



Suggested Practices and Policies for the Documentation of Customary Land Rights in Myanmar

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I. Background: Customary land rights

Customary land rights may be defined as the unwritten local rules, norms and practices governing property, land and natural resource management, use rights and the pursuit of livelihood, and the various ways of relating to and being on the land that have, over time and use, gained local legitimacy and become embedded in the fabric of a society.¹ Customary rules governing land and natural resource use and management are highly nuanced and location-, culture-, livelihood- and environment/ecology-specific. Customary land and natural resource tenure systems are generally made up of a complex mesh of overlapping and temporal claims, some held privately by families and lineages and others held communally in furtherance of the health, prosperity and survival needs of the greater community.² Across the world, an estimated more than two billion people live and order their lives under customary tenure regimes.³

Within customary tenure systems, multiple and overlapping rights often govern the use of a single parcel of land. In addition to “primary rights” – including the right to exclude, transfer, transact, bequeath, manage and make decisions about the land – a range of secondary rights often exist, including: rights of way, rights of access to use natural resources located on lands shared by more than one community, and permanent or seasonal access rights such as the right to use the land for pasture or agriculture, the right to use trees or collect firewood in the forest, the right to travel across the land or water, or the right to drive cattle across an area to obtain water from a river. In certain circumstances and at particular times, a given piece of land may cater for multiple resource uses (pastoralism, farming, fishing) and users (farmers, pastoralists, nomads) - which may succeed one another over different seasons.⁴ Customary tenure regimes often allow for these overlapping uses according to careful consideration of the myriad interrelating social, environmental, economic and spiritual/cultural interests of the local human and non-human populations.

Summary of Customary Tenure Systems

Cousins succinctly summarizes various norms and practices related to customary ownership, use and management of lands, forests and fisheries:

1. Land and resource rights are directly embedded in a range of social relationships and units, including households and kinship networks; the relevant social identities are often multiple, overlapping and therefore ‘nested’ or layered in character (individual rights within households, households within kinship networks, kinship networks within wider ‘communities’).
2. Rights are derived primarily from accepted membership of a social unit, and can be acquired via birth, affiliation or allegiance to a group and its political authority, or transactions of various kinds (including

¹ Customary tenure systems are not radically different than statutory systems: both statutory and customary rules address the same basic land transactions: allocation and formalization of secure land rights; land transfers and land sharing (long term or short term); land inheritance; use rights and rights of way; management of communal or “public” lands and resources; zoning of local lands (allocating areas for residence, public use, agriculture, industry, etc.); enforcement and protection of land rights; and adjudication of land-related disputes. The central difference between the systems is that one is codified and written, and the other is unwritten and highly localized.

² Otsuka, K. and F. Place (2001) ‘Introduction’, in K. Otsuka and F. Place (eds) *Land Tenure and Africa*, pp. 1–21. Baltimore, MD: The John Hopkins University Press; Washington, DC: International Food Policy Research Institute. *Natural Resource Management — A Comprehensive Study of Agrarian Communities in Asia*.

³ USAID 2011, https://www.land-links.org/wp-content/uploads/2017/02/USAID_Land_Tenure_Customary_Tenure_Brief_0.pdf

⁴ Cotula, above n 4, 11.

gifts, loans and purchases).

3. Land and resource rights include both strong individual and family rights to residential and arable land and access to a range of common property resources such as grazing, forests and water. They are thus both 'communal' and 'individual' in character.
4. Access to land (through defined rights) is distinct from control of land (through systems of authority and administration). Control is concerned with guaranteeing access and enforcing rights, regulating the use of common property resources, overseeing mechanisms for redistributing access and resolving disputes over claims to land. It is often located within a hierarchy of nested systems of authority, with many functions located at local or 'lower' levels.
5. Social, political and resource boundaries, while often relatively stable, are also flexible and negotiable to an important extent; this flows in part from the nested character of social identities, rights and authority structures." (*Cousins, 2007 at 293*)

In Myanmar, Ewers Anderson summarizes key features of customary tenure as:

