Thematic Study

Restoring Land Rights: Pathways for the recognition of customary tenure in Myanmar

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Cover image: Karen (S'kaw) people collecting bamboo shoots from the Shwe Taung Ngwe Taung forest in Bago Yoma (Photo: Saw Eh Khu Dah, POINT)

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Abbreviations

CSO	Civil Society Organisation
FAO	Food and Agriculture Organization of the United Nations
FPIC	Free, Prior and Informed Consent
IDP	Internally Displaced People
ILO	International Labour Organization
MRLG	Mekong Region Land Governance Project
NLUP	National Land Use Policy
POINT	Promotion of Indigenous and Nature Together
RUM	Republic of the Union of Myanmar
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
VFV land	Vacant, Fallow and Virgin land

Farmers sowing a shifting cultivation plot in Harsawkhu village in Kayah State (Photo: Nay Min Lwin, KMSS)

Background, purpose and methodology

This report aims to help civil society organisations (CSOs) and other reform actors in Myanmar in discussions on how to recognise and protect customary tenure in both policy and practice. The original purpose of the report was for advocacy in drafting a new national land law. The drafting process was initiated under the civilian government but was interrupted by the military takeover in February 2021.

In early 2016, the Myanmar government under the U Thein Sein presidency approved a National Land Use Policy (NLUP). The policy set out a plan for writing an umbrella national land law that would enshrine a number of new principles and rights proposed in the progressive policy. These included an increase in transparency and people's participation, the integration of international good practices, and equal rights for men and women. Part 8 of the NLUP is dedicated to the "land use rights of ethnic nationalities" and states that *"Customary land use tenure systems shall be recognized in the National Land Law in order to ensure…formal recognition of customary land use rights, protection of these rights and application of readily available impartial dispute resolution mechanisms"*. In 2018, the government tasked a National Land Use Council to draft the National Land Law.

In that same year, the Mekong Region Land Governance Project (MRLG) formed the Alliance for the Recognition of Customary Tenure in Myanmar. The Alliance involved ten CSOs and aimed to support the drafting of the law through the identification of different legal options for the recognition of customary tenure. Because legal terminology is unclear and there is no consensus on the legal definition of customary tenure, the intention was also to define a number of relevant terms in Burmese. The Alliance requested the primary author to prepare an initial draft of options for discussion within a technical working group of experts. It was expected that these options would then be further developed in legal language as direct input for the formulation of a national land law.

The drafting of the law is currently on hold and it is doubtful whether it can be resumed any time soon. The uncertain political future of Myanmar indicates that more profound changes will be needed. This situation invites us to really think outside of the box and imagine ways of recognising customary tenure without being limited by the earlier constitutional framework. At this point, this analysis has the general purpose of helping policymakers identify key questions for how to recognise and protect customary tenure rights in the future.

The analysis is the result of an iterative process where the authors provided written inputs and received advice from members of the technical working group. Revisions were made to the text after discussions and feedback from Alliance members. A final version was then agreed upon by the group. It has not yet been possible to conduct further consultations with broader civil society and communities with customary practices. If the people of Myanmar succeed in setting up the democracy they are fighting for, we hope that this report will offer a good basis to (re)start policy discussions on this topic with the aim to respond to the aspirations of rural communities, ethnic groups and indigenous peoples.

The study is divided into three sections. Section 1 provides some initial understanding of terminology and concepts related to customary tenure. Section 2 outlines six approaches or options for recognising customary tenure and how each option may fit a specific context. Section 3 deals with several cross-cutting issues and questions that require careful consideration when defining each of the options and the related legislation more specifically.

Farmers transporting their cardamom harvest to sell in Taungoo. Cardamom is an important agroforestry crop that has replaced shifting cultivation in the mountains of Northwest Karen State. (Photo: Antoine Deligne)

1. Unpacking basic terms and concepts[1]

1. Pre-existing rights versus State-granted rights

The source of rights

When discussing legal recognition of customary tenure, a distinction needs to be made regarding the source or basis of rights: the recognition of 'pre-existing rights' on the one hand, and 'State-granted rights' on the other.

- Pre-existing rights are rights held prior to the formation of the State which the respective people or communities are part of. These rights are held whether they are recognised by the State or not.
- State-granted rights are rights held in accordance with the law of a State.

Pre-existing rights may also be referred to as informal rights and State-granted rights as formal rights. However, in the context of customary tenure recognition the terms pre-existing and State-granted rights are more appropriate. This will be discussed further below.

Pre-existing rights exist and are enjoyed by some portions of the population independently from State laws and whether or not the State recognises these rights in law. In Myanmar, many rural communities use customary tenure systems to effectively regulate access to and use of natural resources and lands across all parts of the country. In many cases, there is little understanding of – and adherence to – State laws and regulations.

Ownership versus use rights

In the current legal system in Myanmar, the State claims to be the ultimate owner of all land and resources. The State does not recognise any pre-existing rights but grants use rights over land, forest and resources to individuals, groups and corporations. The conclusion here is that there are no ownership rights over land granted by the State. However, similarities have been drawn with the United Kingdom and it has been argued that it is a matter of governance and not the classification of rights.[2]

> Perpetual land use rights are not different from ownership rights in a similar vein as in many parts of the United Kingdom property rights do exist under a regime where the Crown (Queen) is the allodial title holder. The main difference is the level of interference that the Queen and/or the Myanmar State exercises as such title holder. In the United Kingdom this rarely occurs whereas in Myanmar it is daily business. It is thus more a question of governance rather than the nature of rights.

Whether considered proper ownership rights or merely use rights, the key here is that these rights are granted by the State and therefore can also be withheld or taken away by the State.

Formalisation of rights under State-granted rights

The State claims the authority to define who can be granted rights and under which conditions, and bureaucratic procedures are put in place through which the granting of these rights can be applied for. Land governance under systems of State-granted rights first requires the submission of an application to be granted rights. The rights are then registered and finally a legal document is issued. State-granted rights are protected by this document alone. Examples of a legal document could be a land title or land use certificate. Article 4 of the Farmland Law (2012) states that *"A person who has the permission of right to use farmland shall have to apply for getting the Land Use Certificate to the Township Land Records Department Office*[3] *passing it through the relevant Ward or Village Tract Farmland Management Body"*.[4]

Under the framework of State-granted rights, the State decides: (a) whether to recognise just the right to use a certain area and the related resources, or a broader resource governance system; (b) what laws or legal rights are available in a land or resource governance system; and (c) who is allowed to use such laws or legal rights.

What is a legal person?

One of the key questions in statutory law is what constitutes a 'legal person', 'legal personality' or 'legal entity'. A legal person or a legal entity can be an individual or a collective of individuals – for

1 Annex 1 provides a glossary of key terms used in this document.
2 Paul De Wit, personal communication.
3 Changed to the Department of Agricultural Land Management and Statistics in the amendment of the Farmland Law, 2020.
4 Republic of the Union of Myanmar, Farmland Law (2012).

example, a community, an association or a company. Each can be further subdivided and legal systems give different legal rights based on the type of legal personality. For example, there are restrictions on land ownership for non-citizens in many countries, including Myanmar.[5]

Communities do not have a legal personality per se but need to be registered to claim legal rights. Statutory laws are strongly biased in favour of individual rights over land. As such, collective rights to land – such as communal land rights – may be difficult to obtain.[6] Where collective rights are recognised, the group claiming their collective right may first have to be recognised as a legal personality or entity that can hold the right, and the group has to undergo a bureaucratic procedure of recognition and subsequent registration.

In some countries – including Myanmar – some laws stipulate that a collective of individuals requires incorporation to obtain a legal personality. Incorporation is the legal process used to form a corporate entity, or to register and be recognised as an association. This means that the group claiming the right over its land and resources must acquire a specific legal identity, which is often different from the way the group identifies itself. Communities or other groups can register under an association registration law, as in Myanmar,[7] but by doing so they assume the identity of an association and are subject to the rules and regulations of that law.

Sometimes the legal entity is not exactly the same as the original group claiming the right. For example, community forest user groups in Myanmar can comprise only some members of a community. These user groups do not correspond to a social group (a clan or community) that has traditionally held rights over the respective land or resources and this potentially creates conflict.

Statutory versus customary tenure

When used in the context of land, tenure refers to the regulation of how individuals and groups in a society gain access to land and natural resources. Tenure systems exist in all societies and existed long before the creation of modern nation states.[8] A distinction is made between statutory tenure (tenure regulated by State laws) and customary tenure (tenure regulated by non-formal customary laws, customs and traditions). Statutory tenure is currently the dominant form, even though customary tenure is still important in many countries like Myanmar.

Customary practices are not static

'Customary' is often understood as being in accordance with a society's customs and traditions – in other words, what is common practice and corresponds to accepted standards or models of behaviour. For many people, customary has the (incorrect) connotation of something passed on from the distant past which is ancient, unchanging, and not suited to modern society. 'Traditional' refers to something that is long established and is often used as a synonym for customary. Traditional also implies something old, outdated and static – even more so than customary. However, customary tenure systems have proven to be flexible and dynamic, constantly adapting to changing conditions.

Upland rice in Sai Kah village, Thantlang, Chin State (Photo: villager, MRLG)

5 In Myanmar, the Transfer of Immovable Property Restriction Law (1987) restricts foreign companies and individuals from owning land and other immovable properties.

6 According to Wily (2018, p. 6), a sample of 100 countries from all continents showed that provisions on collective tenure by communities are weak in 18 countries, especially weak in 10 countries and non-existent in 17 countries.

7 Association Registration Law (2014). https://www.burmalibrary.org/docs23/2014-07-18-Association_Registration_Law-en.pdf

8 As Jonathan Liljeblad (personal communication, May 2021) pointed out, "Indigenous peoples argue that the modern system of law is a product of the age of European colonies, which itself was cemented by the Peace of Westphalia 1648 (which formalised the notion of nation state and sovereignty, with legal implications for pre-existing peoples and pre-existing legal systems that predated colonies)".

Definition of customary tenure

For the purpose of this study, customary tenure is defined as:

> **A community-based system of norms, rules, institutions, practices and procedures that determine how land and other resources are used and shared. These have evolved over time and use, have their roots in, and reflect the social organisation, identity, culture and values of communities, have gained social legitimacy and are negotiated, sustained and changed by them.**

Customary tenure is a complex concept with many possible meanings and is not easy to define or translate in any language. In future legislation presented in Burmese, it is important that the terms are defined clearly for a broad range of stakeholders. Terms must also embrace the diversity of practices and claims of indigenous peoples and ethnic groups. A definition of customary tenure should refer to a system of rights that comprises all or at least several of the following features:

- has received long-term social legitimacy, but is also able to evolve and adapt to new contexts
- is based on self-governance by the people living on the land
- includes institutions rather than a list of rules and practices
- involves the full bundle of rights, including those relating to management and governance
- covers all land-related resources, including water, streams, forest, wildlife, and so on
- is deeply connected to the people's identity and the sociocultural, political and spiritual/religious aspects of their life
- includes not just the right to use and exploit, but also the right to care and protect
- includes not just the right to exclude, but also the obligation to include and share with all the members of a community

While a legal definition should highlight these significant aspects of customary tenure, it should avoid becoming overly restrictive. The definition should also be valid for partial customary systems and should be based on the principle of self-identification by the concerned communities and groups.

Bundle of rights

Customary tenure is a system of rights that covers multiple practices and each right can be held by several different people or groups. In the concept of a bundle of rights, different rights to the same parcel of land is pictured as sticks in the bundle. Rights may include the right to sell the land, the right to use the land through a lease, or the right to travel across the land. Each right or stick may be held by a different party. For example, the bundle of rights may be shared between the owner and a tenant to create a leasing or sharecropping arrangement. The tenant or sharecropper then has the right to use the land on specified terms and conditions. A neighbouring farmer may have the right from the bundle to drive cattle across the land to obtain water at the river.[9] There are many such rights and ways to share them between various people. Authors often distinguish between the following groups of rights:[10]

- **Access and withdrawal rights or use rights:** rights to use the land for grazing, growing subsistence crops, gathering minor forestry products, and so on
- **Exclusion rights:** the ability to refuse another individual, group, or entity access to and use of a particular resource[11]
- **Control rights:** rights to make decisions about how the land should be used including which crops should be planted, how to share income from the sale of crops, and if and how improvements should be made to the lands (such as building a terrace or an irrigation channel)
- **Transfer or alienation rights:** rights to lease, give, sell or mortgage the land, to convey the land to others through intracommunity reallocations, or to distribute the land through inheritance
- **Management rights:** rights to define the legal limits of other rights, for example, how a community articulates its rights to access and control the land, and alienation rights over a particular resource or land and allocation to different subgroups and individuals

9 Food and Agriculture Organization of the United Nations (2002).
10 For examples, see: Schlager and Ostrom (1992), Barry and Meinzen-Dick and Hecht (2014) or https://rightsandresources.org/tenure_data/what-is-the-bundle-of-rights/
11 Sometimes it is also useful to consider the obligation to include or share land and resources within the community that many customary systems provide for: new settlers, poor families have a right to land that other community members cannot deny.

In the following text, we also use the term **governance rights**. This has a broader meaning of the right to define the various rules of a customary system which may include: (a) how collective decisions are taken; (b) the assemblies and representatives through which collective decisions are taken; (c) how disputes are dealt with; and (d) how to interact with external institutions and outsiders.

When customary tenure systems are recognised and formalised, the governance system tends to become more complex and involve several institutions (both customary and State) that may share different parts of the governance rights.

Why recognise customary tenure rights?

Some countries, such as Myanmar, do not recognise or protect pre-existing customary tenure rights under the constitution or laws.[12] However, groups of people still make claims to these rights. Claims are now increasingly in reference to international legal instruments such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Representatives of indigenous peoples and indigenous rights advocates argue that the right to self-determination of indigenous peoples in the UNDRIP covers the right to self-determine rights independent of the State. This presents the case that it is not the State that gets to make the decision on the recognition of customary rights.

Market integration and the monetisation of local economies are often accompanied by the emergence of a formal or informal land market, and a trend towards the individualisation and privatisation of lands and resources that were previously under collective customary management. This is a global trend supported by government laws and policies – whether implicitly or explicitly. Experiences have shown that *"the systematic imposition of individualized statutory titles in areas subject to customary tenure has generally failed to increase certainty and reduce conflict"*.[13] Communities under customary tenure have had great difficulties in opposing and preventing land grabbing, which is on the increase. In these circumstances, indigenous peoples and rural communities have been raising their voices to demand stronger State protection of their customary rights.

At the same time, there has been an increasing realisation that recognition of customary tenure can improve land governance. In many cases, customary tenure constitutes *"a way of managing land relations that is more flexible and more adapted to location-specific conditions than would be possible under a more centralised approach"*.[14] Customary tenure systems are also considered to be an important asset in poverty reduction,[15] biodiversity conservation, and climate change mitigation.[16] Some states acknowledge these contributions and have introduced various forms of legal recognition and protection through a range of approaches.

