



## SESSION 8 - Background reading

### Main objectives and basic concepts of the VGGT



#### What are the Voluntary Guidelines on the Responsible Governance of Tenure (VGGT)?

The VGGT are an international instrument that can be used by many different actors to improve the governance of tenure of land, fisheries and forests. The VGGT serve as a reference and set out principles and internationally accepted standards for the practices of responsible governance of tenure. They represent an unprecedented international consensus on tenure. CSOs can use this international instrument to assert the tenure rights of their constituents such as communities, indigenous groups, or other marginalized populations.

The VGGT are voluntary and therefore not legally binding. They do not replace existing national laws or international laws, commitments, treaties or agreements. However, the VGGT encompass the principles of human rights enshrined in the Universal Declaration of Human Rights (UDHR), as mentioned in the first paragraph of the VGGT. The VGGT are an instrument of 'soft law', which has an advantage over binding international agreements in that they are usually easier for countries to reach an agreement on. Furthermore, soft law can be more comprehensive and detailed than binding legislation; soft law is often better suited for technical matters and best practices, such as the governance of tenure. FAO's experience with soft law instruments is that they have a positive impact in guiding national policies and legislation in many countries.

#### What are the main objectives of the VGGT?

The VGGT are meant to benefit all people in all countries, although there is an emphasis on vulnerable and marginalized people.

The purpose of the VGGT is to serve as a reference and to provide guidance to improve the governance of tenure of land, fisheries and forests, with respect to all forms of tenure: public, private, communal, indigenous, customary, and informal.

The overarching goals of the VGGT are to achieve food security for all and to support the progressive realization of the right to adequate food in the context of national food security. While supporting efforts towards the eradication of hunger and poverty, the VGGT are also intended to contribute to achieving sustainable livelihoods, social stability, housing security, rural development, environmental protection, and sustainable social and economic development. Therefore, the VGGT provide interpretation and guidance on how human rights obligations, public international law and humanitarian law are to be applied in the context of tenure.

The VGGT can contribute to:

- securing full rights to land for peasants;
- defending and regaining the territories of indigenous peoples;
- securing access to and control over fishing zones (including coastal land) and ecosystems for fishing communities;
- securing access to and control over pasture lands and migration routes for nomad pastoralist communities;
- securing access to land for the landless;
- securing harvesting rights for communities of gatherers;
- securing a future for rural youth;
- economic and social justice;
- environmental sustainability;
- local autonomy and self-determination of peoples.

The VGGT provide a framework that states are encouraged to use when developing their own strategies, policies, legislation, programmes and activities. They allow governments, civil society, the private sector and citizens to judge whether their proposed actions and the actions of others constitute acceptable practices.

Civil society, with emphasis on non-government organizations, civil society organizations and farmer, fisher and forest user organizations, should play an important role in advocacy, awareness raising, legal assistance and developing capacity for people to be able to enjoy and protect their tenure rights. People, communities and bodies who hold tenure rights should learn what rights they hold, and they should learn how to protect their tenure rights and themselves against corrupt and unlawful behaviour by others.

## The VGGT, human rights and international law

The VGGT place tenure rights in the context of human rights. There is currently no international consensus that a tenure right is a human right. However, tenure rights, which provide access to land, water, fisheries and forests, are important for the realization of human rights, such as the right to a standard of living adequate for health and well-being, including food and housing (Universal Declaration of Human Rights, Article 25; International Covenant on Economic, Social and Cultural Rights, Article 11)<sup>11</sup>.

The governance of tenure may affect the enjoyment of various human rights. The VGGT recommend that states should ensure that all actions regarding tenure and its governance are consistent with their obligations under national and international law, and with due regard to their voluntary commitments under applicable regional and international instruments. All programmes, policies and technical assistance to improve governance of tenure through the implementation of the VGGT should be consistent with states' existing obligations under international law.

<sup>11</sup> The VGGT encompasses human rights enshrined in the Universal Declaration of Human Rights (UDHR), the International Convention on the Elimination of All Forms of Racial Discrimination, International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the International Labour Organization (ILO) Convention No. 169 Concerning Indigenous and Tribal Peoples, UN Declaration on the Rights of Indigenous Peoples, and the World Conference on Agrarian Reform and Rural Development, among others.

## Basic Concepts

### What is tenure?

Tenure is the relationship among people with respect to natural resources, such as to land, fisheries and forests. It determines who can use which resource, for how long and under what conditions.

