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Do Agricultural Companies that own Intellectual Property Rights on Seeds and Plant Varieties have a Right-to-Food Responsibility?

Emmanuel Kolawole Oke

Edinburgh Law School, University of Edinburgh

emmanuel.oke@ed.ac.uk

Abstract

Building on both the UN Guiding Principles on Business and Human Rights and the relevant portions of the advisory opinion of the *International Monsanto Tribunal*, this paper presents a normative argument on the right-to-food responsibility of corporate actors that own and exercise intellectual property rights on seeds and plant varieties. This paper contends that, while states bear the primary responsibility for the right to food, corporate actors that own intellectual property rights on seeds and plant varieties equally have a responsibility to respect the right to food and to ensure that the exercise and enforcement of their intellectual property rights does not negatively affect the ability of small scale farmers to gain access to the means of food production nor threaten agricultural biodiversity as both of these factors are crucial for ensuring food security. In this regard, agricultural companies that own intellectual property rights on seeds and plant varieties should not engage in activities that negatively impact the non-commercial farmers' seed system nor should they prevent farmers from saving and exchanging seeds.

Keywords: Right to food, intellectual property rights, business and human rights, Monsanto, seeds, plant varieties.

Introduction

From time immemorial, farmers have always saved, replanted, exchanged and sold their seeds without any restrictions and this practice constitutes the backbone of agricultural biodiversity which in turn is crucial to food security (De Schutter, 2009, para 42; Haugen, Muller & Narasimhan, 2011, p.111-113; Correa, 2012, p.12; Chiarolla, 2015, p.521). However, the current global framework on intellectual property rights on seeds and plant varieties as embodied in both the International Convention for the Protection of New Varieties of Plants (UPOV Convention) and the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) can hamper local farmers from enjoying this crucial freedom to save, reuse and exchange their seeds and this might in turn have a negative impact on the right to food in general and food security in particular (Haugen et al, 2011, p.103; Correa, 2012, p.12).

As noted by the former UN Special Rapporteur on the right to food, Jean Ziegler (2001), the right to food implies not only access to food, but also access to the means of producing it. However, intellectual property rights on seeds and plant varieties can make it more difficult for small scale farmers to gain access to the means of producing their food. Thus, the current global framework on intellectual property rights (IPRs) threatens both agricultural biodiversity and access to the means of food production for small scale farmers and this has implications for both food security and the right to food.

It is noteworthy that multinational agricultural companies typically own some of the intellectual property rights on these seeds and plant varieties. The enforcement of these intellectual property rights by some of these companies in both developed and developing countries has raised a number of concerns about the impact of the activities of these

companies on the right to food. One notable development in this regard is the recent advisory opinion delivered in April 2017 by a civil-society led international ‘tribunal’ which examined the activities of Monsanto (otherwise known as the *International Monsanto Tribunal*). The ‘tribunal’ held that Monsanto had engaged in activities which have, inter alia, negatively impacted the right to food. While the opinion of this ‘tribunal’ is non-binding and unenforceable, it is suggested here that aspects of the ‘tribunal’s’ opinion that corresponds with current principles of international law cannot just be ignored and may contribute towards the development of more binding rules in the near future.

In light of the above, and using the advisory opinion of the *International Monsanto Tribunal* as a case study, this paper presents a normative argument on the right-to-food responsibility of agricultural companies that own intellectual property rights on seeds and plant varieties. The paper is written from a legal perspective and it will employ a human rights perspective in its analysis of the impact of intellectual property rights on the ability of farmers to save and exchange seeds. It will primarily draw on sources of international intellectual property law and international human rights law but it will also make references to national laws and national court decisions where relevant. Building on both the UN Guiding Principles on Business and Human Rights and the relevant portions of the advisory opinion of the tribunal, this paper contends that, while states bear the primary responsibility for the right to food, corporate actors that own intellectual property rights equally have a responsibility to respect the right to food and to ensure that the exercise and enforcement of their intellectual property rights does not negatively affect the ability of small scale farmers to gain access to the means of food production nor threaten agricultural biodiversity as both of these factors are crucial for ensuring food security.

The paper is structured into three main parts. Part one will examine how seeds and plant varieties can be protected via intellectual property laws while part two will analyse the relationship between intellectual property rights on seeds/plant varieties and the human right to food. Part three will analyse the right-to-food responsibilities of agricultural companies that own intellectual property rights on seeds and plant varieties in the light of the UN Guiding Principles on Business and Human Rights and the advisory opinion delivered by the *International Monsanto Tribunal*.

