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# **Human Rights and the Commons: Exploring Approaches to the Governance of Land and Natural Resources beyond Indigenous Peoples' Rights. The Case of Peasants <sup>+</sup>**

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# Human Rights and the Commons: Exploring Approaches to the Governance of Land and Natural Resources beyond Indigenous Peoples' Rights. The Case of Peasants.

## 1 Introduction

Historically, the transformation of the vast majority of the traditional commons<sup>1</sup> into property-like entitlements has occurred within hierarchical political and power structures that benefited settlers and wealthy landowners at the expenses of indigenous peoples and other rural communities.<sup>2</sup> At the times of colonization and the establishment of modern States, lands and resources held as commons were appropriated by colonial elites and/or dominant groups within the national population through varying enclosures schemes, whereas customary community-based rules and institutions governing the management and use of these resources were very often disregarded along with communities' rights over them.<sup>3</sup> Today, 2.5 billion men and women from indigenous and other rural communities worldwide are estimated to depend on lands managed through customary, community-based tenure systems. These lands would account for over 50 percent of the world's total land area. Yet, these communities have formally recognized rights over only one-fifth of these lands.<sup>4</sup> Lack of recognition of their customary rights and persisting marginalisation, coupled with biased approaches towards communities' forms of land-use and the gradual erosion of their traditional institutions, entail, in many cases, a great vulnerability of these resources to appropriation by the State and private actors in the face of mounting pressures from development projects, foreign investments and conservation initiatives

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<sup>1</sup> The term 'commons' designates shared resources in which each stakeholder has an equal interest (*see* IASC, Research on the Commons, Common-Pool Resources, and Common - Definition, 2009, <dlc.dlib.indiana.edu/dlc/contentguidelines>, visited on 20 June 2017). In this article, we use the term also to refer to a specific regime governing the access to and use of land and natural resources, constituting an alternative to private and State property, whereby primary control rights over resources are held by a group whose size and behaviour in relation to the resources are specified. Generally speaking, commons may encompass, among others, publicly or state-owned lands, fisheries and forests that are collectively used and managed by local groups or communities; those that are held by indigenous peoples and other communities under their own customary tenure systems; and newly established commons. On this, *see* FAO, *Governing Tenure Rights to Commons* (FAO, Rome, 2016).

<sup>2</sup> J. W. Hamilton and N. Bankes, 'Different views of the cathedral: The literature on property law theory', in A. McHarg, B. Barton, A. Bradbrook, and L. Godden (eds.) *Property and the Law in Energy and Natural Resources* (OUP, Oxford, 2010).

<sup>3</sup> McHarg, et al. (eds.), *supra* note 2. Specifically on indigenous peoples, *see* S. Errico, *The rights of indigenous peoples in Asia: a human rights-based overview of national legal and policy frameworks against the backdrop of country strategies for development and poverty reduction* (ILO, Geneva, 2017); CEPAL, *Los pueblos indígenas en América Latina. Avances en el último decenio y retos pendientes para la garantía de sus derechos* (CEPAL, Santiago de Chile, 2014); ILO, ACHPR, *Overview report of the research project by the International Labour Organization and the African Commission on Human and Peoples' Rights on the constitutional and legislative protection of the rights of indigenous peoples in 24 African countries* (ILO, Geneva, 2009); and UN, *Indigenous Peoples and their Relationship to Land*, UN Doc E/CN.4/Sub.2/2001/21, 2001.

<sup>4</sup> Rights and Resources Initiative (RRI), *Common Ground: Securing land rights and safeguarding the earth* (Oxfam, International Land Coalition, Washington, 2016); RRI. *Who Owns the World's Land? A global baseline of formally recognized indigenous and community land rights* (RRI, Washington, DC, 2015).

(so-called ‘green grabbing’).<sup>5</sup> Over the last decades, indigenous peoples and agrarian movements organized at the transnational level, have brought their struggles to regain control over their lives, livelihoods, lands and territories to the United Nations, both framing their claims within a human-rights discourse, although building it on different premises.<sup>6</sup> Indigenous peoples have reclaimed control over their territories, lives and development in the exercise of their right to self-determination within the broader context of what has been regarded as a ‘belated building of the State’;<sup>7</sup> peasants and other people working in rural areas [hereinafter referred to as ‘peasants’]<sup>8</sup> have reclaimed control over their means of subsistence, including land, water, seeds, biodiversity, methods of agricultural production and associated peasant knowledge, invoking the concept of ‘food sovereignty’,<sup>9</sup> in a context marked, among others, by trade liberalization, the rise of industrial agriculture and the gradual disappearance of the peasantry.<sup>10</sup> Their claims have triggered the drafting process of new international human rights instruments stemming from discrimination-related considerations<sup>11</sup> – the UN Declaration on the Rights of Indigenous Peoples [hereinafter UNDRIP] adopted in 2007 by the UN General Assembly,<sup>12</sup> and the UN Declaration on the Rights of Peasants and other people working in rural areas [hereinafter UNDROP], which was adopted on 28 September 2018 by the UN Human Rights Council.<sup>13</sup> At the core of these instruments are provisions on lands and natural resources, which accommodate, to a

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<sup>5</sup> See UN, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, UN Doc. E/CN.4/2003/90, 2003; UN, *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, 2012; ILO/ACHPR *supra* note 3; Errico *supra* note 3.

<sup>6</sup> J. Anaya, *Indigenous Peoples in International Law* (Oxford, OUP, 2004); S. Errico, ‘The United Nations Declaration on the Rights of Indigenous Peoples. An Overview’, 4 *Human Rights Law Review* (2007) pp. 741-755; UN 2012 *supra* note 5; P. Claeys, *Human Rights and the Food Sovereignty Movement: Reclaiming Control* (Routledge, New York, 2015). Further in section 3.

<sup>7</sup> E.I. Daes, ‘Some considerations on the right of indigenous peoples to self-determination’ 3:1 *Transnational Law and Contemporary Problems* (1993) pp. 367-377.

<sup>8</sup> Please note that the term ‘peasants’ here includes pastoralists, fishers, indigenous peoples working the land, the landless, transhumant and nomadic communities, agricultural workers and small-scale farmers, among others, in keeping with the approach followed by the UN Declaration on the Rights of Peasants and other people working in rural areas. See further in the following sections.

<sup>9</sup> The preamble of UNDROP recalls that the concept of ‘food sovereignty’ has been used in many States and regions to designate the right to define their food and agriculture systems and the right to healthy and culturally appropriate food produced through ecologically sound and sustainable methods that respect human rights. See UN, *United Nations declaration on the rights of peasants and other people working in rural areas*, UN Doc. A/HRC/39/L.16, 26 September 2018.

<sup>10</sup> F. A. Araghi, ‘Global Depeasantization, 1945-1990’, 36:2 *The Sociological Quarterly* (1995) pp. 337–68; P. Rosset and M. E. Martínez-Torres, ‘La Vía Campesina: The Birth and Evolution of a Transnational Social Movement’, 37:1 *Journal of Peasant Studies* (2010) pp.149–75; J. Ploeg *The New Peasantries: Struggles for Autonomy and Sustainability in an Era of Empire and Globalization* (Earthscan, London and USA, 2008).

<sup>11</sup> UN *supra* note 5; UN, *Study of the Problem of Discrimination Against Indigenous Populations: Vol V, Conclusions, Proposals and Recommendations*, UN Doc E/CN.4/Sub.2/1986/7/Add.4, 1986.

<sup>12</sup> It should be noted that the International Labour Organisation (ILO) started addressing the issue of the living and working conditions of indigenous peoples since the 1920s. This has resulted in the adoption, in 1957 and 1989, of two international treaties specifically concerning indigenous peoples’ rights, i.e. ILO Indigenous and Tribal Populations Convention No. 107 and ILO Indigenous and Tribal Peoples Convention No. 169. The former is closed to new ratifications since the entry into force of Convention No. 169.

<sup>13</sup> UN *supra* note 9. UNDROP was adopted by a recorded vote (33 to 3, with 11 abstentions).

varying degree, their claims for control over their territories through the recognition of collective rights.<sup>14</sup>

Around the same span of time, the resources falling under the communal management of indigenous peoples and peasants' communities,<sup>15</sup> have also received increasing attention by scholars out of concerns for the 'sustainability' of their use. This has been especially the case since the publication of Ostrom's work on the governance of the commons.<sup>16</sup> In this context, collective action<sup>17</sup> based on the voluntary cooperation of resource users has been put forward as a valuable institutional arrangement for the sustainable management of these resources. Collective action has been presented as an alternative to privatization and State control, and a number of 'facilitating' conditions for its establishment and functioning have been identified.<sup>18</sup>

It is the authors' view that there is considerable potential in crossing the governance approaches to land and natural resources that have been elaborated within the fields of human rights and collective action theory, as was suggested by Bakker in the case of water.<sup>19</sup> As will be discussed below, the two fields appear to have the potential to complement and mutually reinforce each other for the purpose of ensuring the social and environmental 'viability' of the commons. We use the concept of 'viability' to emphasize the social dimensions of the commons and the importance of looking at the rights of the actors concerned and the global context affecting them, bearing in mind that the commons are essential to the livelihoods and lives of the rural poor.<sup>20</sup> To date, however, the intersection between human rights and collective action over the commons has been scarcely explored. As will be recalled in the following sections, although land and natural resources are recognized as essential elements for the realization of several human rights, international human rights law does not recognize

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<sup>14</sup> We use the term 'territory' to refer to the total environment of the areas which the groups concerned occupy or otherwise use. Please note that this concept is borrowed from ILO Convention No. 169 (*see note 12 supra*).

