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INTERNATIONAL SOFT-LAW INSTRUMENTS AND GLOBAL RESOURCE
GOVERNANCE: REFLECTIONS ON THE VOLUNTARY GUIDELINES
ON THE RESPONSIBLE GOVERNANCE OF TENURE

Lorenzo Cotula

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Lorenzo Cotula, PhD, Principal Researcher – Law and Sustainable Development / Team Leader – Legal Tools, Natural Resources Group, International Institute for Environment and Development (IIED), 4 Hanover Street, Edinburgh, EH2 2EN, UK. Email: lorenzo.cotula@iied.org

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* Principal Researcher in Law and Sustainable Development, International Institute for Environment and Development (IIED); Visiting Professor, Law School, University of Strathclyde; and Visiting Research Fellow, Centre for the Law, Regulation and Governance of the Global Economy (GLOBE), Warwick Law School. The author would like to thank Margret Vidar and two anonymous peer reviewers for their helpful comments. The views expressed and any errors are the author's responsibility.

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1

INTRODUCTION

The governance of land and natural resources is an increasingly prominent issue in international policy agendas, cutting across public concerns about economic development, environmental sustainability, social inclusion and cultural identity.¹ Local-to-global socio-economic change has compounded pressures on natural resources in many parts of the world, and exacerbated the challenges facing institutional arrangements for the management of those resources – from unwritten customary systems to rules, institutions and processes that found their legitimacy on state-based law.

These evolutions result from deep-seated and long-term transformations, but a recent wave of land-related investments in low and middle-income countries made the issue a higher policy priority. Despite the great diversity of business and legal configurations, many such investments involved the acquisition of long-term rights over large areas of land to establish agribusiness plantations. Several governments saw opportunity in the prospect of greater investment inflows, but the deals also prompted concerns about land dispossession, environmental degradation and the marginalisation of small-scale rural producers, fostering heated debates about control over land and the future of food and agriculture.

Outside the international spotlight, land and resource relations have often experienced wider reconfigurations linked to economic, social and cultural change, including, depending on the context: the growing commercialisation of tenure relations; urban expansion and the involvement of urban elites in acquiring rural land; the assertiveness of traditional authorities in resource governance; and the renegotiation of relations between men and women, youths and elders, and first occupants and newcomers – to name but a few headline examples. Land is often at the centre of

difficult disputes presenting political, emotive connotations.²

For lawyers, these evolutions create complex challenges. Natural resources – from genetic to transboundary ones – have long formed the object of international regulation.³ But political sensitivities led states to maintain land governance largely within the exclusive preserve of domestic jurisdiction.⁴ As a result, national law has traditionally provided the primary normative reference for efforts to regulate land relations. Recent years have witnessed growing recourse to international law in land disputes, reflected in the growing land-related case law of regional human rights institutions and international investor-state arbitral tribunals.⁵ A range of declarations, guidelines and principles have spelt out the implications of international human

1 Governance is defined broadly to encompass ‘all processes of governing, whether undertaken by a government, market, or network, ... and whether through laws, norms, power, or language’; Mark Bevir, *Governance: A Very Short Introduction* (Oxford University Press 2012) 1.

2 There is a vast literature on large-scale land-related investments and on changing land relations, particularly in Africa. For a few examples, see Kojo S Amanor, ‘Global Resource Grabs, Agribusiness Concentration and the Smallholder: Two West African Case Studies’ (2012) 39(3-4) *Journal of Peasant Studies* 731; Saturnino M Borras Jr and others, ‘The Rise of Flex Crops and Commodities: Implications for Research’ (2016) 43(1) *Journal of Peasant Studies* 93; Jean-Philippe Colin and Phil Woodhouse, ‘Interpreting Land Markets in Africa’ (2010) 80 *Africa* 1; Lorenzo Cotula and Thierry Berger, *Trends in Global Land Use Investment: Implications for Legal Empowerment* (International Institute for Environment and Development 2017) <<http://pubs.iied.org/12606IIED/>>; Kerstin Nolte, Wytse Chamberlain and Markus Giger, *International Land Deals for Agriculture Fresh insights from the Land Matrix: Analytical Report II* (International Land Coalition 2016), <http://landmatrix.org/media/filer_public/ab/c8/abc8b563-9d74-4a47-9548-cb59e4809b4e/land_matrix_2016_analytical_report_draft_ii.pdf> and Pauline E Peters, ‘Inequality and Social Conflict over Land in Africa’ (2004) 4(3) *Journal of Agrarian Change* 269.

3 Elisa Morgera and Kati Kulovesi (eds), *Research Handbook on International Law and Natural Resources* (Edward Elgar 2016).

4 Examples of international treaties that contain explicit provisions on land rights include the International Labour Organisation’s Convention Concerning Indigenous and Tribal Peoples in Independent Countries (27 June 1989), 1650 U.N.T.S. 383, Articles 13-19; and the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW) (18 December 1979), 1249 UNTS 13, e.g. Article 14(2)(g).

5 See e.g. Jérémie Gilbert, ‘Litigating Indigenous Peoples’ Rights in Africa: Potential, Challenges and Limitations’ (2017) 66 *International and Comparative Law Quarterly* 657; Lorenzo Cotula, ‘Land, Property and Sovereignty in International Law’ (2017) 25(2) *Cardozo Journal of International and Comparative Law* 219.

rights norms in areas relevant to land rights.⁶ Until recently, however, no international instrument tackled land governance in comprehensive terms.

The emergence of new international soft-law instruments on land and resource governance has altered this picture. While located outside the realm of international law, these instruments provide relatively detailed guidance for states and/or non-state actors on wide-ranging governance issues. A particularly prominent global instrument is the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security ('Tenure Guidelines', or 'VGGT'), which the Committee on World Food Security (CFS) unanimously endorsed in 2012.⁷

Besides creating new arenas to address land and resource issues, these developments raise broader questions about the evolving nature of global governance. In contrast with the traditional inter-state focus of international law making, for example, novel institutional arrangements have enabled non-state actors to play an active role in the development of the Tenure Guidelines. Compared to international treaties, the VGGT also involve a different 'theory of change' that promotes reform through multi-stakeholder dialogue, political consensus and international best practice, rather than binding norms.⁸

Approaches that depart from formal regulation have long been theorised in scholarly work,⁹ and documented in their actual manifestations,¹⁰ but more rarely monitored in their implementation and ultimate outcomes. The rise of international soft-law instruments in a politically sensitive arena such as resource governance provides opportunities to track the life trajectories of those instruments and their ultimate effectiveness in delivering change. In turn, this could provide insights potentially relevant to a wider range of international policy arenas.

This article reflects on the Tenure Guidelines as a tool for addressing resource governance challenges. After outlining the process through which the Tenure Guidelines were developed and reviewing key features of their content, the article focuses on two issues: the legal significance of the VGGT, and the nature of initiatives to advance their implementation. While it is a truism that, as a voluntary instrument, the Tenure Guidelines do not create legal obligations, the article argues that the VGGT nonetheless present elements of normativity and have legal significance, which require lawyers to take their guidance seriously.

At the same time, a vast body of initiatives to translate the Tenure Guidelines into practice has challenged traditional state-centred approaches to the implementation of international instruments within national jurisdictions. The article argues that these circumstances call for more pluralist, 'bottom-up' accounts of the processes that give effect to international instruments – highlighting the important role of non-governmental organisations (NGOs), social movements and citizen groups in promoting change in policy and practice, and of international instruments in promoting active citizenship in politically contested terrains. This recognition has implications for initiatives to provide legal support in implementing the Tenure Guidelines.

6 See e.g. United Nations Declarations on the Rights of Indigenous Peoples (UNDRIP), General Assembly Resolution 61/295 (13 September 2007), Annex; and Basic Principles and Guidelines on Development-Based Evictions and Displacement, Annex 1 of the Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, UN Doc. A/HRC/4/18 (5 February 2007) <http://www.ohchr.org/Documents/Issues/Housing/Guidelines_en.pdf>.

7 Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (Rome, 11 May 2012) <<http://www.fao.org/docrep/016/i2801e/i2801e.pdf>>. The CFS is the foremost UN body in food security matters.

8 The concept of 'theory of change' is borrowed from international development practice, where it is often used to describe how planned interventions are expected to promote social change through causal connections between activities, immediate results and ultimate outcomes. For a broader discussion, see Paul Brest, 'The Power of Theories of Change' (2010) 8(2) *Stanford Social Innovation Review* 47.