Delineation of customary land in Doutawi village, Kayah State (Photo: Elena, KMSS)

12 According to a study by the Rights and Resources Initiative (2015) over 50 per cent of global land mass is managed by indigenous peoples and local communities, but only 10 per cent is legally recognised under their ownership. In more than half of the 64 countries studied, IPs have no legal avenue to obtain ownership of their land or the protection of their existing rights.

13 Fitzpatrick (2005, p. 465).

14 World Bank (2003), quoted in Fitzpatrick (2005, p. 449).

15 Wily (2012).

16 See various publications on land rights, conservation and climate change by the Rights and Resources Initiative (https://rightsandresources.org/climateandconservation). The importance of community-based approaches in biodiversity conservation is increasingly recognised by major conservation agencies (Painemilla et.al., 2010). As Veit (2021) points out, *"The Intergovernmental Panel on Climate Change (IPCC), the internationally accepted authority on climate science, recognized the importance of indigenous and community land and customary land governance systems in climate mitigation and adaptation in its 2018 Special Report on Climate Change and Land."*

2. Concepts and approaches for the recognition of pre-existing rights

Recognising pre-existing rights in the constitution or a specific law

In some countries, pre-existing rights to land and resources are explicitly stated in the constitution or affirmed by a specific law and can be the result of a court ruling. One example is the High Court decision in Australia, which ultimately led to the passing of the Native Title Act (see Box 1).

A Chin women selling river fish. Chin communities have specific customary rules for managing river fish resources (Photo: Antoine Deligne)

Box 1: The Native Title Act in Australia

The Australian High Court decision in the Mabo case (Mabo v Queensland, No. 2) in 1992 is a landmark ruling that reversed the legacy of the colonial concept of *terra nullius* applied to Australia by the British.[17] The concept had the meaning that the land belonged to no one, and denied the rights of Australia's indigenous peoples who have occupied, used and governed the land through customary law for millennia. The High Court decision corrected this, recognising the rights of Aborigines and Torres Strait Islanders to land under the legal doctrine of native title. The ruling prepared the ground for the passing of the Native Title Act of 1993. About 15 percent – more than one million square kilometres – of land and waters in Australia are now under Native Titles.[18]

Australian law now differentiates between State-granted rights known as 'land rights', and pre-existing rights called 'native title'. The difference between the two are explained as follows:

"There are fundamental differences between land rights and native title. Land rights are rights created by the Australian, state or territory governments. Land rights usually comprise a grant of freehold or perpetual lease title to Indigenous Australians.

By contrast, native title arises as a result of the recognition, under Australian common law, of pre-existing Indigenous rights and interests according to traditional laws and customs. Native title is not a grant or right created by governments."[19]

Customary law – which includes customary tenure – still exists parallel to statutory law in many countries. Swenson points out that in developing countries, for example, "non-State justice systems often handle most disputes and retain substantial autonomy and authority".[20] Customary law remains informal unless it is recognised in the constitution and/or in statutory law. One example where customary systems are recognised in law is in Mexico. In 1997, the Federal State of Quintana Roo "declared some parts of Mayan customary law officially valid law and accepted the Mayan way of administering justice as producing legal decisions of the same rank as the state justice decisions".[21]

Who are the people with customary tenure rights?

In some countries, pre-existing customary tenure rights have been recognised for groups who have a special status within a society. Examples include:

- indigenous peoples or natives who are recognised as original inhabitants of the whole

17 University of Sydney. https://www.sydney.edu.au/news-opinion/news/2017/06/02/five-things-you-should-know-about-the-mabo-decision.html
18 Federal Register of Legislation, Australian Government. Native Title Act 1993. https://www.legislation.gov.au/Details/C2013C00415
19 Attorney General's Department, Government of Australia. Native Title Act 1993. https://www.ag.gov.au/legal-system/native-title
20 Swenson (2018, p. 438).
21 Hoekema (2017, p. 67).

of the geographical area that is now under the respective nation state (for example, indigenous peoples in countries that have experienced settler colonialism like in the Americas, Australia or New Zealand)

- ethnic groups with distinct identities and their own territories that were made part of a nation state that is politically, culturally and economically controlled by a different dominant ethnic group (for example, the natives of Sarawak and Sabah in Malaysia, or Scheduled Tribes in India)

In other cases, rights are recognised not just for specific ethnic groups but for all groups in the country. Examples can be seen in some countries in Africa (see Box 2 on customary tenure in Uganda).

In Myanmar, claims to rights over land, territories and resources have long been linked to ethnic nationalities,[22] ethnic groups or, increasingly, to indigenous peoples. The application of the term 'indigenous peoples' has been rejected by the government in Myanmar, even though it sometimes appears in government documents.[23] While an in-depth reflection on the definition and the implications of the use of any of these terms in Burmese language is much needed, it is beyond the scope of this study. A preliminary translation and short characterisation and discussion of how terms are used in Burmese is provided in Annex 2.

To avoid a complex and possibly conflictual process of definition, the legal recognition of customary tenure rights in Myanmar should remain accessible to all rural communities and not be exclusive only to specific groups. However, different options can coexist that respond to the realities on the ground. Some ethnic nationalities may have stronger independent political rights over territories and the form of recognition can be adapted to correspond to the context.

Formal application for the recognition of pre-existing rights is not always necessary

Where pre-existing rights are recognised as legitimate rights that are protected by the State and as a basis for legal claims, there is usually no need for any formal application procedure. However, mechanisms to register these rights may exist. Rights holders may choose to register pre-existing rights but there is no legal obligation to do so. One example where formal application is not required is the recogniti on of customary tenure in Uganda (see Box 2).

Yapkhu villagers from Kayan ethnic group discussing their customary tenure practices (Photo: Elena, KMSS)

22 Part VIII of the NLUP (2016), Republic of the Union of Myanmar, refers to the "Land Use Rights of Ethnic Nationalities".

23 The position taken is that all Burmese are indigenous or that there are no indigenous peoples in the country. Statement made by the representative of the National Human Rights Commission in the National Policy Dialogue on the Rights of Indigenous Peoples in Myanmar, Nay Pyi Taw, 2–3 February 2017. One of the outcomes of this policy dialogue was the recognition of the need to settle the issue of the definition of indigenous peoples in Myanmar and the choice of the right term in Burmese once and for all.

Box 2. Certificate of Customary Ownership in Uganda

The Constitution of the Republic of Uganda, 1995 recognises customary tenure along with freehold, leasehold, and *mailo* tenure (a hybrid of statutory and customary tenure). Customary tenure applies to all non-registered land that has previously been considered public land. About 75 percent of the country's land area is under customary tenure. The Land Act of 1998 contains provisions for a person, family or community that holds land under customary tenure to obtain a certificate of customary ownership. However, obtaining a certificate is not a legal requirement.

The Land Act also grants groups of people the right to own communal land. These groups can establish a Communal Land Association that can be incorporated but this is also not legally required. If an individual or a family is a member of such an Association and wishes to own their part of the land in their own capacity, they can apply for a certificate of customary ownership or a freehold title.

Since customary tenure is recognised without registration, community members can continue governing their land through their informal customary tenure system. However, if they wish to formalise their rights, they have to form a Communal Land Association.

The law has been criticised for encouraging individuals or families to obtain a private customary ownership certificate or a freehold title at the expense of community governance. This is because these private parcels are alienated from the community area and corresponding authority.[24]

Land compartmentalisation versus recognition of the broader physical and spiritual space of a community

Land has many meanings depending on who is talking about it. For investors, land is a commodity which is bought and sold to make profit, or it is one means of production for a particular agricultural, industrial or commercial enterprise. State laws often support this approach and identify different categories of land based on the specific use – for example, residential land, industrial land, farmland, forest land, protected area, and so on. This leads to the compartmentalisation of land where different laws, rules and regulations apply to different categories of land regarding their use, registration, transfer and alienation. Furthermore, separate rights are regulated by specific laws for resources on the surface (such as trees and water) and for subsurface resources (such as minerals, oil and gas). All the different categories of land are usually under the jurisdiction of different ministries or departments.

For many people who have lived on and off the land for generations, land has a much broader meaning beyond economic and financial purposes. While land is an important means of production and a basis for their livelihood for these groups also, they may object to seeing it only as a commodity and the potential for profit. Land is more than that. Their relationship to land often includes aspects of culture, identity, history, social organisation and spirituality. Traditional knowledge in these communities often comprises a very subtle distinction of different types of land, based on the properties of the soil, vegetation, microclimate, location, past use, and spiritual and cultural significance. At the same time, there is also a broader understanding of land that comprises the totality of the land area shaped by people practices and community management. It may include different types of agricultural land, grazing land, different types of forest, water bodies, burial grounds and sacred sites. People with this broader relationship with land will claim recognition of their rights over this space as a whole. They will not accept to compartmentalise and apply separate procedures for different components of the land.

Ceremony for worshiping the spirits of the land before the establishment of a new village in Kayah State (Photo: Elena, KMSS)

24 Sources: Food and Agriculture Organization of the United Nations Gender and Land Rights Data Base. Uganda. http://www.fao.org/gender-landrights-database/country-profiles/countries-list/land-tenure-and-related-institutions/prevailing-systems-of-land-tenure/en/?country_iso3=UGA and Wily, (2018, p. 68)

Box 3. Ancestral Domain in the Philippines

The Indigenous Peoples' Rights Act of 1997 gives elaborate definitions for Ancestral Domain:[25]

"Ancestral Domains…refer to all areas generally belonging to [Indigenous Cultural Communities/ Indigenous Peoples] ICCs/IPs comprising lands, inland waters, coastal areas, and natural resources therein, held under a claim of ownership, occupied or possessed by ICCs/IPs, by themselves or through their ancestors, communally or individually since time immemorial, continuously to the present except when interrupted by war, force majeure or displacement by force, deceit, stealth or as a consequence of government projects or any other voluntary dealings entered into by government and private individuals/corporations, and which are necessary to ensure their economic, social and cultural welfare. It shall include ancestral lands, forests, pasture, residential, agricultural, and other lands individually owned whether alienable and disposable or otherwise, hunting grounds, burial grounds, worship areas, bodies of water, mineral and other natural resources, and lands which may no longer be exclusively occupied by ICCs/IPs but from which they traditionally had access to for their subsistence and traditional activities, particularly the home ranges of ICCs/IPs who are still nomadic and/or shifting cultivators".

The term 'domain' emphasises absolute ownership of land as defined by the Encyclopaedia Britannica:

"Domain, in Anglo-American law, the absolute and complete ownership of land, or the land itself which is so owned. Domain is the fullest and most superior right of property in land. Domain as a legal concept is derived from the dominium of the Roman law, which included the right of property as well as the right of possession or use of the property." [26]

Adding the word 'ancestral' emphasises the long historical relationship between peoples and communities to their land or domain.

The concept of ancestral domain

In the Philippines, the broader understanding of land and related customary tenure systems are legally recognised as Ancestral Domain (see Box 3).

The concept of territory

Using the term 'territory' instead of land has specific legal implications as with the term domain. Territory implies collective ownership of the respective area by a people, ethnic group or community, for example. The International Labour Organization Convention No. 169 on Indigenous and Tribal Peoples defines territories as *"the total environment of the areas which the peoples concerned occupy or otherwise use".*[27]

Territories are commonly associated with the State, and a territory is considered an area (including land, water bodies and parts of the sea) over which a State claims supreme authority. Therefore, using territory instead of land at the sub-State level can also imply political control over a particular area in the form of self-government or autonomy.

Harvesting swidden rice in Sar Pauk, an Asho Chin community in Magwe Region. Households have inherited rights over particular plots within larger swidden blocks, that are cultivated and left fallow in a more or less fixed cycle. (Photo: Christian Erni)

25 Republic of the Philippines (1997)
26 https://www.britannica.com/topic/domain-property-law
27 International Labour Organization (1989), Convention 169, Article 13.

"Territory is the right of peoples and land is the right of individuals. Territory is under the cultural influence and political control of a people [...] gives the right to economic use without interference by third parties. Today, when indigenous peoples claim rights they refer [...] to control over what happens socially in their way of life, above all to the exploitation of resources in these spaces".[28]

Using the term territory instead of customary land can mean going beyond the right to land and natural resource management by including political rights as some form of political autonomy over the concerned area. In this document, we use the concept of territory to highlight the level of autonomy achieved by the community in terms of governance over land and all the resources therein. Broader political autonomy of the community is not assumed or excluded.

A traditional dance during the Deeku festival in the Kayan community of Manumanaw, Kayah State (Photo: Nay Min Lwin, KMSS)

28 Grunberg et.al. (2012).

A Chin woman pounding corn (Photo: Antoine Deligne)

2. Mechanisms for legal recognition and protection of customary tenure

Responding to the diversity of customary tenure systems in Myanmar

A recent MRLG study showed that some forms of customary tenure still exist in all parts of Myanmar.[29] The report acknowledged the dynamic nature and adaptability of customary tenure systems and also identified forces that are currently transforming these systems. These forces include changes in land use, market integration, population growth, migration, social and cultural changes, State interference in the form of land acquisition, forced displacement, laws and policies on land and forests, and armed conflicts. As a result of the interplay of all these factors, there is considerable diversity in customary tenure systems in the country. Any policy response for the recognition and protection of customary tenure must take this diversity into account.

The notion of a one-size-fits-all solution is not realistic in this context. The recognition of different customary systems requires a range of options to be considered. These options will depend on the reality on the ground and the way in which local communities govern their resources. The approach will depend on the cause of tenure insecurity – such as the threat of land alienation by outsiders, increasing interaction and land dealings with outsiders, or difficulties in managing internal conflicts. The particular cause of tenure insecurity should inform the policy response and approach.[30] In this section, six approaches to the legal recognition of customary tenure are proposed. The options are not mutually exclusive. Different options can and should be applied to respond to the particular context in a given area.

In order to differentiate basic approaches to legal recognition and protection of customary tenure, it is important to first look at a number of critical issues.

A customarily managed Pa-O village that spans diverse landscapes, in Hishseng township, Southern Shan State (Photo: Antoine Deligne)

29 Erni (2021).
30 Fitzpatrick (2005, p. 454).

1. KEY ISSUES

1) Recognising a customary governance system

The State may decide to recognise customary tenure in one of two ways: (a) as a basis for legal claims by individuals or groups over parcels of land or particular resources; or (b) as an independent land and resource governance system in its own right. In the first approach, the State takes all the decisions about the governance rules without reference to the original customary tenure system. In the second approach, the customary governance system remains in place. The State may choose to grant rights over collectively held areas such as village territories. However, this does not necessarily imply that the State recognises the rules that local communities apply according to their customary tenure systems, nor the way they govern their land and resources within these areas. The State may recognise rights holders but impose its own governance system and rules that may be very different from local customary practices. This is a key concern when discussing the scope of customary tenure recognition in a future law.

