

Why wait for the state? Using the CFS Tenure Guidelines to recalibrate the political-legal terrain in struggles for human rights and democratic control of land, fisheries and forests

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In 2012, with the adoption of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (or TGs), the UN Committee on World Food Security (CFS) established a new international standard on natural resource governance. After adoption, the challenge is for these guidelines to be implemented and used. However, no law is self-interpreting or self-implementing, and so how states will interpret and implement these new guidelines cannot be taken for granted. This is especially true in the current global context of land grabbing driven, in many cases, by alliances of state and capital. Consequently, subaltern people, for whom rights in relation to the natural resources on which they depend remain out of reach, face the challenge and potential opportunity of making use of the TGs to recalibrate the political-legal terrain in favour of human rights and democratic control of land and other natural resources.

Keywords: human rights, right to land, accountability, governance

1. Introduction

Background

Access to and control over land and associated natural resources have long been key determinants shaping rural lives worldwide. Relationships to land, forests, water and aquatic resources influence whether rural working people are able to build decent and dignified livelihoods, avoid or escape hunger, participate in decision-making, avoid or escape political exclusion and marginalization, and sustain collective identities and social reproduction processes.¹ Loss of control of land and territory by those whose lives depend on them is historically linked to agrarian unrest, and land concentration processes often involve violent conflict and human rights violations.² Numerous structural and institutional factors contribute to land and natural resource conflicts, including: unequal power structures, heavily market-oriented economic development models, elitist decision-making processes, weak and corrupt land and natural resource administration institutions, persecution of subaltern social groups, discrimination in access to justice, and abuses of power by non-state actors.

In recent years multiple crises (e.g., around food, fuel/energy, climate, and finance) have led to a global rush for land accompanied by a fundamental revaluation of land and related natural resources. Land is important in itself, but control of land is often also a precondition for access to water, forests, fisheries, and subsoil resources. Land targeted for acquisition is likely to be under unregistered informal or customary tenure use and management systems based on multidimensional meanings of land, in addition to being the backbone of local food producing systems, and used in ways adapted to local ecological contexts.³ Land revaluation has entailed reducing the meaning of land to a single economic dimension: the value of land is fulfilled only when it is used to create economic wealth/surplus.

The global land rush has reignited debate over two broadly competing visions of development: development based around small-scale, labour-intensive uses like peasant farming for household consumption and linked to local markets, versus that relying on large-scale, capital-intensive uses such as industrial monocultures, raw material extraction and large-scale hydropower generation linked to metropolitan areas and foreign markets. New land acquisitions for such projects are often portrayed as confined to unpopulated, unused, unproductive and ‘wasted’ areas lacking ‘development’ and assumed to be ‘available’.⁴ Projects and associated acquisitions may be portrayed as bringing benefits to local people, mainly employment and new social and economic infrastructure. Yet investigations by academics, activists and media cast doubt on these claims. In many such acquisitions, evidence shows a deepening of existing patterns of discrimination and structural violence against rural women and an undermining of efforts to build the resilience and food sovereignty of vulnerable rural households and communities.⁵ Areas targeted for acquisition are often populated and productive, while the new economic arrangements involve either expulsion or adverse incorporation of people.⁶ People have been expelled when the land is needed but their labour is not; when the land and labour are both needed, they are incorporated into the emerging enterprises as labourers or contract growers, frequently under unfavourable and onerous terms. Either way, a wide range of human rights are violated and/or undermined.⁷

The aspiration for greater state accountability to rural citizens runs deep despite these strong pressures narrowing the space for excluded rural working people to (re)gain effective control of their natural resources. Accountability is about holding those in power responsible for their decisions; accountability politics is about whether and how this can be done.⁸ Accountability encompasses rights, rules and procedures that enable citizens to demand answers and sanction misconduct, as well as citizen action to challenge power, claim citizenship and improve and expand democratic processes.⁹ Yet neither of these two dimensions of accountability arises out of thin air. Rights, rules and procedures must be formulated, adopted interpreted and implemented, while citizen action must be envisioned, planned, organized and undertaken – oftentimes in hostile political-legal settings marked by major power imbalances and cultures of impunity. Across Africa, public accountability in favour of the recognition, respect, protection and fulfilment of the right to land and natural resources of vulnerable, marginalized and threatened social groups – such as peasants, small-scale and artisanal fishers, herders and pastoralists, and indigenous peoples, women and youth – is scarce. Many legal and extra-legal obstacles exist or emerge along the way to undermine movement forward on either dimension. Large-scale land acquisitions (LSLAs) are being initiated in such settings, making it especially difficult to hold those in power responsible for their decisions.

In examining struggles of movements to claim indigenous rights, Sawyer and Gomez have found that ‘...seeking and acquiring indigenous rights is not, in and of itself, emancipatory. Rather, it recalibrates the arena of struggle.’¹⁰ The same can be said about the pursuit of a right to land and/or other natural resources. With this in mind, we can ask: How can the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (hereafter TGs) be used by subaltern groups to recalibrate the political-legal terrain in the direction of greater respect for human rights and more democratic land control?¹¹ The answer is not obvious; the TGs are a soft law instrument and therefore not legally binding. At the same time, even where hard law favourable to the human rights of subaltern groups does exist, state authorities often appear unwilling or unable to respond democratically to citizen demands. The adoption of

the TGs presents an opportunity to review why and how they were formulated, and to ‘test’ whether and how they might make a difference in struggles for human rights and democratic land control.

