



UNIVERSITY OF OREGON

School of Law

26 January 2021

Ambassador Hans Hoogeveen
CFS Food Systems and Nutrition OEWG Chair

Excellency,

I am writing this letter to you in the midst of the negotiations of the Voluntary Guidelines and Food Systems and Nutrition (VGFSyN). I am a member of the Open Ended Working Group but due to the COVID-19 pandemic and my limited resources, I have not been able to directly attend the negotiations. Nevertheless, I have been following them closely and I am in regular contact with different Members States and stakeholders. Please accept this letter under these extraordinary circumstances. I invite you and the CFS Secretariat to circulate my letter to the Friends of the Chair and the Open Ended Working Group. I will share this letter with the Friends on the Right to Food.

On 11 January 2021, I provided you in an email my concerns over how human rights are referenced in the draft text. I am writing to you today to express my deep concern over how international law itself is now in question.

I therefore provide my legal opinion on Paragraph 39 of the draft text. You may appreciate my expertise in human rights. I am, however, also drawing from my experience as an international lawyer who has appeared before the Inter-American Court of Human Rights, been cited by the International Court of Justice, argued before national tribunals and courts bringing claims under international law, and taught at the world's leading law schools.

I understand that the United States of America has proposed the following footnote to the chapeau of Paragraph 39:

“Treaties in the list below are only relevant for the parties to each respective treaty; other documents listed are not legally binding and reference to them shall not be interpreted as a sign of support or acknowledgement by countries that abstained or voted against their adoption and have not since then expressed their support.”

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This changes the nature of the negotiations around the VGFSyN. What is now at stake is not just these particular voluntary guidelines but international law and the multilateral system itself. I note that Chair's proposal for Chapeau of Paragraph 39: "The VGFSyN are intended to be applied in accordance with the following instrument as far as each of these instruments are relevant and applicable to their respective parties and other entities." I appreciate that as a matter of diplomacy it is important to propose compromises. But as a legal matter, there should not be any compromise on properly referencing our international system of norms.

I will first address the general matter, and then touch upon the particular instruments in brackets.

Treaties, UN Declarations, and other instruments combine to create an international system of norms. Undoubtedly, there is a hierarchy of norms. In simple terms: international treaties, customary international law, and general principles of international law [Art. 38 (1) (c) of the International Court of Justice] are more binding than UN Declarations; UN Declarations are more binding than voluntary guidelines. Nevertheless, the system of norms has its own complexities. Treaties sometimes codify customary international law and therefore States may be bound to certain provisions of a treaty even if they are not a signatory. The majority of the world's governments may come together to clarify and advance a set of human rights in a Declaration which in turn spurs national legal adoption. Indeed, sometimes Declarations operate as customary international law, reflect general principles, or provide a framework for treaties.

Negotiations over voluntary policy guidelines are not the appropriate place to navigate those complexities. Instead, the VGFSyN like other CFS policy instruments must be appropriately embedded in the complete set of international norms in order to encourage uptake by States. In turn, when States take up the voluntary guidelines, they then implement them through their particular international legal obligations and domestic laws.

To propose language in a policy instrument that in effect delimits the international legal system suggests that parties may not be negotiating in good faith. And as everyone knows, negotiating in good faith in multilateral settings is a general principle of international law applicable to all. During these troubled times, as we



saw with the United States of America's recent rejoining of WHO, it is more important than ever that all Member States act as responsible members of the international legal community.

On more particular matters –

I see that the United Nations Declaration on the Rights of Peasants and other People Working in Rural Areas (UNDROP) is in brackets in Paragraph 39. I imagine this is the United States of America's main concern. UNDROP was passed by the UN Human Rights Council by a significant majority of Member States. Even though some Member States abstained and other voted against, UNDROP has been enacted through the proper process to become an established international norm. UNDROP carries more authority than CFS policy instruments. To not include UNDROP in this particular voluntary guideline is to undermine the Human Rights Council. The contents of UNDROP reflect and organize existing human rights and it articulates some particular rights in greater detail. If a Member State still stands opposed to certain portions of UNDROP, this can be raised in the particular domestic context when it comes time for the State to implement the VGFSyN.

I also see that the International Treaty on Plant Genetic Resources for Food and Agriculture is in brackets. This treaty with 148 Contracting Parties enjoys broad support and creates legal obligations. This treaty is also directly relevant to food systems and nutrition: The global consensus is that everyone must have a reliable source of plant-based food in order to enhance human and environmental health. It is therefore difficult to imagine a food system geared towards nutrition that does not address plant genetic resources.

Please accept, Excellency, the assurances of my highest consideration.

Dr. Michael Fakhri
UN Special Rapporteur on the Right to Food