

# Shedding a Light on the Human Rights of Small-Scale Fishers: Complementarities and Contrasts between the UNDROP and the Small-Scale Fisheries Guidelines<sup>1</sup>

Elisa Morgera

Director of the UKRI GCRF One Ocean Hub (OOH), University of Strathclyde Law School, Lord Hope Building, 141 St James Road, Glasgow G4 0LT, UK; <https://oneoceanhub.org>. Professor of Global Environmental Law at Strathclyde Centre for Environmental Law and Governance (SCELG), University of Strathclyde Law School, Lord Hope Building, 141 St James Road, Glasgow G4 0LT, UK  
[elisa.morgera@strath.ac.uk](mailto:elisa.morgera@strath.ac.uk)  
ORCID ID: 0000-0002-5234-8784

Julia Nakamura

PhD Candidate at SCELG, University of Strathclyde Law School, Lord Hope Building, 141 St James Road, Glasgow G4 0LT, UK  
[julia.nakamura@strath.ac.uk](mailto:julia.nakamura@strath.ac.uk)  
ORCID ID: 0000-0002-2558-1732

## Abstract

*The UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP) underscores the need for a coherent interpretation and application of existing international human rights in the specific context of small-scale fisheries (SSF), including small-scale marine and continental capture fishing, small-scale aquaculture, related preparatory works and cultural practices. It complements the UN Food and Agriculture Organization (FAO)'s Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the context of food security and poverty eradication (SSF Guidelines), which were the first international instrument entirely dedicated to SSF. The two instruments originate from forums that frame issues and respective responses differently, involving individuals and specialised international bodies with distinct interests and areas of expertise (human rights and fisheries, respectively), and having garnered differing levels of intergovernmental support. The two instruments thus offer their own particular perspectives on how international law currently relates to the challenges and contributions of SSF. Against this backdrop, this Chapter will analyse and compare the contributions of the UNDROP and the SSF Guidelines to the recognition, protection, respect and full realisation of the human rights of peasants involved in SSF and to the sustainable use of natural resources in SSF, with a view to supporting the relevant Sustainable Development Goals (SDGs).*

---

<sup>1</sup> The authors are thankful to Margherita Brunori, Jackie Sunde, Bernadette Snow, Lorenzo Cotula, Patrick Vrencken, and Ana Suarez Dussan for their valuable comments and inputs to an earlier version of this chapter. This chapter has been prepared under the UKRI GCRF One Ocean Hub (The One Ocean Hub is a collaborative research for sustainable development project funded by UK Research and Innovation (UKRI) through the Global Challenges Research Fund (GCRF) (Grant Ref: NE/S008950/1). GCRF is a key component in delivering the UK AID strategy and puts UK-led research at the heart of efforts to tackle the United Nations Sustainable Development Goals.

## Keywords

UNDROP, Small-Scale Fisheries Guidelines, human rights, fishers and peasants' rights, Sustainable Development Goals

## Introduction

The UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP)<sup>2</sup> expressly covers any person, including indigenous peoples and local communities, engaged in artisanal or small-scale fishing and related handicrafts in rural areas.<sup>3</sup> There is no doubt, therefore, that the Declaration applies to small-scale fisheries (SSF)<sup>4</sup> and affirms their human rights. It embodies the recognition<sup>5</sup> of the need for a coherent interpretation and application of existing international human rights standards to a broad range of actors involved in small-scale fishing, to ensure their full enjoyment of all human rights.<sup>6</sup> It also represents the commitment of States to promptly take steps to enhance the protection of all rights spelled out therein.<sup>7</sup>

Before the adoption of the UNDROP, the UN Food and Agriculture Organization (FAO)'s Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the context of food security and poverty eradication (SSF Guidelines)<sup>8</sup> was the only international instrument specially dedicated to small-scale fisheries and making express references to fishers' rights. The SSF Guidelines were developed as part of FAO's long-standing efforts to contribute to the coherent interpretation and application of international instruments on sustainable fisheries, at the crossroads of international fisheries law and international environmental law.<sup>9</sup> International human rights law also informed and was incorporated in the SSF Guidelines, which offer specific guidance

---

<sup>2</sup> UN Human Rights Council, 'United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas' (8 October 2018) UN Doc A/HRC/RES/39/12 (adopted by 33 votes to 3 - Australia, Hungary and the UK; 11 abstentions).

<sup>3</sup> Ibid, art. 1.2 and 1.3.

<sup>4</sup> The acronym SSF is used for both 'small-scale fisheries' and 'small-scale fishing' when referred to small-scale fishing communities.

<sup>5</sup> The UNDROP was adopted by majority voting at the UN General Assembly and at the Human Rights Council, as discussed in section below on the development of the UNDROP and the SSF Guidelines.

<sup>6</sup> UNDROP, *supra* note 2, art. 3.1.

<sup>7</sup> Ibid, art. 2.1.

<sup>8</sup> FAO, *Voluntary Guidelines for Securing Sustainable Small-scale fisheries in the context of food security and poverty eradication* (FAO 2015) 18, (adopted at the 31st Session of the Committee on Fisheries, 9-13 June 2014).

<sup>9</sup> FAO, 'Code of Conduct for Responsible Fisheries' (31 October 1995) Resolution 4/95.

on States' obligation with respect to the rights of women,<sup>10</sup> indigenous peoples,<sup>11</sup> migrants<sup>12</sup> and children.<sup>13</sup>

Notwithstanding the importance of the SSF Guidelines, very little has been said about this instrument and its relationship with the UNDROP. Originating from forums that frame issues and respective responses differently, and which involve individuals and specialised international bodies with distinct interests and areas of expertise<sup>14</sup> (fisheries and human rights, respectively),<sup>15</sup> these two instruments offer their own particular perspectives on how international law currently addresses the challenges and contributions of SSF to sustainable fisheries overall. This Chapter explores the extent to which they can and should be read together, with a view to illuminate a mutually supportive<sup>16</sup> interpretation of multiple – and traditionally disconnected – sources of international law, all of which applies to SSF. To that end, this Chapter will analyse and compare the two instruments with respect to the processes that led to their development and adoption; their notion of SSF and their scope of application; the recognition and protection of customary tenure of fishery resources, the protection of small-scale fishers' traditional knowledge, and the relevance of procedural rights. These findings are then brought together to demonstrate how the mutually supportive interpretation of the two instruments can support States in the realization of multiple Sustainable Development Goals (SDGs), which include targets on providing access of small-scale fishers to land, marine resources, productive resources and inputs, knowledge, financial services, markets and opportunities for value added.<sup>17</sup>

---

<sup>10</sup> In reference to women throughout many parts of the SSF Guidelines, as will be detailed later, and specifically to the Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

<sup>11</sup> In reference to indigenous peoples in many parts of the SSF Guidelines, as will also be detailed later and specifically to the UN General Assembly, 'United Nations Declaration on the Rights of Indigenous Peoples' (2 October 2007) UN Doc A/RES/61/295.

<sup>12</sup> In reference to migrants in SSF. No specific international instrument dedicated to migrant workers is mentioned in the SSF Guidelines, which generally refers to relevant ILO instruments. These may include the Work in Fishing Convention (adopted 14 June 2007, entered into force 16 November 2017) (C188); and the Migration for Employment Convention (Revised) (adopted 01 July 1949, entered into force 22 January 1952) (C097).

<sup>13</sup> In reference to children engaged in SSF and, in specific, to the Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).

<sup>14</sup> That is, expertise from a range of actors, from government-level to community-level. Both the UNDROP and the SSF Guidelines, as detailed further below, were the outcomes of participatory processes, proving participation by non-State actors, notably small-scale fishers' representatives, in processes that have been traditionally technocratic and States-driven, possible to obtain.

<sup>15</sup> While fisheries' management has traditionally been the focus of international fisheries instruments, modern international fisheries law (to which FAO is inherently associated with as the main UN agency driving the legal developments of this domain) has been changing over the past decades to encompass environmental and social concerns in fisheries. For a comprehensive collection that brought about various aspects of this evolving international law field, which draws attention to environmental considerations and evolution in international fisheries law, see Erik J. Molenaar and Richard Caddell, *Strengthening International Fisheries Law in an Era of Changing Oceans* (Hart Publishing 2019). For linkages between international fisheries law and the protection of people at sea, including fishers, see Irini Papanicolopulu, *International Law and the Protection of People at Sea* (Oxford University Press 2018).

<sup>16</sup> That is, 'mutual supportiveness' among different international regimes to be 'understood and applied as reinforcing each other with a view to fostering harmonization and complementarity, as opposed to conflictual relationships', as argued in Riccardo Pavoni, 'Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the 'WTO-and-Competing-Regimes' Debate?' (2010) 21 *European Journal of International Law* 649.

<sup>17</sup> UNGA, 'Resolution 70/1 of 25 September 2015, Transforming our world: the 2030 Agenda for Sustainable Development' (21 October 2015) UN Doc A/RES/70/1, SDGs 14(b) and 2.3.

## The development of the UNDROP and the SSF Guidelines

The making and adoption of the UNDROP and the SSF Guidelines provide concrete examples of participatory international law-making processes led by distinct international UN bodies with different mandates,<sup>18</sup> memberships and processes. The UNDROP was the result of long-standing efforts driven by international agrarian movements and human rights organizations, which eventually led to political and intellectual engagement with the Human Rights Council (HRC), a subsidiary body of the UN General Assembly (UNGA).<sup>19</sup> The SSF Guidelines, in turn, were the outcome of a multi-stakeholder process, pledged with the support of small-scale fishers and fishing communities, and ultimately endorsed by the Committee on Fisheries (COFI),<sup>20</sup> a subsidiary body of FAO Council.

The formal negotiation of the UNDROP commenced in 2012 with the establishment by the HRC of an open-ended intergovernmental working group (HRC Working Group) dedicated to drafting and negotiating the Declaration, which was finalised and adopted by the UNGA in 2018.<sup>21</sup> The process that led to the negotiation and adoption of the UNDROP started decades earlier, outside of the UN: La Via Campesina took the lead in the organization of a global, bottom-up agrarian movement ‘to articulate the vision of a locally controlled food system’ that takes stock of ‘wide-ranging livelihood strategies’ embedded in close relationships with rural areas.<sup>22</sup> As a result, the Declaration of La Via Campesina on the Rights of Peasants – Women and Men was adopted. The document was used as a starting point for the UNDROP drafting process. La Via Campesina and other international organizations representing rural constituencies from across the world continued to provide ‘extensive inputs’ to the HRC Working Group.<sup>23</sup>

Stakeholder engagement in the development of the SSF Guidelines, in turn, was managed by FAO. In 2006, the UNGA mandated FAO to develop an instrument on

---

<sup>18</sup> See respectively UNGA, ‘Resolution adopted by the General Assembly on 15 March 2006, Human Rights Council’ (3 April 2006) UN Doc A/RES/60/251; and FAO, ‘Rules of Procedure of the Committee on Fisheries’ in *Basic Texts of the Food and Agriculture Organization of the United Nations* (Volumes I and II, FAO 2017) 109-16.

