

PRACTICAL MANUAL ON THE RIGHT TO SEEDS IN EUROPE

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

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CONTENTS

KEY MESSAGES AND RECOMMENDATIONS	6		
1. INTRODUCTION	10		
2. THE RIGHT TO SEEDS AND INTELLECTUAL PROPERTY RIGHTS IN INTERNATIONAL LAW (BEFORE 2018)	11		
A. THE RIGHT TO SEEDS	11		
B. INTELLECTUAL PROPERTY RIGHTS	13		
C. WHERE ARE THE TENSIONS?	16		
3. THE RIGHT TO SEEDS AND STATES' OBLIGATIONS IN UNDROP	18		
A. UNDROP'S ADOPTION AND HOLISTIC VISION	18		
B. THE PRIMACY OF HUMAN RIGHTS AND UNDROP OVER OTHER INTERNATIONAL INSTRUMENTS	19		
C. THE RIGHT TO SEEDS OF PEASANT WOMEN	20		
D. THE MAIN ELEMENTS OF PEASANTS' RIGHT TO SEEDS	20		
1. PEASANTS' RIGHT TO MAINTAIN, CONTROL, PROTECT AND DEVELOP THEIR OWN SEEDS AND TRADITIONAL KNOWLEDGE	21		
2. THE RIGHT TO THE PROTECTION OF TRADITIONAL KNOWLEDGE, INNOVATION AND PRACTICES RELEVANT TO SEEDS	21		
3. THE RIGHT TO PARTICIPATE IN DECISION-MAKING ON MATTERS RELATING TO SEEDS	22		
4. THE RIGHT TO EQUITABLY PARTICIPATE IN THE SHARING OF BENEFITS ARISING FROM THE UTILIZATION OF SEEDS	23		
5. THE RIGHT TO SAVE, USE, EXCHANGE AND SELL FARM- SAVED SEED OR PROPAGATING MATERIAL	23		
E. STATES' OBLIGATIONS	24		
1. OBLIGATION TO ENSURE THE CONSISTENCY OF INTERNATIONAL AGREEMENTS AND STANDARDS, AND OF NATIONAL AND REGIONAL LAWS AND POLICIES WITH THE RIGHT TO SEEDS	25		
2. OBLIGATIONS TO RESPECT, PROTECT AND FULFIL THE RIGHT TO SEEDS	26		
3. OBLIGATIONS TO SUPPORT PEASANT SEED SYSTEMS AND TO PROMOTE THE USE OF PEASANT SEEDS AND AGROBIODIVERSITY	27		
4. OBLIGATION TO ENSURE PEASANTS' PARTICIPATION IN DECISION-MAKING PROCESSES IN RELATION TO SEEDS	28		
5. OBLIGATION TO ENSURE THAT AGRICULTURAL RESEARCH AND DEVELOPMENT INTEGRATE THE NEEDS OF PEASANTS, WITH THEIR ACTIVE PARTICIPATION	30		
4. MAIN CHALLENGES TO THE PROTECTION OF THE RIGHT TO SEEDS IN EUROPEAN UNION LAW	31		
A. CHALLENGES TO PEASANTS' RIGHT TO MAINTAIN, CONTROL, PROTECT AND DEVELOP THEIR OWN SEEDS	31		
1. INTELLECTUAL PROPERTY RIGHTS IN THE EU			
a. PATENT PROTECTION IN THE EU	31		
b. PLANT VARIETY PROTECTION IN THE EU	33		
2. BIOSAFETY REGULATIONS AND GENETICALLY MODIFIED SEEDS	33		
B. CHALLENGES TO THE RIGHTS TO THE PROTECTION OF TRADITIONAL KNOWLEDGE AND TO EQUITABLE BENEFIT SHARING	35		
1. ACCESS AND BENEFIT SHARING UNDER THE NAGOYA PROTOCOL	35		
2. ACCESS AND BENEFIT SHARING UNDER THE ITPGRFA	36		
3. LINKING ABS, TRADITIONAL KNOWLEDGE, AND INTELLECTUAL PROPERTY RIGHTS	37		
C. CHALLENGES TO THE RIGHT TO PARTICIPATE IN DECISION-MAKING ON MATTERS RELATING TO SEEDS	38		
D. CHALLENGES TO THE RIGHTS OF PEASANTS TO SAVE, USE, EXCHANGE AND SELL FARM-SAVED SEEDS AND TO ACCESS LOCALLY AVAILABLE SEEDS	39		
1. INTELLECTUAL PROPERTY RIGHTS	39		
a. FARMERS' RIGHTS IN EU PATENT PROTECTION	39		
b. FARMERS' RIGHTS IN EU PLANT VARIETY PROTECTION	40		
2. SEED MARKETING LAWS	41		
a. PEASANT SEED SYSTEMS SAVING, USING AND EXCHANGING SEEDS	41		
b. ACCESS OF PEASANT SEEDS TO THE MARKET AND DIVERSIFIED SEED MARKET OFFER	42		
3. PLANT HEALTH LAWS	43		
5. EU MEMBER STATES OBLIGATIONS FOR THE IMPLEMENTATION OF UNDROP	46		
A. OBLIGATION TO ENSURE THE CONSISTENCY OF INTERNATIONAL AGREEMENTS, NATIONAL AND REGIONAL LAWS AND POLICIES WITH THE RIGHT TO SEEDS	46		
B. OBLIGATION TO RESPECT, PROTECT AND FULFIL THE RIGHT TO SEEDS	47		
C. OBLIGATIONS TO SUPPORT PEASANT SEED SYSTEMS AND TO PROMOTE THE USE OF PEASANT SEEDS AND AGROBIODIVERSITY	48		
D. OBLIGATIONS TO PROTECT TRADITIONAL KNOWLEDGE, INNOVATION AND PRACTICES, AND TO ENSURE EQUITABLE BENEFIT SHARING	48		
E. OBLIGATION TO ENSURE PEASANTS' PARTICIPATION IN DECISION-MAKING PROCESSES IN RELATION TO SEEDS	48		
F. OBLIGATION TO ENSURE THAT AGRICULTURAL RESEARCH AND DEVELOPMENT INTEGRATE THE NEEDS OF PEASANTS, WITH THEIR ACTIVE PARTICIPATION	49		
6. CONCLUSION	50		
ANNEX: RELEVANT ARTICLES OF THE UNITED NATIONS DECLARATION ON THE RIGHTS OF PEASANTS AND OTHER PEOPLE WORKING IN RURAL AREAS	51		

KEY MESSAGES AND RECOMMENDATIONS

KEY MESSAGES

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

In the European Union (EU) and EU Member States, seed laws and regulations have been designed to cater to the needs of the agricultural industry, and the rights of peasants have been largely neglected. Peasant seed systems and traditional knowledge have not been recognised, and therefore not adequately supported. European seed diversity has suffered a drastic decay in recent decades, largely as a result of a normative framing that disregards the needs and realities of peasants. National seed catalogues and the EU Common Catalogue have been designed to promote industrial seeds and agriculture standards, largely excluding peasant seeds. Due to strong IPR regimes, peasant seed saving, exchange and selling have been outlawed, or severely restricted in the EU. This has discouraged, and in some cases hindered the continuation of peasant agricultural activities.

To respond to these challenges, among others, the United Nations (UN) adopted in 2018 the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP), in which peasants' right to seeds is recognized. According to UNDROP, states shall, inter alia, 'elaborate, interpret and apply relevant international agreements and standards to which they are party, in a manner consistent with their human rights obligations as they apply to peasants' (Article 2(4)). They shall also 'support peasant seed systems, and promote the use of peasant seeds and agrobiodiversity' (Article 19(6)). And they shall 'ensure that seed policies, plant variety protection and other intellectual property laws, certification schemes and seed marketing laws respect and take into account the rights, needs and realities of peasants' (Article 19(8)).

UNDROP's implementation represents a unique opportunity to rebalance the lack of support given to peasant seed systems worldwide, Europe included, compared to the support given to industrial seed systems in recent decades. This is essential for the protection of the lives and livelihoods of hundreds of millions of peasants, as well as the interest of all in the preservation of crop biodiversity.

In 2018, the European Parliament (EP) called for EU Member States to support UNDROP's adoption, and the European Economic and Social Committee called

on European institutions and EU Member State governments to actively support UNDROP in all future work leading up to its realization. Following these calls, and in accordance with the need to apply international instruments adopted by the UN General Assembly in good faith, and the need to give priority to human rights norms in international and national laws, reflected in UNDROP's Articles 2(4), 15(5) and 19(8), the EU and EU Member States shall ensure that their regional and national laws and policies, as well as the international agreements to which they are party, do not lead to violations, but to a better protection of rights of peasants, including their right to seeds.

RECOMMENDATIONS

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

- The EU and EU Member States shall take appropriate measures to eliminate all forms of discrimination against peasant women, to promote their empowerment and to ensure that they enjoy the right to seeds without discrimination.
- The EU and EU Member States shall promote the right to seeds at the UN and in the implementation of the CBD and its Protocols, the ITPGRFA, UNDRIP and UNDROP.
- The EU and EU Member States shall elaborate, interpret and apply international agreements and standards in a manner consistent with the right to seeds. This implies that they shall, inter alia, ensure that the negotiation, interpretation and implementation of WIPO, WTO and UPOV instruments, as well as any other international agreement protecting intellectual property rights, do not violate, but facilitate the realization of the right to seeds, including peasants' right to freely save, use, exchange and sell farmed-saved seeds or propagating material. In the UPOV system, the EU shall change its approach to the notion of "private and non-commercial use", re-assess the farmers' privilege and the breeders' exception in light of peasants' right to save, exchange and sell farm-saved seeds or propagating material. In the European Patent Convention System, the EU shall support the recent developments regarding exclusions on patentability, and ensure that patent claims do not extend to native traits.
- The EU and EU Member States shall ensure that free trade agreements to which they are party do not lead to violations of the right to seeds of European peasants or peasants in other countries. This implies that they shall, inter alia, stop promoting the 1991 Act of the UPOV Convention when negotiating free trade agreements. Instead, they shall encourage developing countries to use the possibilities offered by TRIPS to design sui generis systems of plant variety protection.

- The EU and EU Member States shall engage in international development cooperation to support efforts of developing countries aimed at implementing the right to seeds. By doing so, they shall, inter alia, promote agrobiodiversity and the use of peasants' seeds, support the strengthening of peasants' seed systems and ensure peasants' participation in the design of these as well as in the design of sui generis systems.
- The EU and EU Member States shall consult and cooperate in good faith with peasants, through their own representative organizations, before adopting and implementing international agreements that may affect their right to seeds.
- The EU and EU Member States shall establish mechanisms to ensure the coherence of their agricultural, economic, social, cultural and development policies with the realization of the right to seeds. For example, the reform of the Common Agricultural Policy shall include provisions and conditionality requirements that support and protect peasants' right to seeds and seed systems.
- The EU and EU Member States shall ensure that seed policies, plant variety protection and other intellectual property laws, seed marketing laws, variety registration and certification schemes respect and take into account the rights, needs and realities of peasants. They shall, inter alia, revise their legal frameworks on seed marketing, excluding peasant seed systems from the definition of seed marketing, and strengthening their access to seeds by allowing peasant seeds but also seeds from locally adapted varieties to be marketed, whether inside or outside of current seed marketing rules, as a derogation or, better, a self-standing regime.
- The EU and EU Member States shall recognize the rights of peasants to rely either on their own seeds or on other locally available seeds of their choice, and to decide on the crops and species that they wish to grow. They shall also ensure that seeds of sufficient quality and quantity are available to peasants, at the most suitable time for planting, and at an affordable price.
- The EU and EU Member States shall respect, protect and fulfil peasants' right to seeds, including their rights to the protection of traditional knowledge relevant to seeds, and to equitably participate in the sharing of benefits arising from the utilization of seeds. They shall recognize peasants' ancestral and innovative practices as traditional knowledge, and acknowledge their role in the conservation, sustainable use and dynamic management of crop diversity, adequately compensating them for its maintenance and adaptation in a multi-layered European strategy on genetic resources where they would find representation.
- The EU and EU Member States shall support peasant seed systems, promote the use of peasant seeds and agrobiodiversity, and guarantee the right of peasants to maintain, control, protect and develop their own seeds and traditional knowledge. They shall modify their normative framework so that peasants' seed systems not only exist, but also fully operate and thrive as production and conservation systems. They shall for instance consider the impact of strict plant health regulations on peasants' rights to seeds, and alleviate their detrimental effects. They shall also promote a fair, impartial and appropriate system of evaluation and certification of the quality of peasant seeds, and promote peasants' participation in its formulation.

