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# *Voice under Domination: Notes on the Making and Significance of the United Nations Declaration on the Rights of Peasants*

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## **Abstract**

*In 2018, a transnational coalition led by La Via Campesina, a 200-million-strong peasants' organization, managed to have the United Nations General Assembly adopt the Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP). The present article examines selected aspects of the law-making process that led to the Declaration, focusing on the stiff resistance encountered by the peasants' struggle for equality. As the most controversial UN-sponsored human rights instrument ever, the UNDROP intrudes deeply into the field of relations of production and market structures and applies to billions worldwide, including the great majority of the population in least developed countries. Framed as a case study of a voice under domination in international law, the article retrieves what the oppressed were not allowed to say through the language of international human rights law and describes how they responded to this impediment. It argues that UNDROP fits into a law-making tradition rooted in the decolonization process, reinvigorates it and channels it in new directions. UNDROP combines NIEO-inspired measures and human rights law in a way that seems to achieve much more than the elusive Declaration on the Right to Development. Its non-consensual adoption and radical content also point to a possible alternative to the absorption of the political process concerning the right to development into the a-conflictual logic of the 2030 Agenda for Sustainable Development.*

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## 1 Introduction

Third World rural populations account for a disproportionate share of the hundreds of millions who live in extreme poverty, suffer from hunger and endure the worst effects of climate change.<sup>1</sup> According to recent United Nations reports, about 79 per cent of the world's poor live in rural areas, where the average poverty rate is more than three times higher than in urban areas.<sup>2</sup> Two-thirds of the workers living on less than US \$1.90 a day (i.e. 'extremely poor' despite having a job) are agricultural workers.<sup>3</sup> In sub-Saharan Africa, close to 40 per cent of the workforce is entrapped in extreme poverty.<sup>4</sup> Of the 840 million people living without electricity, 87 per cent live in rural areas.<sup>5</sup> Most of the billions of people lacking access to clean drinking water and sanitation are rural poor.<sup>6</sup> When proclaiming the Decade of Family Farming (2019–2028), the UN General Assembly noted that smallholder farmers contribute to the production of 'more than 80 per cent of the world's food in terms of value'.<sup>7</sup> The rural poor feed the world while they themselves starve.<sup>8</sup> Defying the General Assembly's insistence on the importance for smallholder farmers to join a turn to 'mass entrepreneurship and innovation',<sup>9</sup> peasants – as they wish to be called, giving new meaning to the pejorative term<sup>10</sup> – took a different path, claiming human rights under international law. In 2018, after nearly a decade of struggle, a transnational coalition led by La Vía Campesina (hereafter also 'La Vía') had a Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP) adopted by the UN Human Rights Council,<sup>11</sup> and shortly thereafter by the UN General Assembly.<sup>12</sup> To the extent that

<sup>1</sup> Agricultural trade liberalization, skewed integration in global supply chains, unrelenting land grab, rural workforce proletarianization, financial speculation on sales of basic foodstuffs and police repression all contribute to make the life of the Third World's peasantry miserable. Our analysis relies on background information drawn from Friedmann and McMichael, 'Agriculture and the State System: The Rise and Decline of National Agricultures, 1870 to the Present', 29 *Sociologia Ruralis* (1989) 93; V. Shiva, *The Violence of the Green Revolution: Third World Agriculture, Ecology and Politics* (1991); Araghi, 'Global Depeasantization, 1945–1990', 36 *Sociological Quarterly* (1995) 337; R. Patel, *Stuffed and Starved: Markets, Power and the Hidden Battle for the World Food System* (2007); A. A. Akram-Lodhi and C. Kay (eds), *Peasants and Globalization: Political Economy, Rural Transformation and the Agrarian Question* (2009); W. Bello, *The Food Wars* (2009); McMichael, 'The Land Grab and Corporate Food Regime Restructuring', 39 *Journal of Peasant Studies* (2012) 681; Pegler, 'Peasant Inclusion in Global Value Chains: Economic Upgrading but Social Downgrading in Labour Processes', 42 *Journal of Peasant Studies* (2015) 929.

<sup>2</sup> *The Sustainable Development Goals Report 2019*, at 22. Although the latest report features no updates in this respect, it points out that '[s]mall-scale food producers, already disadvantaged, are being hit hard by the effects of the pandemic' (*The Sustainable Development Goals Report 2020*, at 26).

<sup>3</sup> *The Sustainable Development Goals Report 2019*, at 5.

<sup>4</sup> *Ibid.*, at 22.

<sup>5</sup> *The Sustainable Development Goals Report 2017*, at 10.

<sup>6</sup> *Ibid.*, at 34.

<sup>7</sup> GA Res. 72/239, 19 January 2018, at 2–3.

<sup>8</sup> This is by no means a new phenomenon: see Hobsbawm, 'Peasants and Politics', 1 *Journal of Peasant Studies* (1973) 1, at 6.

<sup>9</sup> GA Res. 72/239, *supra* note 7, at 1.

<sup>10</sup> McKeon, 'La Via Campesina: The "Peasants' Way" to Changing the System, Not the Climate', 21 *Journal of World-Systems Research* (2015) 241.

<sup>11</sup> HRC Res. 39/12, 28 September 2018.

<sup>12</sup> GA Res. 73/165, 17 December 2018.

international human rights law is ‘a status quo project of legitimation’,<sup>13</sup> there is no inconsistency between the General Assembly’s simultaneous endorsement of paternalistic exhortations and the UNDROP, a ground-breaking instance of international law-making from below. However, the extraordinary amount of dissent, in the form of negative votes or abstentions, attracted by the UNDROP – which makes it the most contentious human rights instrument the General Assembly has ever adopted<sup>14</sup> – militates against dismissing it as the culmination of a harmless ritual.<sup>15</sup>

The consecration of the rights of peasants marked a steep decline in the First World’s already dwindling enthusiasm for new human rights instruments. The UNDROP elicited dissension, often expressed in exasperated tones, for it strikes at a political fault-line of exceptional depth and breadth. On the one hand, unlike most human rights instruments, the Declaration intrudes deeply into the field of relations of production and market structures.<sup>16</sup> On the other hand, the broad definition of its beneficiaries, spelled out in Article 1, makes the Declaration applicable to billions worldwide, including the great majority of the population in least developed countries. The definition revolves around the notion of ‘occupation in a rural area’, which includes all sorts of small-scale activities carried out in non-urban spaces, including the sea, forests and other kinds of wilderness. Importantly, ‘family or household labour’, and ‘non-monetized’ labour more generally, are expressly mentioned as typical (although not necessarily defining) aspects of peasant life, characterized by ‘a

<sup>13</sup> Kennedy, ‘The International Human Rights Regime: Still Part of the Problem?’, in R. Dickinson *et al.* (eds), *Examining Critical Perspectives on Human Rights* (2012) 19, at 33. See also Gauchet, ‘Les droits de l’homme ne sont pas une politique’, 1(3) *Débat* (1980) 3; Kennedy, ‘The International Human Rights Movement: Part of the Problem?’, 15 *Harvard Human Rights Journal* (2002) 101, at 117; Brown, ‘“The Most We Can Hope For...”: Human Rights and the Politics of Fatalism’, 103 *South Atlantic Quarterly* (2004) 451, at 453–462; Golder, ‘Beyond Redemption? Problematising the Critique of Human Rights in Contemporary International Legal Thought’, 2 *London Review of International Law* (2014) 77.

<sup>14</sup> GA Res. 3281 (XXIX), 12 December 1974. Having received 121 affirmative votes out of a total voting membership of 193 (63 per cent), the UNDROP proved to be more contentious than the Charter of Economic Rights and Duties of States, which received 120 affirmative votes from a smaller total of 138 voters (87 per cent). UN Doc. A/PV.2315 (1975), at 1372, para. 99. Eight states voted against the Declaration: Australia, Guatemala, Hungary, Israel, New Zealand, Sweden, the United Kingdom and the United States. Only Luxembourg, Portugal and Switzerland broke ranks with the First World to cast an affirmative vote. UN Doc. A/73/PV.55 (2018), at 24–25.

<sup>15</sup> B. Moore, *Injustice: The Social Bases of Obedience and Revolt* (1978), at 459.

<sup>16</sup> For Heri, ‘The Human Right to Land, for Peasants and for All: Tracing the Social Function of Property to 1948’, 20 *Human Rights Law Review* (2020) 433, at 449, the UNDROP aims to change the human rights framework from within, threatening the stability of a system premised on global capitalism. Similarly J. J. Wills, *Contesting World Order? Socioeconomic Rights and Global Justice Movements* (2017), at 142. Cotula, ‘Between Hope and Critique: Human Rights, Social Justice and Re-imagining International Law from the Bottom Up’, 48 *Georgia Journal of International and Comparative Law* (2020), 473, at 513, believes that the UNDROP is unique in that it establishes ‘a strong relation between social justice claims and human rights norms’. Salomon, ‘The Radical Ideation of Peasants, the “Pseudo-Radicalism” of International Human Rights Law, and the Revolutionary Lawyer’, 8 *London Review of International Law* (2020) 425, at 450, found that the Declaration ‘begins chipping away at the very political-economic system that underpins the legal form and is reinforced by it’. For a sceptical take, see A. Chadwick, *Law and the Political Economy of Hunger* (2019), at 185–191.

special dependency on and attachment to the land'. The Declaration also applies to 'dependent family members of peasants', 'transhumant, nomadic and semi-nomadic communities', 'the landless' and 'hired workers, including all migrant workers regardless of their migration status'. This complex enumeration mirrors the diversity of the transnational political coalition led by La Vía Campesina. La Vía is itself a coalition of 182 organizations from 81 countries, with more than 200 million individual members representing a vast array of interests and cultures.<sup>17</sup> In the lead-up to and during the negotiation process, La Vía collaborated with other NGOs, academic institutions, incumbent or former UN Special Rapporteurs and, most importantly, a small vanguard of like-minded states, led by Bolivia.<sup>18</sup> The making of the UNDROP realized one of the modalities of counter-hegemonic international law-making identified by Rajagopal – that is, 'the emergence of coalitions of smaller states and social movements, forming tactical alliances with larger states in particular negotiations, while increasing the prominence of sub-state actors in international law more broadly'.<sup>19</sup>

