



# The Normative Dimension of Food Sustainability

## A Human Rights-Based Approach to Food Systems Governance



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*Ecological niches shrink  
Biodiversity fast disappears  
Greater uncertainty hovers everywhere  
Heightened risks for us the food producers  
Traditional agriculture knowledge is fast eroding  
What and who shall save us?*

*(Elizabeth Mpofu, extract from the poem  
'Climate Justice and Food Sovereignty Now!')*

# 1 Introduction

Food systems are processes and activities carried out for the satisfaction of the food needs of a certain population. They involve networks of stakeholders, including farmers, companies, financial institutions, public agencies and other organizations and consumers, working interdependently on the different steps of supply chains (production, processing, packaging, distribution, retailing and consumption). They influence and are influenced by social, cultural, political, economic and environmental matters.<sup>2</sup>

One of the major challenges for humanity in the twenty-first century will be to find ways to feed the whole world's population while at the same time coping with Earth's capacities. There is a growing consensus that this can only be achieved by a reorientation of global food policies and related laws, and a rethink of the operationalization of food systems so as to take full account of the complex interactions between food production, trade, environmental protection, social justice and human well-being at local, national and international levels.

It is against this backdrop that the concept of food sustainability has emerged. It presents a holistic vision of food systems and integrates a number of food-related factors, including those of an economic, political, social, cultural and ecological nature, in assessing the performance of food systems.<sup>3</sup> Food sustainability also integrates general principles that inform the concept of sustainable development, especially the democratic governance of natural resources, intergenerational equity and the observation of human rights standards, the focus of this study.

At the international level, law- and policy-making relevant to food systems – and food sustainability – remain largely fragmented. The notions of – and objectives surrounding – the right to food and food security, for example, have been built into the diverse United Nations fora and agencies in different and, to a large extent, disconcerted ways, most notably the Committee on Economic, Social and Cultural Rights (CESCR), the UN Special Rapporteur on the right to food and the UN Food and Agriculture Organization (FAO). Despite attempts to harmonize agendas, synergy has proved to be an important challenge. At the academic level, hardly any consistent discussion has taken place on the legal framework that governs (or should govern) food systems.<sup>4</sup>

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<sup>2</sup> For a discussion on contemporary definitions of food systems, see P. Colonna, S. Fournier and J.-M. Touzard, 'Food Systems', in C. Esnouf, M. Russel and N. Bricas (eds), *Food System Sustainability: Insights From duALIne*, Cambridge University Press, 2013. This definition has borrowed elements from J.-L. Rastoin and G. Ghersi, *Le système alimentaire mondial: concepts et méthodes, analyses et dynamiques*, Collection Synthèses, 2010, p 19, and D. Goodman, 'World-Scale Processes and Agro-Food Systems: Critique and Research Needs', 4 *Review of International Political Economy* 4 (1997).

<sup>3</sup> See, for example, the notion of food sustainability proposed by the project *Towards Food Sustainability: Reshaping the Coexistence of Different Food Systems in South America and Africa (2015–2020)*. The project posits that the notion of food sustainability is based on five pillars: the pursuit of food security, the realization of the right to food and other related human rights, the reduction of poverty and inequality, environmental performance (understood as the sum of positive and negative impacts of food systems on nature), and social-ecological resilience. For further details of the project, see <http://www.r4d.ch/modules/food-security/food-sustainability> (last accessed 28 November 2018).

<sup>4</sup> Exceptions include N. C. S. Lambek, P. Claeys, A. Wong and L. Brilmayer (eds), *Rethinking Food Systems: Structural Challenges, New Strategies and the Law*, Springer, 2014; A. Kennedy and J. Liljeblad, *Food Systems Governance: Challenges for Justice, Equality and Human Rights*, Routledge, 2016.

This study engages in the discussion on food sustainability from a human rights-based perspective. It maps out international human rights standards closely related to food production that should be taken into account by law- and policy-makers when developing domestic normative and policy frameworks concerning food systems. The selection of the instruments here is not exhaustive: the focus is on the various aspects concerning the right to food, the rights of actors involved in food supply chains (especially production) and the international norms related to productive resources fundamental for food production, particularly land, water and seeds. Special attention is dedicated to the recently adopted UN Declaration on the Rights of Peasants and Other People Working in Rural Areas, which sets basic human rights norms of relevance to food systems governance.



## 2 Right to food, food security and food sovereignty: the global attempt to halt hunger

### 2.1 Right to Food

The recognition of the right to food in international law can be traced back to the adoption of the Universal Declaration of Human Rights (UDHR) in 1948. Article 25.1 of the UDHR states: ‘Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, *including food*, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.’<sup>5</sup> Eighteen years later, this right was reaffirmed in a legally binding instrument, the 1966 International Covenant on Economic Social and Cultural Rights (ICESCR).<sup>6</sup> Pursuant to Article 11.1 of the ICESCR, states agreed to ‘recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food’, and to ‘take appropriate steps to ensure the realization of this right’. More specifically, Article 11.2 recognizes the fundamental right of everyone to be free from hunger and identifies corresponding state obligations. First, states have the obligation to ‘improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources’. Second, states must ‘tak[e] into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need’.

Specialized international instruments have equally made reference to states’ obligations to respect, protect and fulfil the right to food of specific social groups. Examples include the 1979 Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW),<sup>7</sup> the 1989 Convention on the Rights of the Child (UNCRC),<sup>8</sup> the 1951 Convention Relating to the Status of Refugees,<sup>9</sup> the 2006 Convention on the Rights of Persons with Disabilities<sup>10</sup> and the 1989 International Labour Organization Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169).<sup>11</sup> The entry into force of the 2008 Optional Protocol to the ICESCR in May 2013 has opened the way for the CESCR – the monitoring body of the ICESCR – to receive and consider

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<sup>5</sup> Emphasis added.

<sup>6</sup> As of April 2018, 167 states are parties to the International Covenant on Economic Social and Cultural Rights (ICESCR), including Bolivia and Kenya, which are of particular interest to this study. On 10 December 2008, the UN General Assembly adopted the Optional Protocol to the ICESCR, which establishes its complaint and inquiry mechanisms. The Protocol entered in force on 5 May 2013 and, at the time of writing, relies on 23 ratifications.

<sup>7</sup> Preamble, Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), 1979.

<sup>8</sup> Art 24.2(c), The United Nations Convention on the Rights of the Child (UNCRC), 1989.

<sup>9</sup> Art 20, Convention Relating to the Status of Refugees, 1951.

<sup>10</sup> Art 28.1, Convention on the Rights of Persons with Disabilities, 2006.

<sup>11</sup> Although this instrument does not refer expressly to the right to food, it draws attention to the subsistence rights of indigenous peoples and tribal populations. See, for instance, Art 14, International Labour Organization (ILO), Convention Concerning Indigenous and Tribal Peoples in Independent Countries.

communications submitted by or on behalf of individuals or groups about violations of economic, social and cultural rights, including the right to food.<sup>12</sup> Moreover, notwithstanding their non-binding nature, the 1969 Declaration on Social Progress and Development<sup>13</sup> and the 1974 Universal Declaration on the Eradication of Hunger and Malnutrition have also contributed to setting the international legal benchmark for fighting hunger and malnutrition all over the globe.

At the regional level, the 1969 American Convention on Human Rights<sup>14</sup> and the 1988 Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights – the ‘Protocol of San Salvador’<sup>15</sup> – have reaffirmed the obligation of the member states of the Organization of American States (OAS) in relation to the realization of the right to food in the Americas. Likewise, in Africa, despite the silence of the 1981 African Charter on Human and Peoples’ Rights in this respect, a number of subsequent instruments have made express reference to the right to food of a number of groups deemed vulnerable, including children,<sup>16</sup> women<sup>17</sup> and the internally displaced.<sup>18</sup> Moreover, the 1990 African Charter for Popular Participation in Development and Transformation established the duty of African governments to uphold the rights of civilians to food in times of armed conflict.<sup>19</sup>

International human rights and monitoring bodies have had the opportunity to adjudicate cases related to the right to food on a number of occasions. The Inter-American Court of Human Rights, for example, has largely consolidated its jurisprudence with regard to the rights of indigenous peoples to land and natural resources indispensable to their ‘cultural and physical survival’. Even though not all decisions have made express references to food and nutrition, these rulings have clearly evoked communities’ subsistence rights, including the right to produce their own food.<sup>20</sup> An exception was the *Sawhoyamaxa* case, in which the court unambiguously determined that the state must provide indigenous communities with immediate food assistance until the full restitution of their traditional lands.<sup>21</sup> On the same lines, the decisions of the African Commission on Human and Peoples’ Rights in the leading cases *Ogoni*<sup>22</sup> and *Endorois*<sup>23</sup> have constituted important steps towards the recognition of the rights

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<sup>12</sup> Art 2, Optional Protocol to the ICESCR. See I. Biglino and C. Golay, The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Academy In-Brief no 2, Geneva Academy of International Humanitarian Law and Human Rights (Geneva Academy), 2013, <https://www.geneva-academy.ch/joomlatools-files/docman-files/The%20optional%20protocol%20in%20brief%202.pdf> (last accessed 28 November 2018).

<sup>13</sup> See especially, Art 10(b), Declaration on Social Progress and Development, 1969.

<sup>14</sup> Art 26, American Convention on Human Rights, 1969.

<sup>15</sup> Art 12, Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights (Protocol of San Salvador), 1969.

<sup>16</sup> Arts 14.2(c) and 20.2(a), African Charter on the Rights and Welfare of the Child, 2000.

<sup>17</sup> Art 15, Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, 2003.

<sup>18</sup> Arts 7.5(c) and 9.2(b), African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, 2009.

<sup>19</sup> African Charter for Popular Participation in Development and Transformation, para 18.

<sup>20</sup> See, for example, the rulings of the court in IACtHR, *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Judgment, Series C no 79, 31 August 2001; and IACtHR, *Saramaka People v Suriname*, Judgment, Series C no 172, 28 November 2007. See also the decision of the court in IACtHR, *Yakye Axa Indigenous Community v Paraguay*, Judgment, Series C no 125, 17 June 2005.

<sup>21</sup> IACtHR, *Sawhoyamaxa Indigenous Community v Paraguay*, Judgment, Series C no 146, 29 March 2006.

<sup>22</sup> ACommHPR, Social and Economic Rights Action Center & the Center for Economic and Social Rights v Nigeria, Communication no 155/96.

<sup>23</sup> ACommHPR, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Communication no 276/2003.

of indigenous communities to food, in the light of human-provoked environmental disasters and unreasonably strict nature conservation strategies. At the national level, recent experiences in India,<sup>24</sup> South Africa,<sup>25</sup> Argentina<sup>26</sup> and Colombia,<sup>27</sup> to name just a few countries, have affirmed the justiciability of the right to food in domestic courts and consolidated the obligation of states vis-à-vis international human rights standards in general and the right to food in particular.<sup>28</sup>

In recent decades, there have been a number of attempts to establish working definitions of the human right to food. In 1999, the CESCR adopted General Comment no 12 on the right to food and proposed the following definition: '[Right to food is] [t]he right [of] every man, woman and child, alone or in community with others, [to have] physical and economic access at all times to adequate food or means for its procurement'.<sup>29</sup> This definition also clarifies that states have the obligation to ensure that all individuals and groups have the ability to purchase and/or produce food, or receive food assistance in case of need.<sup>30</sup> In other words, the right to food encompasses the right to receive enough income to buy a basic food basket that satisfies one's nutritional needs; the right to access food production resources one derives their livelihood from; and the right to have access to assistance programmes and mechanisms that enhance one's ability to access adequate and nutritious food, especially in times of emergency or economic vulnerability. Other related rights include, especially in case of those that produce their own food, access to land, seeds and other inputs, food production knowledge, technology and innovations as well as food storage facilities.<sup>31</sup>

The CESCR definition has been further elaborated upon by UN special rapporteurs on the right to food,<sup>32</sup> who have aimed to offer a comprehensive definition of the right to food that captures its different elements and dimensions and speaks to the different realities and needs of the diverse sectors of society.<sup>33</sup> The most recent definition has been adopted by former Special Rapporteur Olivier De

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<sup>24</sup> See Supreme Court of India, *People's Union for Civil Liberties v Union of India and Others*, Writ petition (civil) no 196/2001.

<sup>25</sup> See High Court of South Africa, *Kenneth George and Others v Minister of Environmental Affairs & Tourism*, File no EC1/2005 (2007).

<sup>26</sup> See Corte Suprema de Justicia de la Nación, *Defensor del Pueblo de la Nación c Estado Nacional y otra*, 2007.

<sup>27</sup> See Corte Constitucional, *Abel Antonio Jaramillo y otros c la Red de Solidariedad Social y otros*, Sentencia T-025/2004, 2004.