- The EU and EU Member States shall take all necessary measures to ensure that non-state actors that they are in a position to regulate, such as private individuals and organizations, and transnational corporations and other business enterprises, respect and strengthen the right to seeds. They shall, inter alia, prevent risks arising from the development, handling, transport, use, transfer or release of genetically modified organisms (GMOs), including by protecting peasants against crop contamination. They shall also address the detrimental impacts that patents on plants have on peasants' capacity to access seeds and breeding material freely to develop varieties and populations adapted to their local conditions and social needs.
- The EU and EU Member States shall ensure the full and meaningful participation of peasants in decision-making on matters relating to seeds. They shall also respect and support the establishment and growth of strong and independent peasant organizations, addressing the existing imbalance of representation compared with more traditional actors of civil society or industry actors.
- The EU and EU Member States shall ensure that agricultural research and development integrate the needs of peasants, with their active participation. They shall, inter alia, invest more in research on and development of orphan crops, local varieties and seeds that respond to the needs of peasants, and they shall ensure peasants' active participation in the definition of priorities and the undertaking of research and development

1. INTRODUCTION

“To control seeds is to control life itself.”

M. Fakhri, UN Special Rapporteur on the right to food¹

The United Nations (UN) Human Rights Council adopted the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP) on 28 September 2018, and the UN General Assembly adopted it on 17 December 2018.²

Several UNDROP's articles describe measures that states shall take to better protect peasants' right to seeds.³ These provisions recognize, inter alia, the rights to food, seeds and biological diversity, and define corresponding state obligations. They provide that states shall respect, protect and fulfill the right to seeds, and that they shall engage in international cooperation with the same purpose. Like other states, European Union (EU) Member States shall ensure that their laws and policies, as well as the international agreements to which they are party to, do not lead to violations, but to a better protection of the right to seeds.

This practical manual focuses on the steps that the EU and EU Member States shall take to better protect the right to seeds.⁴ It starts with a presentation of the protection of the right to seeds and intellectual property rights in international law before UNDROP's adoption, and of their inherent tensions (Part 2). It then introduces UNDROP, outlines its definition of the right to seeds and states' obligations, and explains why it shall prevail over other international instruments, including those protecting intellectual property rights, and over national and regional laws and policies (Part 3). It ends with a contextual presentation of the challenges to the protection of the right to seeds in European law (Part 4), and develops proposals to better protect the right to seeds in the EU and EU Member States based on states' obligations defined in UNDROP (Part 5).

¹ Report of the UN Special Rapporteur on the Right to Food, UN doc. A/HRC/46/33, 24 December 2020, §78.

² UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP), UN doc. A/RES/73/165, 17 December 2018.

³ By 'seed' we mean any plant reproductive organ, including plants.

⁴ This manual is partially based on C. Golay and A. Bessa, *The Right to Seeds in Europe*, Geneva Academy, 2019. It includes information taken from this 2019 publication, summarizing it, updating it and adapting it to offer a practical tool to all users.

2. THE RIGHT TO SEEDS AND INTELLECTUAL PROPERTY RIGHTS IN INTERNATIONAL LAW (BEFORE 2018)

International law offers a number of opportunities for and challenges to the protection of the right to seeds.⁵ This section begins with a brief history of the right to seeds and intellectual property rights in international law before 2018 (Sections A and B). It then presents their inherent tensions and explains why it was important to adopt UNDROP (Section C).

A. THE RIGHT TO SEEDS

For over 10,000 years, peasants have freely saved, selected, exchanged and sold seeds, as well as used and reused them to produce food.⁶ At the end of the twentieth and the start of the twenty-first century, states affirmed these customary rights by adopting the Convention on Biological Diversity (CBD) and its Protocols, the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).

The CBD was adopted in 1992. Today, it has acquired almost universal acceptance, with 196 states parties.⁷ The CBD protects important elements of peasants' right to seeds, through provisions aimed at ensuring the protection of indigenous and local communities' traditional knowledge and practices, and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to these resources.⁸ In the Cartagena Protocol on Biosafety, adopted in 2000 and to which more than 170 states are parties,⁹ states have also agreed to take steps to protect biological diversity and indigenous and local communities from the potential risks posed by genetically modified organisms (GMOs).¹⁰ And, in the Nagoya Protocol on Access to Genetic Resources and

⁵ See also C. Golay, *The Right to Seeds and Intellectual Property Rights*, Geneva Academy, 2020 ; A. Bessa and K. Veiga, *The Right to Seeds and Food Systems*, Geneva Academy, 2020.

⁶ R. Andersen, *The History of Farmers' Rights: A Guide to Central Documents and Literature*, Fridtjof Nansen Institute, 2005.

⁷ See the List of States Parties to the Convention on Biological Diversity (CBD).

⁸ See Art 8j, CBD.

⁹ The Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Cartagena Protocol) was adopted on 29 January 2000.

¹⁰ See in particular, Art 26, Cartagena Protocol.

Benefit-Sharing (Nagoya Protocol), adopted in 2010 and ratified by more than 120 states,¹¹ states have further defined benefit sharing obligations arising from the use of traditional knowledge associated with genetic resources, and from research and development on genetic resources held by indigenous and local communities.¹² They have also committed, ‘as far as possible, not to restrict the customary use and exchange of genetic resources and associated traditional knowledge within and amongst indigenous and local communities’.¹³

The ITPGRFA was negotiated for 20 years and it was adopted by consensus at FAO in 2001. It has more than 140 states parties today¹⁴ and is the most important international treaty in terms of its recognition and protection of farmers’/peasants’ right to seeds.

In ITPGRFA’s Preamble, states affirmed that ‘the rights recognized in this Treaty to save, use, exchange and sell farm-saved seed and other propagating material, and to participate in decision-making regarding, and in fair and equitable sharing of the benefits arising from, the use of plant genetic resources for food and agriculture, are fundamental to the realization of Farmers’ Rights, as well as to the promotion of Farmers’ Rights at national and international levels’.¹⁵

In ITPGRFA’s Article 9, states recognized ‘the enormous contribution that the local and indigenous communities and farmers of all regions of the world, particularly those in the centres of origin and crop diversity, have made and will continue to make for the conservation and development of plant genetic resources which constitute the basis for food and agriculture production throughout the world’.¹⁶ The same article requires states parties to take measures to protect and promote farmers’ rights, by: (a) protecting traditional knowledge relevant to plant genetic resources for food and agriculture, and affirming (b) the right to equitably participate in sharing benefits arising from the utilization of plant genetic resources for food and agriculture, and (c) the right to participate in making decisions, at national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture’. It is important to note that Article 9 provides that a state party will do this ‘as appropriate and subject to its national legislation’. But it also states that its provisions shall not be interpreted ‘to limit any rights that farmers have to save, use, exchange and sell farm-saved seed or propagating material’ (Article 9(3)). It is therefore clear that these provisions aim at protecting customary rights that farmers/peasants have always had.

11 The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (Nagoya Protocol) was adopted on 29 October 2010.

12 See Art 5(5) and 5(2), Nagoya Protocol.

13 See Art 12(4), Nagoya Protocol.

14 See the List of States Parties to the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA).

15 See Preamble, ITPGRFA.

16 See Art 9, ITPGRFA.

In adopting UNDRIP in 2007, states recognized the right to seeds in international human rights law for the first time, by recognizing indigenous peoples’ right to maintain, control, protect and develop their seeds and their ownership of these seeds.¹⁷

B. INTELLECTUAL PROPERTY RIGHTS

The creation of intellectual property rights over seeds and plant varieties began in European countries and the United States in the twentieth century, through the protection of breeders’ rights and patents.¹⁸ This legal development was intrinsically linked to the development of a commercial breeding sector separate from farming and, more recently, of a biotechnology sector.¹⁹ Today, binding international treaties and effective monitoring mechanisms offer strong protection to these two forms of intellectual property rights.

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), adopted as Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization (WTO) on 15 April 1994, defines how patent laws should protect innovation. The TRIPS Agreement requires WTO members to provide for a minimum patent protection of 20 years for all inventions in almost all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application.²⁰ Protection is optional for plants and animals, but members of the WTO must protect intellectual property rights over plant varieties either by patents, an effective *sui generis* system (a system of its own kind) or a combination of both.²¹

Patents represent the most comprehensive form of protection that can be granted. They ultimately give the right-holders – in many cases corporations – exclusive rights over plant-related inventions. When they use a patented product or process, peasants (like breeders) are considered to be licensees of the patent holder, and they are frequently requested to sign agreements not to save, resow or exchange the seeds that they buy from sellers, which may be the patent-holders or their licensees.²²

While some countries have protected intellectual property rights over plant varieties through patents, most countries have chosen to grant breeders’ rights. In

17 UN Declaration on the Rights of Indigenous Peoples (UNDRIP), UN doc. A/RES/61/295, 2 October 2007, Art 31(1).

18 Réseau Semences Paysannes, *Seeds and Farmers’ Rights: How International Regulations Affect Farmer Seeds*, 2011, pp 14–19.

19 UN Special Rapporteur on the Right to Food, *Seed Policies and the Right to Food: Enhancing Agrobiodiversity and Encouraging Innovation*, UN doc. A/64/170, 23 July 2009, §1.

20 See Art 27, TRIPS.

21 See Art 27(3.b), TRIPS.

22 UN Special Rapporteur on the Right to Food, *Seed Policies and the Right to Food: Enhancing Agrobiodiversity and Encouraging Innovation*, UN doc. A/64/170, 23 July 2009, §12; Réseau Semences Paysannes, *Seeds and Farmers’ Rights: How International Regulations Affect Farmer Seeds*, 2011, p 31.

doing so, a few countries, such as Ethiopia, Malaysia, the Philippines and India²³, have chosen to develop their own *sui generis* system, through which they protect both plant breeders' and peasants' rights.²⁴ For example, through its 2001 Protection of Plant Varieties and Farmers Rights Act²⁵, India – which is a member of the WTO and a state party to TRIPS but not a member of UPOV – protects plant varieties and breeders' rights as well as peasants'/farmers' rights to save, use, sow, resow, exchange, share and sell farm produce, including seeds of varieties protected by plant breeders' rights (Article 39).²⁶ Norway offers another interesting example, as it decided not to adopt a law in 2005 that would have reinforced the protection of breeders' rights – and allow Norway to become a member of UPOV 1991 (instead of UPOV 1978) – because it would have been detrimental to the existing protection of peasants'/farmers' rights in the country.²⁷ In 2000, the African Union developed a Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources, to guide African countries in protecting both breeders' and peasants'/farmers' rights.²⁸

In implementing TRIPS' Article 27(3.b), many countries have adopted the model proposed by the International Union for the Protection of New Varieties of Plants (UPOV) and its Convention (UPOV Convention).²⁹ Developing countries that have adopted this model have usually done so as part of a trade agreement with the EU, the United States, Japan or the European Free Trade Association (EFTA).³⁰

The first version of the UPOV Convention was adopted in 1961 by six Western European countries and it entered into force in 1968. It was then revised in 1972, 1978 and 1991. Since 1999, new members are obliged to become parties to UPOV 1991. Today, more than 70 states are members of UPOV, and two-thirds of them have ratified the 1991 Act. Members include all large commercial powers with the notable exception of India.³¹ The EU has been party to the UPOV Act of 1991 since 2005, and has operated a plant breeders' rights system that covers the territory of its Member States since 1994.³²

23 See the [Farmers' Rights Project, 'Farmers' Rights Legislation & Policy Database'](#).

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

25 See the [Protection of Plant Varieties and Farmers' Rights Act](#) adopted by the Indian Parliament.

26 The Farmers' Rights Project, 'Best Practices: India's Protection of Plant Varieties and Farmers' Rights Act'.

27 The Farmers' Rights Project, 'Best Practices: Norway's "No" to Stricter Plant Breeders' Rights'.

28 See [The African Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources](#) adopted by the African Union.

29 UPOV, [Guidance for the Preparation of Laws Based on the 1991 Act of the UPOV Convention](#), UPOV doc UPOV/INF/6/5, 6 April 2017.