Claeys and Edelman agree that the UNDROP emerged from 'an innovative, bottom-up process of building alliances, lobbying, and authoring international law'.<sup>20</sup> The present article examines selected aspects of this process, focusing on the stiff resistance that the peasants' struggle for equality met. For social movements worldwide – La Vía Campesina among them – claiming international human rights is 'a praxis of resistance to oppression and violence'.<sup>21</sup> In this sense, ours is

<sup>17</sup> The list of the affiliated organizations is available at <https://viacampesina.org/en/who-are-we/re-gions/>. On La Vía's history and politics generally, see M. Edelman and S. M. Borras, *Political Dynamics of Transnational Agrarian Movements* (2016); Desmarais, 'The Power of Peasants: Reflections on Meanings of La Vía Campesina', 24 *Journal of Rural Studies* (2008) 138; Martínez-Torres and Rosset, 'La Vía Campesina: The Birth and Evolution of a Transnational Social Movement', 37 *Journal of Peasant Studies* (2010) 14; Rosset and Martínez-Torres, 'Food Sovereignty and Agroecology in the Convergence of Rural Social Movements', in D. H. Constance (ed.), *Alternative Agrifood Movements: Patterns of Convergence and Divergence* (2014) 137; I. Gaarde, *Peasants Negotiating a Global Policy Space: La Vía Campesina in the Committee on World Food Security* (2017); Figueroa-Helland, Thomas and Pérez Aguilera, 'Decolonizing Food Systems: Food Sovereignty, Indigenous Revitalization, and Agroecology as Counter-Hegemonic Movements', 17 *Perspectives on Global Development and Technology* (2018) 173.

<sup>18</sup> See C. Golay, *Legal Reflections on the Rights of Peasants and Other People Working in Rural Areas*, Background Paper Prepared for the First Session of the Working Group on the Rights of Peasants and Other People Working in Rural Areas (2013), at 6–9, available at <https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGPeasants/Golay.pdf> (last visited 7 April 2022); Claeys and Edelman, 'The United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas', 47 *Journal of Peasant Studies* (2020) 1, at 25–33; Pacheco Rodriguez and Rosales Lozada, 'The United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas: One Step Forward in the Promotion of Human Rights of the Most Vulnerable', 123 *South Centre Research Papers* (2020), at 3.

<sup>19</sup> Rajagopal, 'Counter-Hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy', 27 *Third World Quarterly* (2006) 767, at 781.

<sup>20</sup> Claeys and Edelman, *supra* note 18, at 1.

<sup>21</sup> Rajagopal, 'Culture, Resistance, and the Problems of Translating Human Rights', 41 *Texas Journal of International Law* (2006) 419, at 422. In the same vein, see Chimni, 'Third World Approaches to International Law: A Manifesto', 8 *International Community Law Review* (2006) 3, at 24; U. Baxi, *The Future of Human Rights* (2006), esp. ch. 3; B. S. Chimni, *International Law and World Order* (2017) at 534–543. See also Brem-Wilson, 'From "Here" to "There": Social Movements, the Academy and Solidarity Research', 10 *Socialist Studies* (2014) 111.

a case study of ‘voice under domination’ in international law.<sup>22</sup> For James Scott, who coined the phrase, the voice of the oppressed inevitably takes on ‘a deferential tone of address’.<sup>23</sup> The speaker ‘looks upward’, which is how he or she will ‘gain a hearing’.<sup>24</sup> Although the oppressed thereby accept the dominant discourse as ‘the only plausible arena of struggle’, they also understand it as ‘a plastic idiom ... carrying an enormous variety of meanings’, including ‘subversive’ ones.<sup>25</sup> This analysis resonates with the Third-Worldist conception of human rights law as ‘a terrain of contestation’, ‘a language of both power and resistance’, ‘hegemony and counter-hegemony’.<sup>26</sup> The opposing camps co-produce, in Scott’s terminology, a public transcript, a discursive canvas made of official pronouncements, such as the UNDROP. All the while, each camp spins out its hidden transcript:

Every subordinate group creates, out of its ordeal, a hidden transcript that represents a critique of power spoken behind the back of the dominant. The powerful, for their part, also develop a hidden transcript representing the practices and claims of their rule that cannot be openly avowed.<sup>27</sup>

The more the public transcript bears the mark of unresolved conflicts, the more the hidden transcripts rise to the surface with their unmet demands. The UNDROP is a case in point. Its text displays a contrast between radical content, rejected by the powerful, and the conventional, euphemistic language grudgingly accepted by the oppressed. Diplomatic defeat prompted affluent countries to expound an ultra-conservative doctrine of human rights and to snub the Declaration as substantively eccentric and a mere piece of soft law. On the opposite front, the peasants avoid categorizing it under accepted international legal notions and disseminate the official text purged of the long bureaucratic preamble and accompanied by militant unofficial commentary.

Section 2 describes how La Vía Campesina found its voice as a speaker of human rights language, chronicling its steady embrace of international human rights law for emancipatory purposes. Section 3 shows to what extent international legal discourse recast the peasants’ claims by the irresistible force of its conventions. It inventories what the oppressed were not allowed to say. Human rights experts felt that La Vía’s utterances required reformulation – an intervention which, despite its purported neutrality, produced a disenfranchising loss of meaning at the threshold of the negotiation process. However, as the Declaration travelled back to local contexts, subaltern speech resurfaced, working at the margins of the official text and going as far

<sup>22</sup> J. C. Scott, *Domination and the Arts of Resistance: Hidden Transcripts* (1990), at 137. See also J. C. Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* (1987), a classic in the field of peasant studies, from which Scott drew much of the material employed in his later theoretical work.

<sup>23</sup> Scott, *Domination*, *supra* note 22, at 96.

<sup>24</sup> *Ibid.*, at 93.

<sup>25</sup> *Ibid.*, at 103.

<sup>26</sup> Rajagopal, ‘The International Human Rights Movement Today’, 24 *Maryland Journal of International Law* (2009) 56. See also Hunt, ‘Rights and Social Movements: Counter-Hegemonic Strategies’, 17 *Journal of Law and Society* (1990) 309, at 314, 320; Özsu, ‘The Question of Form: Methodological Notes on Dialectics and International Law’, 23 *Leiden Journal of International Law* (2010) 687, at 698.

<sup>27</sup> Scott, *Domination*, *supra* note 22, at xii.

as to replace parts of the paratext with more straightforward political messages. As Section 4 reports, hard-won linguistic conformity did not prevent powerful states from pursuing the charge of incompetence in a different direction, this time lecturing the peasants on the universality of human rights, purportedly disregarded by an instrument that singles out a socio-economic group. In reality, the UNDROP instantiates the principle under a non-trivial and well-accepted concept of the universal, a concept that the peasants have made their own. Section 5 foregrounds another way in which competent legal discourse impresses the mark of inequality on successful egalitarian claims. Often celebrated as more efficient than law properly so-called, soft law is also, should the need arise to portray it so, an inferior form of law.<sup>28</sup> Stressing that the UNDROP is mere soft law, as its detractors did, is symbolic violence, which the prestige of human rights may well neutralize, however. The UNDROP fits into a law-making tradition, which, rooted in the decolonization process, has made extensive use of soft law, including in combination with human rights law, but without calling it ‘soft’. The UNDROP reinvigorates this Third-Worldist tradition of engagement with international law and channels it in new directions. Section 6 recapitulates and concludes.

## 2 Embracing Human Rights

The idea of resorting to human rights to advance the peasants’ political agenda met with some internal resistance at first. Standard human rights discourse is predominantly individualistic, whereas La Vía Campesina conceives of its claims as collective and aimed at realizing ‘food sovereignty’ – that is, democratic control over local production and distribution of food, with or without state support.<sup>29</sup> La Vía’s longstanding position on this matter is that food sovereignty and the human rights specifically of peasants are one and the same thing.<sup>30</sup> A policy document approved in October 2008, at La Vía’s fifth international conference held in Maputo, Mozambique, encapsulates the gist of the organization’s human rights doctrine:

<sup>28</sup> Cutler, ‘Gramsci, Law and the Culture of Global Capitalism’, 8 *Critical Review of International Social and Political Philosophy* (2005) 527, at 537: ‘to the extent that juridification is taking a non-binding, “soft” form of law, one must consider whether law is operating dialectically to juridify certain relations in hard legal disciplines ... and de-juridify others ... in “soft law” and voluntary legal regimes’. See also Pellet, ‘Le “bon droit” et l’ivraie: Plaidoyer pour l’ivraie (Remarques sur quelques problèmes de méthode en droit international du développement)’ in *Le droit des peuples à disposer d’eux-mêmes: Méthodes d’analyse du droit international; Mélanges offerts à Charles Chaumont* (1984) 465, at 488–491.

<sup>29</sup> On food sovereignty generally, see Patel, ‘What Does Food Sovereignty Look Like?’, 36 *Journal of Peasant Studies* (2009) 663; Nash, ‘Human Rights, Movements and Law: On Not Researching Legitimacy’, 46 *Sociology* (2012) 797; Bellinger and Fakhri, ‘The Intersection between Food Sovereignty and Law’, 28(2) *Natural Resources and Environment* (2013) 45; Claeys, ‘Food Sovereignty and the Recognition of New Rights for Peasants at the UN: A Critical Overview of La Vía Campesina’s Rights Claims over the Last 20 Years’, 12 *Globalizations* (2015) 452, at 458; Dunford, ‘Human Rights and Collective Emancipation: The Politics of Food Sovereignty’, 41 *Review of International Studies* (2015) 239.

<sup>30</sup> See, e.g., La Vía Campesina South Asia, South Asia Regional Meeting Declaration (Kathmandu, 9–11 September 2006): ‘food sovereignty is an inalienable right’. Gathii, ‘Food Sovereignty for Poor Countries in the Global Trading System’, 57 *Loyola Law Review* (2011) 509, at 534, stresses the existence of a close relationship between the two concepts.

