

CSO Comments<sup>1</sup>  
on the Zero Draft of the Voluntary Guidelines on the Responsible Governance of Tenure of Land,  
Fisheries and Forests

10/05/2011

We thank FAO for the Zero Draft and the efforts to include the substantive issues raised during the broad process of consultation.

Our comments will be presented in two parts: the first part will refer to the normative framework of the document. It is fundamental to get the normative framework right as this lays the groundwork for the contents of the guidelines. The second part will present a list of issues that we would like to highlight as positive in the zero draft, and a second list of issues we find missing or problematic and therefore need to be amended. .

### **Part I: Normative framework**

As para 2.2 states, the Guidelines should be interpreted and applied with respect for existing obligations under national and international law that address human rights and secure access to land, fisheries and forests. We welcome this approach, however certain contradictions and important omissions in the guidelines (outlined below) could be solved by clarifying more explicitly their commitment to existing human rights standards. Principally, in order to have a clear normative standard about the nature of responsible governance, it is of utmost importance that the Guidelines are clearly based on the universal human rights framework as laid down in the International Bill of Human Rights and other relevant human rights treaties. These treaties are binding for ratifying States and must form the foundation of the Guidelines' normative framework.

#### **The zero draft unfortunately misses any explicit reference to these legal standards.**

Access to *and* benefits from land and natural resources are part of the normative content explicitly recognized as indispensable elements of several specific human rights, particularly the right to adequate food and housing, enshrined in various international legal instruments. These include among others: the Universal Declaration of Human Rights (UDHR), the International Convention on the Elimination of all forms of Racial Discrimination (ICERD), the International Covenant on Economic, Social, and Cultural Rights (ICESCR, particularly art. 6-8, 11, 12), the International Covenant on Civil and Political Rights (ICCPR, particularly art. 6), the Convention on the Elimination of all forms of Discrimination against Women (CEDAW, particularly art. 14). Based on these standards, all those who directly depend on land and natural resources for their living have an entitlement to them.

**The zero draft does not follow international agreed language when it introduces human rights concepts and thus entails the risk of being interpreted as lowering existing agreed standards. This is not acceptable and would contradict the obligation of States that have ratified human rights treaties to not develop any new instruments which would undermine existing obligations.**

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<sup>1</sup> The elaboration of these comments has been facilitated by the International CSO Facilitating Team which the International Planning Committee for Food Sovereignty (IPC) put in place early 2010 to facilitate CSO participation in the elaboration process of the FAO Guidelines. It requested comments from all CSO interested in this process through the Civil Society Mechanism of the CFS. The organizations which endorse these comments can be seen at the end of the document.

The zero draft does not mention that States have human rights obligations and does not recall what these obligations are. Instead, in part 2 on General Matters, para 3 on Guiding objectives and principles for responsible tenure governance, the zero draft introduces as “guiding objectives“ categories (respect, protect and fulfil) which resemble the States' human rights obligations as spelled out by the UN Committee on Economic, Social and Cultural Rights.

Even more problematic is the fact that the zero draft does not clearly identify the States as duty bearers of human rights obligations and tends to wrongly put “all parties“ as having the same level of obligations throughout the whole document; or to talk as in para 4 about “rights and responsibilities“ without identifying the duty bearers and the right holders.

Moreover, the zero draft confuses human rights with other rights that regulate specific aspects of access to, use of and control over land and other natural resources (such as tenure regimes, demarcation and titling, etc.). By definition, a human right is a right that seeks to protect human dignity and is inherent to human beings without any discrimination based on sex, origin, race, place of residence, religion, and any other status. Human rights are universal, interdependent, indivisible and interrelated. They impose obligations on States derived from various sources of international law, e.g. treaties, customary law. As opposed to human rights, tenure rights are not universal but subject to the specificities of the national/local historical, social, economic and political context.

Finally, key concepts which have been carefully defined by the UN human rights treaty bodies, such as the concepts of security of tenure and forced evictions have not been properly included in the zero draft. Likewise, the principle of free, prior and informed consent (FPIC) under which the States must obtain the approval of indigenous peoples for any measure affecting indigenous territory or resources is barely referred to despite its paramount importance for these Guidelines. Other rights enshrined in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), such as the indigenous peoples' right to territory, are not mentioned at all in the entire zero draft.

