commission's presentation of the Animal and Plant Health Package, which included a reform of plant reproductive material, is worth mentioning here only as a reminder. An appeal and a petition were launched in October 2009. LVC found itself associated with the International Days of Action on 17th and 18th April 2011 in Brussels, under the banner of "Free our seeds". The accompanying website was entitled "seed-sovereignty", in support of a new campaign for "seed sovereignty". See É. Demeulenaere, '"Free Our Seeds!" Strategies of Farmers' Movements to Reappropriate Seeds' in F. Girard and C. Frison (eds.), *The Commons, Plant Breeding and Agricultural Research: Challenges for Food Security and Agrobiodiversity* (Routledge, Abingdon, 2018) pp. 210–225.

issues of global and urgent concern. The first is the International Assessment of Agricultural Knowledge, Science, and Technology for Development Report, *Agriculture at a crossroads*, which was published in 2009.[86] This report emerged from a consultative process initiated by the World Bank in 2002, and its findings may not have been entirely palatable to the sponsor. To be sure, modern sciences and technology, together with market and institutional arrangements put into place by the State, have made farm-level yield increases in the industrialised world possible and reduced farmgate prices (if at the expense of externalising costs). Nevertheless, "given the new challenges we confront today, there is increasing recognition within formal S&T organisations that the current [Agricultural, Knowledge, Science and Technology] model requires revision. Business as usual is no longer an option".[87] To improve farmers' livelihoods, this should include "legal frameworks that ensure access and tenure to resources and land (...) and progressive evolution and proactive engagement in intellectual property rights (IPR) regimes and related instruments".[88] Furthermore, "[d]evelopments are needed that build trust and that value farmer knowledge, agricultural and natural biodiversity; farmer-managed medicinal plants, local seed systems and common pool resource management regimes".[89]

The same year also marked the release of the second critical event, the significant report by the then-new Special Rapporteur on the right to food. This report represents a pivotal moment: it delves deeply, in a uniquely critical manner, into the repercussions of seed policies on farmers' ability to sustainably produce food and maintain agrobiodiversity.[90] For the first time, a special procedure provides substantial evidence illustrating how high-yielding varieties, bolstered by extensive support to the commercial seed sector – whether through the catalogue of varieties or seed certification procedures, subsidised inputs, government-sponsored seed distribution programs, or even credit conditions tied to technology packages – and strengthened IPRs, have fostered greater reliance of smallholders on agribusiness, leading to the "progressive marginalisation or disappearance of local varieties".[91]

86 IAASTD, *Agriculture at a Crossroads – Global Report* (Island Press, Washington, DC, 2009).

87 IAASTD, *Agriculture at a Crossroads – Synthesis Report* Island Press, Washington, DC, 2009), p. 3.

88 *Ibid.*, p. 5.

89 *Ibid.*, p. 5. Also see for a reference to the concept of food sovereignty in the full report: IAASTD, *supra* note 86, p. 114.

90 UN General Assembly, *Report of the Special Rapporteur on the Right to Food. Seed Policies and the Right to Food: Enhancing Agrobiodiversity and Encouraging Innovation*, UN Doc A /64/170.

91 *Ibid.*, para. 36.

Consequently, this has placed both food security and crop genetic diversity in peril. The Special Rapporteur argues for a paradigm shift that necessitates prioritising support for "farmers' seed systems, on which not only these farmers depend, but the enhancement of which is vital, in addition, for our long-term food security".[92]

Jack Kloppenburg notes in another article in 2014,[93] that the concept of "seed sovereignty", though not yet universally embraced, is steadily gaining traction within LVC, notably championed by Navdanya and its founder, Vandana Shiva. More importantly, the range of issues that were previously addressed in a piecemeal manner can now be unified under the umbrella of a shared concern – the "commodification of seed"[94] – and directly related to the struggle for food sovereignty through the concept of "seed sovereignty". Notably, in the Declaration of Rights of Peasants – Women and Men adopted by International Coordinating Committee in Seoul on March 2009, the "right to food sovereignty" is not presented as a self-standing and overarching right but as the final component of the "Right to seeds and traditional agricultural knowledge and practice".[95] Regaining "control over genetic resources"[96] is emphasised as a guiding principle within this context.

Whether it is the Bali Seed Declaration,[97] the perspectives expressed in the LVC's collection of experiences and the position paper *Our Seeds, Our Future*,[98] or the Jakarta Call,[99] a potent aspiration for peasants' control over seeds manifests itself: *control* over landraces and traditional crop varieties which have been displaced by high-yielding varieties, due to the "opening up [of] all borders to the subsidised products of industrial agriculture from

92 *Ibid.*, para. 25.

93 Kloppenburg, *supra* note 23.

94 *Ibid.*, p. 1232.

95 LVC, 'Declaration of Rights of Peasants – Women and Men' (LVC – International Coordinating Committee, Seoul, March 2009). <viacampesina.org/en/wp-content/uploads/sites/2/2011/03/Declaration-of-rights-of-peasants-2009.pdf>.

96 Kloppenburg, *supra* note 23, p. 1234: "control over genetic resources" becomes a "key component" of the struggle to food sovereignty.

97 LVC, 'Peasant Seeds: Dignity, Culture and Life. Farmers in Resistance to Defend Their Right to Peasant Seeds. La Via Campesina – Bali Seed Declaration' (LVC, s.l., 16 March 2011). <viacampesina.org/en/peasant-seeds-dignity-culture-and-life-farmers-in-resistance-to-defend-their-right-to-peasant-seeds/>.

98 LVC, *La Via Campesina: Our Seeds, Our Future* (LVC, Jakarta, Indonesia, 2013).

99 LVC, 'The Jakarta Call – Call of the VI Conference of La Via Campesina – Egidio Brunetto (June 9–13, 2013)' (LVC, s.l., 20 June 2013). <viacampesina.org/en/the-jakarta-call/>.

rich countries",[100] land grabs, as well as water and seed policies;[101] *control* over peasant seeds which are the product of thousands of years of selection and which must not be misappropriated ("theft of our peasant seeds") through their being incorporated into elite varieties (whatever "benefit sharing" is promised in return by the industry);[102] *control* over the "Peoples' Heritage Seeds",[103] "seeds that are the heritage of our peoples",[104] or "peasant seeds" that "are the heritage of peasant communities and indigenous peoples in the service of humanity",[105] as a precondition for the maintenance of biodiversity,[106] and the breeding of varieties adapted to local conditions and farming practices and suited to "local food and cultural needs".[107] Apart from the rhetoric of control, another noteworthy aspect is the emergence of a rights-claiming language: LVC now asserts their attachment to "farmers' rights" as enshrined in the Seed Treaty (Article 9)[108] and the "Right to seeds and traditional agricultural knowledge and practice", as well as the "Right to biological diversity" both included in the Declaration of Rights of Peasants – Women and Men.[109] It is to these rights that we shall now turn our attention.

3 Seed Sovereignty and the Right to Seeds

3.1 *Engaging with Rights-Claiming but What Rights?*

If the process of reclaiming control over seeds implies, at the very least, an overhaul of the current agricultural system, the transnational agrarian

100 LVC, 'Small-Scale Farmers and Peasants Worldwide Are the Last Defence against the Destruction of Seeds' in LVC (ed.), *La Via Campesina: Our Seeds, Our Future*, Notebooks 6 (LVC, Jakarta, 2013), p. 1.

101 *Ibid.*, p. 1.

102 LVC, 'Peasant Seeds: Dignity, Culture and Life. Farmers in Resistance to Defend Their Right to Peasant Seeds. La Via Campesina – Bali Seed Declaration' (LVC, s.l., 16 March 2011). https://viacampesina.org/en/peasant-seeds-dignity-culture-and-life-farmers-in-resistance-to-defend-their-right-to-peasant-seeds/.

103 LVC, 'The Jakarta Call …', *supra* note 99.

104 LVC, 'Peasant Seeds …', *supra* note 97.

105 *Ibid.*

106 *Ibid.*

107 LVC, 'Small-Scale Farmers …', *supra* note 100, p. 1.

108 LVC, 'Peasant Seeds …', *supra* note 90: "We demand the adoption of national laws that recognize Farmers' Rights. La Via Campesina calls for the rapid approval and ratification of an international convention on peasant rights in the United Nations. Agriculture and seeds have no place in the WTO and Free Trade Agreements".

109 LVC, 'Declaration of Rights of Peasants – Women and Men', *supra* note 88, respectively Articles V & X.

movement would find it difficult to avoid the adoption of a rights-claiming strategy. Nevertheless, there were valid reasons to be cautious about asserting peasants' rights, in particular a deep-seated scepticism towards international human rights within certain social movements. Has the critical literature of the last two decades not seriously challenged, and in so doing tarnished, the emancipatory potential of human rights?[110] Worse still, has it not been said that "(…) the simultaneous global expansion of neoliberalism and the rise of international human rights over the last five decades is not an historical coincidence",[111] and that the latter has laid the foundations for the first by focusing on civil and political rights rather than socio-economic and cultural rights?[112] These objections were notably present within LVC when the question of exploring a rights-claiming strategy first arose; they caused hesitation and explain the departure from the "right to food" in favour of the novel "right to food sovereignty".[113]

At the same time, as the literature on counter-hegemonic legality testifies, law can be envisioned as bottom-up, cosmopolitan (as opposed to a nationally-bound or statist legality), and capable of carrying "(…) new notions of rights that go beyond the liberal ideal of individual autonomy, and incorporate solidaristic understandings of entitlements grounded on alternative forms of legal knowledge".[114] The expression effectively captures what LVC strove to achieve with the UNDROP, pursuing a sort of "constitutive mode" of advocacy through the negotiation process whereby they "sought to shift the contours of human rights themselves".[115]

Let us reiterate, though, what has been said above: there is no such thing as a "clean slate" strategy when faced with a dense regime complex. In no way, for example, could discussions on seeds have successfully gained momentum without "farmers' rights" serving as a catalyst. This gives explanatory power to the genesis of the rights-talk on seed, namely: that farmers' rights be mandatory and that the plant breeders' rights be subordinated to these farmers' rights, as

110 See, *inter alia*, S. Hopgood, *The Endtimes of Human Rights* (Cornell University Press, Ithaca, 2013).

111 Rodríguez-Garavito, *supra* note 24, p. 1–2.

112 *Ibid*.

113 P. Claeys, 'The Creation of New Rights by the Food Sovereignty Movement: The Challenge of Institutionalizing Subversion', 46:5 *Sociology* (2012) pp. 848–849. DOI:10.1177/0038038512451534.

114 B. de Sousa Santos and C.A. Rodríguez-Garavito, 'Law, Politics, and the Subaltern in Counter-Hegemonic Globalization' in B. de Sousa Santos and C. A Rodríguez-Garavito (eds.), *Law and Globalization from Below* (Cambridge University Press, Cambridge, 2005) p. 16.

115 Cotula, *supra* note 26, p. 484.

stated in LVC's Bali Seed Declaration.[116] Unsurprisingly, what is now Article 19 of the UNDROP of the "right to seed" was modelled after Article 9 of the Seed Treaty, and it is open to question whether the right to seed is a "new" right.[117]

With that said, seed-related provisions of the UNDROP could not have been a mere rehash of the content of the Seed Treaty. It is now common knowledge that the relevant Seed Treaty stipulations on farmers' rights, encumbered as they are with a raft of qualifications (e.g., "In accordance with their needs and priorities, each Contracting Party should, as appropriate, and subject to its national legislation (…)" – Article 9.2 – and "subject to national law and as appropriate" – Article 9.3), are, at best, "hortatory". Article 9.2 of the treaty, as an epitome of a toothless clause, states that the responsibility for realising farmers' rights "rests with national governments". The former Special Rapporteur on the Right to Food, in a strongly worded statement, expressed no hesitation in referring to farmers' rights as "rights in name only", and as rights "without remedies".[118]

There was even a more compelling reason for LVC and its supporters to distance themselves from the "blueprint" laid by Article 9. Farmers' rights emerged from contentious debates between the global South and industrialised countries, regarding the status of "plant genetic resources" deemed "(common) heritage of mankind" under the International Undertaking on Plant Genetic Resources for Food and Agriculture, which was adopted by a FAO Conference resolution in 1983.[119] In 1989, during the Uruguay round of negotiations, the negotiating group on TRIPS received a comprehensive mandate to negotiate rules on IPRs in general. Within this context, a further two resolutions were adopted by the FAO Conference. According to the first,[120] "Plant Breeders' Rights, as provided for under UPOV [was] not incompatible with the International Undertaking" (para. 1). The second,[121] titled "Farmers' rights", served as a *quid pro quo*: in exchange for the recognition of PBRs (and

116 LVC, 'Peasant Seeds …', *supra* note 97.

117 HRC Advisory Committee, *Final Study*, UN Doc A/HRC/19/75, para. 72; M. Coulibaly *et al.*, 'The Right to Seeds and Legal Mobilization for the Protection of Peasant Seed Systems in Mali', 12:3 *Journal of Human Rights Practice* (2020) p. 479. DOI:10.1093/jhuman/huaa039.

118 UN General Assembly, *supra* note 90, para. 43.

119 International Undertaking on Plant Genetic Resources for Food and Agriculture adopted by a FAO Conference resolution in 1983, Resolution 8/83, Report of the Conference of FAO, Twenty-second Session, Rome, 5–23 November 1983.

120 Agreed Interpretation of the International Undertaking, Resolution 4/89 (Adopted 29 November 1989), Report of the Conference of FAO, Twenty-fifth Session, Rome, 11–29 November 1989.

121 Farmers' Rights, Resolution 5/89 (Adopted 29 November 1989), Report of the Conference of FAO, Twenty-fifth Session, Rome, 11–29 November 1989.

the impending reinforcement of IPRs), it endorsed the concept of Farmers' Rights. This commitment ensured that the international community would strive to guarantee that farmers receive full benefits from the improved use of genetic resources and that sufficient funds and assistance would be provided to support their contribution to the conservation and sustainable use of plant genetic resources.[122]

This origin serves as a reminder that farmers' rights were initially conceived as a redistributive mechanism aimed at benefiting States rich in crop genetic resources, rather than as rights inherently bestowed upon farmers. While farmers' rights were partially intended to promote the conservation of agrobiodiversity, they remained intertwined with a model of agricultural modernisation in which genetic progress was, and still is, the primary objective, with IPRs serving as a means to achieve it. Consequently, despite their normative re-elaboration – the right-holders are now the farmers[123] – farmers' rights are a modest dent in an agricultural regime fundamentally designed to prioritise efficiency. The small legal space that has been accommodated within the Seed Treaty is intended for on-farm conservation and management of crop genetic resources (as a subcategory of *in situ* conservation), admittedly an essential complement to *ex situ* conservation, but which does not contest the prevailing agricultural model.[124] As they currently stand, these provisions have little bearing on intellectual property law, limited impact beyond constraints related to IPRs and barely any on the many legal factors (land law and agriculture subsidies), as well as market and institutional arrangements (crop insurance schemes, technology packages) that uphold the dominant model. Moreover, these provisions fail to adequately address issues such as technological path dependence and the irreversible nature of certain evolutionary processes.

