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Just standards: international regulatory instruments and social justice in complex resource conflicts

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Abstract

Climate change mitigation and land grabbing are distinct but not isolated phenomena. There is evidence that their intersection and interaction contribute to rapid agrarian transformations with dire social and ecological spillover, including the onset and aggravation of conflicts. Several existing human rights instruments are applicable to such spillover situations and are preferable to other kinds of regulation, as they tend to be seen as more legitimate by those adversely affected. With insights from Cambodia and Myanmar, this paper argues for a recalibration of analysis and action on climate change mitigation and land grabs that moves beyond regulation in each isolated case and toward integrated solutions.

KEYWORDS: Climate change; agrarian transformation; land grabbing; conflict transformation; regulation

The environmental, social and gender impacts of climate change mitigation strategies (biofuels, REDD+ (Reducing Emissions from Deforestation and Degradation) and hydropower projects portrayed as renewable energy) and of land grabbing continue to capture the attention of scholars, practitioners, government and civil society actors. Relevant research often investigates these processes separately and confined within discrete temporal and spatial boundaries (such as a particular landholding) where dispossession or competing land claims occur. Yet, evidence from the ground increasingly points to the need for a wider analytic lens, such as landscape or region. It is the intersection and interaction of these phenomena that can produce social and ecological spill-over effects, chain reactions and ignite new or aggravate old sets of competing claims and conflicts over resources within a wider area.

When climate mitigation initiatives and land deals overlap, compete or run in parallel, they do so not just spatially or temporally, but also institutionally, in terms of policies, land claims, community social dynamics and mechanisms for settling disputes. Future conflict and cooperation outcomes, particularly gendered ones, will depend on intersecting struggles of power and meaning in the construction of narratives and contestations around the grabbing of one resource or another (land, forest, water, fisheries or aquatic resources, or some combination of these). Understanding specific conflicts in a particular moment in time requires analysing the wider spatial, social-ecological and historical-institutional conditions and circumstances in which they arise. Only then can we contemplate appropriate interventions for influencing their trajectories in the direction of greater social justice.

For those interested in promoting social justice-based solutions in these situations, some kind of regulatory mechanism may be relevant and useful under certain conditions. An array of national and international mechanisms, processes and bodies are available to respond to issues arising from the related ongoing agrarian transformations. Broadly referred to here as international regulatory instruments,[i] such mechanisms are increasingly considered as potential solutions to many of today's natural resource related problems. However, from a social justice and political legitimacy perspective, a clear distinction must be made between international instruments adopted by states, such as the human rights treaties, and those instruments that are established by corporations for the ostensible purpose of corporate social responsibility. The former are grounded in international human rights law and within the state system, while the latter are essentially attuned to corporate interests (see Coumans 2017).

After 2008, following the (re)new(ed) global attention to land grabbing, a number of initiatives emerged – ranging from intergovernmental guidelines (Principles for Responsible Agricultural Investments jointly developed by UNCTAD, IFAD, FAO and World Bank) to corporate-led self-regulation (for example, Bonsucro, which is a multi-stakeholder membership based organization which promotes 'responsible' sugar production including through certification of standards, and whose members include big corporations alongside farmers, end users and civil society) – ostensibly to influence how investments are carried out in relation to social and environmental concerns.[ii] While potentially useful, there is a tendency to apply regulatory instruments according to the project parameters of an investment or

initiative in isolation and within a single landholding, as if this is how such processes actually unfold in reality. While in some instances, a 1:1 correspondence ratio may be relevant, this is not the case in others. Often, these phenomena intersect and interact to produce complicated situations with social and ecological effects that spill over the initial project parameters. Even if an intervening actor – be it a company or the state – is willing to apply or use human rights in regulating an intervention, in practice their sense of obligation might still stop at the physical or time boundaries of their project, which would effectively indicate a different logic at work than human rights.

With insights from Cambodia and Myanmar, this paper problematises the complex reality currently unfolding in Southeast Asia, and calls for recalibration of analysis of international regulatory instruments and action, including moving beyond a 1:1 application of regulation to a single case in isolation. Assuming that international regulatory instruments can help avoid conflict or direct conflict dynamics towards more socially just outcomes, it is argued that their effectiveness depends not only on the underlying legitimacy of the instrument deployed but on other factors such as interpretation, context and strategy.

Background

Cambodia and Myanmar present similar yet different contexts, opportunities and challenges for the deployment of international regulatory instruments with regard to the intersection of climate change mitigation initiatives and land grabbing (and the conflicts these might ignite). Both countries have allowed, and sometimes proactively promoted, the exploitation and extraction of value from land and forest resources by elite, military and private companies. Agribusiness development has taken the form of large scale flex crop and tree monocultures and has often entailed displacement or eviction of local communities. Climate change mitigation activities are also ongoing in both countries, albeit more evidently labeled as such in Cambodia where the discourse and rhetoric is being used to justify large scale forestry plantations, for instance (Scheidel and Work 2015). Cambodia is also a REDD+ ready country, meaning that concrete projects exist on the ground, though the collection of carbon credits is yet to start. In Myanmar REDD+ plans exist but there are no projects at time of writing, although hydropower projects are increasingly (re)framed as climate change mitigation (Borras et al. 2015).

