

**Track 8 What Role can the Commons play in the Struggle for Land Rights, in particular of
Indigenous Communities?**

Analysis of ways to codify customary communal shifting cultivation land in Myanmar

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Stating the Problem

Research into the Commons can contribute to the struggle for land rights of indigenous communities, if the research can suggest the means for the indigenous communities to articulate their claims and seek ways to have their land protected under statutory law in a way that does not distort their traditional tenure arrangements. The present research looks at this struggle for land rights in Myanmar to show how the application of the Theory of the Commons and its guiding principles can prepare a stepping stone for the preparation of procedures that eventually could become embedded in a legal and regulatory framework for land registration of customary communal agricultural land of upland ethnic groups.

The argument is that in S. E Asia it is better for indigenous communities to try to find a way to register their customary communal agricultural lands despite the possible loss of original indigenous notions of the wider landscapes and territory in which their agricultural land use is embedded. If land is not protected by some legal means, the land may be lost to land concessions in agribusiness. Control of land is the basis of communities' livelihood as well as power and influence today. Present day governments in S. E. Asia wish to retain as much land as possible under their control based on the eminent domain of the state with the aim to promote agribusiness for export production turning land into capital.¹ Land grabbing in the 21st century of any untitled land by the State and commercial interests is a risk that communities today can counter primarily through protests, if they dare. They cannot go to court, because their land is not titled. In Myanmar, as elsewhere, there had been an acceleration of business and corporate interest in mineral and natural resources and agricultural land for business in rubber, oil palm, corn and cassava, not to mention tropical timber, and once the timber is gone the land can be planted with palm oil as has happened all over Indonesia. In S. E. Asia, this has led, as said, to comprehensive loss of untitled land for upland indigenous peoples in Myanmar, in Lao PDR and in Cambodia.

The aim of the research was as advocacy research to influence the military government of the Union Solidarity and Development Party (USDP) during the reform process that started 2012. The goal was to protect the customary tenure arrangements of indigenous communities in the uplands through a possible customary communal land registration based on an idea that a codification of customary communal tenure under an overall statutory framework would protect the land against the ongoing land grabbing by agribusiness and the military. The intermittent research during 2013-16 therefore focused on recording the customary tenure arrangements of pilot communities in Chin

¹ In comparison, if we go back centuries, it was not land, but labor that the Southeast Asian kingdoms needed to maintain the upkeep of the courts. Back then prisoners of war were transported back and forth between kingdoms, settled and forced to produce for the court. See James C. Scott *The Art of Not Being Governed. An Anarchist History of Upland Southeast Asia*, Yale University Press 2009 p.147

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and Shan states identifying tentative land registration procedures that may be accepted by the government. The principles of the Theory of Common Property were used to record, as is, the customary appropriation arrangements and collective choice mechanisms of the pilot indigenous communities so that any future land registration would be truthful to their way of life. This could be done, if the community's internal rules of managing the common property, which were recorded, could be embedded in an overall national legal framework in a way that allowed the community self-determination in formulating and changing its internal rules whenever so warranted.

The research was initiated in 2013, when the Burmese military government of USDP started a reform process opening-up the country to attract business. It then became possible to travel under the aegis of local registered NGOs carry out work (research). The research was carried out for the Myanmar Land Core Group (LCG), which is a Yangon-based conglomeration of national and international NGOs working on land and forest issues lobbying the government. The LCG has had the ears of relevant progressive USDP government officers, due to, among others, interpersonal relations.

In the developing world only around 15% of land is titled, and untitled land, e.g. land under customary communal tenure, is at high risk of alienation.² An answer discussed in the research would be for farmers and communities to seek a registration of their land rights under a statutory law either in the name of individual farmers, a probable and possible choice for many lowland Burmese under the new Farmland Law, 2012 or in the name of the community as communal tenure by upland ethnic villages of indigenous people, a choice that not yet exists. Most rural communities do not know the laws and which laws could be construed to support them, and which legal means they might have.

In many developing countries, it takes decades to set up a land administration system and undertake land registration. The recommendations to government from this research do keep this in mind. It is recognized by the researcher that UN Habitat has developed Social Domain Tenure models,³ which are more flexible than statutory systems, but in the case of Myanmar it was judged better to try and accommodate recommendations with the existing regulatory system as this is what donors and development partners in the land sector presently support the government in.

Experience in registration of indigenous peoples' customary communal tenure is found in Asia in the Philippines and Cambodia. Communal land registration has been carried out in Cambodia, which, by law, provides communal land titling for indigenous communities. Here registration of communal tenure is legally complex as the entity owning common property must be a legal

²Augustinus, Clarissa, *Key issues for the future that support or prohibit a more pro-poor approach and why such an approach is needed* Land and Tenure Section, Shelter Branch, Global Division, UN-HABITAT
http://www.itc.nl/library/papers_2005/general/augustinus_sch.pdf

³ Lemmen, Christian 2010 *The Social Tenure Domain Model. A Pro-Poor Land Tool* International Federation of Surveyors, Global Land Tool Network and United Nations Human Settlements Programme (UN-HABITAT),

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personality, meaning the identity of the right-holders must be known. This requires a legal incorporation of the indigenous community concerned, - if a regulatory framework for such incorporation can be found. It also requires that the spatial units constituting the common property can be demarcated.⁴

The research in Myanmar has been drawing on lessons learnt in Cambodia. Looking to the Ostrom principles for common property and understanding the variety in institutional forms of customary tenure found in Myanmar, the challenge in the research was to understand the rules of appropriation and collective choice arrangements in the different ethnic village institutions. This was combined with an understanding of the great variety in resource endowment of the upland ethnic groups' village territories - specifically where land use comprised large tracts of shifting cultivation land and where delineation of boundaries, a mandatory element of mapping in government land adjudication, proved problematic as analyzed for the Chin shifting cultivators below.

Myanmar Land Issues

Myanmar was under British control most of the 19th century until 1948. First it was a part of India and then British Burma. The Colonial Rule of the British stressed the distinction between the Burman - or Bamar - occupied areas vis a vis the upland territory of other ethnic nationalities. Under a dual system of governance, the British administered the predominantly Burman area of 'Ministerial Burma' separately from the other ethnic areas called the 'Frontier Areas'. For the most part, the frontier areas were left under the local authority of traditional headmen and chiefs. Today, Myanmar has a population of around 50 million people, where over 20 million belong to non-Bamar speaking ethnic minority groups primarily found in states that bear their name, e.g. Kachin State, Chin State, Shan State, Mon State and Kayin State. The Myanmar government officially recognizes 135 "national races".

