



DISPLACED AND DISPOSSESSED

Conflict-affected communities and their land of origin in
Kachin State, Myanmar

May 2018



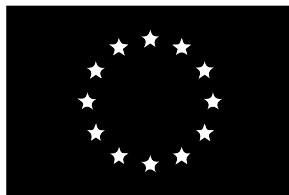
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*I want this war to end. I want to go back to my land
and work as soon as I can. I wish both the armed
groups and the military can find a way to stop fight-
ing. The longer this war is, the harder our lives are.*
Person displaced by conflict, Kachin State

SUMMARY

People displaced by conflict in Kachin State want to return in safety to their land of origin, yet much of their land is being appropriated by a range of actors, with little accountability. Legal or administrative procedures are being used in a way that undermines the rights of those displaced by conflict and ignores the exceptional circumstances of displacement. Forced and arbitrary restrictions on movement reduce accountability and transparency further and exacerbate fears about the land that has been left behind, increasing tensions.

Losing their land of origin is a pressing issue for people displaced by conflict, and one that requires urgent action. Even when conditions are eventually met for those displaced to safely and voluntarily return to their land of origin, their inability to reclaim their land from third parties is likely to undermine peace, reconciliation and development efforts.

All stakeholders can play a role in resolving the lack of clarity over land rights for displaced people by taking both immediate and longer-term action to recognize, protect and promote secure rights to land of origin and to ensure that equitable remedy is available in cases where land has been appropriated by external actors without the knowledge or consent of displaced individuals.

The Durable Peace Programme (DPP) is a consortium of seven international and local organizations that have been supporting peace, reconciliation, rehabilitation and development in Kachin State since 2015. Ensuring that the voices of all people feed into the peace process is a central component of the programme. Listening to the voices of those displaced by conflict, it is clear that they overwhelmingly want to return to their land, and that the barriers to return are directly linked to the failures of the peace process in Kachin State.



THE IMPORTANCE OF LAND IN KACHIN

The issue of land is very important to most internally displaced persons (IDPs)¹ in Kachin. The research underpinning this briefing paper found that:

- Most IDPs had access to land at their place of origin prior to displacement (primarily through customary tenure or informal purchase);²
- Most IDPs are engaged in agriculture and/or livestock-based livelihoods;³
- Most IDPs want to return to their land of origin.⁴

This report was produced to explore growing concerns that IDPs' land of origin in Kachin is being acquired by various actors without the permission of, or consultation with, IDPs themselves. These concerns have been raised regularly by IDPs throughout Kachin⁵ and are increasingly gaining media attention.⁶ Field research carried out as preparation for this brief has produced new evidence of what is happening to land vacated by IDPs.⁷ In order to protect the anonymity of interviewees, this report does not reproduce extensive detail from case studies, but links trends identified in the cases researched with broader systemic issues related to IDPs' land of origin.

Although the timing for any possible return remains unclear, the necessary preconditions should be in place to enable eventual return and reintegration where possible. An important precondition would be that IDPs' rights to their land of origin are clarified and legally recognized. The Inter-Agency Standing Committee (IASC) Framework on Durable Solutions for Internally Displaced Persons stipulates that the restoration of housing, land and property is a key component for achieving a

durable solution for peace.⁸ The Joint Strategy Team (JST),⁹ a coordinating body of nine humanitarian organizations working closely with IDPs, has also reiterated the importance of restitution in addressing transitional justice, including an assertion of the principle that all IDPs will retain their previous rights to land and property.¹⁰

'IDPs and any other people affected by armed conflicts will retain all their previous rights and/or entitlements they might have; transitional justice should apply, this includes: right to restitution, (right to recover their properties, housing and land, and to request compensation for those who lost family members, were injured or lost properties) and protection of civil and political rights.'

Joint Strategy Team, Kachin, 2017

The Durable Peace Programme (DPP)'s endline assessment strongly reinforces both that IDPs surveyed overwhelmingly want to return and that the barriers to return are directly linked to the failure of the peace process in Kachin, a context that remains highly volatile and unpredictable. Through an extensive survey detailing IDPs' perceptions, the DPP report establishes that the three main barriers to return reported by IDPs are the presence of armed actors, the presence of landmines and active armed conflict.¹¹ Although for a majority of these IDPs the desire to return remains strong, perceptions about the actual possibility of return indicate that over the past three years levels of uncertainty have increased,¹² which is likely prompted by an escalation in armed conflict in Kachin.

For most IDPs surveyed in Kachin, their desire to return to their land of origin is in part linked to an understandable need to restore their previous livelihoods and economic opportunities.¹³ Land, however, is about far more than economic assets. As in many parts of the world, land in Kachin State has a social and cultural significance, and is a key source of identity, from the Myitstone confluence¹⁴ being regarded as the spiritual birthplace of the Kachin people to small prayer hills having localized significance. Burial, ancestral and spiritual grounds are situated throughout the state. This report cannot do justice to the full extent of these dynamics,¹⁵ but it is important to recognize that IDPs' land is more than just a replaceable economic asset. The JST, whose members do extensive work with IDP populations, argues for a 'free choice of return to their original locations'. Resettlement or compensation for lost land appears to be an inferior option for IDPs compared with return. This reality must inform the way in which stakeholders approach IDP land issues in Kachin State.



Land rights and governance of land in Kachin

Kachin State, which has an area of roughly 89,000 square kilometres, has been severely affected by conflict. The Kachin Independence Organisation (KIO) and its armed winged the Kachin Independence Army (KIA) have been in conflict with the Myanmar Armed Forces (the Tatmadaw) since the 1960s. The latest iteration of armed conflict is the result of a ceasefire collapsing in 2011. This rapidly led to the displacement of over 100,000 people, nearly all of whom remain displaced today. Their experiences of displacement are traumatic, often involving fleeing into the jungle, losing livelihoods and property and being subject to violence. Six years after the resumption of fighting, peace remains elusive and the situation remains tense and volatile. Land in some parts of the state is under the administrative control of the KIO/A, while in other areas it is controlled by 'border guard forces'. Most land, however, is formally under the control of, and administered by, the Myanmar government, backed by the Tatmadaw, within the national legal framework. In certain areas influence may be wielded by two or more of the above actors, including in relation to decisions about land use. The vast majority of people from rural communities across the state engage in agriculture, including shifting cultivation, and community forestry. While formal titling of farmland is progressing, much land, including that forcibly abandoned by IDPs, is not titled but is under customary land tenure arrangements. Kachin has been subject to several waves of large-scale land acquisition in recent years, with actors motivated by its mineral and forest resources, as well as its strong agricultural potential and proximity to the Chinese market.



