



Mandate of the Special Rapporteur on the right to food

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

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The Special Rapporteur on the right to food welcomes the Zero Draft of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests. These draft guidelines have been prepared through a broad consultative process, for which the FAO and many supporting governments should be commended. The adoption of these guidelines should be one of the most important outcomes of the 37th session of the Committee on World Food Security (CFS) in October 2011. Once adopted, they could encourage governments to put the governance of land and other natural resources at the heart of the efforts to improve food security and progressively realize the human right to adequate food.

The Special Rapporteur commends the FAO for the structure of the Zero Draft, which clearly distinguishes among various elements of a responsible governance of tenure of land and other natural resources. He welcomes the recognition of the importance of a gender approach; the reminder of the need, where adequate, of redistributive reforms; the systematic stress on the need to fight corruption; and the recognition of indigenous and other customary tenure.

However, the Guidelines should be further improved on a series of issues in order to become the important tool that it aims to become. The following comments build on the report "Access to Land and the Right to Food", which the Special Rapporteur presented at the 65th General Assembly of the United Nations in October 2010.¹ They are based also on the set of minimum principles and measures to address the human rights challenge of large-scale land acquisitions and leases, which was presented to the Human Rights Council in March 2010.² The reader will find the detailed rationale for all assertions made in this statement in these two reports, which are fully referenced. The proposals made below also stem from consultations held in Bamako, Mali, on 8–10 December 2009; in Kuala Lumpur, Malaysia, on 23–24 March 2010; and in Chennai, India, on 28–29 March 2010.

Main comments

1. The context

The preface, when declaring that the livelihoods of many rural poor are based on access to land and other natural resources, could recall that around 80% of the hungry depend on land and other natural resources for their food security. This would establish from the beginning a better connection between these Guidelines and the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security adopted by the Council of the FAO in November 2004, and which the present Guidelines aim to “build on and support”. It is indeed estimated that, globally, fifty per cent of the hungry live in small-scale farming households, living off less than two hectares of land; twenty per cent are landless ; and a further ten per cent are pastoralists, fisherfolk, and forest users.³

¹ U.N. doc A/65/281, see <http://www.srfood.org/index.php/en/areas-of-work/land-rights>

² U.N. doc A/HRC/13/33/Add.2, see <http://www.srfood.org/index.php/en/areas-of-work/land-rights>

³ United Nations Millennium Project, Halving Hunger: It Can Be Done: Summary Version (United Nations Development Programme (UNDP), 2005), p. 6. The remainder, around two-tenths, are urban poor.

2. The consistency of the Zero Draft with existing international standards (Parts 1 and 2)

As he stated in October 2010 before the U.N. General Assembly, the Special Rapporteur is convinced that the Voluntary Guidelines on the Responsible Governance of Tenure of Land and other Natural Resources can make a significant contribution by providing a systematic and comprehensive restatement of existing provisions of international human rights law and international environmental law that protect the rights of land users in all categories, whether indigenous peoples or other rural groups such as peasants, pastoralists and fisherfolk. At present, the rights of these groups remain scattered across various instruments, which is an obstacle to their systematic interpretation.⁴

The Zero Draft makes reference to a series of international standards and commitments, including the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security, 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”). The Zero Draft also integrates governance principles borrowed from the human rights framework, including non-discrimination, participation, accountability, and a focus on the most vulnerable groups. These elements are of vital importance to progressively realize the human right to adequate food.

Great care has been taken to ground the Guidelines in international human rights law. This is consistent with the existing consensus on the need for such a framework to guide our efforts towards achieving the right to adequate food. However, the Zero Draft makes no references to some specific elements and treaties that are part of the universal human rights framework and which have important consequences for the governance of land and other natural resources at national level. Moreover, it also moves away from these existing international legal standards by not referring to the specific obligations and responsibilities of States and non-State actors, by using language that puts all stakeholders on the same level. The Zero Draft does insist on the importance of consistency with international obligations in different paragraphs, but in a way that still leaves too much space for ambiguity.

In the view of the Special Rapporteur, the integration of human rights standards could be further improved. The Guidelines will influence the review of land policies at national level and other initiatives at regional level, as well as the priorities of international agencies. They should also become an important tool for professional staff on land issues at all levels, who are not systematically trained on international standards. The reference to existing human rights law should therefore be explicit, as it cannot be presumed that it will constitute the framework of reference for those using the Guidelines in the future.