30 See, for example, C. Golay and C. Dommen, *Switzerland's Foreign Policy and the United Nations Declaration on the Rights of Peasants*, Geneva Academy et al., 2020.

31 In addition to states, the EU and the African Intellectual Property Organization are also members of UPOV. See [List of UPOV Members](#).

32 [EU Council Regulation \(EC\) No 2100/94 of 27 July 1994 on Community plant variety rights](#).

The UPOV Convention protects the rights of plant breeders who have developed plant varieties that are new, distinct, uniform and stable (Article 5(1)). It is important to note that the novelty criterion does not mean that the plant variety was not already known or used (by peasants, for instance). Rather, it means that the variety was never commercialized in the formal market, or listed in an official seed catalogue.³³ The uniformity and stability requirements imply that the UPOV Convention cannot offer any protection to peasant varieties, which are inherently unstable and in permanent evolution.³⁴

UPOV 1991 grants breeders at least 20 years of rights over novel, distinct, uniform and stable plant varieties (Article 19). If previous versions of UPOV already prohibited peasants from selling protected seeds, the 1991 Act also prohibits them from exchanging these seeds. Peasants in State Parties of UPOV 1991 cannot save or reuse seeds of protected varieties, except on their own farms, in a limited fashion and with due regard for the 'legitimate interests of the breeder', and only provided that their government has adopted an optional exception to this effect (Articles 14 and 15).

Intellectual property rights aim at encouraging innovation by allowing the patent-holder or the breeder to be rewarded for the investment made in the development of a new plant variety, while at the same time – in the case of the protection of plant breeders' rights – allowing access to others for breeding.³⁵ However, experts have argued that excessive protection of breeders' rights and patents may discourage innovation instead of rewarding it. For the former UN Special Rapporteur on the right to food, Olivier De Schutter, 'intellectual property rights reward and encourage standardization and homogeneity, when what should be rewarded is agrobiodiversity, particularly in the face of the emerging threat of climate change and of the need, therefore, to build resilience by encouraging farmers to rely on a diversity of crops'.³⁶

33 Réseau Semences Paysannes, *Seeds and Farmers' Rights: How International Regulations Affect Farmer Seeds*, 2011, pp 32–33.

34 UN Special Rapporteur on the Right to Food, [Seed Policies and the Right to Food: Enhancing Agrobiodiversity and Encouraging Innovation](#), UN doc. A/64/170, 23 July 2009, §13.

35 UPOV, [UPOV Report on the Impact of Plant Variety Protection](#), 2005. See also UN Special Rapporteur on the Right to Food, [Seed Policies and the Right to Food: Enhancing Agrobiodiversity and Encouraging Innovation](#), UN doc. A/64/170, 23 July 2009, §26; International Seed Federation, [ISF View on Intellectual Property](#), 2012.

36 UN Special Rapporteur on the Right to Food, [Seed Policies and the Right to Food: Enhancing Agrobiodiversity and Encouraging Innovation](#), UN doc. A/64/170, 23 July 2009, §39. See also [Report of the UN Special Rapporteur on the Right to Food](#), UN doc. A/HRC/46/33, 24 December 2020, §89.

C. WHERE ARE THE TENSIONS?

Intellectual property rights pose serious challenges to the protection of peasants' right to seeds.³⁷ While these property rights may not interfere when peasants use only peasants' seeds and fully operate in peasant seed systems – a situation that states shall support in implementing UNDROP's Article 19(6), especially when designing seeds marketing legislation, which can directly encroach on peasant seed systems³⁸, tensions appear when they use farm-saved seeds from varieties or plants protected by intellectual property. In some countries that have adopted laws compliant with UPOV 1991, peasants face civil and, in some cases, even criminal sanctions for saving, reusing and exchanging farm-saved seeds from commercial varieties³⁹, i.e. 'for conduct that should be deemed legitimate and which is functional to society's interest in a sustainable agriculture and the attainment of food security'.⁴⁰

These tensions are exacerbated in developing countries, where peasants make up a majority of the agricultural population.⁴¹ In such countries, *sui generis* systems of plant variety protection adapted to local specificities are better suited to protecting the right to seeds enshrined in UNDROP.⁴² Yet states of the Global North continue to put the UPOV 1991 model forward in their collaboration with developing countries, as if it were the only model for the protection of intellectual property relating to seeds.⁴³

An additional set of tensions arises in the case of so-called native traits patents, where the protected innovation relates to identified characteristics in plants, which may be found in peasants' fields without their knowledge, in the local plant varieties and seeds they have been using and saving, at times even before the grant of the patent. In these cases, intellectual property rights create limita-

37 UN Special Rapporteur on the Right to Food, *Seed Policies and the Right to Food: Enhancing Agrobiodiversity and Encouraging Innovation*, UN doc. A/64/170, 23 July 2009, Summary and §36. See also S. Shashikant and F. Meienberg, *International Contradictions on Farmers' Rights: The Interrelations Between the International Treaty, Its Article 9 on Farmers' Rights, and Relevant Instruments of UPOV and WIPO*, Third World Network and Berne Declaration, 2015.

38 See for example T. Wattnem, *Seed laws, certification and standardization: outlawing informal seed systems in the Global South*, 2016.

39 Examples of countries and national laws can be found in *Information sent by civil society representatives and the seed industry in response of the resolution of the Governing body of the IIPGRFA on the relation between the ITPGRFA, UPOV and TRIPS*.

40 R. Andersen, 'Some Considerations on the Relation Between Farmers' Rights, Plant Breeders Rights and Legislation on Variety Release and Seed Distribution', Input Paper for the Second Meeting Ad Hoc Technical Committee on Sustainable Use of Plant Genetic Resources for Food and Agriculture, Rome, 2-3 March 2015. See also Right to Food and Nutrition Watch Consortium, *Right to Food and Nutrition Watch: Keeping Seeds in Peoples' Hands*, Issue 8, 2016.

41 M. Coulibaly and R. A. Brac de la Perrière, with S. Shashikant, *A Dysfunctional Plant Variety Protection System: Ten Years of UPOV Implementation in Francophone Africa*, APBEBES et al., 2019.

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

43 See, for example, C. Golay and C. Dommen, *Switzerland's Foreign Policy and the United Nations Declaration on the Rights of Peasants*, Geneva Academy et al., 2020.

tions to the customary rights of peasants to use, save, select, exchange, and sell farm-saved seeds or propagating material.

An additional factor contributes to the exclusion of peasant seeds in the EU and EU Member States: the fact that the criteria chosen to determine which seed varieties can be registered in seed catalogues are the same as those used to grant intellectual property rights – distinctness, uniformity and stability (DUS). This implies that plant varieties protected by intellectual property rights are – with only few exceptions – the only ones that can be registered in catalogues and be put on the market.⁴⁴

Given the tensions between peasants' right to seeds and intellectual property rights, there was a need to reinforce the protection of the right to seeds at international level, including through the recognition of peasants' right to seeds in UNDROP.⁴⁵

44 B. Magarinos-Rey, *Semences hors-la-loi. La biodiversité confisquée*, Éditions Alternatives, 2015.

45 C. Golay, *The Right to Seeds and Intellectual Property Rights*, Geneva Academy, 2020.

3. THE RIGHT TO SEEDS AND STATES' OBLIGATIONS IN UNDROP

This part starts with a brief introduction on UNDROP's adoption and holistic vision (Section A), followed by an explanation of the primacy of human rights norms in international law (Section B). It then describes the protection afforded to the right to seeds of peasant women (Section C), and presents the main elements of peasants' right to seeds (Section D) and corresponding state obligations (Section E) in UNDROP.

A. UNDROP'S ADOPTION AND HOLISTIC VISION

UNDROP was adopted in 2018, after almost 20 years of mobilisation by La Via Campesina and its allies, and 6 years of negotiation at the UN Human Rights Council.⁴⁶

On 28 September 2018, the Human Rights Council (with its 47 Member States) adopted UNDROP by a vote of 33 states in favour, 3 against and 11 abstentions. And, on 17 December 2018, the UN General Assembly (composed of all UN Member States) adopted it by a vote of 121 states in favour, 8 against and 54 abstentions.⁴⁷

At the UN General Assembly, where all EU Member States voted, 23 of them abstained to UNDROP's adoption, 2 voted in favour – Portugal and Luxembourg – and 3 voted against – Hungary, Sweden and the United Kingdom.⁴⁸

It is important to note that the UN General Assembly, when it adopted UNDROP, called all Governments to disseminate the new UN Declaration and to promote universal respect and understanding thereof, without making any distinction on the basis of the votes of states during this adoption; in conformity with the need for UN Member States to implement UN General Assembly resolution in good faith.⁴⁹

UNDROP builds upon existing UN instruments, and it fills gaps in international law. International law is fragmented on the matter, and UNDROP's elaboration represented a unique opportunity to recognize the rights of peasants, farmers, local com-

46 See C. Hubert, *The United Nations Declaration on the Rights of Peasants - A Tool in the Struggle for Our Common Future*, CETIM, 2019. See also P. Claeys and M. Edelman, 'The United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas', *The Journal of Peasant Studies*, Vol 47, Issue 1, 2019, pp 1-68.

47 UN General Assembly resolution 73/165, adopted on 17 December 2018.

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

49 UN General Assembly resolution 73/165, adopted on 17 December 2018, §2.

munities, indigenous peoples, fisher people, pastoralists, nomads, hunters, gatherers, landless people, rural women and rural workers in one single instrument.⁵⁰

In relation to the right to seeds, UNDROP has built on a number of binding international instruments, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW Convention), the CBD and its Protocols, and the ITPGRFA. It has also built on UNDRIP, the Right to Food Guidelines adopted at FAO in 2004⁵¹ and the reports presented by the UN Special Rapporteur on the right to food, including the report on seed policies presented by Olivier De Schutter in 2009.⁵²

Two of UNDROP's main added values include its capacity to recognize individual and collective rights that can be transformed into legal entitlements in national and regional laws and that can become enforceable before judicial or quasi-judicial bodies at national, regional or international levels⁵³, and its capacity to define states' obligations in a way that is more precise than those that are contained in other international instruments.⁵⁴

B. THE PRIMACY OF HUMAN RIGHTS AND UNDROP OVER OTHER INTERNATIONAL INSTRUMENTS

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

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

50 See C. Golay, *Negotiation of a United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas*, Geneva Academy, 2015.

51 FAO, *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security (Right to Food Guidelines)*, 2004.

52 UN Special Rapporteur on the Right to Food, *Seed Policies and the Right to Food: Enhancing Agrobiodiversity and Encouraging Innovation*, UN doc. A/64/170, 23 July 2009.

53 C. Golay, *The Role of Human Rights Mechanisms in Monitoring the United Nations Declaration on the Rights of Peasants*, Research Brief, Geneva Academy, 2020.

54 C. Golay, *The Implementation of the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas*, Geneva Academy Research Brief, 2019.