IDPS ARE LOSING THEIR LAND OF ORIGIN

Many IDPs interviewed claimed that their land of origin was being appropriated for use by armed actors, for the extraction of natural resources, for small-scale and large-scale agriculture, and for civilian habitation and other purposes. Appropriation ranged from small-scale encroachment on land to acquisitions of several hundreds of hectares, including for agricultural plantations. One interviewee detailed a case where their land was used for gold mining operations:

I came to know that businessmen were doing gold mining at our original village... I saw that much of our farmland was devastated because of the gold mining. As we didn't have authority and money, we couldn't do anything about it. Although we went to report the case to village-level authorities, no action was taken.

Reasons for these acquisitions were primarily reported to include military objectives and small- and large-scale commercial activities, as well as opportunism and convenience. The actors allegedly involved in the appropriations ranged from members of non-displaced communities and Myanmar companies to armed actors and foreign companies.

According to field investigations, the instances of large-scale appropriation of IDPs' land appear to be particularly concentrated in areas that have a greater abundance of natural resources, fertile ground and/or strategic military value to armed actors, such as in contested areas, including areas close to the road from Myitkyina to Bhamo. The JST sent a letter in October 2017 relaying the concerns of IDPs about the appropriation of IDP land of origin for the development of banana plantations. Most small-scale appropriation of IDPs' land highlighted by those interviewed appears to be more ad hoc and opportunistic, rather than systematic, such as

inter-communal land appropriation of one family's land by another. However, there are also instances of small-scale appropriation of IDPs' land appearing to be for the strategic purposes of armed actors. IDPs interviewed said that they often feared visiting or returning because of the presence of these armed actors. They also fear that there may be additional larger-scale appropriation of land but they cannot know for sure, since access problems mean that the required consultation of land rights holders cannot take place.

In the scope of existing field research, the full extent of appropriation of IDPs' land in Kachin could not be assessed, though multiple sources suggest that the scale of the problem, including that of large-scale acquisitions of land for banana plantations, could be considerable.¹⁶ Gauging the full scale of appropriation of land to which IDPs still have rights would require extensive research, including documentation and checking of claims. Although at some point a full review will need to be done as part of a robust land restitution process, at present this is not feasible, in part due to insecurity relating to active armed conflict and the presence of landmines. Comments in October 2017 by the Kachin State Chief Minister, however, suggest that an official review is under consideration¹⁷.

'Kachin State Chief Minister Dr. Hket ... ordered the state office's secretary to establish a land scrutiny commission in order to establish the amount of redistributed land and how much of it belongs to IDPs. He declined to give a time frame for the scrutiny process and the resettlement of IDPs but acknowledged it could be a growing problem in the area.'
The Irrawaddy, 3 October 2017



A LEGAL BASIS FOR IDP LAND RIGHTS PROTECTIONS

This report does not provide an in-depth analysis of land laws and policies applying in Myanmar and Kachin, as this exists elsewhere,¹⁸ but it is important to note certain points to clarify the status of IDP land rights in law and in practice. Among the relevant national legislation and policies applicable to this context are:

- the 2016 National Land Use Policy (NLUP), which explicitly references the rights of IDPs
- a land use policy under development by the KIO
- the 2012 Vacant, Fallow and Virgin Lands Management Law (VFV Law)
- the 2012 Farmland Law
- the 2013 Law of Protection of Farmers' Rights and Enhancement of their Benefits
- the 2013 Natural Disaster Management Law.

The three key sets of international principles that should inform national legislation governing the land of origin for IDPs are:

- the United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons (the 'Pinheiro Principles')
- the UN Guiding Principles on Internal Displacement
- the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

These laws, policies and principles from the KIO, the Government of Myanmar and the international community suggest that IDPs retain their rights to their land of origin, even when displaced. According to these laws, there are no legal provisions¹⁹ allowing for other actors to arbitrarily take over land forcibly abandoned by IDPs. Moreover, provisions relating to the exceptional circumstances of displacement and loss of livelihoods as a result of armed conflict, within the official definition of natural disaster, can be interpreted to address the situation of IDPs, both in terms of damage to and loss of land and property, as well as restitution, and in terms of protections.

In national laws, the Government of Myanmar also has a positive obligation to provide health, education and livelihood opportunities for IDPs, which is broadly in line with the UN Guiding Principles that reiterate a duty to support them to recover property or land and assist in reparation.

- The 2013 Natural Disaster Management Law, whose definition of natural disaster includes 'man-made accidents', makes explicit reference to 'violence and armed insurgencies' as a listed cause of a natural disaster.²⁰ It goes on, under article 18, to outline the procedures to minimize losses and includes both short-term and long-term emergency response measures. This includes keeping records of damages and losses and stipulates that the government has a positive obligation towards 'rehabilitation in order to restore agriculture, livestock breeding and other vocations required for victims'. That this law



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explicitly stipulates government responsibility to provide health, education and livelihood opportunities for persons affected by natural disaster is broadly in line with the UN Guiding Principles, which reiterate the duty to support IDPs to recover property or land and to assist in reparation.

- The 2013 Law of Protection of Farmers' Rights and Enhancement of their Benefits refers to 'giving priority assistance to farmers possessing small plots who encounter damage to the farm land and crops due to a natural disaster or infestation of pests or diseases and other causes'²¹. This provision is significant because it stipulates a case of exception, since in Myanmar violence and conflict are part of the legal definition of 'natural disaster ... or other causes'. Assistance to farmers required under the law for those who have lost their land would surely include measures to assist them in restoring their farms and livelihoods.
- The 2016 National Land Use Policy²² also recognizes that, for ethnic nationals who have lost their land resources due to civil war, land confiscation, natural disaster or other causes, the 'desire to resettle to their original lands, adequate land use rights and housing rights shall be systematically provided

in accordance with international best practices and human rights standards²³. This implies that policy is guided by the three sets of international principles mentioned above. It is also significant that the NLUP recognizes customary land tenure rights. This is of relevance because most IDPs in Kachin were living and farming under customary land tenure arrangements prior to their displacement in 2011.

