

The UN Declaration on Peasants' Rights (UNDROP): Is Article 19 on seed rights adequately balancing intellectual property rights and the right to food?

Hans Morten Haugen 

Faculty of Theology, Diakonia and Leadership Studies, VID Specialized University, Oslo, Norway

Correspondence

Hans Morten Haugen, Faculty of Theology, Diakonia and Leadership Studies, VID Specialized University, P.O. Box 184 Vinderen, 0319 Oslo, Norway.

Email: hans.morten.haugen@vid.no

Abstract

The UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP) was adopted by the UN General Assembly in 2018. One provision that caused opposition by certain states was Article 19 on the right to seeds. The article discusses whether the right to seeds is implicitly recognized by Article 15.1(b) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) on “benefits of scientific progress...,” seen in light of ICESCR Article 11.2(a) on “improving methods of production...” as well as the Convention on the Elimination of All Forms of Discrimination against Women Article 14.2(g), on rural women's right to appropriate technology. Moreover, the positive protection of farmers' breeding efforts is covered by the wording of ICESCR Article 15.1(c). Other treaties and soft-law sources also direct states to improve peasants' livelihoods, including seeds. States can legislate to serve peasants' interests and strengthen their rights when adopting IPR legislation. The article shows how this can be done, for instance by introducing exclusions and limited exceptions to IPRs. States have a policy space when

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implementing IPR legislation that should be utilized to promote the right to food and the livelihood of peasants.

KEYWORDS

farmers' rights, peasants' rights, right to benefit from scientific applications, seed rights

1 | WHY A DECLARATION ON PEASANTS' RIGHTS AND WHY DISAGREEMENTS OVER SEED RIGHTS?

Twelve years after the World Development Report 2008 highlighted the role of agriculture in fighting poverty (World Bank, 2007), a new report from the same institution affirms that earning more from the farm is a key to poverty reduction (Christiaensen & Vandercasteelen, 2019). Poor land policies and low productivity among peasants are seen as main causes of many African countries' inability to diversify and improve their economies. In addition to identifying the peasants as a key to economic transition, there are five other reasons why the international community should be particularly concerned with policies that improve peasants' lives—from local to global: (a) the hardships these peasants face; (b) domestic food security; (c) stemming migration to the cities; (d) the role of sustainable agriculture for biodiversity; and (e) agriculture's role in reducing climate change.

Hence, any efforts to identify policy measures that would reduce the vulnerabilities and enhance the productivity of peasants should be expected to be welcomed by the international community. However, even if the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP; UN General Assembly, 2018) was adopted, it was met with resistance and far from universal support.¹

Probably the most controversial provision in the UNDROP is Article 19, titled Right to Seeds.² The criticism was that the right to seed is not appropriate to include in a human rights instrument adopted by the Human Rights Council, and that there are other UN bodies that are more suitable, most notably the World Intellectual Property Organization (WIPO) or the Food and Agricultural Organization (FAO). This article will analyze whether rights relating to seeds are already implicitly recognized in the International Covenant on Economic, Social and Cultural Rights (ICESCR; 170 State parties) Article 15.1(b) and Article 15.1(c), seen in light of ICESCR Article 11.2(a). Moreover, the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW; 189 State parties) Article 14.2(g) recognizes the right to appropriate technology for rural women. ICESCR and CEDAW are the two human rights treaties that address measures for advancing technology in the context of the right to food, but only ICESCR does so explicitly, as will be shown. Global and regional treaties on genetic resources and global and regional treaties on intellectual property rights (IPR), as well as domestic IPR legislation and nonbinding sources, including from the FAO, will be scrutinized. The purpose is to identify if there is an adequate basis to identify a human right to seeds.

Human rights treaty bodies have established a clear distinction between human rights and IPRs (UN Committee on Economic, Social and Cultural Rights [UN CESCR], 2006, paras. 3 and 4; see also UN Special Rapporteur in the field of cultural rights, 2015; 2012). The treaty bodies have also specified access to seeds (UN Committee on the Elimination of Discrimination against Women [UN CEDAW], 2016, paras. 56 and 62) or rights relating to seeds (UN CESCR, 2009a, para. 37). I will analyze these two below. These documents are termed general recommendations (CEDAW) or general comments (ICESCR) and do represent the most authoritative elaborations of the content of the respective treaty provisions, specifying also derived obligations and violations—but they do not bind States which are parties to the respective treaties. Hence, I am also avoiding the term “interpretation” to describe general recommendations or general comments. These are better referred to as “clarifications.”

The right to seeds in the UNDRO have relationships to several other treaties and nonbinding declarations. First, the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA; 146 State parties) Article 9 on farmers' rights, Article 6 on sustainable use of plant genetic resources, and Article 13 on benefit-sharing, as a part of the Multilateral System on Access and Benefit-sharing under ITPGRFA (Articles 10–13). These provisions will be analyzed in the section on farmers' rights.

The Governing Body of the ITPGRFA has initiated processes for the implementation of farmers' rights (ITPGRFA, 2019a). The relationship between ITPGRFA and UNDRO is described in two recital paragraphs from the UNDRO, and the Governing Body refers explicitly to Article 19 of the UNDRO, saying that it “includes all provisions of Farmers’ Rights as addressed in Article 9 of the International Treaty” (ITPGRFA, 2019a, para. 15). Hence, the UNDRO Article 19 and ITPGRFA Article 9 are seen as compatible. The most interesting examples of farmers' rights implementation come, however, from national legislations that go beyond farmers' rights as recognized in the ITPGRFA.

Second, indigenous peoples' rights over their genetic resources³—which include seeds—have been recognized, in binding and nonbinding instruments. The most relevant binding instrument, the 2010 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (120 State parties), uses terms such as “as appropriate” and “in accordance with domestic legislation...”⁴ These qualifications can read so as to exempt States from an obligation to legislate for indigenous peoples' rights to participate in benefit-sharing.

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) recognizes indigenous peoples' “right to maintain, control, protect and develop their intellectual property...” (UN General Assembly, 2007, Article 31.1) The same provision recognizes traditional knowledge relating to “genetic resources, seeds, medicines, knowledge of the properties of fauna and flora...” and applies the term “science” in this context.

Third, the main IPR instruments on patents and plant breeders' rights, the Paris Convention on the Protection of Industrial Property Rights (177 State parties), the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS Agreement; Annex 1C to the Agreement establishing the World Trade Organization [WTO]; 164 State parties) and the International Union for the Protection of New Varieties of Plants (UPOV) Convention (76 State parties) do not have explicit consideration of peasants, but UPOV 1991 recognizes what is termed farmers' privilege in Article 15.2—as an optional exception. Different treatment is allowed for in regional instruments, including EU regulations and the 2015 Arusha Protocol for the Protection of New Varieties of Plants (Arusha Protocol; adopted by the African Regional Intellectual Property Organization [ARIPO]; not in force), as will be shown below.

Hence, the right to seeds as formulated in the UNDRO relate to other binding and nonbinding instruments. I will, in this article, explore these relationships to identify: *whether there is a basis in existing treaties to formulate a human right to seeds, and whether the right to seeds as formulated in the UNDRO can create positive synergies with other rights, not only human rights, but also farmers' rights and intellectual property rights?*

The article will proceed as follows: First, Section 2 discusses the most relevant factors that must be taken into account when identifying an adequate balance between various treaty obligations. Section 3 spells out the essential elements of IPR protection, in the context of agriculture and seeds. The analysis is limited to patent and plant breeders' rights, and those IPRs that seek to distinguish products in commerce, such as trademarks or geographical indications (GI), will not be addressed. Section 4 reviews the relevant provisions of the ICESCR, as well as subsequent State practice, regarding better access to seeds. Section 5 asks whether there is a basis in the ICESCR for justifying positive protection of efforts over genetic material. Section 6 elaborates on the concept of farmers' rights, and its recognition in international law and national law. Section 7 clarifies whether promoting peasants' rights can be done while complying with the WTO's TRIPS Agreement. Section 8 reviews some of the disagreements during the negotiations on the UNDRO. Section 9 asks why several normative sources were ignored when the UN Office of the High Commissioner for Human Rights presented normative sources (OHCHR, 2017). Section 10 analyzes the provisions on seed rights in the UNDRO. Section 11 provides a concluding discussion.