55 See Arts 1, 55, 56 and 103, UN Charter.

56 UN General Assembly, *Vienna Declaration and Programme of Action*, UN doc A/CONF.157/23, 12 July 1993, §1.1.

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

C. THE RIGHT TO SEEDS OF PEASANT WOMEN

Peasant women play a key role in local and global food security – producing food crops worldwide and earning incomes to feed their families.⁵⁷ Their role is also central in peasant seed systems, where it is estimated that up to 90 percent of planting material used in peasant agriculture are seeds and germ plasms produced, selected and saved by women. Yet women and girls represent 70 percent of the world's hungry, and are subject to multiple discriminations in access to productive resources, including seeds.⁵⁸

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

In its General Recommendation No. 34 adopted in 2016, in which it interpreted Article 14 of the CEDAW Convention, the UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee) recognized that rural women's right to seeds is a fundamental human right.⁵⁹

D. THE MAIN ELEMENTS OF PEASANTS' RIGHT TO SEEDS

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

⁵⁷ FAO, *The State of Food and Agriculture 2010-2011. Women in Agriculture: Closing the Gender Gap for Development*, FAO, Rome, p 5.

⁵⁸ UN Special Rapporteur on the Right to Food, *Seed Policies and the Right to Food: Enhancing Agrobiodiversity and Encouraging Innovation*, UN doc. A/64/170, 23 July 2009, §42.

⁵⁹ CEDAW Committee, *General Recommendation No. 34 on the Rights of Rural Women*, UN doc CEDAW/C/GC/34, 4 March 2016, §56.

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

UNDROP

Article 19(2)

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

Today, the overwhelming majority of people living in rural areas in developing countries still rely on peasant food and seed systems, which are essential to their own food security and to global food security and biodiversity. But the protection of intellectual property rights over seeds and the promotion of commercial seed systems have posed serious challenges to the maintenance of peasant food and seed systems and agrobiodiversity.

To respond to these challenges, UNDROP recognizes peasants' right to maintain, control, protect and develop their own seeds and traditional knowledge (Article 19(2)) – similarly to the way in which the UN recognized this right of indigenous peoples in UNDRIP⁶⁰ – and it defines states' obligations to support peasant seed systems and to promote the use of peasant seeds and agrobiodiversity (Article 19(6)).

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

UNDROP

Article 19(1)

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

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

Article 20(2)

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

⁶⁰ See [Art 31\(1\), UNDRIP](#).

As we have seen, the CBD requests states parties to ‘respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity’.⁶¹ The protection of traditional knowledge relevant to seeds has also been reaffirmed in the ITPGRFA,⁶² the Nagoya Protocol⁶³ and the FAO Right to Food Guidelines.⁶⁴ It includes traditional knowledge, innovation and practices concerning the selection, conservation and use of seeds and propagating materials.

In Articles 19(1.a) and 20(2), UNDROP clarifies the international standards for the protection of the traditional knowledge, innovation and practices of peasants, including in relation to seeds, and calls upon states to adopt all possible measures at law and policy levels for their preservation and protection.⁶⁵

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

Article 19(1)

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

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

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

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

⁶¹ Art 8(j), CBD.

⁶² Art 9(2.a), ITPGRFA.

⁶³ Art 7, Nagoya Protocol.

⁶⁴ Guideline 8.12, FAO Right to Food Guidelines.

⁶⁵ See also Arts 26(1) and 26(3), UNDROP.

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

UNDROP

Article 19(1)

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

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

In addition to protecting seed-related traditional knowledge, and to ensuring peasants’ participation in decision-making on matters relating to seeds, states have also undertaken, under the CBD, the ITPGRFA, the Nagoya Protocol and the FAO Right to Food Guidelines, the responsibility to take measures to protect and promote the rights of peasants to equitably participate in the sharing of benefits arising from the utilization of plant genetic resources for food and agriculture, including seeds.⁶⁶ UNDROP’s Article 19(1.b) recognizes the human rights nature of this right.

As clarified in the text of the Nagoya Protocol, states must also take all measures to ensure that the prior informed consent or approval and involvement of peasants and their communities are obtained before access to seeds and benefit-sharing modalities are prescribed in mutually agreed terms.⁶⁷

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

UNDROP

Article 19

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

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

⁶⁶ See Art 8(j), CBD; Art 5, Nagoya Protocol; Art 9, ITPGRFA; and Guideline 8.12, FAO Right to Food Guidelines.

⁶⁷ Arts 5(5) and 6(2), Nagoya Protocol.

We have seen that for over 10,000 years, peasants have freely saved, selected, exchanged and sold farm-saved seeds, as well as used and reused them to produce food.⁶⁸ We have also seen that these customary rights have been recognized in the ITPGRFA.⁶⁹

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

Peasants' right to save, use, exchange and sell farm-saved seed or propagating material, enshrined in UNDROP's Article 19(1.d), therefore creates entitlements over farm-saved seeds of both peasant varieties and varieties protected by intellectual property rights.

In the implementation of this right, states could draw inspiration from examples of good practice at national and regional levels.⁷⁰ In the 2001 Protection of Plant Varieties and Farmers Rights Act,⁷¹ India for example recognized peasants' rights to save, use, sow, resow, exchange, share and sell farm produce, including seeds of varieties protected by plant breeders' rights (Article 39).⁷² In the African Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources,⁷³ the African Union recognized that peasants should have the right to use a new variety protected by breeders' rights to develop farmers' varieties, and the right to collectively save, use, multiply and process farm-saved seed of protected varieties (Article 26(e) and (f)).

E. STATES' OBLIGATIONS

States have defined their obligations in relation to the right to seeds in several UNDROP's articles.⁷⁴ In this section, we will see that they have committed (1) to ensure the consistency of their national laws and policies, and of international agreements and standards to which they are party with the right to seeds, (2) to

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

69 See *Preamble and Art 9, ITPGRFA*.

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

71 See *Protection of Plant Varieties and Farmers' Rights Act*. See also *The Farmers' Rights Project, 'Best Practices: India's Protection of Plant Varieties and Farmers' Rights Act'*; S. Koonan, 'Developing Country Sui Generis Options: India's Sui Generis System of Plant Variety Protection', Quaker UN Office, 2014.

72 Safeguards have been provided against innocent infringement by farmers, as farmers who unknowingly violate the rights of a breeder are not to be punished if they can prove that they were not aware of the existence of such a breeder's right. *Protection of Plant Varieties and Farmers Rights Act, Art 42*.

73 See *The African Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources* adopted by the African Union in 2000.

74 See also C. Golay, *The Implementation of the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas*, Geneva Academy, 2019.

respect, protect and fulfil the right to seeds, (3) to support peasant seed systems and promote the use of peasant seeds and agrobiodiversity, (4) to ensure the participation of peasants in decision-making processes in relation to seeds, and (5) to ensure that agricultural research and development integrate the needs of peasants, with their active participation.

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

UNDROP

Article 2(4)

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

Article 15(5)

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

Article 19(8)

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

In accordance with the primacy to be given to human rights norms in international and national laws (see section 3.B above), states have committed to ensure the consistency of their national laws and policies, and of international agreements and standards to which they are party, with peasants' right to seeds.

In implementing UNDROP's Article 2(4), states shall ensure that the negotiation, interpretation and implementation of WIPO, WTO and UPOV instruments, as well as any other international agreement protecting intellectual property rights, do not violate, but facilitate the realization of the right to seeds.

They shall also ensure that free trade agreements to which they are party do not lead to violations of peasants' right to seeds in their country or in other countries. This implies that they shall, inter alia, stop promoting the 1991 Act of the UPOV Convention as if it were the only model for the protection of intellectual property

on plant varieties.⁷⁵ Instead, states should encourage partner countries to use the possibilities offered by TRIPS to design sui generis systems of plant variety protection adapted to the agricultural and social specificities of each country, and which enable them to protect the rights of both plant breeders and peasants.⁷⁶

At national level, states shall establish mechanisms to ensure the coherence of their agricultural, economic, social, cultural and development policies with the realization of the rights contained in UNDROP (Article 15(5)). They shall also ensure that seed policies, plant variety protection and other intellectual property laws, certification schemes and seed marketing laws respect and take into account the rights, needs and realities of peasants and other people working in rural areas (Article 19(8)).

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

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

UNDROP

Article 2(1)

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

Article 19(3)

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

⁷⁵ See, for example, C. Goley and C. Dommen, *Switzerland's Foreign Policy and the United Nations Declaration on the Rights of Peasants*, Geneva Academy et al., 2020.

⁷⁶ C. M. Correa, with S. Shashikant and F. Meienberg, *Plant Variety Protection in Developing Countries. A Tool for Designing A Sui Generis Plant Variety Protection System: An Alternative to UPOV 1991*, APBEBES, 2015; M. Coulibaly and R. A. Brac de la Perrière, with S. Shashikant, *A Dysfunctional Plant Variety Protection System: Ten Years of UPOV Implementation in Francophone Africa*, APBEBES et al., 2019.

In international human rights law, it is generally accepted that states have the obligation to respect, protect and fulfil all human rights.⁷⁷ The respect, protect and fulfil typology can also be used to define states' extraterritorial obligations.⁷⁸ The inclusion in UNDROP of states' obligations to respect, protect and fulfil the rights of peasants in general (Article 2(1)), and the right to seeds in particular (Article 19(3)), is therefore in conformity with international human rights law.

In his report on seed policies, Olivier De Schutter defined violations of the obligations to respect, protect and fulfil the rights to food and seeds.⁷⁹ For him, the obligation to respect would be violated if states were to introduce legislation or other measures that create obstacles to the reliance of peasants on informal seed systems, as this would deprive peasants from a means of achieving their livelihood. The obligation to protect would be violated if a state failed to regulate the activities of patent-holders or of plant breeders, so as to prevent them from violating the right to food of the peasants depending on those inputs in order to be able to continue to farm. According to the obligation to fulfil, states must proactively strengthen peasants' access to and utilization of resources and means to ensure their livelihood; they must also improve methods of production of food by making full use of technical and scientific knowledge. He added that, '[i]n the absence of proactive policies aimed at preserving and encouraging the development of farmers' seed systems and associated traditional knowledge and practices, such systems risk disappearing'.⁸⁰

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

UNDROP

Article 11(3)

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

Article 19(6)

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

⁷⁷ See for example CESCR, *General Comment no 12: The Right to Adequate Food (art. 11)*, UN doc E/C.12/1999/5, 12 May 1999, §15.

⁷⁸ ETO Consortium, *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, 2011.

⁷⁹ UN Special Rapporteur on the Right to Food, *Seed Policies and the Right to Food: Enhancing Agrobiodiversity and Encouraging Innovation*, UN doc. A/64/170, 23 July 2009, §§4-6.

⁸⁰ UN Special Rapporteur on the Right to Food, *Seed Policies and the Right to Food: Enhancing Agrobiodiversity and Encouraging Innovation*, UN doc. A/64/170, 23 July 2009, §48.

As stated by Olivier De Schutter, ‘merely removing barriers to the saving, exchange or selling of seeds will not suffice: for farmers’ rights to be truly realized, Governments should accept that they have duties to support farmers’ seed systems’.⁸¹ This obligation was included in UNDROP’s Article 19(6). In implementing Article 11(3), states shall also promote a fair, impartial and appropriate system of evaluation and certification of the quality of peasant seeds, and promote peasants’ participation in its formulation.

UNDROP’s implementation represents a unique opportunity to rebalance the support given to peasant seed systems, compared to the support given to industrial seed systems in recent decades. This is essential to protect the rights of hundreds of millions of peasants, as well as the interest of all in the preservation of biodiversity.⁸²

4. OBLIGATION TO ENSURE PEASANTS’ PARTICIPATION IN DECISION-MAKING PROCESSES IN RELATION TO SEEDS

UNDROP

Article 10(1)

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

Article 10(2)

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

Article 11(2)

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

Article 19(1)

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

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

Article 25(3)

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

Article 27(1)

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

As we have seen, UNDROP shows deep concern with structural discrimination against peasants, and recognizes, among others, their right to participation in decision-making processes to reverse that discrimination. To guarantee that right, UNDROP provides, inter alia, that states shall ensure the participation of peasants, directly and/or through their representative organizations, in decision-making processes related to seeds (Articles 10(1), 10(2) and 19(1)), as well as their right to information (Article 11(2)). States shall also encourage equitable and participatory peasant-scientist partnerships to respond to the challenges that peasants face (Article 25(3)). UNDROP also provides that UN specialized agencies, funds and programmes, and other intergovernmental organizations, shall contribute to the full realization of UNDROP, and consider ways to ensure peasants’ participation on issues affecting them, which include issues affecting their right to seeds (Article 27(1)).