These rights (and duties) can be created under formal legal systems, often in documents, or they can arise from custom, depending on the system in a particular country.

Usually, we talk about people owning, having or using land or forests. Another way of saying this is that they have rights to the land or forest.

Tenure systems define and regulate how people, communities and others gain access to natural resources, whether through formal law or informal arrangements. The rules of tenure determine who can use which resources, for how long, and under what conditions. They may be based on written policies and laws, as well as on unwritten customs and practices.

Tenure rights can include the right to possess, sell, gift, mortgage, leave by inheritance, or lease out the land or forest. These can also include the rights to occupy and use the land or forest, such as to harvest and collect produce. Tenure rights can also include the right to exclude others from occupying or using the land or forest, particularly where a person has an exclusive right to the land or to the forest.

### What are legitimate tenure rights?

The VGGT do not provide a definition of legitimate tenure rights<sup>12</sup>. Rather, they generally recognize both statutory and customary, formal and informal tenure rights as legitimate, and encourage states to acknowledge and respect all legitimate tenure rights in national law, policy and practice. The VGGT suggest that states arrive at their own non-discriminatory definitions of legitimate tenure rights after a careful review of all existing tenure governance systems currently in their country.

Tenure systems are often very complex and vary considerably, even within the same country, according to local terrain, culture, environment and the livelihoods practised. Defining socially legitimate tenure rights can pose challenges as there may be competing visions of legitimacy in a given society. Perceptions about legitimate tenure rights may be influenced by the power structures and economic interests of the society in which one's tenure claims are situated, and they may differ in local and national contexts. The VGGT emphasize several points in considering the determination of legitimate tenure rights:

#### *a. Customary and indigenous rights are legitimate tenure rights*

More than two billion people worldwide access resources through customary tenure regimes (USAID, 2011b). An estimated 90 percent of all land in Africa is held under customary tenure regimes, while almost 90 percent of the estimated 40 million indigenous peoples in Latin American hold land under customary tenure systems (Colchester *et al.*, 2001).

<sup>12</sup> The technical guide *Responsible Governance of Tenure and the Law* was used to inform the explanation on legitimate tenure rights.

Customary tenure may be defined as the local rules, institutions and practices governing land, fisheries and forests that have, over time and use, gained social legitimacy and become embedded in the fabric of a society. Although customary rules are not often written down, they may enjoy widespread social sanction and may be generally adhered to by members of a local population. Customary tenure systems are extremely diverse, reflecting different ecosystems, economies, cultures and social relations. Customary tenure systems may be associated with indigenous systems of shifting cultivation (e.g. USAID, 2011a, on Cambodia; and USAID, 2013, on upland Myanmar), but also pastoral resource use, communal forests and sacred or burial sites. The VGGT explicitly state that customary tenure rights can constitute legitimate rights. They call on states to recognize and respect ‘legitimate customary tenure rights that are not currently protected by law’ (paragraph 5.3). They also provide guidance on how to recognize customary tenure rights. Recognizing customary tenure rights as legitimate is relevant to fisheries as well as to land and forests.

*b. Common property rights, use rights, tenancy rights, and overlapping and shared rights are legitimate tenure rights*

Within both customary and statutory tenure systems, multiple and overlapping rights may govern the use of the same resource. For example, multiple rights to the same piece of land could include: the right to use the land for pasture or agriculture, possibly in different seasons; the right to use trees or collect firewood in the forest; the right to travel across the land or waters; the right to drive cattle across an area to obtain water from a river. A given piece of land may cater to multiple resource uses (i.e. pastoralism, farming, fishing) and users (i.e. farmers, pastoralists, herders). Tenure rights over common property resources (e.g. rangelands, fishing ponds, traditional forests), seasonal and otherwise temporary rights of access and use, as well as tenancy and sharecropping rights, can all be legitimate tenure rights for the purposes of the VGGT. It is often poorer and more vulnerable groups that hold these rights and, as discussed, the VGGT pay special attention to the tenure rights of these groups. ‘Whenever states provide legal recognition to informal tenure, this should be done through participatory, gender-sensitive processes, having particular regard to tenants. In doing so, states should pay special attention to farmers and small-scale food producers.’ (paragraph 10.3).

