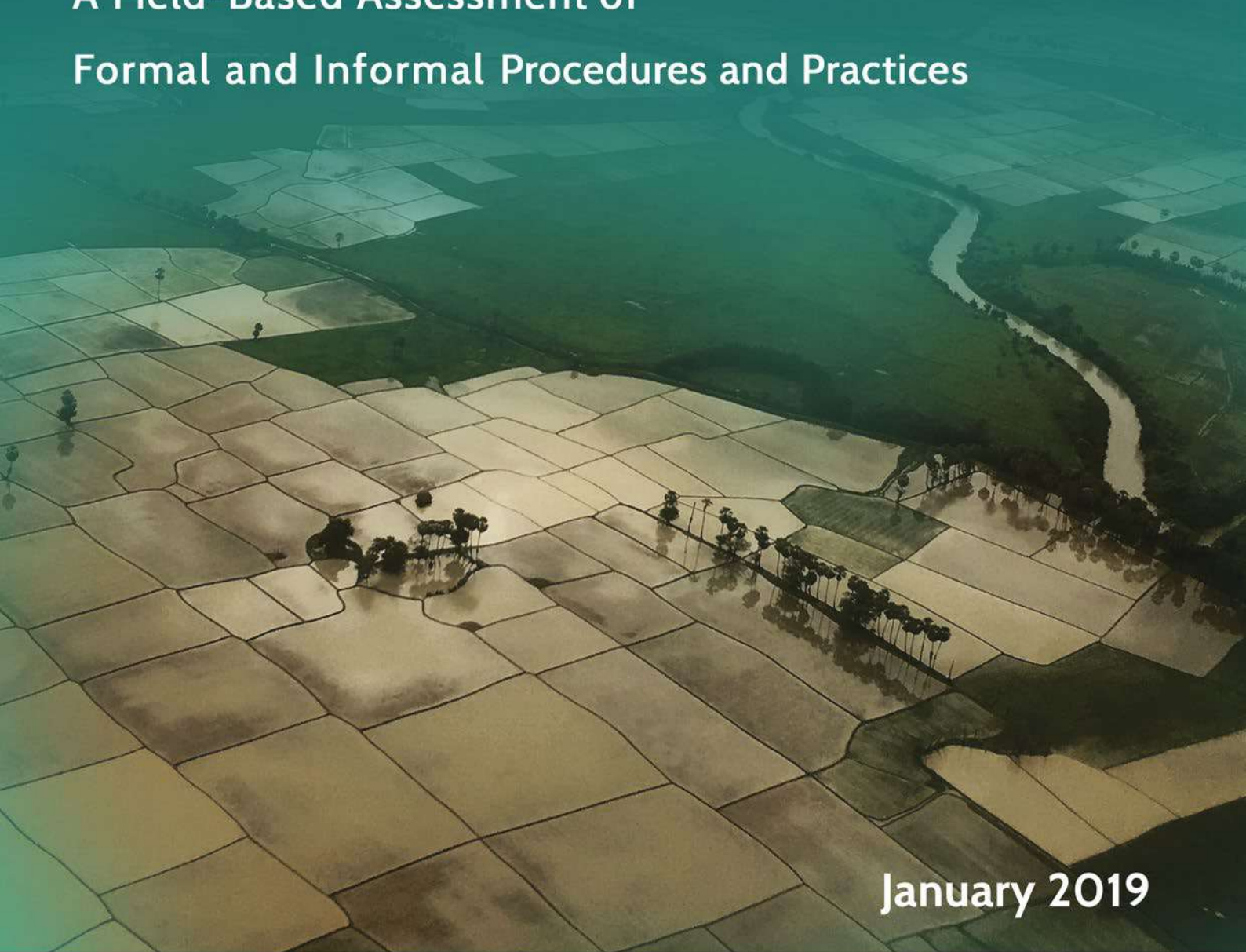


Obstacles to Housing, Land and Property Rights in Northern Mon State

A Field-Based Assessment of Formal and Informal Procedures and Practices



January 2019

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Executive Summary

Land in South-eastern Myanmar is a critical resource for the mainly rural population which is in need of greater safeguards within the formal, informal and customary systems of land administration. Customary law continues to operate at the village level, largely unchanged since pre-colonial times. While exhibiting many of the positive elements commonly attributed to such systems throughout the developing world, customary laws in relation to the resolution of land disputes are not always effective and equitable, and do not always display qualities which are consistent with rule of law standards. Deficiencies in transparency, accountability and equality have the potential to undermine the ability of marginalised sections of the population to access justice and obtain fair outcomes.

Decades of military rule have exacerbated the structural inequalities experienced by Mon, Kayin and other ethnicities in their interactions with government authorities and the parallel administrations of Ethnic Armed Organisations (EAOs). This means that in addition to the large amounts of land-grabbing experienced by the population across Mon State, the avenues of resolving such grievances remain inaccessible to most poor rural populations, due to a combination of fear of authorities, language barriers, lack of knowledge regarding land law and dispute resolution mechanisms beyond the village level.

Increased knowledge of land law and dispute resolution techniques are important tools to help farmers realise their HLP rights in Mon State, but accessing the protection offered by the state land registration mechanisms should also be promoted. The input from farmers and key informants indicates that very few farmers in the study area are in possession of Land Use Certificates (LUCs) under the 2012 Farmland law. The majority hold their land under customary recognition, making these parcels vulnerable to land grabs by other actors. The reluctance to engage with the formal system is a result of lack of awareness, language barriers, fear of authority and prohibitive costs. A simple solution to this situation would be for NRC to expand its activities to directly assisting beneficiaries through its partner network to obtain LUCs, as is currently being done by Lokha Ahlin and the Human Rights Foundation of Monland (and by Ecodev in Myeik area, Tanintharyi and Spectrum in Kachin State). This activity would go hand in hand with the awareness raising efforts mentioned above, which would highlight to farmers why registration is critical.

Decades of conflict and land-grabbing across Mon State have resulted in thousands of acres of land being confiscated by a variety of actors. The vast majority of this land has yet to be returned. As most of these confiscations took place during the military dictatorship, in very few cases was compensation paid, and if it was, it was not at market value. Although feedback indicated that cases involving the military are still too difficult to resolve for local CSOs, there have been successes through the formal legal system in pursuing cases where the actors involved have been government and / or companies. Resolution of these cases usually results in return of lands where government was involved, or compensation being paid where companies were involved. Legal aid providers in Mawlamyine and across Myanmar have had limited successes with strategic litigation including in cases even where incomplete land documentation was available.

It is therefore the conclusion of this assessment that while CDR methods are highly beneficial in assisting to resolve land disputes at the village and village tract level, the resolution of land confiscation disputes involving more powerful actors requires the coercive power of the court system, since the administrative system cannot be relied on. Successful strategic litigation would act as a deterrent to future actors planning on grabbing farmland and may result in either the return of grabbed lands or the payment of adequate compensation. This would enhance the standing of NRC and its partners among the beneficiary communities (and hopefully prevent reduced engagement caused by only engaging with them through training and awareness raising) by providing an example of how communities can be empowered to challenge illegal confiscations and see practical results.



Shwe Sar Yan Pagoda, Thaton, Mon state (Jose Arraiza, NRC)

Glossary

CBO	Community-based Organisation
CSO	Civil Society Organisation
DALMS	Department of Agriculture and Land Management Statistics
EAO	Ethnic Armed Organisation
FGD	Focus Group Discussion
FUGC	Forest User Group Certificates
GAD	General Administration Department
HLP	Housing, Land and Property
ICLA	Information, Counseling and Legal Assistance programme
IDP	Internally Displaced Persons
INGO	International Nongovernmental Organisation
KDN	Karen Development Network
KNLA	Karen National Liberation Army
KNU	Karen National Union
LUC	Land Use Certificate
MNLA	Mon National Liberation Army
MWO	Mon Women's Network
MYPO	Mon Youth Progressive Organisation
NLD	National League for Democracy
NMSP	New Mon State Party
PIN	People in Need
SLRD	Settlement Land Records Department (renamed DALMS, see above)
SLORC	State Law and Order Restoration Council
SPDC	State Peace and Development Council
UNDP	United Nations Development Program
UNHCR	United Nations High Commissioner for Refugees
VTA	Village Tract Administrator

Assumption & Limitation

Considerable limitations must be acknowledged regarding the collection of information in the preparation of this report. Given the limited time-frame and the small number of villages visited, the information collected cannot yield statistically significant data. It can, however, provide a brief overview of the types of issues faced by villagers in relation to land disputes, resolution mechanisms and interactions with duty-bearers.

The focus of the data collection in this study concerns northern Mon State only. Given that this area traditionally falls under Karen National Union influence, the analysis provided in the report only reflects the situation in these areas. In other parts of Mon State, for example, south of Mawlamyine (Ye, Kyaikmaraw etc), where the presence of the New Mon State Party is stronger and the concentration of Mon ethnic populations is greater, a different set of dispute resolution mechanisms may be operating in relation to land disputes.

Efforts were made to incorporate the perspectives of female land owners and access to justice issues at the village level however, it must be acknowledged that this was difficult to achieve for several reasons, including the presence of village headmen and male participants. Also, more accurate information would be gained by holding separate female only FGDs with female research staff and interpreters. Unfortunately, this was not possible given the time constraints on the research team.

Methodology

The goal of the current assessment is to establish which kinds of concrete CDR-based interventions are feasible and necessary to:

1. Improve access to justice and legal assistance for vulnerable individuals;
2. Strengthen village land authorities to better fulfil their roles in HLP protection in Mon State; and
3. Develop legal capacity of civil society organizations involved in improving access to justice.

In order to answer these questions, inputs were sought from three primary groups:

1. Village residents;
2. Village land authorities and EAO dispute resolution providers in NRC operational areas; and
3. CSO/CBO service providers involved in access to justice on HLP issues.

1. Village residents

FGDs were developed for groups of 10 people in each of the 4 villages selected by NRC. Participants for FGDs required the assistance of village heads who were requested to gather a gender balanced group (preferably 50% female). Across the four villages, a total of 47 respondents took part in FGD discussions with a gender breakdown of 28 male and 19 female participants. FGD discussion was aimed assessment of: types of ownership/documentation, typology of disputes (nature of disputes as well as identifying different disputants), which dispute resolution actors are usually approached in order to solve grievances over land issues, satisfaction with outcomes, presence of discriminatory practices/outcomes, types of barriers that hinder access to justice as well as issues resulting from the process itself including bias, corruption, lack of transparency.

2. Village Headmen/Headwomen and EAO Representatives

Duty-bearers at the village-level and the Karen National Union (KNU) liaison of Brigade 1(Thaton area) were interviewed to establish the types of barriers they face in implementing their mandate over land dispute resolution at the village level, as well as their views on appropriate assistance that would increase their efficiency in dispute resolution.

3. CSOs/CBOs

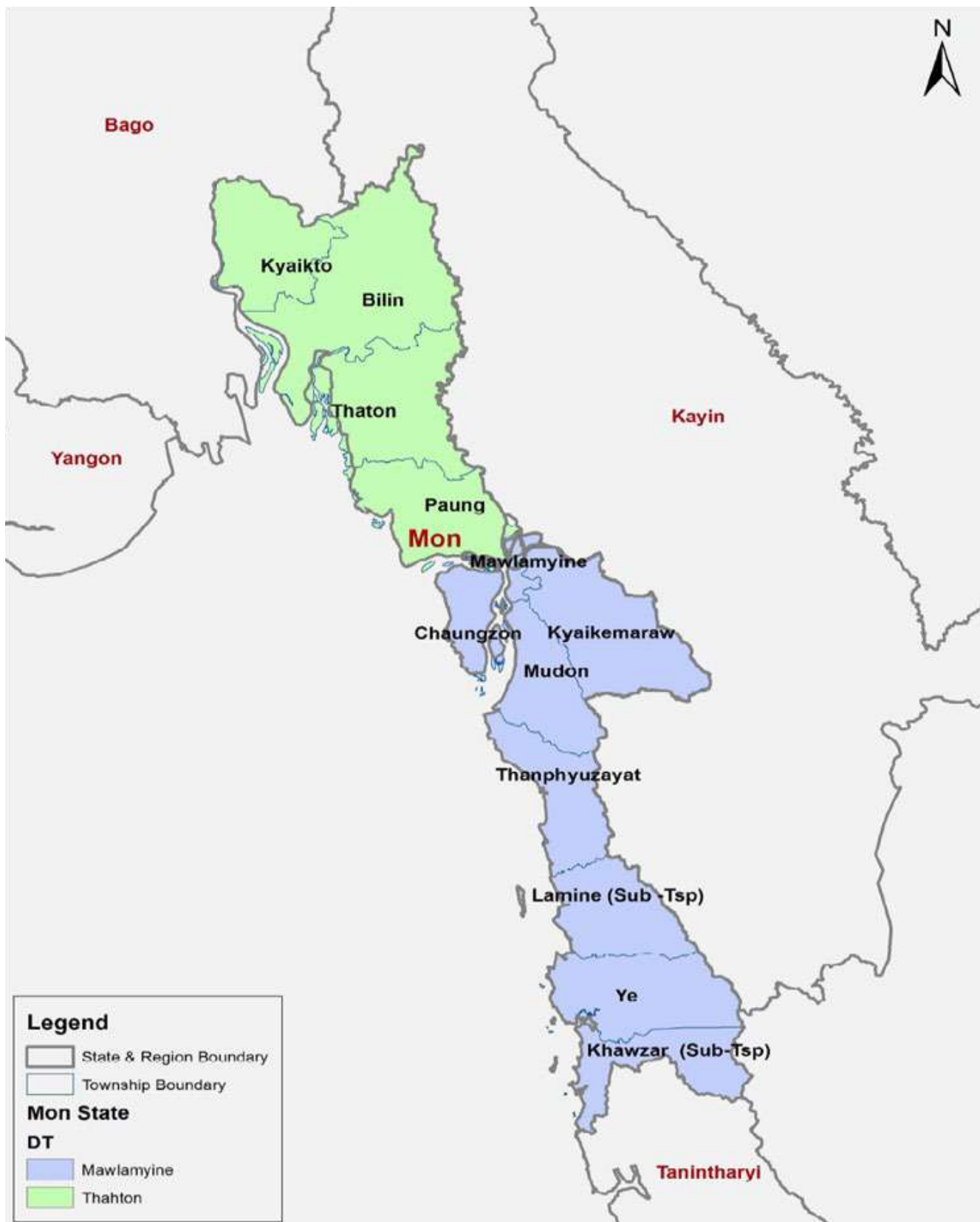
Personnel from a range of CSO legal aid providers involved in access to justice activities throughout Mon State were interviewed, in order to gauge their experience in assisting the population of Mon State and to assess possible avenues where NRC could provide assistance through CDR programming where appropriate.

