

**FROM CONCEPT TO ACTION**

# **The Protection and Promotion of Farmers' Rights in East Africa**



**Ronald Naluwairo**

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## LIST OF ACRONYMS

<b>ACODE</b>	Advocates Coalition for Development and Environment
<b>AU</b>	African Union
<b>CBD</b>	Convention on Biological Diversity
<b>CPB</b>	Cartagena Protocol on Biosafety
<b>CPGRFA</b>	Commission on Plant Genetic Resources for Food and Agriculture
<b>FAO</b>	Food and Agriculture Organization
<b>GATT</b>	General Agreement on Tariffs and Trade
<b>GMOs</b>	Genetically Modified Organisms
<b>HIVOS</b>	Humanist Institute for Development Co-operation
<b>IFPRI</b>	International Food Policy Research Institute
<b>IUCN</b>	The World Conservation Union
<b>MAAIF</b>	Ministry of Agriculture, Animal Industry and Fisheries
<b>NAADS</b>	National Agriculture Advisory Services
<b>MFPEd</b>	Ministry of Finance, Planning and Economic Development
<b>NARO</b>	National Agriculture Research Organisation
<b>PEAP</b>	Poverty Eradication Action Plan
<b>PGRFA</b>	Plant Genetic Resources for Food and Agriculture
<b>PIC</b>	Prior Informed Consent
<b>PMA</b>	Plan for Modernization of Agriculture
<b>SMTA</b>	Standard Material Transfer Agreement
<b>TRIPS</b>	Trade Related Aspects of Intellectual Property Rights
<b>UNCED</b>	United Nations Conference on Environment and Development
<b>UNESCO</b>	United Nations Educational Social Cultural Organisation
<b>UPOV</b>	The International Union for the Protection of New Varieties of Plants
<b>WIPO</b>	World Intellectual Property Organisation
<b>WHO</b>	World Health Organization
<b>WTO</b>	World Trade Organization

## ACKNOWLEDGEMENTS

This policy research paper has been prepared to promote the understanding of the concept of Farmers' Rights with the view of contributing to their effective realization in East Africa specifically and Africa in general. The paper traces the origin and evolution of farmers' rights, examines their rationale and explains the different rights protectable under the concept of Farmers' Rights within the context of the International Treaty on Plant Genetic Resources for Food and Agriculture. The paper also examines the potential role these rights can play in regional and national development and explores the different policy options for their protection and promotion in East Africa.

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## EXECUTIVE SUMMARY

The importance of plant genetic resources and the need to conserve and sustainably utilize them has been the subject of many regional and international discussions in the last two and a half decades. The thrust of these discussions has centered not only on the modalities of ensuring that these resources are utilized in a sustainable manner but also the need to reward those who have helped nurture and made them available to successive generations. The adoption of the International Treaty on Plant Genetic Resources for Food and Agriculture represents an international consensus that the protection and promotion of farmers' rights is one way through which countries can achieve the above objectives.

The recognition of farmers' rights by the International Treaty on Plant Genetic Resources for Food and Agriculture and the need by member countries to fulfill their obligations has given policy makers a lot of challenges. These challenges mainly revolve on the available policy options for realization of these rights at the national and regional level. In East Africa, where the concept of Farmers' Rights is new, where majority of the people are illiterate farmers, and where poverty is getting to alarming levels, the implementation of these rights presents peculiar challenges. This paper identifies and addresses some of the major challenges in implementation of farmers' rights within East Africa's social, political, economic and cultural context.

The paper is premised on the understanding that the first step in realizing these rights lies in promoting awareness among the different stakeholders about the concept of Farmers' Rights. The concept of farmers' rights is new to many stakeholders in the region including the policy makers who are charged with the responsibility of their implementation. The paper therefore goes at length to explain the concept of Farmers' Rights including tracing its origin and evolution. The concept is summarized as based on conservation concerns and equity considerations. It is premised on the fact that rewarding the world farmers for their contribution to agro-biodiversity provides them the incentives to continue nurturing, sustainably utilizing and making available these resources for future generations.

It is emphasized that the concept entails the recognition and protection of many rights, the major ones being: the protection of traditional knowledge relevant to plant genetic resources; equitable sharing of benefits arising from their use; participation in decision making processes touching on the conservation and sustainable use of these resources and the right to save, use, exchange and sell farm saved seed/propagating material of farmers' varieties.

The paper also explores the potential role of farmers' rights in East Africa's regional development agenda and concludes that they provide a big opportunity to the region in addressing some of the major development challenges including poverty eradication, food security, rural transformation and preservation of cultural heritage.

Regarding the policy options for realization of these rights at the national level, the paper provides a number of alternatives. These include: developing *sui generis* system of protection of traditional knowledge relevant to plant genetic resources; recognition of customary law, practices and knowledge governance systems of farming communities; joint ownership of intellectual property and other related rights over new plant varieties; supporting the formation of farmer groups; supporting farmers' programmes, projects and initiatives relevant to the conservation and sustainable use of genetic resources; and appointing representatives of farmer groups to key policy decision making organs in the different sectors that have a bearing on issues of plant genetic resources.

Taking Uganda as a case study, the paper makes an assessment of the status of implementation of farmers' rights in East Africa. It is observed in that regard that although the three countries are at different stages in the implementation process, Uganda seems to be taking the lead. It has in place a National Task Force for Domestication of the International Treaty on Plant Genetic Resources for Food and Agriculture which is exploring the modalities of implementing farmers' rights among other things. Uganda also now has an advanced National Draft Policy on Plant Genetic Resources for Food and Agriculture in which farmers' rights constitute a major component. The country also has in place a law governing access to genetic resources and benefit sharing which deals with many aspects of farmers' rights as well.

By way of recommendations and way forward, the paper makes four major proposals. First, the need to scale up debate and dialogue among the different stakeholders on the need for and modalities of protecting and promoting farmers' rights. Secondly, the need for countries in the region to effectively participate in ongoing regional and international policy and decision making processes having a bearing on farmers' rights. Thirdly, the need for vigorous sensitization of the masses about issues of farmers' rights and the development of appropriate legal expertise and lastly, the need to invest in further analytical research on the issues and challenges involved in the effective realization of farmers' rights.

The paper concludes by calling upon policy makers in the region to prioritize the realization of farmers' rights in the national and regional development agenda. The policy makers are also challenged to start considering the need for



and modalities of a regional approach to farmers' rights in East Africa. This is particularly important especially so that the region is moving towards the East Africa Political Federation. The regional approach could also be cost effective both in terms of money and time. The plausibility of the regional approach also lies in the fact that farmers in the region share a lot in common not only in terms of their farming systems and practices but also the problems and challenges that face them.

## 1. INTRODUCTION

The adoption of the International Treaty on Plant Genetic Resources for Food and Agriculture (hereinafter referred to as the Treaty) represents an important milestone in the protection of farmers' rights<sup>1</sup>. It represents an international consensus on the need to protect and promote farmers' rights.

The concept of Farmers' Rights derives legitimacy from the important role farmers in all regions of the world have played over the generations and continue to play in conserving, improving and making available plant genetic resources for food and agriculture which are the foundation of agricultural systems and food security in the world<sup>2</sup>.

Despite its international recognition, the concept of Farmers' Rights remains unclear to many people in the East Africa region including policy makers who are charged with the responsibility of realizing these rights at the national level. Often times, the debate on farmers' rights has always narrowed down to the farmers' right to save, re-use, exchange and sell farm saved seed. Though one of the most important components, the right to seed is only one of the many rights comprised in the concept of Farmers' Rights.