From this legal perspective, there are both challenges and opportunities to be considered:

- Myanmar's land laws do not provide sufficient guidance on IDPs' return to land of origin or restitution. IDPs are largely unable to engage in a process of documenting land claims or formalizing their land tenure rights, and these laws are being used unfairly by external actors to register IDPs' land of origin for their own purposes.
- Ongoing conflict leads to a situation in which armed actors from all sides are involved in the occupation of land, much of which is likely to be for strategic military purposes, rather than commercial, residential or agricultural purposes. Under such exceptional circumstances, the normal rules that govern civilian land use are not applied.
- Under normal circumstances, if farmland is left fallow for a number of years without justification,²⁴ farmers or businesses may forfeit their rights to it and the land then reverts to the state. This should not apply, however, under 'exceptional' circumstances, which would also include displacement resulting from conflict. There appears to be confusion about how these 'use it or lose it' rules apply in the exceptional case of land abandoned by IDPs, which is leading to authorities allowing acquisitions of this land by third parties to take place.
- Numerous international principles provide guidance for restitution of IDPs' land, and these same principles should be reflected in local legislation governing land issues. This has not happened explicitly or clearly in Myanmar, however.
- The NLUP provides some general guidance for IDPs' return and land restitution, committing to the basic principle of implementing fair procedures related to land tenure and housing rights of IDPs. The NLUP, however, is not a legally enforceable document, and current legislation must still be reviewed and revised to reflect these basic principles. Despite the recent announcement of the Union government of the formation of a National Land Use Council,²⁵ the implementation of this, including the development of a planned National Land Law, has barely started, two years after the policy was announced.
- Rules differ in areas under the control of the Kachin Independence Organisation/Army, which can cause further legal confusion. The KIO/A, which administers land in areas not controlled by the government,²⁶ is in the process of developing its own land policy.²⁷ The KIO/A currently recognizes customary land tenure and issues individual land use certificates, and in some instances has also assisted in resolving land disputes. Recent KIO/A statements relating to the grabbing of IDP land indicate a recognition of IDPs' right of return and restitution in conflict-affected areas.²⁸
- There is currently a wide range of land legislation and policy under discussion, which makes it hard to address a single issue as specific as IDP land rights. The Farmland Law and the VFV Law are currently being amended in parliament, along with the 1894 Land Acquisition Act. In addition, the NLUP is in its early

stages of implementation, and land rights issues also feature in the national political dialogue.²⁹ A wide range of issues are part of the longer-term reform agenda in relation to land, such as the status of customary land rights, women's land rights, protection against land grabbing by foreign and domestic investors and the need to have fairer judicial procedures for farmers.

- The government is continuing to process a backlog of complaints in relation to thousands of land confiscations across the whole of Myanmar, mainly but not exclusively dating from the start of the period of transition to democracy.³⁰ Many of these cases are in Kachin State.

The challenges described in this paper add an additional layer of complexity to an already very challenging policy environment. As a result, the issue of the rights to land of IDPs is often forgotten or sidelined, in spite of the real urgency of the issue and the priority given to land issues by IDPs themselves in Kachin.

THE UNCLEAR LEGAL STATUS OF FORCIBLY ABANDONED LAND CAUSES CONFUSION

The case studies researched for this briefing paper reveal legal uncertainty on what to do with land forcibly abandoned by IDPs. In some instances, interviewees alleged that companies used the VFV Law to register IDP land, and in others land was registered using the Farmland Law. Some interviewees claimed that both the General Administration Department (GAD) and the Department of Agricultural Land Management and Statistics (DALMS) were more favourable to businessmen in registering their land, pointing to a power imbalance that worked against IDPs. In some instances, village administrators or leaders refused to get involved in resolving land disputes or deferred to local military commanders, suggesting a lack of accountability or clarity about how to resolve disputes in relation to IDP land. In some cases it was clearly because more powerful interests were at play, and some interviewees alleged corruption between local officials and businesses. An interviewee whose land was being used by a businessman for a gold mining operation reported:

We went to report the case to a military officer whose base is just near the village. But that officer refused to get involved, saying it had nothing to do with him... He [the businessman] refused to give us compensation despite the fact that it was asked for. He is not afraid of anyone as he has a good relationship with the authorities.

Some cases suggest that some recognition of IDP rights exists, such as where local civil society organizations (CSOs) have successfully challenged land acquisitions under the VFV Law procedures, using the argument that the land was IDP land. In others, village administrators have stood up for IDP land rights, or companies have been reported to have paid compensation or rent for IDP land they are using. In other instances, CSOs or local lawyers and paralegals have been able to work more informally towards dispute resolution, reaching some sort of compensation



agreement that was found mutually agreeable by both parties. Often, however, compensation granted is neither just nor fair – and in several cases it was only promised and never paid.

The different ways in which IDP land is being appropriated give the impression that clear mechanisms to address disputes are lacking and that enforcement is ad hoc, but that sensitivity to IDP land rights does exist in some places. Though multiple case studies pointed to IDPs attempting different forms of redress involving different administrative bodies, how they worked varied considerably from case to case. This could either mean a lack of legal clarity or a lack of political will, or a combination of both. **Notably, there is no clear statement in the law about protections for land and property rights of people displaced by conflict, although protections are implied in the Natural Disaster Management Law, which recognizes ‘armed conflict’ in its definition of natural disaster.**

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RESTRICTED ACCESS INCREASES IMPUNITY

Barriers to return have meant that some IDPs have effectively lost their ability to assert any land rights they may have. One finding of the field research was that military checkpoints and other arbitrary restrictions on the movement of people are commonplace, and these ultimately reduce accountability and oversight of actors appropriating land to which IDPs may have a valid claim. This also presented

practical obstacles for the research team in its efforts to investigate claims of land appropriation. Many IDP informants have explained how they were interrogated at checkpoints and were often unable to pass. Even if entry was granted, IDPs have reported in interviews that they have faced intimidation and have feared for their own safety, for instance in relation to landmines, while there were also accusations of grave human rights abuses. As one interviewee explained:

I was scared of being shot even though I wished to go there [home]... I feel threatened and insecure... Even if there is peace, we will not be sure if the landmines have been cleared or not.