1. Customary tenure is secure and socially legitimate as long as outsiders (persons not living in the village) do not claim the land of the community.
2. There is a clear distinction between insiders and outsiders and clear entry and exit rules for membership. Insiders become outsiders if they leave the village. In most such cases, this land is passed on to a relative or is redistributed by the elders and the village chief.
3. Only insiders, which are families residing in the village, have rights to access agricultural and forest land in the village territory. Outsiders may borrow land for a single year, but generally they cannot plant perennials.
4. Customary tenure provides for the livelihoods of families in the community. Where customary tenure is communal, such as for large tracts of shifting cultivation land, tenure arrangements ensure that no one is landless. All families, including widows, are provided land in the annual lottery for plots.
5. Where there is sufficient land, village-based Internal Rules which articulate local 'customary tenure' allow villagers to convert plots of shifting cultivation under communal tenure into informal private claims if the land plots (through investment in labor) are converted to perennials (e.g. fruit trees, tea, rubber) and/or terraces. The informal private claims form part of the customary tenure arrangements and have social legitimacy.
6. When land becomes partitioned through conversion of land use (e.g. the planting of perennials and production for the market), customary tenure may still prevail in the sense that Internal Rules prohibit the sale of land to outsiders. Where informal private land claims inside customary tenure systems are registered to obtain a Land Use Certificate (Form 7) issued by the state, customary tenure becomes open to outsiders and it can lead to a breakdown of the system.
7. Communities hold clear customary rights in their own eyes and most often also in the eyes of their neighbors, but these rights are not recognized by formal law. (*Ewers Anderson, 2016, at iv*)

II. Statutory definition of customary land rights

In addition to variety of international instruments that set out protections for customary land rights (detailed in Appendix 1), many national laws also protect customary land rights and set out legal procedures for their recognition and documentation.⁵ In recent years, lawmakers have made concerted efforts to leave definitions of

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- In Uganda, the 1995 Constitution and the 1998 Land Act, as amended, protect customary land rights.
- The constitutions of Bolivia, Brazil, Colombia, Costa Rica, Panama, Paraguay, and Peru all recognize indigenous land rights, as well as some national legal and regulatory framework operationalizing international instruments.
- The South Africa Communal Property Associations Act 1996 permits customary groups to incorporate and supports local institutions to acquire, hold, and manage property in accordance with a written constitution.

what is a “customary land right” vague and open to local/indigenous definitions so as to ensure that all relevant ethnic groups within their countries may claim such rights. For example, Liberia’s recent 2018 Land Law defines customary land as: “The land owned by a Community and used or managed in accordance with customary practices and norms, and which include, but are not limited to, residential land, farmland, communal forestlands, and fallow lands.” Thereafter:

- Article 38(1,2) set out that “A Community may divide its Customary Land into various categories, including but not limited to the following: residential areas, agricultural areas, commercial areas, industrial and mining areas, cultural shrines & heritage sites, protected areas, forest lands, and any other category of Land that the Community may deem appropriate. The categorization of Customary Land shall be based on customary practices and long period of use, as well as consensus reached by members of the Community, provided that Customary Land may be re-categorized based on changed conditions.”
- Article 32 (1-3) states that “Customary Land is acquired and owned by a Community in accordance with its customary practices and norms based on a long period of occupancy and/or use. ... The acquisition and ownership of Customary Land by a Community is established by one or more of the following:
 - (i) The Customary Land, prior to the Effective Date of this Act, was deeded to the Community;
 - (ii) The Land is considered to be Customary Land by common and long-standing understanding among members of the Community. This includes Land that has been used or possessed exclusively or continuously by the Community or some of its members for socio-cultural and economic purposes for a minimum period of fifty (50) years as can be established by oral testimonies of members of the Community and members of neighboring Communities.
 - (iii) The use or claim of possession of the land by the Community through historical activities and ties are acknowledged by some or all neighboring Communities; and/or recognized by rules of customary practice, as can be established by oral testimonies of members of the Community and members of neighboring Communities.”
- Article 37(1) also establishes that “A Community's claim of ownership of Customary Land shall be established by competent evidence including oral testimonies of Community members, maps, signed agreements between neighboring Communities and any other confirming documents.”⁶

In Myanmar’s regulations, it may be best to advocate that “customary tenure” is defined according to **a contextually-appropriate balance of the widest definitions possible of the following three factors:**

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- In Papua New Guinea, the Land Group Incorporation Act of 1974 lets customary groups incorporate as a formal legal entity with the right to hold, manage, and deal with land transactions with outsiders.
 - In Botswana and Namibia, the government has set up Land Boards to administer community lands. Customary authorities are represented on the board. In Botswana, customary tenure is recognized by statute and constitution.
 - Customary rights are protected in Tanzania’s Village Land Act 1999, Niger’s Rural Code 1993 and Namibia’s Communal Land Reform Act 2002. In Mozambique, the Land Law and Regulations recognize pre-existing customary rights.
 - In Niger, the Rural Code specifically recognizes customary rights as a legitimate source of land claims.⁵
 - In Mali, while post-independence legislation abrogated customary rights, the Land Codes (*Codes Domaniaux et Foncier*) of 1986 and 2000 (as amended in 2002) legally recognize customary land rights and grant them (some degree of) legal protection.
 - Madagascar, Mexico, Ethiopia, and Vietnam have encouraged transparent and accountable customary land registration structures at the local level.
 - In Costa Rica the responsibilities and procedures for indigenous land recognition are clearly stated in the national laws and regulations.
 - In Panama, the Constitution makes the state responsible for the recognition of indigenous groups’ customary land claims.
 - In Cambodia the Land Law of 2001 protects and establishes indigenous peoples’ right to collective land titling, and subsequent regulations set out procedures for communities to go through the collective titling process