This diffused and lack of clear understanding of the concept of Farmers' Rights is hampering the design and development of effective mechanisms to effectively realize these rights and their full benefits at the different levels. Indeed, the process of implementing these rights at the national level in many countries especially in sub-Saharan Africa is proceeding at a very slow pace largely due to lack of clarity about the concept of farmers' rights and the different options available for realization of these rights.

This policy research paper is therefore aimed at promoting the understanding of the concept of Farmers' Rights within the context of the Treaty and examining the potential role these rights can play in regional and national development. The paper also explores the different policy options for the protection and promotion of farmers' rights at national level and gives policy recommendations for their advancement in East Africa. It is hoped that this paper will be found useful by policy makers in East Africa and beyond who are in the process of developing policy and regulatory frameworks on farmers' rights in particular and plant genetic resources in general.

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<sup>1</sup> The treaty was approved by Conference Resolution 3/2001 of the Food and Agriculture Organisation Conference at its Thirty-First Session in November 2001. It entered into force on 29<sup>th</sup> June, 2004.

<sup>2</sup> See, the preamble to the Treaty.

## 2. TRACING THE ORIGIN OF FARMERS' RIGHTS

The concept of Farmers' Rights resulted from debates in the Food and Agriculture Organisation (FAO) that started in the early 1980s concerning the development of privately held intellectual property rights over plant genetic resources<sup>3</sup>. It resulted from the initiatives taken by FAO in promoting adherence to the International Undertaking on Plant Genetic Resources (hereinafter referred to as the Undertaking)<sup>4</sup>. FAO was concerned that a number of countries had expressed reservations to the Undertaking and that adherence to its provisions was generally poor.

Through its Commission on Plant Genetic Resources<sup>5</sup>, FAO recommended that the secretariat prepares a paper, for consideration by the Commission at its next session, analyzing the countries' reservations to the Undertaking and delineating possible courses of action, including suggestions for possible interpretations of the text to increase acceptance of the Undertaking. The Commission established two major reasons for the reservations and poor adherence to the treaty. The first reason related to the Undertaking's approach to plant genetic resources for food and agriculture as a common heritage of mankind which should be generally available without restriction and the second concerned the need to recognize plant breeders' rights<sup>6</sup>.

Recognition of plant breeders' rights therefore emerged as one of the ways of increasing adherence to the Undertaking. Debate about the need to recognize farmers' rights then started in response to the push for recognition of plant breeders' rights.

These debates were protracted and characterized by a lot of controversy, suspicion and uncompromising spirit between the developed world and the developing countries. The concern especially from the developing countries was the inequity of continuing the historical free flow of germplasm from their countries to the developed

### Box 1: Defining Farmers During the Treaty Negotiations

"If you are educated, wear a shirt and a pair of trousers and cultivate crops with help of a tractor, chances are that you may not be called a farmer. Unless you are attired in a dirty dhoti-kurta, wear soiled shoes or chappals and still perform subsistence farming with a bullock-drawn wooden plough, you do not qualify to be a farmer. At least, that is what United States, Canada, Australia, Japan and South Korea wanted"

Source: Sharma Devinder, 2002

<sup>3</sup> The terminology "farmers' rights" was coined and first used by Pat Roy Mooney and Cary Fowler in the early 1980s to highlight the valuable but unrewarded contribution of farmers to plant genetic resources for food and agriculture. See, Anderson R; *The History of Farmers' Rights: A Guide to Central Documents and Literature*. The Fridtjof Nansen Institute, Norway, 2005.

<sup>4</sup> The International Undertaking on Plant Genetic Resources was adopted by the FAO Conference at its Twenty Second Session in Rome, 1983 as a non legally binding instrument to among other things encourage international cooperation in the conservation and sustainable use of plant genetic resources. It was this Undertaking that was later revised, developed and adopted into the Treaty.

<sup>5</sup> The Commission was established by FAO Conference Resolution 9/83 in 1983 to deal with issues related to plant genetic resources, including monitoring the operation of the international arrangements provided for in the International Undertaking.

<sup>6</sup> See, Anderson R, December 2005.

industrialized countries which were seen as the major beneficiaries of plant breeders' rights<sup>7</sup>. The developing countries also argued that extension of intellectual property rights over plant genetic resources was unjustified and unfair unless the farmers were rewarded first for their role in nurturing and making available these resources which are the foundation of modern plant breeding. They considered the formal breeders' role as mere "minor improvements" on varieties already developed by farmers and their local and indigenous communities. There was also concern that plant breeders' rights would disrupt and destroy the customary practices of farmers to save, reuse, share and develop plant varieties; practices which were seen as a basis for their continued contribution to conservation and innovation in plant genetic resources<sup>8</sup>.

The developed countries on the other hand sought to justify the need for recognition of plant breeders' rights on the basis that their scientists invest a lot of time and money in research into techniques that enable them make genetic improvements. For that matter, they needed to recoup their investment and be rewarded for their effort. They also argued that there was no concept either in national or international jurisprudence that would provide a sufficient basis for recognition of farmers' rights<sup>9</sup>. In other respects, they argued that it was a fantasy to believe that the world's first farmers knew they were improving the value of species for mankind so as to justify the need to recognize their effort in nurturing and availing plant genetic resources<sup>10</sup>

In an effort to have a negotiated and acceptable solution, it was agreed that an interpretation to the Undertaking be provided that would recognize both plant breeders' rights and farmers' rights. Thus, by Resolution 4/89, the FAO Conference at its 25<sup>th</sup> Session in Rome<sup>11</sup> provided an agreed interpretation to the Undertaking that recognized that plant breeders' rights as provided for by the International Convention for the Protection of New Varieties of Plants were not incompatible with the Undertaking<sup>12</sup>. The resolution simultaneously recognized farmers' rights which were subsequently defined in Conference Resolution 5/89. The concept of Farmers' Rights was thus introduced in the Undertaking as a response to the developed countries' pressure to recognize plant breeders' rights.

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<sup>7</sup> Historically, plant genetic resources were freely exchanged in accordance with the idea that these resources were a common heritage of mankind that had to be freely available for the present and future generation of mankind. This is the position that obtained in the Undertaking before its revision.

<sup>8</sup> Anderson R, *The History of Farmers' Rights: A Guide to Central Documents and Literature*, The Fridtjof Nansen Institute, Norway, 2005.

<sup>9</sup> See, FAO's Progress Report on the International Undertaking on Plant Genetic Resources, CPGR/87/4, December 1986.

<sup>10</sup> See, Sharma D, 2002.

<sup>11</sup> 11-29<sup>th</sup> November 1989.

<sup>12</sup> The International Convention for Protection of New Varieties of Plants was adopted in Paris in December 1961 to provide protection of new varieties of plants by intellectual property rights. The Convention has so far been revised three times viz. in 1972, 1978 and 1991. In East Africa, only Kenya is a member to the Convention. It is a member to the 1978 Act.

Resolution 5/89 defined the concept of Farmers' Rights in terms of the substantive grounds for the concept, the entities in which the rights are vested and the objectives for which they should be recognized<sup>13</sup>. It defined farmers' rights as "rights arising from the past, present and future contribution of farmers in conserving, improving, and making available plant genetic resources, particularly those in centres of origin/diversity". It also provided that these rights were vested in the international community, as trustee for the present and future generation of farmers, for the purpose of ensuring full benefits to all farmers, and continuation of their contributions, as well as attainment of the overall purpose of the Undertaking.

FAO Conference Resolutions 4 and 5 were therefore land mark decisions in the history and struggle for recognition and protection of farmers' rights<sup>14</sup>. These resolutions were however not binding nor did they provide any measures for realization of farmers' rights. Thus, in 1991, while adopting a new annex to the Undertaking, the FAO Conference in its Resolution 3/91 also provided that farmers' rights were to be implemented through an international fund on plant genetic resources. This fund was supposed to support plant genetic conservation and utilization programmes. For reasons difficult to discern from available literature, this fund never materialized.