122 On this sequence of texts, see: G.L. Rose, 'The International Undertaking on Plant Genetic Resources for Food and Agriculture: Will the Paper be Worth the Trees?' in N.P. Stoianoff (ed.), *Accessing Biological Resources: Complying With the Convention on Biological Diversity* (Kluwer Law International, The Hague, 2004) pp. 55–90.

123 R. Andersen, 'The History of Farmers' Rights. A Guide to Central Documents and Literature', FNI Report 8/2005, Background Study 1 (The Fridtjof Nansen Institute, Lysaker, Norway, 2005). <www.fni.no/getfile.php/131903-1469869845/Filer/Publikasjoner/FNI-R0805.pdf>.

124 See, F. Girard and C. Frison, 'From Farmers' Rights to the Rights of Peasants: Seeds and the Biocultural Turn', 102:4 *Review of Agricultural, Food and Environmental Studies* (2021) pp. 461–476. DOI:10.1007/s41130-021-00163-x. Apart from the stipulations on farmers' rights, there are only few provisions that open the way for other agricultural systems – and the language is still distinctively hortatory: see, e.g., Seed Treaty, Article 6.2, (a) & (f).

The preceding arguments substantiate LVC's assertions focused on reinstating peasants' control over their seeds. In terms of the future of modern plant breeding and the integration of peasant seeds into professional breeders' selection programmes, the combination of the Seed Treaty and the Nagoya Protocol[125] gives farmers some control over their seeds. These seeds are normally not considered to be "under the management and control of the Contracting Parties and in the public domain" as outlined in Article 11.2 of the Seed Treaty, and therefore are not included in the Multilateral System (MLS) established by the treaty.[126] However, there exists a caveat regarding the "prior and informed consent" provision of the Nagoya Protocol, which applies to indigenous and local communities, but is contingent upon their having the "established right to grant access to such resources" under domestic law.[127] It is worth noting that in few jurisdictions, farmers can assert *sui generis* IPRs over their seed, notably in India.[128]

Halting the displacement of traditional varieties and landraces by modern cultivars poses a significant challenge, as highlighted in the earlier discussion. The tide of agricultural modernisation in certain regions has resulted in the loss of a vast array of biological treasures, making their recovery difficult, if not impossible, especially if they were never systematically collected. Furthermore, the loss of associated TK and practices during this transition further complicates the revival of traditional varieties.[129] Apart from IPR regimes and seed policies, various compelling factors may drive farmers to abandon traditional varieties in favour of elite cultivars. Among these factors, input subsidies and the widespread distribution of selected seeds through rural extension networks stand out as primary drivers.[130]

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125 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, Nagoya, 29 October 2010 (entry into force, 12 October 2014), UNEP/CBD/COP/DEC/X/1.

126 On the MLS, see C. Frison, *Redesigning the Global Seed Commons: Law and Policy for Agrobiodiversity and Food Security* (Routledge, London, 2018).

127 Nagoya Protocol, Article 6.2. The proviso holds true for the sharing of benefits arising from the utilisation of genetic resources that are held by Indigenous and local communities (Nagoya Protocol, Article 5.2). This issue is discussed further *infra*, para. 4.3.3.

128 For a critical view, see S.K. Joseph, *Customary Rights of Farmers in Neoliberal India: A Legal and Policy Analysis* (Oxford University Press, New Delhi, 2020). Further examples, accompanied with critical insights, can be found *in* C. Correa, 'Sui Generis Protection for Farmers' Varieties' in M. Halewood (ed.), *Farmers' Crop Varieties and Farmers' Rights* (Routledge, London, 2016) pp. 115–183.

129 See Z. Lokhandwala, 'Peasants' Rights as New Human Rights: Promises and Concerns for Agrobiodiversity Conservation', 12:1 *Asian Journal of International Law* (2022) pp. 108–109.

130 See, in particular, UN General Assembly, *supra* note 90, para. 36.

Regarding farmers' contributions to the maintenance and improvement of crop genetic diversity on-farm, this can be significantly improved by exempting peasant seeds from varieties registration and seed certification requirements or implementing an alternative registration and certification scheme for farmers' varieties, as well as upholding the farmers' privilege (the reuse of farm-saved seeds by farmers).[131] As we shall see, these measures fall within the purview of farmers' rights under Article 9 of the Seed Treaty and have been used in certain rare jurisdictions, as permitted under Article 27.3 (b) of the TRIPS agreement, to pass plant variety protection law that allows farm-saved seeds without restrictions.[132] Unfortunately, good intentions are often incompatible with bilateral free trade agreements (or TRIPS-Plus agreements) which force developing countries to adhere to the 1991 UPOV Convention or to adopt UPOV-compliant legislation and thus to impose severe limitations on the right of farmers to re-sow protected varieties.[133]

From these few examples, it is evident that farmers' rights were not a panacea for the problems identified by LVC, and the transnational agrarian movement had every reason to propose a radical reinterpretation of these rights. At the very least, there was an urgent need to anchor farmers' rights in international human rights laws and to address inter-regime conflicts in way more favourable to peasants. This is what we must now explore in comparing farmers' rights with the right to seeds in the UNDROP.

131 See the review *in* O.T. Westengen *et al.*, 'Navigating toward Resilient and Inclusive Seed Systems', 120:14 *PNAS* (2023) p. 6. DOI:10.1073/pnas.2218777120. Alternative certification systems can take the form of the Quality Declared Seed system developed by the FAO in the early 1990s (FAO, *Quality Declared Seed System: Expert Consultation, Rome 5–7 May 2003: FAO Seed and Plant Genetic Resources Service* (FAO, Rome, 2006) or the "standard grade" seed system, wherein seeds only undergo germination and physical purity tests, but not a full certification process (K. Kuhlmann and B. Dey, 'Using Regulatory Flexibility to Address Market Informality in Seed Systems: A Global Study', 11 *Agronomy* (2021) p. 377).

132 India is again a perfect example. See *supra*, note 128.

133 Additionally, philanthrocapitalists and multinational corporations have been leading efforts to persuade groups of African States – some grappling with endemic rural poverty – to enact UPOV 1991-compliant legislation. For example, the African Intellectual Property Organization (OAPI in French) joining the 1991 UPOV Convention and the adoption of the Arusha Protocol (in July 2015) by the African Regional Intellectual Property Organization (ARIPO) are significant developments to note. See C. O'Grady Walshe, *Globalisation and Seed Sovereignty in Sub-Saharan Africa* (Springer, Cham, 2020) pp. 87–88; K. van der Borght and S. Ghimire, 'Seeds & Intellectual Property Rights: Bad Faith and Undue Influence Undermine Food Security and Human Rights' in K. Byttebier and K. van der Borght (eds.), *Law and Sustainability: Reshaping the Socio-Economic Order Through Economic and Technological Innovation* (Springer, Cham, 2022) pp. 183–208.

Seed Treaty	UNDROP	
Farmers' rights	**Right to Seeds**	**States' obligations**
Protection of traditional knowledge relevant to plant genetic resources for food and agriculture (Art. 9.2 (a))	The right to the protection of traditional knowledge relevant to plant genetic resources for food and agriculture (Art. 19.1 (a))	States shall take measures to respect, protect and fulfil the right to seeds of peasants and other people working in rural areas (Art. 19.3)
The right to equitably participate in sharing benefits arising from the utilization of plant genetic resources for food and agriculture (Art.9.2 (b))	The right to equitably participate in sharing the benefits arising from the utilization of plant genetic resources for food and agriculture (Art. 19.1 (b))	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 (Art. 19.4)
The right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture (Art. 9.2 (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 (Art. 19.1 (c))	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 (Art. 19.5)
The rights that farmers have to save, use, exchange and sell farm-saved seed/propagating material (Art. 9.3)	The right to save, use, exchange and sell their farm-saved seed or propagating material (Art. 19.1 (d))	States shall take appropriate measures to support peasant seed systems, and promote the use of peasant seeds and agrobiodiversity (Art. 19.6)
	The right to maintain, control, protect and develop their own seeds and traditional knowledge (Art. 19.2)	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 (Art. 19.7)
		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 (Art. 19.8)

FIGURE 1 Synoptic presentation of seed-related provisions in the Seed Treaty and the UNDROP (original material)

3.2 *The Right to Seeds: Old Wine in a New Bottle?*

A useful starting point may be to show, in a synoptic way, the convergences and differences between farmers' rights under the Seed Treaty and the right to seeds following the UNDROP (see figure 1).

A first point that will not escape the notice of an attentive reader is the partial alignment of Article 19 of the UNDROP with the structure and content of Article 9 of the Seed Treaty. Indeed, paragraphs (a) to (d) of Article 19.1 clearly mirror the language of farmers' rights (Article 9.2 (a) to (c) and 9.3 respectively). However, it is important to recognise that there are notable differences – differences that can be highly significant. While "international law is often developed by building in an iterative process on previously agreed language",[134] "akin to a continuous dialogue within an open-plan office",[135] this process also entails strategic shifts in meaning, additions, and proviso deletions, as well as substantive variations. These variations may stem from the integration of supportive provisions from other regimes, which may have been overlooked previously but are called upon by the interpretative principle of mutual supportiveness.[136] In this regard, and without overlooking the difference between a legally binding instrument adhered to by 150 Contracting Parties and a UN Declaration,[137] one cannot fail to stress that the provisions on the right to seeds use more binding legal language. Gone are the qualifying clauses ("as appropriate", "subject to its national legislation", "subject to national law and as appropriate"); gone is the "bundle" of farmers'

134 E. Morgera, 'The Need for an International Legal Concept of Fair and Equitable Benefit Sharing', 27:2 *European Journal of International Law* (2016) p. 357. DOI:10.1093/ejil/chw014. And on the importance of using agreed language in the context of the UNDROP, see C. Golay, 'Negotiation of a United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas', Academy In-Brief No. 5 (Geneva Academy, Geneva, 2015) pp. 20–25.

135 C. McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention', 54:2 *International & Comparative Law Quarterly* (2005) p. 284. DOI:10.1093/iclq/lei001.

136 This risk was well identified by certain States over the course of the negotiations: see A/HRC/30/55, para. 29. On mutual supportiveness, see *supra*, para. 1.2.

137 At the same time, one should not downplay the role of soft law in modern international law-making. On the legal significance of the UNDROP, F. Francioni, 'The Peasants' Declaration. State Obligations and Justiciability' in M. Alabrese *et al.* (eds.), *The United Nations' Declaration on Peasants' Rights*, Earthscan Food and Agriculture (Routledge, London, 2022) pp. 4–15. Furthermore, it should not be forgotten that "[…] normative statements contained in nonbinding texts can generate a political impact equal at times to that of legally binding instruments and can give rise to customary international law through state practice" (Shelton, *supra* note 44, pp. 292–293), as they can also "act interstitially to complete or supplement binding agreements" (*ibid.*, p. 321).

rights whose realisation is the sole responsibility of national governments.[138] Quite the contrary, the UNDROP transformed what were previously considered environmental rights into human rights provisions.[139] In this manner, it feeds into a trend where environmental law provides ammunitions to extend the content of international human rights law, particularly for Indigenous peoples and specifically in the context of (agro-)biodiversity-dependent human rights.[140]

Apparent in the strengthening of the existing bundle of rights is the clear use of rights-language in Article 19.1(a) ("The right to the protection of traditional knowledge (…)") where Article 9.2(a) of the Seed Treaty conspicuously avoided it. Article 7.1 of the Nagoya Protocol (along with Article 8(j) and 10(c) of the CBD) strongly supported this extension, since it conditions access to TK associated with genetic resources that is held by indigenous peoples and local communities on the prior and informed consent (or approval and involvement) of said peoples and communities.[141] For indigenous peoples, additional support is provided by Article 31.1 of UNDRIP which protects their TK, as well as their intellectual property over it.[142] While the text of the UNDROP is somewhat limited to TK "relevant to plant genetic resources for food and agriculture [PGRPFA]", a broader protection is conferred upon peasants via Article 26.1 on the Declaration related to cultural rights.[143] According to the

138 For a critic, see FAO, *Stakeholders' Consultation on Farmers' Rights. African Position Paper* (FAO, Rome, 2016) p. 11.

139 E. Morgera, 'Dawn of a New Day? The Evolving Relationship between the Convention on Biological Diversity and International Human Rights Law', 53:4 *Wake Forest Law Review* (2018) pp. 691–712; J. Gilbert, *Natural Resources and Human Rights: An Appraisal* (Oxford University Press, Oxford, 2018) p. 76 ff.

140 UN Human Rights Council, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, UN Doc A/HRC/34/49, para. 33. Also see, COP CBD, decision 15/4, *Kunming-Montreal Global Biodiversity Framework*, CBD/COP/DEC/15/4, Target 9; FAO, *Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication* (FAO, Rome, 2015), Guideline 5.1; FAO, *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security* (FAO, Rome, 2005), Guideline 8.12; *Advisory Opinion on the Environment and Human Rights*, 15 November 2017, IACtHR, OC-23/17, para. 142; *Lhaka Honhat* case, *supra* note 16, paras 209, 243 et *seq*.

141 As explained below, these stipulations are qualified. Article 5 of the Nagoya Protocol, on benefit-sharing, uses mandatory language, though.

142 T. Stoll, 'Intellectual Property and Technologies' in J. Hohmann and M. Weller (eds.), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press, New York, 2018) pp. 299–327. On the interplay between the UNDRIP and the UNDROP for indigenous peoples, see UNDROP, Preambular clause 4, Art. 2(3) and 28(1).

143 See *infra*, para. 4.1.3.

study "Normative sources and rationale underlying the draft declaration on the rights of peasants and other people working in rural areas",[144] Article 19.1(b) on benefit sharing notably builds on the Seed Treaty, thus indicating that it is to take place within the framework of the Multilateral System. This can be through facilitated access to plant genetic resources for food and agriculture (PGRFA) which are included in the Multilateral System, or, in case of use of PGRFA, via the exchange of information, access to and transfer of technology, capacity-building, or the sharing of the benefits arising from commercialisation which then operates through a project-based system.[145] But, as the same study alludes to through its reference to Article 5 of the Nagoya Protocol,[146] bilateral benefit sharing is to take place, based on mutually agreed terms with the communities concerned, whenever there are benefits arising from the utilisation of genetic resources that "are held" by indigenous and local communities.[147] Indeed, as shall be seen, the Seed Treaty and its MLS, as *lex specialis*, normally prevail over the CDB and the Nagoya Protocol, but only to the extent that the PGRFA are listed in Annex I of the Treaty and under the "management and control" of the Contracting Parties and "in the public domain".[148]

Article 19.1(c) on the right to participate in the making of decisions on matters pertaining to the conservation and sustainable use of PGRFA is a verbatim restatement of Article 9(c) of the Seed Treaty, with one notable exception: while the latter limits participation "at the national level",[149] the former has no such limitation. This is a welcome extension,[150] given the scale

144 OHCHR, *Normative Sources and Rationale Underlying the Draft Declaration on the Rights of Peasants and Other People Working in Rural Areas*, UN Doc A/HRC/WG.15/4/3, para. 278.

145 The Benefit-sharing Fund allocates the accumulated funds to particular activities designed to primarily support farmers: see, E. Tsioumani, *Fair and Equitable Benefit-Sharing in Agriculture: Reinventing Agrarian Justice* (Routledge, Abingdon, 2021) pp. 18, 21, 40–41.