⁶ Importantly, to avoid insecure tenure caused by administrative failure to issue relevant registration paperwork, Article 37(5) mandates that “Pending the issuance of formal title documents to the Community, for purposes of evidence of title, subsequent to the completion of the Confirmatory Survey, the confirmed measurements, inclusive of precise coordinates and maps of each Customary Land, as validated and registered shall serve in lieu of a Deed as proof of ownership. Articles 34 to 37 establish the process for customary land registration.

1. **Who is considered to be a legitimate customary rights holder.** Fortunately, one the six core objectives of Myanmar's land policy is "To recognize and protect customary land tenure rights and procedures of the ethnic nationalities." (¶16(c)) There are a large number identified ethnic groups in Myanmar, each with their own customary legal frameworks and relationships to their ancestral lands, so it is necessary to define "customary rights holders" as broadly as possible to ensure that the definition can be unquestionably applied to all of these groups. Critically, "ethnic nationalities" should be specifically defined as *all* ethnic groups native to Myanmar (including Burmese people, who are an ethnic nationality as well).

The law should allow for all individuals, families and communities to be legitimate "customary rights holders" regardless of gender, language, ethnicity, or mixed ethnicity. To this end, it is critical that the definitions of "legitimate customary rights holders" *allow for the fact that many local communities are heterogeneous*, including members of various different ethnic groups. The law should leave the definition of who is a "community member" to the community to decide for itself, in alignment with national laws against discrimination and disenfranchisement.

2. **Traditional use.** Myanmar's Land Policy ¶168 sets out that: "The customary lands of ethnic groups used traditionally that fall under current forest land or farmland or vacant, fallow and virgin land classifications shall be transparently reviewed, registered, and protected as "customary land," in accordance with the Constitution of the Republic of the Union of Myanmar..." To allow common pool resources like forests, grazing lands, waterways, watersheds, water bodies and shorelines, settlements, cemeteries, temples/churches, etc. to be fully documented as "customary land," "*traditional use*" should therefore be defined very widely, so as to include any and all livelihoods, social activities, commercial activities, residential practices (including nomadic use) spiritual practices (including the sacred sites of such practices), rights of way, locations of gathered resources such as medicinal plants and building materials like thatch, and all other ways that the various national ethnicities might use lands. etc. It is also necessary to ensure that the regulations allow for common pool resources to be registered as "customary lands" to the wider group.

The government may likely want to tightly define "use" as land that is used for farming or residential areas only, with physical proof of buildings, fences, and other "improvements" to the land. The regulatory definition should therefore carefully say that forest lands, fallow lands, wetlands and water bodies, and other kinds of lands can be classified as "customary lands," and be clear that there may be no physical evidence of use at all of lands used traditionally for hunting, gathering, and spiritual practices.

3. **Time frame of "continuous use.** "The government of Myanmar may seek to create a long-time frame of proven "continuous use" to limit the scope of who may apply for their lands to be set aside as "customary." However, I advise advocating that this time period be as short as is feasible to allow for greater ease of producing proof of the use (although this should be balanced against too short a time period, which would potentially allow people without authentic customary claims to claim lands they have recently moved onto). A period of roughly 20-50 years (one generation; three generations at the most), may be a reasonable compromise. The agreed time frame of proven continuous use should very explicitly create exceptions for short-term abandonment during wartime/military occupation, when it was unsafe to stay, or for periods where the military claimed those lands by force, leaving the indigenous rights holders no choice but to abandon their claims.

As such, a possible definition of “customary land” may be:

“Land held by all ethnic groups of Myanmar, including Burmese peoples, who have been using lands privately and in common for at least thirty years for any and all customary purposes, including residence, hunting, gathering, fishing, farming, pastoralism, spiritual and cultural practices, ecosystem regeneration (allowing for fallow land/fallow seasons), protected areas, conserved areas, reserve land for future generations, and all other locally-agreed customary practices.”

