

**“SHADOW” NATIONAL BASELINE ASSESSMENT (NBA) OF  
CURRENT IMPLEMENTATION OF BUSINESS AND HUMAN  
RIGHTS FRAMEWORKS**

**MYANMAR**



**ALTSEAN  
BURMA**

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**MYANMAR**

**DECEMBER 2017**

**Alternative ASEAN Network on Burma (ALTSEAN-Burma)**

**With support from  
the International Corporate Accountability Roundtable (ICAR)**

## PROJECT TEAM

**ALTSEAN-Burma (Alternative ASEAN Network on Burma)** is a network of organizations and individuals based in ASEAN member states working to support the movement for human rights and democracy in Burma. The network is comprised of human rights & social justice non-governmental organizations (NGOs), political parties, think tanks, academics, journalists and student activists.

**The International Corporate Accountability Roundtable (ICAR)** harnesses the collective power of progressive organizations to push governments to create and enforce rules over corporations that promote human rights and reduce inequality.

### Report Authors

Marie Krizel Malabanan and Tessa Cerisier<sup>1</sup>  
Research Officers  
ALTSEAN-Burma  
[krizel@altsean.org](mailto:krizel@altsean.org)

### Contributors

Sophia Lin, Legal and Policy Coordinator, ICAR  
Debbie Stothard, Coordinator, ALTSEAN-Burma

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<sup>1</sup>Tessa Cerisier was a Research Officer for ALTSEAN-Burma in 2016.

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## GLOSSARY

ATIGA (ASEAN framework agreements on goods)

ACIA (ASEAN framework agreements on investment)

ASEAN framework agreements on services (AFAS)

AICHR (ASEAN Intergovernmental Commission on Human Rights)

AIHCR (ASEAN Intergovernmental Commission on Human Rights)

ANNI (Asian NGO Network on National Human Rights Institutions)

ASEAN (Association of Southeast Asian Nations)

BIT (Bilateral Investment Treaties)

CNPC (China National Petroleum Corporation)

CSO (civil society organization)

CAT (Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment)

CED (Convention for the Protection of All Persons from Enforced Disappearance)

CEDAW (Convention on the Elimination of All Forms of Discrimination against Women)

CRPD (Convention on the Rights of Persons with Disabilities)

CRC (Convention on the Rights of the Child)

DIHR (Danish Institute for Human Rights)

DSEZ (Dawei Special Economic Zone)

DICA (Directorate of Investment and Company Administration)

EMP (Environment Management Plan)

ECC (Environmental Compliance Certificate)

ECD (Environmental Conservation Department)

EIA (environmental impact assessment)

EITI (Extractive Industries Transparency Initiative)

FAO (Food and Agriculture Organization)

FTA (free trade agreement)

FPIC (free, prior, and informed consent)

GSP (Generalized Systems of Preferences)

GSTP (Global System of Trade Preferences among Developing Countries)

ICT (Information and Communications Technologies)

IEE (Initial Environmental Examination)

ICoCA (International Code of Conduct for Private Security Service Providers Association)

ICRC (International Committee for the Red Cross)

CERD (International Convention on the Elimination of All Forms of Racial Discrimination)

CMW (International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families)

ICJ (International Court of Justice)

ICCPR (International Covenant on Civil and Political Rights)	NCDR (National Committee for Disability Rights)
ICESCR (International Covenant on Economic, Social, and Cultural Rights)	NCP (National Contact Point for OECD Guidelines for Multinational Enterprises)
IFC (International Finance Corporation)	NSDC (National Defence and Security Council)
IIA (International Investment Agreement)	NHRI (National Human Rights Institution)
ILO (International Labour Organization)	NLUP (National Land Use Policy)
ITUC (International Trade Union Confederation)	National League for Democracy (NLD)
IPA (Investor Protection Agreement)	NGO (non-governmental organization)
ISDS (investor-state dispute settlement)	CRC-OP-SC (Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography)
MFGM (Mann Field Grievance Mechanism)	CRC-OP-AC (Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict)
MOECAF (Ministry of Environmental Conservation and Forestry)	OECD (Organization for Economic Co-operation and Development)
MONREC (Ministry of Natural Resources and Environmental Conservation)	SME (small and medium-sized enterprise)
MSG (multi-stakeholder group)	SEANF (South East Asia National Human Rights Institution Forum)
MCRB (Myanmar Centre for Responsible Business)	SEZ (Special Economic Zone)
MEC (Myanmar Economic Corporation)	SCA (Subcommittee on Accreditation of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights)
MIC (Myanmar Investment Commission)	SU (Supplementary Understanding)
MNHRC (Myanmar National Human Rights Commission)	SIA (sustainability impact assessment)
MOGE (Myanmar Oil and Gas Enterprise)	UAGO (Union Attorney General Office)
My-PEC(Myanmar Programme on the Elimination of Child Labour 2014–17)	UMEHL (Union of Myanmar Economic Holdings Limited)
MTE (Myanmar Timber Enterprise)	
MWAF (Myanmar Women’s Affair Federation)	
NBA (National Baseline Assessment)	