A Kayan woman making traditional clay pots (Photo: Elena, KMSS)

The State should recognise existing governance systems of local communities based on customary practices and local institutions as much as possible rather than imposing external systems. Local institutions and practices have been shaped over the long term through practical experience and are well understood by local people. In some circumstances, institutions may need to be strengthened, formalised or renegotiated within communities. However, existing institutions are often better suited to the local context, and adherence to governance systems is more likely.

2) Distinguishing partial and complete systems

The MRLG report on customary tenure systems in Myanmar proposes a basic distinction between partial and complete systems of customary tenure. The distinctions reflect the extent of a community's jurisdiction over its land and resources.[31]

Partial customary tenure systems are systems where *"the State has established administrative control and introduced formal land registration instruments"*. These instruments *"might be used in addition to customary tenure arrangements, thus overlaying but not necessarily replacing them"*.[32]

Conversely, a complete customary tenure system is a system in which *"the community territory is considered common property over which the community holds jurisdiction through customary law"*. It is *"the effective enforcement of customary tenure by the community governance institution (be it the formal village administration or the traditional self-government institution)"* that is an indicator of community jurisdiction. An important aspect of community jurisdiction is *"the assertion of control by the community over the transfer of land, including restrictions on, or regulation of, sale to outsiders"*.[33]

This distinction cannot do justice to the diversity of concrete customary tenure systems because *"the dynamic nature of customary tenure systems and the multitude of causes and agents of change, identifying a system as either partial or complete, might sometimes be difficult"*.[34] Any particular customary tenure system may lie somewhere along a continuum between partial and complete. The recognition and protection of complete systems of customary tenure means the recognition and protection of group rights over the territory over which it holds jurisdiction. For partial systems, it can also mean the recognition of group rights, but only over certain parcels of land that are held under collective tenure – such as plots of grazing land or forest.

31 Erni (2021).
32 Erni (2021, p. 40).
33 Erni (2021, p. 41).
34 Erni (2021).

3) Scope: diversity of resources and extent of area governed

Customary tenure systems differ according to the geographical extent of the area held under customary tenure and the diversity of the land and resources they govern. In complete systems, rights are more comprehensive and complex, providing group members with specific rights that apply to the whole range of lands and resources found within the respective territory. Certain land areas or certain types of resources may be used jointly by more than one neighbouring group or community. In some cases, one group may hold rights over resources that lie in the territory of another group.

In partial systems, customary tenure is limited to fewer land and resource types – such as grazing and forest land. In contrast, rights over most agricultural and residential lands are managed under statutory tenure. Rights may be recognised over parcels of land – that is, a particular category of land associated only with a defined land use or resource, such as forest or grazing areas, or over an entire landscape or territory including all land categories, resources and uses. Variations within these two basic options include recognition of the following:

- A single parcel with a specific resource (such as agricultural land or forest) or use (such as a cemetery)
- Multiple parcels with a single resource or use (such as several plots of forest that are recognised as a community forest)
- Multi-purpose parcels – that is, parcels of land that provide different resources and forms of land use (such as land that contains both forest and agricultural land, or agricultural land and residential land)
- A village or community
- Landscape area controlled by multiple communities
- Entire territory (landscape area) managed by a single village or community
- Landscape area controlled by multiple communities

4) Rights holders: collective rights and nested rights

Rights holders are understood here to be holders of legal rights which are recognised under either statutory or customary law. While rights holders can be individuals or groups of people, the recognition of a customary governance system implies recognising the way a community or a group as a collective entity manages the rights of the various stakeholders within the area under its authority. The various approaches to recognition require the identification of a group or collective entity who share a common interest in managing the land and resources together.

Depending on the context in areas under customary tenure, different groups may be recognised as rights holders. Fitzpatrick[35] suggests, for example:

> where landholding relations are based on kinship it is logical to register in the name of the kinship or lineage group. Where land relations are based on territoriality, it may be enough to register in the name of the local village or its equivalent. Where land relations involve a combination of territoriality and kinship, or vary greatly as a result of conflict and population displacement, it may be sensible to ascribe legal landholding status to a broadly defined common interest community.

Some approaches for recognising customary tenure do not require detailed identification of the various rights holders within the customary system, especially within complete systems. If rights overlap between customary and statutory systems, there might be a need to identify more specific rights holders within the system. Different approaches for recognition would then need to be adapted to each group. The same may apply where different ethnic groups or interests coexist.

'Nested rights' are specific rights that are allocated to subgroups or individuals within the broader collective management of the customary area. For example, these can be rights over trees that they have planted or rights to cultivate plots that were first cleared and occupied by their ancestors. If a collective entity is recognised as the rights holders of the governance systems for the resources and land in a large area, the nested rights of individuals and subgroups within the governed area remain. However, how these individual or sub-group rights are dealt with in the process of formalisation is important.

5) Governing institution

Defining which institution will hold the right to govern the land and resources depends on the willingness or capacity of the collective – such as the community or ethnic group – to retain jurisdiction over its territory and to continue governing land. This will then have an impact on the relative need for State interference with customary land governance. Four possible scenarios are considered here.

35 Fitzpatrick (2005, p. 466).

a. Existing customary institutions are able and willing to manage land and resources

In most customary tenure systems, day-to-day management of land and resources is done at the village or community level by customary institutions such as village councils or councils of elders. Where existing customary institutions are working and legitimate, governance rights should remain with these institutions. State interference should be minimal.

Traditional supra-community governance institutions are rare but have emerged in recent decades among some indigenous ethnic groups – for example, tribal councils among Naga groups in Northeast India. These institutions play a role in resource governance mostly by helping to resolve intercommunity conflicts or by issuing certain general rules regarding environmental conservation. In other respects, they do not interfere in internal land and resource governance of communities.

b. State administration takes over the management responsibilities from customary institutions

The State administration may choose to assume complete control of the management responsibilities in the following circumstances: (a) where traditional institutions have become marginalised or have disappeared; (b) where traditional institutions are unable to manage the conflicts and challenges arising from market integration; or (c) the land and resources are under State control. However, State administrations often have little capacity to effectively regulate local practices and manage rights at the local level, especially in remote areas. Therefore, a hybrid institution or a new, independent institution may be preferred.

c. A hybrid institution is formed between the State administration and a customary institution

Where administrative units of the State – such as the village or township administration – are given the authority to govern land and resources within the area under their jurisdiction, the involvement of customary institutions could considerably strengthen their governance capacities. These customary institutions have knowledge and experience, as well as the legitimacy and respect they may still hold among community members. A community-based institution can be formed to represent the management interests of both the collective and the State.

In some countries, the law requires the formation of new institutions for the governance of land under legally recognised customary tenure. One example is the Village Land Councils in Tanzania. Customary institutions (like village headmen or village councils) can be part of these new institutions. Additional members can be chosen through election or appointed by the government. For example, the district and subdistrict level Land Boards in Botswana, which hold the *"right and title of the chiefs and tribes on trust"*, originally used to include the tribal chief or his deputy in its membership because of the position that they held in the community. However, Land Boards now consist of *"five elected members,*

Community members carrying bamboo to help construct a new house in Yaungkon village, a Tangshang Naga community in Nanyun Township of the Naga Self-administered Zone. (Photo: Christian Erni)

and up to seven members appointed from various government departments" [36] (see also Box 4).

In Myanmar, the Village Tract Land Management Committee is an example of a hybrid of State and community institutions that, in principle, includes two representatives from the community (a farmer and an elder) alongside government officials.[37]

d. A new (independent) institution is formed with the backing of the State administration

New institutions may be created to support customary institutions, or to change the structure and composition to strengthen their capacities.

For larger territories that comprise several communities, the law may require new institutions to be set up as legal entities. These entities would then hold the collective rights over the area. In such cases, there is a question around what role these entities will play in actual land and resource governance because this usually takes place at the individual community level.

The formation of a new institution in charge of customary tenure governance can address a number of issues related to traditional institutions. For example, traditional systems may not always apply internationally recognised principles of good governance – participation, democracy, gender and social equality. In addition, with land competition and conflicts on the increase, traditional local institutions may not always be able to meet all the challenges that governance of their customary tenure area requires today. Traditional leaders might even be more prepared to sell land than government authorities, which can have a negative impact on the tenure security of individual community members. For each particular area, a careful assessment is needed to determine what type of institution is better able to govern the communities' land and resources – customary authorities, village-level government authorities or a new community-level institution.

What ultimately matters is that land and resource governance is effective. Governing institutions need to have the legitimacy, capacity, financial stability and political backing necessary for the effective management of land and resources in a customary tenure regime.

Box 4. Land Boards and Village Land Councils

Land Boards and Village Land Councils are forms of decentralised land governance where customary authority over land is transferred to these newly created institutions. Land Boards have been established at district and subdistrict level in Botswana, and Village Land Councils at the village level in Tanzania.

In Botswana, Land Boards can allocate land to outsiders as well as insiders. This potential to grant tenure security to both groups is seen as an advantage.[38] If the allocation is for commercial purposes, it will be under a statutory lease and the holder pays rent.[39] The disadvantage of Land Boards is the possibility of exploitation and inappropriate intervention by the State. There is a separation of authority from customary rights holders themselves over land decisions, and a tendency to ignore weak and marginalised groups and to favour elite groups.[40]

For Village Land Councils in Tanzania, the issue of separation of authority from customary rights holders does not arise because councils are established at the village level through elections by all adult village members. The law stipulates that at least a quarter of the council members must be women. It also includes various obligations relating to equal access and distribution, environmental management, accountability to village members and consistency with customary law.[41]

36 Fitzpatrick (2005, p. 463).
37 See Kyi Pyar Chit Saw and Arnold (2014, p.52). In many villages, these community representatives have limited influence, are not really representing the community, and are aligned with the interests of the village tract administrator (Boutry et al. 2017 p.252). In Myanmar, the Village Tract administrator is elected indirectly by the villagers and the Village Tract clerk is appointed by the State. I am grateful to Paul De Wit for drawing attention to such a 'compromise solution' and the example of the Village Tract.
38 Fitzpatrick (2005, p. 463).
39 Fitzpatrick (2005, p. 463).
40 Fitzpatrick (2005, p. 464).
41 Fitzpatrick (2005, p. 465).

6) Recognition process

Formal recognition of rights must follow procedures that may have various levels of complexity depending on various criteria – for example, the need for boundary delineation, the issuance of a title or certificate, or the establishment of a new governing institution, among others. For collective rights, one requirement can be prior incorporation. In this case, the rights holder is registered as a legal entity and must follow procedures defined in the law, such as having customary practices or proof of descent from the original occupants, among others. Each of these procedures may involve different government agencies and different levels of approval that can become a hurdle for local communities to comply with.

If the law or implementing rules and regulations prescribe procedures and accuracy standards that only certified professionals like geodetic engineers with the use of expensive equipment can fulfil, delineation and mapping procedures can be complicated and expensive. A more cost-effective approach which has been successfully applied across the globe is participatory community mapping facilitated by CSOs.[42]

The law can allow alternative delineation and mapping approaches and provide for less bureaucratic validation procedures by the relevant authority.

A complex process of formalisation is expected to deliver a higher level of protection. However, overly complex bureaucratic procedures make it difficult for communities to obtain legal recognition, particularly

Box 5. Requirements and procedures for the recognition and titling of indigenous community land in Cambodia

In 2001, Cambodia passed a new Land Law which recognises indigenous peoples as a legal category and provides for the titling of their communal land. However, communities must first prove that they are indigenous and that they have occupied and owned their land. Until this is done, and their rights are formally recognised through a communal title by the State, there is no protection against dispossession by outsiders or the State.

Many communities all over the country have lost their land to companies who were given economic land concessions (ELC) over customary land by the government. ELCs have been issued quickly and for large areas. However, titling of communal land of indigenous communities has been very slow because the official application process is lengthy and complicated. The process requires that, first, the Ministry of Rural Development formally recognises a community as an indigenous community. After that, the community must be registered as a legal entity by the Ministry of Interior. Lastly, the Ministry of Land Management, Urban Planning and Construction carries out the titling of the community's land, which includes surveying the area, undertaking public notification and issuing the title. It is common for community land to overlap with State forest or an ELC. In this case, the community will have to obtain a no objection from the Ministry of Environment and/or the Ministry of Agriculture and Fisheries.

To date, not a single community has been able to complete the registration process on its own because the procedures are technically complicated, very bureaucratic and involve different ministries. Communities that have succeeded in getting a community land title, were dependent on outside support from donors and non-governmental organisations. The lack of political will of the government to implement the law makes it more unlikely that indigenous communities in Cambodia will obtain a title.[43] Figures for 2021 show that only 33 out of an estimated 155 indigenous communities had received communal land titles.[44]

42 See for example Di Gessa (2008), Rainforest Foundation UK (2015) and https://www.rainforestfoundationuk.org/mappingforrights

43 Sources: Keeton-Olsen (2021) and Ironside (2017).

44 In September 2020, a total of 155 indigenous communities had been recognised by the Ministry of Rural Development, of which 152 had been recognised by the Ministry of Interior according to the internal reports from the ministries. Unofficial information indicates that 98 of these communities have made a formal application for a title. In March 2021, the Ministry of Land Management, Urban Planning and Construction had approved 33 communal land titles according to an internal report (Sophorn Poch, personal communication, October 2021).

when the procedures include incorporation (see Box 5 on indigenous community land titling in Cambodia). Sometimes the financial costs involved are so prohibitively high that communities are not able to achieve recognition of their land without external assistance.

It may seem that rights holders have strong legal protection if rights are mapped in detail and registered by the government, and if a title is issued to a registered collective representative of the community. However, protection is still dependent on access to effective legal remedy when community rights are violated. In Cambodia, for example, the administration seems to have used the complexity of the process to discourage communities from accessing their rights. At the same time, private companies accessing concessions are not under the same level of scrutiny. In the absence of an independent and affordable judicial system, there is little chance for communities to effectively prevent encroachment by powerful actors.

Therefore, it is important that the process for customary tenure recognition remains simple, accessible and without the need for incorporation, except in specific situations. In all cases, it is important to carefully consider the added value of any steps in the recognition process. The heavy burden of producing documentation should not fall on communities in cases where government agencies or private companies are seeking access to land and resources within areas held under customary tenure. It should be the responsibility of outsiders to assess the impact of these projects on the affected communities and seek permission from the communities by obtaining free, prior and informed consent (FPIC).