Then, subsections underneath this definition could make clear that:

- Customary land includes both family land that can be registered to the family, as well as common pool resources that must be registered and documented at the level of the overall ethnic group/local community.
 - Legitimate rights holders within these family and community groups should be defined by the family and/or community who holds the overall right, with clear recourse for local/customary complaints procedures and grievance mechanisms for individuals who feel they have been unfairly excluded. (This is why a clear time period can be useful.)
 - International human rights norms and national laws can be referenced to ensure that a community/family defines these “customary rights holders” as including women, members of minority groups living within the community, etc.
- Within an area, multiple ethnic groups may live together, with overlapping, shared use rights to common pool resources; evidence of their “unity” as a group of customary rights holders may be set out as proof of adherence to common land governance rules, natural resource management practices, and cultural norms related to the land.
- “Use” should be continuous, with exceptions made for wartime/military occupation/forced eviction.

III. Overview: why its most effective to document customary land at the meta-level of the community/village first, before documenting individual households’ lands

Currently, in Myanmar, up to 10 million people live or rely on lands classified as VFV. Should these lands be formalized and documented at the household level, the practice will take decades – not months. Securing customary lands at the level of an agreed meta-unit (the “community,” the village, or VT, according to how each ethnic minority sees best, as per their customary way of holding and managing lands) is simply more efficient, expedient, and economical. It will protect a vaster scale of land in a much shorter time frame.

Moreover, documenting land at the level of the “meta-unit” will ensure that common pool resources are protected. Peoples in every country in the world share lands for the public good, including public parks, state forests, etc.⁷ In many less-developed countries, communities depend upon communally-used and managed forests, water bodies, and grazing areas for their survival. These common lands are often the only bulwark that the poorest families have against starvation: multiple studies have shown that poor families rely most heavily on common areas for the provision of their basic necessities, including water, food, fuel, medicine, building materials, fodder for animals, etc. These poor families, which often have little or no land on which to farm, both subsist from and earn their livelihood on these lands, hunting and gathering basic resources both to consume and sell on the market. (It is not only the poor who rely on common lands, however: studies have shown that even the most relatively wealthy community

⁷ It is important to note that “common pool resources” documented as belonging to a group, village or community does not equate with “communism.” These areas are simply lands used by all rights holders, according to locally-agreed rules and norms.

members rely on communal land to gather wild foods and medicines, hunt and fish, graze their animals, collect wood for fuel, and source building materials.⁸

However, these lands are most at risk because land shared communally may look “undeveloped” or “unimproved” to untrained eyes and may even be considered by community members to be owned “by no one” even when, according to custom, it is owned and used “by everyone.” As such, registration of communities’ common pool resources is particularly important, as these areas may appear to outsiders as “unused” or “vacant.” Under Myanmar’s VFV Law, the state now has the legal power to proactively reclaim apparently “unused” land and then use it for its own purposes, thereby cancelling a community’s customary land rights. In this context, formally delimiting, registering and titling common pool resources (and then supporting communities to take actions to demonstrate that the land is being actively used, such as by erecting fences, markers, or other improvements) is becoming a matter of urgency.⁹

The remainder of this memo assumes that civil society will advocate for customary lands to be secured at the level of the larger group. Should this not be the case, the following recommendations may be adapted to apply to individual families’ customary land claims.

IV. Evidence of customary land rights

A survey by Namati of 290 households across Rakhine, Karen and Shan states and Magwe Region found that 87% of household had no official documentation to prove their land tenure claims; only 9% held old tax documents to prove ownership. In the absence of formal legal documentation of land rights, there are various ways to prove evidence of customary land rights. Generally, these include: governance evidence/testimony of leaders; oral history; written history/historical documentation; landscape-based evidence; and spiritual/cultural evidence. Across Myanmar’s myriad national ethnicities, at least one of these kinds of evidence may be easily located within a community to prove customary land rights. As such, it may be useful to advocate that any of the following kinds of evidence be accepted as proof of customary land claims in Myanmar:

1. **Affidavits from “Village Heads” as proof of (historical) customary land governance over an area.** Historically in Myanmar, Village Heads were relied on to keep their village in order, and to be a link between the village and the central government. Either on their own or in tandem with one of the following other forms of evidence, signed statements from village heads may be a simple method of creating proof of customary land rights. In addition, historical records of village land assigned under the domain of Village Heads in the past may also be considered proof.
2. **Oral histories of local land claims, by both the holders of the customary land rights as well as their neighbors.** For both common pool resources and family lands, the legal weight of collective oral testimony made

