



LAND GRABBING AS AN INTERNATIONALLY WRONGFUL ACT:

A LEGAL ROADMAP FOR ENDING LAND
GRABBING AND HOUSING, LAND AND
PROPERTY RIGHTS ABUSES, CRIMES
AND IMPUNITY IN MYANMAR

October 2019



DISPLACEMENT SOLUTIONS



MINISTRY OF FOREIGN AFFAIRS
PRINCIPALITY OF LIECHTENSTEIN

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EXECUTIVE SUMMARY

Although the general power of States to compulsorily acquire, expropriate or otherwise confiscate or 'grab' land, homes and properties is legislatively recognised in virtually all national legal systems, to be lawful these processes generally carry with them five fundamental pre-conditions. Namely, when housing, land or property rights are revoked or limited through these processes, this can only be carried out when the taking concerned is:

- 1) subject to law and due process;
- 2) subject to the general principles of international law;
- 3) in the interest of society and not for the benefit of another private party;
- 4) proportionate, reasonable and subject to a fair balance test between the cost and the aim sought; and
- 5) subject to the provision of just and satisfactory compensation.

In all countries, the act of compulsorily acquiring land is highly regulated and something which rights-respecting governments are often reluctant to invoke except in exceptional circumstances when all other viable alternatives have been pursued. In general terms, the housing, land and property rights of affected persons and communities are often at the centre of proposed projects involving land acquisition and project evaluation processes, and active efforts are often undertaken by the relevant state authorities to avoid acquisition and resultant resettlement if at all possible, and when no other option exists, to ensure the full protection of relevant human rights norms. As this paper reveals, such points of view - even with the recent adoption in May 2019 of a new *Land Acquisition, Resettlement and Rehabilitation Law* - are almost entirely absent from the both the legal framework and practice of those engaging in the massive land confiscation epoch through which Myanmar is now passing and which it has experienced for decades. In short, all of these five basic international rules governing land acquisition by the State are systematically violated in Myanmar.

Indeed, if anything, measures to ensure that land confiscation in Myanmar is not carried out in a manner contrary to all of the five pre-conditions outlined above are almost universally absent when land is sought by others than those owning it, working it or residing upon it. Within the country, in fact, every act of land confiscation, acquisition, grabbing and expropriation in Myanmar can be assessed against these five pre-conditions, and in the overwhelming majority of cases - including those that have taken place subsequent to the so-called political reform process underway since 2011, and following the 2015 of the National League for Democracy - are structurally inconsistent with the norms expected of a country that has ratified human rights treaties protecting basic HLP rights. This report finds that the vast majority of all acts of land grabbing (including those acts of confiscation carried out under the *Land Acquisition Act* (1894), recently replaced by a new, but certainly not dramatically improved, land acquisition law) violate basic international norms governing these matters, and many constitute internationally wrongful acts.

In particular, the following list outlines common components of these processes in Myanmar today:

- They are often contrary to national laws binding on the government of Myanmar
- They are often contrary to international laws binding on the government of Myanmar
- They are often contrary to general principles of international law
- They are often carried out for private gain, not in the public interest
- Confiscation is often carried out without any compensation whatsoever
- When compensation is provided it is often neither just nor satisfactory
- When provided, compensation is rarely paid prior to resettlement
- When provided, compensation is rarely paid at the market value of lost land
- There is little or no access to grievance mechanisms for affected persons
- There is little or no access to legal counsel for affected persons
- There is little or no access to an independent judicial body
- Resettlement plans are virtually never prepared
- Affected persons and communities lose income and livelihoods
- Return to and restitution of confiscated land is rare, inequitable and often arbitrary
- There is no national restitution law, claims process or commission, and thus no effective remedy for restoring HLP rights that were arbitrarily undermined.

Arguably, thus, the sheer scale of arbitrary land confiscations and subsequent dispossession in Myanmar is so widespread, so inadequately regulated and so contrary to basic legal protections, that an exceptionally strong case exists for wholesale legal and policy reforms governing housing, land and property rights. An additional case can be made that all of the criteria needed for the International Criminal Court to become involved in this issue in the country are fully in place. When comparing what the people of Myanmar *should* be entitled to in terms of HLP rights, and what in practice they actually are *forced to experience*, we see nothing less than gross and systematic violations of internationally recognised human rights and other legal norms that the State of Myanmar has voluntarily undertaken to comply with in good faith. These include crimes against humanity and war crimes.

This in-depth report begins with an examination of how land confiscation takes place in the country, the scale of the practice, the methods used, who actually benefits from these practices, and how the legal system of Myanmar actually promotes what are, *inter alia*, illegal acts under international law. The second section then examines general international and national rules governing the practices of land acquisition in the public interest and what criteria need to be in place for such acquisition to be considered legal under international law. Section 3 then looks into how human rights law, including case law and jurisprudence has approached the sensitive issues surrounding land acquisition and what is expected of countries engaged in these practices. The next section then looks specifically at the core topic of this report; namely does land grabbing, confiscation or whatever terms are used constitute an internationally wrongful act which in turn activates State responsibility and the procedures and mechanisms that can be invoked to hold violator States accountable?

The report then concludes with a legal roadmap of constructive, specific and actionable recommendations designed to build an entirely new vision of housing, land and property rights in the country which is fundamentally different from how these issues are treated today in contemporary Myanmar.

I. INTRODUCTION - ILLEGAL LAND GRABBING IN MYANMAR

1. Anyone familiar with what is - within the borders of Myanmar - often referred to in hushed tones as the highly 'sensitive' nature of land knows that very few nations have a more controversial history and present than this country when it comes to questions of displacement, land grabbing¹ and highly inequitable housing, land and property laws and policies.² While much was expected from the political reform process that commenced in 2011, followed by the victory of the National League for Democracy and Aung San Suu Kyi in the 2015 elections, land relations in Myanmar remain a source of immense and worsening conflict and concern, with few if any notable improvements in this regard when contrasted to the various military regimes in place for most of the post-independence period which commenced in 1948. According to one recent report, "the long-simmering land problem has become a burning land problem with the start of yet another new wave of land confiscations (...) The wave of land grabbing since 2010 is occurring on top of and in interaction with previous waves of land grabbing. Evidence suggests that the amount of land lost in these previous waves is significant and may even be larger than what has been lost under the current wave of land confiscations".³
2. The question of land remains one of the most complex, challenging and vexed topics in Myanmar. This is true in many respects, but particularly so with regard to land that was either confiscated or otherwise changed hands in less than equitable ways during recent decades or land that was left behind and subsequently acquired by third parties following the flight of refugees and internally displaced persons. The parameters of the land question are increasingly well understood and have been subject to extensive review and analysis in recent years, with a growing number of publications and reports outlining

¹ 'Land grabbing' is a widely used, but also often mis-understood term describing the transfer of land from one party to another. One of the better definitions is provided in the International Land Coalition's Tirana Declaration as: "Acquisitions or concessions that are: in violation of human rights, particularly the equal rights of women; (ii) not based on free, prior and informed consent of the affected land-users; (iii) not based on a thorough assessment, or are in disregard of social, economic and environmental impacts, including the way they are gendered; (iv) not based on transparent contracts that specify clear and binding commitments about activities, employment and benefits sharing, and; (v) not based on effective democratic planning, independent oversight and meaningful participation". See: <http://www.landcoalition.org/fr/node/1109>. As this report will show, the vast majority of land confiscation in Myanmar would fall under this definition of land grabbing. The terms land grabbing, land confiscation, land acquisition, ethnic cleansing, forced evictions and other related terms are used inter-changeably in this report.

² See, for instance, Transnational Institute, *The Meaning of Land: A Primer*, TNI, Nov 2015. This report outlines the real meaning of land and land rights to the people of Myanmar, where land is described in the following terms: Land is livelihood and life with dignity. Without land, there is enslavement, struggle, fragmentation, and mere survival devoid of dignity and self-determination; Land is also inheritance with remembrance; Land is family integrity and togetherness; Land means family continuation across generations. Land is knowledge passed from one generation to the next; Land is the link between people's past, present and future; it connects lives from the past with those in the present and to a foreseeable future; Land is individual identity; Land is ethnic identity; Land is community; Land is education and health; Land is safety and security; and The value of land cannot be measured; land that is taken away can never be properly compensated.

³ Id, p. 10.

land-related concerns.⁴ These practices have been widespread throughout the country since independence. For decades, using either the 1953 *Nationalisation of Land Act*, the 1894 *Land Acquisition Act*, the intentional and active non-recognition of customary land rights (far and above the most common form of land tenure in Myanmar) or outright violence or threats of violence, combined with a prevailing view by those holding political power that all land within Myanmar ultimately belongs to and is controlled by the State, combined to create conditions that led to very large-scale land confiscation throughout the country. Similarly, the period of military rule from 1988-2011 during which time the country was governed successively by the State Law and Order Restoration Council (SLORC) and the State Peace and Development Council (SPDC), is viewed as an historical period when generally arbitrary land grabbing, land confiscation/acquisition and subsequent displacement from these lands was particularly extensive. While a portion of this displacement and confiscation may have been consistent with the domestic laws in force at the time, and carried out in a manner not that dissimilar to land alienation measures undertaken by governments elsewhere, the vast majority of these actions were arguably contrary to prevailing international norms (as well as some key national laws) which are quite clear in terms of what is and what is not allowed in this regard. Surprisingly, although many people would have expected these practices to end with the political reform process that commenced in 2011, all evidence points to the sad reality that in fact they have worsened.

3. Land grabbing and resultant involuntary displacement in Myanmar, both prior to and during the reform process, has been carried out under a variety of contexts including State-sponsored agriculture projects, the establishment of agro-industrial plantations by private entities, large industrial development projects, special economic zones, military incursions and base construction, large public infrastructure projects, urban expansion, hotel zones, and land speculation by individuals and as a consequence of conflict. Most acts of land confiscation follow a similar process involving the frequently arbitrary nature of land acquisition with little or no effort to find alternatives to reduce or preclude the need for subsequent displacement; a lack of consultation or free and informed consent with affected

⁴ See, for instance, Displacement Solutions, *The Urgent Need to Prepare for Climate Displacement in Myanmar: Establishing a Myanmar National Climate Land Bank (MNCLB)* (May 2018); Displacement Solutions and Norwegian Refugee Council, *Housing, Land and Property Rights and Peace Agreements - Guidance for the Myanmar Peace Process* (February 2018); Displacement Solutions and Norwegian Refugee Council, *Restitution in Myanmar - Building Lasting Peace, National Reconciliation and Economic Prosperity Through a Comprehensive Housing, Land and Property Restitution Program* (March 2017); Displacement Solutions and Norwegian Refugee Council, *A Framework for Resolving Displacement in Myanmar - The United Nations 'Pinheiro Principles' on Housing and Property Restitution for Refugees and Displaced Persons* (March 2017); Displacement Solutions and Norwegian Refugee Council, *An Introductory Guide to Understanding and Claiming Housing, Land and Property Restitution Rights in Myanmar - Questions and Answers* (March 2017); Scott Leckie, *Land Acquisition Law and Practice in Myanmar* (August 2015); Displacement Solutions and Norwegian People's Aid, *Land Rights and Mine Action in Myanmar - Do No Harm: Proposals for a Set of Eight Core Principles and a 14-Step Sequencing Process for Land Rights-Sensitive Mine Survey and Clearance in Myanmar* (February 2014); Displacement Solutions, *Bridging the HLP Gap. The Need to Effectively Address Housing, Land and Property Rights During Peace Negotiations and in the Context of Refugee/IDP Return*, June 2013; Displacement Solutions, *Myanmar at the HLP Crossroads*, 2012, available at: <http://displacementsolutions.org/files/documents/MyanmarReport.pdf>; Displacement Solutions, *Housing, Land and Property Rights in Burma: the Current Legal Framework*, 2009; Food Security Working Group, *Legal Review of Recently Enacted Farmland Law and Vacant, Fallow and Virgin Lands Management Law*, 2012; Karen Human Rights Group (KHRG), *Losing Ground: Land conflicts and collective action in eastern Myanmar*, 2013, available at: <http://www.khrg.org/khrg2013/khrg1301.html>; Transnational Institute, *The Challenge of Democratic and Inclusive Land Policy Making in Myanmar. A Response to the Draft National Land Use Policy*, 2015; Transnational Institute (TNI) & Burma Centrum Nederland (2013) *Access Denied: Land Rights and Ethnic Conflict in Burma-Burma Policy Briefing Nr 11*, May 2013. Available at: <http://www.tni.org/briefing/access-denied> (last accessed 20 June; UNHCR Policy Development and Evaluation Service, 'Forced Migration and the Myanmar Peace Process', prepared by Ashley South and Kim Joliffe, Research Paper 274, 2015, and many others.

communities; disputed, inadequate or the absence of just and satisfactory compensation; the absence of any policy on resettlement following land acquisition and the general lack of attention to this issue; and insufficient opportunities for judicial or other forms of redress to prevent or resolve displacement due to land acquisition, and effectively a complete disavowal of the housing, land and property rights of those affected.⁵ These processes have not ceased since the onset of the political reforms, despite recent statements by the new National League for Democracy (NLD)-led government aiming to curtail these practices. One often cited report outlines the tenure types of confiscated land, pointing out that 57% of land confiscated was customary land, 30% rights based on occupation-usage and 8% where land rights were purchased. According to this report, there was no consultation prior to confiscation in the vast majority of cases, and the same applies to receipt of compensation. This study indicates that land was confiscated by the following entities: military 47.7%, government department 18.8%, company 13.9%, local authority 5.8%, foreign company 4.4%, military with government department and company 1.3%, military with government department 1.3%, government department with local authority 1%, individual 1%, ethnic armed group 0.9%, government department with company 0.4%, military with company 0.4%, unknown 3.1%.⁶ While precise national figures as to the precise scale of land confiscation carried out in the country during past decades are difficult to assess, and because systematic nationwide inventory maps of these confiscations do not exist comprehensively revealing the locations of such land acquisitions, it is certain that the total number of acres acquired is clearly not measured in thousands, but rather in millions of acres, and almost certainly affecting millions of people.⁷

⁵ According to an in-depth analysis on Land Concession, Acquisition, and Confiscation: “In Myanmar, land-related discussions frequently circle back to (a) land confiscated without due process or compensation (and probably using force or political authority); (b) land acquired through a largely faulty process; and (c) limited-period permits granted for use of land for development and production/extraction. Since the early 1990s, development planners have conceived ambitious national projects to achieve economic benefits from natural resources. However, fertile tracts targeted by investors are usually occupied or used by rural communities. This resulted in, and continues to cause land conflicts that negatively affect the livelihoods of many households and social and political stability. The government’s policies and regulations on classifying land as “fallow” and acquiring land from current holders are rather vague. Antiquated laws such as the 1894 Land Acquisition Act give the regime the right to take over any land, making local people extremely vulnerable to forced displacement without any remedy. Large-scale concessions for investors were established by the General Ne Win government in the 1960s and refined by the State Law and Order Restoration Council (SLORC) regime from 1991. Land acquisition was facilitated by the police and armed forces and uncertain laws and administrative procedures were used to take over land for “public purposes.” Contradictory regulations and instructions, manipulation, coercion, and confusion were reportedly used to acquire land from farming households and allocate it to favored individuals or groups. Civil society groups have expressed concern that despite awarding numerous concessions since 2001, few long-term jobs have been given to local residents as compensation. Reports published by the Ministry of Agriculture and Irrigation (MoAI)/SLRD (now called DALMS – Department of Agricultural Land Management and Statistics) and MoECAP on land use and State-land leases suggest that about 20 percent of all of Myanmar’s land has been awarded to foreign or joint venture investors for 30 to 70 years. MoAI’s 2014 report (Myanmar Agriculture in Brief) indicated that only close to 20 percent of the five million hectares approved for land concessions had been developed. Senior government officials conceded that State land leases/concessions have been negotiated and awarded in haphazard and inconsistent ways with negligible quantification and qualification of their impacts. The government’s experiment with land concessions has yielded little positive economic or social results. Investors are reluctant to invest anything more than nominal sums on land. Consequently, few concessions have generated expected revenue streams for the government. (Source: Shivkumar Srinivas and U Saw Hlang, Myanmar: Land Tenure Issues and the Impact on Rural Development, FAO (May 2015)). See also: Myanmar Centre for Responsible Business, Land – Briefing Paper (March 2015), Yangon, (Institute for Human Rights and Business, Myanmar Centre for Responsible Business and the Danish Institute for Human Rights).

⁶ Land in Our Hands Network, *Destroying People’s Lives: The Impact of Land Grabbing on Communities in Myanmar*, December 2015, 29.

⁷ “By 2013, 5.3 million acres of land has been leased for agriculture, mostly to local crony companies with close connections to government and military officials” (Source: Global Witness, Press Release, 11 May 2016). Another article cites government figures: “According to findings of the Farmers Affairs Committee in the Upper House of Parliament, as many as 2 million acres of land across Burma could be considered “confiscated.” (Source: <http://www.irrawaddy.com/burma/return-of->

4. By any measure the scale of just how structurally skewed land relations are in Myanmar is simply staggering. One might explain the situation, both in legal and *de facto* terms, to someone who has yet to explore or experience this remarkable state of affairs in the following simplified way:

In contemporary Myanmar, under the 2008 Constitution all land ultimately belongs to the State. Because the 'State' in Myanmar is in practice under the prevailing control of the military and its close associates and supporters, despite a democratic veneer and so-called reforms which were scrupulously planned and then activated by the same military in 2011, housing, land and property rights under law and practice in Myanmar almost universally default in favour of the military and their associates, often referred to as 'cronies'.

Indeed, it appears clear that it is no coincidence that the first three pieces of legislation put forward once the 'post-military' reforms commenced were two land laws and a foreign investment law. These laws, combined with dozens of additional laws already in place, many of which are legacies from the colonial, pre-independence era, amount to this day to a legislative framework which not only falls far short of what is expected of modern states adhering to international human rights and other laws governing housing, land and property matters, but instead of providing a basis for 'the continuous improvement of living conditions' as recognised in the *International Covenant on Economic, Social and Cultural Rights* which was ratified by Myanmar in 2017, these laws entrench both the power of the military and its associates and make it easier than ever for them to acquire land belonging to ordinary people.⁸ As a result, millions upon millions of people in Myanmar have suffered visible housing, land and property (HLP) losses because of the systematic undermining of their HLP rights.

5. In almost every respect, housing, land and property rights for the vast majority of the country's 54 million population are under a state of perpetual threat and insecurity. With the exception of the *Tatmadaw*, Myanmar's still much feared military, and often crony business and wealthy urban elites with direct connections to the military, very few of Myanmar's citizens (and certainly 'non-citizens' such as the *Rohingya*) possess what international human rights laws state unequivocally say they should possess in terms of legal protections of their HLP rights. Whether the majority of citizens who are farmers, those living and working on customary land, ethnic groups engaged or actively not engaged in the increasingly moribund peace process, urban tenants, slum dwellers and virtually all other tenure groups, neither under law nor policy or practice, maintain HLP rights to the degree to which human rights law says they should. The same can be said of the protections, albeit limited, accorded to Myanmar citizens under the 2008 Constitution.
6. Underlying all of this is the simple fact that land for the overwhelming majority of people in Myanmar remains a source of countless unresolved disputes, insecure tenure and the

[seized-land-a-top-nld-priority-deputy-agriculture-minister.html](#)). One report of the Food Security Working Group report claims that over 6 million acres of land from farmers were confiscated with 4 million acres seized by Tatmadaw. (Source: Mon News, 9 April 2016, 'Tatmadaw and Gov't Return Over 16,000 Acres of Seized Land. Source: <http://monnews.org/2016/04/09/tatmadaw-govt-return-16000-acres-seized-land/>, viewed on 5 November 2016. Added to this, figures point to the existence of hundreds of thousands of IDPs within Myanmar, and at least 215,000 refugees from Myanmar living within camps along the Thai border.

⁸ <https://www.ohchr.org/EN/countries/AsiaRegion/Pages/MMIndex.aspx>.

basis of ongoing fear that people may lose their land in a moment's notice should the military and those business and investment interests linked to them wish to procure it, notwithstanding the rationale, legal or otherwise, to do so. Such a perspective can be witnessed in literally every corner of the country, whether in Rakhine State where nearly a million *Rohingya* people were ethnically cleansed from their homes in 2017⁹, southeastern Myanmar where ethnic groups continue to struggle to secure their HLP rights in the context of the peace process¹⁰, or northern Myanmar in Shan State and Kachin where Chinese and other investors continue to drive processes resulting in mass resource extraction to the huge detriment of local residents whose land is taken with little regard to the HLP rights they are meant to possess in law, but which practice shows are all too often worthless as real tools for land justice.¹¹

7. Those responsible for building the legislative framework that so effortlessly enables the military, private persons, private companies, foreign investors¹² and an array of government agencies¹³ to procure land are clearly identifiable. They are collectively and individually

⁹ See the report of the United Nations Independent International Fact-Finding Mission on Myanmar, UN Doc. A/HRC/39/CRP.2 (Sept 2018).

¹⁰ See, for instance: Displacement Solutions and NRC, *A Housing, Land and Property (HLP) Rights-based Analysis of Customary Land Dispute Resolution in Kayin State, Eastern Bago Region and Shan State*, 2019.

¹¹ See, for instance: Displacement Solutions and NRC, *Housing, Land and Property Rights and Peace Agreements: Guidance for the Myanmar Peace Process*, 2018.

¹² As foreign investors begin to gain increasing access to the Myanmar market, additional concerns have arisen that further, and perhaps even larger, land acquisition processes will be undertaken in the coming years. According to one analysis, for instance: "Between 2010 and 2030, our analysis suggests that Myanmar will need to invest \$320 billion in its infrastructure if the economy is to achieve growth of 8 percent a year. The majority of infrastructure investment - 60 percent - will need to be in residential and commercial real estate, but there is also a huge need for power plants, water-treatment plants, and road and rail networks" McKinsey Global Institute, *Myanmar's moment: Unique opportunities, major challenges*, McKinsey & Company, June 2013).

¹³ Many public organs of State in Myanmar are involved in activities that result in people permanently losing their lands in a manner inconsistent with recognised international norms that are binding on the State of Myanmar. Some of the key such bodies, include: *The Ministry of Agriculture and Irrigation (MoAI)* - The MoAI is the main, and very powerful, government body responsible for land administration and agricultural policy (but not forested lands) in Myanmar, and is responsible for land-use planning, settlement, land records and a range of other matters. *The Farmland Management Body (FMB)* and the *Central Committee for the Management of Vacant, Fallow and Virgin Lands (CCVFL)*, both established by laws enacted in 2012 are chaired by the head of MoAI; *Department of Agricultural Land Management and Statistics (DALMS)*. DALMS is located within MoAI and is responsible for updating and maintaining land records, especially for lands used by farmers for agricultural and settlement purposes. With the passage of the Farmland and VFV Laws, the DALMS is responsible for recording and registering interests in farmland and VFV land, and issuing Land Use Certificates to farmers who have received approval to use farmland from the Farmland Administration Body at the appropriate level; *Farmland Administration Body (FAB)* - The Farmland Administration Body (FAB) falls under the auspices of the MoAI designated under the Farmland Law (2012), and is chaired by the Minister of MoAI. The Deputy Minister of MoAI is deputy chairperson and the Director General of Settlement and Land Record Department is the secretary. FABs are responsible for: reviewing applications for the use of farmland; formally recognizing/ approving rights to use farmland; submitting approved rights to use farmland to the DALMS for registration; conducting valuations of farmland for tax and acquisition compensation purposes; issuing warnings, imposing penalties or rescinding use rights if conditions for use of farmland are not met; and resolve disputes that arise over the allocation and use of farmland use rights. Land use rights are managed by FMBs at Village/Ward, Township, State and Central levels, and registered by the DALMS; *Ministry of Environmental Conservation and Forestry (MoECaF)* - This Ministry is responsible for issues relating to protection of the environment, implementing rules relating to Environmental and Social Impact Assessments (ESIA), and management of forestlands and forest resources in the country. MoECaF has overlapping authority over lands classified as Public Forest in the Forest Law, and Virgin Land under the VFV Law; *Forestry Department* - The Forestry Department is the primary authority responsible for administering Reserved Forest lands and works within the MoECaF. The Forestry Department also has delegated authority over areas of land classified as Protected Public Forest and Public Forest; *Central Committee for the Management of Vacant, Fallow and Virgin Lands (CCVFL)* - Under the VFV Law, the Central Committee for the Management of Vacant, Fallow and Virgin Lands (CCVFL) has the overall management responsibilities regarding VFV lands including dispute resolution in coordination with other government departments and agencies. CCVFL is a national, multi-ministerial committee formed at the President's discretion who may appoint the Minister of MOAI as Chairperson; the Director General of the DALMS as the Secretary and individuals from various government department organs, or

complicit in colluding to confiscate land from millions of people of their land in a manner wholly inconsistent with international legal norms and the rights of those affected. Despite the fact that the way by which HLP rights have been (mis-) treated is seen by those in power simply as 'the way business is done', many of these actions are in fact unlawful, unjustifiable, unfair, and unwise, with the most severe instances being criminal acts, excessive enough to be brought to the attention of the International Criminal Court, as will be explored below. While the ruling elites of Myanmar attempt to legitimize these land grabs by a wish to attract foreign investment through reliance on laws of questionable legitimacy, the net effect of these practices is fraudulent enrichment, theft and corruption, with resultant displacement, impoverishment, environmental destruction and a deep undermining of democratic principles and practices. As one commentator simply notes "Most farmland in Myanmar taken from farmers by government bodies and private companies was not acquired properly."¹⁴ Since independence in 1948, each of the successive regimes governing Myanmar, including the present government, have frequently invoked powers under prevailing legislation to compulsorily acquire and allocate large tracts of land in all areas of the country. One widely cited recent study asserts that more than 5.2 million acres of private agribusiness concessions have been awarded, including more than 3 million since 2011.¹⁵ These acquisitions form part of a broader global trend of increased land grabbing - very large-scale land acquisitions, either buying or leasing (or outright acquisition), wherein many tens of millions of hectares have been grabbed in recent years, with Myanmar being one of the most heavily affected of all countries.¹⁶ Once the widely condemned provisions of the 2018 amendments to the *2012 Vacant, Fallow and Virgin Land Law* are implemented, millions more stand the very real chance of facing the confiscation of their land.¹⁷

other suitable persons of his choosing, as members of the CCVfV. The CCVfV oversees the granting and monitoring of use rights over VFV lands in the country for agriculture, mining and "allowable other purposes" under the law, in coordination with concerned Ministries and Regional or State Governments. The CCVfV is specifically responsible to: receive recommendations for the use of VFV land from various Ministries and Regional or State Governments; receive applications for the use of VFV land from public citizens, private sector investors, government entities and NGOs; reject applications or Grant "Permission Orders" for the use of VFV lands; rescind or modify rights to use VFV land; coordinate with MoECaF and other Ministries to prevent damage or destruction to forest lands and conserve natural regions, watershed areas and natural fisheries; submit semi-annual monitoring reports on the use of VFV to the Cabinet of the Union Government; provide input on the formulation of National Land Policy; fix the rate of security fees to be deposited for use of VFV land; fix the annual land revenue rate and suitable period for tax exemption in connection with the use of VFV land; organize and delegate responsibilities to Task Forces and Special Groups for use of VFV land at the Regional and State level of Government; help those with rights to VFV land secure assistance upon request (technical assistance, inputs, loans etc.); resolve disputes related to the use of VFV land in coordination with other Government departments and agencies; *Department of Human Settlement and Housing Development (DHSHD)* - The Ministry of Construction's Department of Human Settlement and Housing Development (DHSHD) is another major player in the land acquisition process in Myanmar; *Land Allotment and Utilization Scrutiny Committee* - In July 2012 a Cabinet-Level *Land Allotment and Utilization Scrutiny Committee* was established to examine national land-use policy, land-use planning and the allocation of land for investment. The Committee is headed by the Ministry of Environmental Conservation and Forestry; and *The City Development Committees* - In the cities, land administration, use and ownership activities are managed by the respective City Development Activities. These Committees have powers enabling them to reclassify the assigned designation to land parcels, to acquire land and buildings and to transfer titles of ownership.

¹⁴ Quoting statements from parliamentarian U Aung Zin analyzing the first report of the parliamentary land investigation commission: "The two biggest reasons are grabbing land for the needs of the military and for government projects, especially for industrial zones and to extend city areas." Noe Noe Aung, "Most acquisition broke land laws, says commission", *The Myanmar Times*, 01 April 2013.

¹⁵ Kevin Woods, 'A political anatomy of land grabs' in *The Myanmar Times*, 03 March 2014. "This means we have entered the terrain of "legal land grabs" that cannot easily be contested on legal grounds, including more than 5.2 million acres of private agribusiness concessions that have been awarded to date. Of this, more than 3 millions acres have been "legally" awarded since the new government took office and started applying its new land-related laws."

¹⁶ See, for instance: Fred Pearce, *The Land Grabbers: The New Fight Over Who Owns the Earth - How Wall Street, Chinese billionaires, oil sheikhs, and agribusiness are buying up huge tracts of land in a hungry, crowded world*, Beacon Press, Boston, 2012.

¹⁷ See the analysis of the negative impacts of the amendments to the VFV Law in: Displacement Solutions and Norwegian Refugee Council, *Building Agreement on Restitution Rights within the Myanmar Peace Process & National Legal Framework*, February 2019.

8. Viewed as a whole, therefore, the legislative framework governing land grabbing is skewed disproportionately in favor of the State, the military and companies with close relations or otherwise favored by these entities, and pays virtually no attention to the rights of people and communities whose lands may be of interest to those seeking to acquire it. Thus far, rules governing the land acquisition process have arguably worsened the position of the rural majority in the country, and create conditions that may lead to far greater displacement in coming years. One report notes that “Inadequate land laws have opened rural Myanmar to rampant land grabbing by unscrupulous, well-connected businessmen who anticipate a boom in agricultural and property investment. If unchecked, the gathering trend has the potential to undermine the country’s broad reform process and impede long-term economic progress”.¹⁸ Another asserts that “Ironically, the over-played “rule of law” mantra is what provides state legitimacy in carrying out what can be thought of now as a “legal land grab”, where the new land-related laws are haphazardly and improperly applied to legally turn farmers into “squatters” and their farm fields into “vacant wastelands” for corporate investment”.¹⁹ While the three new land-related laws - *the Farmland Law*, *the Vacant, Fallow and Virgin Land Law* and *the Foreign Investment Law* - have been adopted since the reform process began, these laws - combined with the *Constitution* and *Land Acquisition Act* (including the new 2019 revised version of this law) - effectively strengthen the powers of the political and economic elite and do not take seriously the rights of the poor majority who make up some 75-80% of the country’s population. These laws systematically fail to recognize the customary land rights that have governed land relations in much of the country for centuries, greatly facilitate the classification of land into categories enabling it to be acquired with increasing ease by the State and its adherents and create conditions of increased tenure insecurity and threatened human rights abuses.
9. In analyzing the manner by which land grabbing is carried out one report notes that “Land confiscation, forced displacement and forced resettlement without informed consent or adequate compensation have been a major business related human rights issue. The main actors have been local private companies linked with the military, multinational companies in joint ventures with State owned enterprises or local businesses.”²⁰ Business-led land confiscations have increased in recent years.²¹ One recent report found that “Whereas land grabs during previous periods were predominantly conducted directly by military-state and non-state armed actors for their benefit alone, “crony companies” with extreme wealth and political leverage have become the new driver of land grabs in different parts of the country, often financially backed by foreign investors”.²² Indeed, though the political reform process of the past eight years has altered many aspects of life in the country, most analysts agree that it has *not* reduced land confiscation throughout Myanmar, and may have increased and expedited the scale and frequency of these practices. As an indication of just how large future land grabbing and consequent displacement could become, under the controversial laws adopted at the outset of the reform process, millions of acres of land now classified as cultivatable or arable, vacant, fallow or virgin could conceivably be conceded legally to investors, including foreign investors, thus raising considerable fears of larger-scale land

¹⁸ Brian McCartan, ‘Land grabbing as big business in Myanmar’ in *Asia Times Online*, 8 March 2013.

¹⁹ Supra, Kevin Woods, ‘A political anatomy of land grabs’ in *The Myanmar Times*, 03 March 2014.

²⁰ Hnin Wut Yee, *Baseline Report: Myanmar (Burma)*, *Business and Human Rights in Asean*, p. 254.

²¹ See, for instance, Burma Partnership, ‘Rampant Land Confiscation Requires Further Attention and Action from Parliamentary Committee’, 12 March 2013.

²² Supra, Kevin Woods, ‘A political anatomy of land grabs’ in *The Myanmar Times*, 03 March 2014.

acquisitions. Because most of this land is already home to people and communities, there are serious concerns that larger-scale dispossession and potential human rights abuses are possible. There is also considerable concern that additional land acquisition measures will occur in the immediate aftermath of land mine and unexploded ordinance clearance operations throughout the country once those programs commence and make safe the millions of acres of land thought to be mined, and which are currently of limited or no interest to the groups most responsible for land acquisition, but which will be once they are declared safe.²³

10. Ethnic communities throughout the country such as the Rohingya, Shan, Karen, Kachin and many others - amounting to some 40% of the country's population - have faced particularly frequent land acquisition. Numerous detailed reports from all ethnic groups have systematically recorded land confiscation on a very large scale.²⁴ Indeed, the large-scale nature of land acquisition in Myanmar needs to be viewed in light of the fact that structural landlessness in Myanmar remains a major problem. Anywhere between 30-50% of the rural population currently have little or no formal land rights, though virtually everyone has a legitimate claim of some degree over the land upon which they reside and often work.²⁵ In addition, slums and informal settlements are commonplace in urban areas, some of which recently faced forced eviction.²⁶
11. Since 2011, a growing number of analysts have examined the staggering scale of land grabbing and other violations of HLP rights in Myanmar. In his article published during the early stages of the political reform process, Brian McCarton notes that "Inadequate land laws have opened rural Myanmar to rampant land grabbing by unscrupulous, well-connected businessmen who anticipate a boom in agricultural and property investment. If unchecked, the gathering trend has the potential to undermine the country's broad reform process and impede long-term economic progress. Under the former military regime, land grabbing became a common and largely uncontested practice. Government bodies, particularly military units, were able to seize large tracts of farmland, usually without compensation. While some of the land was used for the expansion of military bases, new government offices or infrastructure projects, much of it was used either by military units for their own commercial purposes or sold to private companies."²⁷ While leading analyst²⁸

²³ Displacement Solutions, *Land Rights and Mine Action in Myanmar - Do No Harm: Proposal for a Set of Eight Core Principles and a 14-Step Sequencing Process for Land Rights-Sensitive Mine Survey and Clearance in Myanmar*, February 2014.

²⁴ There are numerous in depth studies exploring the particular land hardships facing various ethnic groups throughout Myanmar. See, for instance, TNI & BCN, *Access Denied: Land Rights and Ethnic Conflict in Burma* (Burma Policy Briefing No 11, May 2013), Karen Human Rights Group, *Losing Ground: Land Conflicts and Collective Action in Eastern Myanmar*, March 2013, The Human Rights Foundation of Monland - Burma, *Disputed Territory: Mon Farmers' Fight Against Unjust Land Acquisition and Barriers to Their Progress* (October 2013) and many others.

²⁵ "Estimates of landlessness among Burma's rural population range from 30-50%" *USAID Country Profile: Property Rights and Resource Governance - Burma*, p. 8. McKinsey's estimates are somewhat lower: "Around one-quarter of Myanmar's rural households do not have title to their land and are often under-employed" (p. 85, McKinsey, quoting UNDP, The Integrated Household Living Conditions Survey, June 2011).

²⁶ Phoe Soe Thu and Nann Myint, 'Forced eviction leaves hundreds homeless in Yangon Region village', in *Mizzima*, (5 Feb 2014).

²⁷ Brian McCarton, Myanmar: Land grabbing as Big Business, 11 March 2013.

²⁸ Saskia Sassen, Land Grabbing Responsible for Persecution and Refugee Crisis, in Myanmar and Central America, *Portside*, Sept 2017.

Saskia Sassen noted in 2017 that “The military have been grabbing vast stretches of land from smallholders since the 1990s, without compensation, but with threats if they try to fight back. This land grabbing has continued across the decades but has expanded enormously in the last few years. At the time of the 2012 attacks, the land allocated to large projects has increased by 170% between 2010 and 2013”...the government allocated 1,268,077 hectares (3.1m acres) in the Rohingya area of Myanmar for corporate rural development”. She continued by noting that “The extreme violence against the Rohingya in Myanmar (Burma) is closer to extermination than religious persecution. One key factor insufficiently recognised is the massive land grabbing that is happening in Burma and has now reached into the poorest state, Rakhine.”

12. A March 2015 report by Global Witness is particularly instructive in detailing the precise modalities by which land is unjustly acquired through a long-term and ongoing conspiracy of military, government and business interests which operates throughout the country to fraudulently enrich these actors to the expense of ordinary people.²⁹ *Guns, Cronies and Crops: How Military, Political and Business Cronies Conspired to Grab Land in Myanmar* reveals a range of startling facts (See Box 1).

BOX 1: THE 2015 GLOBAL WITNESS REPORT

“By 2013, 5.3 million acres of land - thirty five times the size of Yangon - had been leased out to investors for commercial agriculture, the majority without the consent of its owners”, p. 7.

“the majority of those acquiring land are domestic cronies with links to the former military government, and land deals continue to be conducted behind a wall of secrecy enabling corruption to flourish”, p. 7

“the Generals were reportedly busy ensuring that, post-transition, they and their associates would retain control of the state’s assets and natural resources”, p. 7

“Evidence unearthed by Global Witness reveals that the confiscations were conducted by local regiments under direct orders from the North East Regional Command....Aiding the military, the district-level government was also complicit in the land grabs. Officials from the Land Statistics Department in Lashio accompanied soldiers to conduct the confiscations....The main beneficiary of the land confiscations described above was the private, domestic company Sein Wut Hmon....Sein Wut Hmon colluded with the North East Regional Command and the Land Statistics Department in Lashio in order to gain control of the majority of their land holdings, evidence suggests. A manager of the company accompanied the soldiers as they confiscated land in some villages while, in others, officers in uniform presented themselves as Sein Wut Hmon representatives. The officers who led the confiscations, Major Myo Yee, now works for the company.”, pp. 7-8.

Continued next page.

²⁹ Global Witness, *Guns, Cronies and Crops: How Military, Political and Business Cronies Conspired to Grab Land in Myanmar*, March 2015.

“At no point before or during the land confiscations did the army, district government or Sein Wut Hmon consult the villagers whose land they took....with almost no compensation paid by the company or military”, p. 8.

“At the time of the confiscation, the inhabitants of these remote villages were to scared to protest or even complain about their lost land due to fear of retribution by the Tatmadaw born out of six decades of on-going conflict. Since 2012, the inhabitants of three villages have sent appeal letters to the authorities requesting the return of their land. Not one has received a response.”, p. 8.

“This level of collusion, and the accompanying violations of land tenure and human rights, should be of serious concern to potential investors and customers of Myanmar’s rubber.”, p. 8.

“The Tatmadaw (Myanmar’s armed forces) has been responsible for confiscating vast tracks of land from Myanmar’s rural population. Land has been confiscated to grow cash crops or to be leased to private companies to raise revenue for an already powerful military elite. In border regions, the military has also expropriated land for military bases and training. Such expropriations by the military for rubber and other cash crops have typically been pushed through without any compensation paid to local formers. Instead, local people have been forced from being land owners to land labourers, working on plantations for free and coerced into paying rent for the continual use of the land”, p. 8 (footnotes omitted).

“Global Witness investigations into land confiscations in northeastern Shan State have revealed that a multitude of military, political, and business elites have collaborated behind closed doors to confiscate land with impunity from the local villagers. The result is an opaque and confusing free-for-all in which land confiscations, secrecy and human rights violations are the standard. Despite this lack of transparency, Global Witness was able to identify that the rubber company with the largest land holdings in northeastern Shan State is Sein Wut Hmon. Investigations also revealed how Sein Wut Hmon managed to acquire its land through dubious means, including formal collaborations with the Tatmadaw and local government officials., p. 17.

“In ten of the eleven villagers where Sein Wut Hmon has rubber plantations, not a single villagers has received any kind of compensation for their confiscated land.”, p. 31.

“The land confiscations plaguing Myanmar are part of a global rush for land which has seen more than 95.8 million acres (38.8 million hectares) of land change hands in the last decade with an additional 39.5 million acres (16m hectares) currently under negotiation.”, p. 41.

13. These findings are further backed up by evidence provided in a 2016 report by Human Rights Watch entitled *The Farmer Becomes the Criminal* captures the essence of how land laws enable land grabbers to confiscate land while simultaneously criminalising resistance to such grabbing by the legitimate owners of such land (See Box 2).³⁰ Similar sentiments are echoed in countless other independent and reliable reports, all of which corroborate the mountains of evidence available concerning large-scale and illegal land confiscation in Myanmar.³¹ A 2019 report, for instance, incapsulates the types of housing, land and property rights struggles facing people throughout Myanmar and how difficult it remains to enforce them in Myanmar, in this case the challenges facing refugees seeking to resettle in their former homes in Ye Phyu Township:

Forced to leave their village as IDPs and refugees in 1992 during the civil war, villagers from Kye Zu Daw returned to their ancestral lands in 2012 to find their lands had been confiscated. Faced with few options, in 2016 Kye Zu Daw villagers decided that they would start the process of trying to register their lands, which had been categorised as VFV by the government. Despite their attempts to legally recover and register their lands, villagers have faced consistent barriers. They have been sued over three times by agribusiness companies, faced abuse and intimidation from the Department of Land Management and Statistics (DALMS), and being forced to compete with companies on an unequal playing field to register their lands under a legal framework that does not reflect how land is used by communities in Myanmar and strips them of their customary and communal land rights. As a result of the consistent hardship and discrimination faced by Kye Zu Daw villagers in recovering their lands, many have given up hope, some even considering returning to the border.³²

³⁰ Human Rights Watch, *The Farmer Becomes the Criminal: Land Confiscation in Burma's Karen State*, 2016.

³¹ See, for instance, Jacob Goldberg, 'Nowhere to go: Myanmar farmers under siege from land law', Al Jazeera News, 4 April 2019; Thompson Chau, 'Tanintharyi landholders sued under new law', Myanmar Times, 11 March 2019; Tanintharyi Friends, 'The Long Road of Resilience: The Fight Against Illegal Land Confiscation in Palaw Township', 2018; Tanintharyi Friends, 'Living in Fear: 20 Years of Land Grabbing by the Myanmar Navy in Tanintharyi Region', 2016; Nyein Nyein, 'Shining a Light on Shady Business in Myanmar's Extractive Industries', *Irrawaddy*, 21 March 2019; Thomson Reuters Foundation, 'Land Lost, Families Uprooted as Myanmar Pushes Industrial Zones', 21 March 2019; Ron Corben & Bryan Lynn 'Group Warns of Rising ASEAN Land Grab Conflicts', Voice of America, 1 August 2016; Asian Human Rights Commission, 'Myanmar: Myanmar at risk of land-grabbing epidemic' (A written statement submitted by the Asian Legal Resource Centre (ALRC), September 2011; Brian McCarton, Myanmar: Land grabbing as Big Business, 11 March 2013 (<https://www.cetri.be/Myanmar-Land-grabbing-as-big?lang=fr>), and many, many others.

³² Tanintharyi Friends, *Between a Rock and a Hard Place: The Struggle of Returning Refugees to Resettle their Lands in Ye Phyu Township*, 2019.

BOX 2: HUMAN RIGHTS WATCH ON LAND GRABBING IN MYANMAR

Among other things this comprehensive report reveals not only the continuing nature and extent of land confiscation in Myanmar, but also outlines the manner by which these practices constitute active barriers to the realisation of land rights. The report points, in particular, to the following structural obstacles to the enjoyment of land rights: intimidation by the Border Guard Force and other armed groups, forced evictions and destruction of property, obstacles in the justice system, lack of free expression and assembly, lack of notice and consultation, difficulties demonstrating land claims, problems with local land administration offices, non-existent or inadequate compensation, loss of livelihood and migration to Thailand, and lack of redress.³³ The report notes that “Land disputes are a major national problem, with rising discontent over displacement for plantation agriculture, resource extraction, and infrastructure projects - often with adequate consultation, due process of law, or compensation for those displaced. In many parts of the country, those contesting land seizures have taken to the streets in frequent demonstrations but have faced retaliation in the courts.”³⁴ The HRW report “details cases in which government officials, military personnel and agents on behalf of the army, local militia members, and businessmen have used intimidation and coercion to seize land and displace local people”³⁵, and documents how legal charges are often filed against farmers under section 447 of the penal code for ‘trespass’ or squatting,³⁶ where one interviewee is quoted as saying: “The businessman takes the land from the farmer”...“But when the farmer protests, he becomes the criminal”.³⁷

14. These two exemplary independent reports detail just how flawed both the law and practice in Myanmar are when it comes to questions of housing, land and property rights. Countless other reports could be reviewed which equally outline these destructive practices throughout all corners of the country. But of all land-related crimes, none in recent years have been as severe as the ethnic cleansing that has been carried out in Rakhine State against the Rohingya people. More than 670,000 refugees from Rakhine State fled to Bangladesh seeking safety between August 2017 and February 2018. These numbers continued to grow in the intervening year, resulting in more than one million refugees now being housed in camps in eastern Bangladesh. The recent outflows of refugees have been the subject of very extensive global criticism against the government and military of Myanmar and have been repeatedly characterised by the UN and other commentators as ‘a textbook case of ethnic cleansing’, crimes against humanity, gross human rights violations, apartheid and even genocide.³⁸ In January 2019, the United Nations Special Rapporteur, Yanghee Lee

³³ Supra Note 27, (pp. 22-53).

³⁴ Id, p. 4.

³⁵ Id, p. 7.

³⁶ Id, p. 28.

³⁷ Id, p. 29.

³⁸ The UN High Commissioner for Human Rights, addressing the Human Rights Council on 11 September 2017, stated: ‘Last year I warned that the pattern of gross violations of the human rights of the Rohingya suggested a widespread or

(now prevented by the government of Myanmar from entering the country because of her independent and accurate reports documenting massive human rights violations in the country), asserted that Myanmar's army chief Min Aung Hlaing should be prosecuted for genocide, and that holding the perpetrators to account for their crimes was necessary before refugees would have any chance of returning and reclaiming and reasserting their HLP rights. The severity and well-documented brutality of the recent events cannot be over-emphasised, for they clearly also constitute a threat to international peace and security in addition to holding criminal and human rights implications. This is exemplified by a 6 November 2017 statement by the President of the UN Security Council that notes, *inter alia*, the following:

...

"The Security Council further expresses grave concern over reports of human rights violations and abuses in Rakhine State, including by the Myanmar security forces, in particular against persons belonging to the Rohingya community, including those involving the systematic use of force and intimidation, killing of men, women, and children, sexual violence, and including the destruction and burning of homes and property.

...

"The Security Council stresses the primary responsibility of the Government of Myanmar to protect its population including through respect for the rule of law and the respect, promotion and protection of human rights.

...

"The Security Council highly commends the efforts undertaken by the Government of Bangladesh, with the assistance of the United Nations, their partners and other nongovernmental organizations, to provide safety, shelter, and humanitarian assistance to those who have fled the violence, encourages the Government of Bangladesh to continue to do so until those who have fled the violence can return voluntarily, and in conditions of safety and dignity to their homes in Myanmar, with due regard to the principle of nonrefoulement, welcomes states' provision of support to Bangladesh, and encourages states able to do so to provide further financial and logistical support to Bangladesh, the United Nations, in particular to the United Nations' Rohingya Refugee Crisis Humanitarian Response Plan, and other humanitarian partners engaged in this effort.

systematic attack against the community, possibly amounting to crimes against humanity, if so established by a court of law. Because Myanmar has refused access to human rights investigators the current situation cannot yet be fully assessed, but the situation seems a textbook example of ethnic cleansing'. Two days later, The UN Secretary-General on 13 September 2017 was asked in light of the High Commissioner's statement, whether he considered the situation to constitute 'ethnic cleansing' and answered: 'Well, I would answer your question with another question. When one third of the Rohingya population had to flee the country, can you find a better word to describe it?'. On allegations of genocide, see: [http://www.fortifyrights.org/downloads/THEY_TRIED_TO_KILL_US_ALL_Atrocities_Crimes_against_Rohingya_Muslims_Nov_2017.pdf?ct=t\(Fortify_Rights_USHMM_New_Report11_14_2017\)&mc_cid=7692f47f6a&mc_eid=f06ebe8e7f](http://www.fortifyrights.org/downloads/THEY_TRIED_TO_KILL_US_ALL_Atrocities_Crimes_against_Rohingya_Muslims_Nov_2017.pdf?ct=t(Fortify_Rights_USHMM_New_Report11_14_2017)&mc_cid=7692f47f6a&mc_eid=f06ebe8e7f). See also: Section 5 'Does the situation in northern Rakhine State involve crimes under domestic or international law? What are the definitions of these crimes?' in International Commission of Jurists, *Myanmar: Questions and Answers on Human Rights Law in Rakhine State: Briefing Note*, November 2017.