### **The Guidelines cannot be “voluntary”.**

They are grounded in binding treaty obligations and principles of international human rights and other public law, thereby making it incumbent upon States to apply the principles outlined in the Guidelines. Qualifying the Guidelines as “voluntary” will promote the mistaken understanding that they are somehow “optional” and not binding national and international obligations, and encourage the idea that States and international organizations can act entirely at their own privately driven discretion in the administration and disposal of land and other natural resources. The Guidelines alone will not create new obligations, but should provide an authoritative interpretation of existing obligations so as to assist policy makers and implementers to know their duties, as well as *how* to fulfil them. For these reasons we reiterate our proposal of deleting the word “voluntary” from title of the Guidelines.

**Given these serious concerns, we strongly recommend to the FAO Secretariat to seek the assistance of the specialized UN Human Rights bodies and experts, in particular, the Special Rapporteur on the Right to Adequate Food, the Special Rapporteur on the Rights of Indigenous Peoples and the Office of the High Commissioner for Human Rights, for improving the existing draft.**

## **Part II:**

### **A. Positive elements**

The zero draft contains a series of elements that should be maintained and strengthened.

- (1) The references to the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security (particularly Guidelines 8.1, 8.6, 8.7, 8.10 and 8.13 could be cited in the Guidelines on Tenure), the International Conference on Agrarian Reform and Rural Development (ICARRD), the International Labour Organization Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries, the United Nations Declaration on the Rights of Indigenous Peoples, the Convention on Biological Diversity (CBD), the United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons (“Pinheiro Principles”) and the intention to base the Guidelines on existing obligations under international human rights law.
- (2) The cross-cutting gender approach.
- (3) The attempt to mainstream the legal concept of forced eviction.
- (4) The recognition of indigenous and other customary tenure, as well as of informal tenure, and the recognition that there are different tenure systems and socio-legal contexts.
- (5) The inclusion of restitution and redistributive reforms.
- (6) The importance of recognising and tackling the impact of high-level corruption between business and political elites in the mis-governance of land and natural resources.

### **B. Missing issues**

We welcome the objective formulated in para 1.1 that the Guidelines should have an emphasis in improving the governance of tenure for the benefit, and we strongly recommend to add, for the realization of the right to adequate food and other human rights of vulnerable and marginalized people. The core mandate of FAO and the CFS is to overcome hunger. The Guidelines should explicitly be aimed at contributing to achieve this goal. Giving priority to the groups most affected by hunger and malnutrition related to lack of access to land, water and other natural resources, and to insecurity of tenure is a must. The Guidelines should therefore more strongly state that the rights of vulnerable groups need to be protected in order to secure their livelihoods and ability to achieve food security. It should be one of the core objectives of the Guidelines to protect the rights of vulnerable groups in any process of land development or investment in rural areas. In the following section, we list a series of issues included in the zero draft which are not coherent with this objective and the prioritization it defines or which are missing but are crucial to the protection of the most affected groups.

- (1) **The new title of the Guidelines excludes water.** This is difficult to understand especially if the Guidelines intend to apply a holistic approach to natural resources and their use as stated in paragraph 3.2(4). Moreover, access to drinking water and to water for food production and livestock keeping is absolutely crucial when it comes to hunger eradication. The use of land for productive purposes cannot be separated from the use of water (investment in land is very much linked to the availability of water), and several cases of investments into land

have already shown severe negative impacts on the availability of water for local users. Control of the land often means that groundwater can be extracted or that river water can be diverted to irrigate fields or for other purposes at will. Moreover, the use to which the land itself is put may also result in water being contaminated. Such practices severely affect the access to water of neighbouring and downstream communities. **We therefore strongly recommend to include water in the title and contents**, particularly in para 2.2 of the Guidelines.