In another interview, an IDP reported being denied access to their land by the Tatmadaw:

Almost all of the IDPs ... are not able to go back to their home. Many have tried to go back and check on their lands but were stopped and investigated by the military.

Research indicated that IDPs in non Government controlled areas, areas controlled by the KIO, and in Government controlled areas reported harm or fear caused by a combination of artillery, gunfire and landmines. These factors effectively create barriers to IDPs being able to access their land. These restrictions make it difficult for IDPs to monitor what is happening to their land or to be consulted in village-level governance structures or as part of land surveying carried out in relation to land acquisitions. **Consequently, many IDPs either do not know what is happening to their land or, if they do know, they struggle to access their villages and land of origin to assert their land rights. Both factors make it**





easier for external actors to appropriate IDP land without any accountability to the IDPs themselves.

LAWS ARE USED TO DISPOSSESS IDPS OF THEIR LAND UNFAIRLY

The VFV Law provides for the transfer of land to ‘Myanmar citizen investors’ and to ‘rural farmers and families who wish to carry out manageable agricultural projects’. It is reported to have been used by external actors to acquire IDP land for economic exploitation. This was found to have occurred across several townships, particularly Waingmaw and Momauk. In some instances, it may simply have been opportunistic action on the part of non-displaced communities and in other cases it was on a larger scale by bigger actors. There are two main issues at stake here. Firstly, when other actors succeed in formally acquiring IDP land, it makes the IDPs’ eventual return even more challenging, owing to the presence of secondary occupants on their land who, with a legal permit or farmland certificate, may have lived on or invested in the land for a significant period of time. Secondly, the way the VFV Law is used by others to acquire IDP land suggests flaws in the implementation of procedures under the law, which should be revised.

In the VFV Law, there are clear procedures that must be followed to ensure that land is actually available before it is allocated to farmers or businesses. Township officials must verify ‘whether the lands are in fact vacant, fallow and virgin lands’. Additionally, the Central Committee for the Management of Vacant, Fallow and Virgin Land has a positive obligation to ‘negotiate with the said peasants and take action to ensure that they are not unfairly or unjustly dealt with’, should there be sufficient evidence



to prove that the land was not vacant. While not explicit, it can be assumed that it is 'unfair' to acquire the rights to the land of farmers who have fled conflict, who are not present and who cannot give their permission.

The land claim process outlined in the VFV Law demonstrates how easily the law can be used to dispossess IDPs of their land of origin. After submitting an application for the right to work or utilize 'vacant, fallow and virgin land', the relevant township official is obligated to notify the public by displaying a notice in the relevant government department office (Form 5). Thereafter, any individual has the right to raise an objection if they submit the necessary paperwork, together with evidence proving that the land in question is not in fact vacant. **However, objections to a VFV application can only be made**

within 30 days from the date of notification,³¹ which is a practical impossibility for most people who have been displaced.

This process is highly problematic for IDPs in Kachin. It is unlikely that IDPs would be aware of any Form 5 posted, because it would be displayed in an area from which they have been displaced and are generally unable to visit (due to restrictions and costs). Even if they are able to visit periodically, the notice is only displayed for a period of 30 days. On the small chance that IDPs see or become aware of the notice, they will then have to be able to read Myanmar language and also understand the process for submitting an objection, which is often not the case for many IDPs in Kachin State. The objection process requires significant legal understanding and resources to pursue, which are likely to be out of reach for many IDPs.

There are examples where IDPs have been able to raise objections, but this was only with the help of local CSOs, lawyers or paralegals who become involved. In these cases, such intermediaries found out and informed IDPs of the Form 5 and were then able to assist with the process, and even stop the acquisition and development of IDP land.

In addition to the Form 5 application being displayed, the township DALMS office is required to inspect the land to determine whether it is indeed VFV land, according to certain criteria.³² In theory, inspections should provide some protection for IDPs, as surveyors from the Land Department ought to be able to identify if the land was previously used or occupied by IDPs by consulting local people and especially the village administrator (who is responsible for keeping an overview of village land use), or by the existence of housing or orchards on the land. In practice, if physical inspections occur (which may not always be the case, with DALMS officers relying on often out-of-date maps rather than venturing into potentially unsafe areas), **it seems that surveyors may not have been told about, or may have ignored, evidence of former land use. IDPs have reported that in some cases inspections have been conducted for the purpose of measuring land but not assessing whether it is subject to competing claims, including those of IDPs displaced by conflict.**

There are comparable procedures for surveying land registrations under the 2012 Farmland Law, and also examples reported of IDPs' farmland being registered by others in their absence. Procedures of public notification of farmland applications may not always be followed at village level, so opportunities for objection may be effectively removed. In research by development NGO GRET, which considered village-level notifications under the Farmland Law in the Dry Zone and Delta regions, it was found that only 42.5 percent of respondents reported that a public list of applications for farmland certificates was actually published at the village level.³³ Nonetheless, assuming that the correct process was actually followed in Kachin State, the challenges are clear for IDPs in being able to monitor announcements in the village from which they have been displaced.

FEARS THAT UNUSED OR UNDOCUMENTED LAND WILL BE LOST

IDPs interviewed are concerned that the longer they are displaced, the more likely it is that their land will be unfairly reclassified as vacant or fallow, resulting in them losing their rights. These concerns are rooted in a number of factors.