Overview of the discussion

This paper explores why and how the TGs are being used by subaltern groups to recalibrate the political-legal terrain in favour of greater respect for human rights and more democratic land control in a ‘global land grab hotspot’: namely, sub-Saharan Africa. The discussion follows key issues related to popular resistance, as outlined by Hall et al. in 2015 in terms of resistance to land grabbing,¹² whether resistance involves overt/organized contention as in Martiniello (Uganda),¹³ Kandel (Uganda),¹⁴ Milgroom (Mozambique),¹⁵ and Larder (Mali)¹⁶; or whether about covert and everyday forms of resistance in Ethiopia (see Moreda¹⁷). The initiatives of local social actors in Mali, Nigeria, South Africa and Uganda mark a turn away from the TG formulation and adoption process at the global level, to real people and movements interpreting and using them in society. The focus is on using the TGs ‘from below’, as part of a larger arsenal of ‘weapons of the weak,’ in efforts to push for change in the direction of more democratic natural resource control. We first trace historically the key civil society actors and processes of formulating and adopting ‘pro-people’ regulation. Then we locate the initiative vis-à-vis the global land grab and competing political responses to it. Finally, we outline particular accountability challenges and how they are being addressed by relevant social actors using the TGs in Mali, Nigeria, Uganda, and South Africa. This paper is a very initial field report of these initiatives from the ground, contextualized within grassroots mobilizations in international political spaces (i.e., CFS). We see the value of such an early field report to help generate feedback that can further strengthen grassroots mobilization. It goes without saying that this is taken from a perspective of scholar-activism.¹⁸

2. Recalibrating the political-legal terrain, Part 1: Formulation and adoption of the TGs

On 11 May 2012 the CFS endorsed the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the context of national food security, or Tenure Guidelines (TGs). The process by which the TGs were developed lasted for more than three years and was novel for its degree of inclusion of and participation by social movements and civil society organizations (CSOs). Following the inclusive and participatory spirit of the earlier International Conference on Agrarian Reform and Rural Development (ICARRD) in 2006, the FAO established conditions for social movement representatives to actively participate from the start and throughout the process. This participation was facilitated by the International Planning Committee for Food Sovereignty (IPC), an international network that brings together organizations representing farmers, fisherfolk and small and medium scale farmers, agricultural workers, and indigenous peoples, as well as NGOs, providing a common space for mobilization that links local struggles and global debates.

On the global level the IPC is the only platform aggregating large organized bodies that represent hundreds of millions of food producers, and aiming to play an active role in the debate on global governance and to demand accountability (and effectiveness) in support of national governments’ realization of the rights of small food producers and consumers.¹⁹ The IPC, historically, has been the connective tissue between these organizations and the different transnational movements to which they belong. Politically, the IPC played a key role in pushing

for and negotiating the TGs. For this reason, it is useful to briefly review the IPC, how it emerged and evolved, and how its story is tied up with the story of the formulation and adoption of the TGs.

The IPC was born after the World Food Summit in 1996, in the context of advocacy by La Via Campesina and the Foodfirst Information and Action Network on the crucial importance of land and agrarian reform for food sovereignty and the right to food. The IPC's founding mission was to open a new path to broaden the opportunities for people, organizations and movements to participate within the UN agencies responsible for food and agriculture. The IPC aimed to establish an effective democracy and bring new social actors, their content, working methods, and militancy to the locus of international decision-making. Since then, the IPC has facilitated the involvement of its members in processes including: the FAO International Treaty on Plant Genetic Resources for Food and Agriculture (which includes the first international recognition of Farmer's Rights to their seeds); the FAO Guidelines on the Right to Food; the FAO Guidelines on Small-Scale Fisheries (which recognizes the rights of small-scale fishers); and the Wilderswil Declaration on Livestock Diversity and the rights of livestock keepers which was presented to the FAO's International Technical Conference on Animal Genetic Resources held in Interlaken in 2007.

For the IPC, participation in these official processes necessarily means engaging not only on substantive issues, but also on procedural matters related to setting the rules of the game in order to democratize international policy making. For example, the principle of autonomy of peoples' organizations, including the capacity to self-organize their own spaces of representation when interacting with governments and international organizations, has been a paramount principle in IPC's work. Indeed, the reformed CFS, as well as the FAO in its Strategy for Partnerships with Civil Society Organizations, have both recognized the autonomy principle when interacting with civil society organizations, thus marking an important milestone.²⁰

With a loose organizational structure, the IPC operates mainly through thematic working groups.²¹ The four organizations discussed below are all members of IPC's working group on land and territory, and participated directly in the processes of developing and negotiating the TGs. The Coordination Nationale des Organisations Paysannes (CNOP), for instance, hosted the regional consultation for Africa in Mali where African CSOs submitted their views on the governance of tenure into the larger process. For its part, the IPC played a major role in the overall development of the TGs, and especially in facilitating the articulation of common demands across different rural constituencies for equitable and sustainable access to and control over natural resources for food production.²²