146 UN Doc A/HRC/WG.15/4/3, para. 275.

147 Unless express decision of the right holders to include their PGRFA in the MLS.

148 Seed Treaty, Article 11.2.

149 In the Convention (No. 169) concerning indigenous and tribal peoples in independent countries, Geneva, 27 June 1989, (entered into force 5 September 1991), *UNTS* vol. 1650, p. 383 (Art. 6.1 (a)) and in the UN Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, Paris, 14 October 1994 (entered into force 26 December 1996), *UNTS* vol. 1954, p. 3 (Art. 10(2)f), participation is at the local, national or regional scale, but does not extend to the international level.

150 S. Le Teno *et al.*, 'The Right to Seeds: Using the Commons as a Sustainable Governance Scheme to Implement Peasants' Rights?' in M. Alabrese *et al.* (eds.), *The United Nations' Declaration on Peasants' Rights* (Routledge, London, 2022) p. 121.

at which decisions are made that are most likely to have a bearing on the right to seeds and the global nature of the seed market.[151]

The provision is further reinforced by Article 10.1 of the Declaration on the right to participation ("right to active, free, effective, meaningful[152] and informed participation, directly and/or through their representative organisations, in the formulation, implementation and assessment of policies, programmes and projects that may affect their lives, land and livelihoods") which also contains no limitation as to scale, thereby aligning with Article 18 of the UNDRIP.[153]

Article 19.1(d) of the UNDROP on "the right to save, use, exchange and sell their farm-saved seed or propagating material" is more forthcoming than its equivalent under the Seed Treaty. This very contentious provision warrants two comments. Firstly, farm-saved seed/propagating material refers to what is known as the farmers' privilege under UPOV 1991, *i.e.*, farmers' right to save and re-sow seeds from *protected varieties*. Given that IPRs are directly at stake, a decision was made during the Seed Treaty negotiations to treat farm-saved seed separately in a paragraph which, noticeably, "places no obligations on Contracting Parties".[154] The delicate nature of the issue was somewhat reflected in the Chairman's Elements derived from the Montreux meeting of experts, wherein the right to farm-saved seed was put on equal footing with the other rights of the bundle, but the right to sell ("market" in the Elements) applied only in respect of "landraces and varieties that are no longer registered".[155] Interestingly, Christophe Golay, no doubt predicting that the provision was likely to re-enact confrontational stances between the North and the South, tried to revive this distinction. According to his proposal, the Declaration "could recognise peasants' rights to save, use, exchange and sell at local level

151 On the need to increase transparency and participation in the negotiation of international trade treaties, see UN Human Rights Council, *Report of the Special Rapporteur in the Field of Cultural Rights, Farida Shaheed. The Right to Enjoy the Benefits of Scientific Progress and Its Applications*, UN Doc A/HRC/20/26, paras 73–75.

152 "Active, free and meaningful participation" are qualifiers drawn from the Declaration on the Right to Development, UN General Assembly, Res. 41/128 of 4 December 1986, Art. 2(3).

153 UN Doc A/HRC/WG.15/4/3, para. 140. Art. 15.4 and 15.5 of the UNDROP on the right to food sovereignty also include relevant clauses on the right of peasants to participate in decision-making.

154 Moore and Tymowski, *supra* note 38, p. 24.

155 F. Gerbasi, 'Overview of the Regional Approaches. The Negotiating Process of the International Treaty on Plant Genetic Resources for Food and Agriculture' in Christine Frison *et al.* (eds.), *Plant Genetic Resources and Food Security. Stakeholder Perspectives on the International Treaty on Plant Genetic Resources for Food and Agriculture* (FAO, Bioversity International and Earthscan, New York, 2011) p. 39.

farm-saved seeds of varieties protected by intellectual property rights, but prohibit the commercialisation of these seeds by peasants".[156] Eventually, this proposal was not taken up. Consequently, Article 19.1(d) stands as a significant advancement with its broad and unrestricted language. It recognises the crucial role of farm-saved seed practices in achieving the right to food and promoting on-farm innovation, all while reaffirming the supremacy of human rights guarantees over commercial interests.

As for peasant seeds, landraces and farmers' varieties, farmer-to-farmer seed exchanges (including trading) is a very old demand of the agrarian movements. The right to freely exchange peasant seeds is at the core of farmer seed networks, the importance of which for seed sourcing and crop genetic resources maintenance and development cannot be overstated.[157]

In this regard, the inclusion of the new "right to maintain, control, protect, and develop their own seeds and traditional knowledge" in Article 19.2 of the UNDROP represents a significant advancement. However, as we shall explore further, the paragraph's most significant breakthrough extends beyond the realm of peasant seed exchanges.

This being said, the legal significance of this disposition, at least in its "free exchange of seeds" aspect, is uncertain for want of authoritative sources in international law and other standard-setting initiatives in the UN or elsewhere to support it, save for Article 31 of the UNDRIP, which applies to indigenous peoples and reportedly served as inspiration,[158] and Article 12(4) of the Nagoya Protocol, the obligation of which is nonetheless qualified.[159] This uncertainty is partly evident in the meticulous attention the drafters have devoted to delineating a comprehensive list of correlative obligations and duties of States. The first of these obligations (Article 19.3) enshrines the "respect, protect, and

156 C. Golay, 'Legal Analysis on the Rights of Peasants and Other People Working in Rural Areas. The Right to Seeds and Intellectual Property Rights', *Prepared for the third session of the United Nations Human Rights Council working group mandated to negotiate a Declaration on the rights of peasants and other people working in rural areas (17–20 May 2016)* (Geneva Academy, Geneva, 2016) p. 36.

157 O.T. Coomes *et al.*, 'Farmer Seed Networks Make a Limited Contribution to Agriculture? Four Common Misconceptions', *56 Food Policy* (2015) pp. 41–50. DOI:10.1016/j.foodpol.2015.07.008.

158 UN Doc A/HRC/WG.15/4/3, para. 282.

159 Elisa Morgera et *al.*, *Unraveling the Nagoya Protocol: A Commentary on the Nagoya Protocol on Access and Benefit-Sharing to the Convention on Biological Diversity* (Nijhoff, Brill, 2014) pp. 227–228, who stress that, unlike the corresponding stipulation of the Seed Treaty, Article 9(4) applies to all genetic resources and is framed as a positive obligation.

fulfil" framework,[160] affirming the strategy of anchoring seed-related rights into human rights and outlining the corresponding responsibility of States to act for their advancement. Article 19.4 mandates States 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". In the OHCHR document on normative sources, this provision is presented as an extension of the "respect, protect, fulfil" general clause,[161] albeit with a focus on emergency situations (or their prevention):[162] in a crisis situation, the State's obligation to fulfil is tied to the core elements of the right to food and translates into an obligation to distribute food-producing resources rather than solely providing food.[163] Moreover, the provision implies that States should take steps to promote on-farm management of crop genetic diversity,[164] recognising that access to a variety of local plants act as a safety net for vulnerable rural communities. Additionally, agricultural biodiversity is intimately tied to adaptation and mitigation efforts necessary for addressing climate change.[165]

The most important provisions are contained in Article 19.5, 19.6 and 19.8. These articles take aim at both IPRs laws and seed policies. Article 19.8 specifically requires States to develop IPRs laws and seed regulations (e.g., registration of varieties and certification of seeds) which do not jeopardise peasants' varieties[166] and undermine peasants' right to save seeds from

160 *Cf*, in the context of the now-adopted WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge, May 24, 2024, GRATK/DC/7, IGC and James Anaya, 'Technical Review of Key Intellectual Property-Related Issues of the WIPO Draft Instruments on Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions', WIPO/GRTKF/IC/29/INF/10, (WIPO, 11 January 2016), para. 10.

161 See, already, UN General Assembly, *supra* note 90, para. 48.

162 This reading is reinforced by UNDROP, Art. 16.5: "States shall take appropriate measures to strengthen the resilience of peasants and other people working in rural areas against natural disasters and other severe disruptions, such as market failures".

163 H. Morten Haugen, 'The UN Declaration on Peasants' Rights (UNDROP): Is Article 19 on Seed Rights Adequately Balancing Intellectual Property Rights and the Right to Food?' *23 The Journal of World Intellectual Property* (2020) pp. 288 and 295, who stresses the limits of food aid.

164 Also see UNDROP, Art. 19.5. On the possible measures, see D. I. Jarvis *et al.*, 'An Heuristic Framework for Identifying Multiple Ways of Supporting the Conservation and Use of Traditional Crop Varieties within the Agricultural Production System', 30:1–2 *Critical Reviews in Plant Sciences* (2011) pp. 283 *seq*. DOI:10.1080/07352689.2011.554358.

165 UN Human Rights Council, *supra* note 140, para. 19. Food security depends on the biodiversity within the landscape (*i.e.*, the mosaics of different land-use patterns and practices beyond the farm or the village) (*ibid*, para. 20–21); hence the importance of a broader focus on the conservation and sustainable use of biodiversity as posited by Article 20.1 of the UNDROP.

166 UN General Assembly, *supra* note 90, para. 57.

protected varieties. The text also has implications for States in shaping public policies, establishing standards, and committing themselves at regional and international levels.[167] Article 19.5 outlines the corresponding obligation to the rights enumerated in Articles 19.1(d) and 19.2, thereby equipping peasants with additional legal tools to protect themselves against IPRs and seed regulations that target farm-saved seeds and farmers/peasants seed networks.

Article 19.6 obligates States to not only enact legal provisions, but also to implement appropriate measures to support peasant seed systems and encourage the utilisation of peasant seeds and crop diversity on-farm. These measures may encompass various forms of assistance, such as backing farmer-led participatory plant breeding,[168] establishing community seed banks, facilitating the reintroduction, re-establishment, or restoration of materials from *ex situ* collections, facilitating the repatriation of TK,[169] establishing community biodiversity registers, and conducting research on orphan crops[170] among others.[171] Some of these actions are included in, or at least indirectly addressed by, Article 19.7 which mandates that States undertake appropriate measures to ensure that agricultural research and plant breeding (with active participation from stakeholders) cater to peasants' needs. Additionally, this article emphasises the necessity to augment funding for research and development pertaining to orphan crops.[172] Furthermore, Article 20.2, which pertains to States' obligations regarding biodiversity, stipulates the necessity for appropriate measures to be taken to "promote and protect the traditional knowledge, innovation and practices of peasants". This includes protecting "traditional agrarian, pastoral, forestry, fisheries, livestock and agroecological systems relevant to the conservation and sustainable use of biological diversity".[173]

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167 Le Teno *et al.*, *supra* note 150, p. 122. Furthering this interpretation are Articles 2.4 (obligation to interpret and apply relevant international agreements and standards consistently with human rights obligations as applicable to peasants) and 15.5 (partnership with peasants in formulating public policies at all scales) of the UNDROP.

168 Also called Participatory Plant Breeding, *tout court*, as opposed to Participatory Varietal Selection (PVS)), when the process is led by scientists. See, T. Berg and O. Tveitereid Westengen, 'Origins and Evolution of Participatory Approaches in Plant Breeding' in O. Tveitereid Westengen and T. Winge (eds.), *Farmers and Plant Breeding. Current Approaches and Perspectives* (Routledge, New York, 2020) pp. 17–25; Salvatore Ceccarelli and Stefania Grando, 'Origins and Evolution of Participatory Approaches in Plant Breeding' in O. Tveitereid Westengen and T. Winge (eds.), *op. cit.*, pp. 231–243.

169 COP CBD, Decision 14/12, CBD/COP/14/14, 20 March 2019.

170 Golay, *supra* note 156, p. 32.

171 See the very comprehensive list included *in* Jarvis *et al.*, *supra* note 164.

172 Also see FAO, *Voluntary Guidelines ...*, *supra* note 140, Guideline 8.4.

173 *Ibid*, Guideline 8D; UN General Assembly, *supra* note 90, paras 54–55.

To conclude, we can insist once again on the innovative provision contained in Article 19.2 which endows peasants with "the right to maintain, control, protect and develop their own seeds and traditional knowledge". The text, modelled after Article 31.1 of the UNDRIP, is a significant extension of Article 6.2 of the Nagoya Protocol. For one thing, the text is agnostic as to the means of operationalising this control and protection. At the same time, it is worth noting that the absence of an express reference to intellectual property, as in Article 31.1 second indent of the UNDRIP, is not to be interpreted as precluding the recognition of *sui generis* IPRs. Secondly, if the Nagoya Protocol obliges Parties to take measures with the aim of ensuring that the prior informed consent of indigenous peoples and local communities is obtained for access to (their) genetic resources, this is only provided that "they have the established right to grant access to such resources" which is a matter for each State to decide based on domestic legislation and international law, if any.[174] Article 19.2 of the UNDROP contains no such qualification. Finally, the UNDROP is not limited to indigenous peoples and local communities (including peasant communities), but equally applies to peasants *qua* individual rights holders.[175]

Given the contentious nature of this provision, which remains the crux of the tensions within the seed regime complex, and touches upon the question of free exchange of peasant seeds, the risk of it remaining a dead letter looms large. The final section is specifically designed to examine the support it can garner in international sources of authority and to propose a dynamic and holistic reading of the UNDROP that places more emphasis, as we believe references to "food sovereignty" and "seed sovereignty" call for, on the right to freely dispose of natural resources.

4 Seed Sovereignty and the Multiple Shades of Sovereignty

4.1 *Exploring the Normative Support for the Right to Seeds*

4.1.1 General Observations

Just like the provisions concerning the right to land, those pertaining to seeds were hotly debated during the negotiations and only reached a stable form – especially Article 20 on the "right to biodiversity"[176] and indent 4 to

174 Morgera *et al.*, *supra* note 159, pp. 69–70.

175 UNDROP, Art. 1.1.

176 The content of Article 20 was almost entirely rewritten during the fifth session: compare Revised draft United Nations declaration on the rights of peasants and other people working in rural areas, 12 February 2018, A/HRC/WG.15/5/2, and Draft United Nations declaration on the rights of peasants and other people working in rural areas, 10 September 2018, A/HRC/WG.15/5/3.

Article 26 which included a provision on prior informed consent for access to peasants' genetic resources[177] – towards the final stage of the fifth session.[178] In all honesty, taking into consideration only provisions pertaining to seeds and biodiversity, the first drafts of the declaration were too far removed from agreed language and too redundant to win widespread support. The "right to reject" language (see, e.g., the 2013 Draft UNDROP, Art. 5.2: "Peasants have the right to reject varieties of plants which they consider to be dangerous economically, ecologically and culturally"; or Art. 10.2: "Peasants have the right to reject patents threatening biological diversity, including on plants, food and medicine" …) of the 2013 draft[179] attracted much criticism, and rightly so, while the Advanced Version dated 27 January 2015[180] erred on the side of overprotection and suffered from various redundancies.[181] Subsequent versions did not dispel the notion that the "right to seeds" was problematic "in particular with regard to intellectual property"[182] or that it was a right which did "not exist under international human rights law".[183] Therefore, including this right in the Declaration was seen as going too far and not in line with the current legal framework.

The aforementioned quote, attributed to the representative of the United States, delves into the core objective that the UNDROP aimed to accomplish.