“The Security Council welcomes the signing of a memorandum of understanding on 24 October 2017 between the Governments of Myanmar and Bangladesh on the situation in Rakhine State, urges the Government of Myanmar to work with the Government of Bangladesh and the United Nations to allow the voluntary return of all refugees in conditions of safety and dignity to their homes in Myanmar, welcomes in this regard the commitment to establish of the Joint Working Group between the Governments of Myanmar and Bangladesh to implement this process, urges the Governments of Myanmar and Bangladesh to invite the United Nations High Commissioner for Refugees and other relevant international organizations to participate fully in the Joint Working Group and implementation of the returns process, further calls upon the Government of Myanmar to expedite the voluntary return of all internally displaced persons in conditions of safety and dignity to their homes in Myanmar.

“The Security Council welcomes the Government of Myanmar’s decision to establish ‘the Union Enterprise Mechanism for Humanitarian Assistance, Resettlement, and Development in Rakhine’ (the Union Enterprise Mechanism), as well as its commitment to ensure that humanitarian assistance and development work undertaken by the Union Enterprise Mechanism is provided for the benefit of all communities in Rakhine State without discrimination and regardless of religion or ethnicity, urges the Government of Myanmar to ensure the Union Enterprise Mechanism supports the voluntary, safe and dignified return of displaced individuals and refugees to their homes in Rakhine States, and to allow UN agencies to operate with full access in Rakhine State.³⁹ (emphasis added)

15. Beyond the nature, scale and causes of the recent forced displacement of the Rohingya refugees into Bangladesh (which includes reports of mass killings, torture, rape, house burnings and other crimes)⁴⁰, recent reports provide worrying views stemming from the government and military of Myanmar that, if implemented, will make voluntary repatriation and return to the lands and homes from which the refugees were displaced effectively (if not, intentionally) impossible to imagine at present.⁴¹ Despite the fact that on 12 October 2017, State Counsellor Aung San Suu Kyi stated the government’s “three main tasks (are) first, repatriation of those who have crossed over to Bangladesh and providing humanitarian assistance effectively; secondly, resettlement and rehabilitation; and third, bringing development to the region and establishing durable peace”, statements have been made by government officials indicating that identity documents issued by previous Myanmar governments will be a requirement for refugees wishing to return despite the well-known fact that many refugees were never issued such documents. Additionally, refugees will not

³⁹ Security Council Statement by the President S/PRST/2017/22, SC/13055, Security Council, 8085th Meeting (PM), 6 Nov 2017).

⁴⁰ See, for instance, International Commission of Jurists, *Myanmar: Questions and Answers on Human Rights Law in Rakhine State: Briefing Note*, November 2017 and [www.fortifyrights.org/downloads/HEY_TRIED_TO_KILL_US_ALL_Atrocities_Crimes_against_Rohingya_Muslims_Nov_2017.pdf?ct=t\(Fortify_Rights_USHMM_New_Report11_14_2017\)&mc_cid=7692f47f6a&mc_eid=f06ebe8e7f](http://www.fortifyrights.org/downloads/HEY_TRIED_TO_KILL_US_ALL_Atrocities_Crimes_against_Rohingya_Muslims_Nov_2017.pdf?ct=t(Fortify_Rights_USHMM_New_Report11_14_2017)&mc_cid=7692f47f6a&mc_eid=f06ebe8e7f).

⁴¹ See, for instance, <https://asia.nikkei.com/Spotlight/Rohingya-crisis/Tensions-over-Rohingya-return-highlight-donor-dilemmas> and www.channelnewsasia.com/news/asiapacific/government-will-take-over-burned-myanmar-land-minister-9255498.

be allowed to return to their former homes and lands and, if they ever do return, will be forced into resettlement camps or so called 'model villages' designed and constructed by the government without either consultation with or approval by any potential returning refugees as things now stand.⁴² Additional statements have been made indicating that 'burned' homes and lands will revert to the State without any judicial or legal procedure in place to enable refugees to resist or appeal these efforts in accordance with their rights. Should these measures proceed as publically elaborated by government officials, not only would voluntary repatriation be made even more unlikely than it already is, but it would also be highly inconsistent with the both the international and – to a certain extent – domestic rights of the refugees now seeking safety in Bangladesh. Moreover, these sentiments are neither consistent with the Security Council statement nor basic human rights protections.

16. Indicative of government policy, according to a *Nikkei Asian Review* report, Tin Maung Swe, Rakhine State Secretary and a senior official with the military-backed General Administration Department, detailed how government departments led by the Home Affairs ministry would reclassify or rezone land for purposes such as forestry and agriculture, as well as for new villages. As reported, Tin Maung Swe further noted that new villages would be built for settlers within Rakhine State and further afield, but returning refugees would not be entitled to return to their original villages. He also stated that "Our GAD will collect data [on land]... This will be a national plan, it will divide lands into villages, paddy fields, forests... Now we are surveying to make the new map, which will look at land use and ownership" to be completed "within months". Tin Maung Swe further explained that Rohingya returnees could be resettled and given access to farmland for crops, however they would have no claims on previous dwellings. "This is not their land, they are not the real owners, the owner is the nation, our ancestors, we never will give them away.... There will be a relocation plan but of course that depends on national policy", he concluded. His comments, along with similar remarks made by military chief Senior General Min Aung Hlaing, contradict assurances by civilian government ministers that refugees could return to their original homes and farming lands. In mid-October, Win Myat Aye, Minister for Social Welfare, Relief and Resettlement, told the *Nikkei Asian Review* that returning refugees could go back to their homes. Yet, he affirmed in late September a national law that reclassifies land burnt in conflict as government-managed land. In mid-October, State Counsellor Aung San Suu Kyi established a multi-agency body to oversee Rakhine reconstruction and refugee return. The body has rallied business and civil society behind reconstruction and development efforts, but government officials, particularly from the military-run Ministry of Home Affairs, have spoken about building 'model villages' which aid officials red flag as potential permanent camps.⁴³ The State Counsellor's office formed this private-public consortium to undertake

⁴² See, for instance: 'Myanmar Gov't Speeds Up Construction Of Repatriation Camps, Houses In Conflict-affected Rakhine State': YANGON, Nov 14 2017 (Bernama) -- Myanmar authorities have target to complete construction of repatriation camps and houses for local people in conflict-affected areas in northern Rakhine state in a month, China's Xinhua news agency reported, citing official Global New Light of Myanmar on Tuesday. As part of implementation of rehabilitation and resettlement process by the Union Enterprise for Humanitarian Assistance, Resettlement and Development (UEHRD), construction of the infrastructures including buildings, roads, water and electricity supply were launched on Nov. 8 in northern Rakhine state. At present, construction of Oh-Htein Hindu village with 72 houses as well as seven surrounding villages with 173 houses and repatriation camps are underway by the authorities since Nov 8. The construction of such basic infrastructures has been implemented by construction team, one of nine private sector task forces, which was formed to join the Aung San Suu Kyi-led mechanism of UEHRD in northern Rakhine state. (Source: www.bernama.com/bernama/v8/wn/newsworld.php?id=1410198).

⁴³ <https://asia.nikkei.com/Spotlight/Rohingya-crisis/Tensions-over-Rohingya-return-highlight-donor-dilemmas>.

activities across nine sectors in Rakhine.⁴⁴ Any construction of camps into which returnees would be forced to reside, would constitute both a breach of the *Guiding Principles on Internal Displacement* as well as the international principle on returns to one's home. As reported by the *Global New Light of Myanmar*, Win Myat Aye, who also chairs the multi-agency body, further stated that "According to the law, burnt land becomes government-managed land" while attending a meeting in the Rakhine State capital of Sittwe.⁴⁵ Citing a disaster management law, he stated in a September 2017 meeting with authorities that redevelopment would "be very effective". The law states the government oversees reconstruction in areas damaged in disasters, including conflict.⁴⁶

17. Against this background, the *Agreement on Return of Displaced Persons from Rakhine State between the government of Bangladesh and Myanmar* on 23 November 2017 for the possible repatriation of the Rohingya refugees now in Bangladesh, while positive in terms of recognising the principle of return and encouraging 'those who had left Myanmar to return voluntarily and safely to their own households and original places of residence or to a safe and secure place nearest to it of their choice', the agreement has already faced criticism because of identity verification measures and documentary requirements of 'evidence of past residence', which many refugees do not possess, and because conditions on the ground are so far from conducive to safe and secure return.⁴⁷ In fact, Human Rights Watch, for instance, has described the agreement as both 'laughable' and 'a public relations stunt'.⁴⁸ Moreover, widely reported reports by Amnesty International concerning the construction of structures by the military upon land belonging to Rohingya refugees and IDPs are particularly alarming.⁴⁹ In terms of indications as to the likelihood of actual return, a report on 15 March 2018 notes that only 374 of 8000 refugees' names submitted by the Government of Bangladesh for voluntary return were found to be 'eligible for repatriation'.⁵⁰ In sum, therefore, and assuming that safety and security for returning refugees can somehow be assured through the large-scale presence of human rights monitors, international journalists and other protection measures, and that other criteria necessary for safe and dignified return can be guaranteed, the present government/military response to the question of eventual return by the refugees currently in Bangladesh et al. to Rakhine State, based on official statements publically made to date, will ostensibly be based on the following perspectives:

⁴⁴ See President's Office website for details: <http://www.president-office.gov.mm/en/?q=issues/rakhine-state-affairs/id-7803>.

⁴⁵ <http://www.moi.gov.mm/moi:eng/?q=news/27/09/2017/id-11604>.

⁴⁶ <http://www.channelnewsasia.com/news/asiapacific/government-will-take-over-burned-myanmar-land-minister-9255498>.

⁴⁷ Oliver Holmes, 'Myanmar signs pact with Bangladesh over Rohingya repatriation' in *The Guardian*, 24 November 2017.

⁴⁸ See: <http://www.theage.com.au/world/deal-to-repatriate-rohingya-to-myanmar-a-stunt-hrw-20171124-gzs87n.html>

⁴⁹ See, for instance: <https://www.amnesty.org/en/latest/news/2018/03/myanmar-military-land-grab-as-security-forces-build-bases-on-torched-rohingya-villages/>

⁵⁰ <https://www.theguardian.com/world/2018/mar/15/myanmar-willing-to-take-back-fewer-than-400-rohingya-refugees-bangladesh>

- Repatriation to Myanmar *may* be allowed, *however*,
 - Only those who can establish proof of residency will be allowed to return, *but*
 - Because ‘burnt’ lands purportedly revert to the State, the right to return and restitution to one’s original home and lands will not be allowed, *also due to the fact that*
 - Those returning will be ‘rehabilitated’ and forced to reside in new camps or ‘model villages’.⁵¹
18. These perspectives would fail to comply with international norms and best practice and clearly would not satisfy basic human rights requirements. They are particularly alarming given the widely criticised track record of the government of Myanmar concerning earlier instances of forced displacement in Rakhine State, in particular, following earlier mass displacements of some 140,000 Rohingyas in 2012. That group of IDPs remain in internment camps and are subjected to a range of human rights violations including freedom of movement, HLP rights and many others. As such, as elaborated in the remainder of this paper, government intentions to arbitrarily acquire refugee homes and lands and to force returning refugees to reside in camps or model villages are *prima facie* inconsistent with pre-existing legal obligations of the government of Myanmar and should both be rejected and replaced with new policies which are explicitly designed to both be consistent with international norms and which adequately support recognised durable solutions to forced displacement.
19. These views are reflected in the devastating report and conclusions reached by the detailed findings of the Independent International Fact-Finding Mission on Myanmar entrusted with investigating the treatment of the Rohingya.⁵² (See Box 3)

⁵¹ There are also already reports of Rakhine settlers being moved to land previously occupied by Muslims. There are additional reports of buildings not damaged in the attacks, including mosques, that are now being bulldozed to make way for new town planning initiatives.

⁵² See UN Doc: A/HRC/39/CRP.2 (Sept 2018).

BOX 3: THE UN'S REPORT OF THE INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON MYANMAR

63. In its efforts to appropriately characterize the human rights violations and abuses it established, the Mission has had regard to international criminal law. This body of law governs the situations in which individuals can be held individually criminally responsible for gross violations of international human rights law and serious violations of international humanitarian law that amount to crimes under international law. The principal crimes considered by the Mission were genocide, crimes against humanity and war crimes. In doing so, the Mission referred to the definitions of these crimes in the Convention on the Prevention and Punishment of the Crime of Genocide, the Rome Statute of the International Criminal Court and customary international law, as well as the interpretation of these definitions in the jurisprudence of international courts and tribunals.

64. As mentioned above, the prohibitions of genocide, crimes against humanity and war crimes amount to peremptory norms of international law (*jus cogens*), meaning that no derogation from the rule is allowed. The recognition of a crime under international law as *jus cogens* gives rise to a duty of the State to prosecute and punish perpetrators, the non-applicability of statutes of limitation for such crimes, and the universality of jurisdiction over such crimes regardless of where they were committed, by whom, or against whom. Moreover, under various sources of international law and under United Nations policy, amnesties are impermissible if they prevent prosecution of individuals who may be criminally responsible for war crimes, genocide, crimes against humanity or other gross violations of human rights.

...

1671. The Mission concluded on reasonable grounds that gross human rights violations and serious violations of international humanitarian law have been committed in Myanmar since 2011 and that many of these violations undoubtedly amount to the gravest crimes under international law. (footnotes omitted, see Annex 8 below for additional text from this report).

20. Thus we have a range of views, all consistent with one another, outlining the deplorable nature of housing, land and property rights practices in Myanmar; both historically and at present. Indeed, having been deeply involved in researching and analysing the housing, land and property rights situation in Myanmar for more than a decade, and producing more than one dozen in-depth books, reports and other publications on these issues⁵³, Displacement Solutions has come to the conclusion that only a full-scale, comprehensive legal overhaul of relevant land legislation, combined with fundamentally new visions of what housing, land and property rights should mean for the entire populace of the country, will be required for

⁵³ All Displacement Solutions publications on Myanmar current to (2009-2018) can be accessed here: <http://displacementsolutions.org/wp-content/uploads/2018/06/An-Overview-of-DS-work-on-HLP-Rights-in-Myanmar-2009-2018-1.pdf>. All additional publications can be found at: www.displacementsolutions.org.

the people of Myanmar to be able to enjoy the full spectrum of the HLP rights to which they are entitled. A series of specific and actionable recommendations are offered at the end of this report which, if implemented in full, would fundamentally improve the enjoyment of basic human rights protections in the country, prevent future HLP rights violations, hold guilty parties accountable, and build the legal and societal foundations needed - and now so glaringly lacking - for true national prosperity, the rule of law and justice throughout the HLP sector. Before turning to these many needed changes, however, let us explore in detail how current law in Myanmar facilitates the massive confiscation of land in this country.

HOW CURRENT LAW ENABLES LAND GRABBING

21. Current Myanmar law, combined with long-standing policy and practice, legitimises and permits the confiscation of land by many government actors and those closely - and often conspiratorially - associated with them. Many different laws combine to form the Myanmar legal code on housing, land and property issues, many of which collectively form the legislative basis for land acquisition actions that have been such a central part of Myanmar political life since the military took control in 1962 and which continue to this day - eight full years after the start of the so-called political reform process.⁵⁴ Even nearly a decade after the political reform process commenced, the legal and regulatory environment remains disproportionately skewed in favor of military, State and business interests. **Indeed, it is clear that law is incapable in its present form of adequately protecting the full spectrum of HLP rights of ordinary citizens and communities.**
22. In determining the comprehensive position of law on the specific question of land acquisition, the following laws, in particular, are of central relevance: *The Constitution of the Republic of the Union of Myanmar* (2008), *The Land Acquisition Act* (1894) and *2018 (Draft) Land Acquisition, Resettlement and Rehabilitation Law*, *The Vacant, Fallow and Virgin Land Law* (2012)(2018, as amended), *The Farmland Law* (2012), *The Myanmar Investment Law* (2016), among others.

THE CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR (2008)

23. Underpinning all Myanmar law regulating HLP matters is the overarching principle that the State owns virtually all land in the country. Article 37 of the 2008 Constitution addresses the question of land in the following terms:
 37. The Union - (a) is the ultimate owner of all lands and all natural resources above and below the ground, above and beneath the water and in the atmosphere in the Union; (b) shall enact necessary law to supervise extraction and utilization of State-owned natural resources by economic forces; and (c) shall permit citizens right of private property, right of inheritance, right of private initiative and patent in accord with the law.

⁵⁴ See: Scott Leckie and Ezekiel Simperingham, *Housing, Land and Property Rights in Burma: The Current Legal Code, Displacement Solutions*, Bangkok, 2009; UNHCR, UN Habitat and the Norwegian Ministry of Foreign Affairs, *Guidance Note on Land Issues Myanmar*, 2010; Displacement Solutions (2013) *Bridging the HLP Gap: The Need to Effectively Address Housing, Land, and Property Rights During Peace Negotiations and in the context of Refugee/IDP Return*, available at: <http://displacementsolutions.org/landmark-report-launch-bridging-the-housing-land-and-property-gap-in-myanmar>; and *Legal Review of Recently Enacted Farmland Law and Vacant, Fallow and Virgin Lands Management Law Improving the Legal & Policy Frameworks Relating to Land Management in Myanmar*, Food Security Working Group's Land Core Group, Yangon, November 2012.

24. Thus, with the exception of some freehold titles mainly in urban areas, the remaining land parcels in the country (except Forest Land, Grazing Land, and land held in Cantonment and Monasteries) are leased out to individuals and companies through grant, lease or license, thus giving the State considerable leverage over how land is used and who uses it and for how long. The land-related laws that have been promulgated since 2008 fully embrace this perspective, and as a result these sentiments pervade subsidiary laws that govern all aspects of land acquisition in Myanmar. While reference to State ownership of lands within a constitution is not unusual, what is odd is the manner by which this issue is addressed within Myanmar's national guiding law. Indeed, most other constitutions that confer ownership rights over land to the state, such as Article 27 of the Mexican Constitution of 1917, tend also to then outline the modalities of both private ownership and the manner by which these rights can be infringed in 'the public interest'.⁵⁵ Despite the frequency of land acquisition in Myanmar, however, until May 2019 these actions were left to the 1894 Land Acquisition Act (now revised) and several other laws outlined below and are neither explicitly mentioned nor limited in the 2008 Constitution. Another anomaly is the wholesale absence of any specific provision prohibiting the arbitrary taking of property, and stipulating the specific conditions under which such takings can be legally justified.⁵⁶ Such provisions are commonplace, with the terms of South Africa's 1996 Constitution exemplary in this regard.⁵⁷ By contrast, therefore, the Constitution asserts full state ownership of land and offers no outright protection against land takings for ordinary people in the country.

⁵⁵ Article 27 of the Mexican Constitution provides: The property of all land and water within national territory is originally owned by the Nation, who has the right to transfer this ownership to particulars. Hence, private property is a privilege created by the Nation. [Expropriations](#) may only be made when there is a public utility cause. The State will always have the right to impose on private property constraints dictated by "public interest". The State will also regulate the [exploitation of natural resources](#) based on social benefits and the equal distribution of wealth. The state is also responsible for conservation and ecological considerations. All natural resources in national territory are property of the nation, and private exploitation may only be carried out through concessions.

⁵⁶ Such provisions are found in many constitutions. For instance, under the Sierra Leone Constitution of 1991, these matters are addressed in Articles 21(1) which reads: 21. (1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say— the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development or utilization of any property in such a manner as to promote the public benefit or the public welfare of citizens of Sierra Leone; and the necessity therefor is such as to afford reasonable justification for the causing of any hardship that may result to any person having any interest in or right over the property; and provision is made by law applicable to that taking of possession or acquisition— for the prompt payment of adequate compensation; and securing to any person having an interest in or right over the property, a right of access to the court or other impartial and independent authority for the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled and for the purpose of obtaining prompt payment of that compensation....

⁵⁷ 25. Property - 1. No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property; 2. Property may be expropriated only in terms of law of general application a. for a public purpose or in the public interest; and b. subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court. 3. The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including a. the current use of the property; b. the history of the acquisition and use of the property; c. the market value of the property; d. the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and e. the purpose of the expropriation. 4. For the purposes of this section a. the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and b. property is not limited to land. 5. The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis. 6. A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress. 7. A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress. 8. No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1). 9. Parliament must enact the legislation referred to in subsection (6).

25. Another lacunae concerning the Constitution is that it fails to explicitly recognize citizen's rights to land or housing, as many dozens of other constitutions do. Article 26 of South Africa's post-apartheid Constitution, for instance, provides: '26. Housing - 1. Everyone has the right to have access to adequate housing; 2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right; and 3. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.' These rights, including the right not to be evicted under Article 26(3), have been subject to extensive court attention in South Africa, most notably in the famous 2001 Grootboom case⁵⁸, which confirmed several key points including the justiciable nature of economic, social and cultural rights, that all rights are indivisible and interdependent, that South African courts need to use international law as an interpretive aide in determining the meaning of constitutional provisions, and that minimum core obligations under the Constitution include a minimum level of economic, social and cultural rights including the right to adequate housing. Needless to say, the people of Myanmar could benefit greatly were similar perspectives to find recognition within a revised Constitution. Interestingly, the principle that the State should have a direct role in the provision and guarantee of housing is already recognised in the Constitution, but only for civil servants. Article 26(b) provides that 'The Union shall enact necessary laws for Civil Services personnel to have security and sufficiency of food, clothing and shelter, to get maternity benefits for married women in service, and to ease livelihood for welfare of retired Service personnel.' If this can be done for certain sectors of society, there seems to be little justification for not expanding these protections to everyone.
26. At the same time, although the 2008 Myanmar Constitution does not explicitly single out recognition of general housing, land or property rights, as such, it does on the other hand recognize a series of central HLP rights themes and may, therefore, be useful as a foundational basis in pursuing an improved HLP restitution environment in the country conducive to, rather than inhibiting the right to return. Chapter VIII of the Constitution outlines fundamental rights and duties and contains the following provisions which are relevant to the framework of housing, land and property rights:
347. The Union shall guarantee any person to enjoy *equal rights* before the law and shall equally *provide legal protection*.
348. The Union *shall not discriminate* any citizen of the Republic of the Union of Myanmar, based on race, birth, religion, official position, *status, culture, sex and wealth*.
353. Nothing shall, except in accord with existing laws, be *detrimental to the life* and personal freedom of any person.
355. Every citizen shall have the *right to settle and reside in any place* within the Republic of the Union of Myanmar according to law.

⁵⁸ *Government of South Africa and ors v Grootboom, Appeal to Constitutional Court, [2000] ZACC 19, 2001 (1) SA 46, 2000 (11) BCLR 1169 (CC), ILDC 285 (ZA 2000), 4th October 2000, South Africa; Constitutional Court ([CC].*

356. The Union shall *protect according to law movable and immovable properties of every citizen* that are lawfully acquired.

357. The Union shall *protect the privacy and security of home, property, correspondence and other communications of citizens* under the law subject to the provisions of this Constitution.

372. The Union guarantees the *right to ownership, the use of property* and the right to private invention and patent in the conducting of business if it is not contrary to the provisions of this Constitution and the existing laws.

381. Except in the following situations and time, no citizen shall be denied redress by due process of law for grievances entitled under law: (a) in time of foreign invasion; (b) in time of insurrection; (c) in time of emergency.
(emphasis added)

27. Beyond these rights, the Constitution also enshrines a range of principles which viewed in their totality could form at least a partial basis of a constitutional case aiming to enhance HLP protections, something which as far as the author is aware has yet to occur. While discussions are underway at all levels concerning the eventual overhaul of the 2008 Constitution, at the moment this is the overarching law of the land and should, in our view, therefore, be used to the maximum possible extent as a tool in support of reducing further displacement and land theft, and increasing the enjoyment of HLP rights in line with the terms of, for instance, the ICESCR. Viewed as an integral whole, the solid beginnings of at least a partial constitutionally entrenched legal framework is, therefore, in place which can form the legal bedrock in support of HLP rights, despite the fact that several of these guarantees are accorded only to 'citizens'. Although the Constitution does not explicitly single out recognition of a comprehensive right to adequate housing or concomitant rights to security of tenure or protection against forced eviction or displacement, as such, it does recognize a series of central HLP rights themes and may, therefore, be useful as a foundational basis in pursuing an improved restitution environment in the country. Thus, understanding these constitutional norms in terms of how they address vital aspects of what the term 'HLP rights' means in both law and practice, citizens have rights to equal protection of law, without discrimination; to settle and reside where they wish; to have their immovable properties, privacy, security of the home protected; and the right of ownership and use of property. For instance, beyond the HLP-related norms already found in the Constitution, a comprehensive reading of this standard, as imperfect as it may be, recognises 'eternal principles of justice, liberty and equality' (Arts. 6(e), 21, et al), guarantees in all cases the right of defense and the right to appeal (Art. 19(c)), the duty of State to enact laws 'to protect the rights of the peasants' (Art. 22) and to undertake measures to 'reduce unemployment' (Art. 31), 'to improve living standards' (Art. 36) and the duty to refrain from actions that are 'detrimental to the life and personal freedom of any person' (Art. 353). This cornerstone document of Myanmar law also creates legal duties for citizens to both 'abide by the provisions of the Constitution' (Art. 383) and to enhance unity among national races to ensure public peace and stability' (Art. 387). If we view these norms against the reality of land confiscation in Myanmar, a convincing case can be made that fundamental changes will be required regarding these practices if a situation of constitutional consistency is to emerge.

THE LAND ACQUISITION ACT (1894) AND THE LAND ACQUISITION, RESETTLEMENT AND REHABILITATION LAW (2019)

28. Though recently replaced by the *Land Acquisition, Resettlement and Rehabilitation Law* in May 2019, for more than 125 years a considerable proportion of land confiscated in Myanmar was carried out under the powers accorded to the State under the *Land Acquisition Act* (1894) which enabled the President of the Union as the representative of the State to compulsorily acquire land where the State asserts that such land is needed for 'public purposes'. Article 4(1) of the 1894 Act provided: Whenever it appears to the President of the Union that land in any locality is needed or is likely to be needed for any public purposes, a notification to that effect, shall be published in the Gazette, and the Collector shall cause public notice of the substance of such notification to be given at convenient places in the said locality. The Act further outlined relevant procedures, including notice periods, procedures for objections to acquisition (Art. 5), the method of valuation of land, the process for taking possession of land (Arts. 16 and 17), court processes and appeals (Arts. 18 and 24), procedures for the temporary occupation of land (Art. 35) and the acquisition of land for companies (Art. 38). The Act required that compensation 'at market value' is provided to those from whom land is acquired (Art. 23).⁵⁹ Indicative of the many problems found within this law, one report urged the government of Myanmar to "[b]ring compulsory acquisition policies in line with international best practices"...."Burma's laws permit the state to use compulsory acquisition to acquire land for public purposes and for business purposes. The law defines neither purpose in detail, leaving landholders vulnerable to losing their land through arbitrary processes. Donors could help improve compulsory acquisition policies by providing technical, legal and policy support for the development of a law that embodies minimum international standards for fair and effective compulsory acquisition procedures".⁶⁰
29. A 2015 paper examining the consistency and non-consistency of the 1894 Act with the International Finance Corporation's (IFC) Performance Standard No. 5 on Land Acquisition and Involuntary Resettlement (2012) found a series of systematic gaps between national law and practice in Myanmar concerning land acquisition and the IFC's detailed performance standards in this regard.⁶¹ Further critiques ensued and, combined with a range of other influences urging the government to reform its land acquisition rules, led the government to propose a new draft *Myanmar Land Acquisition Law* in 2017. An excellent and highly detailed *Technical Review of the Draft Myanmar Land Acquisition Law 2017* proposed scores of recommendations concerning the draft law, which many analysts found to be even worse in many respects than the 1894 Act.⁶²

⁵⁹ The full text of the Act is contained in the annexure at the end of this report.

⁶⁰ Supra Note 25, *USAID*, p. 2

⁶¹ Scott Leckie, *Land Acquisition Law and Practice in Myanmar: Overview, Gap Analysis with IFC PS1 & PS5 and Scope of Due Diligence Recommendations*, May 2015. This study notes, for instance, that "In practical terms, in the vast majority of cases of land acquisition there are at the moment very few effective judicial remedies available to those wishing to halt land acquisition, to enforce compensation rights for those whose land has been acquired or to enforce restitution claims for land acquired in the past. At least in part because of the limitations existent within the judicial system, communities and supporters affected by land grabbing have turned increasingly to public displays of dissatisfaction through street protests which continue to received extensive and growing media attention."

⁶² Land Core Group, *Technical Review of the Draft Myanmar Land Acquisition Law 2017*, Feb 2018.

While the current objectives do refer to receiving just and equitable compensation and the rehabilitation of socio-economic livelihoods, the spirit of the document currently casts forced acquisition of lands and subsequent resettlement as fait accompli'. There is considerable room for improving on the current objectives to show a spirit of the law that is pro poor and does not view forced acquisition as a foregone conclusion. It was also felt that it would be useful for the current objectives to also highlight the overarching reasons for why land acquisition may be necessary in the context of infrastructure development etc. Additionally the objectives could refer to the need for transparency throughout the process, and seek outcomes that avoid and minimise land acquisition and involuntary resettlement by exploring project design alternatives as well as to ensure that peoples livelihoods are not just restored, but also enhanced particularly when resettled peoples are the poor and vulnerable.⁶³

30. In many respects this critique homes in on two of the overarching perspectives that continue to pervade land grabbing practices in Myanmar, and which are responsible for the extremely poor record of the country in this regard; a record that has greatly contributed to the declining reputation of the country internationally.⁶⁴ It is this continuing blind embrace of land acquisition as something that those in power carry out repeatedly and with impunity combined with no attention whatsoever to avoid or minimize the effects of such acquisition that generate such concern by analysts exploring these practices. In a similar light, the comments provided by the Myanmar Centre for Responsible Business on this same draft were highly critical of how the new document was formulated.⁶⁵ One point made in this report notes that:

Essential concepts which are currently missing from the law include: cut-off date, entitlements, full replacement cost, security of tenure, host community considerations, providing options for resettlement site, housing and livelihood restoration, monitoring & evaluation, and meeting the principles of restoration of standards of living and livelihoods to at least pre-project levels. In particular, to adopt a comprehensive Land Acquisition Act (LAA) which is aligned with international standards and the Myanmar government's duty to protect human rights, including under the UN Convention on Economic, Social and Cultural Rights which was ratified by Myanmar in 2017, Myanmar law needs to recognise a wider range of land rights than at present, including customary tenure.⁶⁶

⁶³ Id.

⁶⁴ See, for instance, <https://www.theguardian.com/world/2017/mar/31/aung-san-su-kyi-myanmars-great-hope-fails-to-live-up-to-expectations>.

⁶⁵ Myanmar Centre for Responsible Business, *Bilingual Comments on Land Acquisition, Resettlement and Rehabilitation Law (Draft)*, 17 August 2017.

⁶⁶ Id.

31. Following these critiques, a new land acquisition law was adopted on 19 August 2019. Labeled with the more expansive title of the *Land Acquisition, Resettlement and Rehabilitation Law*, the new law does address some of the more glaring problems associated with the 1894 Act, but nonetheless still faces the structural problems that pervade so much law and policy on the question of land confiscation and displacement in Myanmar; namely the failure to offer any formal legal requirements to *prevent and avoid land confiscation if at all possible* or to *minimize* the effects of these processes when all viable alternatives have been explored, positions that both accord with prevailing international law and policy, and that simply recognises the devastating impacts that land theft has had on so many millions of people in Myanmar since independence in 1948. Indeed, the view that the State has total ultimate control over land rights and that citizens and other lawful residents should be content without housing, land or property rights, without secure tenure and expect little or no compensation or right to judicial remedies if their land is taken continues to pervade the new law.
32. The 2019 law declares its objectives to be to “implement land acquisition matters with this law, based on the *National Land Use Policy* adopted by the Union Government; To protect the interest of damaged persons whose land has been acquired through incompliance with the law of land acquisition for public purpose; To carry out transparently the providing advance notice, negotiation, and making decisions by the processes which is participating local people and damaged persons when carrying out the land acquisition; To ensure the acceptance of fair compensation and damages for damaged persons; To ensure the entitlement for resettlement or rehabilitation of socio-economic life for being removed from land because of land acquisition, according to the desire of landowner of their rights by agreement of department/organization; and To prevent the occurrence of damage to the natural environment and socio-economic due to the land acquisition”. These superficially positive sentiments, however, viewed more deeply raise a range of concerns that the new law will be used not as a method of protecting the rights of those whose land is needed for public purposes, but rather as yet another convenient legal rationale for continuing the long-standing land grabbing catastrophe which has decimated so many people in the country for so long. While it is positive that reference is made to the resettlement and rehabilitation needs of those affected and the 2016 *National Land Use Policy* - a non-legal document which directly contradicts the terms of the new law in countless ways by calling for greater protection of HLP rights and restitution for the displaced population - it remains difficult to imagine that the new law will substantively improve the prospects of ordinary dwellers affected by its application. In stark contrast with the sentiments of the 2019 Law, the 2016 *National Land Use Policy* specifically highlights rights to return, restitution and compensation, and includes terminology such as the need to “develop and implement fair procedures relating to land acquisition, compensation, relocation, rehabilitation, restitution, and reclaiming land tenure and housing rights of internally displaced persons and returning refugees caused by civil war, land confiscation, natural disasters and other causes”, “When managing the relocation, compensation, rehabilitation and restitution related activities that result from land acquisition and allocation, unfair land confiscation or displacement due to the civil war, clear international best practices and human rights standards shall be applied, and participation by township, ward or village tract level stakeholders, civil society, representatives of ethnic nationalities and experts shall be ensured”, and commits to “Conduct research on best procedures for restitution of rights to land and housing of individuals, households and communities that had to abandon the area

where they previously resided due to illegal land confiscation, civil war, natural disasters or other causes”.⁶⁷ How these positive, pro-people, pro-human rights sentiments can be streamlined with the terms of the new law remains to be seen. Moreover, the continued deep centralization of power outlined in the law in the form of a Central Committee, the ability of the Committee to acquire lands in a ‘case or urgency’, which can all too easily be abused⁶⁸, the power of the Committee to temporarily occupy land, yet another power all too easily subject to abuse⁶⁹, and further powers to imprison and fine people for legitimately resisting land acquisition activities envisaged under the new law⁷⁰ are all cause for continuing concern that HLP rights again will not be enforced in Myanmar.

THE VACANT, FALLOW AND VIRGIN LAND LAW (2018, AS AMENDED)

*We are concerned that this law may be used to illegally dispossess land users of their land without due process or adequate notice, undermine their human rights, and have a disproportionate impact on poor, rural and minority communities, ethnic nationalities and indigenous peoples.*⁷¹

33. The *Vacant, Fallow and Virgin Land Law (2018, as amended)* originally adopted at the same time as the *Farmland Law* in 2012, allows leases of State land vaguely classified as ‘vacant, fallow or virgin’ for 30 year periods. It sets an allocation limit of 5000 acres at any one time, with a total maximum amount of 50,000 acres for any single person or entity. Both nationals of Myanmar and foreign entities can lease land under this law subject to a two-step process involving approvals from the Myanmar Investment Commission and then the Land Allotment Commission. Some have claimed that 50% of the land in the country could be classified as technically ‘fallow’, which, if correct, provides an indication that large-scale

⁶⁷ National Land Use Policy, Republic of the Republic of the Union of Myanmar (January 2016).

⁶⁸ Chapter X - Land Acquisition in Case of Urgency - 51. The Central Committee shall continue following matters for taking possession of land and land acquisition urgently according to the proposed department and organization subject to section 8 and 9, based on the agreement of Union Government for public purpose; requirement to deploy due to emergency situations in matters for State safety and defenses; requirement of any land for social, economy and, smooth in road transportation and communication due to sudden change caused by unforeseeable circumstances; necessary evacuation of the public when the natural disaster happen or it could be happen; and requirement for emergency settlement according to the decision of Pyidaungsu Hluttaw and Union Government.

⁶⁹ Chapter XI - Temporary land occupation - The Central Committee shall carry out the temporary land occupation that include following matters which are not exceeded for maximum 3 years by means of description in section 17 and 18 for the public purpose, with the approval of Union Government after the notification order for the necessary of temporary land occupation is issued and declared for it: temporary requirement matters for the safety, defense and military operations of the State; temporary requirement matters only for the duration of project for any project of the State; temporary requirement matters only for the duration of the project for any project through any methods assigned by the Union Government to local and foreign private companies; and temporary requirement matters by the Union Government.

⁷⁰ Chapter XIII - Offences and Penalties - Anyone who committed any of following things on conviction, shall be punished with and imprisonment not exceeding 3 years or with a fine not exceeding fifty thousand kyats or with both: to prevent, bother or obstruct the duties that carrying out by organization or person assigned by this law; and to obstructed with dishonesty of any programmes of land acquisition which carrying out by this law for the public purpose, for damage; Any responsible member or his assigned person by this law, having carrying out the acts which are not in compliance with the provisions of this law with dishonesty, on conviction, shall be punished with an imprisonment not exceeding 3 years or with a fine not exceeding one hundred thousand kyats or with both; Anyone who submitted the false evidence and documents knowing to the organization or a person assigned for carrying out the tasks by this law, on conviction, shall be punished with an imprisonment not exceeding 7 years together with a fine not exceeding one million kyats.

⁷¹ Joint letter by seven UN human rights special rapporteurs about the VFV amendments: (quoted in Oliver Springate-Baginski, “There is no vacant land”: A primer on defending Myanmar’s customary tenure systems, Transnational Institute, March 2019, p. 6).

displacement and land disputes will occur as the new law is implemented.⁷² Amendments⁷³ to the law introduced in September 2018 will greatly increase land grabbing and further displacement.⁷⁴ The new rules require people living on land that is (arbitrarily) classified as ‘vacant, fallow or virgin’ in nature to apply for permits to utilize these lands by March 2019 or otherwise face either eviction from the land concerned or even the application of criminal penalties if people fail to apply for the requisite permits or defy eviction orders to leave their land.⁷⁵ These draconian rules have led many to demand the reversal of these amendments, and indeed, the wholesale repeal of a piece of legislation that has been sold as a key tool to promote foreign investments, without regard to the rights of tens of millions of people who are simply unprotected by national human rights laws.⁷⁶ (See Box 4)

⁷² For an overview of some of the structural flaws in both of the 2012 land laws, see: Supra, *Legal Review of Recently Enacted Farmland Law and Vacant, Fallow and Virgin Lands Management Law Improving the Legal & Policy Frameworks Relating to Land Management in Myanmar*, Food Security Working Group's Land Core Group, Yangon, November 2012, 13-14. According to another analyst, “The result of these two new land laws is that families and communities living in upland areas - now labeled ‘wastelands’ - have no legal land rights and land tenure security...The two land laws dispossess farmers, especially upland subsistence farmers, of their right to farm, and more broadly their right to land and to decide how they will use and manage their farm and forestlands”. Kevin Woods, K. *Agribusiness Investments in Myanmar: Opportunities and Challenges for Poverty Reduction*, Yunnan University Press, Kunming, Yunnan, PRC China, 2013.

⁷³ See, for instance, the following articles: Art. 2(e) “Vacant land and Fallow land” means land which was used by the tenant before, and then that land was abandoned by the tenant in any reason, not only the State designated land but also for agriculture or livestock breeding purposes; Art. 2(f) “Virgin land” means land which may be new land or other wood land in which cultivation was never done before. It may have or not with forest, bamboo or bushes, even though ground feature may be plane or not, and includes the land which has been cancelled legally from Reserved Forest, Grazing ground, and Fishery pond land respectively for Agriculture, Livestock Poultry Farming and Aquaculture, Mining, and Government allowable other purposes in line with law; Art. 7. The Central Committee shall permit the grant on application for granting right to do, right to utilize land of Vacant, Fallow and Virgin Lands with the agreement of Myanmar Investment Commission for foreign investment; Art. 8. The Central Committee shall make permission or rejection of the systematic application in order to ensure the management task concerning the use of Vacant, Fallow and Virgin Lands; Art. 9. In accordance with the Section 8, the Central Committee Shall issue the permission order, granting the right to do, right to utilize land of vacant, fallow and virgin lands, after security fees has been paid.

⁷⁴ See, Oliver Springate-Baginski, “*There is no vacant land*”: A primer on defending Myanmar’s customary tenure systems, Transnational Institute, March 2019. “Myanmar’s Government has been interfering in and undermining these systems, and therefore undermining its own international commitments....A new amendment to the VFV law 2012 passed in September 2018, making continued occupation, without official permission, of land which is not municipal, private or state (i.e. land which is de facto customary) a criminal offence”. (p. 7).

⁷⁵ The law provides that: (b) The person and organization occupying and utilizing the vacant, fallow and virgin lands without the permit of the Central Committee for the Management of Vacant, Fallow and Virgin Lands shall; (1) apply for the permit to utilize the vacant, fallow and virgin lands at the Central Committee or relevant management committees by submitting complete detailed information including the area of the vacant, fallow and virgin lands that have been utilized, within six months from the day when the Law Amending the Vacant, Fallow and Virgin Lands Management Law (2018) was enacted. (2) acknowledge that the vacant, fallow and virgin lands that have been utilized shall be resumed or they shall be evicted from the land in line with regulatory procedures in the case of failure to apply for the permit to utilize in line with the sub-section (b)(1) or such application is rejected. (3) acknowledge that they shall be subject to penalties under this law in the case of continuing to occupy and utilize the vacant, fallow and virgin lands without applying for the right to utilize in line with the sub-section (b)(1) or by defying the order to leave the vacate the vacant, fallow and virgin lands issued by the Central Committee or relevant management committee with the reason the permission should not be granted.”

⁷⁶ The Transnational Institute, for instance, recommends “A moratorium on any appropriation and allocation of all customary land and resources must be introduced. Past and continuing injustices in relation to land grabbing and dispossession must be investigated systematically, proper restitution facilitated, and punishments against the perpetrators. Oliver Springate-Baginski, “*There is no vacant land*”: A primer on defending Myanmar’s customary tenure systems, Transnational Institute, March 2019.

BOX 4: MYANMAR'S LAND LAW IS A TICKING TIME BOMB⁷⁷

The VFV Lands Management Law “requires those currently on VFV land with Central Committee permission to apply for a land use permit by March 2019....The amended VFV law forces existing land-users to give up their customary land rights and apply for a 30-year land-use permit, or risk being charged with trespassing....the measure criminalises and dispossesses millions of smallholder farmers in the ethnic borderlands, who hold and use land under customary tenure rights for which there is no formal recognition. It also potentially extinguishes the land rights of the many hundred thousand displaced people and refugees who can't stake their claims. This will be a grave setback for Myanmar's democratic transition, intensify the struggles over land and exacerbate the country's six decades of armed conflict. The approach is inconsistent with Myanmar's human rights obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR) the government ratified in 2017, which requires Myanmar law to protect ESC rights.”...“The law opens the window for companies and powerful individuals to apply for VFV land, taking over from poorly-informed and marginalised communities who fail to register in time. As such, pushing ahead with the deadline to enforce the law would shatter the government's pledge in tackling land acquisition injustices and destroy the ruling party's prospects in ethnic regions for decades.”

THE FARMLAND LAW (2012)

34. *The Farmland Law (2012)* establishes a system of land registration⁷⁸ for farmers that ostensibly provides land use certificates (LUCs) that, once secured, create rights to sell, exchange, access credit, inherit and lease the land over which they hold rights. The prevailing view is that this law does not provide either ownership or sufficient land tenure security for farmers as the law in fact fails to provide adequate protection against arbitrary and forced displacement or land confiscation. Tenure rights under the *Farmland Law* are not secure because Government retains the power to revoke the LUCs if any of the strict conditions of use are not complied with in full. The law essentially sacrifices security of tenure for commercial interests. While this law expands the rights available to those in rural areas in a limited manner in principle, it is important to reiterate that without either a deed of title or legal registration of rights in land, those residing or using the land in question are effectively without rights to the land concerned under statutory law. Because many farmers cannot show a land registration document⁷⁹, and as noted above, the fact that many in the rural sectors of the country live under customary land law arrangements that are not adequately protected under domestic laws, it is clear that farmers, shifting cultivators and villagers in rural, upland and ethnic

⁷⁷ Thompson Chaufabien Daudier, 23 Jan 2019, *Myanmar Times*.

⁷⁸ Under Section 4, “A person who has permission to use farmland shall have to apply for a Land Use Certificate to the Township Land Records Department Office passing it through the relevant Ward or Village Tract Farmland Management Body”(unofficial translation).

⁷⁹ “42% of farmers live in upland areas and their livelihood is agriculture. Less than 10% of them have land use certificates (Supra, Hnin, 258).

areas are tremendously vulnerable to abuses of their land rights and to land acquisition and subsequent displacement.⁸⁰ Moreover, the *Farmland Law* sets up an unworkable administrative scheme that lacks basic rule of law safeguards that are necessary for stable, rights-protective land administration system, and further, denies access to independent judicial review. The law contains vague rules with respect to farmers' obligations, a multi-layered appeals process with each appellate level appointed by the same central authority and unduly harsh penalties for non-compliance. All of this makes the process inordinately complex and the consequences of missteps disproportionately severe.⁸¹ In addition, land registration and record keeping remains extremely poor.⁸² This is particularly so given the fact that farmers and those reliant on customary land rules live under the permanent spectre of displacement because of how meekly national laws protect HLP rights.⁸³

⁸⁰ "In many cases, customary land use of farmers was ignored and agribusiness were awarded such 'vacant' land given it was not registered with the SLRD. Even if farmers registered their land with the SLRD and had the land use certificate, land confiscation was still possible" (id., Hnin, p. 257).