9 E.g. Orly Lobel, 'The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought' (2004) 89 *Minnesota Law Review* 342.

10 E.g. Ayelet Berman and others (eds), *Informal International Lawmaking: Case Studies* (Torkel Opsahl Academic EPublisher 2012).

2

THE DEVELOPMENT OF THE TENURE GUIDELINES

The governance of land and natural resources has long provided an arena for technical cooperation in an international development context. The Food and Agriculture Organization of the United Nations (FAO) – the most directly relevant UN specialised agency – is an important player in that space. In 2006, FAO convened the International Conference on Agrarian Reform and Rural Development (ICARRD).¹¹ The event followed an earlier international conference held in 1979, and injected new momentum in public efforts to improve and secure access to land and resources for the rural poor.

In the years that followed, FAO upscaled its ‘normative’ work in this area, and in 2009 it initiated the process to develop a voluntary international instrument on the governance of land and natural resources.¹² The new instrument would be ‘similar in nature’ to other voluntary instruments developed with FAO support, including the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security, and the Code of Conduct on Responsible Fisheries.¹³ While

the initiative to develop a new instrument was not designed as a response to transnational land-related investments, its timing did coincide with an acceleration in the pace of such investments, and with rapidly developing policy debates on this issue.

In fact, the wave of land deals arguably compounded global support for some form of international instrument. On the one hand, the deals – and the associated reports of land dispossession – led social movements and NGOs to mobilise, with positions ranging from advocating for an outright ban on ‘land grabbing’ to seeking more effective international safeguards. On the other hand, some businesses and their home-country governments saw value in establishing international standards that, if followed, would shelter them from accusations of ‘land grabbing’. Meanwhile, many low and middle-income country governments opposed a ban, considering large-scale investment as a legitimate route to national development.¹⁴

While an international instrument came to be seen by many as part of the solution, the pathway was hotly contested. Views about the most suitable thematic entry points diverged considerably – from ‘responsible agricultural investment’, through to holistic guidance on the governance of land and resources, of which investment would be but one element. Some commentators raised concerns that a soft-law instrument centred on large-scale private investments would merely serve to legitimise undesirable models of agricultural development.¹⁵

There was also uncertainty about the most appropriate institutional site for developing international guidance, with the World Bank, human rights bodies and other institutions initiating relevant processes.¹⁶ Ultimately,

11 Report of the International Conference on Agrarian Reform and Rural Development (ICARRD), Porto Alegre, 7-10 March 2006, C2006/REP. The resulting Conference Declaration is available as Annex I to Council of the Food and Agriculture Organization of the United Nations, *Outcome of and FAO Follow-up to the International Conference on Agrarian Reform and Rural Development (ICARRD)*, 20-25 November 2006, CL 131/15. One of the six ‘issue papers’ prepared for the conference was later published as Lorenzo Cotula, Camilla Toulmin and Julian Quan, *Better Land Access for the Rural Poor: Lessons from Experience and Challenges Ahead* (Food and Agriculture Organization of the United Nations / International Institute for Environment and Development 2006), <<http://pubs.iied.org/12532IIED/>>.

12 Philip Seufert, ‘The FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests’ (2013) 10(1) *Globalizations* 181.

13 Paul Munro-Faure and David Palmer, ‘An Overview of the Voluntary Guidelines on the Governance of Tenure’ (2012) 1(12) *Land Tenure Journal* 5.

14 Seufert (n12) 185.

15 Saturnino M Borras Jr. and Jennifer Franco, ‘From Threat to Opportunity? Problems with the Idea of a “Code of Conduct” for Land-Grabbing’ (2010) 13 *Yale Human Rights & Development Law Journal* 507.

16 A particularly note-worthy initiative is the set of principles developed by the then UN Special Rapporteur on the Right to Food. See Special Rapporteur on the Right to Food, Olivier De Schutter, *Large-Scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge*, U.N. Doc. A/HRC/13/32/Add.2 (Dec. 28, 2009).

public attention and political momentum coalesced in a policy space that could take the governance of land and resources as the primary entry point, and that combined intergovernmental negotiation with opportunities for input from non-state actors such as social movements, NGOs, and private sector companies and associations.

Just as the land deals started attracting international attention and FAO began work on the new voluntary instrument, an institutional reform restructured the CFS. The CFS is an intergovernmental body originally set up in 1974 and its institutional reform adopted in 2009 transformed it into an ‘inclusive global policy forum deliberating on food security’:¹⁷ CFS membership is restricted to states,¹⁸ but ‘civil society’ (social movements, NGOs) and the private sector can take part in the work of the CFS as ‘participants’.

This new category of ‘participants’ goes beyond the binary classification traditionally followed in most of the United Nations system – whereby actors are divided between ‘members’ (states) and ‘observers’ (including non-state actors). At the CFS, ‘participants’ have the right to intervene and contribute to discussions, albeit without any voting or decision making rights. Autonomously established coordination ‘mechanisms’ (the Civil Society Mechanism and the Private Sector Mechanism) facilitate the participation of civil society and the private sector in the work of the CFS.¹⁹ The reformed CFS ultimately became the key site for the

development of the new voluntary instrument, building on preparatory work conducted by FAO.

In 2009-2010, FAO organised extensive multi-stakeholder consultations, reportedly reaching 700 people from 133 countries.²⁰ On the basis of these consultations, FAO developed a ‘draft zero’ of the instrument, which formed the object of an online consultation, in turn leading to the elaboration of a first draft.²¹ This document provided the basis for intergovernmental negotiation among CFS member states, with the participation of civil society and the private sector via their respective ‘mechanisms’.²²

In 2012, the CFS unanimously endorsed the Tenure Guidelines.²³ While the outcome was always going to be a non-binding instrument, accounts suggest that states took the negotiation very seriously.²⁴ The active participation of civil society resulted in several proposals being reflected in the final text.²⁵ The inclusive process has provided the foundation for widespread political backing and strong perceived legitimacy of the Tenure Guidelines. Endorsement at the CFS was followed by numerous statements of high-level political support.²⁶ The VGGT became a central pillar of the international architecture relating to the governance of land and natural resources.

17 Nora McKeon, “‘One Does Not Sell the Land Upon Which the People Walk’: Land Grabbing, Transnational Rural Social Movements, and Global Governance” (2013) 10(1) *Globalizations* 105.

18 Committee on World Food Security, *Reform of the Committee on World Food Security: Final Version* (Rome, 14-17 October 2009), CFS:2009/2Rev.2. The membership of the CFS is open to all member states of FAO, of the World Food Programme (WFP) or of the International Fund for Agricultural Development (IFAD), or to non-member states of FAO that member states of the United Nations (*id.*, para. 8). As of October 2017, the CFS had 137 member states; see Committee on World Food Security, *Making a Difference in Food Security and Nutrition – Report*, CFS 2017/44/Report (9-13 October 2017) <<http://www.fao.org/3/a-mv030e.pdf>, Appendix B>.

19 *ibid.*, Committee on World Food Security paras. 11-12, 16-17.

20 David Palmer and others, ‘Fostering a New Global Consensus: The Voluntary Guidelines on the Governance of Tenure’ (2012) 12(1) *Land Tenure Journal* 19.

21 Paul Munro-Faure and others, ‘A Global Standard for Tenure: From Development to Use’ (2017) 1 *Journal of Law and Rural Development* 11.

22 Seufert (n12) 182-184.

23 Council of the Food and Agriculture Organization of the United Nations, *Report of the 38th (Special) Session of the Committee on World Food Security (11 May 2012)*, 11-15 June 2015, CL 144/9 (2013/20), Decision Box point ii).

24 Conversations with persons involved in the negotiations, October 2012. See also Seufert (n12) 183; McKeon (n17) 110.

25 Jennifer Franco and Sofía Monsalve Suárez, ‘Why Wait for the State? Using the CFS Tenure Guidelines to Recalibrate Political-Legal Struggles for Democratic Land Control’ (2017) *Third World Quarterly* 4.

26 See e.g. UN General Assembly Resolution No. 67/228 of 21 December 2012, UN Doc. A/RES/67/228, para. 31; *The Future We Want – Outcome Document of the Rio+20 Conference* (Rio de Janeiro, 22 June 2012), para. 115; and *G20 Leaders Declaration* (Los Cabos, 19 June 2012), para. 58.