177 In the revised draft of the fifth session (A/HRC/WG.15/5/2), Article 26 on "Cultural rights and traditional knowledge" was supplemented with a fourth indent which read: "States shall take measures, as appropriate, to ensure that the prior informed consent or approval and involvement of peasants and other people working in rural areas is obtained for access to genetic resources where they have the established right to grant access to such resources". It was deleted from the subsequent draft (A/HRC/WG.15/5/3).

178 Similar criticisms were still being voiced during the vote in the General Assembly. See, e.g., UN General Assembly, Third Committee, Seventy-third Session, 52nd & 53rd Meetings, 19 November 2018, GA/SHC/4255, https://press.un.org/en/2018/gashc4255.doc.htm; UN General Assembly, Seventy-third session, 55th plenary meeting, 17 December 2018, A/73/PV.55, p. 55. For earlier criticisms raised during the negotiation process, see UN Human Rights Council, *Report of the Open-Ended Intergovernmental Working Group on a Draft United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas* (2016) UN Doc A/HRC/33/59 paras 115 and 126; A/HRC/36/58 para 208.

179 A/HRC/WG.15/1/2, 20 June 2013. This draft declaration was originally annexed to the HRC Advisory Committee, *Final Study*, UN Doc A/HRC/19/75.

180 https://www.ohchr.org/en/hr-bodies/hrc/rural-areas/nd-session.

181 On the discussion on "agreed language", see UN Doc A/HRC/26/48, para. 37; Golay, *supra* note 134, pp. 26–27.

182 UN General Assembly, Seventy-third session, 55th plenary meeting, 17 December 2018, A/73/PV.55, p. 55 (Switzerland).

183 UN General Assembly, Third Committee, Seventy-third Session, 52nd & 53rd Meetings, 19 November 2018, GA/SHC/4255, https://press.un.org/en/2018/gashc4255.doc.htm (USA).

It did not seek to create a new right, as reiterated time and again during the negotiations, nor to simply restate the exact content of Article 9 of the Seed Treaty.[184] *Instead, its fundamental aim was to consolidate all international norms pertaining to seeds, biodiversity, and traditional knowledge and establish a solid foundation for them in international human rights law by incorporating them into a human rights-based instrument.*

A reminder is warranted here: amidst the strategies aimed at addressing the fragmentation of international law and restoring a cohesive system of norms, identifying an overarching principle may aid in reconciling conflicting standards. In this light, international human rights law, posited to constitute potentially superior norms,[185] holds the potential to fulfil this role and resolve the debate concerning whether, for example, the right to seeds should yield to intellectual property law and trade agreements, or if the latter must "be adapted to ensure the ongoing protection of human rights".[186]

If one looks at the "Normative sources" document referred to above, references to international human rights law are scarce.[187] There are nevertheless other international sources of authority (hard and soft law) of which the negotiators of the declaration were clearly cognisant.

First is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[188] Article 14.2 (g) of which mandates that States, without qualification, "take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development". For this purpose, States in particular shall confer upon such women the right to have access, *inter alia*, to "appropriate technology". According to the interpretation of the Committee on the Elimination of Discrimination against Women in its General recommendation No. 34 (CEDAW Committee),[189] rural women's rights to land and natural resources – the latter including "seeds" – are fundamental human rights.[190] The Committee

184 This was the position of the FAO: ITPGRFA, Governing Body, *Report on the Implementation of Farmers' Rights*. Eight Session of the Governing Body. Rome, Italy, 11 – 16 November 2019, IT/GB-8/19/12 Rev.1, (Rome: FAO, August 2019), para. 15.

185 P. Cullet, 'Human Rights and Intellectual Property Protection in the TRIPS Era', 29:2 *Human Rights Quarterly* (2007) p. 418; Francioni, *supra* note 43, pp. 17–18. And see the discussion, *supra*, para. 1.2.

186 Golay, *supra* note 43, p. 23.

187 Haugen, *supra* note 163, p. 303.

188 Convention on the Elimination of All Forms of Discrimination against Women, New York, 18 December 1979 (entry into force 3 September 1981), UNTS vol. 1249, p. 13.

189 UN CEDAW Committee, *General Recommendation No. 34 (2016) on the Rights of Rural Women*, UN Doc CEDAW/C/GC/34.

190 *Ibid.*, para. 56.

recognised that the spread of cash crops, linked to "the controversial use of genetically modified organisms and the patenting of genetically altered crops", has come at the expense of local food crops and thus of rural women who are "more often engaged in organic and sustainable farming practices".[191] The CEDAW Committee specifically called on the States to "[r]espect and protect rural women's traditional and eco-friendly agricultural knowledge, in particular the right of women to preserve, use and exchange traditional and native seeds"; "[p]rotect and conserve native and endemic plant species and varieties that are a source of food and medicine, and prevent patenting by national and transnational companies to the extent that it threatens the rights of rural women"; and "[o]btain the free and informed consent of rural women before the approval of any acquisitions or project affecting rural lands or territories and resources (…)".[192]

Beyond rural women, the International Covenant on Economic, Social and Cultural Rights (ICESCR)[193] provides further support for peasants' right to seeds. Article 15.1(b) recognises the right of everyone to enjoy the benefits of scientific progress and its applications. As shall be seen, this provision must be interpreted alongside paragraph (a) on the right to take part in cultural life and (c) on the right of the author to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic productions.[194] Additionally, the ICESCR lays down, in Article 11.1, the right to adequate food and nutrition and, in Article 11.2, the fundamental right to be free from hunger. These three dimensions of cultural rights will be examined in turn.

4.1.2 The Right to Science

There is no denying that at the time of the adoption of the Covenant, there was a prevailing belief in the transformative power of scientific progress to eradicate hunger and malnutrition. This belief was primarily centred around one form of scientific progress, namely the Green Revolution and its efficiency-oriented model of agricultural development. This is somewhat reflected in the measures that States are required to take to achieve the fundamental right of freedom from hunger for all, notably those needed to "improve methods of production, conservation and distribution of food by making full use of

191 *Ibid.*, para. 60.

192 *Ibid.*, para. 62.

193 International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966 (entry into force 3 January 1976), UNTS, vol. 993, p. 3.

194 UN Human Rights Council, *supra* note 151, para. 3. Morten Haugen, *supra* note 163, p. 294.

technical and scientific knowledge [...]" (ICESCR, Article 11.2 (a)). What is clear, though, with the benefit of hindsight, is that progress is not unilinear and that the technology to promote and the methods of production to favour must ultimately be chosen on the basis of their ability to "contribute effectively to the realisation of the right to food".[195] Therefore, efforts should not solely focus on increasing overall production, but rather on supporting modes of production that elevate the incomes and resilience of the most impoverished farmers, while also guaranteeing future food security.[196] By the same token, General Comment No. 25 (2020) issued the strongly-worded position that "the right to participate in and to enjoy the benefits of scientific progress and its applications in agriculture should preserve, not violate, the right of peasants and other people working in rural areas to choose which technologies suit them best".[197]

Participation of individuals, communities, and peoples in "science-related decision-making is vital"[198] for effectively protecting marginalised populations from the adverse impacts of scientific testing or applications, especially as concerns their food security, health, or environment.[199] Such participation ensures that scientific research considers the needs of the most vulnerable segments of society[200] and respects their cultural values.[201]

Assessed against the "respect, protect, fulfil" framework, the right to science would mean first that States must abstain from introducing legislation or any other measures curtailing or preventing peasants' reliance on farmer seed systems. States are further obligated to protect peasants from patent-holders and plant breeders' rights holders, for example by taking steps to ensure that sterile seeds (obtained through the use of genetic use restriction technologies (GURTs))[202] are prohibited. "Shrink-wrap licences" (commonly known as "Technology Agreement" or "Seed Licence")[203] contractually precluding the

195 O. De Schutter, 'The Right of Everyone to Enjoy the Benefits of Scientific Progress and the Right to Food: From Conflict to Complementarity', 33:2 *Human Rights Quarterly* (2011) p. 314. DOI:10.1353/hrq.2011.0020.

196 *Ibid.*, p. 314.

197 CESCR, *General Comment No. 25 (2020)*, UN Doc E/C.12/GC/25, para. 64.

198 UN Human Rights Council, *Report of the Special Rapporteur in the Field of Cultural Rights ...*, *supra* note 151, para. 43.

199 *Ibid.*, para. 43.

200 *Ibid.*, para. 43.

201 UN Doc E/C.12/GC/25, para. 64.

202 Morten Haugen, *supra* note 163, p. 295; De Schutter, *supra* note 195, p. 330. On GURTs, see J. Sanderson, *Plants, People and Practices: The Nature and History of the UPOV Convention* (Cambridge University Press, Cambridge, 2017) pp. 248–251. DOI:10.1017/9781316411216.

203 These restrictive licensing agreements were developed, in the United States, with a view to pre-empting the potential effect of the doctrine of "implied licence" under patent law: Sanderson, *supra* note 227, 251–255, with the relevant case law.

right to use the harvested seed for replanting must also be declared invalid or unenforceable.[204]

Finally, on the fulfil level, States must facilitate the realisation of the right to food "by proactively strengthening people's access to and utilisation of resources and means to ensure their livelihood".[205] For instance, in General Comment No. 25 (2020), the CESCR insisted on the need to support "[l]ow-input eco-friendly agronomic techniques".[206] This would cover measures such as those discussed in relation to Article 19.6 of the UNDROP, with a strong emphasis on research in areas "where there is the greatest need for scientific progress in health, food and other basic needs related to economic, social and cultural rights and the well-being of the population, especially with regard to vulnerable and marginalised groups".[207]

This reading is supported by the recommendatory and interpretive outputs of human rights treaty bodies as part of their monitoring mandate. In its Concluding Observations on the second to the fifth periodic reports of India, the CESCR urged the State party to provide "state subsidies to enable farmers to purchase generic seeds which they are able to re-use, with a view to eliminating their dependency on multinational corporations".[208] The CESCR has also repeatedly urged States Parties to take measures to counteract the detrimental effect of the expansion of monocultures on the enjoyment of economic, social and cultural rights.[209] These developments reflect the position taken by the CESCR in its General Comment No. 12 on Article 11 of the ICESCR, where the Committee stressed the need to "prevent discrimination in access to food or resources for food",[210] and added that this should include "(…) guarantees of

204 This is further supported by the Venice Statement on the Right to Enjoy the Benefit of Scientific Progress and its Applications: Reproduced *in* UNESCO, *The Right to Enjoy the Benefits of Scientific Progress and Its Application*s. Experts' Meeting on the Right to Enjoy the Benefits of Scientific Progress and Its Applications, 3rd, Venice, Italy, 2009 (UNESCO 2009) SHS/RSP/HRS-GED/2009/PI/H/1 para. 13 (c), in particular 3(i).

205 De Schutter, *supra* note 195, p. 315.

206 UN Doc E/C.12/GC/25, para. 64.

207 *Ibid*., para. 52 (as part of States parties' core obligations).

208 CESCR, *Concluding Observations: India*, UN Doc E/C.12/IND/CO/5, para. 69.

209 CESCR, *Concluding Observations: Argentina*, UN Doc E/C.12/ARG/CO/3, para. 10; CESCR, *Concluding Observations: Guatemala*, UN Doc E/C.12/GTM/CO/3, para. 21; CESCR, *Concluding Observations: Paraguay*, UN Doc E/C.12/PRY/CO/4, para. 25.

210 CESCR, *General Comment No. 12: The Right to Adequate Food* (*Art. 11*), UN Doc E/C.12/1999/5, para. 26.

full and equal access to economic resources, particularly for women, including the right to inheritance and the ownership of land and other property, credit, natural resources and appropriate technology".[211]

4.1.3 The Right to take Part in Cultural Life

The most promising doctrinal advancements have occurred within the realm of the right to participate in cultural life. Regarding indigenous peoples, the important General Comment No. 21 allowed the CESCR to incorporate the rights of indigenous peoples related to their science, technology and culture into the normative content of Article 15.1(a) of the ICESCR.[212] The CESCR stated that "cultural life" is not confined to cultural artefacts but embraces "a way of life".[213] In addition, values of cultural life may be communal and include "the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired".[214] More importantly, the rights of Indigenous peoples to maintain and develop their own culture and way of life imply a right to:

> (…) act collectively to ensure respect for their right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, designs, sports and traditional games, and visual and performing arts.[215]

This is a clear reference to Article 31 of the UNDRIP, with the important addition that "States parties should respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by their specific rights".[216]

More recently, the CESCR, while stressing the need for a "global intercultural dialogue for scientific progress",[217] argued for the protection of TK held by local and traditional communities and indigenous peoples in keeping with Article

211 *Ibid.* "Appropriate technology" is broad enough the encompass "seeds": see Morten Haugen, *supra* note 163, p. 295. On economic and physical access to food production sources, see: Golay, *supra* note 9, p. 140; CESCR, *General Comment No. 12* …, UN Doc E/C.12/1999/5, para. 15.

212 CESCR, *General Comment No. 21*, UN Doc E/C.12/GC/21.

213 *Ibid.*, para. 11–13.

214 *Ibid.*, para. 36.

215 *Ibid.*, para. 37.

216 *Ibid.*

217 CESCR, *General Comment No. 25* (2020), UN Doc E/C.12/GC/25, para. 40.

15.1(c). This covers broadly "[l]ocal, traditional and indigenous knowledge, especially regarding nature, species (flora, fauna, seeds) and their properties". States *must* take measures, including "special intellectual property regimes", to protect this knowledge and secure their "ownership and control" over it.[218]

4.1.4 Authors' Rights

Finally, General Comment No. 17 and General Comment No. 25 have given the CESCR the opportunity to shed light on the content of Article 15.1(c) of the ICESCR. Article 15.1(c) casts some intellectual property-type rights as human rights. As human rights, authors' rights – as they are otherwise named[219] – are distinct from entitlements recognised under intellectual property law. They derive from "the inherent dignity and worth of all persons" and, as such, they are "fundamental, inalienable and universal entitlements",[220] which IPRs are not. For this reason, authors' rights recognised in Article 15.1(c) of the Covenant should not be confused with IPRs,[221] even though, as shall be seen, some overlaps exist.