⁸¹ UN Special Rapporteur on the Right to Food, *Seed Policies and the Right to Food: Enhancing Agrobiodiversity and Encouraging Innovation*, UN doc. A/64/170, 23 July 2009, §44.

⁸² See also UN Special Rapporteur on the Right to Food, *Seed Policies and the Right to Food: Enhancing Agrobiodiversity and Encouraging Innovation*, UN doc. A/64/170, 23 July 2009, Summary.

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

UNDROP

Article 19(7)

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

In addition to supporting peasant seed systems and ensuring peasants' participation in decision-making processes in relation to seeds, it is important that states support research and development that contribute to the realization of peasants' right to seeds. During UNDROP's negotiation, support and protection given to three innovation circles that coexist in relation to seeds were discussed: (1) innovation through biotechnology and (2) innovation by plant breeders, which are protected by patents and plant breeders' rights, and (3) innovation by peasants, which is not protected by international law, but represents the most important innovation circle in order to realize peasants' rights and protect biodiversity.⁸³

Article 19(7) of UNDROP provides that states shall ensure that agricultural research and development integrates the needs of peasants, with their active participation, and that states shall increase investment in research and the development of orphan crops and seeds that respond to peasants' needs.

⁸³ See also UN Special Rapporteur on the Right to Food, *Seed Policies and the Right to Food: Enhancing Agrobiodiversity and Encouraging Innovation*, UN doc. A/64/170, 23 July 2009.

4. MAIN CHALLENGES TO THE PROTECTION OF THE RIGHT TO SEEDS IN EUROPEAN UNION LAW

The implementation of UNDROP in the context of the European Union (EU) brings about significant challenges, especially due to UNDROP's holistic approach to the right to seeds. This section identifies the hurdles faced by European peasants at the hands of the different EU policies, measuring them up to the main elements of the right to seeds enshrined in UNDROP, and identified in Section 3D above.

A. CHALLENGES TO PEASANTS' RIGHT TO MAINTAIN, CONTROL, PROTECT AND DEVELOP THEIR OWN SEEDS

Different EU policies impact peasants' right to maintain, control, protect and develop their own seeds (UNDROP's Article 19(2)). The most important are (1) those carving out intellectual property rights (IPR), and (2) those ensuring biosafety against genetically modified organisms.

1. INTELLECTUAL PROPERTY RIGHTS IN THE EU

a. Patent Protection in the EU

Two instruments govern patent protection in the EU: (1) the 1973 Convention on the Grant of European Patents (European Patent Convention, EPC)⁸⁴; and (2) the European Directive 98/44/EC on the legal protection of biotechnological inventions (EU Biotech Directive)⁸⁵, which is transposed in EU Member States' national laws. Patentability requirements are applied by the European Patent Office (EPO) according to the EPC and its Implementing Regulations, which include the provisions of the EU Biotech Directive. National patent laws govern the scope of protection granted to the innovator, whether the title is granted by the national patent offices or by the EPO. Exclusivity is granted for 25 years, requiring anyone using the invention to pay licensing fees freely set by patent-holders. To be patented, inventions must be new, involve an inventive step and be susceptible to industrial application.⁸⁶ Peasant innovation cannot qualify for patent protection, as neither the criteria for patentability, nor the exclusive rights granted by patents reflect its values.

⁸⁴ THE EPC has 38 States Parties, including all EU Member States. See the [List of States Parties to the European Patent Convention](#).

⁸⁵ [Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions](#).

⁸⁶ See Art 52(1), [European Patent Convention](#).

In Europe, several exclusions from patentability exist. Neither plant varieties, nor essentially biological processes for plant production are patentable.⁸⁷ An essentially biological process consists entirely of natural phenomena such as crossing and selection⁸⁸, while a single technical step ends the exception. The products' patentability derived from essentially biological processes was debated at length in Europe. In July 2017, with mobilisation from civil society⁸⁹, and clear guidance from the EU Commission⁹⁰, a new Rule 28(2) was included into the EPC Implementing Regulations, confirmed in May 2020 after internal appeals. It clarified that plants, seeds or genetic information resulting from selection and crossing should not fall under patent protection. Patent claims can still cover genetic sequences (biological material), 'genetic information', specified qualities of plants, or products derived from technical or microbiological processes.⁹¹ Peasant seeds might be covered by patent claims without their knowledge, dispossessing them from the complete ownership and control of their own seeds.

Patents have very broad claims, especially in the life sciences, and give "absolute product protection". Very few acts do not require the authorization of patent holders. Exclusive patent rights extend to multiplied plants or seeds if they have the same characteristics.⁹² Peasant seeds which possess the patented characteristics in their composition as "native traits" thus fall under the yoke of the patent. Peasants need to ask authorization, even pay royalties to multiply their own seeds. The EPO had, in parallel to the new Rule 28(2), established a "disclaimer" practice limiting the reach of a patents' protection. However, the legality, continuity and effects of that practice are unclear.

The research exception allows investigating protected inventions, as defined in national patent laws. Most EU countries have a restrictive attitude, allowing only research on the protected invention, whereas few countries allow more acts to be done also with the invention, like Belgium.⁹³ A number of EU countries included a breeders' exception into their national laws, namely Germany, France and the Netherlands⁹⁴, which allows peasants to use varieties containing patented traits in their selection processes. The upcoming Unitary Patent System has a narrow research exception but excludes all acts done for breeding, discovering, or developing other plant varieties from patent protection.⁹⁵

87 Art 4, [Directive 98/44/EC](#); Art 53(b), [European Patent Convention](#).

88 Art 2(2), [Directive 98/44/EC](#).

89 See '[International Appeal to the President of the European Patent Office, António Campinos: Call for an Immediate Moratorium of Patents on Plants and Animals](#)', 29 January 2019.

90 [Commission Notice on certain articles of Directive 98/44/EC of the European Parliament and of the Council on the legal protection of biotechnological inventions](#), 2016/C 411/03.

91 Art 53(b), [European Patent Convention](#). See also G. Kastler, *La réglementation européenne sur les semences: D'où vient-elle? Où va-t-elle?*, FIAN Belgique, 2015.

92 Art 8, [Directive 98/44/EC](#).

93 Article XI.34 (1b), Belgian Code of Economic Law.

94 V. Prifti, *The Breeders' exception to patent rights as a new type of research exception*, *Rights and Science*, 2017.

95 Art 27, [Agreement on a Unified Patent Court](#) (not yet in force).

b. Plant Variety Protection in the EU

At EU level, the 1991 Act of the UPOV Convention is implemented through the EU PVP Regulation.⁹⁶ Some EU Member States have only ratified the 1978 Act of the UPOV Convention (Italy and Portugal), while others (Cyprus, Greece, Malta and Luxembourg) are not UPOV members. Property titles awarded by the Community Plant Variety Office (CPVO) following the requirements of the EU PVP Regulation are valid throughout all Member States.⁹⁷ Regardless of the granting office, a plant variety must be new and meet the criteria of "Distinctiveness, Uniformity and Stability" (DUS) to be eligible for protection.⁹⁸ Tailored to the needs of industrial plant breeders, this approach excludes peasants' varieties and traditional knowledge, as peasant selection and breeding seek out less uniformity, through collective and local efforts. The innovation reward system tailored for plant breeders in the EU does not make space for the peasant-breeder approach.

The EU PVP Regulation upholds the breeders' exception⁹⁹ as defined in the UPOV 1991 Act, ensuring free access to protected varieties for the development of new ones in peasant population breeding. Populations developed by peasants cannot be essentially derived from the protected variety, conform to the protected variety in their characteristics.¹⁰⁰ Peasants need the PVP titleholder's authorization to commercialize the seeds of new populations if they are too similar to protected varieties.

KEY FINDINGS

IPR affect peasants' right to control, protect and develop their own seeds in different ways. These property regimes neither recognize, nor reward the peasant innovation system. They may on the contrary lead to peasants' dispossession of their own seeds, and hinder peasants' breeding and selection efforts by limiting the use of patented genetic information and protected varieties.

2. BIOSAFETY REGULATIONS AND GENETICALLY MODIFIED SEEDS

The EU has arguably one of the strongest biosafety regulatory frameworks, which guarantees peasants' right to main and control their own seeds and protects peasant seed systems from contamination with genetically modified organisms (GMOs). Seeds with genetic material that has been altered in a way that does not occur naturally by mating and/or natural recombination can only be commercialized if the organism has been authorized for deliberate release pursuant to Directive 2001/18/EC¹⁰¹, or for food and feed purposes pursuant to Regulation (EC) No 1829/2003.¹⁰²

96 [Council Regulation \(EC\) No 2100/94](#) (consolidated version).

97 Arts 1 and 2, [Council Regulation \(EC\) No 2100/94](#).

98 Art 6, [Council Regulation \(EC\) No 2100/94](#).

99 Art 15, [Council Regulation \(EC\) No 2100/94](#).

100 Art 13(5), [Council Regulation \(EC\) No 2100/94](#).

101 Arts 12–24, [Directive 2001/18/EC](#).

102 [Regulation \(EC\) No 1829/2003](#) on GM food & feed.

Before GMO's or products containing a GMO can be cultivated or put on the market in the EU, they need to undergo specific environmental risk assessment, risk management and monitoring processes, and provide for adequate traceability and labelling. All assessment reports need to be made public.

The coexistence of genetically modified (GM) crops with conventional, peasant and organic farming has been subject to fierce debates in Europe. The presence of unwanted GM material in non-GM crops, usually referred to as adventitious presence, typically occurs through 'outcrossing, the growth of volunteer plants from stray seeds and admixture after harvest'. The vulnerability of peasants and organic agriculture to cross-fertilization between GM and non-GM crops, and to crop contamination cannot be taken lightly. The EU Commission Recommendation of 23 July 2003 enacted the guidelines for the development of national strategies and best practices to ensure the coexistence of GM crops with conventional and organic farming.¹⁰³ An amendment of Directive 2001/18 in 2015 allowed states and regions to prohibit GM crops not only for human health and environmental risks, but also to protect conventional or organic agriculture, and 17 EU Member States and 4 regions decided to ban GMO cultivation on their territory.¹⁰⁴

As a process-based biosafety framework which upholds the precautionary principle, the EU legal framework has been quite an efficient gatekeeper to protect the rights to seeds enshrined in UNDROP. It is nonetheless undergoing an arduous writhe regarding what the European Commission calls "new techniques in biotechnology", coined "new GMO's" by some, and "new breeding techniques" by others. In 2018, the European Court of Justice (ECJ) confirmed that organisms obtained by mutagenesis fell within the category of GMOs and would thus be subject to the European GM regulations.¹⁰⁵ EU Member States have requested a study from the EU Commission on "new genomic techniques", expected in April 2021. Efforts to implement the ECJ ruling and to ensure the detection of plants obtained through these new techniques are crucial to protect peasants' right to maintain and control their own seeds and peasant seeds from contamination, and to maintain high safety standards.

KEY FINDINGS

Stringent EU GM Regulations have protected peasants' right to maintain and control their own seeds and peasant seeds against cross-contamination from GMOs. Current discussions on the legal status and detectability of newer genetic engineering and modification techniques threaten the relative stability and security of this situation.

¹⁰³ EU Commission, Recommendation on guidelines for the development of national strategies and best practices to ensure the coexistence of GM crops with conventional and organic farming, 2003/556/EC.

¹⁰⁴ See inf'OGM, *Moratoires sur les OGM en France et en Europe*.

¹⁰⁵ European Court of Justice (ECJ), *Confédération paysanne and Others v Premier ministre and Ministre de l'agriculture, de l'agroalimentaire et de la forêt*, Case C-528/16, Judgment, 25 July 2018.