Upland rice fields in Dawlarsaw village in Kayah State. Trees known for their capacity to restore soil fertility are preserved by the farmers in shifting cultivation plots (Photo: Nay Min Lwin, KMSS)

Table 1: Key principles of – and comparison between – the options for customary tenure recognition

Option	Key principles	Recognition of customary governance system	Suitable for	Scope	Rights holders	Governing institution	State interference	Process complexity	Legal protection
1. Blanket recognition and FPIC	No registration, only focus on the FPIC process	Yes	Complete systems	Areas and resources affected by outsiders	All resource users and affected rights holders	Existing customary institutions if they exist	Minimal	Low (for the community)	Low
2. Customary tenure zones	Zone border delineation and basic recognition of zone-level customary institution	Yes	Complete systems	All resources within the defined landscape / zone	Multiple communities, (multi-)ethnic groups	Existing or newly formed customary institutions	Low to medium	Medium: depends on mapping and recognition requirements	Medium to high if self-government is legally recognised
3. Land governance by village administrative units	Land governance rights devolved to village-level authorities, based on village delineation	Depends on village authorities	Complete and partial systems	Entire landscape or multi-purpose parcels within the village area	Village community	Village authority with or without involvement of customary institutions	Medium to high	Low	Medium
4. Land titles over territories	Full titling process with possible incorporation of collective rights holders	Yes	Complete systems	All resources within the entire territory	Self-defined community, multiple communities or ethnic groups	Representative body of the rights holders – customary or new institution	Low (high during the titling process)	High	High if good access to remedies
5. Tenure right certificates over parcels of land	Tenure right certification over specific land use areas	Possible, often with restrictions from the State administration	Partial systems	Single or multiple parcels of a specific land use category	Village community or defined user group	Village or user group committee	Medium to high	Medium to high	Medium to high
6. Co-management contracts	Contract between the community and the State administration defining the management rules	Limited, depends on State administration	Complete and partial systems	Specific areas and resources under state public administration	The community residing within or accessing the area	Management committee supervised by the State administration	High	High	Low

The landscape under customary management in Chin State includes diverse resource systems such as shifting and permanent cultivation, grazing grounds and forests for various purposes with different tenure rights (Photo: Antoine Deligne)

2. OPTIONS FOR THE LEGAL RECOGNITION OF CUSTOMARY TENURE

The six options proposed in this study are broadly organised from the simplest to the more complex, and from a minimalist approach requiring little input or intervention from government, towards more bureaucratic approaches with a heavier involvement of government administrations at different levels.

Options 1 and 2 can be called minimalistic as defined by Fitzpatrick where the *"only involvement of the State would be in establishing and enforcing the external boundaries of customary land"*. There would be *"no attempt to define which groups held what customary land, and no legal intrusion into areas governed by customary law"*.[45] These minimalist approaches can be applied to complete systems in remote areas with little government outreach and low pressure in terms of competition for land and resources, including from outsiders. This approach, Fitzpatrick suggests, *"may be a politically palatable first step towards recognising customary tenure, one which postpones the difficult questions of State intervention"*.[46]

Options 3 and 4 are more complex and difficult to implement in terms of both a legal framework and administrative processes. They can be further developed with a range of sub-options in terms of governing institutions. If well designed and part of a strong political consensus, these options would provide stronger legal protection to customary tenure rights.

Options 5 and 6 imply more State interference and less autonomy from local communities and are more suited to partial systems or areas of tenure insecurity. Communities may experience tenure insecurity when facing pressure from competing claims, conflict within the group, tenure individualisation, encroachment by outsiders or interventions from the State. Options 5 and 6 provide an alternative to the application of individualised statutory tenure in order to maintain a collective form of governance on part of the land and resources.

Table 1 provides the key characteristics for each option with an assessment of how the options address the key issues identified in Section 1. However, each option can be further defined to make it more effective. For example, the titling process in Option 4 does not need to be complex – complexity is ultimately a policy choice.

45 Fitzpatrick (2005).
46 Fitzpatrick (2005).

Option 1. Blanket recognition with the right to FPIC

In this approach, customary tenure rights are protected over all land that is not yet covered by a formal registration status, that is: (a) all land not covered by a title, land use certificate or lease; or (b) land that is designated as reserved or protected area by State law. It is the least complex option with regard to legal, bureaucratic and technical recognition procedures. There is, at least initially, no identification and registration of specific rights holders, and no demarcation or registration of their plots or territories. Land and resource governance as well as the enforcement of rights are carried out internally by community governance institutions in accordance with customary law, and through customary practices with minimal or no interference from external stakeholders.

As a protective measure against encroachment and unwelcome interference, FPIC of local communities should be made mandatory by the State for any intervention in these areas by outsiders (individuals, corporations or government agencies).[47] Interventions may include resource exploitation (mining or logging), agricultural, industrial or infrastructure development, or the establishment of new protected areas. As FPIC does not yet exist in Myanmar, a related law needs to be enacted that would define the scope and process. A government oversight committee would control and support the FPIC process with customary tenure rights holders. CSOs could be involved in this committee as an independent third party to support and monitor the process to help to ensure impartiality.

Advantages and disadvantages

In this approach, government resources and efforts are invested as a priority to prevent conflict in areas where a public or private intervention affects the customary rights of a local community. Outsiders seeking access to land and resources within areas held under customary tenure – such as government agencies or private companies – are charged with assessing the impact of these projects on the communities affected. Communities are not burdened with having to prove their rights. This approach provides important interim protection for all customary tenure systems prior to the imposition of other legal frameworks for more complex forms of recognition. An FPIC law would also represent an important tool for the enforcement and protection of all customary rights under other options.

However, this option offers limited protection when the customary governing institutions are weak or affected by power imbalances and are unable to resolve internal or intercommunity conflicts. As long as the geographical space of the customary areas is undefined, protection against encroachment by small-scale actors and illegal activities will remain weak.

A group of Asho Chin women from a remote village in Magwe Region carrying agricultural products for sale in town (Photo: Christian Erni)

47 The same requirement could be applied to cases in which community members wish to detach individually held entitlements and apply for a land title under statutory law (Paul De Wit, personal communication, July 2021)

Option 2. Customary tenure zones

Some communities may wish to ensure a higher level of recognition by the State to strengthen the protection of customary areas against encroachment, resource extraction or other threats. In this case, communities may take the initiative to delineate their customary areas. In other instances, the State itself may wish to define customary areas more precisely – such as for land use management purposes.

Customary tenure zones would be an alternative or addition to blanket recognition. In this option, only certain areas are recognised as being held under customary tenure. In these recognised customary tenure zones customary rights are enforced internally by community governing institutions in accordance with customary laws. The involvement of the State would be largely confined to establishing and enforcing the external boundaries of the zone.

Recognition of the governing institution of the zone could be established through a simple process without the need to obtain a legal personality. These governing institutions may vary greatly in how they are organised. Some may remain informal, such as a village-level council of elders, and others may develop a more specific status to establish a board with representatives from various subgroups. There would be no interference from the government in the creation and running of such an organisation.

The scale of these customary tenure zones can vary greatly. Zones could be established for a single community, or for the full or partial village area. Alternatively, zones can also be envisaged over much larger areas and for larger groups – for example, specific ethnic groups or indigenous peoples. Such multi-community zones can be established to allocate governance rights to ethnic groups who have existing capacities to manage land over larger territories. In Myanmar, Self-administered Zones, whole or parts of ethnic states, or even regions could be recognised as customary tenure zones. Multi-community zones would also be relevant where customary areas of cultural significance are already managed by intercommunity and even interethnic institutions – for example, Salween Peace Park in Kayin State and Mount Saramati on the border between Myanmar's Sagaing Region and Nagaland State in India.[48]

Within a zone, all land and resources would be managed internally. Land and resource management under customary tenure is rarely exercised above the community level. Therefore, governance would be left to the traditional rights-holding groups – such as communities – in accordance with the specific conditions in each zone. A special dedicated institution at the zone level may have to be created or recognised to play a supportive role. For example, support may be needed in intercommunity conflict mediation and could be particularly important in zones comprising communities of different ethnicities. Certain rules and regulations in the common interest could be declared binding for customary tenure systems. Zone-level land governance policies may also provide for collectively or individually held rights to be registered according to customary law and within the legal framework of the zone.

State intervention in land and resource governance of the zone should be minimal. The level of intervention will depend on the political status of the customary tenure zone. The degree of autonomy will determine the relationship between the State and the governing institution of the zone. Legislation relating to the legal status of the zone and the relationship to higher-level legal frameworks will need to be enacted.

Where zone institutions do not have sufficient capacity, certain protective measures on the part of the State may be required to ensure integrity and to prevent encroachment and unwelcome intervention. One such measure could be FPIC. Some, or all, of the environmental and social safeguards mandated by national and subnational laws may apply. Enforcement of the safeguards would require some form of State coordination with the governing institution of the zone.

Advantages and disadvantages

Customary tenure zones are more complex than blanket recognition since they require more State engagement. For example, the State would need to demarcate the zone perimeter and, in some cases, the governing institution of the zone must have official recognition from the State. The complexity of customary tenure zones can increase with the size of the zone and the number of communities involved. Consequently, this option may require more complex coordination systems and institutional set-up.

Land and resource governance under customary tenure zones is largely left to customary institutions and imposes few financial or administrative demands on State authorities. "It would allow customary rights to evolve over time in response to population changes and economic needs, without undue restriction or imposition by a formal legal regime."[49]

48 Erni (2021, p. 17–18).
49 Fitzpatrick (2005, p.458).

However, a limitation is that no legal entity is recognised or created at the community level. This makes it difficult to enter into legal agreements with outsiders (individuals, corporations or government agencies) for the purposes of investment, land lease, or resource extraction, among others. The limited oversight of local customary institutions also carries the danger of clandestine informal agreements between outsiders and individuals or by groups from within the customary tenure area. This is a risk with traditional authorities in particular.

Large customary tenure zones that cover a whole territory and are managed by an ethnic group or a Self-administered Zone will most probably overlap with lands in other categories – for example, land under existing statutory tenure, State lands managed by State agencies or State-owned enterprises, or land under long-term lease by private companies. Clarifying and negotiating the status of these tenure holes might be a particularly challenging issue.

A Chin traditional house built on local materials (Photo: Antoine Deligne)

Option 3. Customary tenure governance by village administrative units

One alternative to creating specific zones could be to vest land and resource ownership and governance in existing State administrative units. In Myanmar, these could be village tracts.[50] This approach would simplify the recognition process by removing the requirement to map the areas held under customary tenure. There would also be no need to identify, create or recognise a new governing entity. The total land area of a village tract could be recognised as a territory collectively owned by its members. The government would be able to scale up the recognition process quickly across the whole country.

Traditional governance systems have undergone drastic changes in the wake of their incorporation into the State administrative structure. With these changes, village tract-level administrations now enjoy a degree of legitimacy, especially now that village tract administrators are indirectly elected by the villagers.

It is important to distinguish between the collective owner of the land – the village or village tract – and the institution in charge of governance. The institution governing land and resources would be one of three alternatives: (a) the existing institutions of the administrative unit, such as the village tract authority; (b) the existing customary institutions, like a village council of elders; or (c) a hybrid institution which has a mix of representatives from both the administrative institution and the customary body, such as traditional leaders called *thagyi* in Myanmar. A new institution for the purpose of land governance could be created, like in some African countries (see Box 5 on Land Boards and Village Land Councils).

Even where a village council holds governance responsibility over customary tenure within the community, the council would need to work closely with the local authorities who would play an intermediary role with higher-level administrative institutions as well as with outsiders.

When administrative units are land-owning units, there is greater State intervention. These units interface more directly with the State in compliance with policies, regulations and laws at the township, state/region or national levels that directly or indirectly affect land governance. In general, this implies the need for a more careful clarification around governance at the local level: (a) to what extent local governance applies; (b) the rules that local governance institutions are required to follow; and (c) when administrative institutions within the village and beyond might be enlisted.

In Myanmar, as elsewhere, current village tracts that function as local government units do not correspond to traditional communities. If administrative villages are to be considered as collective rights holders, it is important to keep that difference in mind. Village tracts boundaries are often already clear and would not require additional mapping, but they may include several villages and possibly several customary institutions. To clarify governance responsibilities at that level, the demarcation of village boundaries could be required.

Advantages and disadvantages

One advantage of this approach is clear geographical boundaries that do not require additional mapping. Another is established governance institutions at the lowest level of State administration (village tract). These institutions are likely to have a fair degree of legitimacy in the eyes of community members because officials are elected. In this context, authority can be vested at the local level without the need for a complex process of registration.

A disadvantage is that local government units potentially do not correspond to a specific community and customary lands. For example, an administrative village may comprise more than one traditional village, or boundaries may cut across traditional village boundaries. Even if the local authorities are elected and enjoy a degree of legitimacy, their authority and the effectiveness of their leadership may be limited if traditional authorities are still widely recognised but not included in governance.

A regular concern in land management across the country is elite capture. Village chiefs or administrators are involved in land transactions and often a party in land conflicts.[51] They have vested interests in land management and may not always manage land for the benefit of other community members. Given their function in the community and the hierarchical structure of Myanmar society, people may not be able to hold chiefs or administrators accountable, even if there is an electoral process. Therefore, this option might not be suitable for many areas of Myanmar.

Because administrative units are part of the State administration, higher-level interference is a possibility. Decision-making processes may be conducted without consulting the community or gaining approval. The village may still face difficulties in engaging with outsiders and investors – for example, to enter into a long-term contract – if the community does not receive the authority to do so.

50 In Myanmar, the residential part of villages is already under a similar kind of arrangement. The General Administration Department recognises the area of residential land and allows management by the village administration. (Peter Swift, personal communication, March 2022)

51 Boutry et al. (2017, pp. 247–253)

Option 4. Titles over territories

Where strong, independent customary governing institutions exist, or where local communities want to manage their resources with autonomy from government administration, they may agree to acquire a legal personality in order to hold legal authority in all matters related to land governance over a specific territory. In this case, a mechanism can be established for issuing a title over a territory that is provided to a collective registered as a legal entity.[52] Legislation would specify the rights and obligations linked to the title and the issuance process by the relevant authorities.

Under this mechanism, collectives are recognised as rights holders over their entire territories that comprise different types of land. Different groups may be recognised as a legal entity and thus registered as a landowner. Examples include communities, kinship groups or residential groups that are part of a community, or territorial groups comprising more than one community.

In many countries, recognition of the rights-holder group as a legal entity requires incorporation. It also requires the drafting of statutes and possibly an electoral process to ensure compliance to good governance principles. In other countries, incorporation is voluntary and is offered as an additional level of protection. Examples of this mechanism without compulsory incorporation is the titling of Ancestral Domains of indigenous peoples in the Philippines or customary tenure recognition in Uganda (see Boxes 2 and 3).

Titling requires delineation and usually involves the mapping of these territories. This approach is characterised by a high degree of complexity and discretionary oversight by the State as it involves different bureaucratic procedures, such as demarcation, gazetting, titling and cadastral registration of the territory.

