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Rights for Sustainability?

A rights based analysis of the zero draft of the Rio +20 document

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Introduction

"The Future We Want", or the zero draft of the outcome document for the United Nations Conference on Development Sustainable Development (UNCSD) to be held in Rio de Janeiro in June 2012, was released on the 10th of January 2012. This negotiation text or 'zero' draft is an important step forward in the process leading to Rio +20, as the world community prepares to review the historical agreements reached in Rio two decades ago as a result of the United Nations Conference on Environment and Development (UNCED), otherwise known as the Earth Summit, in 1992.

Where do we come from?

At the time, UNCED was intended to pave the way forward for a global transition to sustainable development, and it certainly set in motion a long process of international engagement and debate on issues related to development and to sustainability. Concretely, in terms of outputs, UNCED resulted in a joint political declaration, the broad ratification of three major environmental conventions, a joint statement on principles for sustainable forest management, and the drafting of a comprehensive plan of action. These were, respectively, the Rio declaration, the Convention on Biological Diversity (CBD, 1993), The United Nations Framework Convention on Climate Change (UNFCCC, 1994), the United Nations Convention to Combat Desertification (UNCCD, 1996), principles on the management, conservation and sustainable development of forests, and Agenda 21.

On the one hand this package of measures is well known and has served as the basis for international negotiations and national debates on sustainable development for two decades. On the other hand very few measures contained in either the conventions or the plan of action were legally binding or linked to accountability mechanisms. The agreements have met with very limited implementation, and in the meantime the situation in terms of both poverty and environmental degradation has become alarming. The volume of world trade (and the resulting environmental footprint) has almost tripled in the two decades since the Earth Summit, but this growth has benefitted only a small minority: the wealthiest 20% of the world account for more than 75% of global consumption compared to the poorest 20% who account for just 1,5%. Despite the CBD, Biodiversity decline has accelerated with 10-30% of the world's fauna and 40% of its flora threatened with extinction, amounting to the greatest mass extinction of species on earth in the last 65 million years. Despite the UNFCCC, global greenhouse gas emissions are some 40% higher than in 1992. Despite the UNCCD, some 60-70% of the world's drylands, home to the majority of the world's poor, are experiencing degradation.¹

"The Future we want": Shifting the goalposts?

In the run up to the Rio + 20 conference a broad range of national and international actors will be sharing views on the successive drafts of the negotiating text, in the hope that representatives of national governments can adopt the declaration in June. At first glance, "The Future We Want" has many good elements. The text begins with an emphasis on renewed commitment to the principles of earlier agreements such as the Rio Declaration, Agenda 21 and the Johannesburg declaration.

In addition, there are some hopeful paragraphs as for example the establishment of an Ombudsperson, or High Commissioner for Future Generations, to promote sustainable development (see paragraph 57), the ambition to set global Sustainable Development Goals that reflect an integrated and balanced treatment of the three dimensions of

¹ See UNEP: Global Environmental Outlook IV. Nairobi: UNEP

sustainable development, are consistent with the principles of Agenda 21, and are universal and applicable to all countries but allowing for differentiated approaches among countries; (105a). Third, there is a request to the Secretary-General to establish a process to further develop and strengthen indicators complementing GDP that integrate economic, social and environmental dimensions in a balanced manner (paragraph 111) Fourth, the document speaks about the phase out of market distorting and environmentally harmful subsidies that impede the transition to sustainable development, including those on fossil fuels, agriculture and fisheries, with safeguards to protect vulnerable groups (paragraph 126) and a global policy framework requiring all listed and large private companies to consider sustainability issues and to integrate sustainability information within the reporting cycle (paragraph 24). Fifth, the document punctuates the importance of the participation of civil society in shaping and implementing policies related to sustainable development.

However, in the light of the important steps taken in the past , the zero draft of the Rio+20 declaration could have been expected to be fundamentally anchored to these commitments, especially to those that have a legal character. It could have been expected to be formulated as a rallying call, recalling existing international commitments, evaluating progress and detailing which areas require action in order to meet targets.

Unfortunately, however, the zero draft does not do this. It is, of course, a draft document for negotiation and therefore it is a document that has been written with the specific aim of being uncontroversial and palatable to all stakeholders. It would perhaps be naïve to look for strong language and hard commitments in an opening move, but even if read with limited expectations the document comes across, as one commentator put it, not as a "zero draft " but " below zero". The Bureau of the UNCSD has made little attempt to anchor the document on the baseline set by the three Rio conventions and Agenda 21. Late in the document, articles 91 and 92 mention the CBD and the UNCCD in passing but fail to recognise their roles as two of the key international conventions on which the entire Rio process is hinged.

