

**JANUARY  
2019**



**A HOUSING, LAND AND PROPERTY (HLP)  
RIGHTS-BASED ANALYSIS OF  
CUSTOMARY LAND DISPUTE RESOLUTION IN  
EASTERN BAGO REGION AND  
KAYIN AND SHAN STATES**

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# EXECUTIVE SUMMARY

This report provides an in-depth understanding of customary land dispute resolution in Kayin State, Eastern Bago Region and Shan State and its interaction with the formal statutory Government of the Republic of the Union of Myanmar (GORUM) system. A participatory community-based research approach was used to understand customary practices concerning land, including how land title is defined, enforced and how land disputes are contested, negotiated and resolved at the community level.

Based on the perceptions of local people and village leaders in the three research sites, the report identifies current practices as well as prior work on this topic in Myanmar and seeks to identify ongoing dispute resolution mechanisms and practices used by communities in ethnic nationality areas with a view to informing policy and programming on restitution. Key to this analysis is the question of what a genuine restitution process might look like in Myanmar and how customary practices might be integrated into it. Furthermore, if a genuine restitution process was established, what realistic capacity is there to integrate customary dispute mechanisms and authorities into it.

Based on in-depth qualitative research in 31 villages across 3 regions/states, it offers an insight into understandings of customary mechanisms that people use to regulate the use of land and the most important actors regarding dispute resolution, as well as their interaction with the formal system. This includes the following:

- An analysis of key actors involved in customary practices of dispute resolution around Housing, Land and Property (HLP) issues
- An analysis of power relations between the service providers of dispute resolution and disputants.
- Public perceptions towards customary dispute resolution practices and their perceived strengths and constraints.
- An analysis of the reasons why people choose to resort to customary dispute resolution mechanisms for their HLP issues (over the official state-sponsored mechanisms).
- The existing relationship between customary dispute resolution practices and national statutory legal frameworks and its implications for justice and effective HLP dispute resolution.
- How might national statutory legal frameworks in Myanmar integrate customary dispute resolution practices and authorities.

The use of customary and formal land laws and dispute mechanisms varies across research sites. However, research in these areas demonstrates the importance of customary land dispute mechanisms and the need to build more flexible policies to recognize customary land laws and authorities.



## Customary Dispute Resolution

**A**cross all research sites in Myanmar, respondents indicated a preference for dealing with land disputes at the village or tract level using traditional means. The substantive goals of customary dispute resolution within the communities consulted are often predicated on the importance of maintaining village or ethnic harmony, both for disputants and for the wider community. Members of communities involved in the research often seek to avoid disputes that involve individuals, families, multiple families, neighbours or others in their community, because any disputes are often of concern to, and may have impacts on, the wider group.

The research reveals that land disputes at the community level are rare, but when they do occur, they are primarily resolved in an informal manner through customary forms of negotiation and arbitration. At the village level, the resolution process is most often led by village heads or other customary leaders such as elders, who are viewed by the community as the most trusted and authoritative actors. The reasons provided for the degree of community trust in customary authorities in dispute resolution, were uniform across all research sites and include the following:

- (I) **Speed** - Disputes tend to be resolved more quickly using customary arbitration as all parties (disputants and authorities) have greater knowledge of the issues than outsiders and the mediations/arbitrations take less time to convene and conclude.
- (II) **Trust** – In many of the research sites people had low levels of trust in the GORUM and its restitution mechanisms.
- (III) **Economy** - Customary dispute resolution does not ordinarily involve payments of any sort to engage in the process. In the alternative, engagement with the formal system often leads to costs (bribes, fees).
- (IV) **Less intimidation** - Structural barriers have historically impeded engagement with the formal authorities. Factors such as speaking an ethnic language rather than Myanmar (the legal language of Myanmar), geographical proximity to township administrative centres and knowledge of formal laws, have all limited the ability of the rural population to access formal land authorities.
- (V) **Non-interruption to livelihoods** - Customary dispute resolution allows disputants to be able to continue working and earning a livelihood. In the alternative, farmers may have to visit the Village-Tract Administrator (VTA) office in another village or engage with the Township level of the Administrative Bodies of the Farmland (ABsF) which may involve travel, which costs both time and money.

These factors, combined with a perception that customary authorities, have deep knowledge of the ownership and usage rights within rural farming communities, means that customary authorities continue to maintain a high level of legitimacy within communities. They are also seen, more often than not, as delivering equitable results and outcomes which maintain community harmony.



• Karen woman walks home through paddy fields in Kyauk Kyi Township •

The research also demonstrates that the role of the VTA in mediating village-level disputes has increased significantly in recent years. Members of farming communities now consider the VTA, as Chairperson of the Ward/Village-Tract ABsF, to be the logical authority to help mediate land disputes. VTAs also play an essential role in assisting land registration according to GORUM land law and in the provision of Land Use Certificates (LUCs)<sup>1</sup>, which have been widely adopted by farmers since 2012.

Across all three areas where the research took place, there has been a significant uptake of LUCs by farming communities. This has had both positive and negative effects. On the positive side, many farmers now have documentation which adds to security of tenure. However, on the negative side, some inequalities have been frozen in place by corrupt and/incorrect issuance of LUCs, poor boundary mapping and issuance of LUCs to those who have acquired land illegally from former users have deprived some farmers of their HLP rights.

While land titling has the potential to secure people's HLP rights, it can also formalise land expropriation. Since the formal management of land is concentrated in the hands of people with power and authority, the formalisation of land title has the potential to enable land grabs.

The VTA tends to resolve disputes in either an informal way through provision of advice, or with formal binding resolutions as part of the GORUM dispute resolution mechanism through the ABsF. Across all areas, the transition to formal registration of land has significantly increased the role and power of VTAs, which in turn makes customary authorities less relevant as land actors. Furthermore, customary authorities are starting to transfer part of their dispute resolution duties to VTAs, who are viewed by an increasing number of communities as the dispute resolution actor with the authority to deliver binding decisions on disputants at the village and tract level.

## Land Grabs and Restitution Mechanisms

Previous research demonstrates that conflicts over land are one of the central challenges facing Myanmar's rural population in the contemporary period.<sup>2</sup> The research conducted in Kayin State, Eastern Bago and Shan State for this report similarly exposes how the legacies of military rule continue to play out and challenge peoples' access to housing, land and property (HLP) rights.

The report highlights the significant structural barriers many people continue to face in exercising their HLP rights despite the political changes in Myanmar. Enhancing provisions for the recognition of customary land use and dispute resolution practices within Myanmar's laws has the potential to positively impact land tenure and security in conflict-affected communities. While new land laws have allowed titling in settled areas without conflict, which contributes to tenure security, in ethnic areas and conflict-affected areas in particular, they have facilitated land-grabbing, and allowed expropriation to take place.

Large-scale land grabbing cases which occurred over several decades under the military junta are numerous and remain unresolved. The scale of confiscations makes this issue far more important to the average farmer than any other issue because of the loss of livelihoods. However, people affected by land grabs have little trust in the institutions or authorities in charge of resolving land disputes and in administering land title and development projects.

In disputes between farmers and powerful outside actors (most commonly illegal land confiscation), neither customary authorities nor VTAs are viewed by community members as holding the requisite coercive power to compel actors like the military or companies to return land illegally confiscated or to force those actors to pay compensation. Even though those who have suffered illegal confiscations are actively seeking to have their lands returned as per current GORUM laws and restitution mechanisms, land grabs cases remain unresolved and farmers have overwhelmingly been denied access to justice. The lack of progress made through available restitution mechanisms creates a deep sense of powerlessness and grievance on the behalf of local farmers.

<sup>1</sup>Farmland Law 2012, Ch II, 4.

<sup>2</sup>HRW (2018) *'Nothing for Our Land': Impact of Land Confiscation on Farmers in Myanmar* (Bangkok: Human Rights Watch); KHRG (2015) *With only our voices, what can we do? Land Confiscation and Local Responses in Southeast Myanmar* (Chiang Mai: Karen Human Rights Group); Kapoor, M., Soe, N. N., & Viswanathan, V. (2018) *Midcourse Manoeuvres: Community Strategies and Remedies for Natural Resource Conflicts in Myanmar* (New Delhi: Centre for Policy Research and Namati).

## Conclusion and Recommendations

**H**ousing, land and property rights are at the centre of Myanmar's most pressing development challenges and the peace process. The degree to which Myanmar will see a genuine and equitable restitution process will depend largely on the progress made in building local governance institutions and processes that are inclusive and responsive to the needs of the local population. Based on research in the three areas, this report recommends the following:

### **1** Recognition of Customary Land Management Practices through Legislation

**A** new National Land Use Policy was approved in Myanmar in January 2016. This policy recognises the importance of customary land rights in Myanmar, as well as restitution and the inclusion of women in land governance. While this new policy has the potential to help protect customary communal land rights and management practices in line with international standards, its implementation has fallen short of expectations.

The GORUM has made positive efforts recently at recognising customary land management practices, notably in the National Land Use Policy and the amendments to the VFV Law in 2018. The VFV Law amendments mark the first time that these customary practices have been explicitly recognised in legislation related to land management.<sup>3</sup> These steps should be built upon to ensure full HLP rights protections for customary practices, including dispute resolution. Steps to achieve these aims should include explicit legislative recognition within land laws and administrative instructions. Specifically:

- (a) Recognise customary agricultural practices including shifting agriculture within the Farmland Law 2012 and implementing instructions and clarify the recent amendments to the VFV Law 2012 regarding customary land management practices.
- (b) Recognise customary tenure schemes (communal tenure) within the Farmland Law 2012 and the VFV 2012 Law.
- (c) Recognise customary authorities (through an elected representative) input into ABsF, VFV Committee and Reinvestigation Committee decision-making.

To ensure democratic decision making within the administrative and reinvestigation committees, it is necessary to ensure that customary authorities with the best knowledge of communal history and relationships, be given a voice within formal land mechanisms. VTAs already seek opinions of customary authorities to verify land use in practice at the village level, and these practices should be recognised legally as well.

## 2 Collaborative Dispute Resolution Training

The communities consulted for this study were unanimous in their preferences for the dispute resolution practices of customary authorities over those provided by the GORUM mechanisms in resolving land disputes at the village level. Furthermore, a stakeholder analysis suggests that in disputes within the village, often the disputants enjoy relative parity in terms of power dynamics and therefore leverage in negotiations. Therefore, it appears that some Collaborative Disputes Resolution (CDR) practices which share some similarities with customary dispute resolution, have the potential to build upon the advantages of customary dispute resolution, in terms of the legitimacy of the decisions reached with the help of a third party, the speed and low cost of such procedures, and the ability to achieve outcomes that contribute to communal harmony.

Critically however, it is important to recognise concerns regarding customary dispute resolution and human rights standards. Plans to provide CDR training to customary authorities and communities in techniques of dispute resolution, should be designed such that customary practices which may be discriminatory are brought into line with rights-based approaches.

## 3 Restitution

Beyond grievances within the village/tract setting between community members, which customary dispute resolution mechanisms appear capable of addressing adequately, the research indicates that illegal land confiscation remains the largest and most pressing concern for many respondents. While CDR training can augment customary dispute resolution, which remains a viable tool for intra-village grievances, restitution of HLP assets in response to widespread illegal land confiscation will require institutional responses on a nationwide scale.

Clearly, genuine restitution laws and mechanisms are needed in Myanmar to address the problem of historic and current illegal land confiscation, if justice is to be achieved. Such measures should be implemented in line with the National Land Use Policy (NLUP) and need to be addressed within the National Land Law that is currently being drafted, guided by the United Nations Guidelines on Internal Displacement and the Pinheiro Principles.<sup>4</sup>

The NLUP establishes a clear commitment to a restitution process. A restitution law and mechanism should build on that commitment by including the following provisions;

- Explicit expression of the right to restitution, which is lacking in domestic law, for any parties illegally deprived of HLP assets (including IDPs and refugees)
- In cases where restitution is not possible, the law should contemplate in-kind restitution or compensation.
- Creation of an independent land claims tribunal with a clear mandate, decision-making powers and a claims process.

<sup>3</sup>This is a positive step, but one that certainly requires further clarification over the areas defined as a legal category, and how this land will be protected by the land administration authorities.

A genuine restitution process should also recognise those affected by former land confiscations of customary communal lands. The Myanmar government and EAOs should ensure that any future development projects which acquire customary communal lands are implemented only after securing free, prior and informed consent from affected communities. In particular, more coordinated attempts to strengthen local capacity, increase local participation and support a rights-based approach should be a condition of any development initiative. Policies should support and encourage local people's participation in meaningful consultations, dialogues and community forums.

## 4 Information, Knowledge and Transparency

The research shows that in order for all communities to better secure HLP rights, there need to be coordinated efforts made to improve people's access to knowledge and information about land laws and restitution mechanisms. In particular, it is essential to make knowledge about the NLUP more accessible and available in languages other than Burmese to help put ethnic minority people's HLP rights on an equal footing with the majority. Union and State Governments as well as formal land institutions and legal aid authorities should be mandated to disseminate information on land laws and policies.

While information is flowing downward to people through Village-tract Administrators (VTAs), most people remain uninformed. The centralisation of information and knowledge about land laws in the hands of powerful local authorities leaves people vulnerable to expropriation.

## 5 Enhancing the Role of Civil Society

In conjunction with government authorities and EAOs, donor support and funding for capacity building initiatives should be directed at the education, documentation and advocacy work of civil society organisations working on HLP rights. Significantly, many of these organisations empower communities to understand land laws and policies for the protection of HLP rights. Since current restitution processes can be expensive and may lead disputants into further debt, funds should be targeted especially towards paralegal organisations in particular. Given the potential for corruption within the current system and the lack of oversight of low-level authorities involved in land management, it is essential that the strength and capacity of these community organisations are bolstered. This is especially important in conflict affected communities where there are low levels of trust in government authorities and rule of law remains weak.

<sup>4</sup>United Nations, Office for the Coordination of Humanitarian Affairs, *Guiding Principles of Internal Displacement*, 22 July 1998; United Nations, Economic and Social Council, *Housing and property restitution in the context of the return of refugees and internally displaced persons: Final report of the Special Rapporteur, Paulo Sérgio Pinheiro: Principles on housing and property restitution for refugees and displaced persons*, 28 June 2005. E/CN.4/Sub.2/2005/17. (See also E/CN.4/Sub.2/2005/17/Add.1).



## 6 Improving Gender Equality in HLP

The absence of women in formal and customary land governance is a key issue in Myanmar. The benefits of securing land rights and title for women can help address gender inequities and address material needs. In accordance with Articles 1-4, 7 and 8 of CEDAW and CEDAW General Recommendations 5, 23 and 25, it is important that both the Myanmar government and EAOs take more concrete steps to address the gender imbalance that exists in land use management so as to enable a fair and just environment for women to claim their rights. Such steps could include;

1. Explicit recognition of women's rights to register for LUCs solely or jointly
2. Ensure that women participate in the GORUM land administration bodies.

### Conclusion

It is hoped that this report will represent a valuable resource for practitioners and stakeholders working on issues related to HLP rights in Myanmar. Developing an in-depth understanding of customary land dispute mechanisms, how they function and perform, is a basic requirement of implementing a genuine restitution process. Research on customary land dispute mechanisms can help to better understand the relationships of people to land and what influence new land policies have on these relationships. This is particularly important in conflict-affected communities who continue to face the consequences of an insecure protection environment and need accessible legal pathways and assistance to secure and regain access to their land and properties.

This study seeks to facilitate formulation of policy frameworks and legislation and concrete plans and actions that will better support the needs of rural ethnic minority populations in post-conflict areas. This report highlights the normative and practical challenges faced by ethnic communities to protect their HLP rights. It proposes ways forward to better understand customary land laws and dispute mechanisms and ways that these might be integrated into a genuine restitution process. The protection of HLP rights is key to the peace process and the negotiation of federalism in ethnic states. If the government wishes to build trust with communities, the protection of their land rights is vital. By better recognising the customary land dispute mechanisms policy makers and land activists have an opportunity to build trust and confidence among the key stakeholders of the ceasefire in very practical ways.



- A large area of paddy land affecting multiple people has been progressively confiscated by a prison in Hpa-an Township, Kayin State •

## ACKNOWLEDGEMENTS

**T**he authors would like to acknowledge the people of Kayin, Shan and Eastern Bago for their active participation and support of this research. We would also like to express our deepest gratitude to our three field assistants whose assistance made this report possible. They played a significant role in guiding the research and in village site selection.

This report was developed under the leadership and guidance of the Norwegian Refugee Council and MyJustice. The authors would especially like to thank José María Arraiza, Scott Leckie, Christopher Moore, Swati Mehta, Caitlin Reiger and Zaw Myat Lin for their comments and feedback.

# GLOSSARY

<b>ABsF</b>	The Administrative Bodies of the Farmland (ABsF)
<b>BGF</b>	Border Guard Force
<b>CSO</b>	Civil Society Organization
<b>DALMS</b>	Department of Agricultural Land Management and Statistics (formerly SLRD)
<b>DKBA</b>	Democratic Karen Benevolent Army
<b>DNDP</b>	Danu National Democratic Party
<b>DNOP</b>	Danu National Organisation Party
<b>DoA</b>	Department of Agriculture
<b>DRD</b>	Department of Rural Development
<b>EAO</b>	Ethnic Armed Organization
<b>FAB</b>	Farmland Administration Body
<b>GAD</b>	General Administration Department
<b>GORUM</b>	Government of the Republic of the Union of Myanmar
<b>HLP</b>	Housing, Land and Property
<b>IDP</b>	Internally Displaced Person
<b>INGO</b>	International Non-Governmental Organisation
<b>KNLA</b>	Karen National Liberation Army
<b>KNU</b>	Karen National Union
<b>LUC</b>	Land Use Certificate
<b>MADB</b>	Myanmar Agricultural Development Bank
<b>MAS</b>	Myanmar Agricultural Service (former DoA)
<b>MMK</b>	Myanmar Kyat
<b>MOECAF</b>	Ministry of Environmental Conservation and Forestry
<b>MONREC</b>	Ministry of Natural Resources and Environmental Conservation
<b>NGO</b>	Non-Governmental Organization
<b>NLD</b>	National League for Democracy
<b>NLUP</b>	National Land Use Policy
<b>NRC</b>	Norwegian Refugee Council
<b>PNLA</b>	Pa-o National Liberation Organisation
<b>PNO</b>	Pa-o National Organisation
<b>PPF</b>	Protected Public Forest
<b>RCSS</b>	Restoration Council of Shan State
<b>RF</b>	Reserve Forest
<b>SAA</b>	Self-Administered Area

<b>SAZ</b>	Self-Administered Zone
<b>SLORC</b>	State Law and Order Restoration Council
<b>SLRD</b>	Settlement and Land Records Department
<b>SPDC</b>	State Peace and Development Council
<b>SSPP</b>	Shan State Progressive Party
<b>USDP</b>	Union Solidarity and Development Party
<b>UN</b>	United Nations
<b>VFV</b>	Virgin, Fallow and Vacant
<b>VTFMC</b>	Village-tract Farmland Management Committee
<b>VTA</b>	Village-tract Administrator



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# 1. METHODOLOGY AND ANALYTICAL FRAMEWORK

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• Mixed upland cropping and orchards near Ywangan, Shan State •



# 1. METHODOLOGY AND ANALYTICAL FRAMEWORK

A participatory community-based research approach was used in order to understand customary practices concerning land, including how land title is defined, enforced and land disputes are negotiated, contested, transferred and resolved. The research identified current practices as well as prior work on the topic in Myanmar and sought to identify ongoing dispute resolution mechanisms and practices used by communities in these areas with a view to inform policy and programming on land dispute resolution.

This was informed by the following key research questions:

1. How does customary land dispute resolution take place in practice in Kayin, Eastern Bago and Southern Shan? Who are the actors? What kinds of cases do they resolve? What approaches do they use? Are they fair and non-discriminatory? Are there linkages between customary and formal systems?
2. Are there particular groups who have less access or benefit than others from these practices? What are the primary obstacles/challenges?
3. Through a comparison of practices, which of these are successful in providing access to justice in line with human rights standards (the “Respect, Protect and Remedy” framework)?
4. What role could CDR capacity building play in improving such practices and promote access to justice?

From June to August 2018, the authors conducted research with farmers and land holders in Eastern Bago Region, Kayin State and Shan State. Between 8-12 villages were visited in each region. Interviews and group discussions were conducted in the preferred languages of the areas researched with the help of interpreters. In Kayin State this included Burmese, Plong Karen, S’gaw Karen and Pa-O. In eastern Bago Region interviews were conducted in S’gaw Karen and Burmese languages and in Shan State interviews were conducted in Shan language. The authors consulted both the NRC and local civil society networks working on HLP rights to help assist the process of village selection.

In order to obtain a holistic perspective of customary land dispute resolution mechanisms and practices in the three research sites, the research team sought out the perspectives of local land holders primarily through interviews and informal group discussions. Most of these discussions were conducted in people’s homes or in common village areas, including village tract administrator’s offices, church halls, monasteries and other community meeting places.

Information which could be used to identify any interviewees and individual villages visited have been removed and not included in the study to prevent possible adverse consequences or reprisals that might result from their participation. All participants in the study were informed of the purpose of the research, its voluntary nature, and ways data was being collected and would be used. All participants in the study orally consented to be interviewed.



## 2. ASSUMPTIONS AND LIMITATIONS

### Assumptions and Key Concepts

#### 'Customary' Land

A number of studies define 'customary lands' as lands that are not titled.<sup>5</sup> The researchers in this study, however, define all land as customary regardless of whether it is titled or not, if it has been customarily occupied for a significant period of time and over successive generations. This is in line with the views of research participants, since both titled and untitled land has often been passed on from generation to generation using very similar practices.

#### Customary Communal Land

There are some areas nearby to villages which are regarded as communal property under the management and control of the whole village. For some villages, communal tenure of forest areas for example is very systematised and spread equally amongst villagers through a system of inheritance. In other areas, however, adjacent forested areas are large enough for people to have flexible approaches to the boundaries of their land. In these cases, boundaries are based on the amount of land 'cleaned' by people.<sup>6</sup> Areas left free or uncleaned are reportedly used communally for collecting firewood and grazing animals.

As a result of widespread land grabs which took place under the military junta there are less customary communal lands available for use in this way in the research areas visited.



## Customary Dispute Resolution

In this report 'customary dispute resolution' refers to practices used by participants to address and resolve disputes within their villages or communities. While these practices are used to settle a range of differences and difficulties, the focus of this report is those disputes which concern land.

Processes used in customary dispute resolution vary from village to village or between ethnic communities. They range from unassisted dispute resolution, such as informal direct talks or negotiations between disputing parties, to a number of forms of third-party assistance. Third party help may be very informal and consist primarily of listening and a conversation between a disputant and another respected and trusted person not directly involved in the dispute. In this instance, the third-party may be just a listener or may make suggestions on how the disputant could proceed to resolve the dispute. They may also give advice or make a recommendation for a potential settlement.

A procedural goal that is often important in customary dispute resolution is for disputing parties to reach a consensus decision. A consensus is reached when a solution is identified or built that disputing parties can all support, "live with", or at a minimum, not oppose. A consensus can be reached either by mutual agreement between or among disputing parties or their voluntary acceptance of a recommendation or decision by a third party or the broader community.

In addition to the above definitions and concepts, the key terms outlined below in Table 1 are important to understand.

<sup>5</sup>See for example Andersen, K. E. (2016) *The Recognition of Customary Tenure in Myanmar (Vientiane: Mekong Region Land Governance)*.

<sup>6</sup>To 'clean' an area of land within a forested area refers to cutting down vegetation and planting trees, vegetables and bamboo.

## Table 1: Key Terms

Communal Tenure	Ownership and use of land by a community as a whole.
Customary Authorities	Includes 10 Household Heads, 100 Household Heads, Village Heads, Elders and Religious Leaders.
EAO Administration	Dispute resolution mechanisms and procedures established by Ethnic Armed Organisations. They may be based on a national legal system or a parallel system of laws and institutions. EAO mechanisms range in their formality and can include customary authorities and procedures or their own statutory laws and courts.
LUC	Land Use Certificate issued by the Administrative Bodies of the Farmland to recognise and register farmland usage, subject to conditions.
Taungya	Upland farming (can be either stable or shifting).
Shwe Pyaung Tanugya	Shifting cultivation – practice of rotating crops over a large area of land, leaving some areas fallow, to allow land to regenerate.



• Communal Timber Stand Loilem Township, Shan State •

## Opportunities

A significant factor that affected the study's research sites and the people researchers could interview was the latter's reliance on relationships with local CSOs and NRC teams. The team's access to villages was sometimes contingent on the connections of research assistants, whose relationships with people living in targeted communities helped to secure access.

The researchers deliberately sought out research assistants and interpreters with close links to the communities where the research took place. It was also vital to the integrity of the research that they already had experience working closely with the people from the area independent of either the Myanmar government or the relevant EAO. Having the assistance of individuals seen as objective from the perspective of communities was important for building trust and giving respondents the confidence to speak openly about land management and dispute resolution.

## Limitations

### Research Sites and Interviewees

Research conducted for this report cannot be considered representative of the experiences of all people living in Shan State, Kayin State and Eastern Bago Region. It reflects only the views and understandings of individuals and groups that were interviewed in the targeted study areas.

The research team was able to access only limited geographic areas due to sensitivities on the part of the Myanmar government, EAOs, people being interviewed and security considerations. Despite the ongoing peace process and ceasefire agreements between the Myanmar government and EAOs, access by researchers to EAO controlled territories was difficult due to restrictions placed on their travel by the government and EAOs and recent fighting in some areas. Additionally, the research team was also more restricted in areas under mixed administration.

Another limitation was the timing of the research during the rainy season. Visits deeper into the field were hampered by conditions that made accessing higher terrain impossible, given the poor conditions of roads in remote villages.<sup>7</sup> In addition, since the field research was conducted during the planting season, many farmers were busy in their fields, limiting the people available for the research team to meet with.

The above limitations had critical impacts on gathering information on customary land management and dispute resolution practices. Because the research was conducted in more easily accessible areas, it is likely that stronger customary practices might be found in more remote, upland agricultural areas where the influence of the GORUM is weaker.

<sup>7</sup>In July and August 2018 Kayin State and eastern Bago division experienced significant flooding impacting the geographical scope of the research.



### 3. BACKGROUND: OVERVIEW OF GOVERNANCE STRUCTURES

Various legislative amendments have placed a renewed focus on land in Myanmar in recent years. In March of 2016, the GORUM published its new National Land Use Policy (NLUP). Subsequently, a National Land Use Council and Committees were formed (based on the NLUP), the National Land Law is in the drafting process, the Vacant, Fallow and Virgin Land Management Law has been amended, and an updated version of the Land Acquisition Act is also being drafted. Given the well-documented importance of land to Myanmar's rural communities, these legal changes have the potential for far-reaching impact on rural farming communities in Myanmar.

Substantial research has been conducted in recent years on the numerous gaps in current land legislation which have effectively undermined rural communities and their ability to engage with the system of land use registration.<sup>8</sup> This report seeks to build on that research by providing a comparative analysis of customary dispute resolution of land disputes in three states/regions. The report aims to provide an overview of the prevalence of these practices within communities (are they still being used?), successes and challenges, and community attitudes toward such practices. The report also intends to examine the impact these systems have had in terms of addressing long-standing land confiscation cases, as well as their representation within the formal legal system.

#### Formal Law and Land Dispute Resolution in Myanmar

The formal legislative regime controlling and administering land use in Myanmar has been extensively studied in recent years.<sup>9</sup> The system does not require further elaboration here, beyond a brief summary of its main failings in relation to recognition of customary land management practices and dispute resolution.

<sup>8</sup>See *Displacement Solutions and Norwegian Refugee Council, Restitution in Myanmar: Building Lasting Peace, Reconciliation and Economic Prosperity Through a Comprehensive Housing, Land and Property Restitution Program, March 2017*; *Displacement Solutions and Norwegian Refugee Council, An Introductory Guide to Claiming Housing, Land and Property Restitution Rights in Myanmar, March 2017*; *Displacement Solutions, Bridging the HLP Gap: The Need to Effectively Address Housing, Land and Property Rights During Peace Negotiations, and in the Context of Refugee/IDP Return: Preliminary Recommendations to the Government of Myanmar, Ethnic Actors and the International Community, June 2013*.

<sup>9</sup>See for example, *Earth Rights International .2018. Proposed Amendments to the 2012 Vacant, Fallow and Virgin Lands Management Law*; Kapoor, M., Soe, N. N., & Viswanathan, V. 2018. *Midcourse Manoeuvres: Community strategies and remedies for natural resource conflicts in Myanmar*. New Delhi. Centre for Policy Research (CPR) and Namati; HRW .2016. "The Farmer Becomes the Criminal": *Land Confiscation in Burma's Karen State*; Food Security Working Group's Land Core Group, *Legal Review of Recently Enacted Farmland Law and Vacant, Fallow and Virgin Lands Management Law Improving the Legal & Policy Frameworks Relating to Land Management in Myanmar, November 2012*; Food Security Working Group's Land Core Group, *Technical Review of the Draft Myanmar Land Acquisition Law 2017*; *Transnational Institute and Burma Centrum Nederland, Access Denied: Land Rights and Ethnic Conflict in Burma, Burma Policy Briefing Nr 11, May 2013*.

