

RESPONSIBLE GOVERNANCE OF LAND TENURE: AN ESSENTIAL FACTOR FOR THE REALIZATION OF THE RIGHT TO FOOD

DISCUSSION PAPER



Luisa Cruz

The Right to Food Team (ESA)

May 2010



RESPONSIBLE GOVERNANCE OF LAND TENURE: AN ESSENTIAL FACTOR FOR THE REALIZATION OF THE RIGHT TO FOOD

DISCUSSION PAPER

Luisa Cruz

The right to food (ESA)

May 2010

This document was produced by the Right to Food Team, Agriculture and Development Economics Division (ESA) of the Department of Economic and Social Development, in close collaboration with the Climate, Energy and Tenure Division (NRC) of the Natural Resources Management and Environment Department, as part of the process of establishing Voluntary Guidelines on responsible governance of tenure of land and other natural resources.

The designations employed and the presentation of material in this information product do not imply the expression of any opinion whatsoever on the part of the Food and Agriculture Organization of the United Nations (FAO) concerning the legal or development status of any country, territory, city or area or of its authorities, or concerning the delimitation of its frontiers or boundaries. The mention of specific companies or products of manufacturers, whether or not these have been patented, does not imply that these have been endorsed or recommended by FAO in preference to others of a similar nature that are not mentioned.

The views expressed in this publication are the author's and do not necessarily reflect the views of FAO.

Photograph: **Antwerpen Vredeseilanden**

List of Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHPR	African Commission on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ADRDM	American Declaration of the Rights and Duties of Man
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CODAN	Consejos Departamentales de Alimentación y Nutrición [Departmental Food and Nutrition Councils] (Bolivia)
COMAN	Consejos Municipales de Alimentación y Nutrición [Municipal Food and Nutrition Councils] (Bolivia)
CONAN	Consejo Nacional de Alimentación y Nutrición [National Food and Nutrition Council] (Bolivia)
CONASSAN	Comisión Nacional de Soberanía y Seguridad Alimentaria y Nutricional [National Food and Nutritional Sovereignty Commission] (Nicaragua)
CT-CONAN	Comité Técnico del Consejo Nacional de Alimentación y Nutrición [Technical Committee of the National Food and Nutrition Council] (Bolivia)
ESA	Agriculture and Development Economics Division (Dirección de Economía del Desarrollo Agrícola)
FAO	Food and Agriculture Organization of the United Nations
FIAN	Food First Information and Action Network
IACHR	Inter-American Commission on Human Rights
IACourtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IFAD	International Fund for Agricultural Development
IIED	International Institute for Environment and Development
ILO	International Labour Organization
IMF	International Monetary Fund
LOA	Loi d'Orientation Agricole [Agricultural Orientation Law] (Mali)
MDG	Millennium Development Goal
OAS	Organization of American States
OHCHR	Office of the High Commissioner for Human Rights
ONIC	Organización Nacional Indígena de Colombia [National Indigenous Organization of Colombia]
PANTHER	Participation, Accountability, Nondiscrimination, Transparency, Human dignity, Empowerment, and Rule of law
PDM	Plan de Desarrollo Municipal [Municipal Development Plan] (Bolivia)
PEI	Plan Estratégico Institucional [Institutional Strategic Plan] (Bolivia)
POA	Plan Operativo Anual [Annual Operating Plan] (Bolivia)
SERAC	Social and Economic Rights Action Center
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDAF	United Nations Development Assistance Framework
UNDG	United Nations Development Group
UNDP	United Nations Development Programme
WHO	World Health Organization

Table of Contents

Introduction	1
1. Why access to land is essential for the realization of the right to food?	2
1.1. Relationship between access to land and access to food	2
1.2. Land tenure and the right to food: a reality reflected in the international legal framework	8
2. Human rights: principles and obligations that drive the policy of land governance towards the realization of the right to food	11
2.1. A human rights-based approach	11
2.2. Human rights and governance: differences and complementarities	12
2.3. The legal obligations of states in implementing the right to food	13
2.3.1. Three obligations to ensure the right to food: respect, protect and fulfil	14
2.3.2. Obligation to guarantee rights without discrimination	19
2.4. Human rights principles applied to the implementation of the right to food	21
3. Governance of land and the right to food in practice	25
3.1. A common framework for legitimacy and sustainability	25
3.2. From planning to monitoring: applying a human rights-based approach to land tenure policy	25
3.3. Institutions, administration and legislation in practice	27
3.4. Taking a closer look at the Voluntary Guidelines	31
Conclusion	33
Bibliography	34

List of graphics and figures

Graphic 1	World population	2
Graphic 2	Number of undernourished people in the world	3
Graphic 3	World agricultural production	3
Figure 1	Land access, use and security of tenure	6

Introduction

The right to food is one of the central human rights indispensable for an individual to enjoy a life in dignity. It is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement.¹ In addition to being a fundamental and inalienable right, access to adequate food is a current day priority of the Millennium Development Goals. At the national level, the welfare and rights of individuals constitute an objective of the state itself and the purpose for which state bodies have been created. Guaranteeing the right to food requires coherent public policies through institutions established to secure the right at a national level. It largely depends on whether sectoral policies create the conditions necessary to make it a reality and on the fact that it must be understood as indivisible and interrelated² with other human rights. Among the most important areas in this respect are: natural resources management, trade policy, investment in agriculture, infrastructure and local markets, national social security, educational and public service systems. The multidimensional nature of the right to food requires implementation with a broad perspective that takes into account all policy areas that bear on access to food.

The present document emphasizes the right to food as a primary objective of the set of public policies concerned with economic and social development. Achieving this objective depends on responsible governance of land and other natural resources. The importance of land lies in the fact that it often represents a direct link with cultural identity, while serving as the primary source of food production and sustenance. Given that land tenure and administration systems determine who and under what conditions can exercise property and usage rights of such a valuable resource, it is fundamental to analyse the relevance of land tenure in light of its effect on the realization of the right to food. After setting forth the links between access to land and the right to food, the analysis proceeds to a more detailed look at the significance and implications of these links in legal terms. The third section of the document focuses on issues concerning national implementation; it sets forth examples in a variety of countries pointing out challenges and opportunities encountered in a human rights-based approach to land tenure policy for the realization of the right to food.

¹ CESCR. 1999, General Comment 12, *The right to adequate food*. E/C.12/1999/5.

² The Vienna Declaration and Plan of Action were adopted in the context of the World Conference on Human Rights, held from 14 to 25 June 1993, which established that “All human rights are universal, indivisible and interdependent and interrelated.” It also asserts that “the international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.” See A/CONF.157/23.

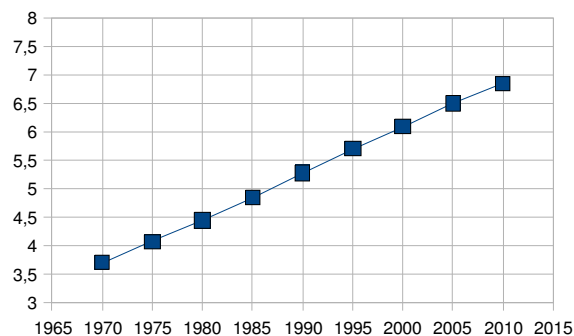
1. Why access to land is essential for the right to food?

1. 1. Relationship between access to land and access to food

One paramount factor in ensuring adequate availability and access to food is the way in which both are effectively achieved through access to, use of and tenure of land at various territorial levels (national, regional and local). If one is to take into consideration that during the last four decades the total number of the global population has practically doubled from 3.6 billion to 6.5 billion and that during the same time frame, food production has also doubled (due to major technological advances and greater agricultural investment) one can easily conclude that growth in food production has been proportional to population growth.³

Despite the above, there has been a failure to stem the increase in the number of people suffering from hunger worldwide during the last 15 years (see graphic 2). The latest figures show that 1.02 billion people across the world are suffering from food insecurity and malnutrition.⁴ The number of people suffering from hunger today is actually the highest that it has ever been since the 1970s.⁵ Still, in relation to the world population, the percentage of undernourished individuals has steadily declined,⁶ dropping from 16% to 13% between 1990 and 2006. During that period FAO had already recognized that the decline was much slower than what was required to meet the hunger reduction goal established in the Millennium Development Goals. Now, following the food crisis, the undernourished population represents 14.9% of the world population, returning to the levels of malnutrition prevalent years ago.

Graphic 1. World population (billions)



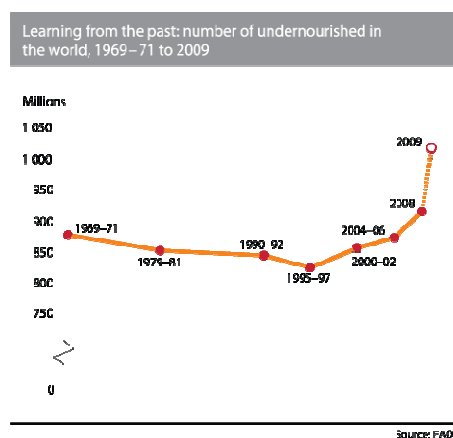
³ Total grain production is estimated to have doubled in the last four decades, to around 2 billion tons annually. See World Bank, *World Bank Sustainable Land Management Sourcebook*, Washington, D.C. 2008, p. 7.

⁴ FAO, 2009, SOFI. *The State of Food Insecurity in the World*, p. 4.

⁵ FAO, *ibid.*, p. 4.

⁶ See statistics on lack of food and prevalence of undernutrition in the world population, especially from 1970 to 1995. Information on this can be found on the FAO website: <http://www.fao.org/economic/ess/food-security-statistics/en/>

Graphic 2. Number of undernourished people in the world (millions) **Graphic 3. World agricultural production**



Although food production plays an essential role in attempts to eliminate world malnutrition, looking at graphics 2 and 3 it is clear that the correlation is not as simple as one would think. As established by FAO, agricultural investment (scientific research, infrastructure, irrigation) between 1970 and 1995 led to rapid growth of agricultural output, which to a large extent accounts for the reduction in the percentage of the population affected by hunger during that period. However, since 1995, production has continuously increased without generating a consistently positive impact as before. This should not be interpreted in terms of insufficient output (the population grew 16% between 1995 and 2005, while agricultural output rose 27%).

The analysis of agricultural production as a determining factor in food security (i.e. the argument of increasing supply and consequently declining prices) has changed radically over the last 10 years, given that a part of the global agricultural output is not directed to human consumption but towards the energy markets. Although increased production is crucial to maintaining the global availability of food, the conditions under which people have access to food represents an increasingly critical issue. As the food crisis has demonstrated, hunger is the result not of insufficient levels of production, but rather of unequal access – which can lead to food insecurity.

Access to food is guaranteed by income earning capacity, that is, through economic means or by direct physical access (such as food aid or subsistence production). According to the United Nations Special Rapporteur on the Right to Food, Olivier de Schutter, 80% of the world's hungry depend on access to land and other natural resources as a means for guaranteeing their livelihoods,⁷ including shelter and household consumption. Use of the subsoil, agricultural surface area and other natural resources, such as water and forestry products, constitutes a major means of generating wealth. Nevertheless, the vast majority of individuals suffering from hunger and malnutrition in the world lives in rural areas⁸, where such resources are generally found, as established by FAO.

⁷ See *Land access and rural development: new challenges, new opportunities*, 9th Brussels Development Briefing. Of this figure, 50% are small producers, 20% landless persons and 10% persons making a living from pastoral work, fishing or forestry products.

