

Human Rights and the Commons: Bridging Gaps and Exploring Complementary Approaches to the Governance of Land and Natural Resources.

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Introduction

The transformation of the vast majority of the traditional commons into property-like entitlements has historically occurred within hierarchical political and power structures that benefited settlers and wealthy landowners at the expenses of indigenous peoples and other rural communities (Hamilton and Bankes 2010). 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 (McHarg *et al.* 2010; specifically on indigenous peoples, see Errico 2017a; CEPAL 2014; ILO/ACHPR 2009; Daes 2001). As some authors have put it, laws established *dominium* over natural resources by enclosing them, and *imperium* over people by dispossessing them (Rajamani 2010).

Currently, approximately 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 (RRI 2016; RRI 2015). 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, entails in many cases a great vulnerability of commons to appropriation by the State and private actors, as the scarcity of resources and population growth lead to mounting competition for them (UN 2003; UN 2012; Errico 2017a; ILO/ACHPR 2009).¹

Over the last decades, indigenous peoples, peasants and other people working in rural areas [hereinafter referred as 'peasants']² organized at the transnational level, have brought their struggles to regain control over their lives, livelihoods and territories to the United Nations, both framing their claims within a human-rights discourse (Anaya 2004; Errico 2007; UN 2012; Claeys 2015b). The differences between the two groups are substantially great: indigenous peoples are peoples reclaiming 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' (Daes 1993); peasants, instead, are individuals and communities in rural areas reclaiming control over their means of subsistence, including land, water, seeds, biodiversity, methods of agricultural production and associated

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¹ RRI estimates that a 500 million people in sub-Saharan Africa depend on 3.46 billion acres of communally held farmland that has been a primary target of foreign governments and investors seeking to produce food specifically for non-African populations (RRI 2017).

² Please note that for the purpose of this paper we will be using the term 'peasants' as encompassing "peasants and other people working in rural areas" according to the definition provided in article 1 of the UN draft Declaration on the Rights of Peasants and Other People Working in the Rural Areas (UN Doc. A/HRC/WG.15/4/2, 2017). This includes pastoralists, fishers, indigenous peoples working the land, the landless, transhumant and nomadic communities, and small-scale farmers, among others. See further in section 2.

peasant knowledge, in a context marked by trade liberalization, the rise of industrial agriculture and the gradual disappearance of the peasantry (Araghi 1995; Rosset and Martínez-Torres 2010; Ploeg 2008).

Common to both groups, however, is the circumstance that their claims have triggered the drafting process of new international human rights instruments stemming from discrimination-related considerations – the UN Declaration on the Rights of Indigenous Peoples [hereinafter UNDRIP] adopted in 2007 by the UN General Assembly,³ and the UN draft Declaration on the Rights of Peasants and other people working in rural areas [hereinafter UNdDROP], the negotiation of which is still on-going at the UN Human Rights Council (UN 1986; UN 2012). Also common to both groups, is the fact that at the core of these instruments are provisions on lands and natural resources, which accommodate, to a varying degree, their claim for collective rights.

In this paper, we focus on the on-going process of negotiation of a UN Declaration on the Rights of Peasants and other people working in rural areas, with a view to exploring some of the issues concerning the governance of the commons in rural areas, in the broader context of the governance of land and natural resources that is enshrined in this new instrument.⁴ Although the term commons is mentioned only once in the UNdDROP, most rights listed in the draft text are relevant to the commons, and we see this process, initiated at the request of the transnational agrarian movement La Via Campesina (see below), as a direct reaction against the enclosure of rural commons to fuel the expansion of neoliberalism.