The most important laws for land use currently are set out in the table below.<sup>10</sup>

Laws	Mandate	Weaknesses
Farmland Law 2012	Allows farmers to apply to have transferrable use rights over various types of farmland recognised and documented through a Land Use Certificate (LUC). Farmers need to comply with conditions in order to keep the LUC.	Does not allow for land to be left fallow. <sup>11</sup> No recognition of shifting cultivation. No recognition of communal ownership. No official recognition of communal dispute resolution actors. Prohibits judicial review of administrative decisions. <sup>12</sup>
Vacant, Fallow and Virgin Land Management Law 2012	Allows for abandoned or never-before-used land to be claimed as VFV and used under certain conditions.	Fallow land used in shifting cultivation systems could be classified as VFV and use rights granted others (particularly companies). 2018 amendments introduce harsh penalties on farmers who are using but do not register VFV land within six months of the amendment to the law. <sup>13</sup>

<sup>10</sup>This is not an exhaustive list. Other relevant laws include the Land Acquisition Act 1894 (currently considered for amendment) and several others. For a full list of land related laws see *Displacement Solutions, Housing Land and Property Rights in Burma, the Current Legal Framework*, Scott Leckie and Ezekiel Simperingham, 2009.

<sup>11</sup>Farmland Law 2012, Ch IV, s12(i), s17(b) state the mandate for dispute resolution, while s25(c) establishes that there are no appeals available after a decision by the state-level Farmland Administrative Body.

<sup>12</sup>Farmland Law 2012, Ch IV, s13.

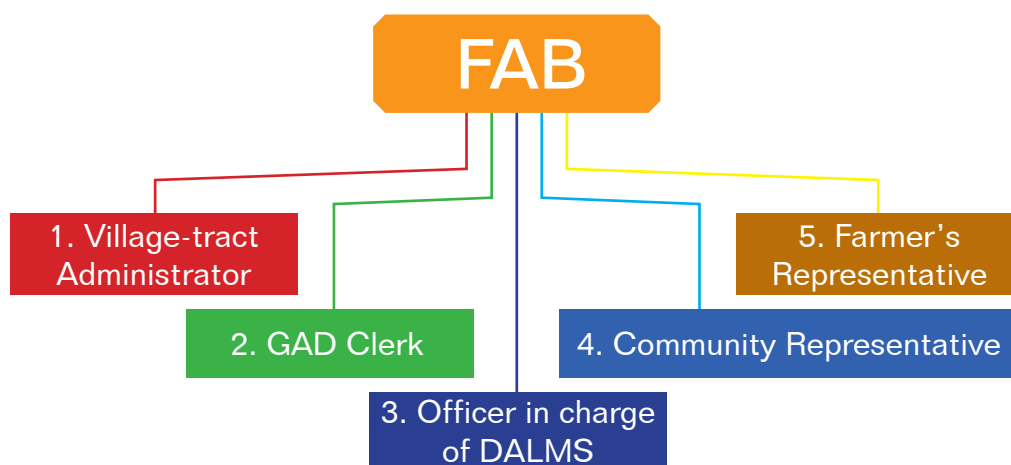
<sup>13</sup>Unofficial translations of the new VFV Law amendments suggest that the law will now include a new Article 30, which states that the law does not apply to the management of the following types of land: a) Land for which taungya land tenure rights have been given in accordance with existing laws and procedures; b) Land that is defined in accordance with cultural and traditional systems of local ethnic nationalities; c) Land currently used for religious, social, educational, health and communication purposes related to the public and ethnic nationalities. If these are accurate translations, the recognition of customary tenure and land management practices is a positive step, though it is unclear how such provisions would operate with other new provisions which are cause for concern, such as 22(b) (1 & 2), related to the need to register use of VFV land within 6 months or face eviction and potential criminal sanctions. Further, proposed amendment 27(a) also creates a strict liability (ie can be committed without intent) trespass offence on VFV land, which can also lead to criminal sanctions.



These laws are implemented and administered via subsidiary rules, as well as administrative bodies, originating at the central level and permeating the administrative system down to the village-tract level.

At the Village-tract level, the entity that is responsible for both land administration and resolving land disputes is the village-tract land committee. Members of the committee include the Village-tract Administrator<sup>14</sup>, a General Administration Department (GAD) clerk, an officer from the Department of Agricultural Land Management Statistics, and one representative each of local farmers and the broader community.

This committee, with the same five members, serves as the lowest level representative of the three national bodies mandated to address land issues and disputes – the Administrative Body of the Farmland, the Central Committee for Management of Vacant, Fallow and Virgin Land, and the Central Reinvestigation Committee for Confiscated Farmland and Other Lands. The composition of the Administrative Body of the Farmland at the Village-Tract Level (which is the most important level for the current study) is illustrated in the diagram below.



The 2012 Farmland Law and the Vacant, Fallow and Virgin Lands Management Law provide the mandate for the resolution of disputes over agricultural land.<sup>15</sup> The Farmland Law is particularly concerning in that the law allows for appeals against decisions made by the ABsF up through the Village-Tract, Township, District then State level. Thereafter, a finality clause does not allow further appeal, precluding judicial oversight of administrative (executive) decisions.

<sup>14</sup>A Village-Tract Administrator is elected by community members according the Ward and Village-Tract Administrator Law 2012.

<sup>15</sup>Farmland Law 2012 Ch IV, s 12(i), s17(b); VFV Law 2012, s25(a).

A finality clause in the Farmland Law establishes that no appeal is possible to an independent judicial body after the State-level ABsF has made its decision regarding a land dispute.<sup>16</sup> The finality clause is unconstitutional and contrary to rule of law principles, for several reasons. There are three relevant sections of the Constitution which guarantees certain rights for citizens set out below.

2008 Constitution	
Article 11(a)	The three branches of sovereign power namely, legislative power, executive power and judicial power are separated, to the extent possible, and exert reciprocal control, check and balance among themselves.
Article 19	The following are prescribed as judicial principles: (a) to administer justice independently according to law; (b) to dispense justice in open court unless otherwise prohibited by law; (c) to guarantee in all cases the right of defence and the right of appeal under law.
Article 381	Except in the following situations and time, no citizen shall be denied redress by due process of law for grievances entitled under law: (a) in time of foreign invasion; (b) in time of insurrection; (c) in time of emergency

Article 11(a) establishes the separation of powers between the three branches of government. Normally, this arrangement would allow judicial oversight of executive authority, represented within the land management system, by the ABsF. The finality clause removes the judicial oversight from executive action in this case, which breaches Article 11. Article 19 is also breached because a citizen is not able to appeal an administrative decision. Together these breaches mean that a citizen who cannot appeal an administrative decision has been denied the due process of law afforded by Article 381 (without any of the exceptions to this right being triggered).

The Vacant, Fallow and Virgin Lands Management Law differs slightly in that it does not expressly prohibit appeals through the judicial system.

The decision-making power over land use grants/documentation, as well as the dispute resolution function residing in one body responsible for administering each law (Farmland and VFV land) operating without judicial oversight, has resulted in well-documented abuses of power.<sup>17</sup>

<sup>16</sup>Farmland Law 2012, 25(c).

<sup>17</sup>Cite UNDP-UNHCR forthcoming paper on administrative corruption when published.[is this likely to be published before this report?].

The composition of the administration bodies is also problematic. The presence of the GAD at all levels of the administrative bodies, given the relationship between the GAD and the military, means that these bodies cannot be said to be operating independently, especially where the issue of military land-grabbing is concerned.<sup>18</sup> A forthcoming UNDP-UNHCR report touching on the issues surrounding administrative bodies highlights assertions by farmers' association members that village-tract administrators are influenced and intimidated by the GAD clerks who take orders from Township Administrators, who are also GAD officials, undermining the independence of the Village-Tract ABsF.<sup>19</sup>

Apart from structural concerns regarding their independence, there are also concerns regarding the competency and performance of these bodies. Numerous reports in recent years have highlighted inefficiency, corruption and the lack of funding for these bodies, which combine to prevent a well-functioning and transparent system of land use registration and dispute resolution across the country.<sup>20</sup>

Despite flaws in the formal administration bodies, there has been a degree of success in provision of LUCs. However, this has only been the case in areas where land use is not contentious. Typically, these are stable, lowland cropping areas which have been established for generations and over which there is agreement regarding ownership/use. For example, the central lowlands have seen a relatively high uptake in LUCs. However, in areas where conflict has taken place, and where there are competing systems of administration, such as in mixed areas controlled by both the GORUM and an EAO, as well as considerable land-grabbing (especially by the military or militarily affiliated entities), LUCs have not been issued as quickly.<sup>21</sup> Furthermore, and potentially more importantly, in recent decades, the dispute resolution mechanisms of the GORUM have only returned minimal amounts of land to those from whom it was confiscated, particularly by the military.

### How do these bodies resolve disputes?

**T**he ABsF and Committees for Management of Vacant, Fallow and Virgin Land (CMVFVL) and their subordinate bodies receive disputes or grievances either informally through individuals approaching them to assist in the resolution of their differences or as a result of referrals by an upper-level body.<sup>22</sup>

<sup>18</sup>Kyi Pyar Kyit Saw and Mathew Arnold, *Administering the State in Myanmar: An Overview of the General Administration Department*, Asia Foundation, October 2014, 12.

<sup>19</sup>Cite UNDP-UNHCR forthcoming paper on administrative corruption when published.

<sup>20</sup>Namati, *Streamlining Institutions to Restore Land and Justice to Farmers in Myanmar*, June 2016, 13; Namati, *Evidence is Not Sufficient to Secure Land Rights in Myanmar; Impartial and Transparent Procedures Are Critical*, January 2017, 3.

<sup>21</sup>SPECTRUM Sustainable Development Knowledge Network, *Form 7: Seven Case Studies of Farmland Registration in Kachin State*, October 2015, 14.

<sup>22</sup>Disputes are "A significant disagreement or argument, often over a narrow range of issues." Grievances are "An official complaint over something or an action believed to be wrong or unfair." Grievances are commonly levied against a government agency. (These definitions are from the report on GORUM and KNU land dispute resolution mechanisms and procedures.)

<sup>23</sup>Research team interviews with VTA, villages heads in Shan State.

<sup>24</sup>Research team interviews with VTA, villages heads in Shan State.

ABsF are often asked to adjudicate disputes over customary unregistered land, Committees for Management of Vacant, Fallow or Virgin land are asked to investigate disputes over contested applications for VFV land, or land that has already been allocated under the law. Both processes may involve field visits by the VTA and other members of the VTABsF to investigate land use and a dispute.<sup>23</sup> Site visits can include consultation with elders and village heads about boundaries and other issues, as well as meetings with the Department of Agricultural Land Management and Statistics about recorded land use and registration, tenancies etc.<sup>24</sup>

The process for the VTA and VTABsF handling objections is triggered if, after posting a notice of a claim (which indicates and an entity is claiming to be the legitimate user of a particular parcel of farmland), another entity comes forward and makes an objection (usually a counter-claim that they are the legitimate user of the same land.) The investigative process is undertaken (often in collaboration with customary dispute resolution actors – village heads, elders) in order to gather evidence. Unlike customary dispute resolution mechanisms, this evidence gathering results in a determinative decision by the VTABsF as a body, whether the parties are in agreement or not. The decision is then passed up to the Township level of the TABsF for its consideration.

The VTA holds an unusual office, in that this person represents something of an interface between the customary and formal systems. If the dispute resolution authorities were to be represented as a continuum from purely customary to strictly formal, the VTA could be considered the main point at which the customary and formal overlap, as this individual may also be considered a customary authority in some respects, especially when assisting in dispute resolution outside of the VTA's formal position.



• Paddy crops that have recently been planted in Hpa-an Township, Kayin State •

## Reinvestigation Committee for Confiscated Farmlands and Other Lands

Once military and company land confiscations are considered, the formal land dispute resolution mechanisms must be considered to include the Reinvestigation Committee for Confiscated Farmlands and Other Lands operating at all administrative levels.

After taking power, the NLD government dissolved the Farmland Investigation Commission set up by the Thein Sein administration in 2012 and established its own, calling it the Central Reinvestigation Committee for Confiscated Farmlands and Other Land.<sup>25</sup>

The central committee (and subordinate committees replicated down to the village-tract level) are charged with investigating confiscations by the military and government departments in an effort to return any unused land to farmers. This committee has only returned minimal amounts of land to original users, despite thousands of claims made since inception in 2016. In 2017, Vice President U Henry Van Thio, the Chairman of the Central Committee for Reinvestigating Confiscated Farmlands and Other Lands, claimed that the committee had only managed to resolve 212 cases out of the 3,980 which had been submitted.<sup>26</sup> The year 2018 has seen some apparent improvement in the situation with some returns of land being publicly recorded in Shan State, Mandalay Region and Bago Region.<sup>27</sup>

The process of dispute resolution utilised by the various Reinvestigation Committees is supposed to be guided by the instructions of the Central level committee, but in reality, the process remains relatively obscure. Field visits and investigations do take place on occasion, however the decision-making process which follows is unclear and there have been well-documented issues with the actual return of land, even when decisions are made in favour of original land users.<sup>28</sup>

Whether dispute resolution involves claims over farmland, VFV land or confiscated land, within the formal system there is no official recognition of customary authorities within the process, despite the reliance on these actors at the grassroots level of validating land use claims (particularly in the LUC registration process).<sup>29</sup>

One positive feature of the committee is that it allows for the participation of civil society groups, though the degree of civil-society involvement in decision-making remains unclear.<sup>30</sup> Regardless, many of the committees at different levels remain ineffective or powerless to grant land restitution, especially at the township level.<sup>31</sup>

<sup>25</sup> Republic of the Union of Myanmar Central Reinvestigation Committee for Confiscated Farmlands and Other Lands Letter No. ..../1- Committee/ Land (Central)/2016 Date. June 10th, 2016.

<sup>26</sup> Republic of The Union of Myanmar, President Office, VP U Henry Van Thio attends meeting of committee on confiscated farmlands, 4 January 2017, available at <http://www.president-office.gov.mm/en/?q=briefing-room/news/2017/04/01/id-7452>.

<sup>27</sup> Republic of the Union of Myanmar President's Office, VP U Henry Van Thio attends ceremony to return confiscated land to farmers, <http://www.president-office.gov.mm/en/?q=briefing-room/news/2018/03/15/id-8561>; Republic of the Union of Myanmar President's Office, Vice President U Henry Van Thio praises Mandalay Region for topping the list among states and regions in returning confiscated lands, <http://www.president-office.gov.mm/en/?q=briefing-room/news/2018/08/07/id-8925>; Republic of the Union of Myanmar President's Office, Vice President U Henry Van Thio witnesses returning 481 acres in Toungoo, <http://www.president-office.gov.mm/en/?q=briefing-room/news/2018/08/27/id-8952>.



## Customary dispute resolution authorities

The identification of customary authorities is complicated by the fact that several of these actors are also recognized in legislation. 10/100HH heads, as well as Village-Tract Administrators are all recognized in the Ward and Village-Tract Administrator Law 2012.<sup>32</sup> While the VTA is recognised as a member of the GORUM land administration apparatus in the role of chair of the ABsF at the tract level, this individual may also act as a customary authority when resolving land disputes outside the authority of the VTABsF office. Likewise, the 10/100HH Heads, in the context of land disputes (rather than in low-level roles assisting with village administration), play a role in customary dispute resolution, sometimes as a first point of contact for land disputants.

Throughout this report the 10/100HH Heads are referred to in their customary dispute resolution roles, rather than in their recognised administrative roles.

## Ethnic Armed Organisations Role in Land Dispute Resolution

The roles played by Ethnic Armed Organisations in land dispute resolution depends in part on their relationship with the central government, as well as the geographical area under consideration and the level of influence enjoyed by that particular group at a given point in time. The roles played by the EAOs in the relevant areas for this report need to be looked at individually according to their specific circumstances, which vary considerably.

### Kayin State and Eastern Bago Region

Much of the administration of lowland areas of Kayin State and Eastern Bago Region is based on basic territorial subdivisions that were established under British colonial rule. Following the first Anglo-Burmese War in 1824-26, the southern part of what is now Kayin State was incorporated into British India when it formed part of what was then Tenasserim Division. Areas north of northern Kayin State and Eastern Bago Region were later annexed after the Second Anglo-Burmese War of 1852. The British divided the country into the central lowlands of 'Burma Proper' and the highland 'Frontier Areas', adopting different approaches to political and economic governance. In lowland areas, the British gradually expanded their legal and administrative power down to the village level, including through widespread land titling.<sup>33</sup> However, in upland areas autonomy was granted to ethnic elites in exchange for British dominion over natural resources including teak and precious metals.

<sup>28</sup>Displacement Solutions and Norwegian Refugee Council, *Restitution in Myanmar: Building Lasting Peace, National Reconciliation and Economic Prosperity Through a Comprehensive Housing, Land and Property Restitution Programme*, 2017, 13; Namati, *Streamlining Institutions to Restore Land and Justice to Farmers in Myanmar*, June 2016, 7.

<sup>29</sup>Interviews with VTAs in Shan State.

<sup>30</sup>Namati, *Myanmar's Foray into Deliberative Democracy: Citizenship Participation in Resolving Historical Land Grabs*, Namati, June 2017, 2. Namati notes several difficulties for civilian participation including limited access to information, limited involvement in decision-making, lack of notification about meetings, field trips, involvement in review and signing final documents on recommendations.

<sup>31</sup>Interviews with farmers and VTAs in Shan State.

These different administrative systems effectively endured after colonial rule as much of southeastern Myanmar collapsed into civil conflict between the Karen National Union and the Myanmar military.<sup>34</sup> While most lowland areas of Eastern Bago Region and Kayin State came under control of the Burmese military junta, during this time the KNU operated as a de-facto government across primarily upland areas, establishing their own education, health and justice systems.<sup>35</sup> Over the 1970s and 1980s, however the areas which the KNU controlled decreased significantly after a series of major military offensives. The KNU was also significantly weakened in 1994 after a ceasefire deal was established with the Democratic Karen Buddhist Army, an offshoot of the KNU.<sup>36</sup> Despite this, the KNU still maintained its own state-like apparatus in the areas it controlled, including importantly, laws related to the regulation, management and sale of land.

The 2012 preliminary ceasefire agreement between the KNU and the GORUM marked a significant change for people in Myanmar's southeast. This was further cemented by the signing of the Nationwide Ceasefire Agreement (NCA) in October 2015 and the November 2015 general election, in which the National League for Democracy won a landslide victory. The ceasefire has positively impacted many Karen people in conflict areas, improving security and access to basic service provision. In the contemporary era, however, economic development brings along new challenges, notably land-grabbing, natural resource depletion and environmental degradation.<sup>37</sup>

The research areas visited for this report are primarily under the control of the GORUM, but the KNU still maintains some power and influence across all areas, especially in Eastern Bago Region. There are seven districts as per the KNU administrative system, which include Thaton, Taungoo, Nyaunglebin, Mergui-Tavoy, Duplaya, Hpa-An and Papun, which in turn have townships and villages.<sup>38</sup> The research for this report was conducted in Hpa-An and Hlaing Bwe Districts, which come under the control of the KNU's Seventh Brigade and Eastern Bago Region, which comes under the control of Nyaunglebin's Third Brigade.

The KNU is controlled by two administrative organs, the Central Committee and the Executive Committee.<sup>39</sup> However, each individual District is managed relatively autonomously by a KNU District Chairman and a KNLA Brigade Commander. Within each District groups of ten-twenty villages are grouped into a village-tract and each village elects a village leader, which in turn elects a village-tract committee. According to KNU land laws, these leaders play an important role in the administration of land and in dispute resolution.

<sup>32</sup>Pyidaungsu Hluttaw Law No. 1/2012 - Ward and Village Tract Administration Law.

<sup>33</sup>See Adas, M. 2011. *The Burma Delta: Economic Development and Social Change on an Asian Rice Frontier, 1852-1941* (Madison, WI: University of Wisconsin Press).

<sup>34</sup>For a more detailed history of this conflict see Smith, M. 1999. *Burma: Insurgency and the Politics of Ethnicity* (London: Zed Books); South, A. 2011 *Burma's Longest War: Anatomy of the Karen Conflict* (Amsterdam: Transnational Institute).

<sup>35</sup>For more details see McCarten, B. and Joliffe, K. 2016. *Ethnic Armed Actors and Justice Provision in Myanmar* (Yangon: The Asia Foundation).

<sup>36</sup>The ceasefire deal made with the DKBA was one of a wave of similar agreements the Myanmar military government negotiated with other EAOs in the early 1990s. Those groups who established ceasefires with the Myanmar army, received lucrative economic deals such as mining licenses and land concessions, gaining access to highly profitable systems of resource. Internal divisions within the KNU also spawned two additional non-state armed groups, the Karen Peace Force (KPF) in 1997, and the KNU/KNLA Peace Council (KPC) in 2007, which emerged when members of KNU Brigades 6 and 7 respectively defected and signed ceasefires with the Myanmar military Tatmadaw.



• Rainy season in Hpa-an District, Kayin State •

As one of the 14 departments under the KNU, the Agriculture Department was established in 1949 and the land policy was enacted in 1974. Since 2013, the KNU's Agriculture Department has been carrying out land registrations and measurements in Kayin State, Eastern Bago Region and other Karen areas which they administer. Their land policy was amended in 2015 under the slogan "people are owners of the land" (see Annex II). The Preamble of the KNU Land Policy states that it:

“ Envisions recognition, restitution, protection and support of the socially legitimate tenure rights of all Karen peoples and longstanding resident village communities, resulting in improved practical and ecological governance of tenure of land, forests, fisheries, water, and related natural resources. This aspires toward greater self-determination in the context of a decentralized federal Union of Myanmar.

The most fundamental difference between the KNU's land policy and the GORUM is that the KNU recognises that people own the land, whereas the Government only grants land-use rights. The KNU's land policy also protects customary communal tenure and the use of negotiation, consensus building and meditation in the resolution of land disputes. It's land policies also include detailed mechanisms for the titling of village communal land, including land for shifting cultivation, community forestry and grazing. There are also a number of specialized bodies that have been created to address inter-village disputes and those involving businesses. However, the implementation of KNU land laws in mixed-administered and government-controlled areas is minimal.

<sup>37</sup>See KHRG. 2014. *Truce or Transition? Trends in Human Rights Abuse and Local Response in Southeast Myanmar Since the 2012 Ceasefire* (Chiang Mai: Karen Human Rights Group); KHRG. 2015. *With only our voices, what can we do?: Land Confiscation and Local Responses in Southeast Myanmar* (Chiang Mai: Karen Human Rights Group).

<sup>38</sup>For more details of the KNU's administrative system see Joliffe, K. 2016. *Ceasefires, Governance and Development: The Karen National Union in Times of Change. Policy Dialogue Brief Series No. 16* (Yangon: The Asia Foundation).

## Shan State

The research areas covered in this report relate to three distinct administrative relationships as the study areas incorporate parts of the eastern Pa-O Self-Administered Area (the northern part of which includes an area with some level of RCSS influence), the western Pa-O Self-Administered Area and the Danu Self-Administered Area. In each of these areas, despite a veneer of autonomy, the land administration is ostensibly under the auspices of the central land use registration and titling system.

The accommodation reached between the PNO/PNLA and the central government for self-governance does not interfere with the governmental system in any significant manner.<sup>40</sup> As such, the PNO/PNLA has no role to play in acting as an alternative dispute resolution actor through alternative land policy and land bodies or EAO courts in the way that is occurring in Kayin State, where the KNU administers land through recognition of customary systems and KNU personnel are sometimes involved in resolving disputes (either independently or in conjunction with formal governmental authorities in mixed administration areas<sup>41</sup>). The Danu areas appear much the same, given that in their areas of self-administration, the governing structure is split between the USDP and the Danu National Democracy Party and the Danu National Organisation Party.<sup>42</sup>

### International best practices toward recognition of customary land management practices

The GORUM has taken some positive steps toward recognition of customary land management practices, through the NLUP and more recently with the amendment of the VFV Law to recognize the existence of customary tenure and shifting agriculture practices. Official English versions of the amended VFV Law were not available at the time of writing, however, land activists working from the Myanmar version suggest that the law will now include a new Article 30, which states that the law does not apply to the management of the following types of land: a) Land for which taungya land tenure rights have been given in accordance with existing laws and procedures; b) Land that is defined in accordance with cultural and traditional systems of local ethnic nationalities; c) Land currently used for religious, social, educational, health and communication purposes related to the public and ethnic nationalities.

The recognition of customary tenure and land management practices is a positive step, though it is unclear how such provisions would operate with other new provisions which are cause for concern, such as 22(b)(1)-(2), related to the need to register use of VFV land within 6 months or face eviction and potential criminal sanctions. Further, amendment 27(a) also creates a strict liability (ie can be committed without intent) trespass offence on VFV land, which can also lead to criminal sanctions.

<sup>39</sup>For more details see McCartan, B. and Jolliffe, K. 2016. *Ethnic Armed Actors and Justice Provision in Myanmar* (Yangon: The Asia Foundation).

<sup>40</sup>Interviews with VTAs in Pinlaung and Nam Khok.

<sup>41</sup>Some of the government bodies involved in dispute resolution are the Karen Agriculture Department, the Central Land Commission, customary authorities and Village Land Committees. There are also a number of specialized bodies that have been created to address inter-village disputes and those involving businesses. Above the local level WVT and Township Authorities play a role.

<sup>42</sup>Jolliffe, K. 2015. *Ethnic Armed Conflict and Territorial Administration in Myanmar* (Yangon: Asia Foundation), 52.



Various international models for recognition of customary land management practices exist, and should be studied for applicability in Myanmar. The complexity of individual contexts makes this a difficult task, even in conflict-free environments. Some of the key concepts that should guide the enquiry into such recognition would need to include the degree of state intervention in customary areas.<sup>43</sup> Recognition of customary land management practices within formal structures can take place along a spectrum of options ranging from light to heavy state intervention in land relations; some examples are highlighted below.

	Characteristics of Customary Land Management Recognition	Country Examples
1	No state intervention beyond a recognition of boundaries of customary areas	Ecuador, Colombia, Panama, Mozambique
2	Incorporation of customary groups to regulate dealings with outsiders	Papua New Guinea, South Africa
3	Agency approaches predicated on group representation	Solomon Islands, Nigeria
4	Independent land boards with some customary representation	Somalia
5	Independent land boards with no customary representation	Botswana, Lesotho <sup>44</sup>

Recognising customary land management practices will require tailoring the legal options to the Myanmar context, as well as taking into account rights-based concerns such as gender<sup>45</sup> and marginalization of specific groups<sup>46</sup>. Further, pitfalls identified in previous efforts, notably those in various African countries, should also serve as a warning (these include procedural complexity, weak instructional capacity, government corruption and a focus on investment, lack of political will, lack of legal knowledge and poor access to justice).<sup>47</sup> Finally, the conflict context must also be taken into account in Myanmar, especially given recent efforts on behalf of EAOs to define their own land management approaches through policy development.<sup>48</sup> Given the public adoption of federalist stances by many EAOs, the GORUM can certainly expect that many ethnic groups will seek to control

<sup>43</sup>Such interventions should also be guided by the United Nations Food and Agriculture Organisation's Voluntary Guidelines on Responsible Governance of Tenure of Land, Fisheries and Forests, Rome 2012.

<sup>44</sup>Fitzpatrick, D. 2005. 'Best Practice Options for the Recognition of Customary Tenure' *Development and Change* 36(3): 449-475.

<sup>45</sup>UNDP, UNICEF, UN Women. 2013. *Informal Justice Systems: Charting a Course for Human Rights-Based Engagement*, 98; Harper, E. Ed. 2011. *Working with Customary Justice Systems: Post-Conflict and Fragile States*, International Development Law Organisation, 150.

<sup>46</sup>UNDP, UNICEF, UN Women. 2013. *Informal Justice Systems: Charting a Course for Human Rights-Based Engagement*, 139.

<sup>47</sup>Harper, E. (ed). 2011. *Working with Customary Justice Systems: Post-Conflict and Fragile States*, International Development Law Organisation, 156.

<sup>48</sup>Kayin, Shan and Kachin EAOs have all been working on land policies which will impact their negotiations in ceasefire agreements and subsequent political dialogues.

Recognising customary land management practices will require tailoring the legal options to the Myanmar context, as well as taking into account rights-based concerns such as gender and marginalization of specific groups . Further, pitfalls identified in previous efforts, notably those in various African countries, should also serve as a warning (these include procedural complexity, weak instructional capacity, government corruption and a focus on investment, lack of political will, lack of legal knowledge and poor access to justice). Finally, the conflict context must also be taken into account in Myanmar, especially given recent efforts on behalf of EAOs to define their own land management approaches through policy development. Given the public adoption of federalist stances by many EAOs, the GORUM can certainly expect that many ethnic groups will seek to control their own resources, including land, thereby further complicating efforts at recognising customary land management practices.<sup>49</sup>



<sup>49</sup>For an in depth analysis of the interim arrangements in the Myanmar peace process and how this affects land and natural resource management see South, A., Schroeder, T., Joliffe, K., Mi Kun Chan Non, Sa Shine, Kempel, S., Schroder, A. and Naw Wah Shee Mu. 2018. *Between Ceasefires and Federalism: Exploring Interim Arrangements in the Myanmar Peace Process* (Yangon: Joint Peace Fund).