- (2) **Fisheries and Forests are not equally and comprehensively reflected in the Guidelines.** The present draft is basically oriented to land issues, and tenure issues in fisheries and forests are not adequately or appropriately addressed (despite both of them now being in the title). Paragraph 7 on Safeguards mentions, for instance, “tenure rights to land, fisheries and forest” in 7.1, but paragraph 7.5 only deals with evictions and does not mention the impediment of user rights (gathering, grazing, fishing rights, etc.). Moreover, the Guidelines did not refer at all to the Code of Conduct on Responsible Fisheries, particularly to articles 6.18, 9.1.4 and 10.1.3. **Forests and fisheries tenure issues should be adequately incorporate throughout the whole Guidelines.**
- (3) **The new title also lacks clarity about the extent to which it addresses broader natural resources.** For example it is not clear if the scope of the Guidelines covers rights of access to, use of, and control over – range lands, hunting rights, gathering of non-timber forest products, sub-surface resources (such as oil, gas and minerals), above-surface resources, and carbon. **We recommend to explicitly include these in the Guidelines.**
- (4) **The Preface fails to mention key driving forces behind the growing conflicts over land and natural resources and related human rights violations.** Land and natural resource grabbing, and the (re-)concentration of access to land, forests, fishing grounds, water sources (freshwater and marine) and other natural resources are accelerating as a result of the dominant development model that thrives on industrial monocrop agriculture (including crops for agrofuel production and tree plantations), industrial tourism, fishing, and ranching; large-scale mining and energy production, destructive industrial and infrastructure projects, commoditization of natural resources, rapid, unplanned urbanization and needless consumption. **The Guidelines should make clear in which context they will be operating and what are the major problems that they seek to address.**
- (5) **The zero draft does not address power imbalances in tenure issues** but rather tends to put “all parties“ on equal footing as if the States, transnational companies and landless women had the same rights, responsibilities and duties. Governance of land and other natural resources involves deciding not only how land and other natural resources are to be governed, but also who gets to decide and how the key decisions will be made, including how different social groups’ priorities, interests and rights will be dealt with. At the heart of this matter lie the power relations and modes of production that prevail in a given society and the international community. The main land and natural resources tenure problems faced by marginalized rural and urban groups are related to distorted power relations within and behind the ruling government structures affecting land and natural resources; discrimination in mainstream economic development models; exclusion from decision-making processes on land and natural resources laws and policies; discrimination in accessing justice; and abuses by powerful non-State actors. The zero draft barely touches upon these issues. The impact of grand corruption between high level business and political elites, State capture of natural resources and kleptocratic mis-governance are not yet addressed. Particularly worrying is the silence about the persecution, harassment and violent repression that defenders of the human rights of peasants, indigenous peoples, fisherfolks, pastoralists and other traditional users suffer for defending their rights related to land and

natural resources. **The Guidelines should explicitly include provisions guaranteeing the rights of all people (citizens or not) to due process, and the civil and political liberties of the human rights defenders so that criminalization and repression against social and community struggles in defense of land and other natural resources are avoided. The Guidelines should also encourage enacting right to information legislation at the domestic level.**

- (6) **Women tenure issues are poorly taken into consideration.** As we positively acknowledged before, the zero draft integrated a cross-cutting gender approach. Nevertheless, women's tenure issues should be included more explicitly. A clear provision highlighting, for instance, the importance of guaranteeing that women have direct access to and control over land and other natural resources, be it in collective or individual tenure systems, would be very important.
- (7) **Environmental sustainability and climate change issues and their relationship with tenure of natural resources have not been sufficiently taken into account.** The sustainable use of natural resources should be included in the zero draft as a principle. Moreover, the protection of ecosystems according to international conventions, and ecosystem functions with regard to adaptation and mitigation of climate-change should be included more explicitly.
- (8) **Paragraphs 3 and 4 in part 2 require major redrafting so that they clearly state - on the basis of agreed language – the content of States' human rights obligations and how the States must implement these obligations.** The reference to binding obligations of states in international law should be made more prominent. We suggest including the references to all relevant treaties and guidelines in one of the starting chapters and also shortly explaining their relevance for the Guidelines; in particular UDHR, IESCR, ICCPR, CEDAW and ICERD. An example for such a starting chapter is the chapter “basic instruments” in the introduction of the Right to Food Guidelines. The text needs to be precise in reference to international law standards and needs to be corrected particular in Part 2. The “guiding objectives” (respect, protect, fulfill...) mentioned under 3.1 are the since many years the standard description of state obligation under international law and should be incorporated following agreed language (for example the language of paragraph 17 in the basic instrument chapter of the Right to Food Guidelines). Equally important is to clearly identify who are the right holders and the duty bearers of the human rights obligations related to tenure of natural resources, and to clearly distinguish when the word “rights” is used to denote human rights or tenure rights. The chapter 3.2 “principles of implementation” needs also a rewriting. It should focus on the first hand on internationally agreed standards for the implementation of human rights (human rights principles) such as non-discrimination, participation, gender equity, rule of law, transparency, accountability and progressive realization (instead of continuous improvement). Again it is important to use agreed language, which is often more precise than trying to reformulate agreed standards. In a second part it can take up the other relevant standards such as “holistic approach”. Paragraph 4.8 should be reformulated so that it covers the concept of holding States accountable to their human rights obligations. At present, it limits the concept of access to justice to resolve disputes over tenure rights but fails to state that all persons and communities have the right to an effective remedy in case of violations of her/his human rights in relation to tenure of natural resources. This implies the right to access political, administrative, judicial and quasi-judicial mechanisms to provide adequate, accessible, effective and fast appeals/recourse (including the possibility of creating national and international independent jurisdictions) when their rights to land and other natural resources and to territory – when it applies— have been threatened or violated, or when the States do