Human rights embody the vision of oppressed people, and their longing for freedom. ... Human rights instruments provide a means to facilitate the elimination of oppression. These instruments attempt to cover all spheres of human life. Indeed, human rights exist for the oppressed to defend or obtain their human standards in situations of oppression.<sup>31</sup>

In 2008, La Vía hammered out the rights catalogue with which it would later petition the UN Human Rights Council.<sup>32</sup> The event took place in June 2008, at a special meeting convened in Jakarta, which saw the participation of more than 100 delegates from 60 countries, along with ‘rights activists and academics’.<sup>33</sup> In March 2009, La Vía’s International Coordinating Committee, meeting in Seoul, South Korea, ratified the Declaration of Rights of Peasants – Women and Men (hereafter ‘the 2009 Declaration’).<sup>34</sup> The 2009 Declaration is not just a draft whose contents the UNDROP partly absorbed, a part of its official archive. To this day, that text reflects the peasants’ views about their rights. It is a component of a transnational covenant that stands beside the UNDROP, a self-standing document which in the end never reached the negotiating table. Upon receiving it in 2009, the UN Human Rights Council set about recasting it in standard, UN-style human rights language, a complex operation that was not completed until 2012.<sup>35</sup>

La Vía received advice from human rights experts before petitioning the UN, especially in the lead-up to the Jakarta meeting. Collaboration with the Centre Europe-Tiers Monde (CETIM) and the FoodFirst Information and Action Network (FIAN) facilitated access to relevant expertise. Christophe Golay, a Swiss scholar who more than anybody else worked on La Vía’s drafts, remembers that in 2008

we had a meeting in Bilbao that was absolutely central, with the human rights commission of [La Vía], FIAN, CETIM and some experts. [La Vía] had had its draft Declaration since 2001. We told them ... to formally adopt their Declaration to have something to show the world, and that is what they did in 2009. We helped a little bit with the language to make it closer to agreed language at the UN, particularly in terms of the titles and content of certain articles, so that it would be easier to convince the states.<sup>36</sup>

By drawing attention to the experts’ intervention, we are not suggesting that the original voice of the oppressed, untainted by the encounter with the experts, could be retrieved through the old draft Golay refers to. Serikat Petani Indonesia (SPI), a peasants’ union affiliated to La Vía, was the driving force behind the earliest drafts. Claeys reports that a London-based NGO, the International Institute for Environment and Development, persuaded SPI to frame its complaints in the language of human

<sup>31</sup> La Vía Campesina, ‘Towards an International Convention of the Rights of Peasants’ in *La Vía Campesina Policy Documents* (2009) 173. This compilation of documents ‘represents a broad consensus within La Vía Campesina’ and ‘an important basis to go further and deeper into the building of a strong peasant’s voice’ (*ibid.*, at 4).

<sup>32</sup> See *infra*, Section 3.

<sup>33</sup> C. Hubert, *The United Nations Declaration on the Rights of Peasants: A Tool in the Struggle for Our Common Future* (2019), at 26. See also Untitled working document A, on file with authors, at 6 (La Vía plus ‘rights activists and academics developed a global step for the institutionalisation of rights’).

<sup>34</sup> La Vía Campesina, *Declaration of the Rights of Peasants: Women and Men* (2009), at 2.

<sup>35</sup> See *infra*, Section 3.

<sup>36</sup> Claeys and Edelman, *supra* note 18, at 20 (interview).

rights.<sup>37</sup> The peasants accepted from the very start the idea of formulating their claims in accordance with existing discursive parameters, but on occasions did not hold back from overstepping them.

The process officially started in 1996 at La Vía's second international conference in Tlaxcala, Mexico, where SPI successfully proposed that the human rights of peasants be put on the organization's agenda. Four years later, in Bangalore, India, La Vía set up a commission on human rights.<sup>38</sup> Meanwhile, under the leadership of Henry Saragih, a future general coordinator of La Vía Campesina, SPI, liaising with regional partners, started experimenting with human rights writing. A declaration on the rights of peasants, prepared by Vía Campesina South East Asia and East Asia, saw the light of day in April 2002.<sup>39</sup> Regional delegates meeting in Jakarta adopted it in the hopes that it would serve as a basis for an 'International Convention on the Rights of Peasants ... to be elaborated by the UN, with the full participation of La Vía Campesina and other representatives of the civil society'.<sup>40</sup> La Vía's fourth international conference, held in São Paulo, Brazil, took note of the draft but refrained from transmitting it to the UN.<sup>41</sup> Instead, it mandated further groundwork, with a view to documenting violations of peasants' rights in every part of the world. Between 2004 and 2006, La Vía and FIAN regularly submitted reports on such violations to the UN Commission on Human Rights and its successor, the UN Human Rights Council.<sup>42</sup>

Such extensive surveying underpinned the second and last stage of collective drafting. At both stages, La Vía kept the interference of human rights experts to a minimum and in principle confined to questions of form and style. The peasants were reluctant to abandon their modes of expression, however. The text had to be of their own making, reflecting 'their concerns and demands', and 'couched in their language'.<sup>43</sup> In fact, it is not the advice of experts that made the 2002 draft evolve into the 2009 Declaration, but a process of radicalization nourished by years of systematic knowledge gathering about the peasantry's condition. As one of La Vía's canonical texts explains, those surveys confirmed that human rights 'apply differently whether one belongs to Humanity (first class) or to Humanity-existing-through-humanitarianism (second and third classes)'.<sup>44</sup> This realization did not affect La Vía's trust in the law, which it still sees as an emancipatory tool. However, although both declarations reflect a certain 'impertinence to expect justice',<sup>45</sup> the 2002 text expresses a faith in the

<sup>37</sup> P. Claeys, *Human Rights and the Food Sovereignty Movement: Reclaiming Control* (2015), at 55–56.

<sup>38</sup> Referred to in Golay's recollections, *supra* note 18.

<sup>39</sup> Untitled working document A, on file with authors, at 6. See also Golay, *supra* note 18, at 5.

<sup>40</sup> Untitled working document B, on file with authors, at 3.

<sup>41</sup> Edelman and James, 'Peasants Rights and the UN System: Quixotic Struggle? Or Emancipatory Idea Whose Time Has Come?', 38 *Journal of Peasant Studies* (2011) 81, at 92–93.

<sup>42</sup> See FIAN and La Vía Campesina, *Violations of Peasants' Human Rights* (2004); FIAN, *Violations of Peasants' Human Rights* (2005); La Vía Campesina, *Violations of Peasants' Human Rights* (2006).

<sup>43</sup> Hubert, *supra* note 33, at 26.

<sup>44</sup> Delpechin and Nhamposa, 'African Perspective: The Food Crisis Is Not Just About Food' in *La Vía Campesina Policy Documents* (2009) 16, at 26.

<sup>45</sup> E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (1975), at 268.

law's redemptive power that seems almost extinguished in the 2009 Declaration. In Scott's terminology, the draft's evolution reflects a shift to a *less* deferential tone of address, the adoption of a fighting posture partly dissimulated by the conventional choice of expressing grievances in the language of human rights.<sup>46</sup>

The 2002 draft repeatedly appeals to the state and other authorities to change the law: rights 'should be protected by the law',<sup>47</sup> or 'must obligate by national and international law',<sup>48</sup> or entitle to (still lacking) 'protection of law nationally and internationally'.<sup>49</sup> By contrast, the 2009 Declaration consistently asserts *existing* rights. Instead of filing pleas for protection, it chastises authorities for failing to protect rights or worse. An example may illustrate the difference between the two texts and the impact that expert intervention typically had on the draft's evolution. The 2002 draft read: 'Peasants man and woman and their family have right *on the protection* of the security of our live.'<sup>50</sup> Experts rephrased this as follows: 'Peasants have the right to physical and mental integrity and security of life.'<sup>51</sup> La Vía added to this the rights of peasants 'to not be harassed, evicted, persecuted, arbitrarily arrested, and killed for defending their rights'.<sup>52</sup> All the changes made to the 2002 draft and its expert-vetted version went into radicalizing the text and in no case were they expert-driven. La Vía single-mindedly enhanced the draft with, inter alia, rights to 'reparation for ecological debt and the historic and current dispossession of their territories',<sup>53</sup> to 'an equitable access to land',<sup>54</sup> to 'develop community-based commercialization systems in order to guarantee food sovereignty',<sup>55</sup> to 'reject certification mechanisms established by transnational corporations'<sup>56</sup> and to 'resist oppression'.<sup>57</sup>

La Vía's espousal of the human rights discourse did not entail the abandonment of the anti-capitalistic stance it took upon its foundation in the early 1990s and which it has maintained ever since. The text prefacing the 2009 Declaration locates the structural causes of human rights violations in 'neoliberal policies promoted by the World Trade Organization, Free Trade Agreements (FTAs), other institutions and many governments in the North as well as in the South'.<sup>58</sup> The text culminates in the rejection of 'the capitalistic logic of accumulation', which is dooming 'peasant agriculture'.<sup>59</sup> La Vía contends that its approach to human rights will help 'dismantle capitalism and give us back the world that is socially just and equal'.<sup>60</sup> One feature of the 2009

<sup>46</sup> See *supra* note 23 and corresponding text.

<sup>47</sup> Untitled working document A, on file with authors, at 9.

<sup>48</sup> *Ibid.*, at 14. Here and elsewhere, we quote the 2012 draft verbatim.

<sup>49</sup> *Ibid.*, at 16.

<sup>50</sup> *Ibid.*, at 9 (emphasis added).

<sup>51</sup> Untitled working document B, on file with authors, at 9.

<sup>52</sup> *Ibid.* (now Art. III(1) of the 2009 Declaration).

<sup>53</sup> *Ibid.*, at 14.

<sup>54</sup> *Ibid.*, at 11.

<sup>55</sup> *Ibid.*, at 13.

<sup>56</sup> *Ibid.*, at 14.

<sup>57</sup> *Ibid.*, at 15.

<sup>58</sup> 2009 Declaration, at 3.

<sup>59</sup> *Ibid.*

<sup>60</sup> La Vía Campesina, *United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas: A Book of Illustrations* (2020), at 4.

Declaration may justify this claim – namely, the text’s focus on the economic means to which most peasants have little or no access, like land, seeds, decent wages and equitable market arrangements. This trait largely survived the negotiations ordeal. La Vía’s invective against capitalism did not, but it still belongs to the organization’s hidden transcript.