⁸ FAO, 2005, *SOFI*, p. 6.

A comparative study by FAO of eight countries selected according to geographical representativeness (developing countries on different continents) analysed the impact of rising food prices on nutritional status of households in Bangladesh, Guatemala, Nepal, Cambodia, Tajikistan, Vietnam, Kenya and Malawi.⁹ In seven of these eight countries, malnutrition levels were higher in rural areas than in urban areas. The study showed that, although poverty and malnutrition are closely linked, the relationship is not absolute, Bangladesh being one example of an exception to this correlation. Despite high rates of rural poverty (53%), malnutrition levels in rural Bangladesh are lower than in the country's urban areas because access to food is better in rural areas. In analysing the impact of rising food prices on nutritional levels, a number of factors were considered, including access to land. The study concluded that land tenure policy and investments geared towards increasing agricultural productivity play a fundamental role in reducing food insecurity among the households studied. Although this conclusion principally reflects nutritional levels in rural zones, it can be equally valid in urban areas.

Given the observations made above, identifying those who enjoy the guarantee of effective access to land and determining the conditions under which such access can be exercised will determine how such resources will be utilized and the profits derived from them. Food products are one of the greatest benefits that society garners from appropriate access to land. The type of access will depend on the legal framework governing land tenure systems, the rights and obligations they encompass.¹⁰

Policy on land and other natural resources is intrinsically related to economic policy on investment and international trade. Major challenges that land governance must address include, for example, growth of urban populations and the effects this has on land use planning. Other challenges that have become increasingly important are the scarcity of certain natural resources, accelerated investment in biofuels (and other renewable energy) and large-scale land acquisitions in certain countries in a commercial effort to fill a gap in domestic food availability. These dynamics have greatly increased the rate of acquisition and leasing of large tracts of land in certain countries. Investments in Africa, Southeast Asia, Central Asia and Latin America have risen sharply in recent years, and contracts to acquire large land holdings in these continents are proliferating. A joint study by FAO, the International Fund for Agricultural Development (IFAD) and the International Institute for Environment and Development (IIED) revealed the magnitude of such investment deals in five African countries (Madagascar, Mali, Ghana, Ethiopia and Sudan), where a total of some 2,492,684 hectares were allocated to agricultural investment projects between 2004 and 2009.¹¹

Investment in agriculture – in the form of infrastructure, technology or the creation of new local markets – has a direct impact on food availability and access for local populations. It is therefore an essential factor for the strength of the agricultural sector, and for ensuring that people benefit from agricultural productivity. Given their major impact on various sectors (economic and social), the types of investment undertaken

⁹ FAO, 2010, Anríquez, G., Daidone, S. and Mane, E, *Rising food prices and undernourishment, a cross-country inquiry*. ESA Working Paper No. 10-01, February 2010.

¹⁰ Property rights can be formal or based on custom. Some countries have a mixed land tenure system in which both formal property titles and local custom-based rights are recognized.

¹¹ FAO, IFAD, IIED, 2009, Cotula, L., Vermeulen, S., Leonard, R. and Keeley James. *Land grab or development opportunity? Agricultural investment and international land deals in Africa*, p. 41. London, Rome.

should comply with responsible land tenure governance. Access to food by the local population, and the economic, ecological and social sustainability of such projects, are crucial from a global, human rights-based perspective. In this context, land tenure is a decisive element in development, and in ensuring the right to food for the overall population — especially for the most vulnerable segments. Thus, land governance policy is fundamental in any analysis of the necessary conditions for the realization of the right to food.

It is important at this point to define some of the vocabulary used throughout this document.

- *Land tenure* is the set of rules (formal or customary law) that define the relationship between individuals and land.¹² Through land tenure, people's rights of access to specific natural resources and the social endorsement of this relationship to land is defined. Land tenure rules may be typed as formal (i.e. state legislation – taking the form of laws, codes, decrees, regulations and the like), customary and informal. Where the legitimacy of the rules depends on an authority other than the state – a community, clan or association, for example – the land tenure system is customary in type. In general terms, informal tenure systems are defined through rules, authorities and institutions that are neither formal nor customary such that they are created *ad hoc*. In certain countries land tenure can be of a mix resulting in coexistence of various types of tenure systems (formal, customs-based and informal).¹³
- Land tenure systems determine individuals' rights to access resources. In this sense, *access to land* is the ability to use and control the resource, as well as to transfer land rights in order to take advantage of other opportunities.¹⁴ In light of its relevance for the realization of the right to food, access to land must be understood from a broad perspective and not a narrow restricted one. Beyond legalization of the right to access land and guaranteeing it as a right for individuals, effective access must include those factors that turn this guarantee into a path towards being able to access food. Thus, infrastructure, coverage of public services (water and electricity), effective and sustainable access to credit systems and other resources that facilitate the productive use of land are essential in guaranteeing the right to food. To guarantee a physical access to land and to do so in the absence of social and economic inclusion does not in any way provide for a real guarantee of economic and social rights. Good governance of land entails a consideration of such factors as a prerequisite to ensuring the right to food.

Nevertheless, access to land loses significance where there is no guarantee of tenure security.

- *Security of tenure* is the certainty that a person's rights to land are recognized by others and protected in case of specific challenge situations. Those who do not have secure land tenure are at risk of having their rights jeopardized by third-party claims

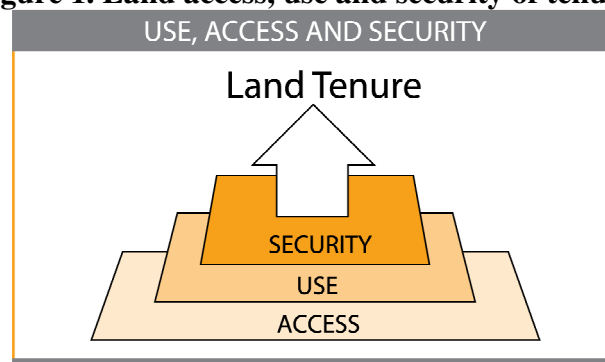
¹² FAO, 2007, Good governance in land tenure and administration. Land tenure studies 9, p. 3. Rome.

¹³ For a detailed study of land tenure systems and access rights, see FAO, 2006, Herrera, A. and Guglielma da Passano, M., *Land tenure alternative conflict management*. Land tenure manuals 2, Rome and FAO, 2003, *Land tenure and rural development*, Land tenure studies 3, Rome.

¹⁴ FAO, 2006, *ibid.* p. 12

or lost as a result of eviction orders. Given the scope of importance of this concept, defining it entails a series of challenges. Interpreting the notion of land tenure security can be an entirely different issue depending on the specific culture involved, as well as on the country's level of development. In some countries, security of tenure can be conceived in terms of legal reliability and judicial protection of rights to land. However, in others the perception of security might be totally different, that is, understood as something imposed by force rather than through legal procedures. In some communities, security of tenure depends on social sanctions and on the extent of social recognition by others of an individual's right to enjoy access to a specific parcel of land. In such cases, the legitimacy of tenure does not rely on a legal title but rather on an informal system, in which only those who are members of the community have the capacity to socially sanction particular behaviours. Nevertheless, above and beyond cultural aspects, security of tenure can be analyzed starting with factors affecting the realization of the right to food. In effect, legal protection of access to land, land use and ownership of land turns out to be a paramount aspect of the realization of the right to food. Freedom from illegal evictions and access to effective appeal and conflict resolution mechanisms are essential. As mentioned earlier, however, analysing access to land and security of tenure strictly from the point of view of physical access or legal protection considerably limits understanding of the importance of security of land tenure for the realization of the right to food.¹⁵

Figure 1. Land access, use and security of tenure¹⁶



Throughout this document, the scope and implications of effective access to land are examined from a variety of perspectives. The first is a global vision according to which access to land is understood as a matter of public interest, one in which a multitude of national, regional and local sectors are given consideration. Spatial planning and territorial development warrant agreement among different actors on a national and decentralized scale. Policies on infrastructure as well as soil and water resource management cannot be defined without considering their impact on access to food. For example, inappropriate techniques to increase agricultural production in a municipality can unleash contaminants in a river and the resulting impact will affect not only the municipality itself but an entire region. Interaction between cities and rural areas is also very important in achieving sustainable outcomes in policies in terms of land tenure, land planning and land use.

¹⁵ FAO, 2009, *Towards Voluntary Guidelines on responsible governance of tenure of land and other natural resources*. Discussion paper LTWP No. 10, Rome.

¹⁶ Figure from FAO, 2006, *Land tenure alternative conflict management*, Land tenure studies 2, p. 28. Rome.

A second perspective on access to land and its impact on the right to food, holds that a proper analysis of the issue must look beyond the sole focus on *an individual's physical access to land* guaranteeing *his or her own right to food* at an individual level. Although the individual component analysis is fundamental and will be examined further through concrete cases involving vulnerable groups or populations, not every single individual depends on access to land for the purpose of accessing food. In fact this might depend on other factors – such as the economic accessibility of products in local markets, adequate distribution of production in cities and residential clusters, and policies reflecting labour and employment issues, inflation, transportation, etc. – which enter into the equation. Someone living in an urban sector – and even in a rural sector – with income that provides for food purchase in adequate quantity and quality does not really need physical access to land to be able to exercise his or her right to food with dignity. On the contrary, such a person's access to food in fact depends on the effective access of those who work the land from a production standpoint. Thus, the relation between access to land and the right to food needs to be understood and examined with a broader perspective that incorporates the whole scope of governance, rather than as a problem that manifests in a restrictive line of individual cases.

However, despite the fact that the theme of access to land is analysed taking a wide angle approach on the issue throughout this document, it is yet still fundamental to tackle the issue where it particularly concerns vulnerable sectors and communities. Indigenous and tribal communities on various continents have reclaimed the importance of access to land to maintain cultural identity and carry out their ancestral rites and traditions. The majority of these populations live on hunting and fishing as well as farming as basic agricultural activities that ensure food security for their communities' members. For them, physical access to land and secure land tenure are of the paramount importance and can end up being vital for survival. Cases brought before the Inter-American Court of Human Rights (IACourtHR)¹⁷ in the context of the Inter-American Human Rights System have revealed the pernicious effects of exclusive and discriminatory land tenure policies. The United Nations Declaration on the Rights of Indigenous Peoples approved by the General Assembly of the United Nations in 2007 and Convention 169 of the International Labour Organization (ILO) concerning Indigenous and Tribal Peoples in Independent Countries adopted in 1989 establish concrete principles and obligations that the states must observe with regard to access to land for indigenous populations.¹⁸

It is thus appropriate to stress the fact that in referring to access to land for indigenous and tribal communities or other vulnerable sectors, the physical aspect of access and security of tenure assume fundamental importance beyond that of whether they are guaranteed or not, but rather, in consideration of the fact that the survival of such communities could be under imminent threat without provision of access to and security of land. This also applies to cases of internal conflict involving isolated, self-sufficient populations whose survival depends entirely on their access to land or on humanitarian aid.¹⁹

¹⁷ Representative cases in this connection include *Mayagna (Sumo) of Awas Tingni v. Nicaragua*, *Yakye Axa Indigenous Community v. Paraguay*, *Moiwana Community v. Suriname*, *Saramaka v. Suriname*, and *Sawhoyamaya Community v. Paraguay*.

¹⁸ FAO, 2009, Knuth, L, *The right to adequate food and indigenous peoples. How can the right to food benefit Indigenous Peoples?* Rome.