Groups consulted included:

- Human Rights Foundation of Monland
- Mon Youth Progressive Organisation
- Mon Women's Organisation
- Legal Light
- Mawlamyaing Justice Centre
- Karen Development Network
- Lokha Ahlin
- Earthrights International
- Tharti Myay

Maps of Mon State





Map of Mon State taken from the Mon State Census, 2014.²

1. Mon State Background



Mon State Landscape (Jose Arraiza, NRC)

1.1. Conflict and Ceasefire in Mon State

Mon State has a diverse population of just over two million people, 72% of whom live in rural areas. Most of the population is ethnic Mon, thought to be one of the earliest ethnic groups to have settled in Myanmar. The Mon are believed to have migrated into the southeast of Myanmar originally from areas in Southern China. Mon language derives from the Mon-Khmer group of Austro-Asiatic languages, though many Mon also speak Burmese⁵. Mon people comprise a majority of the population in Mon State, with the remaining population made up of Kayin and Bamar (mostly in the northern township of Thaton), with smaller populations of other groups including Pa-o and Shan. The capital Mawlamyine is also home to religious and ethnic minorities, such as persons of Indian and Chinese descent.⁶

Politically, Mon State has been riven by ethnic conflict since the mid - 20th century, as the Mon people fought for the creation of an independent nation-state. These efforts were undertaken by a variety of entities over time, but predominantly by what eventually became the New Mon State Party (NMSP) and their military wing, the Mon National Liberation Army (MNLA). In 1995, the NMSP signed a ceasefire deal with the then ruling State Law and Order Restoration Council (SLORC), which brought a measure of stability to the state. The deal has been marred by intermittent skirmishes between the MNLA and the Myanmar Army under various military and quasi-civilian governments since signing. Although the deal was broken in 2010 following refusal by the MNLA to transform into a Border Guard Force, an agreement was re-signed in 2012 and has remained in place ever since. The NMSP (a member of the United Nationalities Federal Council (UNFCU)) has also recently signed the Nationwide Ceasefire Agreement with the government.⁷

Mon State has also seen operations conducted and territory claimed by the KNU and its armed faction the Karen National Liberation Army (KNLA), among others. The amount of territory that is claimed by the KNU as being under control differs markedly with the territory claimed by the central government, meaning that the KNU and the central government's mapping of territory in Northern Mon State is contradictory.

1.2. Land Grabbing in the Southeast

Land grabbing by various actors during the State Law and Order Restoration Council / State Peace and Development Council (SLORC / SPDC) administration was common across large areas of the Southeast, especially during the past 30 years, and continues today⁸. Many cases of land grabbing, some decades old, have never been resolved, leaving land in the hands of government, military and companies, while the traditional owners receive little, or more commonly, no compensation. The advent of the land-based legal reforms of 2012 which appear to favour large investors and high productivity of land over small-holders and subsistence farming, have changed the trends in land confiscation.⁹ Customary ownership of land and lack of formal documentation of ownership and use rights of houses and land, have resulted in companies and those with resources being able to register land, taking advantage of inaccurate land cadastres or land that has been marked as fallow.¹⁰ This has allowed the evictions of farmers from land that may have been in families for generations under customary ownership.¹¹





Source: South, A. (2011). *The longest war. Anatomy of the Karen Conflict*. Amsterdam: Transnational Institute (TNI). p. 9.

The maps above show the area of government-recognised Mon State claimed by the KNU as constituting Karen State. The variance in the areas claimed by EAOs and the Union government has led to a situation of mixed administration in some areas of Mon State, where different entities provide services to the civilian population and maintain political support. In the areas where research was conducted in the writing of this report (Thaton, Kyaikto and Bilin) the KNU maintains a considerable presence, with a liaison office in Thaton, operating concurrently with governmental General Administration Department (GAD) and other administrative entities of the central state apparatus.

1.3. Legal Pluralism

Overlapping and competing systems of governance and service provision in Mon State are particularly important, as they result in a variety of legitimate dispute resolution mechanisms. The Myanmar state implements the formal judicial system in Mon State throughout all administrative levels, as across other areas of the country. The EAOs in Mon State (KNU in Northern Mon, and NMSP in Southern Mon) operate parallel judicial systems which are not recognised by the state, and which interpret and apply the legal codes developed by those EAOs. The combined operation of formal institutions run by the Myanmar state, the parallel judicial institutions run by the EAOs (not sanctioned by the Myanmar government) and the operation of informal customary law at the village and village-tract level, results in legal pluralism. In the formal system, courts operate from the Union level down through the administrative levels to the Township. In areas where EAOs have influence in the southeast (KNU and NMSP controlled territory), independent EAO judicial apparatus operate as part of their administrative structures, with courts at the State/Regional, District and Township Levels. At the village and village-tract level, customary laws determine most civil and small criminal disputes.¹² This is particularly important to note in areas with land disputes, as current research suggests that land disputes at the village level are often dealt with under customary practices, particularly in rural areas.¹³

1.4. The Union-recognised Formal Legal System

Myanmar's formal legal system, as recognised by the Republic of the Union of Myanmar, is largely inherited from the British common law legal tradition, introduced as part of the administration of British India during the colonial era, prior to the emergence of Burma as a separately administered entity¹⁴. The Myanmar penal code, for example, is a direct replica of the Indian Penal Code 1860¹⁵. Legislation related to land in Myanmar is a morass of conflicting, overlapping legislation that lacks clarity, is difficult to understand and lacks consistent interpretation and enforcement.

The numerous civil conflicts in Myanmar have had a profound effect on the operation of the formal legal system and the rule of law. The judiciary was all but subsumed by the executive during the decades of military rule, thereby undermining it as a separate branch of government. During periods of military rule, the judiciary was reconstituted by removing officers of the court and replacing them with military officials, who often had no legal training.¹⁶ The courts became a rubber stamp for military and administrative decisions, including fulfilling the role of punishing dissidents, rather than acting as legitimate dispute resolution mechanisms.

Over time, this has substantially undermined the rule of law within Myanmar. Moreover, in the public eye, the court is no longer seen as a place where justice is dispensed. Consequently, the public image of the judicial system is poor, in the sense that the wider community see it as highly corrupt and the court as a place to avoid. The connection of student protests in 1988 and the subsequent closure of universities (viewed by the military as hotbeds of sedition), has undermined legal education within Myanmar, leading to poorly trained lawyers. The aforementioned image of the courts, as well as the fact that the law is a poorly paid occupation in Myanmar, also means that the legal system does not attract the talent that it otherwise might¹⁷.

An assessment of the state of the judicial system in Myanmar by the International Commission of Jurists highlighted a raft of issues which have resulted from the military's subjugation of and interference in, the courts in Myanmar, including but not limited to; lack of judicial independence¹⁸, lack of financial independence, corruption, lack of transparency in appointments and decisions, poor security of tenure for judges, poor legal education, limited access to justice for the public, limits on lawyers' freedom of expression and association¹⁹.



FGD participants in Alon Gyi, Bilin Township, (Jose Arraiza, NRC)

1.5. Land Legislation

The legislation governing land in Myanmar is confusing and archaic, with more than 70 pieces of legislation affecting land use, some of which remains valid from the colonial era.²⁰ Recent efforts to reform land legislation comprise a laudable first step, however, the results have unfortunately fallen short of what is required to tackle a complex and sensitive issue.

Land in the 2008 Constitution

Article 37 of the 2008 Constitution provides that the state in Myanmar owns all the land in the country.²¹ Despite subsidiary legislation providing for the grant of land use rights, the government retains the power to rescind these grants. Though this has parallels with more transparent systems of land management, the history of government land confiscations without payment of compensation has been a concern in recent decades. Previous governments have been guilty of land-grabbing under a variety of pretexts including for military purposes, large-scale public infrastructure and agricultural projects. An example of the latter was the attempt to cultivate biofuels across the country in the early 2000's.²²

This was accomplished by confiscating privately-held agricultural land and legitimising the process under the 'national interest' clause in the Land Acquisition Act 1894²³. Many land users were never compensated for losses and many of the resulting projects, hampered by inept management by the former military government, subsequently failed. In the former cases of infrastructure projects, again, compensation was not made available and additionally citizens were often used as forced labour on said projects. The Karen Human Rights Group have reported as recently as March 2016 that the Burmese Army continues similar practices²⁴. Areas of Southern Mon state were also subjected to these programs, as has been documented by the Human Rights Foundation of Monland²⁵.

Recently enacted land legislation

Farmland Law 2012

The Farmland Law 2012 has received criticism from local CSOs and land experts since its implementation. Several aspects of the law are problematic, including;

Registration : In order for farmers to register and use their land under the formal system, they must obtain a Land Use Certificate (LUC) from the Township Farmland Administration Body ²⁶. The process for obtaining the certificate is long, complicated and made more difficult by corruption on the part of officials. For example, Department of Agriculture and Land Management Statistics (DALMS) staff, which should be surveying and recording land plots, often lacks the budget to leave their offices and go to the areas being claimed, in order to measure the plots, which may oblige farmers to pay for the exercise.²⁷ The process of registration itself is complex, requiring 11 different forms before the farmer receives the requisite LUC.

Bias against female owners : The LUC allows for joint registration and registration by females but does not explicitly state that this is so. The person who registers is usually the head of the household (from the household list) and is most commonly the male.

Limitations on crop choice : Farmers must specify which crops they intend to grow. If they wish to change the type of crop in future, they must reapply to make these changes, going through another lengthy process.²⁸

Lack of recognition of customary ownership : Rotational cropping, frequently used in ethnic upland areas are not recognised under the law. Consequently, the practice of leaving land unused may result in the classification of the land as fallow whereupon it could be claimed as such by other actors.²⁹ The lack of recognition of customary ownership in combination with inaccurate records at DALMS, leaves ethnic land under customary land management systems at risk of confiscation and reclassification by hostile actors.

Limited appeals : The administration of the law is performed by a Central Committee at the Union level and Farmland Administration Bodies at State, District and Township and Village-Tract levels. Beginning at the Village - Tract level, appeals against decisions of the Farmland Administration Body can ascend to the State FAB level.³⁰ A finality clause in the Farmland Law establishes that no appeal is possible to an independent judicial body after the State-level FAB has made its decision regarding a land dispute.³¹ The finality clause is unconstitutional and contrary to rule of law principles, for several reasons. There are three relevant sections of the Constitution which guarantee certain rights for citizens set out below.

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

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



FGD in Alon Gyi, Mon (Jose Arraiza, NRC)

Vacant, Fallow and Virgin Land Management Law 2012

This law allows for land that is not being used in a productive manner, as defined by the state, to be reclassified and leased out for up to 30 years, to domestic and foreign interests³². Once the land is cultivated, it may then classify as farmland under the law mentioned above. The VFV Law is usually applicable to leases over larger tracts of land, rather than small scale grants. The law has serious implications, especially in ethnic areas where rotational cropping may be utilised by ethnic minorities, as well as areas of communal forests, to name some. This is particularly so since the law has been amended in 2018, to impose obligations on farmers to register VFV within 3 months of the law passing, or face penalties for trespassing on VFV land.³³ The VFV Law differs from the Farmland Law, in that it contains no express prohibition on the ability to appeal decisions of the administering body through the judicial system. Recent amendments have strengthened sanctions against current users of land. Recognition of customary lands in the amendments lacks sufficient safeguards.³⁴

Village land

Villageland in Mon State falls under the Lower Burma Town and Village Lands Act 1899, which requires a house and plot owner to register both assets with authorities.³⁵ House owners can obtain title deeds from the DALMS (previously the SLRD). The land under the house can be registered with DALMS and a Form 105 including a cadastral map obtained. Taxes are levied on both houses and housing plots and for this reason, any changes in ownership should be recorded by the Revenue Officer, according to the law. In reality, ownership of title deeds and registration of interests in land is weak throughout Myanmar and property often changes possession without changes in the registered interests. Several factors account for the lack of compliance in the registration of property interests, inclusive of a slow and extractive bureaucracy.³⁶

Central Committee for Rescrutinising Confiscated Farmlands and Other Lands

Under former President Thein Sein, a Parliamentary Investigation Commission was formed to investigate land-grabbing in Myanmar, including those perpetrated by the military, which lasted from 2010-2015. In 2016, a new Central Committee for Rescrutinising Confiscated Farmlands and Other Lands was formed by the NLD to build on the work of the Commission.³⁷ A Union-level Central Committee sets policies and guidelines on reviewing cases. If the region/state committees ascertain that investigations are necessary, they are passed to the district level committee. Cases then pass down to the township and village-tract level where investigations are carried out by a combination of civilians and members of the General Administrative Department. A report goes back to region/state committees, who have the authority to

resolve cases, in theory, through instructions to the DALMS to return land where appropriate. The mandate of the Committee is relatively opaque, however, and little public information is available to explain clearly how it works or what level of success it has achieved thus far (the President's office in April 2017 reported that only 212 cases out of 3,980 received had been resolved).³⁸

2016 National Land Use Policy

The National Land Use Policy, released in 2016 following input from civil society and other stakeholders, sets out the goal of reforming land legislation throughout the union. The NLUP marks a significant improvement on the actual laws in place, including the additions mentioned above from 2012, through recognition of customary land management practices including shifting cultivation and customary dispute resolution mechanisms. At the time of writing, the National Land Management Committees have been formed at the Central level, with Vice President Henry Van Thio as Chairman, the Union Minister for Natural Resources and Environmental Conservation, U Ohn Win as Vice-Chairman, with assorted relevant Union Ministers and the Chief Ministers of the States and Regions making up the rest of the union level body. The group held its first meeting on 5 April 2018 in Naypyidaw to discuss the direction of the Council's work³⁹. However, a National Land Law which should follow the policy was still in the drafting stage at the time of writing.