2 | PRINCIPLES FOR BALANCING INTERNATIONAL LAW SOURCES

More insight into the IPR logics is warranted. One can discuss the IPR logics by contrasting it with the human rights logics, at least if urgent needs are at stake. Human rights, particularly as they concern social rights, have enhanced access to necessities as their basic rationale. The IPR system has restricting unwarranted access to new technologies and creative work as its basic rationale. On the face of it, these logics seem incompatible.

This initial impression will be challenged, however, if a time perspective is introduced. Human rights implementation is about measures for the daily enjoyment of basic necessities, as well as facilitating technology development that will materialize in the future. IPR will, under normal conditions, safeguard investments in plant breeding, which in turn provides better seeds and increases food security among farmers. Hence, IPR protection might imply that societal benefits of a policy measure materialize long into the future. IPR are instrumental rights, serving societal needs by rewarding innovative contributions.

More insight is needed on the time dimension in IPR. The logics of the patent system implies that “by slowing down the diffusion of technical progress it ensures that there will be more progress to diffuse” (Robinson, 1971, p. 87; see also de Schutter, 2011, p. 329). The perceived predictability of the patent system induces technology developers to invest in R&D efforts.

This, however, is only one part of the story. First, technological improvements can be hindered by too many patents, referred to as “patent thicket.” Second, it is estimated that only when reaching a GDP/capita level of 7,750 U.S. dollars will a given country be expected to benefit from a stronger patent system (Maskus, 2000, p. 108). Third, the TRIPS Agreement, while acknowledging its flexibilities and the postponement in implementation for least-developed countries, has led to a rapid adoption of higher IPR standards than a country's technological level would indicate (Maskus, 2000, p. 144). Fourth, potential positive long-term impacts of a patent or plant breeders' rights will require comprehensive policy shifts in a number of policy areas, including infrastructural, educational and social policies.

This insight now allows us to discuss issues of balancing in greater depth. First, human rights implementation must be undertaken with special concern for the disadvantaged and marginalized individuals and groups, and this applies to scientific applications [UN Committee on Economic, Social and Cultural Rights (UN CESCR), 1999, paras. 26 and 28; UN CESCR, 2009b, para 70(a)]. In other words, those who are adequately served by the market actors, gaining access to productive resources and basic necessities, should under normal circumstances not be subject to the same attention from State organs as persons who are too vulnerable to be well served by the market actors, but the States have comprehensive obligation to *fulfill* human rights, encompassing facilitating, promoting and providing (UN CESCR, 1999, para. 15; see also paras. 21–28). While adequacy and availability of food is crucial, what is decisive for the individual is accessibility, which encompasses both economic and physical accessibility.

Second, the State has an obligation to regulate market actors, To avoid scientific applications that are “contrary to the enjoyment of human dignity and human rights” [UN CESCR, 2009b, para. 70(b)]. Concerns for varieties with improper qualities is provided for in Article, 2.2 of UPOV 1978, allowing States to “limit the application of this Convention within a genus or species to varieties with a particular manner of reproduction or multiplication, or a certain end-use.” This refers *inter alia* to the so-called genetic use restriction technologies (GURTs). Hence, the State must always be prepared to *protect* human rights, to ensure that the activities of the private business sector are consistent with the right to food (UN CESCR, 1999, para. 27).

Third, particularly for social human rights, there is less prohibition and much more emphasis on taking appropriate policy measures. In the realm of food, the obligation to *respect* includes allowing peasants' practices of breeding and exchange to continue, and through this enable peasants to increase production, representing the major share of global food consumption (Graeub et al., 2016), as family farms provide 53 percent of global food *production*. The share of food *consumption* from such farms is likely even higher.

3 | IPRS AND CONTROVERSIES WHEN APPLIED TO FOOD PLANTS

To understand the core of the controversies regarding seed rights, it is necessary to have a basic understanding of IPRs, being time-limited rights that give exclusive rights over the commercial application of an invention. In patent law, the scope of these rights is specified in the so-called patent claims. By being rights that can be traded, licensed to others, subject to compulsory licenses, and revoked or forfeited—as will be explained below—IPRs have a different rationale than fundamental human rights (UN CESCR, 2006, para. 2). IPRs can be justified based on instrumental arguments, as particularly patents provide adequate incentives for both inventiveness—leading to a patent grant—and innovativeness—to commercialize the invention and sell the resulting product.

IPRs can also be justified as moral rights, in accordance with the *droit d'auteur* concept. It was this approach that inspired France and several Latin American countries to insist on a provision in the Universal Declaration of Human Rights (Article 27.2), and subsequently in the ICESCR (Article 15.1(c)) on recognition of the right to enjoy the moral and material interests of those contributing with literary, artistic or scientific production.

It can legitimately be objected to granting rights to natural or legal persons who have managed to develop certain traits within plants, as the growth of any plant happens through complex natural biochemical processes. A five-fold criticism has been presented: (a) encouraging corporate concentration; (b) fostering inappropriate research and development; (c) threatening the sustainability of food production; (d) eroding traditions and knowledge; and (e) opening the way to biopiracy (3D Trade—Human Rights—Equitable Economy, 2009; see also Schutter, 2011; UNESCO, 2001, pp. 27–28; UN Special Rapporteur on the Right to food, 2016; see also WTO, 2004, para. 102 [statement by Bangladesh] and Islam, 2013). These criticisms are beyond the scope of this article, as the focus will be on certain forms of IPR protection that are applicable to plants, various components of plants and plant varieties, as well as their off-springs—but with variations between different States' legislation.

Concerning patents, the three criteria are (a) novelty, in other words, that the invention is not described or exhibited before; some national laws provide for a so-called grace period, allowing for disclosure within a given period, usually 12 months before the filing date of the patent application; (b) inventive step (termed non-obviousness in U.S. legislation); and (c) industrial applicability (termed usefulness in U.S. legislation). The latter requirement is specified by the European Patent Office (EPO) as an invention “made or used in any kind of industry, including agriculture” and having a “technical character” (EPO, 2016). For biotechnology inventions, one distinguishes between “essentially biological processes”—which are possible to exclude from patentability in accordance with TRIPS Article 27.3(b)—and “nonbiological and microbiological processes”—which cannot be categorically excluded under the TRIPS Agreement.

For one example of how far the patent protection can extend, the case *Monsanto Canada vs. Percy Schmeiser* from the Canadian Supreme Court (2004) is illustrative. Even if Canada did not recognize patents over plants, the majority (5-4) in the Canadian Supreme Court determined that the protection of Monsanto's so-called Roundup Ready technology extended to the plant into which the protected gene had been incorporated, even if they admitted that this was an “expansive doctrine” (Canadian Supreme Court, 2004, paras. 79 and 80). The Roundup Ready technology gave genes new abilities to survive the use of Monsanto's glyphosate-based Roundup herbicide. The case also illustrates well the “innocent bystander” problem, as will be seen later.

Turning to plant variety protection, it is relevant to note that such IPR protection applies to those varieties which express a different phenotype compared to varieties which have not been subject to breeding efforts. There are specific criteria applying to plant varieties—defined in the UPOV Convention Article 1(vi) as a “plant grouping within a single botanical taxon of the lowest known rank...” In addition to novelty, the three standard requirements are distinctive, uniform and stable; commonly referred to as the DUS criteria. TRIPS Article 27.3(b) requires that an “effective *sui generis* system” must be in place for the protection of plant varieties, and the term “effective” implies that the rights holders should be able to effectively enforce their rights. This can be ensured without adopting legislation that complies with the most recent UPOV Convention, termed UPOV 1991. UPOV is colocated with WIPO in Geneva, but unlike WIPO, is not a UN agency.

