

TRANSNATIONAL INSTITUTE

# THE CHALLENGE OF DEMOCRATIC AND INCLUSIVE LAND POLICYMAKING IN MYANMAR

## A RESPONSE TO THE DRAFT NATIONAL LAND USE POLICY

February 2015



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Published by the Transnational Institute

February 2015

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## Executive Summary

In October 2014 the Myanmar government unveiled a draft National Land Use Policy (NLUP) and announced it would take public comments for a limited time before finalizing the document. Once it is finalized, the new policy will determine the distribution, use and management of the country's land and related natural resources like forests and rivers, for years to come. It promises to make profound changes to the current land-related economic, social, and political-institutional landscape.

This is an important – and bold – step for Myanmar, with its complex history of political and armed conflict and protracted displaced populations. More so because land policymaking also tends to involve simplification – that is, putting aside real-life facts and phenomena that have the potential to derail formal-legal standardization agendas. Some simplification is unavoidable. But policies that too narrowly follow overly neat categories of land use will be unable to detect, adapt to or address many of the most significant and “messy” details of actual land based social relations. These are often the very facts that need to be understood and taken into consideration in the first place.

So the big question at the heart of the NLUP process is: *whose* details are going to count? This briefing examines this question with a particular emphasis on an ethnic minority perspective.

An inclusive land use policy-making process that allows for - and encourages - full and meaningful participation for all rural working people is essential for ensuring a policy outcome that is widely and effectively accepted by society. It is a significant and welcome development that the public is invited to submit comments and recommendations. If the government is to make this step matter, then it must follow through. It must ensure that the issues, concerns, and aspirations expressed by those whose lives and livelihoods are most affected or threatened by forced eviction and dislocation, land confiscations and large-scale land deals, leave a substantial imprint on the policy that finally gets adopted.

The English version of the draft NLUP (as uploaded onto the government website) is positive in some ways and includes several key provisions that would improve Myanmar's current land governance arrangements. But it still needs improvement especially in terms of some fundamental principles in order to be better positioned to address these key and urgent land policy challenges.

Overall, for Myanmar's land policy to succeed, it must seek to: (i) ensure benefits to the landless and near-landless working peoples; (ii) remedy historical injustices; (iii) promote the distinct right of women to their own land rights; (iv) promote the distinct right of ethnic minority groups, and other customary communities such as Mon villagers in Karen State, for example, to their territorial claims as rural working people<sup>1</sup> and as indigenous peoples; (v) support ecological land and labor uses in pursuit of productivity; (vi) ensure state/public support for building diverse and sustainable livelihoods; and (vii) advance the rights of rural working people and peoples to access and use land for purposes and in ways of their own choosing.

This is because the current land problem plaguing Myanmar society today is rapidly increasing land polarization, which in turn, is tied to a deeper set of problems related to three main and broadly distinct types of situations affecting rural working households and peoples: (i) some already have access to land but this access threatened or is vulnerable to threat, (ii) some currently have little or no effective access to land and control over land-related decisions, and (iii) some previously had access but lost it due to armed conflict and also natural disasters (such as Cyclone Nargis). It is these three dimensions of the land problem in Myanmar today that define the type of policy response that is needed, and which the NLUP can and must try to address.

## General Recommendations

The NLUP could be further improved in line with international standards. Given this urgent situation, we make the following overall recommendations:

1. An immediate moratorium on all current and planned land concessions and land confiscations as an interim measure to address current land conflicts;
2. Adoption of an across-the-board land size ceiling (not only on land concessions) with land redistribution and land restitution, along with recognition of informal and customary land users rights, as a core pillar of the new NLUP;
3. Adoption of a public and private investment strategy that promotes and supports rural working people to stay on the land in a self-determining manner, that supports robust local economies and local food production systems and enables them to reach local and regional markets as a core pillar of the new NLUP;
4. Revision of the draft NLUP in line with and incorporating these and the other more specific recommendations outlined in this briefing;
5. Explicit commitment to review and amend all other relevant existing laws to be in line with the above.

The NLUP process presents a strategic opportunity to act on these core recommendations toward achieving a solid *social foundation for peace, development and democracy* after six decades of war and a resurgence of armed conflict.

In support of making these improvements to the NLUP draft, the Voluntary Guidelines for Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (hereinafter referred to as “Tenure Guidelines”) are indispensable. The Tenure Guidelines are the highest international standard on tenure of land, fisheries and forests to date and must be read in conjunction with other relevant international human rights instruments. The Myanmar Government is a signatory to these guidelines, which makes using them as the standard by which to improve the NLUP policy especially relevant and appropriate.

On the need to *protect* existing democratic access to land where this already exists but is or may be threatened, through legal recognition and allocation of tenure rights, guidance can be found in Article 7 (Safeguards), Article 8 (Public land, fisheries and forests), Article 9 (Indigenous peoples and other communities with customary tenure practices).

On the need to *promote* democratic access to land where poor, vulnerable and marginalized people have little or no access, through distributive and redistributive reform, guidance can be found in Article 15 (on land redistribution and land ceiling).

On the need to *restore* democratic access to land through land restitution in cases where people have lost their prior access as a result of armed conflict or natural disaster, guidance can be found in Article 14 (on land restitution).

## Specific Recommendations

The NLUP could be further improved in line with international standards by explicitly declaring the following as policy aims in the Preliminary section of the document:

1. Respect for the multiple meanings and values in Myanmar society, including social and spiritual functions; ecological and environmental functions; and a political legitimacy function.
2. Special emphasis on poor, marginalized and vulnerable people and peoples in the context of national food security, the realization of the human right to food, and the peace process.
3. Measures to promote social justice, namely:
  - a. Recognition and protection of the tenure rights of small scale food producers, ethnic minorities, women, and other poor, marginalized and vulnerable customary users;
  - b. Establishment of a land size ceiling (not only on land concessions) with land redistribution of tenure rights to landless and near-landless working people, in order to promote democratic access to and control of land, as well as to avoid (re)land concentration.
  - c. Establishment of mechanisms of land restitution of tenure rights of those who have previously been displaced by armed conflict

and natural disaster, especially IDPs and refugees, under safe and secure conditions, in order to restore those rights which were lost.

4. Recognition and protection of diverse agro-ecological conditions and diversity of farming systems, especially those which support food production for household consumption and local and regional markets.
5. Promotion of social justice and the progressive realization of human rights throughout Myanmar society.

Additionally, it is recommended to make the following improvements to some specific chapters:

1. Part I, Chapter 1
  - a. Define clearly public purpose. The TGs offer relevant guidance: “States should expropriate only where right to land, fisheries or forests are required for a public purpose. States should clearly define the concept of public purpose in law, in order to allow for judicial review” (Art.16.1).
  - b. Adopt fully the entire standard of basic principles as laid out in the TGs Article 3A (“General principles”) and Article 3B (“Principles of implementation”).
2. Part I, Chapter 2
  - a. Acknowledge that in many places throughout the country customary and informal land management mechanisms and institutions have emerged or persisted, while in some places these were disrupted or destroyed by armed conflict and natural disaster, among others.
  - b. Acknowledge that the five laws enacted in 2010-2013, including the SEZ law, have created dissent and should be reviewed and revised based on the purposes and principles of this national land use policy as revised above.
3. Part I, Chapter 3
  - a. Indicate clearly how this structure will serve the state’s obligation to respect, protect and fulfill human rights under international law, especially the right of self-determination in the enjoyment of individual and collective land use rights.
  - b. Indicate how this structure will democratize control of land related decision-making and policy implementation.

4. Part I, Chapter 4

- a. Establish clear safeguards that recognize and respect actual land use practices including community decision-making.
- b. Eliminate the category of VFV land, which when combined with a top-down (re)classification approach, risks hampering effective access to forest, land, fisheries and waterways by those whose lives and livelihoods most directly depend on it.
- c. Adopt the Tenure Guidelines Article 8.1 which states that “Where States own or control land, fisheries and forests, they should determine the use and control of these resources in light of broader social, economic and environmental objectives” (and also Art.4.4 of the Tenure Guidelines).
- d. Adopt the Tenure Guidelines provision in Article 1.1 on the wider objectives of responsible land policy.

5. Part I, Chapter 5

- a. The NLUP draft provides for recognition/protection of “long-term land user rights whether or not they have been registered, recorded or mapped”. Yet there is no differentiation of different users, where they come from or how they got onto the land in question. There is no mention of those who may have been on the land in an earlier era and may have been displaced by armed conflict or natural disaster or due to arbitrary eviction. It is not explicit about whose rights will be emphasized in this process or why such recognition and protection is important as a matter of public policy. Also, a key theme of the TGs is that land information management systems should be a pro-poor tool used to protect poor, marginalized and vulnerable groups from dispossession. Special care must be taken to ensure that land information and administration systems do not become a tool for dispossession. While a welcome provision, Art. 22(e) should nonetheless strive to specify how it will be determined who these long-term land users are, and how it will ensure their tenure protection from corporate or state actors over time.
- b. These current weaknesses can be remedied by relevant provisions of the Tenure Guidelines, among others:
- c. Adopt the Tenure Guidelines Article 1.1.

- d. Adopt the Tenure Guidelines Article 4 on the rights and responsibilities related to tenure, especially Articles 4.5, 4.6, 4.8 and 4.9,
  - e. Adopt the Tenure Guidelines Articles 7.1 and 7.6 (Safeguards), Article 8.3, Article 9, and Article 10.
6. Part II Chapter 1
- a. The NLUP draft stresses a technical approach to planning and changing land use, which might clash with actual uses and knowledge on the ground; risks putting at risk poor, vulnerable and marginalized households and communities; principle of “bottom-up” is not applied to decision-making over which information will be accepted.
  - b. The Tenure Guidelines recognize diverse development models and farming systems, as well as diverse land use change purposes. They would not envision definitions of suitability that promote large-scale investment exclusively and at the expense of the marginalized, and would envision definitions that permit pro-poor redistributive reform alongside other types of investment
  - c. The current draft of the NLUP’s Article 26 must be read against the Tenure Guidelines provisions on principles of implementation which call for participation of the most affected people (TG Art.3B.6). Currently, Art. 26(c) of the NLUP draft outlines a ‘bottom-up’ approach will be used for urban planning matters, while “deciding” and “determining” will rest with the district level (Art. 26(d) and Art. 26 (g)). This veers away from the principle of participation as elaborated in the Tenure Guidelines.
7. Part II, Chapter 2
- a. “Changing land use by zoning”: interesting provision to “protect the continuous land use, land management and land tenure rights whether or not they are registered”; but not explicit on priorities in terms of how/which continuous users and uses will be prioritized; risks ratifying current users/uses at the expense of those who suffered from past misappropriations; removes earlier draft’s principle of FPI consent (e.g., role in decision making) in validating proposed land use zoning, and instead settles on informing public and stakeholders.

- b. Part II overall is oriented to providing safeguards in favor of displacement, for which there are UN Guidelines, the UNDRIP, and ILO 69; main safeguard is impartial environmental and social impact assessment, which is interesting, but not yet based on the international human rights principle of FPIC or the standard on development related evictions and displacement (UN Guidelines); provision to prevent land grabbing is severely weakened by setting limits on land acquisition according to the capacity of each company that applies for concession, rather than the international standard set by the Tenure Guidelines; safeguards on contract farming are not clearly based on existing human rights standards.
8. Part IV
- a. The NLUP establishes procedures for land acquisition, compensation, resettlement, and rehabilitation together, but this section is very short and grossly lacking in detail (especially when compared with the part on taxation). Notably, restitution is not mentioned at all. The provision also fails to elaborate on the circumstances under which compensation will be required (i.e. Why displacement is occurring in the first place), the mechanisms and procedures in place to ensure resettlement and rehabilitation are carried out, etc.
  - b. The TGs have entire sections dedicated to the respective topics of *land consolidation (Article 13)*, *restitution (Article 14)*, *expropriation and compensation (Article 16)*. The draft NLUP should be revised to conform with the Tenure Guidelines, starting with shifting the NLUP draft's emphasis from harmonization with national law to harmonization with international standards, such as FPIC (for before land deals occur) and restitution (for after land deals occur).
  - c. The draft NLUP should also be revised to fully meet the most relevant and existing international human rights standard set by the UN Guidelines on Development related Eviction and Displacement, UNDRIP and ILO 69.
9. Part V
- a. This part should be revised to conform with the Tenure Guidelines particularly on ensuring "accessible to all" (Art. 21.1) and should ensure that alternative dispute resolution mechanisms, including democratic customary land conflict resolution systems, are supported and made accessible.

## 10. Part VII

- a. Being such an important topic, this section should be moved forward in the NLUP to a place of higher prominence.
- b. Provide greater clarification to ensure that terms like cooperation, consultation, and participation are adopted in a meaningful way, and not in a checklist style manner.
- c. Potentially positive, but contradictory provision: while it claims to recognize and protect the right of all ethnic nationalities to their land, it also suggests provisions aimed at ending the traditional taungya system by reclassifying these as “permanent taungya”; lacks clarity on who gets to decide how ethnic nationalities can use and manage their land and prescribes a particular farming system, highly dependent on costly external inputs.

## 11. Part VIII

- a. Art. 78 should be revised to make clear how it conforms fully with existing international standards, especially CEDAW and the Tenure Guidelines gender equality Principle of Implementation, which calls on states to: “Ensure the equal right of women and men to the enjoyment of all human rights, while acknowledging differences between women and men and *taking specific measures aimed at accelerating de facto equality* when necessary. States should ensure that women and girls have equal tenure rights and access to land, fisheries and forests independent of their civil and marital status” (Article 3B4).

## 12. Part IX

- a. This is a welcome provision if it opens the way to remedying the problems associated with the existing land and investment laws; and if it raises the demands on this policy to actually and comprehensively address the underlying land issues and in ways that go beyond a technical-procedural approach.

## 13. Part X

- a. This provision should explicitly reference to the international human rights principle of evolutive law, and explain clearly how it relates to the formulation of the prospective new land law.

# I Discussion

## *Land Policy Making in Myanmar*

On 18 October 2014 the Myanmar government unveiled a much-awaited draft National Land Use Policy (NLUP) for public comment. Once it is finalized, the new policy will guide the establishment of a new overarching framework for the governance of tenure of land and related natural resources like forests for years to come. This is a very important step for Myanmar, given the fundamental importance of land policy for any society – particularly those with recent and complex histories of political and armed conflict and protracted displaced populations. With 70% of Myanmar's population living and working in rural areas, agriculture is a fundamental part of the country's social and economic fabric. The situation is particularly dire for the country's ethnic minority groups, who make up an estimated 30% of the population.

