

The status of the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas in international law

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Abstract: In 2021, the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP or Declaration) celebrates its third anniversary. Since its adoption by the United Nations General Assembly (GA) in 2018, the UNDROP has inspired a growing load of academic and non-academic research. This research has analysed almost every aspect of the UNDROP, from questioning the reasons behind its adoption, to its ostensible recognition of a right to participate in the management of natural resources, as well as the controversial affirmation of peasants' right to plant genetic resources in international human rights law. In particular, there is a growing focus and attention on the UNDROP's status in general international law, no doubt prompted by the over-eager opinionists and authors who immediately after the adoption of the Declaration held that some of the fundamental rights and freedoms encompassed therein already constitute part of general international law. The anxiety over whether aspects and issues of the UNDROP are binding or not is clear and evident, yet little attention is granted by the authors and opinionists of this interpretation to the limitations of general international law and the unrealistic expectations such a claim produces in peasants, other rural workers and their representatives. Given the scrutiny the Declaration has attracted, this work approaches some of the most noteworthy issues and themes arising from the international legal literature on the UNDROP of the past three years, in order to reflect on the meaning of the UNDROP's third anniversary.

Keywords: agro-ecology; food sovereignty; legal mobilisation; farmers' rights; right to seeds; rights of peasants; right to biodiversity; a right towards plant genetic resources.

I. INTRODUCTORY REMARKS

In 2021, La Vía Campesina, an international non-governmental organisation dedicated to supporting peasants, farmers and landless workers engaged in agrarian struggles,¹ celebrated the third anniversary of the adoption of the UN Declaration on the rights of peasants and other people working in rural areas (hereinafter UNDROP or Declaration) at the UN General Assembly.² This was a major event for those who participated since the UNDROP, as adopted by the UN General Assembly in 2018, had taken nearly twenty years of intense debate and campaigning in favour of farmers' human rights to advance through the United Nations system.³

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¹ More informations are available on the website of La Via Campesina at the following address: <https://viacampesina.org/en/>

² UN 'Declaration on the Rights of Peasants and Other People Working in Rural Areas' (8 October 2018) UN Doc A/RES/73/165.

³ Amplius, see P. Claeys, M. Edelman, 'The United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas: Grassroots Voices' 47 *Journal of Peasant Studies* (2019) 1 ff; L. Cotula, 'Be-

During this long period of time the negotiations between states and representatives of peasants and other people working in rural areas were lengthy and often conflictual and difficult to handle.⁴ The adoption of the UNDROP in 2018 with a recorded vote of 121 in favour, 8 against and 54 abstentions was met with the broad acclamation of representatives of peasants in several states; though the negative votes cast *inter alia* by Australia, Israel, New Zealand, Sweden, the United Kingdom and the United States of America have significantly tempered the celebrations for many.⁵

In its draft form, the UNDROP attracted relatively uncritical academic attention⁶ except for few new human rights such as the right to seeds, right to food sovereignty and the right to biodiversity.⁷ It is somehow surprising then that the UNDROP – a new human rights tool – has attracted so much scrutiny and media and press attention since its adoption.⁸ No doubt the UNDROP has been of particular attention because of the romantic popular narrative – the idea lying behind the notion of food sovereignty – that people have the right to define their own food and agricultural systems in culturally and ecologically appropriate ways – of calling into question the legitimacy of the State's exclusive power on the mechanisms and policies of food production and distribution.⁹ The

tween Hope and Critique: Human Rights, Social Justice and Re-Imagining International Law from the Bottom Up' 1 *Georgia Journal of International and Comparative Law* (2021) 504 ff.

⁴ See M. Edelman, J. Carwil, 'Peasants' Rights and the UN System: Quixotic Struggle? Or Emancipatory Idea Whose Time Has Come?' (38 *Journal of Peasant Studies*, (2011) 1 ff; C. Golay, 'Negotiation of a United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas' 3 *Académie de droit international humanitaire et de droits humains à Genève, Academy In-Brief* no 5 (2011) 30.

⁵ For further references on these issues see F. Seatzu, 'The United Nations Declaration on rights of peasants and other people working in rural areas,' in C. BINDER, M. NOWAK, J. A. HOFBAUER and P. JANIG (eds.), *Elgar Encyclopedia of Human Rights* (Edward Elgar Publishing, London, 2022) (forthcoming).

⁶ But see M. G. Alabrese, A. Bessa, M. Brunori, P. F. Giuggioli (eds.), *The United Nations' Declaration on Peasants' Rights* (London: Taylor & Francis, 2022); M. Salomon, 'The Radical Ideation of Peasants, the "Pseudo-Radicalism" of International Human Rights Law, and the Revolutionary Lawyer' 8 *London Review of International Law* (2020) 425–456; C. Golay 'Legal Analysis on the Rights of Peasants and other People Working in Rural Areas: The Right to Seeds and Intellectual Property Rights' 19 May 2016, <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGPLeasants/Session3/StatementsPresentations/Cristophe_Golay_GENEVA_ACADEMY.pdf> accessed 2 January 2021; C. Golay, 'The Implementation of the United Nations Declaration on the Rights of Peasants and Other Peoples Working in Rural Areas' 13 *Research Brief Geneva Academy of International Humanitarian and Human Rights* (2019), <<https://www.geneva-academy.ch/joomlatools-files/docman-files/The%20implementation%20of%20the%20UN%20Declaration%20on%20the%20rights%20of%20peasants%20and%20other%20people%20w.pdf>> accessed 12 January 2021.

⁷ See H. Morten, 'The UN Declaration on Peasants' Rights (UNDROP): Is Article 19 on seed rights adequately balancing intellectual property rights and the right to food?' 23 *Journal of World Intellectual Property* (2020) 288 ff; M. Coulibaly, P. Claeys, A. Berson, 'The Right to Seeds and Legal Mobilization for the Protection of Peasant Seed Systems in Mali' 12 *Journal of Human Rights Practice* (2021), 479–500.

C. Chen, M. P. Gilmore, 'Biocultural Rights: A New Paradigm to Protect the Rights of Indigenous Peoples' 3 *International Indigenous Policy Journal*, (2015) 1 ff.

⁸ Amplius, see P. Claeys, 'Food Security/Sovereignty: A Challenge for Human Rights. The rise of new rights for peasants. From reliance on NGO intermediaries to direct representation' 9 *Transnational Legal Theory* (2018) 386 ff. See also M. Edelman, J. Carwil, "'Peasants' Rights and the UN System: Quixotic Struggle? Or Emancipatory Idea Whose Time Has Come?' 38 *Journal of Peasant Studies* (2011) 1 ff.

⁹ See M. Salomon, 'Nihilists, Pragmatists and Peasants: A Dispatch on Contradiction in International Human Rights Law' 5 *Institute for International Law and Justice Working Paper* (2018), <www.iilj.org/publications/nihilists-pragmatists-peasants-dispatch-contradiction-international-human-rights-law/> accessed 3 January 2022. See also F. Francioni, 'The Peasants' Declaration: State Obligations and Justiciability', in M. Alabrese, A. Bessa, M. Brunori, P. F. Giuggioli, *supra*, n. 6, at 1.

symbolism of the notion of peasant's sovereignty on food and of its main corollaries has increased the UNDROP's attractiveness to political and international legal scholars as fertile ground for critical study and analysis. In several ways, the UNDROP is a highly stratified legal text that offers the opportunity to academic writers to engage in several cross-cutting controversies in public international law, such as the role of NGOs and civil society in the UN legal system, in international law-making and in human rights compliance and implementation.

More surprising, though, is the discursive character of this body of studies; it encompasses highly diverging interpretations of its character (its normative status in international law) and its content (the norms and rights envisaged therein) even the motives of its non-state beneficiaries are duly considered and scrutinised. It is an indispensable exercise in order to engage with the divergent issues deriving from this inquiry since it may be influential in shaping a global understanding of both the character and content of the UNDROP. The 'teachings of the most qualified publicists of the various nations in the area of international law' are a source of international law as a subsidiary means for the determination of rules of international law;¹⁰ though this attracts competing interpretations as to its cogency.¹¹ The majority of the writings concerning UNDROP by no means constitutes that. Still, in the absence of a comprehensive *travaux préparatoires*, it may be that some of these sources are used to detect its content.

The explicit reasoning for much of the discussion and debate in the literature turns on the issue of UNDROP's normative status in international law. The anxiety that is present in the literature over the character of the UNDROP is no doubt informed by the over-eager approach of some scholars and opinionists to prematurely claim aspects of the UNDROP as already constituting general or customary international human rights law.¹² The eagerness to claim customary status has been met with caution by some,¹³ given the conservative nature of international law, especially the complexity surrounding

¹⁰ Article 38(1)(d) of the Statute of the ICJ mentions 'the teachings of the most highly qualified publicists' as a 'subsidiary means' to be applied by the Court when it 'decide[s] in accordance with international law such disputes as are submitted to it'. On the teachings of the most qualified publicists, see e.g. S. Sivakumaran, 'The Influence of Teachings of Publicists on the Development of International Law' (2017) 66 *ICLQ*, p. 37 ff; S. T. Helmersen, 'Finding 'the Most Highly Qualified Publicists': Lessons from the International Court of Justice' (2019) (30) *EJIL*, p. 509 ff.