### 3 Human Rights Vernaculars

The opportunity to submit the 2009 Declaration to the UN came in the aftermath of the 2007–2008 world food crisis. In 2009, the UN Human Rights Council solicited La Vía Campesina’s opinion on how to counter the crisis. The answer, La Vía suggested, lay in the rights catalogue it had just ratified in Seoul.<sup>61</sup> Meanwhile, the UN Special Rapporteur on the right to food, Olivier De Schutter, following in the footsteps of his predecessor Jean Ziegler, urged states to step up protection of smallholder farmers’ rights over land and seeds.<sup>62</sup> Later that year, the UN Human Rights Council Advisory Committee, a panel of experts whose members included Ziegler, sought the Council’s permission to prepare ‘a study on the food crisis, the right to food, agricultural subsidies and the rights of peasants’.<sup>63</sup> In response, the Council commissioned a report on ‘discrimination in the context of the right to food’, remaining silent on the broader issue of peasants’ rights.<sup>64</sup> Oddly enough, the Advisory Committee turned that silence into a chance to follow through with La Vía’s plan.<sup>65</sup> In February 2010, the experts suggested that the time was ripe for assessing ‘the significance and importance of a possible new instrument on the rights of peasants and other people living in rural areas’.<sup>66</sup> This time the Council almost concurred, greenlighting ‘a preliminary study on the ways and means to further advance th[ose] rights’.<sup>67</sup> Despite the Advisory Committee’s zeal, the peasants’ grievances did not make it to the negotiating table until October 2012, nearly four years after the adoption of the 2009 Declaration. On that occasion, the Human Rights Council set up an open-ended intergovernmental working group with the task of producing ‘a draft UN declaration on the rights of

<sup>61</sup> As reported in Golay, *supra* note 18, at 6.

<sup>62</sup> De Schutter, ‘Seed Policies and the Right To Food: Enhancing Agrobiodiversity and Encouraging Innovation’, Report of the Special Rapporteur on the Right to Food, UN Doc. A/64/170 (2009); De Schutter, ‘Large-Scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge’, Addendum to the Report of the Special Rapporteur on the Right to Food, UN Doc. A/HRC/13/33/Add.2 (2009); Ziegler, Report of the Special Rapporteur of the Commission on Human Rights on the Right to Food, UN Doc. A/57/356 (2002).

<sup>63</sup> Report of the Human Rights Council Advisory Committee on its Second Session, UN Doc. A/HRC/AC/2/2 (2009), at 19.

<sup>64</sup> UN Doc. A/HRC/10/12 (2009), at 10, para. 36.

<sup>65</sup> Christophe Golay, who at the time assisted Ziegler at the Advisory Committee, recalls that it was clear that the latter ‘did not have an explicit mandate to propose a declaration’. See Edelman and Claeys, *supra* note 18, at 21.

<sup>66</sup> Preliminary Study on Discrimination in the Context of the Right to Food, UN Doc. A/HRC/13/32 (2010), at 22, para. 78.

<sup>67</sup> HRC Res. 13/4, 24 March 2010, at 7, para. 44.

peasants and other people working in rural areas', based on 'the draft submitted by the Advisory Committee'.<sup>68</sup>

The adoption of a draft declaration by the Advisory Committee in February 2012 marked a turning point in the law-making process. In the final study accompanying the draft, the experts recommended starting negotiations on 'a new instrument – initially, a declaration'.<sup>69</sup> In official parlance, the term 'declaration' refers to a non-binding instrument, a piece of soft law. The Advisory Committee picked up the term from La Vía's 2009 Declaration. However, lexical identity concealed in this case a semantic difference. By using that term, La Vía meant to underscore the document's solemnity, not make it fall into a given category of international legal instruments.<sup>70</sup> The 2009 Declaration's preface asserted that 'peasants of the world need an International Convention on the Rights of Peasants'.<sup>71</sup> Its postface invoked 'a proper Convention', with 'chapters/parts on "state obligation" and "monitoring mechanism or mechanisms related to measures"', and other provisions similar to other international conventions'.<sup>72</sup> In 2009, La Vía still wished to see its Declaration turned into 'a proper Convention', a binding instrument complete with an effective enforcement mechanism. It was only later that the peasants accepted the experts' 'misreading' as the sole realistic option.<sup>73</sup> In sum, the pull of conventional language helped to settle a fundamental preliminary issue almost insensibly. For the rest, the Advisory Committee did its best to faithfully translate La Vía's grievances into accepted language: the two documents – the 2009 Declaration and the 2012 ur-draft – overlap to a considerable extent. However, the atypical features of La Vía's rights catalogue made a certain amount of rewriting unavoidable. A synoptic reading of the two texts offers glimpses of the earliest and most dramatic stage of the translation process, which started with the 'expropriation' of the declaration.<sup>74</sup>

In La Vía's text, the identity of the declarant remains at first unspecified due to the impersonal voice of the first two preambular paragraphs: 'Affirming that peasants,

<sup>68</sup> HRC Res. 21/19, 27 September 2012, at 1, para. 1.

<sup>69</sup> Final Study of the Advisory Committee on the Advancement of the Rights of Peasants and Other People Working in Rural Areas, UN Doc. A/HRC/19/75 (2012), at 20, para. 72.

<sup>70</sup> In an old memorandum prepared for the UN Commission on Human Rights, the UN Secretariat's Office of Legal Affairs suggested that declarations differ from ordinary recommendations. Although a resolution 'cannot be made binding upon Member States ... purely by the device of terming it a "declaration" rather than a "recommendation"', a declaration is nonetheless 'a solemn instrument resorted to only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected'. UN Economic and Social Council, 'Use of the Terms "Declaration" and "Recommendation"', Memorandum by the Office of Legal Affairs, UN Doc. E/CN.4/L.610 (1962), at 2, para. 5.

<sup>71</sup> 2009 Declaration, at 2.

<sup>72</sup> *Ibid.*, at 12.

<sup>73</sup> La Vía has not officially abandoned the plan to have the Declaration's contents recast into a binding instrument. See Montón, 'Opinion: Adoption of the Peasant's Rights Declaration Enriches the Human Rights System', 29 June 2019, available at <https://viacampesina.org/en/opinion-adoption-of-the-peasants-rights-declaration-enriches-the-human-rights-system/> (last visited 8 April 2022).

<sup>74</sup> Larking, 'Mobilising for Food Sovereignty: The Pitfalls of International Human Rights Strategies and Exploration of Alternatives', 23 *International Journal of Human Rights* (2019) 758, draws comparisons between La Vía's 2009 Declaration and the draft adopted by the intergovernmental working group in 2015.

men and women, are equal to all other people'. However, the third paragraph marks a shift to personal and possessive pronouns: the peasants claim 'an adequate standard of living for ourselves and our families, including ... our right to be free from hunger'.<sup>75</sup> This adjustment lets a 'We, the Peasants' come to the surface. The Advisory Committee had to suppress that cry of protest as the declaration's ownership passed to the UN. Curiously enough, the panel of experts itself provisionally took up the declarant's role, so irresistible is the applicable linguistic convention.<sup>76</sup> Of course, the Advisory Committee, like the Human Rights Committee and the General Assembly after it, 'adopted' the rights in question instead of claiming them. However, in this convention there is nothing natural or logical about authorship. It is perfectly possible to imagine an institutional arrangement where decision-making bodies endorse a document without changing the author's identity. It is international law-making's grammar that forecloses anything like 'We, the Peasants'.

La Vía thought it essential to make explicit that peasants are 'women and men', so much so that the concept appears in the title and is then rerun 81 times, one for each claim of right, as follows: 'Peasants (women and men) have the right....' The 2009 Declaration sounds like a chant or a litany, an unfitting style for a UN document. The iteration was therefore suppressed. The experts also took pains to fix misstatements of the law and politically divisive assertions. For La Vía, 'States have undertaken to ensure the realization of the right to an adequate standard of living'.<sup>77</sup> They committed to just taking 'appropriate steps' in that direction, the experts rectified.<sup>78</sup> In their reformulation, 'genuine agrarian reform',<sup>79</sup> which for the peasants is key to the realization of their rights, gave way to 'development and reform of agrarian systems'.<sup>80</sup> While La Vía understood its Declaration as ammunition in the struggle against the existing system, in the experts' translation 'systems' (in the plural) needed just improvement. A clear allusion to state and corporate violence against the peasants did not survive the UN's rarefied atmosphere.<sup>81</sup> The Advisory Committee's draft still called attention to the overbearing presence of transnational corporations in the agricultural sector,<sup>82</sup> the precondition of the violence that the peasants had impolitely brought up.<sup>83</sup> Such allusions disappeared in the draft's later versions. The UNDROP's preamble recognizes the peasants' sufferings, but it evokes

<sup>75</sup> 2009 Declaration, at 5.

<sup>76</sup> Final Study, *supra* note 69, at 22.

<sup>77</sup> 2009 Declaration, at 5, 3rd recital.

<sup>78</sup> Final Study, *supra* note 69, at 22.

<sup>79</sup> 2009 Declaration, at 5, 3rd recital.

<sup>80</sup> Final Study, *supra* note 69, at 22, 3rd recital.

<sup>81</sup> 2009 Declaration, 7th recital: 'Considering that peasants' conditions are worsening because of governments' exclusion of peasants from policy decision making, because of the use of military, and/or paramilitary groups to displace peasants and allowing transnational corporations to exploit natural resources'. Compare Final Study, *supra* note 69, at 22, 6th and 7th recitals.

<sup>82</sup> Final Study, *supra* note 69, at 22, 7th preambular paragraph: 'Considering the increasing concentration of the food systems in the world in the hands of a small number of transnational corporations'.

<sup>83</sup> See, in this regard, Marks, 'Human Rights and Root Causes', 74 *Modern Law Review* (2011) 57.

them as though they ‘came out of nowhere’.<sup>84</sup> Even when the UNDROP’s preamble gets at its closest to the root causes, it still describes a world in thrall to some objective force: ‘Concerned about speculation on food products, the increasing concentration and unbalanced distribution of food systems and the uneven power relations along the value chains, which impair the enjoyment of human rights’.<sup>85</sup> By contrast, the preamble of La Vía’s 2009 Declaration featured a recital on international law’s complicity in the ravages of ‘capitalist globalization’<sup>86</sup> – an indictment that the experts could not let through: in the palace, international law is saviour, not accomplice in crime.