<sup>28</sup> For a discussion on the justiciability of the right to food in domestic courts, see C. Golay, *The Right to Food and Access to Justice: Examples at the National, Regional and International Levels*, Food and Agriculture Organization (FAO), 2009, <http://www.fao.org/3/a-k7286e.pdf> (last accessed 28 November 2018). For cases in Latin America more specifically, see J. L. Vivero Pol and V. Scholz Hoss, 'La justiciabilidad del derecho a la alimentación en América Latina y El Caribe', in J. L. Vivero Pol and X. Erazo (eds), *Derecho a la Alimentación, Políticas Públicas e Instituciones contra el Hambre*, Ediciones LOM, 2009.

<sup>29</sup> Committee on Economic, Social and Cultural Rights (CESCR), General Comment no 12: The Right to Adequate Food (Art 11), UN doc E/C.12/1999/5, 12 May 1999, para 6.

<sup>30</sup> The Food Assistance Convention adopted in 2012 governs food assistance measures at the international level. This treaty replaced the Food Aid Convention, first adopted in 1967 and subject to revisions until 1999, and proposed a broadening of approaches to the response to emergency food situations and food needs. For a collection of studies on the new approaches derived from the notion of food assistance, see S. W. Oamamo, U. Gentilini and S. Sandström (eds), *Food Revolution: From Food Aid to Food Assistance. Innovations in Overcoming Hunger*, World Food Programme, 2010.

<sup>31</sup> See FAO, *Curso Políticas de Seguridad Alimentaria y Nutricional en América Latina y El Caribe. Introducción a la Seguridad Alimentaria y Nutricional en América Latina y el Caribe*, vol 1, p 7.

<sup>32</sup> The mandate of the UN Special Rapporteur on the right to food was created by the Commission on Human Rights in 2000. More information about the work of the two former special rapporteurs, Jean Ziegler and Olivier De Schutter, is available at [www.righttofood.org](http://www.righttofood.org) and [www.srfood.org](http://www.srfood.org), respectively (last accessed 28 November 2018).

<sup>33</sup> On the development of the notion of the human right to food, see B. Konstantinov, 'Invoking the Right to Food in the WTO Dispute Settlement Process: The Relevance of the Right to Food to the Law of the WTO', in O. De Schutter and K. Y. Cordes (eds), *Accounting for Hunger: The Right to Food in the Era of Globalization*, Oxford, Hart Publishing, 2011, pp 212 ff.

Schutter in his final report presented to the UN Human Rights Council (HRC) in 2014: ‘The right to food is the right of every individual, alone or in community with others, to have physical and economic access at all times to sufficient, adequate and culturally acceptable food that is produced and consumed sustainably, preserving access to food for future generations.’<sup>34</sup>

De Schutter’s definition of the right to food makes explicit the quantitative aspect of nutrition, according to which every individual should have access to *sufficient* food that allows for the full development of human capacities. Moreover, it proposes the incorporation of two further dimensions to the notion of the right to food as originally proposed by the CESCR: cultural and environmental. In so far as the cultural dimension is concerned, De Schutter recalls the vast human cultural diversity and identity – a fundamental aspect of human dignity – also reflected in one’s culinary habits. From this perspective, food must not only be sufficient in amount but also in tune with one’s culture, traditions and religious beliefs. Providing for vegetarian options or respecting religious beliefs in school diets and prisons as well as promoting traditional recipes of indigenous peoples and traditional local communities are two examples of actions expected from states in order to comply with their international obligations regarding the right to food.

As for the environmental dimension of the right to food, the concept proposed by De Schutter reflects general concerns about the impact of food production on nature. Likewise, it reaffirms the principle of intergenerational equity contained in the notion of sustainable development proposed by the UN in 1988,<sup>35</sup> by highlighting that global food production and consumption must account for the needs of future generations and their right to feed themselves.<sup>36</sup>

In addition to the definition of the right to food, the scope and content of states’ correlative obligations have also been defined by UN human rights mechanisms. In this respect, General Comment no 12 of the CESCR clarifies that the full implementation of human rights in general and the right to food in particular entails three levels of state obligations: the obligations to respect, protect and fulfil.<sup>37</sup> The obligation to respect refers to the obligation of states not to interfere with people’s freedoms and resource bases in a manner that entails a limitation on their ability to access adequate and nutritious food. In other words, state governments or those acting on their behalf must not enact any laws, adopt any policies or take any actions that may result in a threat to individuals’ access to food. Arbitrary governmental restrictions on accessing land and other natural resources used to produce food and employed in food production (water, fish stock, forest products), including those deriving from the

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<sup>34</sup> Report of the Special Rapporteur on the right to food, Olivier De Schutter. Final Report: The Transformative Potential of the Right to Food. UN doc A/HRC/25/57, 24 January 2014.

<sup>35</sup> See Annex, Report of the World Commission on Environment and Development: Our Common Future, UN doc A/42/427, 4 August 1987.

<sup>36</sup> For a thorough appraisal of the applicability of the concept of sustainable development in international law in general and international agricultural agreements in particular, see E. Bürgi Bonanomi, *Sustainable Development in International Law Making and Trade: International Food Governance and Trade in Agriculture*, Elgar, 2015.

<sup>37</sup> CESCR, General Comment no 12, supra fn 29, para 15. See also P. Alston and A. Eide, ‘Advancing the Right to Food in International Law’, in E. Asbjorn, W. Barth Eide, S. Goonatilake, J. Gussow and Omawale (eds), *Food as a Human Right*, United Nations University, 1984; M. Windfuhr, ‘The World Food Crisis and the Right to Adequate Food’, in M. Gibney and S. Skogly (eds), *Universal Human Rights and Extraterritorial Obligations*, University of Pennsylvania Press, 2010, p 140; C. Golay, ‘The Food Crisis and Food Security: Towards a New World Food Order?’ 1 *International Development Policy* (2010); J. Ziegler, C. Golay, C. Mahon and S.-A. Way, *The Fight for the Right to Food: Lessons Learned*, Palgrave Macmillan, 2011; Report of the UN Special Rapporteur on the Right to Food, Olivier de Schutter, UN doc A/65/281, 11 August 2010, p 3.

privatization of common pool resources, and the destruction of subsistence crops by state agents are examples of violations of the obligation to respect.<sup>38</sup>

The obligation to protect corresponds to the obligation of states with regard to any actions of third parties that limit the access of individuals and groups to adequate food. Examples include the obligation of the state to adopt measures in order to avoid the contamination of the arable soils and water streams used for food production and to ensure that food producers, distributors and retailers observe food safety standards. The obligation to fulfil is subdivided into the obligations to facilitate and to provide. The former entails the state obligation to improve the availability of and accessibility to food of all people at all time. This obligation requires, for instance, the adoption of measures to increase food productivity (particularly food that is consumed locally), the implementation of policies to enhance family incomes and the adoption of long-term prevention and mitigation strategies to alleviate the impact of natural hazards and events of other sorts (socioeconomic, political, etc.) on food production. Other measures, for example expanding women's education, are also implied by the obligation to facilitate, for the degree of mothers' education has proved to be directly related to the nutrition of their children.<sup>39</sup> The obligation to provide speaks to food assistance and actions needed in times of food crises, especially temporary food assistance and food relief for those who have lost their resource bases and are therefore unable to produce or procure food.<sup>40</sup>

The implementation of human rights obligations in general and right to food obligations in particular is informed by a set of fundamental principles, all too often referred to by the mnemonic acronym PANTHER: participation, accountability, non-discrimination, transparency, human dignity, empowerment and rule of law. In so far as the right to food is concerned, these principles determine that (a) individuals and groups participate actively, freely, effectively and significantly in all decisions that affect their lives, especially those that might affect their ability to access food (participation); (b) authorities must be accountable for their actions and omissions and there should be mechanisms that allow people to challenge both the process and content of their decisions (accountability); (c) the enjoyment of the right to food should not suffer any limitations on the basis of race, sex, creed or any physical, socioeconomic or cultural status (non-discrimination); (d) all information regarding food-related laws, policies, programmes and budgets must be accessible to the public (transparency); (e) all actions affecting people's lives and livelihoods and especially their ability to exercise the right to food must

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<sup>38</sup> In this respect, De Schutter has made a strong case that the recent phenomenon of large-scale land acquisition and leases, or as it has often been termed 'land grabbing', might lead to violations of the right to food: States would be acting in violation of the human right to food if, by leasing or selling land to investors (whether domestic or foreign), they were depriving the local populations from access to productive resources indispensable to their livelihoods. They would also be violating the right to food if they negotiated such agreements without ensuring that this will not result in food insecurity, for instance because this would create a dependency on foreign aid or on increasingly volatile and unpredictable international markets, as large proportions of the food produced thanks to the foreign investment would be shipped to the country of origin of the investor or sold on the international markets. Report of the Special Rapporteur on the Right to Food, Olivier De Schutter, Large-Scale Land Acquisitions and Leases: A Set of Core Principles and Measures to Address the Human Rights Challenge, UN doc A/RHC/13/33/Add.2, 11 June 2009, para 11.

<sup>39</sup> The International Food and Policy Research Institute's (IFPRI) study on the factors that helped reduce child malnutrition in developing countries showed that an increase in women's education not only accounted substantially for the total reduction in child malnutrition but was by far the factor that contributed the most to it. See IFPRI, *Women: The key to Food Security. Looking Into the Household*, 2000, <https://msu.edu/~mandrews/global/womenfood.pdf> (last accessed 28 November 2018). On the relation between poverty and gender inequality, and its impact on households' food accessibility, see the findings of IFPRI, *The Unfinished Agenda – Perspectives on Overcoming Hunger, Poverty, and Environmental Degradation*, 2001. The study explains that '[p]overty is a major threat to the food security both of the family and of particular individuals within the family, and the combination of poverty and gender inequality is an even greater one. Lower levels of education and other resources can severely limit earning potential for the growing number of women who are the sole income earners for their families', p 314.

<sup>40</sup> CESCR, General Comment no 12, supra fn 29, para 15. See also the Food Aid Convention, first adopted in 1967 and subject to revisions throughout subsequent decades, with the last version adopted in 1999; and Guideline 15, FAO, *Voluntary Guidelines on the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*, 2005, <http://www.fao.org/3/a-y7937e.pdf> (last accessed 28 November 2018).

be adopted in a way that respects the absolute value of the person (human dignity); (f) all individuals and groups must be provided with resources, including relevant information, in order to make the best decisions and choices (empowerment); (g) governments' authority must be exercised in strict accordance with constitutions and laws in force (rule of law).<sup>41</sup> The observance of these principles is of paramount importance for the implementation of the right to food and marks the boundaries between the notion of the right to food and food security, discussed in Section 2B below.

In 1993, the World Conference on Human Rights<sup>42</sup> put an end to the classical divide in the international human rights framework, nurtured during the Cold War, between civil and political rights – governed by the International Covenant on Civil and Political Rights – and economic social and cultural rights – governed by the ICESCR, in which the right to food is prescribed. The Vienna Declaration and the Plan of Action, the main outcomes of the conference, upheld the indivisibility and interrelatedness of all human rights: 'All human rights are universal, indivisible and interdependent and inter-related. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.' This understanding has led to further elaboration on the inextricable links between human rights, and on how the violation of one right might lead to the violation of another. The full enjoyment of the right to work, for example, has an important impact on the realization of the right to food, in as much as situations of unemployment may considerably restrict one's ability to purchase/access food. Equally, taking into account that certain rural actors, particularly indigenous peoples and traditional local communities, tend to produce all or a great part of the food consumed in households, property rights and secure land tenure have a direct link with the enjoyment of the right to food in rural areas.<sup>43</sup>

The developments surrounding the notion and scope of the right to food at the international level have paved the way for a number of initiatives. One of the most prominent examples of such initiatives at the global level has been under the framework of the UN Millennium Development Goals (MDGs) and the subsequent Sustainable Development Goals (SDGs). While the MDGs included a commitment to halve the proportion of the world's population suffering from extreme hunger by 2015 (Goal 1), the SDGs reaffirm this commitment and go one step further by aiming to end all forms of hunger, food insecurity and malnutrition by 2030. Notably, concerns for environmental degradation and social justice have been fully incorporated in the SDGs. The promotion of sustainable and resilient agricultural practices and the improvement of small-scale farmers' access to land and productive resources, incomes and capacities have been selected as key tools to enhance access to sufficient and nutritious food for all persons worldwide.<sup>44</sup>

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<sup>41</sup> On this point, see FAO, *The Right to Food Within the International Framework of Human Rights and Country Constitutions*, 2014, p 8, <http://www.fao.org/3/a-i3448e.pdf> (last accessed 28 November 2018).

<sup>42</sup> Endorsed by UNGA Res 48/121, 20 December 1993.

