

CSO Consolidated Comments¹ on the Zero Draft of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests

The Civil Society Organizations (CSO) thank the FAO for the Zero Draft and its efforts to include the substantive issues raised during the broad process of consultation.

Our comments are presented in two parts in this document. The first part refers to the normative framework of the Guidelines, which is fundamental as the groundwork for the content. The second part presents those aspects of the Zero Draft that we consider positive, followed by a summary of those elements deemed problematic and in need of amendment.

Part I: Normative framework

As paragraph 2.2 of the Zero Draft states, the Guidelines should be interpreted and applied with respect for existing obligations that address human rights and secure access to land, fisheries and forests under national and international law. We welcome this approach. However the contradictions and important omissions highlighted in this document could be addressed through explicit clarification of the Guidelines' commitment to existing human rights standards. Principally, it must be clear that the Guidelines are 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 promote a clear normative standard about the nature of responsible governance. As such, they must form the basis of the Guidelines' normative framework.

1. The Zero Draft lacks any explicit reference to the legal standards enshrined in human rights treaties.

Access to *and* benefits from land and natural resources are explicitly recognized as indispensable elements of several specific human rights, and particularly the right to adequate food and housing. These rights are enshrined in international legal instruments including but not limited to 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) and the Convention on the Elimination of all forms of Discrimination against Women (CEDAW, particularly art. 14). These standards prescribe the entitlements of those who directly depend on land and natural resources for their livelihoods.

2. The Zero Draft does not follow international agreed language when it introduces human rights concepts. This may lead to misinterpretation and a potential lowering of existing agreed standards, which is not acceptable. It may also 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 Part 2 (General Matters: Guiding objectives and

¹ 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.

principles for responsible tenure governance, paragraph 3), introduces as “guiding objectives” the 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 States as duty bearers of human rights obligations and tends to mistakenly present “all parties” as having the same level of obligations throughout the document. In some cases “rights and responsibilities” are discussed without identification of the duty bearers and the right holders (see Part 2, paragraph 4).

Moreover, the Zero Draft conflates 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 without discrimination based on sex, origin, race, place of residence, religion or any other status. Human rights are universal, interdependent, indivisible and interrelated. Derived from various sources of international law such as treaties and customary law, they impose obligations on States. In contrast, tenure rights are not universal but subject to the specificities of national/local historical, social, economic and political contexts.

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 eviction, are not appropriately addressed 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 scarcely referred to despite its paramount importance to the purpose of 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.

3. The Status of the Guidelines cannot be “voluntary”.

The Guidelines 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 they outline. 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 CSO strongly recommend the removal of “voluntary” from title of the Guidelines.

We strongly recommend that the FAO Secretariat seek the assistance of the specialized UN Human Rights bodies and experts, and in particular that of the UN Special Rapporteurs on the Right to Adequate Food, on the Right to Water, on the Right to Adequate Housing, on the Rights of Indigenous Peoples and the Office of the High Commissioner for Human Rights in making improvements to the existing draft.

Part II:

A. Positive elements

The Zero Draft contains the following positive elements that should be retained and may, in some cases, be strengthened:

- (1) 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 stated 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) recognition of different tenure systems including indigenous, customary and informal tenure within various socio-legal contexts;
- (5) the inclusion of restitution and redistributive reforms.
- (6) recognition of the importance of tackling the impact of high-level corruption in elite business and political spheres in the mis-governance of land and natural resources.

B. Omissions

We welcome the Guidelines’ emphasis on improving the governance of tenure for the benefit of vulnerable and marginalized people (as stated in paragraph 1.1) however we strongly recommend that this is presented in terms of the realization of the right to adequate food and other human rights. The core mandate of the FAO and the CFS is to overcome hunger. The Guidelines should explicitly aim to contribute to the achievement of this goal. It is essential that the Guidelines give priority to the groups most affected by hunger and malnutrition due to factors including lack of access to land, water and other natural resources, and insecurity of tenure. The Guidelines should therefore emphatically state that the rights of vulnerable groups must be protected in order to secure livelihoods and achieve food security.

One of the core objectives of the Guidelines must be to protect the rights of vulnerable groups in any process of land development or investment in rural areas. The following issues covered in the Zero Draft are not consistent with this objective.