Both countries have embraced ambitious socio-economic and political reform agendas, although much earlier in Cambodia (1992) than in Myanmar (2011). This time lapse means that, for instance, Myanmar has not accessed and ratified most human rights instruments (see table 1 below), whereas Cambodia ratified most of them from 1983 onwards, including the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of all Forms of Discrimination against Women. The institutional set up and framework, as well as institutional capacity, is much more established in Cambodia than it is in Myanmar. For instance, in Cambodia, the 2001 Land Law sets the framework for tenure rights in the country, including in terms of indigenous people's access to communal land titles. There is currently no equivalent comprehensive piece of legislation in Myanmar, but

existing legislation does not recognise customary land rights or communal lands and instead sees these areas as "vacant, fallow and virgin" land and earmarks them for large-scale (foreign) investment.[iii]

INSERT TABLE 1 HERE: Status of ratification of human rights instruments in Cambodia and Myanmar

Reality on the ground in both countries is marked by multiple, discrete land-based interventions and initiatives – either in more or less the same place (but different historical periods), at more or less the same time (but in different spaces), or both in the same place and at the same time. As in many societies where land and water grabbing is occurring, the two countries exhibit an overall failure to address land-based conflict (Deininger 2011; Collier and Hoeffler 2005).

Meanwhile, the regulatory landscapes in which these interventions overlap and interact are characterised here as "plural legal", with numerous regulatory fields competing for standing on the ground and the state law being just one of these. To illustrate, in Cambodia's Prey Lang Forest, a once-massive contiguous forest area, conservation and exploitation is occurring in a contested field of power occupied by private companies, conservation organisations, government ministries and the communities who have inhabited and used the territory for generations. Each actor in the landscape is attempting to assert its own understanding of who has which rights, to which land, for how long and for what purpose; each attempts to perform this allocation of natural resources in society. Likewise, in Myanmar's Northern Shan State sub-region, in addition to the state military and numerous ethnic armed groups, other actors are recasting the landscape and existing patterns of social relations through: mining concessions, illegal logging, tree plantations billed as "conservation", agribusiness linking flex crop production to processing plants near the border, hydropower dam projects and China's opium substitution program being used by entrepreneurs as a stepping stone to amass large landholdings. In both of these rapidly changing landscapes, state law is just one actor, among many, and very often is not the most authoritative actor on the ground, while localised customary law systems continue to operate simultaneously. Plural-legal settings can vary from one place and time to another, and thus play a variable role in structuring limits and opportunities for competing rights claims and in shaping resource related conflicts (Franco, 2011).

However, institutions and processes that could contribute to preventing or transforming complex resource conflicts may be weak or absent in the very places and at the scale where they are probably most needed. In the case of complex resource conflicts (involving intersection and interplay of multiple initiatives and grabs), for example, the issue of scale is important. Village level customary practices are often very relevant and appropriate for handling social conflict within a village and between parties of relatively equal status. But the same institutions may not be geared toward addressing conflicts that spill over village boundaries to involve multiple villages at a time. They may not be capable of handling conflicts where one party is relatively more powerful than another. Institutional strength is partly about capacity and partly about autonomy vis-a-vis powerful actors/interests in society (Fox 1994). "Institutional capture" and the

veto power of landlords help to explain why, historically, in predominantly agrarian societies marked by inequality, democratising the distribution of land (through titling programs, through redistributive reform or through land restitution) is extremely difficult. Similarly, the notion that "water flows to power" resonates because it draws a link between decision making control and political power and water allocation outcomes (Roth, Boelens, and Zwarteveen 2005, 2).

Recalibration of analysis and action

In both Cambodia and Myanmar, one cluster of increasingly prominent land-based interventions and initiatives involves generic land grabbing on the one hand, and climate change mitigation on the other hand. When it hits the ground, either sort of activity may engage existing structural and institutional fault-lines, potentially reigniting old conflicts or tensions or triggering new ones. But the more complicated and potentially explosive situation is when land grabbing and land-based climate change mitigation start to overlap, interact with and reshape one another (Hunsberger et al. 2017). In the Prey Lang Forest, villagers are being squeezed between expanding government-awarded economic land concessions on the one hand, and initiatives labeled as climate change mitigation activities, such as forest conservation, on the other hand (see Scheidel and Work 2015). Members of the grassroots Prey Lang Community Network (PLCN) seeking to protect the forest and defend their place in it against illegal logging and deforestation by companies have suffered violent attacks by armed assailants.[iv] In the Tanintharyi Region in Myanmar, government forest preservation for carbon sequestration initiatives and international environmental NGO-driven marine, forest and wildlife conservation projects are accommodating large-scale land-takings that are consuming forest and forest communities: an expansive Navy confiscation area eating up villagers' long-standing cashew orchards and community forests, numerous mining concessions contaminating traditional local water sources, a sprawling Special Economic Zone (SEZ) and a major highway slashing through kilometers of old-growth forest to connect Thailand to the Andaman Sea, and expanding oil palm and rubber concessions (and the lucrative large-scale logging that precedes them). Villagers are especially vulnerable when concessions and conservation need the land but not the people on it, as Li (2011) puts it.