<sup>19</sup> UNHRC, ‘Report of the Human Rights Council on its Thirty-Ninth Session’ (23 November 2018) UN Doc A/HRC/39/2, 191.

<sup>20</sup> FAO, ‘Report of the Thirty-first Session of the FAO Committee on Fisheries’ (9-13 June 2014) FIPI/R1101/2015.

<sup>21</sup> The resolution was adopted by a recorded vote of 23 to 9, with 15 abstentions. Those countries voting against were Austria, Belgium, Czech Republic, Hungary, Italy, Poland, Romania, Spain and the United States of America. See UN Human Rights Council, ‘Promotion and protection of the human rights of peasants and other people working in rural areas’ (11 October 2012) UN Doc A/HRC/RES/21/19.

<sup>22</sup> Lorenzo Cotula, ‘Between Hope and Critique: Human Rights, Social Justice and Re-imagining International Law from the Bottom Up’ (2020) 48(473) *Georgia Journal of International and Comparative Law* 505-508.

<sup>23</sup> Ibid, 506; Eibe Riedel, Gilles Giacca and Christophe Golay, ‘The Development of Economic, Social, and Cultural Rights in International Law’ in Eibe Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford University Press 2014) 5-6.

SSF,<sup>24</sup> which was supported in 2008 by the Global Conference on SSF.<sup>25</sup> The development of the text, however, was only formally initiated by a decision of COFI in 2011,<sup>26</sup> from which a series of global and regional consultative meetings and similar events engaged over 4,000 stakeholders, including small-scale fishers and their communities.<sup>27</sup> Then, the draft text was subjected to a two-session high-level technical consultation, and eventually FAO Member States and the European Union (EU) negotiated and agreed on the final text, considering the inputs of intergovernmental organizations, non-governmental organizations and civil society organizations that followed the negotiations as observers.<sup>28</sup> Finally, in 2014, the SSF Guidelines were endorsed by consensus by representatives of 110 FAO Member States, from all regions.<sup>29</sup> The level of intergovernmental support was therefore initially much broader for the SSF Guidelines than for the UNDROP, and, considering the EU support for the SSF Guidelines, broader overall. Following a majority vote at the HRC,<sup>30</sup> the Declaration gained 121 countries votes in its favour at the UNGA; Australia, Guatemala, Hungary, Israel, New Zealand, Sweden, the UK and the US voted against the Declaration; EU Member States (Portugal excepted), Canada, Japan, Norway, the Republic of Korea, and the Russian Federation abstained.<sup>31</sup> The lack of support for the UNDROP from high-income countries may be due to the fact that the UNDROP's text is articulated in prescriptive terms (consistent use of the verb *shall*) and explicit references to *having the right to*, to reflect the explicit intent of clarifying how existing international legally-binding instruments on human rights apply in the specific case of peasants.<sup>32</sup> Those countries characterized by industrialized food production may have thus been reluctant towards the UNDROP's recognition of peasants' 'vision' embedded in traditional local

---

<sup>24</sup> See UNGA, 'Sustainable fisheries, including through the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and related instruments' (8 December, 2006) UN Doc A/RES/61/105, paras. 12 and 97.

<sup>25</sup> See FAO, 'Report of the Global Conference on Small-Scale Fisheries Securing Sustainable Small-scale Fisheries: bringing together responsible fisheries and social development' (13-17 October 2008) FIEP/R911 (Tri).

<sup>26</sup> COFI members 'approved the development of a new international instrument on small-scale fisheries that would draw on relevant existing instruments, complementing the Code [the CCRF]'. See FAO, 'Report of the Twenty-Ninth Session of the FAO Committee on Fisheries' (31 January - 4 February 2011) FIPI/R973, VII-VIII, para. 56.

<sup>27</sup> Similarly, other FAO international fisheries instruments have been considered by technical consultations first, followed by consensus-based negotiation at COFI and final adoption by FAO Council. See Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press 2007) 126-128.

<sup>28</sup> FAO, *Securing Sustainable Small-Scale Fisheries: Update on the Development of the Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication (SSF Guidelines)* (FAO 2014) 4-5.

<sup>29</sup> FAO, 'Report of the Thirty-first Session of the FAO Committee on Fisheries', supra note 20.

<sup>30</sup> UNHRC, 'Promotion and protection of the human rights of peasants and other people working in rural areas', supra note 21. Note that the HRC is composed by 47 Member States: UNHRC, 'Current Membership of the Human Rights Council for the 14<sup>th</sup> cycle, 1 January - 31 December 2020' (2020) <<https://www.ohchr.org/en/hrbodies/hrc/pages/currentmembers.aspx>> accessed 30 April 2021.

<sup>31</sup> UNGA, 'Report of the Third Committee, 55th Plenary Meeting' (17 December 2018) UN Doc A/73/PV55.

<sup>32</sup> UNDROP, supra note 2, preamble.

food production.<sup>33</sup> In contrast, the SSF Guidelines are framed as recommendations (characterized by the predominant use of *should* and *recognise*), which may have facilitated its adoption by consensus.<sup>34</sup>

Another consequence of the differing levels of intergovernmental support for these instruments is that the UNDROP and the SSF Guidelines are subject to different follow-up processes, which has relevance to the ends of understanding their respective legal strength as *soft law*.<sup>35</sup> FAO's COFI has supported the implementation of the SSF Guidelines through planning instruments, including the FAO's Global Assistance Programme in 2014, its Umbrella Programme for the promotion and application of the SSF Guidelines, established in 2015, and the development of an SSF Guidelines Global Strategic Framework from 2016 onwards.<sup>36</sup> The SSF Umbrella Programme, for instance, has four interrelated components aimed at awareness-raising, strengthening the science-policy interface, empowering stakeholders and supporting implementation.<sup>37</sup> These activities by FAO, governments and stakeholders have advanced the implementation of the SSF Guidelines,<sup>38</sup> including through providing legislative guidance.<sup>39</sup> With respect to a follow-up mechanism for the UNDROP, scholars have put forward recommendations ranging from establishing a new specific UN Special Procedure (e.g. UN Special Rapporteur, Independent Expert or Working

---

<sup>33</sup> Cotula, 'Between Hope and Critique: Human Rights, Social Justice and Re-imagining International Law from the Bottom Up', supra note 22, at 505.

<sup>34</sup> FAO, 'Chairperson's Report of the Technical Consultation on International Guidelines for Securing Sustainable Small-Scale Fisheries - Thirty-first Session of the FAO Committee on Fisheries' (9-13 June 2014) COFI/2014/Inf10, Para 32.

<sup>35</sup> It has been argued that this feature has blurred the boundaries between *hard* law and *soft* law, where the latter mimics the former's compliance mechanisms. See Catherine Redgwell, 'International Soft Law and Globalization' in Barry Barton et al (eds), *Regulating Energy and Natural Resources* (Oxford Scholarship Online 2006).

<sup>36</sup> In the subsequent meetings of COFI, both the 32<sup>nd</sup> and 33<sup>rd</sup> sessions held respectively in 2016 and 2018, the attending Member States have discussed the implementation of the SSF Guidelines. See FAO, 'Securing Sustainable Small-Scale Fisheries: Towards Implementation of the Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication (SSF Guidelines)' COFI 32<sup>nd</sup> Session (April 2016) Doc COFI 2016/7; FAO, *Small-Scale and Artisanal Fisheries Governance* (COFI 33<sup>rd</sup> Session, Doc COFI/2018/7, March, 2018). See also FAO, *Global Strategic Framework in support of the implementation of the Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the context of food security and poverty eradication* (FAO 2020).

<sup>37</sup> FAO, 'Securing Sustainable Small-Scale Fisheries: Towards Implementation of the Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication (SSF Guidelines)', supra note 36, at para. 18; FAO, *Enhancing the contribution of small-scale fisheries to food security and sustainable livelihoods* (FAO 2019).

<sup>38</sup> Notably, some countries (Cambodia, Costa Rica, Ecuador, Guinea, Peru, Sri Lanka and Tanzania) have been identified in taking specific steps to implement the SSF Guidelines at national level, including the review and development of legal frameworks as in the case of Cambodia and Costa Rica. FAO, 'Update on Progress to Develop the Global Strategic Framework in Support of the Implementation of the Voluntary Guidelines for Securing Small-Scale Fisheries in the Context of Food Security and Poverty Eradication (SSF-GSF)' COFI 33<sup>rd</sup> Session (July, 2018) COFI/2018/SBD23, 6. See also Julia Nakamura, Ratana Chuenpagdee and Mustafa El Halimi, 'Unpacking legal and policy frameworks: A step ahead for implementing the Small-Scale Fisheries Guidelines' (2021) 129 *Marine Policy* 1.

<sup>39</sup> See FAO, *Legislating for Sustainable Small-Scale Fisheries – A guide and considerations for implementing aspects of the Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication in national legislation* (FAO 2020).

Group), engaging and reinforcing existing human rights monitoring mechanisms to assess the UNDROP's implementation, and drafting implementing legislation.<sup>40</sup>

It would be desirable to see mutual supportiveness of these two instruments in this respect as well. FAO's activities on SSF could support the UNDROP's implementation by deepening the understanding of human rights and building capacity to respect and monitor them in the fisheries sector at different scales. Monitoring activities of international human rights bodies could also rely on the SSF Guidelines to better understand how human rights might be supported or hindered in the fisheries sector, particularly focusing on peasants involved in fishing and fishing-related activities. To that end, FAO, UNHRC, as well as the diverse UN Human Rights treaty bodies and special procedures should explore forms of collaboration.

## **The nuances underpinning the concept of 'small-scale fisheries'**

There is no universally agreed definition of 'small-scale fisheries'. This term is multi-fold as academic scholarship has developed various methodologies to measure 'small-scale' or 'artisanal' fisheries,<sup>41</sup> which are often associated with numerous other terminologies like coastal, nearshore, customary, traditional fisheries as well. Experts in the field underscore that a single, universal and rigid definition of SSF would be unpractical and ineffective in capturing the diverse and dynamic forms of SSF around the world.<sup>42</sup> The flexibility of the notion, instead, allows for conveying the 'considerable diversity of contexts, from the social differentiation that typically exists in rural areas, of the blurred lines between rural and urban worlds, and from overlapping and often shifting registers of social identity'.<sup>43</sup>

---

<sup>40</sup> Priscilla Claeys and Marc Edelman, 'The United Nations Declaration on the rights of peasants and other people working in rural areas' (2020) 47(1) *The Journal of Peasants Studies* 10-11 and 43.

<sup>41</sup> See Darah Gibson and Rashid Sumaila, 'Determining the degree of 'small-scaleness' using fisheries in British Columbia as an example' (2017) 86 *Marine Policy* 121; Yannick Rosseau et al, 'Defining global artisanal fisheries' (2019) 108(103634) *Marine Policy*; Hillary Smith and Xavier Basurto, 'Defining Small-Scale Fisheries and Examining the Role of Science in Shaping Perceptions of Who and What Counts: A Systematic Review' (2019) 6 *Front Mar Sci* 1.