⁸ Qureshi, Mohammad Hashim and Suresh Kumar. 1998. “Contributions of common lands to household economies in Haryana, India.” *Environmental Conservation* 25(4): 342–353. Shackleton, Charlie M., Shackleton, Sheona E. and Ben Cousins. 2001. “The role of land-based strategies in rural livelihoods: the contribution of arable production, animal husbandry and natural resource harvesting in communal areas in South Africa.” *Development Southern Africa* 18(5): 581-604. Gray, Matthew and Jon Altman. 2006. “The economic value of harvesting wild resources to the Indigenous community of the Wallis Lake Catchment, NSW.” *Family Matters* 75: 24 – 33. Australian Institute of Family Studies. <http://www.aifs.gov.au/institute/pubs/fm2006/fm75/ja.pdf>

⁹ Alden Wily argues that: “Priority focus should be upon the rural commons... It is these community-owned properties to which governments throughout the continent have so consistently helped themselves with generally no compensation at all and/or reallocated to others. Despite a decade-plus of reform in this area, most commons on the continent still bear the status as de facto un-owned land or public land owned by everyone and which accordingly fall to government jurisdiction and *de facto* tenure... Whether we like it or not, this means registration. We cannot escape the reality that each and every common property estate must be defined, its customary owners known and institutional representation established in order for the owners to hold onto that property and reap future benefits from it. If this is not undertaken we are merely sustaining the past and present in which some millions of hectares of invaluable property on this continent are annually lost to the majority rural poor.” (Alden Wily, 2005 at 1-2).

publically in front of the whole community should be made equivalent to the legal weight of paper documentation. A community might invite a local government official responsible for customary land claims to a large community meeting, at which community members stand up and provide oral testimony of the community's claims to local forests, water bodies, grazing lands, etc. To ensure that these claims are accurate, the leaders of neighboring villages should be present, and should be given time to speak to either confirm or context the articulated historical customary land claims. (As described below, a community may want to prepare in advance for such a meeting by having private meetings with its neighbors, and making sketch maps, etc., to ensure that they are in agreement about customary boundaries *before* inviting a government official to witness this oral testimony.) These verbal accounts could be transcribed as well as audio- or video-recorded to create digital evidence.

Similarly, oral evidence made in a large public meeting is particularly useful for family land claims; likewise, neighbors may be asked to publicly confirm or contest the stated boundaries of a family's customary lands. Such meetings should make sure to have respected elders or mediators present to address any conflicts that may arise.

3. **Historical evidence, including colonial documents.** In Myanmar, as across Asia and Africa, the British colonial government kept scrupulous maps and written records of their administration over rural areas. It is highly likely that government archives recorded the names and territories of Myanmar's various ethnic minorities. Such documentation could be easily accessed by students or academics (in Myanmar or elsewhere) eager to volunteer to support land protection efforts. These documents could provide simple proof of customary land rights over forests, water bodies, watershed areas, and other common pool resources used by community members as a group. Colonial maps, in particular, may provide particularly strong proof of customary land claims held and used continually for many decades. In addition, historical records may also provide proof of local governance bodies and their claims to/rules concerning local lands and natural resources. Colonial court records of land conflicts may even provide documentation of shared and overlapping use rights held by various ethnic groups.
4. **Landscape-based evidence of livelihood, cultural or spiritual use.** Under some customary paradigms, planting permanent trees or making changes to the natural landscape creates public proof of one's rights over land and increases tenure security. Myanmar's regulations should incorporate "landscape-based evidence" as proof of customary land claims.¹⁰ For example, some cultures plant specific kinds of boundary trees to mark the entrance to their community, or to designate a spiritual site.

The regulations should allow for these certain natural markers to help define the boundaries of customary land; Should a local community have such a standard practice, the government of Myanmar should accept proof of a 200-year old tree, or old marks made into stone, etc. as proof that the community living on those lands made those marks or planted those species long before the required period of proven use.¹¹

5. **Cultural/spiritual evidence and community origin stories.** Many communities have origin stories of how their ancestors arrived at the place where the village or community resides. Some of these stories are purely historical, while others have strong spiritual significance and involve links to non-human forces. For example, some cultures have stories of how their ancestors emerged from certain caves or water bodies that are

¹⁰ Unruh, Jon D. 2006. "Land Tenure and the "Evidence Landscape" in Developing Countries". *Annals of the Association of American Geographers*, Volume 96, No. 4, pp. 754–772. Unruh explains that: "Inscriptions on the landscape are acts of formalisation which have a high degree of social visibility...[and can] signify a public claim... Forces associated with the war and the tenurial disconnection between customary, migrant (war displaced), and formal tenure acted to put even greater weight on older agroforestry trees compared to younger trees and other forms of evidence. This suggests that even in situations where formal and informal institutions regarding property rights are most disrupted (subsequent to war), agroforestry trees as legitimate evidence can be or can become quite strong, particularly relative to other forms of evidence." (Unruh, 2006 at 761).