¹¹ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 38(1)(d).

¹² See e.g. F. Kroff, '*VERS DE NOUVEAUX DROITS POUR LES PAYSAN(NE)S*', https://www.fian.be/IMG/pdf/fian_etude_ddp_final_web_2.pdf (p. 30); Les Amis de la Terre, 'La Déclaration des Nations Unies sur les droits des paysans en tant qu'instrument pour la reconnaissance des droits collectifs', <https://www.foei.org/wp-content/uploads/2021/02/La-Declaration-des-Nations-Unies-sur-les-droits-des-paysans-en-tant-qu-instrument-pour-la-reconnaissance-des-droits-collectifs>, available at: https://www.fian.be/IMG/pdf/fian_etude_ddp_final_web_2.pdf (15 to 17).

¹³ See e.g. P. Claeys, M. Edelman, 'The United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas: Grassroots Voices' 47 *Journal of Peasant Studies* (2020) esp. 13 to 15; A. Genier, 'La déclaration des nations unies sur les droits des paysans et des autres personnes travaillant dans les zones rurales: un instrument ambitieux, audacieux, mais faible...?', https://www.mcgill.ca/humanrights/files/humanrights/ihri_v7_2019_genier.pdf; S. Vezzani, 'Il progetto di Dichiarazione sui diritti degli agricoltori: nuovi diritti germogliano?', 10 *Diritti umani e diritto internazionale* (2013) 211-216.

the formation of custom.¹⁴ Still, it would seem that the UNDROP like the Universal Declaration of Human Rights (UDHR)¹⁵ exists in an amorphous in-between state of constituting both a ‘non-binding’ and aspirational statement of soft law but equally an instrument that reflects already binding rules of general international law. These claims of binding norms have attracted the attention of peasant communities and their representatives.¹⁶ So, it is worthwhile to trace the literature the UNDROP has generated since its adoption in 2018, as it provides us with a layered narrative of the contribution of the Declaration to peasant’s rights in international law so far, and gives us some insight into the developing character of the UNDROP. Yet we should take this seriously because of the exigency of the peasants’ international project to buttress contemporary peasants’ struggles around the world. For this reason, it is important also to reflect on the dissonant tenor of some of this literature which is surprisingly negative and even, on some occasions, mean spirited about the motives and capabilities of peasant peoples and their representatives in this project.

Part of the purpose of this work is to draw from the discursive body of legal literature on UNDROP to lay out the major issues that have arisen since its adoption. The work begins by providing a truncated version of the development of the UNDROP from its early conception in the Advisory Committee to the Human Rights Council, to its challenging passage through the Open-Ended Intergovernmental Working Group on the Draft United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas to the Human Rights Council (HRC). Part III draws a picture of the competing interpretations that have arisen since the UNDROP’s adoption by the UN General Assembly in relation to character and content. Here, we will examine in more detail the most important elements of scholarly captivation with the UNDROP. Regarding its content, the focus will be on four controversies: a) the question of whether the UNDROP contains existing and codified rights or *sui generis* rights; b) the question of whether the UN Human Rights Council (HRC) should proceed towards the establishment a new special procedure on the rights of peasants and other people working in rural areas as suggested by some commentators;¹⁷ c) Article 19, the human right to seeds and biodiversity; and d) Article 12 (3), the rights of landless peasants, young people, small-scale fishers and other rural workers to have priority in the allocation of public lands, fisheries and forests. Then, regarding character, I will turn to the discussion in the legal literature of the competing interpretations of: a) UNDROP as ‘soft’ law; and b) the UNDROP and general international law. These elements of the academic debate are the most useful in understanding the anxieties that have arisen since the UNDROP’s

¹⁴ On the complexity surrounding the formation of custom, see e.g. (See e.g. A. Elizabeth Roberts, ‘Traditional and Modern Approaches to Customary International Law: A Reconciliation’ (95 *AJIL* (2001) 757-791.

¹⁵ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: <https://www.refworld.org/docid/3ae6b372c.html> [accessed 12 January 2022]. On the status of the UDHR in international law, see e.g. Hurst Hannum, ‘The Status of the Universal Declaration of Human Rights in National and International Law’ (4 *GA. J. INT’L & COMP. L.* (1996) 289 ff.

¹⁶ For references on this issue, see C. Hubert, *La Déclaration de l’ONU Sur le Droits des Paysannes. Outil de la Lutte pour un Avenir commun*, (Cetim, Paris, 2019).

¹⁷ For references, see Arne Vandenbogaerde, *The Human Rights Council from Below: A Case Study of the Declaration on the Rights of Peasants* (Intersentia, Antwerp, 2015), https://medialibrary.uantwerpen.be/oldcontent/container2621/files/LHR%20series%20no%201_The%20Human%20Rights%20Council%20from%20Below_.pdf

adoption. Part IV will consider the literature problematising the participation of peasant peoples and rural workers in the drafting of the UNDROP.

II. HISTORY OF THE UNDROP

The genesis of the UNDROP may be traced back to the work of the first specialised UN mechanism to examine peasant peoples' human rights issues, the Working Group on the Draft United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (OEIWG). The OEIWG was established in 2012 by the UN Human Rights Council. The now decommissioned WGPR was a body of experts and its mandate was to 'negotiate, finalise and submit to the Human Rights Council a draft United Nations declaration on the rights of peasants and other people working in rural areas'.¹⁸

A unique feature of the OEIWG was the informal and open atmosphere of its meetings. Facilitated by its low-ranking status (only a subsidiary body of the UN Human Rights Council) and by its law-making mandate¹⁹, this convergence enabled peasant peoples and other rural workers to make grievances about the state's violation of peasant peoples' human rights.²⁰ This helped the OEIWG in achieving substantial evidence of the gravity and extent of those violations in relative anonymity; few states regularly attended the annual working group. It was through this process of nearly seven years²¹ that it became clear and evident to the peasant representatives and experts that there was universality of the oppressions that peasant peoples encounter as consequence of food crises, globalisation, capitalism, neoliberalism in agriculture and natural resources grabbing. Also, there was a strong commonality in the ways multinational agricultural companies and global natural resource grabbers had dispossessed peasants and other rural peoples and workers of their land and other means of production, for instance through recourse to various market mechanisms.²²

At the request of the peasant representatives, the experts turned their focus and attention to scrutinizing the comprehensive body of information assembled annually by grassroots peasant movements like La Vía Campesina and FIMARC (Fédération Internationale des Mouvements d'Adultes Ruraux Catholiques, International Federation of Rural Adult Catholic Movements), enacting its human rights standard-setting mandate to commence drafting an international legal instrument on the rights of peasant peoples

¹⁸ A/HRC/RES/21/19.

¹⁹ A/HRC/RES/21/19, para. 6.

²⁰ Some of these grievances are echoed in the Preamble to the Declaration.

²¹ For further references on this process, see e.g. P. Claeys, M. Edelman, 'The United Nations Declaration on rights of peasants and other people working in rural areas' to *The Journal of Peasant Studies* (2019), <https://www.universal-rights.org/wp-content/uploads/2019/11/The-United-Nations-Declaration-on-the-rights-of-peasants-and-other-people-working-in-rural-areas.pdf>; F. Seatzu 'Land Grabbing', in C. BINDER, M. NOWAK, J. A. HOFBAUER and P. JANIG (eds.), *supra* n. 5, at 12., also recalling that: 'Efforts date back to 2001, when La Vía Campesina (LVC), a global movement of peasants and agricultural workers, first brought issues related to peasants' rights to the UN's attention during the debates on the 'right to development' taking place at the now dissolved UN Human Rights Commission.

²² See e.g. D. A. Ide, 'Socialism without Socialists: Egyptian Marxists and the Nasserist State, 1952-65', https://etd.ohiolink.edu/apexprod/rws_etd/send_file/send?accession=toledo1430392180&disposition=inline

to address the protection gap.²³ During the fourth session of the OEIWG, in 2017, the experts resolved to elaborate a draft declaration on peasant peoples' human rights ('Draft Declaration') inspired by La Campesina's Declaration of the Rights of Peasants

Women and Men of 2002.²⁴ According to Vincent Delobel, an organic goat farmer, each and every article of the UN Draft Declaration was said to be an: '... an historical recognition of this very particular social form that is the nourishing family farm autonomous in resources and decision-making, with diversified production' and its role in the balance of our democracies'.²⁵

The above-mentioned passage shows how peasant peoples and rural workers who participated in the drafting of the UN Declaration viewed it as extending already existing international human rights rules and standards pertaining to the individual to the collective; extending existing human rights, rather than introducing new ones. The final text of the Draft Declaration was concluded by the OEIWG in 2012, and in the same year it was also presented at the nineteenth session of the Human Rights Council Sub-Commission at its 45th session for its adoption.