<sup>43</sup> See, for example, decision of the Inter-American Court of Human Rights in *IACtHR, Saramaka People Judgment*, supra fn 20, in which the court emphasized the importance of the recognition and protection of land rights of indigenous peoples for their 'physical survival'. For a criticism of the use of property rights and individual land titling to this end – in contrast to the recognition of collective rights and customary forms of land tenure – see O. De Schutter, 'The Role of Property Rights in the Debate on Large-Scale Land Acquisitions', in C. Gironde, C. Golay and Peter Messerli (eds), *Large-Scale Land Acquisitions: Focus on South-East Asia*, Brill, 2016.

<sup>44</sup> See United Nations Development Programme (UNDP), *Sustainable Development Goals (SDGs), Goal 2: Zero Hunger*, <http://www.undp.org/content/undp/en/home/sdgoverview/post-2015-development-agenda/goal-2.html> (last accessed 28 November 2018). Targets 2.3 to 2.5 are of particular relevance. Target 2.3 demands that states '[b]y 2030, double the agricultural productivity and incomes of small-scale food producers, in particular women, indigenous peoples, family farmers, pastoralists and fishers, including through secure and equal access to land, other productive resources and inputs, knowledge, financial services, markets and opportunities for value addition and non-farm employment'; Target 2.4 demands that states '[b]y 2030, ensure sustainable food production systems and implement resilient agricultural practices that increase productivity and production, that help maintain ecosystems, that strengthen

At the regional level, the Iniciativa América Latina y Caribe Sin Hambre<sup>45</sup> (Hunger-Free Latin America and the Caribbean Initiative) adopted in 2005 has marked the commitment of states in the Americas and the Caribbean islands to creating conditions for the eradication of hunger by the year 2025. Within this framework, the Frente Parlamentario contra el Hambre en América Latina y el Caribe (Latin America and the Caribbean Parliamentary Front Against Hunger)<sup>46</sup> and the Observatorio del Derecho a la Alimentación en América Latina y el Caribe (Right to Food Observatory for Latin America and the Caribbean)<sup>47</sup> were created. The establishment of this institutional framework in support of the implementation of the right to food in the region led to the Latin American Parliament's<sup>48</sup> adoption of the Framework Law on the Right to Food, Food Security and Food Sovereignty.<sup>49</sup> This reaffirmed the scope and content of the right to food as prescribed in the UDHR and the ICESCR as well as by CESCR General Comment no 12 and the special rapporteurs' reports,<sup>50</sup> so as to further the promotion of national law- and policy-making for the realization of the right to food.

At the domestic level, a number of states have included special provisions recognizing the right to food in their national constitutions and laws, incorporating to some extent the elements and principles detailed here. In Latin America, this is the case in Mexico, El Salvador, Bolivia, Brazil, Ecuador, Guatemala, Guyana, Haiti and Nicaragua, to name a few.<sup>51</sup> In Bolivia, for instance, the reform of the Constitution in 2009 introduced the human right to food in the domestic legal system as a constitutional guarantee. Article 16 of the Bolivian Constitution establishes that '[e]veryone has the right to water and food. ... The State has the obligation to ensure food security, by securing healthy, adequate and sufficient food for the entire population'.<sup>52</sup> In Africa, the Kenyan reform of the Constitution in 2010

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capacity for adaptation to climate change, extreme weather, drought, flooding and other disasters and that progressively improve land and soil quality'; and Target 2.5 demands that states '[b]y 2020, maintain the genetic diversity of seeds, cultivated plants and farmed and domesticated animals and their related wild species, including through soundly managed and diversified seed and plant banks at the national, regional and international levels, and promote access to and fair and equitable sharing of benefits arising from the utilization of genetic resources and associated traditional knowledge, as internationally agreed'. On the links between economic, social and cultural rights and the SDGs, see C. Golay, *No One Will Be Left Behind: The Role of United Nations Human Rights Mechanisms in Monitoring the Sustainable Development Goals that Seek to Realize Economic, Social and Cultural Rights*, Academy Briefing no 11, Geneva Academy, 2018, <https://www.geneva-academy.ch/our-projects/publications/detail/285-briefing-no011-no-one-will-be-left-behind-the-role-of-un-human-rights-mechanisms-in-monitoring-the-sdgs-that-seek-to-realize-esrc> (last accessed 28 November 2018).

<sup>45</sup> See <http://www.ialcsh.org/> (last accessed 28 November 2018). On this, see also FAO, Hunger-Free Latin America and the Caribbean Initiative Support Project, <http://www.fao.org/in-action/apoyo-ialcsh/resumen/en/> (last accessed 28 November 2018).

<sup>46</sup> See <http://www.fao.org/alc/es/fph/> (last accessed 28 November 2018).

<sup>47</sup> See <http://www.oda-alc.org/> (last accessed 28 November 2018).

<sup>48</sup> The Latin American Parliament, or as it is often referred to, *Parlatino*, is an intergovernmental organization established in 1964 to promote the better integration of the region. It is composed of members of national parliaments of democratically elected countries in Latin America. See <http://www.parlatino.org/es/> (last accessed 28 November 2018).

<sup>49</sup> Adopted during the XVIII Ordinary Assembly of the Latin American Parliament, 30 November to 1 December 2012, Panama. Full text available in Spanish at <http://www.fao.org/3/a-au351s.pdf> (last accessed 28 November 2018).

<sup>50</sup> See in particular, the definition of the right to food in Art 10, *Ibid*.

<sup>51</sup> On this point, see O. De Schutter, *A Rights Revolution: Implementating the Right to Food in Latin America and the Caribbean*, Briefing Note no 6, September 2012, [http://www.ohchr.org/Documents/Issues/Food/SRRTF%20BN06\\_LAC\\_en.pdf](http://www.ohchr.org/Documents/Issues/Food/SRRTF%20BN06_LAC_en.pdf) (last accessed 28 November 2018); and FAO, *Análisis de la legislación en materia de seguridad alimentaria y nutricional. El Salvador, Guatemala, Honduras y Nicaragua*, 2015, <http://www.fao.org/3/a-i5287s.pdf> (last accessed 28 November 2018). As De Schutter notes, in addition to these, a number of national constitutions have recognized the right to food of specific groups: Colombia, Cuba and Honduras recognize the right to food of children in their constitutional texts, whereas the Surinamese constitution refers to the right to food in the context of the right to work. Moreover, the constitutions of Argentina and Costa Rica implicitly recognize the right to food by granting constitutional or supra-constitutional status to the ICESCR and other international human rights treaties.

<sup>52</sup> Author's translation of 'Toda persona tiene derecho al agua y a la alimentación. ... El Estado tiene la obligación de garantizar la seguridad alimentaria, a través de una alimentación sana, adecuada y suficiente para toda la población.' For a more detailed analysis of the policy and legal framework on the right to food and food sustainability in Bolivia,

secured the constitutional protection of the right to food in Article 43(1)(c), which provides that '[e]very person has the right ... to be free from hunger, and to have adequate food of acceptable quality'.

## 2.2 Food Security

The notion of food security emerged in the international scene in the early 1970s and originally focused on the need for states to take steps to increase food production and availability, as these were thought to be the fundamental causes of the high rates of hunger and starvation worldwide.<sup>53</sup> In 1996, the World Food Summit marked an important change in the mindset as states acknowledged the role of social inequality and poverty as major causes of food insecurity globally and agreed to take all possible measures towards poverty eradication so as to improve access to food.<sup>54</sup>

At the international level, debates and the negotiation of policies and standards on food security are held under the auspices of the UN Committee on World Food Security, based at the FAO in Rome, and are articulated around four dimensions or pillars: food availability, accessibility, utilization and stability. The first dimension relates to international, national and local food supplies and is assessed in terms of the level of food production and stock as well as the net food trade. The accessibility dimension corresponds to the actual ability of individuals and groups to obtain food. In this sense, access to food is often referred to in terms of the ability to produce (physical accessibility) and/or purchase (economic accessibility) food. Utilization – or biological utilization – refers to sufficient energy and nutrient intake as a result of, among other things, diet diversity and food preparation methods, and the way the body profits from the energy and nutrients. In addition to nutrition aspects, this dimension also encompasses food safety.<sup>55</sup> Lastly, stability denotes the continuous availability of and access to food throughout the year. For the FAO, the realization of food security depends on the simultaneous achievement of these four dimensions.<sup>56</sup>

The notion of food security has been defined in the following terms: 'Food security exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life.'<sup>57</sup> This definition is very close to the definition of the right to food described earlier in this study. Nonetheless, major differences may be identified in terms of nature, content and scope. To start with, the realization of the right to food is underpinned by the existence of legally binding obligations for states, whereas international agreements for fostering global food security constitute political (not legal) commitments. As has been

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see C. Kopp Valdivia, *Reconocimiento e Implementación del DHAA y Temas Relacionados. Estudio Jurídico en Bolivia. Documento de trabajo No 2, Proyecto R4D: Hacia la sustentabilidad alimentaria en Bolivia y Kenia*, Impresiones Poligraf, 2016, <http://docplayer.es/63287912-Documento-reconocimiento-e-implementacion-del-derecho-humano-a-la-alimentacion-adeuada-y-temas-relacionados-estudio-juridico-politico-en-bolivia.html> (last accessed 28 November 2018).

<sup>53</sup> This view changed with the work of Amartya Sen, especially the publication of his book *Poverty and Famines: An Essay on Entitlement and Deprivation*, Oxford University Press, 1981. Briefly, Sen contradicts the idea that hunger and starvation derived from the lack of food availability by demonstrating that they occur mostly as a result of social inequality and lack of financial means to access food. More recently, more emphasis has been placed on the ability of individuals and communities to access food through their own production of it, as opposed to purchasing it.

<sup>54</sup> See the main outcome of the World Food Summit, the Rome Declaration on World Food Security.

<sup>55</sup> See FAO, *Curso Políticas de Seguridad Alimentaria y Nutricional en América Latina y El Caribe. Introducción a la Seguridad Alimentaria y Nutricional en América Latina y el Caribe*, vol 3, p 13.

<sup>56</sup> On the four dimensions, see FAO, *An Introduction to the Basic Concepts of Food Security*, 2008, <http://www.fao.org/3/a-al936e.pdf> (last accessed 28 November 2018). For a discussion on the diverse understandings of the term food security, see P. Pinstrup-Andersen, 'Food Security: Definition and Measurement', 1 *Food Security* 1 (2009).

<sup>57</sup> Rome Declaration on World Food Security and Plan of Action, adopted during the World Food Summit, 13–17 November 1996.



noted, ‘there is a difference between promoting one or other policy to improve food security, and acknowledging that individuals have a right to food. The right to food is based on an a priori commitment to the value of human dignity, and makes the individual and his or her rights the centre of policy in a way that enables him or her to hold government accountable and to seek redress for violations of his or her rights.’<sup>58</sup>

In addition to accountability, questions related to social justice and democratic governance of food systems are left out of the scope of food security. More recently, there has been a strong push from civil society for the incorporation of these concerns in food- and agriculture-related laws and policies at national and international levels. Regrouped behind the claim for ‘food sovereignty’, this push has gained momentum since the food crises in 2007-2008, and has recently achieved some results at the international level, with the inclusion of the right to food sovereignty in the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas.

### 2.3 Food Sovereignty: A New International Political Agenda for Food and Food Systems

The term food sovereignty was first coined by La Via Campesina, an international movement that emerged in 1993 with the aim of bringing together non-governmental organizations and unions of small and medium farmers, indigenous peoples and other rural actors worldwide. The main scope of the movement is the protection and promotion of small-scale sustainable agriculture as a way of furthering social justice and dignity.<sup>59</sup> In the Declaration of Nyéléni,<sup>60</sup> adopted in 2007, La Via Campesina describes food sovereignty as a principle that should serve as a primary guide for states’ food-related policies. The term was defined as ‘the right of peoples to healthy and culturally appropriate food produced through ecologically sound and sustainable methods, and their right to define their own food and agriculture systems.’<sup>61</sup> As of 2018, a number of international documents have made express mention of the term,<sup>62</sup> including the UN Guiding Principles on Extreme Poverty and Human Rights adopted in 2011,<sup>63</sup> reports of UN special rapporteurs,<sup>64</sup> and more recently, General Recommendation no 34 of the Committee on the Elimination of Discrimination against Women (CEDAW Committee) on

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<sup>58</sup> K. Mechlem, ‘Food Security and the Right to Food in the Discourse of the United Nations’. 10 *European Law Journal* 5 (2004), 648.

<sup>59</sup> See <http://viacampesina.org/en/> (last accessed 28 November 2018).

<sup>60</sup> The Via Campesina Declaration of Nyéléni was adopted during the Forum for Food Sovereignty, held in Sélingué, Mali, 23–27 February 2007. Full text available at <http://nyeleni.org/spip.php?article290> (last accessed 28 November 2018).

<sup>61</sup> *Ibid.* For an appraisal of the emergence of the food sovereignty movement and its interplay with international human rights institutions and NGOs, see P. Claeys, *Human Rights and the Food Sovereignty Movement*, Earthscan, 2015.