The CESCR also clarified in its Comment No. 17 that the term "author" within the meaning of Article 15.1(c) encompasses not only individuals, but also groups of individuals and communities. Importantly, the same comment delineated the scope of States' obligation to protect the scientific, literary or artistic production of indigenous peoples. The Committee stressed that States should adopt measures to ensure the effective protection of the interests of indigenous peoples in respect of their productions, often manifestations of their cultural heritage and traditional knowledge. It emphasised that such "protection might include the adoption of measures to recognise, register and protect the individual or collective authorship of indigenous peoples under national intellectual property rights regimes".[222] Furthermore, states are urged to prevent the unauthorised use of indigenous productions. In implementing these protective measures, "States parties should respect the principle of free, prior and informed consent of the indigenous authors concerned and the oral or other customary forms of transmission of scientific, literary or artistic production".[223]

According to the CESCR, therefore, Indigenous peoples enjoy some level of protection of their production – which includes varieties bred by indigenous

218 *Ibid.*, para. 39.
219 Saul *et al.*, *supra* note 37, p. 1225.
220 CESCR, *General Comment No. 17*, UN Doc E/C.12/GC/17, para. 1.
221 *Ibid.*, para. 3.
222 *Ibid.*, para. 32.
223 *Ibid.*, para. 32.

peoples[224] – *by operation of law*. A combined reading with Article 6.2 of the Nagoya Protocol (FPIC in relation to access to genetic resources), 12.3(e) of the Seed Treaty (access to plant genetic resources for food and agriculture under development), and Article 15.1(a) of the ICESCR argue for applying FPIC requirements and benefit-sharing obligations whenever access to indigenous seeds is sought.[225] Nonetheless, a more positive form of protection – such as intellectual property-like protection for farmers' varieties along the lines of Indian law (however adequate) or mandatory disclosure and information systems[226] – would require lawmakers to intervene.[227]

A last point to elucidate is whether IPRs, and notably patent rights, are subject to limitations based on the right to science and culture within the meaning of Article 15.1 of the Covenant. A related question is whether IPRs enjoy some additional protection under relevant human rights provisions, and if so, with what consequences. The last question is a difficult one. The apparently clear-cut distinction that General Comment No. 17 draws between authors' rights as "timeless expressions of fundamental entitlements of the human person" and intellectual property as primarily tools for protecting "business and corporate interests and investments"[228] is misleading. In fact, Article 15.1(c) also retains an evident economic dimension,[229] which is reflected in the protection of "material interests" of authors, themselves connected to the "right to own property" as protected under Article 17 of the Universal Declaration of Human Rights, and to the rights of everyone to the opportunity to gain one's living by work which one freely chooses (ICESCR, Art. 6.1), to adequate remuneration (Art. 7(a)) and to an adequate standard of living (Art. 11.1).[230] In addition, as the term of protection of material interests of authors under Article 15.1(c) is not necessarily infinite (perpetual) or does not extend over the lifespan of an author,[231] it is difficult to tell what distinguishes rights of authors under

224 See, Morten Haugen, *supra* note 163, p. 297.

225 UN Commission on Human Rights, *Final Report of the Special Rapporteur, Mrs. Erica-Irene Daes. Annex. Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples (1995)*, UN Doc E/CN.4/Sub.2/1995/26, Principles 5, 9 and 10; UN General Assembly, *Report of the Special Rapporteur in the Field of Cultural Rights (2015)*, UN Doc A/70/279 para 39.

226 See, WIPO Secretariat, *Diplomatic Conference to Conclude an International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources. Basis Proposal for an International Legal Instrument*, GRATK/DC/3, (WIPO, 14 December 2023); WIPO Treaty, *supra* note 160.

227 Morten Haugen, *supra* note 163, p. 297.

228 UN Doc E/C.12/GC/17, para. 2.

229 *Ibid.*, para. 4.

230 *Ibid.*, paras 4 & 15.

231 *Ibid.*, para. 16.

Article 15.1(c) from traditional IPRs. To be sure, the Committee clarified that the protection afforded to authors under Article 15.1(c) "need not necessarily reflect the level and means of protection found in present copyright, patent and other intellectual property regimes";[232] but, as we saw, the Committee also indicated that the protection of indigenous productions might rely on "national intellectual property rights".[233] At this point, if there is a difference between standard IPRs and authors' rights within the framework of international human rights law, it ultimately comes down to this: "legal entities", as holders of IPRs, do not have entitlements "protected at the level of human rights".[234]

If this assertion holds true, even patent holders, as long as they are natural persons, enjoy the same level of protection under human rights law as Indigenous peoples. This is certainly problematic: holders of IPRs are already adequately protected by intellectual property law.[235] Secondly, under the human rights regime the threshold for imposing limitations is very high as the latter "must be determined by law in a manner compatible with the nature of these rights, must pursue a legitimate aim, and must be strictly necessary for the promotion of the general welfare in a democratic society, in accordance with article 4 of the Covenant".[236] On the face of it, it is challenging to envision how States parties can effectively strike an adequate balance between the interests of the authors and the "public interest in enjoying broad access to their productions".[237] In fact, at this stage of the argument, it becomes apparent that the Committee is no longer addressing the exact same issue. When the Committee asserts that "*intellectual property* is a social product and has a social function", and that "States parties thus have a duty to prevent unreasonably high costs for access to essential medicines, plant seeds or other means of food production (…), from undermining the rights of large segments of the population to health, food and education",[238] there is a notable absence of reference to "authors' rights".

While the enjoyment of rights under Article 15.1(c) of the ICESR is not limited "to those not benefitting from enjoyment under standard IPR protection",[239] as the Special Rapporteur in the field of cultural rights recently clarified,[240] authors' rights must vest only in those inventors and scientific

232 *Ibid.*, para. 10.
233 *Ibid.*, para. 32.
234 *Ibid.*, para. 7.
235 Cullet, *supra* note 185, p. 412.
236 UN Doc E/C.12/GC/17, para. 22.
237 *Ibid.*, para. 35.
238 *Ibid.* (our emphasis).
239 Morten Haugen, *supra* note 163, p. 297.
240 UN Doc A/70/279, para. 34.

discoverers for whom there is a "strong personal link" with the "invention" and for whom the "enjoyment of an adequate standard of living" is dependent upon this human rights protection.[241] Given the specific *telos* of Article 15.1(c), it cannot be invoked by patent holders to contest patent rules as "insufficiently protecting their financial or commercial interests".[242] The special rapporteur further noted that, for similar reasons, authors' rights cannot "be used by States to defend patent laws that inadequately respect the right to science and culture".[243] In essence, inventions, such as those protected under patents, are unlikely to satisfy the criterion of "a strong personal link" (although there may be cases where this connection exists)[244] and, therefore, protection under authors' rights is not available.

This limitation on patent – which may also apply *mutatis mutandis* to plant breeders' rights, at least those UPOV 1991-compliant – is a welcome development. The Special Rapporteur Farida Shaheed insisted that IPRs regimes and "[n]ational rules adopted to implement these regimes" undermine the "livelihoods of small farmers, traditional and not for profit crop innovation systems, agro biodiversity [*sic*] as a global public good and the planetary food system as a whole".[245] It is therefore "crucial to recognise that (at least) two parallel agricultural systems exist, and should continue to exist: the commercial seed system and the farmers' seeds (landraces) or informal systems".[246] A fundamental finding of the same report is that "[t]he conjoined human right to science and culture should be understood as including a right to have access to, use and further develop technologies in self determined and empowering ways".[247]

4.2 *Intermediate Conclusion*

We can now take stock of the normative support that is garnered from international human rights law by each of the strands of the right to seeds, going from the strongest to the weakest.

241 *Ibid.*, para. 34.
242 *Ibid.*, para. 34.
243 *Ibid.*, para. 34.
244 The special rapporteur Farida Shaheed specifically addresses the case of "important medicines" which happen to be "classified as traditional knowledge". Here, the "right to the benefit of scientific advancement in this context might require that the traditional knowledge be made available to others for the fulfilment of their right to health" (*ibid*, para. 43).
245 *Ibid.*, para. 52.
246 *Ibid.*, para. 52.
247 *Ibid.*, para. 55.

Rural women's and indigenous peoples' TK are protected by international instruments such as CEDAW and ICESCR, along with relevant general comments. CESCR's Comment No. 25 expands this protection to include TK under the human "right to science", aiming indiscriminately at "local and traditional communities and indigenous peoples".[248] Overall, CESCR's interpretation of ICESCR Article 15.1 enhances Article 5(5) of the Nagoya Protocol, emphasising the sharing of benefits arising from the use of TK with local and indigenous communities.[249]

The right to participate in decision-making regarding the conservation and sustainable use of PGRFA is inherent in the right to benefit from scientific progress and its application.[250] CESCR's General Comment No. 25 extends this right to peasants, understood as comprising the right to determine their own food and agriculture systems, and links it to food sovereignty as enshrined in the UNDROP.[251] General Comment No. 21 emphasises the obligation to involve "minority groups, indigenous peoples and other communities" in the design and implementation of laws and policies that affect them, including obtaining their free, prior and informed consent when the preservation of their cultural resources (including their way of life) is at risk.[252] For rural women, CEDAW also implies the need for the consent of rural women in projects affecting rural lands, drawing on UNDRIP's broader provisions for indigenous peoples' participation and FPIC (UNDROP, Articles 32.2, 18 and 19).[253]

The right to equitably participate in benefits arising for the use PGRFA intertwines with peasants' right to maintain, control, protect and develop their own seeds. The CEDAW Committee urges States to "[p]rotect and conserve native and endemic plant species and varieties that are a source of food and medicine", inviting them to apply the norm of free and informed consent to rural women.[254] General Comment No. 21 reaffirms Article 31 of UNDRIP for indigenous peoples' cultural rights and emphasises the FPIC standard. This represents a major achievement. General Comment No. 17 advocates vesting

248 UN Doc E/C.12/GC/25, para. 39. States parties must obtain free, prior and informed consent of indigenous peoples whenever the State party or non-State actors use their knowledge.

249 Text which is "(…) unencumbered by references to the need for accordance with national law" (Morgera *et al.*, *supra* note 159, p.127), unlike Art. 7 on access to TK associated with genetic resources.

250 UN Doc A/70/279, para. 18. On the links between the right to science and the right to participate in cultural life, see: *ibid.*, paras 16–19.

251 UN Doc E/C.12/GC/25, para. 64.

252 UN Doc E/C.12/GC/21, para. 55.

253 UN Doc CEDAW/C/GC/34, para. 62.

254 *Ibid.*, para. 62.

authors' rights with indigenous peoples. In operationalising them, States Parties are called on to implement FPIC and benefit-sharing norms.[255] The CESCR hinted that such protection might be extended to local communities.[256]

Finally, regarding farm-saved seeds and peasants' rights to use, exchange, and sell propagating material, a robust foothold in international human rights law is lacking. The CEDAW Committee, referencing Article 14.2(g), urges States to respect and protect rural women's rights to preserve and exchange traditional seeds.[257] A combination of ICESCR Articles 11.1, 11.2, and 15.1 provides some support for farmers' privilege by emphasising access to seeds. This suggests the adoption of provisions (only optional under the UPOV Convention 1991) allowing peasants to reuse harvested seeds for propagating purposes on their own holdings and exempting subsistence peasants from equitable remuneration requirements.[258]

Overall, apart from the protection afforded to TK and the right to participate, legally binding international sources of authority to support the other components of the peasants' right to seeds are scarce. While the General Comments of the CESCR have helped clarify the substantive provisions of the ICESCR, it is important to exercise caution in not overestimating or misrepresenting their normative significance. As soft law documents, they admittedly share in the official character that attaches to the hard law instrument they are auxiliary to, but they are not binding on States parties. That said, two further remarks are warranted. First, in their "norm-filling" function,[259] they elaborate on States' practices (as they are described in periodic state reports), render them "more transparent"[260] and therefore contribute to amplifying the

255 UN Doc E/C.12/GC/17, para. 32.

256 *Ibid.*, para. 9. In the African human rights system, see: ACoHPR, *Resolution on Climate Change and Human Rights and the Need to Study Its Impact in Africa*. 46th Ordinary Session Held from 11 to 25 November 2009 in Banjul, The Gambia, ACHPR/Res.153 (XLVI) 09 (Banjul: African Union, 2009); ACoHPR, *Guidelines for National Periodic Reports* (African Union, Banjul, 14 April 1989) sec. III, para. 16(b).

257 UN Doc CEDAW/C/GC/34, para. 62.

258 In the EU, see, e.g., Council Regulation (EC) No 2100/94 of 27 July 1994, *OJEU* L 121, 1.6.1995, p. 31–36. Also see, in Africa, Arusha Protocol for the Protection of New Varieties of Plants within the Framework of the African Regional Intellectual Property Organization (ARIPO) [adopted by a Diplomatic Conference of ARIPO at Arusha, (Tanzania) on July 6, 2015], Art. 22(2) and 22(3).

259 T. Gammeltoft-Hansen et *al.*, 'Introduction: Tracing the Roles of Soft Law in Human Rights' in S. Lagoutte *et al.* (eds.), *Tracing the Roles of Soft Law in Human Rights* (Oxford University Press, Oxford, 2016) p. 6.

260 M. Bódig, 'Soft Law, Doctrinal Development, and the General Comments of the UN Committee on Economic, Social and Cultural Rights' in S. Lagoutte *et al.* (eds.), *Tracing the Roles of Soft Law in Human Rights* (Oxford, Oxford University Press, 2016) p. 73.

terms[261] of the Covenant. This function, although primarily "hortotary", holds significant normative weight as it fits well into the mandated role of most treaty monitoring bodies and is likely to receive due consideration from duty-bearers. On the other hand, they also fulfil a "norm-creating function",[262] all the more prominent in the case of the CESCR as economic and cultural rights are covered by a mere handful of treaty provisions, the justiciability of these rights remains contentious, and there is a paucity of relevant domestic jurisprudence.[263] In this regard, CESCR's General Comments have been described as "prescriptive legal instruments that seek to influence professional discourse on human rights and, by implication, normative development".[264] What is a strength in terms of more progressive interpretations of human rights is also a weak point: in the end, it is governments that need be incentivised to achieve better implementation, and a broad acceptance of the doctrinal work of the CESCR is decisive in this respect.

4.3 *The Right to Freely Dispose of Natural and Productive Resources*

When considered alongside established international norms, it becomes evident that the UNDROP has opened up fresh avenues for addressing fragmentation and bridging normative gaps identified during negotiations. The ongoing challenge lies in advancing this endeavour to facilitate continuous management of regime interplays among various international fora and adapting practices among international courts, tribunals, arbitral panels, and dispute settlement bodies. Moreover, within a decentralised international legal system where resolving norm conflicts does not solely rest on international courts or inter-institutional mechanisms,[265] additional international sources of authority are evidently necessary to instigate changes in implementation practices among duty-bearers and stimulate dynamic interpretations by non-international courts.

Our current inquiry focuses on examining the degree to which the principle of sovereignty over natural resources, implicit within the "right to food sovereignty" and other provisions of the UNDROP, can offer support to seed-related provisions.

261 A. Boyle, 'Soft Law in International Law-Making' in M. Evans (ed.), *International Law* (Oxford University Press, Oxford, 2018) pp. 122–140.
262 Gammeltoft-Hansen *et al.*, *supra* note 259, p. 7.
263 Bódig, *supra* note 260, p 74 and p. 70.
264 *Ibid.*, p. 74.
265 De Wet and Vidmar, *supra* note 44, p. 4.

4.3.1 The Right to Food Sovereignty and the Principle of Sovereignty over Natural Resources

As many astute and informed commentators on the Declaration have noted, the right to food sovereignty, in particular as defined in the Declaration of Nyéléni[266] or as enshrined in the Final Declaration of the World Forum on Food Sovereignty 2011,[267] "reiterates more or less the right to self-determination of peoples as recognised in the ICESCR/ICCPR Article 1".[268] Closely associated with the transnational movement LVC which she has studied for years, Priscilla Claeys has repeatedly stressed that, "[i]n its internal dimension, this right expresses claims that are close to people's internal self-determination; i.e. the right of a people to freely choose its own political, economic and social system".[269] Invited to the Fourth session of the Open-ended intergovernmental working group to speak in her capacity as a specialist, Claeys reiterated that the "right to food sovereignty can be seen as a contemporary version of the right to development, the right of peoples to self-determination and the right to natural resources".[270]

The connection between the right to self-determination and the right to development was already the building block of the UNDRIP (Art. 3). Just as the right to self-determination is a prerequisite to the right to development,[271] so too is the right to development – *i.e.*, the inalienable right to participate in, contribute to, and enjoy economic, social, cultural and political development[272] – the *telos* of the right to autonomy and self-government[273] in which the right to self-determination finds its full expression.[274] Both imply the peoples' right to freely dispose of their natural resources, which has been described more

266 'The Declaration of Nyéléni, Nyéléni Village, Sélingué, Mali, February 2007', *supra* note 1.