The Special Rapporteur therefore makes the following proposals:

- Section 3 (in Part 2) on ‘Guiding objectives and principles of responsible tenure governance’ should be re-titled ‘Consistency with existing international legal standards’. The objectives of the Guidelines are indeed already defined in Section 1 (Part 1). Under this new title, paragraph 3 could make explicit references to the international legal instruments that define the normative framework for the governance of land and other natural resources. It could also recall – restating and where necessary, clarifying or giving an authoritative interpretation of – the obligations (rather than ‘principles’) of States and non-State actors which stem from these instruments, in order to enable the guidelines to be an operational tool.
- The legal instruments that should be referred to in the Guidelines are related to several specific human rights that are closely related to access to land, in particular the right to adequate food, the right to water, and the right to adequate housing. The Special Rapporteur recommends that an explicit reference be made, at a minimum, to the instruments and provisions of international human rights law referred to in the Appendix to this comment.

⁴ U.N. doc A/65/281, Para 42.

- The Respect-Protect-Fulfil framework in the Para. 3.1, which is complemented by ‘remedy’ and ‘prevent’ principles, is of great importance. However, consistent with the interpretation given to the instruments listed in the Appendix, these dimensions must be presented as ‘obligations’ rather than as ‘principles’, and States should be identified as duty bearers of these obligations, while the responsibilities non-State actors should also be clearly spelled out.
- If the above is agreed upon, Para. 2 on ‘Nature and scope’ could be rephrased in a way consistent with the above, that puts an emphasis on the fact that the Guidelines ‘clarify’ (or ‘provide an interpretation of’) existing international standards and binding obligations. Indeed, the current emphasis on the ‘voluntary’ nature of the Guidelines bears the risk that States would tend to interpret them as ‘optional’ and would consequently underestimate their obligations. This risk must be avoided as it would lower existing agreed standards. The Guidelines do not create new legal obligations; but they cannot undermine existing standards.
- Para. 4 should be redrafted in order to delineate more clearly the scope of the obligations and responsibilities of States and non-State actors respectively.
- The Guidelines should also adopt a comprehensive approach to access to water. As further described in the Appendix, the right to water is increasingly recognized as part of the human rights framework. It is also intrinsically linked to the realization of the right to food. Access to water is of fundamental importance for most land users, including farmers but also pastoralists and fisherfolk, but also for most rural inhabitants, especially where running water is inexistent, which means on very large regions. Given the increased commercial pressure on land, the access to water, and to land close to water sources, will be increasingly a source of tensions. The Guidelines should cover these issues.

3. Clarification of the various ‘rights’ and ‘rights holders’ in the legal recognition and allocation of tenure rights and duties (Part 3)

Safeguards

This section could be improved by a clarification of the various tenure rights and various rights holders. While the difference between ‘tenure rights’ and ‘human rights’ would have been clarified in Part 2, Part 3 should list the various forms of tenure rights (not only property rights, but other users rights, such as rights related to grazing, foraging, gathering, etc) as well as the various types of land users (including small-scale holders of land, tenants, pastoralists, fisherfolk, forests dwellers and other types of land users). Currently, the recognition of these various rights and groups is disseminated in different sections of the Draft. An introductory paragraph clarifying this diversity of rights and users would ensure that the Guidelines are designed for the benefits of all groups which rely upon land and other natural resources, and that the readers constantly bear in mind of the interests of the various categories of land users, as well as possible conflicts of interests to be taken care of.

Para. 7.2, which declares that States should identify all existing rights and rights holders, is very welcome and could be strengthened in order to invite States to conduct *decentralized mapping of users’ land rights*, which is simply an operational equivalent of the current wording of this paragraph.

Para. 7.3 encourages a systematic legal recognition and allocation of tenure rights, and rightly notes that States should prioritize vulnerable groups when implementing such policies. More emphasis could be put on the fact that States can allocate tenure rights “to individuals or to communities”, in order to reflect not only the various existing forms of land tenure that people have built over centuries in different parts of the world, but also to highlight the fact that States can strengthen one or the other form, or both, depending on the circumstances. More broadly, the Guidelines should encourage communal ownership systems (and not only than individual titling) where local communities have a need for them.

Para. 7.5 on forced evictions uses an inadequate formulation when it states that States ‘should’ avoid forced evictions that violate international and regional human rights obligations and are contrary to the rule of law. States ‘must’ follow the internationally agreed upon legal standards as described in the Appendix.

Moreover, this paragraph would lower existing human rights international standards without a full reference to the U.N. Basic Principles and Guidelines on Development-based Evictions and Displacement presented in 2007 by the former Special Rapporteur on the right to adequate housing (A/HRC/4/18) and to the General Comment No. 7 (1997) of the Committee on Economic, Social and Cultural Rights on the right to adequate housing (article 11.1): forced evictions.