<sup>42</sup> They stem from the context-specific feature of SSF, which varies largely by and within communities at any level of governance; the numerous SSF definitions that can be found in scientific literature and legislation, which, in turn, are based on different criteria and mostly on technological parameters (e.g. boat size, type of fishing gear, motor power, etc); the diversity and dynamism in SSF fishing activities. See Smith and Basurto, 'Defining Small-Scale Fisheries and Examining the Role of Science in Shaping Perceptions of Who and What Counts: A Systematic Review', supra note 42; Ratana Chuenpagdee and Svein Jentoft, 'Transforming the Governance of Small-Scale Fisheries' (2018) 17 *Maritime Studies* 101, 105-106; David J. Mills et al, 'Small-scale Fisheries in the Developing World' in Robert Pomeroy and Nail L. Andrew (eds), *Small-Scale Fisheries Management: Frameworks and Approaches for the Developing World* (CAB International 2011) 1; Derek S. Johnson, 'The Values of Small-Scale Fisheries' in Derek S. Johnson and others (eds), *Social Wellbeing and the Values of Small-scale Fisheries* (Vol 7 Springer International Publishing AG 2018) 3-7; Simon Funge-Smith, *Towards Statistical Definition of Small-Scale Fisheries: A matrix scoring approach to characterization of the scale of fishing units* (Working paper CWP-IS/2019/11 Twentyseventh Meeting of the Fisheries Subject Group, Coordinating Working Party on Fishery Statistics, Rome, 15-18 May 2019, 2019).

<sup>43</sup> Cotula, 'Between Hope and Critique: Human Rights, Social Justice and Re-imagining International Law from the Bottom Up', supra note 22, at 514.

Accordingly, the SSF Guidelines, the UNDROP and other relevant international instruments<sup>44</sup> do not define SSF, which creates uncertainty as to who is entitled to special protection and preferential rights. Each country and, pursuant to the respective political and legal systems, different levels of government within the same country (e.g. state, province, municipality) can thus develop a definition of SSF that corresponds more closely to the realities of SSF locally. In practice, however, public institutions do not take SSF into account appropriately,<sup>45</sup> let alone provide clear and consistent statements of what SSF is in their spheres of operation. It follows that policy-, law- and decision-makers, as well as fisheries' managers, are likely to refer and treat SSF based on subjective, possibly ideological, and often undesirable interpretations.<sup>46</sup>

The SSF Guidelines provide guidance to governments and other actors by illustrating what small-scale fishing, small-scale fisher, or small-scale fish worker<sup>47</sup> relate to. The SSF Guidelines refer to SSF as a fisheries *subsector*,<sup>48</sup> which 'serves as an economic and social engine' (for local economies and communities' livelihoods)<sup>49</sup> 'along the value-chain – pre-harvest, harvest and post-harvest'.<sup>50</sup> In addition, the SSF Guidelines avoid differentiating<sup>51</sup> between small-scale commercial artisanal, semi-industrial, subsistence, and arguably recreational, fishing activities.<sup>52</sup> They also note that small-scale fishers and fish workers are often 'self-employed and engaged in directly providing food for their household and communities as well as working in commercial fishing, processing and marketing'.<sup>53</sup> Finally, the SSF Guidelines do not limit the understanding of SSF actors to those solely engaged in fishing operations and related activities, but rather include 'fishers, fish workers, their communities, traditional and customary authorities, and related professional organizations and [civil society organizations]'.<sup>54</sup>

---

<sup>44</sup> For instance, the Agreement on Port State Measures Agreement to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (adopted on 22 November 2009, in Rome, Italy, entered into force on 5 June 2016) exempts 'artisanal subsistence fishing' from the scope of its application without defining it (art. 3(1)(a)(b)). This also points to the need for a definition of 'subsistence': D. Owen pers. comm. on 05 June 2019.

<sup>45</sup> Steven W. Purcell and Robert S. Pomeroy, 'Driving small-scale fisheries in developing countries' (2015) 2 *Frontiers in Marine Science* 1; David J. Mills et al, 'Under-reported and Undervalued: Small-scale Fisheries in the Developing World' in Robert Pomeroy and Nail L. Andrew (eds), *Small-scale Fisheries Management: Frameworks and Approaches for the Developing World* (CAB International 2011).

<sup>46</sup> SSF is commonly perceived under a negative narrative that places them as part of the problem in fisheries' sustainability, instead of elevating their contributions to the solution (in social, economic and environmental terms). The importance of changing this narrative to be a more positive and inclusive one was highlighted in a recent symposium held at FAO. See FAO, *Proceedings of the International Symposium on Fisheries Sustainability: strengthening the science-policy nexus* (FAO Headquarters, 18-21 November 2019 FAO Fisheries and Aquaculture Proceedings No. 65) (Rome, 2020) 27-28.

<sup>47</sup> FAO, SSF Guidelines, *supra* note 8, sec. 2.4.

<sup>48</sup> *Ibid*, preface, para. 5.

<sup>49</sup> *Ibid*, foreword, para. 1-2.

<sup>50</sup> *Ibid*, preface, para. 3.

<sup>51</sup> Though such distinction remains important for the production of disaggregated fisheries catch data. See Daniel Pauly and Dirk Zeller, 'Catch reconstructions reveal that global marine fisheries catches are higher than reported and declining' (2016) *Nature Communications* 7.

<sup>52</sup> While recreational fishing is often seen as a different sector to SSF, recreation may be part of the 'multi-functionality' practices in SSF. See FISHINMED, *Small-Scale Fisheries Multifunctionality Best Practices* (Report prepared under the ENPI CBC Mediterranean Sea Basin Programme 2007-2013, 2013).

<sup>53</sup> FAO, SSF Guidelines, *supra* note 8, preface, para. 4.

<sup>54</sup> *Ibid*, preface, para. 2.3.



Under the UNDROP, in turn, the definition of a ‘peasant’ includes a person who ‘seeks to engage alone, or in association with others or as a community’ in artisanal and small-scale fishing and ‘related occupation in a rural area’ ‘for subsistence or for the market’.<sup>55</sup> Similarly to the SSF Guidelines, this definition is broad enough to encompass people involved in multiple activities associated with SSF, including related preparatory works and cultural practices (e.g. net making and mending, boat maintenance) conducted by fishers and fishing communities on land.<sup>56</sup> The Declaration also applies to hired workers, and broadly encompasses professional small-scale fishers along the supply and value-chain, and includes all migrant and seasonal workers on aquaculture farms,<sup>57</sup> who may have an alternative occupation as small-scale fishers.<sup>58</sup>

In addition, UNDROP sets out two parameters for understanding the concept of ‘peasants’: (i) reliance on family labour or other non-monetized way of organizing labour, and (ii) special dependency on and attachment to the land.<sup>59</sup> So one initial difficulty arises as to whether references to *land* could be interpreted, literally, as referring only to *inland* small-scale fisher peasant – who conducts SSF or small-scale aquaculture in inland waters e.g. rivers, lakes, lagoons, etc.<sup>60</sup> Other articles of the UNDROP, however, support a broader interpretation that encompasses *marine* SSF as well,<sup>61</sup> including in marine areas over which coastal States and archipelagic States exercise sovereignty and jurisdiction in similar ways to those exercised on their land mass, as these actually represent an extension of the *land* seawards. This argument is supported by key concepts of the UN Convention on the Law of the Sea, which represent customary international law:<sup>62</sup> internal waters, the territorial sea and the archipelagic waters are areas over which coastal States and archipelagic States exercise sovereignty and jurisdiction,<sup>63</sup> and where the majority of SSF and small-scale aquaculture operate due

---

<sup>55</sup> UNDROP, supra note 2, art. 1.1.

<sup>56</sup> See Svein Jentoft and Arne Eide (eds), *Poverty Mosaics: Realities and Prospects in Small-Scale Fisheries* (Springer 2011).

<sup>57</sup> UNDROP, supra note 2, art. 1.3.

<sup>58</sup> The migratory move of small-scale fishers occurs for different purposes other than fishing, often constituting a way of life. See Innocent Ngao Wanyonyi and others, ‘Artisanal Fisher Migration Patterns in Coastal East Africa’ (2016) 119 *Ocean & Coastal Management* 93.

<sup>59</sup> UNDROP, supra note 2, art. 1.1 reads: ‘For the purposes of the present Declaration, a peasant is any person who engages or who seeks to engage alone, or in association with others or as a community, in small-scale agricultural production for subsistence and/or for the market, and who relies significantly, though not necessarily exclusively, on family or household labour and other non-monetized ways of organizing labour, and who has a special dependency on and attachment to the land’.

<sup>60</sup> In reality, the UNDROP applies to all workers on ‘farms in *aquaculture*’, thereby dispelling the misconception that small-scale fisher peasants use their land only for capture fisheries. Aquaculture is often categorised as a fishing-related activity, and it does occur at artisanal and small-scale in certain parts of the world. For example, see Aya Suzuki and Vu Hoang Nam, ‘Better Management Practices and their Outcomes in Shrimp Farming: Evidence from Small-Scale Shrimp Farmers in Southern Vietnam’ (2018) 26 *Aquaculture International* 469; Luis A. Henriquez-Antipa and F. Carcamo, ‘Stakeholder’s Multidimensional Perceptions on Policy Implementation Gaps regarding the Current Status of Chilean Small-scale Seaweed Aquaculture’ (2019) 103 *Marine Policy* 138. See Edelman’s Chapter in this book.

<sup>61</sup> UNDROP, supra note 2, art. 17-1 and 21.4.

<sup>62</sup> Robin Rolf Churchill and Vaughan Lowe, *The Law of the Sea* (Dominic McGoldrick ed, 3rd edn, Manchester University Press 1999) 60-61, 77-80 and 129-130.