The ICARRD was an important milestone in the process of bringing together different rural constituencies towards a common agenda anchored in the understanding of land and territory as matters of human rights.²³ The IPC facilitated the active participation of agrarian movements in influencing the outcomes of this conference. In ICARRD's final declaration governments committed to applying a participatory approach based on economic, social and cultural rights for the equitable management of land, water, forests and other natural resources, focusing on sustainable development and overcoming inequalities in order to eradicate hunger and poverty. The declaration undoubtedly represents a forerunner to the TGs. After ICARRD, the process of building a common vision within the IPC about the use and management of natural resources, in which the right to territory and self-determination is guaranteed for all

peoples, continued at the International Forum on Food Sovereignty (Nyeleni) in Mali in 2007. In April 2010, during the World People's Conference on Climate Change and the Rights of Mother Earth in Bolivia, the foundations of alternative models of interaction between human beings and nature were delineated, aimed at forging a new system that re-establishes harmony between nature and human beings.

An International Facilitation Group was established by the IPC in 2009 to make possible the autonomous organization of civil society in building a common agenda among agrarian movements around the use and management of natural resources. This group anchored to effort inside the IPC to hold self-organized consultations and to get these officially recognized, which allowed social movements and CSOs to collectively develop a common proposal that could be presented as bona fide input into the official process to formulate the new guidelines that would eventually become the TGs. This proposal was captured in the document called "The CSO guidelines,"²⁴ which distilled their vision of how land and natural resources should be governed to achieve food sovereignty. This document continues to provide valuable insights and guidance on how practitioners can interpret the officially agreed TGs.

The intergovernmental negotiations at the CFS in Rome from 2011 to 2012 became a site of highly-charged debate about international responses to land grabbing, making them a focal point of debate and struggle. During the negotiations, the social movement-led CSO delegation mobilized teams to propose text, lobby governments, and argue positions. A number of CSO proposals won the support of governments and found their way into the TGs. However, numerous other CSO proposals remained isolated and in disagreement with the consensus reached by member states to the CFS. The final document contains a contradictory mix of philosophical and political positions, ranging from a conservative 'market-based mechanisms' perspective to a radical 'human rights and social justice' perspective. In a joint statement on the occasion of the adoption of the TGs on 11 May 2012, the CSO participants welcomed the TGs but acknowledged that they fall short in some areas that are critical to the livelihoods of small-scale producers, who are the source of most of the food consumed in the world. Still, the unique process behind them, plus the fact that they are the first international instrument to apply a human rights approach to the governance of land, fisheries and forests, imbues them with special political significance.

3. The competing faces of natural resource governance today

The TGs were born into a historical moment where there is increasingly open disagreement over what governance in relation to land and land grabbing should entail.²⁵ Seen as both part of the problem and part of the solution, governance is central to on-going debates in relation to the cycle of land grabbing unfolding globally in recent years. Perspectives vary on what kind of governance is needed, what the purpose of governance ought to be, who should be involved and in what ways, and what the appropriate governance instruments are to apply in cases of large-scale (trans) national land acquisitions.²⁶

In theory, national and international governance principles and instruments should provide a framework and guidance on what is legitimate behaviour regarding land deals, as well as on more generic land and resource concentration issues. But what is governance in practice? The term is now widely used, but in a variety of ways. It can be broadly defined as 'all processes

of governing, whether undertaken by a government, market or network; whether over a family, tribe, corporation or territory; and whether by laws, norms, power or language. Governance is a broader term than government because it focuses not only on the state and its institutions but also on the creation of rule and order in social practices'.²⁷ Common to many definitions of governance is the attempt to capture the changing conditions of governing today and the fact that decision-making and rule-making are no longer the sole prerogative of governments. How governance instruments matter in practice remains an open question. Trying to understand the new ways land is governed is at the core of many discussions today, and involves identifying actors, interests, mechanisms, instruments and ideologies driving particular governance initiatives.²⁸

In the context of a 'global land grab', the existence of competing political tendencies in land and natural resource regulation has taken on practical significance. Various state and social actors view land grabbing differently, with some looking at it as opportunity, and other seeing it as a threat. Borras, Franco and Wang identify three competing political tendencies among state and non-state actors with regards to global governance of land grabbing: first is *regulate in order facilitate land deals*, second is *regulate in order to mitigate adverse impacts and maximize opportunities of land deals*, and third is *regulate to stop and rollback land deals*.²⁹ These three political tendencies have been discussed in more depth elsewhere; here, we offer just a brief summary.³⁰

In the first tendency, governance is seen mainly from an administrative and technical perspective: for example, prescriptions for faster, cheaper and clearer land titling. Hence the call for strengthened property rights, implicitly if not explicitly investors' property rights, environmental and labour standards, and greater community consultation, with a particular preference for transparency mechanisms in land deals.³¹ The goal is to facilitate capital accumulation in an efficient institutional context.