As the peasants were about to approach a forum of states, the experts had them forgo a claim to autonomy from state institutions and the seemingly contradictory ‘right to obtain funds from the State to develop agriculture’.<sup>87</sup> Instead, peasants provisionally got ‘the right to obtain credit’ from unspecified sources.<sup>88</sup> La Vía could not relinquish the ‘right to food sovereignty’, unknown to international law but central to the peasant’s political platform.<sup>89</sup> The Advisory Committee expressed it as follows: ‘Peasants have the right to food sovereignty, which comprises the right to healthy and culturally appropriate food produced through ecologically sound and sustainable methods, and the right to define their own food and agriculture system.’<sup>90</sup> The formula faithfully reflects La Vía’s claims, but in reverse order. The right to food (a consumer’s right to which the UN system gives pride of place) precedes the right to locally self-govern the production system, which is among the peasant’s essential demands.<sup>91</sup> The UNDROP incorporates the concept of food sovereignty reluctantly and marks it off as partisan.<sup>92</sup>

<sup>84</sup> Larking, *supra* note 74, at 15. See, inter alia, 18th recital (‘Considering the hazardous and exploitative conditions that exist in many parts of the world under which many peasants and other people working in rural areas have to work’) and 19th recital, where people defending the rights of peasants are said to ‘face a high risk of being subjected to different forms of intimidation and of violations of their physical integrity’.

<sup>85</sup> UNDROP, 20th recital.

<sup>86</sup> 2009 Declaration, 8th recital.

<sup>87</sup> *Ibid.*, Art. VI, para. 1. See also Art. IV, para. 13: ‘Peasants (women and men) have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.’

<sup>88</sup> Final Study, *supra* note 69, at 25, Art. 6(1).

<sup>89</sup> 2009 Declaration, Art. V, para. 9. See also Art. VIII, para. 9.

<sup>90</sup> Final Study, *supra* note 69, at 23, Art. 2(5). The experts drew the definition from the Nyéléni Declaration on Food Sovereignty (27 February 2007), reproduced in 36 *Journal of Peasant Studies* (2009) 673. La Vía endorsed the Nyéléni Declaration. There is more to the latter than the sentence picked on by the experts – for instance, the radical assertion that food sovereignty ‘offers a strategy to resist and dismantle the current corporate trade and food regime’.

<sup>91</sup> See *supra* note 29 and corresponding text.

<sup>92</sup> See Art. 15(4) UNDROP: ‘Peasants and other people working in rural areas have the right to determine their own food and agriculture systems, recognized by many States and regions as the right to food sovereignty.’

What we have described did not emerge as the outcome of a give-and-take process. La Vía received no invitation to negotiate changes with a counterpart. The negotiation process had not started yet. The peasants had to come to terms with international legal language as spoken in high places. To its credit, the Advisory Committee left a few special features of the 2009 Declaration undisturbed, most notably the stirring list of rights to ‘resist’ and ‘reject’ (e.g. ‘the industrial model of agriculture’).<sup>93</sup> Such rights would generally be taken for granted by those well versed in human rights law: do they not, after all, amount to the exercise of existing civil and political rights? Unsurprisingly, no trace of them remains in the UNDROP. However, this circumstance should not lead one to think that these were solecism on La Vía’s part. The decision to inventory rights to resist and reject may well be a case of strategic ignorance, where the speakers turn the disadvantage of being perceived as naive into an opportunity to ‘naively’ raise issues about which they care.<sup>94</sup> The aim was not to acquire a new right to resist and reject but to expose the causes of the suffering.<sup>95</sup>

The translation of the peasants’ speech into the idiom of international human rights exemplifies a process of reverse vernacularization.<sup>96</sup> Theorized by anthropologists, vernacularization takes place ‘[a]s human rights language and concepts travel from their sources of origin in the Global North to their places of reception in the Global South’, where ‘they become adapted and reconfigured within local sets of institutions, meanings, and practices’.<sup>97</sup> If La Vía’s 2009 Declaration was the outcome of such a process, then, one may argue, the Advisory Committee de-vernacularized it, restoring it to acceptable linguistic standards. However, one may also see the rules of speech enforced by human rights experts as just another vernacular, influential enough to become normative but no less quirky, opaque, disorienting. Its grammatical structures muffle the victims’ voice and conceal the perpetrators as they sculpt the character of the rightsholder, making the economic and political causes of the violations unspeakable.<sup>98</sup> The adoption of the UNDROP did not put an end to the dialectic between the two vernaculars, however. La Vía regained control of the text afterwards, making it available on the peripheries ‘as an open-source document for social movements to adapt and translate into local languages’.<sup>99</sup> Interestingly, La Vía itself modified it, albeit only by tinkering with the paratext. It restored the articles’ titles suppressed at the UN, including the reference to food sovereignty,<sup>100</sup> and further

<sup>93</sup> Final Study, *supra* note 69, at 24–27. Arts. 3(2), 5, 9, 10, 11.

<sup>94</sup> Bailey, ‘Strategic Ignorance’, in S. Sullivan and N. Tuana (eds), *Race and Epistemologies of Ignorance* (2007) 77. For Hobsbawm, *supra* note 8, at 13, ‘refusal to understand is a form of class struggle’.

<sup>95</sup> Compare Larking, *supra* note 74, at 760: ‘in these confrontational contexts, the language of human rights has been used creatively and in ways that are idiosyncratic from a legal perspective.’

<sup>96</sup> Merry, ‘Transnational Human Rights and Local Activism: Mapping the Middle’, 108 *American Anthropologist* (2006) 38, at 48.

<sup>97</sup> Goldstein, ‘Whose Vernacular? Translating Human Rights in Local Contexts’, in M. Goodale (ed.), *Human Rights at the Crossroads* (2013) 111, at 120.

<sup>98</sup> See Marks, *supra* note 83, at 71.

<sup>99</sup> La Vía Campesina, *supra* note 60, at 6.

<sup>100</sup> *Ibid.*, at 39.

highlighted the Declaration's key features by a set of drawings. Above all, it suppressed the hard-to-read official preamble, replacing it with a combative introduction and a preamble-like frontispiece, whose first recital conjures up 'a billion people living in rural areas who exist and resist the assault of global capital'.<sup>101</sup>

## 4 Universal Rights of Peasants

When the draft Declaration came up for adoption at the UN General Assembly, some states rejected the conception of human rights law inspiring it as fundamentally flawed. On 19 November 2018, the Third Committee of the UN General Assembly hosted a debate on a draft resolution reproducing the text of the Declaration as adopted by the UN Human Rights Council. At the request of the United States, a recorded vote was taken. Several explanations of voting decisions approached the topic philosophically, seeking to demonstrate that the draft's sponsors had lost sight of such tenets of human rights law as the principles of equality and universality.

Spain questioned the 'coherence' of the proposed resolution 'with the entire human rights system'.<sup>102</sup> Mexico maintained that, 'by recognizing the rights of a specific economic group', the draft could 'result in the differentiated application of international human rights law'.<sup>103</sup> France abstained on the grounds of being 'committed to a universal vision of human rights', allegedly at variance with 'a new international instrument specifically to cover peasants'.<sup>104</sup> The Russian Federation insisted that granting peasants 'additional rights and legal protection was inconsistent with the principle of the equal treatment of all persons'.<sup>105</sup> Sweden failed to see how entitlements such as 'the right to seeds ... were related to human rights'.<sup>106</sup> The United Kingdom admitted to

long-standing and serious concerns about the content of the Declaration insofar as it granted rural workers new collective rights that were unavailable to others and broadened the scope of existing rights specifically for that group. Since equality and universality were fundamental to human rights, the United Kingdom could not accept the establishment in international law of collective human rights, except with regard to the right to self-determination.<sup>107</sup>

As the video recording of the meeting shows, the British delegate actually said that 'equality, universality are fundamental principles undermining – er – underpinning human rights'.<sup>108</sup> The transcript obliterates that blunder.

These haughty (and occasionally faltering) statements fail to offer a plausible account of the history of human rights law. Seen in its best light, this is a history of equality gaining ground, as the law enables specific categories of persons to overcome the obstacles to the effective enjoyment of rights. With a language not as polished as

<sup>101</sup> *Ibid.*, at iii.

<sup>102</sup> UN Doc. A/C.3/73/SR.53 (2018), at 3, para. 13.

<sup>103</sup> *Ibid.*, at 3, paragraphs 17–18.

<sup>104</sup> *Ibid.*, at 6, para. 30.

<sup>105</sup> *Ibid.*, at 6, para. 26.

<sup>106</sup> *Ibid.*, at 6, para. 28.

<sup>107</sup> *Ibid.*, at 4–5, para. 20. Similarly Singapore, at 6, para. 32.

<sup>108</sup> Video recording available at <http://webtv.un.org>. The quoted passage is at 44<sup>m</sup>23<sup>s</sup>.

that of the British delegate but more faithful to the historical record, Portugal pointed out that peasants were demanding full respect of ‘their human rights without discrimination and on an equal basis with the human rights of all other human beings’.<sup>109</sup> Peasants had reacted to a typical situation where ‘the concrete practices of our society restrict the universalism of our political ideals to limited sectors of the population’.<sup>110</sup> They articulated a ‘lack’ – a lack producing a dehumanizing condition – and did it ‘in universal terms’ – that is, claiming human rights,<sup>111</sup> ‘the rights of those reduced to inhumanity’.<sup>112</sup> Interestingly, both the 2009 Declaration and the UN Human Rights Council Advisory Committee’s rendition of it stressed the concreteness of the peasants’ claim to equality: ‘peasants are equal to all other people’.<sup>113</sup> The text adopted by the UN General Assembly replaces that clarification with a standard restatement of abstract equality.<sup>114</sup> And it painstakingly avoids statements to the effect that the UNDROP aims to remedy a situation of inequality. The final text just admits to ‘the need for greater protection of the human rights of peasants’<sup>115</sup> – greater, but not necessarily equal.