The government initiated a consultation process and organized seventeen public consultation workshops: 1 in each of the states and regions; 2 additional events in Shan State; and 1 in Nay Pyi Taw. Given the crucial meanings of land for the lives and livelihoods of the peoples of Myanmar, and the amount of land-related conflicts in the country, this was an important and welcome decision by the government. However, local organisations were quick to point out that the consultation process did not provide a meaningful platform for communities to fully understand the meaning and potential impact of the draft NLUP as it was announced at short notice and did not take sufficient time to fully reflect their concerns and aspirations and provide sufficient feedback. Despite these concerns, various local and international organisations held pre-consultations workshop all over the country, to raise awareness about the draft NLUP text and facilitate community responses. Land In Our Hands (LIOH), a network of representatives of CBOs and local organisations advocating for land rights for local communities, organized 12 pre-consultation workshops.<sup>2</sup> Following this, two expert meetings will be organized in Nay Pyi Taw to solicit final input.

Establishing an inclusive land use policy-making process that allows for - and encourages - full and meaningful participation for all rural working people is essential for ensuring a policy outcome that is widely and effectively accepted by society.

The land use policy draft under discussion here has a national scope, and will likely have a long-term impact. Therefore it is of crucial importance to the future prospects and trajectories of agriculture and the lives of those engaged in the sector, with impacts not only upon how land is used, but also upon who will use it, under what conditions, for how long and with what purposes. Ensuring that all members of Myanmar's rural communities are considered in the making of the policy, so that their needs are represented and their rights are upheld, is critical to its legitimacy and efficacy in providing a basis for democratic access and control over land and associated resources.

Once adopted, the NLUP will have serious consequences for the current land-related legal landscape. In March 2012, a year after the new Thein Sein government had come to power, the Farmland Law and the Vacant, Fallow and Virgin Land Law were passed. These two laws significantly changed the way land is governed in the country. The Farmland Law stipulated that land can be bought, sold and transferred on a land market with land use certificates. In a country where large numbers of people tilling the land do not have formal land titles this is highly problematic. The Vacant, Fallow and Virgin Land Law stipulates that all land not formally registered with the government can be allocated to domestic and foreign investors. The laws do not take into account the land rights of ethnic minorities, and fail to recognize customary and communal tenure systems in land, water, fisheries and forests. As a result, large numbers of farmers in the country, including most upland ethnic communities, have suddenly become 'squatters' under this law. These laws were passed through parliament very quickly, without the benefit of broad public debate or an inclusive consultation process. Both laws are mainly benefitting commercial interest and have already facilitated land grabbing and created several land related conflicts with increasing protests by local communities affected by these developments.<sup>3</sup>

In response to growing criticism, in June 2012 the President established the Land Allocation and Utilisation Scrutiny Committee (LAUSC), headed by the minister of Ministry of Environment Conservation and Forestry. The role of the committee is to advise the President on land use policy and land laws. The NLUP was drafted by this committee, with assistance from international experts. The President established the Land Investigation Committee in June 2012, composed of MPs and headed by a representative of the military-backed Union Solidarity and Development Party (USDP). The committee is only mandated to investigate land grab cases which must not go back before 1988 (the period before the previous military government). The committee has concluded that the majority of land grabbing was done by the military.<sup>4</sup>

The draft NLUP includes several key issues that would greatly improve Myanmar's land governance arrangements. However, some serious concerns remain that are outlined in this briefing, which also offers recommendations for improvement.

### *Whose Lives Will Count in the Future Myanmar?*

Land policy is never neutral; all land policymaking risks resulting in a less-than-ideal outcome no matter how "good" the process is. This is because policymaking is what James Scott refers to as "state simplification"<sup>5</sup> – e.g., a state building activity that simplifies the complexities of real life in order to make them "legible" to public administrators and amenable to public administration. Across the globe historically, land policymaking has involved dismissing facts and phenomena that could disrupt or derail formal-technical land-use categorization and land property standardization.

Some simplification is unavoidable. Yet policies that too narrowly follow overly neat categories of land use will be unable to detect, adapt to or address many of the most significant details of land based social relations in reality – the very things that need to be the object of analysis in the first place. This is the dilemma: to move forward in land policymaking, choices are made, some "details" will be taken on board, some will be given priority, but others, quite simply, will not, and instead they will be ignored or dismissed. The question is: which details are going to matter?

More to the point, *whose* details are going to count?

This is the heart of the matter in the National Land Use Policy (NLUP) process underway in Myanmar. That the public is invited to submit comments and recommendations is a significant and welcome development. If the government is to make this step matter, then it must follow through. It must ensure that the issues, concerns, and aspirations expressed by those whose lives and livelihoods are most affected or threatened by forced eviction and dislocation, land confiscations and large-scale land deals, leave a substantial imprint on the policy that finally gets adopted.

Asking whose details count in the land policy process opens a window on the larger transition underway in Myanmar today. As the World Bank points out, “Myanmar is now embarking on a triple transition: from an authoritarian military system to democratic governance; from a centrally directed economy to a market-based economy; and from 60 years of conflict to peace in the border areas”.<sup>6</sup> There is widespread recognition that the lynchpin in this triple transition is land (policy) reform. For some, “... land reform ... will determine the role of farmers in the country’s reform process and lay the foundation for new relations between the government and the rural poor.”<sup>7</sup> For others, “[i]f we are truly going to form a new Myanmar under a federal system, there is an urgent need to resolve the land problem”.<sup>8</sup> The new land policy will, in turn, be the basis for a new land law.

The outcomes of this NLUP process will indicate the direction of the country’s reform process and the larger transition. For many societies in transition, in the absence of a “founding” moment – that is, where it is clear that the *old* regime has finally come apart and a *new* regime has come together on the basis of a new set of fundamental agreements *system-wide* – national policymaking is a proxy for debate and finding agreement over the terms and direction of national development. In Myanmar, fundamentally important questions around *what* development, *for who* and for *what purposes*, have still to be decided. How the NLUP answers these questions will determine the breadth and depth of the new regime’s foundations.

Our response flows from two basic assumptions. The first assumption is that if the “triple transition” is to succeed, then people-centered land policymaking is needed.<sup>9</sup> There is a reason why the slogan “Not About Us Without Us” is popular with rural working peoples movements around the world; civilian rule is not the same thing as democratic rule. Among other things, the latter means involving those who have previously been excluded in development decision making. Across the globe, democratizing rural arenas has proven to be especially difficult in the face of an array of historical and institutional obstacles.<sup>10</sup>

Stepping back, Myanmar’s transition has reached an historical moment, where fundamental issues are converging and demanding legitimate solutions that must finally go beyond promises and ceremonies. The new land policy’s answer to the following core question – “who has or ought to have, what rights to which land for how long and for what purposes?” – will either raise or ruin the political legitimacy of the Myanmar state in the eyes of many. For this, policy must be people-centered.

For Myanmar’s land policy to be truly people-centered and the “triple transition” to succeed, it must seek to: (i) ensure benefits to the landless and near-landless working peoples; (ii) remedy historical injustices; (iii) promote the distinct right of women to their own land rights; (iv) promote the distinct right of ethnic minority groups, and other customary communities in minority areas such as Mon villagers in Karen state, for example, to their territorial claims as rural working people and as peoples; (v) support ecological land and labor uses in pursuit of productivity; (vi) ensure state/public support for building diverse and sustainable livelihoods; and (vii) advance the rights of rural working peoples to access and use land for purposes and in ways of their own choosing.

Our second assumption is that as long as the “founding” agreements still have to be worked out, the transition process itself remains fluid and dynamic, and potentially open to previously excluded voices to be heard. But those voices must be raised, and the government must respond accountably. Important steps have been made in national reconciliation in Myanmar in recent years. The initial gains must be extended to reach those who have historically been excluded and marginalized, or risk getting overturned.

Here, a human rights-based approach to land policymaking is essential. In addition to identifying who should be prioritized as a subject-matter of state policy, a human rights-based approach has the potential to apply the brakes on patterns of food-energy production and consumption that incentivize and encourage land grabbing, displacement/ dispossession, and adverse incorporation of poor people into industrial agricultural, fishing and forest food-energy enclaves. In the end, access to and control of land is key to the realization of other basic human rights, including the right to food, the right to housing, and others, and it is also a key to having effective access to and control of other natural resources, including water, fisheries, and forests. Land and its related natural resources are crucial for life; accordingly, States through their public policies must approach them as a matter of human rights, and not just a matter of business.

### *The Land Problem*

Seventy percent of Myanmar's population live and work in rural areas, and small-scale and subsistence agriculture is a fundamental part of the country's social and economic fabric. According to the World Bank, "From a strategic point of view, agriculture is of central importance for achieving the twin goals of ending extreme poverty and promoting shared prosperity in Myanmar. The sector accounts for about 43 percent of the GDP, which is [the] largest share of GDP among ASEAN members....The sector generates about 54 percent of total employment and is source of livelihoods for about 70 percent of population who live in rural areas. Some 29 percent of rural households live below the poverty line".<sup>11</sup>

Behind this situation of course is a serious land problem, which is increasingly highlighted in the national and international news media. As has been noted by some observers, "Under the past 50 years of military rule, land was frequently taken from farmers with little or no compensation and given to cronies of the former junta. It is estimated that approximately 1.9 million acres were illegally transferred to private companies in the past 20 years, even though 70 percent of that land has never been developed and is still used for farming by the original owners."<sup>12</sup> By mid-2013, the government had reportedly given out as much as 5.2 million acres for agribusiness concessions.<sup>13</sup>

Often land issues are described in terms of land grabbing. But in reality, land grabbing is not the only land problem plaguing Myanmar society, and it is in fact tied to a deeper set of problems related to three main and broadly distinct types of situations affecting rural working households and peoples: (i) their access to land exists but is threatened or is vulnerable to threat, (ii) they currently have little or no effective access to and control over land-related decisions, and (iii) they previously lost such access for various reasons especially like getting caught in crossfire during armed conflict or getting caught in a natural disaster and being forced to flee.

The discussion below is not a comprehensive look at the land problem in Myanmar; rather it is a brief description of these three distinct patterns that together make up the problem of lack of democratic access to and control over land. It is these three dimensions of the land problem in Myanmar today that determines the type of land use policy response that is needed, and which the NLUP can and must try to address.

(i) Need for public policy to *protect* effective access to land where this already exists but is or may be threatened – especially land users in ethnic borderland areas and upland shifting cultivators in general, as well as any land users: without the authorized documentation; with authorized documentation but subject to arbitrary eviction; and with papers but vulnerable to “the dull compulsion of economic forces”. Ethnic minority men, women, and children make up an estimated 30-40 percent of the total population, and ethnic states occupy some 57 percent of the total land area and are home to poor and often persecuted ethnic minority groups. Most of the women and men living in these impoverished and war-torn areas are subsistence farmers practicing upland cultivation. Economic grievances have played a central part in fuelling the civil war. While the central government has been systematically exploiting the natural resources of these areas, the money earned has not been (re)invested to benefit the local population.<sup>14</sup>

(ii) Need for public policy to *promote* effective access to land where poor, vulnerable and marginalized people have little or no access, through distributive and redistributive reform – especially

(i) women, who “work as farmers in their own farms, as unpaid workers on family farms and as paid or unpaid laborers on the farms and plantations of others. In addition, while women are increasingly responsible for the production and processing of food as farmers, fisherwomen, forest gatherers and waged agricultural workers, *they do so with very little legal protection in their access to natural and productive resources and in the workplace* (emphasis added)”<sup>15</sup>; (ii) landless labourers who are said to comprise as much as “[o]ne-third of Myanmar’s 47 million rural residents”.<sup>16</sup> This problem cannot be dealt with through regular market mechanisms, but must be addressed through purposive state policy since market mechanisms are a contributing factor in rendering people landless or near-landless

(iii) Need for public policy to restore democratic access to land (restitution) in cases where people have previously lost such access for different reasons such as getting caught in the crossfire during armed conflict and being forced to flee or getting caught in a natural disaster and being forced to flee – this is especially the pressing issue for IDPs and refugees, who after decades of conflict are currently estimated to include 650,000 internally displaced persons (IDPs) in Burma’s ethnic borderlands, as well as over 130,000 refugees (mostly Karens) and as many as two million migrants, many of them unregistered, in Thailand.<sup>17</sup>

This multi-dimensional land problem outlined above is undoubtedly difficult, complex, contested, and therefore delicate. Ethnic minority populations in particular are often at an especially deep disadvantage in claiming land rights as many are without Citizen Scrutiny Cards. This card confers citizenship rights, including the right to obtain formal land use rights. To illustrate: “Land ownership is difficult, as most of the villagers have documentation from armed opposition groups, not from the central government”, explains a Karen community worker. “Their land tenure is based on these local documents. It is crucial that the Karen National Union [KNU – an ethnic armed opposition group] negotiates land titles in the peace talks, otherwise it will dissolve into a big mess. Many people who had documents lost them when they fled to the jungle.”<sup>18</sup>

On top of this, “Because of the conflict the original population has fled and their land has not been used for a long time”, says a representative of a Karen civil society organisation. “The government realizes this, and companies have started to apply for permission to use this land. Villagers coming back find their land occupied.” “The upland areas have no record and demarcation of land use, so we do not know how much area has already been confiscated,” says the Karen civil society worker. “There is also no independent mechanism to address land conflicts. When IDPs and refugees return, maybe some people are living in their areas, and we need to think about this.”<sup>19</sup>

To move forward under such challenging conditions, it is important from the outset to distinguish between social-political process and technical-administrative procedures and mechanisms, and to accept the need to put the latter in the service of the former. An exclusively top-down statist approach is likely to simply worsen the situation.

Instead, what is needed to move forward is an approach that puts state-led procedures-mechanisms at the service of bottom-up people-centered processes of negotiation and collective decision-making. An enduring negotiated solution to the land problem is one that is capable of opening up political space for *many* tailored solutions to be negotiated at the ground level, where the primary agents of constructive change – the various differentiated segments of rural working households and communities who will be most affected – are able to discuss, debate and negotiate a tailored agreement for their peaceful co-existence. This is the only way to minimize, and perhaps even avoid the risk of more violence and conflict.

This takes us back to the underlying issue of who will get to decide who has what rights to which land for how long and for what purposes. Neither land policies nor land practices on the ground arise in a vacuum. Land rights, land practices and land policies are the outcomes of very particularized contestation and struggles between different social classes and interest groups, and between the latter and the state. Historically, and emerging out of and embedded in existing power configurations, there is a strong tendency for the changes wrought by

land policies to favour (or end up favouring) dominant landed classes and groups, as well as powerful state officials and bureaucrats.