The OEIWG had a complex history, which has been widely illustrated in the legal literature.²⁶ The *prima facie* insuperable challenges included: disputation over interpretation and application of the right to biodiversity and the right to seeds and the extent of the scope of rights pertaining to lands and other natural resources. In the end however, the HRC developed a text, which was transmitted to the HRC and then to the UN General Assembly. In its fifth session in September 2018, the HRC adopted the text with a recorded vote of 33 votes in favour, to 3 against, and 11 abstentions. The UNDROP's final adoption by the UN General Assembly occurred in December of the same year.

Although peasants and other people working in rural areas expected the UNDROP to be adopted by consensus, there was a lack of agreement on the draft text that imposes its referral to vote.²⁷ In particular, some economically developed states had several concerns in relation to its necessity and content. The United Kingdom and Hungary claimed the need to have more time to consider the implications of the right to seeds and biodiversity for their legal systems, and wished deferral of the Declaration.²⁸ To many this did not come as a surprise, given that these countries, like every European country, voted against the creation of the working group on a United Nations declaration on the rights of peasants and other people working in rural areas (Resolution 21/19). In contrast, Latin American countries such as Bolivia, Cuba, as well

²³ See e.g. C. Bolzoni, 'Approaching a United Nations declaration on peasant rights', <https://sustainablefood-trust.org/articles/united-nations-peasant-rights/>; M. Edelman, J. Carwil, *supra* note 4 at 81–108.

²⁴ On this Declaration that was adopted by the International Conference of La Vía Campesina in Maputo in 2008, see e.g. LA VÍA CAMPESINA, 'Declaration of Rights of Peasants - Women and Men', <https://viacampesina.org/en/wp-content/uploads/sites/2/2011/03/Declaration-of-rights-of-peasants-2009.pdf>

²⁵ See V. Delobel, 'The peasant farm: dignity, respect and mother earth in the Declaration' in *The Journal of Peasant Studies*, (2019) 13 ff.

²⁶ See Christophe Golay, *supra* n. 4, at 30.

²⁷ See F. Seatzu, *supra* n. 5.

²⁸ See the OEIWG's official website at: <https://www.ohchr.org/EN/HRBodies/HRC/RuralAreas/Pages/4th-Session.aspx>

as countries like South Africa and Russia have supported broad recognition of the new Declaration on peasants' rights.²⁹

The EU and other Western countries questioned whether new rights such as the right to seeds, the right to land, the right to biodiversity, the right to food sovereignty and the right to the means of production may be wrongly interpreted and understood as a 'special treatment' for peasants.³⁰ Australia, Hungary and the United Kingdom seem to believe that the UNDROP set a bad precedent.³¹

In the following years, several writers and policy makers contested this view by arguing that the peasants' rights proposed in the UNDROP are not 'special' rights but are rather articulations of existing human rights, structured to peasants' needs and contexts.³² Much in the same line of reasoning lies the Advisory Committee to the HRC that considered peasant claims as legitimate because they were brought by a strong and well recognised transnational social movement uniting small-scale farmers and peasant organisations speaking in their own name. With the Western countries concerns allayed, on 22 December 2018, the UN General Assembly adopted the text of the Declaration on the Rights of Peasants and Other People Working in Rural Areas.

III. UNDROP: A BRIEF SURVEY OF ITS CHARACTER AND MAIN CONTENTS

The elaboration of a normative framework of peasant peoples' fundamental rights and freedoms in international law has attracted extensive academic and policy attention, especially during the last decade. In its draft form, the UNDROP was the topic of some scholarly and policy analysis ranging from its origins, its progress through the OEIWG, the normative status of its content, its contribution to standard-setting and the role played by peasant representatives and international NGOs in the drafting of the Declaration's articles.

The UNDROP has prompted literature to turn towards its formal status in general international law, the interpretation to be given to its main provisions and especially to Article 19 on the right of peasants to develop their own seeds and traditional knowledge and the fixation on the complex relationship between the right of states to food sovereignty and peasants' rights.

In terms of the normative content, there is a growing body of academic and policy literature that expounds on natural resources, collective rights versus individual rights, the right to biodiversity, the right to drinking water and sanitation and the right of peasants to participate, directly and/or through their representative organisations, in

²⁹ Ibidem.

³⁰ Ibid.

³¹ Ibid.

³² See in this sense e.g. Priscilla Claeys, Marc Edelman, *supra* para. 3, p. 1, insisting in particular on the 'special relationship' peasants and rural workers have to land, water and nature, as well as their vulnerabilities to eviction, hazardous working conditions and political repression.

all decision-making processes that may affect their lives and livelihoods.³³ Another noteworthy feature of this literature is the emphasis on the present and future role of human rights mechanisms in monitoring and implementing the Declaration.³⁴

The literature has fluctuated between claiming the UNDROP is partly or completely binding general international law to being a mere political statement.

This next section is organised into two parts as follows. Part A will examine the content of the Declaration and, in particular, focus on two provisions that have attracted significant attention and comments: a) whether the rights and freedoms contained in the UNDROP are existing or *sui generis* rights; b) art 19; and c) Article 12 (3). Part B will critically scrutinise the existing body of policy and academic literature on the normative status of the Declaration and here the focus will be put respectively on general international law and soft law.

A. Content

The Declaration is composed of a long preamble and 28 articles. The preamble starts by recalling the historic and current injustices experienced by peasants and rural workers such as poverty, hunger and malnutrition, the need to respect and promote their inherent rights and freedoms, and the importance of eradicating all forms of discrimination against them. Moreover, it acknowledges peasants as individuals equal to all other individuals. By doing so, UNDROP acknowledges that peasants, like other individuals, have a right to development that defines in the preamble as: ‘... an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised’ (Preamble).

The term ‘peasant’ has been broadly qualified, for the purpose of the Declaration, as encompassing: ... 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-monetised ways of organising labour, and who has a special dependency on and attachment to the land (Article 1). The same Article 1 specifies that: ‘The [...] 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 [...] [and 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’.

³³ Amplius, see S. Monsalve ‘The Human Rights Framework in Contemporary Agrarian Struggles’ 40 *Journal of Peasant Studies* (2003), 239 ff. See also D. González Núñez, ‘Peasants’ Right to Land: Addressing the Existing Implementation and Normative Gaps in International Human Rights Law’ 14 *Human Rights Law Review* (2014) 589 ff, also for references to the literature on this issue.

³⁴ See Geneva Academy, The role of UN Human Rights Mechanisms in monitoring the implementation of the UNDROP, available at: <https://www.geneva-academy.ch/joomlatools-files/docman-files/The%20Role%20Of%20Human%20Rights%20Mechanisms%20In%20Monitoring%20The%20United%20Nations%20Declaration%20On%20The%20Rights%20Of%20Peasants.pdf>

Article 2 lays down the general duties and obligations of states to respect, protect and fulfill the rights of peasants and other people working in rural areas. Of these obligations it is the obligation to redress the unequal situation of peasants facing human rights abuses by individuals and transnational corporations and other business enterprises that is particularly relevant (Article 2 (5)).

The rest of the articles of the Declaration groups the rights and freedoms contained in the UNDROP into themes: (1) the right to determine their own food and agriculture systems; (2) life, integrity and security; (3) education and public information; (4) participatory rights including the right to have access to and to use in a sustainable manner the natural resources present in their communities that are required to enjoy adequate living conditions; (5) non-discrimination rights; (6) lands, seeds and other natural resources; (7) and cultural and religious identity. Articles 3, 4, 5 and 6 recognise general principles pertaining to equality. This cluster of rights includes art 3, affirming the right to participate in the management of natural resources, art 4, which qualifies this as a right to participate in a fair and equitable sharing of the benefits that arise out of their utilisation, and art 6 (2), proclaiming the right not to be subjected to arbitrary arrest or detention, torture or other cruel, inhuman or degrading treatment or punishment.

With the exception of Article 12 focusing on the right to effective access to justice, Articles 6–12 contain rights to life, security, mobility and association. Articles 13–15 express the right to work and the right to an adequate standard of living. Pursuing the objective of granting protection to peasants against non-discrimination, UNDROP provides in Article 16 (6) that states shall, inter alia, ensure fair wages and equal remuneration for work of equal value, without distinction of any kind. Moreover, it also provides that states must eliminate and prohibit all forms of discrimination relating to the right to land, including those resulting from change of marital status, lack of legal capacity or lack of access to economic resources (Art 17 (2)).³⁵ Furthermore, states shall guarantee access to health facilities, services and goods in rural areas on a non-discriminatory basis (Art 23 (3)). They shall also recognise the natural commons and their related systems of collective use and management of resources (Art 17(3)). Articles 17–22 pertain to the right to land and other natural resources. Articles 18–23 deal with the right to health and well-being including special measures for addressing social disadvantage. Articles 24–26 contain the right to enjoy their own culture and to pursue their traditional knowledge.