When recognised territories cut across the boundaries of State administrative units, customary tenure governance bodies may face competition from local government units that are more powerful and have greater financial resources. This may weaken the legitimacy and enforcement power of customary tenure governance bodies.[53]

Advantages and disadvantages

In principle, this option provides the highest level of legal protection to customary tenure rights and the highest autonomy in governance. However, in practice, experiences have shown that the State can use the complexity of the process to delay or prevent legitimate groups from obtaining a title. Communities that have accessed a title have not always been able to protect their territories from encroachment because they do not have access to courts or support from State administrations. Internal conflicts may exist. When developing legislation for this option, it is crucial to take into

The landscape of a Naga village in Lay Shi Township, Sagaing (Photo: Maung Maung Than, RECOFTC)

52 Titles over territories aims to achieve the highest level of legal protection. This is why we use the term 'title', implying that the right is recorded in a cadastre and includes the full bundle of rights. However, good legal protection can also be achieved through a certificate being issued or through other legal documents.

53 Customary tenure governance bodies have had such experiences with Ancestral Domains in the Philippines. See Wenk (2012), for example.

account existing practices and demands of communities to ensure that it is feasible. This option also requires strong existing customary institutions.

Incorporation has the advantage of enabling the rights-holding group to engage in legal dealings with outside entities, or to take loans from financial institutions. However, incorporation can be problematic if there is no safeguard ensuring that the legal entity is identical to the original rights-holding group to prevent elite capture. The process of incorporation itself may imply changes to the customary tenure system because governance of a corporate entity must comply with the rules and regulations defined by statutory law. If the changes are not explicitly formulated in the right way, they may not be in line with customary law.

Customary governance systems sometimes do not comply with generally accepted principles of social justice and good governance. In this respect, a legally required incorporation bundled together with a set of basic governance rules would offer the opportunity for reform. The key question here is how much the State should intervene in the internal affairs of customary groups.

> "[T]he process of incorporating customary groups should make as little change as possible to internal customary processes…because the ultimate policy goal of incorporation legislation involves recognizing an existing entity, not forcing social change within that entity or subordinating it to an external legal order;… while some form of change inevitably results from incorporation, the greater the degree and novelty of mandatory intervention the more likely that it will be ignored in practice".[54]

The challenge is to strike a balance between the recognition and protection of customary tenure systems and the imposition of norms of land and resource governance that are externally defined.

One additional challenge is how to deal with claims to rights over parcels of land by individuals, households or kinship groups within the territory and the need to find a solution that allows for some formal recognition of these rights.

Permanent terraced rice fields in Nidukhu village, Kayah State (Photo: Elena, KMSS)

54 Fitzpatrick (2005, p. 462).

Option 5. Tenure rights certificates over parcels of land

Not everyone in a village may agree to come under the jurisdiction of the customary governing institution or to be bound by collective decisions. This is either because some individuals and subgroups have a distinct identity and would prefer to remain independent, or because they want to preserve the rights they have acquired over time – either statutory or pre-existing. In communities where many lands and resources are already managed under statutory law, some people may not want to relinquish those rights to customary institutions. At the same time, they may agree that other lands can be managed through such a mechanism. Some communities may wish to have rights recognised over parts or types of land only rather than obtaining governance rights over the whole landscape or territory. This could, for example, exclude areas where rights are well defined under statutory and individual tenure.

The most frequently encountered situation may be that individual rights are managed under statutory laws, and collective rights under customary laws – with more or less influence from State norms. A village may wish their customary rights to be recognised and protected for pasture lands which are used collectively, but exclude rice fields which are managed independently by each family.

Different types of rights, or bundles of rights, may be provided to cover different types of land and parcels – such as forest, pasture, or fishery grounds. These rights can be claimed by individuals, groups of people (collective, association, and so on) or an entire community. Rights of lease, sale and transfer may or may not be included. The State may impose specific rules to be applied to different land uses, or provide flexibility for communities themselves to define the rules that they will apply. The relevant groups would then need to engage with the particular administration that has jurisdiction over those lands to define more specific management rules.

For collectively managed lands, a tenure rights certificate can be issued for a community or a specific user group, with a bundle of rights adapted to their customary tenure rules. In general, the formalisation process would involve a number of steps: (a) identification of the rights-holding or user group; (b) mapping the lands and resources under collective management; and (c) defining the management rules of the area and the status of the governing entity through some form of participatory process. The prior recognition of the rights-holding group as a legal entity may be required. This could be through incorporation, for example. Tenure rights certificates can be similar in approach to issuing a title to a legal entity as outlined in Option 4. The only difference would be that rights are recognised over parcels of land instead of over the whole territory.

Advantages and disadvantages

The main advantage of tenure rights certificates is the flexibility to adapt rules and governance to different parts of the village area. Some parts can be managed under statutory law and other parts would be managed under customary rules. This flexibility is necessary in partial systems where collective and individual interests do not match. It offers the possibility to strengthen customary governance institutions that are weakening by giving them renewed legitimacy to manage the lands that are under collective use.

A tenure rights certificate (or a title) provides strong legal recognition and protection, even if it comes with a more limited bundle of rights. This option is relatively complex and resource intensive because the formalisation of rights is required for each separate parcel or group of parcels. The rules may also vary from one community to another. State administrations are often not well equipped to manage participatory processes and in general do not favour flexibility. This approach also reinforces the compartmentalisation of land management.

Community members who are well connected and wealthier often benefit from the privatisation of common property. In contrast, privatisation further marginalises poor households whose livelihoods partly depend on access to common property land. To reduce the risk of elite capture, State registration of common properties that explicitly prohibit the transfer of rights can be an opportunity and a strong incentive for a community or a group of users with secured rights to establish more sustainable and inclusive management practices.

Option 6. Co-management contracts

Collaborative management or co-management is *"a situation in which two or more social actors negotiate, define and guarantee amongst themselves a fair sharing of the management functions, entitlements and responsibilities for a given territory, area or set of natural resources"*.[55] In most cases, co-management agreements are made between the State and one or several communities.

Co-management itself is not a form of recognition of pre-existing rights and customary tenure. Therefore, co-management agreements can vary considerably with regards to the bundle of rights over land and resources held by communities, individuals and other social actors that are part of the agreement. Where pre-existing rights are not recognised by the State, the negotiation of management rights offers a space for local communities to claim rights and reach a form of mutual understanding with the authorities about how customary tenure and practices can apply over State land. The extent to which this system provides an avenue for customary tenure recognition depends on the flexibility of the management agreement and the space provided to customary governing institutions to play a role in co-management.

In many countries, State public lands are not eligible for titling or certification. In some cases, those areas overlap with lands and resources traditionally used by local communities. The designation of State lands (such as protected areas) without the FPIC of local communities has been criticised as 'green grabbing'. This form of appropriation of land and resources for environmental purposes has resulted in the displacement of local residents from land where they live or make their livelihoods.[56]

In State-designated protected areas or reserved forests, the government may want to keep the governance under State management while realising that conservation and protection objectives can only be met with voluntary participation of local communities. Therefore, the State may allow local communities to continue some of their customary practices in these areas and encourage their participation in defining and monitoring the application of management rules.

In this case, the government agency that has jurisdiction over the related State lands negotiates a co-management agreement with the communities who traditionally access those areas. As long as the communities abide by the rules and management plan agreed to in the contract, their rights are protected by the State agency.

Co-management has been experienced in protected areas mainly for conservation purposes. However, this approach can also apply to a broader range of resource management objectives. This could include economic development in production forest and fisheries, for example. As will be discussed in Section 3, co-management can also be used in the framework of other options to manage tenure holes within customary tenure areas in line with the recognition process.

In Myanmar, the most common form of co-management is Community Forestry.[57] This system provides some rights to local communities but it does not include any recognition of customary tenure governance as such. There are also plans for Community Conservation Areas[58] in protected areas of high biodiversity conservation value.[59] Most of these co-management systems include the creation of a committee that represents the community as a whole or a group of people within the community. The committee signs the contract with the State agency and monitors the application of the rules by its members.

Advantages and disadvantages

The main advantage of co-management is that it already exists within Myanmar's current legislation. In this case, the system provides a more direct avenue for engagement with authorities and the recognition of rights as well as a more secure way for the government to delegate responsibilities within State lands. However, significant amendments would be required to this legislation to include the recognition of customary tenure and customary governance.

If customary tenure is not recognised, the main limitation of co-management is that it does not provide full autonomy to customary institutions: The State maintains its authority over these areas but agrees

55 Borrini-Feyerabend et al. (2007, p.2).

56 Fairhead et al. (2012).

57 According to the Forest Law (2018) and the Community Forestry Instructions (2019), a Community Forest Certificate is issued by the Forest Administration for a duration of 30 years that can be repeatedly extended. The District Forest Officer may revoke the certificate if management rules are violated or if the forest is neglected. There is no independent legal recourse against such a decision.

58 Indigenous peoples have been advocating for the recognition of indigenous and community conserved areas to allow communities to lead the conservation efforts in respect of the environment in which they live according to their cultural values. This applies even when the conscious objective of management is not conservation – it may be livelihoods, safeguarding cultural and spiritual values, and so on. Note that the other options, such as customary tenure zones or titles over territories, might be better suited than co-management contracts for the recognition of indigenous and community-conserved areas. See also: www.iccaconsortium.org/index.php/discover/

59 The Biodiversity and Conservation of Protected Areas Law (Republic of the Union of Myanmar, 2018) allows the allocation of Community Conserved Areas or community forests in the buffer zone surrounding the core zone which has high biodiversity conservation value.

to delegate some governing responsibilities to local communities. The related bundle of rights allocated to communities can vary depending on the type of land and resource.

Co-management is relatively complex and costly to implement as it requires a participatory process of negotiation between State authorities and the community or users to define and agree the contractual rules and management plans. It can also require the mapping and zoning of the areas concerned. It is rarely effective without the financial and technical support of third parties such as non-governmental organisations.

Co-management contracts can offer different scopes and bundles of rights but they often have significant limitations.

- Tenure security provided by a contract is weak, especially if it is limited in duration. Without independent oversight, it is easy for a State agency to revoke a contract at its own discretion.
- Contracts rarely recognise customary governance systems. While some level of customary management is allowed, major rules are defined by the State administration in relation to its own objectives, without much consideration for existing customary institutions.
- Co-management areas are often limited to a small portion of the land under State management and sometimes areas are already degraded. In practice, communities may use and claim rights over much larger areas.
- In some cases, contracts are signed only with a subgroup of the community and exclude disadvantaged people who do not have time to contribute to community activities. The system may allow for elite capture.
- Contracts allow for resources to be collected only for local consumption and prohibit commercial activities.[60] This limits the capacity of communities to participate in conservation efforts while generating sufficient benefits from sustainable activities.
- The communities do not have the right to enter into contracts with outsiders in order to invest in sustainable economic activities.

These limitations are not insurmountable and legislation can be adapted to provide strong rights that have independent oversight and are unlimited in duration. These can include commercial rights and can be aligned with and supported by customary institutions. A well-designed co-management system can be a powerful means to achieve the objectives of both the State administration and communities.

Figure 1 provides a simple summary of the six options for customary tenure recognition with regards to two key aspects: the type of customary tenure system and the degree of protection provided.

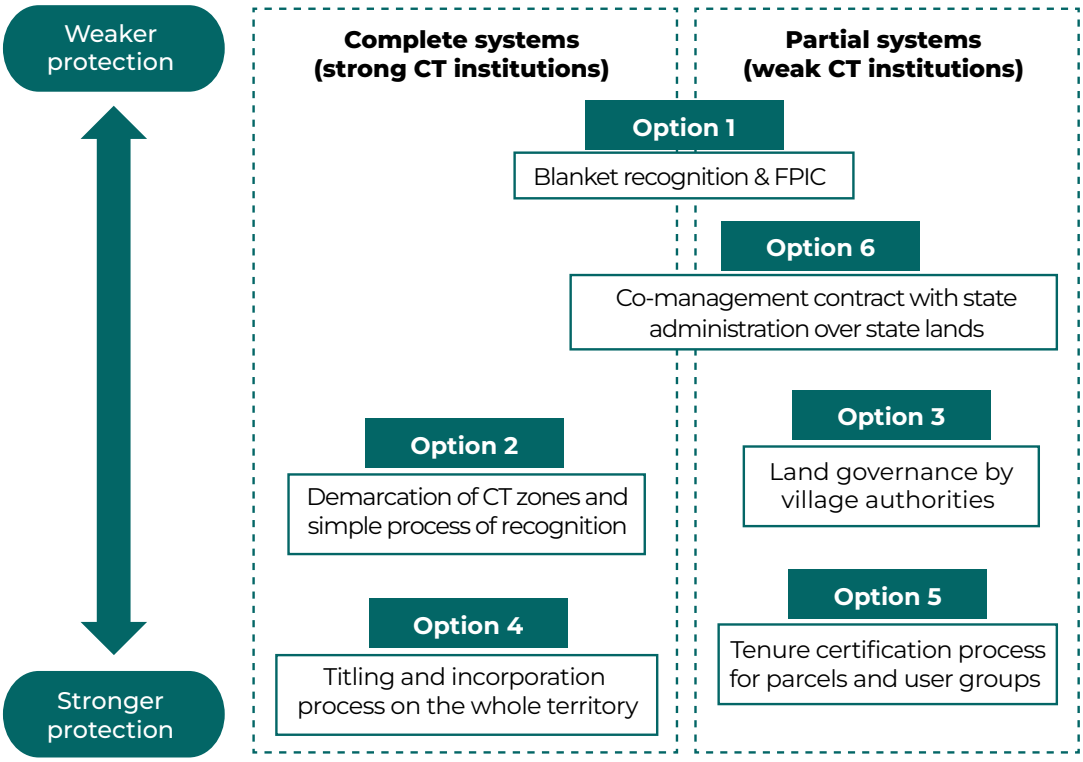

Figure 1: Six options for the recognition of customary tenure by type of system and degree of protection

60 In Myanmar, Community Forestry Instructions (Republic of the Union of Myanmar, 2019) allow the establishment of Community Forest Enterprises for the collection of forest products on a commercial scale and for processing and trade by forest user groups.

A Chin woman from Thantlang weeding her vegetable garden (Photo: Antoine Deligne)

3. From ideal types to a concrete solution

Six approaches to recognition of customary tenure rights have been proposed. To ensure that these options will work in practice, a number of important issues must be kept in mind when a law is drafted. International experience shows that good legal frameworks are necessary, but never sufficient to ensure that rights are effectively protected. This study outlines ten measures that could increase protection, including interim measures, content and roles and responsibilities.

1. Provide interim measures of protection

The process of drafting and enacting a new law is lengthy, especially because it ideally involves broad consultations with all relevant stakeholders. Once the law is adopted, it will take time to become effective even if the application and recognition process is kept simple. In the meantime, land grabbing of customary land continues unabated. Therefore, immediate interim measures will need to be put in place to prevent further loss of customary land before it can be legally protected. Two recommendations for immediate action are as follows:

- Decree a moratorium on granting any new private ownership use rights and land lease or resource extraction concessions until the formal recognition of land under customary tenure is completed.
- Prioritise new legislation for blanket recognition of customary tenure as described in Option 1. The legislation should state that all land that is not yet covered by formal use or ownership rights under statutory law would be considered customary land. Coupled with the right to FPIC enjoyed by all communities within these areas, further encroachment and dispossession could be prevented or at least reduced.