B. CHALLENGES TO THE RIGHTS TO THE PROTECTION OF TRADITIONAL KNOWLEDGE AND TO EQUITABLE BENEFIT SHARING

In sharp contrast with the protection given to IPR, the elements of the right to seeds that relate to traditional knowledge and benefit sharing are poorly protected in the laws and regulations of the EU and EU Member States. Although all EU Member States have ratified related international instruments such as the CBD, the Nagoya Protocol and the ITPGRFA, their implementation in the EU remains ineffective to protect the rights enshrined in UNDROP, and most peasants remain uncompensated for their contribution to the maintenance and improvement of seeds.¹⁰⁶

1. ACCESS AND BENEFIT SHARING UNDER THE NAGOYA PROTOCOL

The CBD and its Nagoya Protocol operate a distinction between accessing a genetic resource, which triggers benefit sharing obligations with the state that has sovereign rights over the resource, and accessing traditional knowledge associated with such resources, which triggers benefit sharing with communities that hold such knowledge. Peasants' knowledge, which includes ancestral but also innovative practices, need to be recognised as traditional knowledge in the EU for peasants to receive an equitable share of the benefits arising from the use of their resources and knowledge.

With EU Regulation 511/2014¹⁰⁷, the EU has developed one of the most complete compliance regimes in developed countries concerning user's obligations under the Nagoya Protocol. The EU Access and Benefit Sharing (ABS) Regulation levies a due diligence obligation to ensure that ABS is rightfully carried out, with an obligation to seek, keep and transfer relevant documents, and to submit due diligence declarations at different stages of research and development.¹⁰⁸ As access to genetic resources is linked to the sovereign rights of states, it is regulated at national level. Most EU Member States have chosen not to require prior informed consent for access to resources found on their territories.¹⁰⁹ Countries that have done so tend to exclude genetic resources of domesticated or cultivated species altogether from their scope, mainly due to the existence of the ITPGRFA, like it is the case in France.¹¹⁰

The EU ABS Regulation, just like the Nagoya Protocol, has not been drafted with peasants' reality in mind, but rather for different industrial value chains that include genetic resources. They show inherent shortcomings when analyzed

¹⁰⁶ UN Special Rapporteur on the Right to Food, *Seed Policies and the Right to Food: Enhancing Agrobiodiversity and Encouraging Innovation*, UN doc. A/64/170, 23 July 2009, §47.

¹⁰⁷ Regulation 511/2014 on compliance measures for users from the Nagoya Protocol.

¹⁰⁸ Commission Implementing Regulation (EU) 2015/1866.

¹⁰⁹ See B. Coolsaet, F. Batur, A. Broggiato, J. Pitseys and T. Dedeurwaerdere, *Implementing the Nagoya Protocol: Comparing Access and Benefit sharing regimes in Europe*, 2015; T. Greiber, *Implementation of the Nagoya Protocol in the EU and Germany*, 2019.

¹¹⁰ Art L. 412-5, French Law no 2016-201 (pour la reconquête de la biodiversité, de la nature et des paysages).

through UNDROP's lens. National EU ABS laws very rarely recognize the existence of traditional knowledge in their sovereign territory.¹¹¹ EU countries are indeed generally viewed as users of such knowledge, rather than providers, in parallel to genetic resources themselves. The French Biodiversity Law provides one of the few exceptions to this approach, by regulating access quite broadly albeit not for domesticated species and focusing on the traditional knowledge of communities in its outermost regions. Even for peasant communities outside of Europe, their traditional knowledge would need to be described and included in contractual arrangements to fall under the compliance rules of the EU ABS Regulation.¹¹²

2. ACCESS AND BENEFIT SHARING UNDER THE ITPGRFA

The ITPGRFA contains provisions that can uphold the rights to seeds enshrined in UNDROP, if interpreted more strongly. Farmers' populations have been collected by gene banks and widely circulated to breeders through the standard Material Transfer Agreement (sMTA) developed under the Treaty for a number of species listed in its Annex I. Although the sMTA pre-establishes conditions for monetary and non-monetary benefit sharing, they have not yet triggered the desired influx of financial resources. A hefty revision of this specialized and multilateral ABS system is still being discussed.¹¹³

Even though the European gene bank community extensively uses the sMTA, even for species outside of the ITPGRFA's Multilateral System, EU peasant communities need to rely on the ITPGRFA's national and regional implementation for the protection of their right to seeds.¹¹⁴ The lack of a comprehensive European genetic resources policy, despite the different "EU Preparatory Actions", increases the difficulty, as national genetic resources policies and biodiversity action plans rarely recognize peasant organizations' contribution in the conservation, sustainable use, and dynamic management of biodiversity, let alone highlight their traditional knowledge's importance. Some positive developments could be expected in the translation of the May 2020 European Farm to Fork Strategy into concrete regulatory actions.¹¹⁵

111 T. Kiene, *Traditional Knowledge in the European Context*, IDDRI, 2006.

112 Art 3(7) of Regulation 511/2014, and Section 2.3.2. of the non-binding European Commission *Guidance Document on the scope of application and core obligations of Regulation (EU) No 511/2014*, 2020.

113 The process of the sMTA has been going on for approximately 10 years, to no avail. See E. Tsioumani, *ITPGRFA GB-8: A missed opportunity for Multilateralism*, 2019.

114 On the implementation of Art 9, ITPGRFA, see www.farmersrights.org and FAO, *Submissions of Views and Experiences on the Implementation of Farmers' Rights Submitted by Contracting Parties and Relevant Organizations*.

115 EU Commission, *A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system*, COM/2020/381, 2020.

3. LINKING ABS, TRADITIONAL KNOWLEDGE, AND INTELLECTUAL PROPERTY RIGHTS

An important missing link to protect peasants' traditional knowledge is rooted in the artificial dissociation of ABS regimes with those granting IPR over inventions using such knowledge. Although peasant innovation and related traditional knowledge cannot be protected through patents, it does not mean that such knowledge cannot be used to develop inventions susceptible of patent protection. The controversial patent on the use of antifungal agents extracted from the neem tree, which was revoked by the EPO in 2000, has proven the opposite.¹¹⁶ In the EU patent system, novelty is assessed compared to the "state of the art", i.e., 'everything that is made available to the public anywhere in the world by means of a written or oral description, or by use'.¹¹⁷ Although the notion is broad enough to encompass peasant innovation and thus prevent their traditional knowledge to be patented by third parties, it remains difficult to establish concrete links between a patent application, with its technical jargon, and the peasants' traditional knowledge, largely uncodified, documented using different values and norms.

DISCLOSURE OF ORIGIN IN EU PATENT LAWS

The disclosure of the origin of genetic resources used for the development of inventions, could trace back the roots of the invention to existing peasant knowledge. Disclosure requirements can be found in the Belgian, Danish, French, German, Italian, Romanian, Spanish, and Swedish national patent laws, to different degrees, either requiring the disclosure of the source of the biological material or requiring more documentation on the origins of the material and/or traditional knowledge.¹¹⁸

EU plant variety protection also links to peasants' knowledge. A plant variety is considered new when its constituents have not been sold in a commercial exploitation setting.¹¹⁹ The novel nature of a variety is thus not checked against peasant seeds that have not been formally marketed. New varieties are further scrutinized through the "distinctness" criteria, which checks that varieties are distinguishable from varieties of common knowledge, which could include peasant seed systems.¹²⁰ This assessment follows protocols on characteristics that are rarely relevant in peasant seed systems, checked against reference collections available to testing authorities, which rarely include peasant varieties. That is how a purple carrot purchased at a peasants' market was granted PVP in the EU.¹²¹

116 U. Hellerer and K.S. Jarayaman, 'Greens persuade Europe to revoke patent on neem tree', *Nature*, Vol. 405, 2000, pp 266-267.

117 Art 54(1), *European Patent Convention*, and Chapter 6, *EPO Guidelines for Examination*.

118 World Intellectual Property Organization, *Disclosure Requirements Table*, 2020.

119 Art 10(1), *Council Regulation (EC) No 2100/94*.

120 Art 7, *Council Regulation (EC) No 2100/94*.

121 E. Hammond, *Biopiracy of Turkey's purple carrot*, 2014.

KEY FINDINGS

EU law does not recognize peasant communities as holders of traditional knowledge in ABS legislation. Peasants' crucial role in the conservation or sustainable use of crop diversity is not formally recognized in policies and actions at EU or national levels. They are thus not yet compensated for the maintenance and management of crop genetic diversity they hold in trust. IPR systems in the EU fail to protect peasants' seeds and knowledge from misappropriation as required by UNDROP, even though disclosure requirements start being utilized.

C. CHALLENGES TO THE RIGHT TO PARTICIPATE IN DECISION-MAKING ON MATTERS RELATING TO SEEDS

Strong social movements and EU institutional reforms have allowed peasants to reclaim more space in the EU decision-making processes related to seeds, making a step towards ensuring peasants' right to participate in decision-making enshrined in UNDROP's Articles 10, 11 and 19(1d). Peasants and their organizations are increasingly represented in different EU consultation forums. However, institutional practice shows considerable differences from one institution and one policy field to another. When peasants participate in the formal EU legislative train, their weight and capacity remain quite limited when compared to conventional or industry farming and also civil society organizations.

ROOM FOR PEASANT ORGANIZATIONS' PARTICIPATION IN THE EU

The European Economic and Social Committee (EESC) has been a great ally for the fulfilment of peasants' right to participate in decision-making. At the EESC, individual peasants and their organization European Coordination Via Campesina (ECVC) can and do occupy seats through EESC's "Various Interests/Diversity" Group. The EESC's Section for Agriculture, Rural Development and Environment regularly holds debates giving space for peasants to express their realities, providing forums for peasant organizations to organize debates, and steer discussions. The EESC only has a consultative role in EU law-making, and its participative approach falls behind in the main institutions, i.e., the European Commission, the European Council, and the European Parliament. ECVC also has seats at the civil society dialogues groups (CDG) of the EU Commission's Directorate General for Agriculture and Rural Development.¹²² ECVC has three seats on the CDG on Arable Crops, where issues related to seeds are discussed, which is already quite significant, but pales in comparison to the 17 members of industrial farmers organizations (COPA, COGECA and CEJA), and to the 19 other members representing industry across the value chain, including traders.¹²³

¹²² These groups have been established according to [EU Commission Decision 2013/767](#).

¹²³ European Commission, [Composition of the CDG on Arable Crops](#), 2020.

Aside from designated institutional seats, the European Commission has also put in place extensive feedback mechanisms at various stages of the law-making process, from inception to implementation, since the 2015 EU Better Regulation Agenda. Through the "Have Your Say" portal, individual peasants and their organizations can comment on EU reports, proposals or decisions in their language of choice. Although feedback mechanisms can be used effectively to ensure greater peasant participation, they are generally less influential than targeted stakeholder consultations and direct advocacy actions. Participation in decision-making also raises the question of the capacity to contribute soundly to legislative debates given scarce resources. To that end, the European Commission financially supports peasant and civil society organizations through different grants and programs, so that they can effectively engage with decision-makers. The situation is quite uneven from one EU Member State to another at national level.

KEY FINDINGS

EU law and institutional practice provide opportunities for peasants and their organizations to participate in decision-making processes, giving them formal seating in consultative groups, organizing feedback mechanisms and stakeholder consultations. But peasant organizations need more support to effectively participate in these processes, especially compared to other stakeholders.

D. CHALLENGES TO THE RIGHTS OF PEASANTS TO SAVE, USE, EXCHANGE AND SELL FARM-MADE SEEDS AND TO ACCESS LOCALLY AVAILABLE SEEDS

In an overall regulatory context designed for monoculture-based, chemical input reliant and intensive agriculture, and for its primary source of inputs, i.e. the industrial formal seed system, important tensions arise with peasants' right to save, use, exchange and sell farm-made seeds enshrined in UNDROP's Article 19(1d), as well as with their rights to rely either on their own seeds or on other locally available seeds of their choice, and to decide on the crops and species that they wish to grow (Article 19(5)).