Article 27 is concerned with the role that specialised agencies, funds and programmes of the United Nations system, and other intergovernmental organisations, including international and regional financial organisations, shall play to contribute to the full realisation of the UNDROP.³⁶ Finally, art 28 renders all the articles subject to existing

³⁵ On the discriminations against peasants, see also the *Final study of the Advisory Committee on the advancement of the rights of peasants and other people working in rural areas*, available at: <http://www.righttofood.org/wp-content/uploads/2012/09/A-HRC-19-751.pdf>, where the Advisory Committee identified the vulnerable groups working in rural areas that are subject to discrimination, including smallholder farmers, landless workers, fisher-folk, hunters and gatherers.

³⁶ See M. Natalia Pacheco Rodríguez, L. Fernando Rosales Lozada, 'The United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas: One Step Forward in the Promotion

international human rights law rules (Art. 2 (4)). This means that the rights are relative and shall be balanced with the rights of others.

1. *New Rights or Existing Rights?*

Part of the current debate and discussion on the content of the UNDROP has been the question of whether the provisions contained therein are existing provisions or whether they are new and distinct rights. The view supported by the large majority of Western States is that they are not new rights but merely an extension of what already exists in the human rights universe.³⁷ According for instance to Christophe Golay, the UNDROP does not attempt to bestow peasant peoples or other rural workers with a set of new human rights, but rather provides a contextualised elaboration of general human rights and principles as they relate to the specific cultural and social circumstances of peasant and rural peoples.³⁸

This view was also shared and supported by the Chair-Rapporteur at the Human Right Council's twenty-sixth session, Angélica C. Navarro Llanos, who observed that: "many provisions in the *UN* draft declaration reflected the application of existing rights to the specific needs and vulnerabilities of peasants, or reflected provisions existing in other international instruments *such as the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)*".³⁹ And traces of this view are also discernible in the pertinent legal literature.⁴⁰

Even so, there is still room to argue that peasant rights are at least partially *sui generis* rights. If it were not so, it would be hard to understand why it took so long for the claims of peasant peoples to be addressed seriously within the UN institutional framework, and also why the negotiations on the right to land, the right to biodiversity and the right to seeds were difficult during the whole process. Professor Margot Salomon captured this point very well when she discussed the gains achieved in the peasants' rights process in light of the broader debate between pragmatists and nihilists about whether to reject or strategically deploy international human rights law, and also when she argued more specifically that the UNDROP endorses 'benefit-sharing' from the exploitation of genetic resources as a solution to manage the alienations and contradictions of capital accumulation.⁴¹ In any event, in the thrust and cut of the battle, it is likely that neither

of Human Rights for the Most Vulnerable', 123 *Research Paper* (November 2020) available at: <https://www.southcentre.int/wp-content/uploads/2020/11/RP-123.pdf>, claiming that: 'These provisions have a high potential to trigger renewed attention and joint efforts of the UN system in favour of rural areas. OHCHR, FAO, ILO, UNDP, and all other UN agencies have an essential role in raising awareness and contributing to the implementation of the Declaration from their respective mandates'.

³⁷ For further references on this issue, see e.g. C. Golay, *supra*, n. 4 at 30 ff; L. Cotula, *supra*, n. 3 at 504 ff; Simone Vezzani, *supra* n. 15, at 211 ff.

³⁸ See C. Golay, *Legal reflections on the rights of peasants and other people working in rural areas. Background paper*, Geneva: Geneva Academy, 2013, available at: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGPLeasants/Golay.pdf>

³⁹ A/HRC/26/48.

⁴⁰ See e.g. C. Golay, *supra* n. 38, also stressing that: 'recognising new rights in a new instrument aimed at protecting a specific category of people is [to] conform to UN practice'.

⁴¹ See M. Salomon, *supra* n. 9.

‘prominent peasant representatives’ nor their local communities are overly concerned with the theoretical weakness of claiming that these *sui generis* rights are existing rights even if that is what they are in reality. As states and international organisations progressively enforce the UNDROP and this practice has a direct impact upon the lives of peasant peoples and rural workers, speculation such as Professor Margot Salomon’s becomes the almost exclusive domain of academics.⁴²

As Luis Fernando Rosales Lozada argues, the fact is that regardless of the remaining uncertainties about its normative status, domestic and international courts and quasi-judicial bodies have gradually yet insufficiently started to make use of the Declaration as adopted.⁴³ And this is so, even if the suggested ways of protection and implementation of the rights are often formulated in the UNDROP rather vaguely as state duties and obligations and not as individual rights. In particular, statements according to which: ‘States shall take appropriate measures to ensure and guarantee the relevant rights’ or that: ‘States shall adopt measures to ensure that they have access to relevant, transparent, timely and adequate information in a language and form and through means adequate to their cultural methods’, are indicative of said ambiguity.

Analogously, Robin Dunford suggests one of the challenges of the UNDROP is that there is no consensus amongst states and international institutions on how to identify and balance peasants and other human rights in the public interest, and there is no consensus amongst peasant groups themselves on how this is to be done.⁴⁴ Conversely, it is evident and clear that each and every day, courts and governments with peasant populations in their jurisdiction grapple with the identification and contest of peasant and rural workers’ rights. Yet, frequently during the drafting of the Declaration, states would invoke examples in their own domestic jurisdiction to illustrate where their law and policy was located in relation to the threshold of minimum standards (although this was much to the frustration of peasant peoples and their representatives because states are not allowed to use domestic law to prevent the development of international law rules and standards).

Even so, and additionally to this, the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) has not rarely dealt with the issue of how to identify and balance farmers rights as set out in Article 9 of the ITPGRFA⁴⁵ and over the years has provided us with a body of resolutions on how states

⁴² Informations on the implementation of the UNDROP are available at: <https://viacampesina.org/en/the-implementation-of-the-undrop-analysis-from-the-ground/>

⁴³ See e.g. the Joint Statement, adopted in December 2019 by nine UN Special Rapporteurs and four Members of UN Treaty Bodies, calling for the establishment of a new UN Special Procedure on the rights of peasants; C. Golay, “The role of human rights mechanisms in monitoring the United Nations Declaration on the Rights of Peasants”, Research Brief (Geneva, Geneva Academy, 2020), available at: <https://www.geneva-academy.ch/joomlatoolsfiles/docmanfiles/The%20Role%20Of%20Human%20Rights%20Mechanisms%20In%20Monitoring%20The%20United%20Nations%20Declaration%20On%20The%20Rights%20Of%20Peasants.pdf>; See also, stressing the importance of passing national laws that incorporate UNDROP concepts and language and of engaging with regional systems, such as the Inter-American Commission on Human Rights and the European Union.

⁴⁴ See R. Dunford, ‘Peasant Activism and the Rise of Food Sovereignty: Decolonising and Democratising Norm Diffusion?’ 23 *European Journal of International Relations*, (2017) 145–167.

⁴⁵ This treaty which entered into force on June 29, 2004 provides that the implementation of farmers’ rights at national level should entail: 1. the “protection of traditional knowledge relevant to plant genetic re-

may balance rights, the most notable example perhaps being the report by the Expert Group to the Eighth Session of the ITPGRFA on the Implementation of farmers' rights.⁴⁶

It is worthwhile to consider, nevertheless, Kamalesh Adhikar's critical point about the lack of consensus among states and peasant peoples and other rural workers themselves on how to balance their rights with other human rights.⁴⁷ In particular, there is no universal consensus on how states and peasant peoples balance their collective rights with the individual rights of the group internally. It is hard (if not impossible) to draw broad generalisations on this issue since it depends on the jurisdiction and the specific peasant group.⁴⁸ The disagreement among the Contracting Parties on how to address farmers' rights and duties under Art 9 of the ITPGRFA furnishes good though only indirect confirmation of this difficulty.

A further example that indicates the challenge of the international legal framework applicable to peasants and rural workers is balancing the rights of the most vulnerable within any collective, such as women.

In regard to the case of Brazil and the federal government's response⁴⁹ to the findings of both public and private reports and documents on the marginalisation of peasant women's land rights by governmental institutions, two competing views are possible. One possible view was that land rights – a fundamental part of the peasant's human rights framework – were almost neglected in favour of other women's rights issues such as the prevention of gender-based violence and the promotion of the human rights of women and girls before, during, and after conflict. On the other hand, there is another possible view that the seriousness and frequency of abuses of women's land rights warranted an 'intervention'. Even so, the NAP constitutes a critical juncture in the history of peasant women's rights and welfare in Brazil because it highlighted the inherent tension between collective rights, individual rights and gender equality rights.