Amazingly, the Framework Convention on Climate Change and the Kyoto Protocol do not even receive a mention. While Section II is devoted to 'renewing political commitment', and does indeed reaffirm commitment to the UNCED declaration and Agenda 21, it avoids all reference to three major international conventions to which the Rio process gave birth. Instead, it follows recent trends in international environmental discourse, expressed most notably at the Bonn Water, Energy and Food Security nexus conference in November 2011, which avoids accountability on the non-implementation of multilateral environmental agreements during the last two decades by simply changing the subject and focusing on issues such as the green economy, knowledge and technology transfer, institutional development and the role of the private sector. In order to move forward towards a more acceptable document, a number of *faux pas* of the zero draft need to be revisited, as set out in the arguments below.

Return to established policy principles

Firstly, while the document pays lip service to the 27 principles guiding action at Rio in 1992, the architecture of the document does not systematically follow or give expression to the basic philosophies embedded in these principles. The Rio principles set a number of clear responsibilities for duty bearers and clarify the rights of citizens based on commonly agreed key values that lie at the roots of Agenda 21 and the three framework conventions. These principles are all foundations of a rights based approach to a sustainable and equitable future. Examples are the need for access to information and participation of citizens in environmental issues including access to effective judicial and administrative proceedings including mechanisms for redress and remedy (principle 10), the need for states to enact effective environmental legislation (principle 11), or the need to avoid the risk of irreversible damage to the environment, i.e. the precautionary principle (principle 15). Any reflection of progress should of necessity return to these

principles and common values as a basis for evaluation. To do otherwise is to reinvent the wheel and, as mentioned above, shift the goalposts.

Secondly, in most cultures the relationship between humans and nature is captured in spiritual values or at least in philosophical notions. However the zero draft does not touch on the deep spiritual and cultural attachment of people to the earth but focuses primarily on economic concerns. Clearly, our relationship with nature cannot be reduced to one that is purely instrumentalist or economic in nature, and therefore nature cannot and should not be managed in a purely utilitarian fashion. Traditional knowledge from all over the world points to the urgent need to return to a more holistic vision of our relationship with nature. The importance of such social and cultural values is reiterated in important international milestones that have been reached since UNCED, such as the Earth Charter and the United Nations Declaration in the Rights of Indigenous Peoples.

Therefore

- The Rio principles form the foundations of a rights based approach to a sustainable and equitable future. The Rio + 20 document needs to be reviewed in these terms and the progress of all signatories in living up to these principles needs to be evaluated;
- The instrumentalist approach in the Rio +20 document needs to be replaced by a holistic approach that recognises the social and cultural value of nature alongside its economic value;
- In addition, section V., i.e. the framework for action and follow-up, needs to be clear and short: 1) condensed to the three dimensions of sustainable development called for in paragraph 105a, i.e. economic, social and ecological and 2) governance of sustainable development and 3) concrete steps for implementation and monitoring.

Recognise and integrate recent developments in international law

The zero draft does not take account of the significant changes in international law in the last two decades. Precisely in the period since 1992, international human rights law has emerged from its cold war deadlock between civil and political rights on the one hand and economic, social and cultural rights on the other. Successful struggles for civil and political rights have taken place across Eastern Europe, the countries of the former Soviet Union, Sub Saharan Africa and more recently North Africa and the Middle East. There has been a sharp rise in the number of governments committing themselves to rules based behaviour, and an equally sharp rise in the power and organisational capacity of the global citizenry to hold their governments to account. For instance 160 countries have signed and ratified the International Convention on Economic Social and Cultural rights (ICESCR²). This convention sets out internationally agreed standards to which duty bearers can be held in ensuring the pursuit of a life with dignity of all citizens, and it sets out governance procedures and instruments to help achieve this aim.

Also, currently, many multilateral and bilateral development agencies and NGO's are reviewing their 'development' policies in order to bring them into line with these human rights standards and redefine 'development' as the fundamental right of every individual on earth. Pursuing development in this sense is not a voluntary task that governments and donors can choose to offer to some communities and not to others, such as is the case with the Millennium Development Goals which seek to focus on only half of global poverty. Rather, a Rights Based Approach implies non-discrimination and the development of plans of action that will reach every individual within a clear time frame and within the constraints of budgetary and human resource capacity. Clearly, failure to protect natural resources, failure to limit climate change or failure to conserve biological diversity can undermine human rights by destroying the resources and ecosystem services upon which people depend³. Therefore there is a strong connection between the

² Under article 12, states are committed to the pursuit of the highest standards of physical and mental health for citizens through amongst other things environmental protection.

³ See IUCN (2009): Conservation with Justice. A Rights Based Approach. Gland, Switzerland: IUCN, pg. 6

pursuit of economic, social and cultural rights and the conservation of the natural environment. The clarification of these interlinkages is an important subject for present day international law and therefore it should be a key concern of the Rio process.