- **Farmland Law is unclear on customary land:** Local land tenure arrangements for much IDP land were customary, with no legal documentation. Farmland certificates are issued under the 2012 Farmland Law, which is central to formalizing land rights over existing paddy and agricultural land. A common criticism of this law is that it does not recognize ethnic modalities of land use³⁴ and does not explicitly recognize customary land management and agricultural practices, which were common in areas where much IDP land is located. Specifically, many IDPs have moved from areas in which the traditional practice of shifting cultivation has long been in use. Although this form of land use is acknowledged in article 3a of the Farmland Law, there is no legal means or instruction allowing for the registration or recognition of rights to this kind of land, even though it is recognized in the 2016 NLUP.



- **New laws since 2011 displacements:** Given that this law was enacted in 2012, most farmers would not have had the chance to register their land prior to the main IDP displacements in Kachin, which occurred in 2011.
- **Perceptions of status of unused and untaxed land:** Even on farmland recognized by the government prior to 2012, rights may seem to be ‘lost’ because the land is no longer being used and the infrastructure on it is decaying. According to IDPs’ reports, this fear is compounded by the fact that land use tax receipts are reportedly no longer being issued, on the grounds that IDPs are no longer using the land. Tax receipts have been one of the key ways to establish land use rights for farmers, particularly prior to the introduction of the 2012 VFV and Farmland laws. In losing these receipts, IDPs surveyed feel that they are losing one of the pieces of evidence with which they can prove their land use rights. One interviewee reported:

Our lands were confiscated by the military, [but] we did not have any legal registration to show ownership of our land, like a Form 7³⁵. We do not have any legal documents to prove ownership even though we were working on this land for many years, since [the time of] our ancestors. We just did not know that we should have the documen

In spite of these fears, **it does not follow that IDPs have no legal rights to the land they have left behind. Under the common law system in Myanmar, people’s claims to land rights can be backed up in court in a variety of ways**, including with tax receipts or testimony from neighbours or village administrators.

Although the VFV and Farmland laws were enacted in 2012, after the displacement of most IDPs, they do recognize that under certain circumstances normal rules do not apply. The concern that farmers must ‘use it or lose it’ is reinforced by the Farmland Law, since theoretically rights to farmland that is unused, or left ‘fallow’, can be revoked and the land rights reallocated. In practice, the research has shown that the inability of IDPs to farm their land of origin has indeed offered another avenue for third parties to register this land in recent years. Article 12(i) of the law states, however, that ‘farmland shall not be fallow without a sound reason’. The presence of armed conflict and insecurity preventing an IDP from returning to farm their land should qualify as a ‘sound reason’ to become a case of exception. Similarly, the VFV Law includes provisions to protect land rights of whoever has acquired land under the law but has failed to develop it within a stipulated four-year period, if there are exceptional circumstances, ‘for reasons such as delays caused by natural hazards or lack of security due to other causes’.³⁶ While there is no explicit reference to displacement as a result of conflict, the category of ‘other’ would logically include conflict-related displacement.



THE IMPACT OF LOSS OF LAND ON WOMEN

For women, access to land is critical in facilitating economic empowerment, which in turn increases participation in household decision making and expands their scope of choices. It helps to mitigate vulnerability when dealing with economic loss and crisis, which again impact women disproportionately because often their economic opportunities are comparatively weaker. Land is a substantial means of income for all people, and particularly women in the case of widowhood or divorce. Regressive attitudes towards land ownership or titling often mean that women do not share the same ownership over land or property as men, exacerbating existing vulnerabilities created by a deteriorating humanitarian context.³⁷ One interviewee detailed her challenges after a former village leader helped somebody else to register her land in their own name:

The former village leader was involved with him to register the land. I am facing many challenges to solve this because it was committed by people with power. The administrator ... did this because he thinks people with power can do whatever they want.

People who know about the law can violate and abuse it. The man who took my land is a civil servant, educated and rich. I am not educated nor rich. I am a widow. So they oppressed me. I do not understand the law. I do not have anyone like relatives who I can count on or support me. That is why they are oppressing me.

Research by NGO network Namati³⁸ found that 80 percent of farmland registrations were for men only, 16 percent for women and 4 percent joint titles. The same research found that 22 percent of women paralegals were involved in joint registration cases compared with only 1 percent of men paralegals, suggesting that women paralegals are more likely to support women's land interests. The ability of women IDPs to achieve land tenure security could be strengthened by substantially increasing the percentage of women interlocutors in land-related institutions. **Interventions to support IDPs to claim their land of origin rights should prioritize support for women and proactively address gender inequities.**

Women IDPs tend to be the main ones handling concerns relating to land because they are less likely to travel for work outside IDP camps. Most institutions tasked with land titling or dispute resolution, on the other hand, are dominated by men. **During data collection for this report, all relevant government staff, village heads and community leaders were men.** Research by Namati indicates that of the 330 Township Administrators nationwide – who are critical interlocutors in land disputes – there is not a single woman administrator. Often this means that women's interests are not fully represented and that outcomes are generally less favourable for women.

IDPS LACK ACCESS TO INFORMATION AND JUSTICE MECHANISMS

IDPs say they have a distinct lack of access to land-related information and justice mechanisms. This is partly because of their isolation in camps, and partly because the majority of displacement in Kachin occurred in 2011, while the VFV and Farmland laws were enacted in 2012. In camps, IDPs reported that they have limited exposure to the details of the land laws and it is difficult to access relevant legal information and engage local authorities. When disputes or complaints arise, **IDPs indicated that they often do not know who to turn to, they cannot access the right people or do not have the resources to assert their land rights.**

IDP land rights are well covered in international standards and principles

United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons (Pinheiro Principles)

The Pinheiro Principles³⁹ outline the rights of refugees and displaced persons to recover housing, land and/or property (HLP) that they owned or held other rights over at the time of their displacement. These principles stipulate that displacement needs to be coupled with concrete forms of remedy and redress, and that restitution is central for displaced people to be able to claim their fundamental rights. They highlight that the loss of housing and property is an obstacle to voluntary return and repatriation.

Crucially, the principles recognize the right to both restoration of and compensation for any HLP that IDPs are unlawfully deprived of.⁴⁰ They also highlight an obligation on the part of the state to prioritize the right to restitution as a remedy for displacement and recognize restitution as a distinct right in and of itself.⁴¹ The principles recognize the right to freedom of movement and the right to choose one's residence, and firmly prohibit arbitrary displacement.⁴² They provide a framework of assurance whereby people who are displaced can maintain their HLP rights.