What we do know for sure is that, until the UNDROP, peasant women were rarely considered as such by women's national action plans because of the presumption that they fall under the category of 'peasant people'. Yet the challenge remains that the UNDROP augments peasant women's position as one of vulnerability within peasant communities and groups and arguably entrenches in general international law the structural inequalities that exist within states that neglects and marginalise

sources of food and agriculture"; 2. "the right to equitably participate in sharing benefits arising from the utilisation" of such resources; and 3. "the right to participate in making decisions on matters related to conservation and sustainability use of plant genetic resources for food and agriculture." On the subject see e.g. D. Breen, 'Farmers' Rights as Human Rights', available at: https://www.academia.edu/5434645/Debuque_Teresa_Lingan_ed_Farmers_Rights_as_Human_Rights

⁴⁶ The report is available at: <http://www.fao.org/3/na792en/na792en.pdf> See also FAO, 'Exploring the Human Rights-Based Approach in the Context of the Implementation and Monitoring of the SSF Guidelines. Workshop Proceedings,' available at: <file:///Users/francescoseatzu/Downloads/i6933e.pdf>

⁴⁷ See K. Adhikari, E. Bikundo, X. Chacko, S. Chapman, F. Humphries, H. Johnson, E. Keast, C. Lawson, J. Malbon, D. Robinson et al., 'What Should Farmers' Rights Look Like? The Possible Substance of a Right' in *Agronomy* (2021), available at: <https://doi.org/10.3390/agronomy11020367>

⁴⁸ Ibidem.

⁴⁹ See the Brazilian's National Action Plan on Women, Peace and Security (NAP) of 2017, available at: http://funag.gov.br/loja/download/1220-PNA_ingles_final.pdf The NAP, adopted for the period 2017-2019, was subsequently renewed for four years.

peasant women by stressing their ‘special needs’, as opposed to their unique status and condition as peasant women and as human rights-bearers. For instance, art. 4 (1) provides that the state has an obligation to ‘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’.

Aside from the women-specific provisions in the UNDROP, international law offers no guidance as to how peasant women are situated within the normative framework of farmers’ rights: especially, whether true peasant rights may ever be achieved if women do not live in safety and are unable to maintain land rights in their home villages.⁵⁰ After all, international law sets minimum standards of behaviour for sovereign states and it is left to the state to establish, though always in consultation and co-operation with peasant peoples, how peasants’ human rights shall be achieved internally. Therefore, most depends on how peasant women’s rights are introduced and enforced in the domestic legal orders.

2. Articles 5 and 18

Naturally, the peasant right to land has been the subject of extensive commentary since the adoption of the UNDROP. The reason is five fold. First, Article 1 of the UNDROP explicitly identifies the special relationship with land as one of the key characteristics of peasants and other people working in rural areas.⁵¹

Second and strictly related to the first one, land and natural resources have an inalienable character for peasants and other people living in rural areas, as confirmed by the fact that without land and natural resources peasants lose their specific character and dignity as humans. Third, the UNDROP contains not one but two articles dedicated entirely to the right to land and other natural resources. These articles are articles 5 and 17, defining the right to land and other natural resources, along with states’ duties and obligations. Fourth, land is a fundamental human right that is indispensable for the

⁵⁰ See also CEDAW Committee’s General Recommendation No. 34 on the rights of rural women (UN doc CEDAW/C/GC/34, 4 March 2016, para. 63, recognising that rural women’s right to seeds is a fundamental human right).

⁵¹ Article 1 reads as follow: ‘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’.

realisation of numerous other peasant human rights such as the right to be free from hunger, the right to adequate food, the right to the conservation and protection of the environment, the rights to participation, information, and access to justice.⁵² Fifth, the right to land is an indispensable instrument to fight against land grabbing and human rights abuses by agribusiness companies.

The Coordinator of the Access to Natural Resources Programme at FIAN International, Sofia Monsalve Suárez, explained in detail the meaning of land and other natural resources rights for peasant peoples and other rural workers and her exposition of land and other natural resource rights under the UNDROP is often cited by academic scholars and policy makers.⁵³ Like other authors who preceded her in writing on this subject,⁵⁴ Sofia Monsalve insisted on the fact that international human rights law traditionally guarantees only limited protection to land rights.⁵⁵ Although States cannot arbitrarily deprive people of their property (nor can they evict settled communities that rely on a piece of land), people lack legal title to their property without meeting certain conditions. At the outset of the OEIWG, most states did accept peasant peoples' right to land and territory, while some states and even some peasant movements maintained concerns that the proclamation of new human rights in general and of a new 'right to land and territory' in particular was not a priority for peasant peoples. As the Advisory Committee summed up in its final study to the HRC:

*Some States can accept the view that the adoption of a new instrument — initially, a declaration — was the best way to further advance the protection of the right to land and of other peasant rights. Other States cannot accept this conclusion in part because they believe that this right is already protected in international human rights law including the International Covenant on Economic, Social and Cultural Rights (ICESCR).*⁵⁶

At multilateral standard-setting conferences, it is of crucial importance to reach a consensus amongst all the participant states.⁵⁷ Without raking over the history of the debates on peasant land rights, since that has been addressed in substantial pre- and post-adoption academic writings,⁵⁸ it was only at the 39th OEIWG session that the expression 'right to' land was used in the text of the UNDROP to replace the expression "access to", which was universally deemed to carry less weight.⁵⁹ Of course, this was controversial amongst some delegations at the OEIWG because the references to the 'right to land' and especially to land reform was understood as creating new duties and obligations for

⁵² See e.g. O. De Schutter, 'The Emerging Human Right to Land' 12 *International Community Law Review*, (2010) 303–34.

⁵³ See S. Monsalve, *supra* n. 33, at 584 ff.

⁵⁴ See e.g. J. Gilbert, 'Land Rights as Human Rights: The Case for a Specific Right to Land' 10 *SUR International Journal on Human Rights* (2013), 115, recalling that land rights are not typically perceived to be a human rights issue but only an issue concerning property rights.

⁵⁵ Some exceptions are Articles 10, 18, 26, 28 and 32 of the Declaration on the Rights of Indigenous Peoples.
⁵⁶ Final study of the Human Rights Council Advisory Committee (on the advancement of the rights of peasants and other people working in rural areas), UN doc. A/HRC/19/75, 24 February 2012, para. 63.

⁵⁷ See U. Lindell, 'The Consensus Rule in Two International Conferences' 22 *Cooperation and Conflict*, (1987) 115 ff; R. Sabel, *Procedure at International Conferences. A Study of the Rules of Procedure at the UN and at Inter-governmental Conferences*, (CUP, Cambridge, 2009).

⁵⁸ See e.g. C. Golay, *supra* n. 4 at 30 ff.

⁵⁹ A/HRC/RES/39/12.

States. One delegation called for a legal basis in cases of expropriation and for equitable compensation.⁶⁰ Other delegations pointed out that instruments on specific groups dealt with their specific rights and that the right to land was not a new human right but an already existing right of peasants that should be explicitly acknowledged in the Declaration⁶¹. At this time, the Chairperson also attempted to counter state fears about land reform by clarifying that this obligation did not concern countries that already gone through the process but those that still needed to do it.⁶² This position was supported by several civil society organisations and independent experts that pleaded for the current version of Article 18 and pointed out that land reform was already mentioned in the FAO Voluntary Guidelines and the ICESCR as well as in the 2030 Agenda for Sustainable Development and the Sustainable Development Goals (SDGs).⁶³

Discussion in the literature has concentrated on whether or not the right to land as recognised in the UNDROP delimits or expands the right.⁶⁴ Once this breakthrough was reached, the re-drafting and compromise on all the other relevant articles was relatively swift with the notable exceptions of the right to seeds and the right to biodiversity.

According to Christophe Golay, Articles 5 and 18 offer important opportunities to push for agrarian reform and for the recognition of peasants as rights-holders at national, regional, and international levels.⁶⁵ Corina Heri, on the other hand, reads these rights as simply a reflection of existing international human rights law: despite the uncertainties surrounding land rights, one thing has always been fairly clear, namely that the claims made in this relation to these rights are neither new nor niche. Heri goes so far as to argue that these claims relate to universal human rights entitlements and have existed at least since the drafting of the UDHR of 1948.⁶⁶

3. Article 19

The peasant right to seeds is another right that has attracted extensive comment and a lot of academic and policy analysis since the adoption of the UNDROP.⁶⁷ There are competing interpretations of the negotiated outcome of the Declaration, which range from ‘groundbreaking’ to expressions of harsh disappointment at the ‘capitulation’ of peasant representatives to the state.⁶⁸

⁶⁰ Ibidem.

⁶¹ Ibid.

⁶² Ibid.

⁶³ See INTERNATIONAL LAND COALITION, ‘The Right to Land and the UNDROP’, available at: <https://learn.landcoalition.org/en/manuals-toolkits/right-land-undrop/>

⁶⁴ Ibidem.