¹⁹ FAO, 2005, *Access to rural land administration after violent conflicts. Land tenure studies 8*, Rome.

Given the scope of the concepts outlined above, responsible land governance must take into account sustainability and equity of access and use. National and international investment projects that involve land-use planning must draw on the participation of the local farmers who will be the ones principally affected –positively or negatively– depending on how the projects are implemented. To be approved and be sustainable, such projects must respect certain cultural, economic and environmental concerns, which must be analysed comprehensively based on the local situation. While monoculture and large-scale production can certainly be seen as opportunities to create jobs and economic development in a region, authorities must ensure that local actors have expressed wide spread consent, and that the use of soil and agricultural production is sustainable in the long term. Such guaranteed participation should be in line not only with human rights principles but also with criteria that define development of effective public policy. Local knowledge of natural resources and of climatic and environmental factors is a primary source of information that should be considered and taken full advantage of at the decision-making point as well as following stages. Economically, investment projects should strengthen local markets by providing good job opportunities, under conditions that do not jeopardize individuals’ basic rights.²⁰

Thus, the realization of the right to food entails making decisions in a human rights-based framework of land tenure governance, in which the right to food is considered a priority in both policy and project implementation. If the principal objective of good land governance is to guarantee social development and contribute to eradicating hunger and poverty, then the most appropriate perspective is one based on human rights.

1.2 Land tenure and the right to food: a reality reflected in the international legal framework

In line with the reasoning above, the links between land tenure and the right to food have been emphasized for years, and are enshrined today in international normative structures. Treaties, recommendations, guidelines and other instruments have established the importance of right to food consideration in land policy. Under the International Covenant on Economic, Social and Cultural Rights (ICESCR),²¹ in order to ensure the effective right to food at a national level, States are obliged to adopt measures for “developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources” (article 11).

With a view to carrying out the mandate of ICESCR Article 11 on a practical level, the Right to Food Guidelines, approved by the FAO Council in 2004,²² offer recommendations on implementing the right to food through national policy in different sectors. Unlike the ICESCR, the Right to Food Guidelines are not binding on states. Their content simply serves as a guide, offering recommendations for the countries to consider

²⁰ See the report of the United Nations Special Rapporteur on the Right to Food, *Large-scale land acquisitions and leases: a set of minimum principles and measures to address the human rights challenge*, presented to the Human Rights Council, A/HRC/13/33/Add. 2, March 2010.

²¹ ICESCR article 11, which explicitly establishes the right to food, is examined below in its different dimensions.

²² FAO, 2004, *Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security*. The content of these guidelines is the result of a 2 year process of negotiation between the FAO member countries and other stakeholders, including representatives of academia, the private sector and civil society.

when designing policies and strategies that will affect citizens' right to food. Various sectors play a role in the guidelines. One area intimately involved in this issue is that of natural resource management and access to land.

The guidelines stress the importance of sustainability in access to natural resources. They recommend that the states respect international human rights obligations as well as national legislation, and that they work to facilitate access to resources through coherent and non-discriminatory policies.

The original text of Guideline 8 sets forth the following more specific recommendation:

Guideline 8: Access to Resources and Assets

“States should facilitate sustainable, non-discriminatory and secure access and utilization of resources consistent with their national law and with international law and protect the assets that are important for people's livelihoods. States should respect and protect the rights of individuals with respect to resources such as land, water, forests, fisheries and livestock without any discrimination. Where necessary and appropriate, States should carry out land reforms and other policy reforms consistent with their human rights obligations and in accordance with the rule of law in order to secure efficient and equitable access to land and strengthen growth for the poorer population. Special attention may be given to groups such as pastoralists and indigenous people and their relation to natural resources.”

With specific regard to access to land, the Guidelines recommend that “States should take measures to promote and protect the security of land tenure, especially with respect to women, and poor and disadvantaged segments of society, through legislation that protects the full and equal right to own land and other property, including the right to inherit. As appropriate, States should consider establishing legal and other policy mechanisms, consistent with their international human rights obligations and in accordance with the rule of law, that advance land reform to enhance access for the poor and women. Such mechanisms should also promote conservation and sustainable use of land. Special consideration should be given to the situation of indigenous communities.”

The explicit relationship between access to land and security of tenure on the one hand, and the right to food on the other, has not been extensively covered in international normative frameworks.²³ As it will become clear with the following examination of states' international obligations concerning human rights, particularly the right to food, implementation is intimately linked to respect for and protection of other human rights, such as the rights to life, health, physical integrity, property and the right not to be discriminated against in the exercise of human rights.

²³ For a broad account of the international instruments that are important for natural resource access, see FAO, 2009, Monsalve, S. Marques L. and Langford, M., *Voluntary Guidelines for Good Governance in Land and Natural Resource Tenure, Civil Society Perspectives*, Rome and FAO, 2009, Grover, R., *Voluntary Guidelines for Good Governance in Land and Natural Resource Tenure, Issues from an international Institutional Perspective*, Rome.

Since the purpose of this document is to analyse the relationship between access to land and the right to food in light of states' obligations to respect, protect and fulfil the realization of this human right, it places priority on examining the obligations established through the ICESCR and their further development by the Committee on Economic, Social and Cultural Rights (CESCR) and relevant authoritative bodies competent in interpretation of international human rights treaties.

2. Human rights: principles and obligations that drive the policy of land governance towards the realization of the right to food

2.1 A human rights-based approach

The United Nations Millennium Declaration establishes the primacy of human rights in the development system. The right to food is reflected in the first objective, which is to eradicate hunger and poverty. Through this Declaration, the member States made a commitment of “respect for human rights and fundamental freedoms, respect for the equal rights of all without distinction as to race, sex, language or religion and international cooperation in solving international problems of an economic, social, cultural or humanitarian character”.²⁴

The human rights-based approach is above all a conceptual framework; its practical implications are discussed in Chapter 3 of the present document. It is normatively based on international human rights standards and operationally directed to the promotion and protection of human rights. This approach aims to identify and correct inequalities and discriminatory practices that result in an unjust distribution of power and that impede development progress. Recognizing that mere charity is insufficient, it emphasizes that development plans, policies and processes are anchored in a system of rights and corresponding obligations established by international law.²⁵

In the context of the United Nations reform initiated in 1997, and, more precisely, during the Interagency Workshop on Human Rights based Approach convened²⁶ in May of 2003 by the United Nations Development Group (UNDG), a Statement of Common Understanding among the UN agencies was adopted referring to a human rights-based approach to development cooperation and development programming. On the basis of the Universal Declaration of Human Rights of 1945, which states that the guarantee of these rights constitutes the basis of the work of the United Nations, and that promoting them is one of the organization’s principal purposes, the Statement of Common Understanding establishes three key points as a frame of reference for all UN agencies in the context of development cooperation projects.

United Nations Common Understanding

1. All programmes of development cooperation, policies and technical assistance should further the realization of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments.

²⁴ United Nations Millennium Declaration, approved at the General Assembly of the United Nations session of 6-8 September 2000. A/RES/55/2.

²⁵ OHCHR, 2006, *Frequently asked questions on a human rights-based approach to development cooperation*. New York/Geneva. p. 15 <http://www.ohchr.org/Documents/Publications/FAQen.pdf>

²⁶ At Stamford in the United States in May 2003.

2. Human rights standards contained in, and principles derived from the Universal Declaration of Human Rights and other international human rights instruments guide all development cooperation and programming in all sectors and in all phases of the programming process.
3. Development cooperation contributes to the development of the capacities of “duty-bearers” to meet their obligations and/or of “rights-holders” to claim their rights.

By emphasizing the fact that human rights are the objective of development and technical cooperation policies and programmes of the entire United Nations system, the Common Understanding highlights the difference between a human rights-based approach and the simple use of good practices. While a human rights-based approach does require good practices, the use of “good programming practices” alone does not constitute a human rights-based approach, as is explained below.

2.2 Human rights and governance: differences and complementarities

The relationship between human rights and what is meant by governance requires clarification. *Human rights* are universal legal guarantees protecting individuals and groups against actions and omissions that interfere with fundamental freedoms, entitlements and human dignity.²⁷ Human rights law obliges governments (principally) to do certain things and prevents them from doing others at national and international level. *Governance*, on the other hand, consists of the mechanisms, institutions and processes through which authority is exercised in the conduct of public affairs. Lack of respect for human rights often has its roots in weak governance. Guaranteeing human rights requires an enabling environment in which: authorities are legitimate and act legitimately, efficiently, effectively and competently; in which there are clear procedures that guarantee the participation of civil society in decision-making; in which information is transparent; and in which governmental authorities are accountable.²⁸ The guarantee of human rights is the best indicator of the state’s performance in this regard. Respect for and protection of these rights cannot be sustained without good governance.

The two concepts are mutually reinforcing and contain common principles (participation, accountability and transparency). Despite this complementarity, however, there are key differences between the two concepts, and the resulting implications are fundamental from a legal perspective. As regards the right to food and its relationship with access to land and other natural resources, states can only meet their human rights obligations if they adopt policies for responsible governance of those resources.

²⁷ OHCHR, 2006, *ibid*, p. 1.

²⁸ OHCHR, 2006, *ibid*, p. 17.

2.3 The legal obligations of states in implementing the right to food

The right to food has been recognized by the international system since the adoption of the Universal Declaration of Human Rights, article 25 of which enshrined everyone's right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services.

The ICESCR subsequently established explicit obligations at the national level associated with states' ratification of this treaty. The international norm in its entirety, as expressed in article 11, stipulates that:

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.
2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:
 - (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;
 - (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

The CESCR, as a UN body whose mandate is to oversee application of the ICESCR at the national level, has interpreted various articles of the treaty. With regard to the right to food, General Comment 12 is the document that establishes in greater detail the scope of states' obligations. By individualizing and defining specific legal obligations that the states have undertaken, the CESCR establishes the scope of the generic obligation as applied to all economic, social and cultural rights. This obligation consists of *adopting measures to progressively achieve* the full exercise of the rights (article 2 of the Covenant).

Taking into consideration the wide ranging scope of this obligation that applies to all rights set forth in the Covenant, the CESCR established its definition in General Comment 3. According to the CESCR, the obligation consists of moving as expeditiously as possible towards that goal. Recognizing the complexity of the task of fully realizing economic, social and cultural rights, the CESCR understands the obligation in terms of means rather than ends. This has concrete implications for determining whether a State is or is not committing a violation of human rights under the terms of the treaty. Although means of implementation will depend on discretionary decisions and on the resources that the state possesses to meet its obligations, a *minimum* is obligatory for the non-violation of the right in question. In the case of the right to food, the state is obliged to ensure for

everyone under its jurisdiction access to the minimum essential food which is sufficient and adequate to ensure everyone is freedom from hunger and physical deterioration that would lead to death.²⁹ The complexity of the notion of minimum protection of human rights has been considered and debated both nationally and internationally. Colombia's Constitutional Court, for example, has established specific rules interpreting the *vital minimum* in the context of the right to food for minors and other groups that find themselves defenseless – as in the case of incarcerated prisoners. According to the Court, “the State must guarantee prisoners the minimum conditions required for subsistence, including proper food with minimum attributes of hygiene, nutritional value, quality and quantity for healthy and complete nutrition”.³⁰ These essential minimum obligations are mandatory, regardless of the availability of economic resources or any other factor or difficulty.³¹ Interpretation of the notion of minimum standards for the right to food has not been confined to the legal realm. From a nutritional perspective, for example, the World Health Organization (WHO) and FAO have established minimum criteria for daily ingestion of food by adults and children.³² In applying international human rights standards, the states have room for discretion that permits them to establish different levels of protection of fundamental rights in different contexts (constitutional, administrative, penal, etc.).