*c. Women’s rights are legitimate tenure rights*

In many cultural contexts, women’s tenure claims may hinge on their relationships with male relatives. Although many rural women have rights to access and use land, they are generally less likely than men to have control over it. In practical terms, this lack of control places many women in insecure and precarious situations: women who have only conditional access to land may lose it when their husbands die or when male family members unilaterally decide to sell it (Budlender and Alma, 2011). Such culturally ingrained marriage and inheritance rules can lead to the perpetuation of gender inequalities in tenure relations across generations (Guyer, 1987).

The VGGT directly address gender inequities. For example, paragraph 3B.4 establishes gender equality as one of the principles for implementation, with the mandate to ‘ensure the equal right of women and men to the enjoyment of all human rights, while acknowledging

differences between women and men and taking specific measures aimed at accelerating de facto equality when necessary. States should ensure that women and girls have equal tenure rights and access to land, fisheries and forests independent of their civil and marital status.’ When it comes to the tenure rights of women, there may be a clash between different sources of legitimacy. Determining legitimate tenure rights while also respecting principles of non-discrimination can pose important dilemmas. The VGGT acknowledge the challenge and state in paragraph 9.6 that ‘where constitutional or legal reforms strengthen the rights of women and place them in conflict with custom, all parties should cooperate to accommodate such changes in the customary tenure systems’.

### Key Recommendations

- Understand that land, fisheries and forests are more than just assets to be traded on the market; they are at the heart of individual and community identity, culture, history and spirituality, as well as the basis of food security and livelihoods.
- Be aware that the VGGT generally recognize both statutory and customary, formal and informal tenure rights as legitimate, and encourage states to acknowledge, document and respect all legitimate tenure rights in national law, policy and practice.
- Bear in mind that the VGGT recognize a range of tenure rights as legitimate – not only those formally recognized by national law, but also those considered to be socially legitimate in local societies.
- Remember that customary and indigenous rights, common property rights, use rights, tenancy rights, overlapping and shared rights, and women’s rights are legitimate tenure rights.

### What is governance?

The VGGT do not define what is governance as there are many different definitions of governance, but in general, governance refers to the organizations and the rules and processes that form part of the political, social, economic and administrative systems. These are used to manage society and to reconcile competing priorities and interests of different groups.

Governance includes formal government agencies as well as informal arrangements. It is concerned with how citizens participate in decision-making, how government is accountable to its citizens, how society obliges its members to observe its rules and laws, and how differences are resolved.

### What is governance of tenure?

The VGGT do not define what is governance of tenure as there are many different definitions, but in general, governance of tenure is the way in which access to and control over natural resources is managed in a society. It includes, among other things, how competing priorities and interests of different groups are reconciled. Governance of tenure refers to both the organizations (government, courts, and agencies) and the rules and processes that regulate tenure rights.

## What is responsible governance of tenure?

The VGGT do not define the term but they illustrate it through the principles and actions in the text.

Governance of tenure can be considered responsible when it is fair and equitable and seeks to bring the greatest good to the most people, while minimizing adverse impacts on individuals or groups, keeping in mind the principle of sustainability, and consistent with states' existing obligations under international human rights law. There are many ways in which responsible governance of tenure can benefit individuals and communities. This includes supporting people's livelihoods and food security, gender equality and the environment.

We could also say that responsible governance of tenure in a country should reflect the following general principles<sup>13</sup> in the country's systems, policies and programmes:

1. Recognize and respect all legitimate tenure rights holders and their rights.
2. Safeguard legitimate tenure rights.
3. Promote and facilitate the enjoyment of legitimate tenure rights.
4. Provide access to justice.
5. Prevent tenure disputes, conflicts and corruption.

## How does the governance of tenure affect hunger and poverty?

The eradication of hunger and poverty, and the sustainable use of the environment depend in large measure on how people, communities and others gain access to land, fisheries and forests. Access to natural resources is defined and regulated by tenure systems.

Tenure systems increasingly face stress as the world's growing population requires food security, and as environmental degradation and climate change reduce the availability of land, fisheries and forests. Inadequate and insecure tenure rights increase vulnerability, hunger and poverty, and can lead to conflict and environmental degradation when competing users fight for control of the resources.

The governance of tenure is a crucial element in determining if and how people, communities and others are able to keep or acquire rights, and associated duties, to use and control land, fisheries and forests.

<sup>13</sup> Detailed information on these principles will be provided in session 10.