UMFCCI (Union of Myanmar Federation of Chambers of Commerce)

UNICEF (United Nations Children's Fund)

UNDRIP (United Nations Declaration on the Rights of Indigenous Peoples)

UNDP (United Nations Development Programme)

UNGPs (United Nations Guiding Principles on Business and Human Rights)

UDHR (Universal Declaration of Human Rights)

UPR (Universal Periodic Review)

VFV (Vacant, Fallow, and Virgin Land)

VGGT (Voluntary Guidelines for the Responsible Governance of Tenure of Land, Fisheries, and Forests)

YSE (Yangon Stock Exchange)



## EXECUTIVE SUMMARY

Myanmar's transition from the military junta to democracy that started in 2011 gained ground when the National League for Democracy (NLD) led by Aung San Suu Kyi took office in April 2016. However, the military elite still maintains extensive economic and political power. The military presides over the ministries of Home Affairs, Border Affairs, and Defense, and holds effective veto power over constitutional changes.

The legal and economic reforms that accompanied the transition have not yet addressed holdover problems from the military rule. The rule of law, including the administration of justice and law enforcement, remains weak. Corruption is endemic. Discrimination and abuses against women and ethnic, religious, and sexual minorities continue. Human rights abuses linked to business activities are routine. Meanwhile, the government is actively pursuing new economic opportunities and foreign investment, which has hit record high in recent years. It is thus urgent to close gaps in laws, policies, and practices so that businesses operating and investing in Myanmar do not further threaten human rights.

ALTSEAN-Burma and ICAR have partnered to support the development of a National Action Plan (NAP) on business and human rights in Myanmar by producing a “Shadow” National Baseline Assessment (NBA) to assess legal and policy gaps, and identify where further efforts are required. This NBA is developed based on the guidance under “National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks” (Toolkit), which was developed by ICAR and the Danish Institute for Human Rights (DIHR) in June 2014.<sup>2</sup> In accordance to the Toolkit, the NBA analyzes the States’ implementation of Pillars I and III of the United Nations Guiding Principles on Business and Human Rights (UNGPs), and focuses specifically on those Guiding Principles which represent obligations of the State.

The NBA is primarily based on desk research. The project team also conducted a number of consultations with select experts and hosted one workshop with representatives from grassroots organizations to ascertain preliminary findings, complete data gaps, and update the NBA in view of ongoing legislative and policy changes. The following presents a list of findings and recommendations to address critical issues and challenges.

### A. PATTERNS OF DISCRIMINATION AND INEQUALITY

The enjoyment of most of the fundamental rights guaranteed by the Constitution, including protection from discrimination, is reserved to “citizens” only. The definition of citizenship set forth in

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<sup>2</sup> An updated version of the Toolkit was launched on November 29, 2017; it can be accessed here: <https://globalnaps.org/wp-content/uploads/2017/11/danish-institute-for-human-rights-dihr-and-international-corporate-accountability-roundtable-icar-national-action-plans-on-business-and-human-rights-a-toolkit-for-the-development-implementation.pdf>. A draft update of the National Baseline Assessment Template has also been released for open consultation and road-testing; it is available here: <https://mail.google.com/mail/u/0/#inbox/160087882e3a806a>.

the 1982 Citizenship Law excludes several ethnic minorities, such as the Rohingya and people of Chinese, Indian, and Nepali descent. This restrictive definition of citizenship renders these ethnic minorities stateless and particularly vulnerable to human rights abuses, including as a result of business activities.

There is also evidence of discrimination and inequality in the context of business activities based on other grounds, including gender, sexual orientation and gender identity, and religion. With respect to discrimination on the basis of gender, the Constitution contains multiple provisions that clearly constitute direct and indirect discrimination against women. In practice, women are unable to participate in employment on an equal basis with men. There is a wide gender wage gap, with women concentrated in the lower-paid informal sector. Few measures have been taken to document and address sexual harassment in the workplace.

In terms of discrimination on the basis of sexual orientation and gender identity, Myanmar law criminalizes same-sex sexual activity. There are significant problems with how law enforcement agencies treat members of the lesbian, gay, bisexual, and trans (LGBT) community. Instances of police abuse, harassment, blackmail, and extortion are often reported. In the workplace, members of the LGBT community, more specifically women and transgender men, are regularly given workloads of men, but receive lower pay for this work.

Discrimination on the basis of religion in Myanmar is manifested in the prevalence of religious hate speech and hate crimes against non-Buddhists, which are often ignored by authorities. For example, law enforcement agencies rarely punish those who destroy religious buildings, houses, or businesses owned by religious minorities. In contrast, authorities regularly place restrictions on religious minorities' activities, discriminating against them when they attempt to buy or sell housing.