2. Keep the law simple and accessible to local communities

Experiences in countries such as Tanzania and the Philippines have shown that responding to the issue of customary tenure rights with complex laws and complicated procedures makes implementation difficult and expensive. Legislation should allow for procedures that are easily accessible for communities and adapted to those living in remote areas. The principles outlined below can help in the design of a simplified registration system.

- Registration should be voluntary, on demand and without pressure on communities.
- The law should not extinguish pre-existing customary rights on the basis that they have not been registered or formalised. Unregistered rights should remain valid and enforceable in court or through the appropriate grievance mechanism.
- The obligation to identify and document customary rights should be put on outsiders (a government agency or an investor) rather than on the community.
- Rights must remain accessible to all rural communities. Recognition should not be exclusive to specific ethnic groups or strictly defined indigenous communities. If necessary, allow for the self-identification of indigenous communities through a simple process.
- Procedures for application, demarcation, recognition and registration should be handled by a single office. In this way, applicants are not forced to deal with several departments or ministries each with their own procedural requirements.
- Devolve responsibilities to the lowest administrative level possible (township or village tract) to make it more responsive to the needs and capacities of ordinary people, especially those living in remote areas.
- Allow participatory mapping of customary zones or territories[61] rather than delineation validated by a land expert.
- Prioritise the direct recognition of communities as rights-holding entities rather than imposing a complicated process of incorporation for collective rights holders. Make incorporation optional, not compulsory.

A good example of a system that does not require incorporation exists in Mozambique:

> "[T]he legislator produced simplified legal procedures for communities acquiring legal personality, especially for facilitating community land registration (…) the Law (2014) and Rules (2016) relating to the Registration of Associations is the most prominent piece of legislation to incorporate collective entities. (…) Especially interesting is its article 19 (C) which states that 'associations formed under any existing law' do not need to be registered specifically."[62]

61 See for example Di Gessa (2008), Rainforest Foundation UK (2015) and https://www.rainforestfoundationuk.org/mappingforrights
62 Paul De Wit, personal communication, July 2021.

- Allow a community to choose the level of recognition and the application process that corresponds to its need at a particular moment in time. Allow the community to obtain a higher level of recognition through a more complex process at a later stage if there is a need for additional protection. A community could decide to delineate their customary tenure zone as a first step. If pressure from outsiders increases, the community could then follow the full procedure to obtain a customary land title.
- Allow legislation to evolve. Keep the law at the level of rights, safeguards and general principles. Develop procedures in sub-legislation with rules and regulations for implementation that are easier to amend.

3. Adapt the legislation to the context of federal states

Ever since the creation of the post-colonial nation state in Myanmar, numerous ethnic groups have asserted their claims to self-determination. In recent years, these groups have sought to realise these claims within the framework of a federal union. Part of this claim to self-determination is the claim to have the right to own and govern the land and resources within their territories in accordance with their own customs and traditions. Claims to pre-existing rights are not confined to those asserted by ethnic political organisations and their armed groups. Indigenous peoples and other rural communities in many areas, including outside ethnic states, have lived on and used land that is part of State-owned forest land for many generations. These communities may also want to manage their land with greater autonomy from central authorities.

In the framework of the 2008 (military-drafted) Constitution of Myanmar, each region and state has its own government and administration. They have an elected parliament with some limited capacity to enact laws, but not on issues related to land. There have been attempts to further decentralise the administration of land and natural resources. However, key decision-making, budget and technical capacities have remained at the national level.

In opposition to the centralisation of government institutions, political organisations of ethnic groups assert that they alone have the authority to decide whether, and how, their customary tenure systems should be recognised under the laws of the nation state they are part of. The Karen National Union and other organisations have already written their own land policies that address customary tenure and are implementing these policies in the territory under their control.[63]

In the context of some form of political autonomy and self-government, how customary tenure is recognised and protected can be delegated to the level of the self-governing entity. Potentially, each autonomous state could enact different legislation based on different options for the recognition of customary tenure depending on what a federal constitution would permit. This might be useful for adapting the law to the local context. At the same time, it might also add a certain level of complexity, as different communities in Myanmar would obtain different rights under various processes. Some level of harmonisation of the laws passed at state level with national laws might be desirable.

The issues that need to be addressed when options are discussed for the recognition of customary tenure at the level of autonomous states are often the same as those that are relevant at the level of a national law. A blanket solution for the recognition of customary tenure rights for all communities within a politically autonomous state or territory will not do justice to the needs and aspirations of communities with different cultures, traditions and livelihoods. Different approaches need to be considered to address recognition of customary tenure for small ethnic groups that have fragmented territories as well as communities of mixed ethnicities. These approaches must reflect those at national level. The multiplication of governance levels and the enactment of laws and policies at several levels introduce a certain level of institutional complexity that will need to be addressed to ensure that there are clear jurisdictions.

The 2008 Constitution of Myanmar does not prevent moving forward with the proposed options for customary tenure recognition. However, in many ways it does not sufficiently protect the rights of indigenous peoples and ethnic communities. Myanmar people are eying a future constitution that would strengthen federalism and the rights of ethnic nationalities. In this context, the development of a new constitution can be an opportunity to further shelter key rights for indigenous communities, and respond to their aspirations as well as define primary safeguards that would apply to all states and guide other legislation. In some countries, the constitutional rights of indigenous peoples have been instrumental in helping them access customary rights in practice.[64]

63 Karen National Union (2015).
64 To explore international experience on how to protect indigenous people rights in a constitution, see Cats-Baril (2020).

4. When should State authorities intervene in the governance of customary tenure?

Under what circumstances should the (national, federal or autonomous) State authorities intervene in the governance of customary tenure by communities and delegate some governance functions to administrative units independent of the community? The recognition of customary tenure is about recognising the self-governance of communities with respect to land and resources. In principle, this means that there should be minimal outside interference. However, there are reasons that justify higher-level interference by the government because it may be in the interest of the communities as a whole or specific members. Justifications include difficulties or limited capacity of the community to:

- prevent land grabbing
- deal with outsiders (for example, to make legally binding agreements)
- legally enforce rules
- resolve internal conflicts
- adhere to good governance[65] and human rights standards often in relation to power imbalances within the communities (such as problems of elite capture, unequal rights of women, migrant settlers, and so on)

The question is how to ensure that the legal recognition of any particular customary tenure system upholds these principles – and also limits the level of interference that might undermine the system's integrity at the same time. Should safeguards be explicit in statutory law or could this be addressed through guidelines for drafting internal rules or management plans? The key here is that members of the collective that holds customary tenure rights are able to seek impartial arbitration when they feel that their basic rights have been violated under customary law.

These issues must be addressed in a sensitive and pragmatic manner that encourages but does not impose reform towards full compliance with the standards of good governance. As a principle, interference in the internal governance of customary tenure systems should be kept to a minimum to avoid undermining group autonomy and the adaptive flexibility of the system.

Interventions by State authorities responding to these issues may include:

- the delineation of clear boundaries relating to areas of customary tenure to help prevent encroachment
- establishing supra-community conflict resolution and grievance mechanisms

Planting swidden rice in Shwe Taung Ngwe Taung village, a S'gaw Karen community in Bago Yoma. Labour exchange is still commonly practiced in different stages of swidden farming. (Photo: Christian Erni)

65 United Nations Economic and Social Commission for Asia and the Pacific (2009)

- adopting laws regarding environmental and social safeguards that include binding standards for good governance and human rights
- establishing co-management schemes with local administration for environmental protection
- limiting the bundle of rights allocated to the local governing institution to avoid mismanagement (such as not allowing land sale or transfer to outsiders)

For natural resource protection, the law can grant legal enforcement rights to enable communities to act as soon as a crime is detected. These could include for identity control and temporary arrest of violators, confiscation of material and the prevention of the destruction of evidence. The law should also ensure that evidence collected by communities will be valid in court. This may require some form of collaboration in enforcement between the police and communities.

State support functions linked to the recognition and protection of customary tenure rights

Even if the formalisation of customary tenure recognises the autonomy of community-level governance, it is implied that the State will secure some important functions that may involve several government agencies at different levels. These functions include:

1. **Developing and enacting a legal framework** for the recognition of customary tenure and the governance of land and resources. This may involve delegating this responsibility to states or self-governing territories. Administrative and parliamentary roles then work to develop and enact the laws. An important role is to ensure consistency between laws and sub-legislation and that laws related to forestry and environment do not contradict customary tenure rights.
2. **Registration and formalisation** of customary tenure rights. In line with the legal framework, the responsible administrative services must implement the recognition process either systematically or based on demand from specific groups. This includes allocation of relevant human and budgetary resources. Several levels of land administration may be involved depending on the complexity of the process. Sometimes new administrative services need to be set up. For example, a specific administration to support an FPIC process might be useful.
3. **Independent and supra-community monitoring, and grievance and conflict resolution mechanisms.** After the registration and formalisation of rights, it is important to ensure that the agreed rules are respected and that the local institution has the capacity and necessary support to enforce them. If members of the local governing institution are directly involved in or cannot manage a conflict, it must be reported to an independent board to ensure an independent conflict resolution process. Mechanisms may involve the court as necessary, but must remain accessible to villagers.

5. Reform State agencies to improve downward accountability

In Myanmar, as in many countries, land administration has been set up to serve State interests – particularly to generate internal revenue through land taxation. Management has always been hierarchical and top down with little space for initiative at the local level, and has generally not been responsive to local needs. There are also issues related to corruption and the prioritisation of the interests of powerful stakeholders over the public good. The attitude of government staff towards rural people can also be patronising or even threatening and oppressive, especially in conflict areas. In response, rural communities have adopted avoidance strategies in relation to local authorities and administration. This behaviour constitutes a barrier to the recognition of customary tenure rights.

In Myanmar, land administration in rural areas is mostly shared between three administrations: the General Administration Department; the Department of Agricultural Land Management and Statistics; and the Forest Department. The General Administration Department is the most powerful department with actual decision-making responsibility on most land issues. The department falls under the Ministry of Home Affairs and has remained under direct military control for most of its existence – except for a short period under the civilian government. It has a very hierarchical structure, with a mandate closely linked with security issues, and is responsible for tax collection.[66] The Department of Agricultural Land Management and Statistics deals purely with technical issues related to land administration. The department primarily responds to government requirements on statutory tenure management, maintaining a cadastre and identifying land available for investment. The Forest Department has direct decision-making authority

66 Kyi Pyar Chit Saw and Arnold (2015, p.10)

within the Permanent Forest Estate. This important role in forest management may overlap with customary rights.

For successful legal reform, a parallel overhaul of State agencies is necessary. A change is needed in the administrative culture and attitudes of government staff towards a more service-oriented administration that is accountable and responsive to local communities. There are several approaches to administrative reform that create incentives for downward accountability. One approach could be the creation of an oversight committee to deal with community grievances related to government agencies. This committee could include elected local representatives or parliamentarians. Given the history of current State agencies, it might be advisable to create a whole new State agency to deal with customary tenure and FPIC processes. A new management culture could be established that is more inclusive, more gender balanced and comprises more staff from diverse ethnic groups.

A woman weeding a shifting cultivation plot in Laatui village, Tedim township, Chin State (Photo: Antoine Deligne)

6. Recognise nested rights within communities and address tenure holes

While the overall management of the territory is under the jurisdiction of the community as a whole, different kinship or residential groups (e.g., extended families, lineages and clans) may hold different use, access and alienation rights to different types of land and resources. Furthermore, members of these groups may hold individual rights to certain plots of land or to certain types of resources. In most complete systems, the nested rights to different types of land and resources for different groups and individuals are managed and allocated according to customary rules. There is no need for additional provisions for their recognition in statutory law. Any additional, overlapping recognition could interfere with customary rights and undermine the customary tenure system. In these cases, nested rights remain customary since they are acquired in accordance with customary practices.[67]

Explicit recognition of nested rights by the community governing institution

In some contexts, the security of these rights cannot be ensured by the customary system alone. In these cases, the explicit recognition of nested rights – and individual rights by extension – may be necessary. This could be in community by-laws or through demarcation and registration in a community cadastre. The recognition of nested rights could be combined with the requirement that any individual wishing to apply for formal recognition of their rights under statutory law has to obtain the FPIC of the community.

An example of how the recognition of individual rights under a collective customary tenure regime can be dealt with can be seen in Tanzania, as explained by Paul De Wit.[68]

> The rights-holding character of the village, through the village council is in fact similar to that of an allodial title. The village is the central unit of land holding from which all individual and other rights flow. These individual rights are in some way disannexed from the collective village shell. After due process, individuals receive a customary right of occupancy (with a formal certificate). This right has several private property elements such as sale and mortgage, and assigning derivative rights such as leases and licences. Hence ownership of rights is much vested in the village members rather than in the new institution.

67 Paul De Wit, personal communication, July 2021.
68 Paul De Wit, personal communication, July 2021.

Address tenure holes related to private statutory rights within customary areas

Individual (or subgroup) rights may have been legally recognised and registered prior to the recognition of customary tenure in the respective area. This may be in the form of land use rights or land titles. In this case, the question arises around how the customary tenure system should deal with such tenure holes in its territory. Usually, these rights must be respected unless they were obtained against the will of the community or in fraudulent ways – and the initiation of their annulation would be justified. The law can also provide the community with the possibility of re-establishing governance jurisdiction over these lands. This could be done by either converting the land into community-recognised individual rights or subjecting them to community rules regarding alienation and transfer, among others.

Consider overlapping tenure rights of neighbouring communities

Another frequent issue relates to areas that are accessed and used by several communities. The borders between villages are often not defined. If the borders are defined, they do not reflect the actual use and access of some areas by several communities. For example, recognising and formalising the rights of a specific community over a forest may exclude neighbouring communities who have customarily accessed the area, and deprive them of their rights over these resources. Therefore, for options that require the delineation of a customary zone or a territory, particular attention is required to avoid excluding other communities, or worse, triggering a conflict between communities. Neighbouring communities should participate in the process of mapping so that their own customary practice can be taken into account. Customary areas with multi-community tenure rights that are jointly used should be allowed in both law and practice. If necessary, a specific mechanism for the management of these areas and for conflict resolution can be established by the communities. The law needs to provide the space and flexibility for these local arrangements.