<sup>15</sup> We refer here in particular to the so-called common pool resources, i.e. those resources in respect of which exclusion or control of access of individual users is very costly and often impossible to achieve (low excludability) and where the use of the resources by a potential user reduces the availability for other users (subtractability). They include, for example, pasture, forests, fisheries and wildlife. On the breakdown of common property institutions into open access situations in the face of socio-economic pressures, *see* F. Ellis, *Peasant Economics* (Cambridge University Press, Cambridge, 1993), pp. 267-68.

<sup>16</sup> E. Ostrom, *Governing the Commons. The Evolution of Institutions for Collective Action* (Cambridge University Press, Cambridge, 1990).

<sup>17</sup> Broadly speaking, collective action can be defined as a "concerted group effort to achieve a shared goal". *See* B.D. Ratner *et al*, 'Addressing conflict through collective action in natural resource management', 11:2 *International Journal of the Commons* (2017) p. 880.

<sup>18</sup> *See* W. Blomquist, and E. Ostrom, 'Institutional capacity and the resolution of a commons dilemma', 5:2 *Policy Studies Review* (1985) pp. 383-392; R. Wade, *Village Republics: Economic Conditions for Collective Action in South India* (Cambridge University Press, Cambridge, 1988), pp. 199-204. Ostrom, for example, identifies eight basic conditions for successful collective action connected with the attributes of both the resource and the resource users, which include: clear group boundaries; matching between the rules governing the use of the common goods and local needs and conditions; participation of the actors concerned in modifying such rules; respect of rule-making rights of community members by outside authorities; community-based monitoring of members' behaviour; graduated sanctions for rule violators; accessible, low-cost means for dispute resolution; responsibility for governing the common resource build in nested tiers from the lowest level upward. *See* Ostrom, *supra* note 16.

<sup>19</sup> K. Bakker, 'The 'Commons' Versus the 'Commodity': Alter-Globalization, Anti-Privatization and the Human Right to Water in the Global South', 39:3 *Antipode* (2007) pp. 430-55.

<sup>20</sup> In this regard, we believe that a human rights-based approach could greatly contribute to complement the 'Institutional Analysis and Development' framework (IAD) which is often used in the research on commons. *See*, for example, E. Ostrom, *Understanding Institutional Diversity* (Princeton University Press, Princeton, NJ, 2005).

a universal human right to land and its pertaining resources,<sup>21</sup> with the significant exception of the standards addressing specifically indigenous peoples. As a result, apart from the case of indigenous peoples, an ‘instrumentalist’ approach to land is commonly employed which takes into account issues related to access, use and control of land and natural resources only to the extent that they are required to fulfil a number of human rights in the absence of alternative means. This has proved, in practice, to leave those people, like peasants, who depend on land and natural resources for their livelihoods, with very limited protection, as will be discussed more in detail below. Indeed, the preamble of UNDROP refers explicitly to the need for greater protection of the human rights of peasants and for a coherent interpretation and application of existing international human rights norms and standards on this matter. A human-rights based collective action framework could offer interesting avenues to protect these rights.

In the following sections, we focus precisely on UNDROP, with the objective of illustrating the potential of making use of both the human rights and collective action approach to ensure the ‘viability’ of the commons.<sup>22</sup> UNDROP has actually been described as an attempt at “reviving” the commons in international law.<sup>23</sup> As shall be seen below, UNDROP takes inspiration from the provisions of UNDRIP while also building on the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security by the UN Committee on World Food Security (more on this *infra*), and, besides being a human rights instrument, also embodies aspects pertaining to collective action. Although the term commons is mentioned only once in the UNDROP, most rights listed in the draft text are relevant to the commons. We consider the process of negotiation of UNDROP as a direct reaction against the enclosure of rural commons, and part of a global effort towards what Borras and Franco have called a people’s counter enclosure,<sup>24</sup> as will be described further below. Because of our focus on the collective rights of peasants, the scope of the analysis will be limited to traditional or ‘rural commons’,<sup>25</sup> more particularly land, pastures, forests, and water bodies.<sup>26</sup>

The article is structured as follows: After having provided a brief overview of the reality of rural commons and the demands of the agrarian social movements, as well as the traditional approach of collective action theory to the commons, we describe the status of land and natural resources in international human rights law, with a particular focus on the rights to land, territories and resources of indigenous peoples as recognized in UNDRIP, with a view to outlining the background to the drafting of UNDROP. We also describe the aforementioned Voluntary Guidelines, which build on existing international human rights law obligations and provide for the recognition of legitimate tenure rights based on customary systems. Against this framework, we next turn to the

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<sup>21</sup> On the right to property under international law and why this is has not been deemed to be sufficient for peasants, *see infra* section 4.

<sup>22</sup> Please note that for the purpose of the analysis in this paper reference is made to the text adopted in September 2018 by the UN Human Rights Council. See UN *supra* note 9.

<sup>23</sup> O. De Schutter, *From eroding to enabling the commons: the dual movement in international law* (CRIDHO Working Paper 1, Université Catholique de Louvain, 2018).

<sup>24</sup> S. M Borras, J.C. Franco, and C. Wang, ‘The Challenge of Global Governance of Land Grabbing: Changing International Agricultural Context and Competing Political Views and Strategies’, 10:1 *Globalizations* (2013) pp. 161–79.

<sup>25</sup> L. Alden Wily, ‘The Commons and Customary Law in Modern Times: Rethinking the Orthodoxies’, UNDP International Land Coalition Workshop: Land Rights for African Development: From Knowledge to Action. Nairobi, 31 October – 3 November 2005,

<sup>26</sup> Although not addressed in this paper, it should be recalled that UNDROP also cover peasants’ rights with regard to seeds. On this point, *see* note 99.

analysis of UNDROP to illustrate our main argument. We then conclude with some final remarks.

## 2 Rural Commons and the Demands of La Via Campesina

Rural households depend to a significant extent upon the commons, and the poorer the household, the greater the proportion of dependency upon the commons. This holds particularly true for peasant women who, despite playing a vital role in the food security of the household, producing between 60 and 80 per cent of the food crops in developing countries, have very often limited and unsecured access to land and natural resources, as a result of discriminatory laws and practices.<sup>27</sup> Today, an increasing proportion of commons is being commoditized. This historical process of commodification is far from complete however: in many parts of the world, the establishment of property rights on land and natural resources, enshrined in law and enforced by the State, is not yet a reality, and is challenged by social actors, particularly in the rural South but also in the North.<sup>28</sup>

Small family farms dominate rural landscapes across the developing world, accounting for up to 80 per cent of food produced in Asia and sub-Saharan Africa, while supporting livelihoods of up to 2.5 billion people.<sup>29</sup> Yet, smallholder farmers represent 50 per cent of the world's hungry. Another 10 per cent of the world's hungry subsist through fishing, hunting and herding activities.<sup>30</sup> In its final study on the advancement of the rights of peasants and other people working in rural areas, the UN Human Rights Council Advisory Committee found that peasants are victims of multiple human rights violations that make them extremely vulnerable to hunger and poverty, and emphasized the need, in order to overcome this situation, for a new legal instrument setting out peasants' rights and addressing current normative gaps in international human rights law, notably the recognition of a right to land.<sup>31</sup> Indeed, as was previously recalled, indigenous and peasants' communities depend mostly on lands managed through customary, community-based systems that remain highly prone to appropriation by the State and private actors. In Africa, for example, 80 per cent of the land is held under customary forms of community tenure<sup>32</sup> and, in over half of the African States rural commons have typically the status of *de facto* un-owned land or State land.<sup>33</sup>

In some regions, such as Eastern and Southern Africa, a trend toward the re-organization of commons has however been noted, especially in the case of specific resources such as pastures, forests, water sources and game.<sup>34</sup> Since 1990, 21 of 54 African states (39 per cent) have improved legal recognition of community lands and

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<sup>27</sup> UN *Supra* note 5.

<sup>28</sup> P. Claeys, 'Food Sovereignty and the Recognition of New Rights for Peasants at the UN: A Critical Overview of La Via Campesina's Rights Claims over the Last 20 Years', 12: 4 *Globalizations* (2015) pp. 452–65

<sup>29</sup> IFAD, *Rural Development Report 2016. Fostering inclusive rural transformation* (IFAD, Rome, 2016).

<sup>30</sup> UN *Supra* note 5.

<sup>31</sup> *Ibid.*

<sup>32</sup> L. Alden Wily, 'Customary tenure: remaking property for the 21st century', in M. Graziadei and L. Smith (eds.) *Comparative Property Law: Global Perspectives* (Edward Elgar, Cheltenham, UK, 2016).

<sup>33</sup> L. Alden Wily, 'The Law Is to Blame: The Vulnerable Status of Common Property Rights in Sub-Saharan Africa', 42:3 *Development and Change* (2011) pp. 733–757.

