

CSO Draft Comments  
on the Zero Draft of the Voluntary Guidelines on the Responsible Governance of Tenure of Land,  
Fisheries and Forests

24/04/2011

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.**

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 people for any measure affecting indigenous territory or resources is barely referred to despite its paramount importance for these Guidelines. The indigenous peoples' right to territory is 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, 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. An explicit provision highlighting 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.
- (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.
- (5) The inclusion of restitution and redistributive reforms.
- (6) The importance of combating corruption.

## **B. Missing issues**

We agree with 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 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. 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. 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 para 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. We therefore strongly recommend to include water in the contents and title of the Guidelines.
- (2) **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.

- (3) **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. 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 to territory, land and natural resources.
- (4) **Para 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.** 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. This part should include an explicit reference to the relevant human rights treaties. Particularly important in this respect is also the concept of holding States accountable to their human rights obligations. The zero draft limits the concept of access to justice to resolve disputes over tenure rights (para 4.8) 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 rights to access political, administrative, judicial and quasi-judicial mechanisms to provide adequate, accessible, effective and fast appeals/recourse 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.
- (5) **The concepts of security of tenure, forced evictions, adequate compensation, the principle of free, prior and informed consent (FPIC) and the indigenous peoples' right to territory** as developed in the respective human rights instruments and authoritative bodies are lacking in the zero draft. We strongly recommend their inclusion in the Guidelines, particularly a reference to the UN Basic Principles and Guidelines on Development-based Evictions and Displacement presented in 2007 by the former Special Rapporteur on the right to adequate housing .
- (6) **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 Guidelines should recognise them and include provisions to protect and strengthen the natural commons.
- (7) 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. For redistributive reforms and for para 20 on regulated spatial planning, 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.

- (8) **Para 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 that should maintain an equitable tenure structure. We recommend addressing this gap.
- (9) **Para 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, 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. FPIC should also apply for para 13 on land consolidation.
- (10) 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 of quality, 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 sovereignty and environmental sustainability objectives.
- (11) **Part 7 on implementation, monitoring and evaluation is extremely weak.** A monitoring mechanism of compliance with these Guidelines should be developed by the CFS and FAO. Without a strong system of monitoring, the Guidelines will not achieve their objectives.
- (12) **The zero draft does not address the dimension of international cooperation in tenure issues beyond the issue of transboundary matters.** We recommend their inclusion.
- (13) **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.** We recommend the inclusion of this important aspect as well.