In addition to recasting the way land is used, in both Cambodia and Myanmar, this convergence of economic land concessions and forest conservation-as-climate change mitigation build on portrayals of villagers' customary ways of life and production as destructive and/or inefficient (Borras et al. 2017), therefore (re)producing narratives that can make the new arrangements seem more acceptable as part of the process of taking control of the land away from the villagers (Scheidel and Work 2015). In Myanmar, portrayals of shifting cultivators as forest destroyers originate in nineteenth century colonial rule when, "as Colonial forest departments entered into competition with swiddeners for control of land, they began to characterize swidden cultivators as primitive, unproductive, even 'pre-agricultural' in contrast to forester's so-called 'modern', 'scientific' management'". [v] Fast-forwarding to today, according to one close observer, "[m]any of the [resulting] policies, and the hostile assumptions and attitudes on

which they are based, persist to this day. Even though they are rarely based on more than subjective preference, they have been selectively employed to unfairly de-legitimate cultivators' rights in ways that would be inacceptable for lowland cultivators." [vi] As one study notes, while the debate on the persistence or demise of swidden cultivation has never ceased amongst governments and academics:

> From the United Nations Framework Convention on Climate Change in 1992 to the Kyoto Protocol in 1997, the policies of inter-governmental organization have immensely promoted research on the relationships among swidden agriculture and forest degradation and global warming […] Negative perceptions from governments towards swiddening in general in SEA have accelerated the demise of this traditional swidden system. (Li et al. 2014, 1656, 1658)

In such settings, national and international development workers, activists, or company officials in charge of corporate social responsibility may seek to promote one or another international regulatory instrument as a potential solution, often in the name of conflict mitigation or conflict resolution. But too often deployment of such measures, when it occurs, fails to take into account the interaction of multiple resource grabs, hence the need for recalibration of analysis and action. Similarly, evaluating rule-of-law and justice reform initiatives in the early 2000s, Carothers (2003) found them suffering from a profound knowledge deficit with much to be learned and unlearned, at a time when such initiatives were still high on official development aid agendas. He observed that the nature and consequences of proposed rule-of-law changes often eluded legal reformers, and that the field of rule-of-law promotion was slow to scale up empirical knowledge gained in practice into lessons learned. He drew attention to the "embedded obstacles to the accumulation of knowledge [that] exist below the surface" such as: (1) the complexity and diversity of societies and of how law functions and operates and (2) the weak impulses of aid organisations and lawyers to undertake systematic "rule of law in society" knowledge-accumulation (Carothers 2003, 14–15). The resulting knowledge deficit ended up reinforcing existing tendencies toward top-down, technical reforms (Decker, Sage, and Stefanova 2005).

From a regulatory perspective, and with insight from Carothers, perhaps it warrants asking the following: Is what is perceived as one problem, in fact a cluster of problems? Are the tools of analysis and action being brought to bear – including relevant international regulatory instruments – more suited to dealing with a single (type of) initiative/intervention at a time, and to what extent can they deal with a cluster of problems? Climate change mitigation initiatives and land grabbing incidents each have the potential to revive old conflicts and spark new conflicts. When they arise at the same time or spill over into the same landscape, their intersection and interplay may turn seemingly discrete conflicts into a "conflict cocktail". How to address these complex situations with different possible aggravated conflict scenarios is not obvious.

Regulatory initiatives do not necessarily or automatically detect these interactions, nor do they necessarily or automatically adjust to the interplay even if detected. Would-be regulators of conflict, whether they are from the government, the private sector or the civil society sphere, may simply find it easier to focus on just

one problem, rather than a cluster of problems. A given regulatory intervention may be programmed to focus on just one type of situation, and the implementers of that program simply unable to adjust even if a cluster of problems is detected. To what extent does focusing on just one problem, for whatever reason, have the potential to aggravate rather than regulate conflict? Meanwhile, not all regulatory interventions are the same either. The realm of regulatory interventions and of (inter)national governance instruments is also highly differentiated. For example, today, there are very sharp differences in how the US Government and many indigenous peoples movements in the world understand and use the principle of Fee, Prior, and Informed Consent (FPIC), and when these different understandings are deployed in the form of a particular regulatory initiative, it is more as an assertion of which particular understanding should prevail over and against another, than as an expression of a universally agreed understanding. Given that a lack of consensus surrounding the meaning and purpose of different international regulatory instruments is indeed part of the regulatory landscape today, which understanding of which "standard" ought to apply in a given situation? And equally important, what are the implications and consequences of using one understanding and standard over another?