Almost 70% of the population are farmers. For lowland irrigated rice land, we find Bamar farmers and in the uplands ethnic farmers cultivating dry uplands (*taungya*) or practice shifting cultivation over areas that include large portions of fallow land, which is an indispensable part of shifting cultivation. Many ethnic states in Myanmar have since independence had very tenuous relationship with the government and most have had their own armies fighting the Burmese government. These so-called non-state actors have set up parallel governments. Land issues make up major contested issues in the ongoing civil wars. Numerous clashes between the Burmese army and the non-state actors still occur daily although some of them have signed up to a National Ceasefire Agreement. There is no end in sight, but many civil society groups and donors/development partners to the government support land rights programs, because in the last three decades, land has become a major issue in the conflicts due to reasons of land grabbing by the military and its cronies. So, solving land issues is now part of the peace process.

⁴ See Kirsten Ewers Andersen 2011 "Communal tenure and the Governance of Common Property Resources in Asia. Lessons from Experiences in Selected Countries". FAO *Land Tenure Working Paper 20*

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Nearly all agricultural concessions in Myanmar are formally run by Myanmar companies, many backed by foreign, often Chinese, investors. Or China may work directly with the Myanmar government. China's opium crop substitution project with the Myanmar government in Kachin State made room for Chinese take-over of land in the northern part of Myanmar under the pretense of substituting opium. Instead land was searched for by the Chinese to plant rubber. In a study by the Transnational Institute's (TNI) of the Chinese 'support' to the military government to eradicate opium growing in Kachin State this support is called 'financing dispossession' as it led to widespread land confiscation and displacement of local farmers.⁵ At the time of passing the laws in 2012 already millions of acres had been grabbed by the military and the government.⁶

The junta of the USDP government and the military represent two sides of the same coin. This is the case still today after the elected Aung San Suu Kyi government of the National League for Democracy took over in 2016. The military still has lot of influence as it is in control of three land-related ministries based on the Constitution of 2008 that the military had drafted then. The business cronies are closely linked to the army officers. The online journal Irrawaddy reports in early 2015 of the USDP reform process that "While the prevailing narrative is that the country has embarked on a reform process that will shake off military control of the government, the reality is that the process is looking increasingly shaky and showing clear signs of backsliding. Within the military there is a smug certitude that the transition to civilian control will be nominal and only advance at a pace that guarantees that the Defense Services, or Tatmadaw, and its political and business interests, remain intact, while escaping justice for past and ongoing abuses is ensured."⁷

The USDP government realized that as part of the reform process it had to return some of the land that was either confiscated by the military or given out as concessions, but not used for any cultivation and the NLD has continued the process, but it is far too slow and the land often cannot be retrieved. Recently, the Kachin State Minister for Agriculture, Livestock and Irrigation said in May 2017 that the Union government, the State government and local authorities had granted over the years many permits for vacant, fallow and virgin lands, but only around 80,000 out of 1,390,000 acres were found to be in use. And just getting land taxes for the 80,000 acres of land on which perennial crops are grown proved difficult. Much of this land had been sublet to Chinese businessmen.⁸ Many of the tree-covered concessions were logged and nothing more happened. So more than 1 million acres alienated in the Kachin State were not used for the purpose stated in the concession.

The loss of land to the military cronies means that today the attempts by the new government of the National League for Democracy led by Aung San Suu Kyi cannot generate the warranted results easily. For lowland Bamar farmers the protests and demonstrations make up a feasible

⁵ Transnational Institute (TNI) 2012 *Financing Dispossession China's Opium Substitution Program in Northern Burma* <http://www.tni.org/briefing/financing-dispossession>

⁶ <http://www.mmtimes.com/index.php/national-news/13773-minister-faces-land-grab-accusations.html>

⁷ David Scott Mathieson, Monday, March 30, 2015 <http://www.irrawaddy.org/contributor/burmas-military-milestone.html>

⁸ <http://www.elevenmyanmar.com/local/9571>

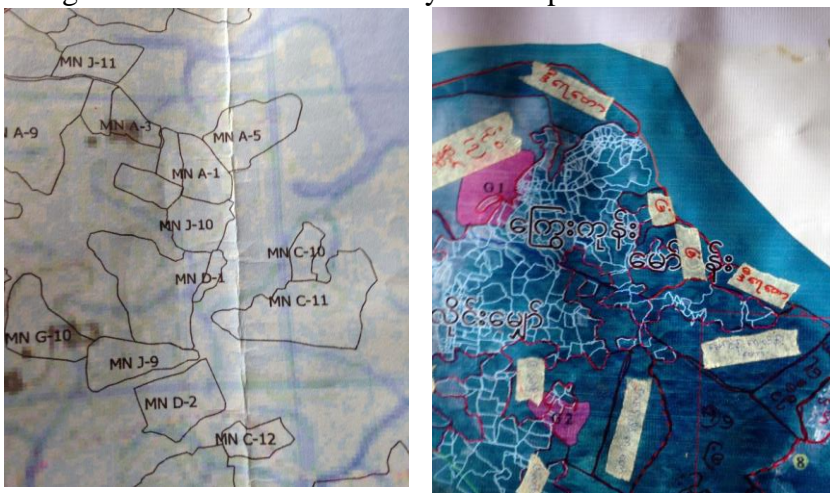
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means of protest. For upland ethnic groups, such protests are less likely due to their limited awareness of the laws and their constant fear of the army that still prevails, plus the lack of easy communication among villages. In the uplands, the fallow land of the communities is still at high risk of alienation, especially when the fallows are covered with 3-4 years of rejuvenating forest and the forest department hands out the 'degraded' forest land to a local businessman to create a teak plantation and the like.

Most grievances are not solved and land loss to businesses is still going on with the connivance of the local land administration agencies. The NLD won the election by the end 2015 and set up a new government at the start of 2016, but there is no chance for it to change the attitude of corrupt local level government officers of the old military regime. Some low-level bureaucrats misappropriate the lands that the government retrieves for giving back to farmers and sell off the land to local businessmen and line their own pockets. A special issue has arisen in the conflict areas such as Kayin State, where thousands of Kayin farmers and forest people have fled to Thailand over the years living in holding centers on the border. The land they abandoned has now been occupied by vested interests, sold by the local government or by the ethnic army, so the attempt at present in 2017 to repatriate the refugees has come to a slow start due to, among others, the occupation by strangers of their old land and lack of new land to give to the returnees. More than 4 million acres have gone into concessions in Myanmar.