<sup>34</sup> M. Bollig, and C. Lesorogol, 'Editorial: The 'New Pastoral Commons' of Eastern and Southern Africa', 10:2 *International Journal of the Commons* (2016) pp. 665–687.

another 13 states (24 percent) are presently improving their laws.<sup>35</sup> Similar processes are taking place also in other parts of the world. In Europe, for example, besides the continuity of historical commons in countries such as Switzerland, Italy, Greece or Norway, just to name a few, a phenomenon of “handing back” of rural commons to communities based on historical claims is occurring in a number of countries in Eastern Europe, Spain and Portugal.<sup>36</sup> This adds to the development of new rural commons in response to the appropriation and concentration of farmland and the development and enforcement of intellectual property rights on seeds. Indeed, land concentration and rising land prices in Europe are posing increased challenges in relation to farm succession and farm renewal, and access to land for new farmers.<sup>37</sup> This situation has given rise to civil society initiatives to take land off the market, put it in the hands of cooperatives who then make it available through long-term leases to aspiring farmers or groups of farmers using agro-ecological methods. Cooperatives like *Terre des liens* in France or *Terre en vue* in Belgium aspire to give back to these lands their status of rural commons.<sup>38</sup> Initiatives aimed at protecting, developing, selling and exchanging peasant seeds and peasant tools are also worth mentioning.<sup>39</sup>

The process that led to the creation, in 2012, of an open-ended intergovernmental working group (OEIWG) within the UN Human Rights Council (HRC), tasked with the elaboration and negotiation of a UN Declaration on the Rights of Peasants and other people working in rural areas (UNDROP), was initiated at the request of agrarian social movements, and notably La Via Campesina (LVC). LVC represents about 200 million small-scale farmers and peasants across 70 countries, both in the North and in the South, and is considered the biggest social movement in the world today. UNDROP builds on LVC’s claims and finds its roots in the late 1990s in Indonesia, although it was brought to the attention of the HRC in the following decade. Through alliances with small and sympathetic NGOs (such as FIAN International and CETIM), and a number of key states (Bolivia, Cuba, Ecuador and South Africa), LVC succeeded in putting the issue on the HRC agenda. The context certainly prompted the HRC to take action. The global food crisis of 2007-08, with its associated biofuel boom and increased numbers of large-scale acquisitions and leases of land, made visible the challenges facing small-scale farmers, and gave particular resonance to LVC’s call for a specific international human rights instrument protecting the rights of peasants.<sup>40</sup> At the heart of the crisis, LVC denounced “the ferocious offensive of capital and of transnational corporations to take over land and natural assets (water, forests, minerals, biodiversity, land, etc.), that translates into a privatizing war to steal the territories and assets of peasants and indigenous peoples”.<sup>41</sup> LVC, together with other social organizations, demanded that

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<sup>35</sup> FAO, *supra* note 1.

<sup>36</sup> G. Bravo, and T. De Moor, ‘The commons in Europe: from past to future’, 2:2 *International Journal of the Commons* (2008) pp. 155–161.

<sup>37</sup> European Parliament, *Report on the state of play of farmland concentration in the EU: how to facilitate the access to land for farmers*, 2016/2141(INI), 2017 <[www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2017-0119+0+DOC+XML+V0//EN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2017-0119+0+DOC+XML+V0//EN)>, visited on 25 June 2018.

<sup>38</sup> See, for example: <[www.terre-en-vue.be/?lang=fr](http://www.terre-en-vue.be/?lang=fr)>, visited on 21 June 2017. More research is needed on whether the institutional setup for these initiatives actually presents the characteristics of commons.

<sup>39</sup> See for example the *Réseau semences paysannes* in the case of seeds, <[www.semencespaysannes.org/](http://www.semencespaysannes.org/)>, visited on 21 June 2017; and *Atelier paysan* in the case of tools, <[www.latelierpaysan.org/](http://www.latelierpaysan.org/)>, visited on 21 June 2017.

<sup>40</sup> P. Claeys, ‘The Creation of New Rights by the Food Sovereignty Movement: The Challenge of Institutionalizing Subversion’, 46:5 *Sociology* (2012) pp. 844–60.

<sup>41</sup> La Via Campesina, ‘Declaration of Maputo’, Declaration of the 5th International Conference of Via Campesina, Maputo, Mozambique, 2008.



an end be put to the ‘new enclosure movement’ that converts “arable, pastoral, and forest lands for the production of fuel”.<sup>42</sup> United in their struggle for food sovereignty, 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>43</sup> LVC member organizations highlighted the structural factors that were making it increasingly difficult for small food producers to make a living, including trade and investment liberalization agreements, the industrialization of agriculture and the commodification and privatization of natural resources. They advocated for alternative, relocalized and resilient food systems, grounded in food sovereignty.

The first draft Declaration that was presented to the members of the OEIWG in July 2013, was the draft elaborated by LVC itself through a long process of internal discussion and consultation, first at the South-Asian level, then across all regions, and adopted by LVC in 2008. In the course of the negotiations, six successive drafts were presented by Bolivia, acting as Chair. These drafts responded to the objectives of grounding the text in agreed UN language, reinforcing coherence with other international human rights standards, and building consensus among states, by responding to the objections and proposals put forward. Throughout the process, Bolivia supported and encouraged the protagonist role played by LVC in the process of negotiation and creation of new human rights from below.<sup>44</sup>

The negotiations of UNDROP have seen different conceptions of human rights confronting each other, some of which being related to certain states’ efforts aimed at ‘decolonizing’ the international human rights system, notably through an emphasis on multiculturalism, collective rights and the rights of Mother Earth.<sup>45</sup> The United States, most countries in the European Union, and other developed countries rejected the creation of a new international legal instrument spelling out new group rights, arguing that the recognition of collective rights would threaten the universality and foundations of human rights. As a result of a polarized negotiation process, the rights contained in UNDROP do not meet all the expectations of LVC. However, UNDROP remains faithful to the initial intent of the LVC draft and reflects the key rights-based claims that peasant movements have formulated over the years, in the framework of food sovereignty, notably when it comes to the collective right to land, seeds and natural resources.<sup>46</sup>

UNDROP builds on existing international standards relevant to the rights of peasants,<sup>47</sup> including the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security,<sup>48</sup> and has taken considerable inspiration, since the outset of the drafting process before the

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<sup>42</sup> International Planning Committee for Food Sovereignty (IPC), ‘No More Failures-as-Usual ! Civil Society Statement on the World Food Emergency (Rome)’, 2008 <[www.foodsovereignty.org/](http://www.foodsovereignty.org/)>, visited on 20 June 2017.

<sup>43</sup> Nyéléni Food Sovereignty Forum, *Declaration of Nyéléni*, 2007 <[www.laviacampesina.org](http://www.laviacampesina.org/)>, visited on 20 June 2017.

<sup>44</sup> P. Claeys, ‘The Rise of New Rights for Peasants. From reliance on NGO intermediaries to direct representation’, *Transnational Legal Theory* (forthcoming).

<sup>45</sup> See the reports from the session of the UN Working Group on the rights of peasants and other people working in the rural areas, available at <<https://www.ohchr.org/EN/HRBodies/HRC/RuralAreas/Pages/WGRuralAreasIndex.aspx> > visited on 2 December 2018

<sup>46</sup> Claeys, *supra* note 6.

<sup>47</sup> For an overview, see *Normative sources and rationale underlying the draft declaration on the rights of peasants and other people working in rural areas*, UN Doc. A/HRC/WG.15/4/3, 4 May 2017.

<sup>48</sup> See further *infra*.

OEWG, from several provisions of UNDRIP. Indeed, UNDRIP is the first international human rights instrument to have recognized collective human rights to resources, marking a significant watershed in the international human rights system that has traditionally been centred on the concept of individual human rights.<sup>49</sup> Before moving to a detailed discussion of UNDROP, in section four we will thus briefly outline the relevant human right standards that provide the background to UNDROP's provisions on land and natural resources and will inform our discussion of the approach to the governance of land and natural resources enshrined in this instrument. Prior to doing this, in the following session, we will shortly discuss current contributions of the collective action theory to the governance of the commons, which will also provide the background for our discussion of UNDROP later.

### 3 Commons and Collective Action

As has been recalled in the introduction, collective action scholars have focused upon whether and how local governance institutions can contribute to sustainable management of resources.<sup>50</sup> More recently, attention has been paid to the relationship between equality - including along caste, gender and ethnicity lines - and governance outcomes. This analysis, however, has similarly been limited to the impact of inequality on environmental outcomes,<sup>51</sup> calling on governments to address local inequalities in order to improve these outcomes.<sup>52</sup> Yet, unless mindful of and informed by the human rights of the concerned individuals and peoples, any initiative taken in this context risk failing to address the situation and may even aggravate it further.<sup>53</sup>

Indeed, the tension between producing equitable outcomes and improving environmental conditions has been acknowledged by certain collective action scholars.<sup>54</sup> It has likewise been recognized that scant attention has so far been paid to

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<sup>49</sup> See however *supra* note n. 2 concerning ILO conventions on indigenous peoples.

<sup>50</sup> K. Andersson, and A. Agrawal, 'Inequalities, Institutions, and Forest Commons', 21:3 *Global Environmental Change* (2011) pp. 866-875.

<sup>51</sup> G. Varughese, and E. Ostrom, 'The contested role of heterogeneity in collective action: Some evidence from community forestry in Nepal', 29 *World Development* (2001) pp. 747-65; A. Poteete, and E. Ostrom, 'Heterogeneity, group size, and collective action: The role of institutions in forest management', 35:3 *Development and Change* (2004) pp. 435-61; B. Adhikari, and J. Lovett, 'Institutions and collective action: Does heterogeneity matter in community-based resource management?', 42 *Journal of Development Studies* (2006) pp. 426-45.

<sup>52</sup> Andersson and Agrawal, *supra* note 50.

<sup>53</sup> Errico, *supra* note 3; ILO, *Including indigenous peoples in poverty reduction strategies. A practice guide based on experiences from Cambodia, Cameroon and Nepal* (ILO, Geneva, 2008); S. Errico 'Opportunities and challenges to strengthen indigenous peoples' rights and livelihoods in the context of REDD+. A study of REDD+ implementation in Vietnam', XX:X *International Forestry Review* (2016) pp. 1-17.