¹¹ However, lawmakers must take care that such evidence does not discriminate against Myanmar's pastoralists, nomads or hunter-gatherers, who may not leave such permanent marks on the lands they have customary rights over.

contained within the local landscape and can be physically visited. Alternatively, a community's customary lands may contain sacred sites within them, and community legends, stories, and spiritual practices may link the people to that sacred site. Often certain elders or spiritual leaders have responsibility for caring for or overseeing the management, use of guardianship of these sacred sites: such individuals' oral testimonies may be considered valid proof of a community's customary land claims. In addition, certain landscape-based cultural rituals or practices may be proof of customary land claims – for example, some cultures have elaborate rainmaking or harvest rituals tied to the land, involving processions or dances to certain deities located in particular places, etc. In many instances, a sacred site may be considered shared by a few local ethnic groups, and the government should be prepared to document these areas as overlapping customary land claims shared and managed equally by various ethnic groups.

V. Suggested process for the recognition and registration of customary land in Myanmar

A process for ascertaining and confirming the validity of customary lands held by communities and families should include four main steps:

1. Community-wide meetings to gather data, oral testimonies and historical or government documentation of customary ownership/use;
2. Boundary harmonization and boundary marking, including careful documentation of shared and overlapping use rights;
3. Documenting the customary rules that have ensured the sustainable, equitable use of the lands and all natural resources located upon those lands; and
4. Establishing an internal community process to document and delineate the family lands from the common-pool resources.

It is important to note that steps 1 and 2 should be all that is legally required to apply for formal documentation of customary land rights. Once a community has mapped their lands and gathered documentation of their legitimate customary claims to these lands, they should be allowed to apply for formal recognition. Then, while the formal legal documents are making their way through Myanmar's bureaucratic processes, the community can hold meetings to create a land governance and natural resource management plan and delineate the common pool resources from documented family lands.

Further suggestions about how these processes may be undertaken as follows:

1. Community-wide meeting to gather data, testimony and documentation of customary ownership/use. As described above, gathering oral testimony of customary land claims is best done very publicly, in large community meetings that allow for the greatest transparency and accountability. Similarly, these meetings are a good opportunity to ask people with any paper documentation of the overall community's customary land claims to bring this paperwork forward. As suggested above, if advocates' research has located historical maps or other colonial- or pre-colonial era data that proves longstanding use, such data may be shared with the community at this time. All documents should be carefully captured using smart phones equipped with scanning apps, and the originals should be gathered and stored in a clean, secure place. Any elders or leaders who can provide oral testimony should be video or audio recorded, and their testimonies written down. These meetings should be attended by relevant government officials who can sign and stamp any resulting oral and written evidence as legally valid and authentic.

2. Harmonizing boundaries and documenting a community's customary lands. As described above, it is advised that a community hoping to formalize its customary land claims meet with its neighbors to determine the agreed boundaries *before* engaging government officials; ideally, a community and its neighbors will have come to shared agreements about the boundaries of each community's land, as well as all seasonal, overlapping use rights, rights of way, etc. before

approaching the government for documentation. This process might be carried out as follows:

- **Participatory community mapping.** Community members meet in a large public meeting to draw sketch maps (groups of women, youth and men drawing separately, each marking the locations of all-natural resources they know of).
- **Boundary harmonization:** Communities meet with their neighbors to agree on shared boundaries. This phase may include land conflict resolution; communities should come prepared with respected elders and mediators to help address differences in opinion as to where boundaries lie until mutually-agreeable solutions are found. Traditional land conflict resolution mechanism and modalities that align with custom and established practice should be used.
 - **For lands that are shared or to which different stakeholders have overlapping rights, it is best to mark them on maps as the customary territory of BOTH/ALL the communities that have customary use and access rights, and seek documentation of such rights for all legitimate customary users.** This may expand the territory of the customary claim dramatically; advocates should push hard that common-pool resources used by communities, no matter how large, will be documented as customary lands. Ensuring that the regulations allow this will exponentially expand the amount of land that can be safeguarded under custom.
- **Documentation of agreed boundaries.** Experience has shown that communities should consider creating a wide range of evidence of the boundaries of their customary lands, including:
 - Written MOUs with their neighbors to formally document all boundary agreements on paper;
 - Taking photos and making videos of the agreed boundaries;
 - Planting boundary trees or placing locally-accepted markers to physically indicate the limits of their lands; and
 - Making technical maps using GIS/GPS software and technology.

At this point, the community's maps and the oral and written evidence of the customary land claims should be all that is needed to be submitted to the government for formal documentation and registration. However, communities may want to undertake the following two steps to prepare themselves for future land-related challenges and document their family lands.