<sup>62</sup> On this point, see also K. Dirgasová and J. Lazíková, ‘Agricultural Land Ownership as Food Sovereignty: The Case of Slovakia’, in M. Alabrese, M. Brunori, S. Rolandi, and A. Saba (eds), *Agricultural Law: Current Issues from a Global Perspective*, Springer, 2017; C. Golay, *The Rights to Food Sovereignty and Free, Prior and Informed Consent*, Geneva Academy, 2018, <https://www.geneva-academy.ch/joomlatools-files/docman-files/The%20Rights%20to%20Food%20Sovereignty%20and%20to%20Free,%20Prior%20and%20Informed%20Consent.pdf> (last accessed 28 November 2018).

<sup>63</sup> Adopted by the Human Rights Council (HRC) by consensus on 27 September 2012, HRC Res 21/11. See p 22.

<sup>64</sup> Report of the Special Rapporteur on the Right to Food, *supra* fn 34. For De Schutter, ‘[u]nderstood as a requirement for democracy in the food systems, which would imply the possibility for communities to choose which food systems to depend on and how to reshape those systems, food sovereignty is a condition for the full realization of the right to food’, para 50.

the rights of rural women<sup>65</sup> and the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas.<sup>66</sup>

La Via Campesina's definition of food sovereignty clearly includes a rights-based approach to national and household food security. It builds upon recent developments regarding the right to food as it combines social, cultural and environmental concerns related to food production and access, and calls for the furthering of democratic principles. In this light, the pursuit of food sovereignty would require a profound and multilevel change in agricultural policies and practices, as well as international trade in agricultural products, on three main fronts. First and foremost, it would require the empowerment of small farmers, pastoralists, fisherfolk and other small-scale food producers through a wider recognition of their rights, including their entitlement to land and other productive resources such as water, seeds and agricultural technology, as well as the promotion of gender equality and rural women's rights. In this respect, the Declaration of Nyéléni states that '[f]ood sovereignty implies new social relations free of oppression and inequality between men and women, peoples, racial groups, social classes and generations.'<sup>67</sup>

As a strategy to advance the recognition of these rights, La Via Campesina proposed its Declaration of Rights of Peasants – Women and Men,<sup>68</sup> adopted internally and presented to the HRC in 2009. The document had the double scope of responding to the 2007–2008 global food crises while at the same time promoting a broader international agenda for the legal recognition of the rights of small farmers and other rural groups. In effect, the initiative – together with a study by the HRC Advisory Committee that identified that small farmers and other people working in rural areas constitute 80 percent of the world's hungry and shed light on their situation of critical marginalization and vulnerability<sup>69</sup> – prompted the HRC's decision to establish an open-ended intergovernmental working group with the mandate of negotiating the new UN Declaration on the Rights of Peasants and Other People Working in Rural Areas, referred to above.<sup>70</sup> After six years of negotiations, the document was finally adopted by the HRC in September 2018.<sup>71</sup>

In terms of substantial rights, the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas recognizes the chronic marginalization and particular vulnerability of small farmers and other rural actors, and prescribes the protection of a wide array of civil and political rights, including the rights to equality and non-discrimination and freedom of association,<sup>72</sup> and economic, social and cultural rights, including the right to work and the right to food.<sup>73</sup> It innovates as it recognizes the rights

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<sup>65</sup> See Committee on the Elimination of Discrimination against Women (CEDAW Committee), General Recommendation no 34 on the Rights of Rural Women, UN doc CEDAW/C/GC/34, 4 March 2016, p 19.

<sup>66</sup> See Preamble and Art 15.4, UN Declaration on the Rights of Peasants and Other People Working in Rural Areas, UN doc A/HRC/WG.15/5/3, 10 September 2018.

<sup>67</sup> Ibid.

<sup>68</sup> Full text available at <http://viacampesina.org/en/index.php/publications-mainmenu-30/1016-declaration-of-rights-of-peasants-women-and-men> (last accessed 28 November 2018).

<sup>69</sup> HRC, 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.

<sup>70</sup> On the early stages of the negotiation process, see M. Edelman and C. James, Peasants' Rights and the UN System: Quixotic Struggle? Or Emancipatory Idea Whose Time Has Come? 38 *The Journal of Peasant Studies* 1 (2011); C. Golay, *Negotiation of a United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas*, Academy In-Brief no 5, Geneva Academy, 2015, [https://www.geneva-academy.ch/joomlatools-files/docman-files/In-Brief5\\_rights\\_of\\_peasants.pdf](https://www.geneva-academy.ch/joomlatools-files/docman-files/In-Brief5_rights_of_peasants.pdf) (last accessed 28 November 2018).

<sup>71</sup> HRC, UN Declaration on the Rights of Peasants, supra fn 66.

<sup>72</sup> Arts 4 and 9, respectively, *ibid.*

<sup>73</sup> Arts 13 and 15, *ibid.*

to land and other natural resources (as distinct from the right to property),<sup>74</sup> to means of production<sup>75</sup> and to seeds<sup>76</sup> as human rights norms. Repeated references to these entitlements under the scope of widely recognized human rights, particularly the right to food, and their inclusion in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) adopted in 2007 suggests international acceptance of the inclusion of these entitlements within the catalogue of international human rights standards.<sup>77</sup> Some of these concerns have already been addressed, at the international level, in the 1979 World Conference on Agrarian Reform and Rural Development, and its outcome document, the Declaration of Principles and the Programme of Action, often referred to as the Peasants' Charter.<sup>78</sup> Having said that, the proposal to include them in a new international human rights instrument with the aim of better securing the protection of peasants and other people working in rural areas should be welcomed. Some of these rights are discussed in Section 3 below.

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<sup>74</sup> Art 17, *ibid.*

<sup>75</sup> Art 16, *ibid.*

<sup>76</sup> Art 19, *ibid.*

<sup>77</sup> On this point, see C. Golay, *The Right to Seeds and Intellectual Property Rights*, Geneva Academy, 2017, [https://www.geneva-academy.ch/joomlatools-files/docman-files/Resarch%20Brief\\_web.pdf](https://www.geneva-academy.ch/joomlatools-files/docman-files/Resarch%20Brief_web.pdf) (last accessed 28 November 2018); C. Golay and A. Bessa, *The Right to Land and Other Natural Resources*, Geneva Academy 2017, <https://www.geneva-academy.ch/joomlatools-files/docman-files/The%20Right%20to%20Land%20and%20Other%20Natural%20Resources%20-%20web.pdf> (last accessed 28 November 2018).

<sup>78</sup> On this point, see M. Brunori, 'Access to Land and Security of Tenure in the Resolutions of the United Nations General Assembly', in M. Alabrese, M. Brunori, S. Rolandi, and A. Saba (eds), *Agricultural Law: Current Issues from a Global Perspective*, Springer, 2017.



### 3 Related human rights

#### 3.1 Rights of workers – the right to work, right to social security and prohibition of child labour

The protection of the right to work and social security of workers, particularly rural workers, and the prohibition of child labour are crucial human rights concerning food systems and their contribution to social and economic sustainability.

##### 3.1.1 The Right to Work

The human right to work is entrenched in Article 23 of the UDHR. Furthering the content of the right to work, the ICESCR underlines in Article 7 that everyone has the right to enjoy just and favourable conditions of work that ensure fair remuneration and allow for a decent living, safe and healthy working conditions, the opportunity for promotion to higher levels and time for rest and leisure. In addition, the Covenant also clarifies that all workers have the right to form and join trade unions and to social security.<sup>79</sup>

The normative framework of the International Labour Organization (ILO) foresees eight fundamental conventions: (1) the Freedom of Association and Protection of the Right to Organise Convention of 1948 (no 87); (2) the Right to Organise and Collective Bargaining Convention of 1949 (no 98); (3) the Forced Labour Convention of 1930 (no 29); (4) the Abolition of Forced Labour Convention of 1957 (no 105); (5) the Minimum Age Convention of 1973 (no 138); (6) the Worst Forms of Child Labour Convention of 1999 (no 182); (7) the Equal Remuneration Convention of 1951 (no 100); (8) the Discrimination (Employment and Occupation) Convention of 1958 (no 111).<sup>80</sup> Specific conventions and recommendations on rural workers include the Plantations Convention of 1958 (no 110), the Labour Inspection (Agriculture) Convention of 1969 (no 129), the Rural Workers' Organisations Convention of 1975 (no 141) and the Safety and Health in Agriculture Recommendation of 2001 (no 192). Negotiations for the adoption of Policy Guidelines for the Promotion of Sustainable Rural Livelihoods Targeting the Agro-Food Sectors started in 2016, with the aim of envisaging new measures to be taken for the promotion of decent working conditions in rural areas.<sup>81</sup>

A number of subsequent international instruments have reaffirmed and elaborated upon these standards. The 2004 FAO *Voluntary Guidelines on the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*, for example, call upon states to 'take measures to encourage sustainable development in order to provide opportunities for work that provide remuneration allowing for an adequate standard of living for rural and urban wage earners and their families,

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<sup>79</sup> See Arts 8 and 9, ICESCR.

<sup>80</sup> For an introduction to the eight main ILO conventions, see ILO, 'Conventions and Recommendations', <http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> (last accessed 28 November 2018).

<sup>81</sup> Final Report, Meeting of Experts to Adopt Policy Guidelines for the Promotion of Sustainable Rural Livelihoods Targeting the Agro-food Sectors, Geneva, 26–30 September 2016, International Labour Office, Sectoral Activities Department, Geneva, ILO, 2017. On this point, see also ILO, Decent Work for Food Security and Resilient Rural Livelihoods: Decent Work in the Rural Economy Policy Guidance Notes, 2017, [https://www.ilo.org/wcmsp5/groups/public/---ed\\_dialogue/---sector/documents/publication/wcms\\_437170.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/publication/wcms_437170.pdf) (last accessed 28 November 2018).

and to promote and protect self-employment'.<sup>82</sup> More specifically on work safety, the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, has explored the situation of workers exposed to toxic substances, including rural workers exposed to pesticides and other agricultural chemicals, and proposed 15 principles detailing the responsibility of states, businesses and other stakeholders with respect to the human rights of workers.<sup>83</sup>

The UN Declaration on the Rights of Peasants and Other People Working in Rural Areas draws upon the right to work of rural actors by calling for responsible governance of food systems. In this sense, the Declaration underscores the role of food systems in the creation of job opportunities in rural areas: 'In States facing high levels of rural poverty and in the absence of employment opportunities in other sectors, States shall take appropriate measures to establish and promote sustainable food systems that are sufficiently labour-intensive to contribute to the creation of decent employment'.<sup>84</sup> Notably, the document focuses on industrial food systems for they are often deemed major providers of employment in rural areas; having said that, the inclusion of initiatives to boost self-employment and family-run enterprises in this article would have been equally welcome. In any case, what is particularly praiseworthy is the clear concern of the Declaration for avoiding abuses against rural workers and the commitment to fighting major contemporary pressing issues involving rural workers by determining that states shall 'take appropriate measures to protect them from economic exploitation, child labour and all forms of contemporary slavery, such as debt bondage of women, men and children, and forced labour'.<sup>85</sup>

### 3.1.2 The Right to Social Security

Lack of access to social security has been identified as one of the main causes leading to the critical vulnerability and marginalization of rural workers.<sup>86</sup> Closely related to the right to work, the right to social security has also been recognized as a fundamental human right, in Articles 22 and 25 of the UDHR. Article 22 states that '[e]veryone, as a member of society, has the right to social security'. Article 25(1) complements this: 'everyone has ... the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control'. The right to social security has also been reaffirmed and elaborated upon by legally binding human rights instruments. The ICESCR, for example, recognizes that 'everyone has the right to social security, including social insurance', and it draws attention to working mothers to whom 'paid leave or leave with adequate social security benefits' should be accorded 'during a reasonable period before and after childbirth'.<sup>87</sup>

General Comment no 19 of the CESCR on the right to social security further clarifies the scope and content of this right.<sup>88</sup> The document explains that it 'encompasses the right to access and maintain

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<sup>82</sup> Guideline 8.8, FAO, Voluntary Guidelines on the Progressive Realization of the Right to Adequate Food in the Context of National Food Security, *supra* fn 40.

<sup>83</sup> Report of the Special Rapporteur on the Implications for Human Rights of the Environmentally Sound Management and Disposal of Hazardous Substances and Wastes, UN doc A/HRC/39/48, 3 August 2018.

<sup>84</sup> Art 13.4, UN Declaration on the Rights of Peasants, *supra* fn 66.

<sup>85</sup> Art 13.6, *ibid*.

<sup>86</sup> HRC, Final Study of the Human Rights Council Advisory Committee on the Advancement of the Rights of Peasants, *supra* fn 69, para 24.

<sup>87</sup> Arts 9 and 10, ICESCR. At the regional level, the right to social security is also prescribed in the American Declaration of the Rights and Duties of Man (Art XVI), the Protocol of San Salvador (Art 9) and the European Social Charter (Arts 12, 13 and 14).