267 Forúm Mundial sobre soberanía alimentaria, *supra* note 3.

268 Morten Haugen, *supra* note 163, p. 273.

269 Claeys, *supra* note 113, p. 849. Also see, Claeys, *supra* note 8, pp. 21–22.

270 Mme Priscilla Claeys (Centre for Agroecology, Water and Resilience, 15–19 mai 2017), Fourth session of the Open-ended intergovernmental working group on the rights of peasants and other people working in rural areas (15–19 May 2017).

271 UN General Assembly, Res. 41/128, Declaration on the Right to Development, UN Doc. A/RES/41/128, 4 December 1986 (adopted by 146 votes to 1; 8 abstentions), Article 1.2: "The human right to development also implies the full realisation of the right of peoples to self-determination (…)".

272 Declaration on the Right to Development, Article 1.1.

273 Self-determination is a principle of international law (A. Cassese, *Self-determination of peoples: a legal reappraisal* (Cambridge University Press, Cambridge, 1995) pp. 132–133) and also a right which has a "political core": see, A. Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (Cambridge University Press, Cambridge 2014) pp. 157 *seq*.

274 UNDRIP, Article 3.

radically as the indigenous peoples' permanent sovereignty over their wealth and natural resources.[275]

The right to food sovereignty should be considered against this extensive conceptual background and in opposition to the State-centric, Westphalian approach to the right to food.[276] Serving as the peasants' entitlement to "determine their own food and agriculture systems",[277] the right to food sovereignty speaks directly to the right to autonomy[278] – a quintessential political right. It enables peasants to pursue their economic, social, and cultural development freely, with a primary focus on producing healthy and sufficient food through ecologically sustainable methods that respect their cultural practices.[279] According to activists within the transnational agrarian movement, food sovereignty requires peasants' full control over their natural wealth and resources.

Quite characteristically, in the draft declaration presented at the Second session of the Open-ended intergovernmental working group, Article 5, now pertaining to the "right to have access to natural resources", was headed "Rights to Sovereignty over Natural Resources, Development and Food Sovereignty" and included the definition of the right to food sovereignty.[280] Most importantly, the text opened with the statement that "Peasants and other people working in rural areas have the right to sovereignty over the natural resources in their communities".[281] Clearly, the provision was met with great perplexity and resistance. For one thing, some NGOs, while praising the draft

275 Declaration on the Right to Development, Art. 1.1. And see, UN Commission on Human Rights, *Final Report of the Special Rapporteur, Erica-Irene A. Daes. Indigenous Peoples' Permanent Sovereignty over Natural Resources*, UN Doc E/CN.4/Sub.2/2004/30.

276 Claeys, *supra* note 8, pp. 79–80.

277 UNDROP, Article 15.4 (also see in the Preamble: "the right to define their food and agriculture systems (…)").

278 W. Schanbacher, 'Conceptualizing the Human Right to Food in the Food Sovereignty Framework', Food Sovereignty: A Critical Dialogue. International Conference Yale University September 14–15, 2013. Conference Paper #53, (Yale University, Yale, 2013), pp. 10–11. https://www.tni.org/files/download/34_clark_2013_0.pdf; P. McMichael, 'Global Citizenship and Multiple Sovereignties: Reconstituting Modernity' in Y. Atasoy (ed.), *Hegemonic Transitions, the State and Crisis in Neoliberal Capitalism* (New York: Routledge, Abingdon, 2008) p. 34.

279 UNDROP, Article 15.4.

280 Human Rights Council, *Draft UN Declaration on the Rights of Peasants and Other People Working in Rural Areas, ADVANCED VERSION 27/01/2015* (2015), presented at the Third session as: UN Human Rights Council, *Draft Declaration on the Rights of Peasants and Other People Working in Rural Areas Presented by the Chair-Rapporteur of the Working Group*, UN Doc A/HRC/WG.15/3/2.

281 UN Doc A/HRC/WG.15/3/2.

for including the right to food sovereignty in the text, felt this right should be better distinguished from the right to permanent sovereignty.[282] On the other hand, an NGO noted that "food sovereignty was, in its view, directly related to the right to self-determination and therefore should be central in the first articles of the draft declaration";[283] while Priscilla Claeys took the view that it rightly belonged in an article on sovereignty.[284] Unsurprisingly, several States expressed their reservation in respect of the concept of sovereignty[285] – chief among them, the EU;[286] but it was Argentina, it seems, which argued for (and obtained) the complete deletion of the paragraph 1 of Article 5 on "the right to sovereignty over the natural resources".[287]

Although the term "sovereignty" was formally removed from later versions of the text,[288] it can still be argued that it remains implicitly present through the inclusion of the right to food sovereignty and its underlying connection to the right of peoples to freely dispose of their natural resources.[289] Furthermore, the *telos* of permanent sovereignty is still maintained through the explicit recognition of the right to development for peasants.[290] As has been noted, the "concept of food sovereignty places more specific emphasis on access to resources".[291] It "provides more far-reaching ammunition than the right to food for calls to improve resource access".[292] At minimum, food sovereignty is a call for peasants' control over the natural resources necessary for food production[293] (and more broadly over everything that ensures their social reproduction), and it can confidently be said that international human rights law has reached a sufficient degree of development to support this call.[294]

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282 UN Doc A/HRC/30/55.

283 *Ibid.*, para. 42.

284 Claeys, *supra* note 270.

285 UN Doc A/HRC/30/55, para. 42; UN Doc A/HRC/33/59, paras 33–61.

286 *Ibid.*, Annex 3, p. 27.

287 *Ibid.*

288 See, starting from the Fourth session, Human Rights Council, *Draft Declaration on the Rights of Peasants and Other People Working in Rural Areas Presented by the Chair-Rapporteur of the Working Group*, UN Doc A/HRC/WG.15/4/2: "Article 5. Rights to natural resources and the right to development".

289 UNDROP, Preamble, referring to both International Covenants on Human Rights.

290 UNDROP, Articles 3.2, 4.1 and 26.1.

291 L. Cotula, 'The Right to Food and Resource Access. Conceptual Links' in L. Cotula (ed.), *The Right to Food and Access to Natural Resources* (FAO, Rome, 2008) p. 24.

292 *Ibid.*, p. 24.

293 J. Gilbert, 'The Right to Freely Dispose of Natural Resources: Utopia or Forgotten Right?', 31:3 *Netherlands Quarterly of Human Rights*, vol. 31, no. 3, 2013, p. 30. DOI:10.1177/016934411303100305.

294 Gilbert, *supra* note 139, pp. 26 *seq.*; Gilbert, *supra* note 293.

4.3.2 The Right to Freely Dispose of Natural Resources in International Human Rights Law

4.3.2.1 *FPIC and Benefit-sharing for Indigenous Peoples*

The challenge to the State-centric approach to sovereignty over natural resources is hardly new, and in the past decades, there have been ongoing discussions regarding the recognition of indigenous peoples' inherent and permanent sovereignty over natural resources.[295] Leaving aside for the moment the thorny issue of indigenous sovereignty, we can at least argue that indigenous self-determination over natural resources is gaining the status of customary international law.[296] International human rights monitoring bodies have established a robust record of supporting indigenous rights-claims over natural resources. They often invoke Article 1(2) of both Covenants or a combination of legal grounds to this end. For instance, the Human Rights Committee has relied on Article 1(2)[297] to assert that the right to self-determination requires that all peoples (including aboriginal peoples) be able to freely dispose of their natural resources[298] and that indigenous peoples be able to effectively participate in all matters affecting the ownership and use of their lands.[299] In *Ángela Poma Poma v Peru*, the Human Rights Committee introduced a two-prong test to evaluate the admissibility of development projects that "substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community". This test involves assessing whether the community "had the opportunity to participate in the decision-making process", with participation understood as FPIC, and whether the community "will continue to benefit from their

295 UN Commission on Human Rights, *supra* note 275.

296 James Anaya, 'Indigenous Peoples' Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources', 22:1 *Arizona Journal of International and Comparative Law* (2005) p. 7; UN Commission on Human Rights, *supra* note 275, para. 40.

297 UN Human Rights Committee, *Apirana Mahuika et al. v. New Zealand*, Communication N° 547/1993, UN Doc CCPR/C/70/D/547/1993, para. 9.2: suggesting that Article 1 may be relevant in interpreting other rights as protected under the Covenant, in particular Article 27.

298 UN Human Rights Committee, 'Concluding Observations: Canada', UN Doc CCPR/C/79/Add.105, para. 8.

299 UN Human Rights Committee, 'Concluding Observations: Australia', UN Doc. A/55/40, para. 508.

traditional economy".[300] An additional protection lies in the applicability of proportionality.[301]

However, it is primarily the CESCR that has formulated an extensive doctrine, frequently based on Article 1 of the ICESCR. In doing so, they have translated the indigenous peoples' right to freely dispose of their natural wealth and resources into norms of consultation.[302] In recent years, this doctrine has increasingly incorporated norms of FPIC,[303] often coupled with benefit-sharing requirements.[304] This progressive approach, which combines FPIC and benefit-sharing, has also received endorsement from the Committee on the Elimination of Racial Discrimination, notably in an oft-quoted concluding observation regarding Ecuador.[305]

Overall, piecing together non-discrimination, the right to participate in public life, States' duties to provide indigenous peoples with conditions allowing for sustainable economic and social development compatible with their cultural characteristics, and the right to land, territories and resources,[306] the CERD has effectively established consent and profit-sharing standards for

300 UN Human Rights Committee, *Ángela Poma Poma v Peru*, Communication No. 1457/2006', UN Doc CCPR/C/95/D/1457/2006, para. 7.6. Also see, G. Pentassuglia, 'Towards a Jurisprudential Articulation of Indigenous Land Rights', 22:1 *European Journal of International Law* (2011) pp. 182–184. DOI:10.1093/ejil/chr005; F. Lenzerini, 'Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples', 42:1 *Texas International Law Journal* (2006) pp. 182–183.

301 *Ángela Poma Poma v Peru*, para. 7.6.

302 CESCR, *Concluding Observations: Cambodia*, UN Doc E/C.12/KHM/CO/1, para. 16; CESCR, *Concluding Observations: Guatemala*, UN Doc E/C.12/GTM/CO/3, para. 7: "consultations to allow free expression of consent".

303 CESCR, *Concluding Observations: Guatemala*, UN Doc E/C.12/GTM/CO/3, para. 7; CESCR, *Concluding Observations: Chile*, UN Doc E/C.12/CHL/CO/4, para. 8; CESCR, *Concluding Observations: Russian Federation*, UN Doc E/C.12/RUS/CO/6, para. 15; CESCR, *Concluding Observations: Argentina*, UN Doc E/C.12/ARG/CO/4, paras 20–21; CESCR, *Concluding Observations: Cambodia*, UN Doc E/C.12/KHM/CO/2, paras 14–15; CESCR, *Concluding Observations: Paraguay*, UN Doc E/C.12/PRY/CO/4, para. 6.

304 CESCR, *Concluding Observations: Argentina*, UN Doc E/C.12/ARG/CO/3, para. 9; CESCR, *Concluding Observations: Finland*, UN Doc E/C.12/FIN/CO/6, para. 9; CESCR, *Concluding Observations: Angola*, UN Doc E/C.12/AGO/CO/4–5, paras 19–20; CESCR, *Concluding Observations: Morocco*, UN Doc E/C.12/MAR/CO/4, paras 5–6. On the distinction between redress, compensation and benefits, see E. Morgera, 'Under the Radar: The Role of Fair and Equitable Benefit-Sharing in Protecting and Realising Human Rights Connected to Natural Resources', 23:7 *The International Journal of Human Rights* (2019) pp. 1114–1116. DOI:10.1080/13642987.2019.1592161.

305 UN CERD, *Concluding Observations: Ecuador*, UN Doc CERD/C/62/CO/2, para. 16.

306 UN CERD, *General Recommendation XXIII. Indigenous Peoples*, UN Doc A/52/18, annex V.

resources extracted from indigenous peoples' territories.[307] These standards align with those set forth by the CESCR, grounded in Article 1.1 of the ICESCR.

Human rights regional systems have also played a pivotal role in bringing FPIC and benefit-sharing norms into the mainstream in general international law with a view to increasing indigenous peoples' and local communities' control over their resources. The Inter-American Court of Human Rights (IACtHR) has been at the forefront of these developments. In the case of the *Saramaka People v. Suriname*,[308] the IACtHR, connecting the right to property as protected under Article 21 of the American Convention on Human Rights[309] and the right to self-determination, held that "by virtue of the right of indigenous peoples to self-determination recognised under said Article 1 [of the ICESCR]", they may "freely pursue their economic, social and cultural development", and may "freely dispose of their natural wealth and resources" so as not to be "deprived of [their] own means of subsistence".[310] The Court further clarified that even thus reinforced by the right to freely dispose of natural wealth as under Article 1 of the Covenant, the right to property suffers limitations. Restrictions are indeed permissible, but only insofar as they do not amount "to a denial of their traditions and customs in a way that endangers the very survival of the group and of its members".[311] In the end, it comes down to the State to meet three standards: "effective participation" of the indigenous people affected in accord with their customs and traditions; reasonable benefits arising out of the project accruing to the people; and prior environmental and social impact assessment.[312] The Court specified that, in cases of "large-scale development or investment projects" that would have a major impact, a heightened level of protection would be required: consultation is not enough to guarantee effective participation, and the State has a duty to obtain the FPIC of the community.[313] While there is little space here to comment on the Court's reasoning, two critical observations are warranted. The first is that this particular prism of property rights tends to frame the debate of State's interference with the indigenous territory and natural resources found therein as a problem of expropriation and eminent domain doctrine. It follows

307 UN CERD, *Concluding Observations: Boliva*, UN Doc CERD /C/BOL/CO/17–20, para. 7; UN CERD, *Concluding Observations: Norway*, UN Doc CERD/C/NOR/CO/21–22, para. 30.

308 *Case of the Saramaka People v. Suriname*, 28 November 2007, IACtHR, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Series C No. 172.

309 American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS.

310 *Case of the Saramaka People*, para. 93.

311 *Ibid.*, para. 128.

312 *Ibid.*, para.129.