But such an undemocratic outcome is neither automatic nor inevitable. Strategic steps can – and must – be taken in Myanmar to prevent this from happening, while setting the country on a course in the direction of real positive change. In sum, the overarching problematic is one of lack of effective access to land, combined with an underlying lack of democratic control over land – e.g., effective participation in decision-making over how land is used, for which purposes, and how social relations surrounding land are organized, especially in those areas targeted for large-scale (foreign) “investments” and land deals and who have been political excluded, socially marginalized and economically impoverished by past state policy.

### *The Iron Cage of Existing Laws*

Stepping back, it is clear that Myanmar is at a crucial moment in its land policymaking where key issues are converging and must be addressed in a way that increases the political legitimacy of the state. But achieving this will not be easy. One problem is that the current government was born mired in congenital weaknesses and tainted by past failings on the part of the state. Its ability to cope with this situation has been further constrained by the iron cage of recently promulgated land and investment law and policy.

The series of land laws designed behind closed doors and promulgated between 2010 and 2013 changed the legal basis for land use rights, especially in the uplands, while establishing a legal land market in order to encourage domestic and foreign investment in land. This situation is unlikely to reduce injustice and inequality, but more likely to worsen the problem and contribute to further land polarization. Had the new land laws been subjected to prior public consultation, the government might have had the opportunity to revise them in order to gain their acceptance. Instead, these laws have been criticised and largely rejected by land and ethnic rights defenders, and the government’s political legitimacy has been damaged. In order to achieve a people-centered land policy, changes to the existing land and investment laws are necessary.

The Farmland Law stipulates that land can be legally bought and sold on a land market with land use certificates (LUCs), thereby inaugurating a Western-style (individual) private property rights regime that reduces the value of land and associated natural resources to an economic asset. Other non-economic meanings and values of land have thus been discarded. Meanwhile, the legalisation of a land market without strong public safeguards has opened the door to a new generation of problems. "Under this new law, farmers who have been growing on hereditary land for their livelihoods can only possess land by means of official registration. As the registration process is not easily accessible for rural people, the land policies put them at risk. In most cases, they are helpless".<sup>20</sup>

The Vacant, Fallow, and Virgin (VFV) Land Law allows the central government to reallocate villagers' farm and forestlands – both upland shifting land, especially fallows, and lowlands without official land title – to domestic and foreign investors. Community-managed resources, such as village forests, waterways, fishponds and grazing lands are equally susceptible to confiscation, despite being crucial to local livelihoods and food security, particularly for vulnerable households. The law allows for a total acreage for industrial crops for up to a maximum of 50,000 acres for a thirty-year lease, with the possibility for renewal.

These two new land laws immediately put upland communities – composed mainly of different ethnic minority groups - under threat of losing their lands, many of which were already being targeted for resource extraction, agribusiness concessions, and mega infrastructure projects. The new laws undermine their right to land, including their right to decide how they will use and manage their farms and forestlands, as well as their right to food and water, among others, while the right of return of hundreds of thousands of IDPs, refugees and migrants who used to occupy and use land in these areas is forestalled.

A third law designed to attract Foreign Direct Investment (FDI restricts some sectors, including the agricultural sector, to large-scale (private) investment, and gives land use rights of up to seventy years, with an option to extend if the concession is located in less developed and poor communication areas that are 'suitable for the economic development

of the whole country'. The Myanmar Investment Commission (MIC) can authorize foreign investment in restricted sectors, including in new ceasefire areas, if it deems these to be in the "national interest" and with little recourse for those who disagree.

Finally, the Special Economic Zones (SEZ) Law, which gives further incentives for foreign investors, including up to 75 years land use rights for large-scale industry, low tax rates, import duty exemptions, unrestricted foreign shareholding, relaxed foreign exchange control, and – most chillingly – government security support. The law has raised deep concerns over an array of negative impacts, including forced dislocations of households and villages, benefits that do not materialize, widespread environmental degradation, and severe industrial pollution, among others. Two large SEZs have already been established (the Dawei SEZ in Tanintharyi Region and the Kyaukphyu SEZ in Rakhine State) and five more are planned in ethnic regions.

Each of these laws was rushed through the parliaments without benefit of broad public debate or serious consideration of their political, economic and social ramifications. They are widely seen as benefitting especially local cronies and ex-generals, some of whom were involved in drafting and/or passing these laws as newly-elected MPs, as well as large private foreign investors, at the expense of rural working people.<sup>21</sup> The resulting loss of cultivation rights is likely to exacerbate rural landlessness, poverty and associated problems, such as rapid rural–urban migration with little prospects for urban employment opportunities, environmental degradation, and growing local and national food insecurity.

### *An Emerging Social Volcano*

As the new land and investment laws have taken effect, a new wave of corporate large-scale concessions, leading to either reallocations of land away from existing land users and rural working households and communities, or to unbalanced contract-farming arrangements,<sup>22</sup> has emerged to become a major national issue. There is fierce (and

growing) resistance and opposition to numerous new and old land deals and “development” projects on the ground by communities living in their path. The previous military government concluded many of these deals.

One example is the construction of a Chinese owned gas pipeline overland from a new deep-sea port at Kyaukphyu in Rakhine State on the Bay of Bengal to Kunming, the capital of China’s Yunnan Province. The 1,100-kilometre pipeline will pass through Rakhine State currently embroiled in communal conflict, central Myanmar, and northern Shan State where armed conflict continues. Concerns of local people are due to existing conflicts near the pipeline as well as problems with how the Chinese company has handled communities in the pipeline’s path. Another example is the deeply controversial Myitsone hydro-power dam. Although President Thein Sein won praise for suspending the China-backed Myitsone project. Protests have likewise continued – and been repressed – over this and other controversial economic projects agreed to under the previous military government.<sup>23</sup>

Still another example is the Letpadaung copper mine project, which has sparked stiff resistance from farmers living in the areas targeted for its expansion. They have repeatedly rejected offers of compensation and blocked roads to keep out bulldozers and to halt fencing operations. Before he passed away in April 2014, the NLD’s U Win Tin observed that the case showed that “[m]oney cannot always appease the people, because sometimes it is their pride and love for their hometown that will prevail over money”.<sup>24</sup> But this message has been lost on proponents of large-scale foreign investment driven development, who have dismissed the “culture of protest” at Letpadaung as the work of “issue protesters who have come in from the outside”.<sup>25</sup>

This view contrasts sharply with that of the UN Special Rapporteur on Human Rights in Myanmar, who said: “[i]n an attempt to protect their rights, people have resorted to public protests, which have led to arbitrary arrests and excessive use of force by the police. The Special Rapporteur underlines that the way to deal with these protests is not to arrest and prosecute the protesters, but to listen to their concerns and grievances and develop a system that protects their human rights”.<sup>26</sup>

Despite ample signs that villagers themselves are serious in their opposition to the mine and their determination to hold onto their land and way of life, the government has been unwilling to concede defeat. This led directly to the tragedy last 22 December 2014, where one protester, woman farmer Daw Khin Win of Moe Kyoe Pyin Village, Sagaing, was shot dead by police.<sup>27</sup> Predictably, Daw Khin Win's death at the hands of government police has prompted further protests and appears to be widening dissent. One prominent member of Myanmar's EITI civil society steering committee has said that the government's handling of the case has caused him to "question his future participation in the EITI process".<sup>28</sup>

### *A Profound Historical Juncture*

Myanmar is clearly opening up for business, leading to a surge in land grabbing and sparking firestorms of social protest, which in turn has increased "corporate social responsibility" type rhetoric. Vikram Kumar, Resident Representative in Myanmar of the International Finance Corporation (IFC), the financing arm of the World Bank focused exclusively on the private sector in developing countries, for example, has warned potential investors of "a delicate path to tread – ensuring that they access this once isolated market *in an ethical and inclusive ways while maximizing the positive benefits for a population mired in poverty*".<sup>29</sup> Yet it is clear to many that concern for social and environmental effects of large-scale land deals has so far, predictably, remained largely rhetorical.

Less obvious perhaps have been the *political effects* of the growing gap between this rhetoric and reality: (i) deepening dissent (ii) rising calls for rolling back the government's development strategy and (iii) creation of small openings for moving away from the status quo.

#### (i) **Deepening dissent**

The government's stated commitment to pro-poor policies and people-centered development may well be sincere, but realities on the ground are pointing in a different direction.<sup>30</sup> Land issues (among

other pressing concerns) have risen to the top of the national political agenda, as easing restrictions on media and people's rights to organise have led to increased news reports on protests by farming communities across the country against land grabbing. While some of the protests are aimed at past land grabs, others involve fresh cases happening amidst what appears to be a new wave of land grabbing on an unprecedented scale since a new round of government reforms. Resulting investments have not, to date, consulted or benefited rural working households and communities. Instead, they have ignored the basic right to free prior informed consent and led to outright land grabs, disruption and dislocation of lives and livelihoods, and even death.

Clearly, at least some (if not many) people whose lives and livelihoods stand to be most affected *do not want what the government and its allies want them to want*. Powerful forces are pressuring those who are currently occupying and using the lands targeted for large-scale investment to take compensation and clear out – but to no avail. Indeed, that's the problem: often, what those people want is not compensation with relocation. What they want is to stay on the land and to build their lives and livelihoods in a self-determined manner.

To move forward against their wishes clearly violates their individual and collective rights as inscribed in international human rights law, a fact that is routinely ignored with impunity. Yet it would be risky to continue to ignore the cumulative political impact of ongoing evictions and displacements like what is unfolding at Letpadaung. Such tragedies only deepen perceptions of the government's "good intention" declarations as hollow gestures fueling a social volcano, which the NLUP process is either going to contain or enflame. Ironically, "[a]lthough the rule of law is, in general, weak in Myanmar, the implementation of pro-business laws is carried out in a hasty manner. On the other hand, there is no urgency when it comes to installing proper mechanisms to protect the vulnerable".<sup>31</sup> This contradiction has become a factor in how the current NLUP process is being perceived (with anger and mistrust) and approached (with deep skepticism) by many whose lives are most at stake.

## (ii) Growing calls for change

Amidst the deepening climate of dissent, there are growing calls from various quarters for the government to change its current development strategy.

Civil society leaders, farmers and their representatives are challenging the government's development model. The main complaint is that investors working with local authorities are not following international best practices. This includes concerns such as lack of transparency, not following FPIC principles (free, prior, informed consent – see text box below), no environmental or social or human rights impact assessment (E/S/HRIA), irregularities with often below-market compensation (if at all), corruption, coercion, and intimidation. Furthermore, some local communities have rejected certain projects outright, as they refuse to lose their homes and farmlands. Several high-profile national cases have received international attention, such as Yuzana Company's cassava concession in Hukawng Valley and the Chinese sponsored Myitsone Dam, both in Kachin State.<sup>32</sup>

Local civil society leaders are quite clear in this regard: "The current policies are business-centered, not people-centered. The current legal framework restricts the people's choice rather than expanding it. In policymaking for investment, especially extractive industries, the question is: «What will be the benefit to the people?» But this question never gets answered. Myanmar is open to investors, but we do not have a clear spatial planning policy, a clear land policy, or sound environmental laws. Protection for indigenous peoples is not a government priority. And protection measures for poor rural communities are even worse in the agricultural sector. Farmers have been struggling with debt problems for decades. ... These problems are not new. The problem is that policymakers are trying to solve the same old problems with the same old solutions".<sup>33</sup>

The UN Special Rapporteur for Myanmar has also been expressing concern: "The Special Rapporteur is concerned that the rights of land users in Myanmar are not secure. Article 37 (a) of the Constitution provides that the State is the ultimate owner of all lands and all natural resources above and below the ground, above and beneath the water and in the atmosphere. Article 29 of the Farmland Law, approved by the

parliament on 30 March 2012, allows the State to confiscate any land for a project in the national interest. Furthermore, the Vacant, Fallow and

Virgin Land Law enables the Government to reallocate villagers' farms and forest lands to domestic and foreign investors. This legal framework, combined with the fact that the vast majority of land users have no property titles to the land that they occupy and cultivate, leaves people vulnerable to forced evictions and loss of livelihood, with limited access to effective legal remedies. Particularly vulnerable groups include farmers, internally displaced persons and returning asylum seekers.

Community-managed resources, such as village forests, waterways and grazing lands, can also be confiscated under the law."<sup>34</sup>

Meanwhile, as the NLUP process moves forward, Myanmar is also negotiating an investment agreement with the EU as well as developing a new investment law. A new wave of investments is expected to focus largely on Myanmar's ethnic borderlands, which are at the forefront of domestic and international change. These areas have been at the centre of more than 60 years of civil war in Myanmar – the longest running in the world – with a large number of ethnic minority armed opposition groups fighting the central government, which has historically been dominated by the Bamar majority, for ethnic rights and greater autonomy. Economic grievances among ethnic groups – largely tied to resources being extracted from the peripheral areas where they live to sustain the urban core controlled by the military and business elite – have played a central part in fuelling the civil war. Foreign investment in these resource-rich yet conflict ridden ethnic borderlands is likely to be as important as domestic politics in shaping Myanmar's future.<sup>35</sup>

Both the new investment agreement with the EU and the new investment law appear to be moving towards providing for investor-state dispute settlement (ISDS), a controversial mechanism whereby (foreign) investors can sue the Myanmar state at an international tribunal, in case they feel government policy impacts on their business and profits. Numerous examples worldwide show how pro-poor land policies have been challenged by investors.<sup>36</sup> These examples

suggest a clear need to link all these different processes in Myanmar to ensure that a pro-poor NLUP would not be overturned by international investment agreements and the new investment law.

Over 200 Myanmar CSOs have recently expressed their concerns about the current development path in Myanmar in a statement as a result of a seminar on investment treaties, held in Mandalay on 21 June 2014. The main concerns raised are that: (i) there are no concrete national land policies and laws in place that protect and promote the rights of Myanmar citizens vis a vis foreign investors, (ii) there are no laws protecting ethnic minority rights under the current reform process, (iii) there is a need to develop policies and adopt laws that control the behaviour of foreign investors and allow them to be sued when they violate human rights, (iv) environmental and social problems, caused by existing foreign investments have not been addressed, such as Myitsone hydropower project, Lethpadaung copper mine, Salween hydropower project, landgrabbing etc., (v) there is currently no stable peace in Myanmar, and investment treaties are signed at this moment, they will not have taken into account the concerns and aspirations of ethnic communities, and (vi) there is a need for a public, broad and participatory consultation process in order to decide whether or not Myanmar needs investment treaties.