1. The Protection of Seeds and Plant Varieties via Intellectual Property Laws

There are two major multilateral treaties that regulate the protection of plant-related innovation via intellectual property laws i.e. the UPOV Convention and the TRIPS Agreement. It should be noted that there are other international legal instruments that touch on issues relating to the global governance of seeds and plant varieties such as the Convention on Biological Diversity, the Nagoya Protocol to the Convention on Biological Diversity, and the International Treaty on Plant Genetic Resources for Food and Agriculture. However, as the focus of this paper is on corporate actors that own intellectual property rights on seeds and plant varieties, the analysis here will be limited to the specific international legal instruments that confer these intellectual property rights i.e. UPOV and TRIPS. While UPOV applies to the protection of new varieties of plants, the TRIPS Agreement applies to all types of plant-related innovations such as new varieties of plants seeds, plant genes and transgenic plants. However, due to constraints of space, the focus of the analysis here will be on the protection of new plant varieties and seeds.

A. Protection of Plant Varieties under UPOV

The first Act of the UPOV Convention was adopted in 1961 and it has been subsequently revised in 1972, 1978, and 1991(UPOV, UPOV Lex, 2011). After the entry into force of the 1991 Act in 1998, countries that want to join UPOV can no longer accede to the 1978 Act. Importantly, both the 1978 Act and the 1991 Act of UPOV provide a system to protect the interest of commercial plant breeders. In order to obtain protection for a new variety of plant under UPOV, Article 5(1) of the 1991 Act of UPOV stipulates that four key requirements must be satisfied i.e. the plant variety must be *new*, and it must possess *uniform characteristics*, and these uniform characteristics must be *distinct* from other varieties, and be *stable* over multiple generations of plant reproduction.

It should be noted however that the 1991 Act of UPOV (UPOV 1991) expands the exclusive rights given to plant breeders under the 1978 Act of UPOV (UPOV 1978). With regard to the propagating material of a new plant variety, Article 5(1) of UPOV 1978 grants plant breeders the right to produce for purposes of commercial marketing, the right to offer it for sale, and the marketing of the material. However, Article 14(1) of UPOV 1991 expands these exclusive rights to include the production or reproduction, conditioning for the purpose of propagation, exporting and importing, and stocking for any of these purposes. Furthermore, whereas UPOV 1978 does not extend these exclusive rights to harvested material, Article 14(2) of UPOV 1991 extends all these exclusive rights to harvested material and it provides that harvested material obtained through the unauthorized use of propagating material of the protected variety shall require the breeder's authorization unless the breeder has had reasonable opportunity to exercise his/her exclusive right in relation to the said propagating material. Article 19 of UPOV 1991 also extends the duration of protection from not less than

15 years in Article 8 of UPOV 1978 to not less than 20 years from the date of the grant of the breeders right.

Apart from expanding the scope of the exclusive rights granted to plant breeders, UPOV 1991 equally narrows down the scope of two key exemptions available under UPOV 1978 i.e. the breeders' exemption and farmers' privilege. In relation to breeders' exemption, Article 5(3) of UPOV 1978 permits the use of the variety as an initial source of variation for the purpose of creating other varieties or for the marketing of such varieties. Article 15 of UPOV 1991 retains certain exemptions for breeders such as the exemptions of acts done privately and for non-commercial purposes, and acts done for experimental purposes. However, Article 15(1)(iii) of UPOV 1991 restricts the scope of the exemption for acts done for the purpose of breeding other varieties by excluding new varieties that are "essentially derived" from protected varieties from the scope of this exemption.

With regard to farmers' privilege, as Helfer and Austin (2011) note, the focus of UPOV 1978 'on commercial exploitation implicitly allows the non-commercial use of protected materials without the breeder's authorization' and 'this exemption benefits farmers who purchase the seeds of protected varieties'. This implied exemption for farmers in UPOV 1978 thus provides a basis for permitting farmers to save seeds and even to sell limited quantities of seeds to other farmers (Helfer and Austin, 2011, p.384). However, while Article 15(2) of UPOV 1991 explicitly provides for an exception for farmers, the scope of this exception is rather limited as it only permits farmers to use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting and this must be done within reasonable limits and subject to safeguarding the legitimate interests of the breeder who owns the protected variety. Thus, while this exception in UPOV 1991 permits

farmers to save seeds, it prohibits farmers from selling or exchanging seeds with other farmers (Helfer and Austin, 2011, p.384; De Schutter, 2009, para 41; Chiarolla, 2015, p.528).

