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Implementing the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) in light of the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP)

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The more a seed system recognizes and supports farmers as stewards of a seed system for all of humankind, the more this system fulfils people's human rights.

M. Fakhri, UN Special Rapporteur on the Right to Food⁷

INTRODUCTION

Following six years of negotiations at the United Nations (UN) Human Rights Council, the UN General Assembly adopted the Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP) on 17 December 2018, by a vote of 121 States in favour, 8 against and 54 abstentions.⁸ When it adopted UNDROP, the UN General Assembly invited “Governments, agencies and organizations of the United Nations system and intergovernmental and non-governmental organizations to disseminate the Declaration and to promote universal respect and understanding thereof.”⁹

The adoption of UNDROP by the UN General Assembly represents a commitment on the part of the UN and UN Member States to respect, protect and fulfil its provisions, within the framework of the obligations established by the UN Charter to promote and protect human rights on a non-discriminatory basis.¹⁰ UNDROP describes the measures that States must adopt to guarantee peasants' rights, including their right to seeds, at national level, and it provides that States shall engage in international cooperation with the same purpose.¹¹ UNDROP represents a significant advance in the legal protection afforded to peasants and other small-scale producers.¹²

The UN Food and Agriculture Organization (FAO) actively participated in UNDROP's negotiation, and welcomed its adoption in 2018. For FAO, “the Declaration is strictly linked with the most relevant principles and guidelines adopted by the Committee on World Food Security and the FAO bodies”, and UNDROP will help peasants, small-scale fishers and pastoralists “in reaching their potential and overcoming the challenges that they face in their everyday life.”¹³

This Briefing Paper explains how UNDROP complements the International Treaty on Plant Genetic Resources for Food and Agriculture (hereafter, the International Treaty)¹⁴, in particular its Article 9 on Farmers' Rights, and how their joint implementation is essential for the realization of farmers' and peasants' rights. We demonstrate that UNDROP: 1) reaffirms as well as further elaborates on the scope of peasants' right to seeds and related State obligations; 2) firmly positions peasants' rights, including their right to seeds, as human rights that take precedence over other legal norms; 3) brings to bear accountability mechanisms linked with defining peasants' rights as human rights guarantees; and 4) clearly defines the role and obligations of UN agencies.

1 DEFINITION AND SCOPE OF PEASANTS' RIGHT TO SEEDS AND STATES' OBLIGATIONS

For over 10,000 years, peasants and farmers have freely saved, selected, exchanged and sold seeds, as well as used and reused them to produce food. At the end of the twentieth and start of the twenty-first century, States affirmed these customary rights by adopting the Convention on Biological Diversity (CBD) and its Protocols,¹⁵ the International Treaty, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)¹⁶ and UNDROP.

Farmers' rights were recognized in international law for the first time with the adoption of the International Treaty in 2001 (Preamble and Article 9). In this regard, the International Treaty can be seen as counter-balancing the obligatory protection of plant varieties under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), a multilateral treaty ad-

ministered by the World Trade Organization (WTO). The TRIPS Agreement imposes obligations on WTO Members to adopt wide-ranging minimum standards of intellectual property protection in a number of areas, including copyright, trademarks, patents, and plant variety protection. While patent protection is optional for plants and animals (other than microorganisms), as well as for essentially biological processes used in the production of plants or animals (other than non-biological and microbiological processes), WTO Members must nevertheless “provide for the protection of plant varieties either by patents, by an effective *sui generis* system, or by any combination thereof.”¹⁷

In adopting UNDRIP in 2007, States enshrined 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.¹⁸ Similarly, the adoption of **UNDROP rooted the rights of peasants and other people working in rural areas in international human rights law, strengthening, *inter alia*, the recognition of their right to seeds.**

UNDROP **explicitly and unambiguously recognizes the right to save, use, exchange and sell farm-saved seeds.** In the International Treaty’s Preamble, States affirmed that “the rights recognized in this Treaty to save, use, exchange and sell farm-saved seed and other propagating material (...) are fundamental to the realization of Farmers’ Rights, as well as to the promotion of Farmers’ Rights at national and international levels.” Article 9.3 of the Treaty states that “nothing in this Article shall be interpreted to limit any rights that farmers have to save, use, exchange and sell farm-saved seed/propagating material, subject to national law and as appropriate.” The International Treaty provisions clearly aim at protecting long-held customary rights. UNDROP’s Article 19 reinforces the legal effect of those rights by recognizing the right to save, use, exchange and sell farm-saved seed or propagating material as an integral part of the rights of peasants, and stipulates that States have an obligation to “take measures to respect, protect and fulfil the right to seeds of peasants” (Article 19.3).