The Guiding Principles on Internal Displacement

The Guiding Principles on Internal Displacement reiterate principles of humanitarian and human rights law that protect the rights of IDPs. Notably, under these principles states have a positive obligation to protect against the displacement of minorities and others who have a 'special dependency on and attachment to their lands'. Further to this, the principles state that the 'property and possessions left behind by internally displaced persons should be protected against destruction and arbitrary and illegal appropriation, occupation or use'.⁴³ The principles also caution against forcible return to or resettlement in any place where IDPs' lives, safety, liberty or health would be at risk.

Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law

The Basic Principles recognize the right to restitution, including vis-à-vis residence and property. They clearly stipulate that 'restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment, and return of property'.⁴⁴

A photograph of a concrete wall with the word 'Kachin' written in red, distressed, hand-painted letters. The paint is thick and uneven, with some areas appearing more saturated than others. The background is a light grey, textured concrete surface with some faint cracks.

RECOMMENDATIONS

To the Government of Myanmar

In the short term:

- The Government of Myanmar should clarify the status of IDPs' rights to their land of origin, in accordance with existing laws, guided by the NLUP and relevant international standards. This could be achieved with an instruction to all relevant officials, including township, village tract and village administrators. It should reduce confusion and concerns among IDPs about what constitutes a valid land rights claim (e.g. tax receipts, testimony, etc.) for those who left their land prior to the enactment of the 2012 land laws.
- Exceptions to rules on leaving land fallow need to be clarified to reassure IDPs that their land restitution rights are not extinguished during their period of displacement in light of their exceptional circumstances, which qualify as a 'natural disaster' under Myanmar law.
- In the case of commercial land acquisitions, the Government of Myanmar should introduce a temporary pause on granting new concessions in Kachin to businesses to prevent new acquisitions of IDP land, while any legal confusion with regard to the treatment of IDP land rights is clarified with the Land Department, township officials and village administrators, as well as Union-level bodies – for instance, in relation to VFV land allocations. This would include not only VFV land permits but also the issuing of Environmental Certificates of Compliance (ECCs) by the Ministry of Natural Resources

and Environmental Conservation (MONREC) and investment permits by the Department of Investment and Company Administration (DICA). In this respect, the commitment of the Kachin State Chief Minister to establish a 'land scrutiny commission in order to establish the amount of redistributed land and how much of it belongs to IDPs'⁴⁵ should be implemented as soon as possible.

- The Government of Myanmar should enact legislation on restitution that introduces clear mechanisms of redress by relevant bodies to effectively register and process claims of unfair or unlawful acquisition of IDP land by third parties, and provide displaced persons (and refugees) with effective remedies.
- Land acquisition and registration procedures under the VFV Law and the Farmland Law in Kachin State must be urgently reviewed, and revised if needed, to ensure that the exceptional circumstances of IDPs are recognized and to take account of their safety concerns and access restrictions, which prevent them from having a say in the use and transfer of their land. This includes amendments to the 30-day notice period for objections, which is a practical impossibility for most IDPs to adhere to. Government bodies tasked with inspecting land should introduce guidelines to fully and accurately scrutinize its vacancy or otherwise in a way that is sensitive to the conflict context of Kachin.
- Armed forces should, where possible, lift access restrictions, both formal and arbitrary, to IDPs' land of origin, and guarantee safe passage for IDPs wishing to access their land of origin.

In the medium to long term:

- The new national land law, as stipulated by the NLUP, should align with the standards set out in the UN Guiding Principles on Internal Displacement, the Pinheiro Principles and other international standards relating to IDPs. Other national laws should also be aligned with these principles, in particular the Natural Disaster Management Law, the Farmland Law and the VFV Law.
- Any laws,⁴⁶ policies or eventual agreements emerging from the national political dialogue or other peace agreements should ensure that IDPs can return voluntarily to their land of origin or be resettled elsewhere in a place of their choice, regardless of length of displacement.
- Any post-conflict land restitution mechanisms or processes agreed in the future should ensure that IDPs, and others affected by conflict, retain all their previous rights and/or entitlements, guarantee the right to restitution,⁴⁷ acknowledge and respect customary practices, be conflict-sensitive and be inclusive of women. Restitution also needs to ensure robust approaches to ensuring justice in the case of secondary occupants who have acquired IDP land since 2011.
- The government should ensure that IDPs are able to participate in key peace and development processes, particularly for women and youth.
- The National Natural Disaster Management Committee should, in accordance with its existing mandate, support and facilitate rehabilitation and reconstruction activities and ensure that IDPs can return to their land and have health, education and livelihood opportunities.

To the Kachin Independence Organisation/Army

- Ensure that all access restrictions to IDPs' land of origin are lifted where possible, and that safe passage of access is granted to IDPs wishing to return to their land of origin.
- Finalize a land policy that provides for explicit protection for IDPs' right to housing, land and property rights.

To international donors and organizations

- Support actors providing legal services and awareness on land issues to individuals and communities affected by the loss of land due to conflict. This should include both direct legal aid and other legal awareness activities and ensuring that laws are available in local languages.
- Special effort should be paid to encouraging women's empowerment, including by directly supporting women paralegals to represent women's interests in land dispute cases.
- Stand ready to support all stakeholders in Kachin to develop and implement a robust land restitution process as part of a comprehensive peace agreement.

To domestic and multinational companies investing in Kachin

- In addition to comprehensive legal and environmental compliance and due diligence, which are a must anywhere in Myanmar, companies should adopt a conflict-sensitive approach to new and existing investments that includes carrying out and acting upon an assessment of any potential loss of land and property rights of IDPs in Kachin.
- In the event that grievances are raised by IDPs in relation to investments, ensure that these are processed sensitively and in accordance with international principles on business and human rights.