• Karen villagers are increasingly worried about the impacts of projects in the name of development •



## 4. CUSTOMARY LAND DISPUTE RESOLUTION IN KAYIN STATE

The focus of this section of the study is on Kayin State. The total population of Kayin State is 1,572,000 people and the main ethnic groups are Karen, Shan, Pa-O, Bamar and Mon. About eighty four percent of the population is Buddhist, and 9.3 percent is Christian. Kayin State is located in the southeast of Myanmar, bordering Mandalay Region, Shan State and Kayah State to the north, Thailand to the east, and Bago Region and Mon State to the west and south respectively (see Figure 1). Large areas of Kayin State consist of floodplains that, combined with an abundant rainfall, enable farmers to harvest two or three crops of paddy rice every year. Lowland areas tend to be more populous and primarily function under the administration of the GORUM. The north eastern part of the state, bordering Thailand is more mountainous and covered with dense forests. This part of the state is less densely populated, and vast areas come under the administration of the Karen National Union. The strength of the KNU is particularly strong in Taungoo district (Second Brigade) and Hpapun (Fifth Brigade). In KNU controlled areas, customary land management and swidden rice cultivation is still widely practiced.<sup>50</sup>

The research for this report was conducted in 12 village sites in Hpa-an and Hlaingbwe townships. Village-tracts included in the study are:

- ◆ Hla Ka Daung, Hpa-an township
- ◆ Bin Chi, Hpa-an township
- ◆ Mi Tha Yaung, Hpa-an township
- ◆ Nat Kyun, Hpa-an township
- ◆ Naung Pa Lein, Hpa-an township
- ◆ Hlain Ka Bar, Hpa-an township
- ◆ San Pa Ree, Hpa-an township
- ◆ Kun Bi, Hlaingbwe township
- ◆ Kawt Hlaing, Hlaingbwe township
- ◆ Hti Lon, Hlaingbwe township
- ◆ Ta Khin Lone, Hlaingbwe township

<sup>50</sup>As expressed in the limitations, the research team was unable to gain access to EAO-controlled areas in upland sites due to various restrictions. Research by others demonstrates, however, the importance of customary land law to Karen people in these and other areas. See for example Allaverdian, C., Fogerite, J. Scurrah N. and Si Thu Than Htike. 2017. *Documenting Customary Tenure in Myanmar: A Guidebook* (Vientiane & Yangon: Mekong Region Land Governance); ECDF. 2016. *Our Customary Lands: Community-Based Sustainable Natural Resource Management in Burma* (Yangon: Ethnic Community Development Forum); Siu Sue Mark. 2017. *Land Tenure Reform in Myanmar's Regime Transition: Political Legitimacy versus Capital Accumulation*, PhD dissertation (Rotterdam, The Netherlands: Erasmus University Rotterdam); Zaw Aung & Khin New Cho. 2018. *Growing up Together with the Forest: The Unique Relationship Between the Forest and Indigenous Karen People of Kamoethway* (Dawei, Myanmar: Tanintharyi River and Indigenous People Network).



Based on the Thanlwin river plain, much of Hpa-An and Hlaingbwe's population lives in rural areas where farming is the primary means of obtaining a livelihood.<sup>51</sup> Agriculture is dominated by highly productive smallholder cultivators and the main agricultural activity is paddy rice cultivation, followed by groundnut and sesame. Plantation crops, including rubber and fruit orchards, are found on higher grounds where there is no floodwater or natural irrigation channels. In all areas that the research team spent time, shifting cultivation has died out over time or due to land grabs which took place under the military government (1962-2010). However, there was some cultivation on limestone cliffs for fruits and vegetables on land which research participants had primarily inherited from their parents and grandparents.

Hpa-An township is famous for its limestone karst landscape. Based on customary inheritance, many people described the use of limestone cliffs as key to securing their livelihoods. In villages where people live adjacent to these small mountains, the most common crops grown are lemons, chilli, mangoes, pineapple, bananas, durian and mangosteen. People often also grow perennial trees including betel nut trees, rubber and teak trees which are seen to have a high value. Many of these crops are used for household consumption, but those with larger land plots sell their produce in the market.

### Land Registration under GORUM law

One of the key questions explored by the research team in Kayin State was people's understanding of land. In all interviews people expressed the importance of land and its value, especially from the point of view of securing their livelihoods. Many people also emphasised its value as their "ancestors land", and the importance of registering their claims over its ownership as part of what they viewed as their inalienable customary user rights. This understanding of land aligns more closely with the KNU's land laws which places tenure in the hands of people themselves rather than the state. However, the majority of people interviewed in the research sites primarily used the GORUM land laws to register their land.

Since the introduction of the 2012 land laws, there has been widespread registration of paddy land in Hpa-An and Hlaingbwe townships. While some areas experienced mixed administration between the Myanmar government and the KNU, in the majority of villages visited by the research team people expressed high engagement with the GORUM land registration system. Most commonly referred to as the 'green book',<sup>52</sup> in all villages where research was conducted, people had or were in the process of getting a Land Use Certificate (LUC) for paddy land. In many villages where the research took place, representatives from the DALMS office had visited the villages directly to measure the land since 2012. The widespread uptake of LUCs was also related to the increased capacity and knowledge of Village Tract Administrators (VTAs) who help to coordinate with the Farmland Administration Body (FAB) to enforce this new land registration system. In all villages where the research took place, respondents suggested that LUC's were secured primarily to gain access to loans provided by the Department of Rural Development (DRD).<sup>53</sup> People also noted the value of LUCs as a protective mechanism against future land grabs.

<sup>51</sup> According to the 2014 census, over eighty percent of people in Hpa-An district are classified as living in a rural area.

In contrast to the widespread registration of lowland paddy fields, few people who use upland areas for their livelihoods, such as one limestone cliffs, reported having LUCs. It was suggested that the reason people don't have LUCs was because of a lack of information regarding the land laws. Many people explained that they believed that LUCs and their associated loans were only available for paddy land, whereas upland areas were managed in informal, customary ways. Some village heads and village tract administrators (VTAs) interviewed by the research team were also unclear as to whether land holders could apply for an LUC for upland areas.

### Adoption of LUCs as a cause for land disputes

**T**he introduction of LUCs under the 2012 Farmland Laws is seen as creating many disputes and conflicts over the boundaries of land. In all interviews, people explained that in having their land formally measured for a LUC they did not know the exact measurements of their land, relying instead on customary knowledge passed down from generation to generation and the use of natural landmarks, such as trees, irrigation canals and rocks. The LUC measurement procedure enacted by the GORUM was widely perceived to have caused disputes regarding neighbouring areas.

In a large number of villages, interviewees reported that they had or were currently involved in land disputes as a result of the incorrect measurement of LUCs. In some cases, they appeared to be caused by some people deliberately extending the boundaries of their land in order to claim more territory. In most cases, however, interviewees attributed problems to negligence by DALMS officers that did not use appropriate procedures and mechanisms to measure land – including consulting with neighbours about land boundaries or using GPS technology.

The 2012 Farmland laws have also been used by people to illegally acquire land. According to formal procedures, when people are applying for LUCs, the DALMS office is supposed to make sure there are no objections to the registration of the land in a new name. It is important to note, that in the majority of cases, LUCs are registered in the name of those people who are already recorded in tax booklets as having a use-right for the land. However, in some cases, where people have recently acquired or bought land, DALMS officers are not using the correct procedures before handing out LUCs.

<sup>52</sup>In all cases, the author sought to check which documentation the people had. In villages which experienced more conflict, the implementation of state land administration has been less systematic in the past. However, since the 2012 ceasefire, many farmers in mixed administered zones have directly sought a land certificate with the assistance of the VTA.

<sup>53</sup>The loans from DRD are repayable over a one-year period. They are acquired for buying seeds, equipment and hiring people to assist with plantation and harvest.

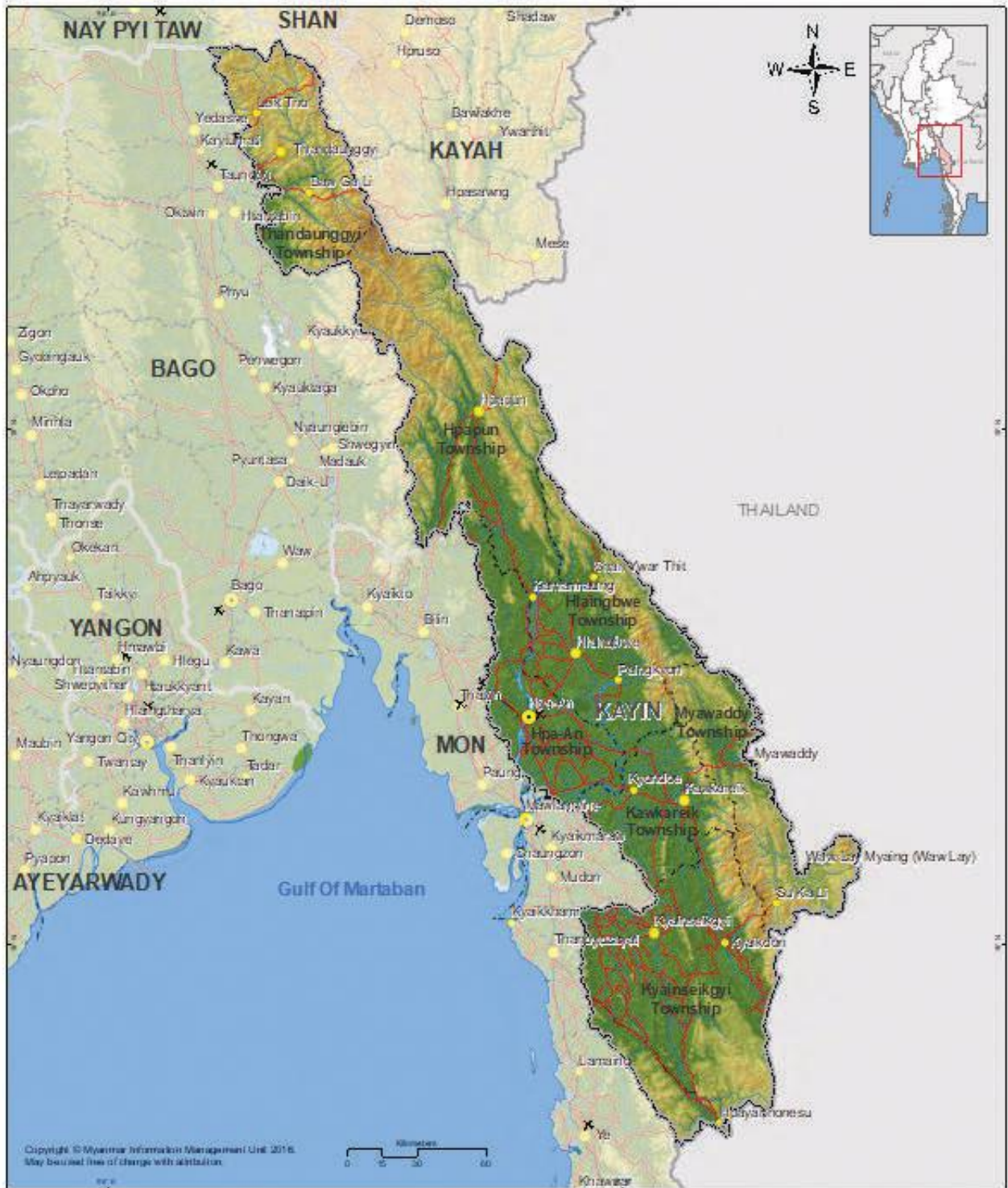
## Sale of Private Land as a cause for land disputes

People interviewed in all research sites in Kayin State reported that the sale of land, especially when inherited, has led to disputes within families. According to local customs, inherited land should first be offered to immediate siblings or relatives at a significantly reduced price to try and keep it in the family. Only if all siblings or relatives do not want or are unable to purchase the land can it be sold, and then only to people within the village. Karen interviewees voiced strong preferences for discouraging the alienation of land to outsiders who did not live in the village. If, however, there were no purchasers within the village, land could be sold to outsiders, but it must be overseen by the village head.

Since there are many people in Kayin State who work as migrants in Thailand and elsewhere, the sale of land to outsiders is increasingly thought to be causing disputes between siblings who no longer live and work at home on the land.



# KAYIN STATE - MYANMAR



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<p>Map ID: MMU152/05 Creation Date: 16 August 2016 A3 Projection/Datum: Geocentric WGS84</p>	<p><b>Legend</b></p> <ul style="list-style-type: none"> <li>State/Region Capital</li> <li>Main town</li> <li>Other town</li> <li>Airport</li> <li>Road</li> <li>National Highway</li> <li>State and Show Line</li> <li>Township Boundary</li> <li>State Boundary</li> <li>State/Region Boundary</li> <li>International Boundary</li> </ul>	<p><b>River/Water Body</b></p> <ul style="list-style-type: none"> <li>Natural Watercourse</li> <li>Reservoir</li> </ul> <p><b>Elevation (Meter)</b></p> <ul style="list-style-type: none"> <li>0 - 250</li> <li>251 - 500</li> <li>501 - 750</li> <li>751 - 1,000</li> <li>1,001 - 1,250</li> <li>1,251 - 2,000</li> <li>2,001 - 2,500</li> <li>2,501 - 3,000</li> <li>3,001 - 4,000</li> <li>4,001 - 5,000</li> <li>5,001 - 7,000</li> </ul>	<p>Data Sources: MMU Base Map: MMU Boundaries: WPRMMU Elevation: SRTM Place names: Ministry of Home Affair (GAD) translated by MMU</p>
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Disclaimer: The names shown and the boundaries used on this map do not imply official endorsement or acceptance by the United Nations.



# Key Actors and Authorities for Dispute Resolution in Kayin State

## Village Heads

Village Heads are seen as the highest customary authority in Karen villagers. In the research areas, village heads are elected through an informal process whereby all household heads come together to elect and vote for an appropriate candidate. This process is supposed to occur every three years, but those elected often hold the position for extended periods of time until they choose to step down. Those elected are often widely respected and command a lot of authority in the village. Their election may be related to their wealth and education, but in many cases, it is simply based on personal qualities such as honesty and a natural ability to command respect. This position is most often held by men in Karen villages, but during the sixty-year long conflict women also took on these roles.

The majority of land-related disputes in Kayin State identified in the research were historical cases that involved powerful authorities from the Tatmadaw, the township GAD, companies/businesses and commanders from ethnic armed organisations (EAOs). Across all research sites it was suggested that disputes within villages were rare because of the importance of maintaining harmonious relations. In those cases where there was a dispute regarding land involving either individuals, groups or family members, the most common way to resolve these matters was through mediation by the village head.

All the respondents interviewed in Kayin State suggested that the majority of land disputes which involved people within a village were often resolved quickly through a mediation process overseen by village heads. It was explained that villagers would approach the village head directly who would then conduct a mediation between disputants. Often this was conducted in the village head's house so as to bring disputants together in an objective setting. In cases which involved boundary disputes, village heads explained that they might also go to the land in question to examine the dispute and to 'walk the boundaries' of the land.

In the case of more complex land disputes, village elders and those whose land was in proximity to the land in question might also be asked to assist, based on their knowledge of the village and its land use. In some cases which involved Buddhist disputants, village heads might also conduct the mediation in a monastery and with the assistance of an abbot. Monks are not asked to resolve a dispute directly, but simply to observe the mediation so that it is conducted in a civil and respectful manner. In those cases, which cannot be resolved at the village level, the assistance of a Village Tract Administrator (VTA) is often sought by village heads who see their authority as declining – especially with the introduction of the 2012 land laws.

Village heads and other respondents across all research sites explained that disputes involving neighbours and family members were often resolved at the village level to maintain harmonious relations. However, it was suggested that since the adoption of the 2012 Farmland laws disputes between villagers and family members are becoming more common and the authority of village heads has diminished. Since village heads do not have formal authority according to the 2012 Ward and Village Tract Administrative Law laws to resolve land disputes, the resolution of disputes at this level is a non-binding recommendation for a settlement. While many respondents suggested that the decision of a village head is considered customarily as binding, people are increasingly turning to VTAs to resolve land disputes.

### Village Tract Administrators (VTAs)

People in Karen villages are increasingly turning to VTAs as a primary authority to mediate land disputes. As outlined below, the intermediary role VTAs play between the Myanmar state and civilians at the level of village tract means that their decisions regarding the demarcation of land boundaries, in particular, are considered as more binding. However, the relationship between VTAs and ordinary people varies from village to village and depends on how they are perceived within the community. Because of the power concentrated in this position regarding land title, in some villages VTAs have been accused of corruption and land grabs.

Across all research sites VTAs were often called to help mediate land disputes that could not be resolved at the village level by village heads. The assistance of a VTA is most often requested directly by individuals if they are not satisfied with the decision of their village head or by a village head themselves who might ask for their assistance. VTAs interviewed suggested that individual villagers are also increasingly bypassing village heads and directly approaching them to begin with for various disputes, since they are now considered to hold more power in decisions regarding land.

In all research sites it was suggested that in the past when VTAs were appointed by the Township Administrator, an official of the Government Administrative Department (GAD) under the military controlled Ministry of Home Affairs, they had not played a role in land dispute resolution. Since 2012, however, when individuals filling this position started to be elected, people were increasingly inclined to approach them as a more genuine representative authority from the area.<sup>54</sup> Even though VTAs have a role in government administration, they are also often widely respected and trusted by the communities which they represent.

<sup>54</sup> See also UNDP. 2014. *Local Governance Mapping: The State of Local Governance Trends in Kayin* (Yangon: United Nations Development Programme); UNDP. 2017. *Consolidated Summary Report: Access to Justice and Informal Justice Systems in Kachin, Rakhine and Shan States* (Yangon: United Nations Development Programme).



- This photo was taken in Hpa-an Township, where a powerful BGF commander is mining a sacred limestone mountains for cem. •

As Chairperson of the ward/village tract Farmland Management Committee the VTA is now increasingly considered as a natural authority to help mediate land disputes. VTAs also play an essential role in assisting land registration according to GORUM land law. They are also generally more affluent, educated, commonly speak the Burmese language and have some knowledge of the GORUM land laws. From the perspective of villagers, these traits place them in a strong position to resolve land disputes as well as to help individuals mediate between government authorities and villagers when they have a dispute.

In interviews, VTAs explained that when they approached land disputes within the village, they always tried to encourage disputants to consider the importance of maintaining harmonious community relationships. In most cases, they explained they would seek to mediate the dispute in the relevant people's homes or in the home of the village head. Some VTAs interviewed also explained that it was important to involve the village head so as to bring in an objective mediator who knew both parties well. Other respondents suggested that friends, neighbours and family members might also attend a mediation to ensure that each of the disputants remain honest. VTAs might also seek the help of the Village Land Committee, but across all research sites this was very rare.<sup>55</sup> It was explained that it was more logical to bring together those involved, alongside people who knew the history of land use in the affected areas, rather than members of the Village Land Committee.

In resolving land disputes regarding the incorrect registration of land, VTAs are often the first port of call since they are responsible for helping to register land in the first place. In resolving boundary disputes, they use a mixture of customary and informal approaches, consulting with village leaders, neighbouring villagers and elders from the village. In most instances, cases involving boundary disputes are resolved easily. But according to VTAs interviewed across all research sites, this also depends on the personal ethic of those involved and their willingness to maintain harmonious community relations.

## Karen National Union

**H**pa-An and Hlaing Bwe townships primarily come under the control of the KNU's Seventh Brigade. While many villagers continue to pay taxes on agricultural land in these areas to the KNU, the Seventh Brigade does not play a significant role in regulating or managing land or land disputes in these areas. In some rural villages the KNU's Agricultural Department is handing out land certificates as per KNU land law and mapping village common lands and forests. However, respondents in all research sites suggest that they have very little influence in the resolution of land disputes, particularly those that regard land grabs related to powerful and armed authorities. In some cases, Karen villagers have sought the assistance of the KNU to help resolve land cases, but they have had little power in relation to land grabs that involve the Tatmadaw, companies/businesses or the Kayin State government.

## Religious Leaders

**I**n some village sites and urban areas Buddhist monks are requested to help mediate land disputes between villagers as well as advocating for the HLP rights of people. However, the research shows that some powerful monks are also implicated in land grabs.

In all of the research sites, religious leaders of other denominations do not play an active role in resolving land disputes.

## Women

**I**n the 12 locations visited for this study, there were no women in formal positions of authority to help negotiate dispute resolution. However, women are very active actors in using informal methods to apply pressure on the government for HLP restitution, including in land demonstrations. This is partly based on the fact that Karen is a matrilineal society and women play a strong role in matters which concern the administration of the household.

<sup>55</sup>Seeking the assistance of the village land committee was very rare as the VTA was often considered as having the authority and power to manage land disputes independently.



## Customary Land Management and Land Disputes

In Kayin State, land is highly valued for social, cultural and livelihood reasons. In all research sites in Kayin State, Karen respondents explained that land is handed down within families from generation to generation through strong customary inheritance laws which emphasise an equal share between siblings. The most interesting aspect of this is that, unlike some areas of Myanmar where there is a clear gender bias in favour of men,<sup>56</sup> according to Karen culture inherited land is always split equally between children and does not exhibit gender bias.<sup>57</sup> People explained that these practices were maintained and endured over successive generations, even in situations where siblings had moved out of the village, taken up employment elsewhere or moved to Thailand to work as a migrant.<sup>58</sup>

Across all of the research sites in Kayin State, the negotiation of inherited land handed down after the death of parents was conducted in informal ways between siblings. Since the registration of paddy land for tax purposes has been common in lowland areas since the colonial era, land certificates are kept in the name of either the husband or wife before they pass away depending on who has inherited the land. In many cases where the research team visited, even after land had been divided between siblings, the land certificate is still registered in the names of one of the parents and often kept with the eldest sibling. Unless there was a dispute, in no cases were village authorities involved in the negotiation of inherited land. This often was explained as a customary process, which relied on the loyalty and trust of sibling relations and importance of maintaining thout kyar, faithful, to each other.

As explained in previous research conducted by one of the authors amongst Plong Karen people in Kayin State, the notion of thout kyar, is a common term used to articulate the interdependency of Karen families or communities as a whole:

“ To have thout kyar, is directly translated in English as being ‘faithful’. However, it is much more encompassing term which is used to refer to a particular Plong Karen ethic which people describe as fundamental to living as a morally coterminous life. It is to live simply and honestly, without pride and greed and to value harmonious relations, over and above individual gain.<sup>59</sup>

<sup>56</sup> See for example Andersen, K. E. 2016. *The Recognition of Customary Tenure in Myanmar* (Vientiane: Mekong Region Land Governance); Faxon, H. O. 2015. *The Praxis of Access: Gender in Myanmar’s National Land Use Policy* (Yangon: BRICS Initiatives for Agrarian Studies); Gender Equality Network. 2014. *Towards Gender Equality in the National Land Use Policy* (Yangon: Transnational Institute); Namati. 2016. *Gendered Aspects of Land Rights in Myanmar: Evidence from Paralegal Casework* (Yangon: Namati).

<sup>57</sup> It was explained by Buddhist communities that the eldest child, regardless of gender, was given land in the eastern direction where one places the household shrine and the youngest child at the western edge of the plot. A similar system was reproduced in the household plot, demarcating where children could build their house, should there be room.

<sup>58</sup> According to Karen customs, in those cases where a sibling no longer wanted their lands, others within the family were able to buy the land at a below market price. Some people also gave away their inherited land to their siblings if they had enough land in their wife’s village.

The importance of thout kyar was a common occurrence throughout all interviews with Plong Karen communities regarding land disputes. This was often the reason given as to why there were very few land disputes between families or villagers regarding land. It was also commonly discussed in reference to orchard lands and communal forests where people do not have formal documentation. Instead, people stressed the fact that they have a long tradition of customary ownership which often dates back many generations. “We do not need a certificate to demonstrate it is our land” one elderly Karen woman from San Pa Ree Village Tract explained:

“ We trust and understand each other. People from the village never create disagreements or arguments over land boundaries because we know which space is our own. The land is marked by big trees, rocks or bamboo bushes. Everyone accepts it, because we have thout kyar. Even if someone moves away and works in Thailand, we know which area of land is theirs. It is their grandparents land, so we always respect that. Because Karen people have thout kyar.

Indeed, the management of community lands in Karen villages is largely predicated on a strong sense of community, trust and loyalty based on shared ethical principles and values. “In our village, land is handed down from generation to generation” a middle-aged man from Kun Bi village explained. “Disagreements never happen between villagers or siblings because we have thout kyar.”

<sup>59</sup>Chambers, J. 2018. *In Pursuit of Morality: Moral Agency and Everyday Ethics of Long Karen Buddhists in Southeastern Myanmar*. PhD dissertation. (Canberra: Australian National University): pg. 94.

## Case Study A – Inherited land is often predicated on the importance of trust and loyalty between siblings

In one village in San Pa Ree Village Tract, a middle-aged Buddhist Plong Karen woman explained emphatically that inherited land was always divided equally between siblings according to Karen cultural customs. In her own situation, however, her parents only had two acres of paddy land and the house land to divide between eight siblings. After both of her parents passed away ten years prior, she explained that all of the siblings had come together and made a joint decision to give the small area of paddy land to her youngest brother. This process was conducted without the assistance of the village head or any other kind of authority. She explained that the decision to give the land to her brother was primarily because he had looked after their parents as they aged and also assisted them with paddy cultivation. Each of the other siblings had spent time working in Thailand and amassed enough income to buy their own housing plots in other areas of the village. Many of them had also inherited land through their husband or wife, whereas their brother had never married and therefore had no access to other inherited land.

Upon returning home, after their own children had taken their place working in Bangkok in Thailand, the woman explained that those siblings without land now worked on their parents' land alongside their brother as labourers and that he split some of the rice after the harvest with them. Her brother had an LUC for the land, but it was still registered in their fathers' name even though he had passed away more than ten years before. She explained that this reflected the fact that the land was still customarily owned communally between the siblings. The research team inquired who the land would go to after his death as he did not have children of his own. She explained that once she and all of her siblings had passed away, the land would then be inherited by all of the cousins who would also share the land between them. Asking if there might be disagreements in the future between the children, she was clear: "Why would there be disagreements between the family? If we are family then we always have thout kyar, to each other."

As documented above, in all of the research sites visited where families had little land to pass on to their children, the resolution of inheritance varied from household to household and was always premised on the importance of maintaining thout kyar between siblings. In many cases, those who were given the house and house land were those who had looked after their parents until they passed away. According to Plong Karen customs, this role is customarily reserved for the youngest daughter.<sup>60</sup> This varies, however, in practice, depending on the marital status of children, if the families have daughters at all and if children have moved out of the household to go and work in Thailand – a common practice in all areas where the research was conducted.<sup>61</sup> In this sense, despite people's emphasis on a singular Karen custom for dividing land, the processes at work are often much more complex and differentiated from household to household (see Case Study A).

<sup>60</sup>Karen living arrangements are primarily uxorilocal, meaning that women traditionally stay within their own village after marriage. However, as a result of high migration rates, this varies in practice.

## Case Study B – The importance of maintaining harmony in resolving land disputes

In a small village in Nat Kyun, one middle-aged Karen woman described the significance of inherited land and how the Karen ethic of *thout kyar* helped to maintain relations within both families and communities in their village. “Our inherited land is the most important land for us. It is our parents’ and grandparents place. We do not need a government certificate. We just know our place. We do not try to take other people’s land, because we have *thout kyar*.”

The woman was referring to a large area of flooded land with a large pool that she and her five siblings shared together without any kind of land documentation. During the rainy season the land was completely covered by flood water, but she explained that as the summer months approached she and her siblings would ‘spread the seed’ for paddy as the water levels dropped. Significantly, they also used the ponds which were naturally created during the wet season to farms fish and prawns. Some people also used the ponds for the production of duck eggs. She explained that everyone who had land in this space did not have an LUC or other tax documents for those plots because they didn’t need it.

“Everyone goes to spread the seed together. We also go to collect the fish together from the pond. We do not have any conflicts over which area is which, because we know each other and we know our area. We know the boundaries from our parents and grandparents. We have been going here together since children. We always keep *thout kyar*.”

In contrast, she noted, “The government system is so complicated. If we want to get the land registered with the government, we have to go all the way into Hpa-An. It is so far. And then when we get there, the officers cannot speak Karen. But if we have *thout kyar* we do not need a certificate.”

The importance of *thout kyar* was also articulated as important for Karen communities in the management of land which did not have land title. Whilst all paddy land areas either had or were in the process of getting an LUC, the Karen ethic of keeping *thout kyar* was viewed as essential to the management of areas without formal title. However, these customary inheritance arrangements are being challenged by the proliferation of formally recognised economic land concessions and formal land titling as per the 2012 Farmland Laws.

<sup>61</sup>Since the early 1990s out-migration from Karen state to Thailand has increased significantly. Under the SLORC/SPDC government (1988-2010), Karen families experienced increased economic insecurity, massive violence and marginalisation pushing many people to seek employment across the border.



### Case Study C – Villager heads are increasingly seeking the assistance of VTAs to resolve land disputes

In one village in Hlaing Ga Bar village-tract, a village head explained that he was currently helping to resolve a land dispute between five siblings over three acres of inherited land. The village head had held this position for more than ten years and was widely respected by other villagers. The five siblings worked together on land that was inherited from their parents as it was seen to be too small to break up into pieces. However, when the officer from the Department of Agricultural Land Management and Statistics (DALMS) arrived in their village to measure the land, the eldest brother registered all of it in his name. He insisted that he had registered it this way as a way to protect it from claimants outside of the family, and that all of his siblings could continue to use the land communally. Two of the siblings, however, also wanted to have their names on the LUC to ensure that their own children in the future could inherit either the communal use right or a portion of it. The village head explained that he was currently mediating the dispute, but the parties had been unable to reach a compromise. He said that after one of the siblings had approached him directly about this issue, he had brought all of the siblings' together in his house to try and resolve the dispute. He explained that if they could not come to an agreement soon, the case was likely to go to the VTA for dispute resolution assistance. He believed that the VTA would be more likely to resolve the dispute since they understood the land laws well and would be able to assist the siblings to change the land certificate if that was necessary.

### Case Study D – Resolving land disputes related to divorce

Across all research sites, disputes over land as a result of divorce were rare but increasing. In cases where disputes involving divorce and use-rights to land had occurred, village leaders were the only authority mentioned to assist with resolution. This was partly because village leaders are often asked to help mediate and sometimes even try and prevent divorce itself.

Village heads explained that assets from a divorce are informally negotiated between respective parties and their extended families. Land that is inherited often remains with the person who inherited the land.

In the case of land that has been bought by a married couple, it was suggested that it should be given to children from that marriage and that it cannot be transferred to children from another marriage or a new partner.

It was noted by interviewees that even in complex cases, villagers were highly unlikely to seek dispute resolution through township authorities or in the court regarding divorce since it was perceived as costly and difficult to access.