The notion of minimum standards, as applied to the right to food, becomes a matter of judgment subject to discretion, and defining the standards will inevitably depend on interpretations that connect it with other human rights, such as the right to health, life, property and physical integrity.³³

2.3.1 Three obligations to ensure the right to food: respect, protect and fulfil

The CESCR, examining in greater detail the obligations involved in implementing the right to food points to three main types of obligations: **respecting, protecting and fulfilling the right**. (This analysis has also been applied to the rest of the economic, social, cultural rights of the Covenant).

- The *obligation to respect* means that states must not take measures of any type that impede existing access to food. This obligation of the state towards its citizens is thus an obligation to refrain from certain types of activity. For example, in the context of good governance of land, authorities must refrain from authorizing expropriations that violate international standards set forth among the Basic Principles and Guidelines on

²⁹ FAO, 2009, Golay, C. The Right to Food and Access to Justice. Rome, p. 14.

³⁰ Judgement T-208/99, Reporting Judge Vladimiro Naranjo and T-714/96, Reporting Judge Eduardo Cifuentes.

³¹ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, adopted 22-26 January 1997.

³² FAO/WHO, 2002, Joint FAO/WHO expert consultation on human vitamin and mineral requirements. Expert consultation, Bangkok, Thailand.

³³ On the subject of land tenure and its relation to the minimum standards or minimum vital, Colombian jurisprudence has analysed the violation of the right to collective property, life and physical integrity, among other rights, in cases of irregular possession by firms and natural persons that have forced the displacement of entire communities whose right to live in conditions of dignity has been violated by having to abandon their property. See Judgement 0073 of 5 October 2009 of the Administrative Court of El Chocó. *Caso de los Consejos Comunitarios de Curvaradó y Jiguamandó*. See also the IACHR report on provisional measures subsequent to the on-site visit to the two communities, available at: <http://www.cidh.org/countryrep/MPColombia2.20.09.sp.htm>

Responsible governance of land tenure:
An essential factor for the realization of the right to food

Development-Based Evictions and Displacement,³⁴ especially when this would result in a violation of the right to food. With regard to evictions, it is important to consider that respect for the law does not always imply respect for human rights, since laws often contain provisions in favour of those who exercise certain degree of power with respect to land tenure.

In the case of *SERAC (Social and Economic Rights Action Center), in Center for Economic and Social Rights v. Nigeria*, the African Commission on Human and Peoples' Rights imposed sanctions based on the Nigerian State's violation of the right to food due to its participation in actions that led to the forced displacement of 80,000 members of the Ogoni community. By taking part in the consortium consisting of the national oil company and the transnational Shell Oil, the State participated actively in the irresponsible use of resources and in the repression of the Ogoni community. The coordinated action of the State and a transnational firm led to the destruction of crops, the killing of animals and improper exploitation of natural resources which caused air and water pollution, as well as soil contamination. In this case, the Commission took into consideration various economic, social and cultural rights affected by the State's actions and omissions. These included the right to health and to a healthy environment, as set forth in articles 16 and 24 of the African Charter on Human and Peoples' Rights (ACHPR),³⁵ the right to housing (in connection with the right to property, established in article 14 of the ACHPR) and the right to food (in connection with the right to life, set forth in article 4).

The decision of the African Commission on Human and Peoples' Rights stated that in this specific case, the Nigerian government had violated its obligation to respect the right to food by destroying and contaminating the natural resources that constitute the Ogoni community's principal source of food. According to the Commission, the State, by participating in the action that triggered the community's forced displacement, also interfered with the inhabitants' ability to feed themselves through means of their own. The Commission ruled that of the remedies to be adopted to repair the harm done, the government must pay compensation to the victims and develop activities to clean up the contaminated rivers and land.³⁶

In relation to the content of the obligation to respect, the former United Nations Special Rapporteur on the Right to Food, J. Ziegler, placed special emphasis on the arbitrary nature of the measures that characterize the violation of this obligation, insisting in a report to the Human Rights Commission in 2006 that "[t]he obligation to respect means that the Government should not arbitrarily take away people's right to food or make it difficult for them to gain access to food. Violations of the obligation to respect would occur, for example, if the Government arbitrarily evicted or displaced people from their land, especially if the land was their primary means of feeding themselves, if the Government took away social security provisions without making sure that vulnerable people had alternative ways to feed themselves, or if the Government knowingly

³⁴ A/HRC/4/18, Annex I of the Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living.

³⁵ Henceforth CADHP.

³⁶ ACHPR, 2001, *SERAC (Social and Economic Rights Action Center), Center for Economic and Social Rights, v. Nigeria*, paragraph 49.

introduced toxic substances into the food chain, as the right to food entails access to food that is ‘free from adverse substances’.’³⁷

- The obligation to *protect* requires the state to take measures to ensure that enterprises or individuals do not deprive others of their access to adequate food.³⁸ Unlike the obligation to respect, the state’s responsibility here is not judged in terms of deliberate action against the right to food, but in terms of failing to control activity by third parties. The Maastricht Guidelines, which are based on the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, state that “States are responsible for violations of economic, social and cultural rights that result from their failure to exercise due diligence in controlling the behaviour of such non-state actors”.³⁹

States’ obligation to protect the right to food has also been analysed in the Nigerian case cited above. On that occasion, by permitting private-sector firms to destroy the natural resources that provide food, the government committed an act of omission in failing to prevent third parties from violating the Ogoni community’s right to food.⁴⁰ On a national level, the Brisas del Bejuco case in Honduras (November 2007) is a vivid illustration of the principle of protecting the right to food in a context of land conflict. In that case, the peasant group “Brisas del Bejuco”⁴¹ was accused of usurping the land of one of the area’s landholders. The trial court’s ruling called for immediate eviction. The group’s attorney filed an appeal based on arguments invoking the State’s obligation to protect the right to food for those within its jurisdiction. These arguments were based on knowledge from a right to food training course attended by one of the community’s members. On appeal, the Sectional Appeals Court of San Pedro Sula ruled on the case with substantial reference to the ICESCR and the CESCR interpretation of the right to adequate housing stipulated in General Comment 7. The Court resolved and affirmed that “the evictions entail human suffering and could lead to serious violations of human rights”, and thus “the eviction order shall be rendered null and void”.

- Finally, the obligation to *fulfil* has been interpreted on two different levels in General Comment 12. The first – the obligation to *fulfil (facilitate)* – necessitates major action by authorities, since it requires the state to undertake activities to strengthen access to and use of resources, as well as secure a population’s means of livelihood including food security. However, the obligation to *fulfil* goes beyond a progressive State responsibility; it also covers a dimension of protection in situations of heightened vulnerability in which individuals or groups are unable – for reasons beyond their control – to enjoy the right to food through their own means. In this case, the obligation to *fulfil* means an obligation to *provide*.

This third type of obligation represents, in a more detailed fashion, the stipulations of article 2 of the ICESCR, in other words, the principal obligation to take measures to progressively achieve the full exercise of the right to adequate food. The CESCR has

³⁷ Human Rights Commission, *The right to food*, Report of the Special Rapporteur on the Right to Food, Jean Ziegler (16 March 2006), United Nations document E/CN.4/2006/44, paragraph 22.

³⁸ CESCR, 1999, General Comment 12, paragraph 15.

³⁹ Maastricht Guidelines, paragraph 6.

⁴⁰ ACHPR, 2001, SERAC, Center for Economic and Social Rights v. Nigeria, paragraphs 65-66.

⁴¹ Vivero Pol, J. and Scholz, V., 2009, *La justiciabilidad del derecho a la alimentación*, in “Derecho a la alimentación, políticas públicas e instituciones contra el hambre”. LOM ediciones, p. 238.

established that although this article includes, in measures to be adopted, passage of legislation at the national level, this is only one of the actions through which states can be compliant with their obligations in order to make human rights effective. The Committee suggests, for example, that States design strategies that establish concrete responsibilities for the different actors that play decisive roles in the realization of the right to food. The various sectors connected with health, education, work and social security must take part in formulating public policy on food issues. Each of these sectors possesses valuable knowledge regarding issues affecting the right to food from a unique lens. These perspectives must be taken into account in developing a long-term strategy that will yield sustainable and consistent policies. Similarly, the CESCR recommends that the process of developing such strategy include significant participation from all the different territorial levels. Policy that defines systems and chains of food production, processing, marketing and consumption should be debated at the national, regional and local levels to achieve greater interaction and institutional coordination.

This obligation has been broadly interpreted in both national and international contexts. In a wide variety of land-related cases brought before the Inter-American Court of Human Rights, the obligation to *fulfil* has been analysed vis a vis the rights to health, food, life and property, among other rights considered by the Court.

The body of jurisprudence developed by the Inter-American Court of Human Rights has defined the substance of the right to property from a much broader perspective, one that takes into account aspects of culture and identity. This line of jurisprudence has been fundamental in protecting indigenous and tribal communities that have for years fought to reclaim ownership of their ancestral lands. The Court used ILO Convention 169 as a standard in interpreting the right to property in cases involving claims to ancestral territory by indigenous communities. The Court established that, due to the close relationship that indigenous and tribal communities have with the land and with natural resources, the aforementioned relationship must be understood as an intrinsic aspect of their world view and cultural identity.⁴²

A case of major importance in this context is *Comunidad Indígena Sawhoyamaxa v. Paraguay*, a case in which the IACourtHR considered the right to food to constitute an integral component of the right to life.⁴³

In the facts of the case, the Inter-American Court of Human Rights considered it to be “proven” that the State’s sale to foreigners of land in the Paraguayan Chaco region (dating from the late 19th century) caused a fragmentation that resulted in reduced access to land by the Sawhoyamaxa indigenous community. The Sawhoyamaxa community (literally, the community “of the place where the coconuts ran out”) is a sedentary indigenous community who have traditionally inhabited the Paraguayan Chaco. Because the Paraguayan State failed for years to recognize rights to ancestral lands, this community lived in extremely difficult conditions, that is, lacking the access to traditional means of subsistence (hunting, fishing and gathering). The food aid that the community’s members received from the State was insufficient, and the lack of regular food distribution led to the death of 31 individuals, including a number of children.

⁴² Courtis, C., 2009, “Apuntes sobre la aplicación del Convenio 169 de la OIT sobre Pueblos Indígenas por los tribunales de América Latina”, in Revista SUR, no. 10. São Paulo.

⁴³ Article 4 of the ACHR.