In 2012 as part of the reform process the military USDP government passed two laws, namely the Farmland Law and the Vacant, Fallow and Virgin Land Law (VFV). Prior to that farmers were tenants of the state and had to grow the crops the state wanted them to grow. The Farmland Law allows, for the first time, individual farmers as well as 'organizations' to receive land use certificates for their parcels and even sell their land. The VFV Law allows, as the name says, the government to seize land that is vacant and fallow land to its eyes. To the government fallow land of shifting cultivators is idle and ready to be capitalized.



The NGO Dawei Development Association (DDA) mapped in 2016 the land parcels of individual farmers in 19 villages, a project funded by the Irish NGO Trócaire. The farmers were at risk of Navy land acquisition

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The passing of the Farmland Law in 2012 gave opportunity for farmers to acquire land use certificates and titles to their individual parcels of land. Several NGOs started helping lowland farmers in selected townships by mapping their land parcels with handheld GPS persuading the local land administration authorities to accept the parcel maps and insert them into the old – since British times – *kwin* map of the government and issue land use certificates. However, so far, no NGO or government office has yet tried to officially map upland communities' communal land.

The VFV Law was early seen by civil society to create additional risks of alienation to upland communities practicing customary communal tenure under shifting cultivation. The agricultural land of these communities includes large areas of fallow land, which in the eyes of the government would, as said, be idle land. Idle land could be taken for concessions. This risk to upland ethnic communities/indigenous peoples' communities prompted the Myanmar Land Core Group and the present researcher to work together in undertaking pilot research on customary tenure in 2 x 2 villages in the Chin and Shan States to learn the specific characteristics of customary communal tenure. Based on knowledge gained, the research prepared recommendations to the government on customary communal land registration that would pay respect to the existing customary systems.



https://en.wikipedia.org/wiki/Myanmar#/media/File:Burma_en.png

The timing of the research was optimal as the USDP government was then engaged in preparing a National Land Use Policy and the Land Core Group had an advisory role.

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History of Customary Communal Tenure of Indigenous Communities in Mountain Southeast Asia

In Cambodia as well as Myanmar the *village* is the unit for traditional land rights in the form of customary communal tenure. The management follows its own internal rules of appropriation and collective choices. The customary communal ownership of land of indigenous communities was a characteristic noted by a French traveler Cupet already by the end of the 19th century in Eastern Cambodia and Central Highlands of Vietnam. He noted that, “there is no land in the Moi country without an owner but that most of it was collectively owned” and he continues to explain that, “For the duration of its use the ray [swidden field] is the private property of the one who has cleared it; once abandoned, it reverts to the community, and the person who had cultivated it retains no rights to use it”.⁹

The accepted view among Western jurists in the nineteenth century - prior to the publication in 1861 of *Ancient Law* by the English jurist Henry Sumner Maine - had been that the origin of the concept of property was the occupation of land by a single proprietor and his family. However, Maine insisted, “it is more than likely that joint ownership, and not separate ownership, is the really archaic institution, and that the forms of property that will afford us instruction will be those that are associated with the rights of families and of groups of kindred.”¹⁰

The British officer in Burma, J.S. Furnivall, who coined the concept of ‘plural society’, wrote in 1920 in his paper “Land as a free Gift of Nature”¹¹ that: “the characteristics, therefore, of the tenure in Pegu were a temporary appropriation of the land during the period of occupation only; when done with it was restored to the community, like the atmosphere we breathe, changed, but after renovation in the usual course of nature, open to further use. The occupation was for the most part restricted to the people who lived near it”. He emphasized that uncleared land “belonged to the community as a whole.” After one year of cultivation the land would return to the common pool and the land would rest as fallow land and only to be cultivated again after some years, and this time perhaps by another household.

Southeast Asian agricultural shifting cultivation land and forest land has been used jointly by the upland communities. Inside these named landscapes of common property, we do find selected privateness of rights linked to technologies, conversion of land-use to terraces in which labor was invested, or tea gardens or rights linked to ritually-based prerogatives of certain patrilineal clans, e.g. among the Chin. Rights in customary tenure systems may constitute a hierarchy or nested institutions including special rights accruing to clans belonging to the “first founder of the

⁹ Cupet, P. 1998 (1893) *Among the Tribes of Southern Vietnam and Laos*, White Lotus 1998 by Walter E.J. Tips, originally published as ‘Chez les Populations Sauvages du Sud de l’Annam’ in *Le Tour de Monde*, vol. 65, 1893 Paris

¹⁰ Maine, Sir Henry Sumner 1876 *Ancient Law. Its connection with the early history of society, and its relation to modern ideas*, London

¹¹ Furnivall, J.S. 1920 *Land as a Free Gift of Nature*, Cambridge University Press

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domain”, i.e. the person, who back in history wielded the machete to clear the land for the village first (the *dama ucha* principle).¹² But often these prerogatives give way to communal interests and equity in land access.

The international recognition of customary tenure of indigenous communities has gained acceptance in countries such as Australia, New Zealand and Canada and it became manifest in the UN Declaration on the Rights of Indigenous Peoples in 2007. The Declaration specifies individual and collective rights of indigenous peoples, as well as their rights to culture, identity, language, land and natural resources, employment, health and education. It was voted for in the UN by 144 countries, including Myanmar.

Many Asian countries today do have rights-based policies, which feature the rights of indigenous peoples/ethnic groups/ethnic minorities or ‘ethnic nationalities’, but often this is confined to policy and not really found in law and implementation. We do, though, find legislation that respects customary law under national legislation in the Philippines and in Cambodia, where the registration of a communal land title for indigenous communities is supported by law. The Philippines have a separate legal law, 1997 catering to the land rights of indigenous peoples (IP) as ancestral domains.¹³ In Cambodia, it is part of the Land Law, 2001.