Part 7 should also encourage States to adopt or strengthen *anti-eviction laws* imposing strict conditions for interference with the rights of land users as well as *tenancy laws* which can protect tenants from eviction and from excessive levels of rents. Such laws can also allow a tenant's heirs to occupy the land if the tenant dies, and provide the tenant with the right to pre-emption if the landowner wishes to sell (ideally, at a below-market price); they can provide for the joint titling of husband and wife as tenants, in order to protect widows from the risk of eviction; and they can ensure that the tenant will be allowed to remain on the land if the property changes hands.

The Special Rapporteur commends the FAO for having integrated the concept of 'tenure duties' in the Zero Draft in addition to 'tenure rights'. However, a further elaboration of the operational consequences of these tenure duties is needed, as the draft is almost silent on these. The notion of the 'social use' of land, as acknowledged in the Brazilian Constitution, is for instance a concrete example which identifies the duties of land owners, and it could be one experience among others to be built upon when improving the Guidelines on this aspect. The duties of land owners and land users to respect the environment as well as maintain or improve soil quality and to preserve water resources would be a second important aspect.

Public natural resources

Paras. 8.1 to 8.9 do not acknowledge the importance of *commons* in the responsible governance of tenure of land and other natural resources despite the fact that they play a vital role for many type of land users. Fisherfolk need access to fishing grounds; pastoralists need grazing grounds for the animals they rear. The privatization of the commons that results from the generalization of a Western notion of individual property rights over land may represent a significant threat for these groups. The Guidelines should specify the necessary provisions that could be adopted in order to protect the commons. It could identify a set of principles to promote their sustainable use by the various groups that depend on them for their livelihoods.

Indigenous and other customary tenure

This section acknowledges the importance to fully take into account indigenous and other customary tenure as well as the many dimensions and values of land, and at the same time it avoids the trap of idealizing customary forms of tenure. Para. 9.4 on the recognition by States of indigenous and other customary tenure could be improved by inviting States to implement the specific rights of indigenous peoples by *demarkating their lands and territories*, as required in international under the instruments cited in the Appendix. Para. 9.8 on negotiations between States, other parties and indigenous communities, when referring to the principle of free, prior and informed consent, should make due reference to the legal source of this principle, which is the 2007 Declaration on the Rights of Indigenous Peoples, referred to in the Appendix. The Declaration prohibits, in its article 10, any forcible removal of indigenous peoples from their lands or territories, imposing the requirements of free, prior and informed consent, agreement on just and fair compensation and, where possible, the option of return (for relocations) ; and article 32 of Declaration provides that "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources." It should also be noted that the Minimum Human Rights Principles presented by the Special Rapporteur on the right to food state, thus, that "in general, any shifts in land use can only take place with the free, prior and informed consent of the local communities concerned," without limiting this requirement to indigenous peoples' rights on their lands, territories and resources.⁵

⁵ See A/HRC/13/33/Add.2 (see Principle 2).

3. Transfers of tenure rights: setting priorities and avoiding negative impacts (Part 4)

Part 4 provides guidelines for very different forms of transfers or changes of tenure rights. It could contain an introductory section to guide States among the choices that they sometimes have to make *between* some of these options, as for instance when they have to choose between different means of effectuating land reforms, or when they must set priorities for their action, given the constraint of scarce resources. The opening introductory section could declare that States should prioritize development models that do not lead to evictions, disruptive shifts in land rights for vulnerable groups and increased land concentration. States should indeed carefully consider the development models that they follow, as the mainstream agro-export-led model has major detrimental impacts on the access to land of vulnerable groups, and disproportionately favors the largest producers and landowners. The proposal that land investments implying an important shift in land rights should represent the last and least desirable option, acceptable only if no other investment model can achieve a similar contribution to rural development and improve the livelihoods within the local communities concerned, could also be included. More emphasis should be put on the need for States to carefully examine how they promote the various types of transfers of tenure rights identified in this section, from redistributive reforms to strengthening markets, and how they manage the coexistence and possible conflicts among these approaches.

The sections on markets, investments, and agrarian reforms also could be further developed on the safeguards that should accompany such policies or programs in order to avoid possible negative effects on the realization of the right to food. Examples are provided below.