1. INTELLECTUAL PROPERTY RIGHTS**a. Farmers' rights in EU patent protection**

In the EU, the scope of patent protection extends to the propagation and multiplication of seeds by peasants. Peasants merely sowing seeds falling within patent claims need, as a rule of thumb, to be authorized to do so by patent-holders. This restrictive outlook has been partially alleviated by the EU Biotech Directive, echoed in numerous national patent laws across the EU.

FARMERS' PRIVILEGE IN THE EU PATENTS

The EU Biotech Directive sets out a derogation from exclusive patent rights for agricultural use of propagated material or livestock by farmers and peasants, by stating that the sale of seeds to a peasant by the patent holder for agricultural use implies an authorization to use the product of his/her harvest for propagation or multiplication by him/her on his/her own farm.¹²⁴ This implied authorization, coined the farmers' privilege, is seen in several national EU patent laws, including in Austria, Croatia, Denmark, Latvia, Finland and Slovakia.¹²⁵

The farmers' privilege only allows peasants the right to save and use seeds falling under patent claims in their own farms and does not permit the exchange or the sale of such seeds. When considering the patentability of native traits found in nature, the constraints of the farmers' privilege create significant tensions with the right to seeds enshrined in UNDROP. National patent laws have developed additional solutions. The Austrian Patent Act specifies that biological materials fall under patent protection only if they are "directly derived" from the patented biological material.¹²⁶ This could mean that peasants who have not multiplied or propagated seeds directly purchased from the patentholder, could partially be protected. In France, patent protection cannot be enforced on incidental presences in peasants' fields.

b. Farmers' rights in EU plant variety protection

In parallel to the 1991 Act of the UPOV Convention, the EU PVP Regulation adopts a limited posture on farmers' rights. In the other Acts of the UPOV Convention, plant variety protection only extends to the sale of protected varieties, and not their multiplication.

In the EU, community plant variety rights do not apply to 'acts done privately and for non-commercial purposes'.¹²⁷ This exception is interpreted extremely narrowly by UPOV and the EU, as it does not make room for local seed systems or traditional practices of seed exchange within peasant communities.¹²⁸ The EU PVP Regulation rather enshrines the farmers' privilege, whereby peasants are allowed to use the product of the harvest which they have obtained by planting, on their own holding, a protected variety, again for propagating purposes in the field, on their own holding.¹²⁹ This derogation may be limited for certain species listed in national

¹²⁴ Art 11, [Directive 98/44/EC](#).

¹²⁵ World Intellectual Property Organization, [Exceptions and Limitations to Patent Rights: Farmers and/or Breeders' Sue of Patented Inventions](#), 2014.

¹²⁶ Section 22(b1) of the Austrian Patent Act 1990.

¹²⁷ Art 15, [Council Regulation \(EC\) No 2100/94](#).

¹²⁸ UPOV Secretariat, [Explanatory Note on Exceptions to the Breeders' Rights under the 1991 Act](#), 2013.

¹²⁹ Art 14(1), [Council Regulation \(EC\) No 2100/94](#).

laws, and on the area of cultivation.¹³⁰ There are quite a significant number of EU countries, which do not require royalty payment for farm-saved seeds, like Romania, Bulgaria, Italy, Malta, Luxembourg, Cyprus, Greece, Portugal, Croatia, Slovenia and Austria.

2. SEED MARKETING LAWS

The marketing of seeds and other types of plant reproductive material in the EU is governed by twelve different Directives at EU level (EU Seed Directives). They establish the Common Catalogues of varieties of agricultural and of vegetable plant species¹³¹, pair the marketing of seeds to mandatory pre-marketing registration requirements and establish quality criteria and seed production rules in different crop-specific instruments.¹³² EU Seed Directives need to be transposed at national level, which means that there are effectively 27 different seed marketing regimes in the EU, with quite important differences. EU Seed Directives were adopted in the 1960's to ensure the identity, quality and productivity of seeds for the needs and interests of the agricultural industry, and peasant seed systems are forced to carve out their space as derogations and exceptions to this demanding rule.

a. Peasant seed systems saving, using and exchanging seeds

Seed marketing laws only apply to the marketing of seeds, defined in the Directives as the 'sale [...] aimed at commercial exploitation of seed to third parties, whether or not for consideration'.¹³³ 'Trade in seed not aimed at commercial exploitation of the variety [...] shall not be regarded as marketing'.¹³⁴ This theoretically excludes all exchanges of seeds between peasants and amateur gardeners, as well as seed saving activities for biodiversity conservation or its dynamic management. In parallel, the Directive regulating the marketing of fruit propagating material, exempts small producers engaged in local circulation activities.¹³⁵ These provisions nonetheless need to be transposed at national level, and their implementation has been unequal at best. EU Member States' margin of maneuver to define the scope of seed marketing laws have affected peasant communities differently, from outright violation to conditional recognition of their rights to seeds.

¹³⁰ Art 14(2-3), [Council Regulation \(EC\) No 2100/94](#). See also detailed conditions in [Commission Regulation \(EC\) No 1768/95 of 24 July 1995](#).

¹³¹ [EC Directive 2002/53 on the common catalogue of agricultural plant species](#), and [EC Directive 2002/55 on the marketing of vegetable seed](#).

¹³² For a detailed appraisal of this regulatory system, see T. Winge, 'Seed Legislation in Europe and Crops Genetic Diversity', *Sustainable Agriculture Reviews*, Vol. 15, 2015.

¹³³ Although slight differences can be found in some Directives (fruit, vegetable other than seeds), the seven main Directives (beet seed, fodder plant seeds, cereal seed, seed potatoes, oil and fibre plants, vegetable seeds and the common catalogue of agricultural plant species) use these terms since 1998.

¹³⁴ Art 2 of the aforementioned Directives.

¹³⁵ Art 10(1.a), [Council Directive 2008/90/EC of 29 September 2008](#) on the marketing of fruit plant propagating material and fruit plants intended for fruit production.

THE MANY SHADES OF SEEDS MARKETING IN THE EU

In certain countries, peasant seed systems are swallowed up in seed laws. In Estonia, the mere transfer of seed from one neighbor to another is considered as marketing, whether it is for free or not. The Polish national seed law considers any exchange or circulation of seed as marketing, and only excludes movement for scientific purposes and trials.

In other countries, the contours of seed marketing point towards peasants' right to seeds enshrined in UNDROP. Austrian seed laws allow the transmission of seed by peasants or seed users against payment or in kind if the peasant or user does not trade in seed, if the variety is not registered and if the transmission is done in small quantities.¹³⁶ In Denmark, authorities have issued instructions for non-commercial use of seeds, which clarify that seed laws only govern the marketing of seeds for agricultural and horticultural production, i.e. commercial production.¹³⁷ More recently in France, the Rural Code was amended to exclude from seed marketing laws 'the assignment, supply or transfer, whether free of charge or against payment of varieties belonging to the public domain to non-professional end-users not aiming at the commercial exploitation of the variety', while exchanges between peasants are considered mutual assistance.¹³⁸

EU seed marketing laws only apply to listed genera and species, which are determined according to their commercial and industrial relevance. Each Directive lists the species to which it applies. Non-regulated species, for which peasant seed systems will not be constrained, count buckwheat millet, parsnips, and quinoa amongst other species. EU Member States may choose to regulate additional species, like France, where lentil seeds are regulated at national level, but they can also request not to regulate species which are not relevant for their territories.

b. Access of peasant seeds to the market and diversified seed market offer

Despite their crop-specific differences, all EU Seed Directives require mandatory pre-marketing registration, either of the variety (which is the dominant rule, required in the case of agricultural crop species¹³⁹, vegetable seed¹⁴⁰, and vine¹⁴¹), or

¹³⁶ Austrian Seed Regulation, 1997 (2016 Version), §4(3).

¹³⁷ Ministry of Environment and Food of Denmark, *Seeds 2. Instructions for amateur breeders, seed savers and companies*, 2005, especially Section 7. See also Danish Seed Savers, *Legal Aspects of seed trade and exchange in the Baltic States and Denmark from seed-savers point of view*, 2020.

¹³⁸ French law on the transparency of the information in the food chain, June 2020, Art 10.

¹³⁹ Agricultural crop species include fodder plant seeds (regulated through [Directive 66/401](#)), cereals (regulated through [Directive 66/402](#)), seed potatoes (regulated through [Directive 2002/56](#)), beet seed (regulated through [Directive 2002/54](#)), and seeds of oil and fiber plants (regulated through [Directive 2002/57](#)).

¹⁴⁰ [EC Directive 2002/55 on the marketing of vegetable seed](#).

¹⁴¹ [Directive 68/193 on the marketing of material for the vegetative propagation of the vine](#).

of the supplier (which is the case for ornamentals¹⁴², forest material¹⁴³, vegetable propagating material other than seeds¹⁴⁴, and partially for fruits¹⁴⁵). They also establish seed production rules, with quality standards such as humidity rates, but also mandatory or optional seed lot certification (in agricultural crop species and vine), or allow for more flexibility with post-marketing quality controls (such as standard vegetable seeds or fruit CAC material). EU Seed Directives also include labelling and packaging rules based on the principle of official labelling and sealing.

Access to the seed market is quite difficult in the EU for peasant communities or for actors who cater local varieties adapted to peasants' needs. Civil society organizations have been sued for selling seeds not registered in the official seed catalogues.¹⁴⁶ The main principle of pre-marketing variety registration in the main crop species indeed requires varieties to comply with DUS criteria, which are determined by protocols established by UPOV and the CPVO. Access to the seed market is subject to the same conditions as the grant of IPR. Access is even more difficult for agricultural crops, since varieties also need to show their value for cultivation and use (VCU), before they make their way into the national and then Common EU Catalogue. In most national seed laws, this pre-marketing variety registration obligation is supplemented by an obligation to register as a seed producer or supplier. This obligation creates hurdles for small actors to enter the seed market. Some countries like Slovenia or Spain provide exceptions to the obligation to register as a seed producer for small-scale actors, or those conserving genetic diversity.

Owing to growing criticism of EU seed marketing rules, and the restrictive impact of mandatory DUS-based pre-marketing variety registration, some derogatory regimes have been put in place. These regimes either allow EU Member States to provide adapted access to the market for certain types of varieties, in the case of conservation and so-called 'amateur' varieties, or establish new light-touch access regimes, in the case of the temporary experiment on cereal populations or organic heterogeneous material.

CONSERVATION AND AMATEUR VARIETIES IN THE EU

Since 2008¹⁴⁷, the EU common catalogues include varieties that do not comply with traditional DUS criteria. Conservation varieties are landraces naturally adapted to

¹⁴² [Directive 98/56 on the marketing of propagation material of ornamental plants](#).

¹⁴³ [Directive 1999/105 on the marketing of forest reproductive material](#).

¹⁴⁴ [Directive 2008/72 on the marketing of vegetable propagating and planting material, other than seed](#).

¹⁴⁵ [Directive 2008/90 on the marketing of fruit plant propagating material and fruit plants intended for fruit production](#).

¹⁴⁶ Cases *Kokopelli v France* and *Kokopelli v Baumaux*, in B. Magarinos-Rey, *Semences hors-la-loi. La biodiversité confisquée*, Éditions Alternatives, 2015.

¹⁴⁷ [Commission Directive 2008/62/EC of 20 June 2008 for agricultural landraces](#), and [Commission Directive 2009/145/EC of 26 November 2009 providing for certain derogations, for acceptance of vegetable landraces \[...\]](#).

the local and regional conditions and threatened by genetic erosion, in vegetable and agricultural crop species. Amateur vegetable varieties have no intrinsic value for commercial crop production or are developed for growing under particular conditions. National procedures show quite differing approaches. Some countries, like the Netherlands, still require DUS testing in one growing cycle for these varieties, while most EU countries rely on an unofficial description, results from unofficial tests or knowledge gained from practice. Even though the system works quite smoothly in some EU Member States, its administrative burden is considerable. Seeds from conservation varieties still need to be certified for agricultural crops, a heavy burden for operators, and they can only be sold in their region of origin, and in limited quantity. Amateur vegetable varieties can be marketed as standard seed, which eases operators' burden, but only in small packages.