<sup>63</sup> United Nations Convention on the Law of the Sea (Adopted 10 December 1982, entered into force 16 November 1994) 1883 UNTS 397 (LOSC), artt. 2, 3, 48 and 49.

to their proximity to land and the technical inability of small-scale operations to occur offshore.<sup>64</sup> These legal concepts should be related to peasants' traditional or customary relationship with land utilized for their SSF activities, including *inland* and *marine* waters falling under the sovereignty of coastal States and archipelagic States, all waters of which correspond to their *fishing grounds*.<sup>65</sup> This interpretation of the UNDROP as broadly applying to inland and marine SSF resonates with the SSF Guidelines, which, while being focused on marine capture fisheries,<sup>66</sup> apply to SSF 'in all contexts',<sup>67</sup> 'in both marine and inland waters',<sup>68</sup> as well as to small-scale aquaculture.<sup>69</sup> By setting out these two parameters, the UNDROP also emphasizes the 'intimate connection' of peasants with fishing resources and fishing grounds, either in inland or at sea as 'a source of social identity'.<sup>70</sup>

The linkages between fisheries and land become clearer in the UNDROP provisions on governance of tenure, discussed below.<sup>71</sup> It is worth noting that the SSF Guidelines recognize the importance of land tenure rights in the coastal/waterfront area 'for ensuring and facilitating access to the fishery, for accessory activities (including processing and marketing), and for housing and other livelihood support'.<sup>72</sup> It also underscores that '[m]any small-scale fishers, fish workers and their communities – including vulnerable and marginalized groups – are directly dependent on access to fishery resources and land'.<sup>73</sup> The references, in both the UNDROP and the SSF Guidelines, to dependency on land<sup>74</sup> need to be understood, in as far as certain small-scale fishers also self-identify as indigenous peoples.<sup>75</sup> As such, they also enjoy the human right of indigenous peoples to 'maintain and strengthen their distinctive spiritual relationship with their traditionally occupied and otherwise used lands,

---

<sup>64</sup> In this respect, the UN Convention on the Law of the Sea is limited to provisions that aim to protect fisheries in zones under sovereignty from unpermitted foreign fishing vessels or to require regulation on the conservation of living resources. See Martin Tsamenyi and Quentin Hanich, 'Fisheries Jurisdiction under the Law of the Sea Convention: Rights and Obligations in Maritime Zones under the Sovereignty of Coastal States' (2012) 27 *The International Journal of Marine and Coastal Law* 783, 785-786.

<sup>65</sup> The term 'fishing grounds' is referred to in the FAO, Code of Conduct for Responsible Fisheries, *supra* note 9. According to art. 6.18 of the Code, 'States should appropriately protect the rights of fishers and fishworkers, particularly those engaged in subsistence, small-scale and artisanal fisheries, to a secure and just livelihood, as well as preferential access, where appropriate, to traditional fishing grounds and resources in the waters under their national jurisdiction'.

<sup>66</sup> FAO, SSF Guidelines, *supra* note 8, para. 2.2.

<sup>67</sup> *Ibid.*, para. 2.1.

<sup>68</sup> *Ibid.*, para. 2.2.

<sup>69</sup> For more on small-scale aquaculture, see *supra* note 60, and Ben Belton and David C. Little, 'Contemporary Visions for Small-Scale Aquaculture' in Ratana Chuenpagdee (ed), *World Small-Scale Fisheries: Contemporary Visions* (Eburon Delft 2011).

<sup>70</sup> Cotula, 'Between Hope and Critique: Human Rights, Social Justice and Re-imagining International Law from the Bottom Up', *supra* note 22, at 513.

<sup>71</sup> See subsection below on 'land tenure and rights to natural resources'.

<sup>72</sup> FAO, SSF Guidelines, *supra* note 8, preface.

<sup>73</sup> *Ibid.*, preface.

<sup>74</sup> *Ibid.*, preface; UNDROP, *supra* note 2, art. 1.1.

<sup>75</sup> 'Self-identification' and the 'special relationship with ancestral lands' are the '[o]nly two of the [six] listed criteria essential to be considered essential for a community to be considered as an indigenous people': ILA, *Final Report on the Rights of Indigenous Peoples* (International Law Association, SOFIA Conference 2012), 2-3.

territories, waters and coastal seas and other resources’, as provided by the UN Declaration on the Rights of Indigenous Peoples.<sup>76</sup> Similar considerations apply in as far as SSF communities self-identify as ‘traditional communities’ under the UN Framework Principles on Human Rights and the Environment<sup>77</sup> and/or ‘local communities’ under the Convention on Biological Diversity (CBD).<sup>78</sup>

On the whole, the UNDROP and the SSF Guidelines are aligned in providing a broad and flexible notion of SSF, while calling attention to key features that provide the rationale for international human rights protection. This reflects observations in the literature that, ‘[w]hat is interesting and important about small-scale fisheries, therefore, is not their scale per se, but all that they are associated with... inherent and related features’.<sup>79</sup> The choice of the term ‘peasant’ under the UNDROP serves to capture the multiple grounds of discrimination experienced by individuals and communities in SSF such as expropriation of land, forced evictions and displacement, gender discrimination, the absence of agrarian reform and rural development policies, the lack of minimum wage and social protection, and the repression and criminalization of movements protecting their rights.<sup>80</sup> These persisting discriminatory treatments have hindered the ability of peasants, including small-scale fishers and fish workers, to have their voice heard, defend their human rights and tenure rights, secure sustainable use of natural resources that they depend on.<sup>81</sup> They have also precluded the appreciation and recognition of peasants’ present and future contributions to development, conserving and improving biodiversity, which constitute the basis of food production throughout the world.<sup>82</sup> The SSF Guidelines also shed light on *vulnerable and marginalised groups* in SSF, pointing to their dependency on access to fishery resources and land, unequal power relations, isolation, limited opportunities, poverty, environmental threats and impacts, as well as the high interdependence and competition of SSF with large-scale fisheries, tourism, aquaculture, agriculture, energy, mining, industry and infrastructure development.<sup>83</sup>

## **Mutual supportiveness between the UNDROP and the SSF Guidelines**

---

<sup>76</sup> UNDRIP, supra note 11, art. 25.

<sup>77</sup> UNHRC, ‘Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment’ (24 January 2018) UN Doc A/HRC/37/59, Framework Principle 15.

<sup>78</sup> Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79 (CBD), art. 8(j) and 10(c).

<sup>79</sup> See Svein Jentoft, ‘Walking the talk: implementing the international voluntary guidelines for securing sustainable small-scale fisheries’ (2014) 13(1) *Maritime Studies* 3.

<sup>80</sup> Riedel, Giacca and Golay, ‘The Development of Economic, Social, and Cultural Rights in International Law’, supra note 23, at 8.

<sup>81</sup> UNDROP, supra note 2, preamble.

<sup>82</sup> Ibid, preamble.

<sup>83</sup> FAO, SSF Guidelines, supra note 8, preface.

Both the UNDROP<sup>84</sup> and the SSF Guidelines<sup>85</sup> support the application of international human rights standards to SSF, but they do so from different (albeit, arguably, compatible) perspectives. The Declaration articulates directly specific international human rights standards from the perspectives of peasants as rightsholders, thereby clarifying States' obligations. The SSF Guidelines, in turn, focus on advancing food security and environmental sustainability, taking a 'human rights-based approach'.<sup>86</sup> On that basis, the SSF Guidelines identify good practices in the use and management of natural resources, emphasizing the role of small-scale fishers as agents in environmental conservation and management,<sup>87</sup> and as benefit-holders of the social development, security and safety, which is the State's responsibility to deliver.

The UNDROP makes the link more explicit between SSF communities' right to adequate standard of living and 'concrete, productive dimensions' and 'real-life factors'<sup>88</sup> such as having the right to facilitated access to means of production, production and processing, as well as technical assistance, credit, instance, which are necessary to gain access to local, national and regional markets at prices that guarantee them a decent income and livelihood.<sup>89</sup> State discretion is clearly limited by human rights standards under the UNDROP, clarifying States' specific duties vis-à-vis peasants in SSF and the inter-linkages between concurrent human rights obligations (such as non-discrimination, access to effective remedies, the protection of human rights defenders). Consequently, the UNDROP points towards the need to address systemic and engrained sources of discrimination, the multiple dimensions of poverty, and the underlying need to support the voice and vision of small-scale fishers, including their control over fishery resources, as part of the protection, respect and full realization of their human rights. In comparison, the SSF Guidelines arguably support a more accessible translation of international human rights obligations into action-points that specialized managers and decision-makers are expected to implement, focusing on sector-specific means to address the real-life factors upon which the respect and enjoyment of SSF communities' human rights depend.

Against this background, the following sub-sections will identify similarities and differences, as well as opportunities for mutually supportive interpretations between the two instruments, in relation specifically to land tenure and control over natural resources, traditional knowledge, and procedural rights.

## ***Land tenure and control over natural resources***

One fundamental feature of both instruments is their recognition and protection of legitimate tenure rights to land (which, as argued above, extends to fishing grounds in

---

<sup>84</sup> UNDROP, supra note 2, artt. 2.4 and 3.1.

<sup>85</sup> FAO, SSF Guidelines, supra note 8, para. 3.1(1).

<sup>86</sup> Ibid, supra note 8, para. 1.2.

<sup>87</sup> Ibid, supra note 8, paras. 5.5, 5.13, 5.14 and 11.6.

<sup>88</sup> Cotula, 'Between Hope and Critique: Human Rights, Social Justice and Re-imagining International Law from the Bottom Up', supra note 22, at 510.

<sup>89</sup> UNDROP, supra note 2, art. 16.

both inland and marine waters). Recalling the FAO Voluntary Guidelines on the Responsible Governance of Tenure of land, fisheries, and forests in the context of national food security (Tenure Guidelines),<sup>90</sup> both the SSF Guidelines and the UNDROP consider legitimate tenure rights as including customary tenure rights as in non-conventional and traditionally regulated tenure systems, of lands<sup>91</sup> and natural resources,<sup>92</sup> as well as the restoration of the relevant peoples' access to their land in cases of natural disasters and/or armed conflict.<sup>93</sup> The two instruments safeguard SSF peasants from arbitrary displacement from their land or from other natural resources.<sup>94</sup> The instruments, however, diverge in the terms in which they address access to resources and environmental sustainability. They also differ in how they refer to the need for impact assessments, consultation/consent and benefit-sharing to ensure control over the use of resources.

Both the UNDROP and the SSF Guidelines provide for the facilitation of equitable access through redistributive reform.<sup>95</sup> UNDROP contains an express obligation to give *priority* to small-scale fishers, together with other peasants, in the allocation of public lands, fisheries and forests, in line with the immediate relationship it establishes between land (including fishing grounds, as discussed above) and the attainment of an adequate standard of living.<sup>96</sup> In addition, under the UNDROP, the 'right to land' establishes a more immediate relationship between the *control* of fishing grounds and the attainment of an adequate standard of living for small-scale fishers.<sup>97</sup> This arguably provides 'a more explicit normative foundation for redistributive agrarian reforms'.<sup>98</sup> In comparison, the SSF Guidelines call for the appropriate granting of *preferential access* of small-scale fishers to land, fishery resources and to fish in waters under national jurisdiction, as well as 'exclusive zones for small-scale fisheries',<sup>99</sup> and 'co-management'.<sup>100</sup>

The Declaration's provision on the right to have access to, sustainably use and manage 'land and the water bodies, fisheries, pastures and forests therein'<sup>101</sup> serves to bring attention to the various habitats in which small-scale fishing communities may conduct activities, not only limited to fishing, but also alternative or complementary livelihoods

---

<sup>90</sup> FAO, *Voluntary Guidelines on the Responsible Governance of Tenure of land, fisheries and forests in the Context of National Food Security (Adopted at the 38th (Special) Session of the Committee on World Food Security, in Rome, on 22 May 2012)* (2012).

<sup>91</sup> FAO, SSF Guidelines, *supra* note 8, para. 5.1 and 5.4; UNDROP, *supra* note 2, art. 17.3.