Markets

Although Para. 11.1 mentions that States should ‘address undesirable impacts and promote non-market policy objectives’, it lacks clarity in identifying these impacts. Establishing markets indeed usually goes hand in hand with a titling process, and the combination of both have shown to be associated with a number of risks to be avoided. First, while the formalization of property rights may be seen as an adequate option to improve security of land tenure for sedentary agriculturalists, it may underestimate or ignore the interests of other groups, and even worsen their livelihoods. Indeed, the privatization of the commons could restrict the access of pastoralists to grazing areas; the strengthening of individual property rights may mean that fisherfolk will be fenced off from the land that gives them access to the sea or to rivers; and many rural households still depend on the gathering of firewood for their cooking energy, and on commonly owned wells or water sources for their access to water. Appropriate ex-ante safeguards should consequently be developed in order to avoid these possible negative impacts, or to ensure that appropriate solutions can be identified through participatory processes with the consent of the parties involved.

Secondly, a number of historical examples show that the creation of a market facilitating sales of land may lead to a gradual reconcentration of land unless it is accompanied by appropriate safeguards (such as regulations on the transferability of land and other natural resources tenure rights) as well as by appropriate rural development policies supporting small-scale food producers (such as investment in public goods such as communication infrastructures, storage facilities, agricultural extension services, and organization of farmers into cooperatives and producers organizations in order to enable small-scale land users to access markets at local and regional levels). Unless the creation of a market for land rights is preceded by measures that support the ability of small-scale farmers to make a living from farming, which requires that they have access to sufficiently large plots of land, the process can lead to increased exclusion and inequality. Indeed, it provides an exit route from agriculture for the rural households who are unable to survive on their land. It may thus result in more land concentration, rather than democratization of access to land. This is especially the case since small farmers face structural disadvantages in land markets, particularly in developing countries. Although, following titling, small farmers can in principle use their land as collateral and borrow what they need to expand the plots they cultivate, small-scale farmers typically borrow at a higher cost than large landowners do because small farmers have worse credit ratings

and depend on local money-lenders, who charge high interest rates. Large landowners also generally pay less per unit of land than small producers, who face high transaction costs.⁶

Although the Guidelines focus on tenure, they must reflect this situation and encourage States to accompany any titling scheme by the above safeguards and rural development policies, including by a reference to the ‘Vision’ of the ICARRD Final Declaration⁷, as well as by measures that promote agroecological methods of farming and an agricultural model that is fit to cope with climate change.⁸ This section should also declare that States should regulate markets by taking appropriate measures to prevent increased land speculation, increased land concentration, abuse of customary forms of tenure ; to ensure that markets benefit women and men equally ; and that they should establish specialized recourse mechanisms at the local level, that are accessible, work transparently and include safeguards against corruption.

Investments

This section should better distinguish between various types of ‘investments and concessions in land’ and between various types of investors. Currently, large-scale land investments and leases by foreign operators, and small-scale investments in land by tenants (planting trees, improving soil fertility or water conservation methods) would both fall under the concept of ‘investments and concessions in land’, although they call for very different policies and regulations.

Section 12.1 declares that ‘States should encourage and support investments and concessions in land, fisheries and forests while safeguarding against dispossession of tenure rights and livelihoods’. This should be further improved (i) by a reference to the set of Minimum Principles and Measures to address the Human Rights Challenge of Large-scale Land Acquisitions and Leases, presented at the thirteenth session of the Human Rights Council in March 2010, which provides a restatement of the legal obligations of States, both hosts and investors, and non-State actors under international human rights law⁹ ; and (ii) by a reference to the proposal that large-scale shifts in transfer of rights should be considered as a least desirable option. In the vast majority of cases of large-scale investments that the Special Rapporteur has examined, the benefits of the investment could be achieved by the use of other business models such as contract farming or schemes where farmers can be shareholders, without any change being made to the rights over the land. Such alternatives should be explored prior to any shift in rights over the land. Unless such alternatives are prioritized, the development of large-scale land acquisitions or leases will result in nothing less than an agrarian counter-reform; such a consequence would be completely unacceptable and run directly counter to the realization of the right to food, as well as to the objectives of the Guidelines, further marginalizing the communities that depend on access to land for their livelihoods.

Para. 12.2 rightly states that laws should require agreements for investments and concessions to clearly define the rights and duties of the investors (the term ‘acquired’ seems out of place here). These rights and duties could be listed as relating, at a minimum, to the creation of employment and compliance with the application labour legislation; compliance with environmental regulations and the sustainable use of the soil and of water resources; and the regular payment of taxes. It is welcome that this paragraph recalls the importance of enforceability of sanctions that are provisioned in investment agreements. In addition, the

⁶ See UN doc. A/65/281, October 2010.

