Open Letter to the Member States of the African Regional Protocol
for the Protection of New Varieties of Plants

24 November 2016

Excellency,

On 5 December, the Administrative Council of the African Regional Intellectual Property Office (ARIPO) will meet to adopt the draft regulations to the Arusha Protocol for the Protection of New Varieties of Plants (“Arusha Protocol”). As the Special Rapporteur on the right to food, I would like to share my concerns with regard to the considerable negative impacts that the Protocol and its Draft Regulations may have in relation to fulfilling the right to food in ARIPO Member State countries.

It is my understanding that these draft regulations are aimed at facilitating the implementation of the Arusha Protocol, which will come into force twelve months after four States have deposited their instrument of ratification or accession. I further understand that the Arusha Protocol, adopted on 6 July 2015, is intended to provide a harmonized regional legal framework for the protection of plant breeders’ rights, and according to its Preamble seeks to provide Member States with a regional plant variety protection system to provide growers and farmers with improved varieties of plants in an effort to ensure sustainable agricultural production.

However, it has come to my attention that there is much concern amongst famers’ organisations and networks that the Protocol will negatively impact on the traditional practices of African farmers, in particular freely using, saving, exchanging and selling farm-saved seed and propagating material. These practises, which are the backbone of agricultural systems in Sub-Saharan Africa, have ensured access to and the maintenance of a diverse pool of genetic resources by farmers themselves. Such diversity is key to ensuring food security, long-term sustainability and providing farmers with resilience to natural disasters and the negative effects of climate change.

A specific concern is that the Arusha Protocol provides very strong intellectual property rights to breeders of uniform varieties, at the expense of farmers’ rights. There is nothing in the Protocol or the draft Regulations that expressly safeguards the right of smallholder farmers in the ARIPO region to freely use, save, exchange and sell seeds/propagating material of protected varieties.

Article 22 (1) (a) of the Protocol on “Exception to Breeder’s rights” allows farmers to use protected material only for “private *and* non-commercial use”. As there is no further definition, it is unclear which acts are covered by this exception. Worryingly, a similar exception has been defined by the International Union for the Protection of New Varieties of Plant (UPOV) as prohibiting regular exchange and sale of seeds/propagating material of protected varieties, even in small amounts, among farmers. Article 22 (2) of the Protocol allows in certain circumstances, farmers to save protected seed for propagating purposes on their own holdings, but this appears to be subject to payment of royalties, which many smallholder farmers will not be able to afford.

For smallholder farmers in Sub-Saharan, the main source of seeds is often from local markets, farm saved seed, and obtained from relatives and neighbours. Moreover, selling seeds is an important source of income for many farmers. The above-mentioned restrictions could adversely affect the right to food, as seeds might become either more costly or harder to access. They could also reduce the amount of household income which is available for food, healthcare or education, thus impacting on a number of human rights. Moreover, these restrictions could result in smallholder farmers gradually losing their know-how related to seed selection and seed preservation, which is critical for maintaining sustainable local food systems. Finally, restrictions on the use, exchange and sale of protected seeds could also negatively impact on the functioning of the informal seed system, as the beneficial inter-linkages between the formal and informal seed systems will be severed.

It is also important to note that, in its present form, the Arusha Protocol and its draft Regulations risk undermining Article 9 of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) which requires Contracting Parties to take measures to protect and promote farmers’ rights, including the right to save, use, exchange and sell farm-saved seed and propagating material. Article 9 furthermore ensures the protection of traditional knowledge and equitable participation in sharing benefits arising from the use of these resources as well as the right to participate in decision making on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture.

It is furthermore my understanding that the Arusha Protocol is modelled on the 1991 Act of UPOV, mentioned above, which is not appropriate for farming systems in Sub-Saharan Africa. Its legal regime is instead suited to industrialised farming systems and professional plant breeding for the development of genetically uniform plant varieties. In this context, it should also be noted that the majority of ARIPO Member States are Least Developed Countries, who are under no obligation to put in place a system for plant variety protection, and have even been granted a transition period from complying with the Agreement on Trade Related Aspects of Intellectual Property Rights.

I am also very concerned with regard to the non-transparent and non-inclusive process by which the Arusha Protocol was adopted. It is my understanding that civil society and farmer representatives were excluded from participating in key meetings that led to its adoption, and it remains unclear whether they will be permitted to attend the Administrative Council meeting taking place on 5 December to adopt the Draft Regulations. Considering the very significant impact the Protocol, if ratified, will have on the livelihoods of smallholder farmers in Sub-Saharan Africa, it is crucial that they are given a seat at the negotiating table and that their concerns are heard and addressed.

As outlined by the Committee on Economic, Social and Cultural Rights in General Comment No. 12, the right to food requires States to pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihoods. They are obliged to respect existing access to adequate food, and are furthermore required not to take any measures that result in preventing such access. Such access certainly includes production resources such as seeds, and intellectual property regimes and seed policies must be compatible with and conducive to the realisation of the right to adequate food. Realization of the right to food also requires full compliance *inter alia* with the principles of transparency, accountability and people’s participation.

Considering the vast majority of States member to ARIPO have ratified the International Covenant on Economic, Social and Cultural Rights,[[1]](#footnote-1) and the International Treaty on Plant Genetic Resources for Food and Agriculture,[[2]](#footnote-2) I strongly urge you to refrain from endorsing and/or ratifying the Arusha Protocol and adopting the Draft regulations for its implementation. I also urge you to begin a new process that is transparent, evidence based and inclusive of civil society and smallholder farmer representatives to overhaul the Protocol and the draft Regulations and to develop a new legal framework that is appropriate for the agricultural system that prevails in the ARIPO region, and which reflects the needs and interests especially of farmer managed seeds systems in the ARIPO region.

 Please accept, Excellency, the assurances of my highest consideration,

Hilal Elver

Special Rapporteur on the right to food

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Ms. **Hilal Elver** (Turkey) was appointed Special Rapporteur on the right to food by the Human Rights Council in 2014. She is a Research Professor, co-director of the Project on Global Climate Change, Human Security and Democracy housed at the Orfalea Center for Global & International Studies, and global distinguished fellow at the University of California Los Angeles Law School (UCLA) Resnick Food Law and Policy Center. Learn more: <http://www.ohchr.org/EN/Issues/Food/Pages/FoodIndex.aspx>

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 With the exception of Botswana, Mozambique (both no action) and Sao Tomé and Principe (signatory)

2 With the exception of Botswana, Mozambique and the Gambia.

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To: Permanent Representatives to the United Nations Office

and other international organizations in Geneva

Member States of the African Regional Intellectual

Property Office (ARIPO)

cc: ARIPO Head Office

1. [↑](#footnote-ref-1)
2. [↑](#footnote-ref-2)