In Cambodia, the ethnic indigenous communities make up only 1% of the population while they make up more than 10 % in the Philippines. In the Philippines, they have a strong voice, in Cambodia they are remote and marginalized living in the eastern provinces bordering the Central Highlands of Viet Nam, where the same ethnic groups are found across the border. The reason a provision for registration of customary communal tenure is found in the Cambodian Land Law of 2001 in its chapter on ‘communal immovable property of monasteries and indigenous communities’, is due to pressure and lobbying from civil society and support from the Asian Development Bank by the end of the 1990s.

Customary communal tenure of all products and resource niches in the village’s territory is the norm in upland ethnic communities in Cambodia and Myanmar and a registration of land as communal tenure would cover identified landscapes inside the village territory. In the Philippines, an ancestral domain is very large and covers several villages. Ancestral domains in the Philippines are defined as “areas generally belonging to indigenous cultural communities (ICC), including ancestral lands, forests, pasture, residential and agricultural lands, hunting grounds, worship areas, and lands no longer occupied exclusively by indigenous cultural communities but to which they

¹² See Tannenbaum, N. and Cornelia Ann Kammerer (eds.) 2003, *Founders' Cults in Southeast Asia. Ancestors, Polity, and Identity*. New Haven, Conn.: Yale University Southeast Asia Studies, 2003, pp. xi + 373. Monograph 52: Yale Southeast Asia Studies, in particular the paper by Chit Hlaing (F.K. Lehman) *The Relevance of the Founders' Cult for Understanding the Political Systems of the Peoples of Northern South East Asia and its Chinese Borderlands*, pp. 15-39.

¹³ In the Philippines, customary ownership is recognized in their 1997 Republic Act No.8371: *An Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/Indigenous Peoples, Creating a National Commission on Indigenous Peoples, Establishing Implementing Mechanisms, Appropriating Funds therefore, and for other purposes*. See <http://www.iwgia.org/regions/asia/philippines>

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had traditional access, particularly the home ranges of indigenous cultural communities who are still nomadic or shifting cultivators.”¹⁴

The specificity of village-based customary communal tenure in mountainous S. E. Asia is, as said, that it includes large areas of fallow land as part of the agricultural system of shifting cultivation. Most governments in S. E. Asia blame shifting cultivation for land degradation, closing their eyes to the widespread destructive legal and illegal logging, mining and clear-felling in concessions. Any attempt to seek land protection and land registration of customary tenure must find a way around the governments’ wish to ‘eradicate’ shifting cultivation as it is expressed in the Lao PDR. In the present Myanmar research shifting cultivation was named ‘rotating fallow farming systems’ or ‘rotating fallow *taungya* systems’, *taungya* meaning dry uplands, to avoid government antagonism up front.

In Myanmar, the communities holding customary tenure see their village territories as the village’s common property, which has clear boundaries to the land of the neighboring villages. The village territory includes the agricultural land, forest, grazing lands, the streams and the lakes that the village possesses. Resources are shared among the village’s households according to the village’s own internal rules, which are the rules that articulate the rules of access and appropriation. The research addressed only the agricultural land under communal tenure because a potential land registration of this would be under the jurisdiction of one ministry, while forestry belongs to another ministry and it would be counterproductive to try to lump the two together in a first attempt at government recognition.

In contrast to Cambodia and the Philippines, there is in Myanmar no legislation or recognition of customary tenure until recently when the National Land Use Policy was under preparation at the time of the present research in 2015. In the January 2016, endorsed version of the USDP government the policy caters to customary tenure in several articles having a whole section on ‘ethnic nationalities’.

The Theoretical Basis for the Advocacy Research

The idea working with the Land Core Group was to use the principles of the CPR theory to identify in a truthful way the self-determined rules of customary communal land management. The research therefore used the guiding principles of the Theory of Common Property to prepare scoping questions and analyze the institutions that manage the villages’ agricultural activities and the nature of the collective action that ensure efficient internalization of externalities. It was the plan eventually that the customary internal rules for resource appropriation and management could become embedded accurately under a new national framework, i.e. policy and law, for land registration. If the community could hold a piece of paper in its hand with government signatures and stamps to it, the land would be better protected against land grabbing.

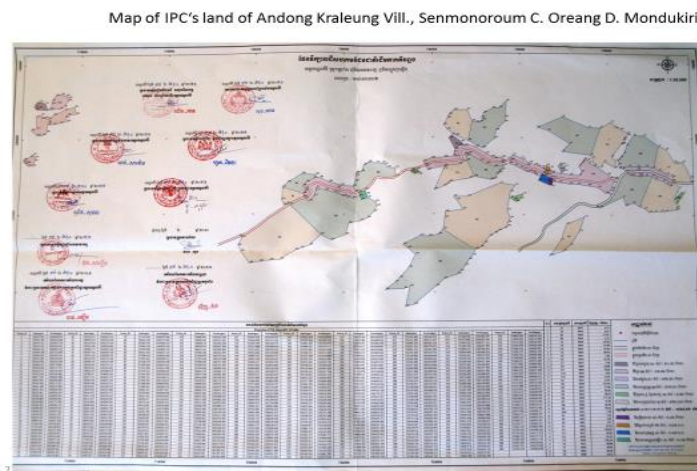
¹⁴ Op.cit.

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The research in Myanmar looked to the Cambodia examples. In Cambodia, the Land Law, 2001 and the land administration system recognizes a provision for titling communal tenure of indigenous peoples' communities. For each selected indigenous village, the government would undertake a cadastral survey and subsequently provide titles of the 40 - 50 measured parcels - which altogether make up the common property - in the name of the village community as the right-holder of these parcels. Such parcels would be either cultivated land or fallow land if the community practice shifting cultivation. For each village's common property, the government would prepare a cadastral index map with say up to 400 GPS index points for 3,700 acres.

In the cadastral index map of Andong Krালেung village in Cambodia, the beige color represents the land under present cultivation, the grey color, the reserved or fallow land. Stamps signify the endorsement by numerous authorities.



Cadastral Index Map of Andong Krালেung Village, Cambodia

The map of Andong Krালেung village in Cambodia covers around 3,700 acres of presently cultivated as well as fallow land in addition 2 x 17 acres of spirit forest and burial forest, which was the amount of forest land allowed by the Forest Administration to be included in the communal titling.