Among the considerations that the Court took into account was a broad interpretation of the right to life, construing that “along with lack of land, the lives of the members of the Sawhoyamaxa community are characterized by unemployment, illiteracy, morbidity rates caused by evitable illnesses, *malnutrition*, precarious conditions in their dwelling places and environment, limitations to access and use health services and drinking water, as well as marginalization due to economic, geographical and cultural causes” (emphasis added).⁴⁴ Thus, the Court ruled that the right to life had been violated, since the Paraguayan State failed to take the positive measures needed to prevent or avoid jeopardizing the right to life for the members of the community. In terms of reparations, the Court ruled that the State should take legislative, administrative and other measures to ensure the community’s formal and physical use of its ancestral land. The Court set a deadline of three years for the State to implement these measures. It also ruled that the State must create an economic fund to implement projects on agriculture, health, drinking water, education and housing. It ruled that, for the duration of the implementation of the measures, the State must ensure access to adequate food for all community members who did not have complete access to their land.”⁴⁵

This broad interpretation of the right to life has been established in many cases involving indigenous peoples that face extreme deprivation due to lack of physical access to land. This situation has in various cases led to a threat or compromise of the right to food and other economic, social and cultural rights protected by the ICESCR. In these cases, the Court has examined compliance with the essential minimum obligations regarding these rights, and has stated that the right to life “includes, not only the right of every human being not to be arbitrarily deprived of his life, but also the right that conditions that impede or obstruct access to a decent existence should not be generated”.⁴⁶ From this perspective of analysis, the most recent case is *Comunidad Indígena Xákmok Kásek v. Paraguay*, which was publicly heard by the court on 14 April 2010. Among the background facts of this case, the Inter-American Commission on Human Rights (IACHR) alleged before the Inter-American Court of Human Rights that the lack of recognition of ancestral property rights had created a persistent state of “medical, health and **nutritional vulnerability** among the members of the community” (emphasis added).⁴⁷

The importance of these case rulings by the Inter-American Court of Human Rights has implications not only for property rights, security of tenure and the right to food, but also for the obligation to guarantee the fulfilment of economic, social and cultural rights without discrimination.

⁴⁴ Among other things, the Court took into account CESCR General Comment 12.

⁴⁵ IACourtHR, 2006, Case of the Sawhoyamaxa Indigenous Community v. Paraguay, paragraphs 164 and 204-230.

⁴⁶ IACourtHR, 2005, Case of the Yakye Axa Indigenous Community v. Paraguay, paragraph 161.

⁴⁷ IACourtHR_CP-06/10. Press release. See the resolution of 8 March 2010 for more details on the current status of the case before the Court. <http://www.corteidh.or.cr/docs/asuntos/X%C3%A1mok.pdf>

2.3.2 Obligation to guarantee rights without discrimination

The ICESCR establishes that “the States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (article 2, paragraph 2). Considering that non-discrimination is an immediate and general obligation within the Covenant, the CESR has stated that “any discrimination in access to food, as well as to the means and entitlements for its procurement (...) with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of economic, social and cultural rights constitutes a violation of the Covenant”.

Discrimination in access to resources or food results from a society’s established power dynamics. Attitudes that involve a certain degree of discrimination are well-entrenched in some cultures and constitute major obstacles to decision-making regarding access to land – for example, in the case of women or indigenous communities. Such social behaviour is likely to be reflected in an exclusive form of land tenure. In formal land tenure systems, the passage of land-use legislation is an essential element in preventing discriminatory arrangements. When such societal dispositions are expressed in the law, they can further aggravate existing discrimination in a community. Thus, the process of consultation and passage of legislation governing access to land requires significant participation from all sectors of a society if implementation is to be sustainable over the long term.

Discrimination against women in land tenure is more frequent in some cultures than in others. In some countries, women have access to land only through their husbands or male relatives.⁴⁸ This leads to complete dependence on men and to what extent they allow women to use the land. In such cases, women cannot achieve truly independent access to the means of production; thus, their exclusion is not only discriminatory, but also has a direct impact on their households’ access to food. Legislation on inheritance, for example, often excludes women from inheriting, and thus from access to land and land-based means of production.⁴⁹ As regards international normative frameworks, the *Convention on the Elimination of All Forms of Discrimination against Women* requires the States Parties to “take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

- a) To participate in the elaboration and implementation of development planning at all levels;
- b) To have access to adequate health-care facilities, including information, counseling and services in family planning;
- c) To benefit directly from social security programmes;
- d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, *inter alia*, the benefit of all community and extension services, in order to increase their technical proficiency;

⁴⁸ FAO, 2008. Rae, I., *Women and the right to food* and FAO, 2006, Cotula, L., *Gender and law. Women’s rights in agriculture*. Legislative study 76. Rome.

⁴⁹ FAO, 2009, Bojic Bultrini, D., *Guide on Legislating for the Right to Food*, Book 1, Rome, p. 203.

- e) To organize self-help groups and cooperatives in order to obtain equal access to economic opportunities through employment or self-employment;
- f) To participate in all community activities;
- g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes;
- h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

Eliminating discrimination against women in rural areas and affording them true participation in rural development is understood from a broad perspective within the Convention. Adequate access to land also includes access to education and to the means of production that make it possible for them to use resources efficiently, and to participate in local markets and share in the benefits of such markets. Equal treatment of women in land legislation reform is one of the concerns covered in the Convention. An example of national legislation with objectives and principles that include equal and equitable access to resources is Mali's Agricultural Orientation Act (*Loi d'Orientation Agricole*, or LOA), adopted in September 2006.⁵⁰ Article 8 of this law establishes the objective of agricultural development policy as the promotion of men and women making their living from agriculture, whilst observing the principle of equity. With regard to access to land and the allocation of land parcels, article 83 gives priority to women, young people and vulnerable groups.⁵¹

Implementation and monitoring of the law are essential stages to avoid discriminatory effects in application of the law. Many legal texts are impeccable on paper, but are not implemented in an effective manner in practice. In this sense, education and promoting awareness of rights established in legislation are vital in making people feel that they have the right to make appropriate claims in cases where legal provisions are not effectively observed. The content of the legislation needs to be channelled and disseminated in forms that are accessible to citizens. Legal and technical terminology should be presented in understandable terms relating to real life circumstances such that the law itself becomes accessible and meaningful beyond its mere existence on paper. Only in this fashion can citizens themselves understand when the law is not being observed by officials or by private parties. Monitoring then becomes a task for all; thus, both citizens and government authorities participate actively and freely where action is required to address nonobservance of the law. In terms of gender issues, women must take part in these mechanisms from an institutional standpoint in order to be able to influence decisions that affect their access to land and food.⁵²

⁵⁰ For more in-depth case studies of some countries and their legislation on access to natural resources, see FAO, 2008, Cotula, L., Djiré, M. and Tenga, R.W., *The right to food and access to natural resources. Using human rights arguments and mechanisms to improve resource access for the rural poor*. Rome.

⁵¹ "L'Etat veille à assurer un accès équitable aux ressources foncières Agricoles aux différentes catégories d'exploitants Agricoles et promoteurs d'exploitations Agricoles. Toutefois, des préférences sont accordées aux femmes, aux jeunes et aux groupes déclarés vulnérables dans l'attribution des parcelles au niveau des zones aménagées sur des fonds publics. Les critères d'attribution des parcelles et de déclaration de vulnérabilité d'un groupe de populations sont fixés par voie réglementaire (Article 83, LOA)."

⁵² FAO, 2009, Bojic Bultrini, D., *Guide on Legislating for the Right to Food*, Book 1, Rome, p. 229. This section of the Guide refers to the Tanzanian case in which, pursuant to article 60 of Tanzania's 1999 Village Land Act, the Village Land Council (which has conflict resolution authorities) is required to include three women among its seven members.

Discrimination is at the root of many human rights violations, particularly as concerns violations of economic, social and cultural rights. However, this argument has not been sufficiently developed at the international level in concrete cases by representatives of civil society.

Discrimination in access to land of certain groups that find themselves socially marginalized directly affects the fulfilment of their economic, social and cultural rights. As mentioned above in cases related to access to land for indigenous groups, the Inter-American Court of Human Rights has emphasized that in the context of the positive obligations entailed in the right to life, failure to provide health services and minimum basic services, including access to drinking water and sanitation, or to provide conditions that make it possible to enjoy the right to food, constitute violations of the right to life and physical integrity.⁵³ Given the coexistence of culturally based claims of indigenous communities that are not fulfilled and the extreme poverty in which such communities live, literature on human rights affirms that the Court “has detected a situation of *systematic* or *structural discrimination*”, highlighting that in such cases there is convergence of two mandates: respect for cultural diversity, and adoption of specific measures to meet the basic needs of communities suffering social exclusion and marginalization.⁵⁴ The effect that such discrimination has on access to food for socially marginalized individuals is tantamount to a violation of the right to food. Thus, there should be further exploration of discrimination-based arguments, in both national and international litigation, to claim recognition of violations of the right to food and violations of other economic, social and cultural rights.⁵⁵ In the great majority of cases, protection of these rights has been achieved through a broad interpretation of the right to life, since in the area of economic, social and cultural rights, the Additional Protocol to the American Convention on Human Rights –Protocol of San Salvador– provides for the possibility of litigation only on trade union rights and the right to education.⁵⁶

2.4 Human rights principles applied to the implementation of the right to food

Leaving aside legal obligations under international law, the human rights principles as set forth in the Right to Food Guidelines are fundamental for implementing the right to food at the national level. **Participation, accountability, non-discrimination** (which, as mentioned above, is both a principle and an obligation), **transparency, human dignity, empowerment** and the **rule of law** (PANTHER according to the acronym) apply to the implementation of the right to food. Their ultimate objective is to serve as a framework for all levels of implementation of the right to food using a human rights based approach. Complete observation of these principles is essential in formulating policy and projects, as well as in oversight and monitoring and evaluation. These principles are fundamentally

⁵³ IACourtHR, 2005, *Case of the Yakie Axa Indigenous Community v. Paraguay*, paragraphs 161-162, 164-165 and 167.

⁵⁴ See Curtis, C., *Dimensiones conceptuales de la protección legal contra la discriminación*, op. cit., p. 22.

⁵⁵ See Curtis, C., *ibid.*, p. 19.

⁵⁶ Article 19 states that: “Any instance in which the rights established in paragraph (a) of Article 8 [labour union rights] and in Article 13 [right to education] are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights.”

based on procedural and substantive human rights recognized at the national level, as well as in international law.

Considering more closely some of the principles of human rights involved in implementing the right to food, it becomes clear that their scope can vary from one group to another. The principle of *participation*, for example, has been described as “free, prior and informed consent” in relation, specifically, to indigenous communities and to the requirement for consultation regarding projects that take place in their territories for the exploitation of natural resources.⁵⁷

Guaranteeing these principles at the different stages of public policy development and implementation has concrete legal implications. In addition to lending legitimacy to governmental actions, participation by all actors – especially the most vulnerable groups – in decisions affecting their long-term rights is a basic prerequisite to policy sustainability. National jurisprudence has determined the scope of these principles through rulings on specific cases. Two Colombian cases show how the jurisprudence of that country’s Constitutional Court has recognized these principles.

In the first of these two cases, the Court interpreted the right of indigenous peoples to prior consultation on projects to exploit natural resources before the projects are authorized. In ruling SU-039/97, the Court ruled on a *tutela* action⁵⁸ filed by the Ombudsman, on behalf of the indigenous U’wa community, against the Ministry of the Environment and the Sociedad Occidental de Colombia, Inc.⁵⁹ The suit alleged that the prior consultation that should have occurred before granting a license for the extraction of hydrocarbons in this community’s territory was not properly conducted as per articles 6 and 15 of ILO Convention 169. The Ombudsman asked for a repeat consultation under more appropriate conditions, and requested nullification of the administrative ruling granting the license. In deciding the case, the Constitutional Court stated that consistency between the exploitation of natural resources and the U’wa community’s right to preserve its cultural, ethnic, economic and social identity can be achieved by a mechanism for community participation in decision-making. The Court’s ruling emphasized the fundamental nature of the right to be consulted – one that is sourced from international law and incorporated into the Colombian Constitution⁶⁰ – considering it a basic condition for the survival of indigenous communities with their own culture and identity. Accordingly, the Constitutional Court ordered the suspension of the environmental license and ordered authorities to carry out the consultation in the manner in which it should originally have been conducted.