⁸¹ Additional provisions of the law, include: 19. If it fails to comply with all or any of the terms and conditions contained in Section 12 of this Law, the Administrative Body of the Farmland appointed by the Ministry for this purpose may pass the following one or more order after scrutinizing in accord with this law and the rules issued under this law; (a) causing to pay the stipulated fine; (b) causing to carry out the farmland according to the stipulated means; (c) expelling the deserved person from the farmland; (d) removing the buildings constructed without permission on the farmland; 22. The Ward or Village Tract Administrative Body of the Farmland opens an original case of dispute in respect of the right to use the farmland shall make examination, hearing and decision. 23.(a) The person who is dissatisfied with the order or decision passed by the Ward or Village Tract Administrative Body of the Farmland under Section 22 may appeal to the relevant Township Administrative Body of the Farmland in accord with the stipulations within 30 days from the day of such order or decision. (b) The Township Administrative Body of the Farmland may approve, amend or cancel the order or decision passed by the Ward or Village Tract Administrative Body of the Farmland. 24.(a) The person who is dissatisfied with the order or decision passed by the Township Administrative Body of the Farmland under Sub-section (b) of Section 23 may appeal to the relevant District Administrative Body of the Farmland in accord with the stipulations within 30 days from the day of such order or decision. (b) The District Administrative body of the Farmland may approve, amend or cancel the order or decision passed by the Township Administrative Body of the Farmland. 25.(a) The person who is dissatisfied with the order or decision passed by the District Administrative Body of the Farmland under Sub-section (b) of Section 24 may appeal to the relevant Region or State Administrative Body of the Farmland in accord with the stipulations within 60 days from the day of such order or decision. (b) The Region or Stat Administrative Body of the Farmland may approve, amend of cancel the order or decision passed by the District Administrative Body of the Farmland. (c) The decision of the Region or State Administrative Body of the Farmland shall be final and conclusive. Chapter IX - Indemnities and Compensations - 26. Notwithstanding contained in any existing law, the Central Administrative Body of the Farmland shall coordinate as may be necessary in respect of giving compensation not to grieve absolutely for the matters carried out by the person who has the ownership right to use the farmland including the land confiscated for interests of the State or the public interests and development by building on such land and managing by other means by the relevant. 27. The person whose right to use the farmland is revoked or the farmland is recovered by the Central Administrative Body of the Farmland under Sub-section (d) of Section 17 shall not have the right to enjoy compensation....31. The Central Administrative Body of the Farmland may, if the farmland is not put into effect as the stipulated manner within six months from the permitted day or if the business is not completed within the stipulated period after having permission to use the farmland by other under Section 30, confiscate such farmland. Chapter XI - Administration of the Farmland - 32. In confiscation the farmland for the projects of the State interests, only the required minimum area shall be confiscated. The project shall be implemented to complete as soon as possible within the prescribed period and when the project is not carrying out, it shall be returned to the person or organization which has the original right to use the farmland. 33. The Union government or the authority assigned by the Union Government for this purpose shall, except summons by other means, continue to keep not to damage pastures and communal land of the village. 34. In respect of vacant, fallow and virgin lands that are permitted to carry out or use for agriculture and livestock breeding businesses, when the cultivation and production of crops is stable, the Central Committee for the management of vacant, fallow and virgin lands shall alter and stipulate as the farmland and cause to involve in this laws....40. No proceeding shall be filed at any court for any matter carried out in good faith in accord with this Law or rules made under this Law to the members of various levels of Administrative Body of the Farmland.

⁸² "Another land-related issue that hampers manufacturing is the inadequacy of access rights and ownership registries. Poor records and regulations that leave land ownership unclear and inadequate housing in both rural and urban areas contribute to difficulties faced by companies trying to find adequate building sites. Moreover, if disputes arise over land, Myanmar currently offers no meaningful legal recourse and no national legal-aid programme to ease access to the justice system. Certifying land rights in a way that is fair and equitable, particularly those relating to customary and communal use, is a major challenge and a familiar issue for other countries that are making the transition to become modern economies. Any land reform needs to address taxation, land valuation and zoning" (p. 77, id., McKinsey).

⁸³ Displacement Solutions (2012) *Myanmar at the HLP Crossroads*, available at <http://displacementsolutions.org/files/>

35. The *Myanmar Investment Law* came into effect in October 2016, and incorporated and amended to earlier laws regulating these matters, namely the 2012 *Foreign Investment Law* and the 2013 *Citizens Investment Law*.⁸⁴ The present law provides the legislative framework for new investment by international companies in Myanmar. Beyond the provision of a 3-7 year tax-exemption for foreign investors and a range of other measures designed to stimulate foreign investment, the law explicitly addresses land questions in several of its key clauses.⁸⁵ Under the 2016 law, investors must procure a Myanmar Investment Commission (MIC) permit or MIC Endorsement enabling them to invest in the country. Investors with this status can obtain leases of land or buildings for up to 70 years. Investors are ostensibly protected against the nationalisation of their enterprises under Section 55 of the law, however, this Section in fact gives government the power to carry out acts of ‘extraordinary expropriation’ of assets, subject to these measures being ‘non-discriminatory’ in nature, and benefitting or regulating economic or social activity including efforts to protect “citizens’ morals” or maintain public interest or national security. If such measures proceed, those affected must be provided with fair and adequate compensation at market value at the time of expropriation of the investment. Section 53 clarifies that compensation for the indirect expropriation would normally be equal to an investment’s fair market value, but that other factors should also be taken into account.
36. Also noteworthy is the *Special Economic Zone Law* (2011), which governs land issues within SEZ’s. It addresses the question of land acquisition and places the burden on ‘developers’ and ‘investors’ to transfer and pay for compensation costs associated with land-based investments. Article 36 reads: The developer or investor shall bear the expenses of transferring and compensation of houses, buildings, farms and gardens, orchards/fields, plantation on land permitted by the Central Body if these are required to be transferred. Moreover, he shall carry out to fulfill fundamental needs of persons who transfer so as not to lower their original standard. The relevant Management Committee shall coordinate as may be necessary for the convenience of such works.⁸⁶ In addition, both the Yangon City

[documents/MyanmarReport.pdf](#). See also: Scott Leckie, *Guidance Note on Developing Policy Options for Addressing Land Grabbing and Speculation*, 26 June 2012.

⁸⁴ One source notes that: The MIL, which provides the overall legal framework, was followed by the more detailed Myanmar Investment Rules 2017 (Investment Rules) which came into effect on 30 March 2017 as well as two notifications: Notification 13/2017 dated 1 April 2017 (Classification of Promoted Sector) (Notification 13) and Notification 15/2017 dated 10 April 2017 (List of Restricted Investment Activities) (Notification 15). Together, these represent the body of the current Myanmar foreign investment laws. See: <https://www.charltonsmyanmar.com/investing-in-myanmar/investment-law/>.

⁸⁵ Under the law of Myanmar foreigners cannot own land, however, under the 2012 Foreign Investment Law foreign investors can lease land from the government for 50 years, and then extend it for another 20 years with two 10-year extensions; thus amounting to the possibility of 90-year leases. Private land owners can also lease land to foreigners if approved by the relevant ministries.

⁸⁶ Chapter VII reads: Land Use: 35. The Central Body: (a) may, with the approval of the Government, permit the developer or investor land lease or land use after causing payment of fees to be made for land lease or land use, for at least 30 years; (b) if desirous to continue to operate after the expiry of the permitted term under subsection (a), may extend consecutive term of 30 years for large-scale investment enterprise and further 15 years of extension after the expiry of the said term; (c) if desirous to continue to operate after the expiry of the permitted term under subsection (a), may extend consecutive term of 15 years for medium-scale investment enterprise and further 15 years of extension after the expiry of the said term; (d) if desirous to continue to operate after the expiry of the permitted term under subsection (a), may extend two times of consecutive term of five years for small-scale investment enterprises; (e) shall scrutinize and permit the term of period for land lease or land use which the developer or investor actually needs depending on the type of investment business and the amount of investment; 36. The developer or investor shall bear the expenses of transferring and compensation of houses, buildings, farms and gardens, orchards/fields, plantation on land permitted by the Central Body if these are required to be transferred. Moreover, he shall carry out to fulfill fundamental needs of persons who transfer

Development Committee and Mandalay City Development Committees, under the relevant *City Development Laws* have functions including drawing up civil projects and developing new towns, administering land in accordance with existing laws, constructing, maintaining and demolishing buildings, demolishing and resettlement of squatter houses, squatter buildings and squatter wards, carrying out environmental conservation work and other duties potentially involving land acquisition.⁸⁷

37. Far more information could be provided as to the opaque and inconsistent legal framework in Myanmar that so conveniently for land grabbers essentially makes their job an all too easy one. Indeed, if one were to design a legal system that expedited the theft of land, under a protective legal cloak, with virtually assured impunity for the land grabber, then Myanmar is the place to look for guidance. With a few notable exceptions, such as the 2016 *National Land Use Policy* and the work of the Land Grab Reinvestigation Committee, the post-reform period of 2011 onwards has not improved the protections afforded citizens to feel safe and secure in their homes and lands. If Myanmar is serious about democracy and promoting the rule of law, this state of affairs simply must change, and must change immediately if the rights of tens of millions of people throughout the country are actually to mean anything in practical terms. Some will react to these sentiments with alarm, and attempt to justify and rationalise laws and practices that have made Myanmar the international poster-child for land grabbing, displacement and disenfranchisement that is today and has been for decades. They may point to the existence of a government body put in place in 2012 as evidence for their views, and may believe that such a body actually protects the full spectrum of HLP rights of land grab victims, but nothing could be further from the truth, and arbitrary land acquisition, unjustifiable displacement with compensation and permanent loss of HLP rights continue throughout Myanmar on at a horrific level.

so as not to lower their original standard. The relevant Management Committee shall coordinate as may be necessary for the convenience of such works; and 37. The developer or investor: (a) shall use the land which he is entitled to lease or use in accordance with the prescribed terms and conditions; (b) may, in accordance with the existing Law, rent, mortgage or sell the land and building to another person for investment business within the term granted to operate in accord with the stipulations. If he sells, he shall comply with the stipulations under subsection (a) of Section 19; (c) shall not modify or alter, without permission, the topography or the contour of the land for which he obtained lease or land use; (d) shall report immediately to the Management Committee if natural mineral resources or antiques not relating to the permitted enterprise and which are not included in the original agreement are found above or under the land which he is entitled to lease or use. If the Management Committee permits, he may continue to operate on such land. If not, he shall shift to the substituted area; (e) intend to operate affectively the permitted enterprises on the land permitted to lease or use. As such the enterprise contained in the agreement shall be completed within the prescribed term in the original agreement or up to two years from the day of permission to operate. If not completed, the permission shall be revoked. The said land shall be returned back and the buildings on this Land shall be removed.

⁸⁷ Art. 8, *City of Mandalay Development Law* (2002).

38. Since the onset of the political reform process, the two governments in place have each established non-judicial government committees to address various land-related themes. In 2012 a *Parliamentary Land Confiscation Commission* (also sometimes referred to as the 'Farmland Investigation Commission') was created to investigate abuses in confiscation of land and make recommendations on cases where the government should take back land from concession holders, or pay households for uncompensated past expropriations. In the following year, a *Land Utilization Management Central Committee* was established and entrusted with implementing the recommendations of the *Parliamentary Land Confiscation Commission* and facilitating the return of seized land. The body currently responsible for examining land confiscation and potential restitution cases is *The Central Land Grab Reinvestigation Committee*, which was formed by the Office of the Union President in May 2016. The *Reinvestigation Committee* is entrusted with resolving 'conflicts from farmland and other land acquisition', as well as to 'supervise solution procedures of the relevant Ministries, the Nay Pyi Taw Council or Division and State Governments in Connection with land acquisition expressed in the report of the Enquiry Commission submitted to the Union Parliament about farm land and other land acquisition', and to 'give back systematically the former affected persons the farmlands forsaken by the relevant ministries, companies and private enterprises'. The *Reinvestigation Committee* has also adopted a policy that dispossessed farmers should be compensated for their losses when the return of land is not possible. The *Reinvestigation Committee* is responsible for forming various levels of committees ranging from nationwide bodies down to the village level. It has powers to issue notice and order relating to its authoritative rights, tenures and duties with approval of the government. Reinspection Committees at all levels are authorized to accept claims, either grievances or disputes, from citizens concerning requests for the return of confiscated lands. They are authorized to investigate them, deliberate, and, as appropriate, make decisions regarding how the dispute or claim should be settled.
39. All of this may sound incredibly promising, however, in practice the success of these bodies in restituting land to claimants, however, remains an open question⁸⁸, with divergent views on the scale⁸⁹ to which actual restitution and/or compensation has occurred under these various measures.⁹⁰ What is clear is that many thousands of cases remain either not

⁸⁸ Caitlin Pierce and Stephen Huard, *Land Tenure Rapid Assessment - Pyapon and Maubin (Ayeyarwaddy), Pilot Sites for Land Distribution to the Landless*, Land Core Group, August 2016.

⁸⁹ See, for instance, Myanmar Centre for Responsible Business, *Land - Briefing Paper* (March 2015), Yangon, (Institute for Human Rights and Business, Myanmar Centre for Responsible Business and the Danish Institute for Human Rights): «This Committee has agreed to return land or provide compensation for 474,000 acres (699 cases) but in July 2014 reports suggested that less than 150,000 acres may be returned. In September 2014 the Parliamentary Commission presented a report to Parliament, citing many layers of bureaucracy as the main cause of extreme delays in returning land to farmers which had been taken by the government. Indeed, the official newspaper *The New Light of Myanmar* reported in September 2014 that the Commission said only 583 out of 2,689 complaints which they had forwarded to the Ministry of Defense, and only 299 out of 6,559 complaints forwarded to the State/Region Governments, had been addressed. Such delays indicate the lack of capacity in the government to deal with the large number and the complexity of land disputes, as well as a cumbersome legal and administrative regime.»

⁹⁰ The Parliamentary Land Confiscation Commission received and reviewed 26,371 complaint letters from people and communities alleging to have been the victims of land confiscation, with the Executive Branch of the government given the responsibility of settling these claims and potential disputes. Of these some 19,836 complaints were scrutinized and sent

reviewed or without any form of adequate redress. One analyst notes in this regard that “The Reinvestigation Committee policies do not explicitly exclude nor include claims from conflict-displaced IDPs; however, anecdotal evidence suggests that even in post-conflict areas, the Reinvestigation Committees are not operating or have been instructed not to accept cases relating to armed conflict.”⁹¹ While much remains to be done, and many restitution claims remain outstanding and unresolved, particularly those linked to conflict in ethnic areas, the land returns that have occurred are significant. A variety of actors have voluntarily returned formerly confiscated land, including the military and local and regional governments.⁹² These are important steps forward, and constitute a meaningful start on Myanmar’s restitution journey. But much remains to be done to ensure that a system is in place that facilitates the submission of restitution claims by *everyone* with such a claim, within a given time-frame, and subject to clear legal rules, all assessed by an independent, fair, expert body with judicial powers of both determination and enforcement. At present, the vast majority of claims made (recalling that many claims may yet to have been made) have not been considered by judicial bodies, but rather through administrative or political mechanisms that may or may not necessarily be consistent with the rights possessed by those making such restitution claims.⁹³ Beyond the difficulties in resolving such cases, determining how best to address the issue of inadequate past compensation vis-a-vis current market value of the land concerned is also proving a major challenge to the Committee. This is not to say that non-judicial remedies cannot provide acceptable avenues to restitution, and indeed, that in many cases such forms of redress may be preferable to judicial pathways.

40. For land grabbing to end and restitution to succeed in Myanmar, unilateral determinations on potential restitution claims without independent oversight and review falls short of what is expected in any restitution programme that is consistent with prevailing legal norms. For instance, views by the Ministry of Home Affairs in 2015 that some 336 restitution claims concerning 335,000 acres of land in its view ‘cannot be transferred to the owners’ (a sentiment which is not uncommon within ministries or others with current possession of land potentially subject to restitution), would need to be reviewed by an independent body specifically entrusted to examine restitution claims if the restitution process is to provide an effective restitution remedy for all who seek one.⁹⁴ A restitution process driven by the wishes of civil society and restitution claimants that is enshrined within whichever document is produced at the conclusion of the peace process and within a new National Land Law,

to the Union government for resolution. According to one source, 12,978 cases were ‘solved’ involving almost 400,000 acres of land, although these figures are difficult to accurately verify. See: Caitlin Pierce, ‘Whose Land is it Anyway?’, in *The Irrawaddy*, 7 July 2016. See also, Namati, *Returns of Grabbed Land in Myanmar: Progress After 2 Years*, December 2015.

⁹¹ Gendered experiences of land confiscation in Myanmar: Insights from Eastern Bago Region and Kayin State, (Saferworld, 2018).

⁹² ‘Myanmar returns confiscated farmland to farmers in Mandalay’, *Xinhua*, 10 July 2016 – “Myanmar’s Mandalay regional government has returned over 200 acres of confiscated land to farmers in Madaya township...According to official, the returned land was originally seized by the former Ministry of Industry in 1977. In Mandalay, more than 35,000 acres of land were confiscated with some 32,000 acres having been returned.» See also: Mylaff May 30th 2016, Issue 44 Volume 3.

⁹³ Revealing the many challenges facing the existing mechanisms, the Reinvestigation Committee has received 2,056 cases submitted by hluttaws, states and regions, but thus far only 33 cases have been resolved by local committees. Source: Reinspection Committee Chair, VP Henry Van Thio, public statement made on 2 November 2016, published by the Myanmar News Agency on 2 November 2016.

⁹⁴ Report of the Fifteenth day’s meeting (20 Feb 2015) of the 7th regular session of the first Union Parliament. See also: Caitlin Pierce, ‘Whose Land is it Anyway?’, in *The Irrawaddy*, 7 July 2016: «Evidence suggests that the military was involved directly, or indirectly through family connections, in over 50 percent of land grab cases handled by paralegals working with Namati. The military’s oversight of the GAD, via the Ministry of Home Affairs, creates a conflict of interest in the resolution of these cases.»

constructed using the best practices of the international community and designed to resolve all outstanding restitution claims in the fairest and most expeditious manner possible will be of considerable benefit to the entire country as it continues in its quest for sustainable peace, reconciliation and development.

41. While the *Reinvestigation Committee* and its various tiers constitute steps forward in a country where so much land confiscation has taken place in past decades, in its present form and with its present mandate, this body falls short of what is needed in the following fundamental ways:
 - The Committee only has powers of persuasion in implementing any decisions or recommendations it makes. It has no judicial powers, and can neither issue formal decisions nor enforce its recommendations concerning the complaints it receives and assesses;
 - There is little indication that all potential restitution claims have been submitted to this and former bodies, particularly those linked to conflict areas;
 - The Committee was intended to complete its work within six months (eg. by the end of 2016), which was always a wholly unrealistic time-frame given the nature of the problems at hand, and at time-frame which if strictly enforced, will leave large numbers of restitution claims unaddressed;
 - The Committee is under-staffed, under-financed and lacks expertise in terms of international law and best practice on restitution;
 - There appears to be no comprehensive searchable digital public record of the Committee's work, nor a website or database accessible to the public, including persons living under the control of ethnic armed groups.
 - The Committee has not responded to many of the claims put to it, particularly if the case concerns land that was confiscated by the military.
42. Generally, if it can be definitively shown that the *Reinvestigation Committee* provides an effective remedy for everyone with a restitution claim, then it would be appropriate to consider giving the mandate to this body to determine all remaining restitution claims that have yet to be satisfactorily resolved. However, if this is not the case, - even if politically difficult and 'sensitive' - at a minimum a new body will need to be established to ensure such effective remedies. The current body is neither a remedy, nor does it provide due process. It falls well short of constituting a nationwide restitution process accessible to everyone with an as of yet unresolved HLP restitution claim. None of this is to dismiss the achievements of this body and other efforts to provide restitution, which have been considerable, but rather to state that this body and the overall procedural possibilities realistically accessible to everyone with a legitimate restitution claim are *not yet in place*, and can probably only find a place within the country through a new, consolidated restitution programme and law as a core element of the peace process.
43. We have, thus, an ongoing situation of extensive, intentional and long-standing practice of mass land grabbing made possible by acts of collusion between the military, government agencies, business interests and foreign companies seeking to cash in on the resource bonanza that is modern-day Myanmar, all at the expense of the rights of the millions of

people affected by this conspiracy.⁹⁵ This state of affairs has been well-documented in countless independent reports. Each meticulously reveal the methods and massive scale of these processes that affect ethnic borderland states and regions, conflict areas, free trade zones and industrial zones, land polluted by land mines and unexploded ordnance and within urban areas as well. Viewed as a whole, each land acquisition and confiscation action in Myanmar have some or all of the following characteristics:

- The frequently arbitrary nature of land acquisition with little or no efforts to find alternatives to reduce or preclude the need for subsequent displacement, including ethnic cleansing (and possibly genocide in Rakhine State);
- Forced evictions contrary to international rules and human rights protections;
- A lack of consultation with affected communities;
- Disputed, inadequate or the absence of just and satisfactory compensation;
- The absence of any policy on resettlement following land acquisition and the general lack of attention to this issue; and
- Insufficient opportunities for judicial or other forms of redress to prevent or resolve displacement due to land acquisition.⁹⁶

44. The net effect of these actions, for which the particular agents of the Myanmar State are liable under international law, has been the widespread violation of the full spectrum of housing, land and property rights of millions of individual rights holders. To date, these actions have been carried out in a legal environment that both encouraged such abuses and assured those responsible an assured state of impunity with no real or perceived threat of sanction, accountability or prosecution. It is time for those days to end and for a new vision of HLP rights to emerge in the country.

⁹⁵ An August 2019 UN report is particularly scathing in its analysis of this collusion. The official press release issued by the UN on the day of the report's release, states, in part: "The U.N. Independent International Fact-Finding Mission on Myanmar urged the international community on Monday to sever ties with Myanmar's military and the vast web of companies it controls and relies on. The Mission said the revenues the military earns from domestic and foreign business deals substantially enhances its ability to carry out gross violations of human rights with impunity. The report, for the first time, establishes in detail the degree to which Myanmar's military has used its own businesses, foreign companies and arms deals to support brutal operations against ethnic groups that constitute serious crimes under international law, bypassing civilian oversight and evading accountability. The Mission said the U.N. Security Council and Member States should immediately impose targeted sanctions against companies run by the military, known as the Tatmadaw. It encouraged consumers, investors and firms at home and abroad to engage with businesses unaffiliated with the military instead. The Mission also called for the imposition of an arms embargo, citing at least 14 foreign firms from seven nations that have supplied fighter jets, armored combat vehicles, warships, missiles and missile launchers to Myanmar since 2016. During this period the military carried out extensive and systematic human rights violations against civilians in Kachin, Shan and Rakhine States, including the forced deportation of more than 700,000 ethnic Rohingya to Bangladesh..... The report details how 45 companies and organizations in Myanmar donated over 10 million dollars to the military in the weeks following the beginning of the 2017 clearance operations in Rakhine State. So-called "crony companies" with close links to the Tatmadaw later financed development projects in Rakhine State that furthered the military's "objective of re-engineering the region in a way that erases evidence of Rohingya belonging to Myanmar." The full report is entitled "The economic interests of the Myanmar military: Independent International Fact-Finding Mission on Myanmar", UN Doc: A/HRC/42/CRP.3. See also: <https://www.smh.com.au/world/asia/un-reveals-network-of-businesses-funding-the-myanmar-military-20190805-p52e1j.html>.

⁹⁶ See: <https://www.land-links.org/country-profile/burma/>. USAID Country Profile: Property Rights and Resource Governance - Burma, p. 1: "Forcible and uncompensated land confiscation is a source of conflict and abuse in Burma, and protests and fear of "land grabs" have escalated as the state opens it markets to foreign investors and pursues policies to dramatically increase industrial agricultural production".

II. SOVEREIGNTY, CONSTITUTIONS AND POWERS OF LAND GRABBING

45. There are few legal sectors more important to the effective managing of social stability, the rule of law and for the foundations of equal rights and democracy than the question of the land acquisition powers of the State *vis-a-vis* the housing, land and property rights entitlements of ordinary people. All States domestically entitle the State, generally subject to strict legal criteria, to seek the acquisition of land for public purposes through processes labeled as land acquisition, expropriation, nationalisation, eminent domain, compulsory purchase, appropriation, resumption and, of course, land grabbing. In principle, these tremendous powers are conceded to States as a mechanism for ensuring that the State will be able to implement various legal obligations it may have for achieving sustainable development objectives and the provision of State-wide services that only the State itself is capable with providing, such as roads, bridges, airports and other large-scale infrastructure and investment projects deemed as fundamental to the public. Indeed, these powers are generally recognized as the sovereign right of States.
46. Because they are so liable to abuse these powers are neither absolute nor are they intended to be used on a frequent basis. These powers must be carried out in the public interest. Although one may be forgiven for not automatically comprehending this while examining land confiscation practices in Myanmar, in fact such sovereign rights are both highly *regulated* and *limited* in nature, particularly under international laws, guidelines and best practices. It is in balancing the powers of the State with individual and community rights under prevailing international and related human rights legal regimes that we can begin to determine which acts and omissions constitute internationally wrongful acts, and upon which practical and legal grounds national law, policy and practice should be based to ensure strict compatibility between international and national rules.

REGULATIONS AND LIMITATIONS ON LAND GRABBING

47. When housing, land or property rights are limited through these processes of acquisition, and as noted at the outset of this report, at a minimum this can only be carried out when these are:
- 1) subject to law and due process;
 - 2) subject to the general principles of international law;
 - 3) in the interest of society and not for the benefit of another private party;
 - 4) proportionate, reasonable and subject to a fair balance test between the cost and the aim sought; and
 - 5) subject to the provision of just and satisfactory compensation.

48. Each of these general limitations, in turn, can be considerably refined with further criteria and requirements. For instance, not only must compensation be provided to persons whose land is acquired in accordance with law, but such compensation must be both *just* and *satisfactory*. In many contexts, these terms are interpreted to mean that people must be provided the *fair market value* of the land concerned, paid prior to the acquisition of the land and with legal remedies available to anyone who might wish to dispute these terms.⁹⁷ Similarly, people are generally accorded rights to access to grievance mechanisms, access to legal counsel and to an independent judicial body should they dispute the attempted land grab.

COMPENSATION REQUIREMENTS

49. Almost without exception, the very principle of state sovereignty empowers states with the right to compulsorily acquire housing, land and property in the public interest, and subject to certain criteria being met, and in that respect although it occurs with excessive frequency there, what occurs in Myanmar is not particularly exceptional as most governments at one time or another exercise such powers. What is exceptional, however, is the systematic manner by which such powers are exercised in Myanmar with total disregard for basic rules governing these actions. Under the customary international legal rules of state responsibility, thus, while expropriation of land may be allowed in principle as long as it is done in the 'public interest', it is in the conditions for its lawful implementation that obligations of state arise.⁹⁸ As such, land acquisition is allowed, but if it is carried out neither in the public interest nor in conformity with the obligation to, among other things, compensate landowners at market value, then legal liability emerges.
50. Land grabbing, thus, can be either 'lawful' or 'unlawful', and subsequent legal obligations surrounding compliance with the law, procedural remedies, the right to dispute the acquisition, compensation terms, resettlement terms and many other issues can also be seen as 'lawful' or 'unlawful' in nature. Compensation questions, in particular, therefore can arise both in the context of unlawful acquisition *per se*, as well as for losses incurred as a result of lawful acquisition.
51. The well-known *Chorzów Factory* (1928) case sets out what are widely agreed to be the basic remedial norms for violations of international law involving the illegal acquisition of land. In this case, the pre-cursor to the present International Court of Justice, the Permanent Court of International Justice (PCIJ), decided that in the case of wrongful expropriation: "The principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals –

⁹⁷ The right of the state to acquire land has been laid out by one state government in the United States in the following manner: The question of why land acquisition is a key element of State power stems from the simple perspective that in order for States to fulfill basic responsibilities to citizens including building roads and improving existing ones, erecting and expanding public buildings, creating state parks and preserving historically important places. If it could not acquire private property, the State would be unable to fulfill these fundamental responsibilities. Purchasing Property is one method, eminent domain is another. Both require: the right to information, the right to consultation, the right to be presented with a purchase offer which includes the purpose for the land sought, fair market value and just compensation, compensation to be paid prior to removal, the right to be represented by an attorney, the right to just compensation for the acquisition for your property and reimbursement for moving expenses. Source: State of Illinois (Department of Transportation), *A Land Owner's Guide to Land Acquisition and Eminent Domain*, Illinois Department of Transportation.

⁹⁸ See, for instance: Suzy H. Nikiema, *Compensation for Expropriation*, International Institute for Sustainable Development, 2013.

is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are principles which should serve to determine the amount of compensation due for an act contrary to international law”. This case was based on the specific violation of a treaty. However, the Court’s decision concerning the appropriate remedy did not distinguish between treaty violations and any other violations of international law. As such, a violation of customary law would presumably be subject to the same remedial norm as a violation of a treaty.⁹⁹ In essence, thus, for land acquisition carried out in violation of international legal norms, the remedy is either restitution (the ability to have restored to the owner the housing, land or property in question), or when this is materially impossible, to receive compensation at market value of the asset concerned, lost profit, interest accrued until the date of payment and any other damages.¹⁰⁰

52. And this, in turn, raises the question as to compensation arrangements when the land acquisition has actually – as it rarely is in Myanmar – been carried out in full conformity with the prevailing law, including international law. One very interesting and comprehensive study of national laws in 50 countries concerning the practice of compensation payments following expropriation in Asia, Africa and Latin America reveals that most countries do not currently have in place national laws that comply with international standards on asset valuation under international law.¹⁰¹ Many countries did not provide affected landowners with compensation sufficient to enable them to start life anew at another location, but generally compensation was paid albeit in insufficient amounts. Most cases in Myanmar are not accompanied by compensation at all, which led the country to be ranked 42 out of 50 in this survey.
53. Tagliarino’s analysis provides further insights into often neglected issues for which compensation claims can and should arise; all of which are relevant in one way or another in Myanmar. He addresses, for instance, compensation for unregistered customary tenure holders, an issue affecting up to 70% of Myanmar’s population noting that only eight of 50 countries surveyed provided legislative protection to such groups when land acquisition occurs. In this regard, thus, Myanmar is far from unique. However, the survey also notes that the UN’s Voluntary Guidelines on Security of Tenure clearly provides in Section 3.1 that states “should respect legitimate tenure rights holders and their rights, whether formally recorded or not”, as well as the World Bank Environmental and Social Standards (ESS5) and the IFC Performance Standards 5 and 7 that require borrowers to pay affected populations regardless of legal status.¹⁰² It is important to also note that though not a human

⁹⁹ See: Frederic L. Kirgis (2001) ‘Restitution as a Remedy in US Courts for Violations of International Law’ in *American Journal of International Law*, vol. 95, no. 2, p. 343.

¹⁰⁰ See, for instance, *International Finance Corp. v. Iran*, 15 Iran-US CTR (1987-II), verdict.

¹⁰¹ Nicholas K. Tagliarino, *The Status of National Legal Frameworks for Valuing Compensation for Expropriated Land: An Analysis of Whether National Laws in 50 Countries/Regions across Asia, Africa and Latin America Comply with International Standards on Compensation Valuation*, in *Land* 2017, 6. (www.mdpi.com/journal/land).

¹⁰² Tagliarino notes, that: For example, Article 5 of Laos’ Decree on the Compensation and Resettlement of the Development Project, 2005 states, “All individuals and entities residing or making a living within the area to be acquired for a project as of the formally recognized cut-off date would be considered as project affected persons (APs) for purposes of entitlements to compensation, resettlement and rehabilitation assistance.” Likewise, according to South Sudan’s 2009 Land Act,

rights instrument as such, various World Bank policies and others such as those from the International Finance Corporation also address the question of forced evictions. The 2016 World Bank Environmental and Social Standard 5 on Land Acquisition, Restrictions on Land Use and Involuntary Resettlement (ESS5), for instance, establishes that compensation should reflect the “replacement cost.” “Replacement cost” is defined as a method of valuation yielding compensation sufficient to replace assets, plus necessary transaction costs associated with asset replacement.

54. He additionally examines other issues relating to compensation payments during land acquisition which are also clearly relevant to Myanmar, namely: special protections ensuring women landholders receive fair compensation; compensation for loss of economic activities and improvements made on the land; compensation for intangible land values (e.g., cultural, spiritual, and historical values); the right of affected populations to opt for alternative land instead of or in addition to a cash payment of compensation; prompt payment and objective assessment of compensation; the affected populations’ right to negotiate compensation amounts; delays in compensation payments; and a right to challenge compensation decisions in court or before a tribunal.¹⁰³ The report concludes by recommending that all states should ensure that: (1) Law should ensure that compensation procedures respect and protect the tenure rights of poor and marginalized groups; (2) Laws should establish procedures that ensure a comprehensive valuation of compensation, accounting for all of the losses borne by affected populations; and (3) Laws should establish measures that ensure compensation is promptly paid and objectively assessed.
55. We can see, thus, that the question of land acquisition against private persons and communities by the State is far from the rules-free act that is so commonplace in Myanmar today. For despite the existence of far from adequate laws regulating these matters, eg. the 1894 *Land Acquisition Act* and its recent replacement, not only is the law insufficient to protect the housing, land and property rights of those affected, but the manner by which land acquisition and subsequent displacement plays itself out in Myanmar is structurally contrary to virtually all of the standard rules and limitations governing this practice under international law and best practice standards. While exceptions may occur from time to time, in the vast majority of cases if the State or its agents, eg. the military, wish to acquire privately held land, either titled or customary in nature, it will do so without regard to basic regulations meant to guide these processes.
56. As noted above, State-, military- and company-led land acquisition has a long and controversial history in Myanmar. Based on more than a decade of researching HLP issues in Myanmar, Displacement Solutions was unable to find a single case of land acquisition that had been carried out in a manner fully consistent with international rules, best practice and the human rights of those affected.¹⁰⁴ This rather extraordinary finding, is even more grave given the fact that these processes have continued and have become legitimized throughout the reform process that commenced in 2011, culminating in the ethnic cleansing that occurred against Rohingya people over many years, but in particular, during the 2017 mass expulsions, house

compensation is granted to all affected populations who hold land under customary occupation.

¹⁰³ Id, pp. 12-19. See also: Jonathon Mills Lindsay, *Compulsory Acquisition of Land and Compensation in Infrastructure Projects*, in *PPP Insights*, An Explanatory Note on Issues Relevant to Public-Private Partnerships, August 2012, pp. 1-10.

¹⁰⁴ See, www.displacementsolutions.org for a comprehensive collection of all DS publications on HLP rights issues in Myanmar.

burning, village destruction, killings and subsequent land thefts that occurred at the time, and which have not been resolved since. Land acquisition in various forms is commonplace in Myanmar with extremely limited legal or judicial safeguards in place to protect existing communities against these practices. For instance, beyond the normal rules of international law, the more progressive concept of 'free, prior and informed consent' (FPIC) in all cases of land acquisition in Myanmar leading to involuntary resettlement appears to be effectively ignored or even unknown by those acquiring land, and other than the legally mandated payment of 'compensation' (which rarely occurs in practice in a just and satisfactory manner or at market value), the non-defined term 'for public purposes' is all that is required to justify land acquisition actions in the country. In practice, however, private benefit all too often provides the true rationale behind many land grabbing acts.

57. By far the most common form of land tenure in Myanmar, practiced by the overwhelming majority of the population - customary land tenure and unregistered or undocumented HLP rights - while addressed in the 2016 *National Land Use Policy* - remains unsatisfactorily recognised within the Myanmar legal code. This legal lacunae alone, not to mention the countless others, provides opportunities for land theft that simply should not exist in a state which aims to build democratic practices and the rule of law. Added to this, the fact that in those comparatively rare instances where compensation is paid, this almost invariably falls well short of basic market value benchmarks found in most compulsory acquisition laws when it comes to the calculation of compensation for an acquired asset, nor is compensation commonly as 'just' or 'fair'. The provision of new land resources for lost land resources or managed resettlement is virtually unknown in the country. The duty to explore viable alternatives to land acquisition is absent, as are rights to greater participation and consultation, in particular, free and informed consent, rights to access information, rights to legally resist the planned acquisition, rights to legal counsel, rights to present grievances before an independent tribunal, rights to have any compensation paid well before displacement occurs and so many other basic rules. This simply needs to change if Myanmar is to improve its poor international reputation insofar as HLP rights are concerned.

III. INTERNATIONAL LAW AND HOUSING, LAND AND PROPERTY RIGHTS

58. The State of Myanmar is a member of various inter-governmental organisations, most notably the United Nations, its subsidiary agencies and ASEAN. In joining such organisations, it has in good faith, committed to complying with international legal norms developed under the auspices of these organisations. As such, basic international law standards such as the *UN Charter*, the *UN Convention on the Law of Treaties*, the *Articles on State Responsibility*, the *UN Declaration on Human Rights* and countless others are as relevant to Myanmar as they are to all other sovereign States throughout the international community. Moreover, the State of Myanmar has formally ratified several of the key international human rights treaties (though many more remain to be ratified) signaling their clear intent, again in good faith, to comply with the rights and obligations these important standards generate.¹⁰⁵ Consequently, vital international legal standards cannot be simply dismissed as irrelevant to the country, and in fact, such standards can provide useful guidance to the Government of Myanmar and assist it in grappling with many of the fundamental challenges they face including the current absence of an appropriate HLP legal framework which reduces, rather than facilitates, the arbitrary, unlawful confiscation of land.
59. The international housing, land and property rights legal framework is far more advanced and comprehensive than is often known. These HLP norms are found widely throughout international, regional, national and local law, within the legal regimes of human rights law, humanitarian law, refugee law, criminal law, constitutional law and civil law. This extensive normative framework is useful in developing consistent and clear approaches to these matters in any society, including Myanmar. Some of the specific rights that are clearly enshrined within these regimes include the right to adequate housing and to the continuous improvement of living conditions, the right to be protected against forced eviction, the right not to be arbitrarily deprived of one's property, the right of restitution after displacement, the right to privacy and respect for the home, the right to freedom of movement and others. These rights can be seen as the core HLP rights that need to be considered in developing laws, policies and procedures.

¹⁰⁵ Myanmar has ratified the following human rights treaties: The International Covenant on Economic, Social and Cultural Rights (ICESCR), The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), The Convention on the Rights of the Child (CRC) and the Convention on the Rights of People with Disabilities (CRPD).

60. States are bound by obligations to respect, protect, promote and fulfill these rights. Human rights laws indicate that once such obligations have been formally accepted through the ratification of an international or regional treaty by virtue of customary international law or promulgation of related domestic legislation, the State must endeavor by *all appropriate means* to ensure everyone has access to HLP resources adequate for health, well-being and security, consistent with other human rights, including those affected by potential land acquisition.¹⁰⁶ Governments must, therefore, adopt the policies, laws and programs required - to the *maximum of their available resources* - to continually and progressively expand the enjoyment of these rights and simultaneously ensure in policy, legal or other terms, that no *deliberately retrogressive measures* are taken that lead to the decline in the enjoyment of these basic rights.

THE RIGHT TO ADEQUATE HOUSING AND TO THE CONTINUOUS IMPROVEMENT OF LIVING CONDITIONS

61. Housing, land and property rights have experienced significant clarification and development under human rights law over the past 71 years.¹⁰⁷ This development began with the 1948 *Universal Declaration of Human Rights* (UDHR), which recognized both the right to adequate housing¹⁰⁸ and the right to own property.¹⁰⁹ Since that time, HLP rights have been reaffirmed and developed in a series of international human rights treaties,¹¹⁰ declarations and other documents.¹¹¹ Beyond the contents of the relevant treaties, declarations and other documents, further interpretive *General Comments* of the UN Committee on Economic, Social and Cultural Rights,¹¹² the *Guiding Principles on the Rights of Internally Displaced*

¹⁰⁶ See, for instance, Scott Leckie, 'Where It Matters Most: Enforcing International Housing Rights Nationally' in *National Perspectives on Housing Rights*, The Hague: Kluwer International Publishers (2003).

¹⁰⁷ Beyond the Universal Declaration and the Covenant, rights to housing are found in the Convention on the Elimination of All Forms of Racial Discrimination (art. 5(e)(iii)), the Convention on the Rights of the Child (art. 27(3)); the Convention on the Elimination of All Forms of Discrimination Against Women (art. 14(2)), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (art. 43(1)(d)), ILO Recommendation No. 115 on Workers' Housing and many other standards.

¹⁰⁸ Article 25(1) of the UDHR provides: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including...housing..."

¹⁰⁹ Article 17 of the UDHR provides: "(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property."

¹¹⁰ Key HLP provisions occur in Article 5(e)(iii) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); Article 27(3) of the Convention on the Rights of the Child (CRC); Article 14(2) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the International Covenant on Civil and Political Rights (1966); International Convention Relating to the Status of Refugees (1951).

¹¹¹ Other HLP provisions are contained in International Labour Organization (ILO) Convention No. 169 Concerning Indigenous and Tribal Peoples; International Labour Organization (ILO) Convention No. 161 Concerning Occupational Health Services (1985); International Labour Organization (ILO) Convention No. 117 Concerning Social Policy (Basic Aims and Standards) (1962); International Labour Organization (ILO) Convention No. 110 Concerning Plantations (1958); International Labour Organization (ILO) Convention No. 82 Concerning Social Policy (Non-Metropolitan Territories) (1947); Declaration on the Right to Development (1986); Declaration on Social Progress and Development; The Vancouver Declaration on Human Settlements (1976); and the International Labour Organization Recommendation Concerning Workers' Housing (1961).

¹¹² See, *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, 13 December 1991, UN. Doc. E/1992/23; *General Comment No. 7: The right to adequate: forced evictions housing (Art. 11(1) of the Covenant)*, 20 May 1997, UN Doc. E/1998/22 and *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, 20 January 2003, UN Doc. E/C.12/2002/11.

Persons (1998),¹¹³ *The Principles on Housing and Property Restitution for Refugees and Displaced Persons* (2005) (the ‘Pinheiro Principles’)¹¹⁴ and many others all combine to create a very considerable body of human rights laws and standards relevant to HLP rights. The principal regional human rights frameworks also provide protection of HLP rights.¹¹⁵

62. The most significant formulation of these rights is found in Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified by Myanmar in 2017, and which vitally states:

“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate... housing, and to the continuous improvement of living conditions.”

63. Those entitled to the right to adequate housing under the Covenant (the full text of which can be found in Annex 4 below) are legally entitled to housing that is *adequate*. The right to housing has been authoritatively interpreted and clarified by the UN Committee on Economic, Social and Cultural Rights in *General Comment No. 4 (1991)*.¹¹⁶ *General Comment No. 4* emphasises that the right to adequate housing should not be interpreted in a narrow or restrictive sense but that housing rights should be seen as rights to live somewhere in security, peace and dignity.¹¹⁷ Of all the HLP rights, the right to adequate housing under international law has advanced the farthest. *General Comment No. 4* indicates that the following seven components form the core contents of the human right to adequate housing: (a) legal security of tenure; (b) availability of services, materials, facilities and infrastructure; (c) location; (d) habitability; (e) affordability; (f) accessibility; and (g) cultural adequacy. To achieve these rights, States need to *respect* these rights by ensuring that no measures are taken which intentionally erode the legal and practical status of this right. Governments need to comprehensively review relevant legislation, refrain from actively violating these rights by strictly regulating forced evictions and ensure that the housing, land and property sectors are *free from all forms of discrimination at any time*. States must also assess national HLP conditions, and accurately calculate, using statistical and other data and indicators, the true scale of non-enjoyment of these rights, and the precise measures required for their remedy.
64. Governments need to *protect* the rights of people by effectively preventing the denial of their rights by third parties such as landlords, property developers, social service providers, companies and others capable of restricting these rights. To *promote* HLP rights, Governments should adopt targeted measures such as *national HLP strategies* that explicitly define the objectives for the development of the HLP sector, identify the resources available to meet these goals, the most cost-effective way of using them and how the responsibilities and time frame for their implementation will be applied. Such strategies should reflect extensive genuine consultation with, and participation by, all those affected, including groups

¹¹³ UN Commission on Human Rights, *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39. Addendum: Guiding Principles on Internal Displacement*, 11 February 1998, UN Doc. E/CN.4/1998/53/Add.2.

¹¹⁴ UN Sub-Commission on the Promotion and Protection of Human Rights, *Principles on Housing and Property Restitution for Refugees and Displaced Persons*, 28 June 2005, UN Doc. E/CN.4/Sub.2/2005/17.

¹¹⁵ See for example: Article 16, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2000); Part II, Article 16, European Social Charter (1961); Article 34k, Charter of the Organization of American States (1948).

¹¹⁶ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, 13 December 1991 U.N. Doc. E/1992/23.

¹¹⁷ *Id* para 7.

traditionally excluded from the enjoyment of HLP rights. Finally, the obligation to *fulfil* these rights involves issues of public expenditure, the regulation of national economies and land markets, housing subsidy programmes, monitoring rent levels and other housing costs, the construction and financing of public housing, the provision of basic social services, taxation, redistributive economic measures and any other positive initiatives that are likely to result in the continually expanding enjoyment of HLP rights. Because of the ratification of the ICESCR and other international texts binding the government of Myanmar, all of these principles directly apply to the country and everyone residing there.

THE RIGHT TO BE PROTECTED AGAINST FORCED EVICTIONS

65. Building on the legal foundations of the rights to adequate housing and secure tenure, international standards increasingly assert that forced evictions constitute ‘a gross violation of human rights, in particular the right to adequate housing’.¹¹⁸ The 1998 *UN Guiding Principles on Internal Displacement* adopt a similar perspective and state clearly in Principle 6 that ‘Every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence’. *UN General Comment No. 7 on Forced Evictions* (1997)¹¹⁹ issued by the UN Committee on Economic, Social and Cultural Rights, is perhaps the most detailed statement interpreting the view of international law on this practice, re-affirming the sentiments of the 1991 *General Comment No. 4* that: ‘[t]he Committee considers that instances of forced evictions are *prima facie* incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law (para. 18)’. *General Comment No. 7* goes further in demanding that ‘the State itself must refrain from forced evictions and ensure that the law is enforced against its agents or third parties who carry out forced evictions’. The *Comment* requires countries to ‘ensure that legislative and other measures are adequate to prevent and, if appropriate, punish forced evictions carried out, without appropriate safeguards by private persons or bodies’. Additional guidance as to the need to avoid forced evictions can be found in normative frameworks such as the OECD

¹¹⁸ A 2004 UN Commission on Human Rights resolution on the ‘Prohibition of forced evictions’, for instance, unequivocally reaffirms ‘that the practice of forced eviction that is contrary to laws that are in conformity with international human rights standards constitutes a gross violation of a broad range of human rights, in particular the right to adequate housing’, and which also urged Governments ‘to undertake immediately measures, at all levels, aimed at eliminating the practice of forced eviction by, inter alia, repealing existing plans involving forced evictions as well as any legislation allowing for forced evictions, and by adopting and implementing legislation ensuring the right to security of tenure for all residents, [and to] ‘protect all persons who are currently threatened with forced eviction and to adopt all necessary measures giving full protection against forced eviction, based upon effective participation, consultation and negotiation with affected persons or groups’. Commission on Human Rights Resolution 2004/28 (10 April 2004).

¹¹⁹ UN Committee on Economic, Social and Cultural Rights, General Comment No. 7 (1997) - The right to adequate housing (Art. 11 (1) of the Covenant): forced evictions (UN doc. E/C.12/1997/4), adopted 16 May 1997 by the UN Committee on Economic, Social and Cultural Rights at its 16th session, held in Geneva).

Guidelines for Multinational Enterprises (2011)¹²⁰, World Bank OD 4.12 (Revised 2013)¹²¹, the UN Basic Principles and Guidelines on Development-based Evictions and Displacement (2008)¹²², and many others.

66. Forced evictions are widely considered to be the most severe violation of HLP rights under human rights law.¹²³ The practice of forced evictions involves “the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection”.¹²⁴ Such a construction, therefore, would apply to the vast majority of land grabbing exercises undertaken in Myanmar. Although the causes of forced evictions are diverse, all stages of the forced eviction process involve human rights implications and

¹²⁰ *OECD Guidelines for Multinational Enterprises (2011)* - II. General Policies: A. Enterprises should: (2) Respect the internationally recognised human rights of those affected by their activities;... (5). Refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to human rights, environmental, health, safety, labour, taxation, financial incentives, or other issues....IV. Human Rights: States have the duty to protect human rights. Enterprises should, within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations: 1. Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved. 2. Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur. 3. Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts. 4. Have a policy commitment to respect human rights. 5. Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts. 6. Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.... 38. A State's failure either to enforce relevant domestic laws, or to implement international human rights obligations or the fact that it may act contrary to such laws or international obligations does not diminish the expectation that enterprises respect human rights. In countries where domestic laws and regulations conflict with internationally recognised human rights, enterprises should seek ways to honour them to the fullest extent which does not place them in violation of domestic law, consistent with paragraph 2 of the Chapter on Concepts and Principles. 39. In all cases and irrespective of the country or specific context of enterprises' operations, reference should be made at a minimum to the internationally recognised human rights expressed in the International Bill of Human Rights.

¹²¹ *World Bank OD 4.12 (2013)* - 2. Involuntary resettlement may cause severe long-term hardship, impoverishment, and environmental damage unless appropriate measures are carefully planned and carried out. For these reasons, the overall objectives of the Bank's policy on involuntary resettlement are the following: (a) Involuntary resettlement should be avoided where feasible, or minimized, exploring all viable alternative project designs; (b) Where it is not feasible to avoid resettlement, resettlement activities should be conceived and executed as sustainable development programs, providing sufficient investment resources to enable the persons displaced by the project to share in project benefits. Displaced persons should be meaningfully consulted and should have opportunities to participate in planning and implementing resettlement programs; (c) Displaced persons should be assisted in their efforts to improve their livelihoods and standards of living or at least to restore them, in real terms, to pre-displacement levels or to levels prevailing prior to the beginning of project implementation, whichever is higher.