Legal identity and HLP documentation

Legally, those without formal identity documents are unable to acquire land use rights through the formal system.⁴⁰ The Farmland Law, for example, grants rights to citizens who must be able to show identity documents such as a Citizenship Scrutiny Card (CSC, the official identity card) and who must also be able to provide the household list.⁴¹ Furthermore, research in other parts of the country shows that where formal documentation of HLP ownership, use and tenure is absent, interests in land are transferred informally using tax-receipts or contracts of sale, without a concomitant updating of formal registers, as a means of avoiding bureaucracy and paying bribes.⁴²

1.6. Ethnic Armed Organisations' legal systems

In Mon and Kayin States, the NMSP and the KNU have established relatively comprehensive administrative systems, which incorporate judicial wings. These EAO administrative apparatuses operate in parallel with the state-sanctioned system, sometimes in the same territorial areas⁴³. They are not formally recognised by the Union as official public institutions. This has led to what has been described as mixed areas of administrative control. The NMSP and KNU iterations of judicial ministries operate with judicial officers from the state level down through division, districts and townships, at which level village-tract leaders interface with the EAO administration in referring legal issues that cannot be dealt with at the village/tract level⁴⁴. The KNU has developed its own land use policy which recognises customary tenure. The policy establishes in Article 1.1.1, that 'The ethnic nationalities are the ultimate

owners of all lands, forests, water, water enterprises and natural resources⁴⁵. The wording of the article directly contradicts the Federal Constitution Article 37(a)⁴⁶, which also claims ultimate ownership of all land within the union of Myanmar, and positions the land controlled by the KNU outside the jurisdiction of the central government.

The KNU also has a Justice Department, a penal code⁴⁷ and officials throughout an administrative hierarchy within its controlled territory.⁴⁸ In Karen areas, the village is the most basic administrative unit. Groups of villages form Village Tracts, groups of Tracts form Townships, and several Townships compose Districts. Multiple Districts comprise Karen State. Besides this administrative organisation, the KNU have developed a legal system, with a Supreme Court at the Division level, District Courts and Township Courts. The lowest level of administrative structure has no officials from the KNU Justice Department. At this level, judicial powers reside with village heads, who deal with land matters based on customary laws. The legal system in the KNU controlled areas can be described, at best, as rudimentary, as the focus of the resistance efforts centred around armed struggle, leaving little time or resources to develop a complex legal system.⁴⁹ Judges within KNU areas are often paid in contributions (sometimes rations), have several jobs and do not have formal legal training.⁵⁰

KNU land titling

The KNU has a Department of Agriculture and a Department of Forestry and these bodies have the power to issue land titles, though it is unclear how many individuals benefit from this service⁵¹. One village surveyed in the course of a 3-year research project conducted by the ECDF concluded that within the Karen village of Thay Khermuder, around 28% of people had land title issued by the KNU and this was for lowland rice cultivating areas, not the upland swidden agricultural areas which tends to be more commonly managed under customary systems⁵². The KNU Land Policy reinforces the efforts by the KNU toward land titling and registration of interests, but it is not yet clear how widespread the titling of communal lands will become, as it is difficult to issue individual title over shifting / swidden agriculture areas which are, moreover, communally owned⁵³. Most efforts so far appear to be related to prevention of land grabs by private or central government interests⁵⁴.

As a consequence of legal plurality, in some areas of the Southeast a unique situation has evolved in the areas influenced by the KNU. Alongside the individual deed to houses, urban plots and LUCs for land use available via the state apparatus, the KNU's Karen Agriculture Department have also issued both individual and communal title to land, such that individuals may possess both types of title over the same parcel. The KNU negotiated recognition of its land system as part of the 2012 bilateral ceasefire with the Union level government⁵⁵. The bilateral agreement reached on 6 April 2012 establishes the following points:



9. The KNU agreed to report problems related to land issues to the State Prime Minister before appropriate laws related to land rights are made.
10. Both sides agreed to acknowledge land ownership agreements existing within the KNU and other ethnic organizations and to find solutions in consultation for customary land ownership and other land rights issues for IDPs.
11. Both sides agreed to find the best and most fair solution for the land ownership of the people.⁵⁶

1.7. Customary land management practices

The legal apparatus of the state rarely impacts remote rural areas in any meaningful way. As mentioned earlier, the formal legal system, including the courts, are seen as extractive institutions best avoided by those at the lower end of the socio-economic spectrum. As such, dispute resolution at the community level tends to revolve around customary rules. As a result, village leaders and elders in Myanmar usually resolve a range of civil and domestic matters and petty crimes, as well as land issues.⁵⁷ Customary law and dispute resolution over land issues could operate either in relation to an individually owned parcel or over communally held resources (more commonly associated with upland communities). Due to the degree of autonomy at the village level in the resolution of disputes, the limited amount of research done on the topic suggests that customary land management in many rural parts of the country has remained relatively unchanged, in upland areas particularly, over time.⁵⁸

Unfortunately, little research exists to explain in detail how customary land management and the EAO judicial / land administration systems interact. The KNU Land Policy explains that if customary authorities cannot deal with an issue in the first instance, dispute resolution is to be implemented by a Land Conflict Resolution Committee, comprised of village heads and community elders, women, youth and Karen Agricultural Workers Union representatives at the village and village-tract level⁵⁹. If there is failure to resolve issues at that level, the problem may move up into the KNU judicial and administrative structures at township level and beyond⁶⁰. The exact implementation of the policy requires further research.

Customary land management practices vary across ethnic groups, but research across some of the ethnic areas in the East and Southeast of Myanmar suggests that customary law in relation to land management practices appears to exhibit characteristics common to many indigenous land management systems throughout the developing world.⁶¹

The Karen (many of whose members reside in northern Mon State) conception of land management in upland areas for example, exhibits several factors that are common to customary land management systems, namely:

- Decisions regarding land management are made by communities;
- Communal land ownership (or more accurately stewardship) and use in upland areas;
- Communal management and use of natural resources, including forests, grazing lands and water;
- Land disputes are dealt with locally; and
- Alienating land to outsiders is generally prohibited.⁶²

These elements align with research on customary law across other cultures, in that “boundaries, often fluid and porous, are defined by the relationships between neighbouring families, communities, clans and peoples”⁶³. Dispute resolution in customary law systems reflect a general focus on restoration of community well-being, rather than retribution as a goal.⁶⁴ Although this is more specifically applicable to criminal law, the principle is applicable to customary approaches to property and land as well.⁶⁵

Customary law tends to be based on the principle that the wrongdoer must compensate the victim for their actions in order to be reintegrated into the society, where as western systems usually focus on punishment.⁶⁶ The customary approach to justice focuses on conciliation, driven by a desire for social cohesion among community members.⁶⁷ Such conclusions from international research match what has been thus far observed in the ethnic areas of Myanmar characterised by the presence of customary law, where, as Jolliffe describes it, there is commonly a belief;



Among community members that social stability is paramount and that no one wants to be responsible for upsetting it.

Thus, an ideal customary justice settlement often seeks to provide a balance between stability in the community and a compromise that is agreeable to the disputants.

Positives and negative aspects of customary law

Academic research on legal pluralism in the colonial context highlights the extent to which indigenous legal systems were subjugated, eliminated or ignored during the colonial domination of developing countries. The intervening decades has shown, however, that many indigenous legal systems are highly sophisticated in resolving disputes. Some elements of these systems which focus on communal rights and social cohesion over the rights of the individual and win-lose outcomes in relation to land especially, are highlighted above.

There is a correlation between several of the elements of customary approaches to dispute resolution and the factors which are seen as the positives of the turn toward alternative dispute resolution in western legal systems (general accessibility, speed, legitimacy), which will be discussed below.⁶⁹ However, the renewed interest in customary law is tempered by the clash between elements of these systems with international human rights standards. Particularly concerning is the spectre of discrimination and bias, especially in the case of women,⁷⁰ marginalised elements of society as well as children/youth. An additional concern is the lack of due process.

As part of subjugating individual rights to the welfare of the community as a whole, this clearly raises the spectre of limiting access to justice for some and transparency in decision making, placing elements of customary law in conflict with notions of rule of law as envisioned in western jurisprudence.⁷¹

Particular aspects of customary law are concerning to academics and practitioners who seek further engagement with customary systems when improving access to justice for communities which utilise customary dispute resolution, notably:

1. Customary justice leaders are often male and selected from within the community on the basis of status or lineage. Along with providing legitimacy, such processes may reinforce power imbalances and discrimination;
2. Capacity among customary dispute resolvers may vary greatly;
3. Customary law usually lacks rules of evidence and procedure meaning similar cases might not be treated similarly without a reasonable justification, which may constitute discrimination;
4. Outcomes may contravene human rights standards, including gender related standards; and
5. Maintenance of social harmony may mask violations of individual rights.⁷²

1.8. Dispute Resolution at the Community Level Customary land management practices

Across much of rural Myanmar, the village headman (and occasionally headwoman), is tasked with resolving a range of civil disputes, including those over land. These local authorities, and Village-Tract / Ward Administrators have rarely had any training to assist them perform their various roles and according to a local governance mapping conducted by UNDP in Mon State, these dispute resolution actors could benefit from support⁷³. In addition to a lack of training, as of 2016, there were only 88 female administrators out more than 16,000⁷⁴. Clearly, a lack of training, potentially non-democratic election of headmen (in areas where the new 2012 laws legislating the election of Village-Tract and Ward Administrators has not been implemented), underrepresentation of women and marginalised groups within the local level dispute resolution mechanisms, has implications for the fair administration of justice at the village level.

Collaborative Dispute Resolution (CDR) and applicability in the Customary Law context

Given the deficiencies of the formal legal system in Myanmar and the barriers faced by the rural poor in accessing HLP rights, a consideration of alternatives to the formal system are warranted. In western legal contexts, Collaborative Dispute Resolution (CDR) forms part of the movement to provide an alternatives to judicial dispute resolution, with the benefit of providing cheaper, faster alternatives to litigation⁷⁵. These alternatives may take the form of mediation, negotiation or arbitration as the unique demands of each case require.⁷⁶ CDR encompasses a range of processes which capitalise on cooperation between parties in dispute, with or without the involvement of third parties, to find a mutually satisfactory outcome⁷⁷. CDR can provide a good alternative to litigation in situations where power imbalances between actors exist, however, CDR should include some form of legal aid.⁷⁸

In the Myanmar context, there is some complementarity between the dispute resolution processes already in use by those who typically resolve land disputes at the village level and CDR. This is evidenced by some of the common elements shared by both customary dispute resolution and CDR, which include speed, lower costs and legitimacy.

1.9. Dispute Resolution Actors

Village headmen / women

There are a range of actors who can potentially intervene in land disputes. At the village level the village headman (thu kyi, in Burmese) is often the primary source of dispute resolution for land and other civil issues⁷⁹. The village headman plays a unique role in Myanmar society. Traditionally the role incorporates mediation / arbitration of community disputes and civil issues, however, during the colonial period; the headman also became the lowest administrative unit/agent of the state. In Myanmar's social and administrative system, therefore, the village headmen are viewed by communities as legitimate authorities with intimate knowledge of the local community who are able to maintain communal harmony in resolving disputes. Technically, however, the headman does not have the power to deliver a binding decision, making his role akin to an arbitrator. Due to customary tradition, however, the decisions of the headmen are usually abided by⁸⁰. The preference for the intervention of the village headman in dispute resolution is usually suggested by villagers as being not only for the reasons of legitimacy mentioned above, but also as a means of keeping the dispute at the local level and preventing it reaching higher authorities, and in worst case scenarios, expensive court proceedings.

Village-Tract Administrators / Township Authorities

Technically, the village headman has lost authority with the advent of The Ward and Village-Tract Administration Law 2012. This law provides authority to a higher administrative unit, the, Village Tract Administrator. Bottom up, the administrative organisation would be 10-Household Headman, 100-Household Headman, Village Headman, with the VTA overseeing the lower administrative units. The VTA and the Township Administrator above, may become involved where issues cannot be solved at the community level by village headmen / women. It should be noted that, despite the legitimacy within the community stemming from the village headman / woman's position, both these authorities and the VTA's should not be romanticised or seen as intrinsically fairer. Research has shown that all levels of authority are susceptible to corruption in land dealings.⁸¹

EAO Representatives

In Mon State the NMSP and the KNU administer areas under their full control, as well as other areas where they share control and provision of services with the government.⁸² Within the areas looked at in this assessment (Northern Mon) only the KNU have a presence. In areas where the control and administration are mixed, but the presence of the EAO is light, there may be a liaison officer of the group and where that EAO has ethnic citizens in the region. Hence, it is possible that there is a degree of forum shopping between the government avenues and those offered by the EAOs for dispute resolution⁸³. As such, the EAO representatives may intervene in areas where they have influence to assist in the resolution of a range of civil and criminal matters, inclusive of land issues.

Formal Courts

The courts can only be useful in limited circumstances, such as when land disputes can be recast as criminal or civil matters. This takes the case out of the administrative realm and utilises the criminal or civil jurisdiction of the courts. Most commonly the approach is to file suit for criminal trespass in order to remove, for example a company, from another person's land.⁸⁴

The challenges of leveraging the courts has been well-documented. Research suggests that the courts can be expensive and unpredictable.⁸⁵ Furthermore, the judiciary is not seen as transparent by the general public. Although there have been recent efforts at reforms, the judiciary remains influenced by military oversight and pressure.⁸⁶ The cost of justice for the average person in Myanmar is not only economically difficult, but many still fear that they may suffer reprisals for apparent dissent when taking on the government in the assertion of rights.⁸⁷ Such factors mean that utilising the courts for the average person may well require technical and financial assistance. This is not the case for more powerful actors however. Recent cases show that companies in particular, have utilised the courts to attack farmers they consider to be trespassing on land which companies have confiscated (either legally or illegally from farmers).⁸⁸ The 2018 amendments to the VFV Law, which adds requirements to register VFV land that is being used within 3 months, and criminal sanctions, will no doubt provide more ammunition for the law to be used against farmers not familiar with the law.

2. Feedback From FGDs & Key Stakeholders

Villages : Win Phone (Thaton Township), Ahnan Pin (Thaton Township), Sit Kwin, (Kyaikto Township), Dawn Ywar (Bilin Township).

Ownership and Documentation

The feedback from the FGDs indicated that a large majority of the villagers considered themselves owners of their homes and the plots of land underneath their houses. However, very few individuals were in possession of any documentation apart from tax receipts to prove their ownership. When asked how they proved themselves to be the owners, all participants indicated that they held their houses and plots under customary recognition. In terms of agricultural land (which included paddy, rubber plantations and seasonal vegetables), again, very few participants had any formal documentation from the formal system and none had any land titles issued by the KNU (all villages are in KNU Brigade 1 area).

None of the participants had ever registered any housing, land or property interests with the DALMS. Only six participants out of the total of 47 with agricultural land, had a Land Use Certificate (Form 7).