Within the Convention on Biological Diversity (CBD)<sup>15</sup> negotiation and post negotiation processes, aspects of farmer's rights had been considered at different fora and in different contexts. There was however no major conclusion reached on the concept except Article 8(j) of the CBD which is an expression of agreement by the Parties to respect, preserve, maintain and promote traditional knowledge, innovations and practices of indigenous and local communities relevant to the conservation and sustainable use of biological diversity.

In May 1992, while adopting the agreed text of the Convention on Biological Diversity, countries also adopted Resolution 3 of the Nairobi Final Act. This Resolution recognized that access to *ex situ* collections not acquired in accordance with the Convention, and farmers' rights, were outstanding matters which the CDB had not addressed. It therefore called for solutions to be sought within FAO's Global System on the Conservation and Sustainable Use of Plant Genetic Resources for Food and Agriculture<sup>16</sup>. It also urged for ways and means to be

<sup>13</sup> Moore G., and Tymowski W., Explanatory Guide to the International Treaty on Plant Genetic Resources for Food and Agriculture, IUNC Environmental Policy and Law Paper No. 57, 2005.

<sup>14</sup> It was these Resolutions that formally introduced the concept of Farmers' Rights in the International Undertaking.

<sup>15</sup> The CBD is a global comprehensive agreement addressing the conservation, sustainable use and equitable sharing of benefits arising from all aspects of biological diversity including genetic resources, species and ecosystems.

<sup>16</sup> The development of the FAO Global System on Plant Genetic Resources began in 1983 with the establishment of the Commission on Plant Genetic Resources (now the Commission on Genetic Resources for Food and Agriculture-CGRFA). The objectives of the Global System are to ensure the safe conservation, and promote the availability and sustainable use of plant genetic resources by providing a flexible framework for sharing the benefits and burdens. The FAO Global System is constituted of three major elements viz. the Commission on Genetic Resources for Food and Agriculture, the International Treaty on Plant Genetic Resources for Food and Agriculture and the Global Plan of Action for the Conservation and Sustainable Use of Plant Genetic Resources for Food and Agriculture.



explored to develop complementarity and cooperation between the CBD and the FAO Global System on the Conservation and Sustainable Use of Plant Genetic Resources for Food and Agriculture.

In June 1992, the United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro called for the strengthening of the FAO Global System on the Conservation and Sustainable Use of Plant Genetic Resources for Food and Agriculture and its adjustment in line with the CBD, as well as taking further steps to realize farmers' rights<sup>17</sup>.

Accordingly, the FAO Conference requested the Director General of FAO to provide a forum for negotiations on revision of the Undertaking and adapting it in harmony with the CBD as well as considering the issue of realization of farmers' rights<sup>18</sup>. Negotiations to the above effect commenced in November 1994 and in April 1999, the Commission on Plant Genetic Resources for Food and Agriculture at its 8<sup>th</sup> Regular Session agreed to establish a Contact Group to continue the process. Within the Contact Group, countries negotiated and agreed on three major Articles of the Undertaking including Article 15 which was later adopted into Article 9 of the Treaty which provides for recognition, protection and promotion of farmers' rights.

### 3. ANALYSING THE CONCEPT OF FARMERS' RIGHTS

**Box 2: Five Key Things to Know About the Concept of Farmer's Rights**

- It emerged as counter balance to Plant Breeders' Rights
- It is a political concept aimed at motivating farmers.
- It is based on equity considerations and conservation concerns
- It is intrinsically linked to Human Rights.
- Farmers' rights are collective rights as opposed to individual rights.

The concept of Farmers' Rights generally emerged as a counter balance to the increased demand for plant breeders' rights in international negotiations. It is premised on the fact that all modern plant breeding is in one way or another based on plant genetic resources developed, nurtured and made available by farmers over the generations. The concept

therefore came into view to draw International attention to the unremunerated innovations of farmers that were seen as the foundation of all modern plant breeding<sup>19</sup>.

The plant genetic resources and associated knowledge that farmers and their local and indigenous communities have nurtured, developed and conserved are not the product of any single farmer or farming community but are collective products of many farming communities developed through many generations

<sup>17</sup> See, Chapter 14 of Agenda 21, Programme Area G

<sup>18</sup> See, FAO Conference Resolution 7/93 adopted at the 27<sup>th</sup> Session in November, 1993.

<sup>19</sup> Anderson R, *The History of Farmers' Rights: A Guide to Central Documents and Literature*, The Fridtjof Nansen Institute, Norway, 2005.

world over. Farmers' rights are thus collective rights as opposed to individual rights.

The rationale for farmers' rights is to provide farmers and farming communities rewards for their contribution to agro-biodiversity and give them incentives to continue improving and making available plant genetic resources for food and agriculture which are the foundation of modern plant breeding and sustainable agriculture. The concept of Farmers' Rights is therefore based on equity considerations and conservation concerns. It is an acknowledgement that farmers and their local and indigenous communities are innovators too and as such deserve recognition and rewards just as the formal plant breeders do.

The concept of Farmers' Rights thus emerged as part of the international political effort to correct the inequity created by the growing use and expansion of intellectual property rights to plant genetic resources than as a legal or property right<sup>20</sup>. It does not therefore necessarily create any legal obligations per-se on States party to the Treaty or anyone unless and until the individual national Governments decide so within the meaning of Article 9.2 of the Treaty<sup>21</sup>. It is a political motivation to farmers and farming communities to continue nurturing, conserving and making available plant genetic resources for food and agriculture.

The concept has recently been linked to the Right to Food<sup>22</sup>. A June 1999 study on the Right to Food, submitted to the Commission on Human Rights, urged that farmers' rights should be promoted as part of the Right to Food, especially since the future food supply and its sustainability could depend on such rights being established on firm footing<sup>23</sup>. To the extent that the Right to Food is intrinsically linked to the Right to Life which is the basic and most fundamental human right, it is logical therefore to argue that farmers' rights should be promoted and protected as an integral component of fundamental human rights.

#### **4. DISTINGUISHING FARMERS' RIGHTS FROM PLANT BREEDERS' RIGHTS**

Farmers' rights differ significantly from plant breeder's rights. Plant breeders' rights are a form of intellectual property rights created to provide incentives especially to the private sector actors to engage in plant breeding. They are defined by the International Convention for the Protection of New Varieties of Plants as exclusive rights granted to a person over the commercial production and marketing of reproductive or vegetative propagating material of the protected variety.

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<sup>20</sup> Bragdon S., Fowler z., Franca and Goldberg E., Law and Policy of Relevancy to the Management of Plant Genetic Resources, International Plant Genetic Institute and the International Food Policy Research Institute, Rome, 2005.

<sup>21</sup> Article 9.2 provides that the responsibility for realization of farmers rights rests with individual national Governments according to their needs, priorities and national law.

<sup>22</sup> The Right to Food entails that people have access to enough and quality food at all times for a health and active life.

<sup>23</sup> Anderson R, The History of Farmers' Rights: A Guide to Central Documents and Literature, The Fridtjof Nansen Institute, Norway, 2005.

Farmers' rights on the other hand are rights arising from the past, present and future contribution of farmers in conserving, improving and making available plant genetic resources which are the basis of modern plant breeding and the foundation of agriculture systems and food security in the world. Farmers' rights are thus collective rights as opposed to individual rights.