La Vía took special care in explaining that the peasants were claiming equal rights, and not exclusively in their interest. The preface to the 2009 Declaration warned that ‘[t]he security of the [world] population depends on the well-being of peasants and sustainable agriculture’, so much so that ‘the ongoing violations of peasants’ rights threaten human life’.<sup>116</sup> The assertion that peasants’ rights require protection in the best interest of all society is constant across La Vía’s drafts. The 2002 draft opened with a striking observation: ‘Most people in the world are peasants’.<sup>117</sup> The 2009 Declaration rectified that opening statement to read: ‘Almost half of the people in the world are peasants’.<sup>118</sup> Besides conjuring up multitudes, the 2002 draft and all subsequent texts openly claimed universal significance: ‘To protect human life, it’s important to protect and fulfill the rights of the peasants’.<sup>119</sup> Henry Saragih, who pioneered the campaign for peasants’ rights, recalls how it felt to engage in it: ‘much more than just representing an economic sector, we were defending certain values and a way of life in society based on justice, simplicity and sustainability’.<sup>120</sup> By so doing, La Vía broke into what Gramsci called the ‘third moment’ of political struggle, its ‘most purely political

<sup>109</sup> Fifth Session of the Open-Ended Intergovernmental Working Group on United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (9–13 April 2018), Statement by Portugal, at 2.

<sup>110</sup> E. Laclau, *Emancipation(s)* (1996), at 34.

<sup>111</sup> M. Koskeniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2002), at 505–506.

<sup>112</sup> Žižek, ‘Against Human Rights’, 34 *New Left Review* (2005) 115, at 131.

<sup>113</sup> Final Study, *supra* note 69, at 22, 1st recital.

<sup>114</sup> UNDROP, 1st recital.

<sup>115</sup> *Ibid.*, 33rd recital.

<sup>116</sup> 2009 Declaration, at 2.

<sup>117</sup> Untitled working document A, on file with authors, at 1.

<sup>118</sup> 2009 Declaration, at 2.

<sup>119</sup> Untitled working document A, on file with authors, at 1.

<sup>120</sup> Saragih, ‘Introduction’ in *La Vía Campesina Policy Documents* (2009) 3, at 4.

phase'.<sup>121</sup> This phase is kickstarted by an awareness that 'one's own corporate interests ... transcend the corporate limits of the purely economic class, and can and must become the interests of other subordinate groups too', thereby creating the condition for 'hegemony of a fundamental social group over a series of subordinate groups'.<sup>122</sup> According to the director of CETIM, one of La Vía's principal allies, the UNDROP may well form the basis of 'a sort of social contract between peasants and other sectors of society'.<sup>123</sup> La Vía's political opponents, particularly states that denied the UNDROP an affirmative vote, would no doubt reject these claims. Nor is it our aim to defend them. We simply note that there has been no attempt to consider them as other than particularistic claims in disguise, disobeying human rights grammar and unrelated to larger political issues such as climate change and sustainable production more generally.

## 5 Soft Human Rights and New Law-making Strategies

States opposing the UNDROP placed much insistence on its soft law character. The United States complained that the word 'shall' recurs so frequently in the adopted text that it 'might lead to significant misunderstandings about the authority of the Declaration'.<sup>124</sup> The European Union recalled that a non-binding document is 'incapable of creating new rights'.<sup>125</sup> The Declaration leaves existing norms unaffected, according to Switzerland, a state that voted in favour of the resolution.<sup>126</sup> For Ethiopia, one of the few African states not supporting the UNDROP, '[a]ny current and future national laws or international obligations ... took precedence over the provisions of the Declaration'.<sup>127</sup> The Declaration itself, at Article 28(2), features a subordination clause making clear that, in the exercise of the rights the instrument enunciates, 'human rights and fundamental freedoms of all, without discrimination of any kind, shall be respected'. Some delegations understood the clause as safeguarding property rights that the UNDROP would otherwise threaten via the introduction of 'new rights', such as 'the right to the means of production, the right to land and natural resources and the right to seeds'.<sup>128</sup> Since the Declaration is a piece of soft law, there was in principle no need to specify that conflicting rules of law take precedence over it.

Technically redundant, this insurance scheme against the UNDROP's spillover into the field of law is a political response to an innovative law-making strategy

<sup>121</sup> A. Gramsci, *Selection from the Prison Notebooks* (1971), at 181.

<sup>122</sup> *Ibid.*, at 181–182.

<sup>123</sup> Özden, 'Introduction' in Hubert, *supra* note 33, at 15.

<sup>124</sup> UN Doc. A/C.3/73/SR.53 (2018), at 5, para. 25. The United States further complained that the proposed text 'assumed the existence of rights for which there was no internationally accepted definition or recognition, such as rights to seeds, to return to the land, to use traditional ways of farming, to food sovereignty and to biological diversity'.

<sup>125</sup> *Ibid.*, at 7, para. 35.

<sup>126</sup> *Ibid.*, at 3, para. 12.

<sup>127</sup> *Ibid.*, at 4, para. 14.

<sup>128</sup> *Ibid.*, at 6, para. 31.

that picks up the thread of postcolonial struggles within international institutions. As Wallerstein recently noted, we tend ‘to forget the fear that pervaded the world’s wealthier and more conservative strata in the face of what looked to them like a juggernaut of destructive egalitarianism, equipped with state power’.<sup>129</sup> In 1981, Krasner bemoaned that the Third World had been able ‘to turn institutions against their creators’.<sup>130</sup> However, not long after their mid-1970s diplomatic triumphs, the ‘battle for international law’ had already been lost.<sup>131</sup> In 1974, a vast international alliance could push the Declaration on the Establishment of a New International Economic Order (NIEO) through the UN General Assembly without anybody requesting a vote.<sup>132</sup> A few years later, the vision of a new order started to fade as more and more postcolonial states underwent debilitating economic restructuring and de facto disenfranchisement as actors in international relations.<sup>133</sup> Rooted as they are in disadvantaged social groups, transnational social movements like La Vía Campesina appear less prone to co-option into neoliberal governance structures than the Third World’s political elites have been. After the lost decade of the 1980s, epitomized in the elusive Declaration on the Right to Development, the 1990s saw social movements starting to engage with international law in novel ways ‘to win locally’ the battles that ‘developing countries could not win at the UN in the 1970s’.<sup>134</sup>

Meaningful participation in the international law-making process nonetheless requires some form of state mediation. As an activist affiliated to La Vía Campesina explained to us, the movement’s diplomatic strategy consists of building small coalitions of like-minded states, ideally two per continent, each able to speak to a distinct subcontinental audience. At least one of those states must be firmly committed to the cause, to the point of making it the top priority of its typically small diplomatic contingent in Geneva or New York. In the struggle for peasants’ rights, Bolivia was the perfect fit. Evo Morales, Bolivia’s president since 2006, used to introduce himself as an indigenous peasant (*indígena originario campesino*) who had started his political career as a union leader in the Confederación Sindical Única de Trabajadores Campesinos de Bolivia, an organization that later joined La Vía.<sup>135</sup> In 1997, he founded El Movimiento al Socialismo as the political arm of agrarian unions.<sup>136</sup> La Vía acknowledged Morales’s impeccable credentials in a letter congratulating him on

<sup>129</sup> Wallerstein, ‘Structural Crises’, 62 *New Left Review* (2010) 133, at 136.

<sup>130</sup> Krasner, ‘Transforming International Regimes: What the Third World Wants and Why’, 25 *International Studies Quarterly* (1981) 119.

<sup>131</sup> Von Bernstorff and Dann, ‘The Battle for International Law: An Introduction’, in J. von Bernstorff and P. Dann (eds), *The Battle for International Law: South-North Perspectives on the Decolonization Era* (2019) 3.

<sup>132</sup> GA Res. 3201(S-VI), 1 May 1974.

<sup>133</sup> M. Mazower, *Governing the World: The History of an Idea* (2012), at 343.

<sup>134</sup> B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (2003), at 217.

<sup>135</sup> Archondo, ‘Breve biografía política de Evo Morales’, 19 *Umbrales* (2009) 97, at 106–107; Herrera, ‘Empoderamiento campesino con base étnica: Relaciones políticas CSUTCB-Gobierno’, 42 *Temas Sociales* (2018) 147.

<sup>136</sup> Do Alto, ‘Un partido campesino en el poder: Una mirada sociológica del MAS boliviano’, 234 *Nueva Sociedad* (2011) 95, at 99.

his victorious presidential campaign.<sup>137</sup> These political circumstances are rare, localized and volatile. In November 2019, after a pro-US coalition ousted Morales, the interim government led by Jeanine Áñez dismissed four-fifths of the Bolivian diplomatic corps, including all the officials who escorted the UNDROP through the law-making process.<sup>138</sup>

While the Third World has almost taken control of the UN General Assembly and other analogous international bodies, social movements like La Vía have seized transient opportunities to influence the international law-making process in ways that may help win the battles they fight locally. They enlist international law in a manner that only superficially resembles its prevailing use since the 1960s, particularly in that it, too, relies on the UN General Assembly's ghostly legislative power. La Vía approached the international law-making process from a political platform that combined the progressive socio-economic content of NIEO-inspired blueprints with the turn to human rights marked by the Declaration on the Right to Development. Yet it transcends both, in a bid to constitutionalize not only abstract rights but also the means required to realize them.

### A *The NIEO Roots of the Rights of Peasants*

The UNDROP has a NIEO progenitor in the Declaration of Principles issued by the World Conference on Agrarian Reform and Rural Development hosted by the UN Food and Agriculture Organization (FAO) in 1979. The two documents, which could not be more different as to form, are remarkably similar in content. The FAO's director-general at the time, Edouard Saouma, announced from the conference podium that the Declaration of Principles was 'in fact, the charter of the rural poor'. The Declaration addressed 'rural development' as 'a global problem' requiring a 'reorientation of national development policies', down to the functioning of 'village level' institutions, in the framework of the progressive 'realization of the New International Economic Order throughout the world'.<sup>139</sup> Saouma went on to say, in words that the UNDROP would later echo, that 'the rural poor' had to have 'access to land and water resources, agricultural inputs and services, extension and research facilities', and be allowed to 'participate in the design, implementation and evaluation of rural development programmes'.<sup>140</sup>

Saouma's metaphorical charter of the rural poor was a detailed blueprint, legislative in style, thrown into a world without a legislator. Much to postcolonial governments' frustration, international law never enabled peaceful change via legislation. Suffused with a longing for legislative power, the first wave of Third-Worldist

<sup>137</sup> 'Compañero Evo Morales!', 12 January 2006, available at <https://viacampesina.org/en/compa-evo-morales> (last visited 8 April 2022).