7. Overhaul land categorisation to accommodate customary tenure

Existing land categorisation and the resulting compartmentalisation of land and land administration is one of the challenges for the recognition of customary tenure rights. Since the colonial era, Myanmar land classification and subclassifications have remained rather stable while the rules that apply within each category have evolved. The colonial classification was created for the purpose of State management and control – primarily to collect State revenues and maintain forest land under State control. In the socialist regime, nationalisation aimed to prohibit absent landlords and control agriculture production. Since the end of the socialist regime, reforms have primarily been oriented towards acquisition of land for agribusiness investment and the liberalisation of land markets. Recognising local practices and customary tenure was never an objective of land administration. At best, it was tolerated as long as it did not affect State interests.

Consultation with Danu women about the customary tenure practices of Taelu villagers, Ywangan township, Southern Shan State (Photo: Natalie Y. Campbell, MRLG)

Table 2 provides a summary of the main land categories in rural areas in Myanmar as of June 2022.[69]

Table 2: Main land categories in rural areas in Myanmar, by status, law and jurisdiction.

Category	Sub-categories	Status	State-granted rights	Main law	Under jurisdiction of
Farmland	Lowland (paddy land), upland (*ya*), silty land, alluvial land, hillside land (*taungya*), shifting cultivation land, perennial crop land, nippa palm land, garden land	Individual private land	Land Use Certificate	Farmland Law (2018 and 2020)	*Farmland Management Body* and Department of Agricultural Land Management and Statistics, Ministry of Agriculture, Livestock and Irrigation
Vacant, Fallow and Virgin land (VFV land):		State land	VFV Land Use Permit (long-term lease)	VFV Land Management Law (2012 and 2018)	*Committee for the Management of VFV Lands* and Department of Agricultural Land Management and Statistics, Ministry of Agriculture, Livestock and Irrigation
Forest land	Reserved Forest Protected Public Forest Protected Area	State land	Community Forest Certificate (CFC) Community Conserved Area	Forest Law (2018), Community Forestry Instructions (2019) Biodiversity and Conservation of Protected Areas Law (2018)	Forest Department and Environmental Conservation Department, Ministry of Natural Resources and Environmental Conservation
Grazing land (pasture and village communal lands)		State land	Open access to residents, grazing grants	Ward or Village Tract Administration Law (2012)	Village Tract Administrator, General Administration Department
Residential land		State land Freehold	Grant, lease or license	Ward or Village Tract Administration Law (2012)	Village Tract Administrator, General Administration Department

69 See more information about land categories in Myanmar in Leckie and Simperingham (2009) and UNHabitat (2010).

The State grants different kinds of rights according to the category of land and each goes through a specific application procedure involving different government agencies. Different rules and regulations apply for each land category regarding use, management, inheritance, transfer and other aspects related to rights. The State does not grant rights on the basis of formal recognition of customary tenure. The recognition of collective rights over a landscape or territory that covers several categories of land – such as farmland, forest or grazing land – would not be feasible under a compartmentalised land governance system like the one practised in Myanmar today.

A new land law will have to create a specific land category for customary tenure in multi-purpose areas where specific laws and existing land categories either do not apply or where they could be applied. A comprehensive revision of the laws for each land category will also be required to ensure that they either exclude land under customary tenure, or specify clearly how the legislation applies in areas where customary tenure is designated.

In the upland areas of Myanmar, a very common use of the land is shifting cultivation. This is a form of rotational agroforestry with a long fallow period, commonly over ten years, that allows forest re-growth and the restoration of fertility for the land to be used again in a subsequent agriculture cycle of one or two years. As long as the fallow period is long enough, these agricultural systems have been characterised by high biodiversity and as contributing significantly to the livelihoods of upland communities. These agricultural systems have decreased over time under pressure from the government to shift to permanent agriculture, but more so through the conversion of these areas into permanent plantations of industrial crops. Nevertheless, they remain prevalent and a fundamental aspect of customary tenure systems.[70] The current legal land categories do not distinguish these practices which alternate between forest cover, agriculture and fallow. Legislation does not yet allow for the formalisation and legal protection of these practices. However, the amended Farmland Law 2018 indicates that a specific by-law should be developed for this purpose.[71] A specific land category could be formalised, or these practices should be protected through the recognition of a customary tenure land category that would encompass shifting cultivation.

Address tenure holes related to State lands in customary tenure areas

If customary tenure is recognised over a large multi-purpose area, this would imply that the issue of lands that are under State management are addressed. Land categories here would include land designated as State forest or protected areas, and land covered by tenurial rights granted by the State (such as long-term leases to companies). With the recognition of customary governance rights within these areas, designation could be renegotiated – partial or complete exclusion, or an agreement on collaborative management.

Co-management appears as a relevant participatory tool to provide guarantees to the State that major public objectives such as the conservation of areas of high biodiversity value or the maintenance of forest cover are duly integrated into customary managed areas, especially if they overlap with State lands. Local communities may not have the capacity to patrol protected areas, or the authority to enforce rules or clamp down on environmental crimes. In these circumstances, communities may welcome the intervention of State officers in their areas based on mutually agreed rules. In this case and contrary to Option 6, the recognition of customary tenure is a distinct process carried out prior to co-management agreement.

Abolish the category of VFV land

Communities, civil society and human rights organisations have been fighting the very concept of Vacant, Fallow and Virgin land (VFV land) for years, trying to convince policymakers that *"There is no vacant land"*.[72] All lands in Myanmar are used and occupied in some way by local communities. The allocation of VFV land use permits has been a major source of land conflict and dispossession in Myanmar, especially in areas under customary and informal management.[73] The VFV land category created through the VFV Land Management Law in 2012 was just a reintroduction of the 'waste land' category from the colonial era. This category is based on the illusion that there are large tracts of unused land with no inhabitants that are up for grabs to any capable developer – either large agribusinesses or individual farmers. No one can actually define VFV land. It is a default category that covers all lands that do not yet have a designated category.[74]

70 Erni (2021, p. 16).
71 Paul De Wit, personal communication, July 2021.
72 Springate-Baginski (2019).
73 San Thein et al. (2018, pp. 3–4).
74 Allaverdian (2019).

In the much-criticised amendment of the VFV Land Management Law in 2018, an article was introduced to exclude customary tenure or traditional lands from the application of the law.[75] However, the article is of no effect because there was, and still is, no procedure to identify customary lands.

The easiest and most immediate legislative act that would most significantly improve the protection of customary tenure rights across the country would be to repeal the VFV Land Management Law altogether. A strict moratorium on new land concessions (including through other laws) should also be established until effective legal protection for customary lands is in place.

8. Ensure that economic benefits can be derived from customary tenure rights

In many customary areas, communities are involved in livelihood activities that are connected to traded commodities and markets. Farmers are looking not only to secure their rights to land but they also need to maintain and improve their livelihoods and economic opportunities. Without the capacity to derive sufficient economic benefits from their customary lands and resources, communities may not be able to exercise and protect their land rights. The recognition of customary tenure rights must take into account community needs to use and manage the land productively. The following should be provided:

- the right to harvest and commercialise valuable products (including timber from plantations in community-managed forests)
- strong protection for long-term investments (including the right to compensation in the case of land acquisition by the State)
- the right to enter into contracts with investors and to lease land (such as for sustainable plantations or re-forestation in degraded areas)[76]
- the right to enjoy tax benefits from the conservation of valuable areas (such as through the preservation of a watershed area of a dam, REDD+[77] and other conservation programmes).

An example where communities benefit economically from customary lands is in Mozambique where *"communities having established (post factum) pre-existing rights in protected areas and forest concessions are eligible for payment of 20 per cent of the taxes that the operator (protected area operator or the forest concessions holder) pays to the State. The community does not directly exercise its right but derives direct benefits from others exercising economic activities."* [78]

Ensure access to credit without land as collateral

One of the reasons why individual rights under statutory law are favoured by community members is that individual titles can be used as collateral for loans. However, collective land titles cannot generally be used legally as collateral because collective rights often do not include the right of alienation or transfer. Legislation could be adapted to allow farmer groups to access loans on the basis of collective land titles or to allow for customary individual land certificates to be used as collateral with the agreement of the community.

The Myanmar Agricultural Development Bank provides loans to farmers with a land use certificate as proof that they are actual farmers, but not as collateral.[79] It should be possible to allow collective titles or certificates to offer the same guarantee for a group of farmers who want to invest in their collectively held area.

Forests provide various NTFPs that have an important economic value, such as bamboo for the Karen (S'gaw) community of the Shwe Taung Ngwe Taung village in Bago Yoma, (Photo: Saw Eh Khu Dah, POINT)

75 Republic of the Union of Myanmar (2018, Article 30-a) *"Management of the following types of land shall not be governed by this law: (a) The lands for which the right to use as hillside cultivation (Taungya land) is granted under the existing law and rules, (b) Customary lands designated under traditional culture of the local ethnic people."* (unofficial translation).

76 Noting the risks associated with private sector engagement for communities and the need for safeguards to ensure that communities are able to negotiate and enforce favourable terms.

77 REDD+ means Reducing Emissions from Deforestation and forest Degradation, plus the sustainable management of forests, and the conservation and enhancement of forest carbon stocks.

78 Paul De Wit, personal communication, July 2021.

79 In practice, farmers must hand over their Form 7 certificate to the bank which in principle prevents them from selling their land without bank approval. Legally, there is no foreclosure process but there might be strong pressure from bank staff and the village administrator for the farmer to sell the land in case he or she fails to pay back a loan.

9. Protect the rights of minorities, displaced people and migrants

The notion of a village as a homogenous community of long-time residents of a well-defined ethnic group who can peacefully manage their land and resources might, in reality, be more the exception than the norm across Myanmar. In the many conflict-torn areas of the country, communities have been forcibly displaced. Many communities have been sheltering internally displaced people (IDP) for a long time due to the protracted conflict in their area of origin. New communities sometimes settle in an area abandoned by IDPs. However, the rights of the IDPs in their area of origin are not extinguished. Many rural people have also migrated to upland areas with dynamic agribusiness opportunities in search of jobs and better livelihoods. Some settle more permanently in these places. Even in villages that do not have in-migration or IDPs, the long-term history of the village is complex because multiple groups with distinct ethnic identities coexist on the same territory. Special attention needs to be paid to residents within the respective area who do not belong to the majority ethnic group – for example, non-indigenous people living in ethnic communities, or members of another ethnic group.

It is important that the recognition of customary rights does not take place at the expense of the legitimate rights of the following groups: ethnic minority groups within a larger ethnic group; permanent settlers; migrants; IDPs in host communities; and IDPs in relation to their area of origin. The specific rights of these people can be protected through:

- the representation of different social groups in the local management institution
- the creation of distinct customary zones
- the exclusion of some lands from customary management (see Option 5)
- the creation of a supra-community grievance mechanism

The NLUP (2016) stipulates that *"When managing... restitution related activities that result from...unfair land confiscation or displacement due to the civil war, clear international best practices and human rights standards shall be applied..."*.[80] A new national land law should align with principles relating to IDPs as set out in the UN Guiding Principles on Internal Displacement, the Pinheiro Principles and other international standards. IDPs and other people affected by conflict should retain all their land rights and be eligible for the restitution of their original lands, including the areas under collective and customary management in their place of origin. Where new people have settled in areas abandoned by IDPs, land restitution also needs to ensure justice for these secondary occupants who have acquired IDP land.[81]

Awareness raising session about the customary rules and regulations in a Kayah village (Photo: Alesio, KMSS)

10. Establish legal recourse and independent grievance and conflict resolution mechanisms

Legal procedures should prioritise the protection of rights over their formalisation. The government should invest more resources and efforts in establishing protection, conflict prevention, and grievance and conflict resolution mechanisms than in complex registration procedures. The formalisation process should be adapted to the requirements of a legal recourse or grievance mechanism based on what is reasonable to expect from a community to prove their long-term rights over an area.

A new law protecting customary rights will be effective only if it provides a clear avenue for communities to defend these rights in cases where rights are violated or in dispute.[82] It is fundamental to create effective legal recourse mechanisms that are available to customary rights holders – collective and individual alike. This will strengthen the capacity

80 Republic of the Union of Myanmar (2016, Part V, Article 38).

81 Oxfam (2018, p.26).

82 "[T]*here is no mechanism in the Farmland Law that allows disputes involving allocation or use of farmland to be heard by the judicial branch of Government*" (Oberndorf, 2012, p.19). Currently, the legal system does not provide the possibility to settle land conflicts through the court system, except for inheritance issues or in the case of trespassing under the Penal Code. Farmers and victims of land grabbing by powerful interests have had to resort to occupying their own land and conducting 'ploughing protests' in order to bring their case to court. This often means that they will be arrested as trespassers and are at risk of being sent to jail. (Boutry et al., 2017, pp. 145–146).

of local governing institutions to apply principles of good governance – in particular, transparency, non-discrimination, equity and gender equality.

Develop multi-level grievance mechanisms for both the community and individual rights holders

Legal recourse through the courts is often costly, difficult to access and inefficient for people in rural areas. This is especially true for those in remote areas where government and judiciary services are weak or absent. The priority in these cases should be to support the creation of out-of-court and independent grievance and conflict resolution mechanisms that are low cost, local and easily accessible to the communities. Only complex or large conflicts should be dealt with by the judiciary system.

These grievance mechanisms might be established at three levels:

(1) A community-based conflict resolution mechanism that is based on either customary tenure or new rules, but managed within the community, possibly with the support of local authorities

(2) A supra-community, out-of-court independent grievance mechanism that is local and easily accessible

(3) Judicial recourse with access to courts that would deal with the most complex issues and would be situated as close as possible to communities

These three avenues for legal recourse need to be stipulated in a law that protects customary tenure. The law also needs to state the legal validity of decisions taken through these grievance mechanisms. The feasibility of these mechanisms will need to be tested and adapted over time.

Clarify legal recourse for communities to contest administrative decisions in relation to the recognition or the revision of their customary rights

Communities that have been given rights or that are applying for the recognition of their customary rights need to be protected from unilateral administrative decisions. It is possible that rights may be rescinded, requests rejected or demands blocked by unnecessary bureaucratic requirements. If the government or the responsible State institution takes a decision to rescind a title, certificate or agreement, or to refuse to recognise the rights of a specific community, the grounds must be clearly stated. Communities should have the possibility to contest decisions in court or through an independent mechanism. The creation of such a mechanism would be very innovative not only for Myanmar, but also for the region.

Douwekuu villagers discussing their customary tenure practices in Kayah State (Photo: Elena, KMSS)

Shifting cultivation plots on steep slopes of Northern Chin State (Photo: Antoine Deligne)

Conclusion

This publication proposes six options for the legal recognition of customary tenure. Each option differs in the level of complexity and tenure security as well as the degree of State control and local autonomy in land governance. An important question is whether all or only some of these options should be turned into laws and sub-legislation. Different mechanisms might be appropriate for different contexts. The options are not mutually exclusive and any concrete solution may include more than one of the options proposed. Consultations will need be conducted with people in different areas to identify the most appropriate solutions.