Much could be done to support the country's rural working people after the decades-long toxic mix of neglect and discrimination, including economic structures that discourage people-centered investment and contribute to high levels of debt and landlessness, as well as the repression that contributes to land dispossession, that has characterized rural development in the country. But hopes are fading fast. It seems the most important national development related decisions have already been taken and a decidedly pro-market-for-big-business course has been laid as the country continues to break out of its isolationist past and pursue large-scale foreign investment, particularly in ethnic border areas. As the government pushes on in this vein, still lacking are the kind of far-reaching reforms that many feel are needed to address their concerns and thus, ultimately, to widen and deepen the basic social foundations of the country's economic development and political transition. Measures are urgently needed that can truly

reach out to those who have previously been excluded and provide benefits to them in ways that they themselves deem relevant and appropriate.

(i) **Creation of opportunities for change**

Against this backdrop, the NLUP process has the potential to make a real step forward toward a better future for all of Myanmar society. But the pressure is truly on. If done well and core issues are taken up with sincerity, then a lot of headway could indeed be made in addressing the fundamental problems currently plaguing the country and with it a lot of trust could be gained. If done poorly, however, then whatever trust and political legitimacy the government has left will be irrevocably broken, deep disparities will deepen even more, and a plethora of land problems inherited from the past as well as those erupting in the present are likely to worsen.

The main challenge is how to maximize the NLUP process to achieve a solid *social foundation for peace, development and democracy* after six decades of war and a resurgence of armed conflict. Solving the land problem is central to ending armed conflict and achieving a positive foundational relationship between development and democracy. But it cannot be done well without recognizing that rural/local communities are socially differentiated. A significant segment of the country's population would most likely fit in the broad and loose category of "rural poor". But even this category is marked by significant social differentiation, comprising male and female, ethnic minorities, poor people, small scale farmers, landless rural laborers, subsistence fishers, small scale fishers, fish workers – the list goes on. Land-use change will have different impacts on these various strata of the rural poor – and also will have different impacts between them and rich farmers, landlords, moneylenders and traders (the "non-poor").

Differentiated impacts of land-use change on society, and especially on rural working households and communities, is an intrinsic factor in any land policy. Indeed, not all land-use changes are 'bad' for the rural poor and the environment. But far-reaching land-use change is needed in order to reverse past and current dominance of, and trends towards, monocultures and industrial farming that result from corporate-driven agriculture. How a land policy anticipates, analyses and addresses the

potential impacts of different types of land use change on different strata of society is the underlying link to broader societal issues. A human rights based approach to land rights means giving *priority*: (i) to providing or reinforcing rights and protections for *the poor, marginalized and vulnerable*, (ii) to pursuing measures to restore land to those who have been arbitrarily or coercively evicted and displaced, and (iii) to pursuing measures to redistribute land to landless and near-landless households. Informed in part by this notion, multiple state land policies – in the form of redistributive land reform, land restitution, land tenure reform, land stewardship and so on – have already become the norm in many national settings.

International normative standard setting around the idea of a 'human right to land and other national resources' is ongoing, and creating new political space for previously excluded voices to be heard and their interests and aspirations to be registered and have a chance of influencing policy and political outcomes. This NLUP process presents a small but significant and positive opportunity for change in Myanmar. Which are the voices that most need to be heard by policymakers? They are to be found in emerging new movements in society that are weaving together old and new constituencies and concerns in fresh ways to address fundamental problems. Indeed, there are such social movements that are attempting to contribute to national land policy making. Here then are the new voices that most need to be heard – will they be taken seriously and listened to?

Will Myanmar's future development come with full and meaningful democracy, or without? Will the terms of relationship between national, regional and local development be defined democratically, or not? Which development path will the country take, and, who gets to decide? These are the key questions for the National Land Use Policy, and how this policy will eventually respond will most likely play a big role in determining whether real peace will be possible or not.

### *Whose Aspirations Will Count: The Key Policy Issues*

The civil war in Myanmar, which has lasted for over 60 years, continues to cause great suffering. The fighting continues to take place mainly in

ethnic minority areas, whose civilian population has already experienced the brunt of the war in previous decades. Campaigns by the Myanmar army against ethnic armed opposition groups have been accompanied by serious violations of human rights against the civilian population. Tens of thousands of lives have been lost, and hundreds of thousands of people have sought refuge in the forests or in neighbouring countries, notably China, Thailand, Bangladesh and India.<sup>37</sup> The ongoing civil war is a key part of the current context in which a historic NLUP is being negotiated.

Within this context, there are also new land and investment laws in place that are benefiting large corporate investors and not smallholder farmers, especially in ethnic minority regions and conflict areas, and do not take into account human rights and land rights of ethnic communities. The government has not done enough to fulfill its obligation to ensure that independent human rights impact assessments are carried out before the start of projects, that international human rights standards on displacement and eviction are followed throughout the life of a project, and that the human rights and land rights of rural working people living in the areas targeted by business investments are recognized and protected. The existing legal framework of laws and policies pertaining to land use and land rights fall far short of and in many instances run counter to the international standard.

Although fighting continues in some areas – notably in Kachin State and Northern Shan State – the new ceasefires have put the issue of resettlement of IDPs and refugees higher on the agenda. Among the key issues left to resolve in the current peace process is access to and control of land. Discussion on land conflict and land rights has so far been almost absent in the peace process, even though securing land rights is one of the hallmarks of international post-conflict development. Indeed, the new ceasefires, coupled with the new land and investment laws, have opened up lucrative opportunities for companies to buy up land in conflict-affected areas. This is especially worrying as many people have been displaced due to the conflict of their ancestral lands due to the conflict, but have no formal land titles.

Should the conflict-affected areas now under nominal control of ethnic armed opposition groups come under government control in the future

as a result of the new ceasefires, the new land laws would come into force that would empower the state to legally reallocate large tracts of land that has been deemed 'wasteland' or 'vacant' land to private investors. This scenario could therefore further facilitate 'legal' – but clearly not legitimate – land grabs in war affected territories, setting the stage for further social and political conflict in the years to come.

The new ceasefires have been facilitating land grabbing by state and non-state elites alike in conflict-affected areas where large development projects in resource-rich ethnic regions have already taken place. Many ethnic organisations oppose large-scale economic projects in their territories until inclusive political agreements are reached. Others reject these projects outright. Both the government and the ethnic armed groups ought to ensure that clauses and measures are enshrined to protect and promote the land rights of existing, displaced and returning ethnic populations, including with regard to the land titles and tenure rights of villagers, and that these are included in ceasefire and peace agreements, as well as in their respective land policies.

The current NLUP process should not be confined by this lack of discussion of land issues in the peace process. Instead, it must anticipate the key issues that will prevent progress and make a start in breaking through the impasse and breaking down the "chicken-and-egg" problematic. Underlying the conflict is a question about whose vision of development will count (or should count). But until now, the core concerns of those most vulnerable to and most affected by armed conflict have yet to be given serious consideration and their voices remain unrepresented in the peace process.

One of the key concerns that ethnic peoples have is their land rights. Recognition of informal and customary land users rights can be a positive measure under certain conditions, especially when the overall objective is to protect, promote or restore democratic and inclusive access to land system-wide, in settings where this is not yet guaranteed. But there are reasons to move cautiously, and in any case to avoid approaches that simply reduce or conform informal and customary users' rights to the conventional Western model of exclusive individual (private) property rights.

One reason to move cautiously is that informal and customary land uses exist in relation to a wider structure of land access and control. If this wider context is characterized by a relatively equal distribution of land access and control, then recognizing informal and customary users rights will formalize equality. But if this wider context is marked by land confiscation and land grabbing, land concentration and land polarization, then recognizing informal and customary users rights – without taking concomitant steps to institute a land size ceiling with land redistribution to the landless and land restitution to those who were forced off their land by armed conflict, natural disaster, land grabbing and forced eviction – will merely formalize inequality systemwide.

In short, where there is momentum in land polarization, recognizing informal and customary users rights must be done together with setting a land size ceiling (not only for land concessions) with land redistribution and land restitution for the overall effect to be beneficial. Here, two further points are relevant. First, setting a land size ceiling with land redistribution and land restitution that takes into account diverse agro-ecological conditions (such as upland, lowland, dryland, and location of water resources), and that recognizes actual customary use and management practices such as shifting cultivation is likewise important. Second, land recognition, land redistribution and land restitution must also be accompanied by a wider agrarian reform that puts into place a public and private investment program and strategy that promotes and supports rural working people to be able to stay on the land in a self-determining manner, that supports robust local economies and local food production systems and enables them to reach local and regional markets.

Land titling is another area where caution is needed. As a specific approach, conventional land titling typically seeks to impose fixed and exclusive individual private land property rights as the only legal land right, replacing pre-existing (local customary) practices. Yet customary practices often involve complex and dynamic combinations of individual household, collective or communal ownership and subsidiary use rights. In practice the shift from a multiple-user, moving customary and/or communal entity to a single formal owner under statutory law

does not necessarily erase deep-set feelings that former occupants have a right to use the land in question, especially during times of hardship, or when household fortunes change for the worse, or when one's very survival is at stake (such as during armed conflict).

At the same time, shifting from communal to individual property rights can also often leave out forest, fishing, and grazing grounds that are likewise part and parcel of land users' well being and collective identities. Conventional titling inherently undermines the economic, social and ecological benefits of shifting cultivation practices. It likewise ignores the fact that the land is still used by shifting cultivator households during the fallow period, which is one of the explanations for the assertion that "there is no "vacant, fallow, virgin land" in ethnic territories".<sup>38</sup>

Equally important, the act of fixing a permanent, exclusive boundary for a land plot may spark conflict among adjacent land users; delineating a single exclusive land 'owner' can generate new land conflicts rather than erasing them. Doing this without redressing past land injustices or present land inequalities, and without considering the land needs for future generations of rural working people, could have disastrous consequences. Land titling is never neutral. Rather, it is a political act and not merely a technical exercise, with significant implications and impacts.<sup>39</sup>

The introduction of formal land property rights requires answering in practice (in power differentiated settings marked by conflicting interests) the complex series of questions posed earlier – who has (or should have) what rights to which land for how long and for what purposes.<sup>40</sup> Introducing formal rights for ethnic and informal landholders is not necessarily pro-poor in and of itself, though it will "recalibrate the arena of struggle".<sup>41</sup> Gaining legal recognition has never alone guaranteed that they will actually be respected and protected in the courts or on the ground; for the rural poor, there remains a difficult and contested process involving struggles to actually claim those legal rights and "make them real".<sup>42</sup>

Additionally, while clear and secure land property rights are necessary but not sufficient to guarantee protection of rural poor land rights, it is crucial to recognize that secure property rights should not a priori, only or always,

mean individual private property rights. In many parts of the world, an inductive approach is needed that is based on a deep understanding of the societies where the intervention is targeted and “makes socially legitimate occupation and use rights, as they are currently held and practiced, a point of departure for both their recognition in law and for the design of institutional frameworks for mediating competing claims and administering land”.<sup>43</sup> In the Myanmar context, recognition of existing customary and communal tenure systems in land, water, fisheries and forests is widely considered to be crucial to eradicating poverty and building real peace in ethnic areas; to ensuring sustainable livelihoods for marginalized ethnic communities affected by decades of war; and to facilitating the voluntary return of IDPs and refugees. But a carefully tailored approach is needed.

The UN Special Rapporteur on Myanmar has rightly said that the government should establish a system of individual titling and tenure rights for smallholders to protect them against land appropriation, *together with a collective or communal tenure system* for land, fisheries and forests, in order to protect the access of local communities to common goods and to ensure that land can be converted to new uses only with their free, prior and informed consent. It can be stressed further that ways must be sought to accommodate and protect from encroachment land under shifting cultivation in particular, because these swidden plots move (they are not fixed in place as a land title conventionally demands) and most often they operate under customary law and communal land use rights

Meanwhile, recognition of existing ethnic tenure systems in land, water, fisheries and forests, is a crucial starting point, but it is just a starting point. Additionally, the NLUP must provide measures to increase effective and adequate access to land for women, IDPs/Refugees, and for landless labourers who seek to build a new life and livelihood for themselves and their families. Many farmers in Myanmar’s ethnic borderlands, where most have customary land-use rights, practice traditional upland swidden cultivation (taungya). Many communities in conflict areas often have no formal land titles, and customary rights are not always respected due to highly mobile populations fleeing war zones. While some communities left their homes relatively recently, and

in some instances have been still able to attend their farms, others have lived for many years (and continue to live) in refugee camps in Thailand. In order for IDPs and refugees to return and to be able to rebuild their livelihoods, access to and control of land will be crucial.

The importance of this aspect cannot be stressed enough: “The current government’s handling of land disputes will set a precedent for how future Myanmar administrations are likely to address the legacies of cronyism, abuse, and lawlessness dating back to the former military regime. *Besides devising a working legal framework for the future, the government needs to address issues of land claims predating the Thein Sein government in a manner deemed fair by the public*” (emphasis added).<sup>44</sup>

Finally, the NLUP must also go beyond providing land tenure security for those who already have land and to ensuring land access to those who desire to return to their lands. It must also take steps to provide measures that will promote and ensure democratic control of land related decision-making in the future, in order to strengthen the capacity of small scale and subsistence farmers to stay on the land, and as a safeguard against regime backsliding and as an enabling environment for further people-centered investments. Safeguards to protect land users that are oriented solely around how to responsibly undertake (large-scale) transfers of land tenure rights will never address the aspirations of all. Rather, what many people and peoples need are legal measures to improve supports to rural working people in order to increase their legitimate access to and control of land and related natural resources, and to help them stay on the land and make a decent livelihood. If Myanmar’s majority rural working households and communities are to benefit from the reforms, there need to be new types of investment and processes of implementation. Following the country’s moves towards democratic reforms, the government should direct investment towards people-centered development that benefits household and local economies. To accomplish this, civil society must be included from the outset in decisions regarding public and private investment policies, programs and projects to ensure that benefits flow into working peoples households and local economies.<sup>45</sup>

## II Draft Policy Assessment

The draft NLUP which was unveiled by the government last October 2014 is positive in many ways, but still needs some improvement in order to be better positioned to address key and urgent land policy issues facing Myanmar today. To improve the NLUP draft, the Voluntary Guidelines for Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (hereinafter referred to as “Tenure Guidelines”) are indispensable.