The plant breeders' rights protection emerged as a separate protection system in Europe from the mid-20th century because the patent system was found to be unsuitable for the protection of plant varieties with the ability to reproduce. Over these years, there has been a gradual development toward more patent-like protection for plant varieties. I provide three examples to illustrate this (Haugen, 2007, pp. 256–265): First, the exclusive rights, or acts requiring the rights-holders' permission, is extended in UPOV 1991 (Article 14) as compared to UPOV 1978 (Article 5.1). Second, UPOV 1991 introduces the concept Essentially Derived Varieties (EDV; see Article 14.5), to which these exclusive rights apply, and EDV does not apply in UPOV 1978. Third, the farmers' privilege—specifying what the farmer is allowed to do with protected breeding material on one's own holding—is more restricted in UPOV 1991 Article 15.2 as compared to UPOV 1978 Article 5.3, and in UPOV 1991 it is an “optional exception.” The Member States of the WTO are free to choose an appropriate system for protecting plant varieties—as long as it is effective. In this context, it is also relevant to note that the Member States of the WTO that are classified as Least-Developed Countries are currently not required to comply with the TRIPS Agreement until July 1, 2021 (WTO, 2013).

India, Thailand, and Malaysia have opted for plant variety protection systems that comply with the TRIPS Agreement, but not necessarily with the UPOV requirements (Haugen, 2014, pp. 215–216), while there are two treaties based on UPOV 1991 that have been adopted by two distinct African IPR organizations (Haugen, 2015; Štrba, 2017). First, most Francophone States have since 2006 had a regional plant breeders' rights system in force, and the Organisation Africaine de la Propriété Intellectuelle (OAPI) is a UPOV member. Second, ARIPO adopted in 2015 the Arusha Protocol. Particularly the Arusha Protocol provides for stronger plant variety protection than for instance UPOV 1991.

As one example, the Arusha Protocol says in Article 21(4)(b) that the protections also extend to varieties which are *not* clearly distinguishable from the protected variety. This might cause legal uncertainty, as non-protected plant varieties that appear similar to protected ones can fall within the scope of the latter, which is not found in the global plant breeders' rights organization, UPOV.⁵

A full review of the differences between UPOV 91 and the Arusha Protocol is beyond the scope of this article (Lewis & Mayet, 2018; see also Haugen, 2015), but it is relevant to note that there is no explicit distinction between different type of farmers (large-holders vs. small-holders) in UPOV 1991 and previous acts of the UPOV Convention. On the other hand, Article 22(3) of Arusha Protocol distinguishes between small- and large-scale commercial farmers, in the context of potentially allowing for different payment by farmers to right holders. The term “subsistence farmer” is used in UPOV's “Frequently asked questions” (UPOV, undated).

In an open letter to the Member States of ARIPO, the UN Special Rapporteur on the right to food expressed concerns on the “considerable negative impacts that the [Arusha] Protocol and its Draft Regulations may have in relation to fulfilling the right to food in ARIPO Member State countries” (UN Special Rapporteur on the Right to Food, 2016). She feared that the Arusha Protocol will reduce accessibility and affordability of seeds, affecting household income, loss of know-how related to seed selection and seed preservation, resulting in negative impacts on the peasants' informal seed system. She justified a different approach by referring to General Comment 12 on the right to adequate food (UN CESCR, 1999). The ARIPO meeting intending to adopt Regulations to the Arusha Protocol was met with other criticisms as well (African Centre on Biodiversity et al., 2017), but these were adopted at a subsequent meeting in 2018 (ARIPO, 2018).

One of the signatory States to the Arusha Protocol is Tanzania, and Tanzania adopted in 2012 a new plant breeders' rights act, just 10 years after its previous legislation. Why did this happen, when Tanzania is not required to adopt such strong plant variety protection? First, a view expressed by Tanzania's Registrar of Plant Breeders' Rights that a stronger protection system will lead to more plant breeders' rights applications, enhancing Tanzania's food production (Ngwediagi, 2009, pp. 9–10 and p. 14). Second, Tanzania is part of all the recent global initiatives to boost Africa's agriculture, most notably the G8's New Alliance for Food Security and Nutrition, which required Tanzania to comply with UPOV by November 2012 (G8, 2012; Haugen, 2015, pp. 209–210).

In addition to negotiations of the UNDROP, there are IPR and genetic resources-related processes taking place at TRIPS, with reduced attention recently (2011); CBD (Morgera, Tsioumani, & Buck, 2014); UPOV (2017a, p. 4; no decision was taken—see UPOV, 2017b; see also UPOV, 2016; UPOV, 2009a); and WIPO (WIPO, 2018, 2019a, 2019b).

Some of these relate to traditional knowledge, a term that might give a wrong impression of its qualities, and the term “indigenous innovation” has been proposed as an alternative (Drahos & Frankel, 2012, p. 13).

4 | IS A RIGHT TO SEEDS IMPLICITLY RECOGNIZED BY THE ICESCR? HIGHLIGHTING ACCESS

There are three relevant provisions on *technology access* in the ICESCR, all of which must be interpreted in light of the others. Two will be presented here, and Article 15.1(c) recognizing a human right for some persons only, namely those entitled to “benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author” will be presented in the next section, as this is essentially about States' obligations to ensure *positive protection for “authors” of scientific production*. Moreover, one provision of the CEDAW is relevant: Article 14.2(g) on rural women's human right to appropriate technology. There is also one provision—Article 24.2(c)—of the Convention on the Rights of the Child, which emphasizes appropriate State measures to provide available technology to combat diseases and malnutrition, but this provision is found to be too general to provide any guidance in analyzing whether a right to seeds is implicitly recognized in human rights treaties.

First, Article 15.1(b) recognizes the right of everyone to enjoy the benefits of scientific progress and its applications, as elaborated further in the Venice Statement on the right to enjoy benefits of scientific progress and its applications (2009). Article 15.1(b) must be read together with the other sub-paragraphs of Article 15.1—evidenced by the use of the singular form “right” in its introductory text. Hence, the right to enjoy the benefit of science is to be enjoyed simultaneously with the enjoyment of the human right to take part in culture and the human rights of authors of scientific production. The term “applications” of Article 15.1(b) must be understood as essentially synonymous to “products,” but it cannot be assumed that any scientific product is to be available for free. We will come back to the scope of this provision, and whether it can be reasonable to interpret scientific applications to encompass seeds.

Moreover, Article 15.1(b) must be read in light of Article 15.2 on obligations on States to take measures. Article 15.2 reads: “The steps to be taken ... shall include those necessary for the conservation, the development and the diffusion of science and culture.” The terms “shall” and “necessary for” give a certain strength to Article 15.2, hence implying that the State is under an obligation to take certain measures. What these measures are will be clearer when clarifying the well-established framework of respect, protect and fulfill (UN CESCR, 1999, para 15), below.

Second, Article 11.2(a) declares that States shall take measures to “improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge...” The content of Article 11.2(a) and Article 15.1(b) essentially cover similar concerns, namely how to ensure better *access* (UN Special Rapporteur in the field of cultural rights, 2012, paras. 23 and 75(c)(v); Müller, 2010, pp. 766 and 772). While Article 15.1(b) and Article 15.2 have a broader scope covering all forms of science, there is no contradictions between the science aspects of Article 11.2(a) and the content of Article 15.1(b). The terms “shall” and “which are needed” are applied in Article 11.2 when introducing measures. On the face of it, this seems as a stronger qualifier of the scope of Article 11.2(a) as compared to the qualifying phrase of Article 15.2, as seen above.

The third relevant provision relating to seeds is CEDAW Article 14.2(g), which applies only to rural women, recognizing their right to have access to appropriate technology. Such access is essentially covering the same rights and corresponding obligations as ICESCR Article 15.1(b), as seen above. The introductory sentence of CEDAW Article 14.2 ends with the phrase “in particular, shall ensure...” This must be understood as the strongest formulation of all three provisions regarding the necessity of taking measures.

We see that none of the three provisions explicitly apply the term “seeds,” but rather scientific applications, improve methods of production of food, and appropriate technology in the context of agriculture.

The term seeds is found in three general comments, issued by the respective treaty bodies to clarify the human rights provisions: General Comment 21 (on ICESCR 15.1(b); UN CESCR, 2009a), para. 37; General Comment 17 (on

ICESCR 15.1(c); UN CESCR, 2006), para. 35; and General Recommendation 34 (on CEDAW 14.2(g); UN CEDAW, 2016), paras. 56 and 62. These, as well as General Comment 12 on the right to food (UN CESCR, 1999) will be briefly explained, with General Comment 17 coming last.