According to the definition of the International Association for the Study of the Commons, ‘commons’ is a general term for shared resources in which each stakeholder has an equal interest (IASC 2009). For the purposes of this paper, we use commons 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. We understand commons as the combination of the following elements: a) a resource that is managed collectively, b) a group of resource users (“commoners”) who engage in the practice of doing and being in common (“commoning”), c) some kind of mechanism or institution for self-management or self-governance, and d) the outcomes of that practice in terms of common good (with regard to access, capacity, well-being, quality of life and sustainability of the resource) (Gibson-Graham, Cameron, and Healy 2016; Bollier and Helfrich 2015; Bollier 2014).

We include in this definition commons that predate the State, whether or not they are formally recognized in national legal frameworks, and newly formed or reclaimed commons,⁵ often established by NGOs or the State (Agrawal 2003; Hess 2008). We expand our analysis to ‘commons to be’, i.e. resources that are claimed as commons by certain social groups, with a view to looking into the questions of who creates, sets the boundaries, organizes and protects

³ 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.

⁴ Please note that for the purpose of the analysis of this paper reference is made to the latest draft presented by the Chair-Rapporteur of the UN Working Group on the rights of peasants and other people working in rural areas at the fourth session of the UN Human Rights Council (UN Doc. A/HRC/WG.15/4/2, 2017).

⁵ The concept of “new commons” was proposed by Arun Agrawal. While Agrawal sees the new commons as a consequence of decentralized and more participatory state projects, Charlotte Hess defines new commons as various types of shared resources that have recently evolved or have been recognized as commons (Agrawal 2003; Hess 2008).

the commons, and for what purposes. Because of our focus on the collective rights of peasants, indigenous peoples and other people working in rural areas, our emphasis is on traditional or 'rural commons' (Wily 2005) – such as land, pastures, forests, water bodies, seeds, animal breeds, and traditional knowledge associated to those.⁶

The objective of this paper is to examine if and how the recognition of collective rights to resources in international human rights law can lead to increased protection of the commons that are essential to the livelihood of peasants and rural working people, and in particular to the rural poor. The literature on the intersection between human rights and the commons is scarce, and we believe there is considerable potential in crossing the governance approaches that have been elaborated within each field, as suggested by Bakker in the case of water (Bakker 2007). The commons literature has focused mainly on the problems and challenges linked to the management of natural resources, with an emphasis on identifying the internal governance mechanisms that can meet the goals of economic efficiency and ecological sustainability (i.e. avoiding over-exploitation and extinction of the resource) (Ostrom 1990). As a result, commons are often analysed in isolation from their social context, with little consideration for broader issues of social equity, distribution and resource allocation (Van Laerhoven and Barnes 2014; Meizen-Dick, Di Gregorio, Dohrn 2008).

Adopting a human rights-based approach would allow, in our view, to overcome this weakness by bringing into the picture the very people who depend on natural resources for their livelihoods, and addressing the structural obstacles that impair the enjoyment of their human rights. This notably implies ensuring that these people have access to and control over essential productive resources (Pistor and Schutter 2015), including commons, and looking at the broader question of which resources should be made accessible, for which social uses and which social groups. We believe that addressing these questions is key to the long-term viability of the commons. In this paper, we use the concept of 'viability' to emphasize the social dimension closely attached to commons and, therefore, the importance of looking at the rights of the actors concerned and the global context affecting them. 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 (Ostrom 2005).

This paper is based on our engagement with and active involvement in both the UNDRIP and UNdDROP processes in varying capacities over more than a decade. It mobilizes concepts from the studies of the commons as well as human rights literature. It is structured as follows. In the second section, we discuss the challenges facing rural commons and efforts by contemporary peasant movements to reassert their collective rights over natural resources, notably through their involvement in the process of negotiation of a new UNdDROP. In the third section, we provide a brief overview of indigenous peoples' collective rights to lands, territories and natural resources, as they have been recognized in UNDRIP, with a view to highlighting the main features of the approach to the governance of land and natural resources adopted in this instrument. In the fourth section, we discuss the approach to the governance of land and natural resources, including the commons, that is embedded in the UNdDROP, as well as its implications and limitations. Finally, section five will provide some concluding remarks and guiding questions for future research.