<sup>92</sup> FAO, SSF Guidelines, *supra* note 8, para. 5.1, 5.3 and 5.4; UNDROP, *supra* note 2, artt. 5, 12.5 and 17.7.

<sup>93</sup> FAO, SSF Guidelines, *supra* note 8, para. 5.12; UNDROP, *supra* note 2, art. 17.5.

<sup>94</sup> FAO, SSF Guidelines, *supra* note 8, para. 5.9; UNDROP, *supra* note 2, art. 17.4.

<sup>95</sup> FAO, SSF Guidelines, *supra* note 8, para. 5.4; UNDROP, *supra* note 2, art. 17.6.

<sup>96</sup> See Cotula, 'Between Hope and Critique: Human Rights, Social Justice and Re-imagining International Law from the Bottom Up', *supra* note 22, at 508-513.

<sup>97</sup> *Ibid.*, at 508-513, which refers more generally to the notion of terrestrial land.

<sup>98</sup> *Ibid.*, at 509.

<sup>99</sup> For example, Angola's fisheries act restricts the four nautical miles and the inland waters to fisheries of subsistence, scientific research, recreational and/or artisanal natures. In Ghana, an Inshore Exclusive Economic Zone limits the six nautical miles to small semi-industrial, canoes and recreational fishing vessels. See respectively Aquatic and Biological Resources Law (New Fishing Act) No. 6-A/2004 (Angola, Promulgated on 3 September 2004, published in the Republic Gazette No. 81, Series I, Supplement on 8 October 2004), artt. 33, 235(2) and 237; Ghana. Fisheries Act No. 625/2002; para. 81 and schedule.

<sup>100</sup> FAO, SSF Guidelines, *supra* note 8, paras. 5.1, 5.3-5.5, 5.7 and 5.15.

<sup>101</sup> UNDROP, *supra* note 2, art. 17.1.

during closed seasons, closed areas or in the event of disasters and crisis where fishing is not an option. UNDROP also recalls the CBD's duty to conserve and sustainably use biodiversity, connecting it with the need 'to promote and protect the full enjoyment of the rights of peasants and other people working in rural areas'.<sup>102</sup> Such environmental standards are reflected in the SSF Guidelines through the ecosystem approach to fisheries. The latter entails both involving small-scale fishers in sustainably managing fishery resources for the benefit of habitat, biodiversity and ecosystem wellbeing, and ensuring that small-scale fishers can benefit from fishery resources maintained by healthy ecosystems.<sup>103</sup>

### *Safeguards*

Both instruments refer to three key safeguards for the respect and protection of the rights to land tenure (including fishing grounds) and natural resources: impact assessments, consultation, and benefit-sharing. These standards have emerged at the crossroads of international human rights law jurisprudence on indigenous peoples and international biodiversity law,<sup>104</sup> and are also recognized in the UN Framework Principles on Human Rights and the Environment.<sup>105</sup>

The first safeguard is the undertaking of prior impact assessments, which cover the analysis of potential environmental impacts, as well as the *social* and *cultural* impacts that peasants and people in SSF may suffer. The UNDROP more broadly requires such studies prior to the granting of permission regarding *any* exploitation affecting natural resources that peasants may hold or use,<sup>106</sup> which is in line with the UN Framework Principles, whereas the SSF Guidelines limit this requirement to the implementation of large-scale projects.<sup>107</sup> According to the UN Framework Principles and other international human rights bodies, these assessments should be in accord with the CBD Akwé: Kon Voluntary Guidelines, which provide concrete and systematic step-by-step indications on how impact assessments should include consideration of the exercise of customary laws regarding land tenure, traditional systems of natural resource use,

---

<sup>102</sup> Ibid, art. 20.1.

<sup>103</sup> See FAO, *The ecosystem approach to fisheries* (FAO Technical Guidelines for Responsible Fisheries No. 4, Suppl 2, FAO 2003) 112. See also the definition of 'ecosystem' under the CBD, supra note 78, art 2: 'a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit' and of an ecosystem approach in Decisions V/6 and VII/11: 'a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way'. See also Elisa Morgera, 'The Ecosystem Approach and the Precautionary Principle' in Elisa Morgera and Jona Razzaque (eds), *Encyclopedia of Environmental Law: Biodiversity and Nature Protection Law* (Edward Elgar 2017) 70-80.

<sup>104</sup> Elisa Morgera, 'Under the radar: fair and equitable benefit-sharing and the human rights of indigenous peoples and local communities connected to natural resources' (2019) 23 *The International Journal of Human Rights* 1098.

<sup>105</sup> UNHRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment', supra note 77, Framework Principle 15.

<sup>106</sup> UNDROP, supra note 2, art. 5.2.

<sup>107</sup> FAO, SSF Guidelines, supra note 8, para. 5.10.

maintenance of genetic diversity through customary management, as well as gender, inter-generational considerations, health, safety, food, livelihoods, social cohesion and mobilization.<sup>108</sup> Notably, the CBD Akwé: Kon Voluntary Guidelines recommend considering not only negative, but also positive impacts, including from the viewpoint of indigenous peoples and local communities.<sup>109</sup>

The second safeguard concerns consultation and participation in decision-making processes. According to both instruments, SSF communities, indigenous peoples, peasants and other people working in rural areas have the right to ‘active, free, effective, meaningful and informed participation’ prior to the adoption of decisions that may affect them, also taking into account relevant instruments on indigenous peoples.<sup>110</sup> The UNDROP requires good-faith consultation broadly, before carrying out natural resources exploitation, and participation in the preparation and implementation of food safety, labour and environmental standards.<sup>111</sup> The SSF Guidelines, in turn, require consultation specifically prior to the implementation of large-scale projects; the adoption of policies and management measures related to migration of fishers and fish workers, international trade, climate change and disasters, inland and marine spatial planning; and the setting of research priorities.<sup>112</sup> Neither provide for the standard of free, prior and informed consent (FPIC), which is instead emphasized in the UNDRIP and the UN Framework Principles.<sup>113</sup>

Indeed, international human rights law instruments on indigenous peoples’ rights and international biodiversity law have called more specifically for consulting with indigenous peoples to obtain their FPIC before taking or approving any measures that may affect their lands, territories, or resources, on the basis of access to all relevant information in understandable and accessible forms.<sup>114</sup> The Inter-American Court of Human Rights underscored the need for ‘special and differentiated’ consultation processes when the interests of indigenous and tribal peoples may be affected,<sup>115</sup> with the notion of public interest set at a higher threshold because their physical and cultural survival is at stake.<sup>116</sup> Accordingly, FPIC should arguably guarantee a ‘distinguishable

---

<sup>108</sup> CBD CoP7, Decision VII/16 ‘Article 8(j) and related provisions’, UNEP/CBD/COP/DEC/VII/16 (13 April 2014), annex, F, para. 19.

<sup>109</sup> Elisa Morgera, ‘Justice, Equity and Benefit-Sharing Under the Nagoya Protocol to the Convention on Biological Diversity’ (2015) 24 *The Italian Yearbook of International Law Online* 113.

<sup>110</sup> FAO, SSF Guidelines, *supra* note 8, para. 3.1(6); UNDROP, *supra* note 2, art. 2.3.

<sup>111</sup> UNDROP, *supra* note 2, art. 5.2(b) and 10.2.

<sup>112</sup> FAO, SSF Guidelines, *supra* note 8, paras. 5.10, 6.10, 7.7, 7.9, 9.2, 9.6 and 11.9.

<sup>113</sup> UNHRC, ‘Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment’, *supra* note 77, Framework Principle 15.

<sup>114</sup> UNHRC, ‘Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment’, *supra* note 77, as summarised in Framework Principle 15.

<sup>115</sup> *Case of Kichwa Indigenous Communities of Sarayaku v Ecuador*, Inter-American Court of Human Rights Series C No 245 (27 June 2012), paras. 165-166.

<sup>116</sup> *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (4 February 2010) African Commission on Human and Peoples’ Rights 276/2003, para. 212. Compare with K. Gover, ‘Settler–State Political Theory, ‘CANZUS’ and the UN Declaration on the Rights of Indigenous Peoples’ (2015) 26 *European Journal of International Law* 345, 372.

voice' for indigenous and tribal peoples within a pluralistic and democratic society in light of their right to decide their own development priorities.<sup>117</sup> Other international legal materials have recognised FPIC as part of the human rights of communities other than indigenous peoples.<sup>118</sup> Consensus guidance under the CBD, which benefitted from significant inputs from indigenous peoples' representatives,<sup>119</sup> provided further insights on the 'prior' and 'free' components of FPIC as a *continual* process building mutually beneficial and *ongoing* arrangements<sup>120</sup> that should be free from 'expectations or timelines that are externally imposed'.<sup>121</sup> This formulation fleshes out the characterization of FPIC as a 'constant process of dialogue' advanced in the Inter-American context.<sup>122</sup> With regard to the 'informed' dimension of FPIC, international human rights bodies have also clarified that FPIC should be based on an understanding of the full range of issues and implications entailed by the activity or decision in question. As discussed above, the relationship between FPIC and impact assessment has been explored by human rights bodies with a view to providing indigenous peoples with 'full and objective information about all aspects of the project that will affect them, including the impact of the project on their lives and environment'.<sup>123</sup> That said, certain States continue to object to the FPIC standard.<sup>124</sup>

The third safeguard is fair and equitable benefit-sharing. The UNDROP calls upon States to 'take measures to ensure that any exploitation affecting the natural resources that peasants traditionally hold or use is permitted based on (...) modalities for the fair and equitable sharing of benefits of such exploitation'.<sup>125</sup> This is in line with international human rights jurisprudence seeking to ensure this safeguard for the

---

<sup>117</sup> In light International Labour Organization (ILO), Indigenous and Tribal Peoples Convention (27 June 1989) C169, art. 7.1; Alejandro Fuentes, 'Judicial Interpretation and Indigenous Peoples' Rights to Lands, Participation and Consultation. The Inter-American Court of Human Rights' Approach' (2015) 23(1) *International Journal on Minority and Group Rights* 39, 74-6 and 79.

<sup>118</sup> E.g. the UNHRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment', supra note 77, Framework Principle 15; UNGA, 'Interim Report of the Special Rapporteur on the right to food' (8 August 2012) UN Doc A/67/268, para. 39; ECOWAS, Directive on the Harmonization of Guiding Principles and Policies in the mining Sector (2009); UN-REDD Programme, 'Guidelines on Free, Prior and Informed Consent' (2013) 11-12. See discussion in Morgera, 'Justice, Equity and Benefit-Sharing Under the Nagoya Protocol to the Convention on Biological Diversity', supra note 109, at 1111-3; and Lorenzo Cotula and Kyla Tienhaara, 'Reconfiguring Investment Contracts to Promote Sustainable Development' in Karl P. Sauvant (ed), *Reconfiguring Investment Contracts to Promote Sustainable Development* (Oxford University Press 2013) 301 and 303.

<sup>119</sup> See generally Morgera, 'Justice, Equity and Benefit-Sharing Under the Nagoya Protocol to the Convention on Biological Diversity', supra note 109.