<sup>138</sup> 'Cancillería cesa a un 80% de los embajadores colocados por el anterior Gobierno: El Ministerio de Relaciones Exteriores también informó que se ha procedido a retirar al país de la Alba', *El Deber*, 15 November 2019.

<sup>139</sup> FAO, *The Peasants' Charter: The Declaration of Principles and Programme of Action of the World Conference on Agrarian Reform and Rural Development* (1982), at iv.

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

scholarship valued soft law, often depicting it as the germ of custom.<sup>141</sup> In a study on the Progressive Development of the Principles and Norms of International Law Relating to the New International Economic Order, commissioned by the UN Institute for Training and Research (UNITAR), Georges Abi-Saab recalled that, ‘in the absence of legislative power, there is no possibility of instant creation of norms of general international law’.<sup>142</sup> Nonetheless, he remarked, NIEO’s principles floated in a ‘large grey area’ of “pre-law” or “soft law”, where they could ‘progressively and sometimes imperceptibly’ morph into ‘well established legal norms’.<sup>143</sup> Abi-Saab believed that the Third World would bring about change unobtrusively, using customary law as a flag of convenience. A ‘new type of law-making’ was de facto already in place, he claimed, but drawing attention to it was a mistake since powerful actors would have broken the system rather than accepting marginalization.<sup>144</sup> Such was the sound of voice under domination in the 1980s, when the NIEO’s dusk was turning dark. Recently, Bhupinder Chimni argued that the oppressed should recapture that spirit in a new key, demanding that ‘the views of trade unions and peasants organizations’ impact the ascertainment of the customary law status of non-binding norms broadly accepted by states.<sup>145</sup> However, peasants seem to have no interest in the renewal of customary international law doctrine. Nor do they fret about soft law.

In 1993, Abi-Saab penned the ultimate praise of soft law, whose suppleness would allow it to tread in places where ‘hard law dares not to venture’, thereby ‘expanding the law’s empire’.<sup>146</sup> As the dismissals of the UNDROP as mere soft law confirm, the concept’s capacity to hold back the rule of law is at least as significant. It is then no wonder that, when it comes to defining the Declaration’s nature, the peasants shun doctrinal concepts like soft law. La Vía prefers to portray the UNDROP as a ‘strategical instrument to strengthen the struggles and proposals of rural movements’, ‘an international legal outlook to guide legislation and public policies at all institutional levels’ and deployable ‘in legal procedures in defence of peasants’.<sup>147</sup> Peasants understand human rights law not so much as a staple of international legal doctrine but as an

<sup>141</sup> See Dupuy, ‘Declaratory Law and Programmatic Law: From Revolutionary Custom to “Soft Law”’, in R. Akkerman (ed.), *Declarations of Principles: A Quest for Universal Peace* (1977) 252.

<sup>142</sup> ‘Progressive Development of the Principles and Norms of International Law Relating to the New International Economic Order’, Report of the Secretary-General, Addendum, UN Doc. A/39/504/Add.1 (1984), Annex 3, at 102–103, para. 210. On which, see Abi-Saab, ‘The Third World Intellectual in Praxis: Confrontation, Participation, or Operation Behind Enemy Lines?’, 37 *Third World Quarterly* (2016) 1957, at 1965–1966.

<sup>143</sup> *Ibid.*, at 103, para. 210.

<sup>144</sup> Reported in A. Cassese and J.H. H. Weiler (eds), *Change and Stability in International Law-Making* (1988), at 10: ‘This is why it may be safer, at least for the time being, to keep the old label, while using the new technique.’

<sup>145</sup> Chimni, ‘Customary International Law: A Third World Perspective’, 112 *American Journal of International Law* (2018) 1, at 43. In the same vein, see Okubuiro, ‘Application of Hegemony to Customary International Law: An African Perspective’, 7 *Global Journal of Comparative Law* (2018) 232.

<sup>146</sup> Abi-Saab, ‘Éloge du “droit assourdi”’: Quelques réflexions sur le rôle de la *soft law* en droit international contemporain’, in *Nouveaux itinéraires du droit: Hommage à François Rigaux* (1993) 59, at 64 (our translation).

<sup>147</sup> La Vía Campesina, *supra* note 60, at 4–6.

authoritative discourse about a higher law enabling claims globally, across legal systems.

## B A Different Turn to Human Rights

Abi-Saab's study for UNITAR also adumbrated the turn to human rights later embraced by transnational social movements. The study suggested repackaging the NIEO principles into 'a "right to development", parallel, on the economic level, to self-determination on the political plane'.<sup>148</sup> This move would have helped connect NIEO's progressive agenda to demands of equality expressed in the language of human rights, which is what the UNDROP did much later and in ways that sets it apart from the Declaration on the Right to Development (DRD) adopted by the UN General Assembly in 1986.<sup>149</sup> Notoriously abstract, the DRD eviscerated the NIEO, instead of effectively translating it into the language of human rights. As Baxi observed, the DRD's circumlocutory statements are as many 'gaps between proclaimed goals and means through which these may be reached'.<sup>150</sup> In its neglect of the means needed to make human rights effective, the DRD closely resembles the Sustainable Development Goals (SDGs) set by the 2030 Agenda,<sup>151</sup> whose desultory approach to the so-called Means of Implementation (MoI) was deliberate.<sup>152</sup> Now, in the SDGs context – as Philip Alston pointed out in his last report as the UN Special Rapporteur on extreme poverty and human rights – 'human rights in general remain marginal and often invisible'.<sup>153</sup> Against this backdrop, proposing, as rich countries do, to stop all formal discussions about a legally binding instrument based on the DRD and to deal with development-related questions in the non-judicial framework of the SDGs is tantamount to denying the relevance of human rights as rights in the pursuit of development strategies. Since most Third World countries reject such a proposal, the UN

<sup>148</sup> 'Progressive Development', *supra* note 142, at 103, para. 212.

<sup>149</sup> GA Res. 41/128, 12 December 1986.

<sup>150</sup> Baxi, 'The Development of the Right to Development', in U. Baxi, *Human Rights in a Posthuman World* (2007) 124, at 135, who nonetheless believes that 'the jurisprudence of the Declaration has survived, and will transcend the well-manicured scepticism', for it 'posits a cosmopolitan perspective of participative national and global governance' (*ibid.*, 126, 133). Bedjaoui, 'The Right to Development', in M. Bedjaoui (ed.), *International Law: Achievements and Prospects* (1991) 1177, at 1182, saw in the Declaration 'the alpha and omega of human rights, the first and the last human right, the beginning and the end, the means and the goal of human rights'.

<sup>151</sup> GA Res. 70/1, 25 September 2015, 'Transforming Our World: The 2030 Agenda for Sustainable Development', UN Doc. A/RES/70/1.

<sup>152</sup> In the lead-up to the adoption of the 2030 Agenda, Brazil and Nicaragua complained loudly about that political choice: 'We must express a feeling of deep frustration in respect of the means of implementation. We made good progress in formulating a new vision for development, but we failed to properly devise the means that will make it happen. In fact, there is a huge disparity between the level of ambition of the sustainable development goals and their respective, and missing, means of implementation. We have witnessed the deliberate watering down of the means of implementation to their minimum expression, right up to the end of the debates.' Report of the Working Group on Sustainable Development Goals, Addendum: Explanations of Positions and Reservations on the Report, UN Doc. A/68/970/Add.1 (2014), at 7.

<sup>153</sup> UN Human Rights Council, 'The Parlous State of Poverty Eradication', Report of the Special Rapporteur on extreme poverty and human rights, UN Doc. A/HRC/44/40 (2020), at 11, para. 45.

Working Group on the Right to Development, established in 1998, languishes in what appears to be an irreversible stalemate.<sup>154</sup>

The opposite stances taken within the Working Group show that a merging of horizons between the DRD and the SDGs is underway. States favouring negotiations on a legally binding instrument believe that the right to development is key to achieving the SDGs.<sup>155</sup> An influential minority maintains the exact opposite: making efforts to achieve the SDGs is the best way to bring about development.<sup>156</sup> In a recent report, the UN Human Rights Council Advisory Committee concluded that, although ‘the 2030 Agenda represents the fullest expression to date of the right to development’,<sup>157</sup> a ‘legally binding instrument’ based on the DRD would still provide ‘an enabling environment’ for the 2030 Agenda’s ‘full realization’, provided that states ‘enhance and enrich’ the evasive Declaration they adopted 35 years ago.<sup>158</sup> The Advisory Committee’s progressive attitude dovetails with the opinion expressed by CETIM, an observer at the UN Human Rights Council and one of La Vía Campesina’s closest allies. In CETIM’s view, ‘[e]mphasis should be put not on the Sustainable Development Goals but on the substance of the right to development’<sup>159</sup> – substance which is conspicuously absent from the Declaration on the Right to Development.

Interestingly, the Advisory Committee’s report lists the UNDROP among the milestones in the history of the right to development.<sup>160</sup> In fact, the rights of peasants, as spelt out in the Declaration, could be instrumental in pursuing the goals proclaimed by the DRD and the 2030 Agenda alike. However, the voice of those who make the obvious connection remains marginal at the UN. The 2030 Agenda purports to ‘have a particular focus on the poorest, most vulnerable and those furthest behind’,<sup>161</sup> a group

<sup>154</sup> See HRC Res. 42/23, 27 September 2019, ‘The Right to Development, UN Doc. A/HRC/RES/42/23, at 2: ‘Welcoming the adoption of the 2030 Agenda for Sustainable Development and its means of implementation, and emphasizing that the 2030 is informed by the Declaration on the Right to Development and that the right to development provides a vital enabling environment for the full realization of the Sustainable Development Goals’ (footnote omitted). On the same occasion, the Human Rights Council admitted to the existence of a ‘political impasse within the Working Group’ (*ibid.*, at 4).

<sup>155</sup> According to the Movement on Non-Aligned Countries, the international community must ‘give the right to development the high profile that it merited, putting it at the centre of the implementation of the 2030 Agenda’ (UN Doc. A/HRC/42/35 (2019), at 4, para. 11. China (*ibid.*, at 5, para. 15), India (*ibid.*, at 7, para. 30), Pakistan (*ibid.*, at 7, para. 34) and Indonesia (*ibid.*, at 8, para. 37) defend similar views. For Bolivia, the right to development is ‘essential to achieving the Sustainable Development Goals’ (*ibid.*, at 6, para. 25).