B. Protection of Plant-related Innovations under TRIPS

Article 27(3)(b) of the TRIPS Agreement permits countries to exclude plants from patent protection although it requires them to provide protection for plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. Thus, the TRIPS Agreement does not mandate countries to implement UPOV but as Helfer and Austin (2011, p.385) and Haugen et al (2011, p.119) point out, some bilateral and regional trade agreements require countries to either accede to UPOV or provide patent protection for plants.

Nevertheless, in the absence of any trade agreement mandating countries to implement any of the UPOV Acts, countries have a significant amount of flexibility in terms of how they can provide protection for plant varieties under the TRIPS Agreement. Importantly, countries are free to protect plant varieties via patent rights or by implementing laws that are modelled after any of the UPOV Acts or by designing a *sui generis* law that provides protection for plant breeders while also carving out certain exceptions for farmers.

While the protection of plant varieties via the grant of patent rights might provide sufficient protection for plant breeders, unless a country strategically designs its patent laws to provide certain exceptions for farmers, the grant of patent right on plant varieties may not be in the best interest of farmers, especially poor farmers in developing countries. This is because, as stated in Article 28 of the TRIPS Agreement, owners of patent rights are given a broad range of rights such as the right to prevent others from making, using, offering for sale, selling or importing the patented product. Importantly, pursuant to Article 33 of the TRIPS Agreement,

these broad range of rights should last for at least 20 years from the date the patent application was filed.

As De Schutter (2009) rightly notes, ‘patents are the most far-reaching form of protection that can be granted’. As patent rights confer a broad range of rights on patent owners, farmers that rely on patented seeds have little or no control over those seeds. (It should be noted that patents may be granted for both genetically engineered seeds and traditional seeds). Patent rights eliminate competition and empowers the patent owner to determine the price of the patented product and this can impact access to the patented product. This means companies that own patent on seeds can decide to increase the price of those patented seeds and this can negatively impact poor farmers. As Correa (2012, p.2) notes, ‘higher prices for seeds and other agricultural inputs may be detrimental to small farmers and increase the concentration of agricultural production for food’. In addition, as De Schutter (2009) points out, farmers cultivating patented seeds ‘are considered to be licensees of a patented product, and they are frequently requested to sign agreements not to save, resow or exchange the seeds which they buy from patent-holders’. For instance, according to a report by the Center for Food Safety and Save Our Seeds (2013), ‘Monsanto agreements prohibit seed saving by asserting that farmers may not save or clean seeds for planting, supply Monsanto seeds to anyone for planting, and/or transfer seeds to anyone for planting, unless the grower is also under contract with Monsanto for seed production’.

The decision of the Supreme Court of the United States in *Bowman v Monsanto* illustrates the broad scope of the rights conferred on those who own patent rights on seeds. In that case, the Supreme Court ruled that the doctrine of patent exhaustion (pursuant to which an initial sale of a patented product terminates the right of the patent owner to that product) does not permit

a farmer to reproduce patented seeds through planting and harvesting without the patent holder's permission (Supreme Court of the United States, 2013).

2. The Relationship between Intellectual Property Rights on seeds/plant varieties and the human right to food

The first enunciation of a human right to food at the international level can be found in Article 25(1) of the Universal Declaration of Human Rights (1948) which provides, among other things, that 'everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services'. A more detailed articulation of the right to food is contained in Article 11 of the International Covenant on Economic, Social, and Cultural Rights of 1966 (ICESCR). Article 11(1) of the ICESCR provides, among other things, that states parties to the covenant recognize 'the right of everyone to an adequate standard of living for himself and his family, including adequate food'. Article 11(2) of the ICESCR also provides for a right to be free from hunger as it obliges states to take measures which are needed to, among other things, 'improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge'. It has also been contended that the right to be free from hunger has arguably achieved the status of customary international law (Narula, 2006). Nevertheless, the focus here will be on Article 11 of the ICESCR.

In May 1999, the UN Committee on Economic, Social and Cultural Rights (CESCR) adopted General Comment No. 12 (GC12) on the right to adequate food contained in Article 11 of the ICESCR. In paragraph 6 of GC12, the CESCR noted that the right to food is realized when everyone has physical and economic access at all times to adequate food or means for its procurement. In the same paragraph, the CESCR cautioned against a narrow, biomedical interpretation of the right to food that is focused only on calories, proteins and other nutrients.

Crucially, in 2001, Jean Ziegler, the former UN Special Rapporteur on the right to food produced his first report in which he noted that ‘the right to food implies not only access to food, but also access to the means of producing it’ (Ziegler, 2001, para 73). In this regard, seeds constitute an important means of producing food.