The Tenure Guidelines are the highest international standard on tenure of land, fisheries and forests to date and must be read in conjunction with other relevant international human rights instruments, including: Article 11 of the International Covenant on Economic, Social and Cultural Rights (pertaining to the right to food); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the United Nations Declaration on the Rights of Indigenous People (UNDRIP); the Pinheiro “Principles on housing and property restitution for refugees and displaced persons” (“Pinheiro Principles”); the United Nations “Basic Principles and Guidelines on Development-based Evictions and Displacement”; and of course the Universal Declaration of Human Rights (UDHR).

The Tenure Guidelines themselves are the result of extensive public consultations and negotiations between governments and involving representatives of civil society organizations including small scale farmers, fishers, pastoralists, rural women, youth and indigenous peoples, and were agreed upon and adopted by the governments of the world in 2012 at the Committee on World Food Security (CFS).<sup>46</sup> This gives the Tenure Guidelines high political legitimacy. Notably, the Myanmar Government is a signatory to these guidelines, which makes using them as the standard by which to develop the NLUP policy especially relevant and appropriate.

### (i) Preliminary

The Tenure Guidelines are a negotiated document that accommodates both a business approach and a human rights approach, and the result therefore is a relatively balanced policy character and direction.

Yet the underlying normative foundations of the Tenure Guidelines based in a human rights approach is clear. This ethos is captured early on, for example in Article 1.1 of the Tenure Guidelines: “These Voluntary Guidelines seek to improve governance of tenure of land, fisheries and forests. They seek to do so for the benefit of all, with an emphasis on vulnerable and marginalized people, with the goals of food security and progressive realization of the right to adequate food, poverty eradication, sustainable livelihoods, social stability, housing security, rural development, environmental protection and sustainable social and economic development. All programmes, policies and technical assistance to improve governance of tenure through the implementation of these Guidelines should be consistent with States’ existing obligations under international law, including the Universal Declaration of Human Rights and other international human rights instruments” (Art.1.1, Tenure Guidelines).

Overall, the current draft of the NLUP falls short of this international standard. Weighed against the Tenure Guidelines, the relatively unbalanced character and direction of the NLUP current draft is revealed. The divergence from the standard set by the Tenure Guidelines is fairly stark, and should be firmly, clearly and explicitly redressed. The Tenure Guidelines provide clear guidance on how and where in the policy document this can be done, and this guidance should be taken up from start to finish across the entire NLUP.

In addition, the Tenure Guidelines offer explicit guidance for addressing through policy the 3 dimensions of the land problem in Myanmar as discussed earlier:

- (i) Need to *protect* existing democratic access to land where this already exists but is or may be threatened through legal recognition and allocation of tenure rights;
- (ii) Need to *promote* democratic access to land where poor, vulnerable and marginalized people have little or no access, through distributive and redistributive reform; and

- (iii) Need to *restore* democratic access to land (restitution) in cases where people have lost their prior access as a result of armed conflict or natural disaster etc.

On the first point, it is to be much welcomed that the current draft of the NLUP rightly addresses the first dimension; but this attention is still only partial and should be strengthened by aligning with all the provisions stipulated in the Tenure Guidelines on this dimension. Special attention must be given from the outset to ensuring that formalization – a key feature of the NLUP (current draft) – does not undermine democratic access to and control of land. Some of advocates of land tenure security argue that without clear land property rights (usually taken as individual and private), the risk of dispossession is high. Implicit here is a belief that having formal land property rights (usually individual and private land rights) removes this risk and serves as a guarantee that people will not be displaced and dispossessed by, for instance, large-scale land deals. Yet this assumption is flawed. There is much evidence to show that formal land property rights are no guarantee against dispossession, while land rights formalization processes can lead to dispossession that formalizes inequality. In settings marked by inequality (for example, ethnicity or gender), formalizing land rights through land titling may simply formalize existing inequality and/or create new injustices. The NLUP can take steps to prevent this from happening by making it explicit from the outset, and the current draft appears interested and willing to do that. However, explicit guidance should be taken from the Tenure Guidelines on this, both in framing the overall aims of the NLUP, as well as in aligning with the international standard on this key issue of legal recognition and allocation of tenure rights and duties. The relevant provisions from the Tenure Guidelines are especially: Article 7 (Safeguards), Article 8 (Public land, fisheries and forests), Article 9 (Indigenous peoples and other communities with customary tenure systems), and Article 10 (Informal tenure).

Meanwhile, while partially addressing the first dimension of the land problem (and therefore requiring additional steps), it must be also recognized that the current draft of the NLUP, unfortunately, is silent on the other two dimensions of the land problem in Myanmar. The current

draft does not yet acknowledge either the need to promote democratic land access and control where it is lacking, or the need to restore this where it existed before but was lost due to conflict or calamity. For these two dimensions of the land problem in Myanmar, the NLUP can look for internationally agreed guidance from the Tenure Guidelines. The latter provides relevant guidance on both land redistribution (Article 15) and land restitution (Article 14), understood as vital and essential social justice measures and therefore a matter of human rights that harkens back to the overall objectives and principles of responsible governance of tenure according to the existing international standard.

The Preliminary section could be improved through the following revisions:

- a. Declare explicitly land policy based on effective recognition that land has multiple meanings and values in Myanmar society, of which economic value is just one and not necessarily the most important. Moreover, even from this particular value, the country's rural working people, households and communities are the most crucial economic subject and should therefore be explicitly recognized and promoted.
  - i. Explicit recognition of the social and spiritual function of land.
  - ii. Explicit recognition of the ecological and environmental function of land.
  - iii. Explicit recognition of the political function of land policy.
- b. State explicitly to give special emphasis on poor, marginalized and vulnerable people and peoples in the context of national food security, the realization of the human right to food, and the peace process – and especially give priority to measures to promote social justice:
  - i. Explicit recognition and protection of the tenure rights of small scale food producers, ethnic minorities, women, and other poor, marginalized and vulnerable customary users;
  - ii. Explicit establishment of effective and meaningful land ceiling and redistribution of tenure rights to landless and near-landless working people, in order to promote democratic access to and control of land, as well as to avoid (re)land concentration.

- iii. Explicit establishment of mechanisms of restitution of tenure rights of those who have previously been displaced by armed conflict and natural disaster, especially IDPs and refugees, under safe and secure conditions, in order to restore those rights which were lost.
- c. State explicitly recognition and protection of diverse agro-ecological conditions and diversity of farming systems, especially those which support food production for household consumption and local and regional markets.
- d. State explicitly purpose of land policy to promote social justice and the progressive realization of human rights throughout Myanmar society.

(ii) **Part I Land Use Management**

**Chapter 1** – “Basic principles of the national land use policy” lays the normative framework for the whole policy. As such, this chapter is fundamental and care should be taken to ensure that it aligns with international standards. In the current draft, basic principles are not clearly defined, justified, or aligned with international standards. Here are the main points of concern:

Principle of public interest or public purpose – Art.8(a) refers to the “the interest of all peoples of the state”, or what might be called the “public interest” or “public purpose”. This is an important principle in land policy throughout the world; it often comes up in controversial circumstances, such as state expropriation of privately owned land. There are many reasons for a State to expropriate land owned by private persons that fall under the category of “public interest” or “public purpose”, including in order to redistribute land to landless households or to take land acquired illegitimately in a previous era and return it to the original occupants. There may also be cases that do not satisfy any reasonable definition of public purpose. For this reason, how public purpose is defined is crucial. Here, the TGs offer relevant guidance: “States should expropriate only where right to land, fisheries or forests are required for a public purpose. States should clearly define the concept of public purpose in law, in order to allow for judicial review” (Art.16.1, Tenure Guidelines).

Principle of transparency – Art.8(c) initially refers to this principle in relation to handling disputes, and then it is mentioned repeatedly throughout the rest of the document. Other principles of similar weight and importance, however, are not mentioned in the NLUP at all. For example, accountability is as important as transparency but distinct. The assumption that land transactions among “multiple stakeholders” that are formal and transparent, and to the extent possible, decentralized-localized, are the solution to avoid negative consequences of current corporate land deals is only partly correct. Certainly, any land deal should at least be transparent, but transparency does not necessarily guarantee pro-poor outcomes. Transparency is not the same as accountability, and transparent transactions do not necessarily guarantee accountability, especially to poor “stakeholders”.<sup>47</sup> Meanwhile, it is at the local level that local elites and bureaucrats who stand to gain in new investments can easily manipulate negotiation processes and where local communities of the poor can easily be isolated from their potential national allies.<sup>48</sup> Here, the principle of accountability to the poor and most marginalized and vulnerable sections of local society is fundamental. While the Tenure Guidelines frequently draws on both principles, the NLUP stresses transparent/transparency (appears 14 times) while ignoring the distinct principle of accountability.

The NLUP also lacks several other principles, which together with transparency and accountability, lay the foundations for responsible land governance and are recognized internationally as part of the standard. With the partial exception of gender equality, the NLUP makes little or no mention of other core standard principles such as human dignity, non-discrimination, equity, justice and gender equality. Even core principles that are given a place in the NLUP may require further scrutiny to check, clarify and ensure that their use in the policy meets international standards.

This key chapter should thus be thoroughly revised to bring it into line with the international standard, using the Tenure Guidelines for guidance, especially Art.3A (“General principles”) and Art.3B (“Principles of implementation”) (see Box 1 below). It should declare explicitly that this is a land policy based on human rights principles, including human rights principles of implementation, and then enumerate these human rights principles using the CFS Tenure Guidelines as model.

## Box 1 Tenure Guidelines “Guiding principles of responsible tenure governance”

### 3A General principles

#### 3.1 States should:

1. Recognize and respect all legitimate tenure right holders and their rights.

They should take reasonable measures to identify, record and respect legitimate tenure right holders and their rights, whether formally recorded or not; to refrain from infringement of tenure rights of others; and to meet the duties associated with tenure rights.

2. Safeguard legitimate tenure rights against threats and infringements.

They should protect tenure right holders against the arbitrary loss of their tenure rights, including forced evictions that are inconsistent with their existing obligations under national and international law.

3. Promote and facilitate the enjoyment of legitimate tenure rights.

They should take active measures to promote and facilitate the full realization of tenure rights or the making of transactions with the rights, such as ensuring that services are accessible to all.

4. Provide access to justice to deal with infringements of legitimate tenure rights. They should provide effective and accessible means to everyone, through judicial authorities or other approaches, to resolve disputes over tenure rights; and to provide affordable and prompt enforcement of outcomes. States should provide prompt, just compensation where tenure rights are taken for public purposes.

5. Prevent tenure disputes, violent conflicts and corruption. They should take active measures to prevent tenure disputes from arising and from escalating into violent conflicts. They should endeavour to prevent corruption in all forms, at all levels, and in all settings.

3.2 Non-state actors including business enterprises have a responsibility to respect human rights and legitimate tenure rights. Business enterprises should act with due diligence to avoid infringing

on the human rights and legitimate tenure rights of others. They should include appropriate risk management systems to prevent and address adverse impacts on human rights and legitimate tenure rights. Business enterprises should provide for and cooperate in non-judicial mechanisms to provide remedy, including effective operational-level grievance mechanisms, where appropriate, where they have caused or contributed to adverse impacts on human rights and legitimate tenure rights. Business enterprises should identify and assess any actual or potential impacts on human rights and legitimate tenure rights in which they may be involved. States, in accordance with their international obligations, should provide access to effective judicial remedies for negative impacts on human rights and legitimate tenure rights by business enterprises. Where transnational corporations are involved, their home States have roles to play in assisting both those corporations and host States to ensure that businesses are not involved in abuse of human rights and legitimate tenure rights. States should take additional steps to protect against abuses of human rights and legitimate tenure rights by business enterprises that are owned or controlled by the State, or that receive substantial support and service from State agencies.

### 3B Principles of implementation

These principles of implementation are essential to contribute to responsible governance of tenure of land, fisheries and forests.

1. Human dignity: recognizing the inherent dignity and the equal and inalienable human rights of all individuals.
2. Non-discrimination: no one should be subject to discrimination under law and policies as well as in practice.
3. Equity and justice: recognizing that equality between individuals may require acknowledging differences between individuals, and taking positive action, including empowerment, in order to promote equitable tenure rights and access to land, fisheries and forests, for all, women and men, youth and vulnerable and traditionally marginalized people, within the national context.

4. Gender equality: Ensure the equal right of women and men to the enjoyment of all human rights, while acknowledging differences between women and men and taking specific measures aimed at accelerating de facto equality when necessary. States should ensure that women and girls have equal tenure rights and access to land, fisheries and forests independent of their civil and marital status.
5. Holistic and sustainable approach: recognizing that natural resources and their uses are interconnected, and adopting an integrated and sustainable approach to their administration.
6. Consultation and participation: engaging with and seeking the support of those who, having legitimate tenure rights, could be affected by decisions, prior to decisions being taken, and responding to their contributions; taking into consideration existing power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes.
7. Rule of law: adopting a rules-based approach through laws that are widely publicized in applicable languages, applicable to all, equally enforced and independently adjudicated, and that are consistent with their existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments.
8. Transparency: clearly defining and widely publicizing policies, laws and procedures in applicable languages, and widely publicizing decisions in applicable languages and in formats accessible to all.
9. Accountability: holding individuals, public agencies and non-state actors responsible for their actions and decisions according to the principles of the rule of law.
10. Continuous improvement: States should improve mechanisms for monitoring and analysis of tenure governance in order to develop evidence based programmes and secure on-going improvements.

Finally, in Chapter 1, the NLUP relies heavily on the term “stakeholder”, although at no point is the term defined but instead is left open to interpretation. The first use of the term is illustrative: “It shall cause to decide the matters relating to land disputes arisen between the land users and the stakeholders transparently and truly in accord with the National Land Law” (Part I, Chapter I, Article 8(c) of the NLUP draft). This formulation perhaps unintentionally permits defining “land users” as neither rights holders nor stakeholders. This sets a dangerous precedent that is in any case unacceptable under international human rights principles. By contrast, the term stakeholder appears only once in the Tenure Guidelines, near the end, in specific reference to the establishment of participatory and inclusive multi-stakeholder platforms for monitoring and evaluating implementation of the guidelines (see Art.26.2, Tenure Guidelines).

**Chapter 2** – “The Situation of the Existing Land Management Mechanism” emphasizes technical-legal aspects, but misses other important aspects of the current situation, which the NLUP should aim to take stock of in order to be effective. In particular, it should acknowledge that in many places throughout the country customary and informal land management mechanisms and institutions have emerged or persisted, while in some places these were disrupted or destroyed by armed conflict and natural disaster, among others. It should also acknowledge that the five laws enacted in 2010-2013, including the SEZ law, have created dissent and should be reviewed and revised based on the purposes and principles of this national land use policy as revised above.