To all stakeholders

- Key barriers to return, including the presence of armed actors, landmines and ongoing conflict, must be comprehensively addressed by all stakeholders, necessitating a cessation of armed conflict and a negotiated peace settlement.
- Authorities, NGOs and development partners should support IDPs in understanding their rights in order to allow them to make informed decisions, and document their land rights claims, either to seek immediate remedy where land has been acquired, or to build cases in anticipation of a fully fledged land restitution process in the future.

NOTES

¹ The term internally displaced person (IDP) is widely used to refer to people displaced by conflict, but members of the DPP consortium share the view that the term is problematic, and feel that terminology used should reflect and respect the dignity and worth of people displaced by conflict. Since this discussion is ongoing, and since there is wide use of the abbreviation IDP, this paper will continue to use it for purposes of brevity, while noting that more discussion needs to take place to address this important issue in future publications.

² KMSS and UNDP (2015). Multi-Sector Early Recovery Assessment of Kachin and Northern Shan State, p.25. http://fscluster.org/sites/default/files/documents/assessment_early_recovery_kachin-n.shan_ern_dec2015.pdf

³ Joint Strategy Team (JST) (2015). Assessment on Internally Displaced Persons' Needs and Perspectives, p.25.

⁴ According to the DPP's baseline report, 95 percent of respondents want to return to their land of origin. Durable Peace Programme (DPP) (2016). Baseline Report, p.27. https://myanmar.oxfam.org/sites/myanmar.oxfam.org/files/file_attachments/Durable%20Peace%20Programme%20Baseline%20Report.pdf

⁵ Relief Action Network for IDP and Refugee (RANIR) (2015). Displaced Villages Profiling; and K. Woods (2016). Kachin IDP Land Rights: Armed Conflict, Displacement and Return.

⁶ Htun Khaing (2018). Kachin IDPs fear land grabs in the villages they once called home. Frontier Myanmar. <https://frontiermyanmar.net/en/kachin-idps-fear-land-grabs-in-the-villages-they-once-called-home>; Nyein Nyein (2017). KIA Objects to Use of Vacant IDP Land. The Irrawaddy. <https://www.irrawaddy.com/news/burma/kia-objects-use-vacant-idp-lands.html>; Tun Lin Aung (2017). KBC tries to arrange return of IDPs to 27 Villages in Kachin State. Eleven Myanmar. <http://www.elevenmyanmar.com/local/12327>

⁷ This briefing paper is based on original research carried out by Naushawng Development Institute, Nyein Foundation and Oxfam, involving extensive discussions with IDPs, in which concern over losing their land of origin was commonly raised. IDPs and the research team then worked together to design the research approach and to collect and analyse the data. This began with extensive interviews and a scoping visit to develop preliminary findings. With loss of land established as a major issue, the research process expanded to approximately 20 case studies in the cities of Myitkyina (Kachin's capital) and Bhamo and the townships of Mogaung, Waingmaw, Momauk and Puta-0. These were then narrowed down to 10 broadly representative case studies where the research team was able to gain adequate access to reasonably assess the legitimacy of claims. This involved multiple field visits, obtaining documentation and interviews with IDPs, actors involved in appropriating land and other related actors. The key findings outlined in this paper are based on extensive evidence from these 10 in-depth case studies, but are also consistent with the preliminary findings from the 20 case studies. Results are also consistent and complementary with other published perception surveys (see RANIR (2015). Displaced Villages Profiling; and K. Woods (2016). Kachin IDP Land Rights: Armed Conflict, Displacement and Return).

⁸ Brookings Institution (2010). IASC Framework on Durable Solutions for Internally Displaced Persons. https://www.brookings.edu/wp-content/uploads/2016/06/04_durable_solutions.pdf

⁹ The Joint Strategy Team (JST) is a group of committed, professional local NGOs providing comprehensive, strategic and principled humanitarian assistance to people affected by armed conflict in Kachin and Northern Shan States. The JST has a long history of strategizing and delivering principled humanitarian assistance in complex contexts, and it is highly knowledgeable and exposed to the international humanitarian system. The JST's most significant achievement is its humanitarian work to protect IDPs' rights and satisfy their basic needs over the past five years. It has been able to reach over 85 percent of IDPs in Kachin in both government- and KIO/A-controlled areas (about 102,000 IDPs in total) and has regular access in both areas.

¹⁰ Joint Strategy Team joint positioning paper on land restitution (undated).

¹¹ DPP, Endline Report (pending publication).

¹² Ibid.

¹³ DPP (2016). Baseline Report, p.27. Most participants said that their reason for return was 'better economic opportunities' or 'hope for the future'.

¹⁴ Located 42km north of Myitkyina, the Kachin State capital, this is the confluence of the Maikha and Malikha rivers to form the Ayeyewady River.

¹⁵ For a more in-depth analysis, see M. Sadan (2013). *Being and Becoming Kachin: Histories Beyond the State in the Borderworlds of Burma*; Transnational Institute (TNI) (2015). *The Meaning of Land in Myanmar*. https://www.tni.org/files/publication-downloads/tni_primer-burma-digitaal.pdf

¹⁶ Moe Myint (2017). *Ex-Ministers, Armed Groups Operate Farms in Kachin's Conflict Areas*. The Irrawaddy. <https://www.irrawaddy.com/features/ex-ministers-armed-groups-operate-farms-kachins-conflict-areas.html>

¹⁷ Ibid.

¹⁸ For a comprehensive overview of land laws, see International Commission of Jurists (ICJ) (2017). *Special Economic Zones in Myanmar and the State Duty to Protect Human Rights*. <https://www.icj.org/wp-content/uploads/2017/02/Myanmar-SEZ-assessment-Publications-Reports-Thematic-reports-2017-ENG.pdf>. See also (TNI) (2017). *Re-Asserting Control: Voluntary Return, Restitution and the Right to Land for IDPs and Refugees in Myanmar*. <https://www.tni.org/en/publication/re-asserting-control-voluntary-return-restitution-and-the-right-to-land-for-idps-and>; and USAID. *Country Profile; Burma*. <https://land-links.org/country-profile/burma>

¹⁹ A possible exception to this is the 1894 Land Acquisition Act, which allows government to exercise its right of eminent domain to acquire any land (including IDP land) that is required for public purpose. However, no evidence was found of any use of this Act in relation to IDP land in Kachin.