- (1) **The new title of the Guidelines excludes water.** This is illogical when the Guidelines express the intention to apply a holistic approach to natural resources and their use (stated in paragraph 3.2(4)). Access to water for drinking, food production and livestock tending is absolutely crucial to hunger eradication. The use of land for productive purposes cannot be separated from the use of water. Investment in land is inextricably linked to the availability of water..The severe negative impacts of land investment on the availability of water for local users can be witnessed in many cases. Control of land often results in the extraction of groundwater and/or diversion of rivers for irrigation and other purposes at will. Moreover, the use to which the land is put may also result in water being contaminated. Such practices severely affect the access of neighbouring and downstream communities to water.

Recommendation: Include water in the title of the Guidelines, refer to the human right to water and explicitly reference it throughout, particularly in paragraph 2.2.

- (2) **Fisheries and Forests are not equally and comprehensively represented in the**

Guidelines. The current draft is primarily oriented to land issues while tenure issues in fisheries and forests are not adequately addressed (despite reference to both in the title). The section on Safeguards, for instance, mentions “tenure rights to land, fisheries and forest” (7.1) but only deals with evictions (7.5), neglecting the impediment of user rights (gathering, grazing, fishing rights, etc.). Moreover, the Guidelines fail to reference the Code of Conduct on Responsible Fisheries, specifically articles 6.18, 9.1.4 and 10.1.3.

Recommendation: Forests and fisheries tenure issues should be incorporated throughout the Guidelines.

- (3) **The new title does not adequately reflect the extent to which the Guidelines address access to natural resources, in general.** It is not clear if the scope of the Guidelines includes 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.

Recommendation: Explicit reference to general access to natural resources is made in the Guidelines.

- (4) **The Preface of the Guidelines fails to mention the key driving forces behind the growing conflicts over land and natural resources, and related human rights violations.** Practices including 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. This model is based 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; the commodification of natural resources; rapid, unplanned urbanization; and needless consumption.

Recommendation: The Guidelines should make explicit their operational context and the major problems that they seek to address.

- (5) **The Guidelines do not address power imbalances in tenure issues.** Rather, they deceptively represent “all parties” as equal, as if States, transnational companies and landless women bear 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 managed, 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 considered. At the heart of this matter lies the power relations and modes of production that prevail in a society, and the broader international context. The predominant problems faced by marginalized rural and urban groups in relation to land and natural resource tenure are inextricably linked to distorted power relations in dominant government structures influencing land and natural resources. Power imbalances are manifested in discrimination in mainstream economic development models; exclusion from decision-making processes on land and natural resources laws and policies; discrimination in access to justice; and abuses by powerful non-State actors. The Zero Draft barely touches upon these issues. The impact of corruption among high level business and political elites, State capture of natural resources and kleptocratic mis-governance are not addressed. Of particular concern is the Guidelines’ silence regarding 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 rights related to land and natural resources.

Recommendation: The Guidelines should explicitly elaborate on power imbalances related to tenure issues. Moreover, they should include provisions guaranteeing the rights of all people (not just citizens) to due process. The Guidelines should also guarantee the civil

and political liberties of human rights defenders to prohibit the criminalization and repression of those engaged in social and community struggles in defense of land and other natural resources. The Guidelines should also promote the development of right to information legislation at the domestic level.

- (6) **Women tenure issues are poorly taken into consideration.** As previously acknowledged, the Zero Draft applies a cross-cutting gender approach. Nevertheless, women's tenure issues should be referenced more explicitly.

Recommendation: The Guidelines should highlight the necessity of guaranteeing that women have direct access to and control over land and other natural resources, in collective and individual tenure systems.

- (7) **Environmental sustainability, climate change and the relevance of these issues for the tenure of natural resources have not been sufficiently addressed in the Guidelines.**

Recommendation: 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 the treatment of ecosystem functions with regard to adaptation and mitigation of climate-change, should be referenced more explicitly.

- (8) **The language of international human rights treaties, as agreed upon by States regarding their obligations, commitments and plans for implementation, must form the basis of the Guidelines.** This is particularly relevant to Part 2, paragraphs 3 and 4. The reference to binding obligations of States in international law should be more prominent. We suggest reference to all relevant treaties and guidelines in a preliminary chapter with a concise explanation of their relevance for the Guidelines. Of particular relevance are the UDHR, IESCR, ICCPR, CEDAW and ICERD. This chapter might be modeled on the introduction to the Right to Food Guidelines, "Basic Instruments". The text must explicitly reference international law standards, particularly in Part 2. The Guiding Objectives to respect, protect and fulfil (3.1) provide the standard description of state obligations under international law and should be incorporated following agreed language , for example, in the manner of the language of paragraph 17 in the Basic Instrument chapter of the Right to Food Guidelines. Equally important is clear identification of right holders and duty bearers of human rights obligations related to tenure of natural resources. It is also vital to clearly distinguish between human rights and tenure rights.