⁶⁵ See C. Golay, ‘The Right to Land and UNDROP’, available at: [https://www.geneva-academy.ch/joomla-tools-files/docman-files/Guide%20to%20the%20right%20to%20land%20and%20UNDROP%20\(1\).pdf](https://www.geneva-academy.ch/joomla-tools-files/docman-files/Guide%20to%20the%20right%20to%20land%20and%20UNDROP%20(1).pdf)

⁶⁶ See C. Heri, The Human Right to Land, for Peasants and for All: Tracing the Social Function of Property to 1948’ 20 *Human Rights Law Review* (2020) 433–452.

⁶⁷ See e.g. H. Morten, ‘The UN Declaration on Peasants’ Rights (UNDROP): Is Article 10 on seed rights adequately balancing intellectual property rights and the right to food?’ 23 *The Journal of World Intellectual Property* (2020) 288–309.

⁶⁸ Compare the authors attitudes towards the UNDROP in the essays by Margot Salomon (*supra* note 9) and Coline Hubert (*supra* note 16).

By way of historical background, the major obstacles to peasant peoples' advocacy on the human right to seeds were the intellectual property rights of agricultural MNCs on plant varieties and seeds.⁶⁹ Peasant's right to seeds therefore became synonymous, in the minds at least of sovereign states and MNCs, with threats to their economic interests and powers.⁷⁰ Nevertheless, seed rights – and especially the right to save, use, exchange and sell their farm-saved seed or propagating material and the right to the protection of traditional knowledge relevant to plant genetic resources for food and agriculture – appealed to peasant peoples as anchoring their struggles within MNC and WTO agreements.⁷¹

Hence, as Zoë Goodman points out in her study concerning intellectual property rights on seeds in international human rights law,⁷² it was the 2000s when peasant peoples, having seen their fundamental rights recognised in the text of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) (Article 9),⁷³ began to turn to international law as a consequence of the protection gap in fundamental rights in domestic jurisdictions and the lack of recognition for peasant people's rights. The right to seeds, expressed as the right to preserve the food sovereignty of peasants, came to represent the fundamental principle underpinning peasant peoples' advocacy.⁷⁴

Almost universally, peasant peoples (especially farmers)⁷⁵ had been institutionalised to the extent that almost every aspect of their working activities was either directly or indirectly controlled by the state and heavily influenced by MNCs.⁷⁶ As each trend in peasant policy emerges and subsides, the idea that peasant peoples should have some control over the decisions that are made about their work, land and seeds took hold in peasant political advocacy.⁷⁷

⁶⁹ See C. Golay, *The Right to Seeds and Intellectual Property Rights*, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGPleasants/Session4/Geneva_Academy-Right_to_seeds.pdf (at 36).

⁷⁰ Ibidem.

⁷¹ See R. Andersen, 'The History of Farmers' Rights', <https://www.fni.no/getfile.php/131903-1469869845/Filer/Publikasjoner/FNI-Ro8o5.pdf>, recalling that for over 10,000 years, peasants have freely saved, selected, exchanged and/or sold farm-saved seeds, as well as used and reused them to produce food.)

⁷² See Z. Goodman, *Seeds of hunger: intellectual property rights on seeds and the human rights response*, <https://www.ideaspaz.org/tools/download/47066>

⁷³ In Article 9 of the ITPGRFA, states recognised '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'.

⁷⁴ On the meaning and content of the right to seeds, see also Christophe Golay, *supra* note 69, pointing out that small farmers' right to seeds, as defined in the Declaration, contains four elements: 1. the right of small farmers to save, use, maintain and develop their own varieties and seeds; 2. the obligations of States to respect, protect and promote small farmers' seed systems; 3. the obligations of States to ensure that agricultural research and development is oriented towards the satisfaction of small farmers' needs and take into account their experience; 4. The right of small farmers to save, use, exchange and sell farm seeds, produced by themselves but derived from protected seeds.

⁷⁵ On the difficulties concerning the definition of farmers and their relative rights, see e.g. K. Adhikari, E. Bikundo, X. Chacko, X. Chapman, 'What Should Farmers' Rights Look Like? The Possible Substance of a Right' 11 *Agronomy*, (2021), <https://www.mdpi.com/2073-4395/11/2/367>

⁷⁶ Amplius, see M. Coulibaly, P. Claeys, A. Berson, 'The Right to Seeds and Legal Mobilisation for the Protection of Peasant Seed Systems in Mali' 12 *Journal of Human Rights Practice* (2021) 479 ff.

⁷⁷ For references on this issue, see Christophe Golay, *supra* n. 4 at 30 ff.

Dr. Golay elucidated the meaning of seeds for peasant peoples and his exposition of the right to save, use, exchange and sell their farm-saved seed or propagating material and of the relationship between farmers' rights and plant breeders' rights is largely recalled in legal literature. Golay distinguishes between the right to seeds as an individual right and as serving a social and political purpose.⁷⁸ This distinction is important, not only from a theoretical point of view but also in practical terms. At the outset of the OEIWC, several Western states and in particular the United Kingdom maintained concerns regarding seed rights as collective human rights. These concerns were also voiced in legal literature.

Discussion in the literature has mainly focused on whether or not peasants share enough of the 'social and cultural features of groupness' to qualify for the status of rights-holders of collective rights.⁷⁹

Much has also been written and said about the above-mentioned 'capitulation' of peasant representatives to the state. According to Priscilla Claeys and Marc Edelman, the UNDROP seals the deal: the primacy of human rights, and of the Declaration, over national law and other international agreements such as those on trade and intellectual property rights, was not mentioned in Article 19.⁸⁰

Authors like Hans Morten Haugen, on the other hand, seems to attach less importance to this omission, given that in their view other international human rights instruments such as for instance the ICESCR and the Convention on the Elimination of All Forms of Discrimination against Women could be used to direct states to improve peasants' livelihoods, including seeds.⁸¹ Substantially the same approach to this issue is also found in Karine Peschard and Shalini Randeria's recent analysis, in the part where it is stated that: '... according to Art. 2.4 of the UNDROP, States shall elaborate, interpret and apply relevant international agreements and standards to which they are party, including those protecting intellectual property rights, in a manner consistent with the Declaration'.⁸² Haugen and *La Vía Campesina* went even further than that when they argued that: '... the UNDROP will serve as a legal tool to re-establish the primacy of the collective rights of local communities to natural resources over private property rights to profit from their commercialisation'.

B. The UNDROP Character

The above discussion of the content of the UNDROP highlighted the discursive nature of the writings on the UNDROP. This is understandable because of the competing ideas

⁷⁸ See C. Golay, *supra* n. 69 at 36.

⁷⁹ See *ex multis* M. Jovanović, 'Constructing Legal Personality of Collective Entities – The Case of "Peasants"', 13 *Social Science Research Network*, (2015), <http://ssrn.com/abstract=2599926>. See also Will Kymlicka, 'Derechos individuales y derechos colectivos', in M. Paz Avila Ordóñez, M. Belén C. Ledesma (eds.), *Los derechos colectivos: hacia su efectiva comprensión y protección* (Ministerio de Justicia y Derechos Humanos, Quito, 2009) 3 to 25.

⁸⁰ See P. Claeys, M. Edelman, *supra* n. 5 at 23.

⁸¹ See H. M. Haugen, 'The UN Declaration on Peasants' Rights (UNDROP): Is Article 19 on Seed Rights Adequately Balancing Intellectual Property Rights and the Right to Food?' 13 *Journal of World Intellectual Property* (2020) 1–22.

⁸² See K. Peschard, S. Randeria, 'Keeping seeds in our hands': the rise of seed activism' 47 *The Journal of Peasant Studies* (2020), <https://www.tandfonline.com/doi/full/10.1080/03066150.2020.1753705>

of what a ‘declaration’ constitutes in international law. The following section analyses the question of soft law versus hard law and then general international law.

I. International Soft law

Prima facie at least UNDROP may be classified as an international soft law instrument that does not introduce new legally binding duties and obligations on states. An argument that supports this classification is in the language employed by the UNDROP articles that is largely hortatory rather than mandatory in character. For some lawyers, especially practicing lawyers, it may be complex to be confronted then with the classification of UNDROP as a legal instrument that is neither ‘non-binding’ nor ‘soft’. Professor Gunther Handl suggests that this may indeed turn out to be a problem given that the dichotomy between hard and soft law does not any longer show how international law operates in practice.⁸³

Analogously, Hans Morten Haugen embraces the same view and position as Gunther Handl when he makes abundant recourse to the drafting history of UNIDROP to explain the meaning of a core provision such as Article 19 on seed rights.⁸⁴

On the other hand, Professor Margot Salomon seems to consider the UNDROP’s soft international status as part of a strategy that by assigning the interpretation of the UNDROP articles exclusively to the competent state authorities aims at preserving a state monopoly on the protection of peasants’ freedoms and rights together with the survival of their economic institutions of capitalism.⁸⁵ Its productive value at international level is restricted by the interpretative framework that manifestly benefits the state.⁸⁶ Salomon may be largely right, nevertheless it could hardly be claimed that peasants and their representatives were not overall aware of this disequilibrium of powers, especially when one thinks at the early negotiators such as Priscilla Claeys, Marc Edelman and Joanna Bourke-Martignoni; all of whom have confronted themselves with international law, its structure, functioning and its limitations.