## Case Study E – Collaborative dispute resolution

In a village in Naung Pa Lein in Hpa-An township, the research team was able to informally observe a land dispute case that was resolved through collaborative dispute resolution. The dispute was related to the mapping of villager's paddy land boundaries that had recently been formalised through the issuance of LUCs from the GORUM. Several of the people in the village, suggested that the government officers from the DALMS office had measured the land incorrectly and they had requested the VTAs assistance to have the lines of the land redrawn.

The VTA requested that all of the land owners in the area in question come together to discuss the exact boundaries of each person's land. Approximately 25 villagers gathered together at the site of the land dispute on the designated day to determine the boundaries according to customary knowledge and land usage. Together they physically walked around the boundaries of multiple plots of land to demarcate the areas each of the farmers claimed using physical markers such as trees, rivets and irrigation canals. Many of the people gathered that day were not involved in the case directly but knew the people whose land was in dispute and came to observe and provide input if necessary.

After going out to look at and walk the land, the people directly involved in the dispute were brought together at the edge of the paddy land where everyone sat to discuss, share betel nut and confirm the boundaries. Afterwards they gathered in the VTA's office where the primary claimants involved, two women and one man, showed all of their historical certificates and documentation, including the LUCs which were in dispute. The village head led the discussion, while the VTA observed. Occasionally, villagers from the back of the room spoke up to also give their opinions. After more than an hour of amicable discussion, they all came to an agreement about the boundaries of the land. Several days later the claimants and the VTA travelled to Hpa-An to have the boundaries of the LUCs redrawn.

Like village heads, Karen VTAs often evoked moral frameworks which stressed the importance of keeping thout kyar as a key identity marker of Karen personhood. However, in many interviews, VTAs explained that the value of keeping thout kyar had decreased over time, and that Karen people were increasingly taking their disputes to township authorities in Hpa-an. As one VTA in Ko Mo Ka Sin noted:

“ Now that land is increasing in value around Hpa-An there are many conflicts between people over inherited land. Before we used to have understanding between each other and thout kyar, but now people are greedy and are forgetting their culture and heritage. If we are from the same village or family, it is not good to fight. But these days, many people have disagreements, because the land is so expensive. They are forgetting who they are – they have lost thout kyar.<sup>62</sup>

It was suggested across all research sites that the increasing assistance of VTAs to help mediate disputes was related to their direct connection to the Administrative Bodies of the Farmland (ABsF). This role is seen to have expanded significantly since 2012 and it was suggested that in the past village leaders were a much more highly respected authority. As one former village leader explained, “In the past, Karen people always listened to the village head and their decision was always final. But now, if people don’t agree with their decision they go to the VTA and increasingly to the ‘upper level’.” Taking a different perspective, one young mother from San Par Ri village tract explained that the system was much more transparent under the current system. She suggested that whilst in the past villagers had no opportunity to disagree with the decision of a village head, they could now go and seek assistance from other authorities like the VTA.

While some respondents believed that VTAs helped to resolve disputes, others saw their alignment with the GORUM in a negative light. Some respondents also suggested that their responsibilities as per the 2012 Ward and Village Tract Administration Law gave them power to expropriate land.

“ Everything happens from the VTA level up in Myanmar,” one village leader from Mi Tha Yaung village tract explained. “If the VTA says yes, this is the first step and we can apply for our land and help to resolve any land disputes we have. However, if the VTA says no, we cannot even register our land. In some cases, the VTA does not understand their power well and the authorities above them can manipulate them for their own means. However, some VTAs abuse their power. There is a lot of potential for corruption with this position.

Indeed, VTAs were sometimes involved in land confiscation cases themselves, significantly impacting people’s abilities to claim restitution through the GORUM’s available mechanisms. In those cases where people appealed to government officers regarding their land claims, they were often ignored or told to return to the VTA and resolve the case themselves. Many of the respondents facing this kind of situation explained that they felt powerless against VTAs as poor and uneducated farmers and that the existing mechanisms to seek restitution were inaccessible to them (see Case Study B). It was suggested that the current mechanisms available for land restitution are unable to protect ordinary people in these cases, because of the imbalance in power.

In cases involving VTAs people have sometimes sought the assistance of civil society leaders in Hpa-an who have gained a reputation for helping people with land disputes (see Case Study F & G). While these groups are very active in seeking restitution for land grabs, they have not been very effective in securing HLP rights when it involves powerful authorities.

<sup>62</sup>In recent years the price of land in Hpa-An township has increased significantly, especially in areas proximate to urban centres.



• Floating Tomato Farm Inle Lake, Shan State (1) •

### Case Study F – Corrupt VTAs hampering efforts for restitution

In San Par Ri village-tract a group of 15 farmers interviewed were seeking to resolve a land dispute which involved a VTA and his father-in-law, a retired Tatmadaw officer, who had expropriated more than 120 acres of paddy land under the military junta. The farmers explained that the retired military officer took the land as his own, divided it with small roads and then sold parcels of land off as housing plots (60 x 80 feet) to people from outside of Kayin State between 2006-2012. The farmers explained that even though much of the land had been sold, it mostly remained unoccupied because people from outside of the area were too afraid to come and live there. However, because of the ceasefire in 2012, this situation was changing and the new owners of the land were beginning to build houses and businesses on the plots.



After the 2012 announcement from the GORUM that they would return previously confiscated lands the affected farmers grouped together to try and have their lands returned. They explained that they faced significant difficulties because their VTA was the son-in-law of the retired Burmese military officer who had taken and sold the lands originally. Between 2012-2015 individual farmers had approached the DALMS township officer to get an LUC, but they were refused since the land was under dispute and the VTA refused to sign off on their claims to the land. To try and have their land returned, the farmers affected approached the township Land Committee, but they were told to go back and negotiate with the retired Burmese military officer and the VTA. They then approached a powerful Buddhist abbot who lived nearby their village to help resolve the land dispute. However, this had also been ineffective.

In 2014 the villagers approached a prominent civil society leader in Hpa-An from the 88 Karen Generation Student Organisation, Saw Maung Gyi, to assist them with their case. He encouraged the farmers to take out the fences which designated the housing plots and begin planting paddy to demonstrate their ownership of the land. Some of the affected people had followed his advice and subsequently been threatened by the VTA as well as the police for trespassing. However, others had continued to plant on their land despite these threats and one woman had even built a house on her land. The affected farmers explained that since receiving assistance from the Saw Maung Gyi, he had helped them to write countless letters to all levels of government, including the GAD and the National Land Use Council in Nay Pyi Daw. They had also participated in several demonstrations in Hpa-An regarding land grabs under the military period with Saw Maung Gyi who had subsequently been arrested. They explained that they felt like they were starting to make some progress with their case under the Thein Sein government, but since the NLD came to power with their own land restitution mechanisms, they had to start the process all over again. The 15 villagers which the research team spoke to were extremely frustrated and upset by the situation and felt incredibly powerless vis a vis the retired military officer and the VTA. The affected villagers were also upset that the VTA had recently been re-elected in local elections for reasons which they attributed to corruption and intimidation. They explained that the re-election of the VTA made them feel even more powerless. However, since they all had multiple tax receipts and documents proving their ownership of the land they were hopeful they could have their land returned. One woman explained, "We are all just poor and uneducated farmers so they think they can beat us. But, we don't care if we are arrested or killed trying to get our land back. Because without land we have nothing."

<sup>62</sup>In recent years the price of land in Hpa-An township has increased significantly, especially in areas proximate to urban centres.

## Case Study G – Local CSOs helping land restitution efforts in cases of corrupt VTAs

In Kawt Hlaik village tract a group of five siblings were in a dispute with a woman who lived in Hpa-An township over 12 acres of inherited land. One of the siblings, explained in great detail to the research team how they had used the land since they were children, assisting their mother to plant trees and vegetables there. The woman they were in conflict with was born in the village, but she had moved to Hpa-An township many years earlier and was married to a relatively wealthy Burmese businessman.

The woman who claimed the land has acquired a LUC three years earlier. She said that she had inherited the land in question from her mother who had lived in the same village and since passed away. She argued that her mother had bought the land from the siblings' parents during the 1990s but had no documents to show that the sale had happened.

After the introduction of the 2012 Farmland laws, she requested the VTA to assist her in applying for a LUC for the land. Given that the woman had neither any formal documentation of the land sale nor any tax certificates, the siblings suggested that she had bribed the VTA to assist her in gaining title to the land. They also suggested that the land registration office (DALMS) may have also been bribed.

An additional complication concerning who had a valid use right to the land was that the siblings admitted that they had left the village, gone to work in Thailand and had not planted it for many years. When their mother passed away and the siblings returned home, and were discussing how the land should be divided among them, they discovered that their inherited land had been acquired by the wealthier woman in Hpa-An. This occurred when one of the siblings went to the land in question to dig a well and was charged with trespassing.

To try and resolve the dispute over who had a use-right for the land and the charge of trespassing, the siblings had first appealed to the woman in question. She was recalcitrant. After she ignored their requests, they sought the assistance of the village leader who referred them to the VTA for assistance since he had assisted the woman in getting the LUC. The VTA too refused to help them, leading the siblings to suggest that he had been bribed by the woman. They argued that since she was wealthy, educated and had a Burmese husband, they felt powerless against her.

Next, they went to the Township government land administration office to submit a complaint but struggled to make any progress since none of the siblings could speak or read Burmese. Afterwards they were referred by a friend to get in contact with a prominent civil society organisation, the 88 Karen Generation Student Organisation, who have gained a reputation for helping to solve land disputes. At the time of the research interview, the siblings were confident that they would get their land back, but the case was yet to be solved. The leader of the CSO, Saw Maung Gyi, was also confident they would get their land back since the woman from Hpa-An had no documentation of her mother's ownership of the land prior to attaining the LUC. From his perspective, this was a clear case of bribery.

## Land Expropriation

In Kayin State, villagers described multiple land confiscation cases stemming back more than three decades. Like previous research in Kayin State suggests, many land disputes in the research area involved the Tatmadaw, the Myanmar government, private companies, EAOs and other powerful authorities. The military government's programme of modernisation targeting ethnic states areas (1988-2010) heavily impacted people in the research sites, where the military junta claimed ownership over and seized land, providing limited notice to land owners and no compensation.<sup>63</sup> Land taken was often used for military bases and private sector development, but also included land for educational institutions and government offices.

The authors found no reports of villagers being properly compensated for expropriated land. In most cases, there had been little consultation before the land confiscations and violent tactics had sometimes been used to enforce the government's authority and seizures. Across all village sites respondents suggested they had been too afraid to object to these land grabs at the time. Many people described painful memories related to land confiscations and the difficulties of securing a livelihood after land grabs. For rural communities dependent on agriculture and natural resources, land confiscations have significantly impacted their livelihoods and physical security.

In many of the villages where the research team visited, customary communal and forest lands in particular were appropriated by military figures and sold on to wealthy businessmen for commercial agriculture under the military junta. Granting concessions to large companies through agricultural leases also effectively abolished many people's customary rights to areas previously used under communal tenure. People explained the importance of communal forests for food, timber, bamboo and leaves for housing. Many households also explained that they used communal forests as grazing land for cows and goats. Respondents also suggested that the loss of use of communal forests affected women in particular, who relied on these areas for household consumption and medicinal products.<sup>64</sup>

<sup>63</sup>See Callahan, M. 2004. *Making Enemies: War and State Building in Burma* (Ithaca, NY: Cornell University Press); Perry, P. J. 2007. *Myanmar (Burma) Since 1962: The Failure of Development* (Aldershot: Ashgate); Steinberg, D. 2001. *Burma: The State of Myanmar* (Washington, DC: Georgetown University Press).



• Upland Dry Rice Farming around Loilem •

While the majority of land cases occurred during the period of military rule, interviewees also reported that land confiscations continued under the nominally civilian government.<sup>65</sup> Development-related projects were identified as a primary cause of land confiscation under the civilian administration, including related to road construction, infrastructure development, commercial agriculture and natural resource extraction projects.<sup>66</sup>

Lands customarily managed and organised communally were and presently are particularly vulnerable to land grabs, since they are classified under the Vacant, Fallow and Virgin Land Management Act. Land confiscations continue to occur in non-transparent ways and authorities still use force to implement seizures.<sup>67</sup>

<sup>64</sup> See also KHRG. 2016. *Hidden Strengths, Hidden Struggles: Women's Testimonies from Southeast Myanmar* (Chiang Mai: Karen Human Rights Group).

<sup>65</sup> See also HRW. 2018. *'Nothing for Our Land': Impact of Land Confiscation on Farmers in Myanmar* (Bangkok: Human Rights Watch); Kapoor, M., Soe, N. N., & Viswanathan, V. 2018. *Midcourse Manoeuvres: Community Strategies and Remedies for Natural Resource Conflicts in Myanmar* (New Delhi: Centre for Policy Research and Namati).

<sup>66</sup> See also KHRG. 2013. *Losing Ground: Land Conflicts and Collective Action* (Chiang Mai: Karen Human Rights Group); KHRG. 2015. *With only our voices, what can we do? Land Confiscation and Local Responses in Southeast Myanmar* (Chiang Mai: Karen Human Rights Group).

<sup>67</sup> See also KHRG. 2015. *With only our voices, what can we do?: Land Confiscation and Local Responses in Southeast Myanmar* (Chiang Mai: Karen Human Rights Group).



## Seeking Restitution Regarding Land Grabs

Interviewees suggested across all research sites that while the Thein Sein government had promised in 2012 to grant restitution, villagers had seen little to no action taken to assist them in the recovery of what they considered as their customary lands. Even though many farmers reported making complaints to multiple levels of the Farmland Investigation Commission established in 2012, people overwhelmingly felt frustrated by the lack of progress in resolving their cases. This was further complicated by the change in government in 2016, when the NLD came into power and established their own mechanism to address claims of illegal land confiscation.

Despite the lack of progress addressing land confiscations, the political and social changes in Myanmar have given people increased confidence to actively seek redress for HLP restitution. Despite facing many structural barriers in seeking restitution, ordinary Karen people are increasingly vocal and outspoken land rights advocates. Whereas in the past, Karen villagers did not feel safe challenging people in positions of authority, now, in many cases, they are actively and confidently claiming their land rights.

As detailed in some of the case studies above, respondents whose land was confiscated under the military junta reported using multiple avenues and mechanisms to attempt to get their land back. This included writing complaint letters, staging protests, de-fencing expropriated lands, trying to negotiate compensation and directly confronting township administration officers through village-level committees and civil society organisations. Some interviewees also directly approached multiple levels of government, including the Karen State Parliament.<sup>68</sup> In some cases, local residents said they submitted the complaints to respective governments including the Karen State Chief Minister and the State Security and Border Affairs Minister to demand the return of farmlands that have been unfairly sold, but to date, no progress has been made. In addition, some people also explained that they travelled to Nay Pyi Daw to directly approach MPs and even the Vice President, U Henry Van Thio who is the Chairman of the National Land Use Council.

There are several key issues that people mentioned in all research sites in seeking restitution for land grabs:

- ◆ Knowledge of the land laws was limited and farmers often do not feel able or educated enough to approach township authorities regarding previous land grabs.
- ◆ The long distances between villages and township authorities significantly impacted people's ability to access HLP rights. Additionally, the geographical distance was compounded during the rainy season when many roads become flooded and people's ability to go to administrative offices to seek restitution often had to be put on hold.

<sup>68</sup>This accords with reports from Karen News in November 2017 which suggest that up to 90% of complaint letters sent to the parliament are related to land confiscations and dispute resolution. See Karen News. 2017. 'Land Disputes Made up 90% of Complaint Letters sent to Karen State Parliament,' Karen News, 16 November. Available at <http://karennews.org/2017/11/land-disputes-made-up-90-of-complaint-letters-sent-to-karen-state-parliament/> (accessed 30 October 2018).

- ◆ Once people seeking the return of their land arrive at administrative offices they often encounter officials who speak in Burmese and not one of the Karen languages significantly impacting their ability to seek restitution.
- ◆ The costs associated with seeking HLP restitution were also a common issue facing those who had experienced land grabs. In some cases, people who have sought restitution through public protests, now face court charges and even imprisonment.<sup>69</sup>

Sending complaints or grievances to multiple levels of the government with the assistance of CSO leaders was a common way in which people in Kayin State sought restitution of their land. The majority of people spoken to in rural areas did not have access to formal education beyond primary school and did not have the confidence to approach government authorities on their own. Often people had assistance from a village tract administrator or a local community-based organisation (CBO) when they did not feel confident writing a formal letter to the government in the Burmese language.

In the letters they would clearly state their claim to confiscated land, provide evidence they had of that claim and the actions they wished to take place. In many cases, people refused compensation and stated explicitly that they only wanted their land returned. In the majority of research sites where people had experienced land grabs, respondents were still waiting for a response to their letter and were often unsure as to whether it was received or processed by the relevant government body. There was a strong sense of frustration with the restitution mechanisms that had been put in place under both the previous government and the NLD.<sup>70</sup> Across all villages, respondents often articulated their sense of powerlessness. As one middle aged man from Hlaing Ka Ba village explained: "I am sure that the dispute resolution office gets many letters. So maybe they already lost ours. They know that the Karen people do not like to make complaints, so they will surely just ignore us."

Many people explained that when they do not have the confidence, knowledge or skills to seek justice, local village leaders or educated persons play a vital role in mediating the resolution of disputes. Of those who sought to reclaim land, their complaints were often made at a collective level (see Case Study H). In these cases, a representative was often chosen by those affected, who was believed to be knowledgeable of both land laws and the Burmese language was often chosen by those affected. This individual was believed to be more capable to advocate for restitution of lost land. In many cases, people also sought the assistance of a local CBO, including prominently Hpa-An's 88 Generation Student Group and its Director, Saw Maung Gyi. Since land laws and restitution mechanisms in Myanmar are so complicated, many people see the assistance of these kinds of groups as vital to seeking redress for former land grabs.

<sup>69</sup> See also HRW. 2016. *The Farmer Becomes the Criminal': Land Confiscation in Burma's Karen State* (New York: Human Rights Watch); KHRG. 2015. *With only our voices, what can we do? Land Confiscation and Local Responses in Southeast Myanmar* (Chiang Mai: Karen Human Rights Group).

<sup>70</sup> This accords with similar reports from Namati, an international charity that works on land issues in Myanmar and elsewhere. See Namati. 201. *Myanmar's Foray into Deliberative Democracy: Citizen Participation in Resolving Historical Land Grabs* (Yangon: Namati).

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## Case Study H – Collaborative Efforts Vital for Seeking Restitution

**T**wo women interviewed in Lat Kar Nar village tract were part of a large case which had impacted 84 farmers and over 800 acres of paddy land which was expropriated by prison authorities for one of the Prison Department's 'New Life' agricultural labour camps, otherwise known in Burmese as Bawa Thit. The land was progressively confiscated between 2006 and 2014 and was used by prison authorities where they forced prisoners to produce and harvest rice to help cover the costs of running the country's prisons under notoriously bad conditions. In this case, 24 of the affected farmers acquired LUCs between 2012 and 2015, but they had become redundant after their land was confiscated from the prison department. Since 2015 authorities from the DALMS office had stopped handing out LUCs to affected parties, despite people having tax certificates which dated back to the 1990s.

The two women explained that a village committee was formed in Lat Kar Nar by people affected by the land confiscation. Due to their lack of Burmese language skills and formal education, they explained how the assistance of one 10 Household Head leader was vital to mediating with government authorities in Hpa-An and elsewhere. They noted that whilst those associated with the case played an active role in supporting the 10HH, he played the primary role in mediating with government authorities and prison officials because of his education, Burmese language skills and knowledge of land laws.

The 10HH wrote complaint letters to multiple levels of government to request the return of their farmland. In 2018 alone, the 10HH said he had written seven letters to the Karen State Land Investigation Committee, the Chairman of the Committee on Reinvestigation of Confiscated Farmlands and Other Lands and an MP from the Committee of Agriculture, but he had not received a response from them. This also included letters to the President of the Committee on Reinvestigation of Confiscated Farmlands and Other Lands and the Karen State Government parliament. At the time of the research, the 10HH had also travelled to Nay Pyi Daw to lobby MPs about the return of the land. Two MPs from Kayin State had promised to come and survey the land case, but they had not yet scheduled a time to come and investigate. The 10HH leader did not feel confident that they would be able to resolve the case because it involved the prisons department. However, he explained that he would keep on trying to get their lands returned since it affected so many people.



In several cases people reported that while they had received a response from the national land committee granting the return of their land, township level committees had been unable to implement the orders. Many of the respondents reported that they were told by the relevant authorities to negotiate directly with the new land owners to get their land back. However, this posed major challenges, since many of the new landholders had previously bought the land from military personnel or other armed actors. Additionally, people interviewed faced issues having their land returned, because the involved businessmen or corporations refused to return the land without being paid what they had spent to secure the land. Others faced much more coercive pressures, from the military and EAOs, who in some cases used armed violence to threaten and intimidate those who were seeking to have their land returned.

Many interviewees often felt relatively powerless vis a vis wealthier land owners who had connections to the Tatmadaw and EAOs. In some cases, people had been sued for trespassing on land for which they had valid documents to show it was theirs. For respondents caught up in court cases, many encountered major expenses for travel to and from the township that has significantly impacted their household forcing many of them into significant layers of debt.

### **Case Study I – The KNU has little authority to resolve land disputes regarding the GORUM or Tatmadaw**

In San Pa Ri village tract the military released over 930 acres of confiscated land in 2013, which had previously been used by local villagers as a community forest. Once the land was released, the KNU allocated 60 by 120 foot house plots to local villagers handing out land certificates, but the government reclaimed the area as state-owned land. Despite people's appeals to the KNU for their support, the Hpa-An District General Administrative Department (GAD) ordered the occupants to vacate the land. The state government then used force to demolish people's homes that had been built on the land plots that had been allocated to them. When the research team spoke to the villagers affected they explained that the KNU had not returned the money they had spent to register their land and also were unable to advocate on their behalf to the GAD. Villagers explained that given their proximity to Hpa-An township, the KNU had very little power to enforce their own land laws in the area in question.

Across all areas where the research took place, people expressed that they have fewer opportunities to seek justice or resist confiscation when armed actors are involved. In situations which involved land given to ethnic armed leaders as part of ceasefire concessions in the 1990s and 2000s, it was widely perceived that there was very little chance of restitution.<sup>71</sup> In one case, armed actors were said to have taken significant areas of paddy land from villagers which they had converted into rubber plantations. One interviewee in Nat Kyun who lost 12 acres of land alongside her siblings and access to a large pond which they used to collect fish explained how the ceasefire had only served to entrench the control and power of these groups, vis a vis ordinary villagers.

“ In the past time, nobody dared to come to this area because it was so dangerous, and we had so much conflict. Even though it was dangerous, at least we could still get access to our land. Nowadays, many powerful people are coming here and taking our land and there’s nothing we can do.

In another case in Hlaingbwe township, a powerful Democratic Karen Buddhist Army (BGF) commander had taken over ten acres of paddy land from a family which he was using to build a pagoda. The land had initially been taken by the military in 1991, but the DKBA commander had come to build the pagoda alongside a powerful monk in the 2000s and was refusing to return the land to the land holders. Even though the land had officially been returned to the villagers as per the decision of the national land committee, both the local township GAD officers and land management committee had told the people concerned to go and negotiate with the BGF commander themselves.

Land confiscation cases in Hpa-An district involving Buddhist abbots was also common. It was suggested that the proximity of Buddhist religious authorities and armed actors helped to facilitate their power.<sup>72</sup> In some cases, religious minorities experienced targeted persecution. The Myaing Gyi Ngu Sayadaw, in particular, is famous for having claimed large areas of land in the mid-1990s with the support of the DKBA. However, the expropriation of land by other senior monks was also common across Hpa-An district. In one case, an SDA church was destroyed, and paddy lands taken for the Kyauk Ka Latt monastery complex. In another case, an abbot sold land neighbouring his monastery to wealthy businessmen who used the land to grow rubber. In this case, villagers affected by the land grabs expressed their disappointment that their land had been expropriated for business interests rather than for religious purposes. Not one person affected by this situation, however, sought to get their land back. As one interviewee explained, “How can we ask for our land back from the Sayadaw? He is so powerful. If we try to get back our land we will definitely be arrested or even killed.”

<sup>71</sup>A number of ceasefire deals were made between the Tatmadaw and breakaway factions from the KNU in the 1990s and 2000s, as part of a wave of similar agreements negotiated with ethnic armed organisations across the country. Most prominently, this included the Democratic Karen Buddhist Army (DKBA), who after signing a ceasefire with the military in December 1994 was granted large areas of land. Significantly, this also included control over key arteries through Karen state and the right to tax goods through borderland checkpoints. For more details see Smith, M. 1999. *Burma: Insurgency and the Politics of Ethnicity* (London: Zed Books), pp. 421-41; Callahan, M. 2004. *Making Enemies: War and State Building in Burma* (Ithaca, NY: Cornell University); South, A. 2011. *Burma's Longest War: Anatomy of the Karen Conflict* (Amsterdam: Transnational Institute).

<sup>72</sup>See Chambers, J. 2017. 'Buddhist Extremism, Despite a Clampdown Spreads in Myanmar', *Asia Times*, 30 November. Available at <http://www.atimes.com/article/buddhist-extremism-despite-clampdown-spreads-myanmar/> (accessed 30 October 2018).

## Gender Dimensions

Overall, women reported that they felt less able to approach government officials or other community authorities for assistance regarding land grabs. Women in remote areas were disproportionately affected, due to concerns for their safety and attitudes that they should not be involved in politics. In addition, male respondents often had more knowledge of GORUM land laws. Some women expressed that they wanted to better understand land laws, but that they faced significant barriers when they sought access more information. Women also reflected a heightened sense of vulnerability to the impact of land confiscations and a lack of power, knowledge or capacity to respond in any form.

Despite the many obstacles they face, women play a particular strong role in protesting land grabs which took place under the military. Two women from Hla Ka Daung village tract explained how their husbands were often afraid of seeking redress, as a result of prior human rights abuses committed on behalf of the military state. They explained that under the military period, women had to play important roles in securing family livelihoods, since men often had to run and hide from the military as they were targets for portering and other abuses. Given this history, the two women explained that they had more confidence than their husbands in directly confronting the states on issues of land confiscation. As one quipped, “I always have to negotiate for our family for every issue we face. If I did not try to get back our land, my husband would just leave it, because he thinks it’s too complicated. But how can we just let it go?! It’s my ancestors land. It’s also for our children. If I just let it go, our children will not have any land to inherit.”



• Planting season underway in Hpa-an Township, Kayin State •

## Conclusion

There are several key lessons worth highlighting from the research in Kayin State regarding customary land management, authorities and dispute resolution:

- ◆ Maintaining village harmony is a foundational element of community, family and village life and plays a strong role in keeping land disputes at a minimum.
- ◆ The role of the village head is increasingly being undermined by the Village Tract Administrator who has more authority and power to implement binding decisions regarding land disputes, as well as other village-level matters.
- ◆ Even though people are seeking to have their land titled under Myanmar law, they primarily regard it in customary ways and apply customary practices to its everyday regulation. This includes inheritance practices and beliefs about the sale of inherited land. However, these customary systems of land management are facing increasing pressures due to population growth and decreasing agricultural land available.
- ◆ Land registration has increased significantly since 2012, but has produced numerous small land disputes because it has been made in haste. The increase in disputes is also aided by the fact that the system of registration disrupts customary land management systems, knowledge and authorities.
- ◆ Many land disputes regarding the incorrect registration of land can be solved through mediation at the Village Tract level. However, these systems can benefit from the formal recognition of customary authorities.
- ◆ Wherever possible, the preference is to have land issues solved at the village level without involving outside actors. Customary authorities, however, have little power to intervene and negotiate with perpetrators of land grabbing both in the past and in the present era.
- ◆ The power concentrated in the hands of VTAs is leaving some people vulnerable to further land grabs. This power imbalance could be alleviated by placing more power in the hands of customary authorities, who ordinary villages are much more likely to trust and approach directly. This particularly is important for women, whom, wherever possible prefer to engage with customary authorities.
- ◆ Large-scale land grabbing cases which occurred under the military junta are numerous and remain unresolved. Across all research sites people have been affected by land confiscations which related to the military, the government of Myanmar and/or EAOs. The scale of confiscations makes this issue far more important to the average farmer than any other issue because of the loss of livelihoods. Even though people are actively seeking to have their lands returned as per current GORUM laws and restitution mechanisms, land grabs cases remain unresolved and farmers have overwhelmingly been denied access to justice.



- ◆ People affected by land grabs have little trust in the institutions or authorities in charge of resolving land disputes and in administering land title and development projects. The lack of progress made through available restitution mechanisms creates a deep sense of powerlessness and grievance on the behalf of local farmers. This sense of grievance is
- ◆ There are increasing fears from ordinary villagers about the potential impacts of development related projects on HLP rights. Customary authorities have little power to negotiate with GORUM authorities regarding such projects and their potential impact on communities, including access to communal customary lands have the potential to be extremely negative.
- ◆ Concerns related to HLP rights are especially sensitive in conflict-affected communities where people have little trust in the government authorities, laws and regulations. The integration of customary authorities and land management systems into GORUM law has the potential to positively impact people at multiple levels.