¹²² *Basic Principles and Guidelines on Development-based Evictions and Displacement (A/HRC/4/18)* 6. Forced evictions constitute gross violations of a range of internationally recognized human rights, including the human rights to adequate housing, food, water, health, education, work, security Of the person, security of the home, freedom from cruel, inhuman and degrading treatment, and freedom of movement. Evictions must be carried out lawfully, only in exceptional circumstances, and in full accordance with relevant provisions of international human rights and humanitarian law....38. States should explore fully all possible alternatives to evictions....43. Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights....56(a) No resettlement shall take place until such time as a comprehensive resettlement policy consistent with the present guidelines and internationally recognized human rights principles is in place...60. When eviction is unavoidable, and necessary for the promotion of the general welfare, the State must provide or ensure fair and just compensation for any losses of personal, real or other property or goods, including rights or interests of property.

¹²³ “The practice of forced evictions has generally been recognized as perhaps the most serious violation of the right to adequate housing,” *Forced evictions: Analytical report compiled by the Secretary-General pursuant to Commission resolution 1993/77*, UN Doc. E/CN.4/1994/20 at paras 62 – 72.

¹²⁴ Committee on Economic, Social and Cultural Rights, *General Comment No. 7: The right to adequate housing (Art. 11(1))*: forced evictions UN Doc. at para 3.

while the right to adequate housing is perhaps the clearest human right violated,¹²⁵ a large number of other rights are also affected by this practice.¹²⁶ In clarifying the content of state obligations to prevent forced evictions, the UN Committee on Economic, Social and Cultural rights has on many occasions officially observed that forced evictions in States parties constitute violations of the ICESCR, a process that began in 1990 with the finding that the Dominican Republic had violated the housing rights provisions of the Covenant because of forced evictions.¹²⁷

67. The International Finance Corporation's *Performance Standard 5 on Land Acquisition and Involuntary Resettlement* (PS5) are also relevant. Although this standard is not a human rights instrument as such, it provides a very useful overview of best practice principles when land acquisition and possible forced eviction could occur.¹²⁸ PS5 provides useful guidance to policymakers everywhere, but particularly so for the authorities in Myanmar who for so long have treated land acquisition as a normal state of affairs rather than the exception it should be. As noted in PS5, para 2: 'Involuntary resettlement should be avoided'. Objectives of the standard include: To avoid forced evictions, To avoid, and when avoidance is not possible, minimize displacement by exploring alternative project designs; and To anticipate and avoid, or where avoidance is not possible, minimize adverse social and economic impacts from land acquisition or restrictions on land use by: (i) providing compensation for loss of assets at replacement costs and (ii) ensuring that resettlement activities are implemented with appropriate disclosure of information, consultation, and the informed participation of those affected; To improve, or restore, the livelihoods and standards of living of displaced persons; To avoid, and when avoidance is not possible, minimize displacement by exploring alternative project designs; To improve, or restore, the livelihoods and standards of living of displaced persons; and To improve living conditions among physically displaced persons through the provision of adequate housing with security of tenure at resettlement sites. PS5 further urges states, as follows: 'To help avoid expropriation and eliminate the need to use governmental authority to enforce relocation, clients are encouraged to use negotiated settlements' (PS5, Para. 3). These rules further speak of the need to consider alternative designs precluding the need for land acquisition, the need to focus on the needs of the poor, that compensation should be at full replacement cost and that it be paid prior to any acquisition, that land-based compensation should be considered, that resettlement sites and moving allowances should be provided in addition to compensation, that community engagement should pervade the entire process, grievance mechanisms should be made available, resettlement action plans should be central in the process, that loan recipients

¹²⁵ The UN Commission on Human Rights has declared forced evictions as "gross violations of human rights, in particular the human right to adequate housing" Resolution 1993/77.

¹²⁶ The following legal provisions prohibit forced evictions: UDHR (Art. 17); ICCPR (Art.17); ILO 169 (Arts.13,14(3), 15(1,2),16,17(2,3),18); UNDRIP (Arts.8 (2b), 10, 28(1,2), 30(2), 32(2)); Geneva Convention (IV), Protection of Civilian Persons in Time of War (Art.49); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (Art. 17); UN Basic Principles and Guidelines on Development-based Evictions and Displacement; VGGT (3A, 3(1 2,4), 4(4,9), 6(3), 7(6), 9(9), 10(6), 12(10), 15(9), 16, 21, 23(2), 24(2-5), 25(2-6))

¹²⁷ The Committee has devoted ongoing attention to these issues since its fifth session (1990), with particular concern about alleged instances of large-scale forced evictions. At its tenth session the Committee urged the Government to "take all appropriate measures in the meantime to ensure full respect for all economic, social and cultural rights, in particular in relation to the right to housing" (E/C.12/1994/SR.5).

¹²⁸ Excerpts from PS5 are included in Annex 3 below.

offer people being resettled “a choice of options for adequate housing with security of tenure so that they can resettle legally without having to face the risk of forced eviction” and that “Clients must comply with applicable national law, including those laws implementing host country obligations under international law”, and that “Business should respect human rights, which means to avoid infringing on the human rights of others, and address adverse human rights impacts business may cause or contribute to”.

THE RIGHT NOT TO BE ARBITRARILY DEPRIVED OF ONE'S PROPERTY

68. We have thus far addressed the question of the right to adequate housing or those rights accorded to everyone to have a decent and secure place to live and the issue of forced evictions or the right not to be arbitrarily removed from your home or land by force. Closely related to these two rights, and rights to privacy and respect for the home, the right not to be arbitrarily deprived of one's property, or the right to not have pre-existing HLP rights interfered with or otherwise taken, is also widely addressed throughout human rights law. This right is relevant to those aspects of housing, land and property rights that concern the actual deprivation of property, the control over the use of property, permissible restrictions in the exercise of these rights peaceful enjoyment of possessions, issues such as interference, lawfulness of the restriction, general interest and proportionality, and finally the restoration of these rights once retracted.¹²⁹
69. Although neither of the two human rights Covenants of 1966 specifically address the right to property as such, as noted Article 17 of *Universal Declaration of Human Rights* states that “Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property”. Regionally speaking, Myanmar is a signatory to the 2012 *ASEAN Human Rights Declaration*, which recognizes relevant principles such as the right to property and the right to an effective remedy when alleged violations of this and other rights occur.¹³⁰ Similar sentiments are found throughout the body of international law, including the *European Convention on Human Rights*, the text from which considerable case law has emerged as to the content of property rights, or as it is phrased in the ECHR, the ‘peaceful enjoyment of possessions’. Article 1 of Protocol No. 1 of the ECHR protects individuals or legal persons from arbitrary interference by the State with their possessions, while simultaneously empowering the State to control the use of or even deprive of property belonging to individuals or legal persons subject to certain strict conditions. At the national level in Myanmar, as we saw above, property rights are mentioned in the 2008 Constitution in the following terms: Article 356. The Union shall protect according to law movable and immovable properties of every citizen that are lawfully acquired; and Article 357. The Union shall protect the privacy and security of home, property, correspondence and other communications of citizens under the law subject to the provisions of this Constitution. Land acquisition measures in all of their manifestations in practice have repeatedly shown, of course, that such rights are not sufficient to prevent these actions.

¹²⁹ On these themes generally, see: Aida Grgic, Zvonimir Mataga, Matija Longar and Ana Vilfan, *The right to property under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights and its protocols*, Human Rights Handbooks, No. 10, Council of Europe, 2007.

¹³⁰ ASEAN Human Rights Declaration and Phnom Penh Statement on its Adoption, available at: http://www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf.

70. But what if the rights recognised in Articles 356 and 357 were actually taken seriously and applied against instances of land acquisition in Myanmar, with due regard given to international legal cases and norms, what additional rules would be in place to affect the decisions by the Myanmar state when matters relating to land acquisition were under consideration? In general terms, to be justifiable under human rights law, any such interference with these rights must pursue a legitimate aim in the 'general' or 'public' interest¹³¹ and must be conducted in a manner which is not arbitrary, proportionate¹³², and in accordance with the law.¹³³ In addition, under the ECHR, as well, there is a direct relationship between property rights provisions and rights to a fair trial, which generate rights to access a court and a fair trial in establishing whether the interference was permissible and the property rights determined fairly. This is crucial with respect to Myanmar given the perpetual weaknesses and structural inadequacies of the judicial system, at all levels. Three cases decided by the ECHR are particularly instructive in determining the scope of these rights, particularly when the actual deprivation of property occurs.¹³⁴ Similar sentiments have been expressed by the International Court of Justice in their Advisory Opinion concerning the construction of a wall by Israel in the Occupied Palestinian Territory.¹³⁵

¹³¹ Under the ECHR, "in determining the effects of legal relations between individuals on property, the Convention organs check that the law did not create such inequality that one person could be arbitrarily and unjustly deprived of property in favour of another. In certain circumstances, however, the State may be under an obligation to intervene in order to regulate the actions of private individuals. To conclude, Article 1 of Protocol No. 1 applies in general where the State itself interferes with property rights, or permits a third party to do so." *Supra* note 129, p. 5.

¹³² In terms of proportionality: "A measure interfering with the peaceful enjoyment of possessions must be necessary in a democratic society directed at achieving a legitimate aim. It must strike a fair balance between the demands of the general interest of the community and the requirements of the individual's fundamental rights. Such a fair balance will not have been struck where the individual property owner is made to bear "an individual and excessive burden". *Id.*, p. 14.

¹³³ According to one analysis, "The essential obligation of this provision [Art 1, Prot. 1] is to protect a person against unjustified interference by the State with the peaceful enjoyment of his or her possessions (negative obligations). Negative obligations have been held to include, for example, expropriation or destruction of property as well as planning restrictions, rent controls and temporary seizure of property", *id.*, p. 9.

¹³⁴ "In *Papamiehalopoulos v. Greece* the applicants' valuable land had been taken by the State in 1967 during the dictatorship period and given to the Navy, which then established a naval base on the site. Since after that time the applicants were unable to make effective use of their property or to sell it, the State was held liable for a *de facto* expropriation". *Id.*, p. 11; "The Court has recognised the concept of a continuing violation in the context of the right to property in the case of *Loizidou v. Turkey*...this continuing denial of access amounted to interference with rights under Article 1 of Protocol 1, *Id.*, p. 29; and "The ultimate form of interference with the right to a home and terminal form of deprivation of property is destruction of a dwelling. In such cases complaints under Article 8 and Article 1 of Protocol No. 1 are often raised. In the case of *Selcuk and Asker v. Turkey* the Court simultaneously examined the complaints under these two articles. It found that the Turkish security forces deliberately burned down the applicants' homes and household property obliging them to leave the village of their origin. In such circumstances the Court saw no doubt that these acts constituted particularly grave and unjustified interferences with the applicants' rights to respect for their private and family lives and homes as well as breach of their right to peaceful enjoyment of their possessions. *Id.*

¹³⁵ "The ICJ concluded that the construction of the wall had led to the destruction or requisition of properties in contravention of Arts 46 and 52 Hague Regulation and Art 53 Geneva Convention IV". The ICJ was "of the opinion that the construction of the wall and its associated regime impede the liberty of movement of the inhabitants of the Occupied Palestinian Territory... They also impede the exercise by the persons concerned of the...right to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights." See: Sir Arthur Watts, *Israeli Wall Advisory Opinion* (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory), February 2007.

THE RIGHT TO VOLUNTARY RETURN AND RESTITUTION AFTER DISPLACEMENT

71. The right of refugees and IDPs to voluntarily return to their homes is also one of the primary HLP rights. Widely reaffirmed in numerous human rights standards, the right to voluntary return forms a cornerstone of the *Pinheiro Principles*.¹³⁶ As noted, the *UN Principles on Housing and Property Restitution for Refugees and Displaced Persons*, 2005 - 'The Pinheiro Principles'¹³⁷ are directly relevant to Myanmar. The *Pinheiro Principles*, expand and clarify further the rights of all refugees and displaced persons 'to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived'. This important normative standard contains 23 Principles organised in the following manner: Principle 1 - Scope and application; Principle 2 - The right to housing and property restitution; Principle 3 - The right to non-discrimination; Principle 4 - The right to equality between men and women; Principle 5 - The right to be protected from displacement; Principle 6 - The right to privacy and respect for the home; Principle 7 - The right to peaceful enjoyment of possessions; Principle 8 - The right to adequate housing; Principle 9 - The right to freedom of movement; Principle 10 - The right to voluntary return in safety and dignity; Principle 11 - Compatibility with international human rights, refugee and humanitarian law and related standards; Principle 12 - National procedures, institutions and mechanisms; Principle 13 - Accessibility of restitution claims procedures; Principle 14 - Adequate consultation and participation in decision-making; Principle 15 - Housing, land and property records and documentation; Principle 16 - The rights of tenants and other non-owners; Principle 17 - Secondary occupants; Principle 18 - Legislative measures; Principle 19 - Prohibition of arbitrary and discriminatory laws; Principle 20 - Enforcement of restitution decisions and judgments; Principle 21 - Compensation; Principle 22 - Responsibility of the international community; and Principle 23 - Interpretation. They begin by emphasising their broad scope and application in their key objective of assisting relevant national and international actors to adequately address the legal and technical issues linked to the restitution rights of refugees and displaced persons. The *Principles* apply in situations where displacement has resulted in people 'arbitrarily' or

¹³⁶ Principle 10 of the Pinheiro Principles addresses voluntary repatriation in the following terms: 10(1) All refugees and displaced persons have the right to return voluntarily to their former homes, lands or places of habitual residence, in safety and dignity. Voluntary return in safety and dignity must be based on a free, informed, individual choice. Refugees and displaced persons should be provided with complete, objective, up-to-date, and accurate information, including on physical, material and legal safety issues in countries or places of origin; 10(2) States shall allow refugees and displaced persons who wish to return voluntarily to their former homes, lands or places of habitual residence to do so. This right cannot be abridged under conditions of State succession, nor can it be subject to arbitrary or unlawful time limitations; 10(3) Refugees and displaced persons shall not be forced, or otherwise coerced, either directly or indirectly, to return to their former homes, lands or places of habitual residence. Refugees and displaced persons should be able to effectively pursue durable solutions to displacement other than return, if they so wish, without prejudicing their right to the restitution of their housing, land and property; and 10(4) States should, when necessary, request from other States or international organizations the financial and/or technical assistance required to facilitate the effective voluntary return, in safety and dignity, of refugees and displaced persons. See: 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). This document contains the official UN text of the Principles on Housing and Property Restitution for Refugees and Displaced Persons, as approved by UN Sub-Commission on the Protection and Promotion of Human Rights in Resolution 2005/21 of 11 August 2005.

¹³⁷ (See: 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). This document contains the official UN text of the Principles on Housing and Property Restitution for Refugees and Displaced Persons, as approved by UN Sub-Commission on the Protection and Promotion of Human Rights in Resolution 2005/21 of 11 August 2005.)

'unlawfully' being deprived of their former homes, lands, properties or places of habitual residence. The *Principles* apply in all cases of involuntary displacement resulting from international or internal armed conflict, gross human rights violations such as 'ethnic cleansing', development projects, acts of land confiscation resulting in displacement, forced evictions and natural and manmade disasters. In practical terms in Myanmar, therefore, this standard applies to all refugees and displaced persons forcibly removed from or otherwise forced to flee their 'homes, lands, properties or places of habitual residence (...) regardless of the nature or circumstances by which displacement originally occurred'. Whenever a person or community is arbitrarily displaced from their homes and lands the *Principles* can be used as guidance for how best to return the situation to what it once was. In recognising the restitution rights of all refugees and displaced persons with HLP losses in need of reversal, the *Principles* do not distinguish between categories of displaced persons in terms of defining their restitution rights, and this is particularly important in the case of Myanmar where displacement has taken a wide variety of forms. Ultimately, the *Principles* take the perspective that neither war, human rights abuses, development projects nor natural disaster are in and of themselves justifiable grounds upon which to legitimise the arbitrary or unlawful acquisition, expropriation or destruction of homes and lands over which refugees and displaced persons continue to retain rights. These provisions reflect the transformation of the right to voluntary return (or repatriation) into a concept involving not simply the return to one's country or region of origin, but to one's *original home, land or property*. Increasingly, therefore, return rights and HLP restitution rights need to be treated in tandem with one another. At the same time, the right to voluntary return – whether for refugees or displaced persons – is indeed *not* an obligation to return. Return cannot be restricted, and conversely it cannot be imposed. It must be a free choice by those concerned, and procedures and mechanisms need to be developed to ensure that this right can be secured for all who wish to assert it. Practice clearly indicates that the presence of a viable and all-inclusive restitution programme will facilitate voluntary repatriation.

72. Influenced by and building upon these many clear restitution principles under international human rights law, the particular remedy of restitution stems ultimately from the broader right to an effective remedy for violations of human rights; a core right pervading this entire body of law.¹³⁸ This means, of course, that victims of wrongful acts and/or human rights violations – including the arbitrary loss of residential resources and assets resulting from land grabbing – must have an enforceable right to have the act or violation remedied, repaired and reversed.¹³⁹

¹³⁸ A right to an effective remedy for victims of violations of international human rights law is found in the Universal Declaration of Human Rights (UDHR) (Art. 8), the International Covenant on Civil and Political Rights (CCPR)(Art. 2), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)(Art. 6), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)(Art. 11), the Convention on the Rights of the Child (CRC)(Art. 39), the African Charter on Human and Peoples' Rights (Art. 7), the American Convention on Human Rights (Art. 25), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)(Art. 13).

¹³⁹ Indicative of the growing seriousness accorded these issues by UNHCR, the agency issued an internal memorandum to all UNHCR offices throughout the world in late 2001 outlining UNHCR policy on the recovery of refugee homes and properties. (UNHCR Inter-Office Memorandum No. 104/2001, 28 November 2001, UNHCR Field Office Memorandum No. 101/2001, 28 November 2001.) The memorandum contains a range of far-reaching provisions which reveal just how extensively housing and property restitution rights have percolated not only into law, but into the largest inter-Governmental agencies: "Recovery of refugees' homes and property in their countries of origin needs to be addressed consistently to ensure that effective solutions to refugee displacement are found. Experience has shown that voluntary repatriation operations are unlikely to be fully successful or sustainable in the longer term if housing and property issues – being an integral part of return in safety and dignity – are left unattended."

In addition to the 2007 case concerning Israel just noted, the International Court of Justice has also ruled that preventing the return of members of certain ethnic groups was unlawful and required reversal.¹⁴⁰

73. Historically, land dispossession meant individuals lost their properties for good. Persons, families and communities who were displaced and/or lost their possessions – whether due to armed conflict, arbitrary expropriation of land or human rights violations – did so permanently. The past several decades, however, have been witness to a remarkable turn of events where it has been increasingly accepted that displaced persons are not simply entitled to return to their countries of origin or allowed some form of temporary humanitarian access to their original homes, but that they also have a legally enforceable right to return to, recover, repossess, re-assert control over and reside in, the homes and lands they had earlier fled or from which they had been displaced; the implementation of the process of *restitutio in integrum*. While it may still be difficult to argue that all persons who have ever been displaced have a universally applicable codified right to housing, land and property restitution under international human rights law in all circumstances, or that all people with this right will actually be capable of exercising it, the emergence of this principle as a core human rights issue for refugees, IDPs and others who suffered HLP losses is now abundantly clear. Displacement is such a broad phenomenon, and affects people in such a diverse series of ways, that arguing that restitution is the appropriate or legally guaranteed remedy of choice in each and every case would be difficult to support. For instance, cases of clear and over-riding public interest involving the expropriation of land for use in constructing social housing in a country with severe housing shortages, carried out according to law, and involving the full and satisfactory provision of compensation to those affected, would perhaps weaken a potential restitution claim. Economic migrants not forced by conflict or violence to flee their homes would also not generally be entitled to formal housing, land and property restitution rights. However, in a great many instances of land confiscation and displacement, restitution is clearly the preferred and appropriate remedy.
74. The concept of restitution, of course, has a lengthy history in terms of international law and, has long been accepted as an important judicial remedy within a wide range of national and international legal codes. It is on these foundations that much of the subsequent progress specifically on *housing, land and property* restitution has been built. These and many other international legal affirmations of restitution, in part, also formed the basis for the 1998 *UN Guiding Principles on Internal Displacement* which explicitly address the question of restitution in Principles 28 and 29.¹⁴¹ In turn, the *Guiding Principles* helped subsequently to

¹⁴⁰ See: Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Georgia v Russian Federation, Order on provisional measures, [2008] ICJ Rep 353, ICGJ 348 (ICJ 2008), 15th October 2008, International Court of Justice (ICJ). The provisional measure order included: “Both parties, within South Ossetia and Abkhazia and adjacent areas in Georgia, shall (1) refrain from any act of racial discrimination against persons, groups of persons or institutions; (2) abstain from sponsoring, defending or supporting racial discrimination by any persons or organizations; (3) do all in their power, whenever and wherever possible, to ensure, without distinction as to national or ethnic origin, (i) security of persons; (ii) the right of persons to freedom of movement and residence within the border of the State; (iii) the protection of the property of displaced persons and refugees; (4) do all in their power to ensure that public authorities and public institutions under their control or influence do not engage in acts of racial discrimination against persons, groups of persons or institutions”.

¹⁴¹ Principle 28 - 1. Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. Such authorities shall endeavour to facilitate the reintegration of returned or resettled internally displaced persons; 2. Special efforts should be made to ensure

inspire two vital standards on restitution, both of which were approved by the UN in 2005. The UN General Assembly adopted and proclaimed 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*, which in para. 19, addresses restitution in the following terms:

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*.¹⁴² (emphasis added)

75. These and similar HLP principles have been repeatedly reaffirmed, and are each in their own way fundamental in any quest for all-inclusive restitution. For any violation of international law – including the violation of a range of individual human rights norms such as those just outlined – redress that *will undo the effect of the violation is required. These principles are evidence of the clear preference for restitution as a remedy for violations of international law, in particular* those violations involving the illegal or arbitrary confiscation of housing, land or property. In general terms, if State organs or other governing authorities revoked any pre-existing rights to housing, land or property in an arbitrary manner or applied the law based upon racial, ethnic or national origin or other forms of discrimination, this would necessarily be classified as disproportionate, and thus a violation of international law.
76. As mentioned, States are bound by obligations to respect, protect, promote and fulfill housing, land and property rights.¹⁴³ States also have the independent duty to investigate and, where appropriate, prosecute grave violations of human rights law. While this duty is most clear in regards to violations under the Convention against Torture¹⁴⁴ and the Genocide Convention,¹⁴⁵ States arguably have the same duty to investigate and prosecute violations of

the full participation of internally displaced persons in the planning and management of their return or resettlement and reintegration. Principle 29 - 1. Internally displaced persons who have returned to their homes or places of habitual residence, or who have resettled in another part of the country, shall not be discriminated against as a result of their having been displaced. They shall have the right to participate fully and equally at public affairs at all levels and have equal access to public services; and 2. Competent authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of, upon their displacement. When recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form of just reparation.

¹⁴² 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. (<http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>).

¹⁴³ *Id* at paras 10-15.

¹⁴⁴ Article 5 of the Convention against Torture provides, *inter alia*: “Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4” and Article 7 provides: “The State Party... shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution”, Convention against Torture (1987).

¹⁴⁵ Article 5 of the Convention on the Prevention and Punishment of Genocide (1951) provides: “The Contracting Parties undertake to enact...the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article 3” and Article 6 provides: “Persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction”.

the rights contained in the ICCPR¹⁴⁶ and the ICESCR,¹⁴⁷ both of which include key housing, land and property rights. This position has been supported by comments of the UN Human Rights Committee¹⁴⁸ and the Committee on Economic, Social and Cultural Rights.¹⁴⁹ The duty to investigate and prosecute has also been reinforced by the UN *Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*¹⁵⁰ and the UN *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International*.¹⁵¹ The later document, which was adopted by the UN General Assembly, states clearly:

“The obligation to respect, ensure respect for and implement international human rights law [includes the duty to] investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law.”¹⁵²

77. The question of specific acts and omissions by States under the terms of the ICESCR that constitute violations of this vital international law, are outlined in detail in the 1997 *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* which notes in Section 14 that: Violations of economic, social and cultural rights can occur through the direct action of States or other entities insufficiently regulated by States. Examples of such violations include: the formal removal or suspension of legislation necessary for the continued enjoyment of an

¹⁴⁶ Although, the ICCPR does not contain the same clear provision on the duty to prosecute, such duty can be inferred through Article 2(3), which states: “Each State Party to the present Covenant undertakes...To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy...[and] To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy...”

¹⁴⁷ Article 2(1) of the ICESCR requires States Parties to undertake to “take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by *all appropriate means*, including particularly the adoption of legislative measures” [emphasis added].

¹⁴⁸ The Human Rights Committee has made statements consistent with the view that States Parties have the duty to investigate and prosecute violations of ICCPR rights: “The positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities”, see Human Rights Committee, *General Comment No. 31 on Article 2 of the Covenant*, UN Doc. CCPR/C/74/CRP.4/Rev.6, 21 (2004), para. 8.

¹⁴⁹ The Committee on Economic, Social and Cultural Rights, in *General Comment No. 9*, stated that “the central obligation in relation to the Covenant is for States parties to give effect to the rights recognized therein. By requiring Governments to do so “by all appropriate means”, the Covenant adopts a broad and flexible approach which enables the particularities of the legal and administrative systems of each State, as well as other relevant considerations, to be taken into account... But this flexibility coexists with the obligation upon each State party to use all the means at its disposal to give effect to the rights recognized in the Covenant. In this respect, the fundamental requirements of international human rights law must be borne in mind. Thus the Covenant norms must be recognized in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place. Committee on Economic, Social and Cultural Rights, *General Comment No. 9*, UN Doc. E/C.12/1998/24 (1998), paras 1 and 2.

¹⁵⁰ Principle 19 of the *Updated Principles for the protection and promotion of human rights through action to combat impunity*, states: “States shall undertake prompt, thorough, independent and impartial investigations of violations of human rights... and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished”, Commission on Human Rights, *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, UN Doc. E/CN.4/2005/102/Add.1 (2005).

¹⁵¹ 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*, adopted and proclaimed by General Assembly Resolution 60/147, 16 December 2005.

¹⁵² *Id*, Basic Principle and Guideline II 3(b).

economic, social and cultural right that is currently enjoyed; the active denial of such rights to particular individuals or groups, whether through legislated or enforced discrimination; the active support for measures adopted by third parties which are inconsistent with economic, social and cultural rights; the adoption of legislation or policies which are manifestly incompatible with pre-existing legal obligations relating to these rights, unless it is done with the purpose and effect of increasing equality and improving the realisation of economic, social and cultural rights for the most vulnerable groups; the adoption of any deliberately retrogressive measure that reduces the extent to which any such right is guaranteed; the calculated obstruction of, or halt to, the progressive realisation of a right protected by the Covenant, unless the State is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or *force majeure*; and the reduction or diversion of specific public expenditure, when such reduction or diversion results in the non-enjoyment of such rights and is not accompanied by adequate measures to ensure minimum subsistence rights for everyone. The *Maastricht Guidelines* continue in Section 15 addressing the issue of violations through acts of omission in the following terms: Violations of economic, social and cultural rights can also occur through the omission or failure of States to take necessary measures stemming from legal obligations. Examples of such violations include: the failure to take appropriate steps as required under the Covenant; the failure to reform or repeal legislation which is manifestly inconsistent with an obligation of the Covenant; the failure to enforce legislation or put into effect policies designed to implement provisions of the Covenant; the failure to regulate activities of individuals or groups so as to prevent them from violating economic, social and cultural rights; the failure to utilise the maximum of available resources towards the full realisation of the Covenant; the failure to monitor the realisation of economic, social and cultural rights, including the development and application of criteria and indicators for assessing compliance; the failure to remove promptly obstacles which it is under a duty to remove to permit the immediate fulfilment of a right guaranteed by the Covenant; the failure to implement without delay a right which it is required by the Covenant to provide immediately; the failure to meet a generally accepted international minimum standard of achievement, which is within its powers to meet; the failure of a State to take into account its international legal obligations in the field of economic, social and cultural rights when entering into bilateral or multilateral agreements with other States, international organisations or multinational corporations.¹⁵³

¹⁵³ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997, available at: <http://hrlibrary.umn.edu/instreet/Maastrichtguidelines.html>. See also: Victor Dankwa; Cees Flinterman; Scott Leckie (August 1998). "Commentary on the Maastricht Guidelines". *Human Rights Quarterly*. 20 (3): 708.

INTERNATIONAL HUMANITARIAN LAW

78. In addition to these norms, we must also refer to international humanitarian law, a legal regime that also addresses grave breaches of HLP rights.¹⁵⁴ The violation of housing, land and property rights is an almost universal feature of armed conflict, from the destruction of civilian housing and property, to the illegal appropriation and occupation of housing and the forced displacement of populations. To this end, the laws of armed conflict – or international humanitarian law (IHL) – have consistently included the protection of HLP rights during times of conflict. The recent *United Nations Guidance Note of the Secretary-General on the United Nations and Land and Conflict*, issued in March 2019, provides further evidence at the seriousness accorded to HLP rights in these contexts.¹⁵⁵

¹⁵⁴ The *Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949)* is particularly clear in prohibiting activities involving arbitrary displacement and the destruction of property. Art. 33 No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited. Pillage is prohibited. Reprisals against protected persons and their property are prohibited; Art. 49 ...Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased....The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies; Art. 53 Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered necessary by military operations; Art. 147 Grave breaches ... shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: ...extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. In addition, Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (1977) further strengthens these principles: Art. 17 (1) The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition. Art. 17(2) Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.

¹⁵⁵ United Nations Guidance Note of the Secretary-General on the United Nations and Land and Conflict, issued in March 2019: "Some of the key land-related human rights issues to consider are outlined below. *Protection of civilian objects* – IHL prohibits the directing of attacks against civilian objects. Civilian objects are any objects that are not military objectives. Military objectives are those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. As long as the land in question does not fall within this definition, it remains a civilian object and may not be lawfully targeted. *Protection of specific civilian objects* – Specific objects, such as the natural environment and cultural property, enjoy special protection against attack. *Destruction of property* – Under IHL, the destruction or seizure of the property of an adversary is prohibited, unless required by imperative military necessity. *Exploitation of natural resources* – Under IHL, pillage is prohibited, which may include the pillage of natural resources. *Explosive remnants of war* – States parties to the 2003 Protocol on Explosive Remnants of War are under the obligation to mark and clear, remove or destroy explosive remnants of war in affected territories under its control. *Displacement, refugees and internally displaced persons (IDPs)* - land-related human rights violations are inherent in every displacement situation, such as the destruction and illegal occupation and/or sale of forcibly abandoned land and buildings. Remedying and restoring land rights is important to achieve justice, build peace and facilitate self-reliance (including in the place of refuge) and achieve durable solutions. Monitoring, advocacy, preventive and preparatory measures are required to facilitate early successful voluntary returns. *Discrimination against women* - there is often discrimination in marriage, inheritance, legal status or resource distribution, and many women cannot access, use, control or own land. The number of female-headed households increases sharply during and after conflict, and without access to land, their livelihoods become insecure. Challenges include lack of awareness of their rights and the lack of necessary land documents and resources to pursue claims. International treaty bodies have emphasized the right of women to own, use or control land on an equal basis with men; the prohibition of discrimination on the grounds of land rights (or lack of thereof); and the right of women to own land without restrictions on the basis of marital status or any other discriminatory grounds. *Indigenous peoples land rights*- forced evictions are often associated with indigenous peoples' land. Indigenous peoples are protected by special human rights consideration - ILO C169 and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) emphasized the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy and their control over their economic, social and cultural development through "the principle of free, prior and informed consent" (FPIC). *Business and human rights*. There is an increasing trend of large-scale land-based investments by international and national business that may sometimes lead to forced evictions and human rights abuses, including the destruction of livelihoods. International standards identify the distinct but complementary roles of government and business, whereby the State has the duty to protect against human rights abuses by third parties, including businesses. Corporate responsibility includes avoiding infringement on individual rights and addressing the negative impacts, such as remedies for victims. (footnotes in original text omitted).

79. The protection of HLP rights under humanitarian law can be separated into two broad categories; the prohibition against attacking non-military targets and the prohibition against attacks on military targets that violate the principle of proportionality. The protection of civilian objects (including housing, land and property) during armed conflict is a key principle of humanitarian law. The primary principle is that civilian objects (defined as all objects which are not military objectives) “shall not be the object of attack or reprisals”.¹⁵⁶ Thus, all attacks directed against non-military objectives are prohibited. This is irrespective of whether there is excessive damage or not (there is no proportionality test). However, not all damage, destruction or appropriation of civilian objects (including housing, land and property) is prohibited. Civilian housing, land and property may be targeted where it constitutes a legitimate military objective and its destruction is justified by military necessity. It may also be damaged or destroyed where such damage is an incidental (unintended) and proportional effect of attacks on military objectives. In terms of assessing military necessity, proportionality is a key factor, such that “the incidental harm caused to civilian property must be proportionate and not excessive in relation to the concrete and direct military advantage anticipated by an attack on a military objective”.¹⁵⁷ This principle prohibits many types of military actions that excessively damage or illegally appropriate civilian housing, land and property, including bombardment, pillage and reprisals. In terms of non-international conflict, for instance, “...The following acts...are and shall remain prohibited at any time and in any place whatsoever...(g) pillage; (h) threats to commit any or the foregoing acts”.¹⁵⁸
80. The prohibitions against forced displacement and the illegal transfer of civilian populations are also key elements of HLP rights protection under humanitarian law. In terms of internal conflict, we find “displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition”,¹⁵⁹ as well as “Civilians shall not be compelled to leave their own territory for reasons connected with the conflict”.¹⁶⁰ Together with treaty law, customary humanitarian law is one of the principal sources of the law of armed conflict.
81. Customary humanitarian law is of particular importance as it binds all States - including those that are not party to IHL treaties. In 2005, the International Committee of the Red Cross (ICRC) published a study of the customary law of armed conflict, concluding that customary humanitarian law could be summarized in 161 rules.¹⁶¹ The following 16 rules provide protection of HLP rights under customary humanitarian law: *Rule 10* - Civilian objects are protected against attack, unless and for such time as they are military objectives;

¹⁵⁶ Article 52 of Additional Protocol I.

¹⁵⁷ *Ibid*, this principle is also widely considered to form part of customary humanitarian law.

¹⁵⁸ Article 4(2)(g) & (h), Additional Protocol II.

¹⁵⁹ Article 17(1), Additional Protocol II.

¹⁶⁰ Article 17(2), Additional Protocol II.

¹⁶¹ The updated ICRC database of customary humanitarian law is available at <http://www.icrc.org/customary-ihl>. Although this is an influential assessment of customary international humanitarian law, it has not been endorsed by States and should not be taken as a definitive codification.

Rule 11 - Indiscriminate attacks are prohibited; *Rule 13* - Attacks by bombardment by any method or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects are prohibited; *Rule 14* - Launching an attack which may be expected to cause...damage to civilian objects...which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited; *Rule 15* - In the conduct of military operations, constant care must be taken to spare...civilian objects. All feasible precautions must be taken to avoid, and in any event to minimize... damage to civilian objects; *Rule 16* - Each party to the conflict must do everything feasible to verify that targets are military objectives; *Rule 17* - Each party to the conflict must take all feasible precautions in the choice of means and methods of warfare with a view to avoiding, and in any event to minimizing...damage to civilian objects; *Rule 19* - Each party to the conflict must do everything feasible to assess whether the attack may be expected to cause incidental...damage to civilian objects...which would be excessive in relation to the concrete and direct military advantage anticipated; *Rule 21* - When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected must be that the attack on which may be expected to cause the least danger... to civilian objects; *Rule 22* - The parties to the conflict must take all feasible precautions to protect...civilian objects under their control against the effects of attacks; *Rule 24* - Each party to the conflict must, to the extent feasible, remove civilian...objects under its control from the vicinity of military objectives; *Rule 51* - Private property must be respected and may not be confiscated; except where destruction or seizure of such property is required by imperative military necessity; *Rule 52* - Pillage is prohibited; *Rule 131* - In case of displacement, all possible measures must be taken in order that the civilians concerned are received under satisfactory conditions of shelter, hygiene, health, safety and nutrition and that members of the same family are not separated; *Rule 132* - Displaced persons have a right to voluntary return in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist; and *Rule 133* - The property rights of displaced persons must be respected.

82. As with human rights law, humanitarian law establishes a duty on States to investigate and, where appropriate, prosecute violations of humanitarian law – including those that encompass housing, land and property rights. The duty to investigate and prosecute is expressed in Article 49 of the *First Geneva Convention*, Article 50 of the *Second Geneva Convention*, Article 129 of the *Third Geneva Convention* and Article 146 of the *Fourth Geneva Convention*. These provisions provide that States Parties are: “Under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches [of the *Geneva Conventions*], and shall bring such persons, regardless of their nationality, before its own courts...”¹⁶² They also provide an obligation on States to “enact any legislation necessary to provide effective penal sanctions for violations of any of the grave breaches of the *Geneva Conventions*”.¹⁶³ However, as with the duty to investigate and prosecute under human rights law, this is not an absolute duty on States.

¹⁶² Article 49, *Geneva Convention I*; Article 50, *Geneva Convention II*; Article 129, *Geneva Convention III*; Article 146, *Geneva Convention IV*.

¹⁶³ *Id.*

Despite many HLP rights violations being covered by the grave breaches provisions of the *Geneva Conventions*,¹⁶⁴ it is a limitation that this duty does not expressly apply to all provisions of the Conventions. Further, this duty is only expressed in relation to situations of international armed conflict.¹⁶⁵ States may also, where they “prefer”, discharge this duty by handing over such persons for trial to another State Party, “provided such State Party has made out a prima facie case”.¹⁶⁶ However, this duty may, arguably, be required under customary humanitarian law, in which case it would apply to all States at all time. Rule 158 of the ICRC study on customary humanitarian law provides: “States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.”¹⁶⁷

INTERNATIONAL CRIMINAL LAW GENERALLY

83. The 1998 *Rome Statute* is the international treaty that sets out the mandate and jurisdiction of the International Criminal Court. The Court’s mandate specifically includes definitions of war crimes and crimes against humanity that encompass violations of HLP rights. Article 8 of the *Rome Statute* gives the International Criminal Court jurisdiction over a wide range of war crimes. The Court’s jurisdiction is separated into war crimes committed during an international armed conflict and those committed during a non-international armed conflict. In terms of non-international armed conflict (such as those unresolved armed conflicts that continue within the territory of Myanmar), Article 8(2)(e)(vii) of the *Rome Statute* restricts ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand. The Elements of Crimes for this provision provide: 1. The perpetrator ordered a displacement of a civilian population; 2. Such order was not justified by the security of the civilians involved or by military necessity; 3. The perpetrator was in a position to effect such displacement by giving such order; 4. The conduct took place in the context of and was associated with an armed conflict not of an international character; and 5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict. This provision is based on Article 17 of Additional Protocol II, which provides: “The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand”.
84. Crimes against humanity are international crimes, whether or not they take place in times of armed conflict and notwithstanding the nationality of victims. The *Rome Statute* includes the following crimes against humanity that provide the Court with the legal basis to bring violators

¹⁶⁴ See, for example, Article 85(3)b, *Additional Protocol I*, “...The following acts shall be regarded as grave breaches...(b) launching an indiscriminate attack affecting...civilian objects in the knowledge that such attack will cause excessive... damage to civilian objects...”; Article 50, *Geneva Convention I*, Article 51, *Geneva Convention II* and Article 147, *Geneva Convention IV* (Article 147), “Grave breaches...shall be those involving...extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly”.

¹⁶⁵ This duty does not expressly apply to the provisions of *Additional Protocol II*, nor to common Article 3, both of which cover situations of non-international armed conflict.

¹⁶⁶ Article 49, *Geneva Convention I*; Article 50, *Geneva Convention II*; Article 129, *Geneva Convention III*; Article 146, *Geneva Convention IV*.

¹⁶⁷ See the updated ICRC database of customary humanitarian law is available at <http://www.icrc.org/customary-ihl>.

of housing, land and property rights to account: Deportation or forcible transfer of population; Persecution; and Other inhumane acts. Article 7(2)(a) of the *Rome Statute* states “attack directed against any civilian population means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack”. Article 7 of the *Rome Statute* provides: “1. For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack[...] (d) Deportation or forcible transfer of population[...]. Article 7.2 of the *Rome Statute* provides: “deportation or forcible transfer of population” means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law. The elements of crimes for this provision state: 1. The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts; 2. Such person or persons were lawfully present in the area from which they were so deported or transferred; 3. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence; 4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and 5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

85. Deportation and forcible transfer both entail the forcible displacement of persons from the area in which they are lawfully present, without grounds permitted under international law. The crime of deportation requires that the victims be displaced across a state border. Forcible transfer involves displacement of persons within national boundaries.¹⁶⁸ Forcible displacement means that people are moved against their will or without a genuine choice. Fear of violence, duress, detention, psychological oppression, and other such circumstances may create an environment where there is no choice but to leave, thus amounting to the forcible displacement of people. Displacement of persons carried out pursuant to an agreement among political or military leaders, or under the auspices of the ICRC or another neutral organization, does not necessarily make it voluntary.¹⁶⁹ International humanitarian law recognizes limited circumstances under which the displacement of civilians during armed conflict is allowed, namely if it is carried out for the security of the persons involved, or for imperative military reasons. In such cases the displacement is temporary and must be carried out in such a manner as to ensure that displaced persons are returned to their homes as soon as the situation allows.¹⁷⁰ Both deportation and forcible transfer have clear links with HLP rights violations and particularly the practice of forced eviction. As stated by the International Criminal Tribunal on the Former Yugoslavia (ICTY) in *Prosecutor v Krstić* “any forced displacement is by definition a traumatic experience which involves *abandoning one’s home, losing property* and being displaced under duress to another location” [emphasis added].¹⁷¹

¹⁶⁸ *Prosecutor v Gotovina*, Case No. IT-06-90-T, para 1738, 15 April 2011.

¹⁶⁹ *Id.*, para 1739.

¹⁷⁰ *Id.*, para 1740.

¹⁷¹ *Id.*, para 523.

86. The footnotes to the elements of crimes state that “the term ‘forcibly’ is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment”. The ICTY had previously stated in *Prosecutor v Stakic* that “the term “forced”, when used in reference to the crime of deportation, is not to be limited to physical force but includes the threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment”.¹⁷² In assessing whether the deportation or forcible transfer was “without grounds permitted under international law”, it is necessary to examine all branches of international law applicable to the case at hand, including humanitarian law and human rights law. In this way, the *Rome Statute* provides an important opportunity to examine whether the deportation or transfer was permitted or not under human rights law and, for this determination, to utilise the significant body of human rights law that has developed and clarified HLP rights in general and forced evictions in particular.
87. The *Rome Statute* provides in Article 7: “1. For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:[...] (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.” The Elements of Crimes state: 1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act; 2. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute; 3. The perpetrator was aware of the factual circumstances that established the character of the act; 4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and 5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population. The crime of “other inhumane acts” was deliberately created as a residual category for serious crimes that are otherwise not enumerated as crimes against humanity. As with the crime of persecution, the category of “other inhuman acts” is broad enough to clearly encompass violations of HLP rights. The ICTY has stated that “whether a given conduct constitutes inhuman treatment will be determined on a case-by-case basis and appears ultimately to be a question of fact”.¹⁷³ Further, the ICTY stated that “to assess the seriousness of an act, consideration must be given to all the factual circumstances. These circumstances may include the nature of the act or omission, the context in which it occurred, the personal circumstances of the victim including age, sex and health, as well as the physical, mental and moral effects of the act upon the victim. While there is no requirement that the suffering imposed by the act have long term effects on the victim, the fact that an act has had long term effects may be relevant to the determination of the seriousness of the act”.¹⁷⁴ Importantly, a number of cases under human rights law give support to the principle that HLP rights violations may amount

¹⁷² *Prosecutor v Stakic*, Case No. IT-97-24-A, Para 281, 22 March 2006.

¹⁷³ *Prosecutor v Delalic*, Case No. IT-96-21-T, para 544, 16 November 1998.

¹⁷⁴ *Prosecutor v Vasiljevic*, Case No. IT-98-32-T, para 235, 29 November 2002.

to cruel, inhuman or degrading treatment or punishment.¹⁷⁵ These cases provide support for the argument that HLP violations can amount to great suffering and thus constitute an inhumane act for the determination of crimes against humanity.

88. These crimes are far from hypothetical, and indeed, have been considered within various international criminal contexts. In the case of crimes committed during the *Bosnia* conflict in the 1990s, the destruction of property was considered by various chambers of the ICTY to constitute persecution as a crime against humanity.¹⁷⁶ In *Prosecutor v Kupreskic* the ICTY concluded that the comprehensive destruction of Bosnian Muslim homes and property constituted an act of persecution. The ICTY noted that “the question [in this case] is whether certain property or economic rights can be considered so fundamental that their denial is capable of constituting persecution”.¹⁷⁷ In assessing this question, the ICTY noted that in the Judgement of the International Military Tribunal at Nuremberg (IMT) “several defendants were convicted of economic discrimination”¹⁷⁸ and concluded that “attacks on property can constitute persecution”.¹⁷⁹ The ICTY further noted that “to some extent this may depend on the type of property involved...There may be certain types of property whose destruction may not have a severe enough impact on the victim as to constitute a crime against humanity, even if such a destruction is perpetrated on discriminatory grounds...”¹⁸⁰ However, the ICTY concluded that as the case at hand related to the “comprehensive destruction of homes and property” that “such an attack on property in fact constitutes a destruction of the livelihood of a certain population”, which “may have the same inhumane consequences as a forced transfer or deportation”. The ICTY concluded that the destruction of property “may constitute a gross or blatant denial of fundamental human rights, and, if committed on discriminatory grounds, may constitute persecution”.¹⁸¹ The ICTY also noted in *Prosecutor v Gotovina* that the imposition of discriminatory measures with regards to housing and property and particularly the drafting and adoption of discriminatory housing and property laws may amount to persecution as a crime against humanity. Specifically, the ICTY found that “under the circumstances at the time the vast majority of those affected by these restrictive and discriminatory measures were Krajina Serbs and that they therefore were discriminatory in fact. Considering the evidence reviewed...about the circumstances surrounding the drafting and adoption of the laws, and that these measures were imposed in the context of a wider discriminatory attack against Krajina Serbs, the Trial Chamber finds that they were imposed on discriminatory grounds”. Specifically, the ICTY found that “the imposition of restrictive and discriminatory measures with regard to housing and property, considered in conjunction with deportation and other crimes...constitute[d] persecution”.¹⁸²

¹⁷⁵ See for example, African Commission on Human and People's Rights, *COHRE v Sudan*, Communication 296/2005, July 29, 2010, where the Commission found that forced eviction in the context of Darfur not only violated the right to adequate housing, but rose to a violation of the Article 4 (right to integrity of the person) and Article 5 (prohibition on cruel, inhuman or degrading treatment or punishment); see also, UN Committee against Torture, *Hajrizi Dzemail et al. v. Yugoslavia*, CAT/C/29/D/161/2000, 2 December 2002, where the Committee against Torture found that “the burning and destruction of houses constitute, in the circumstances, acts of cruel, inhuman or degrading treatment or punishment”.

¹⁷⁶ *Prosecutor v Blaskic*, Case No. IT-95-14-A, para 146, 29 July 2004.

¹⁷⁷ *Prosecutor v. Kupreskic*, Case No. IT-95-16, para 621, 14 January 2000, para 630.

¹⁷⁸ *Id.*, para 630.

¹⁷⁹ *Id.*, para 631.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Prosecutor v Gotovina*, Case No. IT-06-90-T, para 1843, 15 April 2011.