Source: WCS and Ministry of Land Management, Urban Planning and Construction

In Cambodia, it was clear that it was important in the eyes of the government to define the right-holders and the Ministry of Interior working with the Ministry of Land Management therefore required a list with the names of everyone living in the village partaking in the communal tenure and later, when a law on associations was in place, it required the community to incorporate legally under the law. It therefore required the preparation of bylaws or statutes, which set up the governance structure for the right-holding legal entity before it could apply for land titling with the Ministry of Land Management. The indigenous communities in Cambodia therefore prepared with help of NGOs their statutes for legal incorporation that were agreed by the Ministry of Interior. Subsequently, following a sub-decree of 2009, the indigenous community in Cambodia could apply for communal land registration to the Ministry of Land Management, if at the same time it presented a preliminary map and its own customary internal rules for sharing the land. The two Cambodian ministries were only interested in the statutes as they were required in the Sub-

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decree of 2009 that operationalized how the Land Law's articles on customary communal tenure. The Cambodian ministries had no concerns for the contents of the internal rules of sharing the land. This contrasts the way the research was carried out in Myanmar as it was decided in the research *first* to record the pilot communities' own internal rules of customary communal tenure arrangements to ensure that any future steps in codification would remain truthful to them and not impose new and different arrangements.

The research focused in the fieldwork on five kinds of important rights, namely access, withdrawal or appropriation, management, exclusion and alienation. These five principles were used to guide the research through the preparation of scoping questions into the customary tenure systems. The scoping questions helped guide the fieldwork together with a national interpreter who was trained to understand the questions. Answers from villagers triggered further questions during the interviews to probe deeper. The outcome of the interviews was a list of internal rules by which the individual indigenous communities in Chin State and Shan State manage land, in case of the former, the extensive shifting cultivation areas in their territory. The internal rules had never been written down before and they would differ from village to village dependent on ethnicity, resource endowment and land use practices, kinship system, religion as well as rituals related to land, and the status of women.

Construed Reading of Myanmar's Legislation

Due to lack of legislation on customary land, it was decided to use a construed reading of the Farmland Law and other laws as outlined below, because it was clear from the beginning that recording the customary tenure alone would not lead to land registration by the government. There had to be a legal personality holding ownership and the government would want to know the physical boundaries of the land to be titled. There was a need in the research to identify *existing* legislation that could be construed to support it. Two laws were identified, the Farmland Law of 2012 and the Association Law of 2014 and its Rules of 2016.

This could be done because the Farmland Law defines in Article 3 the meaning of the 'agriculturalist' as a person/entity that can be awarded a land use certificate. Article 3 (j) includes a 'farmers' organization' as a right-holder. The latter is defined as a body "that is formed in accord with any law issued to support the development of the rural economy". Article 6 specifies the entities that "have right to farming" and this importantly also includes in Article 6 (b) an 'organization', a government department, a government organization, an NGO or a company. In Article 7 (b) it stipulates that the organization/association must be "desirous to carry out agriculture in the farmland".

The reading of the Article 6 of the Farmland Law along with the later Association Law became the basis for pushing forward with the intermittent research in 2014-15. Article 6 of the Farmland Law could be a concrete possibility and potential instrument to acquire a land use certificates under statutory law, if the community was considered an 'organization' or 'association' according to Article 6 (b). It meant the community had to incorporate legally as an organization like it did in

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Cambodia. It was concluded that two sets of rules were warranted, namely 1) the internal rules which were an articulation of the village's own customary arrangements for communal tenure and 2) rules in the form of the village's own statutes, which would allow recognition of the village as an 'organization' or 'association' under the Association Law, 2014 and Rules 2016. If it was recognized as an association, it could try to apply for land registration with reference to the Farmland Law, Article 6.

Using the new Association Law, the community would eventually apply to the General Administration Department (GAD) of the Ministry of Home Affairs. It would ask to be recognized as an association which, according to its statutes, had the objective of managing the village's agricultural communal land parcels. This objective was included up front in the village community's statutes, which also outlined clear membership rules. If recognition from GAD was gained, the land administration authorities of the agriculture ministry could receive an application for land use certificates covering all the land parcels held in common by the association i.e. the village. The village association would in the application refer to article 6 of the Farmland Law, 2012 allowing organizations to hold land use certificates on a par with individual persons. This was the thinking behind the research by the Land Core Group and the researcher during 2013-15.

However, the requirements do not end here as the physical landscapes held as common property needed to be surveyed and measured and that became a headache in the Chin State as described below.

The Results of Field Work in Myanmar

Fieldwork took place in the Chin State in Northwest Myanmar bordering Mizoram in India where the study concentrated on two pilot villages near Hakha. In the Shan State in the Northeast of Myanmar it focused on two pilot villages near Lashio. These 4 villages among the surveyed villages had agreed to take part in the study. None of these villages hold any registered titles to their agricultural land.

The fieldwork and interviews were carried out with the help of national assistants who initially needed training to understand the basic principles of the Theory of Common Property and the scoping questions. In village meetings, the research focused on recording the kinds of resources and lands found in the village territory and the kinds of rights that were vested in each of the categories. Scoping questions thus first focused on mapping all land categories found in the village territory according to the villagers' own definition. Land categories drawn on maps were used to learn the rules of appropriation in each category of land. Possible overlay of government classification of, for instance forest land, was noted. It was recorded how definition of social and physical boundaries took place (boundaries of right-holders and effective exclusion of external unentitled parties on one hand and physical boundaries of the common property in land on the other); how the village rules regarding the appropriation and provision of common resources were adapted to local resource conditions (who can take what, where, why and how and basis for any private rights inside the Common Property) and the collective-choice arrangements that allow resource

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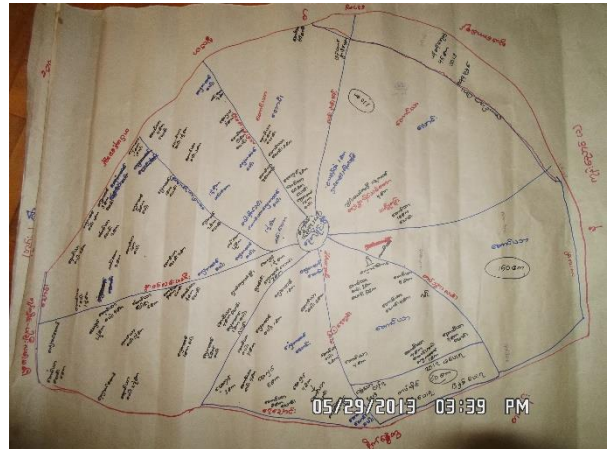
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appropriators e.g. the farmers to participate in the decision-making process ensuring collective action.