General Comment 21 is on the right to take part in cultural life, and the term “seeds” appears in the context of indigenous peoples’ right to “maintain, control, protect and develop ... manifestations of their sciences, technologies and cultures...” (UN CESCR, 2009a, para. 37). Hence, the scope of the relevant paragraph is relatively limited. The assertion that cultural rights are depending upon natural resources—of which seeds is a part—is well established particularly for indigenous peoples (UN Human Rights Committee, 1994, para. 7).

General Recommendation 34 is on the rights of rural women, and when elaborating on the term “appropriate technology” for rural women—taken from CEDAW Article 14.2(g)—in the context of agriculture, it is not surprising that UN CEDAW understands appropriate technology as encompassing seeds.

According to the same logic, the term “appropriate technology” in General Comment 12 (UN CESCR 1999, para. 26) can be read so as to encompass seeds. The term “seeds” is not, however, found in General Comment 12 on the right to food. When elaborating on the content of the right to adequate food (ICESCR Article 11) the CESCR highlighted access to appropriate technology, especially for women (UN CESCR, 1999, para. 26; see also UN CESCR, 2009b, para. 46; the term is “technology for food production”). Moreover, General Comment 12 outlines the normative content of the right to food, and as clarified in the analysis on balancing above, what is decisive for the individual is economic and physical accessibility (UN CESCR, 1999, para. 15). Highlighting States’ obligations to avoid excessive prices of seeds is formulated even more explicitly in General Comment 17 elaborating on ICESCR 15.1(c) (UN CESCR, 2006, para. 35).

In summary, we see that while no human rights treaties include the term seeds, there are three general comments/general recommendations which apply the term seeds. Is the specification of the rights to appropriate technology as encompassing seeds implying that the two treaty bodies go beyond what the wording of the treaties allow for? The answer to this question can best be provided by gaining a deeper insight into State obligations.

The respect, protect, fulfill framework will now be applied to identify the three-fold obligations on the State parties (UN CESCR, 1999, para. 15; first developed by Eide, 1987). This is the standard framework applied by the UN to identify States’ human rights obligations: abstaining from interfering; prevent others’ interference; and provide enabling environments, and—if necessary—provide.

On the respect level, the State must neither take any measures to prevent access to food, or distribution of food, nor interfere in well-functioning distribution systems.

On the protect level, the State should at least assist farmers to be better able to identify bad seeds, including seeds that cannot propagate, so-called sterile seeds or genetic use restriction technology (GURTs; UN CESCR, 2015, para. 25; UN CESCR, 2011, para 10; UN CESCR, 2008a, paras. 16 and 27; UN CESCR, 2008b, para. 29; see also UN CESCR, 2009b, para. 70b).

On the fulfill level, several measures are relevant. If we limit our discussion to fulfill—facilitate, we can identify three measures that public authorities must take in normal circumstances: (a) initiate participatory plant breeding programs, often this can be done with the support of international agricultural research centers (GCIAR), in line with the obligation on international cooperation in ICESCR Articles 2.1, 11.2 and 15.4; (b) adopt IPR laws that are adequately predictable and at the same time designed so as to ensure that farmers’ practice with seed exchange and selling of farm-bred seeds is not impeded; and (c) enact and enforce robust competition policies.

Obligations on the fulfill level can, however, go beyond this, if the urgency of the situation necessitates more robust measures (Haugen, 2007, p. 198). If there is a food crisis amounting to a famine, State obligations on the fulfill level would apply. In these situations—where actual access to specific products for a drastic improvement of the food situation is required—distribution of food-producing resources, such as seeds could be preferable to the distribution of food. This is also addressed by General Comment 12: “Food aid should ... not adversely affect local producers and local markets, and should be organized in ways that facilitate the return to food self-reliance of the beneficiaries” (UN CESCR, 1999, para. 39; for warnings of replacing domestic seeds with alien seeds after disasters,

see Sperling, Remington, Haugen, & Nagoda, 2004). To facilitate the return to food, self-reliance must involve adequate provision of seeds.

These specifications of State obligations are also in line with the FAO Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security, that were negotiated by States:

States should, within the framework of relevant international agreements, including those on intellectual property, promote access by medium- and small-scale farmers to research results enhancing food security (FAO, 2004, guideline 8.5, extract).

The wording is access to “research results” and not “seeds,” but the overall obligations relating to the distribution of food must encompass distribution of food-producing resources, by fostering breeding programs and public extension services, seeking to “benefit those without the ability to pay for the products resulting from the privately-undertaken research” (Haugen, 2007, p. 136). We see also that the FAO Voluntary Guidelines include a concern for States’ obligations under IPR treaties.

Other normative sources will be emphasized in a later section identifying omissions of the OHCHR, but now it is sufficient to mention that several nonbinding sources emphasizing the importance of seeds are adopted by States recently. Most notably, Sustainable Development Goal (SDG) 2 on hunger builds on a premise that seeds are a technology highly relevant for food production, as further elaborated in UN target 2.3, highlighting productive resources and inputs—not using the term seeds—and SDG target 2.5 on diversity of seeds (UN General Assembly, 2015, pp. 15–16).

In summary, as adequate access to food-producing technology is crucial for food production and consumption, it is reasonable to identify the right to seeds as implicitly recognized by both CEDAW and ICESCR, even if the treaties themselves do not apply this term. This leads us to investigate the scope of the other ICESCR provision that is deemed relevant: Article 15.1(c) on the rights of persons introducing new scientific contributions.

5 | IS A RIGHT TO SEEDS IMPLICITLY RECOGNIZED BY THE ICESCR? HIGHLIGHTING POSITIVE PROTECTION

With regard to the rights of scientific producers, individuals or groups of individuals practicing traditional agriculture can develop particular characteristics of plants that might qualify for IPR protection as well as human rights protection. The analysis below will seek to answer what is required for communities of farmers or individual farmers to be able to enjoy such protection. Initially, it is relevant to note that General Comment 17, clarifying the content of ICESCR Article 15.1(c), specifies that States are to “adopt measures to ensure the effective protection of the *interests* of indigenous peoples relating to their productions” (UN CESCR, 2006, para. 32; own emphasis); the term rights is not applied. The term interests is understood as everything that is positive for the livelihoods of the relevant group of persons, including how State authorities facilitate so that persons can both continue and improve their traditional way of living, resulting in an expansion of choices and freedoms. The use of the term interests and not rights can be explained by the fact that an “appropriation mindset” that characterizes the IPR system is alien to the culture of most indigenous peoples.

The same paragraph of General Comment 17 specifies that States should “recognize, register and protect the individual or collective authorship of indigenous peoples...” and “respect the principle of free, prior and informed consent of the indigenous authors...” (UN CESCR, 2006, para. 32). The use of the term “author” should be understood in its widest sense, in line with General Comment 17, encompassing any “creator ... of scientific, literary or artistic productions” (UN CESCR, 2006, para. 7) and specifying that communities can constitute such creators.

General Comment 17 was met with criticism for the high threshold that was set for limitations and derogation for the enjoyment of the rights under ICESCR Article 15.1(c) (UN CESCR, 2006, paras. 22, 23, 27, and 42; for a summary of criticisms; see Haugen, 2011, pp. 41–45). Hence, the distinction between standard intellectual property legislation and the human rights to be enjoyed under ICESCR Article 15.1(c), which was clear in the first paragraphs of General Comment 17, is much less clear throughout the text (Haugen, 2011, p. 53).

Another criticism is that General Comment 17 is not adequately distinguishing between those who are entitled to rights under ICESCR Article 15.1(c) and those entitled to rights under standard intellectual property legislation, as ICESCR Article 15.1(c) allegedly “does not cover anyone who can directly or indirectly benefit from existing intellectual property rights” (Cullet, 2007, p. 425). The present author does not concur in strictly reserving the enjoyment of rights under ICESCR Article 15.1(c) to those not benefitting from enjoyment under standard IPR protection. Nevertheless, the emphasis when promoting ICESCR Article 15.1(c) should be on individuals and communities who do not enjoy the benefits of the IPR system as it is currently working.

Therefore, Article 15.1(c) should provide a basis for making national and international IPR lawmaking and enforcement more inclusive and equitable. Such an approach can be seen in those three States (India, Malaysia, and Thailand) that have recognized farmers and farming and indigenous communities as eligible for enjoying some form of protection for their contributions to new and useful knowledge, for instance, plant varieties with improved traits.