89. Along the same lines, in December 2008, Israel launched *Operation Cast Lead*. The stated aim of the operation was to stop the ongoing rocket fire into Israel from Palestinian armed groups.¹⁸³ Beyond the loss of human life¹⁸⁴, more than 50,000 people were displaced, thousands of private homes were destroyed along with public infrastructure, schools, factories, workshops, businesses, vehicles, and agricultural land.¹⁸⁵ In light of the alleged violations of human rights and humanitarian law during the operation, an independent fact-finding mission was appointed by the UN Human Rights Council.¹⁸⁶ The Mission concluded that extensive violations of both human rights law and humanitarian law had been committed during the operation. Among other things, the Mission concluded: The destruction of...residential houses was the result of a deliberate and systematic policy by the Israeli armed forces. It was not carried out because those objects presented a military threat or opportunity, but to make the daily process of living, and dignified living, more difficult for the civilian population;¹⁸⁷ There appears also to have been an assault on the dignity of the people. This was seen not only in the...vandalizing of houses when occupied and the way in which people were treated when their houses were entered. The graffiti on the walls, the obscenities and often racist slogans, all constituted an overall image of humiliation and dehumanization of the Palestinian population;¹⁸⁸ The Mission has noted with concern public statements by Israeli officials, including senior military officials, to the effect that the use of disproportionate force...and the destruction of civilian property are legitimate means to achieve Israel's military and political objectives. The Mission believes that such statements not only undermine the entire regime of international law, they are inconsistent with the spirit of the *Charter of the United Nations* and, therefore, deserve to be categorically denounced;¹⁸⁹ In a number of cases Israel failed to take feasible precautions required by customary law reflected in article 57 (2)(a)(ii) of *Additional Protocol I* to avoid or minimize incidental... damage to civilian objects;¹⁹⁰ The Israeli armed forces carried out widespread destruction of private residential houses...unlawfully and wantonly;¹⁹¹ and These extensive wanton acts of destruction amount to violations of Israel's duties to respect the right to an adequate standard of living of the people in the Gaza Strip, which includes the rights to...housing.¹⁹² In addition to finding that numerous HLP rights violations had been committed during the operation – under both human rights and humanitarian law – the mission also found that a number of these violations potentially amounted to war crimes and crimes against humanity. The mission looked at Israel's duty under international law to investigate and prosecute allegations of human rights and humanitarian law violations. The mission reviewed Israel's system of investigation and prosecution of serious violations of human rights and

¹⁸³ Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk, A/HRC/13/53/Rev.1, 7 June 2010.

¹⁸⁴ The operation resulted in the deaths of 1,434 Palestinians, 960 of whom were civilians, 13 Israelis, 3 of whom were civilians and injuries to 5,303 Palestinians.

¹⁸⁵ Human Rights Watch, *I Lost Everything: Israel's Unlawful Destruction of Property During Operation Cast Lead*, p20, 2010.

¹⁸⁶ UN Human Rights Council, *Resolution S-9/1*, A/HRC/S-9/L.1, 12 January 2009.

¹⁸⁷ *Report of the United Nations Fact Finding Mission on the Gaza Conflict*, A/HRC/12/48, para 1891, 25 September 2009.

¹⁸⁸ *Id*, para 1892.

¹⁸⁹ *Id*, para 1894.

¹⁹⁰ *Id*, para 1919.

¹⁹¹ *Id*, para 1929.

¹⁹² *Id*, para 1930.

humanitarian law, in particular of suspected war crimes and crimes against humanity, and found major structural flaws that, in their view, made the system inconsistent with international standards.¹⁹³ The mission stated that where domestic authorities are unable or unwilling to comply with the obligation to investigate and prosecute serious violations of human rights and humanitarian law, international justice mechanisms must be activated to prevent impunity.¹⁹⁴

90. In another relevant example, in May 2005 *Operation Murambatsvina* (Operation Restore Order) was launched in Harare, Zimbabwe with the stated aim of removing illegal developments from urban areas as well as combating attendant economic, social and health problems. During the operation, according to official government figures, a total of 92,460 housing structures were demolished, affecting 133,534 households. At the same time, the structures of 32,538 small, micro and medium-size enterprises were demolished. In sum, 569,685 people were rendered homeless and 97,614 people lost their primary source of livelihood.¹⁹⁵ The UN Secretary General appointed a Special Envoy on Human Settlements Issues to assess the situation and present recommendations on how the conditions of those affected may be addressed. The report of the Special Envoy found that the operation was a clear violation of both national and international law: “Operation Restore Order...was carried out in an indiscriminate and unjustified manner, with indifference to human suffering, and, in repeated cases, with disregard to several provisions of national and international legal frameworks”,¹⁹⁶ including in “violation of the right to adequate housing”.¹⁹⁷ In response to the conclusions of the Special Envoy on the question of whether crimes against humanity had been committed, an independent legal opinion was commissioned.¹⁹⁸ The legal opinion entered into a substantial analysis of whether there were legal grounds for considering that crimes against humanity may have been committed and concluded that “the available evidence does disclose grounds to believe that a crime against humanity may have been committed under both of the following Articles of the Rome Statute: Article 7(1)(d) – deportation or the forcible transfer of population; and Article 7(1)(k) – other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. The legal opinion concluded that a prosecution could be commenced before the International Criminal Court subject to a referral being made by the United Nations Security Council.”¹⁹⁹ The opinion also stated that national courts could and should

¹⁹³ *Id*, para 1959.

¹⁹⁴ *Id*, para 1963.

¹⁹⁵ The report of the UN Special Envoy cites “Official Government figures released on 7 July 2005”, see *Report of the Fact-Finding Mission to Zimbabwe to assess the Scope and Impact of Operation Murambatsvina by the UN Special Envoy on Human Settlements Issues in Zimbabwe*, page 32, 18 July 2005. The International Crisis Group states that “[these] figures on housing structures and households are those given by Minister Counselor Pritchard Zhou of the Zimbabwe High Commission in a public address at the Institute of Security Studies, Pretoria, on 7 July 2005 and accepted by [UN Special Envoy] Tibaijuka”, See International Crisis Group, *Zimbabwe’s Operation Murambatsvina: The Tipping Point?*, 17 August 2005, pp. 1-2.

¹⁹⁶ *Id*, p. 7.

¹⁹⁷ *Id*, p. 9.

¹⁹⁸ See: COHRE & Zimbabwe Lawyers for Human Rights, *Operation Murambatsvina: A Crime Against Humanity, An Independent Legal Opinion on whether the 2005 Operation Murambatsvina Forced Evictions constituted a crime against humanity under the Rome Statute*, May 2007.

¹⁹⁹ *Id*, 51.

exercise universal jurisdiction in this case.²⁰⁰ *Operation Murambatsvina* provides a clear example of contemporary violations of HLP rights – committed outside the context of armed conflicts. *Operation Murambatsvina* also provides a clear example of HLP rights violations that may have amounted to crimes against humanity.

IV. INTERNATIONALLY WRONGFUL ACTS

“Every internationally wrongful act of a State entails the international responsibility of that State”

–Article 1 - Responsibility of States for Internationally Wrongful Acts (2001)

91. The foregoing analysis has explored the very extensive nature of improper land grabbing in Myanmar and how these practices dramatically diverge from accepted principles and human rights laws governing such measures. Going still deeper, section IV briefly explores how, and the degree to which, land grabbing measures in Myanmar can be legally classified as internationally wrongful acts, and in turn, what needs to be done within the domestic policy and legal frameworks in the country to bring national rules and practice on land confiscation into full compliance with basic international rules of State responsibility, both in terms of prevention in the future and atonement for past deeds.

THE ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS (2001)

92. After decades of preparatory work, the world’s highest international law making body, the International Law Commission, produced a final draft of its *Articles on Responsibility of States for Internationally Wrongful Acts* in 2001.²⁰¹ In turn, the *Articles* were submitted to the UN General Assembly at its 53rd session. Since that time, the *Articles* constitute the leading legal authority of those acts and omissions that can be defined as ‘wrongful acts’ contrary to basic international legal norms.²⁰² When we speak of ‘internationally wrongful acts’ we

²⁰⁰ “Prosecutions could also be commenced in States where courts have universal jurisdiction over crimes against humanity. The most notable possibility is South Africa where a prosecution could be launched if the perpetrator was visiting or residing in South Africa, or a victim is ordinarily resident in South Africa, and the National Prosecution Authority granted their consent to the prosecution proceeding. Other possible jurisdictions include the Netherlands, Germany, Spain, Germany and to a lesser extent Belgium”, see *Ibid* page 7.

²⁰¹ James Crawford, Jacqueline Peel, Simon Olleson, ‘The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading’ in *EJIL* (2001), Vol. 12, No. 5, 963-991: “International Court [of Justice] has referred to the Draft Articles on a number of occasions, even though they were still only provisionally adopted by the Commission. So have other tribunals. This experience suggests that the Articles may have long-term influence even if they do not take the form of a convention” (footnotes omitted), 969.

²⁰² A legal opinion of the Inter-American Juridical Committee has asserted that restitution is required for any violation of an international obligation: “Pursuant to the rules governing state responsibility in international law, any state that violates

delve into the world of international law and the concept of State responsibility²⁰³, because once such a wrongful act occurs (and recall that ‘acts’ can be both acts and omissions), the principles of State responsibility can be invoked and prevention and remedies sought.²⁰⁴

93. Articles 2 and 3 of the *Articles* define both the elements of an internationally wrongful act of a State and the characterization of an act of a State as internationally wrongful. They provide:

Article 2 - Elements of an internationally wrongful act of a State - *There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.*

Article 3 - Characterization of an act of a State as internationally wrongful - *The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.*

an international obligation must make reparations for the consequences of the violation. The reparation has the purpose of returning, to the extent possible, the situation to the way it was before the transgression occurred. Only to the extent that this would prove impossible, or that the aggrieved party would so agree, could there be room for any substitute reparation". (Inter-American Juridical Committee, Legal Opinion on the Decision of the Supreme Court of the United States of America, OAS Doc. CJI/RES.II-15/92, para. 10 (1992)).

²⁰³ See, for instance, Marco Sassoli, 'State responsibility for violations of international humanitarian law' in *IRRC*, June 2002, Vol. 84, No. 846, pp. 401-434. "Public international law can be described as being composed of two layers the first is the traditional layer consisting of the law regulating coexistence and cooperation between the members of the international society - essentially the States and the second is a new layer consisting of the law of the community of six billion human beings", 401.

²⁰⁴ In terms of the more refined concept of the responsibility to protect (R2P), see: Global Centre for the Responsibility to Protect (22 October 2013) "*State Responsibility and Prevention*": *Summary of the Informal Interactive Dialogue of the UN General Assembly on the Responsibility to Protect held on 11 September 2013*. "Three pillar approach for the operationalisation of R2P: Pillar I notes that every state has the primary responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. Pillar II asserts that the wider international community should assist states in meeting this responsibility. Pillar III holds that if a state is manifestly failing to protect its populations, the international community must be prepared to take appropriate collective action in a timely and decisive manner in accordance with the UN Charter", 1).

94. Examining these norms, it is clear that the principles established under the *Articles* are of direct relevance to Myanmar today with specific reference to land grabbing measures.²⁰⁵ Moreover, the seriousness accorded the land acquisition issue as indicated by the establishment of governmental bodies to restore rights in land to those whose land was taken, the development of special procedures in this regard and the official statements by the office of the President instructing various agencies to refrain from further land confiscation, all point to at the very least a tacit recognition within the State organs of Myanmar that past practices of land acquisition were at the very least unacceptable, unfair or unjust, and arguably acts that could be construed, indeed, to constitute internationally wrongful acts.²⁰⁶ To reiterate, all States, including Myanmar maintain legal powers to expropriate land subject to certain criteria being met, these powers are far from absolute and are increasingly regulated by relevant legislation.
95. State responsibility arises when acts or omissions contrary to international law are carried out, planned or supported by individuals that can be imputed to the State. According to article 4 of the *Articles*, the conduct of *any State organ* is considered to be an act of that State, notwithstanding *whatever position it holds* in the organization of the State (emphasis added). Under article 4(2), “Such an organ includes any person or entity which has that status in accordance with the internal law of the State”. Article 5 then asserts that even if a person or entity (eg. a company) is not an organ of State under article 4 but is empowered by the law of that State to exercise elements of governmental authority, its acts, too, shall be considered to as acts of State.²⁰⁷ In the case of land acquisition in Myanmar, therefore, the *Articles* would apply to all organs of State, such as the Executive Branch of government, the military, government ministries, individual governmental officials and bodies, as well as any other individuals or companies that were entrusted with any degree of governmental authority. On this latter point, thus, were a company to sign a contract with the government to implement projects involving land grabbing, including the demolition of structures, remove people from disputed land or otherwise carry out any act or omission contrary to international law (which were outlined in Section 3 above), they too would be responsible under the terms of the *Articles*.

²⁰⁵ Many analyses support this contention, including, for instance: “Myanmar does not have detailed procedures on land acquisition and appears primarily to be using outdated laws as the basis for land acquisition. These laws do not reflect more modern protections developed in other common law countries to define procedural and substantive protections, nor let alone the more recent international principles on security of tenure...” Source: Myanmar Centre for Responsible Business, *Land – Briefing Paper* (March 2015), Yangon, (Institute for Human Rights and Business, Myanmar Centre for Responsible Business and the Danish Institute for Human Rights), 12.

²⁰⁶ It is important to point out at this juncture that international law is quite unequivocal about the contention that relying on a domestic law as a justification for violating an international rule is inconsistent with the *Vienna Convention on the Law of Treaties* (1969) which clearly states in Article 27 that “A party may not invoke the provisions of its internal law as justification of its failure to perform a treaty. This rule is without prejudice to article 46.” Article 46 provides that: 1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance. 2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

²⁰⁷ In the well-known *Tadić* case at the International Criminal Tribunal for the Former Yugoslavia, the ICTY defined State responsibility by stating three alternative tests for establishing whether an individual acts as a de facto State organ: whether the individual acts under specific instructions or subsequent public approval by the State; in the case of armed groups, whether the individuals are under the overall control of a State; or whether individuals behave as State officials within the structure of a State. See: ICTY, *The Prosecutor v. Dusko Tadić*, IT-94-1-AR72, Appeals Chamber, Decision, 2 October 1995.

96. Articles 12-15 then outline breaches of international obligations.²⁰⁸ Article 12 states that: “There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character”. In other words, if a State is obliged to act in a certain manner in accordance with legal obligations, then any act or omission contrary to that obligation would constitute a breach or violation of the norm concerned. This principle can, therefore, be applied to all acts of land acquisition (in all of its manifestations, whether or not carried out in reference to the terms of the 1894 *Land Acquisition Act*) carried out in Myanmar, both in the future and in the past. The question of how far back in time such determinations can be made as to alleged breaches, eg. the legal principle of *ratione temporis*, are outlined in article 13 which states that “An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs”. This is a vital question in the case of Myanmar and each alleged breach of the Articles that may be alleged will need to be tested against the principles contained in article 13, which essentially reflect the norms of the *Vienna Convention on the Law of Treaties* that clearly stipulates that “in accordance with the general rules of international law...the provisions of the Convention do not bind a Contracting Party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Convention with respect to that Party”.²⁰⁹
97. Further analysis will need to be carried out by lawyers in Myanmar dedicated to building the rule of law in the country, international lawyers and advocates hoping to hold human rights violators accountable, and other States seeking both bolster to the rules based international order and who wish also to hold the Myanmar State legally accountable for mass displacement that has been such a sad and common feature of life in the country since independence in 1948. Convincing arguments can be made, of course, that any act or omission relating to land theft, confiscation, acquisition, expropriation, forced eviction, arbitrary displacement, compensable losses and any other infringements of HLP rights that, in the absence of a specific treaty obligation binding the Myanmar State, constitutes a breach of, for instance, international law generally, customary international law, the UN Charter, the Universal Declaration on Human Rights, international humanitarian law and other legal regimes. Such a perspective, thus, would mean that all cases of land grabbing that in any manner were contrary to these standards would be acts and omissions amounting to breaches under the terms of the *Articles*. As convincing as this may legally be, however, it can be reasonably expected that any person or organ of State in Myanmar that is alleged to have breached these norms will argue that no legal obligation existed in Myanmar at the time of the land confiscation that labeled these actions as breaches of international legal obligations held by the State. Every case that arises will need to be judged on its own merits, but suffice it to say that beyond the numerous legal sources that clearly protect housing, land and property rights, many of which date back to 1948 or earlier, the simple formulation issued in the *Chorzow Case* in 1928 is a good place to begin any such analysis. *Chorzow*, of course, asserted that “the breach of an engagement involves an obligation

²⁰⁸ Generally on the Articles, see: Simon Olleson, *The Impact of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts (Preliminary Draft)*, British Institute of International and Comparative Law, 2007.

²⁰⁹ *Id.*, 107.

to make reparation in an adequate form”, and that such reparation must “wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed”. Imagine this latter clause being applied to all acts of illegal land confiscation in Myanmar. What would Myanmar look like if all illegal acts of land theft were reversed, and would this not contribute to building the foundations of the rule of law and democracy that Myanmar so desperately needs?

98. Indeed, as was outlined above during our examination of the issue of restitution, the *Articles* are clear in articles 28-39 the legal consequences of an internationally wrongful and the reparations required to restore the situation to how it would have been had the breach not taken place. Article 30 is important as a tool for ending breaches and states that: “The State responsible for the internationally wrongful act is under an obligation: (a) to cease that act, if it is continuing; (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require. Article 31 then outlines the obligation to make ‘full reparation’ for any injury caused by an internationally wrongful act. The terms of article 31 are noteworthy for their inspiration by the terms of the *Chorzow* case. Article 32 then very significantly, particularly for Myanmar where national law is often relied upon to justify actions that are clearly contrary to relevant international norms, states that “The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part”. In other words, simply because a law such as the VEV law outlined above allows the State to arbitrarily acquire a person’s land simply because they failed to comply with an unclear registration process, would not absolve the Myanmar government from its concomitant obligations under general international law, as well as the terms of the ICECSR, which incidentally was ratified *prior to* the entry into force of the more draconian terms of the 2018 amendments to the VEV Law.
99. Articles 34 and 35 then give substance to the points made in article 13 of the *Articles* by asserting that “Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this Chapter”. Article 35 specifically outlines restitution issues in the following terms: “Restitution - A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution: (a) is not materially impossible; (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation. These requirements have been specifically relied upon by the International Court of Justice in several cases, most notably the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory case*²¹⁰ and *Bosnia and Herzegovina v Serbia and Montenegro*.²¹¹

²¹⁰ “Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered.”

²¹¹ “It is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it”.

100. Hypothetically, even if none of these arguments were accepted and a strict application of article 13 of the *Articles* was relied upon as regards to a present-day case of unlawful confiscation of housing, land or property, however, there can be no doubting whatsoever that the terms of the International Covenant on Economic, Social and Cultural Rights do not apply, for they certainly do. Myanmar's voluntary ratification of the ICESCR on 6 October 2017 generated precise legal obligations on all organs of State in the country to comply with the rights established under this cornerstone legal text which include the right to adequate housing for everyone within the country, a right impossible to reconcile with arbitrary land grabbing.

THE INTERNATIONAL CRIMINAL COURT AND STATUTE

*"41. The impact of the crimes may be assessed in light of, inter alia, the increased vulnerability of victims, the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities. In this context, the Office will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the **illegal dispossession of land**." (emphasis added)²¹²*

101. The establishment of a permanent International Criminal Court in 2002 represented a major breakthrough in international justice. The Court is vested with a mandate to investigate and prosecute international crimes, namely – genocide, crimes against humanity, war crimes, and aggression. The Court was designed to end the long history of impunity that had surrounded serious violations of human rights and humanitarian law. Through creating an international institution for the investigation and prosecution of serious international crimes, it was hoped that the Court would act as a catalyst for states to fulfill their duty to investigate and prosecute violations of human rights and humanitarian law; to provide a deterrent function to perpetrators and to provide victims and their families with the opportunity to obtain justice, truth and reparations. Importantly, the Court has the specific jurisdiction to investigate and prosecute war crimes and crimes against humanity that encompass a range of housing, land and property rights violations – whether committed in times of conflict or of peace.

The Office will also seek to cooperate and provide assistance to States, upon request, with respect to conduct which constitutes a serious crime under national law, such as the illegal exploitation of natural resources, arms trafficking, human trafficking, terrorism, financial crimes, land grabbing or the destruction of the environment.²¹³

²¹² Office of the Prosecutor, *Policy Paper on Case Selection and Prioritisation*, 15 September 2016.

²¹³ *Id.*

102. In one of the most important developments at the ICC in terms of its potential to prevent displacement and repair past land injustices²¹⁴, and generally address issues relating to land grabbing, the Office of the Prosecutor issued a *Policy Paper on Case Selection and Prioritisation* in September 2016.²¹⁵ As noted at the outset of this sub-section, Paragraph 41 specifically highlights 'the illegal dispossession of land' as an issue that ICC prosecutors will devote particular attention to in terms of future prosecutions. This is a significant development, and although Myanmar has yet to ratify the *Rome Statute*, the potential role of the ICC in judicially addressing land grabbing practices in the country has grown.²¹⁶

²¹⁴ See, the press release issued by Global Witness (13 Sept 2016) *Company Executives Could Now Be Tried for Land Grabs and Environmental Destruction*, which provides that: "Today the Court's Prosecutor, Fatou B. Bensouda, acknowledged this hole in its focus, adding to its priority list the investigation of crimes that result in the illegal dispossession of land, the illegal expropriation of natural resources and the destruction of the environment. The move comes ahead of a decision by the Prosecutor whether to investigate a case filed in 2014 that catalogues mass human rights abuses linked to systematic land seizures in Cambodia, where business leaders have been working hand-in-glove with the country's kleptocratic government".

²¹⁵ Office of the Prosecutor, *Policy Paper on Case Selection and Prioritisation*, 15 September 2016. The following paragraphs are of particular relevance, the latter of which specifically mentions the term 'land grabbing': 2. This is an internal document of the Office and as such, it does not give rise to legal rights, and is subject to revision based on experience and in light of evolving jurisprudence and/or any relevant amendments to the legal texts of the Court....6. Gravity is the predominant case selection criteria adopted by the Office and is embedded also into considerations of both the degree of responsibility of alleged perpetrators and charging; and 7. In relation to cases not selected for investigation or prosecution, it should be recalled that the goal of the Statute to combat impunity and prevent the recurrence of violence, as expressed in its preamble, is to be achieved by combining the activities of the Court and national jurisdictions within a complementary system of criminal justice. As such, the Office will continue to encourage genuine national proceedings by relevant States with jurisdiction. In particular, it will seek to cooperate with States who are investigating and prosecuting individuals who have committed or have facilitated the commission of Rome Statute crimes. The Office will also seek to cooperate and provide assistance to States, upon request, with respect to conduct which constitutes a serious crime under national law, such as the illegal exploitation of natural resources, arms trafficking, human trafficking, terrorism, financial crimes, *land grabbing* or the destruction of the environment. Finally, the Office recalls that it fully endorses the role that can be played by truth seeking mechanisms, reparations programs, institutional reform and traditional justice mechanisms as part of a broader comprehensive strategy. (footnotes omitted)(emphasis added).

²¹⁶ Some additional provisions (footnotes omitted) include: 34. The Office will select cases for investigation and prosecution in light of the gravity of the crimes, the degree of responsibility of the alleged perpetrators and the potential charges. The weight given to each criterion will depend on the facts and circumstances of each case and each situation, and the stage of development of the case hypothesis and investigation. The Case Selection Document will be reviewed as investigations proceed, by applying the same case selection criteria. a) Gravity of crime(s) - 35. Gravity of crime(s) as a case selection criterion refers to the Office's strategic objective to focus its investigations and prosecutions, in principle, on the most serious crimes within a given situation that are of concern to the international community as a whole; 36. Gravity of crime(s) as a case selection criterion is assessed similarly to gravity as a factor for admissibility under article 17(1)(d). However, given that many cases might potentially be admissible under article 17, the Office may apply a stricter test when assessing gravity for the purposes of case selection than that which is legally required for the admissibility test under article 17....b) Degree of responsibility of alleged perpetrators - 42. Regulation 34(1) of the Regulations of the Office and the Prosecution's Strategic Plan direct the Office to conduct its investigations towards ensuring that charges are brought against those persons who appear to be the most responsible for the identified crimes. In order to perform an objective and open-ended investigation, the Office will first focus on the crime base in order to identify the organisations (including their structures) and individuals allegedly responsible for the commission of the crimes. That may entail the need to consider the investigation and prosecution of a limited number of mid- and high-level perpetrators in order to ultimately build the evidentiary foundations for case(s) against those most responsible. The Office may also decide to prosecute lower level-perpetrators where their conduct has been particularly grave or notorious; 43. The notion of the most responsible does not necessarily equate with the de jure hierarchical status of an individual within a structure, but will be assessed on a case-by-case basis depending on the evidence. As the investigation progresses, the extent of responsibility of any identified alleged perpetrator(s) will be assessed on the basis of, inter alia, the nature of the unlawful behaviour; the degree of their participation and intent; the existence of any motive involving discrimination; and any abuse of power or official capacity; 44. The degree of responsibility of alleged perpetrator(s) will also be taken into consideration when defining the charges. The Office will explore and present the most appropriate range of modes of liability to legally qualify the criminal conduct alleged. For this purpose, the Office will also consider the deterrent and expressive effects that each mode of liability may entail. For example, the Office considers that the responsibility of commanders and other superiors under article 28 of the Statute is a key form of liability, as it offers a critical tool to ensure the principle of responsible command and thereby end impunity for crimes and contribute towards their prevention. c) Charges - 45. The Office will aim to represent as much as possible the true extent of the criminality which has occurred within a given situation, in an effort to ensure, jointly with the relevant national jurisdictions, that the most serious crimes committed in each situation do not go unpunished. Consistent with regulation 34(2) of the Regulations of the Office of the Prosecutor, the charges chosen will constitute, whenever possible, a representative sample of the main types of victimisation and of

Indeed, the role of the ICC on land grabbing matters has not been inconsequential. A case filed against the government of Cambodia in 2014, for instance, outlines a wide range of alleged land-related crimes severe enough to warrant the attention of the Court. Because of the numerous similarities in the land grabbing practices in Cambodia with those in Myanmar, the full summary of the Cambodia submission has been included in Annex 7 below. One statement in the submission notes: “The cumulative effect of these violations has pushed this situation beyond the boundaries of human rights abuses and domestic crimes. In furtherance of its twin-objectives of self-enrichment and maintaining power at all costs, the Ruling Elite have committed serious crimes as part of a widespread and systematic attack against the Cambodian civilian population, pursuant to a State policy. The crimes fulfil all the legal elements of crimes against humanity.” Needless to say this bears remarkable similarities to the situation in Myanmar.

103. Myanmar is already under investigation by the ICC. The ICC Prosecutor filed a Request on 9 April 2018, pursuant to regulation 46(3) of the Regulations of the Court and article 19(3) of the Rome Statute, seeking a ruling from the Pre-Trial Chamber on the question of whether the Court may exercise jurisdiction pursuant to article 12(2)(a) of the Statute over the alleged deportation of members of the Rohingya people from Myanmar to Bangladesh.²¹⁷ The government of Myanmar sought to have this request dismissed, claiming it was “meritless”.²¹⁸ Consequently, on 6 September 2018, the Pre-Trial Chamber I issued a decision confirming that the Court may exercise jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh, as well as potentially other crimes under article 7 of the Rome Statute. Twelve days later on 18 September 2018, the Prosecutor issued a statement announcing the opening of a preliminary examination concerning the alleged deportation of the Rohingya people from Myanmar to Bangladesh.²¹⁹ The alleged

the communities which have been affected by the crimes in that situation; 46. The Office will pay particular attention to crimes that have been traditionally under-prosecuted, such as crimes against or affecting children as well as rape and other sexual and gender-based crimes. It will also pay particular attention to attacks against cultural, religious, historical and other protected objects as well as against humanitarian and peacekeeping personnel. In so doing, the Office will aim to highlight the gravity of these crimes, thereby helping to end impunity for, and contributing to the prevention of, such crimes; 47. The Office aims to investigate and prosecute all cases that are selected pursuant to the case selection criteria set out above; 48. Prioritisation governs the process by which cases that meet the selection criteria are rolled-out over time. A case that is temporarily not prioritised is not thereby deselected: it remains part of the Case Selection Document and the Office will endeavour to investigate and prosecute such cases as circumstances permit, based on the criteria below; 49. Case prioritisation flows from the requirement under article 54(1)(b) that the Office take appropriate measures to ensure the effective investigation and prosecution of crimes. It takes into account the practical realities faced by the Office in its work, including the number of cases the Office can investigate and prosecute during a given period with the resources available to it. Accordingly, based on information and evidence, as well as the operational environment at any given time, the Office will need to prioritise among the selected cases within a situation and across the various situations; and 50. For the prioritisation of cases, the Office will take into consideration the following strategic case prioritisation criteria: a) a comparative assessment across the selected cases, based on the same factors that guide the case selection; b) whether a person, or members of the same group, have already been subject to investigation or prosecution either by the Office or by a State for another serious crime; c) the impact of investigations and prosecutions on the victims of the crimes and affected communities; d) the impact of investigations and prosecutions on ongoing criminality and/or their contribution to the prevention of crimes; and e) the impact and the ability of the Office to pursue cases involving opposing parties to a conflict in parallel or on a sequential basis.

²¹⁷ ICC Office of the Prosecutor, *Report on Preliminary Examination Activities 2018*, 5 December 2018.

²¹⁸ See: Reuters, Myanmar to ICC: Rohingya jurisdiction request ‘should be dismissed’, Aug 9, 2018: “Myanmar said on Thursday a request by the International Criminal Court (ICC) prosecutor to seek jurisdiction over suspected deportations of Rohingya Muslims from Myanmar to Bangladesh was “meritless and should be dismissed”.

²¹⁹ Several points were made by the Office concerning Preliminary Jurisdictional Issues. These are: Bangladesh deposited its instrument of ratification to the Statute of the Rome Statute on 23 March 2010. The ICC therefore has jurisdiction over Rome Statute crimes committed on or after 1 June 2010 on the territory of Bangladesh, pursuant to article 12(2)(a) of the Statute, or by its nationals, pursuant to article 12(2)(b) of the Statute; Furthermore, in its decision of 6 September 2018,

crimes under investigation, thus, focus on “alleged crimes committed in part on the territory of Bangladesh since June 2010, in particular in the context of the escalation of violence which occurred in Myanmar in August 2017 and resulted in the alleged deportation of hundreds of thousands of members of the Rohingya people from Myanmar into Bangladesh. In this context, the preliminary examination takes into account a number of alleged coercive acts which may have resulted in the forced displacement of the Rohingya people, including deprivation of fundamental rights, killing, sexual violence, enforced disappearance, destruction and looting.” At the time of writing, the investigation was ongoing, but at the political level increased global attention has been given to the devastating report by the Independent International Fact-Finding Mission on Myanmar, excerpts of which are included in Annex 8 below.²²⁰ Beyond asserting that the events carried out against the Rohingya constituted crimes against humanity and genocide, the report urges the entire international community to refrain from any business relationships with the Tatmadaw.²²¹

PTC I found that the Court may assert jurisdiction pursuant to article 12(2)(a) of the Statute if at least one element of a crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party to the Statute. Specifically, the Chamber held that acts of deportation initiated in a State not Party to the Statute (through expulsion or other coercive acts) and completed in a State Party to the Statute (by virtue of victims crossing the border to a State) fall within the parameters of article 12(2)(a) of the Statute. The Chamber went on to hold that the same rationale may apply to other crimes within the jurisdiction of the Court as well, citing as examples the crimes against humanity of persecution and other inhumane acts under articles 7(1)(h) and 7(1)(k) of the Statute; and As a result, while Myanmar is not a State Party to the Statute and has not lodged a declaration under article 12(3) accepting the jurisdiction of the Court, the Chamber held that the Court has jurisdiction over alleged crimes occurring in part in Bangladesh, provided that such allegations are established to the required threshold.

²²⁰ Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, UN Doc: A/HRC/39/CRP.2 (Sept 2018).

²²¹ See: The Guardian (14 May 2019) *Adani deal with Myanmar military-linked company raises human rights alarm: Australian expert worries Queensland coal may help fund armed forces accused of genocide*.

V. FINDINGS

104. Viewed from the perspective of the enjoyment (or lack of enjoyment) of housing, land and property rights, the findings of this report reveal that the HLP crisis in Myanmar resulting from land grabbing practices is among the worst of any country within the international community of nations. Even if viewed only from the time period of the present political reform process since 2011, in many important respects the enjoyment of HLP rights has worsened since the period before the reforms began. The sheer scale of systematic inequity, and often brutality, and the almost comprehensive violation of nearly all basic HLP standards is alarming in both its callousness as well as its ongoing nature. The entire legal framework governing HLP matters in Myanmar has been carefully and methodically crafted by a conspiratorial triad combining the military, parts of government and business interests that together have had the net effect of severely undermining the rights of tens of millions of people who want nothing other than the protection of their HLP rights. Viewed in its entirety, both in *de jure* and *de facto* terms, it is abundantly clear that the entire HLP system in Myanmar constitutes a multi-leveled package of internationally wrongful acts in need of immediate and comprehensive change. HLP crimes committed under the legal regimes that enable these practices need to be held legally accountable and criminally liable. Companies that have conspired with state actors liable for HLP crimes need also to be held criminally liable for their voluntary collusion in these illegal practices. All political parties and politicians within the country need to recognise this and change needs to come quickly because quite literally none of the key legal criteria required to be in place for land acquisition measures to be lawful are in place in contemporary Myanmar.

FINDING ONE: LAND GRABBING IS NOT GENERALLY SUBJECT TO LAW AND DUE PROCESS

105. In determining the compatibility of land grabbing measures in Myanmar with law and due process requirements, all forms and systems of relevant law need to be considered. We need to consider not only the domestic legal structures of Myanmar which are so favourably skewed in support of those with access to political, economic and military power in the country as was outlined above, but also the numerous international laws of relevance including both those which the government of Myanmar has freely undertaken in good faith to comply with, but also the multitude of customary and other international laws and norms which are equally relevant to Myanmar. If we view the law as an integral whole, therefore, the people of Myanmar - in particular the overwhelming majority of the population without adequate legal security of tenure protections - despite having legal rights to housing, land and property under international laws, and to a degree under Myanmar law too, vastly more people in the country *do not enjoy these rights* in practice than the small minority of those who do.

106. Moreover, in practice there are effectively no real and effective available judicial remedies before independent and impartial courts for communities threatened with land acquisition, just as there remains no judicial remedy for HLP restitution for the millions of displaced people inside and outside the country. Whatever limited judicial remedies there are in

Myanmar to redress unjust land acquisition are unlikely in the vast majority of cases to provide the remedies required to secure residential justice for those affected under current legislation. Indeed, it is not usual for land disputes to reach court except in major cities. Not only can most citizens, in particular farmers, not afford to defend themselves in court, but also even when land cases make it to court they are often unsuccessful. People resisting land acquisition by private companies often face prison terms on charges of mischief and trespassing, while some have even been jailed. Simply put, according to one analyst: “Under military rule, many farmers simply understood that it was fruitless to challenge land seizures by state-owned enterprises or government cronies. Indeed, protests could result in lengthy prison sentences, enforced disappearances, or, especially in ethnic areas, summary execution”.²²² Sadly, the same could be said of today’s Myanmar.

FINDING TWO: LAND GRABBING IS NOT SUBJECT TO THE GENERAL PRINCIPLES OF INTERNATIONAL LAW

107. As outlined above, the laws that enable land grabbing and the manner by which these practices are carried out in Myanmar dramatically diverge from the way these issues are addressed under various international legal regimes. In contrast to what is legally required of States, there is no objective in law to prevent or avoid land confiscation, or resultant displacement or forced evictions. Similarly there is no recognition of clearly-defined HLP rights within the national Constitution, particularly concerning the right to adequate housing, no legal duty on the State to public consultation and stakeholder engagement, nor requirements for free, prior and informed consent in the event of land confiscation. There is also no commitment to resettlement planning²²³ when legitimate land acquisition occurs in the public interest or when it cannot be avoided or minimized. HLP abuses carried out in Rakhine State constitute international crimes, and there are convincing grounds for greater attention to all HLP practices in Myanmar by the International Criminal Court.

FINDING THREE: LAND GRABBING IS OFTEN CARRIED OUT NOT IN THE INTEREST OF SOCIETY BUT FOR THE BENEFIT OF ANOTHER PRIVATE PARTY

108. Under present law in effect in Myanmar, as long as land-related projects are officially shown to constitute a ‘public purpose’, land acquisition can effectively proceed, with only limited means to resist or prevent such processes, and few real judicial remedies available to do so. Some companies have incorporated consent issues within their practices, but government policy and law have yet to enshrine these important notions. While international human rights norms indicate that involuntary resettlement and eviction should only occur in exceptional circumstances where no other possible alternatives to displacement are possible, such norms

²²² Supra, Brian McCarton, Myanmar: Land grabbing as Big Business, 11 March 2013.

²²³ Neither resettlement action plans nor livelihood restoration plans are recognized in law or policy in contemporary Myanmar. While there is a history of land acquisition and resultant displacement in the country, there is no tradition of active resettlement or relocation to assist persons and communities so affected to re-establish their lives at new locations. Relocation measures have been undertaken at some locations including the Special Economic Zone at Thilawa and at Letpaduang copper mine, however, these have been heavily criticized.

are absent from both relevant law and policy in Myanmar. Communities that have faced land dispossession in Myanmar have become increasingly vocal in their efforts to both prevent acquisition, and in cases when this was not possible, to seek to draw attention to previous land acquisition cases by protesting and attempting to re-occupy land from which they were displaced. In what appears to be a growing number of cases, the authorities have brought legal cases against farmers and others protesting the loss of their land. In one case, for instance, the government brought cases against hundreds of farmers in Kantbalu Township who returned to land that was previously seized by the military and given to a sugar company.²²⁴ In a great many cases, land acquisition in Myanmar is very frequently carried out for private, as opposed to public, gain. The transactional relationship between military (and former military) officials and private businesses remains solidly in place despite eight years of political reforms, with devastating effects on the enjoyment of HLP rights in the country.

FINDING FOUR: LAND GRABBING IS RARELY PROPORTIONATE, REASONABLE OR SUBJECT TO A FAIR BALANCE TEST BETWEEN THE COST AND THE AIM SOUGHT

109. Land confiscation in Myanmar is generally carried out in a manner that is not proportional, not consistent with the fair balance principle, and not reasonable by any objective measure. Beyond the imbalanced nature of the legislative framework in favour of those wishing to acquire land over the rights of those owning, working or residing on such lands, in the vast majority of cases of attempted land confiscation in Myanmar, the State and its associated agencies will prevail in their aims, notwithstanding the HLP rights meant to protect those affected.

FINDING FIVE: LAND GRABBING IS NOT CARRIED OUT GENERALLY SUBJECT TO THE PROVISION OF JUST AND SATISFACTORY COMPENSATION

110. Myanmar law and practice also falls short in terms of the provision of just and satisfactory compensation in the event of land confiscation.²²⁵ Although the payment of market rate compensation is envisaged when land is acquired under relevant legislation, in practice, compensation for land acquisition is frequently not paid, wholly inadequate, and often falls far short of the market-value provisions found in the *Land Acquisition Act*.²²⁶ There are no standard methodologies in place to ensure consistency in compensation frameworks and there is no oversight body in place that can review compensation payments.²²⁷

²²⁴ Lawi Weng, 'Sentencing Delayed for 173 Farmers in Sagaing Land Grab Case, *Irrawaddy* (4 August 2014).

²²⁵ ECC Factbook, *Conflict Factsheet: Land Grabbing Conflicts in Myanmar*, 2016.

²²⁶ See, for instance, Earthrights, "There is no benefit, they destroyed our farmland" - *Selected Land and Livelihood Impacts Along the Shwe Natural Gas and China-Myanmar Oil Transport Pipeline from Rakhine State to Mandalay Division*, 2014.

²²⁷ See, for instance, the report by Human Rights Watch that outlines a range of failings in terms of compensation for those suffering land confiscation: Human Rights Watch, *The Farmer Becomes the Criminal: Land Confiscation in Burma's Karen State*, 2016. "In most cases that Human Rights Watch documented, people who had had their land seized received no compensation. This was true even where villagers could produce some form of documentation providing evidence of government-recognised land use rights" (p. 43); "Failure to compensate occurred even in a number of cases involving official taking of land by the government for a public purpose under the 1894 Land Acquisition Act, which requires the government to provide compensation. In cases where villagers were compensated, many said it fell far short of what they

Compensation is seen to be almost totally subjective in nature, and differing levels of compensation are often offered by companies to divide communities negotiating for better compensation arrangements.

111. Eight years into the once much-hyped political reform process, it is clear that whatever hope may have once existed that HLP relations in Myanmar would improve has been lost. Myanmar desperately lacks sufficient numbers of forward-thinking governmental officials with enough independence, fearlessness and political power to put on the table the types of deep, structural and fundamental legal and policy reforms that are needed within the housing, land and property sectors to bring about the type and scale of change needed to ensure that everyone in the country can enjoy at least a minimal level of HLP rights protections as promised to them under law *already now binding on the Myanmar State*. To date, neither the National League for Democracy and its divisive leader State Counselor Aung San Suu Kyi nor any other political party or powerful institution, in particular the military and associates, have shown anything more than passing interest in shifting HLP relations in the country into a proper direction. The problems within the HLP sector are widely known throughout Myanmar society, as are the groups who benefit and the groups who suffer as a result of these archaic laws and policies which so clearly serve certain interests to the detriment of so many others. While no one can predict what the future holds in Myanmar as far as housing, land and property rights are concerned, it is difficult to imagine the situation getting any worse than it already is in this regard. Cosmopolitan, rights-minded officials and those with access to them, thus, need to take heed not only of the dramatic human rights abuses and human deprivation that continue to be carried out against so many within the country, but also be cognizant of the many developments elsewhere in countries that have historically pursued similar practices and which today are finally seeing the emergence of at least a modicum of HLP justice. The recent submissions made regarding land grabbing in nearby Cambodia to the International Criminal Court should be evidence enough to show what awaits Myanmar if nothing is done to reverse these practices. As a Commonwealth country, Myanmar should be aware of developments in countries such as Uganda where the Supreme Court in 2014 held that the *Land Acquisition Act* was unconstitutional because compensation payments were not explicitly required to be made prior to the acquisition of land.²²⁸ Similarly, the March 2019 decision of the High Court of Australia, another Commonwealth country and clearly relevant to Myanmar, found that Aboriginal groups stand to win billions of dollars in compensation for the non-recognition of the land rights of Australia's first inhabitants²²⁹ A major lawsuit in Ecuador led to a ruling in

were owed or what allowed them to earn a sustainable living or even survive. (p. 44); "Villagers interviewed by Human Rights Watch repeatedly cited the lack of compensation or other forms of redress when their land had been seized" (p. 51); and "powerful interests are gaining land through questionable means while farmers are losing it, often without adequate compensation" (HRW, p. 6)

²²⁸ See: *Uganda National Roads Authority vs. Irumba Asumani & Peter Magelah, Supreme Court Constitutional Appeal No. 2 of 2014*.

²²⁹ See: Case D1/2018 - Northern Territory of Australia v. Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples & Anor, Commonwealth of Australia v. Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples & Anor Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples v. Northern Territory of Australia & Anor, Case Nos. D1/2018, D2/2018 and D3/2018, Lower Court Judgment 20/07/2017 Federal Court of Australia (North ACJ, Barker J, Mortimer J), (Orders pronounced 09/08/2017). Excerpts from the Judgment Summary read as follows: Today, the High Court unanimously allowed two appeals in part and dismissed one appeal from a judgment of the Full Court of the Federal Court of Australia, in relation to the compensation payable, pursuant to s 51 of

April 2019 in favour of the indigenous Waorani community and against three government bodies for their failure to conduct a proper consultation process prior to putting Waorani territory up for sale in an international oil auction. The ruling suspended any possibility of selling Waorani land for oil exploration.²³⁰ Countless other examples could be presented here, but suffice it to say that the people of Myanmar deserve a government that not only ceases all land grabbing measures that are inconsistent with national and international laws, but also a government that openly accepts responsibility that land crimes have been tolerated, and indeed, facilitated for decades and commits to developing new laws and procedures to enable everyone affected to put forward claims for restitution and/or compensation for what would amount to billions of dollars of losses since independence. This should include the full forfeiture of any and all land unlawfully grabbed in the country by every person, company or institution that has grabbed such land. Anything short of that would simply be unacceptable within a State longing for international respect and the emergence of true democracy. There is a legal roadmap for doing this, and we include this in the final chapter of this report, which follows.

the *Native Title Act 1993* (Cth), to the Ngaliwurru and Nungali Peoples ("the Claim Group") for the extinguishment of their non-exclusive native title rights and interests. The Court awarded compensation for economic loss equating to 50 per cent of the freehold value of the affected land with simple interest, and compensation for cultural loss in the amount of \$1.3 million. The Northern Territory was responsible for 53 acts held to have impaired or extinguished the Claim Group's native title rights and interests, which gave rise to the Claim Group's entitlement to compensation on just terms under s 51 of the *Native Title Act* ("the compensable acts"). At issue was the amount of compensation payable to the Claim Group. The trial judge held the Claim Group was entitled to an award for economic loss equating to 80 per cent of the freehold value of the affected land, simple interest on that award, and compensation for cultural loss in the amount of \$1.3 million. On appeal, the Full Court varied the trial judge's assessment of economic loss from 80 per cent to 65 per cent of the freehold value of the land, but otherwise, relevantly, affirmed the trial judge's decision. By grants of special leave, the Claim Group, the Northern Territory and the Commonwealth appealed to the High Court. The Claim Group contended among other things that its economic loss equated to the freehold value of the affected land without reduction. The Northern Territory and the Commonwealth contended among other things that the value of the Claim Group's economic loss did not exceed 50 per cent of the freehold value of the affected land, and the award for cultural loss was manifestly excessive. The High Court unanimously allowed the Northern Territory and Commonwealth appeals in part, and dismissed the Claim Group's appeal. The Court held, by majority, that the economic value of the Claim Group's rights and interests involved determining the percentage reduction from full exclusive native title represented by the Claim Group's non-exclusive native title rights and interests relative to full exclusive native title, and then applying that percentage reduction to full freehold value as a proxy for the economic value of full exclusive native title. The Court held that the value of the Claim Group's non-exclusive native title rights and interests, expressed as a percentage of freehold value, was no more than 50 per cent. The Court rejected that the Claim Group was entitled to compound interest on that sum and awarded simple interest at the Pre-Judgment Interest Rate fixed by the Federal Court of Australia Practice Note CM16. That interest was not part of the total compensation payable for the extinguishment of native title within the meaning of s 51A of the *Native Title Act*. The Court upheld the award for cultural loss of \$1.3 million. The Court held that assessment of cultural loss required determining the spiritual relationship which the Claim Group have with their country and then translating the spiritual hurt caused by the compensable acts into compensation and that the assessment will vary according to the compensable act, the identity of the native title holders, the native title holders' connection with the land or waters by their laws and customs and the effect of the compensable acts on that connection. The Court held that the award to the Claim Group was not manifestly excessive and was not inconsistent with acceptable community standards. See also: *Australia Aboriginals win right to sue for colonial land loss: The ruling in favour of the Ngaliwurru and Nungali groups paves the way for billions of dollars in compensation*, Al Jazeera, 15 March 2019, which states: "The High Court of Australia has handed down the biggest "native title" ruling affecting Aboriginal ownership of the land in decades, amid claims that billions of dollars in compensation will need to be paid by governments to indigenous groups".

²³⁰ Kimberly Brown, 'Indigenous Waorani win landmark legal case against Ecuador gov't: Judges rule three gov't bodies failed to adequately consult the community before putting their territory up for sale', 27 April 2019, Al Jazeera.