For instance, there has recently been rapid progress in the definition of minimum standards with respect to natural resources required to maintain life itself. The human rights to food and more recently to water and to sanitation have been recognised. In the case of the human right to food, in 1999, the UN Committee on Economic, Social and Cultural Rights, adopted General Comment No. 12 on the right to food. General Comments are not legally binding but are authoritative interpretations of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which is legally binding upon the States Parties to this treaty. In 2000, the mandate of the Special Rapporteur on the right to food was established by the Commission on Human Rights. And in 2003, an Intergovernmental Working Group was established under the auspices of FAO in order to prepare a set of guidelines on the implementation of the right to food. This process led to the adoption by the 187 Member States of the FAO, of the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security in 2004. The Guidelines build on international law and are a set of recommendations States have chosen on how to implement their obligations under Article 11 of the International Covenant on Economic, Social and Cultural Rights. In the case of the human rights to water and sanitation, international standards have been set through the authority of General Comment no. 15, the recognition of the rights to water and sanitation by the UN General Assembly in July 2010, and the linkage of these rights to the procedures of the Human Rights Commission in October 2010. The realisation of these rights has thus been linked to the instruments and procedures of the ICESCR. Furthermore, many national governments have promulgated laws that explicitly or tacitly recognise the need to reserve minimum flows of water in each catchment for the maintenance of ecosystems, and waive the need for water use permits in the case of subsistence agriculture. In some cases, the intrinsic rights of nature itself have been recognised and codified into national law.

Therefore

- The Rio draft needs to take cognisance of developments in international human rights law over the last two decades, and must use these as the building blocks for further action;
- In the interests of the future of humanity and life on earth, the voluntary nature of many of the commitments made in the present draft should be replaced by legally binding commitments.

Recognise the legitimacy of global landmark documents

While perhaps not carrying the same weight as international law, there are a number of key thematic international documents which have been so widely consulted that they serve as highly legitimate points of orientation in these thematic areas. All have been prepared in the interests of sustainable development but have not achieved formal recognition by governments or international financial institutions as anchoring points for policy and regulation. They are therefore stuck in a policy limbo from which they need to emerge if they are to play the role they were designed for.

These are at the very least:

- The Earth Charter Commission (2000): The Earth Charter
- Asmal et. al (2000): Dams and Development. A Framework for Decision Making. Report of the World Commission on Dams. London: Earthscan;
- International assessment of agricultural knowledge, science and technology for development (IAASTD) (2009): Agriculture at a Crossroads global report. Edited by Beverly D. McIntyre .[et al.]

Therefore

- The ministerial council should work to clarify the policy status of the Earth Charter, the recommendations of the World Commission on dams and the Recommendations of the IAASTD report

Create clear institutional mandates

Given the urgency of the social and environmental issues facing us, and in view of the very limited implementation of the 1992 commitments, it is evident that considerable consideration needs to be given to institutional issues. And indeed, section four of the document and articles 44 to 62 all deal with institutional issues. However the status of global environmental governance in a post - Rio + 20 world is far from clear. Rather than clarifying the distribution of roles within the complex UN system and locating central coordinating authority with one institution, ECOSOC, the CSD and UNEP are all apparently given equal responsibility to promote 'a balanced integration of the economic, social and environmental aspects of sustainable development'⁴. More seriously, the accountability and redress mechanisms for these institutions are not clear. Should a group of citizens feel that their right to a sustainable future has been infringed through global inaction or malpractice in a particular area of global environmental policy, what are the procedures through which these institutions can be held to account and through what mechanisms can ensure that their grievances are addressed? Given the severe dangers inherent in current production and consumption practices, and given the historical failure to live up to the Rio commitments, one would expect at the very least a fundamental rethink of the central institutions overseeing the transition to sustainable development and the elaboration of strong mechanisms for accountability and redress.

Also, the document contains various references to the role of the private sector, acknowledging its important role in sustainable development in article 19 and even calling for public private partnerships in article 96. This kind of suggestion has no place in a global document on governance: private sector entities, like civil society, are have the obligation to abide by international law. Where government sees fit, private entities can be subcontracted to carry out particular tasks but this neither absolves governments of their central responsibility nor does it elevate the private sector to the status of co-governor.

Therefore

- The coordination of global action on sustainable development needs to be clearly located within one central UN body and the division of labour within the UN family needs to be clarified;
- The mechanisms for accountability and redress of these institutions need to be clarified as a matter of urgency in order to ensure effective and responsive governance on sustainable development;
- It needs to be clear that National governments and the UN system bear responsibility for the transition to sustainable development. While the private sector has a role to play it is subject to the working of international and national law;
- End the Rio + 20 conference with a roadmap that consists of politically binding targets in order to meet global Sustainable Development Goals that reflect an integrated and balanced treatment of the three dimensions of sustainable development

⁴ See articles 48, 49 Alt and 50.