<sup>120</sup> CBD CoP13, Decision XIII/18 'Article 8(j) and related provisions', CBD/COP/DEC/XIII/18 (17 December 2016), Mo'otz Kuxtal Voluntary Guidelines, para. 6.

<sup>121</sup> Ibid, para. 14.

<sup>122</sup> *Case of Kaliña and Lokono Peoples v Suriname*, Inter-American Court of Human Rights Series C No 309 (25 November 2015), Joint Concurring Opinion of Judges Sierra Porto and Ferrer Mac-Gregor Poisot.

<sup>123</sup> See *Saramaka People v Suriname* Inter-American Court of Human Rights Series C No 172 (28 November 2007), para. 134; and Alessandro Fodella, 'Indigenous Peoples, the Environment, and International Jurisprudence: Essays in Honour of Tullio Treves' in Nerina Boschiero et al (eds), *International Courts and the Development of International Law* (Asser Press 2013) 356 and 360.

<sup>124</sup> See the convoluted title of the CBD, Mo'otz Kuxtal Guidelines (n 122).

<sup>125</sup> UNDROP, supra note 2, art. 5.2(c).



maintenance of the cultural and physical survival of indigenous peoples.<sup>126</sup> The SSF Guidelines, in turn, support the ‘equitable distribution of the benefits yielded from responsible management of fisheries and ecosystems, rewarding small-scale fishers and fish workers, both men and women’.<sup>127</sup> In doing so, it emphasizes the role of benefit-sharing towards ecosystem stewards as part of an ecosystem approach.<sup>128</sup> It also conceptualizes benefit-sharing as an *incentive* for ecosystem stewards’ positive contribution to human well-being deriving from the ecosystem services they provide, maintain or restore.<sup>129</sup> Benefit-sharing can also be understood as *recognition* for past and present contributions of SSF communities to global environmental objectives and food security, with a view to ensuring that their traditional practices continue in the future.<sup>130</sup> The SSF Guidelines explicitly link benefit-sharing with non-discrimination (based on gender, discussed below, and against indigenous peoples),<sup>131</sup> which is also a dimension recognized under the UN Framework Principles.<sup>132</sup> Furthermore, the SSF Guidelines note the cross-scale dimensions of benefit-sharing, by reference to the need to ensure that SSF communities benefit from wider economic developments at the local level (such as tourism)<sup>133</sup> and international trade.<sup>134</sup> According to the CBD Akwé: Kon Voluntary Guidelines, benefit-sharing should be explored as early as during environmental impact assessments and be considered intertwined with the partnership-building process of FPIC.<sup>135</sup>

These three safeguards (impact assessments, consultation and benefit-sharing) are also relevant to prevent and address gender discrimination<sup>136</sup> in the context of reforms and resettlement schemes’, according to the UNDROP,<sup>137</sup> and in the designing, planning, and implementation of management measures, according to the SSF Guidelines,<sup>138</sup>

---

<sup>126</sup> E.g. *Saramaka People v. Suriname*, supra note 123, para. 91; *Mayagna (Sumo) Awas Tingni Community v Nicaragua* Inter-American Court of Human Rights Series C No 79 (31 August 2001), para. 149.

<sup>127</sup> FAO, SSF Guidelines, supra note 8, para. 5.1.

<sup>128</sup> Elisa Morgera, ‘The Need for an International Legal Concept of Fair and Equitable Benefit Sharing’ (2016) 27 *The European Journal of International Law* 353; CBD, supra note 78.

<sup>129</sup> CBD CoP5, Decision V/6 ‘Ecosystem Approach’, UNEP/CBD/COP/5/23 (22 June 2000), para 9.

<sup>130</sup> Morgera, ‘Justice, Equity and Benefit-Sharing Under the Nagoya Protocol to the Convention on Biological Diversity’, supra note 109.

<sup>131</sup> FAO, SSF Guidelines, supra note 8, para. 6.2.

<sup>132</sup> UNHRC, ‘Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment’, supra note 77, Framework Principle 15, para. 9; Elisa Morgera, ‘A reflection on benefit-sharing as a Framework Principle on Human Rights and the Environment proposed by UN Special Rapporteur John Knox (Part I)’ (2018) *BeneLex Blog* <<https://benelexblog.wordpress.com/2018/04/08/a-reflection-on-benefit-sharing-as-a-framework-principle-on-human-rights-and-the-environment-proposed-by-un-special-rapporteur-john-knox-part-i/>> accessed 06 October 2020.

<sup>133</sup> FAO, SSF Guidelines, supra note 8, para. 6.8.

<sup>134</sup> Ibid, supra note 8, paras. 7.8 and 7.10.

<sup>135</sup> Morgera, ‘Justice, Equity and Benefit-Sharing Under the Nagoya Protocol to the Convention on Biological Diversity’, supra note 109, based on combined reading of the CBD Akwé: Kon Voluntary Guidelines and Mo’otz Kuxtal Guidelines.

<sup>136</sup> UN Committee on the Elimination of Discrimination against Women, ‘General Recommendation No 34 on the Rights of Rural Women’ (7 March 2016) UN Doc CEDAW/C/GC/34 .

<sup>137</sup> UNDROP, supra note 2, art. 4.2(h).

<sup>138</sup> FAO, SSF Guidelines, supra note 8, para. 5.15.

which specifically note the role of benefit-sharing from the management of fisheries and ecosystems for *women* in SSF.<sup>139</sup> These safeguards can also address other grounds for non-discrimination, and ensure consideration of the human rights of children.<sup>140</sup>

These three key safeguards (impact assessments, consultation and benefit-sharing), however, have all been criticized because they may arguably be ‘consistent with the penetration of commercial forms of production’ and ‘operate in ways that are co-extensive with extractivist models’.<sup>141</sup> In particular, benefit-sharing is often associated with an offer of money or other economic advantage (for instance, employment) in exchange for obtaining consent,<sup>142</sup> which ‘encourages a climate of disrespect towards indigenous peoples’.<sup>143</sup> Benefit-sharing has resulted in ‘attempts to undermine social cohesion of affected communities’ through bribes to community leaders or selective negotiations tactics.<sup>144</sup> In addition, monetary benefit-sharing is known to ‘destruct the social network’ of indigenous groups,<sup>145</sup> putting in place self-defeating or paternalistic mechanisms that are not responsive to communities’ specific needs.<sup>146</sup> Regional human rights bodies have thus had occasion to point out situations in which promised benefit-sharing were not delivered,<sup>147</sup> or benefit-sharing arrangements were originally in place but broke down, and/or were weakened by ineffective State monitoring of outsiders’ activities.<sup>148</sup>

An application of these guarantees, however, that genuinely builds upon international human rights and biodiversity law<sup>149</sup> can arguably make space for different worldviews of nature and development<sup>150</sup> embodied in SSF communities’ distinctive ways of life.<sup>151</sup> In

---

<sup>139</sup> Ibid, para. 5.1, emphasis added.

<sup>140</sup> UNHRC, ‘Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment’ (24 January 2018) UN Doc A/HRC/37/58.

<sup>141</sup> Cotula, ‘Between Hope and Critique: Human Rights, Social Justice and Re-imagining International Law from the Bottom Up’, supra note 22, at 514 and 520.

<sup>142</sup> *Case of Kichwa Indigenous Community of Sarayaku v Ecuador*, supra note 115, para. 194.

<sup>143</sup> Ibid, paras. 193-194.

<sup>144</sup> Ibid, para. 186; Jérémie Gilbert and Cathal Doyle, ‘A New Dawn over the Land: Shedding Light on Collective Ownership and Consent’ in S. Allen and A. Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (1st edn, Hart 2011) 289.

<sup>145</sup> Nieves Gomez, ‘Indigenous Peoples and Psychosocial Reparations: The Experience with Latin American Indigenous Communities’ in Federico Lenzerini (ed), *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press 2008) 143 and 158.

<sup>146</sup> Gabriella Citrioni and Karla I Quintana Osuna, ‘Reparations for Indigenous Peoples in the Case of the Inter-American Court of Human Rights’ in Federico Lenzerini (ed), *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press 2008) 317-24 and 340.

<sup>147</sup> *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, supra note 116, para. 274.

<sup>148</sup> *Saramaka People v Suriname*, supra note 123, paras. 77-84 and 183.

<sup>149</sup> Morgera, ‘Justice, Equity and Benefit-Sharing Under the Nagoya Protocol to the Convention on Biological Diversity’, supra note 109.

<sup>150</sup> Alonso Barros, ‘The Fetish Mechanism: A Post-Dogmatic Case Study of the Atacama Desert Peoples and the Extractive Industries’ in Corinne Lennox and Damien Short (eds), *Handbook of Indigenous Peoples’ Rights* (Routledge 2016) 223 and 231-32.

<sup>151</sup> Gaetano Pentassuglia, ‘Towards a Jurisprudential Articulation of Indigenous Land Rights’ (2011) 22 *European Journal of International Law* 165-76; Deborah McGregor, ‘Living Well with the Earth: Indigenous Rights and the Environment’ in Corinne Lennox and Damien Short (eds), *Handbook of Indigenous Peoples’ Rights* (Routledge 2016) 167-75; Ellen Desmet, *Indigenous rights entwined with nature conservation* (vol 8, Intersentia 2011), 58-175; and Francesco Francioni, *Reparation for Indigenous*

that way, the safeguards can serve to challenge mainstream conceptions of economic development and tackle attempts to bottle SSF communities' worldviews into neo-liberal or neo-colonial agendas.<sup>152</sup> To that end, impact assessments, consultation and benefit-sharing need to support communities' *agency* as tools for a concerned and iterative dialogue aimed at understanding and accommodating different worldviews with a view to enhancing communities' choice and capabilities.<sup>153</sup> That transformative potential can be supported by better understanding of SSF communities' needs, values, and priorities as reflected under the UNDROP, so as to inform case-by-case assessments to ensure culturally appropriate implementation of international human rights law.

In turn, the SSF Guidelines provide a finer-grained understanding of the barriers and opportunities within fisheries governance. They do not indicate how to avoid imposing certain views of development upon SSF communities that could endanger their cultural or physical survival. The SSF Guidelines nevertheless can contribute to the transformative application of the three safeguards by emphasizing the need for providing *support* for the exercise of SSF communities' rights, in addition to protecting or enhancing communities' *control* over natural resources (as emphasized by the UNDROP). Together, the two instruments can shift the practice of impact assessments, consultation and benefit-sharing away from a technocratic, damage-control approach, towards collaboratively identifying opportunities for creating positive impacts in addition to avoiding potential negative impacts, taking into account SSF communities' views.<sup>154</sup>

## ***Traditional knowledge***

The importance of traditional knowledge is recognized by both instruments.<sup>155</sup> These considerations about knowledge are essential to understand the tensions around environmental sustainability in SSF: whose knowledge (scientific, modern or traditional) determines environmental sustainability approaches in the fisheries sector more broadly? How are the knowledge contributions of small-scale fishers to sustainable fisheries assessed and taken into account in decision-making processes? And whose

---

*Peoples: Is International Law Ready to Ensure Redress for Historical Injustices?* (Oxford University Press 2008).