The demand for protection of plant breeders' rights particularly in developing countries arose from the conclusion of the GATT Uruguay Round and its agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) at Marrakech in 1994. The TRIPS Agreement obliged the members of GATT (now World Trade Organisation) to provide some form of intellectual property protection on plant varieties either through patents or some "effective *sui generis* system or by any combination thereof"<sup>24</sup>. Since then, countries party to the TRIPs Agreement that had no protection for new plant varieties started on the process of fulfilling their newly incurred international obligation to provide such protection. This has mainly been by way of recognizing plant breeders' rights. Thus, whereas the origins of protection of plant breeders' rights in most developing countries are to be found in TRIPs and are therefore trade related, farmers' rights are recognized and provided for in the Treaty and other instruments dealing with the conservation and sustainable use of biodiversity. They are largely based on the need to reward farmers and provide them with incentives to continue nurturing, improving, conserving and making available plant genetic resources for food and agriculture.

The widely used model for protection of plant breeders' rights at the national level until recently has been the Union for Protection of New Varieties of Plants (UPOV) model<sup>25</sup>. However with the African Union (AU) initiative of developing appropriate model laws on issues of biodiversity, the pattern is likely to change with many countries in Africa expected to opt for the African Model Law on The Protection of the Rights of Local Communities, Farmers and Breeders, and or the Regulation of Access to Biological Resources<sup>26</sup>. The significant difference between the two model laws is that the UPOV model (especially the 1991 Revision) gives greater protection and exclusivity to formal plant breeders whereas the African Model law seeks to protect plant breeders rights in harmony with farmers' and community rights. The African Model Law thus provides for detailed exemptions and restrictions to rights of breeders in favor of farmers and their indigenous and local communities.

The 1978 UPOV Convention contained provision to the effect that a plant variety right did not extend to farm saved seed as a privilege of farmers. The phrase

<sup>24</sup> Article 27.3b.

<sup>25</sup> UPOV is an intergovernmental organisation established by the International Convention for the Protection of New Varieties of Plants to provide and promote an effective system of plant variety protection with the aim of encouraging the development of new varieties of plants for the benefit of society.

<sup>26</sup> Uganda is already taking this approach as reflected in the provisions of the Plant Variety Protection Bill, 2004.

“farmers’ privileges” therefore came to mean the exemption to plant breeders’ rights that allowed farmers to save, use and exchange but not sell seed of a protected variety. However, in 1991, UPOV was revised to increase protection of plant breeders’ rights by making farmers’ privilege optional.

The table below tries to summarize some of the conceptual distinctions between farmers’ rights and plant breeders’ rights.

### Distinguishing Farmers’ Rights from Plant Breeders’ Rights

	<b>Plant Breeders Rights</b>	<b>Farmers Rights</b>
<b>Type of Rights</b>	They are a form of intellectual property rights that are exclusive in nature	They are collective rights
<b>Ownership of Rights</b>	Rights awarded to individuals	Vested in communities to be held in trust for the present and future generations
<b>Extent of the Rights</b>	Rights limited to a particular plant variety	A bundle of rights that extend to plant genetic resources for food and agriculture
<b>Scope of the such Rights</b>	Rights recognize a single inventive step as long as the variety is “new” and clearly distinguishable from any other variety whose existence is a matter of common knowledge	Rights recognize the cumulative intellectual contributions of many preceding generations of farmers
<b>Duration</b>	Limited	Unlimited

## 5. FARMERS’ RIGHTS UNDER THE TREATY AND POSSIBLE OPTIONS FOR THEIR REALIZATION

The Treaty affirms that the basis of farmers’ rights is their past, present and future contributions to the conservation, improvement and sustainable use of plant genetic resources for food and agriculture. It recognizes in particular the enormous contribution that the local and indigenous communities and farmers of all regions of the world, particularly those in the centers of origin and crop diversity, have made and will continue to make in the conservation and development of plant genetic resources which constitute the basis of food and

agriculture production throughout the world<sup>27</sup>. The Treaty therefore recognizes the effective realization of farmers' rights as key in ensuring food security and sustainable agriculture.

It enumerates the possible elements of farmers' rights and vests the responsibility for their realization at national level in individual Governments<sup>28</sup>. National Governments are encouraged to take appropriate measures to protect and promote farmers' rights in accordance with their needs and priorities. By this provision, the primary role of realizing farmers' rights was therefore taken away from the international community and vested in the national Governments<sup>29</sup>.

Article 9.2 of the Treaty strictly interpreted also reveals that implementing and realizing farmers' rights is not an international legal obligation on the member States<sup>30</sup>. It is a mere moral obligation which member States may or may not take on as they so wish "in accordance with their national needs and priorities and subject to their national legislation".

**Box 3: Elements of Farmers' Rights under the Treaty**

- Protection of traditional knowledge relevant to plant genetic resources for food and agriculture
- Equitable sharing of benefits arising from use of plant genetic resources for food and agriculture
- Participation in decision making processes touching on the conservation and sustainable use of plant genetic resources for food and agriculture
- The right to save, use, exchange and sell farm saved seed /propagating material of farmers' varieties

National Governments are however encouraged to take measures to protect and promote these rights in accordance with their needs and priorities. Such measures could include development of national policies, legal and institutional frameworks for realization of these rights and their benefits. The measures could also include support and assistance to farmers and their local and indigenous communities.

Although the Treaty provision on protection of farmers' rights does amount to an international obligation on member States, countries in East Africa have every thing to gain out of their realization. These rights if effectively implemented and realized have great potential to address some of East Africa's chronic problems including poverty, disease and food insecurity among others<sup>31</sup>. These countries should therefore embrace these rights and incorporate them in national policy, legislation and development planning processes.

<sup>27</sup> Article 9.1

<sup>28</sup> Article 9.2

<sup>29</sup> The Undertaking had vested farmers' rights in the international community. See FAO Conference Resolution 5/89.

<sup>30</sup> The language used in the provision is not mandatory and does not therefore bind States party to the Treaty.

<sup>31</sup> For the discussion on the potential role of farmers' rights in East Africa's Development, see section 7 of this paper



The elements enumerated by the Treaty for the realization of farmers' rights include: the protection of farmers' traditional knowledge relevant to plant genetic resources for food and agriculture, participating in decision making processes regarding plant genetic resources for food and agriculture, the right to save, use, exchange and sell farm saved seeds and the equitable sharing of benefits arising from utilization of plant genetic resources for food and agriculture.

### 5.1. Protection of Traditional Knowledge

The need to protect traditional knowledge as it relates to plant genetic resources for food and agriculture arose from the recognition that current intellectual property rights regimes in particular plant breeders' rights do not recognize and reward the local communities of farmers

**Box 4: Nature of Traditional Knowledge**  
Traditional knowledge comprises knowledge which has been developed by local communities over generations, but which still continues to be developed. It is not static; it evolves and generates new information as a result of improvements and adaptation to changing circumstances

whose knowledge, innovations and practices play an important role in nurturing and making available plant genetic resources which are the basis of modern plant breeding. Concern over the rapid loss of traditional knowledge and the need to promote such knowledge in ensuring conservation and sustainable use of plant genetic resources were also big issues that informed and shaped the debates leading to the recognition and protection of the farmers' right to their traditional knowledge in the Treaty.