<sup>54</sup> P. Mudliar and T. Koontz, 'The muting and unmuting of caste across inter-linked action arenas: inequality and collective action in a community-based watershed group', 12:1 *International Journal of the Commons* (2018) pp. 225-248. Studies on collective action from Nepal and India, also indicate that discrimination affects people's participation in collective action. See M. Baker, *Persistence, Transformation and Demise within the Gravity Flow Irrigation Systems (Kuhls) of Kangra Valley, Himachal Pradesh, India*. Workshop on 'Co-operative Management of Water Resources in South Asia' Centre for India and South Asia Research (CISA), University of British Columbia, in Vancouver, Canada, 15-17 December 1997; R. Tiwary, 'Explanations in resource inequality: Exploring scheduled caste position in water access structure', 2:1 *International Journal of Rural Management* (2006) pp. 85-106; N. Hildyard, P. Hegde, P. Wolverkamp, and S. Reddy, 'Same Platform, Different Train: The Politics of Participation'. *Corner House Briefing 04* (The Corner House Station Road Sturminster Newton Dorset

ongoing local-level struggles of traditionally excluded communities to exert control over local resources. It has been emphasized that collective action initiatives around the commons would need to be more expressly focused on enacting social change, rather than being only concerned with resource conservation.<sup>55</sup> For example, studies on forest commons in the context of climate change mitigation initiatives, notably REDD (Reducing Emissions from Deforestation and Forest Degradation), are casting light on the need for enhanced attention to the social dimensions of the commons and the respect for the human rights of the resource users concerned.<sup>56</sup>

Furthermore, most of the literature on collective action has analysed commons in isolation from their social context,<sup>57</sup> and has, with few exceptions, devoted little attention to the role that governments could play in creating and sustaining collective action initiatives that address environmental concerns and social inequalities.<sup>58</sup> This role may be particularly relevant also to respond to the need for coordination and enforcement entailed in situations where multiple users have claims over the same pool of resources – think, for example, of pastoralists’ and farmers’ communities – which call for complex institutional arrangements for their peaceful and sustainable management.<sup>59</sup> Indeed, while social conflict may trigger collective action responses, collective action institutions may also be considerably inegalitarian and some violent social conflicts can be seen as “the clash between groups who are each acting collectively”.<sup>60</sup>

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DT10 1YJ UK, 1998); A. Bhatia, *Power, Equity, Gender, and Conflicts in Common Property Resources in the Hindu Kush-Himalayas: Issues in Mountain Development*, Technical report 1997/7 (ICIMOD, Kathmandu, Nepal),.

<sup>55</sup> B. Adhikari, and S. Di Falco, ‘Social Inequality, Local Leadership and Collective Action: An Empirical Study of Forest Commons’, 21 *European Journal of Development Research* (2009) pp. 179–194.

<sup>56</sup> O. Springate-Baginski, and E. Wollenberg, (eds), *REDD, forest governance and rural livelihoods* (CIFOR, Bogor, Indonesia, 2010); T. Griffiths, *Seeing ‘REDD’? Forests, climate change mitigation and the rights of indigenous peoples and local communities*, (Forest Peoples Programme, Moreton-in-Marsh UK, 2008); C. Luttrell, L. Loft, M.F. Gebara, and D. Kweka, ‘Who should benefit and why? Discourses on REDD+ benefit sharing’, in A. Angelsen, M. Brochaus, W. Sunderlin, L.V. and Verchot (eds) *Analysing REDD+. Challenges and Choices*, (CIFOR, Bogor, Indonesia, 2012), pp. 129–152; E.Y. Mohammed, *Pro-poor benefits distribution in REDD+. Who gets what and why does it matter?*, REDD Working Paper, (IIED, London UK, 2011); . J. K. Lawlor, and W. Sunderlin, *A guide to learning about livelihood impacts of REDD+ projects*, (CIFOR, Bogor, Indonesia, 2010); A. Hall, *Forests and climate change. The social dimensions of REDD in Latin America*, (Edward Elgar Publishing, Cheltenham UK, 2012); Errico *supra* note 53. It should be recalled that the 2015 Paris Agreement on Climate Change has called upon States to respect, promote and consider their respective obligations on human rights, including indigenous peoples’ rights, when taking actions to address climate change (preamble). It is also worth noting that a set of safeguards have been introduced in REDD+ architecture requiring the respect for the rights of indigenous peoples and members of local communities, their full and effective participation, and attention to their sustainable livelihoods.

<sup>57</sup> F. Van Laerhoven, and C. Barnes, ‘Communities and Commons: The Role of Community Development Support in Sustaining the Commons’, 49 *Community Development Journal* (2014) pp. 118–32; R. Meizen-Dick, M. Di Gregorio, and S. Dohrn, *Decentralization, pro-poor land policies, and democratic governance* (International Food Policy Research Institute, Washington, DC, 2008).

<sup>58</sup> S.R. Foster, ‘Collective action and the urban commons’, 1 *The Notre Dame Law Review* (2012). As outlined above, the focus has traditionally been on factors within the user groups that may affect sustainable resource management. On this and related points, *see also* G. Borrini-Feyerabend, M. Pimbert, M.T. Farvar, A. Kothari, and Y. Renard, *Sharing Power. Learning by Doing in Co-Management of Natural Resources throughout the World*. (IIED and IUCN/CEESP/CMWG, Cenesta, Tehran, 2004).

<sup>59</sup> E. Ostrom, R. Gardner, and J. Walker, *Rules, Games, and Common-Pool Resources*. (University of Michigan Press, Michigan, 1994).

<sup>60</sup> B.D. Ratner *et al.*, ‘Addressing conflict through collective action in natural resource management’, 11:2 *International Journal of the Commons* (2017) pp. 877-906.

#### 4 Land and Natural Resources in International Human Rights Law

How and to what extent people access, use, and control land and natural resources<sup>61</sup> have profound implications for the respect and fulfilment of human rights.<sup>62</sup> As has been mentioned above, land and natural resources have been widely recognized as essential elements for the realization of many human rights. Nevertheless, a universal human right to land and its pertaining resources is not yet recognized in international human rights law,<sup>63</sup> with the significant exception of the normative developments concerning specifically indigenous peoples that will be described below.<sup>64</sup> In practice, land issues have thus been addressed in relation to a variety of human rights, taken alone or in combination among them, including the rights to non-discrimination, adequate housing, food, water, health, property, sanitation, work, and the right to participate in the cultural life of the community.<sup>65</sup> This is also the approach adopted by the UN Committee on Economic, Social and Cultural Rights (CESCR) – the body tasked with monitoring the application of the International Covenant on Economic, Social and Cultural Rights (ICESCR) –, which is currently discussing a general comment on land and economic, social and cultural rights with a view to analysing the implication of land issues for the rights enshrined in the Covenant.<sup>66</sup>

Land issues have, for example, been recognized as particular relevant to the human right to be free from hunger, recognized in article 11.2 of ICESCR. This right encompasses the possibility for people to feed themselves directly from productive land or other natural resources.<sup>67</sup> In this connection, it has been underscored that States shall: (i) refrain from taking measures that may deprive individuals of access to productive resources, such as land, on which they depend for the production of their own food; (ii) protect such access from encroachment by other private parties; and (iii) strengthen people's access to and utilization of resources and means to ensure their livelihoods,

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<sup>61</sup> Access to, use of and control over land refer to various aspects of land tenure. Access to and use of land represent the opportunities for temporary or permanent use and/or occupation of land for housing, productive activities, use of land-based resources, or use of land for the enjoyment of cultural, religious and other activities. Control over land refers to the ability to effectively decide how the land should be used, by whom, and how the benefits generated should be allocated. *See UN, Land and Human Rights. Standards and Application* (United Nations, Geneva, 2015).

<sup>62</sup> UN, *Report of the United Nations High Commissioner for Human Rights*. (Human rights analysis of land-related issues). UN Doc. E/2014/86, 11 July 2014; UN, *Land and Human Rights. Standards and Application* (United Nations, Geneva, 2015).

<sup>63</sup> It is worth recalling that the UN Special Rapporteurs on the right to adequate housing and on the right to food have both emphasized the importance of recognizing land as a human right in international human rights law. *See UN, The right to food*, UN Doc. A/65/281, 11 August 2010;

<sup>64</sup> Land is referred to explicitly in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) when dealing with the right of rural women to “equal treatment in land and agrarian reform as well as in land resettlement schemes” (Art. 14.2. (g)), and, indirectly, in the International Covenant on Economic, Social and Cultural Rights (ICESCR), in the context of the right to food, where mention is made to the development or reform of agrarian systems aimed “to achieve the most efficient development and utilization of natural resources” (Art. 11.2).

<sup>65</sup> For an overview, *see UN 2014 supra* note 62. *See also* J. Gilbert, ‘Land rights as human rights: The case for a specific right to land’, 10:8 *SUR International Journal on Human Rights* (2013) pp.115-135.

<sup>66</sup> The first round of consultations on the draft general comment was held in October 2017. More information is available at <[ccsi.columbia.edu/2017/10/19/consultation-on-land-and-economic-social-and-cultural-rights/](http://ccsi.columbia.edu/2017/10/19/consultation-on-land-and-economic-social-and-cultural-rights/)>, visited on 25 July 2018.

<sup>67</sup> CESCR, *General comment No. 12 on the right to adequate food*, UN Doc. E/C.12/1999/5, 12 May 1999.

including food security.<sup>68</sup> In certain cases, such as those situations where people have no alternative means of producing food or gaining sufficient income to purchase food that is sufficient, adequate and culturally acceptable, States' obligations may go even further, covering not only the duty to protect and strengthen the access to land and natural resources, but also the duty to make such access possible, for instance through redistributive programmes aimed at ensuring a more equitable access to land.<sup>69</sup>

Nevertheless, such 'instrumentalist' approach to land, which takes into account land issues only to the extent that they serve the purpose of allowing the achievement of the abovementioned human rights, offers very limited protection to those people, like peasants, who depend on land and natural resources for their livelihoods. Firstly, this approach mainly considers aspects related to access to land and natural resources, leaving on a secondary plan the issue of control over these resources and participation in decision-making concerning them. Secondly, it keeps open the possibility that the rights concerned may be realized through alternative means not implying access to land, as the relationship with the land is not protected as such.<sup>70</sup> Taking the example of the right to food, it is admitted, for instance, that people can be removed from the lands on which they depend, since their right to food can be realized indirectly, through income-generating jobs or safety net schemes that ensure access to food on the basis of well-functioning distribution, processing and market systems.<sup>71</sup> The HRC Advisory Committee, which was mandated to examine the situation of peasants, in fact, observed that existing international human rights instruments remained insufficient to protect them and maintained that the lack of international legal recognition of peasants' need to have a secured access to productive resources, including lands, fishing grounds or forests, was a matter of concern. It thus recommended, among others, that international human rights law should recognize the right to land.<sup>72</sup>

Regarding more particularly the right to property, which is recognized in article 17 of the Universal Declaration of Human Rights but has not been incorporated in the international human rights Covenants,<sup>73</sup> this right has not been considered to be sufficient to respond to the full range of claims and protections needed by peasants for a number of reasons, including its embedment in the culture of individual rights and the failure to address the situation of the landless.<sup>74</sup> In particular, the right to property under international law does not take into account the intrinsic connection existing between

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<sup>68</sup> UN 2015 *supra* note 61; UN, Report of the Special Rapporteur on the right to food, Olivier De Schutter Addendum. *Large-scale land acquisitions and leases: A set of minimum principles and measures to address the human rights challenge*, UN Doc. A/HRC/13/33/Add.2, 28 December 2009.