⁷ Para 28 of the Final Declaration of the International Conference on Agrarian Reform and Rural Development (ICARRD 2006/3) reads the following: “We propose that rural development policies, including those on agrarian reforms, should be more focused on the poor and their organizations, socially-driven, participatory, and respectful of gender equality, in the context of economic, social and environmentally sound sustainable development. They should contribute to food security and poverty eradication, based on secure individual, communal and collective rights, and equality, including, inter alia, employment, especially for the landless, strengthening local and national markets, income generation, in particular through small and medium sized enterprises, social inclusion and conservation of the environmental and cultural assets of the rural areas, through a sustainable livelihood perspective and the empowerment of vulnerable rural stakeholder groups. These policies should also be implemented in a context that fully respects the rights and aspirations of rural people, especially marginalized and vulnerable groups, within national legal frameworks and through effective dialogue.”

⁸ See Agroecology and the Right to Food, report presented by the Special Rapporteur on the right to food to the 16th Session of the United Nations Human Rights Council [U.N. doc A/HRC/16/49], 8 March 2011.

⁹ U.N. doc A/HRC/13/33/Add.2, see <http://www.srfood.org/index.php/en/areas-of-work/land-rights>

principle of free, prior and informed consent of those whose land rights would be affected should be recalled in Paras. 12.3 and 12.5 on negotiations of investments and concessions.

As in the preceding section, this section should also declare that States should regulate investments and concessions by taking appropriate measures to prevent increased land speculation and increased land concentration. It should recall that investments and concessions should benefit women and men equally. It should include a reference to the establishment of specialized recourse mechanisms at the local level, that are accessible, work transparently and include safeguards against corruption.

Consolidation

While land consolidation has been an element of the agricultural development policies pursued by many States, Para. 13.4 assumes that land consolidation would be the right policy tool in certain areas and not in others. Another wording could better identify the parameters that States should bear in mind when considering land consolidation: States should indeed carefully consider the possible benefits of land consolidation (which need to be better clarified than lower production costs) against its drawbacks (which needs to be listed in a comprehensive manner, as small parcels not only provide risk reduction and crop diversification, but play a vital role in the food security of households that rely on non-farms incomes, and as they are part of the identity and culture of many social groups, and consequently empower vulnerable groups).

Redistributive reform

The most recent pledges to pursue land reform were made at the International Conference on Agrarian Reform and Rural Development (ICARRD). The Final Declaration adopted at the Conference encourages the holding of a national and inclusive dialogue to ensure significant progress on agrarian reform and rural development and the establishment of appropriate agrarian reform “mainly in areas with strong social disparities, poverty and food insecurity, as a means to broaden sustainable access to and control over land and related resources”.¹⁰ Section 15 should refer to these pledges made only five years ago.

Building upon the ICARRD Final Declaration, and taking stock of the renewed understanding of the political economy of hunger since the 2007-08 food price crisis, the report presented by the Special Rapporteur on the right to food to the 65th session of the UN General Assembly suggested that States should implement land redistribution programmes where a high degree of land ownership concentration (which could be defined as a level of inequality higher than a Gini coefficient of 0.65) is combined with a significant level of rural poverty attributable to landlessness or to the cultivation of excessively small plots of land by smallholders. Redistributive agrarian reforms should: (a) include comprehensive rural development policies (see the above section on markets); (b) make use of land ceiling laws and be based on legal frameworks that clearly define beneficiaries and exempted land; (c) encourage communal ownership systems, rather than focusing solely on individual beneficiaries; (d) be implemented in accordance with the principles of participation, transparency and accountability, in order to prevent their appropriation by local elites; (e) be grounded in constitutional provisions regarding the social functions of land, where such provisions exist. All States should monitor land inequalities before and after the implementation of such programmes.¹¹

Section 15 could build on these proposals, which reflect the state of the discussion on the question, and it could also invite States to conduct a review of the markets-led and state-led land reforms that were conducted on their territory as well as in countries with similar land parameters, in order to take stock of the lessons learned of the various experiences.

4. Taxation and the right to food (Part 5)

Para. 19.1 states “States should ensure that taxation relating to land (including associated buildings and structures), fisheries and forests is equitable and consistent with the State’s broader social and economic

¹⁰ Final Declaration of the International Conference on Agrarian Reform and Rural Development (ICARRD 2006/3), para. 29.

¹¹ A/65/281, October 2010.

objectives.” This paragraph should clearly identify the progressive realization of the right to adequate food as one of the important social and economic objectives in order to be consistent with the stated objective of the Guidelines to “build on and support” the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security.

5. Implementation, monitoring and evaluation (Part 7)

This section requires substantive developments if the Guidelines are to become a lasting and effective tool on land issues, and if they are to be conceived consistent with the objectives of the reform of the Committee on World Food Security (CFS) in October 2009.