**Chapter 3** – “Forming the national land use council” establishes a centralized structure of land use councils at 4 levels (national-state/region-district-township) to manage and administer land policy. The main concern here is that there is no indication of how this structure will adhere to or promote basic democratic principles of transparency and accountability. In the absence of any clear specification of how the new structures will adhere to these principles, there is a risk that this structure will promote centralized autocratic control of all land use decision-making and policy implementation. Besides, as it is currently written all decision making power remains in the National Land Use Planning Council, while the other levels just provide information.

**Chapter 4** – “Land classifications and administering government departments and organizations” outlines a mainly technical top-down approach to land classification and administration, which in the absence of clear safeguards, risks being detached from and blind to actual land use practices including community decision-making. It retains the dubious category of VFV land, which when combined with a top-down (re)classification approach, risks hampering effective access to forest, land, fisheries and waterways by those whose lives and livelihoods most directly depend on it. The Tenure Guidelines state that “Where States own or control land, fisheries and forests, they should determine the use and control of these resources in light of broader social, economic and environmental objectives (Art.8.1 and see also Art.4.4 of the Tenure Guidelines). The Tenure Guidelines offer explicit guidance on what should be the wider objectives of responsible land policy (op cit. Art.1.1, Tenure Guidelines). More specifically, the VFV category of land should be reviewed and its legitimacy should be measured against the Tenure Guidelines and related international human rights instruments, including ILO 169 and the UN Declaration of the Rights of Indigenous Peoples.

**Chapter 5** – “Information management” envisions a mainly technical approach to setting up a single centralized land information system, putting forth *information management* as the prescribed solution to resolving land tenure issues. This system is seen as the basis for all legal land tenure rights, land acquisition, land transfer, land use change, and land dispute settlement. It will keep up-to-date, complete, and accurate information “based on the actual land use in the whole country” (Art. 22(b)). Access to this information will be ensured through granting “equal rights to know” (Art. 22(d)). The new land information management system will also include “recognition and protection of the long-term land user rights whether or not they have been registered, recorded or mapped” (Art. 22(e)). Art. 23 stipulates a process for formally recognizing land use rights not currently recognized by law, and for creating new (updated) land use maps and records using satellite technology and in line with “actual land use” as well as “negotiat(ions) at the local level”.

The Tenure Guidelines do not explicitly focus on technical aspects such as maps (with the exception of Articles 20 and Article 7.4, which calls for attention to be paid to the methods/approaches used to create these maps: “Locally appropriate approaches should be used to increase transparency when records of tenure rights are initially created, including in the mapping of tenure rights”). The TGs call for states to “establish appropriate and reliable recording systems, such as land registries, that provide accessible information to tenure rights and duties (Art. 11.5, Tenure Guidelines). It also calls for these recording systems to be “appropriate for their particular circumstances, including the available human and financial resources. Socio-culturally appropriate ways of recording rights of indigenous peoples and other communities with customary tenure systems should be developed and used. In order to enhance transparency and compatibility with other sources of information for spatial planning and other purposes, each State should strive to develop an integrated framework that includes existing recording systems and other spatial information systems...” (Art. 17.2, Tenure Guidelines).

The TG’s stress on the methods of information-creation and recording and less on its technical aspects is purposive and borne from widespread recognition that worldwide and across history land data is notoriously slippery and subject to manipulation by powerful forces inside and outside the state.

Art.22(b) and Art.22(d) on ensuring the equal right to know/access information and maintaining accurate information, are but *minimum* requirements of the TGs (within Art. 17.3 and Art. 17.5 for example), and alone do not fulfill international standards.

Art 22(e) is more aligned with the Tenure Guidelines, which call for recognition of informal, customary, and non-written/recorded land tenure rights. But although the NLUP draft provides for recognition/protection of “long-term land user rights whether or not they have been registered, recorded or mapped”, there is no differentiation of different users, where they come from or how they got onto the land in question. There is no explicit mention of those who may have been on the land in an earlier era and may have been displaced by armed conflict or natural disaster or due to arbitrary eviction. It is not explicit about whose rights will be emphasized

in this process or why such recognition and protection is important as a matter of public policy. For instance, when different users' rights overlap or conflict, this formulation, without explicitly emphasizing the recognition and protection of the rights of the poor, vulnerable and marginalized, has the potential to impede the latter's realization of this right in practice. While a welcome provision, Art. 22(e) should nonetheless strive to specify how it will be determined who these long-term land users are, and how it will ensure their tenure protection from corporate or state actors over time.

Art. 23(a) should strive to be clearer with regard to how it will determine who will get these "regularly recognized land use rights". Land information is not self-producing, and the processes through which land information is derived are not neutral. A key theme of the TGs is that land information management systems should be a pro-poor tool used to protect poor, marginalized and vulnerable groups from dispossession. Special care must be taken to ensure that land information and administration systems do not become a tool for dispossession.

### (iii) **Part II Planning and Changing Land Use**

**Chapter 1** – "Planning and drawing land use map": technical approach; emphasis on "precise, complete, correct information" might clash with actual uses and knowledge on the ground; risks putting at risk poor, vulnerable and marginalized households and communities; principle of "bottom-up" is not applied to decision-making over which information will be accepted. The provisions focus on procedures for drawing land use maps and plans – identified as precursors to land use changes: "Before changing land use..." (Art. 24(a)). In other words, building on a rigid system of land classification that lacks legitimacy, the entire purpose of this chapter is laid out in those three words and it becomes evident that the underlying purpose of developing land use maps is more about facilitating land transfers than land rights protection. It is with this tone in mind that we must analyse the subsequent articles.

Art 24(b) – the maps will be used to determine "whether or not the proposals for land use change are suitable for the existing occupation, land use, land tenure..." Not counter to the TGs per se, but the term

“suitable” presents some issues as it leaves much open to interpretation and such ambiguity can be dangerous. How is suitable defined? The TGs envision an inclusive and participatory consultation process for determining what is suitable. Furthermore, “States should ensure that regulated spatial planning is conducted in a manner than recognizes the interconnected relationships between land, fisheries and forests and their uses...” (Art. 20.3, Tenure Guidelines). The TGs recognize diverse development models and farming systems, as well as diverse land use change purposes. They would not envision definitions of suitability that promote large-scale investment exclusively and at the expense of the marginalized, and would envision definitions that permit pro-poor redistributive reform alongside other types of investment.

Art. 25 – “*coordination* with people” will be carried out with regard to advanced land use mapping and zoning, to facilitate the district level planning and decision-making. Coordination is a directive term (like management) that should not be confused with collaboration. The TGs explicitly state that spatial planning processes should be developed “through consultation and participation” (Art 20.2, Tenure Guidelines). Furthermore, this article in the draft alludes that the decision-making will not take place from below, but rather at the district level. Coordination vs collaboration should be interrogated further. How much coordination and to what ends? The TG principle of “consultation and participation” should also be applied to the development and regulation of spatial planning.

The current draft of the NLUP’s Article 26 must be read against the Tenure Guidelines provisions on principles of implementation which call for participation of the most affected people (TG Art.3B.6). Currently, Art. 26(c) of the NLUP draft outlines a ‘bottom-up’ approach will be used for urban planning matters, while “deciding” and “determining” will rest with the district level (Art. 26(d) and Art. 26 (g)). This veers away from the principle of participation. What will this ‘bottom-up’ process look like? Will it only be applied to urban matters and not rural land matters? The proposed process of first informing the public and then asking for comments (Art.26 (e) is not necessarily a ‘bottom-up’ approach because it appears to exclude the most affected from decision-making powers.

Art. 26(i) – Amendments to the land use plans will be assessed periodically “in accord with the changes arising according to time”, and “beneficial and effective mechanisms” will be established in order to allow citizens to discuss land use decisions. This is a positive clause and in line with the TGs, but discussions are not equivalent to decision-making powers.

Art. 27 – “It shall not affect the official, existing land user rights...”.

What does “official existing land user rights” mean? Does this then exclude those without officially recognized titles, or preclude the prospect of land redistribution or restitution?

**Chapter 2 & 3** (Articles 29-34) – Chapter 2 “Changing land use by zoning”: interesting provision to “protect the continuous land use, land management and land tenure rights whether or not they are registered”; but not explicit on priorities in terms of how/which continuous users and uses will be prioritized; risks ratifying current users/uses at the expense of those who suffered from past misappropriations; removes earlier draft’s principle of FPI consent (e.g., role in decision making) in validating proposed land use zoning, and instead settles on informing public and stakeholders. Chapter 3 “Change of land use by individual application”.

There are several articles within these chapters that require further attention:

Art. 29 – “shall protect the continuous land use, land management and land tenure rights whether or not they are registered”.

This is a great clause on paper, but has room to be interpreted in different ways depending on *who* these existing users are.

Art. 32 – Outlines the top-down process for zoning, which begins with the District Management Body: “After having made proposing and mapping for the land use zones, it shall inform to the public and coordinate with the stakeholders” (Art. 32(a)). Art. 34 – Outlines the plan to “protect the impacts” (as opposed to directly protecting groups, it will just protect them from the impacts), and that individuals can propose land use changes, but costs for the change and for the ESIA must be “paid by the applicant” (Art. 34(c)). While the TG’s do not forbid top-down zoning or land use change processes, the spirit of the TGs is to follow consultative

and participatory processes that do not adversely affect the land rights of marginalized groups. For example, “States should take measures to prevent undesirable impacts on local communities, indigenous peoples and vulnerable groups that may arise from, inter alia, land speculation, land concentration and abuse of customary forms of tenure” (Art. 11.2, Tenure Guidelines). It is particularly problematic that the fees involving with contesting or initiating changing to land use must be paid for by the individual applicant as this risks becoming an exclusionary process, benefitting only the rich. In addition, the mention of impact assessments like ESIA within Art. 34(b) and the subsequent Part III sections is not grounded in a human rights framework.

Art. 32 – The below diagram shows the top-down process for land use by zoning. Within steps 3 and 4, the various bodies can either “approve or amend” the original submission, which does not leave room for rejection. This is problematic and risks being an exclusionary, top-down process counter to the TGs. Art. 34 – Requiring individual applicants to pay is problematic, exclusionary, and counter to the TG’s vision of protecting the marginalized.

(iv) **Part III Granting Concession on or the Lease of State-Owned Lands**

Part III concerns granting concessions on state-owned land. It lists a number of safeguards (such as temporarily suspending granting land concessions while investigation and research is carried out, and amending projects that are against “stakeholders” will). Interesting provision temporarily suspending land concessions for State-owned lands (all lands are State-owned according to the 2008 Constitution).

Art. 37(c)- The ESIA will determine whether a land transfer is “actually for the interest of the state”. In reference to the term “interest of the state,” the TGs state that “States should expropriate only where rights to land, fisheries or forests are required for a public purpose. As previously discussed, States should clearly define the concept of public purpose in law, in order to allow for judicial review.” (Art. 16.1, Tenure Guidelines).

Art. 37(f) – Safeguard to protect existing land users. In line with TGs, but who are these existing land users? \*See comments on Art. 24(b)\*

Art. 37(i) – Safeguard to resettle displaced people on equivalent or better land. In line with TGs Art. 16.7, Art. 16.8, Art. 16.9 concerning requirements for evictions and relocations, however greater elaboration is warranted to ensure that international human rights standards are being used as the benchmark.

Art. 38 – Safeguards against land-grabs such as a maximum concession allotment and suspending decisions on disputed lands. In line with TGs Articles 7 and Art. 12.6, concerning safeguards.

Art. 39 – Safeguards related to contract farming. In line with TGs.

But overall is oriented to providing safeguards in favor of displacement, for which there are UN Guidelines, the UNDRIP, and ILO 69; main safeguard is impartial environmental and social impact assessment, which is interesting, but not yet based on the international human rights principle of FPIC or the standard on development related evictions and displacement (UN Guidelines); provision to prevent land grabbing is severely weakened by setting limits on land acquisition according to the capacity of each company that applies for concession, rather than the international standard set by the Tenure Guidelines; safeguards on contract farming are not clearly based on existing human rights standards.

(v) **Part IV Procedures Relating to the Land Acquisition, Compensation, Resettlement and Rehabilitation**

Part IV lumps the procedures for land acquisition, compensation, resettlement, and rehabilitation together. Even when lumping these aspects together, this section is very short and grossly lacking in detail (especially when compared with the part on taxation). Notably, restitution has been removed from the NLUP draft altogether. It fails to elaborate on the circumstances under which compensation will be required (ie. Why displacement is occurring in the first place), the mechanisms and procedures in place to ensure resettlement and rehabilitation are carried out, etc

The TGs have entire sections dedicated to the respective topics of *land consolidation* (Article 13), *restitution* (Article 14), *expropriation and compensation* (Article 16) – each of which are treated separately. There is much work that needs to be done on this section to make it conform with the TGs, starting with shifting the NLUP draft’s emphasis from harmonization with national law to harmonization with international standards, such as FPIC (for before land deals occur) and restitution (for after land deals occur). Provision fails to fully meet the most relevant and existing international human rights standard set by the UN Guidelines on Development related Eviction and Displacement, UNDRIP and ILO 69; lacks explicit mention of the FPIC standard. For further guidance on how to re-write Part IV, see the TGs’ Articles 13, 14, and 16.

(vi) **Part V Settlement of Land Disputes and Appeal**

Part V concerns the settlement of land disputes and appeals, and thus given the historical land conflict context, combined with the current trends of refugee return and land grabs, this is an extremely important section. Yet the current section as it is written is weak. Some issue areas include:

Art. 45(a) – empowers farmers associations to handle land disputes “between their members”. The TGs state that alternative dispute mechanisms should be provided (Art. 21.1 and Art. 21.3). Farmers associations should be key players within this alternative dispute mechanisms, and their realm of power should not be confined to managing disputes within their own associations; such language is weak and divisive. Rather, farmers associations should have a meaningful role within dispute resolution processes and the capacity/power to handle disputes between farmers and investors for example, or farmers and the government or military confiscations of land.

Art. 45(c) – “allowing” civil society to inform the public. “Allowing” civil society to inform the public portrays extremely weak language. According to the TGs, the state’s role is at the bare minimum to not prohibit the flow of information, but rather the state’s role is to actively facilitate and support the dissemination of accessible and accurate information in a timely manner. For example, “States should consider using locally-based professionals, such as lawyers, notaries, surveyors and social scientists to deliver

information on tenure rights to the public” (Art. 17.3, Tenure Guidelines).