3

THE TENURE GUIDELINES: CONTENT HIGHLIGHTS

3.1 Overview

The Tenure Guidelines are the first global instrument to provide comprehensive guidance on land and resource governance. Compared to other international instruments, they take a more holistic approach to the governance of natural resources, covering fisheries and forests as well as land; and they explicitly link resource governance to realising human rights and achieving food security.²⁷ However, this holistic approach does have limits, as the VGGT do not cover important and closely related resources such as water and genetic resources, and they were not designed to tackle tenure issues in the extractive industries. It has been noted that, as a negotiated text, the Tenure Guidelines reflect elements of diverse positions – from concerns about the efficient functioning of markets to social justice goals.²⁸

The first part of the Tenure Guidelines identifies two sets of key principles. The ‘general principles’ essentially call on states to recognise, respect, protect, promote, facilitate and enforce ‘legitimate tenure rights’, and affirm the responsibilities of non-state actors including business enterprises. The more detailed provisions of the VGGT give effect to these general principles. In addition, a set of ‘principles of implementation’ guide the implementation of the Tenure Guidelines, and cut across the detailed provisions. They include non-discrimination, consultation and participation, rule of law, gender equality, transparency, accountability and ‘continuous improvement’.²⁹

The remainder of the VGGT provide guidance on a wide range of tenure issues. A chapter on ‘legal recognition and allocation of tenure rights and duties’ covers topics such as the management of public lands; indigenous peoples and people holding customary rights; and informal tenure. A chapter on transfers of

tenure rights covers markets, investments, restitution, redistribution and expropriation, among other issues. Another chapter deals with the administration of tenure, covering issues such as records of tenure rights, valuation, taxation, spatial planning and dispute resolution. A separate chapter deals with tenure issues in the context of climate change and emergencies, and the final chapter addresses promotion, implementation, monitoring and evaluation of the Tenure Guidelines.

3.2 The Notion of Legitimate Tenure Rights

Partly reflecting a key civil society demand during the negotiations,³⁰ the protection of “legitimate tenure rights” is central to the architecture of the Tenure Guidelines. Conceptually, the notion of legitimate tenure rights is rooted in a substantial body of research and analysis developed over the years. This work highlighted that tenure rights can be grounded in both legal norms and social practices; that many national legal systems deny effective protection to certain tenure rights that local actors perceive to be socially legitimate – particularly the rights claimed by poorer and marginalised groups; and that there is a compelling case for bridging legal structures and social legitimacy, and for legally recognising all legitimate tenure rights.³¹

In line with this approach, the VGGT call on states to “provide legal recognition for legitimate tenure rights not currently protected by law”.³² This call for the legal recognition and protection of all socially legitimate tenure rights also runs through many other VGGT provisions, and as discussed it permeates the “general principles” on which the Tenure Guidelines are founded. If properly implemented, this guidance could

30 *Civil Society Organizations’ Proposals for the FAO Guidelines on Responsible Governance of Land and Natural Resources Tenure* (FIAN International, 2011) <http://www.fian.org/fileadmin/media/publications_2015/2011_3_CSOProposals_LandTenureGuidelines_Annex.pdf> para. 9.2.

31 See for example Philippe Lavigne Delville and others, *Securing Secondary Rights to Land in West Africa* (International Institute for Environment and Development, 2001) <<http://pubs.iied.org/9125IIED/>>; and David Palmer and others, *Towards Improved Land Governance* (Food and Agriculture Organization of the United Nations, 2009) <<http://www.fao.org/3/a-ak999e.pdf>> 8.

32 VGGT para. 4.4. See also paras. 5.3, 7.1.

27 See e.g. VGGT paras. 1.1, 2.2, 3.2, 3B.1, 3B.4, 4.1, 4.3, 4.8.

28 Franco and Monsalve Suárez (n25) 4.

29 VGGT paras. 3A and 3B.

underpin significant policy shifts in those governance contexts that are characterised by gaps between legal frameworks and perceptions of social legitimacy.

The Tenure Guidelines do not define the notion of legitimate tenure rights, partly in response to the great diversity of contexts and situations. Yet what constitutes “legitimate” rights often forms the object of contestation – for instance, where public authorities mobilise productivist arguments to deny the legitimacy of the tenure claims of transhumant pastoralists or shifting cultivators. While providing a flexible concept that can cater for diverse land and resource claims, the notion of legitimate tenure rights could also be subjected to misuse aimed at hollowing out the normative implications of the VGGT. The Tenure Guidelines seek to address this issue by providing procedural guidance on how to identify legitimate tenure rights in any specific context;³³ and by explicitly affirming that wide-ranging types of rights – including those held by “indigenous peoples and other communities with customary tenure systems” – would qualify as legitimate tenure rights.³⁴

3.3 Land-related Investments

Among the many topics covered, the VGGT provide guidance on land-related investments – an issue that featured prominently in the negotiations. The overall approach is to recognise that private investments can be a force for good, while also establishing safeguards to ensure that investments do no harm, respect legitimate tenure rights and contribute to local development. The VGGT provisions have been compared favourably to other international soft-law instruments.³⁵ They are mainly addressed at states, but some clauses explicitly target non-state actors, particularly the private sector.³⁶ The VGGT provisions most explicitly relevant to land-related investments are paragraph 3.2 and section 12.

Paragraph 3.2 of the Tenure Guidelines ties respect for legitimate tenure rights to the responsibility of businesses to respect human rights, which is affirmed in the Guiding Principles on Business and Human Rights.³⁷ Given that land dispossession can violate human rights, the Tenure Guidelines align respect for legitimate tenure rights with international guidance on corporate systems for upholding the responsibility of businesses to respect human rights, including human rights due diligence.³⁸

Section 12 of the Tenure Guidelines (‘Investments’) contains more extensive guidance on land-related investments. While acknowledging that responsible investments ‘are essential to improve food security’,³⁹ this section calls on states to ‘support investments by smallholders as well as public and private smallholder-sensitive investments’,⁴⁰ and to promote partnership-based investment models that do not result in the large-scale transfer of tenure rights.⁴¹ In addition, the Tenure Guidelines state that responsible investments should do no harm, respect legitimate tenure rights, contribute to rural development and poverty reduction, and comply with national and international law and standards.⁴²

33 E.g. VGGT para. 4.4, emphasising participatory processes and “widely publicized rules”.

34 E.g. VGGT para. 9.4.

35 E.g. Margherita Brunori, ‘Principles on Responsible Investment in Agriculture and Food Systems: A (Very) Critical Analysis’ (BENELEX blog, 21 May 2015) <<http://www.benelexblog.law.ed.ac.uk/2015/05/21/principles-on-responsible-investment-in-agriculture-and-food-systems-a-very-critical-analysis/>>.

36 E.g. VGGT paras. 3.2, 12.1, 12.4, 12.12.

37 Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, U.N. Doc. A/HRC/17/31 (21 March 2011). The United Nations Human Rights Council endorsed the Guiding Principles in its Resolution No 17/4 (16 June 2011).

38 VGGT paragraph 3.2 reads: “Non-state actors including business enterprises have a responsibility to respect human rights and legitimate tenure rights. Business enterprises should act with due diligence to avoid infringing on the human rights and legitimate tenure rights of others. They should include appropriate risk management systems to prevent and address adverse impacts on human rights and legitimate tenure rights. Business enterprises should provide for and cooperate in non-judicial mechanisms to provide remedy, including effective operational-level grievance mechanisms, where appropriate, where they have caused or contributed to adverse impacts on human rights and legitimate tenure rights. Business enterprises should identify and assess any actual or potential impacts on human rights and legitimate tenure rights in which they may be involved. [...]”