⁶ It should be noted that despite the focus on rural working people in the title of UNdDROP, the definition of peasants encompasses all those working or seeking to work the land, whether they are located in urban or rural areas. Our emphasis is on rural commons but urban food and agriculture commons are technically not excluded from UNdDROP. See for example Cangelosi 2015.

2. Rural commons and the demands of La Via Campesina (LVC)

Today, an increasing proportion of the common resources upon which rural communities depend is being commoditized. This historical process of commodification is far from complete however: in many parts of the world, the establishment of private 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 (Claeys 2015a). At the heart of the 2007-08 global food crisis, the transnational agrarian movement La Via Campesina (LVC) denounced “the ferocious offensive of capital and of transnational corporations (TNCs) 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” (LVC 2008).

It is well acknowledged that all rural households depend to a significant extent upon the commons; for wood and non-wood products, pasture, wildlife and fish and so on. It is also known that the poorer the household, the greater the proportion of dependency upon the commons. Rural commons remain extremely vulnerable to appropriation, in large part because of the absence of clarification and legal entrenchment of customary rights. In over half of the African States, for example, rural commons continue to have the status of *de facto* un-owned land or State land (Wily 2011).

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. This re-assertion of commons is often led by the State or civil society, with a view to valorizing the resource on the market through co-management programmes conferring on local communities partial control over certain resources and a share of the benefits. These new commons are often established without pre-existing rules or clear institutional arrangements. Rather, their institutions are prescribed from above or have emerged from local adaptations and strategies to recent policy changes. These commons face specific challenges because there has been little time for people, livestock, wildlife, and the environment to interact and gradually evolve workable relationships (Bollig and Lesorogol 2016).

In industrialized regions of the world, such as in Europe or Japan, the number of active users of traditional/rural commons continues to decrease due to the structurally low prices of agricultural products (Saundberg and Theesfeld 2013) and the diminishing use value of grasslands linked to the importation of animal feeds and the introduction of chemical fertilizers (Shimada 2015). As the direct use values from these resources decline in importance, their multi-level values as public goods (e.g. for biodiversity or leisure) increase: the most valuable services shift from direct provisioning to indirect services, and the most important benefits shift from the local to the global. This problem of under-use and increasingly valuable positive externalities has led to new or adjusted institutions for the management of traditional rural commons (*ibid.*). In some places, for example, new management systems have developed that share the management costs with a broader base of beneficiaries, in order not to place all the burden on resource users.

New rural commons have also developed in Europe 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 (European Parliament 2017). This situation has given rise to civil society initiatives to take land off the market, put in the hands of cooperatives of owners who then make it available through long-term leases to aspiring farmers or groups of farmers, using

agroecological 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.⁷ Initiatives aimed at protecting, developing, selling and exchanging peasant seeds and peasant tools are also worth highlighting.⁸

As has been previously mentioned, the process that led to the creation, in 2012, of an open-ended intergovernmental working group (OEIWG) within the UN Human Rights Council, tasked with the elaboration and negotiation of a UN Declaration on the Rights of Peasants and other people working in rural areas, was initiated at the request of agrarian social movements, organized in the transnational network La Via Campesina. 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 (Claeys 2015a). The process is indicative of the increased participation and involvement of civil society organizations in a number of arenas where the creation of new global norms takes place. Over the last two decades, social movements and peoples' organizations have come to be recognized as important interlocutors in processes that used to be dominated by states and, to a limited extent, international NGOs (McKeon 2009).

The UNdDROP finds its roots in the late 1990s in Indonesia but was brought to the attention of the UN Human Rights Council (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 of the rights of peasants on the HRC agenda. The context certainly played a determining role, and prompted the UN 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—denounced as land and resource grabbing (Borras, Franco, and Wang 2013) –, made visible the fate of the rural world, and gave particular resonance to LVC's call for a specific international human rights instrument protecting the rights of the rural poor enduring multiple forms of discrimination (Claeys 2012).