## 5. CUSTOMARY LAND DISPUTE RESOLUTION IN EASTERN BAGO

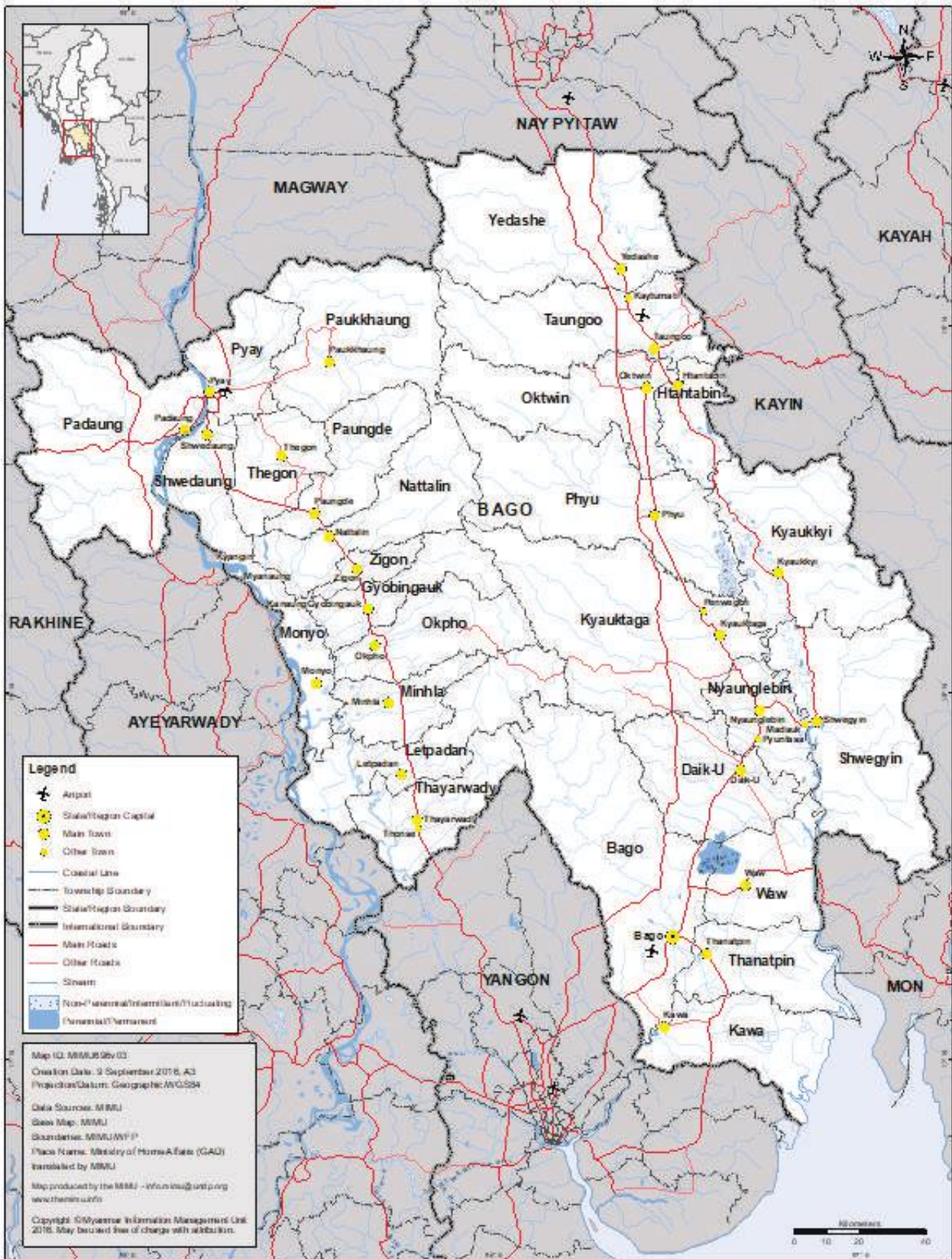
The focus of this section of the study is on Eastern Bago Region. The Region is sub-divided by the Myanmar government for administrative and statistical purposes into Bago East and Bago West. The geographic focus of this report is on those areas of Eastern Bago under mixed administration by the central Myanmar government and the KNU's Nyaunglebin district, Third Brigade. The areas where the research was conducted included villages in Kyaukkyi (Ler Doh) and Shwegyin (Hsaw Htee) townships. Many of the villages where the research was conducted sit between the Sittaung River and the densely forested areas of the Dawna mountain range which have been at the heartland of the Karen ethno-national conflict. As mentioned in the limitations to the study, no research was conducted in upland, mountainous areas in Eastern Bago Region. However, many of the villagers interviewed in Eastern Bago were IDP communities that had previously lived in mountainous regions and practiced customary land management, as well as shifting cultivation.

The respondents in Eastern Bago Region were S'gaw Karen and a mixture of Christian, Buddhist and animist communities. In lowland areas which sit along the Sittaung River and its tributaries, villagers experience favourable conditions for rice cultivation. Since most of the research sites were IDP communities, many respondents did not inherit their paddy land, but had bought it from other people. Many of those that had been unable to purchase paddy land continued to rely on orchard lands in their original village sites and serving as labourers to generate income. Many people explained that they have been able to continue access to orchards in their original upland villages, where they plant fruit trees, including jackfruit, mango, cashew and lime. They also rely on other forested areas for growing vegetables and grazing animals.

The research for this report was conducted in 8 village sites in Kyaukkyi and Shwegyin townships. Village sites were selected in the following village tracts:

- ◆ Ker Der
- ◆ Tone Tadah
- ◆ Kaw Tha Say
- ◆ Hoo Pu
- ◆ Wa Dee

# Bago Region



Disclaimer: The names shown and the boundaries used on this map do not imply official endorsement or approval by the United Nations.

## Introduction to the Research Site

In seeking to understand customary land dispute resolution in Eastern Bago Region, it is important to lay out some of the historical dimensions of this area in more detail. While the Myanmar military has maintained control over large townships and key arteries which run through Eastern Bago for many years, the KNU's Third Brigade has significant authority in this region and conflict has been a common experience for many people over their lifetimes. Many of the rural villages in Eastern Bago Region constitute a front-line between the Myanmar Army and the KNU and have experienced direct violence and human rights abuses during their lifetime.

While the focus of the research was on customary land management, discussions regarding land naturally led to experiences of the sixty-year-long conflict and experiences of displacement. Across all research sites, people described in great detail the many hardships they had endured over their lives, including torture, extrajudicial executions, forced labour and enforced disappearances.<sup>73</sup> According to villagers, violations conducted by the Myanmar military were a regular feature of their lives up until the 2012 ceasefire with the Karen National Union. Up until the 2012 ceasefire, many villages also experienced curfews and other restrictions on their movement which inhibited their ability to secure their livelihoods and access to lands which they managed in customary ways.

Important to understanding the experiences of people in Eastern Bago is the Tatmadaw's widespread application of the 'Four Cuts' (B. Pya Ley Pya) counter-insurgency operation from 1974 onwards, designed to cut off rebel groups from access to food, funds, intelligence and recruitment. The impact of this counter-insurgency campaign was especially harmful to communities living in the mountains of eastern Bago, forcing many people to resettle close to major roads and near Myanmar military installations.<sup>74</sup>

“ We Karen people only know how to run and hide. We only had the chance now to think about getting the land document. In the past, we are always looking for a safe place to hide and we never build a strong house, because we always have to run. In remote areas, even though they have wood, many people just use bamboo to build a house because they are always waiting for the conflict to arrive.” Villager from Kyauk Kyi township.

<sup>73</sup>These accounts were consistent long-standing patterns of violations documented by human rights organisations. See for example, Amnesty International. 2008. *Crimes Against Humanity in Eastern Myanmar* (Bangkok: Amnesty International).

<sup>74</sup>Many people also fled to more remote and hilly areas under direct KNU control and to refugee camps in Thailand.



“ Due to successive waves of displacement, many communities which the research team visited were forcibly cut off from their ancestral lands and from using their customary land management practices over time. While people displaced were often allocated land by the military on which to build their own houses, they were never given paddy or forest land from which to build and secure their livelihoods. In some research sites, respondents spoke about moving back and forth over successive decades between their original homes and land and the places they had been resettled between 1974 and 2012. However, in other villages people had been permanently displaced for more than forty years.

Across Eastern Bago, people explained the many benefits that the 2012 ceasefire had brought to their lives. The peace negotiations and the cessation of hostilities provided momentous social, political and economic changes.<sup>75</sup> Although significant challenges remain to securing a sustainable peace, there has been an increase in freedom of movement, improved livelihoods, more opportunities for income generation, increased healthcare and education services and a significantly reduced incidence of human rights abuses.<sup>76</sup> Discussions with villagers in Eastern Bago Region also highlighted the increased interaction between the central Myanmar state and Karen civilians.

## Key Actors and Authorities for Dispute Resolution in Eastern Bago

### Village Heads

Amongst Karen people in Eastern Bago Region, village leaders are selected on a communal basis, every three years. In the past a male representative from every household would gather in a central location called a ‘blaw’ in S’kaw Karen, to nominate and select their village leaders. ‘Blaws’ were also used as venues to resolve community issues and matters related to justice. Since, however, many communities have been displaced from their original villages in upland areas in eastern Bago, the use of the blaw has been discontinued amongst most IDP communities.

In the present era, men still gather together to nominate and select village leaders, but women are also now allowed to attend should they choose. After a decision to nominate someone has taken place, that person is asked whether they can accept the position. If the nominee answers in the affirmative, they are elected by the community. Subsequently, the new leader informs the local KNU official who explains their duties to them.<sup>77</sup>

<sup>75</sup> See South, A and Joliffe, K. 2015. ‘Forced Migration: Typology and Local Agency in Southeast Myanmar,’ *Contemporary Southeast Asia*, 37 (2), 211-41; Karen Human Rights Group (2013), *Losing Ground: Land Conflicts and Collective Action* (Chiang Mai: KHRG).

<sup>46</sup> Despite these positive developments people in Karen state continue to suffer from poor access to health services, education and a lack of livelihood opportunities. See Joliffe, K. 2016. *Ceasefires, Governance and Development: The Karen National Union in Times of Change. Policy Dialogue Brief Series No. 16* (Yangon: The Asia Foundation); Karen Human Rights Group. 2014. *Truce or Transition? Trends in Human Rights Abuse and Local Response in Southeast Myanmar Since the 2012 Ceasefire* (Chiang Mai: KHRG).

<sup>77</sup> Duties included the regulation of taxation and the distribution of supplies to the KNU/KNLA.

Nominally the term of office for a village leader is for three years, but if villagers in the community like them, they can continue in the position for as long as they choose. In some villages, the village leader had held the position for more than ten years.

In all of the village sites the research respondents suggested that they rarely had disputes between villagers because it was important to maintain village harmony. It was explained that because Karen people have love and respect for each other, land disputes are rare and resolved quickly.

In those cases where there were disputes, the village head was always approached to help mediate a conflict. It was suggested that the village head has the authority and objectivity to be able to resolve land disputes between siblings or fellow villagers, because they only occur in the case of a simple misunderstanding.

Across all research sites, village heads are always the first port of call to negotiate and resolve issues within the village including those related to land. In this role, these authorities commonly talk with involved parties and others knowledgeable about the problem, try to mediate a voluntary settlement, and, if failing to do so, may make a non-binding recommendation on how the parties can settle their differences. In some disputes where parties cannot reach agreement on a settlement on their own, the village head may serve as an arbitrator who makes a decision for the disputants who are said to respect their authority as binding.

### **Village Tract Administrators (VTAs)**

**V**TAs often play a formal and informal intermediary role between the Myanmar state and civilians at the level of village tract. In all villages visited by the research team, the VTA was a male.

The power and influence of VTAs varied across village tracts. Villagers who were able to speak and write Burmese were often elected as VTAs as they were seen as more capable of acting as an intermediary between the government and Karen people. Their level of education, age, ethnicity and religion often influenced if they were affective at mediating with GORUM authorities.

Respondents across all research sites noted that VTAs play an important role in securing LUCs. Many villagers had neither information about this process, nor the knowledge or education to speak or write Burmese to apply for an LUC. Therefore, it was difficult for them to fill out the necessary forms without the assistance of a VTA.

In the village sites visited by the research team, VTAs played little role in the resolution of community land disputes, a role which was still maintained by village heads and sometimes elders.

Like in Kayin State, as Chairperson of the ward/village tract ABsF the VTA is considered as a natural authority to help mediate land disputes under the GORUM's land laws and management system. In land dispute cases regarding boundary demarcation, VTAs were widely regarded as the first port of call to help mediate the disputes because of their relationship with GORUM offices. Village heads point people in the direction of VTAs because they have the most authority to resolve these kinds of issues. Village heads, across the majority of research sites, explained that they preferred to stay out of GORUM-related disputes as it involved complex laws and systems that many didn't fully understand.

There were some documented cases where people explained that they had deliberately reduced the size of their land on tax certificates under the military period in order to avoid taxes from the government, and the paddy tax under the socialist government in particular. It was suggested that even though these farmers had used some lands their whole lives, they were now facing difficulties demonstrating their ownership over the plots of land because they lacked the appropriate documentation. In some cases, village heads were asked to act as an authority to demonstrate the person's historical claims to the land. However, many village heads are reluctant to get involved in these kinds of cases, since it may cause them problems with government authorities.

## Community Elders

Community elders sometimes play a role in helping to mediate disputes regarding inherited or communal land in Eastern Bago Region. This is not a formal position, but once a person reaches a certain age, he or she is given significant respect and authority by community members. Other factors such as wealth and education are not important for this role, unless one is helping to mediate a dispute with the government which requires Burmese language skills.

In cases which are more difficult to resolve, it was explained that elders from the village might sometimes be called to help mediate land disputes alongside a village head and serve as conciliators. It was suggested that elders do not give decisions or recommendations regarding land disputes in mediation sessions. Rather, it was explained that elders have the requisite knowledge of land and land boundaries to help people negotiate mutually acceptable agreements. It was also noted that their presence helps to keep disputants respectful and honest as elders hold a significant degree of traditional authority in Karen villages. In many customary proceedings, elders primarily try to persuade disputants to accept the recommendations or decisions of village heads and make sure that those decisions are fair in the first place. Depending on the structure of customary dispute resolution processes, unacceptable decisions may be appealable either to another customary leader or body or to a government official, such as a ward or village tract administrator and their land committee.

The role of elders in resolving land disputes in IDP villages is likely to increase as people start to return to village sites from which they were previously displaced. Their knowledge is also important for the potential resurrection of customary communal land management and rituals which have died out in some areas as a result of long-term displacement.

## The Karen National Union

The areas where the research took place in Eastern Bago Region are under direct administration of the Third Brigade of the Karen National Union. In all village sites villagers have and continue to pay taxes every year to the KNU for the use of their land. In some villages where research was conducted, there was one village leader for the KNU and another for the Myanmar government. In the majority of research sites, however, one person played both roles.

While the KNU/KNLA plays some role in helping to resolve land disputes that involve the GORUM, they play little role in mediating disputes at the village level.<sup>78</sup> Not a single respondent mentioned EAO actors as relevant to village level land dispute resolution. Instead, at the village level, residents considered village heads to be the first port of call for land issues, in the rare cases where they arose. An interview with a KNU judge from Nyaunglebin District similarly confirmed this, explaining that village heads in KNU administered areas play a central role in helping to administer KNU land laws. The KNU has, however, played a stronger role in helping to regulate the GORUM's expropriation of customary communal lands for commercial and extractive reasons in areas under their control in Eastern Bago. As explained by respondents, however, some of the KNU's own commercial activities have also begun to negatively impacted people's HLP rights.

The research team found no villagers in the sites visited across Eastern Bago who had applied to township level authorities to resolve cases involving land, which involved fellow villagers. Unlike in Kayin State, Karen people in many of the research sites in Eastern Bago did not feel confident to apply for restitution through the mechanisms available through the GORUM. The source of their reluctance was related to their fears of the government and Burmese authorities as a result of their past experiences of conflict. They also lacked the linguistic skills to approach government authorities. Interviewees said they didn't use GORUM systems to resolve land disputes within their villages because they didn't like to approach the Burmese government, who they widely saw as playing an extractive role. "Why would we approach the Burmese government?" one interviewee asked. "We can resolve the disputes between ourselves because we are Karen and we understand each other. It is better not to involve the Burmese (GORUM)."

On nearly every occasion where there was a land dispute which involved the GORUM, a member of the Tatmadaw or a Burmese person from outside the community, Karen people across all village sites instead turned to the KNU to help seek restitution. In some cases, the KNU has been very effective in using their authority to get land returned. It was suggested, however, since the 2012 ceasefire the KNU's power and influence has significantly diminished. "In the past, every person had to respect the authority of the KNU," one interviewee from Shwe Gyin district explained. "Now only Karen people listen to the KNU, and Bamar people can do what they want. Since the ceasefire, the KNU has less power. They cannot use their guns like in the past."

<sup>78</sup>This was also confirmed in an interview with a KNU judge for Nyaung Leh Bin District.



## Women

**A**cross all research sites, there were no women in positions of authority under the Myanmar government's administrative system. Interviewees reported that they had observed a decline of women in formal positions of authority, such as village or village tract leaders, since the 2012 preliminary ceasefire.<sup>79</sup> It was explained by villagers across gender divides that women were more likely to fill these roles in the past under the military regime because men were targeted by the military and more likely to be killed or subjected to human rights abuses. Women explained that under the military regime, men often had to run or hide at the sight of Tatmadaw soldiers, thus leaving them in charge of the household and even community.<sup>80</sup>

Recently the KNU instituted a rule that requires a representative from the Karen Women's Organisation (KWO) on each village "council" in areas under their administration. These representatives also sit on the KNU managed Village Land Committee to help mediate disputes. In many of the research sites, female representatives from the KWO did sit on these councils. In practice, however, these councils have little power. The influence and power of KWO representatives also varied between the research sites and there were no instances where they played a role mediating a land dispute.

## Customary Land Management and Disputes

### Case Study A – KNU's Involvement in Dispute Resolution

**O**ne elderly male Karen farmer, from Kyauk Kyi recounted his experience regarding a land dispute over land adjacent to his own. He explained that during the mid-1990s there had been conflict in the area and that his Karen neighbor had been forced to flee with his family to the Thailand border and abandon his land. When he returned from displacement in 2000, a Burmese farmer had taken over the cultivation of his fields.

He explained that the original owner of the land requested assistance from the KNU to help get his land back. He had land certificates from the KNU which dated back to the 1980s, so they directly intervened on his behalf, forcing the Burmese paddy farmer to return the land in question.

While the man interviewed did not suggest that coercive measures were used by the KNU to have the Burmese occupant return the land, he explained that he had to respect the decision of the KNU since they were a powerful authority who had weapons. As he noted, "If the Burmese farmer took the land case to the Myanmar government side, they could not guarantee his security."

<sup>79</sup>See Karen Human Rights Group (2016), *Hidden Strengths, Hidden Struggles: Women's Testimonies from Southeast Myanmar (Chiang Mai: KHRG)*.

<sup>80</sup>A report by the Karen Women's Organisation, however, suggests that female village heads also experienced systematic abuse by the Tatmadaw. See Karen Women's Organisation. 2010. *Walking Amongst Sharp Knives (Mae Sariang, Thailand: KWO)*.



•Villagers in Eastern Bago •

### Case Study B – Disputes between Registered users and Customary Owners

One area of paddy land in Kyauk Kyi district was the subject of a dispute. The land in question had been inherited by one man from his parents, but since he had additional land to cultivate for himself, he had rented the inherited land to a neighbor. Rental had gone on for more than ten years.

In 2012, new land laws were passed by the GORUM regarding land usage. The farmer who was renting the land applied to the local GORUM township office for an LUC. Because he had paid taxes on the rented land while using it, it was very easy for him to have it formally registered in his name.

When, however, the original land owner found out, he filed a formal complaint at the land office in Kyauk Kyi and the LUC granted to the renter was revoked. The renter disputed the original owner's claims to the land, saying that since he had worked on the land for more than ten years it was his land according to the Myanmar's government's land laws regarding tenure rights.

At the time of the research, the case was currently under consideration by the local township land office. The original land owner also approached the KNU to help resolve the dispute, as he had a KNU land certificate dating back to the 1970s. The KNU, however, decided that since the case involved the Myanmar government's land registration system they did not want to become involved.

## Case Study C – Customary authorities unable to resolve land disputes which involve the military's forced relocation of IDP communities

In one IDP village site in Kyauk Kyi township, a group of displaced people faced pressure from three Karen farmers on whose land they had been forced to relocate to by the military at various times over their life. Since the 2012 ceasefire was signed, the 3 Karen owners of the paddy land where the IDP villagers now lived, wanted it returned to them and for the IDPs to return to their home village, which was only a few kms away.

The displaced community explained that they had been forced to move back and forth between the IDP site and their original village between 1976 and 2004. Since they had been living at the IDP site for more than 15 years at the time of the research they felt entitled to stay.

The affected farmers explained that while they understood that the IDPs had been forcibly moved onto their lands by the military, they now had a choice to return to their original village and give them back their paddy land given the ceasefire. They maintained that it was unfair for many of the IDP villagers to remain on their paddy land now that there was peace, especially since many of them had their own paddy land in their original village which they regularly returned to, to produce paddy. Their desire for them to return was also motivated by the fact almost half of the IDP community (40 out of 87 households) had already returned to their village of origin.

This land conflict created considerable stress on the relations between the original village and the IDP villagers. The VTA which oversaw both villages had held several mediation sessions between all the farmers and the IDPs, but he was unable to resolve the dispute on his own. Elders and other community members had been called into help resolve the situation, but there was a lot of animosity between the farmers and those who had been forcibly move there.

After several mediation sessions failed, the three farmers appealed to both the GORUM and the KNU to have the land returned and to force the IDP villagers to move back to their original village. Officers from the DALMS office suggested that the IDP villagers pay the farmers compensation for their paddy land, but the IDPs claimed they did not have enough money. The farmers then requested assistance from the military by writing a letter to the township GAD office, but they did not receive a response.

Their requests from the KNU to intervene were also unsuccessful. At the time of the research it had been more than 3 months since they sent a letter to the Nyaunglehbin district commander and they still had not received a response. The farmers believed, that since the case involved the Myanmar military, the KNU did not want to get involved.

At the time of this research, this dispute case was ongoing, and tensions continued to be very high.

## Land Expropriation

In Eastern Bago land grabs have become an increasing issue facing communities since the 2012 ceasefire between the KNU and the GORUM. Land taken for military bases was identified as a common issue across all research sites in Eastern Bago, but these cases often affected a minority of people. However, in many of the research sites, people noted that land grabs have increased in recent years as a result of the more stable security situation. In particular, people mentioned that land was increasingly being taken by the Bago state government since the 2012 ceasefire agreement to build schools and hospitals. In these cases, there were no consultations held prior to the expropriation and those land holders affected did not receive any compensation. While all schools were in use and generally seen to play a positive role for the community, in some cases, hospitals remained empty shells.

Unlike in Kayin State where communal and forest lands were often expropriated by the previous military junta for commercial agribusinesses and in ceasefire concessionary deals, in Eastern Bago many of these areas have been left under the management of villagers up until recent years. While people across all research sites spoke of the multiple benefits of the ceasefire, they noted that it also resulted in a new set of challenges related to the protection of their customary communal lands. Two of the emerging issues are people's access to and restrictions on the use of community forests and shifting cultivation land. Since the 2012 ceasefire many of the forest areas that were used as customary communal lands have been taken over by private companies for growing rubber and other perennial plantations. Customary communal lands classified as 'vacant or fallow' under Myanmar's 2012 laws are now under increasing threat from commercial agriculture. One village leader in Shwe Gyin expressed this sentiment, "We have had so many bad experiences over our lifetimes. We have lost almost everything. Now there is some peace and stability, but now we are losing our land."

People in Eastern Bago also face increasing pressures from development and extractive initiatives from both the GORUM and the KNU. Eastern Bago is endowed with significant reserves of natural resources and the absence of demarcated ceasefire areas has led to competition over natural resources from armed actors and civilian authorities in contested areas. Eastern Bago has become an increasingly attractive area for natural resource extraction especially for agribusiness, mining, building hydroelectric dams and infrastructure development projects.<sup>81</sup> However, in the absence of clearly defined interim arrangements as per the ceasefire agreement, these business arrangements largely remain unregulated and the enforcement of environmental and social safeguards is very weak.<sup>82</sup>

Villagers interviewed by the research team across all sites suggested that the KNU and the Myanmar government are increasingly competing over the development of extractive industries. Many people reported that in the KNU's desire for capital some of its internal procedures for implementing land laws have not been followed or

<sup>81</sup> This is also reflected in other research. A 2014 study by The Border Consortium Protection, *Security Concerns in South Eastern Burma/Myanmar*, found that 55% of village tracts had been impacted by outside investments since the signing of ceasefires in 2012.

<sup>82</sup> For an in-depth discussion of the interim arrangements and how this affects land and natural resource management see South, A., Schroeder, T., Joliffe, K., Mi Kun Chan Non, Sa Shine, Kempel, S., Schroeder, A. and Naw Wah Shee Mu. 2018. *Between Ceasefires and Federalism: Exploring Interim Arrangements in the Myanmar Peace Process* (Yangon: Joint Peace Fund).



ignored. A representative from the KNU suggested that unlike Myanmar's laws, community consultation is a compulsory part of any development initiative. In discussions with communities, however, these processes were often not applied on the ground.

Many respondents, for example, discussed the deleterious impacts of gold mining projects authorized and controlled by the KNU nearby to Shwegyin. Since the ceasefire agreement was signed between the KNU and the GORUM, wealthy individuals and private companies have been granted concessions by both the Myanmar government and authorities from the KNU. People spoke about their anger related to the environmental pollution from these projects. From their perspective the impacts have been significant, and in some cases, destroyed their rice crops and the viability of farming land. The environmental damage from gold mines nearby to Shwegyin have severely impacted waterways, having negative effects on downstream paddy field cultivation and fish stocks.<sup>83</sup> Interviewees explained that neither the KNU or the GORUM had consulted with communities near the mine site nor provided any compensation for people's land that had been destroyed as a result of the mining operation. They said they were also not properly consulted or informed about potential health impacts of mining. Respondents in multiple research locations in Shwegyin expressed their frustration with KNU authorities for not consulting with them. Some interviewees believed that the KNU had prioritized the interests of wealthy businessmen, over and above the concerns of ordinary Karen people. KNLA soldiers, in particular, were mentioned as acting outside KNU laws and cooperating with wealthy businessmen to serve their own interests.

Respondents were less upset with the GORUM who they did not see as a legitimate authority in their lives and viewed their actions as typical. They expressed their sense of fear to approach the central government since the land concessions had been negotiated by one of the military commanders in the area. The legacy of sixty years of conflict for this community meant that they felt little confidence in approaching Burmese authorities. "If you are the military you can do anything," one interviewee explained. "We have had so many bad experiences in the past. We have to run, we have been tortured, many people have been killed. Now we have a ceasefire we can say it is more peaceful. So how can we dare ask them for our land back."

Upland communities classified as forest land under GORUM land law also face new pressures from conservation initiatives. The Myanmar's Ministry of Environmental Conservation and Forestry is increasingly seeking to assert its control over mountainous areas in eastern Bago and elsewhere through conservation initiatives, often at the expense of local people living there. In an interview with a representative from the KNU'S Third Brigade, they claimed that the forestry department had sought to take more than 3000 acres of Karen customary communal lands and villages for conservation initiatives. IDP villagers from all research sites expressed their fears about their home communities and whether these conservation initiatives would prevent them from returning.

<sup>83</sup>Th See also [http://khrgh.org/sites/default/files/18-23-s1\\_wb\\_0.pdf](http://khrgh.org/sites/default/files/18-23-s1_wb_0.pdf)

<sup>84</sup>Karen communities in Tanintharyi region are also facing this problem. See Carroll, J. 2018. 'Displaced Villagers in Myanmar at Odds with UK Charity over Land Conservation' *The Guardian*, 2 Nov. Available at [https://www.theguardian.com/global-development/2018/nov/02/displaced-villagers-myanmar-at-odds-with-uk-charity-over-land-conservation-tanintharyi?fbclid=I-wAR1dUnF1-JsZFB6uhnf49pqNNK-79iTXyTob6\\_MMMkrNjiEbfcsmtKccElc](https://www.theguardian.com/global-development/2018/nov/02/displaced-villagers-myanmar-at-odds-with-uk-charity-over-land-conservation-tanintharyi?fbclid=I-wAR1dUnF1-JsZFB6uhnf49pqNNK-79iTXyTob6_MMMkrNjiEbfcsmtKccElc) (accessed 30 October 2018).

## Case Study D – Customary Communal Forest Land Expropriated

In one village in Shwe Gyin, people were experiencing a land conflict regarding their communal forest which they had been able to use up until 2014. On the way to the village the research team passed long stretches of rubber plantations which respondents explained were owned by a wealthy businessman who had been given a concession to use their communal land by local Tatmadaw commanders. Respondents explained that during the time of conflict, they had used the land freely as a communal forest for grazing their animals, collecting firewood and growing vegetables. Each villager had a five-acre plot which they used in an informal system which was negotiated between village members. However, they explained that since the 2012 ceasefire, the businessmen had come to their land, cleaned the forest and planted rubber. One woman reported the following: “In the past we used to go to that area and find bamboo shoots and other vegetable to sell. Now, when we go to that place the rubber worker shouts at us and threatens us.” In the same village, the respondents explained that no process of consultation was put in place prior to the concessions being given to two private businessmen and that they had lost a primary source of income for households. Noting the change in laws in 2012 another interviewee noted, “According to the 2012 laws, we will gradually lose our land. According to the law if you have money, you can apply to use village land and forests. The law is only for the rich people, it is not for us.”

The villagers’ sense of fear and powerlessness was also reinforced after one of the villagers was arrested for trespassing on the communal land, in an area which he had previously used to grow vegetables. The police were called at the time and they forced him to sign a document acknowledging that he was trespassing and that the land was not his.

“ We are just uneducated people. So we have no power. According to the law, a lot of our land is vacant land. But in reality, there is no vacant land. If we go by the customary way, we do not have documents and there is no vacant land. We have lived here all our lives, following from our parents and grandparents. But according to the map we are just illegally occupying this land.

In this case, none of the villagers or the village head felt confident to approach the GORUM and contest the decision to lease the land. They explained that because of their previous experiences with the Tatmadaw, they felt both powerless and afraid to raise their voices regarding their ownership of the land. The villagers also noted their lack of power vis a vis powerful corporate interests, who they saw as more knowledgeable and educated regarding land laws.