Implementation

The Guidelines should mention that States should implement these Guidelines at national level as a full part of national strategies for the progressive realization of the right to food, in order to improve consistency with the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security. They should also recall that States Parties to the International Covenant on Economic, Social and Cultural Rights are obliged to take steps to realize economic, social and cultural rights, including the right to food, *to the maximum of their available resources*, including through international cooperation and assistance (Art. 2(1) of the Covenant).

The Guidelines should also acknowledge that the use of violence against vulnerable land users seeking to defend their legitimate rights is unacceptable. The Guidelines should mention that States must refrain from persecuting and repressing those that defend the rights of land users as well as criminalizing legitimate social protest. Where insufficient progress has been made on the implementation of the commitments set out in the Final Declaration of the International Conference on Agrarian Reform and Rural Development, and where deep land inequalities remain, the non-violent occupation of land by landless movements should not be criminalized. Human rights defenders who protest evictions and defend land rights should be protected. Reference could be made, in this regard, to the United Nations Declaration on Human Rights Defenders (A/RES/53/144, Annex).

Monitoring and evaluation

The Guidelines should articulate monitoring and evaluation processes at both national and international levels.

Para. 26.2 should be more specific and declare that States (rather than “all parties”) should put in place monitoring mechanisms. States should first conduct a comprehensive evaluation of the implementation of the Guidelines five years after their adoption by the Committee on World Food Security, through the participatory process mentioned in Para. 26.2, but also on the basis of an independent evaluation. National institutions that have been created to monitor and assess the right to food situation should play a key role in this process¹².

Para. 26.3 should be more specific when stating that ‘international bodies’ should periodically monitor the implementation and review the relevance and effectiveness of these Voluntary Guidelines. The Committee on World Food Security (CFS) is the United Nations’ forum for reviewing and following up on policies concerning world food security. Already in 2006, the Governments represented at the ICARRD Conference

¹² On national institutions, see the Guideline 5 of the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security. See also Committee on Economic, Social, and Cultural Rights, The Role of National Human Rights Institutions in the Protection of Economic, Social, and Cultural Rights, General Comment 10 (E/C.12/1998/25). For examples of national institutions, see Special Rapporteur on the right to food, Countries tackling hunger with a right to food approach. Significant progress in implementing the right to food at national scale in Africa, Latin America and South Asia, Briefing Note, May 2010.

recommended that the CFS adopt a set of reporting guidelines in order to monitor the implementation of the Declaration.¹³ While the 2007-08 food price crisis and the reform of the CFS in 2009 have delayed this process, the Guidelines must renew and adapt this commitment for an efficient monitoring and evaluation.

Voluntary reporting is not adequate: Art. 16 of the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security includes such a voluntary reporting, but this reporting to date has been largely insufficient. The result is that important opportunities for sharing lessons learned and best practices were lost, as only volunteering States participated to voluntary forums on the question. The Special Rapporteur makes the following proposals:

- States should report on the implementation of the Guidelines five years after their adoption;
- the CFS should commission an independent review with the help of its High Level Panel of Experts;
- and on the basis of both sources of information, a first evaluation of the implementation of the Guidelines should take place at the 43rd annual session of the CFS, six years after the adoption of the Guidelines.

This evaluation would serve a purpose of sharing best practices on dealing with the most acute challenges, but it would not be binding. It is however of essential importance, as it will incentivize States to implement these Guidelines, and as it will allow donors to understand the importance of supporting their efforts in doing so, in the light of the obstacles faced.

APPENDIX. Human rights standards applicable to the governance of the tenure of land, fisheries and forests

1. The *right to adequate food* is recognized under Article 25 of the Universal Declaration of Human Rights¹⁴ and under Article 11 of the International Covenant on Economic, Social and Cultural Rights.¹⁵ Articles 24, para. 2, c) and 27 para. 3 of the Convention on the Rights of the Child also impose on States parties an explicit obligation to combat child malnutrition. In its General Comment No. 12, the Committee on Economic, Social and Cultural Rights takes the view that the right to adequate food imposes three levels of obligations on States. The obligation to respect existing access to adequate food requires States parties not to take any measures that result in preventing such access. 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 fulfil (facilitate) means that States must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable to enjoy the right to adequate food by the means at their disposal, States have the obligation to fulfil (provide) that right directly.¹⁶ The Committee on Economic, Social and Cultural Rights recognizes the link between access to natural resources and the enjoyment of the right to food, as well as the special vulnerability of those who depend on natural resources, where it notes that '[s]ocially vulnerable groups such as landless persons and other particularly impoverished segments of the population may need attention through special programmes'.¹⁷

2. The *right to water* is not explicitly mentioned in the International Covenant on Economic, Social and Cultural Rights, however it is seen as implicit in articles 11 (adequate standard of living) and 12 (right to

¹³ ICARRD 2006/3, para. 30, (2).