In terms of the core obligations of states with regard to the right to food, the CESCR noted in paragraph 14 of GC12 that the principal obligation of states is ‘to take steps to achieve progressively the full realization of the right to adequate food’. In this regard, the CESCR identified three levels of state obligations in paragraph 15 of GC12 i.e. the obligation to respect, protect, and fulfil the right to food. According to the CESCR, the obligation to respect the right to food requires states ‘not to take any measures that result in preventing’ access to food. Ziegler (2001) notes that respecting the right to food entails ensuring that ‘every individual has permanent access at all times to sufficient and adequate food’ and refraining from ‘taking measures liable to deprive anyone of such access.’ This suggests that states should ensure that their intellectual property laws on seeds and plant varieties does not make it difficult for farmers to gain access to seeds at affordable prices or impede the ability of farmers to save and exchange seeds.

Also, according to the CESCR, the obligation to protect requires ‘measures by the state to ensure that enterprises or individuals do not deprive individuals of their access to adequate food’. The obligation to protect thus has implications for how states regulate the exercise and enforcement of intellectual property rights on seeds/plant varieties by corporate actors. Ziegler (2001), echoing the sentiments of the CESCR in GC12, notes that protecting the right to food implies that states ‘must ensure that individuals and companies do not deprive people of permanent access to adequate and sufficient food’. Essentially, intellectual property laws should be designed and implemented in a manner that ensures that corporate actors cannot

abuse or misuse their intellectual property rights in a manner that deprives individuals of their access to adequate food. As De Schutter (2009) notes, the obligation to protect the right to food would be violated ‘if a state failed to regulate the activities of patent-holders or of plant-breeders, so as to prevent them from violating the right to food of the farmers’. Furthermore, according to the CESCR, the obligation to fulfil implies that states must, among other things, ‘proactively engage in activities intended to strengthen people’s access to and utilization of resources and means to ensure their livelihood, including food security’.

Crucially, in GC12, the CESCR highlighted a number of measures that can constitute a violation of the right to food. According to the CESCR in paragraph 19 of GC12, the following, among other measures, are some of the measures that can constitute violations of the right to food: the repeal or suspension of laws necessary for the enjoyment of the right to food, the adoption of law or policies which are not compatible with pre-existing legal obligations concerning the right to food, failure to regulate the activities of individuals or groups in order to prevent them from violating the right to food of others, and the failure of a state to take into account its obligations with regard to the right to food when entering into agreements with other states.

Thus, any state that amends its intellectual property laws relating to seeds/plant varieties and which introduces measures in such laws that make it difficult for farmers to gain access to seeds, or that prevents farmers from saving and exchanging seeds, violates the right to food. Also, the failure of a state to incorporate measures in its laws to ensure that intellectual property rights are not exercised or enforced in a manner that prevents farmers from gaining access to seeds at affordable prices or saving and exchanging seeds violates the right to food. Furthermore, the failure of a state to take into account its right-to-food obligations when

entering into trade or investment agreements that might negatively impact the right to food violates the right to food.

It is therefore crucial for states to incorporate a human rights perspective when designing and implementing their intellectual property laws relating to seeds and plant varieties. As Ayala and Meier (2017) note, human rights ‘offer universal frameworks to advance global justice for food and nutrition security’. Human rights also helps to reframe threats as violations of rights, provide standards that can be utilized to define the responsibilities of states and evaluate policies, and empower citizens to hold their governments accountable for their obligations (Ayala and Meier, 2017, p.8). Thus, any state that has ratified the ICESCR has an obligation to respect, protect and fulfil the right to food and this obligation should be taken into account when designing and implementing intellectual property laws relating to seeds and plant varieties.

Importantly, any intellectual property law or policy relating to seeds and plant varieties should take into account the needs and interests of farmers many of whom are poor.

According to Haugen et al.:

...most farmers in the developing south are subsistence farmers; paying for patented seeds at each harvest and not being able to communally share them could compound poverty in certain contexts. Price hikes on the latest, most resilient strains could result in the reallocation of farmers’ expenses (potentially cutting into household expenditure) in order to finance agricultural livelihoods. It could also mean price hikes for consumers of a specific food variety – simply put, this could further jeopardize food security in parts of the Global South (Haugen et al, 2011, p.120).

As De Schutter (2009) has pointed out, ‘the right to food requires that we place the needs of the most marginalized groups, including in particular smallholders in developing countries, at the centre of our efforts’.