not fulfil their related FPIC obligations.

- (9) **The concepts of security of tenure, forced evictions and adequate compensation**, as developed in the respective human rights instruments and authoritative bodies are lacking in the zero draft. We strongly recommend their inclusion in part 2 of the Guidelines, particularly with a reference to the General Comment 7 of the UN Committee on Economic, Social and Cultural Rights on Forced Evictions and the UN Basic Principles and Guidelines on Development-based Evictions and Displacement.
- (10) **The principle of free, prior and informed consent (FPIC) should be placed more prominently in the Guidelines and be systematically incorporated throughout the whole document.** FPIC is a right and a principle enshrined in UNDRIP (Art. 10, 11.2, 19, 28, 29.2, 32.2). Although FPIC is mentioned in the paragraph 9.8, we recommend to include it in paragraph 3.2 on the principles of implementation and to refer to this principle whenever relevant, e.g. paragraph 5.8, 8.3, 8.5, 9.8, 12, 13, 16, 20, 23. The Guidelines should make clear that this right/principle is also applicable to non-indigenous groups which also directly depend on land and natural resources for their living taking care of not undermining the specific FPIC right of indigenous peoples.
- (11) **The Guidelines refer to indigenous communities or groups only. It is necessary to include also the term indigenous *peoples* as it is standard in the UN system.**
- (12) **We recommend to clearly distinguishing the role of the state, the private sector and civil society.** Particular attention should be given to the accountability of the private sector. The zero draft does not deal with the issues of abuses by powerful non-state actors and the responsibilities of transnational companies and other enterprises with respect to the human rights related to tenure issues. The term “ethical behaviour” (eg. 19.6) is often used in relation to private sector obligations but the term is never defined and no reference to international existing standards is made. We recommend to stress the state’s obligation to properly regulate the activities of transnational companies (TNCs) and other commercial businesses so that they do not affect negatively the realisation and enjoyment of human rights related to land and other natural resources of workers, nomadic pastoralists/herders, artisanal and small-scale fisher-folk, indigenous peoples and peasants. The Guidelines should also encourage the establishment of effective mechanisms that allow TNCs and businesses to be held legally accountable for losses and damages arising from violations and/or crimes that they commit at home or abroad at the domestic and international level.
- (13) **Part 3 fails to acknowledge the natural commons**, their importance for the food and livelihood security of local users and communities and for the conservation of terrestrial and aquatic biodiversity. The natural commons comprise lands and water bodies, including for example, farm/crop lands, wetlands, forests, wood-lots, open pasture, grazing and rangelands, hill and mountain slopes, streams and rivers, ponds, lakes and other fresh water bodies, fishing grounds, seas and oceans, coastlines, minerals, terrestrial and aquatic biodiversity. In every part of the world, agricultural, forest, fishing, coastal, pastoral, nomadic and indigenous communities have developed sophisticated systems of using, sharing, governing and regenerating their natural commons. These systems which in many cases are rooted in collective rights are essential elements of their respective cultural-political identities and are crucial to their very survival. **The Guidelines should recognise the natural commons, collective rights to natural resources, and community-based tenure rights systems and include provisions to protect and strengthen them.**
- (14) Part 4 deals with different ways of transferring and changing tenure rights as if they

had the same importance for the rural and urban marginalized groups. **Restitution and redistributive reforms should clearly have the priority** since they seek to address historic dispossession of natural resources and unjust and discriminatory tenure patterns, and thus are of utmost importance for Indigenous Peoples, pastoralists, ethnic groups, Dalits and landless people. Redistributive reforms should explicitly include aquatic reforms, for instance in paragraph 15.1 and 15.4. Moreover, we recommend that **reference be made to the principles contained in the Final Declaration of the International Conference on Agrarian Reform and Rural Development (ICARRD) and The Peasant Charter** as the most authoritative instruments in this matter.