<sup>156</sup> The European Union refuses to take part in ‘the elaboration of a legally binding instrument, as it was not the appropriate mechanism to realize the right to development’ (*ibid.*, at 5, para. 14). Switzerland (*ibid.*, at 7, para. 28) and Japan (*ibid.*, at 8, para. 38) agree that the SDGs provide the most appropriate framework for discussing the right to development. According to Brazil, ‘[t]he 2030 Agenda should be incorporated into the activities of the Working Group’ (*ibid.*, at 7, para. 33). In Ethiopia’s view, the SDGs define the ‘stepping stones for realizing the right to development’ (*ibid.*, at 9, para. 49).

<sup>157</sup> UN Human Rights Council, ‘Importance of a Legally Binding Instrument on the Right to Development’, Report of the Human Rights Council Advisory Committee, UN Doc. A/HRC/45/40 (2020), at 7, para. 30.

<sup>158</sup> *Ibid.*, at 16–17, paragraphs 68, 71.

<sup>159</sup> UN Doc. A/HRC/42/35 (2019), at 14, para. 72.

<sup>160</sup> UN Human Rights Council, *supra* note 157, at 5, para. 22.

<sup>161</sup> GA Res. 70/1, *supra* note 151, at 32, para. 74(e).

that overlaps with a significant fraction of the UNDROP's beneficiaries. A collective of human rights experts, including six UN Special Rapporteurs and several members of various UN Committees, in a statement marking the UNDROP's first anniversary, recommended that the Declaration be 'mainstreamed into the strategies aimed at achieving the SDGs',<sup>162</sup> seemingly to no avail. A member of La Vía Campesina told us that the movement, which is sceptical about the Agenda 2030, engages with it only as a matter of avoiding complete exclusion from a process which, as Alston bitterly remarked, sometimes provides 'the only available entry point for discussions of contentious issues'.<sup>163</sup> However, La Vía does not participate in the self-organized Major Groups and other Stakeholders High-Legal Political Forum Coordination Mechanism (also known by the acronym MGoS-HLPF-CM), even though the Agenda 21 entitles 'farmers' to sit in it.<sup>164</sup> Since underspecification of policy means is the SDGs' weak point, La Vía insists on drawing attention to the UNDROP as a possible gap-filler, knowing that nobody is going to take it up.

If those in charge of the 2030 Agenda failed to consider the set of measures against poverty and hunger that the UNDROP lays out, it is because the two documents reflect incompatible normative models. The SDGs are non-judicial and consensual – '[t]hese are universal goals and targets which involve the entire world, developed and developing countries alike'<sup>165</sup> – whereas the UNDROP relies on human rights law in a way that stirs up controversy. The UN Human Rights Council Advisory Committee, in the above-mentioned report, suggested that in order to have a meaningful legal instrument on the right to development it is worth breaking the consensus surrounding the 2030 Agenda by setting the ambitions of the negotiating text 'at a level that would facilitate its acceptance by a sufficient number of Member States'.<sup>166</sup> Within its limited yet very broad domain of application, the UNDROP has already produced such rupture. Nearly four decades after the adoption of the DRD, the diplomatic sponsors of the right to development – that is, most Third World states – appear to be faced with the following choice: either replicate the peasants' bid for a substantively rich human rights instrument or let the right to development collapse under the gravitational pull of the SDGs.

### C *The Rights of Peasants as Higher Law*

Unlike states, peasants do not analyse the UNDROP using standard international legal concepts such as the distinction between soft law and law proper, the transubstantiation of soft law into custom or soft law's interpretative pull over treaty law.<sup>167</sup> By

<sup>162</sup> Joint Statement by UN Human Rights Experts: First Anniversary of the Adoption of the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas, 17 December 2019.

<sup>163</sup> UN Human Rights Council, *supra* note 153, at 10, para. 38.

<sup>164</sup> UN Doc. A/CONF.151/26, vol. I, chs 23, 32.

<sup>165</sup> UN Doc. A/RES/70/1, *supra* note 151, at 3, para. 5.

<sup>166</sup> UN Human Rights Council, *supra* note 157, at 19, para. 88 (emphasis added). Ten Members of the European Union (then including the United Kingdom), Australia, Japan and Ukraine voted against the Human Rights Council's Resolution that welcomed the then still ongoing work of the Advisory Committee. Argentina, Brazil, Chile, Mexico, Peru, Uruguay and Iceland abstained. See HRC Res. 42/23, *supra* note 154, at 7.

<sup>167</sup> Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law', 48 *International and Comparative Law Quarterly* (1999) 901.

harnessing the language of human rights, the peasants advanced claims under a generically higher law – one may be tempted to say, a piece of global constitutional law – impacting first and foremost the legal systems of states that accepted the UNDROP one way or another. In this regard, the *Cal* case represents a crucial landmark. In that case, the Supreme Court of Belize applied the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in settling a claim filed by Maya communities against the government, which allegedly failed to protect the Maya’s customary land rights.<sup>168</sup> Chief Justice Conteh, speaking for the Court, held that:

this Declaration, embodying as it does, general principles of international law relating to indigenous peoples and their lands and resources, is of such force that the defendants, representing the Government of Belize, will not disregard it. Belize, it should be remembered, voted for it. ... I therefore venture to think that the defendants would be unwilling, or even loath to take action that would detract from the provisions of this Declaration importing as it does, in my view, significant obligations for the State of Belize.... I conclude therefore, that the defendants are bound, in both domestic law ... and international law, arising from Belize’s obligation thereunder, to respect the rights and interests of the claimants as members of the indigenous Maya community.<sup>169</sup>

A similar logic informs the judgment of the Inter-American Court of Human Rights (IACtHR) in the *Saramaka People v. Suriname* case, where the Court took the UNDRIP into consideration because the UN General Assembly adopted it ‘with the support of the State of Suriname’.<sup>170</sup> Recently, the IACtHR relied on the UNDROP – a first – to deepen the analysis of an issue raised by the defendant state: ‘The Court clarifies that it is not assessing State responsibility based on the Declaration on the Rights of Peasants, but is alluding to it merely as a supplementary reference that, in keeping with Argentina’s comments on the vulnerability of the *criollo* population, reveals the pertinence of taking into account the particular situation of this population in order to safeguard their rights.’<sup>171</sup>

It is worth noting that, while the *Cal* and *Saramaka People* judgments decisively rely on the fact that the defendant states had concurred in the adoption of the UNDRIP, voting against a soft law instrument like the UNDROP would provide little comfort to states interested in the preservation of the current global economic order. For those states, every affirmative vote, like the ones that caused the judicial defeat of Belize and Suriname, represent an increase in the use-value of the soft law instrument thus accepted – via an extension of its territorial reach – hence a potential threat to their

<sup>168</sup> GA Res. 61/295, 13 September 2007. See particularly Arts. 10, 25, 26–30, 32 UNDRIP.

<sup>169</sup> Supreme Court of Belize, *Aurelio Cal et al. v. Attorney General of Belize*, Judgment of 18 October 2007, at 132–134. On which, see Barelli, ‘The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples’, 58 *International and Comparative Law Quarterly* (2009) 957, at 964; Gómez Isa, ‘The Role of Soft Law in the Progressive Development of Indigenous Peoples’ Rights’, in S. Lagoutte, T. Gammeltoft and J. Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (2016), at 208–210.

<sup>170</sup> IACtHR, *Saramaka People v. Suriname*, Judgment of 28 November 2007, at 131. All IACtHR decisions are available at <http://www.corteidh.or.cr/index.php/en/jurisprudencia> (last visited 8 April 2022).

<sup>171</sup> IACtHR, *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, Judgment of 6 February 2020, at 136.

interests abroad. The opening-up of such spaces for contestation, together with the UNDROP's pointed socio-economic content, contribute to explaining why grassroots human rights practices like those described here remain unsettling. The predilection of powerful international actors for the non-judicial and a-conflictual SDGs may also be read as a reaction to the gradual rise of such practices.

## 6 Conclusion

We have studied the making of the UNDROP – the latest and most controversial UN-sponsored human rights instrument – as a vicissitude of voice under domination. Like any public transcript, in Scott's sense, the UNDROP reflects a political compromise that does not completely satisfy either side, even though it strained consensus to the limit given the institutional context, but enough to arouse the hostility of a powerful minority of states. La Vía Campesina painfully discovered that abiding by the rules governing human rights speech at the UN is an obstacle to expressing a critique of capitalism. La Vía has reacted to such frustration by making the link between the rights of peasants and the movement's anti-capitalistic stance even more explicit as it disseminates the text of the UNDROP locally. And the 2009 Declaration of Rights of Peasants – Women and Men is still there to recall the movement's anti-capitalistic way of speaking human rights language.

The critique of La Vía's legislative bid went well beyond censuring the peasants' solecisms and impertinences. Its detractors have described it as a corruption of the universalist paradigm of human rights – a problem mitigated, in their view, by the Declaration's soft law character. Aimed at redressing inequalities, the UNDROP, it is purported, would itself instantiate an inferior form of law, unequal to the task. The peasants replied to such rejection by embracing a 'negative' notion of the universal – which is more in tune with the history of international human rights law – and by deploying a discursive practice which downplays doctrinal categorizations like the distinction between soft law and law proper.

Regardless of what the UNDROP's impact on local and global power structures will be, the proclamation of peasants' rights marked a turning point in the Third World's engagement with the international law-making process. The Declaration welds NIEO-inspired measures and human rights law in ways that seem to achieve much more than the Declaration on the Right to Development could as the first NIEO avatar in the field of human rights. As befits an instrument that builds on NIEO blueprints, the UNDROP is specific about the economic and political means without which the rights of most peasants would remain illusory. As a piece of human rights law, and even more so in view of its detailed character, the Declaration enables the making of claims under a higher law, especially before courts and other authorities in the many states that have accepted it. In addition, the UNDROP's non-consensual genesis and radical content indicate a possible way of revitalizing the political process concerning the right to development while averting its absorption into the 2030 Agenda for Sustainable Development, the irenic standard under which global power nowadays sails.