The villagers had written to the KNU regarding this situation, but they had not responded. The villagers believed that since the case was related to the Tatmadaw, the KNU did not want to get involved. Furthermore, the villagers did not want to pursue the case further, because they did not want to disrupt the peace negotiations between the KNU and the Tatmadaw.

### **Case Study E – Villagers feel that the KNU is losing its power and authority to implement their land laws**

In another case, villagers from Shwe Gyin explained that the KNU had little authority to have customary communal lands returned if they were sold by the military to wealthy businessmen. In this case, the KNU had designated a large area of land as grazing land according to their own laws and mapping of the area. However, Burmese people from a neighboring village were able to have the land successfully converted from grazing land into paddy land through an application to the Myanmar DALMS office. Even though the KNU still had the land classified as grazing land according to their own maps, the villagers explained that it did not have the authority or influence to enforce its own classificatory system.

In this case, villagers felt disempowered vis a vis their Burmese neighbors, who they felt had more capacity to directly approach the GORUM. One interviewee explained, “For Karen people the KNU is our government and for Burmese people Myanmar is their government. Even though we follow Karen laws, the KNU is losing their power here, so we are not protected. During the conflict time, the KNU controlled this area. But the KNU does not have power anymore to enforce their authority. Even if the KNU tells the Burmese people to get off our land, they never listen to them.” They felt extremely powerless and upset that the KNU did not defend their rights to land which was important to their livelihoods.

### **Case Study F – Interaction between Customary Land Management and KNU Administration**

In one village nearby to Kyauk Kyi there was a dispute regarding customary communal land which a wealthy businessman was claiming ownership over. The affected Karen villagers explained that much of their customary communal land had already been converted into housing land over time to make way for natural population growth in their village and IDP communities. However, there was a small area of land in which there was a waterfall which was regarded as a communal resource by all of the villagers. The villagers had approached the KNU to support their claims to the land, but they were facing a number of obstacles because personnel from the KNU were involved.

It was explained that the land had a waterfall on it which in recent years had become a local tourist attraction which the community wanted to use for their livelihoods. Two women from the village had built houses with shopfronts on land adjacent to the waterfall where they were now selling snacks and drinks to visitors of the waterfall. It was explained that anyone in the community could go and build a house since it was considered as customary communal land that was owned by all villagers. However, a wealthy businessman from Kyauk Kyi town claimed that the waterfall and the land surrounding it had

been leased to him by one of the local KNU commanders. He had told the two women that if they wanted to build a house and sell snacks they needed his permission to rent the land from him. However, from the perspective of the local villagers, including the village head, the waterfall was owned by the village according to customary and KNU laws and therefore the businessman had no rights to manage the waterfall. One of the women suggested that corruption was involved and that the KNU commander who had leased the land to the wealthy businessmen had not followed KNU law. She exclaimed emphatically, "I am not afraid of him. I have already survived many difficult experiences, so I can survive this too. He can threaten me as much as he wants. It is our land, so he does not have the right to control it."

The two women who had set up shops nearby to the waterfall explained that many of the other villagers wanted to join them, but that they were afraid of the businessman because he was so powerful and had close connections to the KNU and local Tatmadaw commanders. One of the women was a KWO officer and she was confident of her rights to use the customary communal land according KNU land laws. The villagers had sent a letter to the KNU land office, but they had not heard a response. Since the matter involved KNU authorities, the villagers had chosen not to involve the GORUM, but the two women were considering going to the local DALMS office in Kyauk Kyi to get housing certificates for the places they had built their shops. They strongly believed, that the longer they stayed on the land beside the waterfall selling snacks, the more their claims over the land would be guaranteed vis a vis the wealthy businessman. They believed that part of the reason he had been unable to enforce his control over the waterfall was because he did not have permission from the GORUM and that the KNU would also deny his claims according to their own laws, despite his links with local KNU personnel. The villagers also felt empowered because they had approached a local Kyauk Kyi CSO, who had assured them of their rights over the waterfall and the adjacent land according to KNU laws regarding customary communal lands (see Annex II).



## Seeking Restitution Regarding Land Grabs

In the majority of research sites in eastern Bago, people expressed deep fears and structural constraints in seeking restitution regarding land grabs. In all of the research sites, village leaders and VTAs understood land confiscations as beyond their control and up to the government and KNU authorities to better consult with local people.

Overall, there was a deep sense of frustration with the GORUM's land laws and with the Reinvestigation Committee for Confiscated Farmlands and Other Lands, who they saw as representing the interests of the Tatmadaw and other powerful businessmen. Many people mentioned obstacles to addressing land grabs including the distance to the township, language skills, a lack of knowledge of GORUM land laws and the costs associated with both transport and small fees requested by township administrators. As one 46-year-old female Karen villager from Kyauk Kyi township explained, "I do not know the land laws well. I heard that under the new government we can get land back which has been confiscated by the military. In reality, I don't think the system works. Especially because this is still a 'brown' area. We can say that the rule of law does not apply here."

Fear was also seen as a primary reason why people did not seek HLP restitution. As another respondent from Shwegyin noted, "If we think about our situation, we can see that we lack awareness and knowledge. We need more capacity building to learn about our rights. But we are still afraid. How can we trust the GORUM when they have already taken everything from us already." Some village leaders also suggested they encountered difficulties approaching government authorities and were often asked to pay bribes. Village leaders also suggested that they felt powerless to prevent land grabs and did not understand the GORUM's land laws well. As one village leader quipped, "I do not know how to speak in the Nay Pyi Daw language, so how can I help people in my village."

Additionally, people who were both Karen and Christian felt a double sense of bias and isolation in relation to the GORUM as a result of their status as a religious minority. As the Myanmar government has a historical legacy of marginalizing Christians, interviewees with these backgrounds expressed a deep sense of inequality. Others also suggested that their lack of power was also related to poverty. As one interviewee noted, "If you go to the government office on a motorbike dressed in poor clothes like me, they won't do anything for you. But if you come in nice clothes and a big car they will take care of you and your problem will go away very quickly."

Many Karen respondents also found the KNU's own mechanisms for addressing land grabs ineffective, especially when it was related to development or extractive initiatives. However, respondents were much more likely to register their concerns with the KNU, whom people overwhelmingly saw as a more legitimate authority to govern their lives.

## Case Study G – Karen Communities Threatened by Corporate Interests Increasingly Asserting their Rights

In 2013, the KNU brought a Chinese company to visit an IDP village nearby to Kyauk Kyi town. The company wanted to open a tin mine which was going to directly impact the villagers' use of their communal forest. Villagers expressed the importance of the forest to their livelihoods given many of them did not own paddy lands. They suggested that they were not provided with any direct information about the proposed mine and that they initially felt extremely powerless because it involved local KNU commanders. The company had simply come to their village and handed out jumpers for everyone with the company logo, as well as giving chairs and tables for the community school, which the community perceived as a bribe. After taking a photo of the villagers in their new jumpers the company then left and with the permission of local KNU commanders proceeded to start the project.

Because of the lack of consultation with the community that customarily owned the land, a local environmental network brought the case to the attention of the KNU Executive Committee and was able to prevent the project from going ahead. It was explained by a representative from the CSO that they had closely examined the contract of the tin mine and that none of the appropriate environmental mechanisms had been put in place before beginning the project. Members from the CSO had close links to some of the representatives from the KNU's the executive committee and they explained directly the problem with the tin mine. Members from the CSO told the research team that they had explained to influential Executive Committee members that if the KNU did not follow their own laws they would be as bad as the GORUM and have no right to represent Karen villagers in the area. They also threatened to take the case to the media if it was not stopped.

Despite these obstacles, respondents in eastern Bago explained that they had increasing confidence to seek their HLP rights as a result of the peace process and the changing information environment. This is partly related to increased knowledge of land laws and active campaigns from local civil society networks to empower communities. Civil society groups have played a major role in helping people to seek restitution in eastern Bago. In many of the research sites visited, people had low levels of education and did not read or write Burmese. As in Kayin State, in some of the research sites, members of these networks have played an important role assisting people to write complaint letters both to the Myanmar government and the KNU to seek redress regarding past land confiscations. Villagers in Kyauk Kyi township, in particular, feel empowered by a local Environmental Watch Group who is seeking to protect both HLP rights of ordinary villagers and also the environment. In the few cases where people have made claims against mining or other projects in Kyauk Kyi they were assisted by members from this group who are seen to have strong knowledge about both KNU and GORUM land laws (see Case Study F). Despite their assistance, however, these processes have had little impact.

A recent initiative from another local organisation, the Committee for Internally Displaced People (CIDKP), has also been viewed as an important resource for local people. CIDKP has led public forums in Kyauk Kyi township between military representatives, the KNU and local MPs regarding all issues, including land. This has allowed community members to express complaints they have related to the resolution of land disputes and discuss with local government and company representatives how they feel about local development and mining projects. While no concrete outcomes have been achieved yet from these forums, people see these talks as an important step towards building trust and dialogue for people affected by conflict.

## Conclusion

There are several key lessons worth highlighting from the research in Eastern Bago regarding customary land management, authorities and dispute resolution:

- ◆ Maintaining village harmony is a foundational element of Karen community, family and village life and plays a strong role in keeping intra-village land disputes at a minimum.
- ◆ Customary authorities continue to play a significant role in helping to resolve land disputes at the village level. In some cases, they also assist people in advocating for restitution in relation to land grabs which involve powerful outside authorities including the GORUM and KNU. However, customary authorities feel powerless to help people in cases which involve land grabs that involve the Tatmadaw or authorities related to the GORUM.
- ◆ Even though people are seeking to have their land titled under GORUM and KNU law, they primarily regard it in customary ways and apply customary practices to its everyday regulation. This includes inheritance practices and beliefs about the sale of inherited land. However, these customary systems of land management are facing increasing pressures due to increasing investment in the area.
- ◆ There are increasing fears from Karen people about the potential impacts of development related projects on HLP rights. Customary authorities have little power to negotiate with GORUM or KNU authorities regarding such projects and their potential impact on communities, including access to communal customary lands have the potential to be extremely negative.
- ◆ The KNU is generally seen to act as a more legitimate authority in Karen people's lives and in their governance of land. People feel more confident to approach them about land disputes and confiscations. However, since the 2012 ceasefire, the interests of Karen villagers are increasingly being undermined by the economic interests of the KNU.
- ◆ In conflict affected communities, people do not trust the GORUM to protect their HLP rights. Karen people largely view the GORUM in connection to the Tatmadaw and see restitution mechanisms as both difficult to access and coming from an authority that has only abused them in the past.

## 6. CUSTOMARY LAND DISPUTE RESOLUTION IN SHAN STATE

**S**han State is home to the Shan majority ethnic group, as well as a diverse range of ethnic groups which fit under the umbrella of the Shan, including Pa-o, Danu, Taungyoe, Intha, Lisu, Lahu, Ta'ang, Akha. The state is also home to Jingphaw people. The research in this report was conducted in areas where the main ethnic groups are Shan, Pa-o and Danu. These three groups have some form of political organization with affiliated Ethnic Armed Organisations. Several EAOs are present in Shan State, though in this report only the Restoration Council of Shan State (RCSS) was mentioned by interviewees. These entities have different amounts of interaction and involvement with central authorities of the GORUM depending on their involvement in ceasefire deals with the central government in Nay Pyi Taw.

In research sites visited in Shan State for this report, the main administrative authorities included the GORUM, the Pa-o National Organisation, the Danu National Democracy Party/ Danu National Organisation Party and the Restoration Council of Shan State. At the time of writing, conflict continues in northern Shan state between government forces and a variety of EAOs including Ta'ang National Liberation Army, the RCSS and the Shan State Progress Party.<sup>85</sup>

Through negotiated ceasefires, both the Danu and the Pa-o have secured Self-Administered Zones within Shan State, although these arrangements appear to have very little effect in terms of administrative autonomy for the ethnic groups living in these areas, as the administrative organisation is similar to any other area of the GORUM-controlled regions of the country. While data is lacking on the topic, it appears, that administrators in these areas may have a higher likelihood of being from an ethnic group other than Bamar.

Like most other ethnic states of Myanmar, the population is predominantly rural and relies on a variety of agricultural crops for livelihoods, subsistence and profit. Publicly available prior research on the customary land management practices in Shan is almost non-existent. The limited amount of information that is available has focused on northern Shan and has identified the following customary land management practices which relate to the current study;

- ◆ communal (in addition to individual) tenure
- ◆ rotational cropping
- ◆ traditional dispute resolution practices

<sup>85</sup>Chan Thar, *Myanmar Times*, *More than 2400 people flee clashes in northern Shan State*, 5 September 2018, <https://www.mmtimes.com/news/more-2400-people-flee-clashes-northern-shan-state.html>; Lawi Weng, *The Irrawaddy*, *Weeks of Fighting Between Rival Armed Groups Continues in Northern Shan*, 15 August 2018, <https://www.irrawaddy.com/news/burma/weeks-fighting-rival-armed-groups-continues-northern-shan.html>.



The conflict in Shan State has resulted in a convoluted administrative situation, however, for the purposes of this study, the areas concerned included areas of full GORUM control and administration, the Danu and Pa-o Self-Administered Zones and one area of mixed administration around Loilem (RCSS, PNO and government controlled).

Two points should be noted here. The Self-Administered Zones still utilise the central administrative structure, as do the mixed-control/administrative areas.<sup>86</sup> As a consequence, the architecture of administration across all areas follows the central model in the areas visited for this study. To clarify, this means that even in a village-tract in the Danu area, for example, there is still a Village-Tract Administrator administering the GORUM land laws.

Conflict in Shan State has facilitated a great deal of land disputes over the previous decades, precipitated by a range of factors. Increased militarisation across the southern areas of the state, in combination with changing land and investment laws, along with an increase in infrastructure investments and natural resource extraction investments, have facilitated increases in land-grabbing across southern Shan.<sup>87</sup>

The patterns of militarisation and land conflict in Shan State reflect to a large degree what has happened in other ethnic states which remain in conflict with the central government. The Tatmadaw has historically been able to control lowland areas associated with plains and river valleys, as well as key infrastructure routes in ethnic states.<sup>88</sup> These types of farming areas tend to be associated with stable lowland cropping, particularly rice paddy, which lend themselves to adaption to the titling scheme introduced in 2012.

On the other hand, EAOs have tended to secure and control upland areas, further away from central control. These more remote and mountainous regions tend to be associated with upland farming, but more importantly with shwe pyaung taungya (shifting cultivation) farming practices and communal ownership of agricultural land; practices which cannot be accommodated in the current GORUM land titling regime. In Shan State, these areas which are less common in southern Shan than other ethnic areas due to the flatter topography, are more likely to be found in conflict areas, particularly to the north.



<sup>86</sup>UNDP Myanmar, *The State of Local Governance: Trends in Shan*, 2015, 7.

<sup>87</sup>L Gum Ja Htung, *Land Grabbing As A Process Of State-Building In Kachin Areas, North Shan State, Myanmar*, Asia Pacific Sociological Association (APSA) Conference, *Transforming Societies: Contestations and Convergences in Asia and the Pacific*, 2015, 8; Yin Tai/Shan Herald Agency for News, *Shan farmers take land grab grievances to state Hluttaw committee*, 1 September 2017, BNIonline, <https://www.bnionline.net/en/news/shan-state/item/3446-shan-farmers-take-land-grab-grievances-to-state-hluttaw-committee.html>.

<sup>88</sup>Kevin Woods, *The Impact of Armed Conflict and Displacement on Land Rights in Kachin State*, Trócaire, 2016, 6.



Myanmar Information Management Unit  
**Shan State (South) - Myanmar**



Disclaimer: The names shown and the boundaries used on this map do not imply official endorsement or acceptance by the United Nations.

## Introduction to Findings

The Shan research team conducted field visits in five village-tracts, in Taunggyi and Hopong Townships across southern Shan State, including;

- ◆ Namkhok (south of Taunggyi)
- ◆ Mong Pawn (east of Taunggyi, close to Loilem)
- ◆ Pinlaung (south of Kalaw)
- ◆ Ywangan (north of Kalaw)
- ◆ Inle Lake

The areas covered included a range of ethnic groups and administrative arrangements. The table below sets out the areas (by village/village-tract), administration and ethnic groups in the area.

	Location	Administration	Ethnic groups <sup>89</sup>
1	Namkhok Village and Village-Tract, Hopong Township	PNO-Government	Pa-o, Shan, Bamar, smaller populations of Danu, Chinese, Rakhine, Taungyoe
2	Win Khao Village (Hopong Township)	PNO-Government	Shan
3	Tung Pong Village, Hopong Township	PNO-Government	Shan
4	Khao Nue, Kun Lawng Village-Tract, Loilem Township	RCSS-PNO-Government	Shan and Pa-o
5	Wan Oh Village, Pinlaung Township	Government	Pa-o
6	Nambilin Village, Naungthayar Village-Tract	Government	Pa-o
7	Pat Talae Village, Myindwin Village-Tract, Naung Tayar Township	PNO-Government	Pa-o, Bamar, Taungyoe <sup>90</sup>
8	Tigyit Village, Pinlaung Township	PNO-Government	Pa-o, Shan, Taungyoe, Bamar
9	Taung Kaung Bwar Villaged, Kyauk Myaung Village-Tract, Ywangan Township	Danu Self-AdministeredZone	Danu
10	Thein Gone Village-Tract <sup>91</sup>	Danu Self-AdministeredZone	Danu
11	Boi Zarr Kone Lae Pyin Lwar Village, Inle Lake	Government	Shan

The target areas are administered by the following entities;

- ◆ GoRUM
- ◆ Restoration Council of Shan State
- ◆ PNLO
- ◆ Danu National Democracy Party/ Danu National Organisation Party

Although the variety of administrative arrangements might be expected to have an impact on the relationships between villagers and land (tenure security, registration etc), in reality this was not always clearly the case. The majority of the areas visited by the research team suggested relatively high levels of engagement with the GORUM land registration system. Although quantitative data was not collected, the respondents in each location (including farmers, village heads, VTAs and elders) were asked to estimate the level of increase in applications and receipt of Land Use Certificates (LUC) from the GORUM in their areas. In places such as Khao Nue with mixed RCSS-PNO-Government control and where low engagement with the state systems might have been expected, the interviewees estimated that approximately 70% of farmers had LUCs for their agricultural land.

In Tigyt, where administration is mixed between PNO and GORUM, possession of LUCs was also high. Interviewees estimated the level to be 80%.

Only a few areas visited showed a distinct lack of applications for and possession of LUCs. In Taung Kaung Bwar, in the Danu Self-Administered area, it was estimated that only 10-15% of farmers had LUCs for their farmland. In Pat Talae, possession was estimated at 15%, though this is in a mixed PNLO-government administered area. The results were therefore inconclusive regarding the relationship between types of administration and uptake of LUCs.

What is missing from this report is data from those areas where upland shifting cultivation (shwe pyaung tangya) is dominant.<sup>92</sup> Only one area out of the 11 visited still practices shifting agriculture. This type of farming takes place in locations where greater levels of customary practices might have been expected.<sup>93</sup> However, even in this particular location of Khao Nue, 70% of farmers were estimated to have LUCs for their taungya plots.

<sup>89</sup>List is not necessarily exhaustive.

<sup>90</sup>Full breakdown provided by the VTA: Pa-o 98%, Bamar 1%, Taungyoe 1%.

<sup>91</sup>Team met with 12 youth representatives from 4 villages within the tract, but did not visit the village-tract itself.

<sup>92</sup>As mentioned in the limitations, these areas are difficult to reach.

<sup>93</sup>Ethnic Communities Development Forum, *Our Customary Lands: Community-Based Sustainable Natural Resource Management in Burma*, July 2016, 27.



## Agricultural Activities

A range of topography and agricultural activities characterised the research locations. In locations south of Taunggyi on the road to Hsiseng, farming was primarily conducted in lowland irrigated plains where rice paddy was the dominant crop, along with smaller amounts of sugar cane, peanut and garlic. According to interviews conducted across all research sites, shwe pyaung tangya has died out in the area due to increased populations putting pressure on land resources.

To the east of Taunggyi in more mountainous areas, farming was predominantly upland (taungya) farming with mixed cropping including taungya rice, turmeric, tobacco, ginger and corn. This area also included shwe pyaung taungya, including rice and other crops.<sup>94</sup> This region was also formerly dominated by opium cropping, although the crash in prices for poppies has driven farmers into substituting corn for opium.<sup>95</sup>

To the south of Kalaw, the majority of farming revolves around terraced rice paddy on taungya land as well as seasonal vegetables.

North of Kalaw in the Danu areas, the majority of farmers were growing fruit and beans, corn, wheat on taungya land.

Across both lowland and upland areas there has been an increase in application and possession of LUCs as awareness has grown among farmers that possession of LUCs enables them to get loans provided by the Department of Rural Development. Loans can be obtained to purchase seed and equipment, which can increase farmers' profits.<sup>96</sup>

In general, there is a preference to engage in flatland farming for the simple reason that flatland plots are eligible for 105,000 MMK per acre in loans, whereas upland plots are only worth 50,000 MMK in loans.

## Gender

In the 11 locations visited for this study, there were no women in any of the positions of authority outlined above as key actors in dispute resolution. Although the team interviewed one individual in Pinlaung who is an elder within her community, she explained that in her community, any person reaching a certain age (approximately 65), automatically becomes a respected elder. However, she said that she was not part of the council of elders (who have some level of persuasive authority and decision-making power), due to her gender.

<sup>94</sup> See concept table on page 15 for definition of Shwe Pyaung Taungya.

<sup>95</sup> Prices in recent years have fallen from 1,000,000 MMK per viss to 400,000 MMK per viss. This has led to crop substitution and outflows of migration to Thailand where a single worker from one family can earn 3,000,000 MMK per year, the equivalent of family or five's earnings for the same period.

<sup>96</sup> The loans from DRD are repayable over a 6 month or 1-year period.

## Key Authorities

The identification of key actors was critical for establishing just how widespread customary dispute resolution remains on the ground in Shan State.

### Councils of Elders

Across the research sites, there was uniform presence and involvement of councils of elders as the most common customary dispute resolution actors. Elders have previously been identified in numerous research projects in recent years as key figures in the resolution of disputes at the village level, across different ethnic areas of Myanmar.<sup>97</sup>

As the introduction to the Shan findings suggests, the team visited a variety of locations in which the administrative arrangements changed from full government control to full EAO control. In all types of administrative arrangements, however, village elders were identified as important authorities in the resolution of land disputes.

A critical point to note was that the role played by these actors has changed somewhat since the advent of the 2012 laws. (Their roles will be explored in greater detail in the section below on the relationship between the customary and the formal system).

The elders range in number from a few in small villages, to as many as 15 in larger villages.<sup>98</sup> The elders together form councils which make decisions on issues and maintain communal harmony. It should be noted that 10 Household Heads, 100 Household Heads and Village Headmen/Women may also form part of a council of elders.

Councils of elders may become involved in all manner of disputes in the village, not just land. For example, respondents from Thein Gone Village-Tract were asked to list the issues that elders would adjudicate on in their villages. The respondents listed the following; inheritance, domestic violence, land, family issues like divorce, and fighting between youths in villages.

### How are elders selected?

The question of how individuals become elders was explored with different communities, since these individuals were identified as the traditional choice for assistance in resolving a range of disputes within villages, including those over land.

In Nambilin, for example, the residents said that village leaders are originally selected by the community. Later when they become older, they may also be selected by current elders to also become an elder, though this is not automatic for all village leaders. This may depend on the perception of their performance as a village leader and the needs

<sup>97</sup>See for example, *Ethnic Community Development Forum, Our Customary Land: Community-Based Sustainable Natural Resource Management in Burma*, July 2016.

<sup>98</sup>*Khao Nue in Loilem for example has approximately 60 Household and 5 elders.*

of the community. For example, in Nambilin, the population is small, so there are only three elders at any time. When proposed as an elder, the person is expected to assume the role even if they do not want to do it.

The person chosen is usually someone the current elders and residents feel is educated and respected. According to these residents, the elders have the most complete knowledge of who is the rightful owner of which land inside the village.

In Wan Oh Village however, when the question was put to villagers about how elders were selected, the respondents indicated that the elders themselves get to choose who becomes an elder and that there is nepotism in that system. Some elders choose their friends. Others choose people in the community who have money and power.

In a number of interviews, it was suggested that at least in theory, selection of an elder or elders, or their recognition or appointment, should be based on which individual is respected, has a good education, knowledge of who is the rightful owner of specific parcel of land or has a lot of experience solving community problems.

Respondent agreed about the fact that the elders make their own decisions as a group in choosing the new members, but did not explain whether the selections were based on merit or nepotism. The Wan Oh respondents also indicated that there are cultural barriers to talking about authority figures. Although they were happy to discuss this issue, they indicated that it would be unlikely to be able to have discussions about nepotism or corruption with rural communities generally. In most other areas, the communities and elders themselves indicated that elders were perceived to have the qualities listed below.

Perceived Characteristics of Elders	
1	elderly men (older people are believed to have the most knowledge of the community history)
2	well-respected members of the community
3	intelligent
4	educated
5	honest
6	have the best interests of the community at heart

## Other Key Actors

Apart from elders, 10 Household Heads/100 Household Heads and Village Headmen (there were no women recorded in these roles in this study) were also seen as vital to the customary dispute resolution process at the village level. The place of these actors within the customary approaches to disputes varied across different villages. In some places these actors were sought out first for advice, to facilitate dialogue or to mediate (potentially providing advice or making recommendations for settlements) before disputants approached elders. In other locations, these actors would be involved in an investigation, along with the elders, of competing land claims.

Respondents did not mention whether or not village heads were directly involved in or influenced the decisions on disputes that they had not resolved and were later taken by disputants or referred to the councils of elders.

## Non-engagement of villagers with EAO actors in dispute resolution

The research questions put to residents, village leaders, elders and VTAs were not directed at eliciting information specifically regarding customary dispute resolution. Questions were open ended and couched in such a manner as to discover which authorities people thought of as the primary dispute resolution actors at the village level. This left open the possibility for respondents to include EAO authorities as potential dispute resolution actors. It is notable that not a single respondent mentioned EAO actors as relevant to village-level land dispute resolution.

Regardless of the administrative area (government, RCSS, PNO, Danu), at the village level, residents considered customary authorities – 10 and 100 Household heads, village headmen and elders – to be the third parties approached for help in resolving land issues, in the rare cases when they arose. The situation in Shan differs therefore, from other ethnic areas, where EAOs have been known to be involved in dispute resolution through informal land administration systems and EAO courts (Kayin State and the KNU, for example). In both the PNO and Danu Self-Administered regions, no EAO actors were mentioned as assisting with dispute resolution. Indeed, some key informants only mentioned EAOs in terms of their role in land-grabbing against farmers. This was said to have been perpetrated by the PNO in Hsiseng, Hopong, Pinlaung, for example.

Other actors occasionally seen in ethnic contexts, including monks, were also notable for their absence in the Shan context.

## Dispute resolution techniques used by customary authorities

There was near uniformity in how the councils of elders resolve land disputes in all areas studied. In technical dispute resolution language, this process is most closely aligned with arbitration.



The case studies below indicate the steps taken by elders when solving land disputes.

### Case Study A – Elders' arbitration in Win Khao Village

**T**he elders of the community, which may include the village head, will help to resolve most land disputes.

Usually when a dispute occurs, the disputants first try to directly resolve the issue themselves. If this fails, then one, or both, of the disputants will approach one of the communal elders and inform them about the situation (In this village there are six elders, all of whom are men).

Villagers explained that the meeting with one of the elders results in convening the council of elders. The members of the Council meet in a group with both or all the disputants present.

Each of the parties presents their views and arguments on the issue(s) in dispute. After the council has heard arguments, they make a decision on who has the better claim to the land, right to use it etc. The elders said that they try their best to make fair and transparent decisions in front of the parties.

The decision made by the elders is not a binding decision. It is considered to be a recommendation and persuasive suggestion, based on their knowledge of the history of land use in the village, and their desire to maintain communal harmony within the village.<sup>99</sup>

Because the decision is not binding, and is merely a suggestion from respected elders whom the community considers to be wise and fair, if either party is not persuaded to accept the decision/recommendation, the council will draft a letter to the Village-Tract Administrator – who is not an elder, although he/she could be an individual from the disputants' own village – that outlines the details of the dispute, the evidence available and the decision/recommendation of the council.

The VTA, as the head of the VTABsF, is responsible for addressing the issue(s) in dispute at the Village-tract level. He/she too, may conduct fact finding, talk with the parties individually or together, and may try to resolve the dispute on his or her own or with the assistance of the Village-tract Administrative Body of the Farmland. The VTA and the VTABF may make a binding decision, and try to persuade the disputing parties to accept it. If they do not, they have the right to appeal the outcome to Township and District Administrators or to the State ABF. The latter body has authority to make a final and binding decision on the issue(s) in question.

<sup>99</sup>As opposed to a rights-based approach, which could lead to a recommendation based solely on the merits of the case presented by the disputants, without regard to any potential negative effects of the recommendation on communal harmony.

## Case Study B – Elders Arbitration in Tung Pong

**T**his village has a council of 10-12 elders, all men, who provide dispute resolution for those with land disputes in the village. The techniques employed by the council mirror those explained in Win Khao and several other locations, with a joint hearing of the issue and arguments from both disputants. Elders deliver a non-binding recommendation which is either accepted, or the elders draft a letter for the VTA, so that the issue can be addressed at that level.

The elders actively discourage disputants from seeking to resolve the matter in courts, as that involves greater costs, potential or actual bribery, lawyers' fees and time lost working on farms. The process is also much slower.

Unlike the Win Khao elders, the Tung Pong elders suggested that if a party was not happy with the decision, this would not automatically lead to the problem being sent to the VTA. First the council of elders would try a second arbitration at a later date. The elders may hold up to three meetings with disputants before deciding that the problem is not going to be solved at the village level.

If, however, the case was referred to the VTA and he or she with the assistance of the VTABF is unable to solve it, or the parties aren't satisfied, the disputants can, as described in the case example above, appeal to the Township level ABF for assistance in reaching a resolution.