The incorporation of a human rights perspective into the design and implementation of intellectual property laws relating to seeds and plant varieties does not imply that the protection of seeds and plant varieties via intellectual property laws should be diminished or abolished. It is important not to overlook the importance of incentivising the production of new varieties of plants. As De Schutter (2009) notes, new varieties of plants offer a number of benefits such as improved nutritional values or resistance to diseases. It is therefore important to provide some form of protection for seeds and new varieties of plants whether through patents or laws modelled on UPOV or a *sui generis* law. What the incorporation of a human rights perspective requires is that these laws should not be designed in a manner that fails to take into account the interests of farmers who rely on seeds for producing food.

Importantly, a human rights perspective requires states to make use of the flexibilities available to them under international intellectual property law when designing their intellectual property laws relating to seeds and plant varieties (De Schutter, 2009, para 8; Haugen et al., 2011, p.128-129). As noted above, the TRIPS Agreement gives countries considerable flexibility with regard to how they can choose to protect plants and new plant varieties because Article 27(3)(b) of the TRIPS Agreement permits countries to exclude plants from patentability although it requires them to provide protection for plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. As the former UN Special Rapporteur in the field of cultural rights, Farida Shaheed (2015), notes in her report on the implications of patent policy for the human right to science and culture: from a trade law perspective, flexibilities remain optional; but ‘from the perspective of

human rights ... they are often to be considered as obligations'. Thus, countries have an obligation to utilize the flexibilities available to them to ensure that their intellectual property law on seeds and plant varieties takes into account the needs and interests of farmers and not just that of patent holders and plant-breeders.

Crucially, from a human rights perspective, a country that wants to protect the needs and interests of farmers should protect seeds and new plant varieties via a sui generis law that is not modelled after either patent law or any of the UPOV Acts, especially UPOV 1991 (Haugen et al, 2011, p.122-123). As De Schutter (2009) notes, such countries could 'establish a sui generis protection for plant varieties [that allows] them to preserve the well-established practices of saving, sharing and replanting seeds'. In designing a sui generis law that balances the rights of plant breeders and the interests of farmers, countries can follow the example laid down in the Indian Protection of Plant Varieties and Farmers Rights Act of 2001. This law aims to protect the interests of both plant breeders and farmers (Oguamanam, 2015, p.185). In addition, countries should also implement the provisions of Article 9 of the International Treaty on Plant Genetic Resources for Food and Agriculture of 2001 which, among other things, refers to the rights of farmers to save, use, exchange and sell farm-saved seed/propagating material.

Nevertheless, even where a country has to adopt patent or UPOV-style legislation to protect plant varieties and seeds, there is still a human rights obligation to ensure that such laws incorporate broad exceptions that recognize and preserve the rights of farmers to save and exchange seeds. For instance, there are a number of flexibilities that can be incorporated into a country's patent law where a country decides to grant patents on seeds. As Correa (2012) points out, if patents are granted, a number of safeguards can be incorporated into the patent law to protect the interests of farmers such as allowing farmers to save and reuse seeds.

It might be contended that poor farmers need not use seeds or plant varieties protected by intellectual property laws. However, as De Schutter (2009) notes, ‘farmers often receive commercial varieties as part of a package that includes credit (often vouchers), seed, fertilizer and pesticide ... acceptance of such packages is the only way farmers can access credit in rural areas’. Thus, poor farmers usually have little or no choice than to rely on seeds protected by intellectual property laws. This makes it all the more important for countries to adopt a human rights perspective and incorporate flexibilities into the design and implementation of their intellectual property laws relating to seeds and new varieties of plants.

3. The Right to Food Responsibilities of Agricultural Companies that own Intellectual Property Rights on Seeds and Plant Varieties

From the analysis above, it is obvious that states bear the primary responsibility with regard to respecting, protecting, and fulfilling the right to food. However, it is not just the activities of states that can have an impact on the right to food. The activities of non-state actors such as agricultural companies that own intellectual property rights on seeds and plant varieties can also have a significant impact on the right to food in general and on farmers in particular.

It has been observed that over half of the world’s commercial seed market is controlled by just three agricultural companies i.e. Monsanto, DuPont, and Syngenta (ETC Group, 2011, p.22; Center for Food Safety & Save Our Seeds, 2013, p.2). This development puts these corporate actors in an immensely powerful position which they have not hesitated to use against farmers. For instance, it has been noted that agricultural companies spend a lot of resources to investigate and prosecute farmers who infringe their patent rights (Center for Food Safety & Save Our Seeds, 2013, p.5). The cases of *Monsanto v Schmeiser* (Supreme

Court of Canada, 2004) and *Bowman v Monsanto* (Supreme Court of the United States, 2013) illustrate the length that these corporate actors are willing to go to enforce their intellectual property rights. In addition, farmers are typically required to sign technology use agreements after purchasing seeds from these companies and these agreements prohibit farmers from saving seeds (Center for Food Safety & Save Our Seeds, 2013, p.6).