<sup>88</sup> CESCR, General Comment no 19 on the Right to Social Security, UN doc E/C.12/GC/19, 4 February 2008.

benefits, whether in cash or in kind, without discrimination in order to secure protection, inter alia, from (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; (c) insufficient family support, particularly for children and adult dependents'.<sup>89</sup> The Committee has underscored the fact that 'States parties should also consider schemes that provide social protection to individuals belonging to disadvantaged and marginalized groups'.<sup>90</sup> It gives the example of insurance schemes to cover losses of small farmers in the advent of crop failure or natural disasters.<sup>91</sup> Equally, it refers to 'self-employed persons in the informal economy' – which includes a significant number of rural workers – whose livelihoods should be covered by social protection.<sup>92</sup>

The UN Declaration on the Rights of Peasants and Other People Working in Rural Areas has also included the right to social security within the list of rights of fundamental importance for rural individuals and groups. The document sheds particular light on the need to abolish discrimination against rural workers, including migrant workers, who should enjoy the same social protection floors of all other national workers<sup>93</sup> – as detailed in ILO Recommendation no 202 adopted in 2012.<sup>94</sup> This right was extended to children in 1989 as the wording of the UNCRC prescribed that 'States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law'.<sup>95</sup> Other children's rights, particularly related to child labour, are described in the following section.

### 3.1.3 Child labour

Child labour remains one of the major human rights issues concerning food production. In 2010, the ILO estimated that there were around 215 million children engaged in labour work.<sup>96</sup> Sixty percent of child labourers aged 5 to 17 were employed in agriculture.<sup>97</sup>

At the international level, the UNCRC recognized the right of every child to be protected 'from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development'.<sup>98</sup> States parties to the Convention have undertaken the obligation to set a minimum age for admission to employment and to regulate hours and conditions for child work.<sup>99</sup>

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<sup>89</sup> Ibid, para 2.

<sup>90</sup> Ibid, para 28.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid.

<sup>93</sup> Art 22.2, UN Declaration on the Rights of Peasants, supra fn 66.

<sup>94</sup> ILO, R202 – Social Protection Floors Recommendation, 2012 (no 202).

<sup>95</sup> Art 26, UNCRC.

<sup>96</sup> ILO, Accelerating Action Against Child Labour. Global Report Under the follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference, 99th Session 2010, Report I(B), pp 5–10, [https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms\\_127688.pdf](https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_127688.pdf) (last accessed 28 November 2018).

<sup>97</sup> Ibid.

<sup>98</sup> Art 32.1, UNCRC

<sup>99</sup> Art 32.2, *ibid*.

The ILO Convention Concerning Minimum Age for Admission to Employment of 1973 (no 138) determines that children under 15 must not be in work – the only exception is foreseen for States whose ‘economy and educational facilities are insufficiently developed’, where the minimum age is 14.<sup>100</sup> National laws may allow children aged 13 to 15 to perform ‘light work’, which has been defined as work that is ‘not likely to be harmful to their health or development’ or to ‘prejudice their attendance at school, their participation in vocational orientation or training programmes’.<sup>101</sup> Subsequent to the UNCRC, the ILO adopted two conventions that are specifically dedicated to child labour. The Worst Forms of Child Labour Convention of 1999 (no 182) focuses on measures to secure the elimination of child slavery, child prostitution, the engagement of children in illicit activities and employment of children in activities that are harmful to their health, safety and morals.

The UN Declaration on the Rights of Peasants and Other People Working in Rural Areas has also addressed the issue. The document replicates the wording of the UNCRC regarding the obligation of the states to protect children from harmful work<sup>102</sup> and all forms of contemporary slavery, including debt bondage.<sup>103</sup>

Equally important is how international law has also been sensitive to the situation of children of working parents. In this regard, States Parties to the UNCRC have undertaken the obligation to ‘take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible’, which is all too often neglected in rural areas.<sup>104</sup>

### 3.2 The Rights of Rural Women

As early as 1992, the Rio Declaration on Environment and Development recognized that ‘[w]omen have a vital role in environmental management and development’ and called upon States to secure their full participation in decision-making processes so as to achieve sustainable development.<sup>105</sup> More recently, rural women have been considered the ‘backbone of sustainable livelihoods’, for their role as ‘farmers and farm workers, horticulturists and market sellers, business women and community leaders’.<sup>106</sup> Yet globally, rural women and girls are the most vulnerable to discrimination with respect not only to participation but also to access to land and other natural resources fundamental for food production, as well as to access to credits, machinery and technology. What is more, women and girls are the major victims of food scarcity and hunger worldwide.<sup>107</sup>

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<sup>100</sup> Art 2, ILO Convention Concerning Minimum Age for Admission to Employment.

<sup>101</sup> Art 7, *ibid.*

<sup>102</sup> Art 13.2, UN Declaration on the Rights of Peasants, *supra* fn 66.

<sup>103</sup> Art 13.6, *ibid.*

<sup>104</sup> Art 18.3, UNCRC.

<sup>105</sup> Principle 20, Rio Declaration on Environment and Development, 1992. A number of subsequent international documents have reiterated this concern about the participation of women in decision-making processes. See, for example, the Preamble of the Convention on Biological Diversity, which underscores the ‘vital role that women play in the conservation and sustainable use of biological diversity’ and affirms ‘the need for the full participation of women at all levels of policy-making and implementation for biological diversity conservation’.

<sup>106</sup> See the extract from the statement of the former UN Secretary-General, Ban Ki-moon, on the occasion of the International Day of Rural Women, 15 October 2015, <http://www.un.org/sustainabledevelopment/blog/2015/10/rural-women-are-the-backbone-of-sustainable-livelihoods-ban-declares-on-international-day/> (last accessed 28 November 2018).

<sup>107</sup> On this point, see the collection of essays in A. C. Bellows, F. L. S. Valente, S. Lemke and M. D. Núñez Burbano de Lara (eds), *Gender, Nutrition, and the Human Right to Adequate Food: Toward an Inclusive Framework*, Routledge, 2016. For a discussion on gender discriminatory practices with respect to access to land see I. Westendorp and E. Hilwig, Women’s Right to Land: A Comparison Between International Legal Obligations and Customary Laws in Bali (Indonesia) and Acholi (Uganda), in I. Westendorp (ed), *Legal Aspects of Land Rights and the Use of Land in Asia, Africa, and Europe*, Intersentia, 2016.



Within the international human rights framework, the principles of equality and non-discrimination have been affirmed in the UDHR and the two international covenants,<sup>108</sup> while CEDAW details the specific measures needed to foster equality between men and women. Of particular interest to this study is the special light shed by Article 14 of CEDAW on the specific problems faced by rural women. In addition to all rights it prescribes, CEDAW lists a number of entitlements that states must guarantee in order to eliminate discrimination against women in rural areas. These include participation in the elaboration and implementation of development planning as well as all community activities; access to adequate health care facilities, social security, education and economic opportunities; equal treatment in land and agrarian reform and access to agricultural credit and loans, marketing facilities and appropriate technology; and last but not least, enjoyment of adequate living conditions. In this respect, CEDAW determines that states must ensure the rights to housing, water and sanitation, as well as to public services such as electricity, transport and communications. Although not expressly stated, in order to ensure rural women's enjoyment of adequate living conditions, states must also respect, protect and fulfill their right to food, which, as argued in this study, is intertwined with guaranteeing their fully-fledged participation in food systems governance.

It is possible to identify at least five underlying factors contributing to discrimination against rural women in food systems governance. The first relates to stereotyped gender roles. The CEDAW Committee's General Recommendation no 34 on the Rights of Rural Women has noted that rural women 'carry most of the unpaid work burden due to stereotyped gender roles, intra-household inequality, and lack of infrastructure and services, including with respect to food production and care work'.<sup>109</sup> Moreover, it remarks that '[e]ven when formally employed, they are more often engaged in work that is insecure, hazardous, poorly paid and not covered by social protection'.<sup>110</sup>

The second factor that aggravates discrimination against rural women is the unequal access to arable land and other productive resources. As some authors observe, in many corners of the globe formal and informal legal and social norms have traditionally restricted the rights of women to access, use, own, inherit, transfer and control land and other natural resources.<sup>111</sup> Deeply rooted in local traditions, and thus widely disseminated and socially accepted, discriminatory practices remain largely unchallenged. As for productive resources, legal and policy barriers have hindered rural women from accessing financial services in their own right. As has been noted, 'discriminatory attitudes [have] prevent[ed] women from keeping bank accounts or entering into contracts without the consent of a male relative; or requests for collaterals that rural women may lack'.<sup>112</sup> This issue has been addressed in the 2004 FAO *Voluntary Guidelines on the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*, which encourage states to 'introduce, where it does not exist, and implement gender-sensitive legislation providing women with the right to inherit and possess land and other property. States should also provide women with secure and equal access to, control over, and benefits from productive resources, including credit, land, water and appropriate technologies'.<sup>113</sup>

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<sup>108</sup> See in particular, Arts 2, 7 and 23.2, Universal Declaration of Human Rights; Arts 2.1 and 26, International Covenant on Civil and Political Rights; Arts 2.2 and 7, ICESCR.

<sup>109</sup> CEDAW Committee, General Recommendation no 34, supra fn 65, para 5.

<sup>110</sup> Ibid.

<sup>111</sup> See J. Bourke-Martignoni, Gender Equality and the Right to Food in Contexts of Agricultural Commercialization, Research Brief, Geneva Academy, 2017, p 3, <https://www.geneva-academy.ch/joomlatools-files/docman-files/Gender%20Equality%20and%20the%20Right%20to%20Food.pdf> (last accessed 28 November 2018); Westendorp (ed), Legal Aspects of Land Rights and the Use of Land in Asia, Africa, and Europe, supra fn 107, p 97.

<sup>112</sup> CEDAW Committee, General Recommendation no 34, supra fn 65, para 67.

<sup>113</sup> Guideline 8.6, FAO, Voluntary Guidelines on the Progressive Realization of the Right to Adequate Food, supra fn 40.

Third, asymmetric power relations between men and women combined with under-representation of women in political, legal and economic institutions have led to the exclusion of rural women from decision-making positions at all levels.<sup>114</sup> As has been noted, '[t]he absence of women from decision-making power tends to be particularly acute in the trade, investment, agriculture, forestry and land use planning sectors. In contexts of agricultural commercialization, this lack of political representation means that the interests of women as small-scale landholders, landless farmers or agricultural wage labourers are frequently overlooked in negotiations, policies and legislation.'<sup>115</sup> At the household level, power asymmetry affects the ability of rural women to make decisions on crop production, the use of inputs and technology and marketing.

Fourth, the direct and indirect impacts of macroeconomic policies have equally interfered with the right of rural women to participate in the governance of food systems. In this respect, special attention has been drawn to the privatization and commodification of land, water and other natural resources fundamental for food production and from which rural women derive their livelihoods. Because rural women are all too often dedicated to non-monetized work, the commodification of natural resources critically affects their access to means of food production. In many corners of the world, 'the growth of contract farming, large-scale acquisitions of land and the privatization of communal resources including forests, grazing lands and water resources have been shown to benefit certain groups of men while generally disadvantaging women'.<sup>116</sup>

The fifth factor relates to environmental justice. A number of authors and international documents have reiterated that environmental degradation, including climate change, disproportionately affects rural women.<sup>117</sup> As noted in the CEDAW Committee's General Recommendation no 37 on Gender-Related Dimensions of Disaster Risk Reduction in the Context of Climate Change, 'situations of crisis exacerbate pre-existing gender inequalities and also compound intersecting forms of discrimination against [vulnerable groups]'.<sup>118</sup> In the particular case of rural women and girls, gender inequality all too often limits their participation in and influence on policies and decisions governing access to natural resources, credit and technology, as well as to basic public services such as education, housing and health care. 'As a result of these inequalities, women and girls are more likely to be exposed to disaster induced risks and losses related to their livelihoods and they are less able to adapt to changes in climatic conditions'.<sup>119</sup>

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<sup>114</sup> Ibid.

<sup>115</sup> Bourke-Martignoni, Gender Equality and the Right to Food in Contexts of Agricultural Commercialization, *supra* fn 111, p 3.

<sup>116</sup> Ibid, p 2.

<sup>117</sup> See, for example, the Preamble to the 2015 Paris Agreement; CEDAW Committee, General Recommendation no 37 on Gender-Related Dimensions of Disaster Risk Reduction in the Context of Climate Change, UN doc CEDAW/C/GC/37, 7 February 2018. With a slightly different approach, a number of international documents highlight the importance of women in nature conservation and sustainable use and encourage states to enhance their participation in decision-making processes. See, for example, the Preambles to the Convention on Biological Diversity and its Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, as well as the Preamble to the Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa.

<sup>118</sup> CEDAW Committee, General Recommendation no 37, *supra* fn 117, para 3.

<sup>119</sup> Ibid.