What amounts to traditional knowledge has been a subject of considerable discussion and although the debate is not yet completely resolved, there is now a generally acceptable agreement of what it entails. Traditional knowledge comprises knowledge which has been developed by local communities over generations, but which still continues to be developed. The debate regarding protection of traditional knowledge has also revolved around the difference (if any) and relevancy of the distinction between traditional knowledge and local & indigenous knowledge<sup>32</sup>. But whatever the difference, many international instruments, organizations and processes have recognized the need to recognize, protect and promote traditional knowledge of farmers and their local and indigenous communities. The CBD for instance recognizes and asserts that the knowledge, innovations and practices of indigenous and local communities are essential for the conservation and sustainable use of biodiversity and that they must be recognized and protected<sup>33</sup>. The protection of traditional knowledge is

<sup>32</sup> See, arguments made by members of the Crucible Group in *Seeding Solutions, Volume 2, Options for National Laws Governing Access and Control Over Genetic Resources and Biological Innovations, 2002*. They attempt to define indigenous and local knowledge as that which is held and/ or developed by indigenous and local communities within cultural contexts that can be identified as indigenous and local. They caution however that such a definition would leave protection of such knowledge to challenge on the basis that it was not developed as part of a practice that was sufficiently embedded in indigenous and/ or local cultures. In any case not all countries recognize existence of indigenous people.

<sup>33</sup> See, Article 8 (j)

also being discussed in other international organizations such as World Intellectual Property Organization (WIPO), World Trade Organization (WTO), World Health Organization (WHO), United Nations Educational Social Cultural Organisation (UNESCO) to mention but a few<sup>34</sup>. The discussions in these bodies are considering promoting and protecting traditional knowledge in different contexts but the common thread in all these efforts is to enable the local and indigenous communities and their people benefit from their knowledge and have a say on how, by whom and when it should be used.

The obligation to protect and promote traditional knowledge by the Treaty is intended among other things to enable the indigenous and traditional people benefit from their knowledge. It is also intended to compensate indigenous and traditional communities for their role in nurturing, conservation and sustainable use of plant genetic resources. The protection of traditional knowledge is therefore a critical element in the equitable sharing of benefits arising from use of plant genetic resources for food and agriculture. National Governments are therefore encouraged to put in place mechanisms for the recognition, protection and compensation of knowledge and innovations of traditional communities.

Although the debate on how to recognize and protect traditional knowledge has been ongoing for over two decades now, final universally acceptable solution to achieve such objective has not emerged. But what is generally acceptable is that, because of its nature, the best way of protecting and promoting traditional knowledge is through development of a *sui generis* system of protection and

**Box 5: Challenges in Developing a *Sui Generis* System for Protection of TK**

- Defining Traditional Knowledge
- Requirements for protection
- Rights to be conferred
- Entitlement to rights
- Modes of acquisition
- Duration
- Enforcement measures

rewards that takes into account the peculiarities of traditional knowledge as it relates to plant genetic resources for food and agriculture<sup>35</sup>. Such system should among other things define what traditional knowledge relevant to plant genetic resources for food and agriculture is and should stipulate the conditions for the grant of the protection/ rights. The *sui- generis* system should also

specify the rights to be conferred and those entitled to such rights. In order to be effective, the system should also have criminal and civil sanctions for the violators of the rights conferred<sup>36</sup>.

<sup>34</sup> Commission of Intellectual Property Rights, Integrating Intellectual Property Rights and Development Policy, London, 2002.

<sup>35</sup> *Sui generis system* is a Latin phrase meaning "of its own kind"

<sup>36</sup> The Crucible II Group, Seeding Solutions. VOL. 2: Options for national laws governing control over genetic resources and biological innovations, IDRC, IPGRI, Dag Hammarskjold Foundation, 2001.

Effective protection of traditional Knowledge would also require national Governments to enact mandatory requirements of disclosure of the source of germplasm used, in the application procedures for plant breeders' and other *sui- generis* rights touching on plant genetic resources for food and agriculture . Where such germ plasm belongs to a local community or group of farmers, evidence of Prior Informed Consent (PIC) for its use and arrangements for the equitable sharing of benefits should also be required.

The customary laws and practices and the knowledge governance systems of traditional communities should also be recognized and reinforced<sup>37</sup>.

Documentation of traditional knowledge relating to plant genetic resources for food and agriculture would also go a long way in addressing its rapid loss and promoting its wider use.

## **5.2. The Right to Equitably Share in the Benefits Arising From Utilization of Plant Genetic Resources for Food and Agriculture**

The right to equitable sharing of benefits arising from use of plant genetic resources for food and agriculture forms one of the main cornerstones of farmers' rights. Farmers' rights were adopted to allow farmers, their communities, and countries in all regions, to participate fully in the benefits derived, at present and in the future, from the improved use of plant genetic resources, through plant breeding and other scientific methods. This aspect of farmers' rights directly flows from the major objectives of the Treaty and the CBD<sup>38</sup>.

There is increasing evidence that economic returns of trade in genetic resources and particularly plant genetic resources for food and agriculture has been steadily rising over the last decades yet the local communities and farmers who nurture and supply these resources have received insignificant or no benefit at all<sup>39</sup>. The farmers' right to equitably participate in the benefits arising from the utilization of plant genetic resources for food and agriculture is therefore intended to enable farmers to share in the productivity and profitability of these resources. This right to equitable sharing of benefits applies in relation to the results of research and development and the benefits arising from the commercial and other utilization of plant genetic resources for food and agriculture<sup>40</sup>. These benefits can generally be classified as monetary and non monetary and could

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<sup>37</sup> Ibid

<sup>38</sup> Both the international agreements aim at ensuring among other objectives; a fair and equitable sharing of benefits arising out of utilization of genetic resources generally (in case of the CBD) and plant genetic resources specifically (in case of the International treaty). See Articles 1 of the CBD and the Treaty.

<sup>39</sup> See generally, Nyasha C., and Tomme R., Access to Genetic Resources, and Sharing the Benefits of Their Use: International and Sub - Regional Issues.

<sup>40</sup> Correa C., Options for the Implementation of Farmers' Rights at the National Level, South Centre Working Paper No.8, 2000.

range from sharing financial benefits to exchange of information, access to and transfer of technology and capacity building<sup>41</sup>.

Benefit sharing may also be implemented through farmers' access to funds arising from taxes or levies associated with trade in seeds, or through other charges imposed on breeders that benefit from farmers' contributions<sup>42</sup>. The success of this option would however require mechanisms to ensure that the seed industry does not shift the burden of such taxes and levies to the farming communities through charging high price for the seed. The regulatory authorities would therefore be expected to monitor and control the pricing system. For this option to work well also, national patents, plant breeders' rights and other seed laws should establish the obligation to reveal the source of genetic material used for creation of the new variety and where it belongs to farmers and or their local and indigenous communities evidence of PIC and benefit sharing arrangements.

The other option for ensuring equitable sharing of benefits is for farmers and their local and indigenous communities to negotiate for joint ownership of intellectual property related rights over new plant varieties. This mechanism will ensure that farmers and their communities share in the royalties of the commercial exploitation of the particular variety. For this option to be successful however, farmers and their communities should have the capacity to monitor the sales and other means of exploitation of such varieties. They should also have capacity to enforce their rights under the joint ownership arrangement in case of violation.

Equitable sharing of benefits could also entail supporting and assisting farmers' programmes, projects and other initiatives aimed at encouraging innovations, conservation and sustainable use of plant genetic resources for food and agriculture. For this purpose, it may be necessary for the farmers and their local and indigenous communities to establish Funds where national Governments, the international community and other entities could make their contribution towards such programmes and initiatives.

### **5.3. The Right to Participate in Decision Making Processes**

The right to participate in decision making processes extends to taking part in decision making at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture<sup>43</sup>. This right is premised on the fact that in many countries particularly in the developing

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<sup>41</sup> These are the specific mechanisms of benefit sharing identified by the Treaty for the benefits arising from use of plant genetic resources for food and agriculture in the multilateral system. These benefits should primarily flow to farmers who conserve and sustainably utilize plant genetic resources for food and agriculture. See Article 13.2 of the Treaty.