There is also a noticeable trend towards greater concentration in the seed industry. It has been observed that agricultural companies such as Monsanto, DuPont, Syngenta, Dow, and Bayer have acquired several seed companies (Center for Food Safety & Save Our Seeds, 2013, p.8). There have also been reports of a proposed acquisition of Monsanto by Bayer and there are fears that this might lead to an increase in the price of seeds and a bundling of the sale of seeds and agrochemicals (Burrows, 2017). As at the time of writing, this acquisition has been approved in China, Brazil, the European Union and the United States (Reuters, 2018; Chee, 2018; Detrick, 2018). Inevitably, developments like these result in increased market power and the ability to increase the price of seeds which can make it more difficult for poor farmers to buy seeds at affordable prices (Center for Food Safety & Save Our Seeds, 2013, p.8; International Panel of Experts on Sustainable Food Systems, 2017).

Since these corporate actors wield immense power over seeds as a result of their intellectual property rights, it is important that measures are put in place to ensure these powers are not abused or misused. Human rights can play a crucial role in this regard. While it is true that states bear the primary responsibility in relation to human rights, certain key developments in international human rights law indicate that corporate actors also have some human rights responsibilities. These developments will be further explored below.

A. The UN Guiding Principles on Business and Human Rights and the Right to Food

In June 2011, the UN Human Rights Council endorsed the ‘UN Guiding Principles on Business and Human Rights’ (hereafter, Guiding Principles) which were developed by John Ruggie, UN Secretary General’s Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (Human Rights Council, 2011).

The Guiding Principles are based on three pillars: one, the obligations of states to respect, protect and fulfil human rights; two, the role of business enterprises as specialized organs of society to comply with all applicable laws and to respect human rights, and; three, the need for rights and obligations to be matched to appropriate and effective remedies when there has been a breach (Human Rights Council, 2011, p.6). Thus, the Guiding Principles still emphasizes the primary responsibility of states to respect, protect, and fulfil human rights.

Importantly, with regard to the obligation of states to protect human rights, the Guiding Principles note that states should ensure that laws and policies governing the ongoing operation of business enterprises do not constrain but enable business respect for human rights (Human Rights Council, 2011, p.8). This has implications for how states design and implement their intellectual property laws relating to seeds and plant varieties. Essentially, such intellectual property laws should contain measures that prevent corporate actors from abusing or misusing their intellectual property rights in a manner that disrespects the right to food. For instance, provisions should be made in such laws for farmers to save and exchange seeds. The Guiding Principles also stipulate that states should preserve their policy space to meet their human rights obligations when entering into trade and investment agreements with other states or business entities (Human Rights Council, 2011, p.12). Thus, as part of their obligation to protect human rights, states should be wary of signing any free trade agreement that might narrow the scope of the flexibilities available to them under the TRIPS Agreement

and which might have a negative impact on the ability of farmers to gain access to seeds or to save and exchange seeds.

In relation to the corporate responsibility to respect human rights, according to the Guiding Principles, this implies that business entities should avoid infringing on the human rights of others and that they should address the adverse human rights impacts with which they are involved (Human Rights Council, 2011, p.13). The responsibility of business entities to respect human rights is independent of states abilities and/or willingness to fulfil their human rights responsibilities and it goes beyond mere compliance with national laws and regulations protecting human rights (Human Rights Council, 2011, p.13). According to the Guiding Principles, the scope of the responsibility of business entities to respect human rights covers internationally recognized human rights i.e. those contained in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights (Human Rights Council, 2011, p.13).