## 4 The Environment and Natural Resources

Food production is one of the major drivers of environmental degradation and the transformation of natural sites.<sup>120</sup> This fact has long polarized debates about human rights and the preservation of nature and natural resources, for the increasing presence of human beings on earth seems to necessarily lead to an environmental catastrophe.<sup>121</sup> In reviving Malthus' theory – which proposes that human populations grow exponentially while food production grows at an arithmetic rate – the first environmental thinkers concurred that the limited resources of the planet would not suffice to feed the world's growing population.<sup>122</sup>

Today, international debates on environmental preservation and human rights tend to converge and the integrity of the environment is seen as fundamental to the enjoyment of human rights, including the right to food.<sup>123</sup> At the legal level, a number of international environmental instruments have somewhat referred to the right to food in relation to environmental agendas. In the Americas, the 1996 Andean Decision no 391 Establishing a Common Regime on Access to Genetic Resources for states members of the Andean Community is one example.<sup>124</sup> In the African legal framework, one may cite the 2000 African Union Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Genetic Resources<sup>125</sup> and the 2003 revision of the African Convention on the Conservation of Nature and Natural Resources.<sup>126</sup>

Synergetic views on the right to food and environmental protection have also been part of debates at the FAO. The World Food Summit Rome Declaration on World Food Security and Plan of Action of 1996 make numerous references to the conservation and sustainable use of nature and natural resources, to measures to tackle environmental hazards, including the preservation of biological diversity,<sup>127</sup> and to mitigation strategies in order to combat drought and desertification and climate change,<sup>128</sup> with a view to enhancing food security.

In 2001, FAO Member States adopted the International Treaty on Genetic Resources for Food and Agriculture, which also reaffirmed this intertwined relation between the preservation of nature and the right to food. Going one step further, the Treaty determined that states forge what it termed 'farmers' rights': measures for both the empowerment of food producers and the promotion of sustainable natural resource use. While it maintained a particular focus on seed rights, which will be detailed further

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<sup>120</sup> On this point, see for instance J. L. Vivero Pol, 'Transition Towards a Food Commons Regime: Re-Commoning Food to Crowd-Feed the World, SSRN Working Paper, 2015, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2548928](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2548928) (last accessed 28 November 2018).

<sup>121</sup> For a general appraisal on the clashes between human rights and nature preservation, see T. Hayward, *Ecological Thought: An Introduction*, Cambridge University Press, 1995.

<sup>122</sup> See, for example, F. Osborn, *Our Plundered Planet*, Little, Brown and Company, 1948; P. Ehrlich, *The Population Bomb*, Sierra Club/Ballantine Books, 1968.

<sup>123</sup> See, for example, Interim Report of the Special Rapporteur on the Right to Food, UN doc A/70/287, 5 August 2015.

<sup>124</sup> See Art 14, Andean Decision no 391 Establishing a Common Regime on Access to Genetic Resources, 1996.

<sup>125</sup> See especially, part IV, Art 16, African Union Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Genetic Resources, 2000.

<sup>126</sup> See Art XVII, African Convention on the Conservation of Nature and Natural Resources, 2003.

<sup>127</sup> See, for example, Rome Declaration on World Food Security and Plan of Action, supra fn 57, para 32.

<sup>128</sup> See, for example, *ibid*, para 33.

on in this study, the Treaty proposed the adoption of agricultural policies that privilege the diversification of farming systems, the broadening of the genetic base of crops and the development of plant varieties adapted to local social, economic and ecological conditions, including underutilized species. It is undisputable that the pursuit of the sustainability of food systems largely depends on strict regulation of access to, use of and restoration of natural resources used for food production. The following sections are dedicated to describing and discussing some international sectorial legislation relevant to food production and the governance of food systems, especially those on land, water and seeds.

#### 4.1 Land

Land use and governance is perhaps the most pressing issue with respect to both environmental protection and human rights. Likewise, it is the most important natural resource for food production.

Despite, or due to permanent conflicts over ownership, possession and use rights, land has for a long time not been included as a self-standing right in the existing catalogue of international human rights law. Instead, land rights have been recognized as elements of other human rights. This has been especially true with respect to the rights to housing, work and livelihood, food, cultural identity, non-discrimination and ultimately the right to development. International documents and scholarly literature have reiterated, for example, the close link between the right to food and land rights of indigenous peoples, small-scale farmers and other traditional local communities, and on this basis, have called for the recognition of the right to land as a human rights norm.<sup>129</sup>

The first international instrument to make reference to land rights was ILO Convention 169 adopted in 1989. In Articles 14 and 15, the Convention demands that states parties recognize the rights of ownership and possession of indigenous and tribal peoples over the lands they traditionally occupy and natural resources found therein. In cases where these lands are not exclusively occupied by them, states must guarantee them access for subsistence and the performance of traditional activities. In July 2018, ILO Convention 169 had been ratified by 23 countries, mostly in Latin America. This low level of ratification has entailed a significant limitation on the Convention's legal reach.

Later, in 2007, UNDRIP reaffirmed the rights of indigenous peoples to occupied and used land and natural resources.<sup>130</sup> Despite its non-legally binding status, the Declaration has been quite successful in establishing new human rights standards concerning indigenous peoples to be followed by all 193 UN Member States. Of particular interest to the discussion in this paper is UNDRIP's determining that states have the obligation to respect, protect and fulfill the right of indigenous peoples not only to land ownership, but also 'to the conservation and protection of the environment and the productive capacity

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<sup>129</sup> See, for example, Golay and Bessa, *The Right to Land and Other Natural Resources*, supra fn 77; A. Bessa, 'Traditional Local Communities in International Law', PhD thesis, European University Institute, 2013; and J. Gilbert, 'Land Rights as Human Rights: The Case for a Specific Right to Land', 18 *SUR International Journal on Human Rights*, 2013; Report of the Special Rapporteur on the Right to Food, supra fn 37. On the state obligation to promote agrarian reform, see F. Coomans, 'Agrarian Reform as a Human Rights Issue in the Activities of the United Nations Human Rights Bodies and Specialized Agencies', 24 *Netherlands Quarterly of Human Rights* 1 (2006). See also Olivier De Schutter, 'How Far Are Land Rights and the Right to Food Connected?', <http://www.srfood.org/en/land-rights> (last accessed 28 November 2018).

<sup>130</sup> Art 26, UN Declaration on the Rights of Indigenous Peoples, states that '1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.'

of their lands or territories and resources'.<sup>131</sup> This includes protection against hazardous substances, which should not in any case be stored or disposed of in indigenous lands without indigenous people's free, prior and informed consent.<sup>132</sup> Regrettably, there has been little discussion – both within and outside academia – on the scope of this article and its relevance to food production and the use of pesticides.

In 2008, this question gained momentum with Ecuador's decision to lodge a claim before the International Court of Justice against Colombia for aerial spraying of herbicides in areas surrounding indigenous territories. Part of the US-funded 'Plan Colombia', the measure aimed to eradicate coca and poppy plantations, but ended up provoking serious health problems in the local population, and environmental degradation in the region.<sup>133</sup> The opportunity for discussion on the scope and content of UNDRIP at the Court was lost, however, for Ecuador decided to withdraw the complaint.

Outside the scope of indigenous rights, the importance of access to land for the realization of human rights has been underscored by CEDAW and the UN Committee on World Food Security *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*. As mentioned earlier, CEDAW underscores that rural women have the right to 'equal treatment in land and agrarian reform as well as in land resettlement schemes' to men. The Guidelines, in turn, underscore the critical role land plays in the enjoyment of the most fundamental rights, especially in rural areas: 'land, fisheries and forests are central for the realization of human rights, food security, poverty eradication, sustainable livelihoods, social stability, housing security, rural development, and social and economic growth'.<sup>134</sup>

More recently, the recognition of the right to land as a right of all peasants and other rural workers has been discussed in the context of the negotiation of the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas. Adopted in 2018, the text of the Declaration not only recognizes the right to land as a human rights norm on the same footing as classical human rights tenets such as the right to life and security of person,<sup>135</sup> but it also recognizes the need to protect customary land tenure rights and the natural commons, all too often overlooked by national legal systems.<sup>136</sup>

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<sup>131</sup> Art 29.1, *ibid.*

<sup>132</sup> Art 29.2, *ibid.*

<sup>133</sup> *Aerial Herbicide Spraying (Ecuador v Colombia)*, Order of 30 May 2008, ICJ Reports 2008, p 174. On this point, see also Bessa, 'Traditional Local Communities in International Law' *supra* fn 129, p 113.

<sup>134</sup> CEDAW, para 4.1. On this point, see also M. Brunori, 'Access to Land and Security of Tenure in the Resolutions of the United Nations General Assembly', *supra* fn 78. In the particular context of large-scale land acquisitions and leases, see C. Golay and I. Biglino, 'Human Rights Responses to Land Grabbing: A Right to Food Perspective', 34 *Third World Quarterly* 9 (2013).

<sup>135</sup> Art 17, UN Declaration on the Rights of Peasants, *supra* fn 66.

<sup>136</sup> National legal systems usually subject land rights to evidence that the land is being used productively. While there is a clear and legitimate concern with social justice which motivates such a requirement, i.e. to avoid the concentration of unproductive land in the hands of a few, this requirement undermines legitimate claims of indigenous peoples and traditional local communities to common rangelands, hunting-gathering grounds, sacred sites and other environments where human productive and cultural activities are not conspicuous. On this point, see among others L. Cotula, *Foreign Investment, Law and Sustainable Development: A Handbook on Agriculture and Extractive Industries*, IIED, 2016, p 83.

## 4.2 Water

The right to water was recognized as a human right by the CESCR in 2002.<sup>137</sup> This right was then defined as the right to accessible, available and adequate water for domestic purposes, which did not include water for irrigation. For long, the right to access to water springs and other sources and to use water for irrigation did not enjoy human rights status. It was only considered a fundamental element of other human rights, such as the right to food.<sup>138</sup>

The adoption of the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas has amplified the scope of the right to water and sanitation of peasants and other rural workers so as to encompass the right to water to produce food, including irrigation. Concretely, the Declaration states that '[p]easants and other people working in rural areas have the right to water for personal and domestic use, farming, fishing and livestock keeping and to securing other water-related livelihoods, ensuring the conservation, restoration and sustainable use of water'.<sup>139</sup> Moreover, the Declaration recognizes peasants' right to 'equitable access to water and water management systems, and to be free from arbitrary disconnections or the contamination of water supplies'.<sup>140</sup> In this context, the preservation of customary and community-based water management schemes, and the promotion of affordable technologies for water collection and storage, sustainable irrigation and treatment of wastewater have been particularly highlighted as ways to facilitate access to water.<sup>141</sup>

One further point addressed in the Declaration deserves special attention. In relation to the environmental dimension of the right to water, the document clarifies that the obligation to prevent overuse and contamination of water sources goes beyond the scope of environmental law and constitutes a human rights obligation of states.<sup>142</sup>

It is estimated that 84 percent of extracted freshwater is used for agriculture today and this figure may raise in coming years as the demand for water for feed and food production maintains a steady growth.<sup>143</sup> Against this scenario, measures for more effective water use and wastewater recycling are urgent and mandatory. Previous drafts of the Declaration also prescribed preferential water access and use for small-scale food producers.<sup>144</sup> This rule rested on the undisputable vulnerability of small-scale farmers vis-à-vis food industries with respect to access to and use of water, and on their need not only for irrigation of crops but also for domestic use and subsistence. Regrettably, however, this prescription was not included in the final version of the document.

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<sup>137</sup> See CESCR, General Comment no 15 on the Right to Water (arts 11 and 12 of the International Covenant on Economic Social and Cultural Rights), UN doc E/C.12/2002/11, 20 January 2003.

<sup>138</sup> *Ibid.*, para 7. On discussions on large-scale land acquisitions and restrictions on the rights of local populations to fresh water sources, what has been termed as 'land grabbing', see F. Spagnolo, 'Global Land Rush, Water Grabbing and the Human Right to Water', in M. Alabrese, M. Brunori, S. Rolandi, and A. Saba (eds), *Agricultural Law: Current Issues from a Global Perspective* Springer, 2017.

<sup>139</sup> Art 21.2, UN Declaration on the Rights of Peasants, *supra* fn 66.

<sup>140</sup> *Ibid.*

<sup>141</sup> Art 21.3, *ibid.*

<sup>142</sup> Art 21.4, *ibid.*

<sup>143</sup> L. Szilagyi, 'Agriculture is Destabilizing the Earth System, According to Recent Study', CGIAR Research Program on Climate Change, Agriculture and Food Security, 18 April 2018, <https://ccafs.cgiar.org/blog/agriculture-destabilizing-earth-system-according-recent-study#.W3vwjmcRqAo> (last accessed 28 November 2018). See also Farming First, 'Crop Yield Growth', estimations of the increase of food demand by 35 percent by 2030, <https://farmingfirst.org/Post2015-Food> (last accessed 28 November 2018).