⁵⁷ ILO Convention 169.

⁵⁸ *Tutela* actions in Colombia are that country’s form of appeals that look for the immediate protection of fundamental rights that have been undermined or that are currently under threat

⁵⁹ Courtis, C., *Apuntes sobre la aplicación del Convenio 169 de la OIT sobre Pueblos Indígenas por los tribunales de América Latina*, op. cit., p. 65.

⁶⁰ In the Colombian constitution, Article 93 establishes that all human rights treaties ratified by Colombia constitute part of the “block of constitutionality”, i.e., they have the same status as the Constitutional Charter.

**What is the meaning of participation in this context?
What is the right to be consulted?**

—The Constitutional Court's view was that consultation must be based on the community's full knowledge of the proposed project and of the economic, social, cultural and political effects that its implementation would have, and that the consultation must reflect the community's assessment of the advantages and disadvantages of such implementation.

—The communities must be heard, and in case of disagreement, authorities should act objectively, reasonably and proportionally, not arbitrarily.

Another important principle in making public policy for governance of land tenure is *accountability*.⁶¹ The second Colombian case is an illustration of the failure to apply this principle. It shows how Colombia's Constitutional Court establishes a basis for the obligation to ensure that there are mechanisms of accountability among the different levels of decentralized territorial powers.

In ruling T-704/06, the Court analyses a *tutela* action filed by the National Indigenous Organization of Colombia (ONIC) on behalf of the Association of Heads of Wayuu Families of Northern Alta Guajira against municipal and national authorities. According to the petitioners, the authorities against whom the case was filed, acted or failed to act in such a way as to prevent the communities from receiving and executing the economic resources due to them as their share of the nation's current revenues.⁶² Because of the authorities' acts of omission, the communities found themselves in a situation of extreme poverty, and thus the suit alleged a violation of their basic constitutional right to ethnic and cultural recognition and protection as an indigenous people, as well as of their rights to petition, to human dignity, to health, to education and to equality (i.e., to be free of culturally based discrimination) in the context of Constitutional norms and the standards set forth in ILO Convention 169.

The Court ruled that the authorities were indeed liable, and that the State must take positive action to permit the indigenous communities to fully exercise their rights. In doing so it underlined the close relationship between enjoyment of the economic, social and cultural rights and enjoyment of the right to subsistence and cultural identity.⁶³ It also ruled that all decentralized territorial entities are responsible for ensuring that the funds due to indigenous communities are in fact delivered. Consequently, it declared that government authorities were responsible for failing to ensure the effective delivery of funds to the communities. The Court also established a State obligation to provide training for the community so that it could itself properly monitor the handling of funds. It therefore declared that, as an indigenous community, the petitioners' rights to human dignity, health, education, participation and autonomy, as well as the right not to be discriminated against based on culture, had been violated. The reparations ordered

⁶¹ Accountability means that the authorities are answerable to citizens for their actions and omissions.

⁶² To be charged against the 1999, 2000, 2001 and 2002 fiscal years.

⁶³ *Courtis, C., op. cit., p.71*

included delivery of funds that had not been delivered, with the financial burden to be divided among the authorities responsible for the transfer of the relevant budget allocations. In this way, Colombia's Constitutional Court made effective the principle of accountability at a decentralized level.

3. Governance of land and the right to food in practice

3.1 A common framework for legitimacy and sustainability

The initiative to develop Voluntary Guidelines on the governance of land tenure and other natural resources⁶⁴ aims to establish a global framework of recommendations that states and stakeholders can use in planning and designing public policies on land tenure and other natural resources. The current process of regional consultation being carried out on the various continents has been important as a means of sharing views on local intricacies while setting certain issues on the table for discussion with a broader perspective.

The challenges of today's increasingly globalized world have created new problematic issues that a human rights-based approach can help address by providing a framework for legitimate and sustainable policymaking. The development of the Voluntary Guidelines on land tenure benefits from past experiences at FAO. In this sense, the Right to Food Guidelines adopted by the FAO Council in 2004 serve as a source of inspiration. Since the current Voluntary Guidelines are in large part a further development of some of the provisions included in the Right to Food Guidelines (particularly those aspects associated with the management of natural resources), they will ultimately provide a complementary framework for consistent policymaking to foster social and economic development of a country. What kind of action can the Voluntary Guidelines on land tenure promote at a national level?

3.2 From planning to monitoring: applying a human rights based approach throughout the land tenure policy process

Based on a human rights approach, the implementation of the Voluntary Guidelines for the responsible governance of land tenure and other natural resources will entail certain processes and actions to ensure appropriate programming of national policies and projects. This approach constitutes a framework for designing and implementing policy, from the initial stage to the monitoring and oversight stage. As mentioned in chapter 2, the Common Understanding among the different agencies of the United Nations contains some key elements for implementing the *human rights-based approach* in the programming phase of public policy. Considering the vast impact of national projects supported by the United Nations, and due to the fact that some countries have decided to adopt the United Nations Development Assistance Framework (UNDAF),⁶⁵ it is essential to clarify the content and implications of the approach, which is designed to provide a basis for programming of operations.

The Common Understanding mentions four specific points: (i) prior assessment; (ii) analysis of authorities' capacities (resources, training, etc.) to carry out their obligations, and of the population's capacities to effectively exercise their rights; once capacities are evaluated, programs should seek to strengthen them on both levels, based on those

⁶⁴ See <http://www.fao.org/nr/tenure/voluntary-guidelines/en/>

⁶⁵ According to United Nations General Assembly Resolution 53/192, UNDAF seeks to harmonize projects implemented by United Nations agencies at the national level. It is used in collaboration with government officials, civil society, the private sector, donors and other agencies, such as the IMF, the World Bank and regional development institutions. See the 1999 UNDAF Guidelines, available at: <http://www.reliefweb.int/unpm/documents/509UNDAFGuidelinesEnglish.pdf>

findings suggest; (iii) monitoring and evaluation; and (iv) incorporation of the recommendations by international human rights institutions. Below, the first and third of these points are explained in greater detail from a comprehensive perspective linking the right to food with land governance.

The first point referred to in the Common Understanding is the process of general assessment and analysis meant to precede the design of any policy or project. During this process, the rights of individuals and the obligations of authorities with respect to those rights are to serve as main reference points. The aim is to reach an understanding of the structural factors responsible for the failure to secure certain human rights at the national level and to then formulate appropriate and concrete responses.

In the case of the right to food and its relationship to access to land, the importance of prior evaluation has also been emphasized by the United Nations Rapporteur on the Right to Food, Olivier de Schutter, who has spoken of the challenges and opportunities associated with agricultural investment in the context of large-scale land acquisitions and leases. His most recent report to the United Nations Human Rights Council⁶⁶ set forth principles designed to orient states and other actors in the negotiation, implementation and monitoring of such investment projects.⁶⁷ Taking, as a starting point, respect for international law and human rights obligations, these principles offer recommendations to help states ensure that they have the capacity for sufficiently inclusive and legitimate decision-making, so as to realize the dual objectives of effective and sustainable economic development policy and realization of human rights.⁶⁸

Full participation of the different actors in the preliminary assessment stage is essential for various reasons. In addition to being an individual and collective human right (as illustrated in the case of indigenous communities), an exchange of views with the local population can serve as a source of knowledge for formulating policies that are much more appropriate and efficient in addressing needs in specific contexts. For example, one fundamental element is conducting a careful analysis of land that might be designated for future investment projects. Land considered by foreign actors to be free of use may actually be the principal means of subsistence for a local population. Pastoral activity, for example, is of particular importance in this context where an individual's use of land is not readily apparent to authorities. Since pastoral users of land do not have a property title, their long-term security is not guaranteed.

With regard to the third point referred to in the Common Understanding, in addition to taking note of the outcomes of the project, the monitoring and evaluation stage assesses the processes through which the final results have been achieved. Given that these processes are supposed to incorporate human rights principles during planning, designing, implementing and monitoring of project objectives, it is essential to develop indicators for

⁶⁶ See the report of the United Nations Special Rapporteur on the Right to Food, *Large-scale land acquisitions and leases: a set of minimum principles and measures to address the human rights challenge*, presented to the Human Rights Council, A/HRC/13/33/Add.2, March 2010.

⁶⁷ For more in-depth treatment of the issue of sustainable development from a contractual perspective, see: Cotula, L., *Investment contracts and sustainable development. How to make contracts for fairer and more sustainable natural resource investments*. IIED, 2010. London.

⁶⁸ Principle 9 in the Rapporteur's report recommends that, to achieve clarity on how investment projects affect the realization of the right to food, project impact assessments should be conducted before the projects are approved or authorized.

evaluating them.⁶⁹ Failure to conduct ongoing evaluation and monitoring hinders the identification of gaps and possible errors in implementation. Such failure can even lead to consequences opposite those intended by the project objectives, and that worsen the economic and social situation of a community or region.

Rural development policies in a territory whose implementation in one way or another affects security of access to land should be subject to monitoring that evaluates the extent to which the State is fulfilling its obligation to ensure the right to food. For example, if a policy has either directly or indirectly led to displacement and food insecurity of the local population, authorities have then failed to fulfil their obligation to respect the right to food and the policy should be reviewed and redesigned on the basis of findings of the monitoring process. Such a situation can be averted where an appropriate prior evaluation has taken place. It is extremely important that the monitoring involve different actors at different levels. Government will generally provide structural information on the composition of institutions, the passage of laws, the management of plans and programmes for development, etc. The institutions contributing to the monitoring process independently from the government will provide more critical and yet highly useful information, exposing aspects of a project that may be creating problems in the implementation phase.

For the purpose of evaluating the fulfilment of broad objectives such as achieving *security of land tenure* and the *realization of the right to food*, the information provided by non-governmental actors – academic institutions, non-governmental organizations, social movements and international monitoring mechanisms – serves as a barometer for measuring the impact of public policies. It is particularly important for government to facilitate the work of those overseeing and monitoring public policy. The “*Paris Principles*” relating to the status and functioning of national institutions for the protection and promotion of human rights⁷⁰ represent a broad consensus on the role and features of institutions such as human rights councils, commissions and secretariats whose principal function is to promote and protect fundamental rights at the national level. The Paris Principles emphasize the importance of guaranteeing independence in order to enable these institutions to conduct their work properly. This should be reflected in the structure of such institutions (personnel hiring policies, sources of funding, etc.) and in their operations.

3.3 Institutions, administration and legislation in practice

Land administration requires solid institutions, since this is needed to ensure that measures and administrative processes truly incorporate human rights obligations and principles of good governance. In this sense, the PANTHER principles (*participation, accountability, non-discrimination, transparency, human dignity, empowerment and the rule of law*) governing the implementation of the right to food share a foundation with the principles of good governance, particularly in relation to transparency, accountability and the rule of law.

⁶⁹ A related discussion of the practical challenges of developing and implementing indicators of secure land tenure can be found in Laksa, K. and El-Mikawy Noha, *Reflections on Land Tenure Security Indicators*, UNDP Oslo Governance Centre, Discussion Paper, 11 June 2009.