<sup>69</sup> UN, *supra* note 59; O. De Schutter, 'The green rush: the global race for farmland and the rights of land users', 52 *Harvard International Law Journal* (2011) pp. 504-559.

<sup>70</sup> On the multi-faceted function of land and its close connection with the identity and culture of peasants, see the "Declaration of Rights of Peasants – Women and Men" by LVC, available at [www.viacampesina.org](http://www.viacampesina.org), as well as the reports of the sessions of the OEIWG, <<https://www.ohchr.org/EN/HRBodies/HRC/RuralAreas/Pages/WGRuralAreasIndex.aspx>>, visited on 25 July 2018.

<sup>71</sup> On this point, see for example FIAN, *The Human Right to Land*. Position Paper (FIAN International, Heidelberg, 2017).

<sup>72</sup> See UN 2012, *supra* note 3, paras. 67-68, 74.

<sup>73</sup> See, however, the relevant provisions in the regional human rights instruments, such as article 1 of the first Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms; article 21 of the American Convention on Human Rights; and article 14 of the African Charter on Human and Peoples' Rights.

<sup>74</sup> See UN *supra* note 5; see also the reports from the session of the UN Working Group on the rights of peasants and other people working in the rural areas, available at <<https://www.ohchr.org/EN/HRBodies/HRC/RuralAreas/Pages/WGRuralAreasIndex.aspx>> visited on 2 December 2018.

the land and the community in which it is placed, nor does it afford protection to its multi-faceted functions. By contrast, this aspect is central to the analysis of the commons and is captured by the human right to land.<sup>75</sup> A remarkable exception is provided by the jurisprudence developed by the Inter-American and African human rights institutions that have interpreted the relevant provisions on the right to property under the regional human rights instrument to include community-based forms of tenure in favour of indigenous and tribal peoples and have recognized a value to the land beyond notions of commodification.

#### **4.1 The Right of Indigenous Peoples to Land, Territories and Resources**

As has previously been recalled, a human right to land was, to date, only recognized in favour of indigenous peoples. With UNDROP, “peasant organizations hope to follow in the footsteps of indigenous peoples’ movements”.<sup>76</sup> Despite the substantially different premises of the two Declarations - which have important implications as to the scope and significance of the related provisions -, several provisions in UNDRIP have served as inspiration for UNDROP.

Outcome of the protracted struggles by indigenous peoples worldwide, UNDRIP is premised on the recognition of indigenous peoples as distinct ‘peoples’ with the right to self-determination, to maintain and develop their cultures, ways of life, and institutions, to exercise control over their lives and development, and to participate in decision-making concerning them.<sup>77</sup> UNDRIP recognizes that the special relationship that indigenous peoples have with the lands and natural resources that they occupy or use is at the heart of their cultural identity, unique worldview, social organization, livelihoods, health practices, customs, traditions, values and beliefs. Accordingly, indigenous peoples’ rights to land, natural resources and territory<sup>78</sup> are at the core of the instrument, as they are entrenched into the very existence of indigenous peoples, spiritually and materially.<sup>79</sup> For the purpose of our analysis, it is particularly important to highlight that the nature of indigenous peoples’ rights to their lands, territories and

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<sup>75</sup> On this point, *see also* A. Dolidze, ‘Promise and Perils of the International Human Right to Property’, 47 *The University of the Pacific Law Review* (2016) pp. 169-181. It should also be recalled that the right to land is not about exclusive property over the land but about access, use, management, control, harvest, etc, including at different moments in time.

<sup>76</sup> M. Edelman, and J. Carwil, ‘Peasants’ rights and the UN system: quixotic struggle? Or emancipatory idea whose time has come?’, 38:1 *Journal of Peasant Studies* (2011) p. 81 On the ground, indigenous peoples and peasants’ communities may face very similar challenges in terms of maintaining and regaining control over their territories and livelihoods. Moreover, in many instances, the two categories overlap and in some cases, the boundaries and distinctions between the two groups may not be as clear-cut.

<sup>77</sup> Errico, *supra* note 6.

<sup>78</sup> *See supra* note 6.

<sup>79</sup> Indeed, indigenous peoples are commonly identified as peoples who, in spite of their diversity and the variety of their historical experiences, share some common characteristics, namely: i) occupation and use of a specific territory and special attachment to it, as it has a fundamental importance for their collective physical and cultural survival as peoples; ii) cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions; iii) an experience of subjugation, marginalization, dispossession, exclusion or discrimination; and iv) self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity. *See* E.I. Daes, *Working Paper on the concept of “indigenous people”*, UN Doc. E/CN.4/Sub.2/AC.4/1996/2, 1995; and African Commission on Human and Peoples’ Rights, *Report of the African Commission’s working group of experts on indigenous populations/communities*, 28<sup>th</sup> ordinary session, 2005.

natural resources,<sup>80</sup> as recognized in UNDRIP is two-fold, encompassing at the same time “the governmental and property interests of indigenous peoples as collectivities”.<sup>81</sup> These rights are closely linked to indigenous peoples’ rights to self-determination, cultural integrity, and development.<sup>82</sup> Indeed, besides ensuring tenure security based on indigenous customs and traditions, the overall governance of land and natural resources enshrined in UNDRIP encompasses also self-determination-related aspects. The main elements of this approach can be summarized as follows:

- land tenure security, which is to be based on the recognition of indigenous peoples’ customs and land tenure systems and be respectful of their autonomous institutions, upon condition that the human rights and fundamental freedoms of all members are respected, notably women’s;
- control over the lands, territories and resources, which is closely linked to the recognition of the right to self-determination, encompassing the recognition of indigenous peoples’ autonomous institutions, the right to determine and develop priorities and strategies for the development and use of their lands, territories and resources, and the participation in decision-making processes affecting them;
- reconciliation of diverging interests over land and natural resources based on the participation and consultation of concerned communities and the principle of free, prior and informed consent (FPIC); and,
- criteria for the balancing of varying interests over the same pool of resources that break with purely market-based approaches to take into account the respect for distinct cultural identities, social structures, economic systems, ways of life, customs, beliefs and traditions.

Three aspects of the overall governance of indigenous territories are particularly worth setting out here. Firstly, UNDRIP acknowledges that indigenous peoples’ land rights originate in these peoples’ customary law, and shall be recognized and adjudicated by the State with due respect to the customs, traditions and land tenure systems of the communities concerned.<sup>83</sup> In other words, their rights are pre-existing. Their traditional occupation according to their own land tenure systems confers on them a right to the land and the pertaining resources, whether or not such a right was formally recognized by the State.<sup>84</sup> However, in order to ensure tenure security and legal certainty, States are called to identify, demarcate and give legal recognition to these

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<sup>80</sup> Indigenous peoples’ customary land tenure systems typically include both common property resources (commons) and individual or family-held resources, used and managed within the communal tenure system.

<sup>81</sup> E.I. Daes, *Indigenous peoples’ permanent sovereignty over natural resources*, UN Doc. E/CN.4/Sub.2/2004/30, 2004, para. 56.

<sup>82</sup> S. Errico, ‘Control over Natural Resources and Protection of the Environment of Indigenous Territories’, in M. Weller and J. Hohmann (eds) *The UN Declaration on the Rights of Indigenous Peoples. A Commentary* (Oxford, Oxford University Press, 2018), p. 425.

<sup>83</sup> With regard to issues concerning, among others, gender equality and women’s access to land and decision-making, it is worth highlighting that the recognition of indigenous peoples’ customs is subject to the respect of international human rights standards. Also, UNDRIP, at arts. 21 and 22, calls for special attention to the needs of indigenous women and the adoption of special measures to protect them against all forms of violence and discrimination. Indigenous men and women shall enjoy equally of all human rights and fundamental freedoms.

<sup>84</sup> S. Errico, ‘The controversial issue of natural resources: balancing States’ sovereignty over natural resources and the objectives of national development with indigenous peoples’ rights’, in A. Xanthaki and S. Allen (eds.) *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011); and Errico *supra* note 82.

lands, establish adequate procedures to resolve related land claims, and protect these rights accordingly against third parties (see, for example, UNDRIP arts. 26 and 27).