LVC, together with other social organizations, demanded that an end be put to the « new enclosure movement » that converts « arable, pastoral, and forest lands for the production of fuel » (International Planning Committee for Food Sovereignty (IPC) 2008). 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” (Nyéléni Food Sovereignty Forum 2007), LVC highlighted the structural factors that were making it increasingly difficult for small food producers to make a living. Together, they denounced the trade agreements that were forcing peasants to compete with each other across very diverse agroecological and economic landscapes, and the commodification and privatization of natural resources in their communities, which were depriving them of their livelihood, autonomy and special relation with land and nature. 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 open-ended intergovernmental working group (OEIWG) in July 2013, was the draft elaborated by LVC itself⁹ through a long process of internal discussion and consultation, first

⁷ See for example : <https://www.terre-en-vue.be/?lang=fr>. More research is needed on whether the institutional setup for these initiatives actually presents the characteristics of commons.

⁸ See for example the Réseau semences paysannes (<http://www.semencespaysannes.org/>) in the case of seeds and Atelier paysan (<http://www.latelierpaysan.org/>) in the case of tools.

⁹ This draft declaration was originally published as an annex to the Final study of the Human Rights Council Advisory Committee on the advancement of the rights of peasants and other people working in rural areas (A/HRC/19/75, in English only). On that occasion, a few changes were made to improve the overall consistency of the document with UN standards (Golay 2013).

at the South-Asian level, then across all regions. Since that first session of the OEIWG, two successive drafts have been presented by its Chairperson, in an effort to ground the text in agreed UN language, reinforce coherence with other international human rights standards and respond to the objections of states. Overall the latest UNdDROP remains faithful to the initial intent of the LVC draft and it can be safely assumed that it adequately reflects the rights-based claims that peasant movements have formulated over the years, in the framework of food sovereignty (Claeys 2015b). At the heart of food sovereignty are “food, farming, pastoral and fisheries systems determined by local producers” and ensuring that “the rights to use and manage our lands, territories, waters, seeds, livestock and biodiversity are in the hands of those of us who produce food” (Nyéléni Food Sovereignty Forum 2007).

The preamble of the latest UNdDROP, as discussed in the fourth session of the OEIWG of May 2017, recognizes that access to land, seeds and other natural resources is an increasing challenge for rural people (PP11). The draft stresses the importance of improving access to productive resources, and stresses the fact that peasant and rural women are often denied tenure and ownership of land, equal access to land, and productive resources (PP10). The preamble further recognizes that the respect, protection and promotion of all the rights recognized in UNdDROP is essential in order to guarantee the right of peoples to food sovereignty (PP17).

Article 1 of UNdDROP 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 lands” (para 1). The rights recognized in UNdDROP also apply to any person engaged in the raising of livestock, pastoralism, fishing, forestry, hunting or gathering (para 2), indigenous peoples working the land, transhumant and nomadic communities and the landless (para 3) and hired, migrant and seasonal workers, regardless of their legal status (para 4).

UNdDROP contains several key articles relating to the governance of land natural resources including commons, notably article 5 on the right to natural resources and the right to development, article 10 on the right to participation, article 15 on the right to food and food sovereignty, article 17 on the right to land and other natural resources, article 19 on the right to seeds, article 20 on the right to biological diversity, article 21 on the right to water and to sanitation, and article 18 on the right to a safe, clean and healthy environment. Before moving to a detailed discussion of UNdDROP, we describe, in the next section, some of the key aspects of indigenous peoples’ rights to land and natural resources, and the approach to their governance that stem from them. 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.¹⁰ Despite the substantially different premises of the two Declarations, peasants and indigenous peoples face similar challenges in terms of regaining control over their livelihoods and several provisions in UNDRIP have served as inspiration for UNdDROP, making useful to jointly discuss the two instruments.