Eric T. Hoddy largely insists in his work on the limitations of the international legal project for peasants and rural workers by recalling that prominent peasant representatives and sympathetic international lawyers have embraced the UNDROP despite it being a non-binding international tool.⁸⁷

One concern that one might have with these writings is that several of them deny explicitly or implicitly ‘agency’ to the participants at the drafting of the UNIDROP. There was, among some of these participants, a clear preference for the Declaration to remain a Declaration when approved by the UN General Assembly. And this is to escape the

⁸³ See G. F. Handl, ‘A Hard Look to Soft Law’ 82 *Proceedings of the Annual Meeting (American Society of International Law)* (1988) 371 ff. See also A. T. Guzman, T. L. Meyer, ‘International Soft Law’ 2 *Journal of Legal Analysis* (2010) 171 ff.

⁸⁴ See H. M. Haugen, *supra* n. 81 at 22.

⁸⁵ See M. Salomon, *supra* n. 9.

⁸⁶ *Ibidem*.

⁸⁷ See Eric T. Hoddy, ‘Peasants’ rights and agrarian violence in transitional settings: From transitional justice to transformative agrarian justice’ 20 *Journal of Human Rights* (2021) 91-109.

problems that are always associated with conventions. It may be that the anxiety arises from the preference expressed by peasants, rural workers and their representatives for the UNDROP to remain a non-legally binding agreement in international law.

The awareness is that any effort toward the elaboration of a legally binding instrument on the rights and freedoms of peasants and rural workers would be detrimental for peasant rights and freedoms, since the ratification and effect of any convention would depend on attracting sufficient signatures to become an international instrument and then, even if it did, would necessitate enforcing legislation in all states that follow a dualist approach to the applicability of international law.

The focus on the UNDROP being ‘soft’ law does seem to leave largely unnoticed the impact it may produce on domestic legal orders. This dismissive attitude characterises many even though not all the writings that deal with the Declaration. Yet a partial explanation for this has to do with the scepticism and reservation about the necessity of a specific human rights regime for peasants and rural workers. Another possible concurrent explanation could be the lack of knowledge on how public international law has influenced peasant rights in general and farmer rights in particular in the jurisdictions of those states that are parties to the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA). () And closely related to this explanation, the lack of awareness on the contribution of the Declaration to the development of international human rights law in areas such as the right to land, the right to means of production and the right to seeds.

Internationally, we know that the UNDROP had a major influence on at least one decision by the Inter-American Court on Human Rights namely the *Lhaka Honhat Association v. Argentina* case,⁸⁸ and similarly we know that UNDROP has strongly influenced a report submitted by a group of Colombian rural women to the Committee on the Elimination of Discrimination Against Women (CEDAW).⁸⁹

These and other considerations suggest that the dismissal of UNDROP as a mere soft law instrument denies the way in which the Declaration is producing impact throughout the world. And yet this is unsurprising, given that: “soft law, though not a source of law, remains legally relevant and is therefore a matter governed by international law”.⁹⁰

Peasants and other rural workers have systematically showed through their representatives and especially Vía Campesina that they did not want a treaty since moving to a treaty would require ratifications by the member states to produce their effects. In addition, there could always be reservations that weaken the impact of the Declaration. Vía Campesina claims that for peasants and other rural workers, instead,

⁸⁸ Indigenous Communities of the Lhaka Honhat (Our Land) Ass’n v. Argentina, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 400 (Feb. 6, 2020) [hereinafter *Lhaka Honhat*]. For a commentary, see Margtet Carstens, “Lhaka Honhat Association v. Argentina”: landmark decision on direct justiciability of Article 26 ACHR and the autonomous right to a healthy environment’ 53 *VRÜ. Verfassung und Recht in Übersee* (2020) 492-506.

⁸⁹ Amplius, see S. Monsalve Suárez, ‘Re-grounding Human Rights as Cornerstone of Emancipatory Democratic Governance’ 64 *Development* (2021) 13-18.

⁹⁰ See M. Olivier, The relevance of ‘soft law’ as a source of international human rights’ 35 *The Comparative and International Law Journal of Southern Africa* (2002) 289 ff.

it was essential that, after several years of waiting and the emergence of land grabbing after the 2007-08 food price crisis, the final tool might be immediately effective. This is so given that urgent action is indispensable for the protection of their basic freedoms and rights.

II. General International Law

The focal point of the present work is to define the common threads that arise from a critical analysis of the Declaration. Of course it is not aimed at being an exposition on general international law. It is also important to recall that there is ongoing discussion concerning the foundation and legitimacy of general international law. Nevertheless, in order to survey the writings on general international law it is useful to briefly recall the parameters of general international law as a legal source.

To fulfill the requirements of general international law as indicated by the International Court of Justice (ICJ) in its historical decision on the *North Sea Continental Shelf* case,⁹¹ indispensable is evidence of consistent practice of states in addition to *opinio iuris sive necessitatis* which – to use the same words as Professor David Kennedy from Harvard University – ‘marks the border-line between international comity and international customary law’.⁹² Without entering here into much detail on establishing the test, it is clearly hard to achieve. Having recalled that, once the practice of States and *opinio iuris* are established, the custom can produce binding universal norms, provided that such acts represent a settled practice.⁹³ But as the ICJ has made clear again in its decision on the *North Sea Continental Shelf* case (para. 44): ‘... the acts must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris*’.

In any case, as indicated above, the works by Marc Edelman and James Carwil and some peasants’ rights briefings by FIAN International that parts of the Declaration constitute already general international law sparked a response in the international human rights literature on the premature character of such considerations. Marc Edelman and James Carwil wrote:

“Many of the rights enumerated in the ... *UN Peasants’ Rights Declaration* are rights ... already part of existing international instruments *and of general international human rights law*. Among these are the rights of peasant women and men to freedom of association and expression, physical integrity, personal security, health, food and water for consumption and irrigation, as well as freedom from political persecution and from discrimination ‘based on their economic, social and cultural status’. *While* other rights enumerated in the draft Declaration ... were indicative of an effort

⁹¹ *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, I.C.J. Reports 1969, p.3, International Court of Justice (ICJ), 20 February 1969, available at: <https://www.refworld.org/cases,ICJ,50645egd2.html> [accessed 13 January 2022].

⁹² See D. Kennedy, *The Sources of International Law* 3 *American University International Law Review* (1987) 2 ff.

⁹³ Amplius, see e.g. Hugh Thirlway, ‘The sources of international law’, in Malcom D. Evans (ed.), *International Law* (OUP, Oxford, 2010) 95 ff.

to push existing norms beyond their current bounds, such as claims of a ‘right to reject’ intellectual property of crop genetic material or demands for participation in international economic policymaking processes.”⁹⁴

From the adoption of the Declaration, Denise González Núñez claimed that there is already a distinct body of customary law that accords with the peasant’s right to land.⁹⁵ She conducted a thorough investigation of the current global State practice concerning peasant land. Regardless of the objections to the UNDROP by some economically advanced states like the United Kingdom, New Zealand, Israel and Australia, this does not diminish the contribution those states have already given to state practice when it comes to recognition of peasant land. This customary norm was referred to by the Inter-American Court of Human Rights (IACtHR) in the *Lhaka Honhat Association v. Argentina* case.⁹⁶ Therefore, while it is certainly correct that UNDROP is non-binding in and of itself, to Denise González Núñez, state practice proves that aspects of its operative provisions concerning land and especially the ownership of land by peasants belonging to indigenous groups are already acknowledged by states, including the objectors to the UNDROP.⁹⁷

In her essay dealing with the land rights of rural workers, González Núñez offers a more persuasive argument as to why this may be so. González Núñez is more optimistic about the manner in which an emerging rule can evolve into a binding rule of customary law in contemporary world and thus fill up an existing normative gap. She seems to believe exactly as other international legal writers do⁹⁸ that interactive patterns of states and other influential international actors around specific facts and events are not the only possible constitutive ingredients of customary law provisions. González Núñez suggests that initiatives by transnational movements like La Vía Campesina would also help and indeed help in supporting *the development of new customary law*.⁹⁹

In support of González Núñez’s position, various defenders of peasant rights refer to the fact that the UNDROP was used by international judicial bodies such as the IACtHR as well as by governments in municipal contexts.

Therefore, even in its draft form it was rightly alleged that the normative statement of peasant rights and freedoms had evolved, in part, sufficient practice apropos general international law. So it is that the anxiety often present in international legal writings arises out of the uncharted waters of general international law. Simone Vezzani and Lorenza Paoloni argue that though considering the Declaration or substantial parts of it as general international law may indeed be premature, the document may have noteworthy effects on the development of general international law.¹⁰⁰ Especially, as

⁹⁴ See M. Edelman, J. Carwil, *supra* n. 4 at 94.