- (15) **Paragraph 11 on markets lacks regulations that restrict the transferability of land and other natural resources tenure rights** in order to protect the commons and indigenous peoples' territories, areas that have undergone redistributive agrarian/aquatic reforms, and areas of peasants and small-scale farming that should maintain an equitable tenure structure. We recommend addressing this gap.
- (16) **Paragraph 12 on investments and concessions is extremely worrying** because it contradicts the objective defined in 1.1. It accepts large-scale acquisition of tenure rights regardless of the serious human rights impacts on the local populations, particularly in food insecure countries. Moreover, it fails short to provide guidance about how to properly regulate of all types of investment so that they do not negatively affect the security of tenure of the poor and contribute to the realization of the right to food and other human rights. Instead of formulating strong provisions on the principle of FPIC of Indigenous Peoples and all the peoples whose living directly depends on the natural resources targeted for investments and concessions, paras 12.3 and 12.5 talk about States and investors ensuring "negotiations" with the affected men and women. **We urge FAO to include provisions in the Guidelines which subject both public and private investments to strict, legally enforced regulation that safeguards indigenous peoples' rights to territory and peoples' rights to land and natural resources, as well as the rights of workers to decent work, fair wages and other compensation in accordance with relevant human rights treaties.** States should prohibit large-scale appropriation and concentration of land, water and other natural resources, and impose maximum limits on the quantity of these resources that private investors (domestic and foreign) can control or own to avoid the transfer of land and resources from the commons/peoples' territories to private hands; the concentration of resources in the hands of a few actors; and increased power by private companies over the productive structure of a country. All private investments must be coherent with the public interest and be subject to public monitoring to ensure that they do not violate human rights or negatively affect food security and sovereignty and environmental sustainability objectives. Large-scale acquisition of land cannot be considered a private investment.
- (17) **Weak inclusion of spatial planning:** The central role of spatial planning that brings together national, regional and local land use planning and also combines different land uses (for infrastructure, settlement, agriculture, water catchment protection, environmental protection, natural habitats that needs protection, etc.) does not come out clearly in the document. We suggest to emphasize the need for coherent spatial planning with the overall objectives of poverty eradication, environmental sustainability and realization of human rights in the beginning of the document, and combine it with the reference to human rights principles. Land and natural resources use plans should be formulated in a participatory manner through open and public consultations and decision making processes. Long-term strategies for managing natural resources should include social and environmental safeguards, and are based on economic, environmental, social and human rights impact assessments of different types of land and natural resource use. FPIC in conservation and

management initiatives should also be guaranteed. We also recommend here to include a reference to the ICARRD principles, to the CBD and to the Rio Declaration. “Temporal planning” needs also to be considered since some people, particularly nomadic pastoralists, may need rights that allow for access to some areas at certain times of the year and/or in certain situations.

- (18) **Part 7 on implementation, monitoring and evaluation is extremely weak.** Without a strong system of monitoring, the Guidelines will not achieve their objectives. **A monitoring mechanism of compliance with these Guidelines at national and international level should be developed by the CFS and FAO.** The establishment of national independent and multi-actor bodies to observe compliance with the present Guidelines should be encouraged. Regional and international institutions -- especially IFIs -- must incorporate the present Guidelines in their operational policies and directives and not support private or public projects, programmes or measures that violate human rights.
- (19) **The zero draft does not address the dimension of international cooperation in tenure issues beyond the issue of transboundary matters. We recommend to include guidance in this respect,** for instance, stating that States, the specialized UN organizations, multilateral agencies and IFIs should not promote measures that obstruct or impede in any way the realisation of human rights related to land and other natural resources, including policies that destroy present and future access and tenure rights of local users and promote the concentration of land and other natural resources in elite groups. Instead, they should contribute to the fulfilment of these Guidelines in all countries. Under no circumstances forced evictions or involuntary displacements should be supported, encouraged or condoned. All bilateral and multilateral, regional and international trade, investment and economic cooperation agreements should incorporate these Guidelines. The Guidelines should become mainstreamed in the aid and cooperation policies of FAO, IFAD, other pertinent UN agencies, multilateral bodies and bilateral donors.

List of endorsing organizations

To be added