With these questions in mind, this article aims to lay some analytical foundations for exploring the idea that recalibration of analysis and action described earlier must also problematise the use of international regulatory instruments. The point is not to criticise using them in general, or any one instrument in particular, but rather to put forward some preliminary theoretical reflections on the following question: where discrete processes of land concessions and land-based climate change mitigation/adaptation and conservation overlap, interact with, and reshape one another, under what conditions can which international regulatory instruments contribute to transforming conflict in the direction of greater social justice?

Regulating and transforming conflict

A plural-legal approach (von Benda-Beckmann 2001) combined with Bourdieu's (1987) concept of "fields of action" allows rural landscapes to be viewed as regulated but dynamic spaces, marked by the co-existence of several fields of social regulation, where state law is just one among several competing for standing.[vii] This anthropological view of law emphasises the social, political, economic and intellectual context of enforceable norms, and the role of state and non-state actors in making them authoritative in society. Such an approach allows "Inquiries […] into the way norms are generated, how mandatoriness is created, and how regularities are maintained" (Moore 2005, 1). For instance, until recently in Western societies, a variety of social regulation, including religious law, local customary law and personal law, historically coexisted and competed with state law. The interplay of various regulatory systems determined which regulatory field held greater sway relative to the others, and the outcomes could vary over time and from one locale to another. By the end of the last century, neither "increasing centralisation of authority" nor "increasing importance of international and transnational legal obligations and institutions" has erased non-state law fields or undermined the "complex array of jurisdictions" they entail (Cotterrell 1992, 28).

Legal pluralism characterises many countries in Southeast Asia today, and it is not unusual to find Shari'a systems existing alongside (diverse) customary systems, and both of these existing alongside national Constitutions and statutory systems – what Bourdieu (1987) calls the "juridical field" comprising the ensemble of national official institutions, agents, legal instruments and norms particular to a given national territory. This juridical field is constitutive of the state, but not coterminous with it, since it is reproduced by the actions not only of state agencies and judges, but also lawyers, law firms, professional associations, non-governmental law reform organisations and civil society rights-advocacy groups (Houtzager and Franco 2003). The juridical field may be central to state law making, but it is not necessarily or automatically central to "making law matter" in society (Crook 2001). Instead, it is just one of several fields of action where people may actually end up going to regulate conflict and get redress and protection. Another is customary law, where face-to-face dispute processing by ordinary people at the village level may involve direct negotiation, informal mediation, retaliation and other customary practices to address their grievances.[viii] Customary law practices have raised concerns over how so-called "traditional authority" and customary law allows injustice to creep in, to the detriment of women and the landless rural poor (Agarwal 1994). It is relevant to note that villagers may sometimes resolve a conflict simply by "lumping it" in order to restore social harmony (Galanter 1981). Insights from Africa suggest that because both state-juridical systems and customary systems can produce unjust outcomes, the question for research is how different people or groups of people negotiate such plural legal contexts in their efforts to claim rights and get justice (Ikdahl et al. 2005).

Using a legal pluralism lens does not assume that the co-existence of different regulatory systems is necessarily smooth or unproblematic or even always visible to every actor or observer. There may be competition and/or complementation between what Colchester and Chao (2011) call "diverse paths to justice", and more localised regulatory paths may or may not mesh well with regulatory pressures and instruments originating from "outside". Such an approach, however, makes possible better detection of diverse and possibly competing understandings of justice that different parties to a conflict may bring to bear. "Making law matter in society" can then be seen as a process that extends to and is partly contingent upon the perceptions and choices, and actions and interactions, of individuals or groups who may be seeking justice or looking to resolve a dispute or to address a grievance. In theory, aggrieved individuals and groups on the ground contribute to determining where and when conflicts emerge out in the open, which regulatory order(s) are activated in response, and whether and how these conflicts get resolved or transformed. But exactly how and how much they contribute is an empirical question that invites further investigation.