Only 57% of the respondents indicated they could read and write in Burmese.⁸⁹ Given that all land documentation and processes are in Burmese language, this indicates the potential for structural inequality in the registration of land interests, as well in as access to formal dispute resolution mechanisms.



Thaton, Mon State, (Jose Arraiza,NRC)

Typology of Conflicts and Resolution Actors

2.1. Type 1: Intra-village boundary disputes (Win Phone)

- Conflict : Boundary disputes within village limits
- Disputants : Two or more villagers
- Dispute Resolution Authority : Village headman

In Win Pone, feedback suggested that land disputes were typically low-level; most were boundary disputes between individuals within villages. In such disputes, the village headman was cited the primary arbiter and this function had the support of the community, indicating that a form of CDR is already taking place. In very few occasions were disputes handled by KNU members who would assist in negotiations between parties, however this involvement was not looked on favourably by the respondents, who claimed that this occasionally resulted in bias toward one of the disputants who may have personal connections to KNU members.

In Sit Kwin and Dawn Ywar (no reported intra-village land issues), villagers also claimed that the village headmen were the first choice for conflict mediation if arguments over land arose. Sit Kwin has two village heads, one female and one male. They indicated that their preferred method of dispute resolution was a combination of mediation and arbitration. As a first step, the heads would approach the disputing parties individually before bringing them together to try and facilitate a negotiated settlement.

2.2. Type 2: Inter-village boundary disputes (Win Phone)

- Conflict : Redrafting of village boundaries
- Disputants : Villagers
- Dispute Resolution Authority : None available currently

The residents of Win Phone indicated that in 2016, the GAD and DALMS authorities redrew the boundaries between their village and the adjacent village of Kawt Hlaing. Prior to the redrawing of these recognised boundaries, there was no consultation undertaken, nor notice given by the government to the villagers of Win Phone. It is believed that there was however, negotiation between the village authorities in Kawt Hlaing and GAD and DALMS. Prior to the changing of the boundaries, the owners of the land in Win Phone held the land under customary ownership and did not have any documents proving their ownership. The end result of the re-drafting was that land owners in Win Phone were deprived of considerable amounts of land from their holdings and this eventually caused disruptions to the relationship between the two villages. Moreover, there was no compensation granted to the landowners in Win Phone, who lost land due to the boundary amendments.

2.3. Type 3: Military and government / company land grabs

(Ahnna Pin and Dawn Ywar)

- Conflict: Illegal Land Confiscation
- Disputants: Villagers, Returned IDPs, Former Military Government (SPDC), Companies
- Dispute Resolution Authority: None available currently

A third type of dispute recorded was between farmers and external actors. The residents of Ahnna Pin highlighted two examples of land confiscation that took place in their village during the SPDC era, around ten years ago. The first example was a rubber plantation which was confiscated by the government (department not identified) and handed over to a private company for use. This was done without any consultation with the owners. The land confiscation deprived the traditional owners of their land and income from the rubber. In addition, only two individuals were compensated for the losses. This compensation, however, was awarded at a rate of MMK 100,000 for each person in total, which is far below market rates. As pointed out by the residents of Ahnna Pin, the compensation was barely enough to cover the value of the rubber trees, without even considering the price of the land underneath. The issue has never been resolved.

Another example provided by the Ahnna Pin residents was the case of land confiscation also around a decade earlier, which was perpetrated by a local high-ranking military officer, since retired, who confiscated rubber plantations in the village area, without compensating villagers for their losses. The villagers were powerless to prevent this or complain about it, given that the SPDC government was in power at the time. Once again, this issue has gone unresolved due to the difficulty of pursuing the case and the security issue posed to villagers by the party responsible.

Another example of land grabbing was reported in Dawn Ywar. Fighting in previous years between the government and KNU forced some residents to flee the area and leave their land behind. While they were in displacement, their land was reassigned by the government (department unknown) to a state-run enterprise known to the residents only as "Industry No.2", which is pursuing a development enterprise on the displaced villagers' land. Although 33 acres of land has been released back to the villagers, that amount is insufficient to resettle all of the returnees to the village. In addition, compensation has not been made available to those individuals.

	Type of land dispute	Conflict	Disputants	Disputants resolution authority
I	Inter - village boundary disputes (Win Phone)	Boundary disputes within village limits	Two or more villagers	Village Headman
II	Inter-village boundary disputes (Win Phone)	Redrafting of village boundaries	Villagers	Not available currently
III	Military and government / company land grabs (Ahnaw Pinand Dawn Ywar)	Illegal land Confiscation	Villagers, returning IDPs and refugees, former military government(SPDC)	Committees for Resurutinising Confiscated Farmlands and Other Lands

Dispute Resolution Actors

Monks as mediators

Despite other research indicating that religious authorities are sometimes involved in dispute mediation⁹⁰, in the villages surveyed the general view was that monks should only concern themselves with religious matters, however, there were indications that their good offices could be utilised to broker meetings between disputants.

Village headmen/women as mediators

Responses to village headmen and headwomen acting as dispute resolvers was highly positive in terms of the benefits to be derived, which were listed as:

- Timeliness;
- Costs; and
- Accessibility (not intimidating).

Conversely, the participants acknowledged that there can be negative consequences to this type of dispute resolution which were listed as:

- Corruption;
- Biased decisions;
- Power imbalances between disputants; and
- Discriminatory behaviour toward poor villagers.

Courts

The feedback was unanimous from the FGDs and key informant interviews that the courts are not seen as a desirable means of dispute resolution at the community level. Villagers described their reluctance to utilise the courts due to:

- Fear of courts and police;
- Lack of awareness about how the law works;
- Lack of awareness about how to hire lawyers;
- Lack of knowledge on where to go and how to register their case in the court;
- The amount of time it takes for cases to be tried;
- Costs of litigation; and
- Fear of losing the case.

Female landowners

Feedback from FGDs regarding female land ownership, inheritance and access to dispute resolution were generally inconclusive. Participants across different villages suggested that it was possible for women to both own houses and land independently, but that on any documentation regarding land ownership (in these particular examples, on tax receipts) that it was the general rule that the husband's name would be on the documents. This led to a general response that in the case of the death of a husband, women tend to face discrimination from the community and risk losing property due to the fact that her interest is not recorded on any documents.

Feedback from Dawn Ywar and Sit Kwin indicated that risks were posed to female HLP rights in situations where a husband passes away, the wife has no documentation of her interest and the husband's family wish to acquire the land for themselves. In Win Phone and Ahnan Pin it was suggested that women could access dispute resolution mechanisms and they were not discriminated against in such fora. However, in Dawn Ywar and Sit Kwin, respondents said that much depended on the character of the village head and that person's attitude toward women. Given that village authorities were present for FGDs, the value and accuracy of this feedback must be assessed in context and may not accurately reflect that females with HLP interests are receiving fair treatment. Research by Namati has found that around 85% percent of land across 14 of Myanmar's states and divisions has been registered in the name of the male, despite women's contributions to rural labour.⁹²

Given that split, and given that the communities and CSOs both cite inheritances and family disputes among the common types of land issues in villages, it is rational to assume that women are at a disadvantage in land disputes where documentation is a factor. This is an issue which requires much wider research in order to draw conclusions (inclusive of female only FGDs, without husbands or village headmen present and in the presence of preferably female research teams) and hence, female landowner issues do not form part of the analysis in this assessment.

2.4. Feedback from CSOs regarding Legal Assistance

The points below summarise the feedback received from CSOs engaged in legal awareness raising across all parts of Mon State. When dealing with rural farming communities they noted the following:

- Lack of knowledge regarding formal law;
- Structural inequalities in accessing the formal system (language barriers, literacy, fear of authority);
- Power disparity between farmers and actors responsible for land grabs;
- Time taken to obtain Land Use Certificates (on average over 130 days);
- Slow progress of the Rescrutinisation of Confiscated Land and Other Lands Committees tasked with examining historical land confiscation claims – most CSOs could not really articulate how the committee even works or what progress has been made in resolving cases;
- High court costs deter litigation; and
- Court cases take a long time.

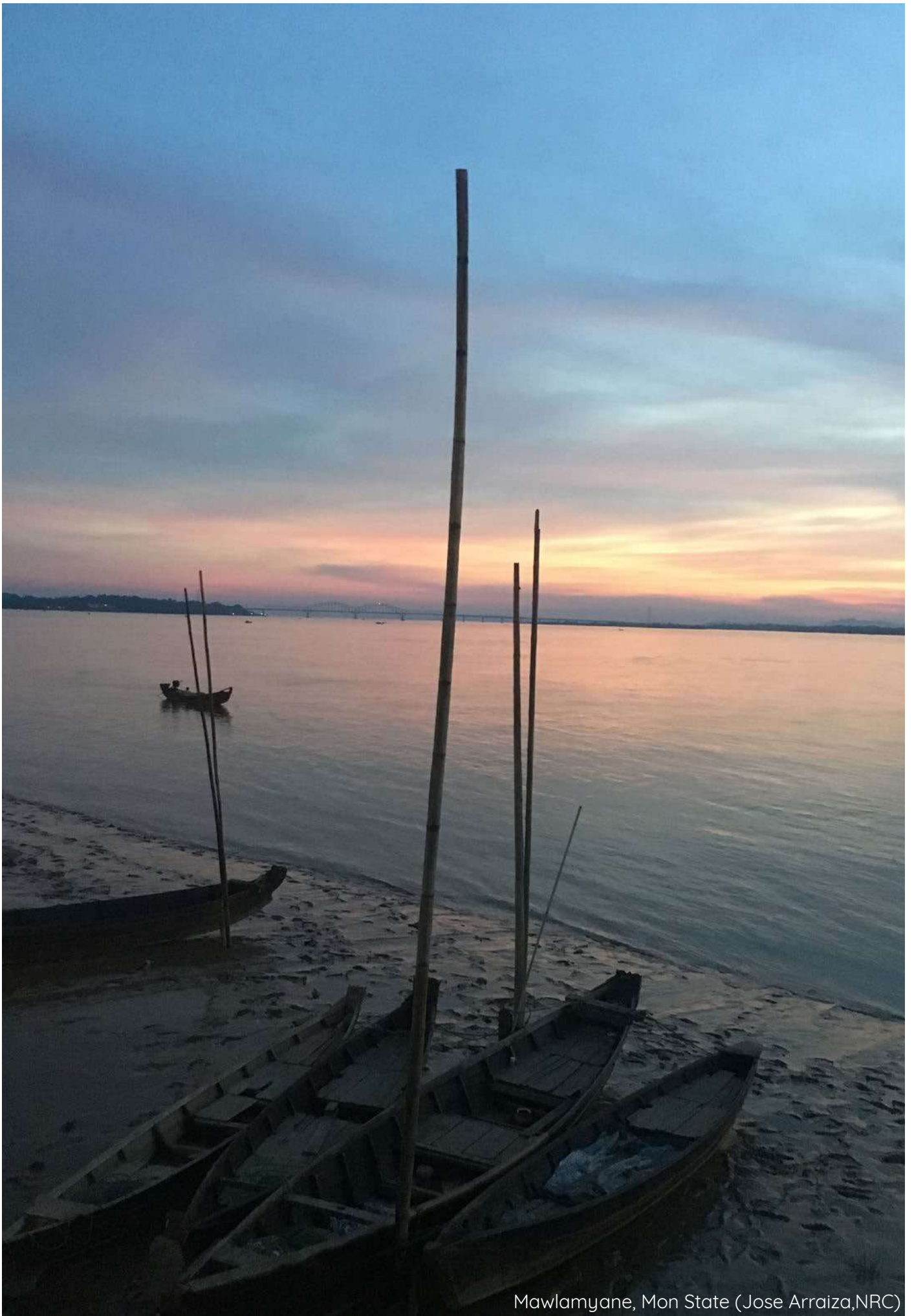
Specific feedback from NRC partner KDN

KDN has been engaged in promoting HLP awareness in seven townships and 48 villages across Mon State, inclusive of areas which are fully government-controlled, mixed administration areas (government and KNU and / or NMSP presence) and what has been referred to in the past as “black areas”, which are fully controlled by anEAO. In these villages, assessments have been carried out through FGDs and this has been followed by awareness raising sessions on HLP rights (usually a four-hour training session in one day).

The director of the Community Mobilisation for Justice pillar of KDN's work, one field coordinator and two field staff were consulted on their experiences and observations from the field. Their observations included many of the points listed above and accorded with the feedback from HURFOM and Lokha Ahlin staff who are both engaged in assisting farmers directly with obtaining Land Use Certificates. Specifically, they noted:

- Farmers typically have either none, or very little, knowledge of the 2012 laws – and, therefore, no appreciation of the implications of not having an LUC. Those that do understand why an LUC is important say that getting an LUC is too time consuming;

- Most common types of disputes seen were those at the village level, usually families with inheritance and boundaries disputes. The major land-grabbing example noted was that of Mawlamyine Cement Limited, a company which villagers allege confiscated the lands of several villages in Kyaikmaraw (Southern Mon) in order to build a cement factory;
- Fear of authorities including both government and KNU/NMSP;
- Illiteracy – KDN staff often have to draft complaint letters to authorities on behalf of farmers;
- Language barriers (many beneficiaries only speak Kayin and Mon), whereas many authorities are, or speak, Bamar. All land related documents are also written in Bamar;
- KDN staff try to cultivate personal relationships with different authorities such that they can introduce farmers with land issues to them for assistance with dispute resolution;⁹³
- Staff noted that as much protection as possible should be made available to farmers, ie; helping them to obtain LUCs in government-controlled areas, KNU titles in KNU areas (and in future NMSP are planning to issue title as well in southern Mon) and in mixed-control areas, farmers should have both government and EAO land titles to ensure the strongest land protection possible.



Mawlamyane, Mon State (Jose Arraiza, NRC)

Specific feedback from Legal Light

Legal Light is a CSO comprised of 25 lawyers who provide pro bono legal services to those with land issues. They estimate that about 30% of their cases involve land issues and complaints from small-holder farmers. Common cases involve inheritance disputes as well as those who have left land behind to travel elsewhere for work (whether internally or to Thailand, for example, as migrant labourers, etc). When they return they often find tenants working the land who have somehow obtained LUCs for their property.