VI. RECOMMENDATIONS - A LEGAL ROADMAP FOR BUILDING A NEW VISION AND LEGISLATIVE BASIS FOR ENDING LAND GRABBING IN MYANMAR

112. This report has outlined how the illegal practices of land grabbing in various guises is carried out contrary to legal obligations binding on Myanmar. It has shown the numerous ways by which these practices often contravene not only Myanmar's own laws, but virtually all international standards which address these issues, including treaties voluntarily ratified by the Myanmar State. We have seen, thus, the yawning and growing chasm between law and practice in contemporary Myanmar. Yet, these need not be the realities facing the 54 million people who reside there. A different reality is possible, and a different HLP future could await the people of this extraordinary nation if the right people make the right decisions about the HLP challenges facing the country today. For more than a decade Displacement Solutions has visited all corners of Myanmar, witnessed innumerable violations of HLP rights and sought to formulate practical, actionable and rights-based ideas and recommendations to assist the people of Myanmar to reach levels of HLP rights enjoyment that should be the birthright of everyone, everywhere. Displacement Solutions experts have spoken directly to thousands of those who have been unfortunate enough to have seen their lands stolen, with no recourse to any judicial or other measure to help them resist this fate. It does not need to be this way. A brighter HLP future is possible for the people of Myanmar. A future where land grabbing ends, where everyone has true security of tenure and the housing rights attributes so closely linked to this. A future where women and men enjoy HLP rights in an entirely equal way. A future where real efforts are made to return stolen lands to the people to whom they legitimately belong. A future based on a vision of Myanmar that can bring about levels of prosperity, peace, tolerance and justice that the country has never before seen. This future is possible, and the following 21 recommendations are designed to facilitate an HLP future that the people in all corners of Myanmar unreservedly deserve:

REC 1. INTRODUCE AN IMMEDIATE NATIONAL MORATORIUM ON ALL LAND ACQUISITION MEASURES AND ALL PLANNED FORCED EVICTIONS

Given the decades-long history of mass land confiscation in Myanmar, an immediate moratorium on all land acquisition measures and all planned forced evictions should be introduced. A strong political commitment is needed from the highest level to put an immediate end to these practices. Once on hold, measures - both legal and political - can be undertaken to establish a nation-wide Zero Land Grabbing Policy to augment additional legal reforms.²³¹

REC 2. AMEND THE NATIONAL CONSTITUTION TO INCLUDE THE RIGHT TO ADEQUATE HOUSING, EXPLICIT PROTECTION AGAINST FORCED EVICTION AND STRICT LIMITATIONS ON THE EXERCISE OF COMPULSORY PURCHASE/LAND ACQUISITION MEASURES

The 2008 Constitution should be amended to include a specific article recognising the right to adequate housing and protection against forced eviction and that imposes strict limitation on how land acquisition measures are carried out. Such an article could be modelled on Article 26 of the South African Constitution mentioned above, and which reads: '26. Housing - 1. Everyone has the right to have access to adequate housing; 2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right; and 3. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

²³¹ Coca Cola recently submitted their first report on their Myanmar operations to the US State Department under the Responsible Investment Reporting Requirements required of all US companies investing more than US\$500,000 in Myanmar. (<http://burma.usembassy.gov/reporting-requirements.html>). The first Coca Cola "Responsible Investment in Myanmar Report" (December 2013) is available here: <http://photos.state.gov/libraries/burma/895/pdf/TCCCStateDepartmentResponsibleInvestment%20in%20MyanmarReport121213.pdf>. A second updated report (30 June 2014) is available here: <http://photos.state.gov/libraries/burma/895/pdf/TCCCDoSResponsibleInvestmentMMReport63014.pdf>. Coca-Cola Myanmar has adopted an explicit 'zero tolerance for land grabs' policy. In a recent report the company noted that: "There were no land acquisitions during the reporting period for this report. The vast majority of the land utilized by the facility is Grant Land and is leased from the government on a 30-60 year agreement. Due to restrictions on foreign ownership, the local Company entity, Coca-Cola Pinya Beverages Myanmar, Ltd. (CCPBM), will not be allowed to acquire the land nor the leases. The land would thus be subleased in all instances to CCPBM. Both sites are located in Yangon; one plant is in Hmawbi Township and the other is in an industrial zone within Hlaing Thar Township." Further, "We recognize that the issue of land rights is concerning in Myanmar given the numerous reports of confiscation...Due to the high proportion of land owned by the government and that Grant Land subleases will be assumed, the Company cannot ensure distance from government owned property. When planning new plant sites, we will strive to ensure that Free, Prior and Informed Consent is obtained. In the case of Myanmar, both plants are pre-existing and investigations could not clarify how the grant or garden lands were obtained by the government. We recognize the importance of land rights and are engaging in ongoing community engagement to ensure sensitivity to issues related to customary usage rights." Their second report notes: "In 2013, The Coca-Cola Company announced a set of industry-leading commitments to protect the land rights of farmers and communities. In these commitments, The Coca-Cola Company outlined a concrete action plan to address land rights in its supply chain, including zero tolerance for land grabs. Although no land acquisition has been made since the December 2013 report submission, the Company is currently starting the process of identifying potential areas for a new plant. Once these areas have been identified, a long list of possible plant sites will be developed. Land rights will be an important component of this ongoing plant siting due diligence process. One of the tools used in the process will be the Plant Siting Checklist, one of seven such checklists published on our website, which is used internally as an early issue identification tool. In addition, suppliers in Myanmar undergoing a Supplier Guiding Principles audit will be assessed against the land rights provisions, including Free, Prior and informed consent of any land acquisition." Clearly Coca-Cola is deeply concerned about the land aspects of its business operations in Myanmar and has acted accordingly. Other companies investing in the country can take useful guidance from the approaches taken by Coca-Cola.

REC 3. ADOPT A NATIONAL HOUSING, LAND AND PROPERTY RIGHTS LAW

A new *National Housing, Land and Property Rights Law* should be adopted without delay. The new law should reflect the terms of international human rights law relating to HLP matters including the right to adequate housing, protection against forced evictions, security of tenure for everyone, and all components of how HLP right are articulated under international law. Such a new law should be seen as a legal means of countervailing current laws which restrict the enjoyment of HLP rights.

REC 4. ADOPT A NATIONAL INVOLUNTARY RESETTLEMENT POLICY

Any new vision of a Myanmar where everyone, in all corners of the nation, enjoy their legitimate housing, land and property rights that is fully consistent with relevant international standards will need to have an overarching objective to prevent any and all forms of displacement and land confiscation/acquisition. When these measures of prevention, however, are simply not possible in exceptional cases involuntary resettlement may be required. At present, there is no national policy regulating such matters, and a policy modeled on the IFC's performance standard on these matters from 2012 could assist in reducing displacement and protecting the rights of those affected. The IFC Handbook for Preparing a Resettlement Action Plan has clear guidelines on what to include within such a policy and how to identify the project impacts and affected populations and could be used as a helpful reference to consider appropriate ways in which resettlement and rehabilitation could be considered in the law. For instance, resettlement and rehabilitation should be guided by the preparation of a resettlement plan with a time bound implementation program, defined budget etc. which is publicly disclosed and developed with the support of the affected communities and CSOs. Local community networks and leaders should be involved in the process to ensure social and cultural relevance of the proposed programs. The resettlement plan serves as a tool for implementers and establishes basic uniform standards, for example an entitlement matrix which details entitlements to affected people based on the type, scale and severity and impact of the losses. Resettlement plans for large projects should be reviewed and revised by independent technical committees. Such a policy should also outline how a person with grievances can legally resist any planned acquisition with which they do not agree.

REC 5. ADOPT A NATIONAL COMPENSATION LAW

Similarly, although prevention measures aiming to reduce land losses, acquisition, forced eviction and displacement should assist in protecting the HLP rights of ordinary people, it will equally be important to develop a national compensation law that clearly outlines compensation rights in all aspects, and which can be invoked by everyone owed compensation but who are still yet to receive what is legally owed to them.

REC 6. ESTABLISH CITIZENS PANELS TO ASSESS LAND GRABBING REQUESTS FOR ALL LAND PARCELS LARGER THAN FIVE ACRES

As a means of preventing unlawful land grabbing, the government of Myanmar should create Citizens Panels to Assess Land Acquisition Requests to act as independent oversight bodies with mandates to review all cases of land acquisition larger than five acres. This body should develop proper oversight procedures to revoke rights over land acquired through land grabbing, and any number of additional measures including assessing the acceptability of all aspects of the compensation process.

REC 7. INCLUDE CONCRETE MEASURES FOR RESOLVING ALL HLP RIGHTS ISSUES WITHIN THE PEACE PROCESS AND WITHIN ANY EVENTUAL PEACE AGREEMENT

Any successful outcome to the peace process in Myanmar will invariably need to address the wide range of housing, land and property (HLP) rights issues that are central components in all of the unresolved conflicts in the country. At least superficially, there is growing evidence that various actors engaged in the peace process are increasingly recognising that the resolution of HLP rights issues will be critical towards building the foundations needed for the long-term peace and stability of the country. The agreement of ten key land and environment principles at the May 2017 *Panglong 2* summit by the government and ethnic negotiating armed ethnic groups provides an important basis for further agreement on HLP issues as the process unfolds. There is a wide range of experience about how and in which manner HLP issues have been included in peace agreements, and HLP issues are increasingly recognized for their multi-dimensional impacts upon conflict. Indeed, HLP issues can be the cause of conflict, a consequence of conflict, and an important means for securing a sustainable peace following conflict.²³² HLP concerns and the human rights and other considerations attached to them are now widely agreed to form vital ingredients in the quest for long-term economic vitality and social stability following conflict. Despite the fact that virtually all recent major peace processes and post-conflict periods of reconstruction have sought to structurally address the severe HLP consequences of the conflict concerned, there is a significant risk in Myanmar that because of the deep vested interests attached to so many of them, HLP issues will be perceived as too sensitive or complex to be properly addressed in any eventual agreement.

²³² See for example Leckie and Huggins (2011) *Conflict and Housing, Land and Property Rights: A Handbook of Issues, Frameworks and Solutions*, Cambridge University Press.

REC 8. ESTABLISH A NATIONAL RESTITUTION COMMISSION

Restitution rights and related claims to homes, lands and properties that were subjected to land grabbing measures attributable to the State and its agents do not lapse and as far as displacement in Myanmar is concerned, many valid restitution claims have yet to be resolved. To redress this situation, a National Restitution Commission should be established to receive, assess and enforce all outstanding HLP restitution claims. Several in-depth publications have already been issued that provide a model restitution agreement, a draft restitution law and the measures required to bring restitution to reality in Myanmar, just as it has in so many other countries undergoing structural political reforms.²³³

REC 9. REPEAL AND REPLACE THE VACANT, FALLOW AND VIRGIN LAND MANAGEMENT LAW

The *VFV Law* and amendments are clearly incompatible with the HLP rights of persons in Myanmar and should thus be immediately repealed and replaced with a chapter in a new comprehensive land law that recognizes customary land rights and enshrines greater security of tenure and other protections.²³⁴

REC 10. REPEAL AND REPLACE THE FARMLAND LAW

The *Farmland Law* is clearly incompatible with the HLP rights of persons in Myanmar and should thus be immediately repealed and replaced with a chapter in a new comprehensive land law that recognizes customary land rights and enshrines greater security of tenure and other protections.

²³³ Displacement Solutions and NRC, *Building Agreement on Restitution Rights Within the Myanmar Peace Process and National Legal Framework: A Guide for Practitioners*, 2019; Displacement Solutions and NRC, *Restitution in Myanmar - Building Lasting Peace, National Reconciliation and Economic Prosperity Through a Comprehensive Housing, Land and Property Restitution Program* (March 2017); Displacement Solutions and NRC, *A Framework for Resolving Displacement in Myanmar - The United Nations 'Pinheiro Principles' on Housing and Property Restitution for Refugees and Displaced Persons* (March 2017); Displacement Solutions and NRC, *An Introductory Guide to Understanding and Claiming Housing, Land and Property Restitution Rights in Myanmar - Questions and Answers* (March 2017), among others.

²³⁴ Among others, two local networks, [Land in Our Hands \(LIOH\)](#) and the [Myanmar Alliance for Transparency and Accountability \(MATA\)](#), have launched a campaign which aims to abolish the VFV law and calls for the government to develop a new federal land law, in close consultation with civil society organisations and communities. LIOH is a local multi-ethnic land network of some 60 organisations that aims to fulfill the right to land for small-scale land users. MATA is a nationwide network comprised of 418 local civil society groups for the adoption of transparency and accountability standards in extractive sectors. "The law will raise the likelihood of conflict in ethnic areas", says a LIOH spokesperson. "It is a political issue, not a technical issue." The campaign has been successful on Facebook and has also attracted media attention. In addition, it has resulted in statements from different organisations echoing the concerns and demands from the campaign. These include the [United Nationalities Alliance](#) (UNA – coalition of ethnic political parties), the [Karen National Union](#) (KNU – ethnic armed organisation), [IDPs in Kachin State](#), a [Karen Land Forum](#) held in Loikaw recently, and a joint statement by several Kayan organisations. They are all equally extremely worried about the VFV Law and demand that it be abolished.

REC 11. REPEAL AND REPLACE THE LAND ACQUISITION, RESETTLEMENT AND REHABILITATION LAW

The new *Land Acquisition, Resettlement and Rehabilitation Law* of 2019 is an improvement over the 1894 Act regulating similar matters, however, even this new text is clearly incompatible with the HLP rights of persons in Myanmar and should thus be immediately repealed and replaced with a chapter in a new comprehensive land law that recognizes customary land rights and enshrines greater security of tenure and other protections. Replacing the 2019 law with a new law that takes fully into account international normative frameworks and best practice, and which focuses on the rights of individuals and communities threatened with land acquisition through referencing transparency, avoiding and minimising land acquisition and forced resettlement and “enhancing” resettled peoples livelihoods is required.

REC 12. REPEAL AND REPLACE THE MYANMAR INVESTMENT LAW

The *Myanmar Investment Law* also maintains provisions that are clearly incompatible with the HLP rights of persons in Myanmar and should thus be immediately repealed and replaced with a chapter in a new comprehensive land law that recognizes customary land rights and enshrines greater security of tenure and other protections.²³⁵

REC 13. ESTABLISH A NATIONAL LAND CADASTRE

The vast majority of land parcels in Myanmar are neither officially registered nor found within a national land cadastre. To remedy this lacunae, a National Land Cadastre which includes full recognition of customary land rights, should be established and independently managed. The Cadastre should be accessible to the public, digitalized and searchable.

²³⁵ Among others, two local networks, [Land in Our Hands \(LIOH\)](#) and the [Myanmar Alliance for Transparency and Accountability \(MATA\)](#), have launched a campaign which aims to abolish the VFV law and calls for the government to develop a new federal land law, in close consultation with civil society organisations and communities. LIOH is a local multi-ethnic land network of some 60 organisations that aims to fulfill the right to land for small-scale land users. MATA is a nationwide network comprised of 418 local civil society groups for the adoption of transparency and accountability standards in extractive sectors. “The law will raise the likelihood of conflict in ethnic areas”, says a LIOH spokesperson. “It is a political issue, not a technical issue.” The campaign has been successful on Facebook and has also attracted media attention. In addition, it has resulted in statements from different organisations echoing the concerns and demands from the campaign. These include the [United Nationalities Alliance](#) (UNA – coalition of ethnic political parties), the [Karen National Union](#) (KNU – ethnic armed organisation), [IDPs in Kachin State](#), a [Karenni Land Forum](#) held in Loikaw recently, and a joint statement by several Kayan organisations. They are all equally extremely worried about the VFV Law and demand that it be abolished.

REC 14. STRICTLY COMPLY WITH THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR)

The ratification of the ICESCR by Myanmar in October 2017 is a great legal significance. To reconfirm the seriousness accorded to the norms found in the Covenant, the government should: Carry out a comprehensive legal survey of national legislation and its compatibility or non-compatibility with the norms found in the Covenant; Publicly commit to the terms of General Comment No. 4; Publicly commit to the terms of General Comment No. 7; Involve NGOs in drafting of States reports required under the Covenant; Publicly commit to implementing any and all recommendations in concluding observations of the UN Committee on Economic, Social and Cultural Rights; and ratify the Optional Protocol enabling the Covenant's complaint procedures.

REC 15. RATIFY ALL INTERNATIONAL TREATIES RECOGNISING HLP RIGHTS WITHOUT RESERVATION

Myanmar should ratify all international treaties the recognize HLP rights and aspects thereof, including the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of Racial Discrimination (CERD) and all others which recognise aspects of HLP rights. Myanmar should also ratify the Statute of the International Criminal Court.

REC 16. EMPOWER THE NATIONAL HUMAN RIGHTS COMMISSION

Most cases that come to the attention of the Myanmar National Human Rights Commission concern HLP issues, however, the Commission is not sufficiently empowered to provide remedial redress to these cases. Empowering the Commission to actively resolve HLP disputes would be beneficial, particularly playing a independent role in promoting mediated settlements through the use of good offices.

REC 17. CREATE A NATIONAL TRUTH AND RECONCILIATION COMMISSION

HLP abuses are so large-scale, have been carried out for so long and have affected so many people that the establishment of a National Truth and Reconciliation Commission to allow the public airing of HLP grievances would also seem to be beneficial. Such a Commission would not supplant judicial and other remedies, but would signify a major recognition that past practices were wrong and will not be repeated again.

REC 18. ISSUE A NATIONAL APOLOGY FOR HISTORICAL HLP ABUSES

Relatedly, the State Counselor should issue a public televised national apology for historical HLP abuses, in particular, unlawful land confiscation, and commit to permanently reversing these acts and preventing them in the future. The apology should explicitly include a commitment to ensure the full forfeiture of all land unlawfully grabbed in the country and its return to its legitimate owners.

REC 19. INCLUDE THE REQUIREMENT BY NATIONAL BUSINESSES AND FOREIGN INVESTORS (AND COMPANIES) TO DEVELOP APPROPRIATE INTERNAL POLICIES ON LAND ACQUISITION AND FORCED RESETTLEMENT

The development of self-assessment measures, combined with the development of internal policies on land acquisition and forced resettlement,²³⁶ can go a long way towards protecting land-related human rights in Myanmar and protecting investors against claims of complicity in any rights abuses that may have occurred in any areas where companies choose to invest. Actively striving to avoid involvement in projects where abuses took place in the past or will take place in the future, and strongly supporting the internationally recognized human rights of the people in Myanmar will greatly reduce the potential for of lawsuits alleging complicity in human rights abuses, such as the well-known *Total Case*²³⁷ in Myanmar, the well-known *Chevron Case*²³⁸ in Ecuador, and many others. Guidance may be also sought from companies that have already invested in Myanmar such as Coca-Cola which have adopted zero land grabbing policies.

REC 20. ENCOURAGE COMPANIES TO CARRY OUT SELF-ASSESSMENTS OF POSSIBLE IMPACTS OF THEIR INVESTMENTS THAT COULD UNDERMINE THE HLP RIGHTS OF PEOPLE ON LAND ACQUIRED BY THE GOVERNMENT OF MYANMAR.

Companies should be encouraged to carry out self-assessments on how to avoid involvement in projects that could violate HLP rights with questions such as: Is the company currently or soon to be engaged in a development, extractive or investment project that has required the purchase, lease or acquisition of land?; If so, is the company certain of the legal ownership and possession status of the land concerned prior to the conferral of rights to use or exploit the land to your company?; Were people living on the land prior to the sale, lease or use of the land by the company?; If so, how many persons were in residence and where are they now?; Were any former or current residents of the land concerned the statutory or customary legal owners of the land or did the occupants hold other rights to reside there?; Is the company certain that the statutory and/or customary rights of those residing on the land prior to purchasing or acquiring use rights of the land were complied with in full by the local authorities/government in the country concerned?; Are the legally enshrined housing, land, and property rights of the people in the project area recognized, respected, and protected in a comprehensive manner?; Was anyone involuntary resettled by the government concerned to provide 'empty' land to the company?; Were provisions requiring the government to remove people from the land concerned contained within any contract or agreement entered into by the company?; If so, what legal standards were

²³⁶ BP adopted an internal policy on human rights and involuntary resettlement in 2002, which is believed to be the first such company policy on HLP rights themes. It is not clear the extent to which this policy that strongly sought to avoid BP involvement in any project involving involuntary resettlement, remains in place.

²³⁷ See, for instance, the views of Total on this case: <http://burma.total.com/myanmar-en/faq/have-legal-proceedings-been-instituted-against-total-what-was-the-outcome-200235.html>

²³⁸ For the views of those filing the case that resulted in an unprecedented US\$ 19 billion judgment by the Supreme Court of Ecuador against Chevron, see: <http://amazonwatch.org/work/chevron>. For the opposing views of Chevron on the case, see: <http://www.theamazonpost.com/>.

taken into account in terms of best practices and international legal norms?; Is the company certain that it has complied with all such practice and legal norms?; What legal protections were provided to the people who were resettled?; and Has the company considered alternative project locations such that the local people need not be resettled?

REC 21. ENCOURAGE THE INSERTION OF HLP RIGHTS CONSISTENT COMMITMENTS INTO ALL POLITICAL PARTY MANIFESTOS

All political parties should include specific commitments to respect, protect and fulfil all HLP rights into their party platforms for the next national election and appoint specific individuals and teams to implement such commitments following the election, including the appointment of a National HLP Minister in government.

113. Contemporary Myanmar remains a country where housing, land and property rights are subject to widespread violations affecting a large majority of those residing in the country. It is not unreasonable to assert that a national HLP crisis is a permanent feature of Myanmar society and legal order. This needs to change. A system of strong HLP rights will enhance the lives of all sectors of the population, will improve the damaged reputation of the country and will equally benefit international and domestic businesses that operate and invest there. Taking HLP rights seriously – something that has never been the case to date in Myanmar – will enhance the brand value of the nation and its products in a world that is increasingly aware of and concerned with the human and environmental impacts of unlawful land grabbing. For far too long land grabbing, displacement, landlessness, slums, housing decay and homelessness and other internationally wrongful acts and omissions have been an accepted part of life, governance and business practices in Myanmar. Allowing and facilitating these practices may seem to be beneficial to those supporting them, despite the fact that they so callously undermine the HLP rights of the population. Unless and until HLP rights are taken seriously by the authorities in Myanmar, the majority of the population will continue to suffer abuses, and the country as a whole will continue to be seen as one of the worst violators of HLP rights. The people of Myanmar deserve so much better.

VII. ANNEXURE

ANNEX 1 - RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS (2001)²³⁹

PART ONE - THE INTERNATIONALLY WRONGFUL ACT OF A STATE

CHAPTER I - GENERAL PRINCIPLES

Article 1 - Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

Article 2 - Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

- (a) is attributable to the State under international law; and
- (b) constitutes a breach of an international obligation of the State.

Article 3 - Characterization of an act of a State as internationally wrongful

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

CHAPTER II - ATTRIBUTION OF CONDUCT TO A STATE

Article 4 - Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

²³⁹ Text adopted by the Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in *Yearbook of the International Law Commission, 2001*, vol. II (Part Two). Text reproduced as it appears in the annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4.

Article 5 - Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Article 6 - Conduct of organs placed at the disposal of a State by another State

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

Article 7 - Excess of authority or contravention of instructions

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

Article 8 - Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Article 9 - Conduct carried out in the absence or default of the official authorities

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Article 10 - Conduct of an insurrectional or other movement

1. The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law.
2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.
3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

Article 11 - Conduct acknowledged and adopted by a State as its own

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

CHAPTER III - BREACH OF AN INTERNATIONAL OBLIGATION

Article 12 - Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

Article 13 - International obligation in force for a State

An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

Article 14 - Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.
2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.
3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

Article 15 - Breach consisting of a composite act

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.
2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

CHAPTER IV - RESPONSIBILITY OF A STATE IN CONNECTION WITH THE ACT OF ANOTHER STATE

Article 16 - Aid or assistance in the commission of an internationally wrongful act

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) that State does so with knowledge of the circumstances of the internationally wrongful act;
and
- (b) the act would be internationally wrongful if committed by that State.

Article 17 - Direction and control exercised over the commission of an internationally wrongful act

A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

- (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) the act would be internationally wrongful if committed by that State.

Article 18 - Coercion of another State

A State which coerces another State to commit an act is internationally responsible for that act if:

- (a) the act would, but for the coercion, be an internationally wrongful act of the coerced State; and
- (b) the coercing State does so with knowledge of the circumstances of the act.

Article 19 - Effect of this chapter

This chapter is without prejudice to the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State.

CHAPTER V - CIRCUMSTANCES PRECLUDING WRONGFULNESS

Article 20 - Consent

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

Article 21 - Self-defence

The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

Article 22 - Countermeasures in respect of an internationally wrongful act

The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of part three.

Article 23 - Force majeure

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.
2. Paragraph 1 does not apply if:
 - (a) the situation of force majeure is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
 - (b) the State has assumed the risk of that situation occurring.

Article 24 - Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.
2. Paragraph 1 does not apply if:
 - (a) the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
 - (b) the act in question is likely to create a comparable or greater peril.

Article 25 - Necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
 - (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
 - (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
 - (a) the international obligation in question excludes the possibility of invoking necessity; or
 - (b) the State has contributed to the situation of necessity.

Article 26 - Compliance with peremptory norms

Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

Article 27 - Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:

- (a) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;
- (b) the question of compensation for any material loss caused by the act in question.

PART TWO - CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

CHAPTER I - GENERAL PRINCIPLES

Article 28 - Legal consequences of an internationally wrongful act

The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of part one involves legal consequences as set out in this part.

Article 29 - Continued duty of performance

The legal consequences of an internationally wrongful act under this part do not affect the continued duty of the responsible State to perform the obligation breached.

Article 30 - Cessation and non-repetition

The State responsible for the internationally wrongful act is under an obligation:

- (a) to cease that act, if it is continuing;
- (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Article 31 - Reparation

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

Article 32 - Irrelevance of internal law

The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this part.

Article 33 - Scope of international obligations set out in this part

1. The obligations of the responsible State set out in this part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.
2. This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.

CHAPTER II - REPARATION FOR INJURY**Article 34 - Forms of reparation**

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

Article 35 - Restitution

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

- (a) is not materially impossible;
- (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Article 36 - Compensation

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Article 37 - Satisfaction

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.
2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.
3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

Article 38 - Interest

1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.
2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

Article 39 - Contribution to the injury

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.

CHAPTER III - SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW

Article 4 - Application of this chapter

1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.
2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

Article 41 - Particular consequences of a serious breach of an obligation under this chapter

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.
3. This article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law.

PART THREE – THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF A STATE**CHAPTER I - INVOCATION OF THE RESPONSIBILITY OF A STATE*****Article 42 - Invocation of responsibility by an injured State***

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

- (a) that State individually; or
- (b) a group of States including that State, or the international community as a whole, and the breach of the obligation:
 - (i) specially affects that State; or
 - (ii) *is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.*

Article 43 - Notice of claim by an injured State

1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.
2. The injured State may specify in particular:
 - (a) the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;
 - (b) what form reparation should take in accordance with the provisions of part two.

Article 44 - Admissibility of claims

The responsibility of a State may not be invoked if:

- (c) the claim is not brought in accordance with any applicable rule relating to the nationality of claims;
- (d) the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.

Article 45 - Loss of the right to invoke responsibility

The responsibility of a State may not be invoked if:

- (e) the injured State has validly waived the claim;
- (f) the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Article 46 - Plurality of injured States

Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act.

Article 47 - Plurality of responsible States

1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.
2. Paragraph 1:
 - (a) does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;
 - (b) is without prejudice to any right of recourse against the other responsible States.

Article 48 - Invocation of responsibility by a State other than an injured State

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:
 - (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
 - (b) the obligation breached is owed to the international community as a whole.
2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:
 - (a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and
 - (b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.
3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

CHAPTER II - COUNTERMEASURES**Article 49 - Object and limits of countermeasures**

1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under part two.
2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.
3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

Article 50 - Obligations not affected by countermeasures

1. Countermeasures shall not affect:
 - (a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;
 - (b) obligations for the protection of fundamental human rights;
 - (c) obligations of a humanitarian character prohibiting reprisals;
 - (d) other obligations under peremptory norms of general international law.
2. A State taking countermeasures is not relieved from fulfilling its obligations:
 - (a) under any dispute settlement procedure applicable between it and the responsible State;
 - (b) to respect the inviolability of diplomatic or consular agents, premises, archives and documents.

Article 51 - Proportionality

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

Article 52 - Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State shall:
 - (a) call upon the responsible State, in accordance with article 43, to fulfil its obligations under part two;
 - (b) notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.
2. Notwithstanding paragraph 1 (b), the injured State may take such urgent countermeasures as are necessary to preserve its rights.
3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:
 - (a) the internationally wrongful act has ceased; and
 - (b) the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.
4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.

Article 53 - Termination of countermeasures

Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under part two in relation to the internationally wrongful act.

Article 54 - Measures taken by States other than an injured State

This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

PART FOUR – GENERAL PROVISIONS**Article 55 - *Lex specialis***

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

Article 56 - Questions of State responsibility not regulated by these articles

The applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles.

Article 57 - Responsibility of an international organization

These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.

Article 58 - Individual responsibility

These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.

Article 59 - Charter of the United Nations

These articles are without prejudice to the Charter of the United Nations.

ANNEX 2 - INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27. Myanmar ratified this treaty in October 2017.

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

Article 1

PART I

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non- nationals.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

Article 4

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.
2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III**Article 6**

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

- (a) Remuneration which provides all workers, as a minimum, with:
 - (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
 - (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
- (b) Safe and healthy working conditions; (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
- (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays

Article 8

1. The States Parties to the present Covenant undertake to ensure:
 - (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
 - (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;
 - (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
 - (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.
3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

Article 9

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

Article 10

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.
2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.
3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.
2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:
 - (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;
 - (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
 - (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
 - (b) The improvement of all aspects of environmental and industrial hygiene;
 - (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
 - (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Article 13

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.
2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
 - (a) Primary education shall be compulsory and available free to all;
 - (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
 - (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
 - (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
 - (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.
4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 14

Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

Article 15

1. The States Parties to the present Covenant recognize the right of everyone:
 - (a) To take part in cultural life;
 - (b) To enjoy the benefits of scientific progress and its applications;
 - (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

PART IV

Article 16

1. The States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein.
2. (a) All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit copies to the Economic and Social Council for consideration in accordance with the provisions of the present Covenant;

- (b) The Secretary-General of the United Nations shall also transmit to the specialized agencies copies of the reports, or any relevant parts thereof, from States Parties to the present Covenant which are also members of these specialized agencies in so far as these reports, or parts thereof, relate to any matters which fall within the responsibilities of the said agencies in accordance with their constitutional instruments.

Article 17

1. The States Parties to the present Covenant shall furnish their reports in stages, in accordance with a programme to be established by the Economic and Social Council within one year of the entry into force of the present Covenant after consultation with the States Parties and the specialized agencies concerned.
2. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Covenant.
3. Where relevant information has previously been furnished to the United Nations or to any specialized agency by any State Party to the present Covenant, it will not be necessary to reproduce that information, but a precise reference to the information so furnished will suffice.

Article 18

Pursuant to its responsibilities under the Charter of the United Nations in the field of human rights and fundamental freedoms, the Economic and Social Council may make arrangements with the specialized agencies in respect of their reporting to it on the progress made in achieving the observance of the provisions of the present Covenant falling within the scope of their activities. These reports may include particulars of decisions and recommendations on such implementation adopted by their competent organs.

Article 19

The Economic and Social Council may transmit to the Commission on Human Rights for study and general recommendation or, as appropriate, for information the reports concerning human rights submitted by States in accordance with articles 16 and 17, and those concerning human rights submitted by the specialized agencies in accordance with article 18.

Article 20

The States Parties to the present Covenant and the specialized agencies concerned may submit comments to the Economic and Social Council on any general recommendation under article 19 or reference to such general recommendation in any report of the Commission on Human Rights or any documentation referred to therein.

Article 21

The Economic and Social Council may submit from time to time to the General Assembly reports with recommendations of a general nature and a summary of the information received from the States Parties to the present Covenant and the specialized agencies on the measures taken and the progress made in achieving general observance of the rights recognized in the present Covenant.

Article 22

The Economic and Social Council may bring to the attention of other organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance any matters arising out of the reports referred to in this part of the present Covenant which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant.

Article 23

The States Parties to the present Covenant agree that international action for the achievement of the rights recognized in the present Covenant includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned.

Article 24

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

Article 25

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

PART V**Article 26**

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a party to the present Covenant.
2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.
5. The Secretary-General of the United Nations shall inform all States which have signed the present Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 27

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.
2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 28

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 29

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.
2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes.
3. When amendments come into force they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

Article 30

Irrespective of the notifications made under article 26, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph 1 of the same article of the following particulars:

- (a) Signatures, ratifications and accessions under article 26;
- (b) The date of the entry into force of the present Covenant under article 27 and the date of the entry into force of any amendments under article 29.

Article 31

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 26.

ANNEX 3 - EXCERPTS FROM PERFORMANCE STANDARD 5 ON INVOLUNTARY RESETTLEMENT OF THE INTERNATIONAL FINANCE CORPORATION (2012)

‘Involuntary resettlement should be avoided’ (PS 5, Para. 2)

‘To help avoid expropriation and eliminate the need to use governmental authority to enforce relocation, clients are encouraged to use negotiated settlements’ (PS5, Para. 3)

Objective: To avoid, and when avoidance is not possible, minimize displacement by exploring alternative project designs

Objective: To avoid forced evictions

Objective: To anticipate and avoid, or where avoidance is not possible, minimize adverse social and economic impacts from land acquisition or restrictions on land use by:

- (i) (i) providing compensation for loss of assets at replacement costs and
- (ii) (ii) ensuring that resettlement activities are implemented with appropriate disclosure of information, consultation, and the informed participation of those affected.

Objective: To improve, or restore, the livelihoods and standards of living of displaced persons.

Objective: To avoid, and when avoidance is not possible, minimize displacement by exploring alternative project designs

Objective: To improve, or restore, the livelihoods and standards of living of displaced persons.

Objective: To improve living conditions among physically displaced persons through the provision of adequate housing with security of tenure at resettlement sites.

‘Project Design’ (PS5, Para. 8)

- ‘The client will consider feasible alternative designs’
- ‘To avoid or minimize physical and or economic displacement’
- ‘While balancing environmental, social, and financial costs and benefits, paying particular attention to impacts on the poor and vulnerable’

Compensation and Benefits for Displaced Persons (PS5, Para. 9)

- ‘When displacement cannot be avoided, the client will offer displaced communities and persons compensation for loss of assets’
- ‘At full replacement cost and other assistance’
- ‘To help them improve or restore their standards of living or livelihoods’
- ‘Compensation standards will be transparent’

- 'Applied consistently to all communities and persons affected by the displacement'
- 'Where livelihoods of displaced persons are land-based, offer the displaced land-based compensation'
- 'The client will take possession of acquired land and related assets only after compensation has been made available'
- 'And, where applicable, resettlement sites and moving allowances have been provided to the displaced persons in addition to compensation'
- 'The client will also provide opportunities to displaced communities and persons to derive appropriate development benefits from the project'

Community Engagement (PS5(10))

- 'Stakeholder engagement'
- 'Disclosure of relevant information and participation of affected communities'

Grievance Mechanism (PS5, Para. 11)

- 'The client will establish a grievance mechanism'

Resettlement and Livelihood Restoration Planning and Implementation (PS5, Para. 12)

- 'A census will be carried out to collect appropriate socio-economic baseline data'

Resettlement Action Plan / Livelihood Restoration Plan (PS5, Para. 14)

Displacement - Physical Displacement (PS5, Para. 19)

- 'In the case of physical displacement, the client will develop a resettlement action plan'

(Para. 20)

- 'If people living in the project area are required to move to another location, the client will
 - (i) offer displaced persons choices among feasible resettlement options, including adequate replacement housing or cash compensation where appropriate; and
 - (ii) provide relocation assistance suited to the needs of each group of displaced persons
- 'New resettlement sites built for displaced persons must offer improved living conditions'
- 'The displaced persons' preferences with respect to relocating in preexisting communities in groups will be taken into consideration'

(Para. 21)

- 'The client will offer the choice of replacement property of equal or higher value, security of tenure, equivalent or better characteristics, and advantages of location or cash compensation where appropriate'

- 'Compensation in kind should be considered in lieu of cash'
- 'Cash compensation levels should be sufficient to replace the lost land and other assets at full replacement cost in local markets'

(Para. 22)

- 'The client will offer them a choice of options for adequate housing with security of tenure so that they can resettle legally without having to face the risk of forced eviction'
- 'Based on consultation with such displaced persons, the client will provide relocation assistance sufficient for them to restore their standard of living at an adequate alternative site'

(Para. 24)

- 'Forced evictions will not be carried out except in accordance with law and the requirements of this Performance Standard'

Economic Displacement

(PS5, Para. 25-29)

- 'The client will develop a Livelihood Restoration Plan...'

(Para. 27)

- 'Economically displaced persons who face loss of assets or access to assets will be compensated for such loss at full replacement cost'

(Para. 28)

- 'Economically displaced persons whose livelihoods or income levels are adversely affected will also be provided opportunities to improve, or at least restore, their means of income - earning capacity, production levels, and standards of living'

Private Sector Responsibilities Under Government-Managed Resettlement (PS5, Para. 30)(For. Invest. Law)

(Para. 30)

- - 'Where land acquisition and resettlement are the responsibility of the government, the client will collaborate with the responsible government agency, to the extent permitted by the agency, to achieve outcomes that are consistent with this Performance Standard'

(Para. 31)

- 'In the case of acquisition of land rights or access to land through compulsory means or negotiated settlements involving physical displacement, the client will identify and describe government resettlement measures'
- 'If these measures do not meet the relevant requirements of this Performance Standards, the client will develop a Supplement Resettlement Plan'

Overview (PS1, Para. 5)

- 'Clients must comply with applicable national law, including those laws implementing host country obligations under international law'

Overview (PS1, Para. 7)

- 'When host country regulations differ from the levels and measures presented in the EHS Guidelines, projects are expected to achieve whichever is more stringent'
- 'When host country regulations differ from the levels and measures presented in the EHS Guidelines, projects are expected to achieve whichever is more stringent'

(PS1, Para. 3)

- 'Business should respect human rights, which means to avoid infringing on the human rights of others, and address adverse human rights impacts business may cause or contribute to'

Policy (PS1, Para. 6)

- 'Under some circumstances, clients may also subscribe to other internationally recognized standards, certification schemes, or codes of practice and these too should be included in the policy.'

Identification of risks and impacts (PS1, Para. 7)

- 'The client will establish and maintain a process for identifying the environmental and social risks and impacts of the project'

(Para. 12)

- 'Where the project involves specifically identified physical elements, aspects and facilities that are likely to generate impacts, and as a part of the process of identifying risks and impacts, the client will identify individuals and groups that may be directly and differentially or disproportionately affected by the project because of their disadvantaged or vulnerable status'

Disclosure of Information (PS1, Para. 29)

- 'The client will provide affected communities with access to relevant information on:
 - (i) the purpose, nature, and scale of the project;
 - (ii) the duration of proposed project activities;
 - (iii) any risks to and potential impacts on such communities and relevant mitigation measures;
 - (iv) the envisaged stakeholder engagement process; and
 - (v) the grievance mechanism.'

- ‘When affected communities are subject to identified risks and adverse impacts from a project, the client will undertake a process of consultation in a manner that provides the affected communities with opportunities to express their views on project risks, impacts and mitigation measures, and allows the client to consider and respond to them’

Informed Consultation and Participation (PS1, Para. 31)

- ‘For projects with potentially significant adverse impacts on affected communities, the client will conduct an (ICP) process’.

ANNEX 4 - THE MYANMAR LAND ACQUISITION ACT (1894)

PART I

PRELIMINARY

1-2. [...]

3. In this Act, unless there is something repugnant in the subject or context:
 - (a) the expression “land” includes benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth;
 - (b) the expression “person interested” includes all persons claiming an interest in compensation to be made on account of the acquisition of land under this Act; and a person shall be deemed to be interested in land if he is interested in an easement affecting the land;
 - (c) the expression “Collector” includes any officer specially appointed by the President of the Union to perform the functions of a Collector under this Act;
 - (d) the expression “Court” means a principal civil Court of original jurisdiction, unless the President of the Union has appointed (as he is hereby empowered to do) a special judicial officer within any specified local limits to perform the functions of the Court under this Act;
 - (e) the expression “company” means a company constituted or registered by or under the law of the United Kingdom, the Union of Burma or India or Pakistan, and includes a society registered under the law of the Union of Burma or India or Pakistan relating to the registration of societies or co-operative societies;
 - (f) the expression “public purpose” includes the provision of village sites in districts in which the President of the Union shall have declared by notification in the Gazette that it is customary for the Government to make such provision; and

- (g) the following persons shall be deemed persons “entitled to act” as and to the extent hereinafter provided (that is to say) - trustees for other persons beneficially interested shall be deemed the persons entitled to act with reference to any such case, and that to the same extent as the persons beneficially interested could have acted if free from disability;

a married woman, in cases to which the English law is applicable, shall be deemed the person so entitled to act, and whether of full age or not, to the same extent as if she were unmarried and of full age; and

the guardians of minors and the committees or managers of lunatics or idiots shall be deemed respectively the persons so entitled to act, to the same extent as the minors, lunatics or idiots themselves, if free from disability, could have acted:

Provided that:

- (i) no person shall be deemed “entitled to act” whose interest in the subject-matter shall be shown to the satisfaction of the Collector or Court to be adverse to the interest of the person interested for whom he would otherwise be entitled to act;
- (ii) in every such case the person interested may appear by a next friend or, in default of his appearance by a next friend, the Collector or Court, as the case may be, shall appoint a guardian for the case to act on his behalf in the conduct thereof;
- (iii) the provisions of Order XXXI of the of the Code of Civil Procedure shall, mutatis mutandis, apply in the case of persons interested in appearing before a Collector of Court by a next friend, or by a guardian for the case, in proceedings under this Act; and
- (iv) no person “entitled to act” shall be competent to receive the compensation-money payable to the person for whom he is entitled to act unless he would have been competent to alienate the land and receive and give a good discharge for the purchase-money on a voluntary sale.

PART II

ACQUISITION

Preliminary Investigation.

4. (1) Whenever it appears to the President of the Union that land in any locality is need or is likely to be needed for any public purposes, a notification to that effect, shall be published in the Gazette, and the Collector shall cause public notice of the substance of such notification to be given at convenient places in the said locality.

- (2) Thereupon it shall be lawful for any officer, either generally or specially authorized by the President of the Union in this behalf, and for his servants and workmen:

to enter upon and survey and take levels of any land in such locality;

to dig or bore into the subsoil;

to do all other acts necessary to ascertain whether the land is adapted for such purpose;

to set out the boundaries of the land proposed to be taken and the intended line of the work (if any) proposed to be made thereon;

to mark such levels, boundaries and line by placing marks and cutting trenches; and,

where otherwise the survey cannot be completed and the levels taken and the boundaries and line marked, to cut down and clear away any part of any standing crop, fence or jungle:

Provided that no person shall enter into any building or upon any enclosed court or garden attached to a dwelling-house (unless with the consent of the occupier thereof) without previously giving such occupier at least seven days notice in writing of his intention to do so.

5. The Officer so authorized shall at the time of such entry pay or tender payment for all necessary damage to be as aforesaid, and, in case of dispute as to the sufficiency of the amount so paid or tendered, he shall at once refer the dispute to the decision of the Collector or other chief revenue-officer of the district, and such decision shall be final.

OBJECTIONS

- 5A. (1) Any person interested in any land which has been notified under section 4, subsection (1), as being needed or likely to be needed for a public purpose or for a company may, within thirty day of the notification, object to the acquisition of any land in the locality, as the case may be.
- (2) Every objection under sub-section (1) shall be made to the Collector in writing, and the Collector shall give the objector an opportunity of being heard either in person or by pleader and shall, after hearing all such objections and after making such further inquiry, if any, as he thinks necessary, submit the case for the decision of the President of the Union, together with the record of the proceedings held by him and a report containing his recommendations on the objections. The decision of the President of the Union on the objections shall be final.
- (3) For the purposes of this section, a person shall be deemed to be interested in land who would be entitled to claim an interest in compensation if the land were acquired under this Act.

DECLARATION OF INTENDED ACQUISITION

6. (1) Subject to the provisions of Part VII of this Act, when the President of the Union is satisfied, after considering the report, if any, made under section 5A, sub-section (2), that any particular land is needed for a public purpose, or for a company, a declaration shall be made to that effect;

Provided that no such declaration shall be made unless the compensation to be awarded for such property is to be paid by a company, or wholly or partly out of public revenues or some fund controlled or managed by a local authority.

- (2) The declaration shall be published in the Gazette, and shall state the district or other territorial division in which the land is situated, the purpose for which it is needed, its approximate area, and, where a plan shall have been made of the land, the place where such plan may be inspected.
6. (3) The said declaration shall be conclusive evidence that the land is needed for a public purpose or for a company, as the case may be; and, after making such declaration, the President of the Union may acquire the land in manner hereinafter appearing.
7. Whenever any land shall have been so declared to be needed for a public purpose or for a company, the President of the Union, or sonic officer authorized by the President of the Union in this behalf, shall direct the Collector to take order for the acquisition of the land.
8. The Collector shall thereupon cause the land (unless it has been already marked out under section 4) to be marked out. He shall also cause it to be measured, and if no plan has been made thereof, a plan to be made of the same.
9. (1) The Collector shall then cause public notice to be given at convenient places on or near the land to be taken, stating that the Government intends to take possession of the land, and that claims to compensation for all interests in such land may be made to him.
- (2) Such notice shall state the particulars of the land so needed, and shall require all persons interested in the land to appear personally or by agent before the Collector at a time and place therein mentioned (such time not being earlier than fifteen days after the date of publication of the notice), and to state the nature of their respective interests in the land and the amount and particulars of their claims to compensation for such interests, and their objections (if any) to the measurements made under section 8. The Collector may in any case require such statement to be made in writing and signed by the party or his agent.
- (3) The Collector shall also serve notice to the same effect on the occupier (if any) of such land and on all such persons known or believed to be interested therein, or to be entitled to act for persons so interested, as reside or have agents, authorized to receive service on their behalf, within the revenue-district in which the land is situated.
- (4) In case any person so interested resides elsewhere, and has no such agent, the notice shall be sent to him by post in a letter addressed to him at his last known residence, address or place of business and registered under the Burma Post Office Act.

10. (1) The Collector may also require any such person to make or deliver to him, at a time and place mentioned (such time not being earlier than fifteen days after the date of the requisition), a statement containing, so far as may be practicable, the name of every other person possessing any interest in the land or any part thereof as co-proprietor, subproprietor, mortgagee, tenant or otherwise, and of the nature of such interest, and of the rents and profits (if any) received or receivable on account thereof for three years next preceding the date of the statement.

(2) Every person required to make or deliver a statement under this section or section 9 shall be deemed to be legally bound to do so within the meaning of sections 175 and 176 of the Penal Code. Enquiry into Measurements, Value and Claims, and Award by the Collector.
11. On the day so fixed, or on any other day to which the enquiry has been adjourned, the Collector shall proceed to enquire into the objections (if any) which any person interested has stated pursuant to a notice given under section 9 to the measurements made under section 8, and into the value of the land at the date of the publication of the notification under section 4, sub-section (1) and into the respective interests of the persons claiming the compensation, and shall make an award under his hand of:
 - (i) the true area of the land;
 - (ii) the compensation which in his opinion should be allowed for the land; and
 - (iii) the apportionment of the said compensation among all the persons known or believed to be interested in the land, of whom, or of whose claims, he has information, whether or not they have respectively appeared before him.
12. (1) Such award shall be filed in the Collector's office and shall except as hereinafter provided, be final and conclusive evidence, as between the Collector and the persons interested, whether they have respectively appeared before the Collector or not, of the true area and value of the land, and the apportionment of the compensation among the persons interested.

(2) The Collector shall give immediate notice of his award to such of the persons interested as are not present personally or by their representatives when the award is made.
13. The Collector may for any cause he thinks fit, from time to time adjourn the enquiry to a day to be fixed by him.
14. For the purpose of enquiries under this Act the Collector shall have power to summon and enforce the attendance of witnesses, including the parties interested or any of them, and to compel the production of documents by the same means, and (so far as may be) in the same manner, as is provided in the case of a civil Court under the Code of Civil Procedure.
15. In determining the amount of compensation, the Collector shall be guided by the provisions contained in sections 23 and 24.