Although the regime of conservation and amateur varieties was a much needed and welcome departure from the main EU seed marketing rules, their inherent constraints, the high cost-benefit ratio considering the administrative burden needed to cater to small markets, have failed to truly allow peasants to access the seed market, or ignite the much-needed change towards market diversification. The new EU Organic Regulation¹⁴⁸, adopted in May 2018, offers another opportunity for peasants to access the seed market and sell their own seeds, but also to be presented with a seed offer adapted to their local conditions, as preconized by UN-DROP. It draws from the experience gained through the temporary experiment on cereal populations¹⁴⁹, but expands its reach to different material in all crop species.

THE NEW EU ORGANIC REGULATION

Under the Regulation that will apply from 2022, seeds from 'organic heterogeneous material' may be marketed following a simple notification procedure, without variety registration or seed lot certification. Breaking the myth of uniformity, these provisions should allow the marketing of a much wider variety of seeds, including peasant selections, and increase the use of agro-biodiversity in agriculture.¹⁵⁰ The EU Regulation will contribute to enlarging peasants' choice of locally available seeds, also thanks to the temporary experiment to be launched for organic varieties, exploring the adjustments needed for these varieties' access to the national list and EU common catalogue.

¹⁴⁸ Regulation 2018/848 on organic production and labelling of organic products.

¹⁴⁹ EU Commission Implementing Decision 2014/150/EU.

¹⁵⁰ Arche Noah, *Seeds in the New EU Organic Regulation 2018/848*, Information Note, 2018.

KEY FINDINGS

EU Seed Directives encroach on peasant seed systems, outlawing or burdening the saving, use, exchange and sale of peasant seeds. They restrict the diversity of locally adapted seeds that can be accessed by peasants on the seed market, as breeders catering to low input, agroecological or organic conditions have difficulties to register their varieties. By using the same DUS criteria used to grant IPR to allow access to the seed market, by additionally requiring proof of satisfactory agronomic value for agricultural crops, and by imposing strict seed production rules through mandatory seed lot certification in certain crop species, EU seed marketing laws largely neglect and defy the rights, needs and interests of peasants, even if they have been progressively asserted as derogations to the general rules.

3. PLANT HEALTH LAWS

Before EU Plant Health Regulation 2016/2031, seed health requirements were mainly governed by the EU Seed Directives.¹⁵¹ The Regulation adopted a more protective approach against plant pests, whether listed as priority, quarantine, or regulated non-quarantine pests. It impacts peasants' right to seeds enshrined in UNDROP by applying to all movement of seeds, instead of only their trade or marketing, without distinction on its commercial or local scale. All professional operators, which would include peasants, need to be registered with authorities, and can be authorised to issue plant passports following strict procedures. If seeds are established as vectors of infection of regulated pests, they need to be accompanied by plant passports, and operators need to establish traceability and pest risk management plans. The Regulation contains a few exceptions that can provide breathing space for peasants, for example on direct sales of seeds or plants to the final consumer, but outside of distance contracts.

KEY FINDINGS

EU plant health rules have important detrimental effects on the rights of peasants to save, use, exchange and sell their seeds. They put considerable administrative burdens on all movements of seeds when viewed as vectors of pests and require substantial financial and human resources.

¹⁵¹ EU Regulation 2016/2031 of the European Parliament of the Council of 26 October 2016 on protective measures against pests of plants.

5. EU MEMBER STATES' OBLIGATIONS FOR THE IMPLEMENTATION OF UNDROP

Building upon the state obligations highlighted in Section 3.E above, this Section will illustrate those obligations in the EU context, highlighting the changes required by the implementation of the right to seeds in the EU, drawing from examples of best practices around the EU.

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

When elaborating new international instruments, and when interpreting and implementing the international obligations that they have already undertaken, including at WTO, WIPO and UPOV, the EU and the EU Member States shall ensure that peasants' right to seeds is not infringed, but respected, protected and fulfilled. In doing so, they shall consult and cooperate in good faith with peasants, through their own organizations, before adopting and implementing international agreements that may affect their right to seeds.

An UNDROP-compliant interpretation of the CBD and its Nagoya Protocol would ensure the recognition and protection of traditional knowledge held by peasants and rural communities. With regards to the 1991 Act of the UPOV Convention, states would need to provide enough guarantees to avoid the misappropriation of peasant seeds by the plant variety protection system. They would also need to change their approach to the notion of "private and non-commercial use", maintaining peasant seed systems outside of the scope of plant variety protection, and re-assess the farmers' privilege and the breeders' exception in light of UNDROP. In the same vein, EU Member States engaged in the EPC's Administrative Council need to support the recent developments on patentability, making sure that no patents are granted on the products and processes of conventional breeding, but also that patent claims do not extend to native traits. Finally, the EU and EU Member States shall also make sure that the free trade agreements previously signed or currently negotiated with third countries do not lead to violations of peasants' right to seeds in the EU and in other countries. This implies that they shall, inter alia, stop requiring developing countries to accede to the 1991 Act of the UPOV Convention, or to adopt laws that are in conformity with UPOV 1991. Instead, they shall encourage developing countries to use the possibilities offered by TRIPS to design sui generis systems of plant variety protection.

The obligation to ensure the consistency with the right to seeds also applies to regional and national laws, which means that all EU laws and policies that challenge the protection of, or restrict the exercise of the right to seeds shall be amended. Mechanisms should be established to ensure the coherence of EU and EU Member States agricultural, economic, social, cultural and development policies with the realization of the right to seeds. As a result, the reform of the Common Agricultural Policy shall include provisions and conditionality requirements that support and protect peasants' right to seeds and seed systems. EU laws and regulations relating to IPR, seed marketing laws, and biodiversity conservation policies shall respect and take into account the rights, needs and realities of peasants. Peasants' rights to save, use and exchange seeds shall not be disproportionately hampered by plant health requirements.

B. OBLIGATION TO RESPECT, PROTECT AND FULFIL THE RIGHT TO SEEDS

In UNDROP, examples of ways through which the EU and EU Member States shall respect the right of peasants to seeds include their obligation to avoid creating obstacles to informal seed systems, which means for instance that they shall not adopt a definition of seed marketing that integrates such peasant seed systems into the realm of stringent requirements of variety or supplier registration and seed production rules.

In order not to violate their obligation to protect the right to seeds, the EU and EU Member States shall take all necessary measures to ensure that non-state actors respect and strengthen the right to seeds. States shall as a result address the detrimental impacts that patents on plants have on peasants' capacity to source seeds and breeding material freely to develop varieties and populations more adapted to their local conditions and social needs, in contradiction to peasants' right to develop their own seeds and knowledge enshrined in UNDROP. States shall also adopt a more comprehensive look at the concept of novelty both in EU patent and plant variety protection regimes, and ensure that the enforcement of these exclusive rights do not counter the right to seeds, by preventing restrictive approaches to the farmers' privilege. States shall also prevent the risks arising from the development, handling, transport, use, transfer or release of any living modified organisms, which would require a truly precautionary approach in the defense of the currently applicable biosafety legislation in the EU.

Finally, in order to fulfil peasants' right to seeds, EU and EU Member States must strengthen peasants' access to seeds, by allowing peasant seeds, but also seeds from locally adapted varieties to be marketed, whether inside or outside of current seed marketing rules, as a derogation or, better, a self-standing regime. They must recognize peasants' role in the conservation, sustainable use and dynamic management of crop diversity, and adequately compensate them for its maintenance and adaptation in a multi-layered European strategy on genetic resources.

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

The obligations to support peasant seed systems and to promote the use of peasant seeds entails the development of normative frameworks that allow peasants' seed systems to exist, fully operate and thrive as production and conservation systems. EU Member States must not regulate peasant seed systems by unfit or disproportionate rules. They shall for instance consider the impact of stringent plant health regulations on peasant seed systems and alleviate their detrimental effects. They shall also reconsider currently applicable seed marketing rules to ensure that peasants have access to a fair, impartial and appropriate system of evaluation and certification of the quality of their products, including seeds, at the local, national and international levels, and to promote their participation in its formulation.

D. OBLIGATIONS TO PROTECT TRADITIONAL KNOWLEDGE, INNOVATION AND PRACTICES, AND TO ENSURE EQUITABLE BENEFIT SHARING

Pursuant to their obligation to protect peasants' right to traditional knowledge, innovation and practices, the EU and EU Member States first need to recognize the existence of such knowledge in the hands of European peasants. The preservation and promotion of traditional agricultural techniques and innovations, including seed handling practices, must be fully integrated in the European laws and policies. Such recognition would need to translate in measures to ensure that the prior informed consent or approval and involvement of peasants and their communities are obtained before access to seeds and benefit sharing modalities are prescribed in mutually agreed terms.

E. OBLIGATION TO ENSURE PEASANTS' PARTICIPATION IN DECISION-MAKING PROCESSES IN RELATION TO SEEDS

Even though the EU and EU Member States have a long-standing tradition of democratic and inclusive governance, in which all social groups are encouraged to participate in public affairs, including peasants, actions could be further taken to raise the capacity of peasants and their organisations to participate in the decision-making processes in relation to seeds, including in the elaboration, interpretation and application of international agreements and standards and of national and regional laws and policies. The EU and EU Member States shall address the imbalanced representation that more traditional actors of civil society or more resourceful industry actors benefit from compared to peasants.

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

The EU and EU Member States shall ensure that agricultural research and development integrates the needs of peasants, by dedicating specific and consequential funding streams to research on and development of orphan crops, local varieties and seeds that respond to the needs of peasants. Building upon the experience gained through different cycles of EU wide research projects, authorities shall continue to ensure and strengthen peasants' active participation in the definition of priorities and the undertaking of research and development of orphan crops and local varieties, taking into account their experience in such research and development. They shall encourage equitable and participatory peasant-scientist partnerships, such as peasant field schools and participatory plant breeding.

6. CONCLUSION

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

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

UNDROP's implementation is therefore key to redressing distortions of laws and policies that have negatively affected European peasants and non-industrial farming systems as well as the rural environment and seed diversity.

The comprehensive nature of UNDROP, touching upon numerous policy fields and requiring the adoption of a systemic and holistic approach to law-making that isn't confined to separate technical units, makes it a powerful tool to better protect peasants' right to seeds and seed systems in Europe.

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

ARTICLE 1

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

ARTICLE 2

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

...

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

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

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

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

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

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

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

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

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

ARTICLE 4

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

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

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

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

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

(f) To participate in all community activities;

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

ARTICLE 10

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

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

ARTICLE 11

1. Peasants and other people working in rural areas have the right to seek, receive, develop and impart information, including information about factors that may affect the production, processing, marketing and distribution of their products.

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

ARTICLE 15

...

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

ARTICLE 19

1. Peasants and other people working in rural areas have the right to seeds ..., including:
 - (a) The right to the protection of traditional knowledge relevant to plant genetic resources for food and agriculture;
 - (b) The right to equitably participate in sharing the benefits arising from the utilization of plant genetic resources for food and agriculture;
 - (c) The right to participate in the making of decisions on matters relating to the conservation and sustainable use of plant genetic resources for food and agriculture;
 - (d) The right to save, use, exchange and sell their farm-saved seed or propagating material.

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

ARTICLE 20

1. States shall take appropriate measures, in line with relevant international obligations, to prevent the depletion and ensure the conservation and sustainable use of biodiversity, in order to promote and protect the full enjoyment of the rights of peasants and other people working in rural areas.
2. States shall take appropriate measures in order to promote and protect the traditional knowledge, innovation and practices of peasants and other people working in rural areas, including traditional agrarian, pastoral, forestry, fisheries, livestock and agroecological systems relevant to the conservation and sustainable use of biological diversity.
3. States shall prevent risks of violation of the rights of peasants and other people working in rural areas arising from the development, handling, transport, use, transfer or release of any living modified organisms.

ARTICLE 25

...

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

...

ARTICLE 26

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

...

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

ARTICLE 28

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

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

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