In the second tendency, governance is seen mainly as an urgent tactical intervention aimed at mitigating negative impacts and maximizing positive opportunities of large-scale land deals. Land deals are taken as a potentially welcome development in the midst of state neglect of the rural sectors. But the potential for harm requires taking extra measures. The main challenge is to link small farmers to the corporate sector, while ensuring that harms do not occur. Hence the call for: strengthened property rights to protect the land rights of people, environmental and labour standards, community consultation and free, prior, informed consent (FPIC).³²

In the third tendency, governance is viewed mainly from a strategic political perspective, where the main purpose is to 'resist and rollback' land grabbing in order to promote an alternative vision such as food sovereignty. Not all governance instruments or mechanisms are equal: they vary in their degree of social connection to vulnerable/ marginal/ subaltern groups and in their political provenance in international human rights principles. Many are seen as defective from the start: their provenance and design is so deeply tied to tendency 1 or 2, as to rule out use for any other purpose (e.g., the RSPO or the World Bank's PRAI). A few instruments may be regarded as legitimate and worth using, although which ones are in this category is subject to debate within tendency 3.

One instrument that is subject to some debate is the TGs. The TGs are an example of soft law: a law that sets standards and guidance on a particular subject but is not mandatory. Some

activists thus doubt the efficacy of trying to use these -- or any non-binding guidelines -- to 'resist and rollback' land grabs and to claim rights. Yet others point to the fact that soft law can become a precursor to binding law at the national or international level. With regard to the TGs, given that they are anchored in human rights, the legal principle of *pro hominem* means that their adoption by the CFS opened up the possibility of interpreting and using them as a springboard to support claims for a human right to land.

At the same time, clearly, no law can shield everyone from resource grabbing. Around the world and across history, resource grabbing has taken place even where people have legal rights to the natural resources they occupy, use and manage. Merely having legal rights does not guarantee that one's land, fishery or forest resources won't be grabbed. Experience also shows how easily efforts to claim legal rights to natural resources can be undermined. Many challenges arise, such as breaking through inertia and 'walls of silence' that have arisen around injustices in politically inhospitable settings (how to initiate breakthroughs). Still another issue is the challenge of reaching out to others and building multiclass, multi-ethnic, multi-sectoral alliances across scales (how to extend and scale up power and voice). Then there is the challenge of authorities and officials at different levels of the political system, including the international, who 'pass the buck' (how to plug the gaps/holes in state authority/ state law that allow room for anti-reform evasion and manipulation), a problem which Fox has referred to as 'squeezing the balloon'.³³ Finally there is the twin challenge of criminalization and impunity – those who attempt to stand up for their rights are often portrayed as criminals and subjected to legal charges, while the criminal and illegitimate actions of powerful parties go unpunished (how to defend against authoritarian backlash and to dismantle structures that facilitate impunity).

In the end, it is real people embedded in existing power relations, who must interpret and apply regulatory ideas in practice to see whether they have any traction on the ground.³⁴ Here too there are many obstacles to overcome. As Fox explains, some common obstacles have to do with: (i) factors internal to processes of articulating and defending interests (e.g., difficulty of mass assembly; dispersion of communities; diversity of economic activities; ecological context; daily precariousness of family survival); (ii) factors constraining collective action beyond community level and making it difficult to act at multiple levels (e.g., regional elite control of electoral machinery, judicial system, economic terms of trade, allocation of credit, means of coercion); and (iii) factors external to rural movements (e.g., absence of mass media; limited access to information; divide-and-conquer & carrot-and-stick strategies, lack of accountability mechanisms for international actors).³⁵

For subaltern and politically excluded social groups, one starting point for changing the balance of power is building their own knowledge and awareness. The problem is not that people do not know when they are being exploited or oppressed, or when their interests and aspirations are being ignored or dismissed. Rather, the people who are in most need of relevant information and analysis that can help them try to change an unjust situation through collective political action, and/or the tools to get these, are often those with the least access to such information.

This is part of the existing power imbalance, and often also characterizes the situation of people in impoverished, vulnerable and marginalized conditions. Having access to relevant information alone -- even relevant alternative information about their situation and about what their rights are in that situation -- will not solve the problem. But without it, a response from authorities is unlikely to lead to greater accountability. For people who aspire to change their

situation in the direction of greater public accountability, but whose only power resources may be knowledge and awareness, organization and voice, the nature of efforts to exact accountability depends in part on the kind of information available to them. Here the TGs are especially significant. They are an internationally agreed normative standard -- the highest currently existing on land and natural resources. They are the first international soft law instrument that focuses on economic, social and cultural rights and how they can be applied to the governance of land, fisheries and forests. They are especially useful not only because they constitute information about an especially relevant standard, but because, at the same time, they contain the seeds of how this standard can be deployed as a tool for investigation, reflection and action. We now turn to look more closely at how people are using the TGs in four countries in sub-Saharan Africa.

4. Recalibrating the political-legal terrain, Part 2: Interpreting and using the TGs in struggle

Mali : Coordination Nationale des Organisations Paysannes (CNOP)

CNOP is a peasant organization working for the protection peasant land rights in Mali. The organization has investigated and documented cases of land grabbing, particularly in the Office du Niger region in Mali. Documentation produced formed the basis for two cases filed by affected communities in Mali in order to claim redress. In 2010 CNOP organized the first national meeting of communities affected by land grabbing, followed in 2011 by an international conference jointly convened with La Via Campesina and other organizations, aimed at defining common strategies to defend the rights of peasants and building an international alliance in defence of peasants' lands. Since 2012, CNOP has conducted its work in the context of the Convergence Malienne contre l'Accaparement des Terres (CMAT), a network consisting of five Malian peasant and other civil society organizations (Association des Organisations Professionnelles Paysannes (AOPP), Union des associations et coordinations pour le développement et la défense des droits des démunis (UACDDDD), Ligue pour la justice, le développement et les droits de l'homme (LJDH) CAD-MALI and CNOP. Finally, at the time of writing, CNOP was the regional coordinator of La Via Campesina for West and Central Africa.