⁹⁵ See D. González Núñez, ‘Peasants’ Right to Land: Addressing the Existing Implementation and Normative Gaps in International Human Rights Law’ 14 *Human Rights Law Review* (2014) 589–609.

⁹⁶ See *supra* n. 88.

⁹⁷ See Denise González Núñez, *supra*, note 95, p. 590 ff.

⁹⁸ See e.g. L. Blutman, ‘Conceptual Confusion and Methodological Deficiencies: Some Ways that Theories on Customary International Law Fail’ 25 *EJIL* (2014) 590 to 592.

⁹⁹ See Denise González Núñez, *supra* n. 95, at 600 to 609.

¹⁰⁰ See S. Vezzani, L. Paoloni, “La Dichiarazione ONU sui diritti dei contadini e delle altre persone che lavorano nelle aree rurali: prime riflessioni” 20 *Federalismi.it* (2019), available at: <https://www.academia>.

indicated by the ICJ in its historical opinion on the *Legality of Nuclear Weapons*: ‘UN GA resolutions, even if they are not binding, can ... supply *key* evidence for establishing the existence of a rule or of an *opinio iuris ac necessitatis*’.¹⁰¹

Regarding UN GA Declarations, Stephen M. Schwebel states that GA Resolutions may work as a source of inspiration for the elaboration of new customary practices.¹⁰² Second, such Resolutions can often contribute to expand and enrich existing customary practices.¹⁰³

This is supported by La Vía Campesina, which provides that the UNDROP, whilst lacking the status of a binding treaty, encompasses several human rights principles already protected under international general and conventional law and sets the minimum standards for States Parties’ interactions with the world’s peasants and rural workers.¹⁰⁴

Analogously, Hans Morten Haugen has concluded that the UNDROP as a whole cannot yet be considered as a statement of existing general international law. It nevertheless, encompasses key provisions which correspond to existing State duties under general international law.¹⁰⁵

This leads to consider a corollary concern in the existing legal writings on the Declaration: the study of the endorsement statements by the states who initially voted against the Declaration. As already recalled above, there is a concern in the context of general international law regarding the role of the persistent objector.¹⁰⁶ This is still relevant despite the fact that the states which voted against have generally comparatively stronger land recognition in their jurisdictions than the minimum standard indicated in the UNDROP.

In writing on the endorsement statements by those states, Miguel Ángel Martín López wisely suggests that the anxiety over the original dissenters is often overestimated.¹⁰⁷ Generally, the fact that the UNDROP was not adopted by unanimous vote could undermine its contribution in this specific respect. Nevertheless, a more attentive analysis of the recorded vote suggests that this is not always the case. The limited weight of a resolution would usually result from the consistent opposition of a number of States

edu/39000810/La_Dichiarazione_UNU_sui_diritti_dei_contadini_e_delle_altre_person_e_lavorano_nelle_aree_rurali_prime_riflessioni_

¹⁰¹ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, International Court of Justice (ICJ), 8 July 1996, available at: <https://www.refworld.org/cases,ICJ,4b2913d62.html> [accessed 13 January 2022].

¹⁰² See S. M. Schwebel, ‘The Effect of Resolutions of the U.N. General Assembly on Customary International Law’ 73 *Proceedings of the Annual Meeting (American Society of International Law)* (1979) 301-309.

¹⁰³ See E. Valencia-Ospina, *General Assembly action at the final stage of the process of progressive development and codification of international law by the International Law Commission* (International Labour Office, Geneva, 2019) 161 ff.

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¹⁰⁵ See Hans Morten Haugen, *supra* note 7.

¹⁰⁶ See *supra* Section III, B, 2. On the persistent objector rule, see recently James A. Green, ‘The Persistent Objector Rule in the Work of the International Law Commission on the Identification of Customary International Law’ 17 *Italian Yearbook of International Law Online* (2018), https://brill.com/view/journals/iyio/27/1/article-pr175_1.xml, also for references to other authors.

¹⁰⁷ See M. Lopez, M. Angel, ‘The rights of pastoralist peoples. A framework for its recognition,’ 6 *The Age of Human Rights Journal*, (2016), <https://revistaselectronicas.ujaen.es/index.php/TAHRJ/article/view/2931>.

or even a small number of States provided that these are the States whose interests are especially affected. Indeed a more focused discussion would be required in order to fully evaluate the effects of the Declaration on general international law. With regard to the subjective element of the *opinio iuris*, nevertheless, it would appear that these contrary votes do not represent the view of a significant portion of the international community of states, and thus cannot per se hinder its emergence.

Professor Carlo Focarelli has written thoroughly on the declaration as a GA resolution and how that may contribute to the development of general international law.¹⁰⁸ He claims that the idea that GA resolutions tell us things about states' intentions with regard to international custom requires careful scrutiny.¹⁰⁹ And, in fact, just as participation in a convention does not necessarily permit inferences about the views of Contracting States concerning general international law, we have valid reason to doubt whether GA votes may tell us that much about the views of voting States on international custom.

In surveying the legal framework on this question, Simone Vezzani and Lorenza Paoloni suggest that the enactment of resolutions such as the UNDROP shall not be taken to have an intrinsic impact on general international law, but rather to function as a source of inspiration for future practice.¹¹⁰ While Vezzani and Paoloni seem to concede that their approach is conservative, this approach fulfills a strategic goal since a more modest conception of the effects of its Resolutions on custom has the ability to lessen bitter disagreements of the sort that postponed the adoption of the Declaration by the UN General Assembly and the introduction of conditions for the development of a more satisfactory substantive law.

III. Final remarks

Since the adoption of the UNDROP in 2018 by the UN General Assembly, there has been a consistent body of academic and non-academic writings that has flourished, critically analysing almost every aspect of the drafting process, the status and its content. This paper has sought to put together some of the most significant issues discussed in these writings to bring some new light on the narratives of the UNDROP ranging from a very broad spectrum of academic disciplines.

In all of the different writings that the present author has considered, there is little or no uncertainty that international law has been highly transformative for peasants and other rural workers. Whether we have reached the limit of that potential, whether we have not properly considered the power dynamics embedded in the international legal system, or eventually undermined the progress of vulnerable people's fundamental rights and freedoms – these crucial questions and issues are ones for academic speculation.

¹⁰⁸ See C. Focarelli, *Trattato di Diritto Internazionale*, Torino: UTET, 2015, pp. 507-508.; Id., *International Law as Social Construct* (OUP, Oxford:, 2012) 308-315. See also Id., B. Conforti, *Le Nazioni Unite* (Cedam, Padova, 2016) 506-16.

¹⁰⁹ See C. Focarelli, *supra* n. 108 at 507 ff. See also R. Miga-Beștelii, 'Quelque réflexion sur le rôle des résolutions adoptées dans le Système des Nations Unies dans la formation du droit international économique' 12 *Revue roumaine d'études internationales*, (1986) 227 ff.

¹¹⁰ See also Simone Vezzani, *supra* n. 13 211-216.

International law has introduced profound changes in the lives of peasants and other rural workers. It has done so for instance by introducing new avenues for enhancing the regulatory role of the state to establish a level playing field in markets for peasants' products, avoiding market failures and thus then also damages to the economic rights of this category of vulnerable subjects.¹¹¹ Moreover, it has also done so by bringing gains in fundamental freedoms and rights – especially peaceful assembly rights – for peasants and other rural workers in economically developing countries such as India, where the UNDROP has recently been employed against the criminalisation of peasant struggles,¹¹² and in Argentina where the Declaration has been used against the use of agrotoxins and forced evictions.¹¹³

Worth noting is also that the Declaration was also at the origin of the drafting of a joint statement by nine UN special procedures and four members of the UN treaty bodies that incorporate a commitment to integrate the implementation of the UNDROP provisions into the exercise of their mandates, as well as a complementary commitment to provide guidance to states on how they may effectively implement the Declaration. It is indeed true that there have been several stops and starts, but the Declaration has exercised and continues to exercise a noteworthy impact on the lives of peasants and other rural workers globally, whether legally binding or not, and that is a suitable international legal tool on which it is therefore worth reflecting today.

¹¹¹ See P. Kashwan, I. Kukreti, R. Ranjan, 'The UN declaration on the rights of peasants, national policies, and forestland rights of India's Adivasis' 25 *International Journal of Human Rights* (2021) 1184 ff.

¹¹² References are found in the section 'PEASANT STRUGGLES FOR JUSTICE – La Via Campesina' at the La Via Campesina's official website: <https://viacampesina.org/en/wp-content/uploads/sites/2/2017/08/Peasants-Fighting-for-Justice-EN-Low-Res.pdf>

¹¹³ For references see 'The Implementation of the UNDROP: Analysis from the ground', <https://viacampesina.org/en/the-implementation-of-the-undrop-analysis-from-the-ground/>