39 VGGT para. 12.1.

40 VGGT para. 12.2.

41 VGGT para. 12.6.

42 VGGT paras. 12.4, 12.12.

The remainder of section 12 calls for specific safeguards to be entrenched in investment processes, including transparency in transactions and disclosure of information;⁴³ systematic and impartial identification of tenure rights;⁴⁴ consultation including (in relation to indigenous peoples) free, prior and informed consent;⁴⁵ social and environmental impact assessments;⁴⁶ and effective monitoring of investment implementation and impacts.⁴⁷ A final clause calls on states to uphold legitimate tenure rights when investing or promoting investments abroad.⁴⁸

3.4 Implementation Measures

The Tenure Guidelines elaborate on the nature of the public action that would be needed to advance their implementation. Examples include ensuring that policy, legal and organisational frameworks promote responsible governance and recognise legitimate tenure rights, which depending on the context may require law reform;⁴⁹ strengthening institutional capacity in the public administration and in the judiciary;⁵⁰ and providing rural people with legal and technical assistance.⁵¹

Given the emphasis the Tenure Guidelines place on respect for legitimate tenure rights, on consultation and participation, on transparency and accountability, and on respect for the rule of law, aligning national governance with the VGGT may in many contexts entail significant changes in the ways public authority is exercised, and in the relationship between private actors (as holders of tenure rights, investors or engaged citizens, for example) and public officials.

Depending on the situation, complex political economies (e.g. vested interests, power relations) may

stand in the way of the reform agenda, begging questions about the nature and effectiveness of arrangements to promote implementation. These questions interrogate the legal value of the Tenure Guidelines, and concrete initiatives to support their implementation. The next two sections discuss these issues in turn.

4

THE LEGAL SIGNIFICANCE OF THE TENURE GUIDELINES

4.1 An International Soft-law Instrument

Discussions about the legal value of voluntary instruments such as the Tenure Guidelines tend to involve both straightforward responses and more nuanced considerations.⁵² It is worth pointing out that recent years have witnessed growing use of international soft-law instruments to tackle some of the world's most pressing challenges, such as promoting food security, governing financial transfers and responding to public pandemics, as part of cooperative multilateral diplomacy including processes convened by United Nations specialised agencies.⁵³ International soft-law instruments have become an important part of contemporary global governance. For lawyers, one important question concerns the legal significance of these instruments.

On the one hand, it is clear that the Tenure Guidelines do not create legal obligations and are not part of international law. While the VGGT formed the object of intergovernmental negotiation, the title of the

43 VGGT paras. 12.3, 12.11.

44 VGGT para. 12.10.

45 VGGT paras. 12.7, 12.9. See also para. 9.9.

46 VGGT para. 12.10.

47 VGGT para. 12.14.

48 VGGT para. 12.15. On home country measures, see Yannick Fiedler and Jesper Karlsson, Home Country Measures that Promote Responsible Foreign Agricultural Investment: Evidence from Selected OECD Countries (Food and Agriculture Organization of the United Nations, 2016) <<http://www.fao.org/3/a-i5802e.pdf>>.

49 E.g. VGGT paras. 5.1, 5.3.

50 E.g. VGGT sections 6, 17, 18, 20, 21.

51 E.g. VGGT paras. 4.7, 5.4, 9.10, 12.9, 14.4, 15.8, 21.6.

52 The reflections presented in this section benefited from insights gained through the following collaborative effort: Lorenzo Cotula and others, *Responsible Governance of Tenure and the Law: A Guide for Lawyers and Other Service Providers* (Food and Agriculture Organization of the UN, 2016) <<http://www.fao.org/3/a-i5449e.pdf>> esp. pp. 13-18.

53 Berman and others (n11); Daniel Bethlehem, 'The End of Geography: The Changing Nature of the International System and the Challenge to International Law' (2014) 25(1) *European Journal of International Law* 9.

document (*Voluntary Guidelines*) and its consistent wording ('should' rather than 'shall') make the non-binding nature of the instrument very clear. The Tenure Guidelines dispel any remaining doubts by expressly stating that they are voluntary.⁵⁴

In the words of an established conceptualisation,⁵⁵ the Tenure Guidelines depart from the traditional international law canon in terms of: *process*, because they formed the object of multi-stakeholder consultation, and of final 'endorsement' rather than formal adoption and ratification; *actors*, because even the inter-governmental negotiation phase involved the participation of private sector and civil society actors represented at the CFS through their devoted 'mechanisms'; and *output*, as they involve non-binding guidelines rather than a treaty creating legal obligations.

While not legally binding, the Tenure Guidelines are inherently normative in the sense that they do not merely describe phenomena. Rather, they provide pointers on what states and/or non-state actors *should* do. In this sense, the VGGT are best described as an international soft-law instrument designed to provide guidance to states (and in several respects, non-state actors) on how to align resource governance with international best practice.⁵⁶

Accordingly, states (and non-state actors, with regard to the provisions addressed at them) do not have a legal obligation to adhere to the Tenure Guidelines. However, the VGGT do define key parameters of responsible governance. It has been noted that views tend to differ widely on the meaning and purpose of land and resource governance, and on the kinds of governance needed and ways to attain them.⁵⁷ By defining key parameters, the VGGT narrow the range of available policy options that can be deemed to be in line with the international consensus on best practice. Public or private-sector conduct falling short of these parameters could expose authorities or businesses to public pressure and reputational risk.

⁵⁴ VGGT, para 2.1.

⁵⁵ Joost Pauwelyn, Ramses A Wessel and Jan Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking' (2014) 25(3) *European Journal of International Law* 733.

⁵⁶ Cotula and others (n52) 14.

⁵⁷ Franco and Monsalve Suárez (n25) 4.

4.2 The 'Soft Law' Debate

The notion of soft law is not unproblematic and deserves some further elaboration. The rise of international soft-law instruments has prompted debates about the legal nature of those instruments and their relation to binding law.⁵⁸ The debates present many complex dimensions, which this succinct analysis cannot do justice to. However, a brief review of the issues points to a more complex picture than is often assumed in positivist accounts framed in black (hard law) or white (no law) terms – one where diverse shades of normativity can coexist and interact.

Conceptually, there is an important distinction between legal obligation and political, moral or policy imperative. For some, the very notion of soft law confuses the binary relations that would inherently characterise the law (e.g. legal/illegal).⁵⁹ On the other hand, complex problems may arguably require complex solutions, and legal forms can involve configurations that are often hard to square in simple dichotomies.

Part of the challenge is that the term 'soft law' is used to describe a wide range of instruments – from United National General Assembly Resolutions to industry standards. These instruments are developed by diverse actors enjoying different political legitimacy, through different processes, resulting in diverse normative outputs. Arguably, these differences can result in soft-law instruments having diverse legal significance.

Indeed, some scholarly scepticism about the notion of soft law is rooted in legitimate concerns that unaccountable

⁵⁸ See e.g. Christine M. Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 *International and Comparative Law Quarterly* 850; Jan Klabbers, 'The Undesirability of Soft Law' (1998) 67 *Nordic Journal of International Law* 381; Jan Klabbers, 'Reflections on Soft International Law in a Privatized World' (2005) 16 *Finnish Yearbook of International Law* 1; Jean d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials' (2008) 19(5) *European Journal of International Law* 1075; Jaye Ellis, 'Shades of Grey: Soft Law and the Validity of Public International Law' (2012) 25(2) *Leiden Journal of International Law* 313; Matthias Goldman, 'We Need to Cut off the Head of the King: Past, Present and Future Approaches to International Soft Law' (2012) 25(2) *Leiden Journal of International Law* 335.

⁵⁹ Klabbers, 'The Undesirability of Soft Law' (n58) and Klabbers, 'Reflections on Soft International Law in a Privatized World' (n58).

interests may unduly influence the development of normative instruments, and ultimately global governance, thereby bypassing democratic processes.⁶⁰ These concerns are corroborated by research pointing to the imbalances in representation and influence that can exist among actors involved in or affected by international ‘multi-stakeholder’ initiatives, and to challenges affecting the follow-up mechanisms to ensure compliance and accountability.⁶¹

However, such process-related concerns arise differently for diverse types of international voluntary instruments. There are arguably significant differences, for example, between a corporate or technocratic code of conduct, on the one hand, and an instrument that (like the VGGT) has formed the object both of extensive public consultation and intergovernmental negotiation at a forum that institutionalises the participation of non-state actors including civil society and the private sector, on the other.