3. The rights of indigenous peoples to land, territory and natural resources

¹⁰ See however *supra* note n. 3 concerning ILO conventions on indigenous peoples.

Aimed at addressing the ongoing consequences of historic injustices on indigenous peoples, including colonization and the dispossession of lands, territories and resources, ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169) [hereinafter ILO C169] and the UN Declaration on the Rights of Indigenous Peoples [hereinafter UNDRIP] arguably provide, to date, the most comprehensive form of recognition of collective rights to land and natural resources.¹¹ Outcome of the protracted struggles by indigenous peoples worldwide, they are premised, as has previously been recalled, on the recognition of indigenous peoples as distinct peoples with the right 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 (Errico 2007).

Indigenous peoples' rights to land, natural resources and territory – understood as the total environment of the areas which indigenous peoples occupy or otherwise use - are at the core of the two instruments, as they are entrenched into the very existence of indigenous peoples, spiritually and materially. 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 self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity (Daes 1996, ACHPR 2005).

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. 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. It profoundly challenges the dominant approach that regards land as a pure commodity, and governs the balancing of multiple overlapping interests over these resources accordingly. In the remaining part of this section, we will be referring to the provisions of UNDRIP to delineate the main aspects of indigenous peoples' rights to land and natural resources and the overall approach to the 'governance' of these resources that can be drawn from it.

Article 26 of UNDRIP recognizes indigenous peoples' "right to own, use, develop and control" the lands, territories and resources that they possess or use as well as those that they have otherwise acquired. These rights are closely linked to indigenous peoples' rights to self-determination, cultural integrity, and development (Errico 2017b). It has thus be noted that the nature of indigenous peoples' rights to their lands, territories and natural resources is two-fold, encompassing at the same time "the governmental and property interests of indigenous peoples as collectivities" (Daes 2004, para. 56). Indeed, besides ensuring tenure security based on indigenous customs and traditions, the overall governance of land and natural resources encompasses also self-determination-related aspects. Fundamentally, at the basis of all provisions is the recognition of indigenous peoples' right to maintain and strengthen their

¹¹ There is no other international law instrument that recognizes a right to land and natural resources as such. It should however be noted that human rights to property, culture, food, adequate housing, non-discrimination, self-determination and development have been used in particular to protect communities' rights over land and resources, in varying ways, at the international and regional levels.

distinctive relationship with their territories and to uphold their responsibilities to future generations in this regard.

Indigenous peoples' land rights originate in their own 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.¹² 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 (Errico 2011, Errico 2017b). However, in order to ensure tenure security and legal certainty, States are called to identify, demarcate and give legal recognition to these 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).

UNDRIP also lays down that indigenous peoples have the right to exert control over their lands, territories and resources (art. 26). The relationship between indigenous peoples' disposal and control of the natural resources of their territories and the realization of their right to self-determination was highlighted throughout the negotiation process of the Declaration (Errico 2017b, Errico 2011). UNDRIP recognizes that indigenous peoples have the right to autonomy or self-government in matters relating to their internal and local affairs, and to participate in decision-making in matters which would affect their rights, through their representative institutions (for more details, see Errico 2007). States are accordingly called to recognize indigenous peoples' political, legal, economic, social and cultural institutions or systems, including decision-making procedures (arts. 5, 18, 20, 34).

When it comes to the governance of land and natural resources, this means, more particularly, that indigenous peoples have the right:

- to determine and develop priorities and strategies for the development and use of their lands or territories and other resources (art. 32.1), including the right to be secure in the enjoyment of their means of substance and development, and to engage freely in all their traditional and other economic activities (art 201.);
- to the conservation and protection of the environment and the productive capacity of their lands or territories and resources (art. 29);
- to 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 (art. 32.2).