UNDROP **elaborates on the concept of peasants’ rights and States’ obligations.** In Article 9.2 of the International Treaty, States Parties agree that the responsibility for realizing Farmers’ Rights, as they relate to plant genetic resources for food and agriculture (PGRFA), rests with national governments, adding that “[i]n accordance with their needs and priorities, each Contracting Party should, as appropriate, and subject to its national legislation, take measures to protect and promote Farmers’ Rights, including (a) protecting traditional knowledge relevant to PGRFA, (b) affirming the right to equitably participate in sharing benefits arising from the utilization of PGRFA, and (c) affirming the right to participate in making decisions, at national level, on matters related to the conservation and sustainable use of PGRFA. UNDROP reaffirms these rights in Article 19.1, and stipulates that States shall respect, protect and fulfil these rights (Article 19.3). It adds that States shall promote and protect peasants’ traditional knowledge, innovation and practices (Article 20.2).

UNDROP goes further and requires that States also:

- guarantee peasants’ right to maintain, control, protect and develop their own seeds and traditional knowledge (Article 19.2);

- ensure that seeds of sufficient quality and quantity are available to peasants at the most suitable time for planting, and at an affordable price (Article 19.4);
- recognize the rights of peasants to rely either on their own seeds or on other locally available seeds of their choice, and to decide on the crops and species that they wish to grow (Article 19.5);
- support peasants’ seed systems and agrobiodiversity (Article 19.6);
- ensure that agricultural research and development integrate the needs of peasants, with their active participation (Article 19.7).

The interface between Farmers’ Rights and national laws governing seed certification and marketing as well as intellectual property (patents and plant variety protection) is a contentious area due to the potential of these latter laws to undermine the realization of Farmers’ Rights.¹⁹ On this point, UNDROP is unequivocal that States have a duty to “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 provides a framework of action towards the full protection and implementation of peasants’ right to seeds, and needs to be taken into consideration in the implementation of Article 9 of the International Treaty.

2 THE PRIMACY OF HUMAN RIGHTS

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.²⁰

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 and 56).²¹ The UN Charter also provides that “In 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).²² 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.²³

It is noteworthy that in defining the right to seeds, UNDROP has built on a number of binding international human rights instruments, including the International Covenant on Economic, Social and Cultural Rights (ICESCR), in which the right to food is enshrined, and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).²⁴

UNDROP strongly reaffirms the primacy of human rights, including those of peasants, over other international norms. Article 2.4 provides that “States shall elaborate, interpret and apply relevant international agreements and standards to which they are party in a manner consistent with their human rights obligations

as applicable to peasants.” In Article 19.8, UNDROP also calls on States to prioritize the rights, needs and realities of peasants over seed policies, plant variety protection and other intellectual property laws, certification schemes and seed marketing laws. Both these provisions reflect the fact that as higher-order norms, human rights cannot be traded off or undermined.

On the contrary, international norms including trade agreements and national laws and policies must be adapted to ensure the ongoing protection of human rights.²⁵ UNDROP further stipulates that “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” (Article 28.1), and that 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.” **This hierarchy needs to be taken into consideration by Contracting Parties when they implement Article 9 of the International Treaty.**

3 ACCOUNTABILITY MECHANISMS LINKED TO HUMAN RIGHTS

A critical effect of UNDROP is that **it brings to bear the accountability mechanisms linked with recognizing peasants’ rights as human rights guarantees that can be enforceable before judicial or quasi-judicial bodies at national, regional or international levels.**²⁶

Canada provides an example of how UN human rights declarations can be incorporated into national law and become enforceable. In 2019, the province of British Columbia became the first Canadian jurisdiction to incorporate UNDRIP into law, by passing an Act “requir[ing] the government of British Columbia to prepare and implement an action plan to achieve the objectives of the Declaration.”²⁷ In 2021, “the federal government followed suit by passing its own legislation ‘to affirm the Declaration as a universal international human rights instrument with application in Canadian law’” and to provide a framework for its implementation. In 2022, the Supreme Court of British Columbia ruled in favour of the Saik’uz First Nation in a case opposing the mining company Rio Tinto Alcan, stating in its decisions that UNDRIP legislation “supports a robust interpretation of Aboriginal rights.”²⁸

UN human rights mechanisms, in particular the Human Rights Council, Special Procedures and Treaty Bodies, also monitor UNDROP’s implementation.²⁹ For instance, in 2019, the UN Human Rights Committee became the first UN Treaty Body to refer to UNDROP, in its decision in *Portillo Cáceres and Others v. Paraguay*.³⁰ While the decision concerns the right to land, it shows how UNDROP can also be used to bring States to fulfil their obligations related to peasants’ right to seeds.

There are already a number of instances in which national courts and regional human rights bodies have referred to UNDROP in their decisions. In 2021, the Supreme Court of Honduras unanimously declared the Plant Variety Protection (PVP) Law (Decree N° 21-2012) unconstitutional, on the grounds that it violated the Constitution, various international treaties ratified by Honduras, as well as international standards related to the protection of the

right to adequate nutrition.³¹ The Law restricted the right to use farm-saved propagation material and made it illegal to give away, exchange or sell seeds from plant varieties protected by plant breeders’ rights.³² The judgment by the Supreme Court of Honduras is one of the first to explicitly refer to the International Treaty’s Article 9 and to UNDROP’s Article 19. In its decision, the Supreme Court concluded that the Law contravened the constitutional and international duty of the State to protect Indigenous cultures and farmers’ and peasants’ rights. It recognized that peasants’ traditional knowledge is essential for the preservation of biological diversity and for global food security, and that the Law violated Article 19 of UNDROP and Article 9 of the International Treaty.