In addition, issues of unequal voice and unaccountable interests can also affect the intergovernmental negotiations that establish binding treaties, particularly where lobbying by commercial interests is intense and states differ in their negotiating power and their internal political space for representation and dissent. The fact that soft-law instruments are not subject to ratification says little, in itself, about a possible democratic deficit,⁶² insofar as the constitutional rules and practices concerning treaty ratification may themselves offer limited opportunities for democratic scrutiny.⁶³

In fact, it has been argued that, relative to treaty negotiations, international arenas for developing soft-law instruments may more easily lend themselves to inclusive processes that enable the active participation of a wider range of actors.⁶⁴ The institutional arrangements to facilitate civil society and private sector participation in the reformed CFS are a prime example of this pluralistic approach to international policy making. Commentators have hailed the involvement of social movements and NGOs in the negotiation of the Tenure Guidelines as a ‘truly innovative’ feature, and as an example of ‘bottom-up’ policy making at the international level.⁶⁵

This is not to deny that opportunities for diverse ‘civil society’ or ‘private sector’ voices to be heard can differ widely, potentially leading to exclusion or marginalisation even within ‘inclusive’ arrangements. However, these considerations suggest that, in politically sensitive arenas that involve polarised positions and have traditionally fallen in the exclusive preserve of national jurisdiction, opting for a soft-law instrument can present significant process-related advantages to incrementally develop consensus-based normativity. Over time, the international consensus embodied in soft-law instruments can also provide the foundations for the development of legally binding norms - as has been and is being done in relation to international instruments in the human rights field.

4.3 The Tenure Guidelines: Two Interlinked Spheres of Legal Significance

Compared to international law instruments, the VGGT reflect a different claim to authority, and a different approach to promoting reform. They draw authority from the consultative, participatory process that led to their development, and from the political support they enjoy, rather than from formal processes

60 *ibid* Klabbers, ‘Reflections on Soft International Law in a Privatized World’.

61 MSI Integrity and Duke Human Rights Centre at the Kenan Institute for Ethics, *The New Regulators? Assessing the Landscape of Multi-Stakeholder Initiatives* (2017) <<https://msi-database.org/data/The%20New%20Regulators%20-%20MSI%20Database%20Report.pdf>>.

62 A concern that Klabbers, ‘Reflections on Soft International Law in a Privatized World’, raises in relation to soft-law instruments.

63 See e.g. Joseph HH Weiler, ‘“The Geology of International Law – Governance, Democracy and Legitimacy” (2004) 64 *Zeitschrift für Ausländisches öffentliches Recht und Völkerrecht* 547; Jan Wouters, Bart De Meester and Cedric Ryngaert, ‘Democracy and International Law’ (2004) Leuven Interdisciplinary Research Group on International Agreements and Development Working Paper No. 5; Lorenzo Cotula, ‘Democracy and International Investment Law’ (2017) 30(2) *Leiden Journal of International Law* 351.

64 Mauro Barelli, ‘The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples’ (2009) 58(4) *International and Comparative Law Quarterly* 957.

65 Lorenza Paoloni and Antonio Onorati, ‘Regulations of Large-Scale Acquisitions of Land: The Case of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests’ (2014) 7(2) *Law and Development Review* 369.

of adoption and ratification. And rather than establishing binding (but not necessarily enforceable or honoured) obligations, the Tenure Guidelines seek to promote change by building political consensus among states and non-state actors, and by providing authoritative guidance based on best practice.

Beyond their political legitimacy, the Tenure Guidelines arguably have legal significance in at least two respects, concerning their relation to national and international law. With regard to international law, the Tenure Guidelines are explicitly rooted in international human rights law.⁶⁶ Several VGGT provisions are aligned with existing international norms, including those explicitly referenced in the VGGT themselves.⁶⁷ The VGGT's calling on states to recognise, respect and protect socially legitimate tenure rights, including rights that are 'not currently protected by law',⁶⁸ resonates with the jurisprudence that regional human rights courts have developed on the human right to collective property, which has afforded protection to collective, customary rights to land even where national law did not recognise those claims.⁶⁹

Of course, the source of any legal obligation remains the relevant international law instrument, rather than the VGGT provision aligned with it. And in line with the non-binding nature of the Tenure Guidelines, many VGGT provisions emphasise that they are themselves to be interpreted and applied in ways that are consistent with existing international obligations.⁷⁰

66 See e.g. VGGT para. 1.1, which links the objective of the Tenure Guidelines to the progressive realisation of the human right to adequate food.

67 E.g. VGGT para. 12.4, referring to the conventions and instruments developed by the International Labour Organization.

68 VGGT paras 4.4, 5.3 and 7.1.

69 See, e.g., *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, (ser. C) No. 79, Judgment, Inter-Am. Ct. H.R. (31 August 2001); *Yakye Axa Indigenous Community v. Paraguay*, (ser. C) No. 125, Judgment, Inter-Am. Ct. H.R. (17 June 2005); *Sawhoyamixa Indigenous Community v. Paraguay*, (ser. C) No. 146, Judgment, Inter-Am. Ct. H.R. (29 March 2006). For a discussion of the interface between land rights and human rights under international human rights law, see e.g. Olivier De Schutter, 'The Emerging Human Right to Land' (2010) 12 *International Community Law Review* 303; and Kaitlin Cordes, 'Is There a Human Right to Land?' (State of the Planet blog, 8 November 2017) <<http://blogs.ei.columbia.edu/2017/11/08/is-owning-land-a-human-right/>>.

70 E.g. VGGT para. 2.2.

But soft-law instruments such as the Tenure Guidelines can provide authoritative guidance on how to interpret and apply binding norms, including by developing 'good-faith' and 'ordinary-meaning' interpretation of international treaties.⁷¹

International tribunals have indeed referred to soft-law instruments when interpreting treaty provisions.⁷² Commentators have deemed the VGGT to be an authoritative instrument on how to interpret and apply human rights obligations in matters concerning resource governance.⁷³ This view has been taken up by international human rights bodies. For example, the Committee on the Elimination of Discrimination Against Women (CEDAW) has identified the Tenure Guidelines as a key reference point to clarify the nature of state obligations with regard to realising rural women's right to participate in and benefit from rural development, a right that is affirmed in article 14(2)(a) of CEDAW.⁷⁴

The second, interlinked dimension of the VGGT's legal significance concerns their relation to national law. The Tenure Guidelines refer to national law reform, at

71 Pierre-Marie Dupuy, 'Soft Law and the International Law of the Environment' (1991) 12 *Michigan Journal of International Law* 420; Pauwelyn and others (n55) 757. The wording cited comes from Article 31(1) of the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), 1155 U.N.T.S. 331, establishing the general rule of treaty interpretation.

72 For example, in *The Environment and Human Rights*, Advisory Opinion 23/17, Inter-Am Ct. H.R. (ser. A) No. 23 (15 November 2017), the Inter-American Court of Human Rights referred to several soft-law instruments including: the 1972 Stockholm Declaration on the Human Environment, the 1992 Rio Declaration on Environment and Development and other declarations and action plans concerning sustainable development (e.g. paras. 52, 183, 230); and the United Nations Environmental Programme's 1987 Goals and Principles of Environmental Impact Assessment (e.g. para. 167). In *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (27 June 2012), the Court referred to the United Nations Declaration on the Rights of Indigenous Peoples and to several soft-law instruments related to cultural heritage when interpreting the provisions of the American Convention on Human Rights (para. 215).

73 Seufert (n12) 182.

74 General Recommendation No. 34 on the Rights of Rural Women (4 March 2016), UN Doc. CEDAW/C/GC/34, para. 36(a).

least implicitly.⁷⁵ Translating international guidance into hard law is seen as an important step towards effecting change. Given the great diversity of resource governance issues and arrangements worldwide, any national law reform would need to be tailored to the local context. However, the Tenure Guidelines can provide guidance on the overarching principles – such as the notion that legitimate tenure rights, whatever these may be in any specific context, would deserve legal recognition.

Interestingly, the key notions underpinning the VGGT (governance and tenure) are not legal concepts themselves. Their deployment arguably owes much to FAO's earlier technical work, which used tenure as a framing notion to capture a wide range of rights and interests in land and resources;⁷⁶ and to longstanding international development discourses about 'good governance', which the VGGT reframed in terms of 'responsible' governance. In any national law reform process, the VGGT's extra-legal notions would require 'translation' into the legal concepts applicable in the relevant jurisdiction. The VGGT's use of extra-legal notions could arguably facilitate such adaptation of VGGT guidance to a wide range of legal contexts.⁷⁷

Again, recent developments provide concrete illustrations of the interface with national law. In Scotland, the Land Reform (Scotland) Act 2016 refers twice to the Tenure Guidelines, as an international instrument that the Scottish government 'must have regard to the desirability of ... promoting respect for' when developing the 'land rights and responsibilities statement' and the 'guidance about engaging communities in decisions relating to land' that are envisaged by the Act.⁷⁸ While the language of the Act and the circumstances it refers to leave the executive with ample discretion, the legislation does embed the Tenure Guidelines in norms that create legal obligations for public authorities (namely, to issue the statement and the guidance).