313 *Ibid.*, par. 134.

that, even when there is no expropriation ("total deprivation of property title"), but "mere" deprivation of certain proprietary interests (e.g., a mining concession granted to a private company), the issue is not one of dialogue between parallel sovereigns[314] or between a State and a self-governed and economically autonomous people, but one of reconciling the interests of the land right-holder with the public interest (proportionality-based test)[315] and compensating for the ensuing material and non-material damages.[316] Another flaw lies in the premise that protection is contingent upon the inseparable connection between natural resources and the economic, social, and cultural survival of indigenous and tribal peoples. This relationship is arguably what enables the extension of protection of the right to property over territory to also encompass natural resources. However, as a result, protection is limited to resources traditionally utilised by indigenous peoples[317] and deemed essential for their survival.[318]

The subsequent case of *the Kaliña and Lokono Peoples v Suriname*[319] once again relied on a combined reading of Article 21 of the American Convention and Article 1 common to both Covenants to acknowledge the rights of the Kaliña and Lokono peoples to their collective territory.[320] The Court reiterated the requirements for restrictions imposed on the right to property. Interestingly, the Court explicitly cited Articles 18 and 32 of the UNDRIP. The reference to Article 18 is particularly significant as it clearly shifts the debate on FPIC and benefit-sharing away from a mere balancing of competing interests or assessment of the public interest against the three-prong test of effective participation, benefit-sharing and prior social and environmental impact assessment.[321] The concept of effective participation "is not only a matter of public interest",[322] but rather delves into issues of political participation,

314 Lenzerini, note *supra* 300, pp. 188–189, 179 and 186.

315 *Case of the Saramaka People*, para. 127.

316 Also of this view, see Gilbert, *supra* note 293, p. 39.

317 *Case of the Saramaka People*, paras 120–123, 125–128; and see, earlier in the jurisprudence of the Court: *Case of the Yakye Axa Indigenous Community v. Paraguay*, 17 June 2005, IACtHR, Merits, Reparations and Costs, Series C No. 125, para. 137; *Case of the Indigenous Community Sawhoyamaxa v. Paraguay*, 29 March 2006, IACtHR, Merits, Reparations and Costs, Series C No. 146, para. 118.

318 Development activities affecting resources which are not necessary for the group's survival can nevertheless be limited if they have a bearing on resources which are.

319 *Case of the Kaliña and Lokono Peoples v Suriname*, 25 November 2015, IACtHR, Merits, Reparations and Costs, Series C, No. 309.

320 *Ibid.*, para. 125.

321 *Ibid.*, para. 201.

322 *Ibid.*, para. 203.

emphasising autonomy as a prerequisite to protect culture and identity.[323] This rationale underscores the substantive content of consultation, highlighting the link between a community's self-governance of its territory and its cultural survival, as well as its right to freely pursue its economic, social and cultural development.[324]

This line of reasoning was recently confirmed in the *Case of Indigenous Communities of the Lhaka Honhat* (*Our Land*) *Association v. Argentina*,[325] where for the first time the Inter-American Court ruled autonomously on economic, social, cultural and educational rights in relation to indigenous peoples. Asked to address the presumed violation of the right to property over the ancestral territory of the indigenous communities of the Lhaka Honhat due to encroachment by non-Indigenous settlers (*criollos*) and public works concessions granted on the territory, the Court found a separate violation of the rights to a healthy environment, to adequate food, to water and to take part in cultural life. Interestingly, the latter violation was based on the State's failure to "guarantee the indigenous communities the possibility of deciding, freely or by adequate consultation, the activities on their territory",[326] and the pivotal right in the Court's analysis is indeed the "interrelated rights to take part in cultural life in relation to cultural identity, and to a healthy environment, adequate food, and water contained in Article 26 of the American Convention".[327]

If we now turn our attention to the African system, the case law is broadly comparable. However, there is a key difference in that the African Charter, unlike the American Declaration of Human Rights, includes two separate articles respectively dedicated to the right to dispose of wealth and natural resources (Article 21) and the right to development (Article 22), in addition to the right to property (Article 14). This distinction has enabled the Court and the Commission to autonomously consider violations on different grounds in cases of encroachment onto the lands of indigenous peoples and local communities. Focusing solely on Article 21, the reasoning of the Commission in its landmark communication *Centre for Minority Rights Development* (*Kenya*) *and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (the "Endorois" case)[328] is reminiscent of the Saramaka case: any restriction

323 Xanthaki, *supra* note 273, pp. 164–166.

324 *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, 27 June 2012, IACtHR, Merits and ReparationsSeries C No. 245, para. 171.

325 *Case of the Indigenous Communities of the Lhaka Honhat*, *supra* note 16.

326 *Ibid.*, para. 288.

327 *Ibid.*, para. 289.

328 *Centre for Minority Rights Development* (*Kenya*) *and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (Endorois case), (ACoHPR 2009), Communication 276/03.

must satisfy the two-pronged test as set out under Article 14 (which assesses whether the encroachment was conducted "in the interest of public need or in the general interest of the community" and "in accordance with appropriate laws").[329] In terms of State obligations, this implies organising consultation with the community, and even "free prior and informed consent" as the Commission later specified in a resolution.[330] While the Commission only evokes "restitution and compensation" (remediation following "spoilation" as provided under 21(2)),[331] the inextricable link between the protection of ancestral lands and territories and natural resources[332] allows the extension of the profit-sharing guarantees provided under Article 14 to the rights protected under Article 21.[333] Notably, there seems to be no need to inquire whether those resources (in that case rubies) are traditionally used and necessary for the very survival of the people.

The only significant difference that is worth stressing is the potency of the right of development, an African doctrinal innovation[334] that speaks all at once to the right to property, the right to natural resources and cultural rights.[335] As the Commission said, the right to development has a two-fold dimension, both "constitutive and instrumental", otherwise conceptualised as "a means and an end".[336] There are few clues as to the substantive content of the right. The Commission highlights at some point that the *telos* of the right is to increase the "capabilities"[337] or the "empowerment" of the group.[338] On the "instrumental" side of the right, "freedom of choice"[339] seemingly constitutes a prerequisite for achieving the identified ends. This freedom of choice is

329 *Ibid.*, para. 267.

330 ACoHPR, *Resolution on a Human Rights-Based Approach to Natural Resources Governance*. Adopted at its 51st Ordinary Session Held from 18 April to 2 May 2012 in Banjul, The Gambia, ACHPR/Res.224 (LI) 2012, (African Union, Banjul, 2012).

331 Endorois case, para. 268.

332 See, most clearly, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, 26 May 2017, ACHPR, Application No. 006/212, para. 201.

333 *Cf.* R. Murray, *The African Charter on Human and Peoples' Rights: A Commentary* (Oxford University Press, Oxford 2020) pp. 512–513. This was clearly articulated in the Ogoni case: *The Social and Economic Rights Action Centre for Economic and Social Rights v. Nigeria*, (ACoHPR 2002), Communication 155/96, para. 60.

334 R.L. Barsh, 'The Right to Development as a Human Right: Results of the Global Consultation', 13:3 *Human Rights Quarterly* (1991), pp. 322–338. DOI:10.2307/762618.

335 See, Murray, *supra* note 333, pp. 522–523, noting that the *travaux préparatoires* to the ACHPR show that the right to development was also conceived of as a "combination of other rights" or "contingent on the respect for other rights".

336 Endorois case, para. 277.

337 *Ibid.*, para. 279.

338 *Ibid.*, para. 283.

339 *Ibid.*, para. 278.

non-existent when the community is deprived of its land, relegated to semi-arid land, barred from accessing sacred sites, deprived of medicinal salt licks or traditional water sources. This typology goes a long way towards unveiling the polymorphous nature of FPIC and benefit-sharing norms: procedural in nature, they also encapsulate and share in the substance of the right they operationalise. There is no well-being, no fulfilment of one's needs without "just compensation";[340] there is no freedom of choice and control over one's life without FPIC. This holds true for the right to freely dispose of natural resources, in that the interplay of FPIC and benefit-sharing express the peoples' political right to autonomy and the right to freely pursue their economic, social and cultural development.

It is worth noting to conclude that the FPIC regime appears to vary depending on the specific circumstances involved. For instance, within the context of the UNDRIP, FPIC is pertinent to legislative and administrative measures, development projects, relocations, disposal of hazardous waste, or military activities. A cursory examination of UNDRIP reveals the multitude of applicable regimes and the presence of discrepancies.[341] The most effective approach to this complexity would be to consider FPIC in a broad sense as a principle that encapsulates certain obligations including (good faith) consultation, consultation with a view of obtaining consent (i.e., efforts to build consensus), and actual consent (i.e., a right of veto), with each step representing an escalating level of obligation.[342]

When we narrow our focus to development projects or administrative and legislative measures, there is a growing consensus that FPIC, in one of its most stringent forms, comes into play when these initiatives "affect" matters deemed of "fundamental importance to their rights, survival, dignity, and well-being".[343] Relevant considerations include "the perspective and priorities of the indigenous peoples concerned; the nature of the matter or proposed activity and its potential impact on the indigenous peoples concerned, taking into account, inter alia, the cumulative effects of previous

340 *Ibid.*, para. 295.

341 R. Rösch, *Negotiating Norms. The Right to Free, Prior, and Informed Consent in Liberia and Beyond* (Springer, Cham, 2023) p. 75. Also see, OAS General Assembly 'American Declaration on the Rights of Indigenous Peoples' (15 June 2016) AG/RES. 2888 (XLVI-O/16).

342 J. Razzaque, 'A Stock-Taking of FPIC Standards in International Environmental Law', in S.J. Turner *et al.* (eds.), *Environmental Rights: The Development of Standards* (Cambridge University Press, Cambridge, 2019) p. 196.

343 UN Human Rights Council, *Follow-up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries*, UN Doc A/HRC/21/55, para. 27.

encroachments or activities and historical inequities faced by the indigenous peoples concerned".[344] Consequently, if a measure or project is anticipated to significantly and directly impact indigenous peoples' lives, land, territories, or resources, their *consent* (and not only participation or consultation) becomes necessary.[345]

This approach is often referred to as the "sliding scale approach".[346] Notably, human rights bodies, regional courts, and certain national jurisdictions have embraced this perspective.[347] Crucially, beyond the nature of the acts themselves which are not limited to a specific category (logging such as in *Saramaka*, oil concession such as in *Sarayaku*, public works concessions such as in *Lhaka Honhat*, eviction to create a game reserve for tourism as in the *Endorois* case), what truly matters are the scale (large development projects as against small-scale projects), duration, and long-term ramifications of such actions. The latter includes the harm inflicted on community land or territory, or the erosion of cultural integrity. Hence, FPIC principles could conceivably apply to measures affecting resources such as seeds subject to traditional ownership or under customary use or impacting on cultural heritage of indigenous peoples or using their cultural heritage (including traditional knowledge) or innovation for commercial purposes.[348] As we shall see, this interpretation is sustained by multilateral environmental agreements, and in particular international biodiversity law, not only for indigenous peoples but also for local communities.

4.3.2.2 *Extension of FPIC and Benefit-Sharing to Non-indigenous Communities*

A final noteworthy point is the extent to which participatory rights and benefit-sharing have been progressively extended to non-indigenous communities in general human rights law. The IACtHR has held, for example,

344 UN Human Rights Council, Free, prior and informed consent: a human rights-based approach, UN Doc A/HRC/39/62, para. 33.

345 *Ibid*.

346 G. Pentassuglia, *Minority Groups and Judicial Discourse in International Law: A Comparative Perspective* (Brill, Nijhoff, 2009) p. 113.

347 UN Human Rights Council, *supra* note 344, para. 37.

348 Also see, IACHR, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*, OEA/Ser.L/V/II. Doc.47/15, (IACHR, OAS, 31 December 2015), para. 189; IFC 'Performance Standards on Environment and Social Sustainability' (2012), 'Performance Standard 7 Indigenous Peoples' (1 January 2012), para. 13–17.

that *consultation* is a general principle of international law[349] that should also benefit the broad category of "indigenous and tribal communities and peoples".[350] In Latin America, FPIC principles have been extended to Afro-Descendant communities.[351] More broadly, Jérémie Gilbert has recently made the case that, given the composite foundation of FPIC and benefit-sharing norms (self-determination, right to development, the right to property), they cannot be interpreted as "exclusive to indigenous peoples rights".[352] In several concluding observations, the CESCR referred to the requirement of FPIC over the exploitation of natural resources located on their territories in cases involving "rural communities, small farmers and agropastoralists",[353] "small-scale farmers and agropastoralists",[354] "dwellers" and "local communities",[355] "vulnerable communities, including pastoralist and hunter-gatherer communities",[356] as well as "peasants and people living in rural areas".[357] In at least three concluding observations, the CESCR went even so far as to argue for FPIC and benefit-sharing standards in regards to the "local population",[358] "communities, including indigenous communities",[359] "communities" and "populations"[360] with "traditional lifestyle". More strikingly, in two instances, the CESCR expressly based its recommendations on Article 1 of the ICESC (in combination with Art. 11 or with Art. 11 and 12).[361] Finally, in the African system, one may certainly conclude that the "very basis" for addressing indigenous issues under the African Convention "does not seem to rest on a rigid distinction between 'indigenous peoples' and sub-national minority

349 CIDH, *Derecho a La Libre Determinación de Los Pueblos Indígenas y Tribales*, OEA/Ser.L/V/II. Doc. 413 (CIDH, diciembre 2021) para. 177.

350 *Case of the Kichwa Indigenous People*, para. 166.

351 See relevant jurisprudence in IACHR, *supra* note 348, paras 28–33, 183 *seq*. Also see IACHR, *Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources. Norms and Jurisprudence of the Inter-American Human Rights System*, OAS/Ser. L/V/II.Doc.56/09, (IACHR, OAS, 30 December 2009).

352 Gilbert, *supra* note 139, p. 80 (benefit-sharing) and p. 74 (FPIC).

353 CESCR, *Concluding Observations: Burkina Faso*, UN Doc E/C.12/BFA/CO/1, paras 13–14.

354 CESCR, *Concluding Observations: Sudan*, UN Doc E/C.12/SDN/CO/2, paras 11–12.

355 CESCR, *Concluding Observations: Togo*, UN Doc E/C.12/TGO/CO/1, para. 26.

356 CESCR, *Concluding Observations: United Republic of Tanzania*, UN Doc E/C.12/TZA/CO/1–3, paras 22, 29.

357 CESCR, *Concluding Observations: Madagascar*, UN Doc E/C.12/MDG/CO/2, para. 12.

358 CESCR, *Concluding Observations: Mauritania*, UN Doc E/C.12/MRT/CO/1, para. 8.

359 CESCR, *Concluding Observations: Cameroon*, UN Doc E/C.12/CMR/CO/4, paras 16–17.

360 CESCR, *Concluding Observations: Democratic Republic of the Congo*, UN Doc E/C.12/COD/CO/6, paras 16–17.

361 Respectively: UN Doc E/C.12/CMR/CO/4, paras 16–17 & UN Doc E/C.12/COD/CO/6, paras 16–17.

groups generally, other than perhaps in terms of the extent of the threat to the physical and cultural integrity of the former".[362]

In conclusion, there is now a significant body of jurisprudence over indigenous land and resources, as well as specialised standard-setting under general human rights treaties. Additionally, outcomes from governing bodies of multilateral environmental agreements,[363] as well as various policies and guiding instruments adopted by United Nations bodies, specialised agencies,[364] and international financing institutions,[365] contribute to this landscape.[366] These developments sustain emerging (or at least burgeoning but increasingly established) norms of general international law or customary law which guarantee indigenous peoples' as well as local communities' control over their resources. Under these new norms of "resource control", national sovereignty over natural resources now must accommodate a legal space for competing autonomy or self-governance claims aimed at preserving communities' capabilities and freedom of choice and, ultimately, their ways of life and different worldviews.