• Terraced Wet Rice Farming near Naungtayar, Shan State

### Case Study C – Combined 10/100 Household Heads, Village Head and Village Elders' arbitration in Namkhok

Once a dispute has developed between two land users, an investigation of the land in question begins. Those involved include the available authorities including the 10HH head, 100HH head, village head and both parties to the dispute. The village elders are also consulted for their opinions about who the correct 'owner' of the land really is.<sup>100</sup>

The first step is to try and reach an agreement between the parties themselves through mediation led by the village head. This is seen as the most durable solution. If the parties can't reach an agreement through this process, the village leader does not have the authority to make a binding decision that would resolve the problem. If the parties do not agree the village leader refers the dispute to the village elders.

If the parties agree to resolve the problem at the village level based on the recommendations by elders and other leaders, there are no further actions. If, however, one or more parties is not satisfied with the outcome, they can take the issues in question directly to the Township administration directly, without following non-binding decision or suggestion of the VTA as an interim step. The problem could theoretically be referred to the VTA, but in the opinion of the villagers who were interviewed, the VTA has only the authority to make a persuasive suggestion and recommendation for a settlement and cannot impose a binding decision on the parties.<sup>101</sup>

The case studies above highlight common procedures used to resolve land, and also many other types of disputes, in all of the study areas. The exception is Taung Kwaung Bar in the Danu Self-Administered Zone, where elders do not participate in land transfers/disputes (see below).

<sup>100</sup> "owner" here is used in the traditional sense, where land users see themselves as the owners of the land. This is in contrast to current Myanmar legislation which only recognises a use right to land users in place of full ownership.

<sup>101</sup> Clearly this is incorrect in terms of the formal authorities, which gives the VTA and the VTABsF the power to resolve disputes (as head of the Village-Tract Farmland Administration Body) at the tract level under the Farmland Law and Rules.





• Upland Turmeric Farming •

### Notable anomalies in the involvement of dispute resolution actors

In Taung Kaung Bwar Village, Kyauk Myaung Village-tract, Ywangan Township in the Danu Self-Administered Zone, villagers indicated that the elders in that village had no role at all to play in land disputes. Unlike in other areas of Shan State, individual transfers in this village are not witnessed or approved by the elders; the individuals conduct the transactions themselves. In land disputes, the elders are not involved at all and people go directly to the VTA level for assistance in reaching resolutions.

Historically, however, elders in Taung Kaung Bwar would have used a type of advisory non-binding arbitration, with both parties present discuss the issues in dispute. The decision was sometimes followed, but sometimes not. In the latter case, if there was no resolution, the village head would refer the issue to directly to the Township Administrator, as previously there were no VTAs to consult or handle cases.<sup>102</sup> The residents said that the elders only role in the contemporary era is during religious festivals where they help to organise events and donations.

The diminished role of elders was also mentioned by residents in wards of Pinlaung town, where locals indicated that there were no further roles for elders to play in land disputes. However, the elders were still said to play an important role in counselling youth in the community regarding issues such as drugs and fighting. Wan Oh elders also indicated that they may be called on to assist with getting people out of custody when they get arrested and acting as guarantors for them, particularly in drug-related cases.

<sup>102</sup>Historically in this context refers to a period around 60-70 years ago when the Taung Kaung Bwar respondent were children, and VTAs were not holding an administrative position as they have been since 2012 under the Ward or Village-Tract Administration Law.

## Power Relations

As mentioned earlier, respondents indicated that land disputes between members of villages have historically been limited.<sup>103</sup> The reasons provided for the harmonious nature of land relations in the various locations were said to be the historical availability of land which allowed for expansion based on the permission of village heads, rather than the confiscation of others' land. Population increases were said to have impacted on this situation in certain areas (Namkhok and Pinlaung, for example). Population increases were noted in Pinlaung, whereby over the course of the last 80 years, the town expansion has turned land that was completely rural into peri-urban and then eventually fully urban environments.

More important than the land pressures generated by population growth, has been the rampant illegal land confiscation in the majority of the research sites. This issue concerned the respondents far more than any other. Though they provided examples of how small-scale (intra-village) land issues were handled, most respondents suggested that boundary and inheritance issues were relatively rare and were successfully resolved in large part by customary authorities. Respondents reported that it was extremely rare for a land dispute to make it out of the village or tract level without resolution. Further, the economic impact of these disputes has also been relatively minor on both the individuals involved and the community at large.

In stark contrast to common village land disputes that often involve and affect only individuals or families, are the impact of large-scale land confiscation in previous decades which were reported in multiple sites across Shan State. These often affected a significant number of land owners within a tract. The following section details several examples of large-scale land grabs by the Tatmadaw, often in concert with private companies linked to the military.





## Land Expropriation

**R**espondents across all research areas indicated that land-grabbing has been an ongoing and insurmountable challenge to small landholders in recent decades. The identified perpetrators of land-grabbing were the military and companies, sometimes acting in concert. As the majority of these expropriations were completed during the SPDC era, they were not challenged through formal channels, as those who lost land were concerned for their safety at the time. The change to quasi-civilian government (and the provenance of land administration bodies) has had no impact on the ability of former land users regaining the plots that were confiscated, or to obtain compensation for their losses, despite the appeal of those who have lost land to these bodies for remedies. Respondents further indicated that customary authorities have little to no role to play in remedying these historic confiscations.

### Land-grabbing Case Studies

#### Case Study A – Tatmadaw land-grabbing in Wan Oh Village

**S**ai Kam Laing, 43, is the leader of a group of 75 families who lost land between 1988 and 1990, followed by a second land confiscation in 1991. The family lost their tea plantation of 2 acres after the land was taken by the Tatmadaw. No compensation was ever paid to the family by the State Law and Order Restoration Council. No negotiations were ever undertaken by the elders of the community over the confiscation because at that time everyone was afraid of the military.

On August 28, 2014, Kai Kam Laing's family started making applications to get their land back writing to the Chief Minister of Shan State and the Speaker of the Shan State Parliament. They also sent the details of their case to the Pyithu Huttaw Lower House and the Union Lower House and directly to the Union Solidarity Development Party. They also plan to send the case to Shan Nationalities League for Democracy as well. To date, they have not received a response from any of these authorities.

More recently, Sai Kham Laing's family submitted the claim and evidence to the Reinvestigation Committee at the township level. The Committee members then told the military about the claim. The military told the families directly that they cannot get the land back.

As a result, the farmers believe that the Committee is either not interested in solving the issues, or they don't have any power to force the military to return the land.

The confiscated land still has tea and beans growing on the plots that were owned by interviewees who have been forced to rent the land back from the military in order to keep cultivating the land. Many of the 160 acres that were originally confiscated, however, remain unused except for one area which is being used for the No.331 Air Force base.

## Case Study B – Tatmadaw land-grabbing in Pat Talae Village

In 1990 the Tatmadaw confiscated about 100 acres of agricultural land. The land was primarily used for a military base and the remaining area for agriculture. The land that was not used by the military was rented back to the original owners for around 30,000MMK per acre per year, but that arrangement depended on the relationship between individuals and the military. Some people who had a good relationship with military officers paid less and others paid more. The situation continues to this day.

Some of the confiscated land was later transferred to a company called Mega Strength Cement Company, which continues to operate on the land in question.

At the time the land was confiscated, no warning was provided by the military to the land owners about what was happening and there were no consultations. The military simply put up sign that said that the land now belonged to the military. People were too scared to even say anything about compensation or request alternative land.

Between 2000-1, the PNO also confiscated about 100 acres from farmers in the area to build their own cement factory called Ruby Dragon. The PNO also failed to provide any warning to the land owners of the confiscated land.

Unlike the Tatmadaw, however, the PNO paid some compensation to the farmers and gave 1 acre per farmer as replacement land. The amount of compensation provided depended on the location of the land that was confiscated. If it was located next to the road, 70,000 MMK was paid. If it was away from the road, only 30,000 MMK was provided.

The farmers believe that it is not possible to get a LUC over the confiscated land. When asked whether anyone had made any efforts to get their land back or get compensation now that the political situation has changed, the local people said that so far, no person has approached the VTA in his role as part of the Reinvestigation Committee to request their land back from the military.

Villagers, however, have requested assistance from an NGO called EID which works on land issues, because they feel like they have no power at the village or VTA level to achieve anything. Even though the issues regarding the land confiscations in the area are well known, there have been no efforts from the Township level authorities to resolve the issue.

Villagers believe there is some cooperation between the military, the cement companies and the coal mining companies who have confiscated land in the area. The coal is powering the cement factories and the coal mines are also on confiscated land.

<sup>103</sup> Given the cultural sensitivities of exposing community issues to outsiders, this must be treated with caution

Currently, the air pollution is getting worse and the water stream is getting polluted in Tigyit and is flowing through this village-tract. The stream is the water source for the villages and it also seeps into the water table.

While to date no one has gotten sick, some people have reported skin conditions that they attribute to the pollution. They say, however, that there is nothing they can do to stop the water and air pollution.<sup>104</sup>

### Case Study C – Company and Tatmadaw land-grabbing in Tigyit Village-Tract

**M**ore than 400 acres of land were alleged to have been confiscated in this tract by four companies including Eden and Shan Yoema Naga coal mining company. Currently, Eden is the only company still operating in the area. Although the land was confiscated in 1990, compensation was not paid to the original owners until 2004. The rate of compensation was 2,000 MMK per .01 acre.

At the time of the confiscation, villagers, including customary authorities, were afraid of companies associated with the military, so they had to accept whatever compensation they were given, and also act as if they were grateful.

Currently, not all of the confiscated 400 acres by the Eden are being used by the company, which has La Ya 30 forms for the land.<sup>105</sup> This kind of permit allows land holders to allow it to be used for purposes different from its original designation and permit. This arrangement allows farmers to use the land free of charge for agricultural purposes. There is no security of tenure over the land, however, because if the farmers are planting on land which the company plans to use, the farmers have to move and the company will pay some compensation to them.

The Tatmadaw also confiscated land for their military base around 1997/8. Villagers were pressed into forced labour to build the military base at the time and no compensation has ever been paid.

<sup>104</sup>The situation in Tigyit has also been explored in Kapoor, M., Soe, N. N., & Viswanathan, V., 2018. *Midcourse Manoeuvres: Community strategies and remedies for natural resource conflicts in Myanmar* (New Delhi: Centre for Policy Research (CPR) and Namati), 61

<sup>105</sup>A type of land registration under the Farmland Law 2012, indicating former farmland used for a different purpose.



• Floating Tomato Farm Inle Lake, Shan State •

### Case Study D – Tatmadaw/Company combined land-grabbing in Ywangan

**F**armers in the tract used to grow fruit, beans, corn and wheat using *shwe pyaung taungya*. However, they were forced to stop using this type of agriculture and switch to stable cropping of orange, tea and coffee, because of a confiscation of their land by the Tatmadaw. 1300 acres were confiscated from around 70 people and sold to the Shwe Thanlwin Company. Around 42 of the original owners received compensation at 1,000,000 MMK per acre. The written documents provided with the compensation described the change of ownership as a sale of the land, not as an act of compensation. Of the remaining farmers, 28 people didn't want any money, preferring to have their land back.

The Tatmadaw and Shwe Thanlwin did not use the land confiscated; they rented it back to the farmers to use for agriculture. Over the last seven years, however, the farmers have not even been able to rent the land. After the 2012 land laws were promulgated, the company stopped allowing the rental because there was concern the farmers might try to reclaim the land.

The confiscation and compensation created tensions between the farmers and within their community, as people had historically bought and sold land informally, without changing the registered names. When compensation was paid by the company, the company split the compensation payments between the person who was in possession of the land and the person whose name was originally on land documents. The original "owner" who had already been paid for the land in the informal transfer, received 50% of the compensation that was paid. Those in possession of the land that was confiscated did not want to complain about the situation for fear that they might not get anything.



In these disputed compensation cases, the affected individuals went to the VTA for dispute resolution assistance. When questioned by the research team about why the elders were not consulted, the respondents said that the elders are not involved in land issues and land transfers in the village. Unlike other areas, individual transfers are not witnessed and approved by the elders, the individuals conduct the transactions themselves. In land disputes, the elders aren't involved at all; people go straight to the VTA level for resolution.

The issue of some farmers refusing compensation and demanding the land back is unresolved. Some people had to move to the Chinese border to look for other work due to the loss of land.

Those that refused to take money and wanted their land returned have initiated a variety of actions to try to reclaim it. They have submitted letters of complaint to the Central Reinvestigation Committee in Napyitaw, including tax slips, and in some cases Form 105, as evidence of their prior ownership.

These farmers also raised the matter in 2016 with their local Member of Parliament. The Minister for Natural Resources and Environmental Conservation has admitted that the company doesn't have the correct documentation to use the confiscated land. There has been no official action, however, to address the situation. The local people believe that this means the company has more power than the Minister, as everyone knows the company is holding the land illegally. Even though it is a Danu Self-Administered area, locals believe that nobody can control or influence the company because of its connection to military officials.

The farmers have also tried to get LUCs over the confiscated land, and VTA has told them since 2015 that the VTFAB will resolve the issue. To date, however, the farmers are still waiting for action to be taken.

In 2017 Reinvestigation Committee members (the farmers don't know which level of the Committee they came from) came to have a look at the land. There has been no response from the Committee since the visit.

The current status of the land is unclear. The VTA told the company that they cannot use the land for any purpose, and informed the villagers that they cannot plant on the land, indicating that perhaps there is a decision pending about what will happen to the land. Despite this, Shwe Thanlwin has occasionally been planting crops on the land, even though the VTA has told all parties that this is forbidden.

The Reinvestigation Committee even requested the VTA go and talk to the company to see if a negotiated agreement was possible but there was no response from the company. It appears that even the VTA has no power to influence the behaviour of the company.

These case studies suggest that;

## 1 Land-grabbing Case Studies

The prevalence of land confiscations and their scale across Shan State makes this issue far more important to farmers than any other because of the loss of livelihoods. Moreover, a large number of land confiscations remain unresolved and farmers are denied access to justice and the opportunity to either have their land returned or recoup their financial losses.

## 2 Customary authorities have no power to address land confiscations, either at the time they occurred, or in the present

In each area where confiscations were recorded, local people indicated that the customary authorities had no power to intervene, prevent it from happening or negotiate effectively with perpetrators. During the time of the military dictatorship, everyone, including elders, feared retribution by the military if they protested land seizures. Although the risks are lower since 2012, elders still do not have adequate power or influence to redress land confiscations.

## 3 Lower-level GORUM authorities have also failed to return illegally confiscated land

As Myanmar has transitioned to a quasi-democracy, and as the military has sold or rented illegally confiscated land to companies, the mandate for addressing the historical land grabs lies with land administrators from the Township to Central levels of government who staff Reinvestigation Committees for Confiscated Farmland and Other Lands. Many of these actors, however, especially beneath State levels, have been hamstrung by a number of factors in acting to facilitate returns of confiscated land. Some of these factors include failure by upper-level administrators to delegate authority to lower-level officials to investigate claims and make binding decisions, corruption on the part of lower level administrators, lack of resources (personnel and dedicated budgets) to conduct investigations, potential pressure from the Tatmadaw to not address historical land grabs perpetrated by the military, and potential lack of will by political elites.

Even though many confiscated lands are now in the possession and use of apparently civilian companies, villagers who lost lands, and potentially land administration authorities from the Township to State level, realise that there are still connections between the companies that possess the land and military figures. These relationships, presumably gives these companies some degree of protection from civilian land administrators who may be interested in returning confiscated land.

VTAs, like customary authorities, have virtually no power to intercede in land confiscations perpetrated by the military and associated companies. When they try to take action, companies commonly ignore them and rarely positively respond.

While GORUM officials above VTAs do on occasion have some power and influence to address smaller and less controversial land confiscation issues, they have the same relative level of powerlessness as customary authorities and VTAs, and for many of the same reasons, to address large-scale land confiscations.

It is often only at the State level that authorities have the power and influence to make binding decisions on large-scale confiscations, and even then, they do not always rule in favour of the parties that lost their land. There is no easy way to bridge the power disparity between the military/companies and farmers, customary authorities and VTAs until the GORUM develops a more democratic way to appoint land administrators, put in place mechanisms to assure their honesty and accountability, gives them a clear mandate to resolve disputes at the lowest appropriate level and decentralizes decision-making authority to enable them to make binding decisions and compel compliance. Given the current structure of the land administration bodies in Myanmar (with substantial GAD involvement), this remains unlikely.



## Relationship between customary dispute resolution practices and national statutory frameworks

There are several key findings regarding the engagement of customary authorities with the formal system;

### 1 Customary authorities have lost some of their mandate in areas where shifting agriculture has been replaced with static cropping, which has led to farmers' increased engagement with the formal system

Land-grabbing has fuelled awareness among farmers, that LUCs may help them protect their land assets and has driven an increase in applications for LUCs and registrations in certain areas.<sup>106</sup>

In Nambilin, for example, residents have heard about the enormous scale of land-confiscations in nearby Tigytit. A company associated with the daughter of former high ranking military official, has been investigating the area looking for land. Local people have become concerned about potential land seizures and have started to obtain LUCs. It is the opinion of local people that companies mostly receive permission from Napyitaw levels of land authorities to take land, and rarely talk with or negotiate with potentially affected villagers themselves. As a result of fears of confiscation, interviewees estimate that around 85% of villagers in Nambilin now have LUCs.

As a result of higher LUC uptake, some farmers no longer view customary authorities and land arrangements as the best options for dispute resolution. They now regard VTAs as more appropriate, because they have authority to address land held under statutory law. Some respondents indicated that if they have an LUC, they prefer to go directly to the VTA because:

- (i) They believe that the VTA may be able to provide a binding resolution<sup>107</sup>
- (ii) There are fewer steps to go through (which allows them more time to spend on farming, rather than trying to resolve a dispute)

In cases where farmers do not have LUCs which clearly demarcate boundaries, some customary authorities, mostly elders who have not been able to resolve these disputes at the village level, have begun referring these cases to the VTAs.

<sup>106</sup>Not in Ywangan and similar areas however, as knowledge of the process is still very low.

<sup>107</sup>A binding decision by a VTA is only possible if all parties accept his or her decision/recommendation, which is a non-binding. If a decision or recommendation for a settlement is unacceptable to one or more parties, it may be appealed to a Township Authority for a decision/recommendation, which if still unacceptable can be appealed to upper level bodies of the appropriate mechanism, generally ABF or Reinvestigation committees.

In Namkhok and the Danu areas visited by researchers, shwe pyaung tanugya is no longer used because it requires a large amount of land to employ successfully, and population pressures have made less land available.<sup>108</sup> Land confiscation by the military is a further factor in the reduction of shifting cultivation, as there is simply less available land for this type of farming.

Shifting cultivation in these areas has been replaced by rotating seasonal crops on the same plot of land. These plots are now eligible for LUCs, and in Namkhok, the population has begun applying for them more frequently.<sup>109</sup> This has resulted in less reliance for dispute resolution on customary authorities and more on VTAs as described above. This is especially the case for smaller disputes.

## **2 The roles and functions of customary authorities are changing due to perceived lack of ability to address land confiscation**

**A**s noted earlier, customary authorities have been seen by villagers as lacking power and authority to handle the frequent and difficult problem of land confiscation. This was not, however, a criticism by interviewees of customary authorities. Respondents said that once land confiscations in the study areas began in the 80s, there were no civilian actors capable of standing up to the military due to intimidation and fear. One resident of Wan Oh pointed out that following military land confiscations in that village, any people who dared to speak out or ask for compensation faced arrest.

## **3 Situations of increased interaction between customary and GORUM authorities**

**T**here are, however, a number of situations where customary authorities have increased their interactions with GORUM authorities and statutory systems. Arbitration in Win Khao illustrates one kind of interaction. On occasion customary authorities interact with and make referrals to the system actors, generally VTAs, if cases cannot be settled at village level or issues are over statutorily registered land.

In Nambilin, elders recommend using permanent physical boundary markers at the conclusion of a dispute resolution process, a common practice under statutory law, rather than relying exclusively on observations, conclusions and verbal understandings reached by an elder or elder council. Additionally, elders also commonly recommend that disputants obtain formal land registration documents (LUCs), in order to avoid further disputes over land.

In Wan Oh village for example, elderly respondents thought that fewer people were using the customary law now than previously. People are using contracts to record land transfers more often than in the past, when they preferred to use verbal agreements for land transactions.

<sup>108</sup>In Win Khao farmers indicated there is no room left in their village at all for new residents due to population increases.

<sup>109</sup>In the Danu areas the situation is different as there is far lower knowledge of the processes involved in the LUC application process.



In Pat Talae, when it comes to investigating applications for LUCs, the VTA relies partly on the elders to help identify who are the historical owners of land in the village. The VTA recognises that the elders know the history of the village better than anyone, and makes use of that knowledge to correctly identify and measure parcels for demarcation.

In this new interface of customary authorities with statutory ones, the former are providing a service that helps facilitate and formalize de facto land use rights. Ironically, however, once elders have identified historic owners/users of land parcels and their boundaries, and farmers have obtained LUCs, the elders' knowledge once transferred to paper lowers, and potentially eliminates, any future role they might play in village land administration and dispute resolution.<sup>110</sup>

### Perceptions of villagers and elders towards the latter's changing roles

**A**n 81-year-old resident of a ward in Pinlaung town suggested that elders now have less respect and authority in their communities than when she was young. She claimed that people no longer see the advice of elders as compulsory to follow, whereas this view seemed to be more commonly held in her youth.

Various elders across research sites indicated that they took their role in dispute resolution very seriously, but that it was a stressful position to be in given that there are high community expectations for elders to perform this service and that they have had little or no real training beyond their individual experiences in the village.

Elders do, however, seem to try to conduct the best dispute resolution processes possible. In Khao Nue, elders suggested that they attempt do their best to achieve fair outcomes for the parties in dispute and the village as a whole, by following customary norms and procedures and trying to satisfy multiple interests. When making suggestions or recommendations for a settlement they strive for “integrative solutions” that try to address and satisfy as many interests as possible. While maintaining or restoring community harmony is important, they also said that they feel pressure to deliver fair decisions that would be understood and respected by all concerned. Elders believed that they would lose the respect of both, the disputing parties and their community, if they delivered biased or clearly incorrect recommendations. Losing respect among the community would undermine their persuasiveness and ability to help resolve other disputes for which they might need to provide assistance (whether that be mediation, arbitration or conciliation).

An example of trying to be both fair and satisfy competing interests occurred in Namkhok. Elders striving for what was perceived to be a fair and broadly acceptable outcome over competing claims for the same parcel of land suggested that the parties alternate their use of the land in question on a yearly basis, which was accepted and implemented by the disputing parties.

<sup>110</sup>In only one location (in Hopong Township) did elders mention that customary rules are written down and formally handed over between changing village heads. These rules included things such as requirement to obtain permission to cut down trees in the village or to kill certain animals, for example.







## 7. ANALYSIS

### Commonalities and Differences Across Research Areas

The table below indicates that across the three research areas, there were significant similarities in the four main factors considered regarding customary dispute resolution mechanisms.

- (a) Dispute Resolution Actors
- (b) Power relations
- (c) Public perception of customary dispute resolution (and why it is or is not preferred)
- (d) Relationship between customary dispute resolution and the GORUM mechanisms

Factor	Kayin	East Bago	Shan
Common Disputes	Boundaries, Inheritance, Illegal Land Confiscation, Lack of Compensation, Lack of Restitution	Boundaries, Inheritance, Illegal Land Confiscation, Lack of Compensation, Lack of Restitution, Displacement Related Land issues, Pressures on community Forests	Pa-o, Shan, Bamar, smaller populations of Danu, Chinese, Rakhine, Taungyoe
Perpetrators of Land Confiscation	Military, Government, Companies, EAOs	Military, Government, Companies, EAOs	Military, Government, Companies, EAOs

Dispute Resolution Actors			
Dispute Resolution Actors	10/100HH Heads, Village Heads, Elders, EAOs, Monks, VTAs	10/100HH Heads, Village Heads, Elders, EAOs, VTAs	10/100HH Heads, Village Heads and Councils of Elders, VTAs
Actor most likely to conclusively resolve land disputes at the village level	Village Head	Village Head	Council of Elders
Perceived positives of customary dispute resolution	Speed, Trust, Economy, Less intimidation, Not interruptive to livelihoods		
Actor most likely to resolve land confiscation cases	X	X	X
Gender			
Gender Balance in Customary Dispute Resolution Bodies	X	X	X
Gender Balance in Statutory Dispute Resolution Bodies	X	X	X
Engagement with Statutory System			
Uptake in LUCs			
Perceived importance of the VTA as a dispute resolution actor			
Confidence in Restitution Mechanisms			
Customary	Low	Low	Low
Statutory	Medium	Low	Low

## a Actors

As the findings and the above table indicate, the primary actors delivering binding resolutions in the rare times where there are land conflicts within communities, tend to be village heads (in Kayin and East Bago) and councils of elders (in Shan). In cases where these actors were not able to resolve disputes using the range of tools at their disposal (advice, mediation, conciliation, arbitration), the disputes are often transferred to the VTA for resolution. The VTA tends to resolve disputes in either an informal way through provision of advice, or with formal binding resolutions (sometimes resulting in issuance of an LUC) as part of the GORUM dispute resolution mechanism, the ABsF.

The research reveals that the uptake of LUCs across the research areas is reducing the influence and role of customary authorities. Furthermore, customary authorities are starting to transfer part of their dispute resolution duties to VTAs, who are viewed by an increasing number of communities as the dispute resolution actor with the authority to deliver binding decisions on disputants at the village and tract level.

In disputes involving powerful outside actors (most commonly illegal land confiscation), neither customary authorities nor VTAs are viewed as holding the requisite coercive power to force actors like the military or companies to return land illegally confiscated or to force those actors to pay compensation.

## b Power relations

Relationships between disputants and dispute resolution providers depends on the type of conflict and the gender of disputants.

- (i) **Intra-community conflict** - Respondents suggested that although there is a power disparity between customary authorities and community members, based on some of the characteristics of those chosen to be customary authorities (money, education, moral authority, integrity), most respondents still preferred that their disputes are resolved by these actors. The reasons provided for this was that despite the potential for nepotism or bias, most community members said that these factors were mitigated by the positives of customary resolution outlined below.
- (ii) **Conflict with outside actors** – The inability of customary authorities to realise the return of illegally confiscated land is indicative of a power disparity that cannot be bridged with the tools provided by the current GORUM land legislation and administrative mechanisms. In addition to this, many customary authorities remain intimidated by the connections between those responsible for historic and current illegal land confiscation and the military.

- (iii) **Gender dynamics** – Women were conspicuously absent from this study in relation to holding positions of authority within dispute resolution mechanisms in both the customary and statutory contexts. Although culturally this is not perceived by communities themselves as necessarily a problem, an objective analysis suggests that women’s HLP rights can only be undermined by their exclusion from registration and dispute resolution decision-making in both contexts.

## **c** Perceptions of Customary Dispute Resolution

**A**cross the majority of research sites, respondents indicated a traditional preference for dealing with land issues at the village or tract level. Substantive goals of customary dispute resolution are often predicated on the importance of maintaining village or ethnic harmony, both for disputants and for the wider community. Members of customary communities often seek to avoid disputes that involve individuals, families, multiple families, neighbors or others in their community because any difficulties are often of concern to and may have impacts on the wider group.

The usual choice to handle these disputes has been some mixture of customary authorities and those that have now been integrated into the formal system, such as 10/100HH Heads and Village-tract Administrators. The reasons for these preferences were uniform across all research sites and include the following:

- (i) **Speed** – Disputes tend to be resolved more quickly using customary arbitration as all parties (disputants and authorities) have greater knowledge of the issues than outsiders and the mediations/arbitrations take less time to convene and conclude. Additionally, there is no paperwork or bureaucracy involved. This is especially important for people with low levels of formal education or for those who do not speak Burmese.
- (ii) **Trust** – In many of the research sites people had low levels of trust in the Myanmar government and its restitution mechanisms. This is related to the history of conflict in these areas and the experience of human rights abuses in the past. Given this history many people are reluctant to engage with formal authorities, especially if they are from the majority Bamar ethnic group.
- (iii) **Economy** - Customary dispute resolution does not generally involve payments of any sort to engage in the process. In the alternative, engagement with the formal system often leads to costs (bribes, fees). Given the first point regarding the length of time required for dispute resolution in the formal system, such costs can mount up over time. In a society where people already have significant levels of debt and livelihoods are often very precarious, most people prefer to avoid the formal system.



- (iv) **Less intimidation** - Structural barriers have historically impeded engagement with the formal authorities. Factors such as speaking an ethnic language rather than Burmese (the legal language of Myanmar), geographical proximity to township administrative centres and knowledge of formal laws, have all limited the ability of the rural population to access formal land authorities.
- (v) **Not interruptive to livelihoods** - While customary dispute resolution proceeds, disputants are able to continue working and earning a livelihood. In the alternative, farmers may have to visit the VTA office in another village or engage with the Township level of the FAB which may involve travel, which costs both time and money.

These factors, combined with a perception that customary authorities, have deep knowledge of the ownership and usage rights within rural farming communities, means that customary authorities continue to maintain a high level of legitimacy within communities. They continue to be seen, more often than not, as delivering equitable results and outcomes which maintain community harmony.

## Negatives

- (i) **Gender Discrimination** – As noted above, customary land management can inadvertently undermine women's HLP rights. Access to land and property is shaped by the persistence of social norms and values, marital and inheritance patterns. Customary dispute mechanisms can therefore have different outcomes for women, depending on the mediating effects of local context, ethnicity and gender norms. However, over and above this, women across all research sites were much more confident in approaching customary authorities where they had an existing relationship, rather than formal government authorities.

Nevertheless, women are dramatically underrepresented in authority roles related to HLP dispute resolution in customary and GORUM systems and this issue needs to be addressed by both GORUM and EAO land administration and dispute resolution mechanisms.