Resolving or transforming conflict increasingly invokes application/use of international regulatory instruments by different actors, but is not necessarily or automatically determined by these alone. Increased interest in using international regulatory instruments to address conflict in places where climate change mitigation initiatives and land grabbing is occurring has been driven in part by a perceived "weakness" of state/ juridical institutions in handling the resulting

conflicts. This is part of the declared logic, for instance, behind increased corporate interest in using international governance mechanisms to regulate natural resource allocation and use in relation to the so-called "global land rush" in recent years. But the understandings of the associated conflicts and the instruments chosen to regulate them can vary considerably, as can the legal reform measures prescribed to address perceived underlying institutional weaknesses. For instance, "…the [World] Bank's legal reform focus is on the ability of legal systems to facilitate market transactions by defining property rights, guaranteeing the enforcement of contracts and maintaining law and order".[ix] By contrast, some critics of the World Bank have argued that women's individual land rights have been used as a trojan horse for neo liberal agricultural and land masking commodification and privatisation of land rights under human rights language while obscuring the need to strengthen women's distinct right to land in different tenure systems (O'Laughin 2009; Monsalve 2006). For some, "[i]ndependent judiciaries and functioning court systems are clearly important tools for human rights protection" (Harris 2007, 1), while for others, it is more about protecting property rights.

state justice institutions may be (1) vulnerable to elite capture and (2) inaccessible either "because they are incompatible with local norms and customs and they are physically or economically inaccessible, or because people lack the knowledge or capacity to navigate the system".[x] "[I]nstitutional safeguards, transparency, and the existence of a civil constituency" may thus be seen as relevant measures needed to boost judicial independence and accountability.[xi] All this may seem logical and appropriate at first. Yet the way forward still remains obscured. For example, how exactly does increased transparency boost public accountability? As Fox (2007, 350–351) has noted, transparency does not necessarily or automatically produce accountability; and only certain types of transparency might do so, and then only under certain conditions. Too often, global prescriptions rely on analytical frameworks that ignore the wider regulatory field, institutionalised inequalities and the agency of different actors that inhabit the ground where they are introduced, while also ignoring complex process-to-outcome pathways, which can then impede access to justice and leave what some aggrieved parties perceive as the real conflicts to fester unresolved.

Analytically, bringing international regulatory instruments to bear in situations marked by natural resource conflict or cluster of conflicts is perhaps best understood as a contingent, dynamic – and potentially contentious – political process that unfolds in the "shadow of the law" (Cooter, Marks and Mnookin 1982), where "law" in a general sense comprises the entirety of what Galanter (1981, 6) refers to as the "background of norms and procedures against which negotiations and regulations in both private and government settings take place". How this process unfolds can vary across time and place, since no law or regulatory instrument is self-interpreting or self-implementing. Instead, laws and regulatory measures are interpreted and implemented in specific historical-institutional contexts by real "flesh-and-blood" people whose perceptions, interests, political calculations and power resources are variably shaped by personal experiences and by "structures inherited from the past" (Houtzager and Franco 2003; Franco 2011, 2014). The perceptions, interests, meanings and purposes that get activated by or end up tapping into these processes can also

influence whether and how any given international regulatory instrument is taken up and where it might lead.

Problematising the use of international regulatory instruments

An array of national and international mechanisms, processes and bodies have emerged and are being used in response to issues arising in an era of "global land grabbing" and related fallout in terms of agrarian transformation. Numerous international initiatives, from intergovernmental guidelines to corporate-led self-regulation, aspire to influence how investments are carried out in relation to social and environmental concerns. Such mechanisms are increasingly taken for granted as potential solutions or part of a solution to many of today's natural resource related problems. International governance is often approached as a matter of applying certain fit-for-purpose procedural instruments or technical tools in order to obtain more or less anticipated results, or implicitly makes one-size-fits-all assumptions about where they are relevant or appropriate. It is increasingly taken for granted that different international regulatory instruments are on equal footing in terms of their origins and legitimacy. These assumptions are problematic. Any situation that is deemed illegitimate by those who are affected is likely to be worsened if the regulatory response is likewise deemed illegitimate. In the following sections, we reflect on these issues and put forward four propositions for a more calibrated approach to international governance that promotes social justice outcomes

Proposition 1 – interpretation

"Making law" is a core process in society that includes, but also goes beyond what happens in national legislatures and courts, to involve struggles between different actors (state and non-state) to make their preferred interpretations of regulatory norms and rules authoritative in society (Houtzager and Franco 2003). Competing interpretations of what counts as good governance, deployed or performed by different actors in the field, are also factors in shaping how natural resources are being allocated, used and managed. Relatedly, different forms and degrees of legitimacy may shape the interpretation and enforceability of different instruments, for instance human rights treaties vs. corporate-led instruments. It is thus important to problematise the very concept of "good governance" in the context of the international political economy in which the different initiatives arise (Margulis, McKeon and Borras 2014).

Interpretation and use of the international human rights principle of Free Prior Informed Consent (FPIC)[xii] is illustrative (Franco, 2014). Use of FPIC or its functional equivalents ("community engagement") is on the rise in land and natural resource governance initiatives globally[xiii] following calls for greater transparency and full disclosure in big land deals. Yet very different actors with very different purposes in mind and in different settings translate the principle into practice very differently. For some, FPIC is a basic democratic principle that includes the right to veto. For others, FPIC enables outcomes where both communities and companies benefit, even if such sharing of resources and benefits of use is not automatically or necessarily promoting social justice (IIED 2012). For still others, FPIC is a tool for averting social conflict, while providing

social license for deals to proceed (minus the social conflict and its disruptions and costs to developers).