Similarly to international tribunals, and depending on applicable national law, domestic courts may also be able to resort to the Tenure Guidelines when interpreting ambiguous norms of national law. Such an approach would be consistent with VGGT provisions affirming that 'States have the responsibility for their implementation':⁷⁹ as a state organ, the judiciary arguably carries its share of that responsibility. There are no known examples of national courts using the VGGT as yet, but there is documented experience with courts referencing other international soft-law instruments.⁸⁰

The upshot is that, while not legally binding, the Tenure Guidelines present elements of normativity and have legal significance that can display its effects at both national and international levels. These findings highlight the need for lawyers to take the Tenure Guidelines seriously. Unlike binding law, however, non-adherence to the VGGT would not, in itself, create any legal responsibility for states or non-state actors.⁸¹ This situation raises questions about alternative arrangements to encourage and support implementation, particularly where political economy factors would stand in the way. The next section turns to discussing these issues.

5 IMPLEMENTATION AND MONITORING

5.1 The International Set-up

The Tenure Guidelines recognise the importance of arrangements to promote and monitor their implementation. Emphasis is on participatory multi-stakeholder processes at the national level,⁸² and on

75 E.g. VGGT paras 4.4 and 5.3, calling for the protection of legitimate tenure rights not currently protected by national law.
76 See e.g. Munro-Faure and others (n21) 11.

77 For example, the term 'tenure' would cover rights ranging from private land ownership to use rights on state-owned land.

78 Land Reform (Scotland) Act 2016, sections 1 and 44. Scotland is part of the United Kingdom but the legislation deals with issues devolved to the Scottish Parliament.

79 VGGT para. 26.1. However, the Tenure Guidelines also affirm that they are to be interpreted and applied consistently with existing national law obligations and 'in accordance with national legal systems' (paras. 2.2 and 2.5).

80 See Cotula and others (n52) 99.

81 However, responsibility may arise under applicable legal instruments, such as human rights treaties, which VGGT-inconsistent conduct may also violate.

82 VGGT para. 26.2.

the role of the CFS as ‘the global forum where all relevant actors learn from each other’s experiences, and assess progress toward the implementation of these Guidelines and their relevance, effectiveness and impact’.⁸³

These arrangements present significant weaknesses: as a political, intergovernmental body, the CFS is not independent of the concerns and priorities of its member states, some of which may have little appetite for meaningful, independent, international scrutiny.⁸⁴ Civil society proposals for independent, international scrutiny of reports to be submitted by CFS member states, possibly via peer review by other states and CFS participants (which as discussed include civil society), were not taken forward.⁸⁵

At a devoted CFS session in October 2016, CFS member states shared, on a voluntary basis, their experiences with using and applying the Tenure Guidelines. This reporting exercise – conducted as a one-off, on the occasion of the fourth anniversary of the VGGT – was framed as ‘a contribution to monitoring progress towards their implementation’.⁸⁶ The CFS concluded that use and application of the VGGT ‘should be monitored on a regular basis’, but it only saw its own role as that of catalysing the member states’ voluntary sharing of experiences.⁸⁷ The CFS confirmed this approach at its 44th session in October 2017.⁸⁸

Ultimately, the effectiveness of the Tenure Guidelines in changing policy and practice relies heavily on public pressure and on institutions and programmes to support implementation. The formal endorsement of the Tenure Guidelines triggered many such initiatives. A brief review highlights the multi-actor, multi-site nature of efforts to advance VGGT

implementation,⁸⁹ with significant implications for law-related strategies to support implementation.

5.2 The Role of the State

Most VGGT provisions are addressed at states, though some also provide guidance for non-state actors. The Tenure Guidelines also clarify that ‘States have the responsibility for their implementation, monitoring, and evaluation’.⁹⁰ In other words, states are expected to play a key role in developing institutions and programmes to advance the VGGT.

This central role of states reflects the fact that states have primary responsibility for land governance within their jurisdiction. The important role of states is particularly evident where implementing the Tenure Guidelines would require reforming national law: as discussed, the VGGT provide guidance on features of national law, and law-making is a prerogative of states. A technical guide developed by FAO provides more specific pointers on ways to reflect the Tenure Guidelines into national law.⁹¹

In practice, awareness of the Tenure Guidelines among government officials, and more generally within national societies, varies considerably in different countries. Limited awareness was found to affect the existence and functioning of the CFS itself, with an evaluation report pointing to awareness gaps between government delegations in Rome and ministries at the country level.⁹² Political resolve to drive forward VGGT implementation also varies from country to country.

Responding to VGGT provisions calling for technical and financial cooperation to support implementation,⁹³ bilateral donors and multilateral agencies have developed a range of aid programmes to address these challenges. In many countries, for example, FAO has

83 VGGT para. 26.4.

84 Ruth Hall and Ian Scoones, with Giles Henley, *Strengthening Land Governance: Lessons from Implementing the Voluntary Guidelines* (LEGEND, 2016) <<https://www.odi.org/publications/10409-strengthening-land-governance-lessons-implementing-voluntary-guidelines>> 42.

85 Seufert (n12) 184.

86 *Committee on World Food Security – Forty-Third Session – Report* (17-21 October 2016), CFS 2016/43 REPORT, <<http://www.fao.org/3/a-ms023e.pdf>>, para. 26.

87 *ibid* para. 27(c). See also para 25(c).

88 Committee on World Food Security, *Making a Difference in Food Security and Nutrition – Report*, *supra*, Recommendation IV.

89 For a more comprehensive stocktake of initiatives to implement the Tenure Guidelines as of early 2016, see Hall, Scoones and Henley (n84).

90 VGGT para. 26.1.

91 Cotula and others (n53) 29-55.

92 *Evaluation of the Committee on World Food Security – Final Report* (14 April 2017), <http://www.fao.org/fileadmin/templates/cfs/Docs/1617/Evaluation/CFS_Evaluation_Final_Report__14_April_2017.pdf>, para. ES37.

93 VGGT para. 26.2.

supported national dialogue to raise awareness and promote public debate on the Tenure Guidelines and their implications.⁹⁴ In some cases, initial workshops led to the establishment of multi-stakeholder platforms for ongoing dialogue, and reportedly to greater political resolve to advance the implementation of the VGGT.⁹⁵

Some bilateral donors established substantial land governance programmes to support VGGT implementation at the country level – a notable example being the European Union’s land governance programme, which at the time of writing was active in 15 countries.⁹⁶ In Sierra Leone, financial support (from Germany) and technical assistance (from FAO) led to entrenching the Tenure Guidelines in the institutional machinery of government, and in the ongoing land policy reform.⁹⁷

5.3 Harnessing the VGGT to Democratise Resource Governance

While the Tenure Guidelines are primarily addressed to states, they make it clear that civil society has an important role to play in promoting and implementing the VGGT.⁹⁸ Following the inclusive process that led to the development of the VGGT, many NGOs and social movements have appropriated the Tenure Guidelines in a number of ways. For example, NGOs have wielded the VGGT as a benchmark for assessing

proposed policy or legislation in the context of land law reform.⁹⁹ In addition, social movements have raised awareness about land rights and the Tenure Guidelines, for example by organising a ‘caravan’ in West Africa.¹⁰⁰ The Tenure Guidelines have also been an important reference point in the local-to-global ‘Land Rights Now’ campaign to strengthen community land rights.¹⁰¹

In addition, there is growing experience with what has been referred to as the ‘creative use of the [Tenure Guidelines] from below’.¹⁰² These approaches involve using the Tenure Guidelines in analysis, trainings or advocacy conducted at the grassroots level, to promote citizen engagement with resource governance and improve the public accountability of local institutions. Examples include action-research and legal or political empowerment initiatives in Mali, Uganda and South Africa;¹⁰³ Cameroon, Ghana and Senegal;¹⁰⁴ and Sierra Leone.¹⁰⁵

94 Munro-Faure and others (n21) 14.

95 *ibid* 14-15.