⁷⁰ See: www.nhri.net/pdf/ParisPrinciples.english.pdf

The importance of transparent, coordinated and efficient institutions is fundamental just as much for the administrative services provided by government as in the broader area of public policymaking. With respect to the first aspect, a guarantee of these principles is, for example, especially important in matters concerning systems of land registry or cadastre.⁷¹ The method used for issuing cadastral documents or historical registry data on property and ownership has a considerable impact on taxes and land assessments. Given the interests involved, there are many cases of corruption that can trigger ownership conflicts. Ensuring transparency in the handling of information is key element to ensure that everyone – the population as well as the authorities – has equal access to information. A good land registry system is indispensable for proper land planning. Indeed, it is an essential tool of public institutions for defining and approving projects, since it is only through effective identification of actual land use that a sustainable method of planning projects involving agriculture and natural resource can take place. Transparent information helps in making decisions that will not harm individual and collective land rights in such a way as to impede access to food or jeopardize the right to food.

Similarly, coordination of management of information must exist in the total institutional system, whether national, departmental or municipal. In formulating public policy, coordination between different sectors and institutions contributing to the effective realization of the right to food is essential. Coordination mechanisms facilitate the articulation of policies and concrete actions that are in hopes of being implemented. In this context, the relationships between land tenure governance and the right to food are indispensable for coherent execution of programmes and to make sure there are no contradictions in the implementation process. Thus, it is necessary to create coordinating bodies – an area in which some countries have already made significant strides.

The case of the Plurinational State of Bolivia illustrates the concrete implementation of national and decentralized entities whose mission is to implement the right to food from a comprehensive, multisectoral perspective. The constitutional recognition of the right to food in article 16 of the New Constitution, approved in December of 2007, has been practiced in institutional, legal and educational planning and, above all through the implementation of multisectoral programmes such as the Multisectoral Zero Malnutrition Programme and the Multisectoral School Feeding Programme. The aim of the creation and subsequent reform of the National Food and Nutrition Council (CONAN)⁷² is to promote and coordinate participation between public sector institutions and civil society organizations in formulating, disseminating information on, and following up on sectoral food and nutrition policies, as a means of promoting the country's National Food and Nutrition Security Policy.

At the operational level, the CONAN Technical Committee (CT-CONAN) is responsible for implementing the Multisectoral Zero Malnutrition Programme⁷³ and promoting the right to adequate food in the Plurinational State of Bolivia. The participation of various

⁷¹ A land information system normally based on division into parcels, and containing a record of interests related to land rights, constraints and responsibilities. The registry is responsible for creating, maintaining and updating an inventory of real property in the national territory, based on a study of the land's physical, economic and legal aspects. The information on each land parcel is recorded in a database that includes both textual and graphic material (cartographic information).

⁷² Supreme Decree 27029 of 8 May 2003 created CONAN, and Supreme Decree 28667 of 5 April 2006 reformed it.

⁷³ This programme seeks to address chronic malnutrition, which affects one out of three children under five in the Bolivarian Republic of Bolivia. It reaches 166 of the country's municipalities.

ministries⁷⁴ in CONAN, including the Ministry of Rural Development and Land, has been fundamental in comprehensively addressing land policy and rural development and its impact on the right to food. Currently, for example, this ministry is working on four policies⁷⁵ that directly support the Multisectoral School Feeding Programme by promoting the production of local food for household consumption.

In the case of Bolivia, institutional coordination has been decentralized at the departmental and municipal levels. The creation of Departmental Food and Nutrition Councils (CODANs) and Municipal Food and Nutrition Councils (COMANs) reinforces the comprehensive, multisectoral execution of programmes and projects at those levels. In the municipalities of Caripuyo and Villavecia, for example, an Institutional Strategic Plan (PEI) has been created based on the PANTHER principles of right to food. At an operational level, concrete mechanisms for ensuring execution and monitoring of the Municipal Development Plan (PDM) and the Annual Operating Plan⁷⁶ create a way for implementation and concrete actions guaranteeing the right to food in these municipalities.

In the area of monitoring and claim mechanisms, an interesting case to look at is that of Brazil. Its strategy for implementing the right to food is widely recognized for its variety and span of coverage: from constitutional and legal recognition to implementation of specific programmes under the supervision of solid coordinating entities, and implementation of enforcement mechanisms. To speak only of monitoring and claim mechanisms is to look at only one component of Brazil's approach. In fact, despite not having an institution that fully and independently carries out the precepts of the Paris Principles mentioned above in this document, the roles of certain institutions as in the case of the Public Ministry have been significant in protecting the right to food. This Ministry's has a constitutional mandate consisting of oversight and monitoring of public policy implementation and ensuring that its execution is consistent with both the Constitution and statutory law. Although it is not a judicial body, the Ministry is independent from the current government administration and, for this reason, has the actual capacity to investigate violations of human rights, formulate recommendations to authorities, and take matters to court if and when violations are not adequately addressed. In this sense, although the Ministry is responsible for monitoring and promoting human rights, the breadth of its mandate gives it a *quasi-judicial* role⁷⁷, that is, to investigate and make recommendations that are not binding as judicial rulings although it indeed can instigate judicial probes so to speak. Therefore, it constitutes one of the recourse mechanisms for claiming protection of the right to food in Brazil.

Besides, the National Rapporteurship on the Human Right to Adequate to Food and Rural Land constitutes a monitoring system based on the mandate of the United Nations Special Rapporteur on the Right to Food. It has a vital monitoring role with comprehensive coverage of land tenure issues and violations of the right to food. The way in which this

⁷⁴ Ministries of Education, Justice, Rural Development and Land, Productive Development and Plural Economy, Water and Environment, and Health and Sports.

⁷⁵ The Food Sovereignty Policy, which promotes campesino family farming; the Land Policy, the Soil Use and Management Policy and the Ecological Production Policy.

⁷⁶ Ordinance 35 of 2009, by which the Municipal Council mandated compliance with the institutional strategic plan of Villavecia, establishes the formation of a system of food and nutrition surveillance.

⁷⁷ See Suarez, A.M., 2008. *How to promote the Justiciability of the Human Right to Food*. FIAN International. Heidelberg, FAO, 2007 *Lessons learned from Brazil*. Rome, and FAO, forthcoming. Franceschini T, Burity V. and Cruz L. *Mechanisms to claim the right to food in Brazil*.

mechanism is implemented provides direct contact with civil society such that a great deal of its investigatory and monitoring work takes the form of visits to affected communities.

The National Rapporteur plays a fundamental role in facilitating dialogue between government authorities and civil society channeling conflicts into a negotiating process in which the Public Ministry at times intervenes to establish Terms of Conduct Adjustment (TAC) - a mechanism through which authorities recognize their failure to meet their obligations towards individuals and make a commitment to the Public Ministry to do so pursuant to the agreement.

Finally, another significant aspect of fulfilling the obligations with respect to the right to food is the adoption of legislation guaranteeing this right at national level. This type of recognition can take the form of constitutional provisions, framework laws or sectoral legislation. Many countries have recognized the right to food explicitly in their respective constitutions. Brazil, for example, recently approved a constitutional amendment that incorporates the right to food in article 6, which enshrines other economic, social and cultural rights. In Ecuador's case, article 13 of the New Constitution, approved by the National Assembly, establishes the right to food as the right to "free and permanent access to sufficient safe and nutritional food for healthy, quality nutrition consistent with the culture, traditions and customs of the peoples". To date, the constitutions of approximately 22 countries explicitly recognize the right to food.⁷⁸

In terms of legal recognition of the right to food, Nicaragua's Food and Nutritional Sovereignty and Security Act⁷⁹ is an illustration of a comprehensive effort to legalize the right. The Nicaraguan law not only defines the right to food as its central purpose, but also creates a National System on Food and Nutritional Sovereignty and Security designed to "promote, protect and fulfil the right to food as a fundamental right" (article 10). Within the System, Food and Nutritional Sovereignty and Security Commissions are established which are responsible for multisectoral coordination at various levels (national, regional, departmental and municipal). Along with participation by members of civil society, the private sector, indigenous communities and the union of agricultural producers, the legislation calls for the Ministry of Agriculture and Forestry and the Ministry of the Environment and Natural Resources to play roles in the National Commission on Food and Nutritional Sovereignty and Security (CONASSAN). This is of special relevance to land tenure governance. As in the case of the Plurinational State of Bolivia, described earlier, coordination between the various public institutions concerned with the right to food, and their decentralization at various territorial levels, are essential to the coordinated execution of policies, projects and programmes that impact the right to food. In this case, it is particularly important to note that the Nicaraguan law incorporates the PANTHER principles in their entirety, and underlines the importance of incorporating gender equity in legislation, policies, strategies, plans, programmes and projects that the Nicaraguan State formulates and implements in relation to food and nutrition (articles 2, 3, 7 and 8).

⁷⁸ Constitutional recognition of the right to food can also be implicit, and approximately 55 countries' constitutions recognize this right, according to studies by FAO. See Vidar, M. and Knuth, L., *Constitutional and Legal Protection of the Right to Food around the World*. FAO, forthcoming and FAO, 2009, Bojic Bultrini, D., *Guide on Legislating for the Right to Food*, Book 1. Rome.

⁷⁹ Law 693 of 2009, *Diario Oficial* no. 1333, Managua, 16 July 2009.

During the process of developing legislation on food, as well as during the adoption of other national legislation, the scope and content of laws are to be analysed from a human rights perspective, with particular consideration of the state's obligation to guarantee the right to food. When land legislation is proposed, for example, its impact on the right to food must be considered. In this process, it is essential to take into account the cultural dimension and discrimination against certain sectors of the society which may be entrenched in that particular's society's mentality.

In relation to gender and access to land, the law can be a major obstacle to women's exercising property rights and enjoying the benefits of this type of access. In many Latin American countries, few women have property rights or control over land in rural areas.⁸⁰In Brazil, only 11% of the land is held by women, in Mexico 22.4% and in Nicaragua 15.5%. In some cases, the obstacle is not seen in legislation regarding land ownership, but rather in legislation relating to family law and inheritance procedures, the provisions of which sometimes discriminate on the basis of gender. Thus, the participation of women and other sectors of society that suffer from latent discrimination through social practices and legislation is essential to prevent violations of the right to food. As seen in chapter 2, there can be serious failure to respect human rights, through discrimination that, although not based on the law, is legitimized through social norms and consolidated in practice. In the process of creating legislation on land and other natural resources, there must be analysis of such legislation not only to ensure there are no discriminatory provisions violating the right to food of excluded segments of society, but also to evaluate the given legislation in relation to sectoral laws that may contain provisions relevant to the right to food. This analysis should mainly ensure that there are neither contradictory provisions within the legislation itself nor secondary effects of the legislation that result in violations of the right to food.

3.4 Taking a closer look at the Voluntary Guidelines

The human rights-based approach and its practical aspects, as suggested throughout this document, are embodied in their entirety in the text of the Right to Food Guidelines, which represent a starting point for developing Voluntary Guidelines on responsible governance of tenure of land and other natural resources. In terms of the relationships between access to land and the right to food, the content of these new Guidelines will further develop elements already introduced and covered in the 2004 Right to Food Guidelines.⁸¹ The present study is an attempt to re-emphasize that the links between right to food and land governance are multisectoral and that formalizing them creates a link among a wide range of actors at various territorial levels of a country. The experience of certain countries, as described above, illustrates the multiplicity of actions that can be taken at different levels to implement a comprehensive policy with human rights as its principal objective.

⁸⁰ FAO, 2006, *Gender and Law. Women's rights in Agriculture*, legislative study No. 76, Rev. 1, p. 23-24.