The example raises several issues. First, who is initiating which instrument for what purpose? Second, how can one know when a given standard (whether FPIC or some other) has been truly met? Achieving consent, for example, is not necessarily the same as people having had a real choice to begin with, and in many land grabbing hotspots in Myanmar, for instance, too often the choice offered to villagers when their consent is sought is between quitting their land with compensation or without. Third, to what extent can consent be treated as a one-time, isolated and fixed outcome when in actuality communities are differentiated, projects are fluid and impacts are experienced within a larger, living landscape? Some villagers may resist at the start and later switch to acceptance, while others may end up withdrawing initial acceptance. Or, some villages that were not affected initially, may get drawn in due to spillover or chain-reaction effects, such as when villagers displaced by a hydropower dam project move, or are moved, onto land in adjacent villages. Fourth, who is making law on natural resources, and from which gender perspective specifically, whether in terms of formulating regulatory responses in corporate offices or state corridors, or in terms of interpreting them in the field?[xiv] What are the varied ways in which gender is considered and manifested in regulatory mechanisms around natural resources? What are the risks of exclusion of women from the associated processes, and conversely, which kinds of processes might favor women's inclusion? Relatedly, in what ways is the perceived legitimacy of a given regulatory instrument gendered, thereby shaping its use or reception in the field?

Finally, if there are opportunities, there are also limits to interpretation, and so analysis must consider that by design some instruments may be less open to interpretation (including social justice interpretations) than others.

Proposition 2 – (pro-social justice) design

Here, different specific international regulatory instruments can be situated along a continuum – for example, as hovering somewhere between a more "pro-business" pole and a more "pro-social justice" pole, using criteria to locate them initially and to track changes in their character over time (vision and process of development, who participates, are the human rights based, do they promote social justice, gender equality) as illustrated in Figure 1 below.

INSERT FIGURE 1 HERE: The continuum of international regulatory instruments

While some international regulatory instruments may be more pro-social justice by design, design alone may not impede or promote social justice in practice. Also relevant is the inclusiveness of the process by which a given instrument is developed, as well as its relation to human rights. Even when a regulatory response ostensibly is, by provenance and design, pro-social justice, this does not necessarily or automatically make it so in practice. The CFS Tenure Guidelines (TGs), for instance, were drafted through what is widely considered a highly participatory process – consultations with more than 1000 people from governments, CSOs, private sector, academia and international organisations,

from nearly 150 countries. The TGs are explicitly human rights based and include among the principles for implementation non-discrimination, equity and justice, gender equality and accountability, among others. Although they are a soft law instrument (in contrast to the International Covenant on Economic, Social and Cultural Rights (ICESCR), for instance, which is legally binding once accessed by the states),[xv] since their adoption in 2012, one can find the TGs being deployed by a wide range of actors, in a variety of ways, including for purposes that could be said to undermine some actors' visions of social justice.

Accessibility is another basis on which to assess the extent to which a given regulatory instrument is pro-social justice. For instance, the Roundtable on Sustainable Biomaterials certification scheme does have a zero-tolerance policy for involuntary resettlement and grievance mechanisms to address conflict. Yet the process for presenting a grievance is complex and not easily accessible, particularly for individuals, and presents limitations in terms of time (past 12 months), number of appeals (only one allowed) and type of grievances (those falling outside the predetermined typology are considered inadmissible). In another example, the IFC Performance Standards on Environmental and Social Sustainability state that land acquisition and involuntary resettlement (both physical and economic displacement) are to be avoided or minimised, with compensation being provided if displacement cannot be avoided. But the definition of FPIC is watered down to a 'good faith negotiation between the client and the Affected Communities of Indigenous Peoples', which does not necessarily require unanimity and may be achieved even when individuals or groups within the community explicitly disagree.

To support pro-social justice analysis and action, it makes sense to privilege international regulatory instruments that come out of more inclusive processes, as well as those that are explicit in their human rights foundations, while being attentive to their plural interpretations, discourses and uses. But where multiple land grabbing and land-based climate change mitigation initiatives overlap, interact with and reshape one another, as in Myanmar and Cambodia, attention must be given to competing interpretations across multiple, intersecting initiatives and how these may undermine or reinforce each other.

Proposition 3 – context

International regulatory instruments may take on varied meanings and operational characteristics depending on the historical-institutional context, including the locally-specific assemblage of rules and procedures (informal and formal) that have been socially constructed and reconstructed over time.