In the south, Legal Light is currently representing five farmers who are in conflict with two companies. The village headman registered the lands of these farmers with the DALMS, with the assistance of a clerk from the department and then sold the land to the two companies. The farmers are now trying to get their lands returned to them with the help of the Legal Light lawyers. According to the team, company land grabs and village heads acting in concert with corrupt officials are the most common causes of land conflict that they see in their work. The most common outcomes in cases between two farmers is return of land, but in cases where companies are involved, the usual outcome is settlement through compensation.

Whilst the courts have lost jurisdiction for handling land cases except for inheritance matters, it is possible to adapt charges to re-engage the jurisdiction of different courts. For example, in cases where land has been sold to a 3rd party without the knowledge of the original owner/user, the individual may be sued for fraud using either civil or criminal jurisdictions. Criminal and civil trespass are also options for taking land matters out of the hands of the designated Farmland and VFV land management committees. A positive point for the farmers who hold their land customarily and have limited documentation is that according to Legal Light, they have already successfully litigated about 10 previous cases, where the farmers only have tax receipts as proof of ownership. Where land was not returned to the farmers, compensation has been paid at market rates.

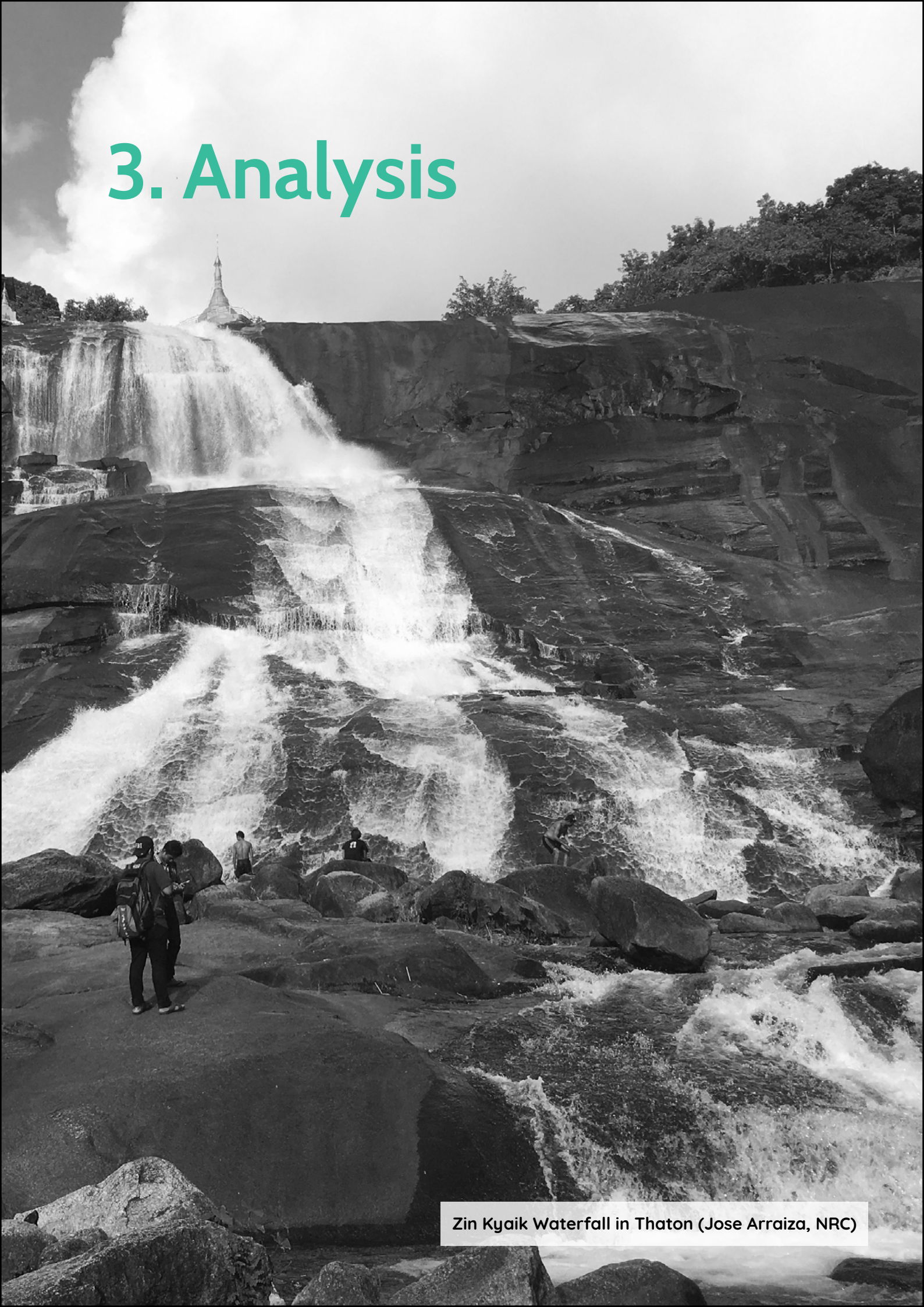
In Northern Mon, specifically Thaton area, they said the most common cases involve mining companies who illegally dump overburden on the lands of farmers, creating conflicts.

Feedback on the Committee for Rescrutinisation of Confiscated Farmland and Other Lands

Legal Light staff mentioned that some 500 acres of land in Kyaikto has been returned to farmers through the Committee for Rescrutinising Confiscated Farmlands and Other Lands process, as well as some land in Kyaikmaraw (acreage unknown). The team only refers cases that are perceived as too difficult to resolve to the Committee, except for the cases involving the military, which Legal Light do not accept under any circumstances, because of the perceived risks to their staff.

Feedback from CSOs regarding the Committee is that its operation appears to be highly inconsistent across different regions and levels of government. It was even suggested by one member of an INGO that sometimes members of the Committee are in fact the perpetrators of the confiscations that they are tasked with investigating. Feedback from Dawn Ywar regarding the reallocation of IDP land to a state-run company was that a complaint had been lodged at the Naypyidaw level, but no response had yet been received. Other research indicates that the committee has had various levels of success in achieving restitution.⁹⁴

3. Analysis



Zin Kyaik Waterfall in Thaton (Jose Arraiza, NRC)

3.1. Lack of documentation weakens HLP protection

The ethnic areas of Myanmar which have traditionally relied on customary law for land administration provide numerous examples of land-grabbing by powerful actors in the post-2012 era. Typically, this involves actors with money, influence, or both, registering interests in land that is being used under customary ownership, but which has not been registered under the 2012 laws by the traditional owners/users. This has sometimes occurred where government authorities have confiscated land, which has then been conceded to companies.

The new owners sometimes charge the former owners to continue using the land as tenants or evict the former owners and even threaten them with trespass or other legal action.⁹⁵ This has been repeated across Myanmar since 2012, with proportionally few cases of resolution in the interim. Although strong statistical evidence is lacking in terms of the efficacy of LUCs and FUGCs in providing full protection against land grabs, it can be surmised that the security of tenure of parcels with no registration at all must necessarily be weaker than those with such protection. Due to the public purpose clause in the Land Acquisition Act 1894, not even the formal system can provide total protection from land grabbing, however, formal documentation is likely to result in a higher chance of compensation being obtained where land grabs are unavoidable.

There are two counter-arguments to this assertion. Firstly, in the mixed administration areas, why should ethnic people engage with the formal system and thereby legitimise it?. Secondly, it could be argued that customary land management systems should be recognised by amending the current formal legal frameworks, before any engagement is encouraged with the formal land titling systems. Although these management systems have been recognised in the National Land Use Policy, it is yet to be turned into concrete legislation.⁹⁶

Both are valid points, but will take years to accomplish, while in the meantime agricultural land may be grabbed by powerful interests thereby creating facts on the ground which are difficult to reverse.

The feedback from the FGDs indicates that despite the geographical proximity of these villages to the administrative centre of Thaton Town, the villagers have very little knowledge of, or interaction with, the formal systems of land use and regulation and continue to rely on customary recognition of ownership and use rights. This pattern, according to the CSOs consulted, as well other research done by Namati, MyJustice, KHRG, HURFOM and others, is common across Mon State.

In addition, in Win Phone, which is an area where KNU have influence, the villagers have not availed themselves of the opportunity to obtain KNU land title. The lack of interaction with the formal system relates to both village houses/plots, as well as agricultural land. Former HLP assessments conducted by NRC also indicate that Win Phone has communally-owned land as well, which is also unprotected under the current laws.⁹⁷

In the areas studied, the lack of documentation of village houses/plots has not caused serious issues in terms of local tenure security, but this is likely a mere benefit of communal harmony and location. In other areas affected by displacement due to conflict in Mon State, the lack of formal documentation will have ramifications for those who have been forced from their HLP holdings and seek to return later.

In relation to agricultural land, the lack of public information around the 2012 land laws has created vulnerability for farmers who are unaware of the importance of registering use rights through LUCs. Even where information is available, villager and CSO feedback highlights that other structural inequalities prevent greater interaction with the formal authorities who administer LUCs, inclusive of fear of authority, language barriers, the unofficial costs of getting an LUC issued, as well as the length of time involved. The combination of these barriers adds to farmers' vulnerability to future land-grabs and highlight the ongoing necessity for ICLA interventions which:

- Increase knowledge of the 2012 laws;
- Explain the protective function of LUCs; and
- Assist farmers in lodging applications, making complaints and obtaining registration documents.

For cases such as Ahnan Pin, where land is already lost, legal assistance should focus on facilitating land restitution and or compensation, if possible. For villages similarly situated and vulnerable to future grabs by powerful actors, CDR in terms of facilitated negotiation prior to confiscation may be useful to redress the power imbalance between farmers and other actors.

3.2. CDR assistance intra-community disputes

Customary dispute resolution procedures work best when the following is observed:

- Customary authorities are trusted, respected and have legitimacy;
- Disputes in question are over customary land;
- Mechanisms are easily accessible;
- Decisions are made in a timely manner;
- Maintenance of community harmony is a goal; and
- More culturally acceptable than courts as well as faster and cheaper.⁹⁸

As the feedback from the FGDs shows, the communities surveyed indicated that these factors were present, and listed many of them as reasons why they preferred the dispute resolution of the village headmen and women in arbitrating land disputes at the village level. Furthermore, a rudimentary stakeholder analysis suggests that in disputes within the village, often the disputants are reasonably close to each other in terms of power dynamics and therefore leverage in negotiations. Therefore, it appears that CDR practices have the potential to build upon the advantages of the form of arbitration provided by customary dispute resolution, in terms of the legitimacy of the decisions reached with the help of a third party, the speed and low cost of such procedures, and the ability to achieve outcomes that contribute to communal harmony.

Critically however, it is important to recognise widely researched concerns regarding customary dispute resolution and human rights standards. Plans to provide CDR training to customary authorities and communities in techniques of dispute resolution, should be designed such that customary practices which may be discriminatory are brought into line with a rights-based approach.⁹⁹

The concerns of community members regarding customary dispute resolution was listed earlier, including perceptions of:

- Corruption;
- Biased decisions;
- Power imbalances between disputants; and
- Discriminatory behaviour toward poor villagers.

These elements can be considered as potential risk factors¹⁰⁰ where communities rely on customary resolution mechanisms. Consequently, these elements, along with gender discrimination and any other relevant human rights concerns, should be addressed if CDR is chosen as a modality to augment village-level dispute mediation. Such an approach would ideally be minimally disruptive to current local practice, address the concerns of marginalised groups within the communities and achieve the goals of accessing and protecting HLP rights, while simultaneously respecting human rights.

3.3. CDR and legal awareness assistance in intercommunal disputes

The second type of conflict observed relates to actions by the local authorities to redraw village boundaries. There are several important issues raised by this situation;

- The redrawing of the boundaries resulted in the loss of land for the Win Phone farmers.
- The fact that this was negotiated between the Kawt Hlaing authorities and the GAD and DALMS.
- The lack of consultation with the Win Phone land holders
- The subsequent access to documentation for the farmers which gained land in Kawt Hlaing
- The lack of compensation for the Win Phone farmers

Although the government has a constitutional prerogative to redesignate village boundaries, this should not result in automatic loss of the land. There is no reason why a farmer cannot hold land parcels in two contiguous villages. Furthermore, no reason was given to the farmers as to why they lost their land and no notice was provided. The fact that the Kawt Hlaing farmers now have LUCs for the land indicates that the VTFAB and the TFAB authorities are aware of the situation and were prepared to issue documentation over the redesignated land to the new owners.

If the Township level GAD and DALMS authorise a boundary change which deprives farmers of land and then the use rights of this land is given to farmers in Kawt Hlaing, this represents a government act of acquisition under the Land Acquisition Act 1894. However, the transfer of the use rights to other villages cannot be said to fall within the public purpose justification for acquiring the land, which is then a violation of the act. In such a case, the land should be returned to the previous owner or compensation should be provided, regardless of where the village boundaries lie.

If the case does not fall within the definition of a land acquisition, for example, if the land was simply transferred from one unregistered user to another registered user with tacit administrative authority, then the second user could be said to be trespassing on the land of the original user. Additionally, if administrators were involved in financial transactions over the land in question, this may represent fraud and the case is amenable to administrative challenge and potentially civil or criminal legal action.

What can be deduced from the situation is that:

1. Farmers lacked the legal knowledge and/or capacity to challenge this decision while it was happening. Greater knowledge of the Farmland Law 2012 and the Land Acquisition Act 1894 might have helped the dispossessed farmers make a case either for return of the land or compensation at the time. Further, CDR skills could have assisted the farmers who lost land in this dispute to negotiate with land administrators and Kaw Hlaing villagers, potentially prior to land being lost;
2. Situations such as this are suitable for ICLA teams or legal aid CSOs to intercede during the process through facilitated negotiation on behalf of villagers who do not feel empowered or able to negotiate for themselves and for whom advocacy supported by legal argument is necessary; and
3. Compensation is still due to farmers who lost agricultural land in this case, and any similar cases. Farmers could be assisted to report the situation to the State-level Farmland Administration Body or to the State-level Committee for Rescrutinisation of Confiscated Farmland and Other Lands in Mawlamyine (it is clear in this case that Township level authorities are involved in the loss of the land in Win Phone, so higher levels of authority would need to be consulted). Given the inefficiency and marginal results produced by these channels in the last few years, either of which would require legal aid, other options may be suitable, namely:
 - a legal case challenging the administrative decision; and
 - appeal to the responsible government body for compensation could also be pursued for violation of the Land Acquisition Act.
 - A legal case for trespass (civil or criminal).