3. Drafting community-wide rules and practices for good governance. This process has been shown to successfully ensure that a community's land is used sustainably, its ecosystem is flourishing, all community members (especially women and members of minority ethnic groups) have equal rights to use and access the land, and that leaders are downwardly accountable to the community members. This process may be carried out as follows:

- **1st Draft.** The community collectively "shouts out" all of their existing local rules and all the rules their ancestors followed in the past. The meeting is split into small groups of men, women and youth to ensure that all voices are heard. The groups present back to the community, and everything that is said is written down onto big sheets of paper organized into three categories:¹²
 - Rules about **leadership and land governance**, including rules about who can be a leader, leaders' responsibilities, how decisions about land and natural resources should be made, how to resolve conflicts, etc.;
 - Rules about **use and management of natural resources**, including rules about water, forests, livestock, hunting and fishing, thatch and building materials, seasonal users' rights, etc.; and
 - **Cultural and social rules** including rules about women's rights, children's rights, rules for relationships with neighbors, etc.
- **2nd Draft.** The community reviews the 1st Draft of its rules, deletes old rules that are no longer useful, changes existing rules that should be updated, and adds new rules necessary for current realities. Communities may want to organize their rules clearly into the following sections:

¹² Nothing is debated at this time; the goal is capture all past and present community norms and practices just as they are.

- Rules about streams, rivers, lakes, springs, wetlands and all related natural resources;
 - Rules about forests and grazing lands and all related natural resources;
 - Community definition, members, inclusion and exclusion;
 - Women’s and minority groups’ rights to land and natural resources;
 - Leadership, accountability, community decision-making and election;
 - Community processes for interacting with potential investor;
 - Financial transparency and management of community money;
 - Land use planning and zoning; and
 - Cultural and social rules, including rules about sacred areas.
- **Legal Review to ensure alignment with international and national laws, then creation of a final draft.** The community’s draft rules may be shared with a lawyer or government official to ensure that they do not contradict international human rights protocols, international conventions like CEDAW, Myanmar’s Constitution, and other relevant national laws. The community then makes any necessary modifications. Once all conflicts of law have been resolved, the 3rd draft of the rules is complete.
 - **Rule Adoption Ceremony.** The community convenes a large, celebratory “Rules/by-laws adoption ceremony,” and invites local and regional leaders, government officials, and neighbors to attend. At the meeting, the community reads out the bylaws, then votes to adopt them in the manner they have decided (often by consensus or supermajority vote). After the bylaws are adopted, it is helpful to have the local government sign and stamp them as evidence of government endorsement.

Note that communities may decide, according to their own desired aims and articulated interests, to maintain current community leadership, or to use their new rules as a platform to elect more diverse, accountable leadership. **The regulations should not mandate any particular governance outcomes, but rather leave such decisions to each ethnic group/documenting group of customary rights holders to decide for themselves.**

4. Internal community processes for documenting families’ customary land holdings within the community. Once the outer boundary of the community’s customary land has been secured, community members may want to take steps to document the boundaries of each family’s customary lands. Various NGOs have recorded excellent, efficient outcomes when they have trained a small cadre of youth to learn how to take GPS measurements and turn them into accompanying technical maps of family lands. These youth can learn how to gather GPS data during the phase of documenting their communities’ outer boundaries, then apply the same skills to household lands. Likewise, community members can learn how to resolve boundary conflicts from observing any negotiated boundary agreements between their community and all neighbors. As above, traditional land conflict resolution mechanisms that align with custom and established practice should be used.

Communities should be allowed to determine their own procedures for validating a family’s customary land claims, according to local ethnic practices and established norms. These may include:

- Testimony of neighbors;
- Evidence of improvements to the land dating from an agreed number of years;
- Any other locally appropriate strategies.

A community whose customary lands have been formally mapped and safeguarded may take as much time as necessary to complete such an internal inventory – **or not complete one at all, if it is not culturally appropriate or desired.** It is important to note that if a community does undertake an internal survey, lands that are common pool resources (forests, grazing areas, watersheds, etc.) should also be mapped - not left as “open” space, which will leave them vulnerable to appropriation by community members and government agents alike.