For instance, in Cambodia, the Hun Sen government has dismissed the TGs completely on the grounds that the country already has a well-established legal and policy framework around land and natural resource management and administration – and arguing that it is only the implementation which poses problems. The government's stance, in turn, has meant that Cambodian civil society organisations have also largely chosen to not refer to the TGs in their advocacy and political work on cases of land grabs – at least for now. By contrast, some civil society organisations in Myanmar have begun experimenting with using

the TGs in their organising and advocacy work. The case of TG uptake in Myanmar shows how changes in a given context, however small and seemingly insignificant, can present new opportunities to influence law making. There, until recently, few observers could have imagined an official public consultation on a new national land use policy, or that it could be anything more than a demonstration consultation – held under highly controlled conditions and aimed at merely signaling rather than acting in good faith to international donors, governments, and investors.[xvi] Yet in October 2014 the Thein Sein government initiated such a procedure and programmed it to start and finish in two months. Whatever the intentions behind it, the official process unexpectedly lasted far longer and went far deeper than originally planned, as previously excluded social actors especially from "below" mobilised to politically engage and register their concerns and proposals, and as moderate political currents on the "inside" worked to accommodate these new voices. Exploiting the government's opening up to international standards (after decades of isolation), some civil society organisations and grassroots groups used the TGs to frame their criticisms and recommendations, which perhaps contributed to reshaping the policy in significant ways and pushing it in a relatively more acceptable direction.

Taken together, the examples from Cambodia and Myanmar show how the existing historical-institutional context – including changes in this context – can influence the political perceptions and calculations of key actors – including government authorities and civil society groups – on whether and how to take up which regulatory ideas, framings and tools that may originate from the international arena.

Proposition 4 – political strategy

In situations where powerful actors are converging to reallocate land and related natural resources away from rural working people, international regulatory instruments are likely to be perceived as legitimate by those (potentially) adversely affected if these are grounded explicitly in human rights principles and provisions because of the latter's core concern for remedying social injustice. Such instruments are likely to be most relevant if used in a way that opens up political space for affected people and peoples to organise and mobilise to put pressure on especially state authorities to act in their favor. With this in mind, international human rights instruments can be envisioned as having at least four tactical and strategic uses.

First, they can be used to inform and frame social movements' and other actors' understandings of the natural resource related problems that affect their lives and livelihoods, as well as the possible solutions to these problems.[xvii] The way in which some CSOs and grassroots social actors used the TGs to highlight the problem of land grabbing while validating their own responses to it during the public consultation on a draft national land use policy in Myanmar is a good example. Second, they can be used to make (more) visible gender dimensions of these conflicts, and to put forward more gender equitable social justice platforms. Again, recent experience in Myanmar provides an example: there, soft law and hard law human rights instruments (CEDAW, the Right to Food, and the TGs) were deployed by CSOs to expose serious weaknesses in the government's handling of women's land rights in the draft national land use policy, and to put forward

alternative policy proposals, many of which were eventually accepted. Third, multiple international regulatory instruments can be used to identify a range of (potential) institutional leverage points to be targeted by advocacy and collective action campaigns at different scales. Fourth, specific instruments can be used to develop "vertically integrated" strategies (Fox 2001), where state authority is targeted at different levels simultaneously in order to minimise aversion of responsibility through displacement (or "passing the buck").

Conclusion

In Cambodia and Myanmar, both climate change mitigation initiatives and land grabbing interventions are recasting the way land is used, while enflaming old or sparking new conflicts. National and international development workers, activists, or company officials in charge of corporate social responsibility may be tempted to launch their own interventions in these simmering complex situations, by promoting one or another regulatory response as a solution. To what extent such interventions are addressing – and capable of addressing – not one problem, but the cluster of problems (the overlap, intersection and interplay of activities that are each in their own way recasting land rights and land use) remains an open question.

In light of the above propositions, and in the context of complex landscapes where climate change mitigation initiatives and land deals overlap and intersect such as Cambodia and Myanmar, it makes sense to privilege the CFS Tenure Guidelines, for both analysis and action. This does not mean discarding other international regulatory instruments as inappropriate or irrelevant, but that there are compelling reasons to emphasise this particular international standard in in analysis and action on this specific project. The reasons are as follows:

First, the TGs alone were formulated to address and answer the underlying "land question" which is at the heart of complex resource conflicts, namely: Who should have what rights to which natural resources (land, fisheries and forests), for how long and for what purposes, and who gets to decide?

Second, the TGs are unique among the array of regulatory instruments most commonly being applied in today's resource conflicts globally in explicitly anchoring themselves in international human rights law. Not only do they make reference to various other specific international human rights instruments, but basic human rights principles have been directly integrated in specific provisions as well as globally throughout the document.

Third, the TGs are unprecedented in the degree to which they are imbued with political legitimacy. These guidelines, in contrast to other instruments currently in use, are the official product of a lengthy and inclusive intergovernmental negotiation and agreement, which uniquely involved the direct participation in the debates (but not in the final decision) of civil society actors, specifically NGOs, human rights organisations and social movement representatives, and was built upon a relatively extensive and intensive and inclusive formal consultation process.