Training on legal rights provided through ICLA and CSOs would contribute to these efforts, as would raising awareness of other situations where customary land holders have been successful in claiming back land in situations where relatively little documentation (only tax receipts) was available as evidence of ownership/use.¹⁰¹

As mentioned above, greater knowledge of CDR skills and negotiation may have assisted and empowered the farmers to attempt a mediation with the Kawt Hlaing farmers and township land administrators before they lost their land.

3.4. Legal assistance in disputes between villagers and outside actors

Feedback from FGDs, the CSOs and supporting research carried out over the past few years (specifically the work done by Namati on land-grabs and restitution) show that there is a wide discrepancy in power between farmers and those responsible for land grabs. Additionally, the amount of cases where these power imbalances are at play that have been resolved in favour of farmers, borders on negligible.

In these types of situations:

When parties have significantly different forms and amounts of power and influence, assistance and procedures that equalise or balance them may be required to produce fair outcomes. This may include securing advocacy help for negotiations, or taking a dispute to an authoritative, trusted and fair third party, such as a judge or customary authority, for a decision.¹⁰²

Given the three main actors commonly cited as being responsible for land grabs across Mon State (Military, Government and Companies) and the history of dispute resolution where there are large power imbalances, it appears that the potential impact of CDR in these cases is negligible. Furthermore, it is also clear that the FABs do not have the mandate to address land-grab issues and the Rescrutinisation Committees have had minimal success in restituting grabbed land to original owners. These types of cases appear to require the coercive powers provided by the formal court system, despite the current challenges within the judicial system.

The feedback from CSOs engaged in legal aid indicates that there is a potential for rural communities to lose the motivation to engage with CSOs if all they do is provide training and awareness raising, without providing any practical solutions.

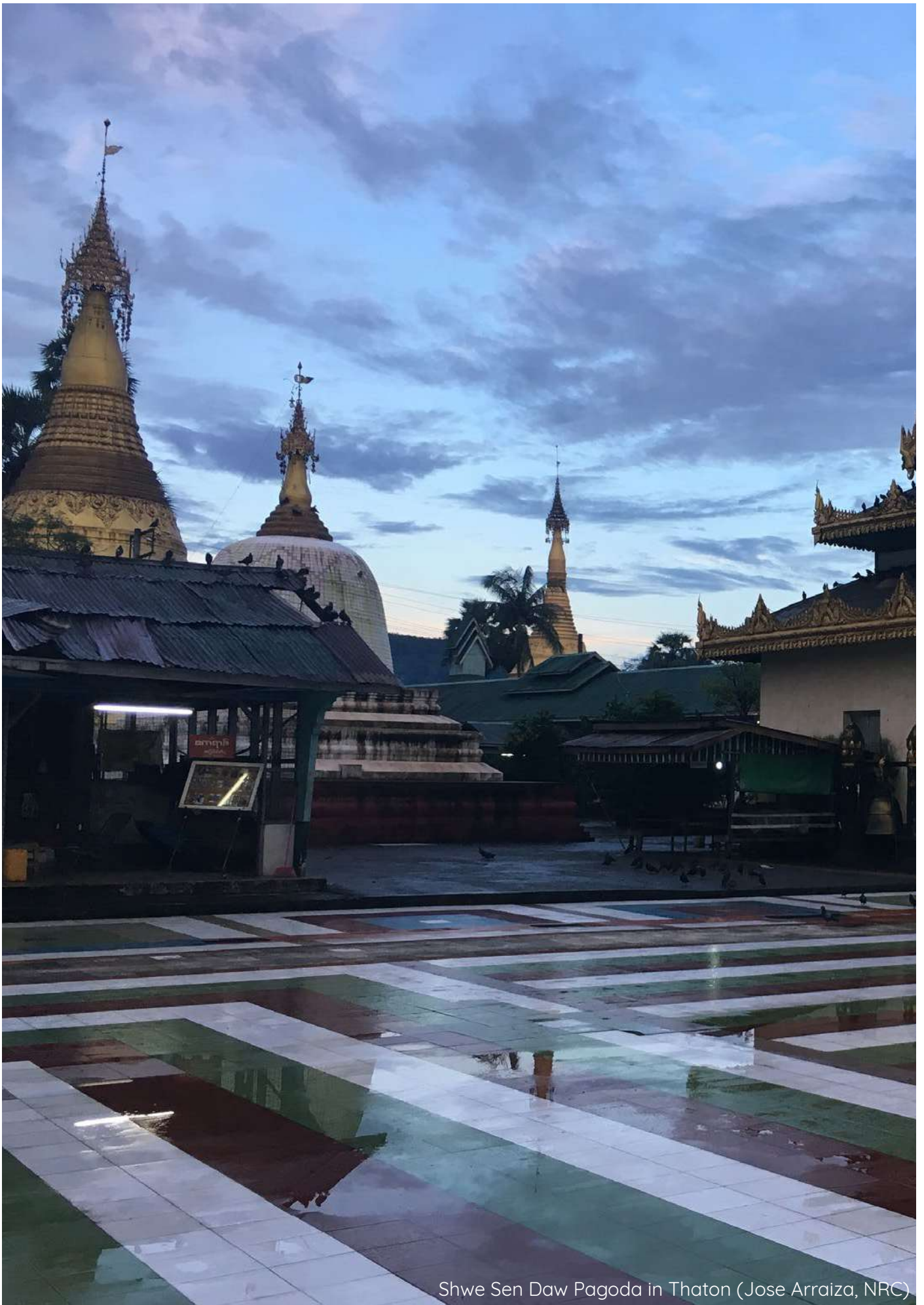
It is therefore part of the conclusion of this assessment, that strategic litigation of some test cases which challenge land grabs as violations of the Land Acquisition Act, the Farmland Law and the VFL law would have some practical impact, as well as act as a deterrent to would-be land-grabbers. Suitable cases could be recent confiscations where there is minimal evidence of ownership in customary areas (only tax receipts available, for example). In such situations, it could be argued that although many farmers lack the formal documentation, the fact that many farmers are in the process of registering their de facto land use rights many years after the passing of the 2012 laws, indicates that the government / FALs are willing to recognise these rights. Often these rights are recognised with only the evidence of a VTA endorsement and the testimony of two neighbours.

3.4.1. Military Land grabs

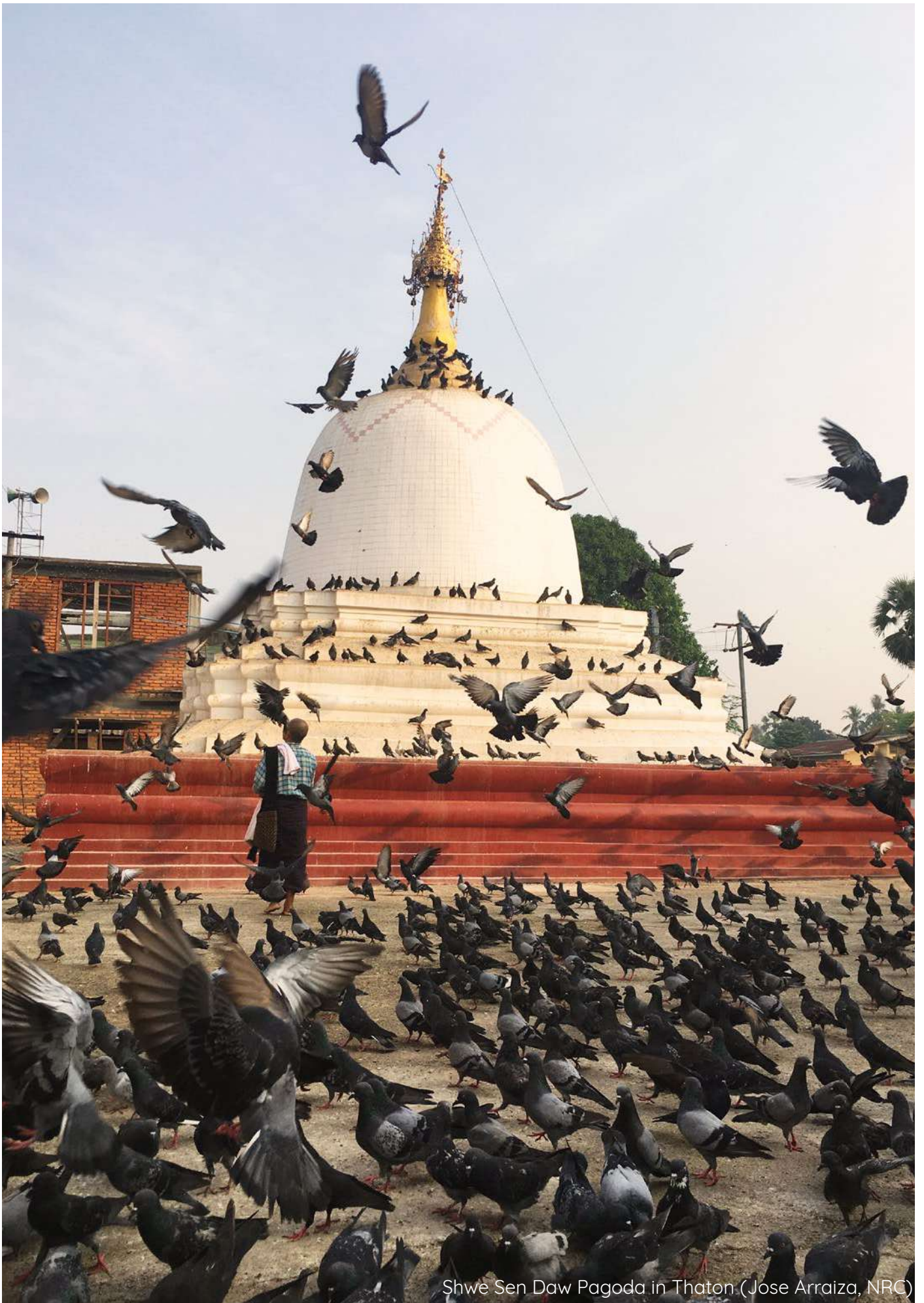
It was made clear in the discussions with various stakeholders that no group within the study has the capacity or the desire to take on the military over land grabs. The issue is seen as dangerous, with potential ramifications for CSOs and others. Although legal aid CSOs in northern Mon are reluctant to get involved with these cases, negotiating with the military on behalf of farmers has been attempted in other areas. Namati paralegals have been trained to do this in Shan State and private legal aid staff have performed similar functions in cases of confiscation around Myitkyina in Kachin State.

3.4.2. Government Land Grabs

Those who have lost land to government confiscation have clear rights under the law and require direct assistance to follow up cases, given that most people lack the necessary legal knowledge and don't have access to government offices. Most farmers affected by government land-grabs may not be aware that although the Land Acquisition Act 1894 gives the government or military wide powers to take land for a public purpose, there are clear procedures and rights for those affected. This includes a right to compensation at market rates, plus 15 percent and financial consideration for other factors (including the value of crops, damage caused during the acquisition process, loss of profits and relocation costs). The law establishes out detailed obligations that the government must comply with.



Shwe Sen Daw Pagoda in Thaton (Jose Arraiza, NRC)



Shwe Sen Daw Pagoda in Thaton. (Jose Arraiza, NRC)

Government Obligations Under the Land Acquisition Act 1894
A 'Collector' must be appointed to administer the process. ¹⁰³
There must be a notice of preliminary investigation in the Gazette and local area. ¹⁰⁴
The affected persons must be permitted to make objections. ¹⁰⁵
A declaration of intended acquisition should then be published in Gazette. ¹⁰⁶
The Land must be marked out. ¹⁰⁷
There must be a public notice in convenient places or near the land, including a statement that the Government intends to take possession and that affected people can make representations on issues such as compensation and measurements of the land and the notice should be given to affected people. ¹⁰⁸
The Collector should make and file a record of any award. ¹⁰⁹

There is also an express right to challenge the measurement of the land, the amount of the compensation and the persons to whom it is payable in a court.

The onus is currently on the government department responsible for land acquisition to initiate the compensation process where land is taken for a public purpose¹¹⁰. However, what is lacking is any obligation on the government in the acquisition law to follow through on the obligation. There is no official process for a victim of land confiscation who has not been compensated, to compel the government to uphold its legal obligations.

As the use of the constitutional writs becomes more widely known in future, challenging administrative decisions in the court may also become a possibility, however at the moment, such suits are rare.

This only leaves the possibility for the individual to make an official complaint and request their due compensation under the law. However, it is rare that those in farming communities are aware that they have the rights outline above, or how to go about making complaints to the authorities. This is an area where greater assistance would be useful.

3.4.3. Companies

Where land has been confiscated illegally, both return and compensation for lost earnings should be sought. Feedback from Legal Light suggested that in cases where companies are involved, the tendency is for companies to pay appropriate compensation.

In the cases of government and company land grabs, a strategic litigation team should be developed, either through support and augmentation of existing capacity (like Legal Light, which appears chronically underfunded and whose current funding from People in Need (PIN) expired in January 2018) or to develop a new team in Mawlamyine. Feedback from Earthrights International, who were engaged in strategic litigation on environmental issues connected to the Thilawa SEZ at the time of writing, recommended that this would require either Mon lawyers or at least lawyers based in Mawlamyaing, given the frequency of court hearings (as often as fortnightly).

The feedback received from Legal Light, as well as input from Earth rights International and a former employee of the Mawlamyaing Justice Centre, suggests that legal empowerment programs to strengthen local capacity could lead to possibilities for strategic litigation of land cases in situations where more powerful actors confiscate land from farmers. Legal Light has had some success in pursuing these types of cases, even when complainants have only been in possession of tax slips as evidence of ownership and prior use.

3.4.4. Legal Action

There are several options for legal action that could be brought on behalf of farmers which circumvent the jurisdiction of the land management bodies. These options involve framing cases as examples of criminal/civil trespass, or, as the case mentioned by Legal Light suggests, as fraud. These suits utilise the civil and criminal jurisdictions, but require considerable resources to pursue, meaning the average farmers would require assistance in bringing such cases to court.

Criminal Cases

There are multiple provisions in the Myanmar Penal Code 1861, which protect housing, land and property (HLP) rights. These include offenses for entering onto someone else's land without permission (trespass) and for selling land without the permission of the owner (fraud).

The main purpose of a criminal offense is to punish the person who committed the offense (and prevent repeat offenses). However, for a farmer to obtain compensation or recover land, a civil suit would also be required.