In Mali the promotion of private investment in agriculture has led to a wave of land grabbing, with government policies promoting private investment in agriculture justified by claims that the state alone cannot provide the large investments required to 'modernize' the agricultural sector. On this basis, the government has adopted several measures to facilitate and promote large-scale land acquisitions, with a particular emphasis on foreign investors. The country's 1991 Investment Code and on-going amendments (including generous tax conditions for large investors), is currently being promoted as one of the most attractive investment codes in West Africa. Moreover, new structures such as the Presidential Investment Council (better known in its French acronym as CPI) chaired by the Head of State, as well as the Agency for Investment Promotion (API) which is under the Ministry of Industry, Investment and Commerce are both tasked to facilitate investment, including through the acquisition of land.

This enabling environment facilitating access to land for large-scale investors has made Mali one of the targets of LSLA in Africa. Cases of land grabbing in Mali have attracted media attention internationally, including the case of Malibya, a land deal initiated by the Libyan state.

Malibya is in effect, an agro-industrial project of 100, 000 hectares in the Office du Niger for rice production which affects the lands of the village of Dalla and 6 other villages. CMAT worked in close collaboration with the affected communities in Dalla to resist this massive land grab using the TGs. Thus far the campaign has succeeded in securing formal recognition and tracing of community lands based on the community customary tenure system. As of 2016, CNOP, together with other members of CMAT, are embarking on efforts to adapt their bottom-up experience in Dalla to Fonsira where a Chinese quarry company (COVEC) is exploiting community lands.

Uganda: Katosi Women Development Trust (KWDT)

Katosi Women Development Trust (KWDT) is a non-governmental organization that aims to improve the general living standards of poor, rural peasant communities of Ntenjeru, Mpata, Mpunge and Nakisunga sub-counties in Mukono District in the Lake Victoria area of Uganda. KWDT, a network of women's groups where resources, knowledge and skills are equitably shared to improve members' lives, was inspired by the earlier success of the Katosi Women Fishing & Development Association. As of 2016 KWDT networked sixteen women's groups. Over fifteen years the organization has reached out to and assisted disadvantaged lakeshore communities, with its involvement grounded in women's participation and action. KWDT has supported fishing communities facing dispossession of their traditional fisheries and livelihoods in the Lake Victoria region, among others. The organization is affiliated with the World Forum of Fish Harvesters and Fish Workers (WFF) and has hosted the WFF secretariat for several years.

KWDT participated in the negotiation and consultation process of developing the TGs, as well as the FAO Small-scale Fisheries Guidelines. In 2016 the organization embarked on efforts to disseminate and utilize both sets of guidelines to increase awareness of human rights and the rights of local community members to the land, water, and aquatic resources associated with Lake Victoria, as well as to plan and organize a collective campaign to document violations of these rights. In Uganda today, LSLA is leading to increasing restrictions of small-scale fishing to certain parts of Lake Victoria, squeezing community members to occupy limited space on landing sites. Reported mistreatment linked to resource grabbing in and around the lake is a major threat to the livelihoods of people in these fishing communities, while efforts to seek the attention of leaders to address these problems have so far been futile. Some of the women members of KWDT have been affected by issues of limited access to land and water resources in their communities. Women's access rights often depend on their husbands, which places them in an even more vulnerable position. Complaints of failing marriages and consequently denied access to land are increasingly common and this greatly affects women's development and frustrates their efforts to build decent and dignified livelihoods.

KWDT's efforts in Mukono district aim to understand the knowledge, visions and practices of local peoples in regards to their natural resource governance and development, to identify the impacts of LSLA on men and women, and to identify existing law and policy gaps and clarify the place of the TGs in dealing with challenges of access to land and water in fishing communities. For many of the people in these affected communities, this is their first experience of coming together to address their situation through organized collective political action. Participatory research methods are thus being used to encourage active participation by people affected, with particular attention to women. Working with and through women provides an

entry point to the communities, and allows women to develop experience in community mobilisation, which they consider necessary to effectively demand accountability.

South Africa: Masifundise Development Trust

Masifundise has been working in the fishing communities of South Africa for 15 years and is serving as the International Secretariat of the World Forum of Fisher Peoples (WFFP) in 2016. At the time of writing they work in close to 100 fishing communities in all four coastal provinces of South Africa. Masifundise has supported and worked closely with fishing communities so that they can advocate for their constitutional rights, and in particular their Human Rights in terms of Article 1 of the African Charter on Human and Peoples' Rights. In 2004, the Trust assisted fishers in the Western Cape to establish Coastal Links, an organisation that represents more than 4000 members nationwide. Masifundise serves as the secretariat of Coastal Links, which informs and shapes their national programme. Through its work with the WFFP, Masifundise was involved in the negotiations in Rome around the formulation and adoption of the TGs. After the guidelines were adopted in 2012, the FAO co-hosted a workshop on TG implementation in South Africa with the Department of Rural Development and Land Affairs in December 2014.