The mapping of the communities' land categories and the resource endowment was carried out in village meetings using flip charts and speed marker pens. Both men and women participated, however more women in the Shan State than in the Chin State as Chin are strongly patrilineal while the Shan being a Tai people tend to be matrilineal in many respects. The village meetings would last one or two days with around 30 persons attending, more than half of them men.



Mapping land use in Chin State



Mapping land use in Shan State

All internal rules related to boundaries, identity of right-holders, rights of outsiders, if any, the nested rights of certain clans in Chin State, the rights to establish new claims of privateness inside the commons, e.g. a terrace or tea garden, inheritance rules, women's and widows' rights, decision, sanctions and the monitoring system were recorded. It was written down in English and Burmese during fieldwork and later translated and written in Chin and Shan for the respective communities to comment and amend what was recorded as their customary communal tenure rules. After the internal rules were recorded and vetted by the communities the researcher returned later with the aim to try to develop statutes making sure the 'collective choice mechanisms' included a reference to the internal rules reflecting them. Statutes included the establishment of an elected customary land management committee that would include women members.

In contrast to the diverse internal rules that differed by village, the statutes would be very similar from village to village except for the named landscapes to which the community claimed customary tenure. Statutes determined the governance structure for decision making, including criteria for amending the internal rules. It was made sure that boundaries of village territory and names of landscapes or *lopil* among the Chin were mentioned in the statutes by referring to geographical features of the village territory. Statutes made sure that social boundaries of the community group of right-holders were known (in contrast to outsiders), that appropriation rules

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were known including privateness of rights of some clans by referring to the internal rules of the village, and that associated appropriation rules of the annual land allocation by lottery inside the shifting cultivation landscapes or *lopil* in Chin State were recorded. Obviously, there were overlaps between internal rules and some statutes.



A 'lopil': Chin temporary opened-up steep landscape for rotating shifting cultivation. A lopil is divided into around 200 – 300 plots for 200-300 households for one year



Shan farmer ploughing dry upland field in an undulating terrain

The statutes would be for the eyes of the community *and* the government. Statutes are therefore put in a language recognized by government for it to accept it.

Selected statutes of one of the Chin villages read

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Statutes of the Chuncung Village Organization for Managing the Communal Rotating and Fallow Taungya Land of Chuncung Village, Chuncung Village Tract, Hakha Township, Northern Chin State

- In accordance with the Constitution of Myanmar, 2008.
- ၂၀၀၈ ဖြူစညးအုပ်ပွဲ၊ ဥပဒေ ဝေဒနာအညီ။
- In accordance with the Farmland Act of Myanmar, 2012.
- ၂၀၁၂ လတ္တဝေဗြူစညးပုံ အေချခခပဒေ ဝေဒနာအညီ။
- In accordance with the Ward or Village Tract Administration Law, 2012.
- ၂၀၁၂ ရပ်ကွက် သို့မဟုတ် ဝေးပြေးအုပ်ပွဲ အုပ်ပွဲဝေးရး ဥပဒေပဌာန ဝေဒနာအညီ။
- In accordance with the goal and objective of Chun Cung village to register as an organization managing the communal lands of Chun Cung village in a sustainable manner, ensuring village livelihood, protecting the environment and Chin cultural practices the following Statutes are formulated:

Name or Organization and Territory

အမည် (သို့မဟုတ်) အဖွဲ့အစည်းနှင့်နယ်နိမိတ်သတ်မှတ်ခြင်း

Article 1: The village residents of Chun Cung village in Chun Cung village tract, Hakha Township, Northern Chin State have agreed on the Statutes for a village organization called “Chun Cung Community Organization for Managing the Communal Rotating and Fallow Taungya Land”.

အပုဒ်ခွဲ။ချင်းပြည်နယ်မြောက်ပိုင်း ဟားခါးမြို့နယ် ချွန်ကျေးကျေးရွာအုပ်စုဝင် ချွန်ကျေးကျေးရွာ လူထုမှ ဤအဖွဲ့အစည်းအား ချွန်ကျေးကျေးရွာအစုအဖွဲ့ပိုင် အလှည့်ကျအနားပေးစံနစ်ဖြင့် စိုက်ပျိုး ထားသည့် တောင်ယာမြေစီမံခန့်ခွဲမှုအဖွဲ့” ဟုစည်းမျဉ်းဥပဒေတွင် မှည့် ခေါ်ရန်သဘော တူကြပါသည်။

Article 4 The land tracts of lopils that constitute the community organization’s communal landscapes are as follows:

အအေးပိုင်းတောင်ယာကွက်များ (Zo Lo (Cold area) Lopil or Taungya area)

စဉ် တောင်ယာကွက်အမည်

No. Name of Taungya lopil

၁။ တလောခိပီး + တလောခိသဲ

1. Tlawkpi + Tlawkt te

၂။ အိမ်တလူး + လုံခိုင်း

2. Ekthlu + Llungngai

၃။ လွေယိုး + ဟ်န်း

3. Lur zu + Heng

၄။ လိုင်ဆွင် + ခွဲပိမ်

4. Laisun + Khuaivam

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၅။ နထလမ်း + သီးခါး

5. Hnah Tlam + Tikha

၆။ ခွောန်နီရ်

6. Khawn Hniar

၇။ လားခိး

7. Lakpi

၈။ ရယ်ပီး

8. Repi

အပူပိုင်းတောင်ယာကွက်များ (Lai Lo (Warm Area) Lopil or Taungya area)

၁။ ခွါဒီး + တလန်ဇာရ် + ခီယာလ်

1. Khuadi + Tlangzaar + Fuar rawn

၂။ ဖယာန်းချီယာရ်

2. Faangchiar

၃။ တွမ်

3. Tuam

၄။ သဲအီမုမဲ

4. Theihhmume

၅။ ရှာနမ်

5. Sainam

၆။ ဖိုအန်

6. Zuan

၇။ သာဟရမ်

7. Ta hrap

၈။ ဖန်ဇန်

8. Phan Zaang

၉။ မွီ

9. Hmuah

တို့ ဖြစ်ပါသည်။

Article 5: *The objectives of the Chun Cung community organization's statutes are to establish the community organization as a legal entity that*