¹⁴ G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948).

¹⁵ Adopted on 16 December 1966, G.A. Res. 2200(XXII), U.N. GAOR, 21st sess., Supp. No. 16, U.S. Doc. A/6316 (1966), 993 UNTS 3.

¹⁶ Committee on Economic, Social and Cultural Rights, General Comment No. 12 : the right to food (1999), E/C.12/1999/5, para. 15.

¹⁷ Ibid., para. 13.

the highest attainable standard of health) of the International Covenant on Economic, Social and Cultural Rights. The right to water is the right of everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.¹⁸ The UN General Assembly formally recognised the right to water and sanitation in Resolution 64/292, where it acknowledges that clean drinking water and sanitation are integral to the realisation of all human rights.

3. The *right to housing* is recognized in Article 11 of the International Covenant on Economic, Social and Cultural Rights. The Committee on Economic, Social and Cultural Rights noted in particular that it implied a guarantee of legal security of tenure. It remarked : "Tenure takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property. Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. States parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups".¹⁹ Human rights bodies or special procedures have also clarified the specific requirements that apply to evictions in the Basic Principles and Guidelines on Development-based Evictions and Displacement presented in 2007 by the former Special Rapporteur on the right to adequate housing,²⁰ and in General Comment No. 7 (1997) of the Committee on Economic, Social and Cultural Rights on the right to adequate housing (article 11.1): forced evictions.²¹

4. The *right to self-determination of peoples* and, specifically, the right of all peoples freely to dispose of their natural wealth and resources – as stipulated under Article 1 of both 1966 Covenants implementing the Universal Declaration of Human Rights²² – benefits all ‘peoples’, a notion that is understood broadly in international human rights law. In *Apirana Mahuika et al. v. New Zealand*²³ for instance, the Human Rights Committee reads Article 1(2) of the International Covenant on Civil and Political Rights – in conjunction with Article 27 of the Covenant, that recognizes the rights of minorities – as allowing an arrangement about the management of fishing resources, noting that the Maori people “were given access to a great percentage of the quota, and thus effective possession of fisheries was returned to them,” and that the new control structure put in place ensures not only a role for the Maori in safeguarding their interests in fisheries but, in addition, their “effective control.”²⁴ The implication would appear to be that these provisions would be violated should any ‘people’ be deprived of the use they make traditionally of the land and other natural resources on which they rely.²⁵ The right to self-determination of peoples also imposes on states a duty to regulate the conduct of private investors in order to ensure that they will not deprive the

¹⁸ See Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002) : The right to water (E/C.12/2002/11, 15 January 2003).

¹⁹ General Comment No. 4 : the right to adequate housing (Art. 11(1)), contained in UN doc. E/1992/23.

²⁰ A/HRC/4/18, annex I.

²¹ E/1998/22, annex IV.

²² International Covenant on Economic, Social and Cultural Rights (A/RES/21/2200A, December 16, 1966) (993 UNTS 3); and International Covenant on Civil and Political Rights (A/RES/21/2200A, December 16, 1966) (999 UNTS 171).

²³ Human Rights Committee, *Apirana Mahuika et al. v. New Zealand*, Communication No. 547/1993, CCPR/C/70/D/547/1993 (2000),

²⁴ *Apirana Mahuika et al. v. New Zealand*, op.cit., paragraph 9.7. The Human Rights Committee observed that “minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture[, which] may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority” (“General Comment No. 23: The rights of minorities (Art. 27),” CCPR/C/21Rev.1/Add.5, (August 4, 1994), paragraphs 1 and 3.2.

²⁵ A similar conclusion has been derived by the Committee on the Elimination of Racial Discrimination from Article 5(d)(v) of the International Convention on the Elimination of All Forms of Racial Discrimination, which protects the right to property: this requires from States parties that they ‘recognize and protect the rights of all indigenous communities to own, develop and control the lands which they traditionally occupy, including water and subsoil resources’: see Committee on the Elimination of Racial Discrimination, “Concluding Observations: Guyana,” CERD/C/GUY/CO/14, (April 4, 2006), paragraph 16.

local communities of a right to benefit from the exploitation of the natural resources on the territory on which they reside.²⁶