Additionally, the "Principles of Implementation" (Chapter 3.2) should focus firstly on the 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 (as opposed to 'continuous improvement'). Again, it is vital to use agreed language, which is more precise and does not require redrafting. The Guidelines should also incorporate other relevant standards such as "holistic approach". Holding States accountable to their human rights obligations should be addressed (in paragraph 4.8). The current draft limits the concept of access to justice to the resolution of disputes over tenure rights. It fails to state that all persons and communities have the right to an effective remedy in case of violations of rights in relation to tenure of natural resources. This implies the right to access political, administrative, judicial and quasi-judicial mechanisms that provide adequate, accessible, effective and rapid appeals/recourse (including the possibility of creating national and international independent jurisdictions) when rights have been threatened or violated, or when the States do not fulfil their related Free, Prior and Informed Consent (FPIC) obligations.

Recommendation: The language of international human rights treaties, as agreed upon by States regarding their obligations, commitments and plans for implementation, must form the basis of the Guidelines. This is particularly relevant to sections 2. 3, 2. 4, 3.2 and 4.8.

- (9) **The concepts of security of tenure, forced evictions and adequate compensation**, as developed in the respective human rights instruments, are neglected in the Zero Draft.

Recommendation: The inclusion of these concepts in Part 2 of the Guidelines, particularly with 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 made more prominent throughout the Guidelines.** FPIC is a right and principle enshrined in UNDRIP (Art. 10, 11.2, 19, 28, 29.2, 32.2). The Guidelines should make clear that this right/principle is also applicable to non-indigenous groups who also directly depend on land and natural resources for their livelihoods, taking care to avoid undermining the specific FPIC right of indigenous peoples.

Recommendation: Although FPIC is mentioned in the Guidelines (paragraph 9.8) we recommend its further inclusion in paragraph 3.2 on the principles of implementation and also in paragraphs 5.8, 8.3, 8.5, 9.8, 12, 13, 16, 20, 23.

- (11) **The Guidelines refer to indigenous communities or groups only.**

Recommendation: The Guidelines should also refer to indigenous *peoples* in keeping with UN standards.

- (12) **The Guidelines do not clearly distinguish 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 (TNCs) and other enterprises with respect to human rights related to tenure issues. The term “ethical behaviour” is often used in relation to private sector obligations (for example, in 19.6) but the term is never defined and no reference to current international standards is made.

Recommendation: The Guidelines must emphasize States’ obligations to properly regulate the activities of TNCs and other commercial entities in order to prevent negative impacts on the realisation and enjoyment of human rights related to land and other natural resources by 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 make TNCs and businesses legally accountable for losses and damages arising from violations and/or crimes they commit locally or internationally.

- (13) **The Guidelines (Part 3) fail to acknowledge the natural commons, their significance for the food and livelihood security of local users and communities, and their role in the conservation of terrestrial and aquatic biodiversity.** The natural commons comprise farm/crop lands, wetlands, forests, wood-lots, open pasture, grazing and range-lands, 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, often rooted in collective rights, are essential dimensions of the cultural-political identities of individuals and communities, and are crucial to their very survival.

Recommendations: 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) **The Guidelines (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 as they seek to address historic dispossession of natural resources and unjust and discriminatory tenure patterns. They are of the utmost importance to Indigenous Peoples, pastoralists, ethnic groups, Dalits and landless people.

Recommendation: Prioritize restitution and redistributive reforms. The latter should explicitly include aquatic reforms (for example, 15.1 and 15.4). We recommend that explicit 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, these being the most authoritative instruments on this issue.

- (15) **The Guidelines fail to promote 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 peasant and small-scale farming that should maintain an equitable tenure structure.

Recommendation: This omission should be addressed in the section on 'markets' (paragraph 11).