<sup>42</sup> Correa C., Options for the Implementation of Farmers' Rights at the National Level, South Centre Working Paper No.8, 2000.

<sup>43</sup> Article 9.2 (c)

world, farmers generally but in particular the vulnerable group of farmers which comprise the women, youth and the old are marginalized and discriminated against in critical decision making processes regarding plant genetic resources for food and agriculture. As such, their efforts and innovations in plant genetic resources management are hardly recognized and their specific needs and priorities are often not adequately provided for in national policy<sup>44</sup>.

**Box 6: Key Considerations in Realizing the Farmers' Right to Take Part in Decision Making Processes.**

- Supporting & Facilitating the Formation of Farmer Groups
- Guaranteeing the Right of Access to Information
- Capacity Building
- Working Towards Creation of a Literate Class of Farmers
- Appointing Farmers and their Representatives to Key Decision Making Bodies

The farmers' right to participate in decision making processes therefore calls for mechanisms and strategies to be put in place that will ensure the effective and equitable participation of farmers in the development and implementation of plans, policies, programmes and processes concerning plant genetic resources for food and agriculture. Taking part in decision making processes is part and parcel of the farmers' democratic rights. However, for farmers to be able to effectively enjoy this right, there are a number of things that have to be guaranteed. These include: access to information, capacity building, strong and well organized farmer groups and ability to read and write among others. Unless Governments in the region address these issues, the farmers' right to participate in decision making processes would largely remain a myth. Appointing farmers and/or their representatives to critical policy decision making organs is also one practical way of having farmers participate in making decisions related to the conservation and sustainable use of plant genetic resources for food and agriculture at the national level.

#### **5.4. The Right to Save, Use, Exchange and Sell Farm Saved Seed/Propagating Material**

Seeds are the first and most essential input into any agricultural based production system in the world. They are the foundation of agriculture and food security. In East Africa where over 80% of the population live on agriculture, the right to save, use, exchange and sell farm saved seed becomes a very critical economic issue to the population's welfare and livelihood security<sup>45</sup>.

Seed saving is not just an activity of keeping seeds for the next planting but is intimately linked to a whole gamut of cultural traditions, social relationships and economic support systems that characterize and allow farmers and farming

<sup>44</sup> Moore G., and Tymowski W., Explanatory Guide to the International Treaty on Plant Genetic Resources for Food and Agriculture, IUNC Environmental Policy and Law Paper No. 57, 2005.

<sup>45</sup> The right to seed is recognized by the African Model Law on the Protection of the Rights of Local Communities, Farmers and Breeders, and for Regulations of Access to Biological Resources as the foundation of agricultural practices and necessary for farmers to keep control of their livelihood systems.



communities to survive and adapt through generations<sup>46</sup>. Thus other than their importance to food security and agriculture production system, seeds constitute a strong social and cultural bond among farmers and between communities. It has helped define and reinforce kinship, friendship and solidarity among farmers through sharing and exchange of seeds<sup>47</sup>. Seed saving is also a very important economic resource for farmers. It translates into economic savings for farmers who do not have to purchase from other farmers or from the market.

Despite its importance to the social, economic, cultural and political wellbeing of farmers and their communities, the right to seed in the Treaty is limited to matters pertaining to plant genetic resources for food and agriculture. The right is recognized and protected within the context of securing the farmers' customary practices of saving, reusing and exchanging seed as a basis of ensuring their continued contribution to the conservation and innovation in plant genetic resources.

The importance the Treaty accords this right can not be over emphasized. It provides that "Nothing in this Article shall be interpreted to limit any rights that farmers have to save, use, exchange and sell farm-saved seed/propagating material"<sup>48</sup>. The Treaty however subjects the farmers' right to seed to "national law and as appropriate" meaning that Governments have the absolute discretion to determine whether or not to recognize and protect the right, the extent of protection if any and the means of protection. But given the importance of this right as highlighted above, countries in East Africa should not lose any opportunity to put in place mechanisms and strategies that ensure that their farmers' right to seed is guaranteed. Such measures could include securing the farmers' right to seed in plant breeders legislation, seed legislation and other *sui generis* plant variety legislation. In such legislation it would also be important depending on the extent of protection accorded to the right, to render null and void any transaction that would require farmers to give up their right.

The biggest challenge that national Governments face in implementing this component of farmers' rights is how to reconcile this right with plant breeders' rights when it comes to protected plant varieties. There is a strong belief among a cross section of stakeholders to the effect that the

**Box 7: Major Challenges in Realization of Farmers' Rights**

- Lack of Awareness and Knowledge Pertaining to Farmers' Rights
- Economic and Political Obstacles
- Inadequate Legislation and Policies
- Weak Implementation Capacity
- External Pressure and Influence of Seed Companies
- Inadequate Advocacy Especially From Civil Society Organizations
- Threats from Genetically Modified Organisms.

Source: Anderson R., November, 2005

<sup>46</sup> Paul Borja; Terminator Seeds: Terminating Farmers' Rights? Paper presented during the forum "IS GURTS (Terminator) the Answer to Transgene Contamination?" organized by the ETC Group on 31<sup>st</sup> May 2005 as a side event at the Meeting of the Parties to the Cartagena Protocol on Biosafety, Montreal, 2005.

<sup>47</sup> Ibid

<sup>48</sup> Article 9.3

unrestricted use of intellectual property rights protected material by farmers will erode the incentives to commercial breeding and create a threat to future world food security<sup>49</sup>. One solution to this challenge could be to provide for varying exceptions in plant breeders' legislation that allow different categories of farmers reuse protected seeds in varying proportions<sup>50</sup>. This would however require careful analysis before determining the categories of farmers, the nature of exceptions and how the entire arrangement would be monitored and enforced.

## 6. FARMERS' RIGHTS BEYOND THE INTERNATIONAL TREATY

It is important to note that the elements of farmers' rights enumerated in the Treaty are not exclusive. The language used indicates that farmers' rights under the Treaty are inclusive<sup>51</sup>. This therefore gives room to national governments to provide for more rights as they deem appropriate according to their national needs and priorities.

Thus in addition to rights provided for under the Treaty, the African Model Law on the Protection of the Rights of Local Communities, Farmers and Breeders, and for Regulations of Access to Biological Resources (hereinafter referred to as the Model Law) provides for more rights to be protected under the framework of farmers' rights. These include the farmers' right to;

- use a new breeders' variety protected to develop farmers' varieties, including material obtained from gene banks or plant genetic resource centers and
- Collectively save, use, multiply and process farm-saved seed of protected varieties.

In addition, the model law recognizes farmers' varieties and breeds and accords them protection under the rules of practice as found in, and recognized by the customary practices and laws of the concerned local farming communities, whether such laws are written or not. In this regard, the model law provides further that a variety with specific attributes identified by a community shall be granted intellectual protection through a variety certificate<sup>52</sup> which does not have to meet the criteria of distinction, uniformity and stability.

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<sup>49</sup> Correa C., Options for the Implementation of Farmers' Rights at the National Level, South Centre Working Paper No.8, 2000.

<sup>50</sup> For more options on reconciling plant breeders rights and the farmers' right to seed, see Carlos M Correa., 2000.

<sup>51</sup> Article 9.2 which enumerates the elements of farmers' rights provides among other things that "in accordance with their national needs and priorities, each contracting party should as appropriate, and subject to its national legislation, take measures to protect and promote farmers including....."

<sup>52</sup> The variety certificate would entitle the community to have the exclusive rights to multiply, cultivate, use or sell the variety, or to license its use without prejudice to farmers rights.