\*See above comments on Art. 9(c) concerning the relevant clauses\*.

Art. 46(c) – on the topic of monitoring land disputes. This article needs further elaboration in order to determine if it is in line with the TGs. The article states that appointed monitors will monitor the settlement of disputes, however it does not clarify *who* will appoint these monitors and thus how impartial they can be. The TGs specify that “States should provide access through impartial and competent judicial and administrative bodies...” (Art. 21.1, Tenure Guidelines).

Art. 46(e) – establishing clear and impartial dispute mechanisms “in case of necessity”. As stated above, the state’s role is to establish these mechanism and bodies – not to determine whether or not they are necessary. Thus to include within this article the wording of “in case of necessity” is to dilute the meaning of this article and to leave it open for interpretation in a way that runs counter to the TGs.

Art. 46(g) – official complaints and court mechanisms. The TG’s specify that the right to appeal should be accessible to all (Art. 21.1, Tenure Guidelines), yet this clause does not specify how it will be paid for. To ensure accessibility and that class-based discrimination does not occur, the state should pay for these fees.

Art. 50 – cooperation of civil society. The wording of “allowing” civil society’s “cooperation” is problematic and, while not directly counter to the TGs, does require further interrogation. As stated above in comments for Art. 10(i), cooperation can be mistaken for coercion. \*See comments on Art. 10(i) for more information\*.

Part V is lacking some crucial points if it is to be consistent with TG standards. These are a series of PROCEDURES, but the principles underlying land conflict resolution seem not to be so much oriented on social justice but in creating and maintaining a nice environment for corporate investors. For example, this part does not meaningfully empower farmers groups to have a voice within disputes, nor does it outline the right to appeal and who will bear the costs of using the court system in cases of appeal. This could threaten the accessibility of dispute

resolution services, which the TGs state should be “accessible to all” (Art. 21.1, Tenure Guidelines). Furthermore, alternative dispute resolution mechanisms, including democratic customary land conflict resolution systems, should be supported and made accessible. Information from civil society should not just be “allowed” – it should be facilitated.

(vii) **Part VI Matters Relating to Assessment of Land Revenue, Fee for Land Transfer and Due Stamp Duty**

Part VI concerns taxation and fees. It is very detailed and provides some safeguards for small-scale farmers, such as the increasing rate of taxation with land accumulation, providing an exemption route for small farmers (Art. 61(b)) and the two taxation categories: 1) essential livelihood vs 2) commercial (Art. 60). However, it is disproportionately lengthy and detailed – both in comparison to the treatment of other important topics within the NLUP draft (such as women, ethnic nationalities, and land disputes) as well as in comparison to the TGs own treatment of taxation (which is ½ page out of 39 pages). For example, within this part of the NLUP draft, we see details such as: the list of departments that will carry out the assessment of land revenue (Art. 53), the determinants of land revenue rates and processes to initiate it as soon as possible (Art. 66(c)); yet within the previous section (Part V concerning Land dispute settlement), this level of detail is lacking. Furthermore, even within this part, we see that some articles (i.e. those facilitating taxation) are provided more detail than articles that empower groups to challenge the revenue rates (such as Art. 61(d)) or details of how to make land owners pay taxes. Such detail and emphasis shows where the current NLUP draft’s priorities lie. It also raises the question of: Is official land registration a requirement under this new system to facilitate taxation?

Art. 56 – Includes a safeguard against land grabbing and land concentration, which works by exponentially increasing tax rates for those owning more land: “to collect at the increasing land revenue rate on the persons who own a lot of land”. The TGs provide just a small section on taxation (within Articles 19). The TGs do not specify the need to tax at different rates.

This article however has the potential to crystallize in progressive taxation that goes beyond the TGs, in which those who have more land should pay relatively more. While progressive on paper, this raises the question of operationalization: how to make sure big landlords and corporations pay?

Art. 64 – Prioritizes the development of land markets and “to carry out the new land transfers effectively”. The “facilitation of land market development” does not run counter to the TGs per se. In fact there is an entire section devoted to Markets within the TGs (Articles 11). However, the way in which the land markets are prioritized – whether they are prioritized above the tenure rights of small-scale farmers – is what will determine if this policy runs counter to the TGs or not. Within the TGs, it states that “States should take measures to prevent undesirable impacts on local communities, indigenous peoples and vulnerable groups that may arise from, inter alia, land speculation, land concentration and abuse of customary forms of tenure. States and other parties should recognize that values, such as social, cultural and environmental values, are not always well served by unregulated markets. States should protect the wider interests of societies through appropriate policies and laws on tenure” (Art. 11.2, Tenure Guidelines). Will land markets be prioritized over the rights of small-scale farmers?

Art. 65 – Concerns fee collection, but is unclear as to whether people must pay for “acquiring land information”. Furthermore, this article outlines that the purpose is to “carry out in time and precisely of a lot of land transfers in the land market”. This article involves unclear wording. If in fact people must pay for information, then this is counter to the TGs. Must people pay for “acquiring land information”?

Art. 66(f) – Concerns fees for transferring state lands to companies, in which the finance raised shall be used for the “interest of the public”. TGs state the public interest should be defined. \*See above comments on Art. 8(a) for more information\* What is in place to ensure that the revenue raised will be spent on the interests of the public?

Again, the focus of the current NLUP draft is on procedures vs principles, outlining a technical approach that is detached from any

clear explanation of the purposes of collecting land tax etc or how such revenues will be used. Besides, it is the very question of “who will pay”, if the Foreign Investment Law and the SEZs Law allow for tax exemptions to large, corporate investors.

#### (viii) **Part VII Land Use Rights of Ethnic Nationalities**

Part VII concerns the land use rights of ethnic nationalities and thus is a critical part of the NLUP draft. The first big comment about Part VII is its physical location within the NLUP document. Despite being such an important topic, it is placed within Part VII – even after taxation. There are some important and positive clauses within this section, however there is still a need for greater clarification and to ensure that terms like cooperation, consultation, and participation are carried out meaningfully and not in a checklist style manner. In addition, the impact of reclassifying certain lands (such as ancestral and taungya) needs to be thought through. Part VII involves contradictory messages: while it claims to protect the right of all ethnic nationalities to their land, it simultaneously suggests there is a need to end the taungya system. The question of who decides with regard to this reclassification as well as with the introduction of technologies needs to be interrogated.

Art. 69 – decentralizes processes of mapping and records to ward, village, and township level, but it is not clear if the ethnic nationalities are within the decision-making part of this process. As outlined in the \* above comments for Art. 23\*, the TG’s specify that recording systems should be “appropriate for their particular circumstances... Socio-culturally appropriate ways of recording rights of indigenous peoples and other communities with customary tenure systems should be developed and used” (Art. 17.2, Tenure Guidelines). Ideally, this would be a co-creation of knowledge process, in which ethnic nationality territory/land use would not only be recorded, but would be discussed and recorded *with* representatives of ethnic nationality communities. This inclusion would ensure the “socio-culturally appropriate” methods of recording rights. Are ethnic nationalities included within making decisions about mapping and records?

Art. 70(a) – Concerning participation of ethnic nationalities: “shall consult with the ethnic persons... and cause them to participate”. Perhaps this is just a poor English translation, however this evokes the image of forced participation for the ends of legitimatization. The TGs do promote consultation and participation (as one of its Principles of Implementation), but people should not be *caused to* participate and consultations should be meaningful and free if they are to be in line with the TGs. What is the nature of this consultation and participation?

Art. 70(b) – Concerning the protection of traditional rights, regardless of being registered or not. This is in line with the entire spirit of the TGs (to protect customary and informal land tenure), and is supported by articles such as Art 4.4, Art 5.3, Art 7.1, Art 8.2, Art. 8.7. This is a positive clause and should be fought for.

Art. 70(c) – concerning the recognition of rights and “provide to register their land use according to existing laws”. This appears to be in line with the TGs, however the wording of “provide to register their land use according to existing laws” leaves some things unclear: Is formal registration required or just allowed for? (Requiring it would run counter to the TGs). Furthermore, does “providing” mean that the registration for ethnic nationality land will be paid for?

Art. 71 – included in decision-making, dispute settlement, and monitoring. This is in line with the TGs and is a positive clause.

Art. 72 – Ancestral land will be reclassified, how? And will temporarily suspend granting concessions during this time. The meaning of this clause is unclear and raises questions such as: How will ancestral land be classified and with what impacts? Depending on whether this reclassification facilitates corporate control of the land or serves to protect the ethnic nationalities will determine whether or not it is in line with the TGs. Requires clarification on: How will ancestral land be classified and with what impacts?

Art. 73 – concerns protection of ethnic nationality land. This clause seems to be very positive and in line with the spirit of the TGs. Finally, we see a clause here that touches upon the bigger picture of what this policy is aiming to do, rather than being another technical clause. This clause and others like it should be kept and strengthened.

Art. 75 – concerns the right to register and the reclassification “of the traditional alternative taungya system as the permanent taungya”. Similar to the above question about ancestral land, what does reclassification “of the traditional alternative taungya system as the permanent taungya” mean and what are the implications of this reclassification? The nature of this will determine whether or not it is in line with the TGs. Similar to the above question about ancestral land, what does reclassification “of the traditional alternative taungya system as the permanent taungya” mean and what are the implications of this reclassification?

Art. 76 – concerns cooperation with NGOs to “increase the interest” (in what?) and use of technical solutions such as fertilizer, machinery, seeds etc. (who will provide this?). Cooperation is in line with the TGs (\*see above comments on Art. 10(i) and Art. 50 for greater discussion on this point\*), but there needs to be clarification as to what “increase the interest” refers to. The emphasis upon technical solutions here is concerning, particularly since questions such as: Who will provide these technological advancements? Are they wanted? Will they lead to or increase farmers’ indebtedness? And is there a danger that it will lead to the commodification of seeds, thereby decreasing access to seeds? These questions must be answered before judging whether this is in line with the TGs or not. What does “increase the interest” refer to?

Potentially positive but contradictory provision: while it claims to recognize and protect the right of all ethnic nationalities to their land, it also suggests provisions aimed at ending the traditional taungya system by reclassifying these as “permanent taungya”; lacks clarity on who gets to decide how ethnic nationalities can use and manage their land and prescribes a particular farming system, highly dependent on costly external inputs.

(ix) **Part VIII Equal Rights between Men and Women  
in Land Tenure and Land Use Management**

Art. 78 – concerning the rights of women within land tenure and land management. It is interesting that this article is the first to reference a piece on international standards (CEDAW). TGs are not referred to, however, analysing this clause in light of the TGs, we see that it fills a

bare minimum standard and is insufficient when looking at the Gender Equality Principle of Implementation: “Ensure the equal right of women and men to the enjoyment of all human rights, while acknowledging differences between women and men and *taking specific measures aimed at accelerating de facto equality* when necessary. States should ensure that women and girls have equal tenure rights and access to land, fisheries and forests independent of their civil and marital status” (Principles of Implementation, Tenure Guidelines). In other words, to ensure gender equality in line with the TGs, the state must not just merely remove barriers and basic prohibitions, but rather must actively support and encourage women’s involvement. How will women’s equal rights not merely be respected (with barriers removed), but actively promoted? Much greater detail is needed here. Compare this ½ page and 1 article to the 4 pages and 16 articles dedicated to the topic of taxation. Welcome provision, but comes last and in an isolated way (not mentioned throughout the rest of the document), leaving unclear how women’s distinct land rights will be not just recognized but actively promoted and fulfilled.

(x) **Part IX Harmonization of Laws and Enactment of New Law**

Part IX concerns the development of the national land law and the topic of harmonization. Art. 79(b) – concerning the participatory process used to legitimate the policy. Consultation and participation is the 6<sup>th</sup> of 10 Principles of Implementation within the TGs, defined as “engaging with and seeking the support of those who, having legitimate tenure rights, could be affected by decisions, prior to decisions being taken, and responding to their contributions; taking into consideration existing power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes” (Principles of Implementation, Tenure Guidelines). Yet the way in which “participatory consultation process” is discussed within this NLUP draft clause tells us little about its character, and based upon the current consultation process of the draft, it is questionable that subsequent ones would be in line with the TGs. How will the participatory consultation process be carried out? Will it be meaningful, informed, active, free, effective, accessible etc? Art. 79(cii)

– concerning the consultation process and the stakeholders who will be able to provide feedback and comments on the national land law, of which “media” is listed as the first stakeholder. Practices within other countries will also be considered. Who are the stakeholders that can contribute within the consultation processes? The TG state that all/everyone should be able to participate, but especially those who “could be affected by decisions” (Principles of Implementation, Tenure Guidelines). Yet here, we need clarification on who the stakeholders are and particularly why the media is listed, whilst farmers are not. Who are the stakeholders that can contribute within the consultation processes? This is a welcome provision if it opens the way to remedying the problems associated with the existing land and investment laws; and if it raises the demands on this policy to actually and comprehensively address the underlying land issues and in ways that go beyond a technical-procedural approach

(xi) **Part X Monitoring and Valuation**

Part X concerns (self) monitoring and evaluation. The National Land Use Council (NLUC) will carry out the monitoring and evaluation. The biggest outstanding issue here – and which runs counter to the TGs - is the fact that the monitoring system is effectively a self-monitoring one. There is no impartial, independent body set up to monitor these processes and thus indicates a conflict of interest. Furthermore, the issue of how to handle instances of unethical behavior (to correct, discipline, and improve upon it) –important aspects within the TGs - are not addressed at all.

Art. 80 – concerns the NLUC’s role in carrying “monitoring and evaluation periodically. This includes monitoring the policy’s implementation and compliance. The TGs have dedicated an entire part to *Promotion, implementation, monitoring and evaluation*, demonstrating its importance. Furthermore, the 10<sup>th</sup> of 10 Principles of Implementation is that of Continuous Improvement, wherein “States should improve mechanisms for monitoring and analysis of tenure governance in order to develop evidence-based programmes and secure on-going improvements” (Principles of Implementation, Tenure Guidelines). How periodic? Self-monitoring?

Art. 80(c) – concerns the creation of evidence-based reports and where that evidence may come from. The TG’s support multi-stakeholder platforms: “States are encouraged to set up multi-stakeholder platforms and frameworks at local, national and regional levels or use such existing platforms and frameworks to collaborate on the implementation of these Guidelines; to monitor and evaluate the implementation in their jurisdictions; and to evaluate the impact on improved governance of tenure of land, fisheries and forests, and on improving food security and the progressive realization of the right to adequate food in the context of national food security, and sustainable development. This process should be inclusive, participatory, gender sensitive, implementable, cost effective and sustainable..” (Art. 26.2, Tenure Guidelines). Whilst this NLUP draft clause touches upon a range of stakeholders, it fails to outline to what extent these groups will be involved and their relative power in relation to the National Land Use Council (which appears to have the overall role of monitoring and evaluation). Farmers are listed as one of the groups from where evidence will be collected. What mechanism will be used to allow for this? What is the relative power of these stakeholders in relation to the National Land Use Council?