Secondly, UNDRIP also lays down that indigenous peoples have the right to exert control over their lands, territories and resources (art. 26) and introduces, at article 32, a fundamental mechanism to reconcile national or society's interests with the respect for indigenous peoples' rights and interests, by establishing that indigenous peoples shall be consulted in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water and other resources. Article 32 is ultimately intended to 'reverse historical patterns of imposed decisions and conditions of life that have threatened the survival of indigenous peoples'.<sup>85</sup> At the same time, it also challenges the dominant approach that regards land as a pure commodity, and governs the balancing of multiple overlapping interests over these resources accordingly. Whereas acknowledging the possibility that the State may undertake initiatives in the name of national interest (extractive or conservation projects, for example) affecting indigenous lands and territories, article 32 establishes various conditions that must be fulfilled, i.e. indigenous peoples must be consulted through their representative institutions in order to obtain their free and informed consent prior to these initiatives being approved. Should agreement or consent not be reached, then the State retains the power to make the final decision on the proposal at hand. However, in the case of a project which will have a severe impact on indigenous communities, States' obligations to protect indigenous peoples' cultural and physical integrity, in addition to respect their self-determination, will come into play as a constraint to the realisation of the project.<sup>86</sup> In line with this rationale, the Declaration identifies two specific situations where consent is required, i.e. relocation of indigenous peoples and storage or disposal of hazardous materials in their territories (arts 10 and 29).<sup>87</sup>

Thirdly, UNDRIP provides criteria to govern the dynamics between collective and individual rights, looking at possible power imbalances within the group, for example when it comes to access to land and natural resources, and participation in decision-making. Thus, as a general principle, it lays down that: all rights shall be recognized equally to men and women; the recognition of indigenous customary law and practices is subject to the respect for international human rights standards; and special attention shall be paid to indigenous elders, women, youth, children and persons with disabilities (see arts. 20, 21, 34 and 44). By way of illustration, from the above said it stems that in those cases where women do not have a voice in traditional decision-making processes, it may be necessary to go beyond traditional institutions and set up new or additional arrangements. UNDRIP also looks at possible conflicts that may arise between communities holding claims over the same territory or with other third parties and calls upon the state to establish and implement, in conjunction with the peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to customary land tenure systems and traditions, in order to adjudicate land rights with the participation of indigenous peoples (art. 27).

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<sup>85</sup> UN Doc. A/HRC/12/34, para. 49

<sup>86</sup> Errico *supra* note 82.

<sup>87</sup> In the same vein, it has been argued that the free, prior and informed consent of indigenous peoples is required in the case of large-scale development or investment projects that would have a major impact within indigenous peoples' territories. See, for example, the decision of the Inter-American Court of Human Rights in the case of the *Saramaka People v Suriname*, 28 November 2007.



## 4.2 *The Voluntary Guidelines on the Responsible Governance of Tenure*

The “Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security” [hereinafter “Guidelines”] were adopted unanimously by the Committee on World Food Security (CFS) in 2012, after three years of participatory negotiation between states and other CFS participants, including civil society organizations,<sup>88</sup> international organizations and the private sector.<sup>89</sup> They lay down the obligations and responsibilities that state and non-state actors have with regard to the governance of tenure of land, fisheries, and forests, including commons, on the basis of existing international human rights law. As emphasized by the HRC Advisory Committee, their elaboration was intended to address the normative gap in international law concerning the recognition of a human right to land.<sup>90</sup> The Guidelines stress, among others, that States should provide legal recognition and protection to the legitimate tenure rights of indigenous peoples and other communities with customary tenure systems - whether formally recorded or not - in ways that are non-discriminatory and gender sensitive, paying particular attention to those vulnerable segments who hold subsidiary tenure rights, such as gathering rights. They also emphasize that States should engage with and seek the support of those who, having legitimate tenure rights, could be affected by decisions, prior to decisions being taken. In this respect, States are invited to take into consideration existing power imbalances between different parties and ensure active, free, effective, meaningful and informed participation of all individuals and groups.

The adoption of the Guidelines was followed in 2016 by the elaboration of a “Technical Guide on Governing Tenure Rights to Commons” that provides specific guidance on recognizing and protecting tenure rights to commons and community-based governance structures.<sup>91</sup> The Guide acknowledges that “tenure rights to commons also imply responsibilities for stewardship of the common resources and collective action in order to ensure their sustainable, efficient and equitable use”. In other words, the users group or the community should be able to collectively manage<sup>92</sup> and control the common resource and allocate tenure rights, i.e. jointly decide who can use what (parts of the) resource, for how long, and under what conditions, and be able to exclude non-members from using the commons.<sup>93</sup> In order to secure tenure rights to the commons and support the collective action needed for their management, the Guide sets out twelve interrelated strategies aimed overall at: 1) legally recognizing and protecting customary tenure systems, which also includes State’s recognition of self-governance and devolution to the rights-holders of the authority and responsibility to govern the commons at the local level collectively; 2) ensuring the effective implementation of tenure rights to commons, by providing support to the communities in strengthening or developing inclusive and accountable community governance structures, and empowering marginalised groups within the communities to take part in community

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<sup>88</sup> Civil society participation to the CFS is facilitated by the Civil Society Mechanism (CSM). LVC sits on the Coordination Committee of the CSM and actively participates in CFS.

<sup>89</sup> It is also worth recalling that in 2014 the FAO adopted the Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication.

<sup>90</sup> UN, *supra* note 5.

<sup>91</sup> See FAO, *supra* note 1

<sup>92</sup> *Ibid.* p. 10.

<sup>93</sup> This also encompasses defining the boundaries of the commons in order to regulate their use and protect them from infringement. Boundaries may be fixed or fluid and defined in a variety of ways (for example, based on the geographical area, utilization periods, type of gear, harvest size, group membership, etc). See FAO, *supra* note 1.

institutions; and 3) supporting the enjoyment of rights, which encompasses ensuring local rights-holders' access to justice, supporting opportunities for income-generating activities from commons, and taking steps to prevent any infringements of tenure rights to commons. The Guide also indicates that national policies need to take into account the social, cultural, spiritual, economic, environmental and political values of land and natural resources.<sup>94</sup>

## 5 UNDROP: a New Instrument for the Governance of Land and Natural Resources?

In this section we look into the main features of the governance of land and natural resources, including commons, which UNDROP proposes. In general, it should be noted that UNDROP is grounded on the “respect, protect and fulfil” framework typical of human rights instruments, which points to specific sets of action on the part of the State.<sup>95</sup> All its provisions are therefore framed around this scheme, according to which the State shall: 1) refrain from interfering or curtailing the enjoyment of the rights concerned; 2) protect individuals and groups against abuses by third parties, including business enterprises; and 3) take positive action to ensure the enjoyment of these rights by facilitating or providing the conditions necessary for this.<sup>96</sup>

The main provision concerning land and natural resources is article 17, which is also the only provision in UNDROP that makes explicit reference to the ‘commons’. The article recognizes that peasants have the right, “individually and/or collectively”, to land, including “the right to have access to, sustainably use and manage land and the water bodies, coastal seas, fisheries, pastures and forests therein, to achieve an adequate standard of living, to have a place to live in security, peace and dignity, and to develop their cultures”. According to this provision, read together with the definition of peasants in article 1,<sup>97</sup> the right to land can be exercised by peasants individually or as a community or group, i.e. collectively. Article 17 assumes a pluralist land tenure system, which shall accommodate group rights as well as individual rights, leaving open the question of the overall tenure regime – i.e. public, private or common property/commons.<sup>98</sup> Article 17 has a two-fold objective. On the one hand, it aims at

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<sup>94</sup> *Ibid.*

<sup>95</sup> Following its adoption by the UN General Assembly Third Committee on 20 November 2018, the UNDROP will become a declaration of the UN General Assembly (GA). As such, it will not create legal binding obligations upon States. A discussion on the legal implications of soft law instruments, such as GA Declarations, being outside the scope of this paper, suffice here to note that these instruments are not totally devoid of legal significance. For more, see D. Shelton (ed.) *Commitment and Compliance: the Role of Non-binding Norms in the International Legal System* (OUP, Oxford, 2000).

<sup>96</sup> See, for example, HRC, *General Comment No. 31*, UN Doc. CCCPR/C/21/Rev.1/Add.3, 2004; and CESCR, *General comment No. 12 on the right to adequate food*, UN Doc. E/C.12/1999/5, 1999.

<sup>97</sup> Article 1.1 of UNDROP defines a peasant as ‘any person who engages or seeks to engage alone, or in association with others or as a community, in small-scale agricultural production for subsistence and/or for the market, and who relies significantly, though not necessarily exclusively, on family or household labour and other non-monetized ways of organizing labour, and who has a special dependency on and attachment to the land’. The rights recognized in UNDROP also apply, among others, to any person engaged in the raising of livestock, pastoralism, fishing, forestry, hunting or gathering, indigenous peoples working on the land, transhumant and nomadic communities and the landless as well as hired workers, including migrant and seasonal workers (see Article 1.2-4)

<sup>98</sup> Its flexible approach seems to be aligned with the finding that when land rights are claimed on a group basis, whether according to customary law or in the form of community commons exercised historically,

ensuring tenure security to existing rights, whether already formally recognized or not. In this context, it provides for the legal recognition of existing customary land tenure rights and the ‘natural commons with their related systems of collective use and management’ (para.3). On the other hand, it contemplates broadening the access to land and resources beyond existing rights, in order to facilitate broad and equitable access to land and other natural resources necessary to ensure that peasants enjoy adequate living conditions, with particular attention to young people, and landless peasants (para. 6). In this connection, article 17 may pave the way for the potential creation of new commons within the context of redistributive agrarian reforms, in the face of a group claim, if this option facilitates such broad and equitable access to land and natural resources for those who use them in their activities and need them to enjoy adequate living conditions.