Fourth, the TGs have immediate social relevance in complex resource conflict settings: their particular character (described above) means not only that states have an obligation to implement these guidelines, but also that civil society organisations and grassroots social actors need not wait for this to happen and can instead immediately make use of the principles and provisions contained in these guidelines to (re)frame their analyses and actions, including assessing their own situations, monitoring and evaluating government and company initiatives, and developing awareness raising, organising and mobilising strategies.

Finally, as a result of their particular orientation and character, the TGs have a wide-ranging applicability that is intrinsic to their purpose. Rather than being built to be used in relation to a specific project or initiative, they can be used for multiple types of interventions and initiatives that cut across policy arenas and issue areas. The TGs' built-in, wide-ranging applicability is especially relevant for situations such as the focus of our paper – where climate change mitigation initiatives and land grabbing impulses overlap, intersect and interact.

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[i] Here, we refer to international regulatory instruments, processes and monitoring mechanisms, tools and entities collectively as international regulatory instruments. However, these instruments vary considerably in terms of legitimacy, ownership, accountability and enforceability. For instance, "corporate-led" instruments are developed by private sector actors, sometimes together with civil society actors, as self-regulatory tools and can be sector-wide or company-specific.

[ii] Margulis, McKeon, and Borras (2013, 5) highlight "the rapid elevation of land grabbing onto the global governance agenda and a flurry of global rule-making projects at various scales involving a multiplicity of actors to regulate land-grabbing."

[iii] See TNI 2016. "The Challenge of Democratic and Inclusive Land Policymaking n Myanmar: A response to the draft National Land Use Policy". 13 (Accessed 5 April 2016). https://www.tni.org/files/download/the_challenge_of_democratic_and_inclusive_land_policymaking_in_myanmar.pdf.

[iv] See http://iphrdefenders.net/cambodia-prey-lang-community-network-plcn-press-release-attempted-murdered-plcn-activist/

[v] Springate-Baginski, Oliver 2013.

[vi] Scheidel and Work 2015.

[vii] Bourdieu (1987) differentiates between diverse fields of social regulation to illuminate different individual actors and groups of actors embedded in field-specific institutions and forms of stratification. Their unique combination of bases of power, institutions and forms of stratification give fields a particular logic and coherence of their own, and therefore, a degree of autonomy from each other.

[viii] Such practices are a basic feature of many societies, whether they originate in pre-colonial cultures, or with European Christian missionaries seeking to spread a "harmony legal model" (Nader 1990; 2001, 21). As von Benda-Beckmann (2001, 52) argues, "Even if one's main orientation is to accept the inevitable primacy of the state and state law as the means for change, one nevertheless has to take into account the overall constellation of normative and institutional orders in which the state apparatus, its institutions and regulations, are only one part." In recognition of customary law, many official legal and judicial reform initiatives include "non-state justice" components as a way to expand access to justice without further burdening regular courts.

[ix] Harris 2007, 1.

[x] Decker, Sage, and Stefanova 2005, 7, 156.

[xi] Decker, Sage, and Stefanova 2005, 7, 157.

[xii] FPIC refers to the right to self-determination and to freely pursue their economic, social, and cultural development. It is clearly articulated in the United Nations Declaration on the

Rights of Indigenous Peoples: “Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.” (Article 10)

[xiii] FPIC is appearing in initiatives “…ranging from the safeguard policies of the multilateral financial institutions; practices of extractive industries; water and energy development; natural resources management; access to genetic resources and associated traditional knowledge and benefit sharing arrangements; scientific and medical research; and indigenous cultural heritage” (as noted by Antoanella-Julia Motoc and the Tebtebba Foundation in a legal commentary submitted to the Commission on Human Rights Sub-Commission on the Promotion and Prosecution of Human Rights, Working Group on Indigenous Populations, at the twenty third Session, 18–22 July 2005).

[xiv] While it is safe to assume that most international regulatory instruments will address gender, it is important to remember that gender equality is a contested notion, including in Asia (Roces 2010), which can lead to different constructions of meanings and politics. The evidence indicates that overall, women are disproportionately affected vis-a-vis men by land dispossession (Doss, Summerfield and Tsikata 2014, 3) due to existing hierarchical structures and patriarchal norms. Conflicts, shocks and competition over scarce resources can exacerbate existing gender and social disparities and further marginalise those who are most vulnerable.

[xv] There are ten core international human rights instruments. For each there is a committee of experts to monitor implementation of the treaty provisions by its states parties.

[xvi] The term “demonstration” is used here conceptually, as in Herman and Brodhead (1984).

[xvii] On the “framing” function of social movements, see McAdam, McArthy, and Zald (1996).

Nazioarteko Hizketaldia

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