Hence, while positive protection rights—including for seeds bred by farmers—are implicitly included within the scope of ICESCR Article 15.1(c), this cannot happen without adequate legislation, with specific guidelines for those examining the applications for some forms of IPR protection.

6 | RECOGNITION OF FARMERS' RIGHTS, AND ITS SCOPE

Initially, it is important to understand that when the concept of farmers' rights first was recognized by an inter-governmental body, it was defined as “rights arising from the past, present and future contributions of farmers in conserving, improving, and making available plant genetic resources...” (FAO, 1989, Haugen, 2007, pp. 272–273). Farmers' rights were initially promoted by nongovernmental organizations to balance the rights that were available to plant breeders.

Three international binding instruments will be analyzed: (a) the ITPGRFA; (b) the Nagoya Protocol; and (c) the 1994 UN Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (Desertification Convention, 196 parties). The most detailed analysis is provided for the ITPGRFA.

The ITPGRFA is the only treaty that applies the term farmers' rights, in Article 9. Before explaining the structure and application of this provision, there are two other provisions that are important for promoting the interests of farmers: Article 6 on Sustainable Use of Plant Genetic Resources and Article 13 on Benefit-sharing in the Multilateral System—further specified in Articles 10–13 of the ITPGRFA.

ITPGRFA Article 6.2 specifies seven policy measures for fostering the sustainable use of plant genetic resources, introduced by the term “may”: (a) diverse farming systems; (b) research which enhances biological diversity for the benefit of farmers; (c) participatory breeding efforts involving farmers; (d) increasing the range of genetic diversity available to farmers; (e) promoting the expanded use of local and locally adapted crops; (f) supporting the wider use of diversity of varieties on farms; and (g) reviewing and adjusting breeding strategies and regulations concerning variety release and seed distribution. The last three sub-paragraphs also apply the term “as appropriate,” but the fact that the whole paragraph is introduced with the term may make the whole paragraph appear more like a list of proposed measures than an obligation to take measures. When analyzing the human rights provisions above, we saw that terms such as shall and ensure were applied, specifically in the context of CEDAW, while the expression “measures which are needed” in ICESCR 11.2 can be read so as to restrict its scope, but as argued above, there might be situations where encompassing measures are needed.

This approach of ITPGRFA Article 6 emphasizing genetic diversity is similar to the approach of the Nagoya Protocol, which regulates fair and equitable sharing of the benefits arising from the utilization of genetic resources outside of agriculture, by transfer of technology and funding, while ITPGRFA regulates plants for food and agriculture. Both treaties have a broad scope, while treaties regulating IPR are not adequately including concerns for how genetic resources might be utilized (Shashikant & Meienberg, 2015; see also Frison, 2018; Girard & Frison, 2018; Santilli 2011). We see that the term seeds is applied in the last subparagraph of Article 6.2, but the overall emphasis is on serving the needs of the farmers to facilitate for participatory breeding and provide them with adequate genetic diversity.

Turning to Article 13.2, four forms of benefit-sharing are listed: information-sharing, technology transfer, capacity-building, and monetary and other benefits of commercialization, and the latter refers to a funding mechanism established Article 19.3(f). For the purpose of this analysis on the right to seeds, it is benefit-sharing through technology transfer and capacity-building that is most relevant, as the improvement of and adequate access to seeds is at the core of Article 19 of the UNDROP.

ITPGRFA Article 13.2(b)(i) reads (extract):

...the Contracting Parties shall provide and/or facilitate access to such technologies and genetic material which is under the Multilateral System and to improved varieties and genetic material developed through the use of plant genetic resources for food and agriculture under the Multilateral System.

Hence, the measures to facilitate the access is strengthened by the term shall. While exchange of plant genetic material is important, full replacement of domestic seeds should be avoided, as briefly explained when addressing disaster relief above (Sperling et al., 2004). The subsequent implementation for promoting access and benefit-sharing under the Multilateral System has not been satisfactory, leading the ITPGRFA seek for ways to improve the functioning of this system (ITPGRFA, 2019b), but no consensus was reached (ITPGRFA, 2019c, p. 7 [para. 31]).

Article 13.2(c) on capacity-building emphasizes education and research in developing countries. While the term farmer is not applied in this subparagraph, Article 13.2(b)(iii) highlights farmers in developing countries, calling for “partnerships in research.” This formulation is, however, restricted by a specification saying “where mutually agreed...” Hence, Article 13 is primarily about how to secure that farmers, primarily in developing countries—and economies in transition—receive a fair and equitable share of the benefits from commercialization of plant genetic material exchanged in accordance with the requirements of the Multilateral System, as further specified in Article 13.3. The partnership in research formulation must be understood as to encourage—but not oblige—participatory research for enhancing and broadening the genetic base for local farmers, many of which are peasants.

Article 9 on farmers' rights is therefore not the only ITPGRFA provision that identifies special consideration of farmers. Article 9 has three paragraphs. Article 9.1 expresses an appreciation of farmers' efforts for the conservation and *development* of plant genetic resources. Article 9.2 of the ITPGRFA specifies three distinct rights. First, protection of traditional knowledge. Article 9.2(a) implies *defensive protection*, understood that farmers' plant genetic resources shall not be appropriated by others without adequate procedures or written agreements. The alternative approach, or *positive protection*, implies some specified exclusive rights that can be enforced in relation to others, as will be further explained below. ITPGRFA Article 9.2(b) and 9.2(c) recognize participation and benefit-sharing rights, respectively, with regard to farmers' plant genetic resources. The scope of ITPGRFA Article 9.2 is limited by the term “should” and the phrase “as appropriate, and subject to its national legislation...” in the introductory sentence.

Article 9.3 is quoted in full: “Nothing in this Article shall be interpreted to limit any rights that farmers have to save, use, exchange and sell farm-saved seed/propagating material, subject to national law and as appropriate.” Rights over their own saved seeds are hence acknowledged, but with the same deferral to domestic legislation as found in ITPGRFA Article 9.2, allowing States *not* to legislate. Hence, Article 9 of the ITPGRFA promotes (a) *recognition* (of farmers' efforts); (b) *expectations* (on those taking out genetic resources) to avoid misappropriation of

farmer-bred seeds and facilitate reward for farmers (and if the genetic resources cover any of the ITPGRFA Annex 1 crops, the requirements of the Multilateral System applies); and (c) *respect* (for farmers' ongoing practice). Implementation of the ITPGRFA, including farmers' rights, will give benefits for consumers, farmers, the scientific community, international agricultural research centers (IARCs), and the public and private sector (Esquinas-Alcázar, Hilmi, & Noriega, 2013, p. 145).

There is an ongoing work to produce an inventory of "national measures that may be adopted, best practices and lessons learned..." as well as "develop options for encouraging, guiding and promoting the realization of Farmers' Rights..." (ITPGRFA, 2017, Annex; see also ITPGRFA, 2018a, 2018b, 2018c, 2019a, 2019d). However, the way Article 9 is formulated implies that it is up to each State to legislate for protecting farmers' rights. States not legislating or otherwise establishing mechanisms for promoting farmers' rights are not acting in violation of the ITPGRFA.

Certain States have legislated for farmers' rights, with *positive protection*. According to Article 39.1(i) of India's Protection of Plant Varieties and Farmers' Rights Act of 2001 (PPV & FR Act), farmers' rights and plant breeders' rights are to be recognized in a "like manner." The Malaysian New Plant Varieties Act of 2004, Section 13.1(d) allows farmers and indigenous communities to apply for breeders' rights, without being required to comply with all the three "DUS" criteria. The same applies to Thailand's Plant Varieties Protection Act of 1999, in its Chapter titled Protection of Local Domestic Plant Varieties (Haugen, 2014, pp. 215–216).

Hence, farmers' rights as recognized in some national legislation differ substantively from farmers' rights as recognized in Article 9 of the ITPGRFA. During the negotiations of the UNDROP, Switzerland proposed that draft article 19 should in its entirety be replaced with Article 9 of the ITPGRFA (OEIWG, 2017b, pp. 63–64; see also FAO, 2004, guideline 8.12).