Article 21 further elaborates on peasants’ right to water bodies mentioned in article 17. It declares that peasants have the right to water for farming, fishing and livestock keeping and for securing other water-related livelihoods, free from arbitrary disconnections and contamination of water supplies. This article calls upon States to respect, protect and ensure access to water including in customary and community-based water management systems, thereby presenting commons as a potential institution for water governance at local level. In this case too, commons are envisaged as both an option to accommodate existing community-based water management systems, and a potential measure to ensure access to water for those in need.<sup>99</sup>

Security in the enjoyment of rights to land and resources is thus one of the first aspects that UNDROP addresses. It provides for the legal recognition of these rights, whether already existing or newly established in the effort to tackle lack of access, as described above, including customary rights that have not yet been protected by law. It calls upon States to ensure that, on the one hand, these rights are protected against violations and arbitrary restrictions, such as, for example, forced evictions, displacements (art. 17.3-5), and disconnections from water supplies (art. 21), and, on the other, that peasants - on a collective basis in the case of commons - are provided with effective mechanisms for the prevention and redress of any action that may dispossess them of their land and natural resources or may deprive them of their means of subsistence and integrity (art. 12.5).<sup>100</sup> In this regard, UNDROP also provides for the establishment of dispute resolution mechanisms that shall give due consideration to customs, traditions, rules and legal systems of the communities concerned, provided that they are consistent with international human rights law (art. 12.1). It furthermore affirms that States shall take all necessary measures to ensure that non-State actors that they are in a position to regulate, including transnational corporations and other business enterprises, do not hinder or nullify the enjoyment of these rights (arts.2.5, 18.5). The abovementioned provisions are of particular relevance also to the prevention and tackling of conflicts between competing resource-users and would reinforce significantly any collective action initiative around the commons. As was highlighted elsewhere, “conflicts cannot be managed by collective action alone” and intervention

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it may be appropriate to extend state protections to such rights as they are characterized by the poor and their customary groups. R. Prosterman, R. Mitchell, and T. Hanstad, *One Billion Rising. Law, Land and the Alleviation of Global Poverty* (Leiden University Press, Leiden, 2007).

<sup>99</sup> Please also note that article 19 recognizes peasants’ rights to ‘save, use, exchange and sell farm-saved seeds or propagating material’ as well as the right to ‘maintain, control, protect and develop their seeds and traditional knowledge’, allowing for individual and/or collective rights – based governance regimes, including commons.

<sup>100</sup> See also Article 17.5.

by external actors, notably the State, may be necessary.<sup>101</sup> In this regard, actions concerning recognition of existing customary rights, participatory design and setting up of dispute resolution mechanisms, strengthening local institutions, proactively addressing inequalities within and between communities, and addressing the broader governance context affecting access and use of natural resources appear to be key to sustain the commons. Indeed, tenure security does not exhaust the scope of the provisions in UNDROP. Building on the examples of UNDRIP and the Voluntary Guidelines, the approach to the governance of land and natural resources enshrined in UNDROP comprises various elements, including local governance, engagement with external decision-making processes, and the creation of an overall conducive environment for the realization of peasants' human rights.

Concerning internal governance, even though it does not contemplate a general provision specifically dedicated to the recognition of rural communities' institutions, arguably as a result of the wide-ranging typologies of subjects addressed in the text, UNDROP does provide for the recognition of customary rights and commons with their related "systems of collective use and management" (art. 17.3) and for the participation of peasants in decision-making through their 'representative institutions', as we shall see below. To counteract power imbalances between the group's members and address any forms of discrimination which may occur, particularly as a result of the recognition of customary institutions and practices, UNDROP provides for a dynamic relationship between individual and collective rights, by affirming the right of every individual to all human rights and fundamental freedoms, including the right to be free from discrimination (art. 3) and calling upon the State to remove and prohibit all forms of discrimination related to land tenure rights (art.17).<sup>102</sup> It also devotes a specific provision to peasant women, addressing explicitly, among others, issues of women's participation in decision-making and community activities, and access to land and natural resources (art.4).<sup>103</sup> These mechanisms are particularly important as community management and control over access and use of resources may be biased in favour of more powerful and/or influential members and may be discriminatory on grounds of gender, ethnicity and/or caste or social origin. As was mentioned at the outset, collective action is often 'inegalitarian'. Those provisions are therefore particularly important. They will also apply to any new commons created, for instances, in the context of land agrarian reforms or the re-organization of local water management systems. In those cases, however, the process of establishing the rules governing the access and use of the resources by the group and its members is unclear. It can however be argued that these rules shall be defined at the very minimum conjointly by the State and the group concerned, given that UNDROP provides for the participation of peasants in decision-making processes concerning them (see further below).

Concerning peasants' participation in decision-making processes affecting them, UNDROP recognizes the general right of peasants to active and free participation, directly and/or through their representative organizations, in the formulation, implementation and assessment of policies, programs and projects that may affect their lives, land and livelihoods (art. 10.1). These include food safety and labour and

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<sup>101</sup> B.D. Ratner *et al*, 'Addressing conflict through collective action in natural resource management', 11: 2 *International Journal of the Commons* (2017) pp. 881ff.

<sup>102</sup> It should be noted that, as a result of the concerns raised by various states at the relationships between the collective rights of the community and the individual rights of its members, the right to land recognized in article 17, for example, is accompanied by a reference to article 28 of UNDROP, which states, among others, that "[t]he human rights and fundamental freedoms of all, without discrimination of any kind, shall be respected in the exercise of the rights enunciated in the present Declaration".

<sup>103</sup> See also Article 17, paras 2 and 6.

environmental standards (art. 10.2), decision-making on “matters relating to the conservation and sustainable use of plant genetic resources for food and agriculture” (art. 19.1(c)) and on “food and agricultural policy” (art. 15.4), and “the definition of priorities and the undertaking of research”, notably to ensure that research is oriented towards their needs (art. 19.7). In addition, UNDROP lays down a general requirement for states to “consult and cooperate in good faith’ with peasants “through their own representative institutions” before adopting and implementing legislation and policies, international agreements and other decision-making processes that may affect their rights, “engaging with and seeking the support of peasants and other people working in rural areas who could be affected by decisions before those decisions are made, and responding to their contributions, taking into consideration existing power imbalances between different parties and ensuring active, free, effective and meaningful and informed participation of individual and groups in associated decision-making processes” (art 2.3). At a more general level, UNDROP recognizes the right of peasants “to determine and develop priorities and strategies for exercising their right to development” (art 3.2). They shall “participate in the management” of the resources present in their communities that are required to enjoy adequate living conditions (art.5.1).

It is important to point out that previous versions of UNDROP referred to the principle of free, prior and informed consent (FPIC), which was borrowed from UNDRIP, and provided that the state should consult with peasants in order to obtain their FPIC. In UNDRIP, as we have seen, FPIC is embedded in the right to self-determination, which represents a fundamental pillar of the overall governance of land and natural resources enshrined in the instrument. The different foundation of the two Declarations did not make the transposition easy and, in fact, the reference to FPIC in UNDROP was met with fierce opposition by States and was eventually removed from the draft. Some States in the OEIWG have also raised concerns about the difficulty of meeting the requirements of participation and consultation in the absence of representative organizations with whom to engage.<sup>104</sup> However, efforts done, for example, under the Convention on Biodiversity (CBD) to support the development of mechanisms, legislation or other initiatives to ensure the “approval and involvement” (CBD, art. 8.j) of indigenous peoples and ‘local communities’ for accessing their traditional knowledge, suggest that there are various ways for communities to set out how they expect stakeholders to engage with them and to determine for themselves how to negotiate with a variety of actors.<sup>105</sup> Indeed, this may be a part of the support to collective action, in the form of strengthening or developing inclusive and accountable community governance institutions, which is called for also in the Voluntary Guidelines. It has to be acknowledged, however, that the variety of subjects and realities captured in the definition of peasants incorporated in UNDROP may, in practice, pose serious issues as to the recognition of the collective subject holder of the rights discussed so far. More research is needed on how this ‘collective’ can be identified and recognized in practice, especially when it comes to groups other than existing rural

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<sup>104</sup> See the reports of the sessions of the OEIWG, available at <[www.ohchr.org/EN/HRBodies/HRC/RuralAreas/Pages/WGRuralAreasIndex.aspx](http://www.ohchr.org/EN/HRBodies/HRC/RuralAreas/Pages/WGRuralAreasIndex.aspx)>, visited on 25 July 2018.

<sup>105</sup> UNEP, and CBD, Report of the Expert Group Meeting of Local Community Representatives within the Context of Article 8(j) and Related Provisions of the Convention on Biological Diversity, UNEP/CBD/WG8J/7/8/Add.1\*, 2011. See also I.U Köhler-Rollefson, E. Mathias, H. Singh, P. Vivekanandan, and J. Wanyama, ‘Livestock Keepers’ Rights: The State of Discussion’, 47 *Animal Genetic Resources* (2010) pp. 119–123.

communities - which are themselves not exempt of issues of social cohesion and community of objectives.<sup>106</sup>

Regarding the creation of an overall conducive environment for the viability of the commons and realization of the rights of peasants, UNDROP acknowledges the existence of a number of other structural factors that negatively affect the livelihoods of peasants. Such structural factors include, speculation on food products, unsustainable production and consumption patterns, increasing concentration and unbalanced distribution in the food system, environmental degradation, climate change, aging farming population and the lack of incentives for the rural youth. Accordingly, UNDROP provides for the adoption of a number of measures on the part of the State to tackle these factors. For instance, article 16, which recognizes peasants' right to a decent income and livelihood and the means of production, outlines the obligation of states to take adequate measures to strengthen and support local, national and regional market, in ways that facilitate, and ensure that peasants have full and equitable access to these markets to sell their products at prices that allow them to achieve an adequate standard of living. Agricultural, environmental, trade and investment as well as rural development policies should contribute to strengthening local livelihood options and the transition to environmentally sustainable modes of production such as agroecology or organic agriculture (art. 16.4). Yet, UNDROP does not provide further guidance on how to achieve this transition to relocalized and sustainable food systems. Rather, it provides that States shall elaborate, interpret and apply international agreements and standards, in a "manner consistent with their human rights obligations", and should cooperate to meet the objectives of UNDROP, notably to improve the management of markets at the global level (art. 2). It also prescribes that States shall establish mechanisms to ensure the coherence of their agricultural, economic, social, cultural and development policies and shall formulate public policies at local, national, regional and international levels, in partnership with peasants, to advance and protect food sovereignty and sustainable and equitable food systems that promote and protect the rights contained in UNDROP (art. 15.5). However, so far, efforts by peasant movements to raise the need for food and agriculture governance reform based on food sovereignty have been met by fierce opposition, with States arguing that they cannot make any decision in a human rights forum that may run counter to what has been agreed at the WTO<sup>107</sup>. Yet, implementing all the rights contained in the UNDROP will no doubt require a complete restructuring of international agricultural trade rules.