<sup>152</sup> Elsa Reimerson, 'Between Nature and Culture: Exploring Space for Indigenous Agency in the Convention on Biological Diversity' (2013) *Environmental Politics* 22 ; Ylva Uggla, 'What is This Thing Called 'Natural'? The Nature-culture Divide in Climate Change and Biodiversity Policy' (2009) *Journal of Politics Ecology* 17-79.

<sup>153</sup> Morgera, 'Justice, Equity and Benefit-Sharing Under the Nagoya Protocol to the Convention on Biological Diversity', *supra* note 109. See also a discussion on consultation and free prior informed content at *ibid*, 14-16.

<sup>154</sup> Morgera, 'Justice, Equity and Benefit-Sharing Under the Nagoya Protocol to the Convention on Biological Diversity', *supra* note 109.

<sup>155</sup> FAO, SSF Guidelines, *supra* note 8, paras. 3.1(2), 5.18, 11.4 and 11.7; UNDROP, *supra* note 2, art. 18.3, 19.1(2), 20.2 and 26.

knowledge determines the limitations imposed upon SSF to ensure sustainable practices?

The UNDROP, which recalls the rights to culture, practices and knowledge, including ways of life, methods of production or technology,<sup>156</sup> specifically emphasizes traditional ways of fishing and community-based commercialization systems;<sup>157</sup> and it emphasizes the *rights* to use and protect peasants' traditional medicines, and to maintain their health practices using plants, animals and minerals for medicinal use.<sup>158</sup> Complementing the UNDROP with a focus on means of implementation, the SSF Guidelines include as one of their objectives 'to enhance public awareness and promote the advancement of knowledge on the culture, role, contribution and potential of small-scale fisheries, considering ancestral and traditional knowledge, and their related constraints and opportunities'.<sup>159</sup> The SSF Guidelines then point to the need for technical and financial assistance to maintain, organize, exchange and improve traditional knowledge of aquatic living resources and fishing techniques.<sup>160</sup>

The UNDROP provides a clear emphasis on the use of traditional knowledge of peasants, including small-scale fishers, in the design and implementation of climate change adaptation and mitigation policies,<sup>161</sup> which is less explicit in the SSF Guidelines. The UNDROP affirms their rights in contributing through the 'use of practices and traditional knowledge' in such endeavours whilst the SSF Guidelines do not mention 'traditional knowledge' in its section devoted to disaster risks and climate change. The UNDROP rather calls for full effective consultation with fishing communities, including indigenous peoples, men and women in the development of policies and plans to address climate change in fisheries.<sup>162</sup> The SSF Guidelines underline the need for support in addressing climate change, through measures that secure disaster preparedness, emergency response, relief and rehabilitation, and the role of small-scale fishers in supporting energy efficiency in the subsector.<sup>163</sup> They further call for transparent access to adaptation funds, facilities and culturally appropriate technologies for climate change adaptation.<sup>164</sup>

All these provisions on traditional knowledge are essential to effectively contributing to the recognition of small-scale fishers and their communities' contribution to sustainable development and environmental protection, and equally to give them voice in decision-making processes that may affect their ways of life and livelihoods.<sup>165</sup> International guidance underscores that respecting traditional knowledge requires valuing it equally with, and complementary to, scientific knowledge, in order to promote the full respect

---

<sup>156</sup> UNDROP, *supra* note 2, art. 26.

<sup>157</sup> *Ibid*, art. 16.1.

<sup>158</sup> *Ibid*, art. 23.2.

<sup>159</sup> FAO, SSF Guidelines, *supra* note 8, para. 1.1(f).

<sup>160</sup> *Ibid*, paras. 11.4 and 11.7.

<sup>161</sup> UNDROP, *supra* note 2 art 18.3. See Alabrese-Savaresi's Chapter in this book

<sup>162</sup> FAO, SSF Guidelines, *supra* note 8, para. 9.2.

<sup>163</sup> *Ibid*, paras. 9.2-9.8

<sup>164</sup> *Ibid*, paras. 9.7 and 9.9.

<sup>165</sup> Elisa Morgera, 'Fair and Equitable Benefit-sharing at the Crossroads of the Human Right to Science and International Biodiversity Law' (2015) 4 *Laws* 803.

for the cultural and intellectual heritage of indigenous and local communities relevant to the conservation and sustainable use of biodiversity.<sup>166</sup> The actual impact on decision-making, however, depends on whether traditional knowledge holders have sufficient procedural access to the relevant decision-making processes,<sup>167</sup> as discussed below.<sup>168</sup> In addition, even if traditional knowledge is recognized as a form of science, its integration in various decision-making processes may impose unfair burdens on traditional knowledge holders, constraining the further development of knowledge systems in light of changed circumstances, including changes to traditional lifestyles within which traditional knowledge is rooted.<sup>169</sup> These considerations point to the need for caution in engaging with traditional knowledge holders and the underlying requirements for impact assessment, consultation and benefit-sharing with traditional knowledge holders, which is clearly recognized in both international human rights jurisprudence on indigenous peoples and international biodiversity law,<sup>170</sup> but is not explicitly recalled in the UNDROP or the SSF Guidelines.<sup>171</sup> Nevertheless, the relevance of these safeguards can be read into the UNDROP based on the combined effect of its provisions on traditional knowledge and that on the right of access to natural resources,<sup>172</sup> as the development and transmission of traditional knowledge are intrinsic to the land tenure (including fishing grounds) and customary governance of natural resources.<sup>173</sup>

Arguably in line with the requirements of consultation and benefit-sharing,<sup>174</sup> the UNDROP points to the role of the State in encouraging 'equitable and participatory partnerships' with scientists.<sup>175</sup> This is an important point with regard to the interface between SSF communities' traditional knowledge and technology transfer in the fisheries sector.<sup>176</sup> While there may be growing political awareness of the benefits that

---

<sup>166</sup> Tkarihwaïé:ri Code of Ethical Conduct on Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities, CBD Decision X/42, annex, preamble.

<sup>167</sup> Suman Seth, 'Putting Knowledge in its Place: Science, Colonialism and the Postcolonial' (2009) 12(4) *Postcolonial Studies* 373-88.

<sup>168</sup> See subsection below on right to water for SSF use.

<sup>169</sup> Saskia Vermeylen, George Martin and Roland Clift, 'Intellectual Property, Rights Systems and the Assemblage of Local Knowledge Systems' (2008) 15 *International Journal of Cultural Property* 201-7.

<sup>170</sup> UNHRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment', supra note 77, Framework Principle 15. Elisa Morgera, 'The Need for an International Legal Concept of Fair and Equitable Benefit Sharing', supra note 128.

<sup>171</sup> Though it has been subject to FAO's technical scrutiny in later studies. See Johanne Fischer and others (eds), *'Fishers' knowledge and the ecosystem approach to fisheries: applications, experiences and lessons in Latin America'* (2015) 591 *FAO Fisheries and Aquaculture Technical Paper* 278.

<sup>172</sup> UNDROP, supra note 2, art 5. See section above on social rights and related provisions.

<sup>173</sup> This has been recognised internationally, for instance, in the Preamble of the Nagoya Protocol the CBD: 'the interrelationship between genetic resources and traditional knowledge, their inseparable nature for indigenous and local communities...' See Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization to the Convention on Biological Diversity (adopted 29 October 2010, entered into force 12 October 2014) 3008 UNTS 3

<sup>174</sup> Morgera, 'Fair and Equitable Benefit-sharing at the Crossroads of the Human Right to Science and International Biodiversity Law', supra note 165.

<sup>175</sup> UNDROP, supra note 2, art. 25.3.

<sup>176</sup> Elisa Morgera and Maria Ntona, 'Linking small-scale fisheries to international obligations on marine technology transfer' (2018) 93 *Marine Policy* 295.

could arise from marine technology transfer to SSF communities, unequal attention has been paid to actual and potential risks, particularly with regard to technologies that seek to enhance the cost-efficiency of fishing activities. SSF communities' own local technologies are more likely to meet local needs for food,<sup>177</sup> and be sensitive to the location in which they are applied, the relative abundance of fishery resources, and the complex, traditional resource use rights.<sup>178</sup> SSF community-scientists partnerships could thus focus on examining and evaluating 'local-specific, small-scale technologies, coupled with community-oriented, participatory measures to protect the ecological integrity of the living coastal resources', with a view to facilitating 'technology blending' to take advantage, where appropriate, of the positive aspects of other technologies.<sup>179</sup> Returning to the matter of whether the protection of traditional knowledge helps address tensions around the environmental sustainability of SSF, the UNDROP frames these issues in terms of the environmental *rights* of peasants,<sup>180</sup> their entitlements to the conservation and sustainable use of rural areas and biodiversity as part of the efforts to protect their traditional knowledge and their right to livelihoods.<sup>181</sup> The SSF Guidelines, in turn, spell out the environmental *duties* of people in SSF (e.g. utilize non-destructive fishing practices and energy-efficiency operations),<sup>182</sup> once again taking the viewpoint of States as implementers of international fisheries law and applying the human rights-based approach to sector-specific contexts. What the UNDROP adds, in that connection, is underscoring the need to 'challenge ingrained prejudices about the "backwardness", or "modernity," of different systems of livelihoods and beliefs, and of different forms of natural resource use'.<sup>183</sup> These prejudices indeed 'underpin the structural discrimination that peasants and indigenous peoples experience in many legal systems',<sup>184</sup> and that may be reflected in the mainstream approaches to environmental sustainability in the fisheries sector.

## ***Procedural rights***

Access to information, justice and effective remedies are essential procedural rights that bolster the guarantees on tenure and control over natural resources, as well as the protection of traditional knowledge just discussed.<sup>185</sup> The SSF Guidelines and the

---

<sup>177</sup> Derek Stephen Johnson, 'Category, narrative, and value in the governance of small-scale fisheries' (2006) 30 *Marine Policy* 747, 27

<sup>178</sup> Conner Bailey, Dean Cycon and Michael Morris, 'Fisheries development in the Third World: The role of international agencies' (1986) 14 *World Development* 1269-71.

<sup>179</sup> John Kurien, 'Small-scale Fisheries in the Context of Globalisation' (1998) *CDS working papers series* 29.

<sup>180</sup> That is, the 'right to conservation and protection of the environment and the productive capacity of their lands, and of the resources that they use'. UNDROP, *supra* note 2, art. 18.1. The UNDROP is limited in providing environmental duties, with the exception of the duty not to store and dispose of hazardous material, substance or waste on peasants' land. See art. 18.4.

<sup>181</sup> *Ibid*, art. 20

<sup>182</sup> FAO, SSF Guidelines, *supra* note 8, paras 5.14 and 9.8.

<sup>183</sup> Cotula, 'Between Hope and Critique: Human Rights, Social Justice and Re-imagining International Law from the Bottom Up', *supra* note 22, at 520.