²⁰ *Natural Disaster Management Law* (2013). http://www.themimu.info/sites/themimu.info/files/documents/Ref_Doc_Natural_Disaster_Management_Law_31Jul2013.pdf

²¹ <http://www.myanmar-law-library.org/law-library/laws-and-regulations/laws/myanmar-laws-1988-until-now/union-solidarity-and-development-party-laws-2012-2016/myanmar-laws-2013/pyidaungsu-hluttaw-law-no-32-2013-law-of-protection-of-the-farmer-rights-and.html>

²² faolex.fao.org/docs/pdf/mya152783.pdf

²³ Principle 64: 'For ethnic nationals who lost their land resources where they lived or worked due to civil war, land confiscation, natural disasters or other causes, that desire to resettle to their original lands, adequate land use rights and housing rights shall be systematically provided in accordance with international best practices and human rights standards.'

²⁴ Such justification might also include the use of land for 'shifting cultivation', which involves periods of cultivation followed by fallow periods. For further discussion, see section 3 of this paper.

²⁵ *Government Notification 15/2018* (Official notification from the Vice President's Office establishing the National Land Use Council). <http://mylaff.org/document/view/4158>

²⁶ K. Joliffe (2015). *Ethnic Armed Conflict and Territorial Administration in Myanmar*. <https://asiafoundation.org/resources/pdfs/ConflictTerritorialAdministrationfullreportENG.pdf>

²⁷ T. Kramer (2015). *Ethnic Conflict and Lands Rights in Myanmar*. http://themimu.info/sites/themimu.info/files/documents/Academic_article_Ethnic_Conflict_and_Land_Rights_Tom_Kramer_2015.pdf

²⁸ Nyein Nyein (2017). *KIA Objects to Use of Vacant IDP Lands*, op. cit.; *Eleven Myanmar* (2017). *KIO releases a warning against land-grabbing*. <http://www.elevenmyanmar.com/local/12603>

²⁹ *Government of Myanmar, Ministry of Information* (2017). *37 points signed as part of Pyidaungsu Accord*. <http://www.moi.gov.mm/moi:eng/?q=announcement/30/05/2017/id-10756>

³⁰ C. Pierce and Ye Yint Htun (2017). *Land committees: An opportunity for inclusion*. *Frontier Myanmar*. <https://frontiermyanmar.net/en/land-committees-an-opportunity-for-inclusion>

³¹ *The Republic of the Union of Myanmar* (2012). *Vacant, Fallow and Virgin Lands Management Rules*, p.3. http://www.burmalibrary.org/docs14/VFVM_Rules-en.pdf

³² Ibid., pp.3-4.

³³ Boutry, M., Allaverdian, C., Mellac, M., Huard, S., San Thein, Tin Myo Win, Khin Pyae Sone. (2017). Land tenure in rural lowland Myanmar: From historical perspectives to contemporary realities in the Dry zone and the Delta. Of lives of land Myanmar research series. Gret: Yangon. . https://themimu.info/sites/themimu.info/files/documents/Report_Land_Tenure_in_Rural_Lowerland_Myanmar_GRET_2017.pdf

³⁴ For instance, see Public International Law & Policy Group (PILPG) (2017). Analysis of Burma's Farmland Law. <http://www.mylaff.org/document/view/4177>

³⁵ A "Form 7" is a land use certificate or title for farm land, issued under the 2012 Farmland Law.

³⁶ 2012 VFV Law 16(b).

³⁷ Trócaire and Oxfam (2017). Life on Hold: Experiences of women displaced by conflict in Kachin State, Myanmar. <https://www.trocaire.org/sites/default/files/resources/policy/life-on-hold-trocaire-oxfam-2017.pdf>

³⁸ Namati (2016). Gendered Aspects of Land Rights in Myanmar: Evidence from Paralegal Casework. <https://namati.org/wp-content/uploads/2016/03/Namati-Gender-policy-brief-FINAL-1.pdf>

³⁹ The Final Report of the Special Rapporteur on Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons (E/CN.4/Sub.2/2005/17 and E/CN.4/Sub.2/2005/17/Add.1). For an overview of the Pinheiro Principles in relation to Myanmar, see Norwegian Refugee Council and Displacement Solutions (2016). An Introductory Guide to Understanding and Claiming Housing, Land and Property Restitution Rights in Myanmar, and Restitution in Myanmar.

⁴⁰ UN Economic and Social Council C (2005). 'Pinheiro Principles', p.6. Principle 2.1: 'All refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived, or to be compensated for any housing, land and/or property that is factually impossible to restore as determined by an independent, impartial tribunal.' <http://www.unhcr.org/protection/idps/50f94d849/principles-housing-property-restitution-refugees-displaced-persons-pinheiro.html>

⁴¹ Ibid., Principle 2.2: 'States shall demonstrably prioritize the right to restitution as the preferred remedy for displacement and as a key element of restorative justice. The right to restitution exists as a distinct right, and is prejudiced neither by the actual return nor non-return of refugees and displaced persons entitled to housing, land and property restitution.'

⁴² Ibid., p.8.. Principle 9.1: 'Everyone has the right to freedom of movement and the right to choose his or her residence. No one shall be arbitrarily or unlawfully forced to remain within a certain territory, area or region. Similarly, no one shall be arbitrarily or unlawfully forced to leave a certain territory, area or region.'

⁴³ <http://www.unhcr.org/protection/idps/43ce1cff2/guiding-principles-internal-displacement.html>

⁴⁴ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005), paragraph 19. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>

⁴⁵ Moe Myint (2017). Ex-Ministers, Armed Groups Operate Farms in Kachin's Conflict Areas. The Irrawaddy. <https://www.irrawaddy.com/features/ex-ministers-armed-groups-operate-farms-kachins-conflict-areas.html>

⁴⁶ Including, but not limited to a land restitution law.

⁴⁷ The JST interprets the right to restitution to be the 'right to recover their properties, housing and land, and to request compensation for those who lost family members, were injured or lost properties' (Joint Strategy Team joint positioning paper on land restitution (undated)).

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