The options are presented as the ideal scenario and any concrete solution will need to be tailored according to a number of cross-cutting issues that were discussed in Section 3. Issues to consider include recognising nested rights, addressing tenure holes, providing effective legal recourse and reforming State agencies – which may be the most challenging. Some of these issues go beyond the design of a law and consider how the law will be implemented. The recognition of customary tenure does not stop at enacting legislation but needs the support of adequate State institutions to achieve its intended results in practice.

Take into account the aspirations of indigenous peoples for self-determination

Myanmar is home to a large number of ethnic groups, and customary tenure systems are almost as diverse as the people who practise them. Customary tenure is found mainly among ethnic groups living in the uplands who belong to what are officially called ethnic nationalities. Some of these groups have come to identify themselves as indigenous peoples. Many of these groups have aspired to and fought for self-determination for many decades. More recently, the aspiration is in the form of autonomy in a federal system of government. This political reality needs to be taken into account when discussing options for the recognition of customary tenure in Myanmar since indigenous peoples (or ethnic nationalities) maintain that they have pre-existing rights to their land, territories and resources.

It is important that any legislation on customary tenure provides a response to these aspirations for more autonomy and ownership of natural resources – even if the response is partial. The demands for a federal system over many decades show that there cannot be one solution for the entire country. Each (future federal) state could have its own solution. Government administration would also need to change the way it interacts with local communities from a prescriptive, top-down and often authoritarian approach towards a more responsive, service-oriented and respectful attitude. This approach should allow space for communities to be part of decision-making.

Align options with Myanmar's international obligations and international best practices

Myanmar, like any other UN Member State, has obligations under international law. The enactment of any law on customary tenure must therefore comply with relevant international legal instruments. In the context of international frameworks, terminology is important for ethnic groups in Myanmar and whether they are recognised as ethnic nationalities or indigenous peoples. Claims to pre-existing rights for indigenous peoples are supported by international laws and conventions – such as UNDRIP or ILO Convention 169 [83] – which explicitly provide for the recognition of rights over land, territories and resources, and rights to customary tenure. The more recent UN Declaration on the Rights of Peasants also includes articles on the recognition of rights to land and resources, and the recognition of customary land tenure rights.[84]

The NLUP (2016) states that any new legislation should "adopt international best practices such as the voluntary guidelines on the responsible governance of tenure of land, fisheries and forests in the context of national food security and human rights standards". This international framework is a useful tool to assess whether policies and practices are moving in the right direction.

Ensure FPIC of communities

It is inevitable that there will be trade-offs between what people (or the international community) want and what is acceptable to a government, or between strong legal protection and the informal systems that have worked for people so far. Merging formal and informal systems through codification in law poses great challenges since there is a danger that, in the process, some aspects of the original system will be lost. The key principle should be to have as

83 Myanmar has not yet ratified Convention 169 (International Labour Organization, 1989).
84 United Nations Human Rights Council (2018).

little State intervention as possible but as much as is necessary to ensure tenure security and social justice for all – especially for the vulnerable and marginalised sectors of society.

Not every community will want to have customary rights recognised. Some may prefer to access statutory rights only and others may prefer their customary tenure system to continue outside of any formalisation process. The customary tenure recognition and formalisation process should therefore include FPIC and allow communities to decide whether they want to follow a specific legal process or no process at all.

Generate broad public support and change perceptions about customary tenure

A legal process for the recognition of customary tenure will not emerge from purely technical discussions. The common perception of customary tenure as a set of backward and inefficient practices is a strong impediment to the promotion of support for legal reforms. The public needs to understand what customary practices are in reality – that they are not static or against development but a tool for more sustainable and equitable development.

Moving forward in the face of political turmoil

Grabbing of land held under customary tenure is not likely to be addressed under the current political context in Myanmar. CSOs are determined to continue their reflections and discussions on what kind of land laws they envision for the country, and how these laws can properly address the need for the recognition and protection of customary tenure. This publication was initiated by members of the Alliance for the Recognition of Customary Tenure in Myanmar in the hope that, in the coming years, the people of Myanmar will be able to develop an inclusive discussion about the future of both the people and their lands.

Customary tenure is also important for lowland communities. For example, alluvial lands within a river are shared between farmers according to customary rules in Larboet Sanpya village in Sagaing (Photo: Antoine Deligne)

Annexes

Annex 1. Glossary[85]

Alienation	is the transfer of ownership of land.
Bundle of rights	the different rights and responsibilities that constitute a customary tenure system, like the right to access, use, manage and transfer, among others.
Collective ownership	is where the holders of rights to a given natural resource are clearly defined as a collective group, and where they have the right to exclude third parties from the enjoyment of those rights.
Common property	is typically land and other resources in which entitled beneficiaries, whether individual or community defined, have specific common rights. For example, community members can use a common pasture for grazing their cattle independently of one another. The community controls the use of the common property and can exclude non-members from using it.
Communal ownership	is a commonly used term to describe those situations where rights to use resources are held by a community. It often includes communal rights to pastures and forests, and exclusive private rights to agricultural and residential parcels. In such community-based tenure regimes, people may not have the right to transfer their land to others, or may have strictly limited rights to transfer (for example, transfers may be limited to heirs through inheritance, or sales may be restricted to members of the community).
Custom	results from practice since time immemorial. Land use rights can be on the basis of custom. These rights are often created through use of the land over a long period of time. They are often the rights created by ancestral occupation and use of land by traditional societies. The creation and recognition of boundaries where these exist for such land will often use natural features, or planted trees or hedges. Although custom and customary use rights are most frequently associated with traditional societies, western societies may also recognise such rights.
Governance	is the process of decision-making and the process by which decisions are implemented (or not implemented).[86]
Incorporation	is the legal process of forming a corporate entity or company which is separate from its owners – that is, it separates assets and income from owners and investors.
Land administration	is the way land tenure rules are applied and made operational.
Land governance	consists of the rules, processes and institutions by which decisions about the access to, use of and control over land are made, implemented and enforced, and how competing claims on and conflicts about land are managed and resolved. It defines, among others, how land is administered and managed.
Land management	is decision-making regarding the use of land.

85 With a few exceptions, this glossary mostly uses definitions given in FAO's multilingual thesaurus on tenure (Ciparisse, 2002).
86 United Nations Economic and Social Commission for Asia and the Pacific (2009).

Land ownership	in the English Common Law context land ownership is comprised of a set of rights in land held by the owner.
Land tenure system	in a given jurisdiction comprises the set of possible bases under which land may be used.
Parcel of land	is an area of land with a particular ownership, land use, or other characteristic. A parcel is frequently used as the basis for a cadastre or land registration system.
Pre-existing rights	are rights held prior to the formation of the State which the respective people or communities are part of. The rights are held irrespective of whether they are recognised by the State.
Private property	is property that is held privately, whether individually, jointly or corporately.
State-granted rights	are rights held in accordance with the law of a State.
State land	in some jurisdictions is a distinct class of land owned by the State.
State property	is property owned by the State.
Registration	is the process by which rights and interests are recorded in registers.
Sub-surface resources	are resources lying below the surface of the earth or the seabed, like hydrocarbons (oil, gas) and mineral resources
Tenure	is the relationship, whether legally or customarily defined, among people as individuals or groups, with respect to land and associated natural resources. Rules of tenure define how property rights in land are to be allocated within societies. Land tenure systems determine who can use what resources for how long, and under what conditions.
Territory	may be viewed in legal, social and cultural contexts as the area where an individual or community lives. Territory could be at State level, where the State's territory includes all of those areas on land and sea where the State has jurisdiction. Territory can also be at intermediate levels of local government, where democratic responsibility ensures a dimension of social accountability within the relevant administrative boundaries. At the lowest level, each individual will identify an element of personal territory.
Title	to a property is the basis of its ownership.
Use right	or right to use land, is one of the essential rights of land ownership.
Zoning	is a planning procedure where a designated zone is allocated for a specified use or uses.

Annex 2. Main terms used for ethnic groups in Myanmar

The NLUP (2016) associates customary tenure with 'ethnic nationalities' and 'ethnic groups'. In recent years, the term 'indigenous peoples' has been increasingly used and promoted by a number of CSOs in Myanmar and, to a very limited extent, has appeared in English versions of some government policy documents. Therefore, the three terms ethnic nationalities, ethnic groups and indigenous peoples are briefly introduced here. Due to the controversy surrounding its application in Myanmar, the term indigenous peoples is discussed a little more extensively. The translations of the terms are partly based on those given in a briefing paper on Indigenous Peoples' Rights and Business in Myanmar.[87]

a) Ethnic nationalities: *taing yin thar / tain yin tha / taing yin thar lu myo mar*

Also translated as 'national races' or sometimes as 'original' or 'indigenous' peoples.[88] It is the term used in the Constitution of 2008, classifying all people in Myanmar into eight ethnic nationalities (Bamar, Chin, Kachin, Kayin, Kayah, Mon, Rakhine, Shan). According to the Citizenship Law of 1982 they comprise all those national races or ethnic groups which have been present in the geographical area of current Myanmar before 1823 (the beginning of the first British annexation). Only they have the right to full citizenship. Those who are not classified as *taing yin thar* – such as people of Indian or Chinese descent, or the Rohingya – can only apply for the status of 'associate' or 'naturalised' citizenship.[89]

b) Ethnic groups or local ethnic groups: *de tha kan taing yin thar / taing yin thar oak su myar*

Means 'local ethnic nationality/national race' (*de-tha-kan means local*). This word is sometimes used to refer to particular local ethnic groups. It refers to a group of people who share a common heritage, culture, and/or language. It is a more academic, classificatory term without any political implications.

c) Indigenous peoples: *hta nay taing yin thar*

Hta-nay means 'birthplace', 'place lived at for a long time' or 'place of origin'. This term is generally used by indigenous peoples' organisations in Myanmar. Adding hta nay stresses 'indigeneity'. In accordance with the understanding of the term indigenous peoples in international law it does not include the nationally dominant group – the Bamar. According to the UNDRIP, indigenous peoples have the right to land and resources, and to self-determination.

The UNDRIP does not include an official definition of indigenous peoples. The most quoted international definition is that of the UN Special Rapporteur José Martínez Cobo in his report of 1986.[90]

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.
>
> The historical continuity may consist of the continuation, for an extended period reaching into the present, of one or more of the following factors:
>
> (a) Occupation of ancestral lands, or at least part of them;
>
> (b) Common ancestry with the original occupants of these lands;
>
> (c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership on an indigenous community, dress, means of livelihood, life-style, etc.);
>
> (d) Language (whether used as the only language, as mother- tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual or normal language;
>
> (e) Residence in certain parts of the country, or in certain regions of the world;
>
> (f) Other relevant factors.

87 Myanmar Centre for Responsible Business (2016, p. 32).
88 See for example Gravers and Ytzen (2014). Literally, it means "sons/offspring of the geographical division", Transnational Institute and Burma Centrum Netherlands (2014, p.1).
89 See Gravers and Ytzen (2014, p. 148) and Transnational Institute and Burma Centrum Netherlands, (2014, p.1)
90 Martínez Cobo (1986, paras 379–80).

Another frequently quoted definition is that of the International Labour Organization's Indigenous and Tribal Peoples Convention of 1989 (ILO Convention No. 169), which states in Article 1(1) that the convention applies to:

> "(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
>
> (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the tie of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions."

The Government of Myanmar does not recognise the existence of indigenous peoples in the country. The position taken is either that all Burmese are indigenous or that there are no indigenous peoples in the country.[91] However, the term is occasionally used in English versions of government policy documents. For example, the draft safeguards for REDD+ use the term 'indigenous peoples' but always in conjunction with 'ethnic groups'.

Since all these national races are *taing yin thar*, the recently enacted Ethnic Rights Protection Law (also translated as Protection of National Races Law[92]) applies to all, including the socially, politically and economically dominant Burmans. The Myanmar Government's understanding of the meaning of 'indigenous peoples' is not in line with the definitions used in international conventions where one of the main criteria is the application to only non-dominant groups.

Therefore, CSOs in Myanmar use a term for indigenous peoples that is different from the official government term – *taing yin thar*). Civil society promotes the term *hta nay taing yin thar*. This term is actually used – though only once – in the Ethnic Rights Protection Law. Chapter IV, paragraph 5 vaguely provides for some form of right to consultation for *hta nay taing yin thar* in the case of development work, business and extraction of natural resources. A very limited right that falls short of the full FPIC rights provided by the UNDRIP. However, in the English version of this law it is translated as local 'ethnic groups'.

While indigenous peoples' organisations in Myanmar tend to agree on the use of the term *hta nay taing yin thar* – and it is clear to them that it does not apply to the dominant ethnic Burmans – there is no consensus on which groups are to be included in this category. Some groups may prefer not to be included. This is in line with self-identification as one of the basic principles for the recognition of indigenous peoples, as widely agreed on by indigenous rights activists and organisations across the world.[93]

91 Statement made by the representative of the National Human Rights Commission in the National Policy Dialogue on the Rights of Indigenous Peoples in Myanmar, Nay Pyi Taw, 2–3 February 2017. One of the outcomes of this policy dialogue was the recognition of the need to settle the issue of the definition of indigenous peoples in Myanmar and the choice of the right term in Burmese once and for all.

92 Myanmar Centre for Responsible Business, Institute for Human Rights and Business & Danish Institute for Human Rights (2016 p. 32).

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Clouds over the Manipur river near Falam, Chin State (Photo: Antoine Deligne)

This study aims at providing guidance to civil society organisations and other reform actors in Myanmar about how to recognise and protect customary tenure in both policy and practice. Based on international experiences and concepts, the study outlines six options for recognising customary tenure with different levels of complexity. These options are not mutually exclusive, as each one may fit a specific context. International experience shows that good legal frameworks are necessary, but never sufficient to ensure that rights are fully protected. The effectiveness of these options in practice depends on a range of issues that must be kept in mind when drafting and implementing legislation, such as the need for interim measures, adapting to federalism, reforming state institutions, and so on. The proposed legal process for customary tenure recognition should provide flexibility for communities to decide if they want to follow such a process and how they want to formalise their tenure.

This Thematic Study has been elaborated in collaboration with the members of the MRLG Alliance for the Recognition of Customary Tenure in Myanmar:

Promotion of Indigenous and Nature Together (POINT) is a Myanmar organisation established in 2012 for promoting the rights of indigenous peoples and increasing awareness on environmental issues. POINT is working together with indigenous communities on rights-based approaches to development and natural resource management.

For more information, please visit:
www.pointmyanmar.org

The Mekong Region Land Governance Project (MRLG) and its alliance members work together to protect the tenure rights of smallholder farmers in the Mekong Region and has been operating in Cambodia, Laos, Myanmar and Vietnam since April 2014.

MRLG is a project of the Government of Switzerland, through the Swiss Agency for Development and Cooperation (SDC), with co-financing from the Government of Germany and the Government of Luxembourg.

For more information on MRLG, please visit:
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