This latter provision introduces a fundamental mechanism to reconcile national or society's interests with the respect for indigenous peoples' rights and interests. Article 32 is ultimately intended to "reverse historical patterns of imposed decisions and conditions of life that have threatened the survival of indigenous peoples".¹³ 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, at the same time, 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

¹² 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.

¹³ UN Doc. A/HRC/12/34, para. 49

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, it has been maintained that 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 (Errico 2017b). 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). 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.¹⁴

To sum up, the approach to the governance of land and natural resources in UNDRIP, including indigenous peoples' commons, encompasses the following main elements:

- 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 based on the participation and consultation of concerned communities and the principle of 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.

4. UNdDROP: a new instrument for the governance of land and natural resources?

Since UNdDROP is still under negotiation, its provisions inevitably present some contradictions and the terminology used is sometimes incoherent. Bearing this circumstance in mind, in this section we look into the main features of the governance of land and natural resources, including commons, which UNdDROP proposes. In general, it should be noted that UNdDROP 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.¹⁵ 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 (See, for example, UN 1999 and UN 2004).

¹⁴ See, for example, the decision of the Inter-American Court of Human Rights in the case of the Saramaka People v Suriname.

¹⁵ If adopted, UNdDROP 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 Shelton 2000.

The main provision concerning land and natural resources is article 17, which is also the only provision in UNdDROP that makes explicit reference to the ‘commons’. The article recognizes that peasants have the right, “individually and collectively”, to the lands, water bodies, coastal seas, fisheries, pastures and forests “that they need to achieve an adequate standard of living, to have a place to live in security, peace and dignity, and to develop their cultures”. The definition of peasants in article 1, suggests that this right can be exercised individually, or by peasants as a community or group as such. In this last case, the group itself is the holder of the right. Article 17 assumes a pluralist land tenure system, which shall also accommodate group rights as well as individual rights. However, it does not specify what kind of rights over the land shall be recognised, as it generally refers to ‘tenure rights’; it also leaves open the question of the overall regime – i.e. public, private or common property/commons.¹⁶

Article 17 has a two-fold objective. On the one hand, it aims at 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. On the other hand, it contemplates broadening the access to land and resources beyond existing rights, thus addressing directly the issue of the lack of access to land and natural resources of those who, individually or collectively, use them or need them for their livelihood, with particular attention to young people, women and girls, and landless peasants. By affirming the collective and individual right of peasants to the land and natural resources they ‘need to achieve an adequate standard of living’, article 17 paves the way to the potential creation of new commons within the context of redistributive agrarian reforms, in the face of a group claim, if this option facilitates in practice 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 (paras. 4 and 5), 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. Among natural resources, special attention is also paid to seeds, in keeping with LVC’s demands. Thus, 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.

Security in the enjoyment of rights to land and resources is thus one of the first aspects that UNdDROP 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. 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), disconnections from water supplies (art. 21) or limitations in the use of seeds (art. 21.5-6), and, on the other, that peasants - on a collective basis in the case of commons - are provided

¹⁶ 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, “it may be appropriate to extend state protections to such rights as they are characterized by the poor and their customary groups” (Prosterman et al. 2007).

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). UNdDROP also 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).

Tenure security, however, does not exhaust the scope of the provisions in UNdDROP. Similarly to the approach employed in UNDRIP, the approach to the governance of land and natural resources enshrined in UNdDROP comprises various elements, including the internal governance of the commons, their relationship with external decision-making processes affecting them, and the creation of an overall conducive environment for the realization of peasants' human rights and the viability of the commons. To these three important aspects of the governance of land and natural resources we now turn.

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, UNdDROP does provide for the recognition of customary rights and commons with their related "systems of collective use and management" (art. 17.3), which encompass the rules regulating the access and use of the resources as well as the institutions tasked with decision-making functions, among others. 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, UNdDROP 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). 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). 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. Thus, devolved management arrangements that combine state and community control can often offer more efficient, equitable and sustainable management (IFAD 2016). These 'safeguards' 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 UNdDROP provides for the participation of peasants in decision-making processes concerning them (see for ex. arts 10 and 19.1.c).