TAKING POSSESSION

16. When the Collector has made an award under section 11, he may take possession of the land, which shall thereupon vest absolutely in the State, free from all encumbrances.
17. (1) In cases of urgency, whenever the President of the Union so directs, the Collector, though no such award has been made, may, on the expiration of fifteen days from the publication of the notice mentioned in section 9, sub section (1), take possession of any waste or arable land needed for public purposes, or for a company. Such land shall thereupon vest absolutely in the State, free from all encumbrances.

- (2) Whenever, owing to any sudden change in the channel of any navigable river or other unforeseen emergency, it becomes necessary for any railway administration to acquire the immediate possession of any land for the maintenance of their traffic or for the purpose of making thereon a river-side or ghat station, or of providing convenient connection with or access to any such station, or whenever it becomes necessary for the War Office to acquire the immediate possession of any land for the use of the armed forces of the Union the Collector may, immediately after the publication of the notice mentioned in sub-section (1) and with the previous sanction of the President of the Union, enter upon and take possession of such land, which shall thereupon vest absolutely in the State, free from all encumbrances:

Provided that the Collector shall not take possession of any building or part of a building under this sub-section without giving to the occupier thereof at least forty-eight hours' notice of his intention so to do, or such longer notice as may be reasonably sufficient to enable such occupier to remove his moveable property from such building without unnecessary inconvenience.

- (3) In every case under either of the preceding sub-sections the Collector shall at the time of taking possession offer to the persons interested compensation for the standing crops and trees (if any) on such land and for any other damage sustained by them caused by such sudden dispossession and not excepted in section 24; and, in case such offer is not accepted, the value of such crops and trees and the amount of such other damage shall be allowed for in awarding compensation for the land under the provisions herein contained.
- (4) In the case of any land to which, in the opinion of the President of the Union, the provisions of sub-section (1) or sub-section (2) are applicable, the President of the Union may direct that the provisions of section 5A shall not apply, and, if he does so direct, a declaration may be made under section 6 in respect of the land at any time after the publication of the notification under section 4, sub-section (1).

REFERENCE TO COURT AND PROCEDURE THEREON

18. (1) Any person interested who has not accepted the award may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court, whether his objection be to the measurement of the land, the amount of the compensation, the persons to whom it is payable, or the apportionment of the compensation among the persons interested.
- (2) The application shall state the grounds on which objection to the award is taken;
Provided that every such application shall be made:
 - (a) if the person making it was present or represented before the Collector at the time when he made his award, within six weeks from the date of the Collector's award;
 - (b) in other cases, within six weeks of the receipt of the notice from the Collector under section 12, sub-section (2), or within six months from the date of the Collector's award, whichever period shall first expire.
19. (1) In making the reference, the Collector shall state for the information of the Court, in writing under his hand:
 - (a) the situation and extent of the land, with particulars of any trees, buildings or standing crops thereon;
 - (b) the names of the persons whom he has reason to think interested in such land;
 - (c) the amount awarded for damages and paid or tendered under sections 5 and 17, or either of them, and the amount of compensation awarded under section 11; and
 - (d) if the objection be to the amount of the compensation, the grounds on which the amount of compensation was determined.
- (2) To the said statement shall be attached a schedule giving the particulars of the notices served upon, and of the statements in writing made or delivered by, the parties interested respectively:

20. The Court shall thereupon cause a notice specifying the day on which the Court will proceed to determine the objection, and directing their appearance before the Court on that day, to be served on the following persons, namely:
 - (a) the applicant;
 - (b) all persons interested in the objection, except such (if any) of them as have consented without protest to receive payment of the compensation awarded; and
 - (c) if the objection is in regard to the area of the land or to the amount of the compensation, the Collector.
21. The scope of the inquiry in every such proceeding shall be restricted to a consideration of the interests of the persons affected by the objection.
22. Every such proceeding shall take place in open Court, and all persons entitled to practise in any civil Court in the Union of Burma shall be entitled to appear, plead and act (as the case may be) in such proceeding.
23. (1) In determining the amount of compensation to be awarded for land acquired under this Act, the Court shall take into consideration:

first, the market value of the land at the date of the publication of the notification under section 4, sub-section (1);

secondly, the damage sustained by the person interested by reason of the taking of any standing crops or trees which may be on the land at the time of the Collector's taking possession thereof;

thirdly, the damage (if any) sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of severing such land from his other land;

fourthly, the damage (if any) sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of the acquisition injuriously affecting his other property, moveable or immoveable, in any other manner, or his earnings;

fifthly, if in consequence of the acquisition of the land by the Collector the person interested is compelled to change his residence or place of business, the reasonable expenses (if any) incidental to such change; and

sixthly, the damage (if any) bona fide resulting from diminution of the profits of the land between the time of the publication of the declaration under section 6 and the time of the Collector's taking possession of the land.
- (2) In addition to the market-value of the land as above provided, the Court shall in every case award a sum of fifteen per centum on such market-value, in consideration of the compulsory nature of the acquisition.

24. But the Court shall not take into consideration:

first, the degree of urgency which has led to the acquisition;

secondly, any disinclination of the person interested to part with the land acquired;

thirdly, any damage sustained by him which, if caused by a private person, would not render such person liable to a suit;

fourthly, any damage which is likely to be caused to the land acquired, after the date of the publication of the declaration under section 6, by or in consequence of the use to which it will be put;

fifthly, any increase to the value of the land acquired likely to accrue from the use to which it will be put when acquired;

sixthly, any increase to the value of the other land of the person interested likely to accrue from the use to which the land acquired will be put; or,

seventhly, any outlay or improvements on, or disposal of, the land acquired, commenced, made or effected without the sanction of the Collector after the date of the publication of the notification under section 4, sub-section (1).

25. (1) When the applicant has made a claim to compensation, pursuant to any notice given under section 9, the amount awarded to him by the Court shall not exceed the amount so claimed or be less than the amount awarded by the Collector under section 11.

(2) When the applicant has refused to make such claim or has omitted without sufficient reason (to be allowed by the Judge) to make such claim, the amount awarded by the Court shall in no case exceed the amount awarded by the Collector.

(3) When the applicant has omitted for a sufficient reason (to be allowed by the Judge) to make such claim, the amount awarded to him by the Court shall not be less than, and may exceed, the amount awarded by the Collector.

26. (1) Every award under this Part shall be in writing signed by the Judge, and shall specify the amount awarded under clause first of sub-section (1) of section 23, and also the amounts (if any) respectively awarded under each of the other clauses of the same subsection, together with the grounds of awarding each of the said amounts.

(2) Every such award shall be deemed to be a decree and the statement of the grounds of every such award a judgment, within the meaning of section 2, clause (2), and section 2, clause (9), respectively, of the Code of Civil Procedure.

27. (1) Every such award shall also state the amount of costs incurred in the proceedings under this Part, and by what persons and in what proportions they are to be paid.
- (2) When the award of the Collector is not upheld, the costs shall ordinarily be paid by the Collector, unless the Court shall be of opinion that the claim of the applicant was so extravagant or that he was so negligent in putting his case before the Collector that some deduction from his costs should be made or, that he should pay a part of the Collector's costs.
28. If the sum which, in the opinion of the Court, the Collector ought to have awarded as compensation is in excess of the sum which the Collector did award as compensation, the award of the Court may direct that the Collector shall pay interest on such excess at the rate of six per centum per annum from the date on which he took possession of the land to the date of payment of such excess into Court.

PART IV

APPORTIONMENT OF COMPENSATION

29. Where there are several persons interested, if such persons agree in the apportionment of the compensation, the particulars of such apportionment shall be specified in the award, and as between such persons the award shall be conclusive evidence of the correctness of the apportionment
30. When the amount of compensation has been settled under section 11, if any dispute arises as to the apportionment of the same or any part thereof, or as to the persons to whom the same or any part thereof is payable, the Collector may refer such dispute to the decision of the Court.

PART V

PAYMENT

31. (1) On making an award under section 11, the Collector shall tender payment of the compensation awarded by him to the persons interested entitled thereto according to the award, and shall pay it to them unless prevented by some one or more of the contingencies mentioned in the next sub-section.
- (2) If they shall not consent to receive it, or if there be no person competent to alienate the land, or if there be any dispute as to the title to receive the compensation or as to the apportionment of it, the Collector shall deposit the amount of the compensation in the Court to which a reference under section 18 would be submitted:

Provided that any person admitted to be interested may receive such payment under protest as to the sufficiency of the amount;

Provided also that no person who has received the amount otherwise than under protest shall be entitled to make any application under section 18;

Provided also that nothing herein contained shall affect the liability of any person, who may receive the whole or any part of any compensation awarded under this Act, to pay the same to the person lawfully entitled thereto.

- (3) Notwithstanding anything in this section, the Collector may, with the sanction of the President of the Union, instead of awarding a money compensation in respect of any land, make any arrangement with a person having a limited interest in such land, either by the grant of other lands in exchange, the remission of land-revenue on other lands held under the same title, or in such other way as may be equitable having regard to the interests of the parties concerned.
 - (4) Nothing in the last foregoing sub-section shall be construed to interfere with or limit the power of the Collector to enter into any arrangement with any person interested in the land and competent to contract in respect thereof.
32. (1) If any money shall be deposited in Court under sub-section (2) of the last preceding section and it appears that the land in respect whereof the same was awarded belonged to any person who had no power to alienate the same, the Court shall:
- (a) order the money to be invested in the purchase of other lands to be held under the like title and conditions of ownership as the land in respect of which such money shall have been deposited was held, or
 - (b) if such purchase cannot be effected forthwith, then in such Government or other approved securities as the Court shall think fit; and shall direct the payment of the interest or other proceeds arising from such investment to the person or persons who would for the time being have been entitled to the possession of the said land, and such moneys shall remain so deposited and invested until the same be applied:
 - (iii) in the purchase of such other lands as aforesaid; or
 - (iv) in payment to any person or persons becoming absolutely entitled thereto.
- (2) In all cases of moneys deposited to which this section applies the Court shall order the costs of the following matters, including therein all reasonable charges and expenses incident thereto, to be paid by the Collector, namely:
- (e) the costs of such investments as aforesaid;
 - (f) the costs of the orders for the payment of the interest or other proceeds of the securities upon which such moneys are for the time being invested, and for the payment out of Court of the principal of such moneys; and of all proceedings relating thereto, except such as may be occasioned by litigation between adverse claimants.

33. When any money shall have been deposited in Court under this Act for any cause other than that mentioned in the last preceding section, the Court may, on the application of any party interested or claiming an interest in such money, order the same to be invested in such Government or other approved securities as it may think proper, and may direct the interest or other proceeds of any such investment to be accumulated and paid in such manner as it may consider will give the parties interested therein the same benefit there from as they might have had from the land in respect whereof such money shall have been deposited or as near thereto as may be:
34. When the amount of such compensation is not paid or deposited on or before taking possession of the land, the Collector shall pay the amount awarded with interest thereon at the rate of six per centum per annum from the time of so taking possession until it shall have been so paid or deposited.

PART VI

TEMPORARY OCCUPATION OF LAND

35. (1) Subject to the provisions of Part VII of this Act, whenever it appears to the President of the Union that the temporary occupation and use of any waste or arable land are needed for any public purpose, or for a company, the President of the Union may direct the Collector to procure the occupation and use of the same for such term as the President of the Union shall think fit, not exceeding three years from the commencement of such occupation.
- (2) The Collector shall thereupon give notice in writing to the persons interested in such land of the purpose for which the same is needed, and shall, for the occupation and use thereof for such term as aforesaid, and for the materials (if any) to be taken there from, pay to them such compensation either in a gross sum of money, or by monthly or other periodical payments as shall be agreed upon in writing between him and such persons respectively.
- (3) In case the Collector and the persons interested differ as to the sufficiency of the compensation or apportionment thereof, the Collector shall refer such difference to the decision of the Court.
36. (1) On payment of such compensation, or on executing such agreement or on making a reference under section 35, the Collector may enter upon and take possession of the land, and use or permit the use thereof in accordance with the terms of the said notice.
- (2) On the expiration of the term, the Collector shall make or tender to the persons interested compensation for the damage (if any) done to the land and not provided for by the agreement, and shall restore the land to the persons interested therein.

Provided that, if the land has become permanently unfit to be used for the purpose for which it was used immediately before the commencement of such term, and if the persons interested shall so require, the President of the Union shall proceed under this Act to acquire the land as if it was needed permanently for a public purpose or for a company.

37. In case the Collector and persons interested differ as to the condition of the land at the expiration of the term, or as to any matter connected with the said agreement, the Collector shall refer such difference to the decision of the Court.

PART VII

ACQUISITION OF LAND FOR COMPANIES

38. (1) The President of the Union may authorize any officer of any company desiring to acquire land for its purposes to exercise the powers conferred by section 4.
- (2) In every such case section 4 shall be construed as if for the words "for such purpose" the words "for the purposes of the company" were substituted; and section 5 shall be construed as if after the words "the officer" the words "of the company" were inserted.
- 38A. An industrial concern, ordinarily employing not less than one hundred workmen owned by an individual or by an association of individuals and not being a company, desiring to acquire land for the erection of dwelling houses for workmen employed by the concern or for the provision of amenities directly connected therewith shall, so far as concerns the acquisition of such land, be deemed to be a company for the purposes of this Part, and the references to company in sections 5A, 6, 7, 17 and 50 shall be interpreted as references also to such concern.
39. The provisions of sections 6 to 37 (both inclusive) shall not be put in force in order to acquire land for any company unless with the previous consent of the President of the Union, nor unless the company shall have executed the agreement hereinafter mentioned.
40. (1) Such consent shall not be given unless the President of the Union be satisfied, either on the report of the Collector under section 5A, sub-section (2), or by an enquiry held as hereinafter provided:
- (a) that the purpose of the acquisition is to obtain land for the erection of dwelling houses for workmen employed by the company or for the provision of amenities directly connected therewith, or
- (b) that such acquisition is needed for the construction of some work, and that such work is likely to prove useful to the public.
- (2) Such enquiry shall be held by such officer and at such time and place as the President of the Union shall appoint.
- (3) Such officer may summon and enforce the attendance of witnesses and compel the production of documents by the same means and, as far as possible, in the same manner as is provided by the Code of Civil Procedure in the case of a civil Court.

41. If the President of the Union is satisfied, after considering the report, if any, of the Collector under section 5A, sub-section (2), or on the report of the officer making an enquiry under section 40, that the purpose of the proposed acquisition is to obtain land for the erection of dwelling houses for workmen employed by the company or for the provision of amenities directly connected therewith, or that the proposed acquisition is needed for the construction of a work and that such work is likely to prove useful to the public, he shall require the company to enter into an agreement with the Government, providing to the satisfaction of the President of the Union for the following matters, namely:-
- (1) the payment to Government of the cost of the acquisition;
 - (2) the transfer, on such payment, of the land to the company;
 - (3) the terms on which the land shall be held by the company;
 - (4) where the acquisition is for the purpose of erecting dwelling houses or the provision of amenities connected therewith, the time within which, the conditions on which and the manner in which the dwelling houses or amenities shall be erected or provided; and
 - (5) where the acquisition is for the construction of any other work, the time within which and the conditions on which the work shall be executed and maintained, and the terms on which the public shall be entitled to use the work.
42. Every such agreement shall, as soon as may be after its execution, be published in the Gazette, and shall thereupon (so far as regards the terms on which the public shall be entitled to use the work) have the same effect as if it had formed part of this Act:
43. The provisions of sections 39 to 42, both inclusive, shall not apply to the acquisition of land for any railway or other company, for the purposes of which under any agreement the Government is, or was, bound to provide land.
44. In the case of the acquisition of land for the purposes of a railway company, the existence of such an agreement as is mentioned in section 43 may be proved by the production of a printed copy thereof purporting to be printed by order of Government.

MISCELLANEOUS

45. (1) Service of any notice under this Act shall be made by delivering or tendering a copy thereof signed, in the case of a notice under section 4, by the officer therein mentioned, and, in the case of any other notice, by or by order of the Collector or the Judge.
- (2) Whenever it may be practicable, the service of the notice shall be made on the person therein named.
- (3) When such person cannot be found, the service may be made on any adult male member of his family residing with him; and, if no such adult male member can be found, the notice may be served by fixing the copy on the outer door of the house in which the person therein named ordinarily dwells or carries on business, or by fixing a copy thereof in some conspicuous place in the office of the officer aforesaid or of the Collector or in the Courthouse, and also in some conspicuous part of the land to be acquired;

Provided that, if the Collector or Judge shall so direct, a notice may be sent by post, in a letter addressed to the person named therein at his last known residence, address or place of business and registered under the Burma Post Office Act, and service of it may be proved by the production of the addressee's receipt.

46. Whoever wilfully obstructs any person in doing any of the acts authorized by section 4 or section 8, or wilfully fills up, destroys, damages or displaces any trench or mark made under section 4, shall, on conviction before a Magistrate, be liable to imprisonment for any term not exceeding one month, or to fine not exceeding fifty rupees, or to both.
47. If the Collector is opposed or impeded in taking possession under this Act of any land, he shall, if a Magistrate, enforce the surrender of the land to himself, and, if not a Magistrate, he shall apply to a Magistrate and such Magistrate shall enforce the surrender of the land to the Collector.
48. (1) Except in the case provided for in section 36, the Government shall be at liberty to withdraw from the acquisition of any land of which possession has not been taken.
- (2) Whenever the Government withdraws from any such acquisition, the Collector shall determine the amount of compensation due for the damage suffered by the owner in consequence of the notice or of any proceedings thereunder, and shall pay such amount to the person interested, together with all costs reasonably incurred by him in the prosecution of the proceedings under this Act relating to the said land.
- (3) The provisions of Part III of this Act shall apply, so far as may be, to the determination of the compensation payable under this section.
49. (1) The provisions of this Act shall not be put in force for the purpose of acquiring a part only of any house, manufactory or other building, if the owner desire that the whole of such house, manufactory or building shall be so acquired;

Provided that the owner may, at any time before the Collector has made his award under section 11, by notice in writing, withdraw or modify his expressed desire that the whole of such house, manufactory or building shall be so acquired:

Provided also that, if any question shall arise as to whether any land proposed to be taken under this Act does or does not form part of a house, manufactory or building within the meaning of this section, the Collector shall refer the determination of such question to the Court and shall not take possession of such land until after the question has been determined.

In deciding on such a reference the Court shall have regard to the question whether the land proposed to be taken is reasonably required for the full and unimpaired use of the house, manufactory or building.

- (2) If, in the case of any claim under section 23, sub-section (1), thirdly, by a person interested, on account of the severing of the land to be acquired from his other land, the President of the Union is of opinion that the claim is unreasonable or excessive, he may, at any time before the Collector has made his award, order the acquisition of the whole of the land of which the land first sought to be acquired forms a part.
 - (3) In the case last hereinbefore provided for, no fresh declaration or other proceedings under sections 6 to 10, both inclusive, shall be necessary; but the Collector shall without delay furnish a copy of the order of the President of the Union to the person interested, and shall thereafter proceed to make his award under section 11.
50. (1) Where the provisions of this Act are put in force for the purpose of acquiring land at the cost of any fund controlled or managed by a local authority or of any company, the charges of and incidental to such acquisition shall be defrayed from or by such fund or company.
- (2) In any proceeding held before a Collector or Court in such cases the local authority or company concerned may appear and adduce evidence for the purpose of determining the amount of compensation;

Provided that no such local authority or company shall be entitled to demand a reference under section 18.

51. No award or agreement made under this Act shall be chargeable with stamp-duty, and no person claiming under any such award or agreement shall be liable to pay any fee for a copy of the same.
52. No suit or other proceeding shall be commenced or prosecuted against any person for anything done in pursuance of this Act, without giving to such person a month's previous notice in writing of the intended proceeding, and of the cause thereof, nor after tender of sufficient amends.
53. Save in so far as they may be inconsistent with anything contained in this Act, the provisions of the Code of Civil Procedure shall apply to all proceedings before the Court under this Act.

54. Subject to the provisions of the Code of Civil Procedure applicable to appeals from original decrees, and notwithstanding anything to the contrary in any enactment for the time being in force, an appeal shall only lie in any proceedings under this Act to the High Court from the award, or from any part of the award, of the Court, and from any decree of the High Court passed on such appeal as aforesaid an appeal shall lie to the Supreme Court subject to the provisions contained in section 110 of the Code of Civil Procedure [and in Order XLV thereof].
55. (1) The President of the Union shall have power to make rules consistent with this Act for the guidance of officers in all matters connected with its enforcement.
- (2) The power to make rules under sub-section (1) shall be subject to the condition of the rules being made after previous publication.
- (3) All such rules shall be published in the Gazette, and shall thereupon have the force of law.

ANNEX 5 - THE REPUBLIC OF THE UNION OF MYANMAR LAND ACQUISITION, RESETTLEMENT AND REHABILITATION LAW, (2019 PYIDAUNGSU HLUTTAW LAW NO. 24) 4TH, WANNING DAY OF WAGAUNG, 1381 ME, (19 AUGUST, 2019) (UNOFFICIAL TRANSLATION)

The Pyidaungsu Hluttaw hereby enacts this Law.

CHAPTER I

Title, Enforcement, Extent and Definitions

1. (a) This Law shall be called the **Land Acquisition, Resettlement and Rehabilitation** Law.
- (b) This Law shall come into force commencing from the day on which issued the notification by the President.
2. The provision of this Law shall be relevant to the acquisition of land either permanently or temporarily, for public purpose, to use personally, or to hold or to control, either by the Union Government or with the consent of the Union Government, in relation to land acquisition, compensation, damages, resettlement and rehabilitation of socio-economic life. In addition, it shall relate to the following matters:
 - (a) Land requirement for the national defense and security matters of the Union;
 - (b) Project to be carried out for the national development according to the National Economic Policy;
 - (c) Socio-economic development projects contained in the National Planning Law;
 - (d) Expansion of urban and rural areas and development of basic infrastructure projects;
 - (e) Resettlement and rehabilitation matters;

- (f) Exception the payment for compensation and damages under the Farmland Law for acquisition of farmlands and under the Vacant, Fallow, and Virgin Lands Management Law for taking back possession of vacant, fallow, and virgin lands, land acquisition matters under the other existing law.
3. The following expressions contained in this Law shall have the meanings given hereunder:
- (a) **Land** means lands and includes benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth.
- (b) **Household** means the family member of the head of household which is blood related or marriage related who living together.
- (c) **Land owner** means the person who owns the land with sufficient evidence and his family members, entitled the right to claim compensation, damages and other rights in according to this Law damage of land acquisition. This expression includes following persons to be damage;
- (1) Officially recorded in the land records specified in accordance with any of existing laws, as owner or person who has the right to hold or the right to use (exploit) the land or building or part of such:
 - (2) Person having obtained land or the grant of ownership of the land in accordance with any of the existing laws;
 - (3) Person having declared as land owner or recorded as such by a Court or an order issued by a person having authority or an organization such as;
 - (4) Person acknowledged as owner by Nay Pyi Taw Council, relevant State and Region Government based on the acceptance of local people in accordance with the tradition of national races though there is no official evidence;
- (d) **Department/ Organization which proposes for land acquisition** means that the government department or organization; proposes for land acquisition for utilizing of public purpose;
- (e) **Notification for declaration of intended acquisition of Land** means the notification which is declared transparently regarding to intent the acquisition of a land, regarding to claim the rights and to object for the public, regarding to be aware of the process of land acquisition.
- (f) **Notification for land acquisition** means the notification which is declared transparently regarding to acquire the land with the approval of the Union Government after completion of preliminary inspections for land acquisition.
- (g) **Taking possession of the Land** means the act of taking possession of the land intended to acquire, in order to transfer to the proposed department or organization as State owned land without any encumbrances of debt, by the Land Acquisition Implementation Body in accordance with this Law.

- (h) **For Interest of the Public** means minimal necessary land acquisition aims for the purpose of the public interest in which matters concerns with this Law under section 2.
- (i) **Court** means to the status of the High Court of relevant Region or State or District Court which is having the jurisdiction power.
- (j) **Damage** includes one or more than that of following damage and lost due to the land acquisition:
- (1) Loss in possession the land which is acquisition or housing on that land and other immovable property;
 - (2) Loss a living land or business.
 - (3) Damage to livelihood and the living business base on the acquisition of land having official owner ship.
- (k) **Related Person of acquired land** means the following persons who are damage relating to the acquired land due to acquire such land;-
- (1) tenant;
 - (2) person who carries out by lease;
 - (3) person who carries out by joint or mutual benefit;
 - (4) person who works as a farmer or a pieceworker or a worker in possession at least 12 years continuously on acquired land before the land acquisition though has not owned the land except movable hill side cultivation land.
- (l) **Damaged person** means land owner and related person of the land who are damaged due to the land acquisition.
- (m) **Land Acquisition in case of urgency** means acquisition of the land urgently due to the unavoidable circumstances caused by and urgent issue.
- (n) **Temporary Land Occupation** means the occupation of land for temporary usage for a specific period for the public purpose without intention to use of long run.
- (o) **Cost of Acquisition** means to the following expense of any land acquisition matters:
- (1) Compensation and damages;
 - (2) The amount of miscellaneous expense includes the development of basic infrastructure for the resettlement and rehabilitation in line with the agreement of landowner and department /organization of land acquisition;
 - (3) Management and Administration cost.
- (p) **Compensation** defines for the amount of money covers for acquired land, buildings and immovable property on that land and crops due to the land acquisition.

- (q) **Damages** means to the amount of money relates to the following matters that given to damaged person for his suffering due to the land acquisition;
- (1) The cost for living and food of landowner before resettlement.
 - (2) Loss income due to the end of livelihood and job.
 - (3) The damage of buildings and crops because of measuring land, making land mark and removing barriers.
- (r) **Resettlement Expense** means the costs of move out from the acquired land and the allowance for residing at relocated area.
- (s) **Resettlement** means for arrangement of residential building and basic infrastructure for relocated people from the acquired land according to their desire as for the right of landowner with the agreement of department/organization of land acquisition under the provisions of the Chapter 7 of this law.
- (t) **Rehabilitation** means organizing rehabilitation of socio-economic life such as job opportunities, vocational jobs, expenses for temporary survival, support for social welfare for damaged person because of land acquisition ,with their desire as a right for land owner in accordance with the agreement of department/organization of land acquisition under the provisions of the Chapter 7 of this law.
- (u) **Central Committee** means Union Government set up the Central Committee for land acquisition, resettlement and rehabilitation matters by the this law.
- (v) **Focal Ministry** means a ministry assigned by Union Government in order to this law.
- (w) **Department** refers a department appointed by the focal ministry for the purpose of this law.
- (x) **Land Acquisition Implementation Board** means, upon the issue of Order for the need to acquire a land, Central Committee formed and assigned Region or State or Nay Pyi Taw land Acquisition Implementation Board for several matters of land acquisition according to this law.
- (y) **Resettlement and Rehabilitation Implementation Board** means the Region or State or Nay Pyi Taw Implementation Board forming by the Central Committee under this law in order to perform for resettlement and rehabilitation process for the land owner.
- (z) **Land Inspection Sub-body** means the sub-body which is formed by Nay Pyi Taw Council or relevant Region or State Government for inspecting relating to land acquisition under this law.

Objectives

4. The objectives of this Law are as follows:
 - (a) To implement land acquisition matters with this law, based on the National Land Usage Policy adopted by the Union Government;
 - (b) To protect the interest of damaged persons whose land has been acquired through incompliance with the law of land acquisition for public purpose;
 - (c) To carry out transparently the providing advance notice, negotiation, and making decisions by the processes which is participating local people and damaged persons when carrying out the land acquisition.
 - (d) To ensure the acceptance of fair compensation and damages for damaged persons;
 - (e) To ensure the entitlement for resettlement or rehabilitation of socio-economic life for being removed from land because of land acquisition, according to the desire of landowner of their rights by agreement of department /organization
 - (f) To prevent the occurrence of damage to the natural environment and socio-economic due to the land acquisition.

CHAPTER III

Forming the Central Committee and Responsibilities

5. Union Government shall;
 - (a) Central Committee for Land Acquisition, Resettlement and Rehabilitation shall be formed with Union Ministers of relevant ministry, relevant officials from government departments and organizations and experts as members and chaired by Vice President for successfully and effectively implemented the provisions of this Law.
 - (b) In forming the Central Committee under sub-section (a), a suitable person among the members shall be assigned as a secretary. And also Vice Chairman and Joint Secretary may be assigned if may be necessary.
 - (c) Central Committee formed by sub-section (a) may reform if may be necessary.
6. Responsibilities of Central Committee are as follows;
 - (a) Laying down the policies concern with land acquisition, resettlement and rehabilitation, laying down the project guidance in line in according with such policies, and monitoring the implementation process;
 - (b) Requiring to issue the Notification for declaration of intended acquisition of Land by the Union level organization or Region/ State Government or Nay Pyi Taw Council after scrutinizing the submitted proposal in regarding to land acquisition; and reporting to Union Government in order to make decision in relating to such land acquisition proposal together with the recommendation whether should or not acquire such land under the land inspection survey.

- (c) Submitting the comments, after scrutinizing, of whether land acquisition should be made or not submitted by the Nay Pyi Taw Council or relevant Region or State Government to the Union Government with its comments. (d) Forming and assigning the Region or State or Nay Pyi Taw Land Acquisition Implementation Board composed of the authorized persons of relevant government department and organizations, land owners, local representatives, ethnic representatives, and expertise for implementing the land acquisition process;
- (e) Forming and assigning the Region or State or Nay Pyi Taw Resettlement and Rehabilitation Implementation Board composed of the authorized persons of relevant government department and organizations, land owners, local representatives, ethnic representatives, and expertise for implementing the resettlement and rehabilitation process regarding to land acquisition;
- (f) Coordination among relevant ministries, departments and organizations of government, resettlement and rehabilitation implementation board, and land acquisition implementation board in order to successful and effective implementation to the provisions of this Law.
- (g) Giving necessary instruction for land acquisition in case of urgency and temporary land occupation for the public purpose; (h) Monitoring and giving guidance in line for transparent, responsiveness, accountable, anti-corruption and avoid misuse when carrying out the land acquisition, resettlement and rehabilitation.

CHAPTER IV

Proposal for Land Acquisition, Scrutiny and Preliminary Inspection

7. The following government department and organizations may have the right to propose and apply for land acquisition in accordance with this law:
 - (a) Union Level ministry and organizations, government departments and organizations,
 - (b) Nay Pyi Taw Council or Region or State Government.
8. Any department and organization which mentioned at Section 7 that needs to use any land for public purpose for any following matter, may submit proposal to Central Committee in accordance with the stipulations-
 - (a) Project implementing by itself by such Department/ Organization which proposes for land acquisition;
 - (b) Project by joint venture,
 - (c) Project will implement by local and international donation for the Union and public in accordance with existing laws.

9. The proposal for land acquisition for public purpose shall be attached following necessary evidences:
 - (a) proposal; signed by proposer or the person assigned to propose,
 - (b) land map and land history of want to acquired land, or draft map when land has not been measured , location and estimated areas,
 - (c) reasons for want to acquire land for public purpose and appropriation usage of such land,
 - (d) whether there are any religious buildings, public cemetery and graves, if there is such submission of the opinion that such places are to be excluded from the acquisition, or if it is to be included instead , the agreement of relevant person and the guarantee of all the expenses including allocated costs,
 - (e) Report of the Environmental Impact and Socio-Economic Effects on the required land; in accordance with Environmental Preservation Law, Rules and Regulations;
 - (f) Plans and Proposal for resettlement and rehabilitation for the landowners of required land;
 - (g) undertaking letter which is submitted by the proposed person concerns with financial matters for various land acquisitions processes;
 - (h) the sufficient reasons of land acquisition in case of urgency or temporary land occupation if necessary;
 - (i) administrative agreement of proposed department / organization for land acquired.
10. Central Committee shall submit proposal with information letter to the relevant Region or State Government and Nay Pyi Taw Council attached with necessary of land surveying an opinion of whether land acquired is necessary or not after scrutinizing the proposal of land requirement. In addition, the copy of information letter shall send to relevant ministry.
11. After receiving the proposal of land requirement from Central Committee in accordance with Section 10, the relevant Region or State Government and Nay Pyi Taw Council shall scrutinize the proposal whether it meets with facts mentioned at Section 9 and, then said so the following plans shall adopted for implementation;
 - (a) land surveying, and discussion and taking opinions of local people for land acquisition proposal for getting well understanding of the public, at the same time, parliament representatives are invited to participate on it;
 - (b) scrutinize the proposal of department and organization on impact of socio-economic life of damaged persons, the prospect of environmental impact of land acquired with ground situation;
 - (c) coordination with department and organization that proposed land acquired for resettlement and rehabilitation plan, based on the expert's opinion and requirements of damaged persons;

- (d) whether it have the condition of benefits for the State and public due to the proposed land acquisition;
 - (e) the appropriate condition of resettlement and rehabilitation plan which attached for proposal ;
 - (f) ensure to have departmental and external expert's opinion
 - (g) analyze findings and submit to Central Committee with comment.
12. Land inspection sub-group shall formed and assigned with proper persons of government department and organization for inspection of land requirement proposal including matters which mentioned at Section 11 and other related matters by relevant Region or State Government and Nay Pyi Taw Council.
13. Land inspection sub-group shall;
- (a) sending notice in advance at least 7 days to damaged persons for land inspection of proposed land and then making necessary works whether such land is usable or not;
 - (b) field surveying, collecting data relates suffer situation and condition of damaged persons;
 - (c) Facts finding and performance on land inspection must be reported to the Nay Pyi Taw Council or relevant Region or State Government.
14. Relevant Region or State Government and Nay Pyi Taw Council shall;
- (a) report to Central Committee the scrutinized facts related to the proposal of required land and recommendation on whether it shall acquire or not for the public purpose attached together with recommendation of relevant parliament representatives,
 - (b) report to Central Committee the draft notification for declaration of intended acquisition of Land, if recommended on proposed land should be acquire for public purpose.
15. If proposal of land acquisition of land and buildings are attached with following facts by Section 14, Central Committee shall takes action on land acquired matters through the approval of Union Government and Pyidaungsu Hluttaw:
- (a) prevented antique materials and buildings are located by law enforce;
 - (b) historical cultural heritages are existed;
 - (c) well-known areas and buildings, premises and commemorate places where strong history evidence and treasured and preserved by people;
 - (d) lands where ethnic tribes use for their traditional practices and protected, treasured and maintained it.

Issuing the Notification for declaration of intended acquisition of Land and submitting the Objection

16. Central Committee shall:

- (a) issue the notification for declaration of intended acquisition of land if it is found that proposed land is necessary to acquire for the public purpose according to analyzing and scrutinizing regarding with the proposal for necessary to acquire the land,
- (b) notification which is issued under sub-section (a) shall include the followings:-
 - (1) Land matters such as located Region or State, District, Township, Ward or Village Tract, field , plot, number and name, estimated area and type of land;
 - (2) The reason of land acquisition for carrying out by any governmental department and organization for public purpose.
- (c) In addition, the following facts shall composed together with order by sub-section(a)
 - (1) assignment order for Land Acquisition Implementation Board and the Resettlement and Rehabilitation Implementation Board
 - (2) summary of analysis on damage of natural environmental and socio-economic life which mentioned at proposal
 - (3) summary plan for resettlement and rehabilitation

17. (a) The notification for declaration of intended the acquisition of land shall be published at National Gazette and also daily newspaper, local news letter (if any) for public awareness at least twice within specific period, in addition, shall posted at the notice board of Region Government, State Government, or Nay Pyi Taw Council. Moreover, the copies of notification shall post on public notice boards at following places of area where is located such land. The notification shall publish in local language if may be necessary:

- (1) Office of the Nay Pyi Taw Council or Office of relevant Region or State Government;
 - (2) District Administration Office and Township Administration Office, Ward or Village Tract Administration Office of the place where land is located;
 - (3) Township Court, City Development Office and markets owned by City Development Council, Township Information and Public Relations Office where land is located;
 - (4) notice board located at prominent places of public awareness where near the land proposed to be acquired;
- (b) shall advertise on television, broadcasting medias and website of the relevant department if may be necessary;

- (c) shall send the notice attached with copy of such notification in accordance with the Civil Procedure Code to every damaged person stay in the proposed acquisition aress.
18. (a) Damaged persons may submit objection letter attached with sufficient evidence which is including the reasons to Nay Pyi Taw Council or relevant Region or State Government and Land Acquisition Implementation Board, if there is not satisfy concerning with such Notification of land acquisition within 45 days from the date of issuing .
- (b) Once receiving the objection letter by Nay Pyi Taw Council or relevant Region or State Government shall inform to the Land Acquisition Implementation Board to inspect such objection and then filing its recommendation accordingly.
19. Relevant Land Acquisition Implementation Board shall:
- (a) give the right to explain to the person who objects in personally or his representative or his lawyer by scrutinizing the objection submitted under section 18;
 - (b) submit with the recommendation of Nay Pyi Taw Council or relevant Region or State Government to the Central Committee in order to public the rejection such issued Notification in accordance with section 17, when there is found that not necessary to acquit the land after giving the right to explain in accordance with sub-section (a),
 - (c) submit to Central Committee for carrying out the process of land acquisition together with the recommendation which is mentioned should to be acquired the land, if there is found that necessary to acquit that proposed land for public purpose.
20. The Central Committee shall:
- (a) When the proposal is agreed subject to Section 19, sub-section (b), the notification on cancelation of Order and Announcement shall publicity in accordance with Section 16 and 17;
 - (b) When the proposal subject to Section 20, sub-section(c) is agreed, it shall inform to land Acquisition Implementation Board and Resettlement and Rehabilitation Implementation Board, as well as Relevant Region or State Government and Nay Pyi Taw Council for carrying out the investigation process for land acquisition.
21. Land Acquisition Implementation Board is going out the field inspection of the land intended to acquire and seeking public objection on objectives of land acquisition and situation , it shall inform at least 7 days prior notice to the damaged persons for aforesaid ongoing process, it shall design by self or assign sub-field inspection board for ongoing implementation process;
- (a) to scrutinize the submission of proposed department and organization akin to consequence of socio-economic effect of damaged persons and environmental impact of proposed land of land acquisition whether relevant with real situation of the ground;
 - (b) to get approval and cooperation based on the expert's view and comment, and landowner's requirement for estimate plan of resettlement and rehabilitation of proposed department and organization for land acquisition;
 - (c) to seek damaged persons including public's objection related with objectives of land acquisition and situations, to accept written objection letter, to do hearing, to ask for necessary documents, and to carry out field inspection as and when necessary;

- (d) to make field survey together with representatives of proposed department and organization, landowner and his representative;
 - (e) to collect list of damaged persons and situation;
 - (f) not to damage plantation and facilities when carry out in accordance with sub-section (c), (d) and (e), if so, the compensation shall be paid to the damaged persons with market price for such damage.;
 - (g) to make record on grievance of damaged persons through field surveying and to calculate the compensation and damages in line with local current price.
22. (a) the damaged persons may submit their un-satisfaction on the compensations paid by the Land Acquisition Implementation Board or On-Ground Sub Survey Group for damage to Nay Pyi Taw Council or relevant Region or State Government within 30 days in accordance with section 21.
- (b) Nay Pyi Taw Council or relevant Region or State Government may make a suitable order after scrutinizing the submission under the sub-section (a). Such order shall be final and valid.
23. Resettlement and Rehabilitation Implementation Board scrutinizes the consistency of estimation of proposed department and organization for resettlement and rehabilitation related for land acquisition with damaged persons' real situation, to make notice at least 7 days prior to the landowner for implementing following tasks by itself or assign to sub-inspection board:
- (a) responsibilities of field inspection shall:
 - (1) whether relocated area is suitable for resettlement or not, if so, the situation of the implementation ;
 - (2) the situation of rebuilding for religious buildings and school, clinic, market, office, so on and so forth;
 - (3) the creativity of job opportunity;
 - (4) the programme of supporting temporary compensation and the adequate situation;
 - (5) the programmes to be supporting by relevant governmental department and organizations for continuing with vocational jobs of the families;
 - (6) the programmes for running systematically of education and health supporting tasks;
 - (b) Land inspection at ground shall perform with representatives from proposed department and organization, damaged persons and their representatives related to the land acquired, departmental experts and other necessary person and organization by sub-section (a);

- (c) Subject to sub-section (a) and (b), it shall have the right to ask necessary documents for viewing, coping, checking against each other and to summon and interview the persons who are deemed to be related.
24. Land Inspection Sub-body shall:
- (a) Have right to ask the comments from the government departments, organizations and experts, which are related to the land inspection, independently. Moreover, shall ask their assistant;
 - (b) submit the finding and reports related to the finding of land inspection, analyzing, review and comment to Land Acquisition Implementation Board for land acquisition, Resettlement and Rehabilitation Implementation Board for resettlement and rehabilitation programme.
25. Land Acquisition Implementation Board, and Resettlement and Rehabilitation Implementation Board complies the findings and reports of each of the Land Inspection sub-board with its finding report included its review and comments for submitting to the Nay Pyi Taw Council or the relevant Region or State Government.
26. Nay Pyi Taw Council or the relevant Region or State Government shall:
- (a) submit its finding and views on whether land acquisition is appropriate or not for public purpose to the Central Committee based on the finding reports of Land Acquisition Implementation Board, and Resettlement and Rehabilitation Implementation Board, the draft order of land acquisition shall also be prepared and submitted for implementing land acquisition as and when the land acquisition is considered.
 - (b) Though the notification order of land acquisition is issued, if proposed department/ organization for land acquisition has retrieved back the proposal, or if the Land Acquisition Implementation Board found out that the land is not appropriate for acquisition as included by investigation, it shall be submitted to the Central Committee to make amendment or termination of land acquisition cancelling the notification order of land acquisition programmes.
27. The Central Committee shall:
- (a) submit its finding and comment to Union Government through the analyzing of proposal and findings of proposed department and organization for land acquisition, the comment of relevant Region Government, State Government or Nay Pyi Taw Council which related to the appropriation of land needs to acquire or not under the section 26, sub-section (a);
 - (b) if it remarks for land acquisition is reasonable for the public purpose by sub-section (a), submit draft order together with the evidence document as proposal of land acquisition for public purpose.

28. The Union Government shall:

- (a) make decision whether the land is to be acquired or, is not to be taken out action for land acquisition for public purpose after analyzing the submitted comments and proposed documents by section 27. The decision shall be confirmed and final.
- (b) if it decide on proposed land is acquired for the public purpose by sub-section (a), inform to Central Committee for taking action on relevant ministry shall release order of land acquisition in accordance with the description of section 16 and 17 for public purpose. The copy of that information letter shall dispatch to the focal ministry and relevant ministry or State Government and Nay Pyi Taw Council.

29. The Central Committee shall release order of proposed land is acquired for the public purpose for public purpose in accordance with the decision of Union Government under section 28. It shall inform to the focal ministry, Nay Pyi Taw Council and relevant Region or State Government and Land Acquisition Implementation Board for proceeding implementation process.

30. The Land Acquisition Implementation Board shall calculate estimate expenses for office works and land inspection programmes, possible compensation and damages plus with management and administration costs in order to ask in advance to proposed department and organization of land acquisition for paying to the department before release the notice of land acquisition order, after receiving the informed letter under section 29. The land acquisition procedures shall proceed after receiving expenses in hand of the department.

CHAPTER VI

Declaration of Intended Acquisition and Taking Possession of the Land

- 31. The relevant ministry shall release advertisement and notification of land to be acquired for the public purpose awareness under the means included in section 16 and 17 for public purpose when Central Committee is informed by section 29.
- 32. As soon as the focal Ministry issued the Notification in accordance with section 31 and gave information, Land Acquisition Implementation Board shall carry out the following matters as necessary:
 - (a) Land Acquisition Order shall re-announce to the public land is located, that order shall be attached with local language if necessary;
 - (b) Surveying the land for acquisition, calculating and awarding compensation and damages shall proceed in accordance with the description of Chapter 8.
- 33. The Land Inspection sub-Body shall carry out recording process including following tasks after informing at least 7 days in advance to damaged persons of land acquisition;
 - (a) the following items shall be checked and recorded during on-ground surveying with damaged persons or their legal representatives:
 - (b) list of damaged persons and their family members, their livelihood condition, list of family owned buffaloes, cows, animals and machinery;

- (c) location, area, type and classification of the land , and its local market value on the dated of issued declaration of requirement for land acquired subject to section 16.
 - (d) age, constructed condition and style , local current value of the building on the land;
 - (e) for perennial plants, 3 times of its local market value calculated based on the value of the existing plants.
 - (f) for seasonal crops, 3 time of its local market value calculated based on the average products rate of one acre.
 - (g) costs of damage effect on livelihood and employment opportunity on that land due to the land acquisition.
 - (h) boundary posts shall be erected prominently as necessary at the expense of proposed department and organization of land acquisition during the on-ground survey;
 - (i) recording of on-ground survey shall informed to each damaged person;
 - (j) recorded information shall be announced for people awareness after completion of on-ground survey;
 - (k) the approved amount of compensation and damages for damage effects, and amount of payment, the deadline to submit for claim, person who shall claim and the place where the claim shall submitted shall be notified for public purpose;
 - (l) announcement by posted at relevant departmental office places easy to visible by the public under sub-section (a) of section 17;
 - (m) notices shall be dispatched in accordance with the Code of Civil Procedure to each head of family listed as claimant for compensation and damages;
 - (n) if necessary, the notices shall be sent together with written in the local common language;
34. (a) Land Acquisition Implementation Board shall:
- (1) After the implementation of tasks mentioned in and subject to the section 32 and 33, it shall continue to take possession of land free from any encumbrances;
 - (2) That land shall transferred to the proposed department and organization of land acquisition through land transfer proceeding file in accordance with the description;
- (b) The acquired land shall vest solely in the Union free from all encumbrances.

Process of Compensation, Damages and Resettlement or Rehabilitation of Land Acquisition by the Preference of Landowner

35. The Land Acquisition Implementation Board shall not necessary to give any chance choosing by the will of the land owner included in sub-section (b) of section 36 when there is no constructed concrete building or any business is not running on that building of the land acquired, pay compensation and damages of that land acquisition to the landowner or damages to related person of the land acquired subject to the descriptions of Chapter 8 in this law.
36. The Land Acquisition Implementation Board shall pay one of the following rights including resettlement expenses through the landowner's desire of choice and, take agreement of proposed department and organization by negotiation for that payment to the landowner when there is no constructed concrete building or the business is not running on that building of the land acquired. The compensation shall not exceed the current value of acquired land and building including resettlement expenses:
- (a) right to have compensation and damages for acquired land and building in a lump sum or installment;
 - (b) the following rights may be enjoyed with the partial privilege mentioned in sub-section (a) jointly or severally:
 - (1) right to have land of resettlement area or land and building;
 - (2) right to have any of rehabilitation programme; and
 - (3) right to have opportunity to invest in upcoming project which will implement on acquired land or portion of land.
37. Land owner shall:
- (a) right to have resettlement expense due to the acquired land and building under this law;
 - (b) not only the privilege of sub-section(a), any privilege shall claim composed in section 36 by own preference which is not exceed than current value of acquired land and building by agreement of proposed department and organization for land acquisition through negotiation.
38. The Land Acquisition Implementation Board may carry out with the approval of the Union Government that to give other land which is equivalent to the compensation after negotiation and consent of the land owner instead of paying compensation in respect of acquisition land.