- *Will hold joint land use certificates for all the customary land parcels of Chun Cung.*
- *Will maintain the customary land governance of Chun Cung, where all resident villagers share decisions on land management each year to ensure livelihood for all with equity.*

For the Chin communities, the findings showed that their customary communal tenure system included very limited private ownership of rotational fallow farmland resources. The cultivable landscape in the *lopil* that was opened-up in, say 2015, on a couple mountain sides would comprise a couple of hundred plots that were numbered. Allocation of plots to a household was carried out through a lottery. Lottery was the rule of appropriation. However, one of the two Chin villages

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studied put only 80% for lottery and kept 20% in reserve in case households that have more consumers than producers won a less productive plot. In this situation, the household having many consumers would be given additional land from the 20%. In contrast to the shifting cultivation land, the rules for communal use of forest would not divide the forest into plots, but stipulate rules for seasons for different forest products to be collected such as mushrooms, barks, nuts and bamboo shoots, including rules of privateness of appropriation of individual households, for instance to tap resin from say fifteen trees in the forest, and rules for grazing cattle in the forest or take firewood.

Certain prerogatives of ancestral ritual rights in some specific plots in some *lopil* landscapes were found. But if a household with ancestral rights, say, in four plots in the *lopil* landscape that was opened-up could not use all four plots due to lack of labor in the household the extra plots went into the common pool and were subject to lottery and no remuneration was provided the household with ancestral rights. This rule that was recorded in 2013-14 research corresponds to observations found back in the 1930s when rendered in an article by the British officer H.N.C. Stevenson stationed in the Northern Chin State. He writes of an individual that “He may also inherit cultivation titles over an unlimited number of plots, but these are in effect priority titles, as he may not refuse permission to cultivate to any person wanting a plot which he himself is not using. Sale and renting are forbidden”.¹⁵ The special prerogatives would often be linked to a history of the village. In former times before Christianity the spirits of the land and the ancestral spirits had a major influence and some clan leaders gained high status by sacrificial offerings.

Many more of the very intricate ancestral rules among the Chin can be found in a monograph by the aforementioned British officer living in the area 80 years ago. He renders the terminology of customary tenure in detail.¹⁶ He observed a rule 80 years ago that was also recorded in 2014, namely that only families physically living in the village had right of access to land under customary communal tenure. This was the principal rule of access. Everyone living in the village had rights. There were no landless. This rule also meant that if a family left the village it would lose its right to access land and to appropriate resources. It could not sell the right to land to any outsider. No outsider had rights in land in the village territory except for temporary rights in cultivated crops if the person lived in a neighboring village that was adjacent to the *lopil* that was opened-up. Only persons in adjacent villages could borrow some plots for a year like Hairawn village shown on the map of one of the Chuncung village’s *lopils* named Ta Hrap. Payment for such lending of land was put into the village kitty to be used to entertain (government) visitors to the village or help buy food for school teachers. Residence in the village was a clear criterion for permanent rights in access to land. No resident in the village could lease out land a town-based businessman.

In contrast to the Chin, the landscape in the pilot villages of the Shan State was very different with less steep mountains and villagers there had their own private irrigated fields that they used each

¹⁵ Stevenson, H. N. C. 1937 ‘Land Tenure in the Central Chin Hills of Burma’ in *Man*, Journal of the Royal Anthropological Institute of Great Britain and Ireland vol. 37

¹⁶ Stevenson, H.N.C. 1943 *The Economics of the Central Chin Tribes*, The Times of India Press

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year. In addition to irrigated land, dry fields under permanent land use were found as well shifting cultivation land. The resources for agricultural use would be divided into named landscapes that each would have several plot-owners inside each such consolidated landscape. But no farmer had any official title to land he cultivated. The village considered all the agricultural land of various kinds as land belonging to the village as a whole. In addition to the agricultural land the village considered also the forest inside the village territory as part of their customary common property.

When asked by the researcher whether the village would want to ask for individual land titles for the agricultural land as now possible under the new Farmland Law, they all said they wanted a communal title for all the land in the village territory and that they would take care of the internal management. There is no lottery for sharing the land, but the villagers shared a characteristic with the Chin in stipulating that only those living in the village had right of access to land in the village territory. In the Shan village, if a household that owned productive irrigated rice fields wanted to move elsewhere it could not sell its land, but it could give it to relatives in the village and if no relatives were found, their land would go into a common pool and be redistributed within the village. If the household came back to live in the village it would be given land.

The idea of rights of access to land in a village territory being linked to physical residence in the village was also observed for lowland Bamar villages in the 1920s by the British officer cum scholar J.S. Furnivall.¹⁷ An anthropological explanation for this ubiquitous trait may be that in S. E. Asia the spirits of the land have been seen to grant its fertility. There is an age-old close “territorialized” relationship to the spirits of the land held by the community living on that very land. These spirits would receive offerings prior to start of cultivation and they would receive ‘first fruits of labor’ after harvest to thank them for guaranteeing the fertility of the land that was cultivated. Therefore, the argument may be that to use the land of the village (and keep good relations with the spirits) a person must be present and live in the village.¹⁸

Issues in registration of shifting cultivation land under customary communal tenure

A tenure relationship is between persons, bodies of persons and land. To register this relationship legally, the government wants not only a clear ID of owner, but also the boundaries of the land. This is where the research ran into a hurdle in the Chin State. The *lopils* had clear named IDs that were put in the statutes. But the *cultivated* land inside the *lopil* among Chin shifting cultivators has boundaries that fluctuate each year, when new fallow *lopils* are opened-up and occasional lending and borrowing land takes place by a villager in a neighboring village, if the original village agrees. In the Chin State, for a village, this year, less land may be opened-up in a *lopil* than the previous time ten years ago, if the labor available in the village’s households is less, due to e.g. seasonal labor migration to India.