Thus, the right to food falls within the scope of human rights that corporate actors such as agricultural companies have a responsibility to respect. It is therefore crucial for agricultural companies that own intellectual property rights on seeds and plant varieties to ensure that they do not exercise and enforce their intellectual property rights in a manner that disrespects the right to food. Importantly, the exercise of intellectual property rights in a manner that negatively impacts on the ability of farmers to gain access to the means of producing food such as seeds would amount to disrespecting the right to food. Furthermore, the utilisation of technology use agreements or genetic use restriction technologies to prevent farmers from saving and exchanging seeds would also amount to disrespecting the right to food. It has been observed that the use of genetic use restriction technologies can have an impact on

agrobiodiversity and the ability of farmers to save and re-sow seeds (Lombardo, 2014, p.1002)

While the Guiding Principles are not binding, it can be argued that it constitutes an articulation of existing standards in international human rights law. As the Guiding Principles itself notes, “the Guiding Principles’ normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved” (Human Rights Council, 2011, p.13). There have also been moves to adopt a binding international treaty on business and human rights at the UN Human Rights Council (Human Rights Council, 2017).

B. The Advisory Opinion of the International Monsanto Tribunal on the Right to Food

One notable development with regard to the right to food responsibilities of agricultural companies is the recent advisory opinion of the *International Monsanto Tribunal* (hereafter, the Tribunal) which was delivered in April 2017 (*International Monsanto Tribunal*, 2017). The Tribunal was created by the Monsanto Tribunal Foundation and the Tribunal was tasked with producing an advisory opinion on six questions relating to the activities of Monsanto (*International Monsanto Tribunal*, 2017, p.9). Essentially, the Tribunal’s opinion assessed the impact of Monsanto’s activities on the right to a healthy environment, the right to food, the right to health, the freedom indispensable for scientific research, war crimes complicity, and ecocide. The focus here will however be on the Tribunal’s opinion on the impact of Monsanto’s activities on the right to food especially as it relates to the impact of intellectual property rights on the right to food.

It should be noted that the Tribunal is an ‘opinion tribunal’ and not a court set up by a country or an international institution pursuant to an international agreement. Opinion tribunals are typically civil society initiatives set up to examine questions on several issues (*International Monsanto Tribunal*, 2017, p.9). Thus, the opinion of this particular Tribunal is merely advisory and not binding. However, while the opinion of the Tribunal is non-binding and unenforceable, it is contended here that aspects of the Tribunal’s opinion that corresponds with current principles of international human rights law cannot be overlooked and may contribute towards the development of more binding rules in the near future. It is important to note that, in its advisory opinion, the Tribunal referred to the Guiding Principles on Business and Human Rights.

The Tribunal was composed of five judges from Argentina, Belgium, Canada, Mexico, and Senegal (*International Monsanto Tribunal*, 2017, p.9). Despite being invited by the Tribunal, Monsanto refused to appear before the Tribunal (*International Monsanto Tribunal*, 2017, p.9-10). The Tribunal listened to the testimony of twenty-eight witnesses who discussed their experiences with regard to Monsanto’s activities (*International Monsanto Tribunal*, 2017, p.10).

In its advisory opinion on the right to food, the Tribunal adopted a broad interpretive approach in defining the right to food. According to the Tribunal, the right to food cannot be understood in a narrow sense of being merely ‘the right to eat or to feed’ but rather in a broad sense of having ‘the chance to feed properly and sufficiently; healthily and permanently; in addition to being understood as the possibility of producing food (for consumption or for marketing)’ (*International Monsanto Tribunal*, 2017, p.22). This broad interpretive approach is in accordance with Article 11(2)(a) of the ICESCR which places an obligation on states to, among other things, take measures which are necessary to improve methods of food

production. This interpretive approach equally has implications with regard to the impact of intellectual property rights on the right to food. Importantly, as noted above in this paper, it means that states (pursuant to their obligation to protect the right to food) have a duty to ensure that their intellectual property laws relating to seeds take into account the needs of farmers to have access to the means of producing food such as seeds.

In addition, the Tribunal noted that the responsibility of business enterprises to respect the right to food is established in the Guiding Principles on Business and Human Rights which, as noted above, states that the scope of the responsibility of business entities to respect human rights covers internationally recognized human rights (*International Monsanto Tribunal*, 2017, p.22). The Tribunal further pointed out that, ‘even if the Guiding Principles on Business and Human Rights are not considered to be legally binding, they nevertheless reflect the normative expectations of society and are thus an important benchmark to evaluate the propriety of business conduct’ (*International Monsanto Tribunal*, 2017, p.22).