CHAPTER VIII

Payment of Compensation and Damages

39. Land Acquisition Implementation Board shall perform following tasks of payment of compensation and damages to landowner, damages to the person who related to land acquisition:
 - (a) if there is no constructed concrete building or any business is not running on that building of the land acquired, compensation and damages shall pay to landowner, and damages shall pay to related person of the acquired land;
 - (b) if there is construed concrete building or any business is running on that building, the current value of acquired land and building shall issue to the landowner;
 - (c) if there is no perennial plants, seasonal crops, vocational project on acquired land, the current value of land shall issue to landowner as a compensation;
 - (d) if there is perennial plants, seasonal crops, vocational project on acquired land, the following compensation and grievance shall issue:
 - (1) for perennial plants, 3 times of its local market value calculated based on the value of the existing plants.
 - (2) for seasonal crops, 3 time of its local market value calculated based on the average products rate of one acre.
 - (3) estimate costs of lost for stop in livelihood and employment;
 - (4) value of lost in buffaloes, cows and other animal husbandry, materials;
 - (e) compensation and damages shall pay by scrutinizing to injured persons or their representative who have privilege for it;
 - (f) record separately on persons who agree and take of the compensation and damages and unsatisfied persons on calculation of payment though accepted it.
40. Land Acquisition Implementation Board shall:
 - (a) calculate and estimate the cost of resettlement, amount of compensation and damages of section 39 for submitting Central Committee through relevant Region or State Government and Nay Pyi Taw Council according to the rules this law;
 - (b) pay compensation and damages including resettlement expenses to landowner and damages to person related to acquired land approved by Central Committee;
41. Any damaged person shall request to the Land Acquisition Implementation Board for submitting the referral letter mentioned with reasons to the relevant court if they are not satisfied with any of following matters:

- (a) compensation and damages for specified area;
- (b) amount of payment for compensation and damages;
- (c) whom to be paid for compensation or who is eligible to have;
- (d) whom to be divided or complains of small and big amount;

42. Land Acquisition Implementation Board shall:

- (a) any damaged person shall submit referral letter with his request letter of submission for referral mentioned with following facts within 60 days to the relevant court subject to section 41;
 - (1) current value of compensation for acquired land or land and building;
 - (2) for perennial plants, 3 times of its local market value calculated based on the value of the existing plants.
 - (3) for seasonal crops, 3 time of its local market value calculated based on the average products rate of one acre.
 - (4) estimate damages of living and food consumption for land owner before resettlement;
- (b) according to the sub-section (a), the following matters shall attached when referral to the court:
 - (1) list of the name of damaged persons, address and address to be for informed;
 - (2) compensation and damages that have not payed yet;
 - (3) a copy of report of sub-group of on-ground surveying that action has taken on land shall be acquired subject to section 33;
- (c) refusal of compensations and damages of any Damaged person shall register as deposit at court.

43. The relevant court shall:

- (a) scrutinize the submitted referral letter subject to section 42 through open case file in accordance with the Civil Procedure Code commence within 30 days;
- (b) investigate serving with summon to any member of Land Acquisition Implementation Board or their representative if objection is to pay compensation and damages for described area under sub-section (a) of section 41;
- (c) investigate by summon of damaged persons and necessary witness instead of an any member of Land Acquisition Implementation Board or their representative for protestation of sub section (b), (c) and (d) of section 41, such investigation shall run by their representatives or layer;

- (d) adopted judgement, order and degree for payment of appropriate compensation and damages by analyzing the current local value for the payment of compensation and damages of Land Acquisition Implementation Board;
 - (e) give instruction for issuing the deposit money that Damaged person refused to accept it which saved at court by sub-section(c) of section 42, moreover the interest of that money saving at government saving bank shall also be issued to Damaged person.
44. Land Acquisition Implementation Board shall:
- (a) suspend the payment of compensation and damages when the case of referral by the request of any Damaged person for submitting referral letter to the court, is still ongoing;
 - (b) proceed for payment of compensation and damages as and when the referral letter case is done at the court or there is no submission of referral letter to the relevant court.
45. Whatever description of this chapter related to the compensation and damages mentioned, payment of compensation, damages and other ways of administration shall perform according to the relevant law intended to no grievance for the person who have originally right to work on farm land or vacant, fellow and virgin land due to the land acquisition for the sake of people.

CHAPTER IX

Resettlement and Rehabilitation

46. Resettlement and Rehabilitation Implementation Board shall perform following resettlement and rehabilitation programmes in accordance with the description of this chapter by chosen the preference of head of the landowner family of one of the rights that composed of sub-section (b) of section 36, based on the agreements through negotiation with proposed department and organization for land acquisition:
- (a) resettlement of head of the landowner family shall be performed simultaneously with the commence of programmes of taking possession of the land and land transferred;
 - (b) housing development programmes, rehabilitation programmes including the basic infrastructures and support for necessary of social life of families, resettlement programmes including basic infrastructures and other requirements for ward and village development;
 - (c) programmes for rehabilitation such as arranging vocational jobs based on acquired land and job opportunities;
47. If proposed department / organization of land acquisition is not able to arrange the resettlement programmes composed in section 46, up to the time of handing over of the land, it shall bear the costs for arranging the temporary living as agreed with head of the landowner family through negotiation.

48. When implementation the programmes mentioned in section 46 based on the agreement of sub-section (b) of section 37, Resettlement and Rehabilitation Implementation Board shall (if necessary):
- (a) arrange necessary programmes for not to affected on livelihood, social life of land owner and origin local people, environmental impacts due to the resettlement at such people;
 - (b) when head of the landowner demand for right for one of the rights of rehabilitation programmes described in sub-section (b) of section 36, or investing in project implementation regarding to the agreement with proposed department / organization of land acquisition, it shall implement based on the agreement programmes.
49. The Central Committee shall divide and assign the tasks of relevant ministry and, proposed department and organization of land acquisition when Land Acquisition Implementation Board has not taken the agreement tasks in advance for implementing the resettlement and rehabilitation programmes.
50. The Resettlement and Rehabilitation Implementation Board shall arrange with attention on women, children, ethnic tribes and persons who right to have possession according to the traditional including people who suffer easily for vulnerable are not effected due to the resettlement and rehabilitation.

CHAPTER X

Land Acquisition In Case of Urgency

51. (a) The Central Committee shall continue following matters for taking possession of land and land acquisition urgently according to the proposed department and organization subject to section 8 and 9, based on the agreement of Union Government for public purpose;
- (1) requirement to deploy due to emergency situations in matters for Union safety and defenses;
 - (2) requirement urgently of any land for social, economy and, smooth in road transportation and communication due to sudden change caused by unforeseeable circumstances;
 - (3) necessary evacuation of the public when the natural disaster happen or it could be happen;
 - (4) requirement for emergency settlement according to the decision of Pyidaungsu Hluttaw and Union Government.
- (b) The Central Committee shall release notification for the requirement of land acquisition by means of descriptions in section 16 and 17 for proposed land acquisition urgently as well as it shall release urgent notification, and shall inform the focal ministry and relevant Region or State Government and Nay Pyi Taw Council, Land Acquisition Implementation Board for continuing the process of land acquisition in case of urgency subject to section 31 for the public purpose through notification of land acquisition in case of urgency;

- (c) Land Acquisition Implementation Board shall assign on-ground survey sub-group for taking the possession of proposed land urgently in respect of the land stated in sub-section (a), though the focal ministry has not been taking action on the payment for compensation and damages after issuing the notification order of land acquisition in case of urgency;
52. For urgent acquisition, relating to the land to be required, the following lands shall be prioritized for acquisition:
- (a) lands reserved in advance for emergency matters by Union Government;
 - (b) lands where the acquisition will deal minimum grievance impact for public interest;
 - (c) lands that has not been utilized however somebody has right to possess and use;
53. Regarding to the land acquisition urgently:
- (a) Anyone assigned by this law shall not be entered, do on-ground surveying and take the possession of the land without advanced notice to Damaged person;
 - (b) The compensation and damages shall reimburse including ordinary packing of expense for resettlement when the head of the family of damaged persons claims the compensation and damages and it is not paid in time;
 - (c) The landowner shall receive plus of 10% of the current value of land and the person who related to the land is acquired shall receive plus of 10% of damages when there will be more grievance due to the urgent implementation of procedure of land acquisition for the payment of compensation and damages;
 - (d) If there is building on the land, land owner shall be received the local current value of that building. In addition, Damaged person shall receive the triple amount of receivable profit of current value of seasonal crops and perennial plans for one year if latter are existed on that land;
 - (e) When head of the family of land owner negotiates for resettlement and rehabilitation programmes subject to sub-section (b) of section 36, it shall be acted according to the descriptions of Chapter 8 in this law.

CHAPTER XI

Temporary Land Acquisition

54. The Central Committee shall carry out the temporary land occupation that include following matters which are not exceeded for maximum 5 years by means of description in section 16 and 17 for the public purpose, with the approval of Union Government after the notification order for the necessary of temporary land occupation is issued and declared for it:
- (a) temporary requirement matters for the safety, defense and military operations of the Union;

- (b) temporary requirement matters only for the duration of project for any project of the Union;
 - (c) temporary requirement matters only for the duration of the project for any project through any methods assigned by the Union Government to local and foreign private companies;
 - (d) temporary requirement matters by the Union Government.
55. For the temporary land occupation , the following lands shall be prioritized for acquisition:
- (a) the land that has not been utilized yet however someone has right to possess or utilize;
 - (b) lands that will cause minimum damage to the public to the land acquisition;
56. The land Acquisition Implementation Board, after publishing the notification order and advertising for necessary of temporary land occupation under section 54, shall dispatch to damaged persons enclosed with the notification order of duration, purpose and proposed lands for such temporary acquisition, moreover, shall negotiate an take agreement with damaged persons who will be paid for damages and the amount of specific fees for duration of temporary land occupation.
57. When the damaged persons demand to submit of referral letter to the relevant court due to the in satisfaction of damages for temporary land occupation by the Land Acquisition Implementation Board, the submission of referral letter to the relevant court by Land Acquisition Implementation Board and the court shall adopted the order and judgment after investigation of that referral letter case through the description of section 41, 42, 43 and 44.
58. If there are damages on the land by utilization when the time of returning the land at the end of temporary acquisition, the damages shall be paid by the agreement of damaged parsons through negotiation.

CHAPTER XII

Taking back of the lands previously transferred after land acquisition

59. The Union may take back the whole or part of the land under any of the following circumstances however the land is acquired for any purpose by proposed department or organization;
- (a) the ancient culture heritage that is immense of historical value found out on acquired land;
 - (b) percious minerals and ore veins are found out on acquired land that not purpose for mining for minerals and gems;
 - (c) causing damage to the health of local people, deterioration of socio-economic conditions and damage to the natural environmental and eco system duet to the failure to carry out the prevention of damages of socio-economic conditions and environmental protection programmes as originally guaranteed;

- (d) failure to implement during the prescribed period as originally intended;
 - (e) there is not utilized as proposed plan or it is not necessary for utilization;
 - (f) it is found out that acquired more than enough for utilization;
 - (g) the resettlement and rehabilitation is not implemented and absented according to the agreement standard;
 - (h) the land acquisition order is cancelled of any reasons through the notification order by Union Government.
60. If the reclamation by the Union is for the matters contained in sub-section (c) to (g) of section 59, there shall not be a right to reclaim the expenses of acquisition.
61. The proposed land acquisition department, organization shall implement for any matters intended for public purpose:
- (a) acquired land which is not utilize or not necessary to utilize or no longer to utilize for any reason, it shall be returned to the Union systemically;
 - (b) when acquired land is not utilize as a purpose during the specific time, or transfer to the other department, organization or person unofficially, it assume that land acquisition shall be cancelled and back to the Union;
 - (c) Relating to the returned land subject to sub-section (a) or State owned by returned land subject to sub-section(b), the expenses of land acquisition and investment money on that land, it shall not have the right to claim anything from the Union for such land.
62. The Union Government shall utilize the land by taking back of the land subject to section 60 for any project of Union for the public purpose.

CHAPTER XIII

Offence and Penalties

63. Anyone who committed any of following things on conviction, shall be punished with and imprisonment not exceeding 1 year or with a fine not exceeding one hundred thousand kyats or with both:
- to prevent, bother or obstruct the duties that carrying out by organization or person assigned by this law; to obstructed with dishonesty of any programmes of land acquisition which carrying out by this law for the public purpose, for damage;
64. Any responsible member or his assigned person by this law, having carrying out the acts which are not in compliance with the provisions of this law with dishonesty, on conviction, shall be punished with an imprisonment with minimum 6 months to maximum 2 years or with a fine not exceeding two hundred thousand kyats or with both.

65. Anyone who submitted the false evidence and documents knowing to the organization or a person assigned for carrying out the tasks by this law, on conviction, shall be punished with an imprisonment not exceeding 7 years together with a fine not exceeding one million kyats.

CHAPTER XIV

Miscellaneous

66. The rules, summon orders issued under the Land Acquisition Act (India Act, 1894) which has been ceased to be in fore by this Law, shall continue to use so far it does not contravene the provisions of this Law, rules, regulations, notification order, order, directive and procedures issued under this Law.
67. If there are any grievance caused due to the usage of land acquiring by other any law enforce for the public purpose even though it was not carried out in accordance with this Law, it shall be acted except the payment of compensation, damages subject to section 45, compensation, damages and resettlement and rehabilitation programmes for landowner in accordance with this Law.
68. Regarding to the land acquisition by this Law:
- (a) The damaged persons shall exempted from income tax on payment of compensation and damages;
 - (b) The Stamp duty of the deed of agreement among proposed department, organization and landowner for land acquisition, the request letter for submission of referral by section 40 and the Stamp Fee on the submission of referral letter to the court by section 42 shall be exempted. In addition, the copy of that deed of agreement or request letter or referral letter or the judgment of the court or order shall be exempted of paying tax.
69. Any Offences under section 63 and 64 are prescribed as cognizable offences.
70. In implementation the provision contained this Law:
- (a) The focal ministry may issue rules and regulations subject to the approval of Union Government;
 - (b) The focal ministry and department may issue notification order, order, directives and procedures.
71. The Land Acquisition Act (India Act I, 1894) shall cease to be in force as soon as this law is coming into force.

I hereby sign under the Constitution of the Republic of the Union of Myanmar.

(/sd)

Win Myint
President, Union of the Republic of Myanmar

ANNEX 6 - THE LAW AMENDING THE VACANT, FALLOW AND VIRGIN LANDS MANAGEMENT LAW (2018) (PYIDAUNGSU HLUTTAW LAW NO. (24), THE 2ND WAXING DAY OF TAWTHALIN, 1380 (11TH SEPTEMBER, 2018))

The Pyidaungsu Hluttaw hereby enacts this law.

1. This law shall be called the “Law Amending the Vacant, Fallow and Virgin Lands Management Law (2018)”
2. In the article 2 of the Vacant, Fallow and Virgin Land Management Law,
 - (a) The expression “ the Ministry of Agriculture and Irrigation” contained sub-section (b) shall be substituted by the expression “the Ministry of Agriculture, Livestock and Irrigation”.
 - (b) The expression “ the Settlement and Land Records Department” contained in sub-section (c) shall be substituted by the expression “ the Department of Agricultural Land Management and Statistics”.
 - (c) (c) sub-sections (d), (f) and (m) shall be substituted as follows –
 - “(d) **Management Committee** means the Region or State Vacant, Fallow and Virgin Lands Management Committee formed under this law. This expression also includes the Union Area Vacant, Fallow and Virgin Lands Management Committee.
 - (f) **Virgin Lands** means valid land and wild forest land whether on which there are trees, bamboo plants or bushes growing or not, or whether geographically (surface) topography of the land is even or not and being the new land on which cultivation has never been done, not even once. The said expression shall include the land of forest reserve, grazing ground and fishery lakes and ponds lands which have been legally revoked to carry out in line with this law and not currently in use.
 - (m) **Permit** means order permitting the right to cultivate or utilize the land issued by the Central Committee and the Management Committee in response to the application for the right to cultivate or utilize vacant, fallow and virgin lands in accord with this law.
3. The title of Section (2) of the Vacant, Fallow and Virgin Lands Management Law shall be substituted as follows.”

CHAPTER 2

Formation of Central Committee for the Management of Vacant, Fallow and Virgin Lands and the Management Committees

4. Section (3), sub-section (a) of the Vacant, Fallow and Virgin Lands Management Law shall be substituted as follows;

“(a) shall form the Central Committee for the Management of Vacant, Fallow and Virgin Lands; with the Union Minister for the Ministry of Agriculture, Livestock and Irrigation as Chairman, Director General of the Department of Agricultural Land Management and Statistics as Secretary, appropriate persons from the government departments concerned and other suitable persons as members, for enabling to utilize, manage and carry out agriculture, livestock breeding, minerals production and other lawful businesses permitted by the Government by using the vacant, fallow and virgin lands effectively and properly for the economic development of the State and to create job opportunities for the locals and landless citizens.”

5. Section (3-a) shall be added after section (3) of the Vacant, Fallow and Virgin Lands Management Law as follows;

“3-a . The Central Committee;-

“(a) shall form relevant region or state, union area Committees for the Management of Vacant, Fallow and Virgin Lands, with representatives of local ethnic groups, farmer representatives, CSO representatives and appropriate experts.

(b) the management committees formed in conformity with sub-section (a) may be reinstituted as necessary.”

6. The expression “investors, who obtained the permission under the Foreign Investment Law” contained in section 5, sub-section (d), sub-section (e) and section 12 of the Vacant, Fallow and Virgin Lands Management Law shall be substituted by the expression “investors, who make foreign investments in accordance with the Myanmar Investment Law” respectively.
7. Sub-section (f) shall be added after section (5), sub-section (e) of the Vacant, Fallow and Virgin Lands Management Law as follows;

“(f) the government, governmental organizations and Non-governmental organizations that are responsible to work for the landless citizens, smallholder farmers or resettlement and rehabilitation tasks.”

8. Section (5-a) shall be added after section (5) of the Vacant, Fallow and Virgin Lands Management Law as follows;

“5-a. The landless citizens and smallholder farmers may apply to relevant management committee in conformity with the criteria should they would like to get permit to carry out agricultural, livestock breeding and affiliated economic enterprises on the Vacant, Fallow and Virgin Lands within the State.”

9. The expression “Ministry of Mines” contained in section 6, sub-section (b) and section 11, sub-section (d) of the Vacant, Fallow and Virgin Lands Management shall be substituted by the expression “Ministry of Natural Resources and Environmental Conservation” respectively.
10. Section 6, sub-section (c) of the Vacant, Fallow and Virgin Lands Management shall be substituted as follows;

“(c) Shall work in coordination with the Ministry of Natural Resources and Environmental Conservation and other relevant ministries to avoid deterioration of forest lands which are forest reserve and protected public forest and to conserve the natural lands, watershed areas, natural lakes and ponds, island and archipelago.”

11. Section (8) of the Vacant, Fallow and Virgin Lands Management Law shall be substituted as follows;

“8. The Central Committee may permit or deny application for the right to cultivate or utilize the Vacant, Fallow and Virgin lands.”

12. Sections 8-a and 8-b shall be added after section 8 of the Vacant, Fallow and Virgin Land Management Law as follows;

“8-a; (a) The relevant management committee shall permit or deny within the set period after scrutinizing the application for the rights to cultivate or utilize the Vacant, Fallow and Virgin lands on the permissible amount.”

(b) The person who is not satisfied with the denial of the management committee may appeal to the central committee within 60 days from the date when the decision is made.

(c) The Central Committee may approve, nullify or amend the decision of the management committee.

8-b; Under section 8 and section 8-a, sub-section (c), the decision of the central committee shall be the final.”

13. Section (9) of the Vacant, Fallow and Virgin Lands Management Law shall be substituted as follows;

“9. The central committee and the management committee shall, when the right to cultivate or utilize the vacant, fallow and virgin lands is permitted under section- 8 and section 8-a, issue the permit after causing to deposit the security fees.”

14. The intro of section 10, sub-sections (a) and (c) of the vacant, fallow and virgin lands management law shall be substituted as follows;

“10. The central committee shall permit for utilizing the vacant, fallow and virgin lands for the following businesses only after inspecting whether there are people utilizing the land under the law or not. In doing so,

(a) In the agricultural business, for perennial plants, orchard crops and Industrial crops, permit 300 acres not exceeding 3,000 acres at a time. If 75 percent of the permitted acres have been fully carried out, permit again not exceeding 3,000 acres at a time up to the total of 30,000 acres, time after time. If the business which should be permissible for the interest of the State, permit more than 3000 acres at a time up to 30,000 acres that can actually be grown with the approval of the Union Government.”

(c) For the mineral production business permit in coordination with the Ministry of Resources and Environmental Conservation.”

15. Section 10-a shall be added after section- 10 of the vacant, fallow and virgin lands management law as follows;

“10-a. The relevant management committee shall permit the use of vacant, fallow and virgin land for agriculture, livestock and other related businesses only after scrutinizing whether there are current users using the land legally. In doing so,

- (a) In agricultural business – permission may be granted up to 300 acres as for perennial plants, orchard crop and industrial crop. After fully carrying out on the 75 percent acre of permitted land, may permit again not exceeding 3,000 acres at a time up to the total of 3,000 acres, time after time.
- (b) May permit not exceeding 50 acres for the rural farmers and persons desires of carrying out agriculture on manageable family-sized scale.”

16. The intro, sub-section (a) clause (1) and sub-section (b) of the section 11 of the Vacant, Fallow and Virgin Lands Management Law shall be substituted as follows;

“11. When the central committee permits the Vacant, Fallow and Virgin Lands for the use of the following businesses, the periods shall be:-

- (a) (1) For the perennial plants and orchard crops, may permit not exceeding 30 years from the day when the permission was granted.
- (b) For livestock breeding work, may permit not exceeding 30 years from the day when the permission was granted.”

17. Section 11-a shall be added after section 11 of the Vacant, Fallow and Virgin Lands Management Law as follows:-

“11-a, When the relevant management committee permits the Vacant, Fallow and Virgin Lands for the use of the following businesses, the period shall be:-

- (a) In agricultural business:-
 - (1) For the perennial plants and orchard crops, may permit not exceeding 30 years from the day when the permission was granted.
 - (2) For growing seasonal crops, may permit as long as the rules are not breached.
- (b) .. May permit not exceeding 30 years from the day it was first permitted for the rural farmers and persons desires of carrying out agriculture on manageable family- sized scale.”
- (c) Permit to extend not exceeding 30 years in total time after time depending upon the type of business, for the business desirous of further continuation after the expiry of the permitted period under sub-section (a) clause(1) and sub-section (b).”

18. The expression “the land for which the right to utilize is obtained” contained in section 16, sub- section (b) of the Vacant, Fallow and Virgin Lands Management Law shall be substituted with “Permitted Land”.

19. Section 17 of the Vacant, Fallow and Virgin Lands Management Law shall be substituted as follows;

“17. The Central Committee may assign the relevant management committees or form specific bodies, stipulated their functions and duties to scrutinize and coordinate the submitted matters concerning the right to cultivate or utilize the vacant, fallow and virgin lands.”

20. Section 22 of the vacant, fallow and virgin lands management law shall be substituted as follows; -

“22. (a) The person and organization having the right to cultivate or utilize under the permit of the Central Committee for the management of vacant, fallow and virgin lands before this law was promulgated shall; -

- (1) submit to the Central Committee a compilation of records describing the area of permitted vacant, fallow and virgin lands, the date of issuance and letter number of the permission together with valid evidence showing the area that has been utilized and the remaining area with photo records.
- (2) comply with this law in every aspect regarding to the vacant, fallow and virgin lands that have been utilized.
- (3) be deemed to have acknowledged that the State has resumed the vacant, fallow and virgin lands which are not yet utilized after four years as of the day when permission was granted.
- (4) Acknowledge that the security fees shall be expropriated as the State treasury and the right to cultivate or utilize the vacant, fallow and virgin lands shall be revoked in case of failure to implement the business in accordance with the stipulated terms and conditions or violation of the terms and conditions within four years from the day when the right to utilize the land was granted.

- (b) The person and organization occupying and utilizing the vacant, fallow and virgin lands without the permit of the Central Committee for the Management of Vacant, Fallow and Virgin Lands shall;

- (1) apply for the permit to utilize the vacant, fallow and virgin lands at the Central Committee or relevant management committees by submitting complete detailed information including the area of the vacant, fallow and virgin lands that have been utilized, within six months from the day when the Law Amending the Vacant, Fallow and Virgin Lands Management Law (2018) was enacted.
- (2) acknowledge that the vacant, fallow and virgin lands that have been utilized shall be resumed or they shall be evicted from the land in line with regulatory procedures in the case of failure to apply for the permit to utilize in line with the sub-section (b)(1) or such application is rejected.

- (3) acknowledge that they shall be subject to penalties under this law in the case of continuing to occupy and utilize the vacant, fallow and virgin lands without applying for the right to utilize in line with the sub-section (b)(1) or by defying the order to leave the vacate the vacant, fallow and virgin lands issued by the Central Committee or relevant management committee with the reason the permission should not be granted.”
22. Section 27 of the Vacant, Fallow and Virgin Lands Management Law shall be substituted as follows: “27. Any person, if convicted of committing any of the following act shall be punished with a jail term not exceeding two years or a fine not exceeding five hundred thousand kyats or both;
- (a) Occupying and living or allowing occupying and living, working or allowing working on the vacant, fallow and virgin lands without proper permits as defined under this law.
- (b) Occupying and working on the vacant, fallow and virgin lands without approval from the person having the right to cultivate or use the vacant, fallow and virgin lands under this law or their legitimate representative.”
23. Section 27-a shall be added after section 27 of the vacant, fallow and virgin lands management law as follows; -
- “27-a : Any person who is convicted of violating sub-section (b) clause (3) of section 22 by utilize the vacant, fallow and virgin lands without permission of the central committee shall be punished with a jail term not exceeding two years or a fine not exceeding five hundred thousand kyats or both”.
24. Section 28 of the Vacant, Fallow and Virgin Lands Management Law shall be substituted with the following; -
- “22. Whoever obstructs the person who has the right to use the vacant, fallow or virgin lands or the person with legitimate permission from the right holder from implementing any lawful business on the relevant vacant, fallow and virgin lands shall be punished with a jail term not exceeding 6 months or a fine not exceeding a hundred thousand kyats or both.”
25. Section-29 a shall be added after section 29 of the vacant, fallow and virgin lands management law as follows; -
- “29-a : Whoever with the rights to utilize the vacant, fallow and virgin lands; -
- (a) upon conviction of violating the rules under section 16, subsection (C) shall be punished with a jail term not exceeding two years or a fine not exceeding ten hundred thousand kyats or both.”
- (b) upon conviction of violating the rules under section 16, subsection (f) shall be punished with a jail term not exceeding seven years and a fine.”
26. Section 30-a shall be added after section 30 of the vacant, fallow and virgin lands management law as follows; -

“30-a. : Management of the following types of land shall not be governed by this law; -

- (a) The lands for which the right to use as hillside cultivation (Taungya land) is granted under the existing law and rules,
- (b) Customary lands designated under traditional culture of the local ethnic people.
- (c) The lands currently used for religious, social, education, health and transportation purposes of the public and ethnic people.

27. Section 33 of the vacant, fallow and virgin lands management law shall be substituted with the followings; -

“33. (a) The central committee shall inherit and implement the duties and obligations of the central committee for management of vacant, fallow and virgin lands which was formed before the enactment of this law as long as they do not contrary to this law.

(b) The rules, regulations, disciplines, notifications, orders, directives and procedures which were issued for the management of the vacant, fallow and virgin lands related issues shall be in force as long as they do not contrary to this law.”

I hereby sign under the Constitution of the Republic of the Union of Myanmar

Sd/ Win Myint

President

The Republic of the Union of Myanmar

(LANDESA UNOFFICIAL DRAFT TRANSLATION)

ANNEX 7 - SUMMARY OF THE CAMBODIA CASE PRESENTED TO THE INTERNATIONAL CRIMINAL COURT - COMMUNICATION UNDER ARTICLE 15 OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (FOOTNOTES OMITTED)

THE COMMISSION OF CRIMES AGAINST HUMANITY IN CAMBODIA, JULY 2002 TO PRESENT

I. EXECUTIVE SUMMARY

“The government talks about poverty reduction, but what they are really trying to do is to get rid of the poor. They destroy us by taking our forested land, 70% of the population has to disappear, so that 30% can live on. Under Pol Pot we died quickly, but we kept our forests. Under the democratic system it is a slow, protracted death. There will be violence, because we do not want to die.”
(A Cambodian victim)

A. INTRODUCTION

1. This Article 15 Communication notifies the Office of the Prosecutor (“OTP”) of the International Criminal Court (“ICC”) of the crimes against humanity committed through the Cambodian State apparatus against Cambodian civilians. A group of individual and independent Cambodian victims (“Filing Victims”) has instructed international lawyer, Richard J Rogers (partner in Global Diligence LLP), to file this Communication before the ICC.
2. The Communication is based on evidence of mass human rights violations collected for well over a decade by multiple independent sources, including United Nations (“UN”) human rights offices, UN Special Rapporteurs, international human rights organisations, Cambodian Non- Governmental Organisations (“NGOs”), and media. The International Federation for Human Rights (FIDH) fully endorses and supports the Communication.
3. The Communication outlines the mass human rights violations perpetrated against the Cambodian civilian population by senior members of the Royal Government of Cambodia (“RGC”), senior members of State security forces, and government-connected business leaders (hereinafter collectively referred to as the “Ruling Elite”), from July 2002 to present.
4. The cumulative effect of these violations has pushed this situation beyond the boundaries of human rights abuses and domestic crimes. In furtherance of its twin-objectives of self-enrichment and maintaining power at all costs, the Ruling Elite have committed serious crimes as part of a widespread and systematic attack against the Cambodian civilian population, pursuant to a State policy. The crimes fulfil all the legal elements of crimes against humanity.

B. FACTUAL BACKGROUND

5. After seizing power in the 1980s, the Ruling Elite have sought to construct a kleptocratic system subjugating the apparatus of a nominally democratic State through patronage and violence for the twin objectives of self- enrichment and maintaining power at all costs. It has succeeded in gaining effective control over all the vital national and regional state institutions, the civil service, State security forces, as well as components of the judiciary and the media – a system sometimes referred to as a ‘Shadow State.’ To implement its objectives, the Ruling Elite has committed international crimes.

1. Self-enrichment

6. The Ruling Elite’s primary source of self-enrichment stems from land grabbing, which has been perpetrated on a truly massive scale. The crimes flowing from land grabbing form the backbone of this Communication. Capitalising on widespread tenure insecurity resulting from decades of civil war, the Ruling Elite have illegally seized and re- allocated millions of hectares of valuable land from poor Cambodians for exploitation or speculation by its members and foreign investors. Rubber- stamped by the corrupt judiciary and civil service, and enforced by armed State security forces, the Ruling Elite have forcibly transferred hundreds of thousands of poor Cambodians from their homes and/or ancestral land. Those who resist evictions have faced brutal violence, trumped-up criminal charges and other forms of persecution.
7. In the absence of official statistics precise figures are difficult to ascertain. However, credible NGOs estimate that 770,000 people have been adversely affected by land grabbing since the year 2000. This figure amounts to 6% of the total population of Cambodia. A significant proportion of the 770,000 people have already been illegally and forcibly transferred and left in squalid conditions. In Phnom Penh alone, over 145,000 people (10% of the capital city’s population) have been forcibly displaced. Today, thousands more face the imminent threat of eviction.
8. Land grabbing and associated deforestation has disproportionately affected the indigenous minority population. Of the estimated 190,000 minorities, more than half may have already been forcibly excluded from communal and ancestral land. Due to their particular dependence on and cultural attachment to land, the land grabbing has devastated their livelihood and threatened their ethnic identity.

2. Maintaining power at all costs

9. Pursuant to a separate but inter-related objective, the Ruling Elite have relied on the (Shadow) State apparatus to maintain power at all costs. The State’s legal and security systems have been used to quell resistance, often violently, in order to promote the private and personal interests of the Ruling Elite. These attacks were not limited to Cambodians who challenged the land grabbing, but targeted more broadly those who were seen as a threat to the Ruling Elite’s power. Victims included civil society leaders, monks, journalists, lawyers, environmental activists, trade unionists, civilian protestors, and opposition politicians (hereinafter the “dissidents”).

10. Dissidents have been assassinated, murdered, beaten-up, subjected to trumped-up charges and illegal detention, and persecuted due their opposition to the Ruling Elite. Initially resorting to tactics such as grenade attacks and drive-by shootings, it is estimated that the Ruling Elite has orchestrated over 300 politically motivated murders since the 1990s. In recent years the Ruling Elite have relied heavily on a corrupt judiciary to crush dissent.

C. CRIMES AGAINST HUMANITY

11. There is a reasonable basis to believe that members of the Ruling Elite have committed, aided and abetted, ordered and/or incited the crimes of forcible transfer, murder, illegal imprisonment, other inhumane acts, and persecution, since Cambodia signed the Rome Statute in July 2002. These crimes form part of a widespread and systematic attack against the civilian population, pursuant to a State policy, and amount to crimes against humanity .

1. Underlying Crimes Committed Pursuant to the Objective of Self- Enrichment

12. In furtherance of its objective of self-enrichment, the Ruling Elite have committed forcible transfer, murder, illegal imprisonment, other inhumane acts, and persecution.
13. *Forcible transfer:* Of the 770,000 persons affected by land grabbing, a significant proportion has been forcibly transferred from an area where they were lawfully present, without legal justification. The force used has ranged from coercion (such as threats and intimidation) to brutal or deadly violence. Entire villages have been burned to the ground and possessions stolen or destroyed. The evictions have been perpetrated by armed police, gendarmes, the Royal Cambodian Armed Forces, as well as by private security forces with the support of the State apparatus.
14. *Murder, illegal imprisonment, other inhumane acts:* Those who challenged the land grabbing and/or resisted the evictions - whether community activists or villagers defending their homes - have been murdered and illegally detained before, during, or after the evictions. Once displaced, many evictees have been forced to live in squalid conditions and have suffered from food insecurity and life-threatening illnesses as the authorities omit to provide adequate housing, healthcare, or sanitation, in full awareness of the consequences. In the most serious cases, this further harm amounts to the crime of 'other inhumane acts.'
15. *Persecution:* The crimes and other intentional deprivations of human rights perpetrated against those who challenge or resist evictions constitute the underlying crime of persecution on political grounds. Members of Cambodia's indigenous minority population have been targeted as part of a persecution on ethnic grounds.

2. Underlying Crimes Committed Pursuant to the Objective of Maintaining Power

16. In furtherance of its objective of maintaining power at all costs, the Ruling Elite have committed murder, illegal imprisonment, and persecution.
17. Those who criticised or protested against the Ruling Elite's power, patronage network, corrupt governance and policies have been targeted for their political opposition. Peaceful demonstrators have been shot and killed in the streets or dragged away and unlawfully detained in pre-trial detention and/or convicted as a result of unfair trials. Dissidents have

been brutally murdered by professional assassins or condemned to linger in jails on spurious charges. Alongside other serious deprivations of fundamental rights, this targeting amounts to persecution on political grounds.

3. A Widespread and Systematic Attack Against the Civilian Population

18. The above underlying crimes were committed as part of a widespread and systematic attack against the civilian population, pursuant to a State policy.

The existence of an attack is evidenced by the multiple commission of the crimes, month after month, for over a decade.

19. The tables on pages 52 – 67 list representative examples of the underlying crimes committed in furtherance of self-enrichment. They detail 72 events of forcible transfer (or attempt) often involving thousands of Cambodian families; ten examples where single or multiple murders accompanied the evictions; and 28 examples where those who resisted were falsely charged and/or illegally detained. The tables are non-exhaustive.
20. The tables on pages 71 – 74 list representative examples of the underlying crimes committed in furtherance of maintaining power. They detail 19 cases of single or multiple murders (or attempts), and 13 examples where one or more dissidents were illegally imprisoned. The tables are non-exhaustive.
21. The victims of these crimes have all been civilians; the attack has targeted the civilian population. The massive number of victims and the geographical reach of the crimes evidence the widespread element of the attack. The organised nature and recurring pattern of criminal conduct demonstrate that the attack was also systematic. These crimes cannot be qualified as isolated or spontaneous acts of violence. Rather, they are part of an identifiable pattern of perpetration, implemented through the Cambodian State apparatus, directed by and for the benefit of the Ruling Elite. The attack was committed pursuant to a State policy.

D. PERPETRATORS

22. Our investigation has uncovered a well-organised and recurring pattern of perpetration, which relies on the complicity between the RGC, State Security Forces, local authorities, private businesses, and judiciary.
23. We recommend an investigation into the role of Security Forces as direct perpetrators of the underlying crimes. The commanding officers of the specific police or military units directly involved in the perpetration of these crimes, as well as the military and civilian commanders exercising effective control, should be investigated.
24. In addition, civilians who planned, instigated, ordered, committed or otherwise aided and abetted the crimes should be investigated.

E. ADMISSIBILITY

25. *Complementarity*: On information and belief, there are no known genuine domestic proceedings in which those most responsible for the crimes alleged in this Communication have been, or are being, investigated or prosecuted. This is apparent both for the overall attack on the civilian population and the individual underlying crimes comprising the attack.
26. Cambodian domestic courts are tainted by corruption and manipulated by power interests. Police and courts are used by the Ruling Elite as important tools to facilitate the crimes associated with its twin objectives of self-enrichment and maintaining power. Any domestic proceedings conducted into facts relating to the alleged crimes have either been ineffective or constituted a deliberate attempt to cover-up the responsibility of those most responsible. There are reasonable grounds to believe that the Ruling Elite have no intention of initiating proceedings to bring justice for the victims of the crimes in this Communication.
27. *Gravity*: When considered cumulatively, the crimes of the Ruling Elite reach the level of crimes against humanity and justifies engagement by the ICC: The victims were targeted *because* they were the most vulnerable in society; the number of direct and indirect victims has been enormous; the crimes were both widespread and systematic; the resultant suffering has affected entire communities throughout the country; and the crimes were perpetrated by the very actors, and using the very institutions and laws, that were meant to serve the public interest. This relentless, omnipresent, State-sponsored criminality reaches the level of gravity contemplated by the ICC Statute.
28. *Interests of Justice*: There are no exceptional circumstances that should dissuade the OTP from opening a preliminary examination into the events described in this Communication. On the contrary, the possible consequences of failing to act provide additional and compelling reasons to initiate action in the ICC: Firstly, hundreds of thousands more Cambodians will likely fall victim to the land grabbing unless something is done to stop it. Secondly, Cambodia may descend into larger-scale violence, as societal stability is progressively undermined by the crimes and their consequences.

F. REQUEST

29. We respectfully request the OTP to consider the Communication according to its obligations under Article 15 of the ICC Statute with a view to initiating an investigation pursuant to Article 53 of the ICC Statute, on the basis that:
 - (1) There is a reasonable basis to believe that a crime within the jurisdiction of the Court has been committed;
 - (2) The case is admissible under Article 17 of the ICC Statute; and
 - (3) Taking into account the gravity of the crime and the interests of victims, there are no substantial reasons to believe that an investigation would not serve the interests of justice.

ANNEX 8 - EXCERPTS FROM THE REPORT OF THE DETAILED FINDINGS OF THE INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON MYANMAR A/HRC/39/CRP.2 (SEPT 2018)

(D) RESPONSIBILITY

47. States are the primary duty holders of international human rights obligations, whether assumed through ratification of human rights treaties or acquired by virtue of applicable international customary law. States can be held responsible for human rights violations committed by their organs (for example, legislative or executive branch) or by their agents (for example, civil servants, the police, the army).²⁴⁰ States have the duty to respect, protect and fulfil human rights. The duty to *respect* means that States themselves must refrain from interfering with or curtailing the enjoyment of human rights, including through their servants or agents. Under the duty to *protect*, States must actively ensure that persons within their jurisdiction do not suffer from human rights abuse committed by others. The obligation to *fulfil* means that States must take action to facilitate and enhance the enjoyment of human rights. This has been understood to include not only the adoption of appropriate laws, but also “judicial, administrative and educative and other appropriate measures”.²⁴¹

48. Inherent in these duties is a State’s obligation to ensure that individuals have accessible and effective remedies.²⁴² States have a duty to investigate and prosecute gross violations of international human rights law and serious violations of international humanitarian law, in particular those that amount to crimes under international law (in particular war crimes, crimes against humanity and genocide), and to provide an effective remedy. States’ investigations into allegations must be carried out by independent and impartial bodies and be prompt, thorough and effective.²⁴³

²⁴⁰ See chapter IX, Responsibility.

²⁴¹ For an overview of these concepts, see F. Mégret, “Nature of Obligations”, in *International Human Rights Law* (2nd ed.), D. Moeckli, S. Shah and S. Sivakumaran, eds. (Oxford, Oxford University Press, 2014), p. 102-103.

²⁴² B. Ramcharan, “The Law-Making Process: From Declaration to Treaty to Custom to Prevention”, in *The Oxford Handbook on International Human Rights Law*, D. Shelton ed. (Oxford, Oxford University Press, 2013), p. 512.

²⁴³ See chapter X, Impunity and accountability.

49. The Mission concurs with the view that, in addition to the State, some non-State actors have human rights obligations under customary international law, in particular when they exercise effective control over territory and carry out government-like functions. They are obliged to respect human rights norms when their conduct affects the human rights of the individuals under their control.²⁴⁴ This is particularly so for peremptory norms of international law.

3. INTERNATIONAL CRIMINAL LAW

63. In its efforts to appropriately characterize the human rights violations and abuses it established, the Mission has had regard to international criminal law. This body of law governs the situations in which individuals can be held individually criminally responsible for gross violations of international human rights law and serious violations of international humanitarian law that amount to crimes under international law. The principal crimes considered by the Mission were genocide, crimes against humanity and war crimes. In doing so, the Mission referred to the definitions of these crimes in the Convention on the Prevention and Punishment of the Crime of Genocide, the Rome Statute of the International Criminal Court and customary international law, as well as the interpretation of these definitions in the jurisprudence of international courts and tribunals.²⁴⁵

64. As mentioned above, the prohibitions of genocide, crimes against humanity and war crimes amount to peremptory norms of international law (*jus cogens*), meaning that no derogation from the rule is allowed. The recognition of a crime under international law as *jus cogens* gives rise to a duty of the State to prosecute and punish perpetrators, the non-applicability of statutes of limitation for such crimes, and the universality of jurisdiction over such crimes regardless of where they were committed, by whom, or against whom.²⁴⁶ Moreover, under various sources of international law and under United Nations policy, amnesties are impermissible if they prevent prosecution of individuals who may be criminally responsible for war crimes, genocide, crimes against humanity or other gross violations of human rights.²⁴⁷

²⁴⁴ E.g. A/HRC/8/17, para. 9; A/HRC/10/22, para. 22; A/HRC/12/48, para. 305. See also e.g. United Nations Committee on the Elimination of Discrimination against Women, "General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women" (CEDAW/C/GC/28), para. 11: "Under international human rights law, although non-State actors cannot become parties to the Convention, the Committee notes that, under certain circumstances, in particular where an armed group with an identifiable political structure exercises significant control over territory and population, non-State actors are obliged to respect international human rights."

²⁴⁵ See chapter VIII. Crimes under international law.

²⁴⁶ E.g. M.C. Bassiouni, "International Crimes: Jus cogens and obligatio erga omnes", *Law and Contemporary Problems*, vol. 59(4), 1996, p. 66.

²⁴⁷ See e.g. OHCHR, *Rule-of-Law Tools for Post-Conflict States: Amnesties* (New York and Geneva, United Nations, 2009), p. 11.

A. CONCLUSIONS

1671. The Mission concluded on reasonable grounds that gross human rights violations and serious violations of international humanitarian law have been committed in Myanmar since 2011 and that many of these violations undoubtedly amount to the gravest crimes under international law.

1672. The gross human rights violations and abuses committed in Kachin, Rakhine and Shan States are shocking for their horrifying nature and ubiquity. They are also shocking because they stem from deep fractures in society and structural problems that have been apparent and unaddressed for decades. They are shocking for the level of denial, normalcy and impunity that is attached to them. The Mission concludes that these abusive patterns are reflective of the situation in Myanmar as a whole.

1673. Myanmar has a heavy responsibility to remedy the situation as a matter of the utmost urgency, or risk destroying its democratic reform process. The international community also bears responsibility and must take a united stand to both condemn the violations and assist Myanmar in addressing the root causes of its recurrent problems. This begins by ensuring that the perpetrators of crimes are held to account, and by giving hope to victims of a future without the fear and insecurity that have characterized their existence.

1674. The steps required to address the human rights crises in Myanmar are well known. For nearly three decades, five consecutive Special Rapporteurs on the situation of human rights in Myanmar have presented annual reports to the General Assembly and the Human Rights Council, with detailed recommendations to all stakeholders. Similarly, the United Nations High Commissioner for Human Rights has formulated concrete recommendations, as have many international and national civil society organizations. The Advisory Commission on Rakhine State also presented a detailed report. These recommendations should be implemented immediately.

1675. The actions of the Tatmadaw in Kachin, Rakhine and Shan States, in particular in the context of the “clearance operations” in northern Rakhine State in 2016 and 2017, have so seriously violated international law that any engagement in any form with the Tatmadaw, its current leadership, and its businesses, is indefensible. Engagement should only be considered when (1) a complete restructuring of the Tatmadaw is commenced, (2) its current leadership is replaced, and (3) extensive reform is undertaken to place the Tatmadaw under full elected civilian control and oversight and to remove the Tatmadaw from Myanmar’s political and economic life.

1676. The half century of continuous conflict between the Tatmadaw and Myanmar's ethnic minorities, with its serious violations of international law, has made it abundantly clear that peace is impossible without a negotiated national political settlement that recognises the legitimate aspirations of all Myanmar's ethnic minorities. Without such a settlement, Myanmar is destined to repeat its cycles of violence and serious human rights violations. The future of Myanmar as a nation can only be assured through peace, justice, true democracy and sustainable development. The international community has an obligation to support Myanmar in achieving that.

B. RECOMMENDATIONS

1. To the Government of Myanmar

1679. The Government of Myanmar, including the civilian authorities and the Tatmadaw as relevant, should further act with the greatest sense of urgency to:

(j) ensure that the repatriation of Rohingya and other refugees is safe, dignified and voluntary, in accordance with international standards; that adequate human rights protections are in place; that Rohingya refugees are expressly permitted to return to their places of origin, providing reparation for losses sustained and support in rebuilding their lives; that Rohingya are consulted on decisions about their future; and that the best interests of the child are the primary consideration with respect to children, particularly unaccompanied minors;

(m) ensure that any infrastructure plans for Rakhine State do not frustrate the safe and sustainable return of Rohingya to their places of origin; accordingly, suspend all terrain clearance in and around villages formerly occupied by Rohingya; only resume activities after (1) consultation with and approval of the original residents; and (2) prior examination by forensic, human rights and criminal experts.

Democratisation

1687. The Government of Myanmar, including its executive and legislative arms, should undertake full democratic reform of the Myanmar constitutional and political system. It should:

(a) revise the constitution to ensure consistency with democratic rights and freedoms and the protection of all human rights for all people of Myanmar; fully protect and respect the rights to freedom of expression, association and peaceful assembly; widen the space for civil society activity and respect and protect the work of human rights defenders;

2. To the United Nations and the international community

1699. The international community, through the United Nations, should use all diplomatic, humanitarian and other peaceful means to assist Myanmar in meeting its responsibility to protect its people from genocide, crimes against humanity and war crimes. It should take collective action in accordance with the United Nations Charter, as necessary.

1700. The Security Council should ensure accountability for crimes under international law committed in Myanmar, preferably by referring the situation to the International Criminal Court or alternatively by creating an ad hoc international criminal tribunal. Further, the Security Council should adopt targeted individual sanctions, including travel bans and asset freezes, against those who appear most responsible for serious crimes under international law. It should also impose an arms embargo on Myanmar.

1701. Until the Security Council acts, the General Assembly, or alternatively the Human Rights Council, should create an independent, impartial mechanism to collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights violations and abuses and to prepare files to facilitate and expedite fair and independent criminal proceedings in national, regional or international courts or tribunals.

5. To businesses enterprises operating in Myanmar

Business and human rights

1716. All business enterprises active in Myanmar or trading with or investing in businesses in Myanmar should demonstrably ensure that their operations are compliant with the United Nations Guiding Principles on Business and Human Rights. They should respect human rights, avoiding infringing on the human rights of others and addressing the adverse human rights impacts with which they are involved. They should have:

- (a) a policy commitment to meet their responsibility to respect human rights;
- (b) a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;
- (c) processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

1717. No business enterprise active in Myanmar or trading with or investing in businesses in Myanmar should enter into an economic or financial relationship with the security forces of Myanmar, in particular the Tatmadaw, or any enterprise owned or controlled by them or their individual members, until and unless they are re-structured and transformed as recommended by the Mission.

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