96 See <<http://www.africallandpolicy.org/eu-programme/>>. The author is involved in the implementation of the Cameroon project, which aims to support the ongoing revision of land and resource legislation with analysis, field pilots and citizen participation in the reform process. See *LandCam: Securing Land and Resource Rights and Improving Governance in Cameroon* (International Institute for Environment and Development / Centre for Environment and Development / RELUFA, 2017) <<https://www.iied.org/landcam-securing-land-resource-rights-improving-governance-cameroon/>>.

97 The National Land Policy of Sierra Leone (1 August 2015) specifically refers to the VGGT as an instrument that informed national policy reform (section 1.3). See also Melinda Davies, *Implementation of the Voluntary Guidelines on Responsible Governance of Tenure in the Land Legislation of Sierra Leone: Analytical Assessment Report* (Food and Agriculture Organization of the United Nations, 2015), <http://www.fao.org/3/a-i5202e.pdf>; Hall, Scoones and Henley (n84) 18-19; Munro-Faure and others (n21) 15.

98 VGGT para. 26.5.

99 E.g. *Global Witness Submission on Myanmar’s Draft National Land Policy* (Global Witness, 2014) <<https://www.globalwitness.org/en-gb/archive/myanmars-draft-national-land-policy/>>; *Recommendations for Implementation of Pro-Poor Land Policy and Land Law in Myanmar* (Namati / Landesa, 2015) <<https://namati.org/resources/pro-poorlandpolicymyanmar/>>.

100 In 2016, transnational peasant movement La Via Campesina convened the West African Caravan for Land, Water and Peasants’ Seeds, whereby activists travelled from Burkina Faso to Senegal to raise awareness about land and resource rights (<<https://viacampesina.org/en/index.php/main-issues-mainmenu-27/agrarian-reform-mainmenu-36/1994-west-african-caravan-for-land-water-and-peasant-seeds/>>). See also Hall, Scoones and Henley (n84) 19-20.

101 *ibid* Hall, Scoones and Henley 22. See <<http://www.landrightsnow.org/en/home/>>.

102 Franco and Monsalve Suárez (n25) 3.

103 *ibid*.

104 The author was involved in the design and implementation of this initiative, which was supported by Canada’s International Development Research Centre (IDRC). See Lorenzo Cotula and Thierry Berger (eds), *Improving Accountability in Agricultural Investments: Reflections from Legal Empowerment Initiatives in West Africa* (International Institute for Environment and Development, 2017) <<http://pubs.iied.org/pdfs/12604IIED.pdf>>.

105 See the video Sonkita Conteh, ‘Reducing Inequality through Grassroots Legal Rights Networks (29 May 2017)’ <<https://www.youtube.com/watch?v=uYlcOmDFCbw&feature=youtu.be>>.

In effect, these initiatives harness the VGGT (the authoritative benchmark they establish, and the momentum associated with them) to open up resource governance and to support active citizenship – broadly defined in political, non-legalistic terms as the active participation of citizens in the management of public affairs.¹⁰⁶ They emphasise the agency of citizens to scrutinise, debate, contest, shape and advance resource governance. This approach is in line with the Tenure Guidelines, which – apart from emphasising consultation and participation throughout – specifically call for participatory processes to develop policies and laws.¹⁰⁷

In fact, the very notion of ‘legitimate’ tenure rights, which the VGGT call for the recognition and effective protection of, means that any effort to assess, monitor and discuss national law against the Tenure Guidelines would require more than just technical analysis. It would require, for example, participatory reflection on what rights are perceived to be socially legitimate in any given context, and by whom; on whether adequate processes are in place to mediate potential disputes about what counts as legitimate; and on local perceptions about the adequacy of the legal protections available, in both law and practice.¹⁰⁸

These bottom-up approaches complement rather than replace initiatives that support states in the implementation of the Tenure Guidelines, including through law reform, and the two dimensions can coexist in the same initiative. This is the case, for example, of an ongoing effort to accompany the revision of land legislation in Cameroon both through technical analysis and assistance, and through local-to-national support to help citizens participate in the reform process.¹⁰⁹ More generally, evidence points to the role that citizen engagement can play in entrenching the Tenure Guidelines into state-led law reform. In Scotland, for example, the explicit referencing of the

VGGT in land reform legislation appears to be linked, at least in part, to the work of advocacy groups.¹¹⁰

5.4 The Private Sector Entry

As discussed, some VGGT provisions – particularly on land-related investments – are addressed at businesses. These provisions include both ‘do-no-harm’ guidance, for instance calling on businesses to respect legitimate tenure rights; and more proactive dimensions, such as making investments through partnerships with local holders of tenure rights and contributing to food security and rural development.¹¹¹ However, the Tenure Guidelines are not formulated in ways that a private sector actor can easily implement.

Following high-profile corporate commitments to uphold the Tenure Guidelines in agricultural supply chains,¹¹² there have been numerous initiatives to help the private sector and their partners (e.g. lenders) to ‘operationalise’ the VGGT, resulting in a large number of guides, toolkits and standards.¹¹³ The not always

106 John Gaventa, ‘Introduction: Exploring Citizenship, Participation and Accountability’ (2002) 33(2) *IDS Bulletin* 1.
107 VGGT para. 5.5.

108 Lorenzo Cotula and others, ‘Land Investments, Accountability and the Law: Findings from Comparative Socio-legal Research in West Africa’ (2017) 1 *Journal of Law and Rural Development* 35.

109 *LandCam: Securing Land and Resource Rights and Improving Governance in Cameroon* (n97). As already mentioned, the author is involved in the implementation of this project.

110 James Hunter, ‘Rights-based Land Reform in Scotland: Making the Case in the Light of International Experience’ (Community Land Scotland, 2014) <http://www.andywrightman.com/docs/Hunter_rights_based_land_reform.pdf>; Peter Peacock, ‘ILC and Voluntary Guidelines Help Shape Scottish Land Reform Policy’ (ILC blog, 9 June 2014) <<http://www.landcoalition.org/en/blog/ilc-and-voluntary-guidelines-help-shape-scottish-land-reform-policy>>; Peter Peacock and Megan MacInnes, ‘Legal Breakthrough on Land Rights and Ending Secrecy of Land Ownership’ (ILC blog, 31 March 2016) <<http://www.landcoalition.org/en/blog/legal-breakthrough-land-rights-and-ending-secrecy-land-ownership>>.

111 VGGT paras. 3.2, 12.4 and 12.12.

112 See e.g. *Cola Giants Back Voluntary Guidelines on Land Tenure* (Food and Agriculture Organization of the United Nations, 2014) <<http://www.fao.org/news/story/en/item/224619/icode/>>.

113 E.g. *Guide to Due Diligence of Agribusiness Projects that Affect Land and Property Rights* (Comité Technique Foncier et Développement, 2014) <<http://www.foncier-developpement.fr/wp-content/uploads/Guide-to-due-diligence.pdf>>; *Respecting Land and Forest Rights: A Guide for Companies* (Interlaken Group and Rights and Resources Institute, 2015) <<http://www.interlaken.org/downloads/Guide-bdf36ef9b283d606913f3c0e7adb153.pdf?vsn=d>>; Analytical Framework for Land-Based Investments in African Agriculture (New Alliance for Food Security and Nutrition, 2015) <<https://new-alliance.org/resource/analytical-framework-responsible-land-based-agricultural-investments>>; *Operational Guidelines for Responsible Land-Based Investment* (United States Agency for International Development, 2015) <http://www.usaidlandtenure.net/sites/default/files/USAID_Operational_Guidelines_updated.pdf>.

coordinated development of multiple derivative instruments was found to have caused some confusion among businesses eager to identify a clear, readily available set of workable standards.¹¹⁴

There is little data on the extent to which these materials are being integrated into corporate policies and practices, including any investment-related contractual arrangements. Anecdotal evidence suggests that much work remains to be done. Recent interventions have focused on developing practical approaches to deal with land issues in an investment context, including through ground-testing international guides and toolkits.¹¹⁵

Another set of issues concerns the role that development finance institutions (DFIs) could play in improving private sector practice – by leveraging their position at the interface between development and commercial worlds, and the influence they could exert over borrowers and investees. Some DFI policies express support for the Tenure Guidelines.¹¹⁶ But social and environmental standards tend to be primarily based on those of the International Finance Corporation, which are framed in more operational terms than the VGGT. A recent study highlighted both similarities and differences between IFC performance standards and the Tenure Guidelines, pointing to work that could be done to better integrate VGGT guidance into lender standards and arrangements.¹¹⁷

114 E.g. Hall, Scoones and Henley (n84) 30.

115 See e.g. the pilot projects supported by the Challenge Fund of the Land: Enhancing Governance for Economic Development (LEGEND) programme, financed by the United Kingdom's Department for International Development (DFID) <<https://landportal.org/partners/legend>>; and the 'responsible land-based investment' pilots supported by the United States' USAID <<https://www.land-links.org/project/pilot-responsible-land-based-investments/>>.