Concerning peasants' relationship with external decision-making processes affecting them, UNdDROP recognizes the general right of peasants to active, free, effective and meaningful and informed participation, directly and/or through their representative organizations, in the formulation, implementation and assessment of policies, programs and projects that may affect their lives and livelihoods (art. 10.1). These include food safety and labour and 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 "the definition of priorities and the undertaking of research", notably to ensure that research is oriented towards their needs (art. 19.7). In addition, the UNdDROP lays down a general requirement for states to "consult and cooperate in good faith" with peasants "through their

own representative institutions”, in order to obtain their “free, prior and informed consent” (FPIC) before adopting and implementing legislation and policies, international agreements and other decision-making processes that may affect their rights (art 2.3). A number of provisions in UNdDROP refer to the principle of FPIC in specific cases, such as “any exploitation of the natural resources that peasants and other people working in rural areas traditionally hold or use” (art.5.3(b)) and the storage and disposal of hazardous materials or substances on their lands (art.18.4). At a more general level, UNdDROP recognizes the right of peasants “to determine and develop priorities and strategies for exercising their right to development” (art 2.2). They shall “participate in the management” of the resources they need to enjoy adequate living conditions (art.5.1) and have the right to “maintain, control, protect and develop their seeds and traditional knowledge” (art. 19.2).

Nevertheless, it should be noted that the demand of peasant movements to be actively involved in policy-making, and have a say in the governance of the natural resources they depend on, is likely to be a key stumbling block in the negotiations of UNdDROP. Reluctant states have objected that the FPIC principle should only apply to indigenous peoples, and could not possibly be extended or adjusted to other rural non-indigenous communities. More generally, they have objected to the recognition of collective rights in favour of peasants. While we believe this recognition is important, more research is needed on how this ‘group’ can be identified and recognized in practice, especially when it comes to groups other than existing rural communities - which are themselves not exempt of issues of social cohesion and community of objectives (see, for example, IFAD 2016). Part of the concern raised by States is also the difficulty of meeting the requirements of participation and consultation in the absence of representative organizations with whom to engage. 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 (UNEP and CBD 2011; Köhler-Rollefson et al. 2010).

Regarding the creation of an overall conducive environment for the viability of the commons and realization of the rights of peasants, UNdDROP acknowledges the existence of a number of other structural factors that negatively affect the livelihoods of peasants. Such structural factors include volatility on international markets, speculation, unsustainable production and consumption patterns, concentration of power and unbalanced distribution in the food system, environmental degradation, climate change, aging farming population and the lack of incentives for the rural youth. Accordingly, the Declaration 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 markets”, increase the resilience of peasants vis à vis market failures, and facilitate peasants’ full and equitable access to these markets to sell their products at prices that allow them to achieve an adequate standard of living. The text also insists on the involvement of peasants and their organizations in fair and transparent processes of price-setting (art. 16.3 and 16.5). 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, UNdDROP 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, including in the areas of trade, investment, finance, and taxation, in a “manner consistent with their human rights obligations”, and should cooperate to meet the objectives the UNdDROP, notably to improve the management of markets at the global level (art. 2). The text is progressive in that it recognizes the extra-territorial obligations of states to respect, protect and fulfil the rights contained in UNdDROP. However, it falls short of even sketching the changes in global food and agriculture governance that would be required to ensure that peasants can sell their products at remunerative prices on relocalised markets, and facilitate a transition to resilient and sustainable food systems. 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. This is unfortunate because implementing all the rights contained in the UNdDROP will no doubt require a complete restructuring of international agricultural trade rules, including the WTO, in order to stop the expansion of industrial, export-driven agriculture and the concentration of agribusiness power along the supply chain.