(a) Criminal trespass

Criminal trespass on housing and land is a crime under the Myanmar Penal Code.¹¹¹

A complaint alleging criminal trespass can be lodged with the local police closest to the land or with the Township court directly. A party found guilty of trespass can be given 3 months in prison or a fine.¹¹²

(b) Fraud

Fraud is an offence under the Penal Code and can occur in various situations related to land and property. For example, one party A who is a tenant on B's land, sells the land to C, without A's permission.¹¹³ As with criminal trespass, complaints can be lodged with the police or directly with the court. A successful outcome would result in imprisonment or a fine (or both) for the perpetrator, and recognition of the rights of the original owner.

Civil Cases

While criminal cases are aimed at punishing perpetrators (and removing parties from a property, for example), civil cases are more suitable if the farmer is seeking compensation. If both outcomes are sought, a criminal suit followed by a civil suit may be appropriate.

Civil Trespass

(a) Common law remedies for Tort

Trespass is both a crime and a tort.¹¹⁴ The tort of trespass is not set out in legislation in Myanmar – it exists as a common law offence recorded in case law.¹¹⁵ It occurs when a person:

- enters land that is in possession of another person; and
- does not have that person's permission to enter the land.

Unlike criminal trespass, there is no requirement for intent (so trespass can take place even if the trespasser did not know they were on someone else's land). This makes it easier to prove than criminal trespass. The remedies for civil trespass can be a combination of:

- an award of damages (e.g. if the land has been polluted or the owner has lost income); and / or
- an injunction either to order the trespass to end or not be repeated (see below for information on injunctions).

A civil trespass claim must be brought within 3 years of the offence.¹¹⁶ If the trespass is ongoing, then the 3-year period only starts to run if / when the trespass ends.¹¹⁷

(b) Other Common Law Remedies

Declarations – In a dispute between a farmer and another party over who holds land rights, the farmer may apply for a declaration by the court which recognises that right to the detriment of the other party.¹¹⁸ When filing suit, the farmer should also request an injunction to remove another party from the land in question (see below).

Injunctions – Injunctions are an order by the court to stop a particular activity.¹¹⁹ For example, an injunction could force a party from continuing to trespass on a farmer's land.

(c) Statutory Remedies

The Specific Relief Act 1877 (SRA) offers several avenues for protecting housing or land rights. The SRA works together with the Code of Civil Procedure 1908, which sets out details such as what documents submitted to the courts should include and what should be in a court's judgment and decree.

The Code of Civil Procedure 1908 also sets out a process for enforcement of decrees over land ownership, including for the delivery of immovable property and removing anyone who is ordered to leave the property and refuses to do so.¹²⁰ A claim must be brought within 12 years of when possession was discontinued.¹²¹

Despite the challenges posed by the judicial system in Myanmar, rule of law has been improving in recent years due to reforms. While it is important to focus on recognising, supporting and strengthening customary land management systems through CDR-based activities due to the benefits outlined earlier, it is also important to show that the judicial system can work for farmers as well, especially when there is fear of authority, power imbalances between actors etc. This is also important given that the land administration / investigation bodies have proven to be largely ineffective in dealing with land grabs.

Legal empowerment leading to successful pro bono litigation against land grabbers may encourage other farmers in Mon State to prosecute those responsible for historic land grabs. Where land is not returned at least there should be market compensation paid for losses suffered by farmers. This is a recommendation which would clearly require further research to judge the capacity of CSO partners, paralegals and a deeper understanding of the types of conflicts, as well as the specific actions available.

Feedback regarding military land grabs was that these cases are too politically difficult and / or dangerous to prosecute and should be referred to the Committee for Rescrutinising Confiscated Farmlands and Other Lands, whose instructions provided by the President's Office have provisions B(1-3) for the return of lands grabbed by the military but which remain unutilised.¹²²

4. Conclusion

Both customary and formal dispute resolution mechanisms available to citizens for the resolution of disputes and the prevention of HLP rights abuses in northern Mon have some clear deficiencies, which could be mitigated by farmers themselves, with some practical assistance from civil society and international organisations.

In the customary system, duty bearers and citizens lack the legal knowledge which would help them prevent and resolve disputes at the village level in a fair and just manner. Legal awareness-raising and CDR assistance would help bring customary practice into line with human rights standards.

The formal land registration system should protect the HLP interests of citizens when powerful actors are involved in land-grabbing. However, it remains largely inaccessible to most villagers due to a lack of knowledge and power. International and local land actors can counter that imbalance by supporting legal aid providers, promoting empowerment for citizens through legal action and providing assistance to document and lodge complaints of land-grabbing.



Mon State Landscape (Jose Arraiza, NRC)

4.1. CDR interventions can improve HLP rights protection

Continued legal assistance (building on what has already been delivered) in the form of training communities and village-level/VTA authorities on relevant laws (with the addition of the rules which guide implementation of the Farmland Law 2012¹²³), the importance of those laws for land protection, as well as further CDR mediation training which improves access to justice, appears to be a viable approach to strengthen and protect HLP rights in cases where the assistance is aimed at:

- a) resolution of community level conflicts between villagers;
- b) mediated by village headmen and women;
- c) ameliorating some of the negative aspects of customary dispute resolution inconsistent with rule of law and human rights; and
- d) builds upon the positives of customary law dispute resolution.

The CDR components which appear to be most relevant for dispute resolution actors at the village level is mediation and facilitated negotiation for disputes between farmers and local government.

4.2. Capacity building can help village land authorities promote HLP protection

CDR training has the potential to augment the positive role of village headmen and women in their role in resolving land disputes at the local level by increasing their knowledge of facilitation, mediation and arbitration with a perspective of incorporating knowledge of human rights standards. Rights-based approaches may help to eliminate some of the negative potential consequences arising out of traditional gender roles, bias and corruption concerns which were raised by villagers in FGDs. Given the mediating role played by the KNU liaison in the Thaton area, this official should be included in future trainings (this should also be the case in areas of mixed administration between government and NMSP).

4.3. Developing the legal capacity of CSOs can improve access to Justice

Train CSO staff on relevant laws

CSOs require specific HLP training to undertake their roles in community awareness raising. Future training should cover:

- Land Law (the relevant sections of the Farmland Law, VFV Law (including 2018 amendments), Forest Law, Land Acquisition Act, Constitution);
- The importance of using the law for protection (LUCs, FUGCs), including examples from across the country of confiscation in customary ownership areas and emphasising the need for women to be part of land registration processes; and
- Improve knowledge of administrative complaints mechanisms (Committee for Rescrutinising Confiscated Farmlands and Other Lands, FABs etc).

Fund CSO partners to hire and train paralegals to assist with LUCs/KNU land titles, or both in the case of mixed administration areas.

Raising awareness of land issues is not enough to protect land against actors who are using the formal system against farmers. Admittedly, government and military grabs cannot be completely prevented by increased documentation where such confiscation is justified under the public purpose

provisions. However, documentation will increase the likelihood of obtaining correct compensation in such cases.¹²⁴

Currently in Mon State, HURFOM and Lokha Ahlin are the only organisations actually assisting farmers in obtaining LUCs. Further direct assistance is required for interested farmers to obtain LUCs (this would be a practical response to requests for assistance with registration that has been recorded in NRC's quarterly reports of activities throughout Mon State in 2017). Teams of paralegals could be trained to do this, preferably local Mon / Kayin staff to ensure the sustainability of such efforts. Assistance with applications for LUCs are tasks which are more administrative than a legal. Such activities would require case management skills and funding to pay for administrative fees, as well as training on transparency and the avoidance of the usual bribery that comes with dealing with administrators. Such activities could alternatively be made a part of the existing activities carried out by ICLA teams which assist in the provision of civil documentation.

It is important to understand that EAOs do not at all times have the best interests of their constituents at heart, or that they are inured to corrupt practices and land grabs themselves, as past documentation has shown. Communities may fear EAOs as much as government actors in some areas, as key informant interviews confirmed. Therefore, efforts should continue to educate the EAO land authorities on the importance of documentation (both in their own and formal systems) in order to argue for access to populations under mixed control areas. This awareness raising could also form part of the forthcoming trainings for government and EAO authorities.

Foster legal empowerment through developing CSO and paralegal capacity to engage in strategic litigation. This might be done through expanding the relationship with Mawlamyaing Justice Centre, or through support to Legal Light which already has experience in land case litigation, or by engaging ICLA staff with prior litigation experience who could implement this activity directly.



Shwe San Daw Pagoda in Thaton, (Jose Arraiza, NRC)

5. Recommendations

5.1. Continue to provide training and mentoring on CDR and HLP legal awareness activities by ICLA, KDN and others.

- CDR (mediation) training for communities and lowest-level authorities (village headperson and VTA and Township authorities) in line with human rights standards to address intra/inter-village land issues.
- Continued training on legal frameworks and complaints mechanisms for both communities and CSOs staff (with an awareness of language and literacy constraints)
- KDN staff should be trained on both formal law and KNU land governance systems as their work is in fully KNU controlled areas.

5.2. Capitalising on awareness - Accessing legal protections

- Provide direct assistance to farmers to obtain Land Use Certificates to give tangible results either through NRC (ICLA), KDN and CSO assistance or training paralegals preferably from within the community (inclusive of case management and transparency).

5.3. Restitution – Strategic Litigation

- Provide direct assistance in obtaining restitution/compensation through mediation and legal action.

Annex.1 Organizations Interviewed

- Human Rights Foundation of Monland
- Mon Youth Progressive Organisation
- Mon Women's Organisation
- Legal Light
- Mawlamyaing Justice Centre
- Karen Development Network
- Lokha Ahlin
- Earthrights International
- Tharti Myay
- Legal Clinic Myanmar

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Notes & References

¹ Collaborative Dispute Resolution (CDR) is here understood as a series of methods for resolving disputes that involve cooperation between or among disputing parties and that enable them to voluntarily settle their differences. Common CDR procedures include: unassisted problem solving or negotiation, or assistance from a trusted third party who provides meeting facilitation, mediation, conciliation (reconciling relationships or differences) or non-binding or binding arbitration. Third parties providing CDR assistance are commonly independent of and not directly affiliated with any of the disputing parties, and are also objective and unbiased toward issues in dispute or potential outcomes.

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⁸ Mon Human Rights Foundation, 'Yearning to be Heard: Mon Farmer's Continued Struggle for Acknowledgment and Protection of their Rights', 2015, 16; Interview with HURFOM Director.

⁹ Transnational Institute, Access Denied: Land Rights and Ethnic Conflict in Burma, Burma Policy Briefing Nr 11, May 2013, 2.

¹⁰ Ibid, 4.

¹¹ Karen Human Rights Group, Losing Ground: Land Conflicts and Collective Action in Eastern Myanmar, 2013, 27-28.

¹² Kim Jolliffe, *Ethnic Armed Conflict and Territorial Administration in Myanmar*, June 2015, 8.

¹³ Jolliffe, Kim and Brian McCartan, *Ethnic Armed Actors and Justice Provision in Myanmar*, Asia Foundation, October 2016, 10.

¹⁴ The common law has since been bolstered and expanded by statute, as in many other common law jurisdictions. This is particularly the case regarding regulation of land rights.

¹⁵ Crouch, Melissa, 'The Layers of Legal Development in Myanmar' *Law, Society and Transition in Myanmar*. Ed. Melissa Crouch and Tim Lindsey. London: Hart Publishing, 2014. 33–56. Bloomsbury Collections, 36.

¹⁶ For more on the recent judicial history of Myanmar, see Cheesman, Nick, *Opposing the Rule of Law: How Myanmar's Courts Make Law and Order*, 2015.

¹⁷ For further reading see the International Commission of Jurists annual reports on the state of the judiciary in Myanmar.

¹⁸ MyJustice, Lisa Denney, William Bennett and Khin Thet San, *Making Big Cases Small and Small Cases Disappear: Experiences of Local Justice in Myanmar*, November 2016, 18.

¹⁹ International Commission of Jurists, *Myanmar: Country Profile*, prepared by the ICJ Centre for the Independence of Judges and Lawyers, June 2014, 6–25.

²⁰ The Land Acquisition Act dates to 1894, for example.

²¹ Constitution of the Republic of the Union of Myanmar (2008) Government of the Republic of the Union of Myanmar, Article 37.

²² Ethnic Community Development Forum, *Biofuel by Decree; Unmasking Burma's Bio-Fuel Fiasco*, 2008, 1.

²³ Ethnic Community Development Forum, *Biofuel by Decree; Unmasking Burma's Bio-Fuel Fiasco*, 2008, 1.

²⁴ Karen Human Rights Group, 'Road construction and expansion results in destruction of villagers' plantations in Kyonedoe and Kyainseikgyi townships, December 2014 to July 2015', accessed online at: <http://khr.org/2016/03/15-5-ps1/dooplaya-photo-set-roadconstruction-and-expansion-results-destruction-villagers#sthash.GrwDWVtq.dpuf>, on 6 May 2016.

²⁵ See various HURFOM special reports available at <http://rehmonnya.org/>.

²⁶ Farmland Law 2012, Chapter II, 4.

²⁷ Spectrum Sustainable Development Knowledge Network, 'Form 7' Seven Case Studies of Farmland Registration in Kachin, October 2015, 10.

²⁸ Farmland Law 2012, Chapter IV, 12(h).

²⁹ Farmland Law 2012, Chapter IV, 12(i).

³⁰ Farmland Law 2012, Chapter VIII.

³¹ Farmland Law 2012, 25(c).

³² Vacant, Fallow, Virgin Lands Management Law 2012, Article 16.

³³ Vacant, Fallow, Virgin Lands Management Law 2012, Articles 22(b), 27(a) respectively.

³⁴ Earth Rights International, "Proposed Amendments to the Vacant, Fallow and Virgin Lands Management Law". Art. 27, The Law Amending the Vacant, Fallow and Virgin Lands Management Law (2018), Earth Rights International, "Myanmar 2018 Draft Land Acquisition Act – Key Issues".

³⁵ The Department of Agricultural Land Management and Statistics.

³⁶ See NRC research on Rakhine for further details.

³⁷ Union of Myanmar President Office order letter number 14/2016 issued on 5th May 2016

³⁸ Republic of the Union of Myanmar President's Office 'VP U Henry Van Thio attends meeting of committee on confiscated farmlands' accessed online at <http://www.president-office.gov.mm/en/?q=briefing-room/news/2017/04/01/id-7452>.

³⁹ Republic of the Union of Myanmar President's Office, VP U Henry Van Thio: More pragmatic, strategic decisions needed for land use, <http://www.president-office.gov.mm/en/?q=briefing-room/news/2018/04/07/id-8659>.