The statement of the Tribunal with regard to the Guiding Principles, when taken together with the Tribunal’s broad interpretive approach to the right to food, implies that business entities such as agricultural companies that own intellectual property rights on seeds and plant varieties have a responsibility to respect the right to food when exercising and enforcing their intellectual property rights. As the Tribunal rightly pointed out, ‘the right to food is firmly established in international law as a fundamental human right’ and ‘business entities have a clear responsibility to respect it’ (*International Monsanto Tribunal*, 2017, p.23). Quoting Maki (2016, p.6), the Tribunal further stated that ‘intellectual property rights should be rightfully respected, but when companies are taking hold of sources of nutrition, [they] should be under closer scrutiny’ (*International Monsanto Tribunal*, 2017, p.26). Specifically, in relation to Monsanto’s activities, the Tribunal stated that:

The aggressive marketing of GMO seeds has also interfered with the right to food by forcing farming methods that do not respect traditional cultural practices. Farmers that have fallen prey to Monsanto's aggressive and misleading tactics have been forced to buy seeds every year and have lost the ability to save seeds. Since the advent of agriculture thousands of years ago, farmers have been saving seeds for cultivation the next season. This cultural practice has allowed for diversity and resilience in period of drought or against pests. But the spread of GMO seeds by Monsanto has denied farmers the ability to practice agriculture according to their traditional cultural practices. A non-commercial seeds system must exist and expand, ensuring that farmers have the ability to preserve their traditional knowledge (*International Monsanto Tribunal*, 2017, p.26).

The importance of protecting the non-commercial seeds system stressed by the Tribunal in the above quotation echoes the views of the former UN Special Rapporteur on the right to food, De Schutter, who had noted in a 2009 report that:

Reliance by farmers on farmers' seed systems allows them to limit the cost of production by preserving a certain degree of independence from the commercial seed sector. The system of unfettered exchange in farmers' seed systems ensures the free flow of genetic materials, thus contributing to the development of locally appropriate seeds and to the diversity of crops. In addition, these varieties are best suited to the difficult environments in which they live. They result in reasonably good yields without having to be combined with other inputs such as chemical fertilizers. And because they are not uniform, they may be more resilient to weather-related events or to attacks by pests or diseases. It is, therefore, in the interest of all, including professional plant breeders and seed companies which depend on the development of

these plant resources for their own innovations, that these systems be supported (De Schutter, 2009, para 42).

In response to the advisory opinion of the Tribunal, Monsanto alleged, among other things, that ‘this is not a real trial, and the results of this initiative have no legal substance – it is simply a publicity stunt’ (Weber, 2017). While it is indeed true that this was no real trial and one may or may not agree with the view that it was a publicity stunt by the organisers of the Tribunal, it is however incorrect to state that the decision of the Tribunal, at least in so far as it relates to the right to food, has no legal substance. As can be discerned from the analysis above, the opinion of the Tribunal is well grounded in international human rights law. More importantly, the Tribunal also relies on the Guiding Principles on Business and Human Rights which has been endorsed by the UN Human Rights Council.

Furthermore, Monsanto also contends that it believes ‘all farming practices will be necessary to feed our growing population’ and that ‘whether farmers grow organic, conventional or GMO crops, all three practices should be available to farmers to choose how they decide to market their crops’ (Weber, 2017). In other words, Monsanto asserts that it supports ‘all types of agriculture and food production’ (Weber, 2017).

Conclusion

What can be distilled from both the Guiding Principles and the advisory opinion of the Tribunal is that agricultural companies that own intellectual property rights on seeds and plant varieties have a responsibility to respect the right to food. This implies that in exercising and enforcing their intellectual property rights, agricultural companies should not disrespect the right to food by making it difficult for farmers to gain access to the means of food production. What this means in concrete terms is that agricultural companies should not

engage in activities that negatively impact the non-commercial farmers' seed system such as the aggressive marketing of GMO seeds with the goal of stifling the existence of the farmers' seed system in a country. In addition, in situations where farmers are dependent on patented seeds, agricultural companies that own these patented seeds should not sell these seeds at exorbitant prices nor should they prevent farmers from saving and exchanging seeds. Importantly, the non-commercial farmers' seed system and the saving and exchange of seeds play a crucial role in maintaining agricultural biodiversity and the preservation of biodiversity is vital to ensuring food security. It is therefore essential for agricultural companies to take seriously their right to food responsibilities.

However, in order to complement the human right responsibilities of agricultural companies in this regard, it is imperative for states to also take seriously their human rights obligations to respect, protect and fulfil the right to food by incorporating a human rights perspective into the design and implementation of their intellectual property laws relating to seeds and plant varieties. This is because it may be easier to hold corporate actors accountable for their responsibility to respect the right to food when states have incorporated a human rights perspective into their intellectual property laws by specifically carving out exceptions for farmers to save and exchange seeds. It is counterintuitive to expect corporate actors to simply act against their self-interest in the absence of any specific provision in the law requiring them to do so.

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