To sum up, UNDROP employs a comprehensive approach to the governance of land and natural resources, including commons. It goes beyond issues of tenure security and addresses fundamental institutional aspects, related to both issues of internal governance of the group, and the relationship with the rest of the society, including by providing mechanisms for participation and consultation to facilitate the reconciliation of diverging interests over the same resources and ensure varying degrees of control by the group, which are key to any collective action initiative. It also takes into account some structural obstacles to the realization of peasants' rights, and more generally, the overall context affecting access and use of land and natural resources.

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<sup>106</sup> See, for example, IFAD, *Rural Development Report 2016. Fostering inclusive rural transformation* (IFAD, Rome, 2016).

<sup>107</sup> See the reports of the sessions of the OEIWG, available at <[www.ohchr.org/EN/HRBodies/HRC/RuralAreas/Pages/WGRuralAreasIndex.aspx](http://www.ohchr.org/EN/HRBodies/HRC/RuralAreas/Pages/WGRuralAreasIndex.aspx)>, visited on 25 July 2018.

## 6 Concluding Remarks

Worldwide, 2.5 billion people today depend on lands managed through customary, community-based tenure systems. Although land and natural resources are recognized as essential elements for the realization of many human rights, international human rights law does not recognize a human right to land, with the exception of the instruments on indigenous peoples' rights and the recent development concerning the negotiation of UNDROP. As was recalled, the process that resulted in the adoption of UNDROP was initiated at the request of agrarian social movements, notably LVC, and can be seen as a direct reaction against the enclosure of the rural commons. In this paper, we discussed more particularly the approach to the governance of land and natural resources, including the commons, which is proposed in UNDROP. Most collective human rights listed in UNDROP are relevant to the commons, starting with the right to land, and accommodate to a certain degree peasants' claims for control over their land, lives and livelihoods.

As was described in the previous sections, UNDROP offers the possibility of combining key and mutually reinforcing elements of the human rights and collective action approaches to the governance of land and natural resources. Whereas the latter has tended to analyse commons in isolation from their social context, and without due consideration for the broader issues of social equity, distribution and resource allocation, these questions are at the heart of the human rights approach, which puts at the centre of the debate the claims of the people, and requires that we identify and tackle structural obstacles to the realization of human rights, including inequalities, discriminatory practices and unjust power relations within groups and between groups and society at large. Importantly, this approach provides fundamental criteria and mechanisms for the reconciliation of diverging interests over resources, the resolution of disputes and the exercise of priority setting in public policy development. It defines a precise role for the state, as a sovereign and duty-bearer,<sup>108</sup> which is important to creating and sustaining collective action initiatives. As we showed in this article, the human rights approach to the governance of land and natural resources that is embedded in UNDROP is fairly comprehensive, and reflects the core demands of the transnational agrarian movements engaged in the process of its negotiation. It departs from the dominant rights-based approach to the governance of land and natural resources that has so far been used in relation to peasants in at least three ways. First, the human rights-based approach has tended to insist on the importance of access,<sup>109</sup> while questions of management, participation in decision-making and control over resources, that are at the heart of UNDROP, have received less attention. Second, the human rights-based approach has regarded peasants' relationship to land as essentially instrumental, thus looking at land merely as a means to ensure a livelihood, whereas UNDROP recognizes the attachment to one's land as a defining characteristic of peasants and embraces the idea that land forms also a crucial part of their culture and ways of life that deserves protection. Third, the human rights-based approach has failed to question the social value of landed property, and the social implications of conceptualizing and handling land as a commodity.<sup>110</sup> In the case of economic, social and cultural rights, this has

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<sup>108</sup> Errico *supra* note 84.

<sup>109</sup> Access to land has been recognized as a key component of the right to food and right to housing, for example.

<sup>110</sup> It has been argued that the focus of the human right approach has been on striking a balance between protecting the right to property as a human right, and placing limits on it to the extent deemed necessary to ensure the realization of fundamental human rights. See C. Golay, and I. Cismas, 'Legal Opinion on the Right to Property from a Human Rights' Perspective', *Rights & Democracy*, (ADH-Geneva, Geneva,

meant in practice a focus on ‘safety nets’ rather than on addressing the structural obstacles needed to ensure respect and protection of peasants’ right to subsistence as such. By codifying peasants’ collective rights over land and natural resources, including commons, and placing these within the UN human rights framework, UNDROP provides the ground for a more radical and thoughtful critique of private property and of the state-market binary. Indeed, whereas Bakker observed that human rights tend to encourage a public/private binary that recognizes only two possible options with either the State or the market at its core,<sup>111</sup> UNDROP opens the door to alternative institutional arrangements, such as commons and collective action. It suggests an understanding of the right to land and natural resources as an individual and collective right to maintain a fluid, dynamic and non-exclusive relationship with land and other natural resources, shared and used collectively.

Nevertheless, if the reinforcement of local or more decentralized forms of governance represents a key feature of UNDROP, the text raises very complex issues in relation to the agency of collective actors and the space for alternative institutions that they can reclaim, including self-management, considering that peasants, unlike indigenous peoples, are not qualified as ‘peoples’ in international law, but are rather local communities or groups. In this regard, commons, with their focus on collective action, provide an important frame and the basis for the recognition of forms of cooperation at the community level with related institutions for decision-making and autonomous management of the resources. Additionally, collective action theory around the commons may contribute to define the contours and limits of the role of the State. Indeed, as has been noted, UNDROP recognizes the potentially important role of the State in addressing structural obstacles to the realization of human rights, looking into the redistribution of resources and ensuring the participation in decision-making of all actors concerned, features that are often missing in the commons literature. As highlighted above, this is particularly important when contemplating the issue of who should get access to natural resources, for which purposes, and for whose benefit. The role of the State may also be particularly important in respect of initiatives to establish new commons undertaken by third actors, to ensure the respect for the rights of the people concerned and their involvement in the process. However, the role of the State is not neutral in practice, especially vis-à-vis traditionally marginalised groups, and the negotiation process showed that States are very reluctant to recognize forms of control over natural resources in favour of these groups. One should thus be mindful of the less degree of control over their resources recognized in favour of peasants in UNDROP, compared with the original LVC draft. In this regard, it should further be acknowledged that, unless UNDROP is interpreted and applied in practice as an instrument complementary to and synergetic with UNDRIP— as it is meant to be —, it may engender risks for indigenous peoples and the full implementation of their rights as recognized in international law, especially in the light of the persisting challenges concerning the

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2010). The recognition of access to land as a key component of the right to food places, for example, some limits on the right to landed property. If land ownership patterns lead to discrimination or high levels of poverty, states are under the obligation to take appropriate measures, in the form of land ceilings, land redistribution or legal reforms to abolish de facto or de jure discrimination (for example to ensure equal access for women). This means that the right to food is supposed to provide some safeguards against high levels of land concentration, should these lead to violations of the right to food. On this, see O. De Schutter, *Report of the Special Rapporteur on the Right to Food. Access to Land and the Right to Food*, UN Doc. A/65/281, 2010.

<sup>111</sup> Bakker also observes that human rights are not sufficient in themselves to counter neoliberalism because they are compatible with capitalist political economic systems. K. Bakker, *supra* 19.



very recognition of indigenous peoples in many countries.<sup>112</sup> Also, as well acknowledged in the commons literature, the emphasis on the role of the State is a double-edged sword, since there is a risk that it could undermine the vitality and flexibility that characterizes the self-rule of the commons.

In spite of these challenges, UNDROP is a welcome invitation to seriously recognize the local community as manager of a resource, with its own ability to ‘self-govern’, and to explore how to develop legal and policy frameworks, from the local to the global, that are supportive of that ability, including the institutional frameworks needed to prevent and tackle conflicts between resource users and between those and other interested actors. Only the future will tell if the implementation of UNDROP will support peoples’ struggles to regain control over their livelihoods and contribute to halting or reversing the appropriation and commodification of the natural resources on which peasants depend. In large part, the relevance of UNDROP will be determined by peoples’ ability to claim the rights recognized in it, and by their choice of preferred governance mechanisms. As academics, we see the need for further research on past, reclaimed and new mechanisms for the collective management of resources, on the nature and recognition of local communities as collective subjects (beyond indigenous peoples), and on the range of legal and policy frameworks that can better integrate commons and human rights approaches to the governance of land and natural resources.

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<sup>112</sup> It should be recalled that indigenous peoples are captured in the definition of peasants in article 1 of UNDROP. Concerns about the risks that this may cause in practice, have thus been raised by both states and indigenous peoples’ organizations during the negotiations of UNDROP. Some provisions in UNDROP seek to specifically address these concerns, including references to UNDRIP in the preamble of UNDROP; a sentence referring to the specific legislation concerning the right to consultation of indigenous peoples in article 2.3; and the general clause in article 28.1 declaring that noting in UNDROP may be construed as diminishing, impairing or nullifying the rights that indigenous peoples currently have or may acquire in the future. The risks are, however, concrete and they remain. For an example of the tensions between the identification as “peasant” or as “indigenous”, with implications in particular on the application of the specific standards concerning consultation with indigenous peoples, see for instance the case of Peru examined by the ILO’s Committee of Experts on the Application of Conventions and Recommendations (CEACR) in the framework of the supervision of the application of ILO Convention No. 169: CEACR *Direct Request* - adopted 2013, published 103rd ILC session (2014), Indigenous and Tribal Peoples Convention, 1989 (No. 169).