⁴⁰ Lisa Denney, William Bennet and Khin Thet San, Making Big Cases Small and Small Cases Disappear: Experiences of Local Justice in Myanmar, MyJustice, British Council, November 2016, 24.

⁴¹ Farmland Law 2012, s6(a)(v) and s6(a)(ii).

⁴² Similar findings have been made across the country including in NRC research in Rakhine State in 2017, Mon and Shan State in 2018, and the author's research in the Ayeyarwady Division in 2017 and Kachin State in 2018.

⁴³ Kim Jolliffe, Ethnic Armed Conflict and Territorial Administration in Myanmar, Asia Foundation, 2015, 1.

⁴⁴ Kim Jolliffe, Ethnic Armed Conflict and Territorial Administration in Myanmar, Asia Foundation, 2015, 46,

⁴⁵ Karen National Union, Land Policy 2016, Office of the Supreme Headquarters, Karen National Union Kawthoolei, Article 1.1 Basic Principle of Kawthoolei Land Policy, 1.1.1.

⁴⁶ Constitution of the Republic of the Union of Myanmar 2008.

⁴⁷ Which was developed in 1955, see Kim Jolliffe, *Ethnic Armed Conflict and Territorial Administration in Myanmar*, Asia Foundation, June 2015, 13.

⁴⁸ Brian McCartan and Kim Jolliffe, Asia Foundation, *Ethnic Armed Actors and Justice Provision in Myanmar*, October 2016, 19.

⁴⁹ *Id* 6.

⁵⁰ Brian McCartan and Kim Jolliffe, Asia Foundation, *Ethnic Armed Actors and Justice Provision in Myanmar*, October 2016, 20.

⁵¹ Ethnic Communities Development Forum, *Our Customary Lands: Community-Based Sustainable Natural Resource Management in Burma*, July 2016, 39.

⁵² *Id* 32.

⁵³ Transnational Institute, 'Access Denied: Land Rights and Ethnic conflict in Burma' Burma Policy Briefing Nr 11, (May 2013) 10; United Nations High Commissioner for Refugees and Norwegian Refugee Council, 'Lessons learned and good practices in addressing housing, land and property disputes', Discussion Paper submitted at Thematic Meeting on Land Issues in Burundi Peacebuilding Commission – Burundi Configuration, 27 May 2008, 5.

⁵⁴ Karen National Union, *Karen National Union Land Policy 2015*, Article 5.5 Resolution of Tenure Rights and Tenure Rights Related Disputes, 5.5.3; Kim Jolliffe, *Ethnic Armed Conflict and Territorial Administration in Myanmar*, Asia Foundation (June 2015) 20.

⁵⁵ Kim Jolliffe, *Ceasefires, Governance and Development: The Karen National Union in Times of Change*, Asia Foundation, December 2016, 55.

⁵⁶ Karen National Union and Union-level Bilateral Ceasefire Agreement, Agreed on 6 April 2012, Points 9, 9, 10 and 11. Available online at <http://www.knuhq.org/preliminary-ceasefire-talks-2012/>.

⁵⁷ Jolliffe, Kim and Brian McCartan, *Ethnic Armed Actors and Justice Provision in Myanmar*, Asia Foundation, October 2016, 14.

⁵⁸ *Ibid*.

- ⁵⁹ Jolliffe, Kim and Brian McCartan, *Ethnic Armed Actors and Justice Provision in Myanmar*, Asia Foundation, October 2016, 20.
- ⁶⁰ Ibid.
- ⁶¹ See Ethnic Community Development Forum, *Our Customary Lands: Community-Based Sustainable Natural Resource Management in Burma*, July 2016, and Brendan Tobin, *Indigenous Peoples, Customary Law and Human Rights – Why Living Law Matters* (Taylor and Francis, 2014).
- ⁶² Ethnic Communities Development Forum, *Our Customary Lands: Community-Based Sustainable Natural Resource Management in Burma*, July 2016, 6.
- ⁶³ Brendan Tobin, *Indigenous Peoples, Customary Law and Human Rights – Why Living Law Matters* (Taylor and Francis, 2014) 100.
- ⁶⁴ Tim Luccaro, 'Customary Justice: An Introduction to Basic Concepts, Strengths, and Weaknesses' International Network to Promote the Rule of Law (September 2016) 19.
- ⁶⁵ Brendan Tobin, *Indigenous Peoples, Customary Law and Human Rights – Why Living Law Matters* (Taylor and Francis, 2014) 30; Brookings Institution–University of Bern Project on Internal Displacement, *Protecting Internally Displaced Persons: A Manual for Law and Policymakers*, October 2008, 177 cited in Barbara McCallin, *Restitution and Legal Pluralism in Contexts of Displacement, Case Studies on Transitional Justice and Displacement*, International Centre for Transitional Justice and Brookings–London School of Economics Project on Internal Displacement (2012) 12.
- ⁶⁶ Brendan Tobin, *Indigenous Peoples, Customary Law and Human Rights – Why Living Law Matters* (Taylor and Francis, 2014) 31.
- ⁶⁷ Barbara McCallin, *Restitution and Legal Pluralism in Contexts of Displacement, Case Studies on Transitional Justice and Displacement*, International Centre for Transitional Justice and Brookings–London School of Economics Project on Internal Displacement (2012) 12.
- ⁶⁸ Kim Jolliffe and Brian McCartan, *Ethnic Armed Actors and Justice Provision in Myanmar*, Asia Foundation, October 2016, 14.
- ⁶⁹ *Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies*, Conference on Customary Law hosted by World Bank and George Washington University, November 17-18, 2009, 138.
- ⁷⁰ Within the rural village context in Myanmar, this could relate to the traditional dominance of men in the role of village headmen, for example.
- ⁷¹ Tim Luccaro, 'Customary Justice: An Introduction to Basic Concepts, Strengths, and Weaknesses' International Network to Promote the Rule of Law (September 2016) 24.
- ⁷² Cunningham, Johanna and Ewa Wojkowska, *Justice Reform's New Frontier; Engaging with Customary Systems to Empower the Poor*, International Development Law Organisation, *Legal Empowerment Working Papers*, Paper No. 7, 2010, 8.

⁷³ UNDP, Local Governance Mapping: Mapping Highlights in Mon State, 2013, available online at http://themimu.info/sites/themimu.info/files/documents/Highlights_Local_Governance_Mapping_Mon_UNDP_Jan2015.pdf. It should be noted that since 2012 legal reforms, village headmen legally speaking no longer have administrative authority which now lies with the Ward and Village Tract administrators only who according to the law should be elected. In reality, the implementation of this law has been piecemeal across the country and village headmen still retain legitimacy in some places.

⁷⁴ UNDP, Myanmar, Meet Village Tract Administrator Daw Naw Ta Bi Thar, article available at <http://www.mm.undp.org/content/myanmar/en/home/presscenter/articles/2017/06/09/meet-village-tract-administrator-daw-naw-ta-bi-thar.html>.

⁷⁵ Joanne Goss, 'An Introduction to Alternative Dispute Resolution', Alberta Law Review Vol XXXIV, NO.1, 1995, 3.

⁷⁶ Markus Zimmer, 'Overview of Alternative Dispute Resolution: A Primer for Judges and Administrators' International Journal for Court Administration, December 2011, 1.

⁷⁷ Christopher Moore, Housing Land and Property Handbook on Design and Implementation of Collaborative Dispute Resolution, Norwegian Refugee Council and NORAD, 2012, 37, 38.

⁷⁸ Christopher Moore, Housing Land and Property Handbook on Design and Implementation of Collaborative Dispute Resolution, Norwegian Refugee Council and NORAD, 2012, 37,38.

⁷⁹ Susanne Kempel and Aung Tun, Workshop Report, Myanmar Ward and Village Tract Administrator Elections 2016: An overview of the role, the laws and the procedures, Norwegian Peoples Aid, 31 January 2016, 5.

⁸⁰ Christopher Moore, Housing, Land and Property Handbook on Design and Implementation of Collaborative Dispute Resolution, Norwegian Refugee Council and NORAD, 2012,163.

⁸¹ SiuSue Mark, 'Are the Odds of Justice "Stacked" Against Them? Challenges and Opportunities for Securing Land Claims by Smallholder Farmers in Myanmar', (2016) Critical Asian Studies 48:3, 46.

⁸² Kim Jolliffe, Ethnic Armed Conflict and Territorial Administration in Myanmar, Asia Foundation, 2015, 55.

⁸³ Brian McCartan and Kim Jolliffe, Ethnic Armed Actors and Justice Provision in Myanmar, Asia Foundation, October 2016, 26.

⁸⁴ Interview with EarthRights International Lawyer.

⁸⁵ MyJustice, Making Big Cases Small and Small Cases Disappear: Experiences of Local Justice in Myanmar, November 2016, 37.

⁸⁶ The military's recent prosecution of journalists is a good example of this phenomenon, in particular the jailing of Irrawaddy journalist Law Weng in 2017 as well as the more recent cases of the Reuters journalists Wa Lone and Kyaw Soe Oo, sentenced for reporting on the Inn Dinn massacre in Rakhine State, Reuters, Myanmar says court in Reuters reporters' case was independent, 7 September 2018, access online <https://www.reuters.com/article/us-myanmar-journalists/myanmar-says-court-in-reuters-reporters-case-was-independent-idUSKCN1LN1QI>. See also International Commission of Jurists, International Commission of Jurists, Myanmar: Country Profile, prepared by the ICJ Centre for the Independence of Judges and Lawyers, June 2014, 6-25; International Commission of Jurists, Right to Counsel: The Independence of Lawyers in Myanmar, 2013, 2.

⁸⁷ See for example International Commission of Jurists, Right to Counsel: The Independence of Lawyers in Myanmar, "Government officials and institutions continue to restrict the independence of lawyers. This is particularly the situation when lawyers are involved in 'political cases': generally, those that challenge the government, officials or their vested interests. They also include cases (generally criminal) involving human rights defenders or alleged acts involving violations of human rights by authorities; land grabbing by authorities, companies or powerful individuals; grievances of ethnic minority groups; and political activities by high profile individuals."¹⁸.

⁸⁸ EarthRights International, Myanmar Farmers Convicted in Major Land Rights Case, 7 May 2018, accessed online <https://earthrights.org/media/myanmar-farmers-convicted-major-land-rights-case/>; Human Rights Watch, "Nothing for Our Land": Impact of Land Confiscation on Farmers in Myanmar, 2018, 5, 18, 23, 26.

⁸⁹ 80% of the respondents were from ethnic groups, mostly Karen with smaller numbers of Pa-o and Shan. The other respondents were of Bamar ethnicity.

⁹⁰ NRC/Displacement Solutions research in regions of Kayin, for example.

⁹¹ This is somewhat surprising given that the possession of Land Use Certificates was quite low, meaning that formal authorities are still drawn on to mediate disputes over unregistered land.

⁹² Namati and Landesa, Recommendations for Implementation of Pro-Poor Land Policy and Land Law in Myanmar: National Data and Regional Practices, October 2015, 17.

⁹³ Fostering relationships is essential to getting anything done in Myanmar across most fields of endeavour. So, although this approach from KDN staff is understandable and indeed laudable, it's also not sustainable from an organisational perspective, as it depends on which staff are working for the organisation at any one time. This response is an indicator that merely complaining to authorities has limited practical value.

⁹⁴ See Myanmar's Foray into Deliberative Democracy: Citizenship Participation in Resolving Historical Land Grabs, Namati, June 2017.

⁹⁵ SiuSue Mark, 'Are the Odds of Justice "Stacked" Against Them? Challenges and Opportunities for Securing Land Claims by Smallholder Farmers in Myanmar', (2016) *Critical Asian Studies* 48:3, 450; Namati, Evidence is Not Sufficient to Secure Land Rights in Myanmar: Impartial and Transparent Procedures are Critical, January 2017, 27.

⁹⁶ EAOs such as the KNU however, already recognise customary practices within its land policy and are able to issue title accordingly, see Karen National Union, Karen National Union Land Policy 2015, Article 1.1.3.

⁹⁷ NRC HLP Village Profile Win Phone 14 July 2016.

⁹⁸ Christopher Moore, Housing, Land and Property Handbook on Design and Implementation of Collaborative Dispute Resolution, Norwegian Refugee Council and NORAD, 14.

⁹⁹ Id.

¹⁰⁰ Id, 76.

¹⁰¹ Kachin State Farmers Network have had some success with such efforts around Myitkyina

¹⁰² Christopher Moore, Housing Land and Property Handbook on Design and Implementation of Collaborative Dispute Resolution, Norwegian Refugee Council and NORAD, 2012, 23.

¹⁰³ Section 3(c).

¹⁰⁴ Section 4.

¹⁰⁵ Section 5A.

¹⁰⁶ Section 6.

¹⁰⁷ Section 8.

¹⁰⁸ Section 9.

¹⁰⁹ Section 18.

¹¹⁰ The Land Acquisition Act 1894 requires the government to send an officer to assess the land and property in question, to determine its value as well as pay 15 % interest on the market rate for the acquisition.

¹¹¹ Myanmar Penal Code 1861, Article 441.

¹¹² Myanmar Penal Code 1861, Article 447.

¹¹³ Myanmar Penal Code 1861, Article 423.

¹¹⁴ A tort occurs when one person breaches an obligation owed to another person.

¹¹⁵ Common law refers to judge-made law and precedent.

¹¹⁶ Limitation Act 1908, Paragraph 37 of the First Schedule.

¹¹⁷ Limitation Act 1908, Section 23.

¹¹⁸ Specific Relief Act 1877, Section 42, illustration (g).

¹¹⁹ Issued under the Specific Relief Act 1877, Section 54.

¹²⁰ Code of Civil Procedure 1908, Order XXI, including paragraph 35.

¹²¹ Limitation Act 1908, Paragraph 142 of the First Schedule.

¹²² Union of Myanmar President Office order letter number 14/2016 issued on 5th May 2016.

¹²³ Farmland Law Rules, official title; The Republic of the Union of Myanmar President Office Notification No 62/2012, can be accessed online at http://www.burmalibrary.org/docs14/Farmland_Rules-en.pdf.

¹²⁴ Extensive research by Namati has shown that cases of land grabs where no documentation exists take on average 350 days to resolve and require higher unofficial fees, whereas those with documents take on average 136 days to resolve. For further reading see Namati, Evidence is Not Sufficient to Secure Land Rights in Myanmar: Impartial and Transparent Procedures are Critical, January 2017, 3.