In South Africa, fishers have typically been left out of key decision-making processes which designate sections of the coast as Marine Protected Areas (MPAs). In South Africa such MPAs are generally 'no-take' zones, which exclude all fishers, regardless of scale, from harvesting marine resources along the rocky shores and fishing off the coast. In addition to the effects of MPAs, fishers' tenure rights have been compromised due to growing tourism, industrialisation and weapons testing. On top of the erosion of traditional tenure rights in favour of commercial and/ conservation interests, small-scale fishers have suffered the burden of exclusion and oppression from a history of colonial and apartheid laws that marginalised and disenfranchised those categorized as 'black', 'coloured' or 'Indian' under apartheid law.

To explore how the TGs might be used to support struggles 'from below' for democratic control of fisheries, the organization is employing action research in the community of Arniston on the Western Capes' South Coast region to examine the ways in which the community's access to tenure rights is impacted by various governance arrangements. The project uses the TGs as a tool to assess the impact of various governance frameworks on small-scale fishing communities and to empower communities to protect their tenure rights in the context of promoting their food security. The communities live adjacent to a MPA so this case illustrates how MPAs impact small-scale fishers' tenure rights and how communities resist and negotiate the challenges of exclusion. Through the research, the community is also examining other governance frameworks such as the national Small-Scale Fishing (SSF) policy and how it complements rights enshrined in the TGs.

Nigeria: Environmental Rights Action (ERA)/Friends of the Earth Nigeria

ERA was founded in January 1993 as a Nigerian non-governmental advocacy organization, concerned with the protection, preservation and conservation of the natural environment, and the sustainable use of its natural resources. ERA is the Nigerian chapter of the Friends of the Earth International (FoEI), a global environmental justice federation campaigning to protect the environment and to create sustainable societies. ERA is dedicated to the democratization of development, defence of human ecosystems in terms of human rights, and

promotion of environmentally responsible governmental, commercial, community and individual practice in Nigeria through the empowerment of local people. ERA derives its mandate from Article 24 of the African Charter of Human and Peoples' Rights: That "(a) generally satisfactory environment favourable to their development".³⁶ ERA/FoEI is the co-coordinating NGO in Africa for Oilwatch International and the 2016 host of the secretariat of the Oilwatch International.

During the past decades, Nigeria has become very vulnerable to large land grabs because of the national government's prioritization of international investment in the country's agricultural sector based on an argument that investments will increase national food production and make Nigeria a food exporting country. This has led to an influx of multinational companies like Wilmar invading community territories in the name of development. Yearly, large areas of forested landmass as well as communal farmlands are grabbed for industrial monoculture tree plantations in a bid to meet the growing market for natural products used as raw materials by multi-nationals. Many smallholder farmers and community members have been negatively impacted at various levels, giving rise to conflicts and underdevelopment in many communities in Nigeria. Due to Nigeria's 'loose' land tenure system, government facilitation of land deals often results in land grabbing.

Since the acquisition of about 30,000 hectares of land in Nigeria's Cross River State by Wilmar Company in the year 2000 -- an area not only rich in agricultural history and legacy but also home to vast tracts of natural forest and a host of endangered species including the Cross River gorilla -- ERA/FoEI has worked with local communities in the State to campaign against and document the impacts of pollution, environmental degradation, forced evictions, deforestation and land grabbing. Their work has built capacity and enabled local people to defend their environmental human rights in law using the TGs. In 2016 the organization is undertaking action research in four communities within the State of Cross River (Betem, Akpet, Idoma, and Akamkpa) to determine the system of land tenure that is in place in Nigeria, the drivers and differentiated impacts of land grabbing within the communities, as well as the strategies of engagement and resistance, and bottom-up accountability initiatives.

5. Concluding discussion

The initiatives outlined above can be understood as embodying "making-human-rights-law activism" within the tendency 3 ('resist and rollback') response to land grabbing. In engaging in this type of activism, social movement actors and other civil society organizations are trying to recalibrate the political-legal terrain for their resource and human rights claim-making, not simply fighting for legal recognition within the status quo. Building on a human rights-framed interpretation of the origin and content of the TGs, the organizations profiled are taking up this special instance of soft law and trying to using it as a vehicle for change in this sense.

The last three decades of neoliberal globalization have brought about deep changes in the national and international legal frameworks related to agrarian issues. First, the decision-making arenas have moved, to an important extent, from national parliaments and governments to International Financial Institutions (IFIs) with de facto powers to impose policies upon national governments as conditions for development loans and similar. Second, the World Trade

Organization (WTO) and free trade agreements have established a framework for trade and investment policies with a mandate to review national policies in order to ensure coherence with WTO rules and disciplines. Moreover, international investment protection regimes have strengthened the legal value of individual contracts by creating international enforcement mechanisms for breaches of contract, and have given investors the possibility to sue host governments using arbitration mechanisms operating to a large extent under secrecy norms, thereby undermining the regulatory capability of states. Third, mandatory regulations related to labour, social and environmental standards for private actors and companies, traditionally enforced by the state, are increasingly being replaced by self-regulatory and voluntary schemes, e.g. corporate social responsibility, with different forms of multi-stakeholder compliance monitoring replacing state mechanisms.