In 2022, the Constitutional Court of Ecuador referred explicitly to UNDRIP and UNDROP in its decision on a legal challenge to the Seed Law adopted in 2017.³³ The Court stated the obligation of States to adopt measures to permit the rural development of peasants, their agriculture, and the preservation of their means of subsistence, including seeds; and the right of indigenous peoples to “maintain, control, protect and develop” the knowledge of their sciences and technologies, which includes knowledge of seeds and flora.

It has been less than four years since UNDROP was adopted, and more court cases and decisions invoking the Declaration are likely to emerge in the coming years.³⁴

4 OBLIGATIONS OF UN AGENCIES IN THE CONTEXT OF UNDROP

UN specialized agencies, including FAO, have been identified as distinct duty-bearers in the realization of human rights instruments.³⁵ FAO, for example, played a key role in the promotion of the right to food, by adopting the Right to Food Guidelines in 2004,³⁶ and by supporting their implementation since.³⁷

As noted above, in the wake of UNDROP’s adoption, the UN General Assembly called on agencies and organizations of the UN system “to disseminate the Declaration and to promote universal respect and understanding thereof.”³⁸

UNDROP specifically provides that specialized agencies, funds and programmes of the UN system, such as FAO, and other intergovernmental organizations, including international and regional financial organizations, such as the International Fund for Agricultural Development (IFAD), shall contribute to the full realization of UNDROP, including through the mobilization of development assistance and cooperation (Article 27.1), and that they shall promote respect for and the full application of UNDROP and follow up on its effectiveness (Article 27.2). They shall also ensure that peasants and other people working in rural areas have the means to participate in decision-making processes on issues affecting them (Article 27.1).

FAO, as a specialized UN agency, and the Secretariat of the International Treaty have an obligation to actively promote human rights, in particular the right to food and UNDROP, including when supporting Contracting Parties in the implementation of the International Treaty. Accordingly, cooperation with organizations and entities that operate to sideline or erode such rights would be inconsistent with the obligations of UN agencies.

CONCLUSION

UNDROP established the right to seeds as a human right to be respected, protected and fulfilled at the international, regional and national levels. It has defined more precisely the role of UN agencies, including FAO, in promoting and protecting human rights. UNDROP and the International Treaty are complementary

and their joint implementation is essential for the realization of farmers' and peasants' rights. It would be highly beneficial to increase cooperation between FAO and the International Treaty Secretariat, on the one hand, and UN human rights bodies, on the other, to promote and facilitate the implementation of the International Treaty in line with international human rights instruments, such as the ICESCR, CEDAW, UNDRIP and UNDROP.

ENDNOTES

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- 7 Michael Fakhri, Seeds, right to life and farmers' rights, A/HRC/49/43 (2021).
- 8 UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP), A/RES/73/165 (2018).
- 9 UNDROP, §2.
- 10 This analysis was developed by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people in relation to the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), but applies equally to UNDROP, as both UN Declarations have the same legal status. See S. James Anaya, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, A/HRC/9/9 (2008), §41.
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- 19 Karine Peschard, Searching for flexibility (APBREBES, 2021), 28–29.
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- 21 United Nations Charter (1945).
- 22 See UN Charter, Arts. 1, 55, 56 and 103.
- 23 UN General Assembly, Vienna Declaration and Programme of Action, A/CONF.157/23 (1993), §1.1.
- 24 International Covenant on Economic, Social and Cultural Rights (ICESCR), Resolution 2200 A (XXI) (1966). Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), A/34/46 (1979). See, also, De Schutter, Seed policies and the right to food.
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- 27 Arend J.A. Hoekstra, Grace Wu and Thomas Isaac, BCSC decision suggests implications for UNDRIP legislation in Canada (2022).
- 28 Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc, 2022 BCSC 15.
- 29 On 17 December 2019, on the occasion of UNDROP's first anniversary, nine UN Special Procedures and four members of UN Treaty Bodies released a Joint Statement in which they committed to integrate UNDROP's implementation in their mandates, and to provide guidance to States on how they can implement UNDROP. They also called on the Human Rights Council to create a new Special Procedure on the rights of peasants.
- 30 For the views of the UN Human Rights Committee, see CCPR/C/126/D/2751/2016 (2019).
- 31 Supreme Court of Honduras, Action of Unconstitutionality EXP SCO-0877/2018 (2021).
- 32 Known as the Monsanto Law, Decree N° 21-2012 was passed by Congress in 2012 and is modelled on the 1991 Act of the International Union for the Protection of New Varieties of Plants (UPOV Convention). Honduras is not a member of UPOV and is under no obligation to adhere to the 1991 Act.
- 33 Ley orgánica de agrobiodiversidad, semillas y fomento de la agricultura sustentable (2017).
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