5. The *rights of indigenous peoples* are protected under ILO Convention (n° 169) concerning Indigenous and Tribal Peoples in Independent Countries, which entered into force in 1991. This convention provides explicitly that ‘the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised’ and that in addition, ‘measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities’. States parties are required to pay ‘particular attention [...] to the situation of nomadic peoples and shifting cultivators in this respect’.²⁷ In order to guarantee effective protection of these rights of ownership and possession, the States should demarcate the land and establish adequate procedures within the national legal system to resolve land claims by the peoples concerned.²⁸ Relocation may only take place when this is considered ‘necessary as an exceptional measure’, in which case the relocation requires their free and informed consent or, where such consent cannot be obtained, ‘following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned’.²⁹ Unless return to the land is possible,³⁰ the people relocated should be provided with lands ‘of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development’, except if they express a preference for compensation in money or in kind³¹; and they are to be ‘fully compensated for any resulting loss or injury’.³²

Although ILO Convention (No. 169) has been poorly ratified, the United Nations Declaration on the Rights of Indigenous Peoples³³ provides under Article 8 para. 2 b) that States shall provide effective mechanisms for prevention of, and redress for, any action which has the aim or effect of dispossessing indigenous peoples of their lands, territories or resources. Under Article 10 of the Declaration, they are guaranteed the right not be forcibly removed from their lands or territories, and no relocation shall take place without their free, prior and informed consent and after agreement on just and fair compensation and, where possible, with the option of return. Articles 25 and 26 of the Declaration, in addition, recognize the distinctive spiritual relationship of indigenous peoples with their traditionally owned or otherwise occupied and used lands, and that they have the right to own, use, develop and control these lands. States must therefore give

²⁶ See The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, African Commission on Human and Peoples’ Rights, Communication 155/96 (2001), paragraph 57 (where the African Commission on Human and Peoples’ Rights, relying on the right to self-determination of peoples as codified in Article 21 of the African Charter of Human and Peoples’ Rights (adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), (*entered into force on* Oct. 21, 1986)), notes that this right implies “a duty [of States] to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties”, in a case where a non-governmental organisation was denouncing the exploitation of the oilfields by foreign companies in the Ogoniland in Nigeria).

²⁷ ILO Convention (n° 169) concerning Indigenous and Tribal Peoples in Independent Countries (adopted on 27 June 1989, into force since 5 September 1991), Art. 14(1).

²⁸ Art. 14(2) and 14(3).

²⁹ Art. 16(2).

³⁰ Art. 16(3).

³¹ Art. 16(4).

³² Art. 16(5).

³³ UNGA Res. 61/295 (13 September 2007). On the status of the Declaration in international law, see Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, Hum. Rts. Council, ¶ 41, U.N. Doc. A/HRC/9/9 (Aug. 1, 2008) (by S. James Anaya) (“Albeit clearly not binding in the same way that a treaty is, the Declaration relates to already existing human rights obligations of states, as demonstrated by the work of United Nations treaty bodies and other human rights mechanisms, and hence can be seen as embodying to some extent general principles of international law. In addition, insofar as they connect with a pattern of consistent international and state practice, some aspects of the provisions of the Declaration can also be considered as a reflection of norms of customary international law. In any event, as a resolution adopted by the General Assembly with the approval of an overwhelming majority of Member states, the Declaration represents a commitment on the part of the United Nations and Member states to its provisions, within the framework of the obligations established by the United Nations Charter to promote and protect human rights on a non-discriminatory basis.”).

legal recognition and protection to these lands, territories and resources, with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

6. Finally, the instruments cited above all impose a requirement of *non-discrimination*. In human rights law, discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms. But it also includes any action or omission that, whether intended or not, disproportionately affects members of a particular group, in the absence of a reasonable and objective justification, thus constituting *de facto* discrimination. Furthermore, in order to eliminate *de facto* discrimination, States may be under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination. In human rights law, such measures are legitimate to the extent that they represent reasonable, objective and proportionate means to redress *de facto* discrimination and are discontinued when substantive equality has been sustainably achieved.³⁴ The general prohibition of discrimination includes a prohibition of discrimination on grounds of gender. Article 14, para. 2, (g), of the International Convention on the Elimination of All Forms of Discrimination against Women specifically guarantees the right of women to equal treatment in land and agrarian reform as well as in land resettlement schemes.

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Olivier De Schutter was appointed the UN Special Rapporteur on the right to food in March 2008 by the United Nations Human Rights Council. He is independent from any government or organization, and he reports to the Human Rights Council and to the UN General Assembly. For more on the work of the Special Rapporteur on the right to food, visit www.srfood.org or www2.ohchr.org/english/issues/food/index.htm.

³⁴ Human Rights Committee, General Comment No. 18: Non-discrimination; Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2), E/C.12/GC/20.