In conclusion, UNdDROP 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. Importantly, it takes into account crucial structural obstacles to the realization of peasants’ rights, which ultimately have repercussions on the viability of the commons. Whereas this comprehensive approach is somehow similar to what can be found in UNDRIP, the substantially different premises underlying the two instruments bring, however, an important challenge in the approach of UNdDROP, which is reflected in current discussions on the recognition of collective rights in favour of peasants.

5. Concluding remarks

In this paper, we discussed the approach to the governance of land and natural resources, including the commons, which is proposed in the draft UN Declaration on the Rights of Peasants and other people working in rural areas. We showed how most collective human rights listed in UNdDROP are relevant to the commons, and in particular the right to land and other natural resources, the right to seeds and the right to water. We also discussed how the process of negotiation of UNdDROP, initiated at the request of the transnational agrarian movement La Via Campesina, is to be considered as a direct reaction against the enclosure of rural commons, and part of a global effort towards a people’s counter enclosure (Borras and Franco 2012). How effective will this new international legal instrument be in contributing to halting or reversing the appropriation and commodification of the natural resources on which peasants depend, thus ensuring that they can earn a decent income and livelihood?

Our preliminary analysis leads us to assert that UNdDROP holds considerable potential, because it offers the possibility of combining key and mutually reinforcing elements of the human rights and commons approaches to the governance of land and natural resources. Whereas the commons literature has focused mainly on the problems and challenges linked to the management of natural resources, with an emphasis on economic efficiency and ecological sustainability, it 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 key 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 and the exercise of priority setting in public policy development.

As we showed in this paper, the human rights approach to the governance of land and natural resources that is embedded in UNdDROP is fairly comprehensive, and reflects the core demands of the transnational agrarian movements engaged in the process of negotiation of this new legal instrument. It is important to highlight that this approach 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,¹⁷ while questions of use, management, participation in decision-making and control over resources, that are at the heart of UNdDROP, 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 UNdDROP 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.¹⁸ To a large part, this limitation derives from its reliance on the social democratic model of the redistributive state (Stammers 1995). In the case of economic, social and cultural rights, this has 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.¹⁹

By combining the discourses of rights and entitlements with that of the commons, UNdDROP 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 (Bakker 2007), UNdDROP opens the door to alternative property arrangements, such as commons. 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 UNdDROP, the text raises very complex issues in relation to the agency of collective actors and the space for alternative institutions that they can reclaim, considering

¹⁷ Access to land has been recognized as a key component of the right to food and right to housing for example.

¹⁸ 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. On this issue, see "Legal Opinion on the Right to Property from a Human Rights' Perspective" (Golay and Cismas 2010). The human rights system recognizes land as a property that needs to be protected under the (individual) right to property. At the same time, the recognition of access to land as a key component of the right to food places 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 the 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 (De Schutter 2010).

¹⁹ The parallel with the right to water has shown that the human rights language alone is not sufficient to counter the damaging impacts of neoliberalism. Indeed, human rights are compatible with capitalist political economic systems and private sector provision of water is compatible with human rights in most countries around the world (Bakker 2007).

that peasants are not qualified as ‘peoples’ in international law, but rather as local communities or groups.²⁰ 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 management of the resources.

At the same time, commons may contribute to define the contours and limits of the role of the State. Indeed, as has been noted, UNdDROP 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 vis-à-vis initiatives to establish new commons undertaken by third actors, to ensure that they respect the rights of the people concerned and involve them in the process. Yet, this 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 governance regime.

In spite of these challenges, UNdDROP is a welcome invitation to seriously contemplate the possibility of having the local community recognized 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. The outcome of the UNdDROP negotiation process is unclear at this stage, and only the future will tell if its content remains useful to peoples’ struggles to regain control over their livelihoods. In large part, the relevance of UNdDROP will be determined by peoples’ ability to claim the rights recognized in UNdDROP, 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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²⁰ We could only address these issues succinctly in this paper, but believe they are essential to address and hope that other scholars will contribute to their exploration.

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