Similar restrictions on the scope of the provisions are found in the Nagoya Protocol, which recognizes particular rights for indigenous and local communities, containing provisions on local communities' participation (Article 12.2) and benefit-sharing [Article 12.3(b)]. Similar to Article 9 of the ITPGRFA, there are, however, no provisions on benefit-sharing that are formulated in a way that make it binding for States to implement these, by terms such as "as appropriate" [Articles 5.2 and 12.3(b)], and "as applicable" (Article 12.1). Moreover, the term right is applied in the context of genetic resources (Articles 5.2 and 6.2), without acknowledging an explicit right to participation or to benefit-sharing.

Finally, the UN Desertification Convention applies the term local populations, specifying in Article 18.2(b) the protection of their traditional knowledge, by requiring States "to ensure that such technology ... are adequately protected and that local populations benefit directly ... from any commercial utilization..." There are no terms that restrict the scope of this provision, similar to those found in the ITPGRFA or the Nagoya Protocol. The terms ensure and directly are more specific than those found in the ITPGRFA and the Nagoya Protocol. Hence, as local populations obviously encompass farmers and nomads, this provision is the most explicit recognition of such communities' rights over traditional knowledge.

In summary, the recognition of farmers' rights in international treaties is formulated so that there is a certain deferral to States, most notably in the ITPGRFA and the Nagoya Protocol. States, however, must take measures to ensure that rights regarding protection of traditional knowledge, participation, benefit-sharing, and continued practice are adequately observed. If these rights are systematically violated, the lack of relevant measures by the State cannot be said to comply with the "as appropriate" requirement. Some States have chosen to recognize IPR for farmers by *positive* rights over their knowledge and the resulting genetic material—by providing exclusive and time-limited rights. The distinction between defensive and positive protection was first made in a WIPO document on policy objectives and core principles at an early stage of the 19 years of negotiations on an international instrument on traditional knowledge (WIPO, 2004). Another categorization distinguishes between the stewardship approach and the ownership approach (Andersen, 2006, p. 4).

One study has found that the ownership approach—or positive protection—that characterizes India's PPV & FR Act has yielded overall few benefits for Indian farmers, while the Brazilian stewardship approach—with defensive

protection—is seen as being better (Peschard, 2017). On the other hand, one can point to high number of applications from farmers to the PPV & FR Authority in India, as seen in its annual reports. These reports show that in recent years, farmers constitute an overwhelming *majority* of those applying for registration, and also a majority of those receiving registration (Protection of Plant Varieties and Farmers' Rights Authority, 2019, p. 9). A decade ago, there were only a handful of applications from farmers (Protection of Plant Varieties and Farmers' Rights Authority, 2009, pp. 1–2). In Section 2, we identified the time factor as a crucial element in IPR justification. Hence, conclusive evidence from India must reflect the continued growth in the number of applications from and registrations to farmers. The high and growing number of applications from farmers must be understood to reflect their perception that they will benefit from such registration.

7 | ACCOMMODATING FARMERS IN THE IMPLEMENTATION OF THE TRIPS AGREEMENT

We saw that the FAO Voluntary Guidelines specify that measures for improved access must be taken within the framework of intellectual property treaties (FAO, 2004, guideline 8.5). While the Voluntary Guidelines are not binding, the balancing of measures to promote farmers' rights and IPR apply generally. While there are approximately 30 States which are not a party to the WTO—and while Least-Developed Countries are not obligated to comply with the TRIPS Agreement, with the exception of Articles 3, 4, and 5, as specified by Article 65.2 (see also WTO, 2013)—a review of the TRIPS flexibilities for ensuring a better balance between farmers/peasants' rights and IPR is relevant.

A full review of the relevant TRIPS provisions falls beyond the scope of this article, but TRIPS allow States to include provisions on (a) exclusions, (b) limited exceptions, (c) compulsory licenses, and (d) revocation (canceling) of patents (Haugen, 2007, pp. 215–253). These will be briefly analyzed to assess how States can accommodate farmers and peasants while complying with the substantive parts of the TRIPS Agreement.

In addition to the exclusion grounds in TRIPS Article 27.3(b), TRIPS Article 27.2 allows States to exclude inventions from patentability if this is “necessary ... to protect human, animal or plant life or health or to avoid serious prejudice to the environment.” There is presently no commercial application of GURT, but if this were to take place, it is expected that TRIPS Article 27.2 will be relevant. Thailand's Plant Varieties Protection Act of 1999 states in Section 13 that there shall be no registration of varieties with a “severely adverse impact ... on environment, health or public welfare.” India's PPV & FR Act prohibits in Article 29(3) registration of varieties containing technology that is “injurious to the life or health of human beings, animals or plants...” In an explanation, it is specified that this applies to GURT.

Limited exceptions are regulated in TRIPS Article 30. For any such exceptions to be justified, they must meet three criteria: (a) be limited; (b) not unreasonably conflict with a normal exploitation of the patent; and (c) not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.

There is one technology-related situation that might motivate States to adopt legislation in line with this provision: the so-called “innocent bystander” situation. We saw above that the Canadian Supreme Court ruled that Percy Schmeiser had infringed Monsanto's patent by sowing canola seeds that contained Monsanto's Roundup Ready (glyphosate-resistant) genes, hence not being an innocent bystander: “The issue is not the perhaps adventitious arrival of Roundup Ready on Mr. Schmeiser's land in 1998. What is at stake in this case is sowing and cultivation...” (Canadian Supreme Court, 2004, para. 96, underlining in original; see also para. 92) The majority of five claimed that when he found that the plants with this patented gene had arrived *accidentally* in his field with the particular qualities, he should have “acted quickly to arrange for its removal...” (Canadian Supreme Court, 2004, para. 86). The minority of four claimed that “saving, planting, or selling seed from glyphosate-resistant plants does

not constitute an infringing use” (Canadian Supreme Court, 2004, para. 162), as no patent claim covered such plants.

The Canadian Patent Act, Chapter P-4, Article 60(2) has a form of innocent infringer provision, allowing anyone to approach the Federal Court to ask for a declaration that a given product or patent made, used or sold by him does not constitute an infringement. Another innocent infringer provision is found in Article 42(i) of India's PPV & FR Act.

On compulsory licensing, States allow licensing patented technology in the public interest to ensure adequate supplies. One example is Article 2.2 of the Brazilian Presidential Decree No. 3201 of 1999, which specifies the following as justifying compulsory licensing: nutrition, protection of the environment, and “primordial importance to the ... social and economic development...”

Finally, revocation of patents can be done based on public interest. Article 89 of India's Patent Act allows for revocation in cases of nonworking of a patent.

Similar provisions to those mentioned above should be considered by other States. Such measures are in line with Article 19.8 of the UNDROP, declaring that States shall ensure that IP laws “respect and take into account the rights, needs and realities of peasants...,” as will be further elaborated below. The WTO's Trade Policy Review Body has never found that the provisions referred to above are in violation of TRIPS.

Based on initiatives from the Governing Body of the ITPGRFA, UPOV has engaged with the ITPGRFA Secretariat to identify “possible interrelations” between farmers' and breeders' rights (ITPGRFA, 2013, para. 3; see also UPOV, 2016). Such efforts have taken place in parallel to growing pressure for better implementation of farmers' rights within ITPGRFA (Shashikant & Meienberg, 2015, Annex). As explained above, there is an ongoing work to disseminate practices and promote the realization of farmers' rights.

Moreover, a UPOV Explanatory Note on Exceptions to the Breeder's Right (UPOV, 2009a) is scheduled for revision, and this might give stronger acknowledgment of farmers' rights (UPOV, 2018; see also UPOV 2017a, p. 4). The ITPGRFA contracting parties were also invited to make proposals for the revision of UPOV's Frequently Asked Questions, on the interrelations between the UPOV Convention and the ITPGRFA (ITPGRFA, 2018d; see also ITPGRFA, 2017; para. 12).

Finally, the ITPGRA secretariat claims to have a project together with other divisions in FAO, including FAO's Right to Food Unit, that includes to undertake a “study that explores the linkages between the concept of Farmer's Rights and the Right to Food...” (ITPGRFA, 2018e). This study has not proceeded further. The weak cooperation between the ITPGRFA secretariat and FAO's Right to Food Unit is also illustrated by the fact that nothing on the ITPGRFA or farmers' rights is found in a recent FAO presentation of its work on the right to food (FAO, 2019). Several other studies exist that demonstrate the tensions particularly between IPRs, on the one hand, and the right to food and farmers' rights, on the other (Bruins, 2017; Christinck & Walløe Tvedt, 2015; Golay, 2016, 2017; Haugen, 2014; Mahop, De Jonge, & Munyi, 2013; Shashikant & Meienberg, 2015).