These interrelated processes have created corporate-friendly regulatory frameworks and dismantled state support and protection for peasants, small-scale fishers, rural workers and other rural constituencies and have effectively paved the way to dispossess them from their livelihoods in favour of commercial interests.³⁷ People on the ground increasingly face the challenge of defending themselves from powerful foreign actors like transnational companies, foreign states and international institutions. To respond to new international governance structures and legal frameworks working against them, agrarian movements are resorting to human rights as an alternative international legal framework to the international trade and investment framework. Besides mobilizing the public, as in the case of rallies against the WTO or protest actions such as the destruction of GMO fields, radical rural social movements are also using international human rights law as part of their strategy to counter corporate-friendly regulatory frameworks.³⁸ The UN Human Rights System has been instrumental in developing an alternative understanding of international regulatory frameworks and international governance structures on food and agriculture issues. Moreover, rural social movements perceive that they can appropriate the human rights discourse to articulate their own aspirations and conceptions of rights in the process of building new international normative standards.

The IPC and its members are trying to recalibrate the international legal framework by using and further developing the human rights framework vis-à-vis the international trade and investment framework. In this sense, the TGs, despite their limitations, are regarded as one achievement which should be interpreted in conjunction with other existing standards and instruments of the human rights system and, at the same time, should be actively promoted and used to consolidate some of these standards and instruments and expand alternative legal frameworks.³⁹ This is the case for instance of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) which is a non-binding declaration lacking mechanisms of implementation. The TGs have operationalized some provisions of UNDRIP including FPIC. For this reason, FAO is the first UN agency which has issued a technical guide of FPIC. Mainstreaming the use of TGs in the work of the monitoring bodies of the international human rights treaties is yet another form of opening up avenues to demand accountability. The TGs can be used in this context as a benchmark to establish whether state parties to the treaties are complying with their obligations in the context of governance of tenure.

Recalibrating the political-legal terrain also implies changing the way international organizations relate to grassroots organizations. Social movements affiliated with the IPC have been demanding that the FAO change the way it operates at the national level so that those

identified as the main beneficiaries of the TGs can be truly part of their implementation. Agrarian justice organizations have also claimed that their expertise on issues related to governance of land should be recognized by the FAO so that they can participate in the development of capacity building materials as well as of technical guides to support the TGs' implementation. In all these efforts, the IPC sees itself as striving to make the FAO more accountable to rural people.

Yet this strategy also entails numerous dilemmas. For example, the IPC demands a comprehensive participatory approach to the implementation of international policy-making, but the network itself has limited capacity to follow all the TG-related initiatives and programs launched by international agencies and donor countries. Many national organizations find it too burdensome to engage with the FAO because heavy bureaucratic requirements, limited funding, and insufficient independence from their national governments. Still, network members recognize that the TGs have opened up the opportunity for national grassroots organizations to directly engage with FAO and other international agencies on terms which are favourable for marginalized groups. The challenge therefore is to take the next step of trying to use the TGs, in order to discover under what conditions their potential to provide the rural poor with broader spaces and resources to organize and mobilize for their claims can become a reality.

This discussion has tried to give an initial overview of new efforts by members of the IPC network to introduce the now-adopted TGs to rural communities facing LSLAs and, together with them, to use the guidelines to strengthen their struggles for human rights and for greater control of the land, fisheries and forests on which they depend. These efforts involve experiments to introduce this especially interesting and relevant tool -- namely, the TGs -- to rural communities in four African countries and, together with them, to use these guidelines to frame and devise collective action and engagement strategies aimed at strengthening their tenure of land, fisheries and forests in order to bring about bottom-up accountability in the context of the current rush for land and other natural resources in Africa.

The political intuition driving these efforts is that, if local communities are aware of the TGs and are provided with support to claim their tenure-related rights in situations where these are not being adhered to already, then they will be able to expand their field of action in order to hold various actors accountable and halt the erosion of their resource rights at individual, household and community levels. We support the conclusion made by Hall and Scoones:

The VGGT have already become the authoritative reference point for further development of international standards regarding land tenure. The inclusion of a land indicator in the SDGs is testament to this. From a civil society perspective, the procedural provisions of the VGGT can help open doors and bring government and private sector actors to the table in dialogue. This offers many opportunities, but these can be closed down if the more progressive interpretations of the VGGT are ignored, subverted or side-lined. Insisting on the provisions regarding 'vulnerable and marginalised' people is vital. Equally, a focus on processes of democratising land control is essential, including with reference to provisions of promoting land redistribution and restoring rights through restitution, not just ameliorating the way the status quo is governed.⁴⁰

Capacitating affected people can bring about changes in land governance by holding public institutions accountable. Such efforts can be understood as part of a broader project to recalibrate the political-legal terrain in which accountability politics takes place. They proceed

on the idea that grassroots organizations do not need to wait for the state to implement the TGs. They can already take these into their own hands and use them as a tool for investigation, reflection and action. But whether and how subaltern groups can make use of even selected international instruments to claim their human rights and their rights to specific lands or territories -- and to what ends from a broader strategic perspective -- is still a relatively new area of inquiry and remains an open question empirically.

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Notes

¹ In 2007 the absolute number of people living in urban centres worldwide overtook the number of people living in the countryside for the first time ever. Yet three-fourths of the world's poor were still living and working in the countryside. Poverty often means hunger, and by 2008 there were an estimated 1 billion hungry people in the world. FAOSTAT data downloaded 3 November 2008.