<sup>184</sup> *Ibid*, at 520.

<sup>185</sup> UN Human Rights Council, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment', *supra* note 77, Framework Principles 7 and 10.

UNDROP are both attentive to the need of SSF communities and peasants to have access to timely and adequate information, especially concerning production, processing, marketing and distribution of their products.<sup>186</sup> And that information should be provided in a language, form and through means adequate to their culture, so that all the interested people can be offered the opportunity to decide to appropriately participate in decision-making processes.<sup>187</sup> Once again focusing on sector-specific means of implementation, the SSF Guidelines emphasize the need for information to ensure the sustainability of SSF, including data on IUU fishing, disaster risks, climate change, livelihoods and food security,<sup>188</sup> as well as the need to develop information systems for data-poor conditions.<sup>189</sup> This is in line with the broader recognition, under the SSF Guidelines, of the importance of access to information for helping SSF communities to ‘cope with existing problems and empower them to improve their livelihoods’.<sup>190</sup>

Provisions on access to justice are, in turn, more elaborated in the UNDROP than in the SSF Guidelines. Both require access to impartial and competent judicial and administrative bodies, to timely, affordable and effective means of resolving disputes, and provision for prompt remedies such as right of appeal, restitution, indemnity, compensation and reparation.<sup>191</sup> The UNDROP, however, also highlights the right to legal assistance, providing for legal aid as an additional measure for peasants who would otherwise not have access to administrative and judicial services.<sup>192</sup> Whereas the SSF Guidelines are limited in only providing for the protection of SSF communities from arbitrary eviction and protection of their legitimate tenure rights from extinction or infringement, the UNDROP is broader in requiring effective mechanisms for the prevention of and redress for *any* action aimed at or resulting in the violation of peasants’ human rights.<sup>193</sup>

All these procedural dimensions serve to support the voice of small-scale fishers and their communities in the making of decisions that could affect them, and to recognize their contributions to sustainable fisheries and sustainable development more broadly.<sup>194</sup> They are all essential underpinnings of the human right to natural resources, including its inter-face with gender discrimination and the protection of traditional knowledge discussed above. In other words, while the UNDROP does not recognize the right to food sovereignty as such,<sup>195</sup> it provides substantive and procedural dimensions underpinning SSF communities’ right to determine their own fisheries systems,<sup>196</sup> and with that underscores the opportunity to also address poverty as a ‘multi-dimensional phenomenon that can be underpinned by marginalization and lack

---

<sup>186</sup> FAO, SSF Guidelines, *supra* note 8, para. 7.10; and UNDROP, *supra* note 2, art. 11.2 and 25.3.

<sup>187</sup> FAO, SSF Guidelines, *supra* note 8, paras. 3.1(7)(8) and 11.8; and UNDROP, art. 11(2).

<sup>188</sup> FAO, SSF Guidelines, *supra* note 8, para. 11.5.

<sup>189</sup> *Ibid*, para. 11.6.

<sup>190</sup> *Ibid*, para. 11.4.

<sup>191</sup> *Ibid*, para. 5.11; UNDROP, *supra* note 2, art. 12.2.

<sup>192</sup> UNDROP, *supra* note 2, art. 12.3.

<sup>193</sup> *Ibid*, art. 12.5.

<sup>194</sup> Cotula, ‘Between Hope and Critique: Human Rights, Social Justice and Re-imagining International Law from the Bottom Up’, *supra* note 22, at 490-497.

<sup>195</sup> UNDROP, *supra* note 2, art. 15.4 reads ‘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’.

<sup>196</sup> Cotula, ‘Between Hope and Critique: Human Rights, Social Justice and Re-imagining International Law from the Bottom Up’, *supra* note 22, at 505.

of voice as well as low incomes'.<sup>197</sup> Attention to practical means of implementation as provided under the SSF Guidelines, however, remains essential, particularly as many SSF communities are located in remote areas and may not be able to take advantage of their procedural rights for logistical reasons.<sup>198</sup>

## **Linking the UNDROP and the SSF Guidelines to the Sustainable Development Goals**

Both the UNDROP and the SSF Guidelines seek to support the application of international human rights instruments and standards to SSF, and in doing so they are each remarkable in their own field. The UNDROP expands, to SSF, the understanding of the relevance of international human rights law and natural resources, which has mainly been concerned with land-based activities. The SSF Guidelines, in turn, stand out as an innovative international fisheries law instrument, as in that area of international law there is still insufficient integration with human rights.<sup>199</sup>

The UNDROP and the SSF Guidelines engage with similar issues, although from different perspectives. The Declaration directly articulates specific international human rights standards from the perspectives of the rightsholders, including the need to address systemic sources of discrimination, the multiple dimensions of poverty, and the underlying need to support the voice, vision and control of resources of small-scale fishers as part and parcel of the protection, respect and full realization of their human rights. The SSF Guidelines, in turn, mainly take the perspective of duty-bearers.<sup>200</sup> By applying the human rights-based approach for identifying good practices and sector-specific means of implementation, this instrument thereby seeks to balance the progressive realization of small-scale fishers' rights with the need to ensure the sustainable management of resources. While the SSF Guidelines may be seen as glossing over the need for more structural approaches, they usefully complement the UNDROP by providing a fine-grained picture of the technicalities that need to be tackled in the fisheries sector, and a more accessible translation of human rights for the specialized managers and decision-makers that are in practice implementing the human rights obligations of States.<sup>201</sup>

---

<sup>197</sup> Ibid, at 55.

<sup>198</sup> Justice may be brought to SSF communities in remote areas, for instance, as opposed to expecting remote communities to seek justice in central locations. For instance, in Brazil, the so-called itinerant justice enabled communities in remote areas to have access to legal advice and proceedings initiated by civil servants. See Julia Nakamura and Fábio Hazin, 'Assessing the Brazilian Federal Fisheries Law and Policy in light of the Voluntary Guidelines for Securing Sustainable Small-scale Fisheries' (2020) 113 *Marine Policy* 1-8.

<sup>199</sup> Ibid, 2-3.

<sup>200</sup> The elaboration on the human rights-based approach and the roles played by duty-bearers and right-holders was further supported by FAO in subsequent activities related to the SSF Guidelines implementation. See Sisay Yesanew, Nicole Franz and Lena Westlund, *FAO Fisheries and Aquaculture Proceedings. No. 53. Exploring the human rights-based approach in the context of the implementation and monitoring of the SSF Guidelines* (FAO 2016).

<sup>201</sup> The need to introduce human rights concepts and standards to fisheries professionals is highlighted by Song and Soliman, who also note the hurdle of overcoming mainstream understandings of 'fishing rights' as individual tradable commodities, which are geared towards wealth accumulation as opposed to protecting access to fisheries as an 'indivisible part of their culture, survival and wellbeing' (20). On the



Their combined interpretation and application are therefore called for, even when governments may not have supported the UNDROP, given the universal, interconnected, indivisible nature of the underlying international commitments to ensure inclusive, fair sustainable development.<sup>202</sup> To some extent, the SDGs provide the ground for doing so, by including specific targets on access of small-scale fishers to land, marine resources, productive resources and inputs, knowledge, financial services, markets and opportunities for value added.<sup>203</sup> But the SDGs address these issues from a technical perspective and the lack of explicit reference to relevant human rights calls into question the suitability of these targets to focus attention on the systemic causes of discrimination that prevent SSF communities from gaining access to these resources and the underlying need to control resources and production as part of the protection and realization of SSF communities' human rights.

The complexities underlying these targets, however, can be brought to light by reflecting on the widely acknowledged need to pursue the SDGs in a coherent manner and exploring the nexus between SSF-related targets and other SDGs. The respective contributions of the UNDROP and the SSF Guidelines can thus guide governments, development operators, and businesses in respecting human rights, as recommended by the HRC,<sup>204</sup> supporting efforts to realize the SDGs through policy coherence, for instance with reference to SDGs 1 (poverty), 2 (food security), 5 (gender equality), 13 (combating climate change) and 16 (access to justice). Both the UNDROP and the SSF Guidelines offer specific guidance on how to address all these issues, thereby supporting the understanding of the inter-dependencies across SDGs in the SSF context.

In conclusion, the UNDROP supports an understanding of the daily realities of marginalization of small-scale fishers that connects the good practices identified in the SSF Guidelines to the need to pursue the SDGs in a coherent manner. We thus argue that this understanding should help overcome the challenge of the limited support for the UNDROP by developed states, due to their resistance to embrace the rights holders' demands to recognize the 'relation between social justice claims and human rights norms' as well as on 'collective rights, on control over the means of production and agricultural value chains'.<sup>205</sup> Could the opportunities of a mutually supportive interpretation of international fisheries law, international human rights law and international environmental law to the benefit of realizing multiple SDGs rather be the

---

other hand, the authors seem to ignore the international human rights approach to balancing of rights and the implications in that context of the international recognition of the inter-dependence of human rights and a healthy environment (22-3). Andrew M. Song and Adam Soliman, 'Situating human rights in the context of fishing rights – Contributions and contradictions' (2019) 103 *Marine Policy* 19.

<sup>202</sup> For a dedicated analysis of these elements of the SDG, their meaning in terms of normativity and in *inter alia* elevating human rights, justice, political and moral considerations, see Graham Long, 'Underpinning commitments of the Sustainable Development Goals: indivisibility, universality, leaving no one behind' in Duncan French and Loïse J. Kotzé (eds), *Sustainable Development Goals: Law, Theory and Implementation* (Edward Elgar Publishing 2018).

<sup>203</sup> UNGA, 'Resolution 70/1 of 25 September 2015, Transforming our world: the 2030 Agenda for Sustainable Development', *supra* note 17.

<sup>204</sup> UNHRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment', *supra* note 77, Framework Principles 2, 8, 12 and 14.

<sup>205</sup> Cotula, 'Between Hope and Critique: Human Rights, Social Justice and Re-imagining International Law from the Bottom Up', *supra* note 22, at 513.

basis for a more constructive engagement of duty-bearers with the rightsholders involved in SSF? This Chapter has partially explored this question by analysing two key instruments for SSF, with a focus on tenure and control of natural resources, as well as the protection of traditional knowledge and procedural rights. Concrete implementation in coherent and complementary ways can be further supported by FAO and international human rights bodies, in their operational, advisory and monitoring activities respectively.

## **Selected Bibliography**

Cotula L, 'Between hope and critique: Human rights, social justice and re-imagining international law from the bottom up' (2020) 48 *Georgia Journal of International and Comparative Law* 49.

Morgera E, 'Under the radar: fair and equitable benefit-sharing and the human rights of indigenous peoples and local communities connected to natural resources' (2019) 23 *International Journal of Human Rights*.

Nakamura J and Hazin F, 'Assessing the Brazilian Federal Fisheries Law and Policy in light of the Voluntary Guidelines for Securing Sustainable Small-scale Fisheries' (2020) 113 *Marine Policy* 1.