17 Furnivall, J.S. 1920 *Land as a free Gift of Nature*, Cambridge University Press

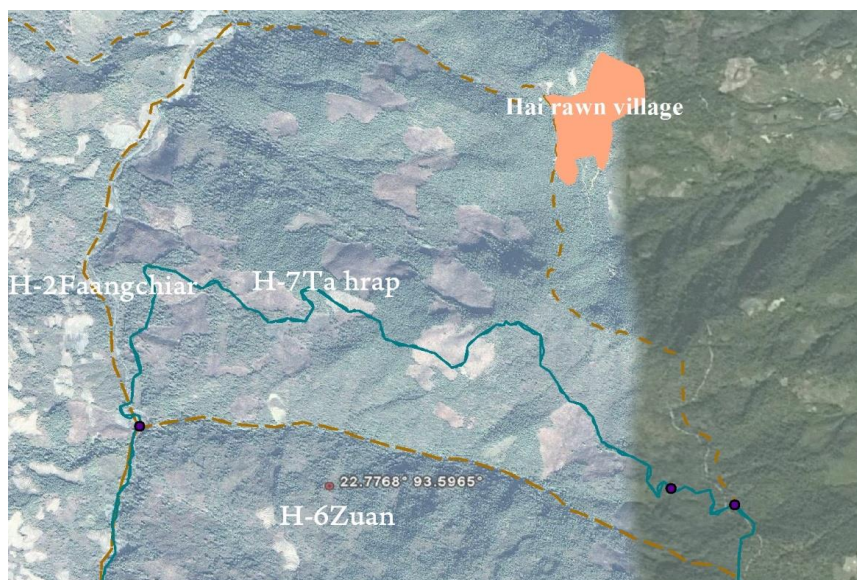
18 For a full report on the research, see Kirsten Ewers Andersen, 2015 *Study of Upland Customary Communal Tenure in Chin and Shan States - Outline of a Pilot Approach towards Cadastral Registration of Customary Communal Land Tenure in Myanmar*, http://www.burmalibrary.org/docs21/Andersen_K.E._2016-02-Communal_tenure_in_Chin_and_Shan_States-corr.pdf

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Ideally, for land administration purposes, the land parcels making up the communal property should be surveyed and mapped like they were done in Cambodia. But here it is where problems arise. In Cambodia, the villages' common property for agriculture, even shifting cultivation including the fallow land, was not large, which is shown on the map above for Andong Krালেung where the registered land covers around 3,000 acres for the total rotation. In the Chin State, all the *lopils* taken together used over ten years for shifting cultivation by *one* village cover up to 20,000 - 30,000 acres which is ten times as much. Can the village ask the government for such a large area with reference to the Farmland Law, when in fact it became evident in the research that only a small part of each *lopil* is used for agriculture as shown below? A village of three hundred households using 3 acres per year over a ten-year period will use 9,000 acres maximum, but these 9,000 acres may move around inside the *lopils*.

The Chin agricultural communal landscapes of 17 *lopils* represent, in fact, areas demarcated by mountain ridges seen as yellow dotted lines on the map below. These named 17 *lopils* figure in the statutes of Chuncung village as the areas that the association wants to manage jointly as farmland by the Farmland Law. But the utilization for agricultural purposes makes up only a fraction of the area of the *lopil*. Even if surveys could be made by drones, and surveyors spared climbing up and down the mountains, the measurements carried out as is would never fit a cadastral index map with legal validity in court. By Farmland Law only the areas put for cultivation count as farmland and here is a second hitch, which has been present all the time, namely the definition of 'farmland'. It will be necessary to have the government accept that fallow land is farmland.



Map of the *Lopil* No 7 listed as Ta Hrap *lopil* in the statutes of Chuncung. The *lopils* of No 7 Ta Hrap and No 2 Faang Chiar were put to cultivation at the time, when the imagery was created. We also see that the village of Hai Rawn is located next to the Chuncung village's *lopil* and therefore may borrow land from Chuncung proper, which is located at some distance from this *lopil*. (Map prepared by Gmap).

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Only a fraction of the *lopil* is used. Other areas in the *lopil* may be too steep or stony or the village does not have enough manpower this year to use the *lopil* fully. This fosters the question of how to protect shifting cultivation land by land registration, if the boundaries of the farmland according to the Farmland Law cannot be established?

In contrast to the agricultural land use in the Chin state, in the Shan state, it is easier to measure the land as the area under shifting cultivation is much smaller and most land is permanently cultivated. The communal tenure could encompass the blocks of land, where many owners hold permanent plots inside without needing to survey each plot if communally held. It is necessary to consider only the block as the parcel in the land registration as the block is used fully. The shifting cultivation land would also be one block. The land holdings by the pilot Shan villages do not amount to more than 1000 - 1500 acres.

Mapping Shifting Cultivation Land for Statutory Land Registration

In the Chin State, in case of Chuncung village, there are 17 named spatial units covering up to 30,000 acres in total. There is no clear answer how to go about surveying shifting cultivation land for subsequent land registration here. In 2015, a National Dialogue was held by the Land Core Group with the USDP government to discuss protection of customary communal tenure. During the dialogue, the results of the present research were outlined.



National Dialogue on Customary Communal Land Tenure and Rotational Fallow Farming Systems Feb.2015 with author presenting the result

In 2015, it was thought that once the Land Core Group got the government into serious discussions, especially the state government and line offices in the Chin State, a solution, may be found in the form of zoning. However, at present in 2017, there is no push for testing as the new Aung San Suu Kyi NLD government's head of the legal commission, U Shwe Mann, seems bent on revising the rather progressive NLUP, which had been adopted by the former USDP government just prior to its leaving office. The present change to the new policy draft is unfortunate. The amended draft version misses out on the customary rights of 'ethnic nationalities', which were there before.

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While the research could have pursued options of different kinds of protective zoning and *registration* of land in a village territory with large tracts of shifting cultivation land, such research would need to involve several technical land administration officials up front, who were not there before, and sufficient time and budget to do the work. At present, in 2017, there are other new debates on land ongoing as the NLD government wants to prepare a new Land Resource Law, to revise the Farmland Law and to prepare a new Agricultural Development Strategy. The Land Core Group is now primarily focusing on lobbying work vis a vis the new draft land resources law and the new draft agricultural strategy to get the word ‘customary tenure’ back into the regulatory framework on land. Customary tenure has become a catch word in ongoing debates on land. Five presentations out of sixteen in a recent World Bank workshop in Naypyitaw on land, ‘Towards a Sustainable Land Administration and Management System in Myanmar’, features the issue of ‘customary tenure’. The word ‘customary tenure’ has become trendy, but no one appears to analyze the characteristics of such tenure, which so often is communal, and no one seems to look at how customary tenure could be registered as *communal tenure* the way many of the communities want.