Appendix 1: International instruments that define and protect customary land rights

A variety of international legal instruments provide definitions of customary land that may be useful to helping to define the process of legal recognition of customary land rights. These include:

1. The Voluntary Guidelines on the Responsible Governance of Tenure (VGGTs), which set out that:

- ¶9.4 States should provide appropriate recognition and protection of the legitimate tenure rights of indigenous peoples and other communities with customary tenure systems, consistent with existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments. Such recognition should take into account the land, fisheries and forests that are used exclusively by a community and those that are shared, and respect the general principles of responsible governance. Information on any such recognition should be publicized in an accessible location, in an appropriate form which is understandable and in applicable languages.
- ¶9.5 Where indigenous peoples and other communities with customary tenure systems have legitimate tenure rights to the ancestral lands on which they live, States should recognize and protect these rights. Indigenous peoples and other communities with customary tenure systems should not be forcibly evicted from such ancestral lands.
- ¶9.6 States should consider adapting their policy, legal and organizational frameworks to recognize tenure systems of indigenous peoples and other communities with customary tenure systems. Where constitutional or legal reforms strengthen the rights of women and place them in conflict with custom, all parties should cooperate to accommodate such changes in the customary tenure systems.
- ¶9.7 States should, in drafting tenure policies and laws, take into account the social, cultural, spiritual, economic and environmental values of land, fisheries and forests held under tenure systems of indigenous peoples and other communities with customary tenure systems. There should be full and effective participation of all members or representatives of affected communities, including vulnerable and vulnerable members, when developing policies and laws related to tenure systems of indigenous peoples and other communities with customary tenure systems.
- ¶9.8 States should protect indigenous peoples and other communities with customary tenure systems against the unauthorized use of their land, fisheries and forests by others. Where a community does not object, States should assist to formally document and publicize information on the nature and location of land, fisheries and forests used and controlled by the community. Where tenure rights of indigenous peoples and other communities with customary tenure systems are formally documented, they should be recorded with other public, private and communal tenure rights to prevent competing claims.

2. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which sets out that:

- ¶Article 26
 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
 3. States shall give legal recognition and protection to these lands, territories and resources. Such

recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

- **Article 27: States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems**, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.
- **Articles 8.2, 10, 25, 28 and 29** also contain relevant protections for the customary land rights of Indigenous Peoples.

3. ILO's **Indigenous and Tribal Peoples Convention 169**, which sets out that:

- **Article 14**
 1. **The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized.** In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.
 2. **Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.**
- **Article 15: The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded.** These rights include the right of these peoples to participate in the use, management and conservation of these resources.
- **Article 16**
 1. **Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.**
 2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.
- **Article 17**
 1. Procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected.
 2. The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community.
 3. **Persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them.**
- **Articles 13, 18 and 19** also contain relevant protections for the customary land rights.

About the Author

Rachael Knight is an attorney with expertise in land tenure security, access to justice, legal empowerment and sacred sites. She is currently a "Senior Associate" at the International Institute for the Environment and Development (IIED). She helped to found Namati, a global legal empowerment organization that helps disenfranchised communities to understand, use, and shape the law. She created Namati's Community Land Protection Program, then served as its Director from 2012-17 and as its Senior Advisor from 2018-2019. In this capacity, together with land rights advocates throughout Africa, she co-created an integrated model of community land protection that is now practiced around the world. Previously, she was Director of the International Development Law Organization's Community Land Titling Initiative, and has worked as a consultant for FAO since 2004; in this capacity she wrote "Statutory Recognition of Customary Land Rights in Africa: An Investigation into Best Practices for Law-Making and Implementation."

She has also written various books and guides for community land protection advocates and activists, available at: <https://namati.org/ourwork/communityland/community-land-protection-publications/>

About Namati

Namati advances social and environmental justice by building a movement of people who know, use, and shape the law.

Namati works in partnership with community paralegals in six countries. The paralegals support their communities to protect common lands, enforce environmental law, and secure basic rights to health-care and citizenship.

Globally, Namati convenes the Legal Empowerment Network, more than 2,200 groups from 160 countries who are learning from one another and collaborating on common challenges. This community successfully advocated for the incorporation of justice into the United Nations' 2030 Sustainable Development Goals.

Namati is active in more than 4,000 cases in six countries to protect community lands, rule of law in environmental protection, access to health care, and basic citizenship rights. Namati brings on ground experience to build and reform within the rule of law and law enforcement environment. Namati established an office in early 2013 with a working plan to focus on land rights (registration, classification and land acquisition) in Myanmar.

Namati's Partners

Since 2013 August, it has partnered with the **Citizens and Political Rights Movement (CPRCG)**, a local non-governmental organization in Myanmar, to work with 15 community-based paralegals assisting farmers in four states and divisions: Bago, Magway, Sagaing and Rakhine.

Then there are other local organizations, such as the Shan State-based local groups in partnership with the **Thanlwin Thitsar (TLT)** and the **Green Peasant Institute(GPI)** , it has grown into a network of 45 community-based paralegals.