² On land and violent conflict see Pons-Vignon and Solignac Lecomte, *Land, Violent Conflict, and Development* and Kay, *Reflections on Rural Violence*, 741-775.

³ Committee on World Food Security, *How to Increase Food Security*.

⁴ Deininger & Byerlee, "Rising Global Interest"; and Deininger, "Forum on Global Land Grabbing," 217-47.

⁵ Behrman, Meinzen-Dick & Quisumbing, "Gender Implications of Large-Scale" 49-79; and Koopman & Mar Faye, "Land Grabs, Women's Farming".

⁶ See research linked to the Land Deals Politics Initiative and several academic journal special issues on the topic, such as *Journal of Peasant Studies*, *Development and Change*, *Globalizations*, *Canadian Journal of Development Studies*, *Third World Quarterly*, and *Water Alternatives*, among others.

⁷ GRAIN, *Seized: The 2008 Land Grab*; Monsalve Suarez, "The FAO and its Work on Land"; von Braun and Meinzen-Dick, "Land Grabbing by Foreign Investors"; Borras and Franco, 'From Threat to Opportunity?', 507; Zagma, "Land and Power" 114-164; White et al., "The new enclosures" 619-647; and Mehta, Veldwisch, and Franco "Introduction to the Special Issue" 193.

⁸ Fox, *Accountability politics*, 1-2.

⁹ Polack, Cotula, and Côte, *Accountability in Africa's Land Rush*.

¹¹ With the meaning of human rights and democratic land control along the lines spelled out by Franco, Monsalve and Borras, "Democratic land control."

¹² Hall et al. "Resistance, acquiescence or incorporation?" 467-488.

¹³ Martiniello, "Social struggles in Uganda's Acholiland" 653-669.

¹⁴ Kandel, "Politics from below?" 635-652.

¹⁵ Milgroom, "Policy processes of a land grab" 585-606.

¹⁶ Larder, "Space for pluralism?" 839-858.

¹⁷ Moreda, "Listening to their silence?" 517-539.

¹⁸ Borras "Land politics, agrarian movements".

¹⁹ Edelman and Borras, *Political Dynamics of Transnational Agrarian Movements*.

²⁰ Brem-Wilson, "The Reformed Committee"; Brem-Wilson "Towards food sovereignty," 73-95.

²¹ See <http://www.foodsovereignty.org>.

²² McKeon "One does not sell," 105-122; Paoloni and Onorati "Regulations of Large-Scale Acquisitions" 369-400.

²³ Monsalve "The FAO and its Work"; Rosset "Re-thinking agrarian reform" 721-775.

²⁴ Available at <http://fian.nl/civil-society-organizations-proposals-to-fao-for-the-tenure-of-land-and-natural-resources/>.

²⁵ Over the past decade, myriad responses have made to the problem of land grabbing: for example, the International Food Policy Research Institute's (IFPRI) call for a 'code of conduct' (von Braun and Meinzen-Dick "'Land Grabbing' by Foreign Investors"); the World Bank's call for 'Principles for Responsible Agricultural Investments' (PRAI); the International Institute for Environment and Development's (IIED) advocacy around transparency and community consultation in land investments (Vermeulen and Cotula, "Over the heads of local people," 899-916; Cotula, *Land Deals in Africa*); human rights advocates call for human rights principles to address land grabbing (De Schutter "How not to think" 249-279; Künnemann and Monsalve, "International Human Rights," 123-139); and the call of transnational peasant movement La Via Campesina and allies to stop land grabbing (La Via Campesina, *Stop Land Grabbing Now!*).

²⁶ For example, several Southern American countries have tried to prohibit or control the 'foreignization' of land ownership, yet it is in this part of Latin America where large-scale land deals remain widespread (Wilkinson, Reydon, and Di Sabbato "Concentration and foreign ownership" 417-438; Murmis and Murmis "Land concentration and foreign land" 490-508; Urioste "Concentration and 'foreignisation'" 439-457; White et al. "The new enclosures" 619-647).

²⁷ Bevir, *A theory of governance*.

²⁸ Margulis, McKeon, and Borras "Land grabbing and global governance" 1-23.

²⁹ Borras, Franco and Wang "The challenge of global governance" 161-179.

³⁰ These three tendencies are more or less stable analytical constructs, but key state and non-state actors and their political stands are dynamic and constantly changing, often straddling two or three tendencies depending on the particular configuration of issues and alliances, over time

³¹ "Forum on Global Land Grabbing" 217-47.

³² For a critical perspective on FPIC in the context of the global resource rush, see Franco, "*Reclaiming Free Prior and Informed*".

³³ "Vertically integrated policy monitoring" 616-627.

³⁴ Franco, *Bound by law*.

³⁵ Fox, "Editor's Introduction," 1-18.

³⁶ African Charter of Human and Peoples' Rights, <http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf>

³⁷ Borras, Edelman, and Kay. "Transnational Agrarian Movements".

³⁸ Monsalve Suárez "The human rights framework " 239-290.

³⁹ FIAN, *Monitoring the governance of land*.

⁴⁰ Hall and Scoones, *Strengthening Land Governance*, 49.