8 | DISAGREEMENTS DURING THE DRAFTING PROCESS OF THE UNDROP

When the resolution mandating the first phase of the Open-ended intergovernmental working group on the rights of peasants and other people working in rural areas (OEIWG) was adopted in 2012, the vote was 23 to 9, with 15 abstentions (UN Human Rights Council, 2012, para. 1; on the process before 2012, see Golay, 2019a; Saragih, 2019; Vandenbogaerde, 2017). Some of the opposition can be explained by the fact that several States disapproved of an intergovernmental process at that stage, including the costs that would accrue during the negotiation process. This opposition was reiterated at the first session of the OEIWG in 2013, where some States emphasized that the Human Rights Council Advisory Committee “had worked, without a mandate, on a draft declaration that the Human Rights Council had not requested” (OEIWG, 2014, para. 29).

In 2012, the Human Rights Council had before it a draft declaration with 13 articles (UN Human Rights Council Advisory Committee, 2012). The Human Rights Council had 1 year earlier—in a unanimous resolution—asked its Advisory Committee for comprehensive studies on “discrimination in the context of the right to food...” and a final study on “how to advance the rights of people working in rural areas...,” respectively (UN Human Rights Council, 2011, paras. 43–46; see also Golay, 2015; UN Human Rights Council Advisory Committee, 2011a, 2011b, pp. 11–14).

The general opposition by some States to a draft declaration at the first session of the OEIWG can be summarized in five points: (a) new rights without consensus; (b) allowing for differential treatment of peasants; (c) collective rights of peasants without a basis in international law; (d) no definition of peasant provided; and (e) existing human rights provide adequate protection (OEIWG, 2014, para. 29). These five objections will be reviewed.

- (1) New rights without consensus: As seen above, farmers' rights are recognized in Article 9 of the ITPGRFA. It is, however, true that there is no consensus between groups of States regarding the balance between farmers' rights, human rights, and IPR. Some of this disagreement is reflected in the wording of Article 19, and it was commented at the second session of the OEIWG that the wording on seed rights [then draft article 22] “was not in line with many national policies and trade agreements” (OEIWG, 2015, para. 61).
- (2) Differential treatment of peasants: As seen above, CEDAW Article 14 recognizes particular human rights exclusively for rural women. Hence, there is nothing new that persons in agriculture are granted special protection under human rights treaties.
- (3) Collective rights to peasants without a basis in international law: Rights relating to benefit-sharing and traditional knowledge seem to be at the core of these objections. Collective rights for local and indigenous communities and farmers are recognized in ITPGRFA Article 9 and benefit-sharing is specifically regulated in ITPGRFA Article 9.2(b) and Article 13.2, but we saw above that several formulations restrict the scope of particularly ITPGRFA Article 9. At the third session of the OEIWG, FAO proposed three new paragraphs to UNDROP draft article 19, one on benefit-sharing, and the two others on participatory plant-breeding and locally adaptable crops (OEIWG, 2016, p. 38).
- (4) No definition of peasant: The draft proposed to the first session of the OEIWG included a definition (Human Rights Council Advisory Committee, 2013, p. 2), and the definition was amended twice, before the third and the fourth sessions of the OEIWG, respectively. The definition says in para. 1 that a peasant:

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

(OEIWG, 2017a, p. 3).

Moreover, Article 1.2-1.4—was slightly amended before the fifth and final session of the OEIWG (2018, p. 3)—includes in the definition any person engaged in “crop planting, livestock raising, pastoralism, fishing, forestry, hunting or gathering, and handicrafts related to agriculture...,” “indigenous peoples ..., nomadic and semi-nomadic communities, and the landless” and “hired workers, including all migrant workers ... on plantations ... in aquaculture and in agro-industrial enterprises.” Hence, the allegation that there is—or was—no definition cannot be substantiated.

- (5) Existing human rights provide adequate protection: The EU—which has two regulations applying specifically to small-holding farmers and two directives promoting conservation varieties (Farmers' Rights Project, undated; Golay & Bessa, 2019) and has addressed the “rights of small and subsistence farmers” in the WTO (WTO, 2003, para. 94)—is among those reiterating that there is no need to specify rights for peasants. The EU's own legal

instruments for small-holding farmers are in themselves interesting counter-arguments against this claim. Nevertheless, at the fourth session of the OEIWG, EU proposed to delete six references to the term “right” in draft article 19 including in the title, three times by a full deletion, twice by replacing it with “access,” and once by replacing it with “should be able to” (OEIWG, 2017b, pp. 63–64). Similar proposals were made by the EU at the fifth and last session of the OEIWG, including insertions of several formulations favoring a commercial breeding system (OHCHR, 2018, pp. 43–44). Probably most noteworthy was the EU proposal to delete the recognition of a right to traditional knowledge relevant to plant genetic resources for food and agriculture, which is recognized in Article 9.2(a) of the ITPGRFA. EU's proposal at the fifth and last session of the OEIWG was to replace the term “The right to” with the term “Support for” (OHCHR, 2018, p. 43).

9 | OMISSIONS BY THE OHCHR WHEN PRESENTING NORMATIVE SOURCES

As a resource for the negotiations, the OHCHR presented a document on normative sources and rationale (OHCHR, 2017, for information on the authors, see Claeys & Edelman, 2019, p. 3). The most striking feature of this document in the context of seed rights is that when justifying the last six paragraphs of Article 19, OHCHR merely refers to four documents: a 55-year-old ILO Recommendation on consultations, the FAO Voluntary Guidelines (FAO, 2004, guideline 8.4), and two reports from the (former) UN Special Rapporteur on the right to food (2009; 2010; for a response to the latter, see UPOV, 2009b; OHCHR, 2017, pp. 56–58). In addition to ICESCR Articles 11.2(a) and 15.1(b) and CEDAW Article 14.2(g), there are seven other relevant soft-law sources that could have been included. The five first have already been brought into the analysis above.

First, General Comment 12 on the right to adequate food specifies “appropriate technology” in the context of “access to ... resources for food” (UN CESCR, 1999, para. 26). Second, CEDAW's General Recommendation 34 on rural women recognizes explicitly the right to seeds (UN CEDAW, 2016, paras. 56 and 62). Third, General Comment 21 on indigenous peoples' rights over their seeds (UN CESCR, 2009a, para. 35). Fourth, the SDG target, 2.3 on “secure and equal access to ... productive resources and inputs” must be read as to encompass seeds (UN General Assembly, 2015, p. 15). Fifth, the FAO Voluntary Guidelines, on small-scale farmers' access to research results (FAO, 2004, guideline 8.5), which encompass seeds. Sixth, the Voluntary Guidelines for Mainstreaming Biodiversity into Policies, Programmes and National and Regional Plans of Action on Nutrition calls upon States to “ensure easy availability of seeds...” (FAO, 2015a, Appendix C, para. B(iii)). Seventh, the FAO Voluntary Guide for National Seed Policy Formulation (FAO, 2015b; endorsed by FAO, 2015a, para. 52) reaffirms farmers' rights in several paragraphs.

Hence, four nonbinding documents adopted by States, as well as three human rights treaty bodies' clarification of the scope of specific human rights and corresponding obligations contain wording that either implicitly or explicitly identify obligations relating to seeds. These sources could have been referred to to demonstrate that there is a growing normative basis for seed rights.

10 | PROVISIONS ON SEED RIGHTS IN THE UNDROP

The eight paragraphs of Article 19 will now be analyzed, in the order they appear.

Article 19.1 is based on ITPGRFA 9.2 and 9.3, both including the right to exchange and sell farmed-saved seeds, but by using the term “right to the protection of traditional knowledge,” it goes beyond ITPGRFA, that does not apply the term “right to” in the context of traditional knowledge. The EU wanted a full deletion of this subparagraph on traditional knowledge (OHCHR, 2018, p. 64).