- (ii) **Inability to resolve historic and current land confiscation** – Customary authorities are not viewed as having the requisite authority to remedy land confiscation cases where powerful actors from outside local communities are involved.

## Entry points for Community Dispute Resolution

Given village communities' preference to maintain customary dispute resolution as their preferred mechanism, entry points for CDR programming appear to exist from the VTA level and lower. Respondents indicated a sense of obligation to provide dispute resolution services to their communities through which they strive to reach fair and equitable decisions which maintain communal harmony. However, they also indicated that they have had very little to no training on how to resolve disputes, relying on past practices and a sense of equity. Many indicated an interest in receiving training on various methods and approaches to dispute resolution. However, even those that do understand current laws and procedures regarding restitution mechanisms continue to feel frustrated with the system and its lack of results.

Some respondents were concerned with the potential for bias and corruption in dispute resolution as well as explicit gender discrimination in customary authorities and other positions of authority related to HLP rights and decision-making. While many respondents acknowledge and approve of customary dispute resolution practices, some also recognise the apparent trade-off between dispute resolution aimed at maintenance of communal relations with the potential for curtailing individual rights.

CDR has the potential for augmenting existing customary approaches, which share many similarities with alternative dispute resolution, while at the same time forging a compromise to customary approaches which promotes greater equality and access to justice for marginalised sections of society.



• Since many of the customary communal lands in Hpa-an Township have been sold off to wealthy businessmen, there is little room for grazing animals, Hpa-an Township, Kayin State •

## d Customary dispute resolution vs national statutory frameworks

The dilemma between customary land management and the formal Myanmar government system is at the heart of this report. The use of formal and customary land laws, however, should not be seen as separate and conflicting systems. Rather, they are often integrated and applied in different ways by people. In mixed-administered areas, such as described in Eastern Bago Region, this also includes the use of EAO laws. The use of customary and formal land laws and dispute mechanisms varies across research sites and depends on the factors identified above. However, research in these areas demonstrates the importance of customary land dispute mechanisms and the need to build more flexible policies to recognize customary land laws.

Across all three areas where the research took place, there has been a significant uptake of LUCs. This has had both positive and negative effects. On the positive side, many farmers now have documentation which adds to security of tenure. However, on the negative side, some inequalities have been frozen in place by corrupt and/incorrect issuance of LUCs, poor boundary mapping and issuance of LUCs to those who have acquired land illegally from former users, etc.

Despite customary authorities still playing a role in dispute resolution, some land holders no longer view customary authorities as the appropriate mechanism for dispute resolution regarding land. Across all areas, the transition to formal registration of land has significantly increased the role and power of VTAs, which in turn makes customary authorities less relevant as land actors. In Shan State, for example, the role of community elders has diminished in areas where the VTA is viewed as having more power and authority to make binding decisions. Similarly, in Kayin State, the role of VTAs in land arbitration has increased significantly over the last five years as a result of their role in the provision of land titling. The role of VTAs in Eastern Bago, however, is still evolving and people primarily prefer to resolve land disputes internally within their own villages. As a result of significant land grabs that were conducted under the military period, there is an increased awareness by people to document land sales and inheritance through the formal system. The diminishing importance of customary authorities in resolving land disputes is also related to the fact that access to communal lands for shifting agriculture has decreased significantly. This was widely observed in all areas and has also had the potential to further undermine the role of customary authorities in more remote upland communities which are increasingly at risk of land confiscations.

While land titling has the potential to play a role in securing people's HLP rights, it can also formalise land expropriation. Since the formal management of land is concentrated in the hands of people with power and authority, the formalisation of land title has the potential to enable land grabs. As described in Kayin State, the power of monks and other armed groups also adds to the insecurity of land. In addition, land titling can freeze land distribution in areas where access to common land or forests was previously negotiable. Since land titling in Myanmar has an implicit male bias, this system leaves women's HLP rights, in particular, vulnerable.<sup>111</sup>

<sup>111</sup>LUCs are registered in the name of the "head of household" and authorities often discourage joint titling.

## Communal Lands

In recent years, strengthening community forest tenure rights under Myanmar government legislation has become a key objective of land activists and environmental networks who work in Myanmar.<sup>112</sup> Research in the three areas similarly highlights the importance of forests and other communal lands as essential to the livelihoods of rural communities. The many years of economic decline and conflict in each of these areas, meant that communal forests have often been key to securing people's livelihoods, providing an important source of food for households. However, widespread land confiscations by the military and in the contemporary era has significantly reduced the amount of communal land available.

According to the 2008 Constitution, all land is officially the property of the state. The 2012 Farmland Law and the Vacant, Fallow and Virgin Lands Management Law effectively institutionalised a user-based property system and exacerbated land tenure insecurity of communal lands. In recent years much of the research on customary land management in upland areas has focused on documenting and publicizing the sustainable land management practices of upland ethnic minority communities.<sup>113</sup>

It is vital that current legislative frameworks better recognise the relationships of local people and forests and protect their access to live in these spaces. It is also important that research regarding customary land practices is broadened to include those people who live in lowland areas and who choose to interact with formal GORUM mechanisms of land regulation systems. As demonstrated in this report, ethnic minority states should not solely be viewed as a peripheral borderland or conflict zone, but a social space where cross border flows of different peoples, goods and ideas coexist with multiple authorities. Indeed, while it is important to recognise customary land laws and the multiple and varied understandings of land use across Myanmar, it is also essential to recognise the diversity of land management practices amongst ethnic minority peoples and the way people are choosing to interact with the GORUM.

Despite the fact that the interaction between the GORUM and ethnic populations is more common in lowland sites, people still regard their land in customary ways and its management is largely designated within customary inheritance systems that exclude formal authorities sometimes entirely. Forests and communal lands are also equally important to the livelihoods of people who live in lowland areas and choose to interact with the GORUM for the purpose of land titling.

It is also important to note that the high uptake in LUCs does not necessarily reflect an understanding of land laws or an acceptance of them. Across all research sites, people had limited knowledge of the land laws and saw the acquisition of LUCs primarily for the purpose of accessing government loans or as a protective mechanism. Since the majority of land is inherited, people still regard it and its management in customary ways. When the ultimate ownership of land by the Myanmar government was explained to people, many people saw these laws as highly problematic, undermining customary beliefs regarding land ownership.

<sup>112</sup> National-level dialogues have also been held in recent years to assess policies and laws in relation to communal forestry tenure. The first dialogue was held in May 2017, an Expert Roundtable in November 2017.

<sup>113</sup> See for example Zaw Aung & Khin New Cho (2018) *Growing up Together with the Forest: The Unique Relationship Between the Forest and Indigenous Karen People of Kamoethway (Dawei, Myanmar: Tanintharyi River and Indigenous People Network)*.



“ The government has fundamentally changed the meaning of land. It is now a product you can buy and sell. But land means more to us Karen people. It is our life and livelihood. It sustains us and our community. And our way of life. Without land we have nothing,” Karen villager from Kyauk Kyi township.

## Land Confiscations and Potential for Restitution

Previous research demonstrates that conflicts over land are one of the central challenges facing Myanmar’s rural population in the contemporary period.<sup>114</sup> Research conducted in Kayin State, Eastern Bago and Shan State similarly exposes how the legacies of military rule continue to play out and challenge peoples’ access to housing, land and property (HLP) rights. Moreover, the introduction of new land laws in 2012 to encourage domestic and foreign investment, has left communal customary land title vulnerable to alienation.

A new National Land Use Policy was approved in January 2016. This policy recognises the importance of customary land rights in Myanmar, as well as restitution and the inclusion of women in land governance. While this new policy has the potential to help protect customary communal land rights and management practices in line with international standards, its implementation has fallen short of expectations.

The 2012 land laws do not acknowledge existing customary land tenure mechanisms, apart from the 2018 amendments to the VFV Law. Specific provisions for the protection of customary land ownership rights and management are yet to be included within the current legislative framework outlined by the 2012 Farmland Law. In addition, the implementation of the kind of policies necessary to enable the recognition of customary land practices are hampered by top-down mechanisms, which importantly do not include the voices of those most affected. The introduction of new frameworks and bodies regarding land under the NLD government has only further complicated these processes. Furthermore, in contexts where powerful armed actors play a defining role in access to justice, many people see these new mechanisms as having little authority.

The historical legacies of ethno-national conflict continue to play a significant role in people’s lives and their access to land in each of the three areas. These political flows and movements are central to understanding customary land laws and peoples’ differentiated access to land title and dispute resolution. Even though protections afforded by both Myanmar and EAO laws are being formalised, the ambiguity of standards of protection and the lack of comprehensive knowledge of land laws weaken the protection of people’s access to HLP rights. Despite the fact that ceasefires have been agreed to in each of the areas, the struggle over political power, legitimacy and authority forces people to negotiate between multiple authorities and regulatory systems and people’s housing, land and property rights. People also face challenges regarding the dual administration of sometimes multiple and conflicting authorities. This is enhanced in mixed-administered areas where there is a lot of confusion regarding who bears responsibility or duty towards civilians. The demarcation of land for private sector development and conservation is still often conducted in non-transparent ways



on maps in distant offices where people have no knowledge of the processes at hand. Development and extractive projects in the contemporary era are also implemented without local participation or even knowledge that the process is occurring.

According to the parliamentary affairs committee, the NLD government inherited more than 6000 cases related to forced land seizure disputes that occurred under the military regime.<sup>115</sup> Whilst the former Farmland Investigation Commission claims that over 335,000 acres of land were returned as of June 2015, other research suggests that the majority of land confiscation cases remain unresolved.<sup>116</sup> In June 2016 the new NLD government created the 'Central Reinvestigation Committee for Confiscated Farmlands and Other Lands' and declared that this committee, and its subordinate committees down to the tract level, would solve all land confiscation cases in six months.<sup>117</sup> In practice, however, these new committees remain ineffective and unable to resolve complex land cases at the township level.

Across all of the research sites people expressed their frustration with the multiple levels of government and the top-down imposition of complex laws and policies which affected their HLP rights. Many people also expressed a sense of fear and powerlessness in seeking justice for land confiscations. Whilst some village leaders and VTAs have some knowledge of land laws, the majority of people are unfamiliar with the complex land titling system and do not feel confident to seek justice or make restitution claims. The concentration of power and knowledge in the hands of a select few obstructs HLP rights.



<sup>114</sup>HRW (2018) 'Nothing for Our Land': Impact of Land Confiscation on Farmers in Myanmar (Bangkok: Human Rights Watch); KHRG (2015) *With only our voices, what can we do? Land Confiscation and Local Responses in Southeast Myanmar* (Chiang Mai: Karen Human Rights Group); Kapoor, M., Soe, N. N., & Viswanathan, V. (2018) *Midcourse Manoeuvres: Community Strategies and Remedies for Natural Resource Conflicts in Myanmar* (New Delhi: Centre for Policy Research and Namati).

<sup>115</sup>Tin Htet Paing. 2016. "Parliamentary Committee: 6,000 Land Confiscation Complaints Yet to Be Addressed," 27 April, *The Irrawaddy*. Available at <http://www.irrawaddy.com/burma/parliamentary-committee-6000-land-confiscation-complaints-yet-to-be-addressed.html> (accessed October 30, 2018).

<sup>116</sup>Boutry, M., Allaverdian, C., Mellac, M., Huard, S., U San Thein, Tin Myo Win, Khin Pyaw Sone. 2017. *Land Tenure in Rural Lowland Myanmar: From Historical Perspectives to Contemporary Realities in the Dry Zone and the Delta* (Yangon: Gret); HRW. 2018. 'Nothing for Our Land': Impact of Land Confiscation on Farmers in Myanmar (Bangkok: Human Rights Watch); Kapoor, M., Soe, N. N., & Viswanathan, V. 2018. *Midcourse Manoeuvres: Community Strategies and Remedies for Natural Resource Conflicts in Myanmar* (New Delhi: Centre for Policy Research and Namati).

<sup>117</sup>National League for Democracy, 2015 Election Manifesto, [http://www.Myanmarlibrary.org/docs21/NLD\\_2015\\_Election\\_Manifesto-en.pdf](http://www.Myanmarlibrary.org/docs21/NLD_2015_Election_Manifesto-en.pdf) (accessed May 17, 2017).

## 8. CONCLUSIONS AND RECOMMENDATIONS

Housing, land and property rights are at the centre of Myanmar's most pressing development challenges and the peace process. The issues raised in this report will continue to play a key role in the institutionalisation of a federal system and the settlement of a genuine peace settlement. The degree to which Myanmar will see a genuine and equitable restitution process will depend largely on the progress made in building local governance institutions and processes that are inclusive and responsive to the needs of the local population.

Enhancing provisions for the recognition of customary land use within Myanmar's laws greatly enhances the scope of improving land tenure in conflict-affected communities. While new land laws have allowed titling in settled areas without conflict which contributes to tenure security, in ethnic areas and conflict areas they have facilitated land-grabbing, and allowed expropriation to take place. Although some new amendments, such as the those in the VFV law mark positive steps toward recognition of shifting agriculture, more needs to be done to implement strong policies and frameworks which protect customary land management practices and guarantee HLP rights, as prior land grabs and legal loopholes continue to place many communities at risk.<sup>118</sup> In addition, the procurement of communal land titling is beleaguered by bureaucratic and legislative requirements which local levels of government have not been able to mitigate. Local vulnerability is exacerbated in conflict affected communities, where people face a heightened risk of expropriation in what are often more insecure environments.



• Communal Timber Stand Loilem Township, Shan State •

# Recognition of Customary Land Management Practices through Legislation

**R**ecognition of customary land management practices has had multiple benefits in a variety of countries (and brings legislation in line with the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security<sup>119</sup>). These range from recognition of forest dwellers' tenure in Gujarat, India<sup>120</sup>, to legal recognition of the role of customary dispute resolution authorities in disputes at first instance in Puntland, Somalia.<sup>121</sup>

The GORUM has made positive efforts at recognising customary land management practices, notably in the National Land Use Policy and the amendments to the VFV Law in 2018. The VFV Law amendments mark the first time that customary practices have been explicitly recognised in legislation. These steps should be built upon to ensure full HLP rights protections for customary practices, including dispute resolution. Steps to achieve these aims should include explicit legislative recognition within land laws and administrative instructions. Specifically;

- (a) Recognise customary agricultural practices including shifting agriculture within the Farmland Law 2012 and implementing instructions and clarify the recent amendments to the VFV Law 2012 regarding customary land management practices.
- (b) Recognise customary tenure schemes (communal tenure) within the Farmland Law 2012 and the VFV 2012 Law.
- (c) Recognise customary authorities (through an elected representative) input into ABsF, VFV Committee and Reinvestigation Committee decision-making

To ensure democratic decision making within the administrative and reinvestigation committees, it is necessary to ensure that customary authorities with the best knowledge of communal history and relationships, be given a voice within formal land mechanisms. VTAs already seek opinions of customary authorities to verify land use in practice at the village level, and these practices should be recognised legally as well.

<sup>118</sup>The recognition of customary land in the VFV Law is offset by the fact that customary land is not well defined in the law. Further, it is not clear how the law will be enforced. Other negative amendments include harsh penalties for trespassing on VFV land and a short period of time for registration for those currently using VFV land.

<sup>119</sup>United Nations Food and Agriculture Organisation, Rome, 2012.

<sup>120</sup>World Bank, *Voluntary Guidelines and the World Bank: Implementation of the Forest Rights Act in India, Critical Issues and Learning from Two Case Studies*, March 2015, available online at <http://pubdocs.worldbank.org/en/61321454017908387/Digital-FINAL-WB-Good-Practices-Brief-2-Layout-1.pdf>.

<sup>121</sup>UN Habitat. 2015. *Harmonization of the Legal Systems Resolving Land Disputes in Somaliland and Puntland Report and Recommendations*, 5.

## Collaborative Dispute Resolution Training

The communities consulted for this study were unanimous in their preferences for the dispute resolution practices of customary authorities over those provided by the GORUM mechanisms in resolving land disputes at the village level. Furthermore, a stakeholder analysis suggests that in disputes within the village, often the disputants enjoy relative parity in terms of power dynamics and therefore leverage in negotiations. Therefore, it appears that CDR practices have the potential to build upon the advantages of the form of resolution practices provided by customary dispute resolution, in terms of the legitimacy of the decisions reached with the help of a third party, the speed and low cost of such procedures, and the ability to achieve outcomes that contribute to communal harmony. The entire range of customary dispute resolution actors at the village/tract level would benefit from CDR training, including 10/100HH Heads, Village Heads, Land Committees, Councils of Elders, Monks, and EAO representatives (where applicable).

Critically however, it is important to recognise concerns regarding customary dispute resolution and human rights standards. Plans to provide CDR training to customary authorities and communities in techniques of dispute resolution, should be designed such that customary practices which may be discriminatory are brought into line with rights-based approaches.

The concerns of community members regarding customary dispute resolution included nepotism in the selection of customary authorities, corruption, biased decision-making, power imbalances between disputants and discriminatory behaviour toward women and poor villagers. These elements can be considered as potential risk factors where communities rely on customary resolution mechanisms. Consequently, these elements, along with gender discrimination and any other relevant human rights concerns, should be addressed if CDR is chosen as a method of supporting existing village-level dispute mediation. Such an approach would ideally be minimally disruptive to current local practice, address the concerns of marginalised groups within the communities and achieve the goals of accessing and protecting HLP rights, while simultaneously respecting human rights.



## Restitution

**B**eyond grievances within the village/tract setting between community members, which customary dispute resolution mechanisms appear capable of addressing adequately, the research indicates that illegal land confiscation remains the largest and most pressing concern for many respondents. While CDR training can augment customary dispute resolution, which remains a viable tool for intra-village grievances, restitution of HLP assets in response to widespread illegal land confiscation will require institutional responses on a nationwide scale.

Clearly, a restitution law and mechanism is called for to address the problem of historic and current illegal land confiscation, if justice is to be achieved in future. Such measures should be implemented in line with the NLUP and need to be addressed within the National Land Law that is currently being drafted, guided by the United Nations Guidelines on Internal Displacement and the Pinheiro Principles.

The NLUP establishes a clear commitment to a restitution process. A restitution law and mechanism should build on that commitment by including the following provisions;

- ◆ Explicit expression of the right to restitution, which is lacking in domestic law, for any parties illegally deprived of HLP assets (including IDPs and refugees)
- ◆ In cases where restitution is not possible, the law should contemplate in-kind restitution or compensation.
- ◆ Creation of an independent tribunal with a clear mandate, decision-making powers and a claims process.

As with the recognition of customary law mentioned earlier in this report, previous international examples of restitution processes can provide direction in framing the most appropriate methods of achieving restitution in Myanmar and should be studied to determine any lessons learned which are applicable in a post-conflict situation of legal pluralism.

### Customary Communal lands and Forests

**G**overnment plans for forest reserves have the potential to undermine fragile peace negotiations and the livelihoods of people that live in upland areas. While efforts to protect forested areas of Myanmar are important to conserve wildlife and mitigate damage from deforestation, illegal logging and industrial development, these processes are often enacted with little transparency nor community consultation and engagement. The establishment of protected areas can also impact the potential return of refugee and IDP communities such as described in eastern Bago. Not only do these conservation initiatives have the potential to uproot people but they also undermine the customary rights and practices of ethnic minority peoples.





• Shifting Cultivation of Upland Rice •

A genuine restitution process should be implemented to address the livelihood concerns of those affected by former land confiscations of customary communal lands. The Myanmar government and EAOs should ensure that any future development projects which acquire customary communal lands are implemented only after securing free, prior and informed consent from affected communities. In particular, more coordinated attempts to strengthen local capacity, increase local participation and support a rights-based approach should be a condition of any development initiative. Policies should support and encourage local people's participation in meaningful consultations, dialogues and community forums.



## Information, Knowledge and Transparency

The research shows that in order for all communities to better secure HLP rights, there needs to be coordinated efforts made to improve people's access to knowledge and information about land laws and restitution mechanisms. In particular, it is essential to make knowledge about the National Land Use Policy more accessible and available in languages other than Burmese to help put ethnic minority people's HLP rights on an equal footing with the majority. While information is flowing downward to people through Village-tract Administrators (VTAs), most people remain uninformed. The centralisation of information and knowledge about land laws in the hands of powerful local authorities leaves people vulnerable to expropriation. A clear delineation of roles and definition of responsibilities of local administrators is also required. Whilst in many cases these authorities play a critical role in helping people to secure their land rights, this power can also lead to exploitation, corruption and abuse. The development of measures which ensure the accountability of VTAs can help to protect people from the alienation of their lands.

Specifically, this could take the form of;

- ◆ A publicly accessible record (a register) regarding the decisions of administrative bodies in regard to issuance of LUCs.
- ◆ Amendments to land law or administrative instructions which guarantee democratic decision-making within all levels of the land administration and reinvestigation bodies
- ◆ Greater training of VTAs on land law and their role within the administrative system
- ◆ Gender sensitisation of VTAs regarding women's HLP rights and the possibility for joint titling on LUCs

## Enhancing the Role of Civil Society

An evolving discourse on customary land rights in Myanmar should not be overlooked. The cessation of armed conflict and the opening of greater political space due to the broader reforms in Myanmar, has meant that local communities are able to formally organise themselves. This has seen a proliferation of community-based organisations, which were previously banned under the military government. Activism from ethnic minority groups pushing for the implementation of land laws which better recognize customary land use systems has increased demonstrably in recent years.<sup>122</sup>

Existing civil society organisations in Myanmar play a significant role assisting people to claim their land rights through land restitution claims. In all of the research sites, respondents emphasised the importance of various people and groups who have knowledge of land laws and empower communities and to try and hold the government to account for previous land grabs. However, many of these organisations

<sup>122</sup> See for example Kayah Earth Rights Action Network. 2016. *Our Customary Land Use Management System* (Yangon: Kayah Earth Rights Action Network).

remain poorly funded, understaffed and overworked.

In conjunction with working with government authorities, donor support and funding for capacity building initiatives should be directed at the education, documentation and advocacy work of civil society organisations working on HLP rights. Significantly, many of these organisations empower communities to understand land laws and policies for the protection of HLP rights. Since restitution processes are seeing people go into further debt, funds should be targeted especially towards paralegal organisations. Given the potential for corruption within the current system and the lack of oversight of low-level authorities involved in land management, it is essential that the strength and capacity of these community organisations are bolstered. This is especially important in conflict affected communities where there are low levels of trust in government authorities and rule of law remains weak.

## Improving Gender Equality in HLP

**T**he absence of women in formal land governance is a key issue in Myanmar. The benefits of securing land rights and title for women can help address gender inequities and address material needs. It is important that both the Myanmar government and EAOs take more concrete steps to address the gender imbalance that exists in land use management so as to enable a fair and just environment for women to claim their rights. In accordance with Articles 1-4, 7 and 8 of CEDAW and CEDAW General Recommendations 5, 23 and 25 we suggest that better provisions need to be made to ensure equal representation of women in decision-making and leadership positions at local, regional and national levels of governance. While land laws of both the Myanmar government and EAOs note the importance of including women in arbitration, there is a clear gap between rhetoric and what is applied on the ground.

Informed interventions by government and EAOs are necessary to give women a genuine space for engagement and support to deal with complex land laws. For example, in Gujarat India, the Working Group for Woman and Land Ownership (WGWLO) has adopted a dual approach of simultaneously mobilising and enhancing the capabilities of women and sensitising the local male bureaucracy. Alongside building women's sub-committees and federations on land, they have also developed training programmes for local government officials.<sup>123</sup> Similar programs should be considered in ethnic states, where conflict sensitivity programs have the potential to address previous human rights abuses.

<sup>123</sup>Working Group for Women and Land Ownership (WGWLO). 2004. *Report of the Paralegal Action Research* (Ahmedabad: WGWLO).

## Conclusion

The protection of HLP rights is key to the negotiation of a comprehensive peace settlement and the negotiation of a federal system of government in Myanmar. If the government seeks to build trust with ethnic minority communities the protection of HLP rights is vital. Currently people do not feel like they have control over their land and livelihoods. Their previous experiences with conflict also preconditions them to fear government authorities and other powerful actors. While there is a great need for economic development in these areas, large scale development and infrastructure projects need to better consider the social and environmental impacts of communities reliant on customary communal lands. By better recognising customary land dispute mechanisms and authorities policy makers and land activists have an opportunity to build trust and confidence among the key stakeholders of the ceasefire in very practical ways.



- This paddy land was taken by the military junta in 2003 for the purpose of a power station that has never been built. The owner is still unable to access the land •



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• Village rice plantation, Hoping Township, Shan State



# ANNEX I

## NLUP Provisions related to Recognition of Customary Land Management Practices and Restitution.

NLUP Provisions on Customary Land Management Practices	
Chapter I: Objectives	6(c) To recognize and protect customary land tenure rights and procedures of the ethnic nationalities;
Chapter III: Changing Land Use by Individual Application	29(d) Protecting lands that are under rotating and shifting cultivation and customary cultivation practices;
Part VI: Land Dispute Resolution and Appeal	41(b) Allowing local farmers organizations to resolve land disputes arising between their members, using local customary dispute resolution mechanisms, if they choose to do so;
Chapter I: Land Disputes Resolution	
Part VIII Land Use Rights of the Ethnic Nationalities	<p><u>Summarised provisions</u></p> <p>64. Recognise and protect customary land use tenure systems and provide accessible impartial dispute resolution mechanisms.</p> <p>65-66 Revise current land use records in consultation with ethnic leaders and formally recognise customary tenure rights and land management practices.</p> <p>67. Ethnic leaders, elders and women shall be involved in decision making processes related to land tenure rights of those practicing traditional cultivation methods on customary lands, monitoring, and dispute resolution mechanisms.</p>

**Part VIII**  
**Land Use Rights of the**  
**Ethnic Nationalities**

68. The customary land falling under forest land or farmland or vacant, fallow and virgin land classifications to be reviewed, registered, and protected as “customary land”. Land allocation to any land user, other than for public purposes, shall be temporarily suspended until these lands are reviewed, recognized and registered as customary lands.

69. National Land Law to state no land grants or leasing of customary land

70. Shifting cultivation shall be recognized in the new National Land Law.

73. Ethnic customary land dispute resolution procedures currently used shall be defined in the new National Land Law.

74. For ethnic nationals who lost their land resources where they lived or worked due to civil war, land confiscation, natural disasters or other causes, that desire to resettle to their original lands, adequate land use rights and housing rights shall be systematically provided in accordance with international best practices and human rights standards.

**Part IX**  
**Equal Rights of Men**  
**and Women**

75(e) The (equal) right to participate and represent the community when making decisions in land disputes relating to land use, land transfer and land succession rights, including customary practices and systems of ethnic nationalities;

75(h) The right of ethnic nationality organization members to formally recognize, register and protect their customary land use rights, regardless of marital status.

76 Elders, civil society and other organizations shall be encouraged to support the realization of the rights mentioned above in paragraph 75.

## Restitution Related Provisionst

### Chapter III Basic Principles

(h) To develop and implement fair procedures relating to land acquisition, compensation, relocation, rehabilitation, restitution, and reclaiming land tenure and housing rights of internal displaced persons and returning refugees caused by civil war, land confiscation, natural disasters and other causes;

### Part V Procedures related to Land Acquisition, Relocation, Compensation, Rehabilitation and Restitution

38. When managing the relocation, compensation, rehabilitation and restitution related activities that result from land acquisition and allocation, unfair land confiscation or displacement due to the civil war, clear international best practices and human rights standards shall be applied, and participation by township, ward or village-tract level stakeholders, civil society, representatives of ethnic nationalities and experts shall be ensured.





• A Karen elder discusses a recent case of land grabbing with the research team that has affected access to customary communal land, Hpa-an Township, Kayin State. •



## ANNEX II

### KNU Land Policy Provisions on Customary Land Management Practices

#### KNU Land Policy 2015 Articles on Customary Law and Restitution

##### Article 4.2 Restitution

###### Article 4.2.1

It is recognized that many people in Kawthoolei have against their will been displaced by war and other factors and have become refugees and internally displaced persons (collectively, "IDPs"). In certain situations their homes and land have been occupied by migrants and other newcomers.

###### Article 4.2.2

Occupation and use rights made or permitted under this policy will be administered in a manner that complies with the internationally recognized Pinheiro Principles, taking into account the primacy of the right of IDPs to have their lands be restored to them. The definitions in this policy shall be applied in a manner consistent with the Pinheiro Principles.

###### Article 4.2.3

Where possible, the original parcels or holdings will be returned to those who suffered the loss, or their heirs. Where the original parcel or holding cannot be returned, the KAD, in close consultation with the Land Committee, will decide on an appropriate alternative with consensus from local authorities and village community of those impacted.

###### Article 4.2.4

The Government will set aside other land in townships to use for the purpose of providing alternative land plots for those that are not able to return to their original land plot, for whatever reason. This consensual process will be facilitated by the KAD and the Land Committee at the township level, in consultation with local customary authority and the returning IDPs and refugees being restituted.



#### Article 4.2.5

The Government has the authority to temporarily transfer use rights to currently unoccupied but previously used land while the original occupants are gone in order to maintain agricultural productivity and offer use rights to those that are in need in the area, in this case returning IDPs and refugees. If the original occupant returns before the temporary use rights holder's use rights have expired (maximum 20 years), then KAD, in consultation with Land Committee and with consensus from customary authorities and the original occupants, will find a suitable alternative land plot for the original occupants until the use rights holders' use rights have expired for the original occupants land plot. Meanwhile, the original occupant will qualify to receive the land taxes paid by the new use rights holder, instead of to the KAD as done before the original occupant returned.

#### Article 4.2.6

Government will develop gender-sensitive, clear, transparent processes for restitution. Information on restitution procedures will be widely disseminated in applicable languages. Claimants will be provided with adequate assistance, including through legal and paralegal aid, throughout the process. Progress of implementation should be widely publicized.