In line with the Continuous Improvement principle of the TGs, mechanisms are needed for monitoring and correcting unethical behavior. The draft makes no mention of this: “Relevant professional associations for services related to tenure should develop, publicize and monitor the implementation of high levels of ethical behaviour. Public and private sector parties should adhere to applicable ethical standards, and be subject to disciplinary action in case of violations. Where such associations do not exist, States should ensure an environment conducive to their establishment.” (Art. 6.8, Tenure Guidelines). Furthermore, “States and affected parties should contribute to the effective monitoring of the implementation and impacts of agreements involving large-scale transactions in tenure rights, including acquisitions and partnership agreements. States should take corrective action where necessary to enforce agreements and protect tenure and other rights and provide mechanisms whereby aggrieved parties can request such action” (Art. 12.14, Tenure Guidelines).

Art. 80(d)(vi) – concerns monitoring participatory land use processes and decentralization. But what is the participation envisioned and how will it be ensured? How will decentralization be carried out and what safeguards will be taken to ensure that decentralized processes do not get captured by undemocratic elites and corrupt practices?

Important element of any land policy, but approach is technical-procedural, does not explicitly reference using international human rights standards, and relies on NLUC conducting self-monitoring and self-evaluation, which risks reinforcing status quo; lack of clarity on how this relates to the formulation of the prospective new land law risks missing opportunities to fully and meaningfully assess and address actual land problems in time to impact on this prospective law.

#### (xii) **Part XI Doing Research and Development**

This part concerns future research and development. The TGs do not explicitly discuss R&D, however this would fall within the overall principle of Continuous Improvement. \*See above comments on Art. 80 for more information\*. Art. 82 – concerning the priorities for research. This clause contains many subjective terms that need to clarification on *how* this will be determined and by *whom*. This includes the terms of: “effectiveness for such use” (Art. 82(a)), “implemented the best” (Art. 82(b)), “best manners to approve” (Art. 82(d)), “best manners for management” (Art. 82(g)), “best manners” (Art. 82(h)), “best manner” (Art. 82(i)), “suitable application of customary law” (Art. 82(j)), “suitable manner for land use” (Art. 82(k)), “other suitable manners” (Art. 82(m)). Who determines what is best/suitable? Useful but makes no reference to relevant existing international human rights standards to guide research and development

#### (xiii) **Part XII Miscellaneous**

Potentially interesting, but lack of clarity on what is “transparent stakeholder consultation processes” leaves the door open to misuse and abuse; lacks explicit reference to using international human rights standards in reviewing, amending and updating the policy; unclear logic (pilot tests come after the policy is formulated instead of before).

## Conclusion

The main purpose of this land use policy draft is to create a comprehensive framework for a formal land market and to secure legal land use rights for the purpose of attracting especially foreign investors especially for large-scale industrial agricultural, fishing and forest food-energy enclaves. It lays out a vision and framework and approach for determining, (re)zoning and administering all the country's land resources under a single centralized system of legal land rights and system of land taxation as a source of revenue for the government.

The good intentions of participatory policy making and the various positive articles and safeguards that are present in the NLUP draft are certainly very welcome and a positive move away from the failed policies and practices of the past. The main problems with the current draft of the policy stem from: its failure to recognize that land has more than an economic function and that many past and present small land users have more than just economic attachments to their land; and from its failure to recognize that for any land policy to have *political legitimacy* and succeed, it must necessarily also have as one of its central purposes to seek to confront the twin issues of correcting past social injustices and promoting social justice. Additionally, the NLUP must address the question of how to move from an overly centralized system of governance in light of ethnic minority groups' desires to move towards a more federal system.

In other words, it must strive to engage with existing realities including the serious land related problems that are part and parcel of current Myanmar society and contributing to preventing it from transitioning toward real democracy and long-lasting peace. This includes thorny issues of a historical nature that have resulted in many places where, through land grabbing of various sorts, land has already become concentrated in the hands of a relative few, and in other places where this is on the verge of happening. The social and environmental consequences have been piling up all around for everyone to see – hundreds of thousands of IDPs and refugees, widespread forced evictions past and ongoing, etc. These people are effectively excluded from any consideration in the current policy draft.

This draft does not adequately take into account these realities past and present. It does make effort to put in place some measures that could very loosely be called protections and safeguards for current ordinary small occupants and users of land. But these still fall short of the existing international standard.

The CFS Tenure Guidelines, the UN Declaration on the Rights of Indigenous Peoples, the ILO 169, the UN Guidelines on Development Related Evictions and Displacement, and other key documents should be consulted for guidance on measures and internationally agreed language. Currently, the safeguards are too few, too weak, and can be interpreted as only applying to current users, who the policy anticipates will be relocated in the future to make way for large-scale agribusiness concessions.

The current draft likewise falls short of addressing past injustices where people were driven off their lands or lost possession, democratic access to or control of their lands as result of armed conflict, natural disasters, or other emergencies. There are no provisions for redistribution of land to landless and near-landless households, or for recognition or restitution of land in cases where people lost possession, access to or control of their lands due to forced evictions, armed conflict or natural disasters.

These are key social justice provisions supported by the Tenure Guidelines. In their absence, combined with failing to distinguish between different types and histories of existing occupants and users, the draft policy's emphasis on instituting land tenure security risks legally securing the land use practices of rights of current big landlords and corporate land grabbers and whoever has the money and muscle to ensure their own inclusion in the new land registry – whether they are the legitimate users or not.

The Tenure Guidelines help to show where and how the current draft of the NLUP falls short of the international standard. These Guidelines are a compromise document – they contain many elements including those that are favorable to promoting the realisation of human rights and achieving social justice as well. In contrast, the draft NLUP falls short of being a compromise document in this sense. Despite its positive elements and good intentions, it still remains below the international standard and as a result, risks pushing the country into serious backsliding.

## Endnotes

- 1 A significant segment of the country's population would most likely fit in the broad and loose category of "rural poor". But even this category is marked by significant social differentiation, comprising male and female, ethnic minorities, poor people, small scale farmers, landless rural laborers, subsistence fishers, small scale fishers, fish workers – the list goes on. Land-use change will have different impacts on these various strata of the rural poor – and also will have different impacts between them and rich farmers, landlords, moneylenders and traders (the "non-poor").
- 2 LIOH organized one national pre-consultation workshop in Yangon, and eleven regional workshops in Myitkyina, Lashio, Taunggyi (1 for Southern Shan and one for Kayah), Mandalay (1 each for Mandalay, Magway and Sagaing Regions), Hpa-an, Moulmein, Dawei and Mae Sod, with support from Paung Ku, KESAN and TNI.
- 3 TNI and BCN, 'Access Denied: Land rights and Ethnic Conflict in Burma', Burma Policy Briefing Nr.11, May 2013.
- 4 Htet Naing Zaw and Aye Kyawt Khaing, 'Military Involved in Massive Land Grabs', The Irrawaddy, 5 March 2013.
- 5 Scott, James C., 1998, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed*. New Haven, CT: Yale University Press.
- 6 World Bank Agriculture Support Project, Project Information Document, Concept Stage, Report No. PID2158, p.1.
- 7 Murray Hiebert and Phuong Nguyen, "Land Reform: A Critical Test for Myanmar's Government", Commentary, Center for Strategic and International Studies, accessible at <http://csis.org/print/40444>, downloaded on 30 December 2014.
- 8 Kyaw Thu, director of the local NGO Paung Ku, interviewed in Perspectives, in Heinrich Boll Stiftung, Perspectives: Political Analyses and Commentary, Issue 2, January 2014 p.61).
- 9 Here, land policymaking is a proxy for people-centered development – something the government has said it embraces, according to Zeya Thu: "The government has also mentioned 'people-centered development' as part of its official strategy. According to Dr. Sai Mauk Kham, the first Vice President of Myanmar, people-centered development is 'development to satisfy the demands of the people'", in Zeya Thu, "Myanmar: Development at a Crossroads, Challenges and Debates" in Heinrich Boll Stiftung, Perspectives: Political Analyses and Commentary, Issue 2, January 2014. p.55.
- 10 Fox 1990.
- 11 World Bank Agriculture Support Project, Project Information Document, Concept Stage, Report No. PID2158, p.2.
- 12 Murray Hiebert and Phuong Nguyen, "Land Reform: A Critical Test for Myanmar's Government", Commentary, Center for Strategic and International Studies, accessible at <http://csis.org/print/40444>, downloaded on 30 December 2014.

- 13 Paul Vrieze, 'Rapid Plantation Expansion Fuels Deforestation in Ethnic Regions', *The Irrawaddy*, 29 November 2013
- 14 Access Denied, p.1.
- 15 Denisse Cordova and Cornelia Helmcke, 'Women Agricultural Workers and the Right to Adequate Food and Nutrition', FIAN International for Hands Off the Land, 2014, p.3.
- 16 Murray Hiebert and Phuong Nguyen, "Land Reform: A Critical Test for Myanmar's Government", *Commentary*, Center for Strategic and International Studies, accessible at <http://csis.org/print/40444>, downloaded on 30 December 2014.
- 17 TNI-BCN, 'Burma's Ethnic Challenge: From Aspirations to Solutions', *Burma Policy Briefing Nr 12*, October 2013, p.10.
- 18 Access Denied, p.9.
- 19 Access Denied, p.10.
- 20 Kyaw Thu, interviewed in Heinrich Boll Stiftung, *Perspectives: Political Analyses and Commentary*, Issue 2, January 2014, p.61.
- 21 Access Denied, p.3.
- 22 In this regard, the six relatively comprehensive provisions raised in the NLUP draft in Art. 39, Part III, are very welcome. It would be advisable, though, to include a "dis-investment provision", to ensure it is the companies and not contract-farmers who run with the high disinvestment costs in perennial crops like oil palm or rubber.
- 23 'Burma's Ethnic Challenge: From Aspirations to Solutions', p.5.
- 24 FOOTNOTE 24 is missing!! (this is footnote 21 in last version that Jenny sent)
- 25 Interview with Vicky Bowman by Andrew D. Kaspar, *The Irrawaddy* (online), October 3, 2013, available at: <http://www.irrawaddy.org/interview/requires-shouted-several-years-listening.html>, accessed on 15 October 2013.
- 26 Sixty-eighth session, Agenda item 69 ©, Promotion and protection of human rights: human rights situations and reports of special rapporteurs and representatives, Situation of human rights in Myanmar, Note by the Secretary-General.
- 27 See news report by Min Min, 'Police kill villager during Letpadaung copper mine protest', *Mizzima*, available at <http://www.mizzima.com/latpadaung/item/16179-police-kill-villager-during-letpadaung-copper-mine-protest/16179-police-kill-villger-during-letpadaung>, accessed on 28 December 2014.
- 28 Quoted in news report by Nobel Zaw, 'CSOs Condemn Govt Response to Mine Protests', *The Irrawaddy* (online), 26 December 2014, available at <http://www.irrawaddy.org/burma/csos-condemn-govt-response-mine-protests.html>, accessed on 28 December 2014.
- 29 See <http://www.sustainbusiness.org/myanmar/>, downloaded on 30 December 2014.

- 30 Buchanan, John, Tom Kramer and Kevin Woods, 'Developing Disparity: Regional Investment in Burma's Borderlands', TNI-BCN, February 2013, p.3.
- 31 Kyaw Thu, interviewed in Perspectives, p.61.
- 32 Access Denied, p.8.
- 33 Kyaw Thu, interviewed in Perspectives, in Heinrich Boll Stiftung, Perspectives: Political Analyses and Commentary, Issue 2, January 2014, p.62.
- 34 Sixty-eighth session, Agenda item 69 ©, Promotion and protection of human rights: human rights situations and reports of special rapporteurs and representatives, Situation of human rights in Myanmar, Note by the Secretary-General.
- 35 Buchanan et al. 2013, p.3.
- 36 Pietje Vervest and Timothé Feodoroff, 'Licensed to Grab: How International Investment Rules Undermine Agrarian Justice', TNI, 20 January 2015.
- 37 Buchanan et al. 2013, p.5.
- 38 Statement of the Ethnic Community Development Forum and the Customary Land Rights Protection Committee, 6 November 2014, Mae Sot.
- 39 Access Denied, p.11 – TNI-BCN – Burma Policy Briefing Nr 11 May 2013
- 40 Richards, supra note 12 and accompanying text.
- 41 Suzana Sawyer and Edmund Terence Gomez, 2008, Transnational Governmentality and Resource Extraction: Indigenous Peoples, Multinational Corporations, Multilateral Institutions and the State, 3, Geneva: UNRISD.
- 42 Ben Cousins, 1997, "How Do Rights Become Real? Formal and Informal Institutions in South Africa's Land Reform", 28, International Development Studies Bulletin, 59. See also Jennifer C. Franco, 2008, "Making Land Rights Accessible: Social Movements and Political-Legal Innovation in the Rural Philippines", 44, Journal of Development Studies, 991.
- 43 Ben Cousins, 2007, "More Than Socially Embedded: The Distinctive Character of 'Communal Tenure' Regimes in South Africa and Its Implications for Land Policy", 7, Journal of Agrarian Change, 281.
- 44 Murray Hiebert and Phuong Nguyen, "Land Reform: A Critical Test for Myanmar's Government", Commentary, Center for Strategic and International Studies, accessible at <http://csis.org/print/40444>, downloaded on 30 December 2014.
- 45 Buchanan et al. 2013, p.3.
- 46 <http://www.fao.org/cfs/cfs-home/en/>
- 47 Jonathan Fox, 1990, Introduction, The Challenges of Rural Democratization: Perspectives from Latin America and the Philippines.
- 48 Jennifer Franco, 2008, "Rural Democratization: (Re)Framing Rural Poor Political Action", Amsterdam: TNI. See also John Gaventa, 2002, "Exploring Citizenship, Participation and Accountability", 33, IDS Bulletin.

*This publication is an updated and improved version of a draft report which was submitted by TNI on 28 January 2015 to the Ministry of Environmental Conservation and Forestry as contribution to finalizing the Myanmar Draft National Land Use Policy, based on discussion and feedback received in the roundtable organised by the Ministry on 31 January – 1 February 2015.*

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