## 7. EAST AFRICAN FARMERS AND THEIR AGRICULTURAL SYSTEMS

Farmers, their farming communities and agricultural systems in East Africa share a lot in general and specifically with regard to issues pertaining plant genetic resources for food and agriculture. Over 80% of the farmers in the region are smallholder subsistence farmers who depend on traditional varieties as their main source of seed and propagating material. In all the three East African countries, agriculture contributes the highest percentage to their national Gross Domestic Product (GDP). It is also the major source of employment in the region, engaging over 60% of the workforce, majority being women and the youth. Despite this, farmers and their local and indigenous communities in East Africa who make such an immense contribution to their countries' national development remain among the poorest of the poor in world.



***Typical African Farmers Working in their Gardens.***

Farmers and their local and indigenous communities in East Africa suffer a lot of injustice. They also share a lot in terms of constraints to their agricultural production and their general wellbeing. These communities have very limited social capital, little or no financial capital, no access to appropriate credit and very limited access to other physical assets. They have very low social status, little or no influence and hardly play any role in decision making regarding the management and sustainable use of resources including plant genetic resources for food and agriculture which they nurture, develop, conserve and make available to other users. They have very poor infrastructure, are constrained by poor extension services, poor marketing and suffer from low and fluctuating prices of their produce. The situation of farmers in the region like their counterparts in other developing countries is made worse by threats of adoption of genetic engineering technologies and their associated intellectual property rights. Such threats include likely contamination of their organic farms, violation of their right to seed and high costs of seed. It is in this context that farmers' rights are seen as a great opportunity for the region to transform the livelihoods of these farming communities and contribute to the sustainable use and management of plant genetic resources for food and agriculture. The following section highlights some of the major opportunities that farmers' rights present to regional and national development.

## 8. FARMERS' RIGHTS IN REGIONAL AND NATIONAL DEVELOPMENT

It has been pointed out that the rationale of farmers' rights was to provide rewards and incentives to farmers especially in the biodiversity rich developing countries to continue developing, conserving and making available plant genetic resources for food and agriculture. Farmers' rights were therefore adopted to enable farmers share equitably in the productivity and profitability of plant genetic resources with a view to enhancing their conservation and sustainable management. As such, farmers' rights if effectively implemented present great opportunities to countries in East Africa to meet some of their major development goals. Such goals include: poverty eradication, food security and rural transformation among others. But whether or not these countries will maximize the benefits accruing from farmers' rights in meeting their development needs depends on the strategies and mechanisms that will be put in place for that purpose. The following are some of the major benefits that countries in East Africa stand to benefit out of the effective realisation of farmers' rights.

### 8.1. Poverty Eradication

Poverty eradication remains one of the biggest challenges for countries in East Africa in particular and the sub Saharan region in general. East African countries are among the poorest countries in the world. On average, about 50% of the population in this region live below the absolute poverty line<sup>53</sup>. Over 80% of these live in rural areas and are smallholder subsistence farmers<sup>54</sup>. Development of effective mechanisms that ensure smallholder farmers equitably share in the benefits arising from the profitability and productivity of plant genetic resources for food and agriculture can therefore contribute immensely to achieving the poverty eradication goal which the three East African countries have prioritized in their national development agenda<sup>55</sup>.

### 8.2. Food Security

Food insecurity at the individual, household, national and regional levels also constitutes a big challenge in the region's development agenda. This is made worse by the rapid population growth without matching increase in food production<sup>56</sup>. There is also increasing evidence that a number of plant genetic resources that are vital for meeting peoples' food and health related needs are becoming extinct due to their unsustainable use. By providing incentives and rewards to farmers to sustainably utilize, conserve and nurture these resources,

<sup>53</sup> In Uganda, recent statistics show a reduction in the number of population of Ugandans living in absolute poverty from 56% in 1992 to 38% in 2004. This percentage however increased during 2005. See the Uganda Human Development Report, 2005.

<sup>54</sup> In Kenya, 87% of the population lives in rural areas and subsistence farmers account for over 50% of the total poor. See, Were S., Babu S., and Temu A., *The Future of Smallholder Agriculture in Eastern Africa: The Roles of States, Markets, and Civil Society*. IFPRI Eastern Africa Food Policy Network, Kampala, 2005.

<sup>55</sup> See the Poverty Reduction Strategy Papers of the three East African Countries.

<sup>56</sup> In Uganda, recent statistics put the country's population growth rate at 3% per annum.

it is thought that they will continue to develop and make these resources available thus ensuring continued food availability at all levels. In this regard, Mr. Asbjorn Eide has recently argued in his study on the Right to Food that it is critical that farmers' rights be promoted as part of the Right to Food especially since the future food supply and its sustainability is likely to depend on such rights being established on a firm footing<sup>57</sup>. Farmers rights therefore if effectively implemented along with other policy interventions could ensure a safe food haven for countries in the region.

### **8.3. Rural Transformation and Improved Livelihoods**

Smallholder farmers and their farming communities in East Africa remain one of the most marginalized and poorest groups in the world. These communities have very little financial capital, no access to appropriate credit and very limited access to other physical assets. They have very little influence and no access to credit facilities. All their human capital is focused on agriculture and related activities. To these communities agriculture and its related activities is life. These communities live in very appalling situation with very poor housing, poor health facilities, poor water and sanitation facilities and poor road and storage infrastructure among others. Guaranteeing their right to equitable sharing in the benefits arising from use of plant genetic resources for food and agriculture and empowering them take part in decision making processes, could therefore transform their livelihoods and welfare.

### **8.4. Preservation of Cultural Heritage**

The protection and promotion of farmers' rights in the region would help preserve the cultural heritage and customary practices whose role in the innovation, conservation and sustainable use of plant genetic resources is now internationally recognized. These customary practices like farmers saving, reusing and exchanging seed have also immensely contributed to the general welfare and stability of the farming communities. They constitute strong social and cultural bonds among farmers and between communities. They are also a form of economic support system.

## **9. STATUS OF IMPLEMENTATION OF FARMERS' RIGHTS IN EAST AFRICA: THE CASE FOR UGANDA**

In bid to fulfill their obligations under the Treaty, countries in East Africa like many other developing countries are taking different steps to realize farmers' rights at national level. These countries are integrating aspects of farmers' rights in the different legal and policy instruments and taking other administrative

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<sup>57</sup> See, Moore G., and Tymowski W., 2005. Explanatory Guide to the International Treaty on Plant Genetic Resources for Food and Agriculture. IUCN Environmental Policy and Law Paper No.57, 2005.

measures for their realisation. The countries are at different stages in this process but Uganda seems to be ahead of Kenya and Tanzania. Below is a summary of the key steps and processes Uganda has undertaken so far to protect and promote farmers' rights. Some of the steps are not necessarily in response to the Treaty obligations but they nonetheless facilitate and contribute to the realization of farmers' rights within that context.

### **9.1. The National Environment (Access to Genetic Resources and Benefit Sharing) Regulations, 2005**

The National ABS Regulations as they are commonly called, represent the most important step by the Government of Uganda to put in place a regulatory framework for access to genetic resources and benefit sharing<sup>58</sup>. They designate the National Council for Science and Technology<sup>59</sup> as the Competent Authority to oversee issues of access to genetic resources and benefit sharing in Uganda. They provide that no access to genetic resources shall be allowed without obtaining the PIC and entering into an accessory agreement with the lead agency, local community or owner.

The Regulations have innovative and practical measures for realization of farmers' rights, in particular the right to equitable sharing of benefits arising from use of the genetic resources. They have comprehensive provisions to the above effect including participation by Ugandan citizens and institutions in scientific research, sharing of access fees, royalties, licence fees and other special fees, collaboration in education and training related to genetic resources, technology transfer, contributions to the development of the local communities and joint ownership of intellectual property rights and other relevant forms of intellectual property rights among others. The Regulations have however not been tested yet<sup>60</sup>. It is therefore not possible to assess their effectiveness.