⁸¹ FAO has developed specific tools to help adapt the content of the Right to Food Guidelines to the local context in different countries. For more detail on the aspects of implementing the right to food, see *Methodological Toolbox on the Right to Food at:* http://www.fao.org/righttofood/publi_02_en.htm

To say it in a few words, what are meant to be the Voluntary Guidelines on tenure of land and other natural resources? This current initiative addresses a variety of issues and deals with their complexities in a conceptual framework that is meant to be clear and widely accepted by the multiple actors participating in the negotiation process. They include specific definitions, objectives and implementation phases aiming at providing orientation for states and other actors involved in governance of land tenure and other natural resources at national level. The Voluntary Guidelines will, above all, serve as a practical document in that it will include a wide range of recommendations that the states would be able to adapt to their local context whilst developing public policy. It is also a toolkit for implementation in different policy areas and sectors.

To reach agreement on the content of the Voluntary Guidelines, the stakeholders – principally government, civil society and the private sector – will conduct a common analysis and share experiences to reach consensus on a theoretical as well as practical level. Developing and adopting the Guidelines is not a simple undertaking, given the diversity of actors, interests and positions involved. As a matter of fact, reaching consensus on overall guidelines for implementation **on a global level and to do so with a human rights-based approach** is an ambitious undertaking. Nonetheless, it is precisely the exchange of viewpoints among different actors and the compromises that will come about when adopting the Voluntary Guidelines that will make this process and final document a legitimate agreement for all parties.

Conclusion

The Voluntary Guidelines on Tenure of Land and Other Natural Resources seek to provide practical recommendations for designing a sustainable policy on natural resource governance. Their relationship to the right to food is fundamental, and thus access to land must be addressed not from a limited perspective that deals only with physical tenure security and legal property titling, but rather from a wider comprehensive approach. Although tenure and legal security are essential elements to secure access to land, an effective access includes other components, such as access to the means of production, technology, training, credit systems and coverage of public services, all of which must be ensured in order to facilitate social inclusion. Investment in infrastructure and education is also essential for rural development and poverty reduction.

Achieving this major objective depends on more than mere physical access to land. Ensuring the realization of human rights must also take account of global issues related to lack of access to social and economic opportunities. The multisectoral nature of the right to food requires strong interactions among different areas of governance. Policies on forest management, investment, fishing, trade, education, health and infrastructure all contribute, among others, to the realization of this fundamental right. Thus, only effective coordination of these sectors on the national, regional and local levels will ensure the successful implementation of a strategy that guarantees the right to food.

Within the context of the development of the Voluntary Guidelines on tenure of land and other natural resources and taking the experience from the Right to Food Guidelines as a reference point, it is essential to understand that the obligations and principles set forth in the latter document seek to go beyond a mere reference to the international standards. Their principal aim is to provide an environment conducive to developing public policies that are consistent, and that result in the respect and guarantee of the right to food as well as other human rights as a primary objective of the state and its institutions. The process of developing and adopting the Voluntary Guidelines on tenure of land and other natural resources can be enriched by previous experience. It is worth mentioning that in collaboration with governments and civil society, FAO has been developing a variety of tools for technical analysis and for promoting awareness, as well as educational materials to facilitate national implementation of the Right to Food Guidelines.

Once they are approved, the implementation of the Voluntary Guidelines on tenure of land and other natural resources will pose challenges and provide opportunities for the future. For implementation to be effective and adapted to local contexts, it is important to integrate and articulate the work that has already been achieved in other sectors so as to translate a comprehensive approach into an operational level. It is the national implementation that will give the Voluntary Guidelines its force and serve as a fundamental step towards validating a country's articulation of public policies related to land tenure and the right to food from a common perspective based on human rights and principles of good governance.

Bibliography

Brussels Development Briefings, 2009, *Land access and rural development: new challenges, new opportunities* No. 9 Brussels.

<http://brusselsbriefings.net/past-briefings/next-briefingfebruary-25-2009>

Courtis, C., 2009, *Apuntes sobre la aplicación del Convenio 169 de la OIT sobre Pueblos Indígenas por los tribunales de América Latina*. Revista SUR, no. 10. São Paulo.

Courtis, C., 2009, *Dimensiones conceptuales de la protección legal contra la discriminación*. International Commission of Jurists. Geneva.

http://www.imdhd.org/articulos_de_opinion.php?id_articulos=21

FAO, 1996, *Cadastral surveys and records of rights in land*. Land tenure studies 1. Rome.

FAO, 2003, *Land tenure and rural development*. Land tenure studies 3. Rome.

FAO, 2003, *Gender and Access to Land*. Land tenure studies 4. Rome.

FAO, 2004, *Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security*. Rome.

FAO, 2005, *Access to rural land administration after violent conflicts*. FAO Land tenure studies 8. Rome.

FAO, 2005, *Gender and land compendium of country studies*. Gender and natural resource management. Rome.

FAO, 2006, Herrera, A. and Guglielma da Passano, M., *Land tenure alternative conflict management*. Land tenure manuals 2. Rome.

FAO, 2006, Cotula, L. *Gender and law. Women's rights in agriculture*. Legislative study 76. Rome.

FAO, 2006, Quan, J. *Land access in the 21st century: Issues, trends, linkages and policy options*. LSP Working paper 24. Rome.

FAO/World Bank, 2006, Zakout, W., Wehrmann, B. and Torhonen, M., *Good Governance in land Administration. Principles and Good Practices*. Rome/Washington, D.C.

FAO, 2007, *Right to Food. Lessons learned in Brazil*. Rome.

FAO, 2007, *Good governance in land tenure and administration*. Land tenure studies 9. Rome.

FAO, 2008, Rae, I., *Women and the right to food*. Right to Food Studies. Rome.

Responsible governance of land tenure:
An essential factor for the realization of the right to food

FAO, 2008, Cotula, L., Djiré, M and Tenga, R.W., *The right to food and access to natural resources. Using human rights arguments and mechanisms to improve resource access for the rural poor*. Rome.

FAO, 2008, Eide, A., *The right to food and the impact of liquid biofuels (agrofuels)*. Right to Food Studies. Rome.

FAO/IIED/IFAD, 2009, Cotula, L., Vermulen, S., Leonard, R. and Keeley, J., *Land grab or development opportunity? Agricultural investment and international land deals in Africa*. London/Rome.

FAO, 2009, Knuth, L., *The right to adequate food and indigenous peoples. How can the right to food benefit Indigenous Peoples?* Right to Food Studies. Rome.

FAO, 2009, Bojic Bultrini, D., *Guide on legislating for the right to food*, Book 1, p. 203. Rome.

FAO, 2009, Monsalve Suarez, S. Marques Osorio, L. and Langford, M., *Voluntary Guidelines for Good Governance in Land and Natural Resource Tenure. Civil Society Perspective*. Land Tenure Working Paper 8. Rome.

FAO, 2009, Grover Richard, *Voluntary Guidelines for Good Governance in Land and Natural Resource Tenure, Issues from an international Institutional Perspective*. Land Tenure Working Paper 9. Rome.

FAO, 2009, *SOFI. The State of Food Insecurity in the World*. Rome.

FAO, 2009, *Towards Voluntary Guidelines on responsible governance of tenure of land and other natural resources. Discussion paper*. LTWP No. 10. Rome.

FAO, 2009, Golay, C., *The right to food and access to justice: Examples at the national, regional and international levels*. Right to Food Studies. Rome.

FAO, 2009, *From Land grab to Win-Win. Seizing the Opportunities of International Investments in Agriculture*. Economic and Social Perspectives. Policy Brief 4. Rome.
<http://fao.org/economic/es-policybriefs>

FAO, 2010, Anríquez, G., Daidone, S. and Mane, E., *Rising food prices and undernourishment, a cross-country inquiry*. ESA Working Paper No. 10-01. Rome.

FAO/WHO, 2002, *Joint FAO/WHO expert consultation on human vitamin and mineral requirements*. Expert consultation. Bangkok, Thailand. Rome.

FIAN, 2008, *Access to land and productive resources. Towards a human rights approach using the FAO Voluntary Guidelines on the right to food*. Heidelberg.

GRAIN, 2008, *SEIZED! The 2008 land grab for food and financial security*. Barcelona.
<http://grain.org/go/landgrab>

IIED, 2010, Cotula, L. *Investment contracts and sustainable development. How to make contracts for fairer and more sustainable natural resource investments*. Natural Resources Issues No. 20. London.

OHCHR, 2006, *Frequently asked questions on a human rights-based approach to development cooperation*. New York and Geneva.
<http://www.ohchr.org/Documents/Publications/FAQsp.pdf>

United Nations, 1999, *UNDAF Guidelines*. Available at:
<http://www.reliefweb.int/unpm/documents/509UNDAFGuidelinesEnglish.pdf>

United Nations, 2000, United Nations General Assembly, *Millennium Declaration*. A/RES/55/2. United Nations General Assembly, *Millennium Declaration*. A/RES/55/2.

United Nations, 2006, General Assembly, Resolution 60/147, *Principles and guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.

United Nations Commission on Human Rights, 2006, *The right to food. Report of the Special Rapporteur on the Right to Food, Jean Ziegler*. E/CN.4/2006/44.

United Nations, 2010, Report of the United Nations Special Rapporteur on the Right to Food, A Set of minimum principles and measures to address the human rights challenge posed by large scale land acquisitions and leases, presented to the Human Rights Commission. A/HRC/13/33/Add.2.

UNDP, 2006, *Indicators for human rights based approaches to development in UNDP programming. A User's Guide*. New York.

UNDP, 2009, Laska, K. and El-Mikawy, N., *Reflections on Land Tenure Security Indicators*. OGC Discussion Paper 11. New York.

Vivero Pol, J. and Scholz, V., 2009, *La justiciabilidad del derecho a la alimentación en "Derecho a la alimentación, políticas públicas e instituciones contra el hambre"*. LOM ediciones. Santiago, Chile.

World Bank, 2008, *World Bank Sustainable Land Management Sourcebook*, Washington, D.C.

World Conference on Human Rights, Vienna Declaration and Programme of Action, 1993. A/CONF.157/23.
[http://www.unhcr.ch/huridocda/huridoca.nsf/\(symbol\)/a.conf.157.23.en](http://www.unhcr.ch/huridocda/huridoca.nsf/(symbol)/a.conf.157.23.en)

Emblematic cases

ACHPR, 2001, *SERAC (Social and Economic Rights Action Center), Center for Economic and Social Rights v. Nigeria*.

Constitutional Court of Colombia, Judgement SU-039/97. Reporting Judge Antonio Barrera Carbonell.

Constitutional Court of Colombia, Judgement T-704/06. Reporting Judge Humberto Antonio Sierra Porto.

Constitutional Court of Colombia, Judgement T-208/99. Reporting Judge Vladimiro Naranjo.

Constitutional Court of Colombia, Judgement T-714/96. Reporting Judge Eduardo Cifuentes.

IACourtHR, Case of the *Yakye Axa Indigenous Community v. Paraguay*, Judgement of 6/17/2005.

IACourtHR, Case of the *Sawhoyamaxa Indigenous Community v. Paraguay*, Judgement of 3/29/2006.

IACourtHR_CP-06/10, Press release. See resolution of 8 March 2010 for more details on current status of case. <http://www.corteidh.or.cr/docs/asuntos/X%C3%A1mok.pdf>

Sectional Appeals Court of San Pedro Sula, *Brisas del Bejuco v. Honduras*, Judgement of 12 November 2007.