116 See e.g. Schedule 5 of the Code of Responsible Investing of CDC, the United Kingdom's DFI ('Recommended Practices Promoted by CDC'); Code of Responsible Investing (CDC, 2017), <<http://www.cdcgroup.com/How-we-do-it/Responsible-Investing/Our-Investment-Code1/>>.

117 Michael Windfuhr, *Safeguarding Human Rights in Land-Related Investments: Comparison of the Voluntary Guidelines on Land with the IFC Performance Standards and the World Bank Environmental and Social Safeguard Framework* (German Institute for Human Rights, 2017) <http://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/ANALYSE/Analyse__Safeguarding_Human_Rights_in_Land_Related_Investments_bf.pdf>.

5.5 Cross-cutting Remarks and Implications For Legal Support Initiatives

This cursory and inevitably selective review of initiatives to implement the Tenure Guidelines illustrates the multiple relevant sites of action – from grassroots initiatives to national law reform, through to private sector engagement. The review sustains a pluralistic account of processes to translate guidance into practice, and points to the feedback loops between actions in different arenas – for example, with civil society influencing the development of international guidance and then harnessing that guidance in their work at local and national levels.

In this pluralistic framework, the Tenure Guidelines can mean different things to different actors, and – far from being merely a technical process – their implementation can involve contestation between competing approaches and interpretations. For example, support to private sector tools triggered debates about the most appropriate entry points for implementing the Tenure Guidelines, with some NGOs and social movements raising concerns about what they saw as a 'business turn' in VGGT implementation – that is, the prioritisation of initiatives to help the private sector implement the Tenure Guidelines over efforts to comprehensively reform governance from the bottom up.¹¹⁸ In the words of some commentators:

Inevitably, different actors see the VGGT in different ways. Some regard them as presenting an opportunity to improve existing state policy or business practice; others have a more transformative agenda, seeing opportunities not only to protect existing rights but also to promote new rights through redistributive measures or to restore rights through restitution mechanisms.¹¹⁹

118 See the public statement 'The Guidelines on the Responsible Governance of Tenure at a Crossroads' (10 December 2015) <http://www.fao.org/fileadmin/user_upload/reu/europe/documents/Events2016/vggt_bp/2.pdf>. The statement was signed by La Via Campesina and several other social movements and NGOs.

119 Hall, Scoones and Henley (n84) 40, citing Jennifer Franco, Sofia Monsalve Suárez and Saturnino M Borras Jr, 'Democratic Land Control and Human Rights' (2015) 15 *Environmental Sustainability* 15.

These cleavages go beyond well-rehearsed divides between the private sector and civil society. For example, some commentators noted differences in the approaches taken by ‘professionalised’ NGOs that promote implementation through development projects, and social movements that seek to renegotiate governance through more explicitly political agendas.¹²⁰ Partly cutting across this divide, different nuances also exist between initiatives that promote change through bottom-up empowerment and grassroots citizenship, and global advocacy not always rooted in local processes.

At the same time, there is scope for synergy between diverse perspectives and approaches. Several of the initiatives reviewed rested on partnerships between actors with complementary expertise in different areas of law and practice, and with the ability to act at different levels and in different places. Implementing international guidance within national jurisdictions may well involve transnational partnerships and alliances. Anecdotal evidence also suggests that the existence of the Tenure Guidelines can facilitate collaboration between government and civil society within each jurisdiction – because it can reframe civil society demands for law reform from a ‘political ask’ to assistance in bringing governance systems into line with international best practice.

From a legal standpoint, these considerations highlight the diverse pathways for using the law to give effect to international guidance – from technical assistance for states to review and reform their national legislation, through to grassroots action that supports bottom-up gap analysis and citizen participation in reform processes. Further, comprehensive law reform provides the most obvious route for addressing any gaps in systemic terms; but a wider range of entries can be explored to give effect, in a legal context, to international guidance, including any contractual arrangements between businesses and states, and between companies and their lenders.

Any initiatives to harness the law in implementing the Tenure Guidelines would need to be informed by a careful consideration of these diverse possible pathways for promoting change. And while lawyers are traditionally trained to leave politics at the door, choices

on pathways can themselves have political connotations, and politically savvy design and implementation are essential if legal support initiatives are to negotiate the difficult terrains that tend to characterise resource governance.

With regard to national law reform, traditional legal support initiatives have often focused on delivering expertise to inform legislative drafting. The Tenure Guidelines, and experience with their use to support grassroots analysis, deliberation and advocacy, point to the need for law reform to proceed from the bottom up. This calls for action to help citizens shape the reform agenda – from the diagnostic stage to law reform. In turn, this requires complementing legal expertise with a wider range of skillsets, and developing effective approaches that link local agendas to national policy.

6 CONCLUSION

The development of the Tenure Guidelines has created hopes among those working towards more just and effective resource governance. In October 2017, a Technical Thematic Forum convened to commemorate the VGGT’s fifth anniversary concluded, in rather positive terms, that ‘the VGGT have contributed to remarkable shifts in land governance’.¹²¹ More implementation time is needed to assess the effectiveness of the Tenure Guidelines in changing policy and practice over the longer term. The analysis presented in this article provides some insights on the changing nature of resource governance in its local-to-global dimensions.

¹²¹ Food and Agriculture Organization of the UN, *Key Messages: Outcome of the Technical Thematic Forum to Commemorate the 5th Anniversary of the VGGT* (Rome, 5-6 October 2017) <<http://www.fao.org/3/a-i7993e.pdf>>. For a discussion, see Anna Locke, ‘The VGGT Five Years On: Are They Changing Lives?’ LEGEND Land Policy Bulletin, Issue 9 (December 2017) <<https://mailchi.mp/landportal/legend-bulletin-7can-technology-revolutionise-efforts-to-secure-land-rights-2214793?e=c0f2124b7b#mctoc6>> 1-2.

¹²⁰ Hall, Scoones and Henley (n84).

The VGGT provide comprehensive guidance on issues that were long considered to fall within the exclusive remit of domestic jurisdiction. Located outside the realm of international law, the Tenure Guidelines nonetheless present elements of normativity, and have legal significance in both national and international spheres. The very fact that states agreed to negotiate international guidance on land governance, the unanimous endorsement of the Tenure Guidelines by the CFS, and the subsequent numerous statements of high-level political support for the Tenure Guidelines are all a reflection of how perceptions about the appropriate boundaries of national and international governance have shifted in recent years.

In line with the voluntary nature of the VGGT, implementation has mainly been supported through a diverse (and not always coordinated) patchwork of initiatives working in different contexts and through different entry points. This diversity of initiatives points to the multi-site, multi-actor and contested nature of efforts to implement soft-law instruments, and to the iterative processes that can link local practice to international standard-setting. In this context, the law lies at a critical juncture. This is not only because, depending on the situation, giving effect to the VGGT may require embedding their guidance into national law; but also because harnessing the Tenure Guidelines can open spaces for citizens to interrogate and activate the law from the bottom up.

There is a need to monitor the implementation and outcomes of the Tenure Guidelines – both to sustain VGGT implementation through learning and peer pressure, and to develop a robust evidence base on the effectiveness of soft-law instruments, including relative to binding law. With implementation underway, there is an opportunity to rigorously test the theory of change that underpins soft-law instruments such as the Tenure Guidelines: can these instruments promote real change, under what conditions, and through what constellations of actors and processes? The lack of institutionalised arrangements for independent, systematic monitoring at the CFS creates the need to explore alternative vehicles to conduct such monitoring.¹²²

Lawyers can help advance this agenda by devising bottom-up methodologies to assess, monitor and debate national law against the Tenure Guidelines; supporting the design and implementation of contextually tailored reforms that embed VGGT guidance into national law; and developing legal empowerment initiatives that help citizens to appropriate the Tenure Guidelines and engage with the design and implementation of the law.

¹²² *ibid* Locke, 2.

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