Article 19.1(d) recognizes “the right to save, use, exchange and sell farm-saved seed or propagating material.” This right applies generally, with no distinction. As this provision covers farmer-bred seeds, the provisions of UPOV

1991 and the Arusha Protocol are not relevant, as these apply to what the farmer can do with protected varieties, as further specified in UPOV 1991 Article 15(2) and the Arusha Protocol Article 22(2), both acknowledging the so-called farmers' privilege. The uncertainties that Article 21(4)(b) of the Arusha Protocol gives rise to, by extending the protection also to varieties which are *not* clearly distinguishable from the protected variety—as discussed above—make this more complicated, however.

Article 19.2 merely says that peasants have the right to “maintain, control, protect and develop their seeds and traditional knowledge” (see also UN General Assembly, 2007, Article 31.1, and UN CESCR, 2009a, para. 37 for similar wording for indigenous peoples). This must be understood to apply to seeds that the peasants and indigenous peoples have developed themselves. Similar wording is found in Article 19.5, emphasizing the State obligation to respect peasants' rights and choices in relation to their seeds.

Article 19.3 says: “States shall take measures to respect, protect and fulfil the right to seeds...” This is a strong recognition, even if the obligations were softened during the negotiations, as the EU at the fourth session of the OEIWG opposed the entire paragraph, and achieved a deletion of the formulation “and recognize it in their national legislation” (OEIWG, 2017a, p. 12).

Article 19.4 merely specifies that affordable seeds of sufficient quality and quantity shall be made available to peasants. This is a fulfill (provide) type of obligation, built on the overall principles of availability, physical and economic accessibility and quality (UN CESCR, 1999, paras. 8, 12, and 13). In this context, Article 19.6 of the UNDROP is highly relevant, stating that States “shall take appropriate measures to support peasant seed system and promote the use of peasant seeds...” What is included in the term “support” is not adequately clear.

A specification of an obligation to support, which is of a fulfill (facilitate) type follows in Article 19.7, saying that States shall “ensure that agricultural research and development integrates the needs of peasants...” The negotiations in the UN Human Rights Council in September 2018 resulted in adding the term “integrates,” replacing the term “duly takes into account” (OEIWG, 2018, p. 11). Hence, the provision was strengthened, and must be considered to be more compatible with ITPGRFA Article 6.2(b) and Article 6.2(c) and ICESCR Articles 15.1(b) and 11.2(a).

Finally, Article 19.8 refers explicitly to IPRs, declaring that States shall ensure that such laws “respect and take into account the rights, needs and realities of peasants...” This wording came during the discussions in UN Human Rights Council in September 2018, and also this made the provision more comprehensive compared to the text from the OEIWG (2018, p. 11). The draft that was distributed before the fourth session included also the wording “in particular the right to seeds...” (OEIWG, 2017a, p. 13). The subsequent deletion of this part of the paragraph was requested by the EU, but the EU had no objections to the balancing of IPR and peasants' rights (OEIWG, 2017b, p. 64).

In summary, the wording of Article 19 on the right to seeds provides a relatively comprehensive protection of peasants, in at least four regards: First, it applies the verb shall. Second, it specifies—in Article 19.3—State measures to respect, protect and fulfill the right to seeds. Even if this formulation was weakened by deleting the formulation “recognize it in their national legislation” (OEIWG, 2017a, p. 12), it specifies duties upon States. Third, paras. 19.2 and 19.5 emphasize peasants' choices regarding their seed rights, which is in line with ITPGRFA. Fourth, paras. 19.6, 19.7 and 19.8 specify that the peasant system must be supported, that agricultural research must integrate the needs of peasants, and that IPR legislation must respect and take into account peasants' rights, needs, and realities.

Hence, UNDROP Article 19 does guide policy making for improving peasants' livelihoods and promoting the right to food. If the domestic legislation promoting peasants' rights is compatible with the minimum standards of the TRIPS Agreement, as explained above, this creates predictability for farmers, breeders, and life science companies.

11 | CONCLUDING DISCUSSION

Many States seek to increase food production through high IPR protection standards, as illustrated by the Arusha Protocol. The letter from the UN Special Rapporteur on the right to food (2016) to ARIPO is just one among several

attempts to identify IPR protection levels that correspond to the States' level of economic and technological development. There are, however, pressure for increased levels of IPR protection from new initiatives seeking to assist African States in increasing their food production, for instance, Tanzania (G8, 2012).

The UNDROP Article 19 can create positive synergies between farmers' rights, the right to food and the right to benefit from science, and standard IPR legislation, while maintaining predictability for breeders and life science companies. While UNDROP Article 19 is more detailed than any of the treaty provisions, it must be remembered that UNDROP is a soft-law source. Article 19 can, however, provide new insight to the scope of the provisions of international treaties, particularly the ICESCR. The right to seeds is implicitly recognized in ICESCR Article 15.1(b) and Article 11.2(a), as well as CEDAW Article 14.2(g), read in light of several soft-law sources that recognize the right to access to seeds. The recognition of farmers' contribution to seed improvement through positive protection is implicitly recognized in ICESCR Article 15.1(c), and the outcome of the ongoing negotiations in WIPO on traditional knowledge (WIPO, 2019a; see also WIPO, 2019b) will strengthen this aspect of seed rights. Hence, what is needed is both an ownership approach—also termed “positive protection”—and a stewardship approach—also termed “defensive protection,” finding an adequate balance between the two.

States have an obligation to facilitate for enhanced food production and distribution, and perhaps the most effective way to ensure the right to food for the most marginalized and vulnerable is to increase the productivity among poor peasants by easing the access to seeds. Such productivity increase will be crucial for poverty reduction, as noted by the World Bank: “...GDP growth originating in agriculture is at least twice as effective in reducing poverty as GDP growth originating outside agriculture” (World Bank, 2007, p. 6).

New momentum is created by SDG 2.3 on doubling the agricultural productivity and incomes of small-scale food producers by 2030. Moreover, there is currently a stronger recognition than before that peasant farmers both constitute a high share of the poorest in developing countries, while their efforts are crucial for national food security in the same countries, and also for global concerns relating to biodiversity and climate change. It is for the respective States, also through international cooperation, to prioritize policy measures specified by UNDROP (Golay, 2019b). These measures can also be read out of States' obligations under CEDAW, ICESCR, ITPRGFA and other treaties and instruments.

ENDNOTES

- ¹ The vote in the General Assembly was 121-8-54; in the Human Rights Council, the vote was 33-3-11 (UN Human Rights Council, 2018).
- ² For criticisms of Article 19, see UN Open-ended intergovernmental working group on the rights of peasants and other people working in rural areas (OEIWG, 2018), para. 76; for States' comments during the vote, see UN (2018); for examples of earlier criticisms, see OEIWG (2016), para. 115 (United States) and para. 126 (Argentina) and OEIWG (2017b), para. 208 (EU, Japan, and Republic of Korea); for the 2017 draft, see OEIWG (2017a). Other controversial elements in the UN Peasants Rights' Declaration were Article 17 (land) and Article 20 (biodiversity).
- ³ Note that Article 2 of the Convention on Biological Diversity (CBD, 1992; entered into force 1993) defines genetic material as “any material of plant, animal, microbial or other origin containing functional units of heredity.” The 2010 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (Nagoya Protocol) adds in Article 2(c) genetic resources' “biochemical components.”
- ⁴ Nagoya Protocol Article 5.2, on benefit-sharing resulting from the utilization of genetic resources also states that the relevant measures are to be taken in accordance with “established rights of these indigenous and local communities over these genetic resources...” No provision the Nagoya Protocol obligates States to legislate for ensuring indigenous peoples' rights.
- ⁵ UPOV (undated). UPOV specifies that for a variety to be granted protection, it “needs to be *clearly* distinguishable from *all* existing varieties...” (own emphasis); according to UPOV 1991 Article 1(vi) a variety must have certain genotype characteristics, be phenotypically distinguishable, and having “suitability for being propagated...”

ORCID

Hans Morten Haugen  <http://orcid.org/0000-0003-3027-3547>

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AUTHOR BIOGRAPHY

Hans Morten Haugen, Cand.Polit, Dr. Jur. is a Professor of International Diakonia at VID Specialized University, Oslo, Norway. He has written extensively on the encounters between international economic law and human rights law, particularly intellectual property law, investment law, indigenous peoples' rights and the right to food. He has provided advice on these matters as an invited expert at UN meetings; see for instance A/HRC/26/19, paragraph 40.

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