### **9.2. The Plant Variety Protection Bill, 2004**

This draft legislation has largely been developed in fulfilling Uganda's international commitments under the TRIPs Agreement to provide protection to new plant varieties. It seeks to recognize and protect the rights of private and public breeders over their developed varieties; recognize, protect and support the inalienable rights of local communities including farming communities over their plant varieties; and to provide for other related and incidental matters<sup>61</sup>. It provides for plant breeders' rights, community rights, and farmers rights. Farmers' rights are provided for almost in similar respects like in the Africa Model Law.

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<sup>58</sup> These Regulations were developed under the National Environment Management Authority Act, Cap 153 Vol. VII Laws of Uganda, 2000. They have three major objectives: to prescribe the procedure for access to genetic resources, to provide for the sharing of benefits derived from genetic resources and to promote the sustainable management and utilization of genetic resources.

<sup>59</sup> Established by the National Council for Science and Technology Act, (Cap 209 Laws of Uganda, 2000) as a lead agency for scientific and technological research and development including promotion of indigenous science and technology.

<sup>60</sup> The implementation process is awaiting the Guidelines for implementation.

<sup>61</sup> See, the Long Title to the Bill.



The Bill provides that farmers' rights to their varieties shall be recognized and protected under the rules of practice as found in and recognized by law. It provides for farmers' rights to include: the protection of farmers' traditional knowledge relevant to their plant varieties, participating in decision making processes at national level relating to the conservation and sustainable use of plant varieties, the right to save, use, exchange and sell farm saved seed or propagating material, the right to participate equitably in sharing of benefits arising from the use of their plant varieties and the right to use a new breeders' variety protected under the Act to develop farmers' varieties. The draft legislation bars the farmer from selling farm saved seed or propagating material of breeders' protected variety on a commercial scale in the seed industry.

The Bill does not however provide any guarantees or clear mechanisms for realization of farmers' rights. It only provides for generalized statements to the effect that farmers' rights shall be recognized and protected. This is opposed to the way in which plant breeders' rights are secured. For plant breeders' rights, the Bill clearly provides for the rights and the mechanisms for their realization including remedies for their breach and stringent penalties. That notwithstanding the draft legislation if passed into law will contribute immensely to the realization of farmers rights in Uganda.

### **9.3. The National Task Force for Domestication of the International Treaty on Plant Genetic Resources for Food and Agriculture**

The major step Uganda has taken in realization of farmers' rights is the constitution of a National Task Force to advise Government on how best to domesticate the Treaty including the development of a National Policy on Plant Genetic Resources for Food and Agriculture<sup>62</sup>. This is a clear sign of government commitment to fulfill its obligations under the Treaty. The taskforce has done commendable work and has already finalized preparing the draft policy on plant genetic resources for food and agriculture of which farmers' rights constitute an essential part.

### **9.4. Plan for Modernization of Agriculture**

The Plan for Modernization of Agriculture<sup>63</sup> is one of the major operationalization instruments of the Poverty Eradication Action Plan (PEAP)<sup>64</sup>. The major policy objective of the PMA is to increase the ability of the poor to raise incomes and improve their quality of life through transformation of the agriculture sector from being largely subsistence to a commercially oriented one. The PMA policy processes through the National Agriculture Advisory Services (NAADS) support

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<sup>62</sup> The Taskforce was constituted by the Ministry of Agriculture, Animal Industry and Fisheries (MAAIF) and is spearheaded by the National Agriculture Research Organisation (NARO). The author is a member of the Task Force.

<sup>63</sup> Ministry of Finance, Planning and Economic Development ( MFPED) and Ministry of Agriculture, Animal Industry and Fisheries, 2000

<sup>64</sup> PEAP is Uganda's comprehensive development strategy aimed at directing budgetary resources to poverty-sensitive areas.

and facilitate the formation of farmer groups to empower them effectively take part in decision making processes on matters pertaining to agriculture. Although this is not necessarily in response to the treaty obligations, it nevertheless works towards achieving the treaty objectives of protecting and promoting farmers' rights.

## 10. RECOMMENDATIONS AND WAY FORWARD

While the adoption of the Treaty represents an important milestone in the recognition and protection of farmers' rights, their actual realization at the national level is still far from near. It is a big challenge that requires clearly well thought legal and policy interventions. This calls for consistent deliberation of the issues involved among the different stakeholders. East African countries should therefore scale up debate and dialogue about the need for and modalities of implementing these rights at the national and regional level. These dialogues should involve wide public participation and should ensure representation of vulnerable groups including the women, the old and the illiterate farmers.

Effective realization of farmers' rights in East Africa would also require the active and effective participation of the countries in the region in the ongoing regional and international processes having a bearing on the subject of farmers' rights. At the moment, two important specific processes whose outcome will impact on the realization of these rights at the national level are worth pointing out. The first process is the ongoing discussions and negotiations for the development of a Standard Material Transfer Agreement (SMTA) under the Multilateral System of Access under the Treaty and the second is the pending review of Article 27.3 b of the TRIPS Agreement.

The SMTA will determine access rights and benefit sharing mechanisms under the Multilateral System of Access under the Treaty. Since the SMTA will be a standard agreement that will apply to all State Parties to the Treaty, effective participation of countries in the region in this process is therefore crucial for the effective realization of farmers' rights. The pending review of Article 27.3 b<sup>65</sup> of the TRIPS Agreement also has serious implications for the effective realization of farmers' rights in East Africa. Countries in the region should struggle to have included in the revision process provisions that require the protection of traditional knowledge in particular and farmers' rights in general. Having the TRIPS Agreement incorporate farmers' rights or aspects thereof is also critical for bringing it in harmony with the Treaty and the CBD.

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<sup>65</sup> Article 27.3(b) requires States party to provide protection of plant varieties through a patent system, an effective *sui generis* regime or a combination of both

Countries in the region should also invest in further analytical research on the issues involved in the effective realization of farmers' rights. One major area of research is to undertake a comprehensive study of the major challenges to the quick and effective realization of farmers' rights. Specifically in this regard the International Survey on Farmers' Rights pointed out GMOs as being a major challenge to the effective realization of these rights<sup>66</sup>. Consequently it may be important for countries in the region to explore the full implications of GMOs on the effective realization of farmer' rights and identify mitigation measures.

Vigorous sensitization of the masses on the importance of farmers' rights in regional and national development and developing appropriate legal expertise in this area are also pertinent issues for the region to pursue in the struggle for realization of farmers' rights and the full benefits that accrue therefrom.

Given the similarities that countries in East Africa share in their farming systems and practices, devising a regional approach to farmers' rights could be a plausible thing for policy makers in the region to start considering.

## 11. CONCLUSION

The international recognition of farmers' rights presents enormous opportunities to countries in East Africa in particular and Africa in general. The struggle for realization of these rights and their benefits in national and regional development is however just beginning. Given the controversial history of the negotiations for these rights and the manner in which they are provided for in the Treaty, it is likely that countries and corporate entities that were opposed to their recognition will continue to water down the struggle.

The most important thing however, is that the Treaty has given national Governments the opportunity and responsibility to implement these rights in accordance with their needs, priorities and national law. The challenge is therefore for the countries in East Africa to seize this opportunity and devise effective mechanisms for the protection and promotion of these rights. This policy research paper has explored some of the options available to these countries in the above regard. It has also highlighted the challenges these countries face in implementing these rights and given the way forward.

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