- (16) **The Guidelines' reference to investments and concessions (paragraph 12) contradicts the objective defined in 1.1.** This is of major concern, particularly in food insecure countries, as it implies tolerance of large-scale acquisition of tenure rights regardless of the serious human rights impacts of these activities on local populations. Moreover, the Guidelines fail to provide guidance regarding the appropriate regulation of all types of investment to prevent negative impacts on the security of tenure of the poor and their realization of the right to food and other human rights. Instead of formulating strong provisions based on the principle of FPIC of Indigenous Peoples and all peoples whose livelihoods directly depend on the natural resources targeted for investments and concessions, the Guidelines require States and investors to ensure "negotiations" with the affected men and women (paragraphs 12.3 and 12.5).

Recommendation: 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 employment, fair wages and other compensation in accordance with relevant human rights treaties. 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. Furthermore, the Guidelines should encourage States to introduce provisions which 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.

- (17) **The Guidelines do not adequately address spatial planning.** Spatial planning links national, regional and local land use planning and also combines different land uses such as infrastructure development, settlement, agriculture, water catchment protection, environmental protection, and natural habitats.

Recommendation: The incorporation of spatial and temporal planning in the Guidelines with reference to the ICARRD principles, to the CBD and to the Rio Declaration. In the Guidelines, spatial planning must reflect the overall objectives of poverty eradication,

environmental sustainability and realization of human rights. This should be addressed in the beginning of the document in combination with the reference to human rights principles. Land and natural resource 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 based on economic, environmental, social and human rights impact-assessments of different types of land and natural resource use. FPIC should be guaranteed in conservation and management initiatives. “Temporal planning” should also 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) **The Guidelines’ treatment of monitoring and evaluation (Part 7) is extremely weak.** Without a strong system of monitoring, the Guidelines will not achieve their objectives.

Recommendation: That the CFS and the FAO develop a monitoring mechanism to ensure compliance at national and international level. The establishment of independent national and multi-actor bodies to observe compliance should be encouraged. Regional and international institutions, and especially international financial institutions (IFIs), must be required to incorporate the Guidelines in their operational policies and directives as a means to avoid supporting 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.**

Recommendation: The Guidelines must require States, specialized UN organizations, multilateral agencies and IFIs to 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 the hands of elite groups. States, specialized UN organizations, multilateral agencies and IFIs should contribute to the fulfilment of these Guidelines in all countries. Under no circumstances should 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 be incorporated in the aid and cooperation policies of FAO, IFAD, other pertinent UN agencies, multilateral bodies and bilateral donors.

List of endorsing organizations

ACORD, Africa

Action Aid International

Africa Europe Faith & Justice Network (AEFJN), Africa and Europe

African Network for the Right to Food (RAPDA), Africa

Both Ends, Netherlands

Brot für die Welt, Germany

Cenesta, Iran

Centre Africain pour la Démocratie et la Gouvernance – CADEG, Africa

CIDSE, Europe and North America

Conseil d'Appui au Développement Communautaire (CADEC), Democratic Republic of Congo
Crocevia, Italy
Economic Justice Network (EJN) of the Fellowship of Christian Councils in Southern Africa (EJN of FOCCISA), Southern Africa
Ecumenical Advocacy Alliance, International
European Food Security group (EFSG) of CONCORD, Europe
FIAN Belgium
FIAN Brazil
FIAN Ecuador
FIAN International
FIAN Netherlands
FIAN Norway
Focus on the Global South, South Asia and South East Asia
Food Secure Canada, Canada
Friends of the Earth International, International
Habitat International Coalition – América Latina (HIC-AL), Latin America
Institute for Agriculture and Trade Policy (IATP), USA
International Collective in Support of Fishworkers (ICSF), International
International Food Security Network (ISFN), International
International Presentation Association of the Sisters of the Presentation, International
Italian Committee for Food Sovereignty, Italy
JUNCTION, Senegal
La Via Campesina, International
Misereor, Germany
Norwegian Forum for Environment and Development, Norway
Oxfam International
Presbyterian Church, USA
Presentation Sisters, English Province, South West Province/Ireland, Fargo/USA, San Francisco/USA, Western Australia
Prisma, The Netherlands
Reseau des Organisations Paysannes et des Producteurs Agricoles de L'Afrique de L'Ouest (ROPPA), West Africa
Traidcraft, UK
Trócaire, Ireland
US Food Sovereignty Alliance, USA