<sup>144</sup> See Art 21.5, Revised Draft, UN Declaration on the Rights of Peasants and other People Working in Rural Areas, UN doc A/HRC/WG.15/5/2, 12 February 2018.

### 4.3 Seeds

Recent decades have witnessed heated debates on seed regulations and rights. With the emergence of the seed industry, the normative framework governing rights and duties of seed creators and users has fast flourished and raised a number of concerns and controversies. From a human rights perspective, the main point of contention has been the fact that seed laws and regulations have been designed with a focus on industrial food systems, and do not duly take into account customs and practices established by farmers worldwide since time immemorial. Environmentalists and human rights advocates have also raised strong critiques of new norms on seeds, as they are believed to significantly contribute to the critical deterioration of seed diversity – and as a result to threaten food security and the right to food of the entire global population<sup>145</sup> – while at the same time neglecting traditional seed-related knowledge and cultural heritage. The following sections are dedicated to discussing international instruments governing seed rights.

#### 4.3.1 Breeders' Versus Farmers' Rights

The idea of breeders' rights was developed *pari passu* with the emergence of the seed industry and the introduction of new food production technologies during the Green Revolution. In this context, the creation of exclusive rights over the commercialization and use of newly created seeds and plant varieties has been characterized by a marked polarization: the rights of industrial plant breeders on one side and the rights of farmers on the other.<sup>146</sup> While the former rely on robust international legal protection, particularly under the framework of the World Trade Organization (WTO), international law has largely neglected farmers' rights, which mostly depend on courageous national initiatives aimed at guaranteeing the rebalancing of power relations between globalized industrial seed producers and local farmers.

#### **Breeders' Rights**

In 1994, WTO members adopted the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), which governs, among other issues, standards concerning the availability, scope and use of intellectual property rights. Article 27 of the Agreement details the criteria for patent applicability. Of relevance here is the special mention it makes of plant varieties and its demand that WTO Member States provide for their legal protection either by patents, an effective *sui generis* system or any combination thereof.<sup>147</sup> Through the patent regime, industrial seed producers enjoy exclusive rights over their inventions for 20 years, 'provided that they are new, involve an inventive step and are capable of industrial application'.<sup>148</sup>

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<sup>145</sup> It is estimated that 940 out of the 7,000 plant varieties whose genes are deemed crucial for global food security are at risk of extinction. Current food-related laws and policies have contributed to this scenario, in so far as they have largely focused on the development of the food industry and thus favoured its push to homogenize global food production. On this point, see Farming First, 'Protecting Genetic Diversity', <https://farmingfirst.org/infographic-sdg2-5-protecting-genetic-diversity/> (last accessed 28 November 2018); Biodiversity International, *Mainstreaming Agrobiodiversity in Sustainable Food Systems: Scientific Foundations for an Agrobiodiversity Index*, 2017, [https://www.biodiversityinternational.org/fileadmin/user\\_upload/campaigns/CBD/Mainstreaming\\_Agrobiodiversity\\_Sustainable\\_Food\\_Systems\\_Summary.pdf](https://www.biodiversityinternational.org/fileadmin/user_upload/campaigns/CBD/Mainstreaming_Agrobiodiversity_Sustainable_Food_Systems_Summary.pdf) (last accessed 28 November 2018).

<sup>146</sup> Literature abounds on this topic. For a general appraisal on farmers' rights, see for instance, V. Shiva, 'Farmers' Rights, Biodiversity and International Treaties', 28 *Economic and Political Weekly* 14 (1993); R. Andersen, *The History of Farmers' Rights: A Guide to Central Documents and Literature*, FNI Report 8/2005, Fridtjof Nansen Institute, 2005, <https://www.fni.no/getfile.php/131903-1469869845/Filer/Publikasjoner/FNI-R0805.pdf> (last accessed 28 November 2018).

<sup>147</sup> Art 27.3(b), Agreement on Trade-Related Aspects of Intellectual Property Rights.

<sup>148</sup> Art 27.1, *ibid*.

In addition to the patent regime, the International Convention for the Protection of New Varieties of Plants (UPOV Convention) has been elaborated as an important international legal tool for the protection of breeders' rights. It was first adopted in 1961 and later revised in 1972, 1978 and 1991. The purpose of this treaty is to protect the exclusive right of professional plant breeders to produce, sell and market new varieties of plants. In principle, the ultimate goal of the UPOV Convention was to encourage the development of new and more productive plant varieties by safeguarding the commercial interests of plant breeders. Upon its adoption, conflicts of a social and economic kind (especially with non-industrial food producers) were already foreseen. In this respect, the drafters of the Convention relied on the principle of public interest to resolve conflicts and delineate limitations on breeders' rights: '[we are] conscious of the special problems arising from the recognition and protection of the right of the creator in this field and particularly of the limitations that the requirements of the public interest may impose on the free exercise of such a right'.<sup>149</sup>

Ponderations on public interest, however, have proved not to suffice to counterbalance the pressure of major international economic actors and industrialized countries seeking more favourable domestic laws and regulations.<sup>150</sup> Growing restrictions on the rights of farmers to use, exchange and sell protected plant varieties throughout the many revisions of the treaty confirm this. From a human rights viewpoint, as some authors have observed in countries like Kenya, Peru and the Philippines, 'restrictions on the use, exchange and sale of protected seeds could adversely affect the right to food, as seeds might become either more costly or harder to access. They could also affect the right to food, as well as other human rights, by reducing the amount of household income which is available for food, healthcare or education.'<sup>151</sup> Yet, these countries have faced strong pressure to enhance the rights of breeders, while at the same time imposing strict limitations on the rights of local farmers.

### Farmers' rights

This imbalance between industrial breeders and farmers has given rise to the emergence of the concept of farmers' rights. The concept derives from the idea that the development of new plant varieties would not be possible without the work of farmers all over the globe, who have domesticated wild plant varieties.<sup>152</sup> Therefore, any normative developments governing the commercialization of new plant varieties should account for the longstanding contribution of farmers. The concept was first formulated in FAO Resolution no 5/89 (1989), which defines farmers' rights as 'rights arising from the past, present and future contribution of farmers in conserving, improving and making available Plant Genetic Resources, particularly in the centres of origin/diversity. These rights are vested in the International Community, as trustee for present and future generations of farmers, for the purpose of ensuring full benefits to farmers and supporting the continuation of their contributions.'<sup>153</sup>

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<sup>149</sup> Preamble, International Convention for the Protection of New Plant Varieties, 1961.

<sup>150</sup> As has been noted, '[t]oday there is enormous pressure on developing country governments to adopt the UPOV 1991 model for the protection of plant varieties. In particular, developed countries negotiating bilateral and regional North-South free trade agreements make it a requirement for developing countries to adopt the UPOV 1991 model and/or become a party to the 1991 Act', S. Shashikant and F. Meienberg, *International Contradictions on Farmers' Rights: The interrelations between the International Treaty, its Article 9 on Farmers' Rights, and the Relevant Instruments of UPOV and WIPO*, Third World Network and The Berne Declaration, 2015, p 12, [http://www.twn.my/title2/intellectual\\_property/info.service/2015/ip151003/457628655560ccf2b0eb85.pdf](http://www.twn.my/title2/intellectual_property/info.service/2015/ip151003/457628655560ccf2b0eb85.pdf) (last accessed 28 November 2018).

<sup>151</sup> T. Braunschweig, F. Meienberg, C. Pionetti and S. Shashikant, *Owning Seeds, Accessing Food : A Human Rights Impact Assessment of UPOV 1991 Based on Case Studies in Kenya, Peru and the Philippines*, The Berne Declaration, 2014, [https://www.publiceye.ch/fileadmin/files/documents/Saatgut/2014\\_07\\_10\\_Owning\\_Seed\\_-\\_Accessing\\_Food\\_report\\_def.pdf](https://www.publiceye.ch/fileadmin/files/documents/Saatgut/2014_07_10_Owning_Seed_-_Accessing_Food_report_def.pdf) (last accessed 28 November 2018).

<sup>152</sup> Andersen, *The History of Farmers' Rights*, supra fn 146, p 2.

<sup>153</sup> FAO Conference, Res 5/89, 25th Session, Rome, 11–20 November 1989.



In 2001, FAO Member States adopted the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) with two general objectives: (a) to promote the conservation and sustainable use of plant genetic resources for food and agriculture, and (b) to operationalize the fair and equitable sharing of the benefits arising out of their use.<sup>154</sup> Farmers' rights have been reaffirmed in the document, which sheds special light on the contribution of farmers worldwide to the development of plant genetic resources used for food and agriculture, and their fundamental role in the eradication of hunger.<sup>155</sup> Article 9 of ITPGRFA provides a non-exhaustive list of farmers' rights, which include: a) protection of traditional knowledge relevant to plant genetic resources for food and agriculture; b) the right to equitably participate in sharing benefits arising from the utilization of plant genetic resources for food and agriculture; and c) the right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture. Furthermore, in an attempt to address the controversy between industrial breeders' and farmers' rights, Article 9(3) of ITPGRFA sets forth that '[n]othing 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'. This highly qualified formulation has been subject to fierce critique, especially from the human rights community. First, it does not clearly recognize the existence of the rights of farmers to save, use, exchange and sell seeds in international law, which should prevail over the rights of breeders. It just states that in case these rights exist, they should not be limited on the basis of Article 9 of ITPGRFA. Second, it leaves to states the discretion to recognize these rights or not. Article 9(3) failed to put an end to the controversy it was supposed (or at least expected) to address.<sup>156</sup> Finally, it does not clarify the meaning of 'farm-saved seed/propagating material': does this refer only to seeds/propagating materials developed by farmers or also to industrial seeds/propagating materials protected by the UPOV convention or intellectual property rights?

In 2013, FAO Member States re-discussed the issue in Resolution 8/2013 on the implementation of farmers' rights. Nonetheless, the wording of the resolution was limited to expressing states' concerns about the activities of both the International Union for the Protection of New Varieties of Plants (UPOV) and the World Intellectual Property Organization (WIPO), which might in their view run counter to the objectives of ITPGRFA and farmers' rights, leaving the resolution of the controversy for a later stage.<sup>157</sup>

### **Democratic Participation in Decision-Making**

The lack of participation of small-scale farmers in decision-making at all levels is equally the subject of discussion. As has been noted, 'UPOV also does not require the beneficiary country (where such a country is a member of the Treaty) to guarantee participation of farmers in decision-making processes'.<sup>158</sup> In many cases, this leads to the imposition of strict restrictions of seed rights without proper

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<sup>154</sup> Art 1, International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA).

<sup>155</sup> FAO, 'Putting Family Farmers First to Eradicate Hunger', 16 October 2014, [www.fao.org/news/story/en/item/260535/icode/](http://www.fao.org/news/story/en/item/260535/icode/) (last accessed 28 November 2018).

<sup>156</sup> Other critiques have been raised regarding the role of farmers both in the negotiation and implementation of the ITPGRFA. As it has been noted, farmers were not involved in the negotiations of the Treaty and are by no means active stakeholders in its implementation. They can neither directly access the common seed basket of the Treaty multi-lateral system nor decide on the destiny of the benefit-sharing funds governed under the Treaty. Ironically, decision-making on the use of the benefit-sharing fund, a mechanism designed to promote sustainable practices of small farmers specifically in developing countries, do not count on the participation of farmer representatives or farmers themselves. On this point, see C. Frison, *Redesigning the Global Seed Commons: Law and Policy for Agrobiodiversity and Food Security*, Routledge, 2018.

<sup>157</sup> FAO Res 8/2013, fifth session of the Governing Body, Muscat, Oman, 24–28 September 2013.

<sup>158</sup> Shashikant and Meienberg, *International Contradictions on Farmers' Rights*, p 12.

public participation, and without the involvement of the main stakeholders, including small-scale farmers. As two authors observed in 2015, in the case of Africa, discussions on the draft ARIPO Protocol [African Regional Intellectual Property Organization] were similarly not transparent or inclusive. For example, the HRIA [human rights impact assessment] of UPOV found organizations in Kenya (a ARIPO member), such as the Kenya National Federation of Farmers Union (KENFAP), that were not aware of, involved in, or consulted in the ARIPO process. And although informed observers expressed concern that implementation of UPOV 91 would have 'significant adverse consequences for small-scale farmers that dominate the agricultural landscape of ARIPO Member States (including Kenya), as well as for food security, agricultural biodiversity, and national sovereignty in Africa', the Kenyan research team of the HRIA could find no evidence that the government mandated any assessments of the likely impacts of the UPOV 91-based draft ARIPO Protocol.<sup>159</sup>

### **Crop Failure and Compensation**

Payment of compensation to farmers for crop failure has hardly been addressed in national and international seed laws and regulations. Perhaps the only exception to the rule has been Section 39 of the Indian Protection of Plant Varieties and Farmers' Rights Act adopted in 2001. Section 39(2) details the right of farmers to information and compensation for crop failure and establishes that breeders provide farmers with information on the expected performance of the propagating materials registered under the Act. If the propagating materials do not perform as expected, farmers are entitled to claim due compensation.<sup>160</sup>

### **The Right to Seeds as a New Human Rights Norm**

The above questions have been equally subject to debate under the negotiation of the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas. In order to guarantee that peasants are not subject to abuses that aggravate their vulnerability and jeopardize their fundamental human needs, negotiators propose the inclusion of the right to seeds in the catalogue of human rights.<sup>161</sup>

As for its scope and content, peasants' right to seeds includes, among others, the rights to the protection of seed-related traditional knowledge, equitable participation in benefits arising from their utilization and participation in decision-making concerning seed conservation and sustainable use, as well as the right to save, use, exchange and sell farm-saved seeds or propagating materials.<sup>162</sup> On these points, the wording of the Declaration replicates verbatim ITPGRFA discussed above.