362 Pentassuglia, *supra* note 300, p. 189. Also see, Murray, *supra* note 333, pp. 484–488. and ACoHPR, *Resolution on a Human Rights-Based Approach to Natural Resources Governance ...*, *supra* note 330.

363 Secretariat of the Convention on Biological Diversity, *Akwé: Kon Voluntary Guidelines* (UNEP, CDB, Montreal, 2004). https://edepot.wur.nl/531233 (COP CDB 7, Decision VII/16, F, UNEP/CBD/COP/7/21; COP CDB, *Decision 15/4. Kunming-Montreal Global Biodiversity Framework*, CBD/COP/DEC/15/4.

364 FAO, *FAO Policy on Indigenous and Tribal Peoples* (FAO, Rome, 2015), p. 5; UNDP, *UNDP and Indigenous Peoples: A Policy of Engagement* (UNDP, 29 November 2015), paras 28, 63; GEF. Council Meeting, *Principles and Guidelines for Engagement with Indigenous Peoples*, GEF/C.42/Inf.03/Rev.1, paras 13, 30, 31; GEF. Council Meeting, *Policy on Environmental and Social Safeguards*, SD/PL/03; FCPF and UN-REDD Programme, *Guidelines on Stakeholder Engagement in REDD+ Readiness With a Focus on the Participation of Indigenous Peoples and Other Forest-Dependent Communities* (FCPF, FAO, UNDP, UNEP, April 2012); UN-REDD Programme, *Guidelines on Free, Prior and Informed Consent* (FAO, UNDP, UNEP, January 2013); UNESCO Executive Board, *Unesco Policy on Engaging with Indigneous Peoples*, 201 EX/6 (UNESCO, Paris, 2017), paras 8, 11, 37, 48; UNESCO. Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage, *Operational Guidelines for the Implementation of the World Heritage Convention*, WHC.21/01 (UNESCO, Paris, 2021), paras 47*ter*, 64, 117, 123, 214*bis*.

365 The World Bank, *The World Bank Environmental and Social Framework* (International Bank for Reconstruction and Development/The World Bank, Washington, 2017), ESS 7.

366 The OAU, *African model legislation for the protection of the rights of local communities, farmers and breeders, and for the regulation of access to biological resources* (OAU Model Law, Algeria, 2000) (part III) holds particular relevance.

4.3.3 Seed Sovereignty as a Push for the Recognition of the Right to Freely Dispose of Natural Resources

We are now in a position to proceed to the last part of the argument. If anything, seed sovereignty expresses a claim to control over the resource base as an integral part of the right to freely dispose of natural resources. Its quintessence is expressed in Article 19.2 of the UNDROP. As said, the provision, which draws on Article 31 of the UNDRIP, garners support from UN standard-setting activities as well as recommendations issued by human rights treaty bodies. These urge States to lay down norms of FPIC for access to indigenous peoples' genetic resources and seeds and to vest authors' rights on seeds with them.[367] The rich *corpus juris* on the right to freely dispose of natural resources, the right to development, FPIC and benefit-sharing explored in the previous section helps fill the gaps with respect to local communities, while increasing the legal significance of Article 19.2 of the UNDROP.

More importantly, this interpretation aligns with that of scholars in the field of international biodiversity law. The adoption of Articles 6(2) et 5(2) of the Nagoya Protocol, the first legally binding instrument to address access to genetic resources "held by" local communities and indigenous peoples, was heralded as a watershed moment in international environmental law, extending the scope of Article 8(j) of the CBD well beyond what could have been fathomed in 1992.[368] Nonetheless, as stressed earlier in this paper, the relevant provisions of the Protocol are heavily qualified. In addition to provisos common to biodiversity-related instruments ("Each Party shall take legislative, administrative or policy measures, as appropriate (…) in accordance with domestic legislation" or "In accordance with domestic law, each Party shall take measures, as appropriate"), both Articles 6(2) and 5(2) limit FPIC and benefit-sharing duties to instances where indigenous peoples and local communities have "established rights" over the genetic resources that they "held".[369] According to a narrow interpretation, the specific State obligation to take legislative, administrative or policy measures with the aim of ensuring that indigenous peoples and local communities have given their FPIC and received a fair and equitable share of benefits arising from the use of genetic resources "held" by them is underpinned by a procedural environmental right at best. In essence, these provisions aim to recognise and/

367 See *supra*, para. 4.1.4.

368 K.S. Bavikatte and D.F. Robinson, 'Towards a Peoples History of the Law: Biocultural Jurisprudence and the Nagoya Protocol on Access and Benefit Sharing', 7:1 *LEAD Journal* (2011) p. 47.

369 Nagoya Protocol, Art. 5(2) (fair and equitable benefit-sharing) and Art. 6(2) (access to genetic resources).

or reward traditional communities for their role as custodians of biodiversity, with procedural guarantees established to address human rights challenges inherent in negotiations between communities and bioprospectors. Beyond this, there is no obligation triggered if the communities concerned are unable to demonstrate that they have "established rights" – a matter that appears to be at the discretion of each State party.[370]

A dynamic and mutually supportive approach to interpreting the Nagoya Protocol, informed by article 19.2 of the UNDROP, the jurisprudence of regional human rights courts and international human rights standards, reveals the inadequacy of this interpretation. As has been convincingly argued, Articles 6(2) and 5(2) of the Protocol are undergirded by a substantive environmental right of indigenous peoples and local communities to their genetic resources. This right emanates from a combination of several rights, including the right to freely dispose of natural wealth and resources, the right to development, and the right to culture.[371] It is imperative to posit that whenever indigenous peoples and local communities can substantiate customary or native rights over these resources, international law mandates that States formally acknowledge them.[372] Any differentiation not grounded in considerations of *legitimate rights*, i.e., rights widely accepted by society,[373] would be discriminatory.[374] In essence, a human rights-sensitive interpretation of the Nagoya Protocol compels States Parties to:

> [...] map customary rights at the domestic level, in consultation with the concerned communities, provide for their legal recognition, and enact domestic measures to ensure benefit-sharing with communities when their customary rights over genetic resources are so ascertained.[375]

370 Morgera *et al.*, *supra* note 159, p. 124.

371 *Ibid*, p. 118.

372 UNPFII, *Report on the Tenth Session* (16–27 May 2011) UN Doc E/C.19/2011/14, para. 27; S. Nijar, 'The Nagoya Protocol on Access and Benefit Sharing of Genetic Resources: Analysis and Implementation Options for Developing Countries', Research Papers 36 (South Centre, Geneva, 2011) p. 25.

373 Reasoning *a pari ratione*, we can build on standards for tenure rights, *cf.* FAO, *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (FAO, Rome 2012) paras 3A, 3.1 (2); FAO, *Governing Tenure Rights to Commons. A Guide to Support the Implementation of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (FAO, Rome, 2016) pp. 24 *seq*. On "social legitimacy", *i.e.* "broad social acceptance", see L. Cotula, 'International Soft-Law Instruments and Global Resource Governance: Reflections on the Voluntary Guidelines on the Responsible Governance of Tenure', 13:2 *LEAD Journal* (2017) pp. 115–133.

374 UN CERD, *Concluding Observations: Guyana*, UN Doc CERD/C/GUY/CO/14, para. 15.

375 Morgera *et al.*, *supra* note 159, p. 125.

This twofold obligation may also be seen as arising from the protection of TK afforded under the Nagoya Protocol,[376] without any requirement for "established rights". If, as the Preamble of the international instrument asserts, there exists an "interrelationship between genetic resources and traditional knowledge" – an "inseparable nature for indigenous and local communities"[377] – "any application for access to the genetic resource would trigger the provisions in the Protocol relating to access to TK as well".[378]

Recently compiled data from ABS Interim National Reports provides evidence of the development of general practice and *opinio juris*.[379] This data reveals that an increasing number of CBD Contracting Parties acknowledge the *established rights* of indigenous and local communities to grant access to genetic resources.[380]

5 Conclusion: Sovereigns or Stewards?

This article delved into the significance of the right to seeds as outlined in the UNDROP. Its aim was to elucidate the political and legal significance of seed sovereignty, which lies at the core of the right to food sovereignty.

Although the concept of seed sovereignty has never been extensively employed within the transnational agrarian movement and was noticeably absent from the *travaux préparatoires*, it holds substantial value both in practical and analytical terms. Firstly, it sheds light on the collective action framework that guided the endeavours of social movements leading up to and including the adoption of the UNDROP. Whether it be the initial mentions by RAFI and Navdanya or the earliest campaigns against Monsanto GM crops, seed sovereignty has served as a rallying cry to challenge the perceived commodification of seeds. This commodification process was felt as the all-pervasive encroachment of IPRs upon the fundamental resource base, gradually eroding the role of farmers as producers and stewards of agrobiodiversity. From an analytical standpoint, the concept of seed sovereignty made it possible

376 Nagoya Protocol, Art. 5(5) and 7.
377 Nagoya Protocol, Preamble.
378 Nijar, *supra* note 372, p. 25.
379 On the role domestic law in providing evidence of customary international law, *ibid.*
380 See, https://absch.cbd.int/en/reports/analyzer and CBD Subsidiary Body on Implementation, *Analysis of Information Contained in the Interim National Reports and Information Published in the Access and Benefit-Sharing Clearing House*, CBD/SBI/2/INF/3 (CBD, UNEP, 15 May 2018). See also the WIPO database: https://www.wipo.int/tk/en/databases/tklaws/.

to bridge seemingly weakly related issues, allowing for the identification of common challenges and their underlying causes, as well as the formulation of effective responses. This doctrinal elaboration, exemplified in the work of Jack Kloppenburg, further refined the strategic framework for transnational agrarian activism. As the global significance of the seed issue continued to grow amidst the world food crisis, a comprehensive legal response could be devised, addressing the multifaceted aspects of what has become a resource control issue. Evidently, such a response required coherence to be brought to a fragmented international legal landscape.

The article proceeded to explain how the UNDROP negotiations focused, within a dense regime complex, on mutual supportiveness by reinterpreting the provisions of the Seed Treaty regarding farmers' rights, drawing upon international human rights law. By emphasising the potential incorporation of all components of the right to seeds into international human rights law, the transnational agrarian movement and its allies strategically heightened tensions within the seed regime complex. Simultaneously, they successfully proposed a means of resolving these tensions by suggesting a potential hierarchy of international law that would ultimately tip the balance of the regimes on the side of peasants.

The article demonstrated that such a normative reconfiguration or re-elaboration only became feasible due to the current stage of development of international human rights law, which now supports many components of the right to seeds. This is particularly evident in the protection of traditional knowledge and the right to participate in decision-making. However, the guarantee of the right to benefit sharing and the right to maintain, control, protect and develop one's own seed appears to be relatively weaker.

The ultimate aim of the article was to demonstrate that the original objective of the transnational movement was, through its reliance on the conceptual linkage between the right to food sovereignty and the right to self-determination, to approximate the principle of permanent sovereignty over natural resources or the right to self-determination over natural resources.[381] A toned-down version of it remained in the final version of the text, in the form of the right to freely dispose of natural resources, implied in the peasants' right to maintain, control, protect and develop their own seeds.[382] This approach opens up expansive and robust international sources of authority, bolstering the right to "resource control" through the implementation of standards such as FPIC and fair and equitable benefit sharing for indigenous peoples and

381 Gilbert, *supra* note 139, p. 29.

382 UNDROP, Art. 19.2.

non-indigenous communities alike. This interpretation further demonstrates that the provisions of the Nagoya Protocol pertaining to FPIC and benefit sharing[383] for access to genetic resources held by indigenous peoples and local communities are substantive environmental rights.[384] In other words, these environmental rights not only recognise substantive entitlements,[385] beyond mere procedural aspects, but also establish a connection with international human rights law, *i.e.*, fundamental rights.

Beneath the conventional language of the right to freely dispose of natural resources, a demand for sovereignty emerges, which has been a driving force for LVC from its inception. The transnational agrarian movement has always recognised that, to secure peasants' ability to shape their food and agricultural systems and regain control over food production, it is necessary to challenge the prevailing State-centric conception of sovereignty. Unlike indigenous peoples, who can back up their demands for control over resources with the right to self-determination or even claims to sovereignty, local communities' right over resources currently remains at the mercy of the eminent domain and *imperium* of the State. While there is no possibility of challenging head-on the principle of the permanent sovereignty of States for the time being, there is still a need to provide peasants with a more robust basis for the right to freely dispose of natural resources, which is currently tantamount to a "right to natural resources" (as an extension of "the right to land") that is not even fully recognised in the UNDROP. This brings to the forefront the important issue of the acceptance of the right to control and protect seeds at the domestic level and across international fora dealing with genetic resources.

Additionally, other components of the right to seeds also currently receive insufficient protection under international human rights law. This includes the rights to save, use, exchange, share, or sell, as well as the right to resow. Furthermore, the broader issues of territory and culture (e.g., language)[386] persist, and cannot be resolved solely through the right to seeds. One promising avenue of research entails emphasising and promoting the role of Indigenous peoples, local communities and farmers (and now peasants) as stewards of biodiversity (including crop genetic diversity), as recognised

383 Nagoya Protocol, Art. 6 (access to genetic resources) & Art. 5 (fair and equitable benefit-sharing).

384 Morgera, *supra* note 159, p. 118.

385 This refers to an entitlement to an environment of a certain standard (e.g., clean and healthy environment).

386 P.L. Howard, 'Culture and Agrobiodiversity: Understanding the Links' in S. Pilgrim and J.N. Pretty (eds.), *Nature and Culture. Rebuilding Lost Connections* (Routledge, London, 2010) pp. 163–184.

since the 1992 "Earth Summit".[387] A notable development in this regard is the proposal for biocultural rights,[388] which has received initial legal recognition in Colombia.[389] This proposal offers a compelling opportunity to leverage international human rights law and international biodiversity law to establish robust standards for resources control norms. Simultaneously, it facilitates the consolidation of a comprehensive bundle of rights (such as the right to land, the right to culture, and the right to seeds) that genuinely empower farmers to regain control over their resource base and productive activities. But this is a matter for another inquiry.

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387 F. Girard *et al.*, 'Community Protocols and Biocultural Rights: Unravelling the Biocultural Nexus in ABS' in F. Girard *et al.* (eds.), *Biocultural Rights, Indigenous Peoples and Local Communities* (Routledge, Abingdon, 2022) pp. 1–52.

388 K.S. Bavikatte, *Stewarding the Earth: Rethinking Property and the Emergence of Biocultural Rights* (Oxford University Press, New Delhi, 2014); G. Sajeva, 'Rights with Limits: Biocultural Rights – between Self-Determination and Conservation of the Environment', 6:1 *Journal of Human Rights and the Environment* (2015) pp. 30–54. DOI:10.4337/jhre.2015.01.02.

389 *Acción de Tutela Interpuesta por el Centro de Estudios para la Justicia Social "Tierra Digna"*, Sentencia T-622/16, No. Sentencia T-622/16 (Corte Constitucional (Colombia) 10 noviembre 2016). On this case, see: P. Wesche, 'Rights of Nature in Practice: A Case Study on the Impacts of the Colombian Atrato River Decision', 33:3 *Journal of Environmental Law* (2021) pp. 531–555. DOI:10.1093/jel/eqab021.