In addition, the Declaration provides that states should take a number of measures to guarantee that peasants' right to seeds are respected, protected and fulfilled. These include measures to ensure that seeds of sufficient quality and quantity are available at affordable prices,<sup>163</sup> to support peasant seed systems<sup>164</sup> and inclusive agricultural research,<sup>165</sup> and to ensure that international instruments as well

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<sup>159</sup> Ibid., p 13.

<sup>160</sup> See also A. Ramanna, *Farmers' Rights in India: A Case Study*, FNI Report 6/2006, p 12, Fridtjof Nansen Institute, <https://www.fni.no/getfile.php/131801-1469869136/Filer/Publikasjoner/FNI-R0606.pdf> (last accessed 28 November 2018).

<sup>161</sup> Art 19, UN Declaration on the Rights of Peasants, supra fn 66.

<sup>162</sup> Art 19.1, *ibid.*

<sup>163</sup> Art 19.4, *ibid.*

<sup>164</sup> Art 19.6, *ibid.*

<sup>165</sup> Art 19.7, *ibid.*

as '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'.<sup>166</sup>

The inclusion of the right to seeds in the human rights catalogue is without doubt an important step towards rebalancing power asymmetries between the seed industry and farmers. A number of questions remain unanswered, however, such as the significance of farm-saved seeds, discussed earlier. Likewise, a few issues have remained unaddressed in the UN Declaration, for example the contamination of non-genetically modified (GM) crops by GM Organisms (GMOs), discussed in the following sections.

#### 4.3.2 Genetically Modified Organisms

The use, disposal and transport of GMOs have been the subject of great controversy in recent decades. Among the innumerable issues that have been raised, at least four are of special relevance to this study: transboundary issues, cross-pollination and the contamination of non-GM crops, the rights of consumers and GM labelling.

##### **Transboundary Issues**

At the international level, the main legal instrument regulating the transfer, handling and use of GMOs is the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Biosafety Protocol), adopted in 2000. The Protocol upholds the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development, and applies it to transboundary issues related to living modified organisms. Concretely, it aims 'to contribute to ensuring an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health, and specifically focusing on transboundary movements'.<sup>167</sup> To reach this aim, States Parties to the Protocol accepted the responsibility 'to ensure that the development, handling, transport, use, transfer and release of any living modified organisms are undertaken in a manner that prevents or reduces the risks to biological diversity, taking also into account risks to human health'.<sup>168</sup>

Also, Article 11 of the Biosafety Protocol establishes the norms governing living modified organisms intended for direct use as food or feed, or for processing. Essentially, this provision imposes on states parties the obligation to inform other parties to the Protocol, through the Biosafety Clearing-House, of its decision to use living modified organisms for direct use as food or feed, or for processing, including placing them on the market. In the case of importing of these organisms, the regulatory framework governing the import procedures shall be consistent with the objectives of the Protocol and available to the Biosafety Clearing-House.<sup>169</sup>

The UN Declaration on the Rights of Peasants and Other People Working in Rural Areas has also addressed this issue. In this respect, it demands that states 'prevent risks of violation of the rights of

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<sup>166</sup> Preamble and Art 19.8, *ibid.*

<sup>167</sup> Art 3, Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Biosafety Protocol), 2000.

<sup>168</sup> Art 2(2), *ibid.* See also A. L. Hobbs, J. E. Hobbs and W. A. Kerr, 'The Biosafety Protocol: Multilateral Agreement on Protecting the Environment or Protectionist Club?', 39 *Journal of World Trade* 2 (2005).

<sup>169</sup> Art 11.4, Biosafety Protocol, *supra* fn 167.

peasants and other people working in rural areas arising from the development, handling, transport, use, transfer or release of any living modified organisms'.<sup>170</sup>

### **Cross-Pollination and Contamination of Non-GM Crops**

Questions arising from GM contamination and effects on non-GM food production are not (at least directly) dealt with in the Biosafety Protocol. Perhaps the only instance in which the question is somehow addressed is in Article 26. This article establishes that states parties that decide to import living modified organisms may take into account 'socio-economic considerations arising from the impact of living modified organisms on the conservation and sustainable use of biological diversity, especially with regard to the value of biological diversity to indigenous and local communities'. These considerations should be consistent with other international obligations that states parties might have contracted. Moreover, States Parties to the Protocol are also 'encouraged to cooperate on research and information exchange on any socio-economic impacts of living modified organisms, especially on indigenous and local communities'.<sup>171</sup> It is easy to see that these norms also apply, among other economic practices, to the eventual negative impacts of GM contamination on indigenous and traditional local communities' production of food. The Protocol remains vague, however, on the definition of measures to be taken to avoid or redress these negative effects.

At the national level, court decisions have shed important light on the complexities involving cross-pollination and the contamination of non-GM crops, while at the same time reaffirming the need to clarify the scope and content of the rights of farmers to save, use, exchange and sell farm-saved seeds and propagating materials. The case *Monsanto Canada Inc. v Schmeiser*,<sup>172</sup> for example, raised the question of the rights of farmers to save and use seeds collected from GM-contaminated crops within their lands. *Marsh v Baxter*,<sup>173</sup> in turn, called upon the Australian Supreme Court to examine if GM contamination of crops – in this case of a certified organic farmer – would give rise to payment of damages by neighbouring GM users.

### **The Rights of Consumers and GM Labelling**

The traceability and labelling of GM-derived products has an important human rights dimension, as it provides consumers with relevant information on the food they are purchasing and allows them to make informed choices. This liaison between the rights of consumers and GM crops has only been indirectly captured in international law, however. The sole extant document concerning the protection of consumers, namely the *UN Guidelines for Consumer Protection*,<sup>174</sup> does not explicitly refer to GMOs.

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<sup>170</sup> Art 20.3, UN Declaration on the Rights of Peasants, supra fn 66.

<sup>171</sup> Art 26, Biosafety Protocol, supra fn 167.

<sup>172</sup> Supreme Court of Canada, *Monsanto Canada Inc. v Schmeiser*, 2004.

<sup>173</sup> Supreme Court of Western Australia, *Marsh v Baxter*, 2014.

<sup>174</sup> *UN Guidelines for Consumer Protection (As Expanded in 1999)*, [https://unctad.org/en/PublicationsLibrary/UN-DESA\\_GCP1999\\_en.pdf](https://unctad.org/en/PublicationsLibrary/UN-DESA_GCP1999_en.pdf) (last accessed 28 November 2018).

Concretely, the Guidelines provide that 'consumers should have the right of access to non-hazardous products, as well as the right to promote just, equitable and sustainable economic and social development and environmental protection'.<sup>175</sup> On this basis, they encourage states to adopt programmes towards consumer education and information, which cover a number of aspects including health, nutrition, prevention of food-borne diseases and food adulteration, product hazards, product labelling, relevant legislation concerning how to obtain redress in cases of abuse and environmental protection. More specifically on food products, the *Guidelines* call upon states to not only forge food security and safety according to international standards, but also to 'promote sustainable agricultural policies and practices, conservation of biodiversity, and protection of soil and water, taking into account traditional knowledge'.<sup>176</sup>

At the regional level, European Union Regulation (EC) no 1830/2003<sup>177</sup> sets the rules for the traceability of GMOs and GM-derived products at all stages of their production and distribution chains as well as their labelling in final consumer packaging. Its ultimate purpose is to facilitate the monitoring of the effects of GMOs on the environment and human health, and the implementation of risk management measures. At the national level, a number of laws and regulations have been more explicit with regard to the rights of consumers to information about GM-derived products. Chile<sup>178</sup> and Brazil,<sup>179</sup> for example, have passed laws on GM labelling, according to which food producers should include special indication on labels of GM-derived items.

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<sup>175</sup> Art 1.1, *ibid.*

<sup>176</sup> Arts 57 and 58, *ibid.*

<sup>177</sup> Regulation (EC) no 1830/2003 on the Traceability and Labelling of Genetically Modified Organisms (GMOs) and the Traceability of Food and Feed Products Produced from GMOs.

<sup>178</sup> Law 20.606 on the Nutritional Composition of Food Items and their Publicity (Ley no 20.606 sobre Composición Nutricional de los Alimentos y su Publicidad).

<sup>179</sup> Law 11.105 of 24 March 2005 (Lei nº 11.105, de 24 de março de 2005).



## 5 Concluding Remarks

This study has aimed to map out international human rights standards of relevance to the governance of food systems. It has identified international obligations governments must observe in the design and implementation of food-related laws, policies and projects. It departs from the premise that no food system is fully sustainable if human rights are not championed in all steps of the value chain.

A number of recommendations for the promotion of sustainable food systems may be envisaged on this basis. First, governments must ensure that food systems contribute to the realization of the right to food of the individuals and groups living in their territories, without discrimination. Food systems operating in states' territories should ideally increase the availability of food for local consumption and must not, in any circumstance, put at risk local food supply. In as much as access to food is concerned, this entails, on the one hand, guaranteeing that the national minimum income suffices to purchase a basic food basket that satisfies one's nutritional needs. On the other hand, it entails facilitating access to resources one needs to produce one's own food, including land, water and seeds. This is particularly pertinent in the case of peasants, indigenous peoples, traditional local communities and other actors whose major means of accessing food is through their own production of it.

In addition to access, the cultural and environmental dimensions of the right to food must also be acknowledged. As for the former, governments must ensure that food systems contribute to food diversity and promote the cultural food habits of the local population – or at least that they do not negatively affect them. Export-oriented food systems should not interfere in the production of local staple and typical foods in a way that they become no longer accessible. Likewise, natural resources must be responsibly used, in a way that contributes to the well-being of all human beings without discrimination, and meets the needs of present and future generations alike. Strict environmental regulations must also be implemented to guarantee that food systems do not negatively affect the availability, accessibility and quality of local water, soil, biodiversity and other natural resources, especially those used by the local population to produce food.

Fundamental human rights principles must also be observed and applied at all levels of governance. The principles of participation, accountability, non-discrimination, transparency, human dignity, empowerment and rule of law should inform national and local food policies and laws. Among other measures, governments must ensure that the population has access to all information concerning food – from laws, policies and budgets to ingredients of processed food and the use of pesticides and GMOs – in a language that is comprehensible to all. This must enable people to make better decisions regarding the food they consume, to actively participate in all decisions that might affect their ability to access adequate food, and challenge actions that directly or indirectly infringe their rights.

Furthermore, governments must give due consideration to the rights of workers and secure the elimination of child labour in all steps of food systems' value chain. Farmers and other food system workers have the rights to safe and healthy working conditions, fair remuneration and social security and time for rest and leisure, as well as the right to form and join trade unions. With respect to children, it is mandatory that governments protect them from slavery and prostitution, and from engagement in activities that might be harmful to their health, safety and morals. Moreover, in the case of working parents, governments must ensure that children benefit from childcare services and facilities.

Fostering equality between men and women constitutes another international human rights obligation relevant to sustainable food systems governance. In this regard, it is particularly critical to address the situation of structural and systemic discrimination against rural women. Governments must guarantee women's equal access to and control of land and other productive resources, as well as equal access to public services, secure income, social protection and political, economic and social institutions. The enjoyment of their right to equal participation in decision-making process at all levels must also be ensured.

Last but not least, governmental laws, policies and programmes must champion the democratic governance of natural resources and social justice. Governments must promote redistributive reforms that guarantee equal access to land and other natural resources and limit land concentration. Traditional systems of collective use and management of natural resources, particularly those of indigenous peoples and traditional local communities, and preferential access for the most vulnerable and needy should also be supported.



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This study engages in the discussion on food sustainability from a human rights-based perspective. It maps out international human rights standards closely related to food production that should be taken into account by law- and policy-makers when developing domestic normative and policy frameworks concerning food systems. The selection of the instruments here is not exhaustive: the focus is on the various aspects concerning the right to food, the rights of actors involved in food supply chains (especially production) and the international norms related to productive resources fundamental for food production, particularly land, water and seeds. Special attention is dedicated to the recently adopted UN Declaration on the Rights of Peasants and Other People Working in Rural Areas, which sets basic human rights norms of relevance to food systems governance.

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