#### Recommendations:

- Review and amend the Constitution in order to:
  - i. Guarantee the enjoyment of fundamental rights, including protection from discrimination, to all people, not just “Burmese citizens.”
  - ii. Remove provisions that clearly constitute direct and indirect discrimination against women, as well as religious and ethnic minorities.
- Amend the 1982 Citizenship Law to replace race and ethnicity as determining factors in the granting of citizenship with objective criteria that comply with the principle of non-discrimination, such as birth in the territory and descent.
- Ensure that any process to determine citizenship eligibility is in line with international standards and that applicants have adequate information about such process.
- Guarantee equal access to education, employment, aid, and livelihood for religious and ethnic minorities.
- Institute affirmative action programs to give women preferential access to governmental or employment positions, and ensure access to maternal benefits such as maternity leave.
- Dismantle laws that criminalize same-sex sexual activity (Article 366 of the Penal Code) and those that are used to legitimize discrimination against the LGBT community (“shadow” and “disguise” laws).

- Hold gender-sensitivity workshops for the police force to eliminate discriminatory treatment, abuse, and harassment of women and members of the LGBT community.
- Enact new legislation which would, among other things, prohibit hate speech; end impunity for hate crimes against religious minorities; end arbitrary restrictions and discrimination against minorities in livelihood and business activities.

## **B. LAND OWNERSHIP AND ACQUISITION:**

Under the Constitution, the State is the ultimate owner of all lands and all natural resources above and below the ground. One may use land for specified purposes by obtaining a land use certificate. However, the State retains wide discretion to expropriate land “in the public interest.” Land-related disputes are decided by a number of administrative bodies, whose decisions are final and are exempt from judicial review under the law. Meanwhile, legal safeguards to protect rights of the land users are weak and inconsistently enforced. A number of cases have been reported in recent years where the State seized large-scale land holdings for private business projects and charged villagers with criminal trespass for refusing to leave.

In 2016, with a view to enacting the National Land Law and harmonizing existing land laws, the Myanmar government adopted the National Land Use Policy (NLUP), which acknowledges the need to legally recognize and protect customary land tenure. However, the NLUP is not legally binding and does not create mechanisms to resolve land-related disputes and grievances.

### Recommendations:

- Investigate ongoing and past land expropriation cases, and provide adequate remedy to victims of illegal land grabs.
- Reform land laws based on the NLUP to fully recognize and protect customary land tenure rights, especially in regards to a number of ethnic minorities, who are particularly vulnerable to abuses.
- Amend laws to allow judicial review for all administrative determinations concerning land-related disputes.

## **C. LABOR:**

Myanmar law guarantees the right to form and join unions. However, law enforcement is weak and the government has wide latitude to limit such rights to maintain “community peace” or “public order.” As such, discrimination on the basis of trade union activity remains prevalent in Myanmar. For example, in two reported cases, worker leaders who sought to organize unions were dismissed for creating “disturbances” in the workplace.

The increase in foreign investment exacerbates the wage “race to the bottom.” As a result, the minimum wage is now seen as a maximum wage. Myanmar’s minimum wage, at K3600 (around US\$3) per day, remains to be among the lowest in the region, and research by Oxfam found it insufficient to sustain a decent living. Furthermore, employers often seek to avoid paying the minimum wage by invoking legal provisions regarding apprentice and probation wages, which allow employers to pay three months of apprentice wages at 50% of the minimum wage followed by three

months of probation wages at 75% of the minimum wage. However, after the six-month period, many employers will dismiss the workers and hire new ones.

Finally, under the law, an employer who fails to abide by arbitration awards can only be punished by a maximum fine of K1 million (US\$372). As a result, workers have not been able to obtain accountability or effective remedy for violations of their labor rights.

Recommendations:

- Strengthen the protection of workers engaged in trade union activities to ensure that they do not face discrimination or dismissal by employers.
- Conduct regular reviews and adjustments to the minimum wage, which currently sets Myanmar's minimum wage at K3600 (around US\$3) per day.
- In order to prevent the abuse of the apprenticeship and probation provisions of the law, amend the Minimum Wage Law so that workers can receive the minimum wage regardless of the contractual terms.
- Increase the penalties for violations of workers' labor rights, including raising the current maximum fine of K1 million (US\$372) on employers and allowing prison terms for employers who do not abide by Arbitration Council decisions.

**D. STATE-OWNED ENTERPRISES:**

Myanmar law grants state-owned enterprises (SOEs), some of which are still controlled by the military, monopoly power in key sectors, including banking, telecommunications, electricity generation, and natural resource extraction. The SOEs may contract out key tasks or enter into joint ventures with private enterprises. The government promotes such public-private ventures but has done little to supervise the management and finances of these business relationships, resulting in serious transparency and accountability gaps. As such, SOE operations are rife with corruption and allegations of environmental and human rights abuses. For instance, the Letpadaung copper mine project—established as a joint venture between the Myanmar government, military-controlled Union of Myanmar Economic Holdings Limited (UMEHL), and Wanbao Mining, a Chinese company—has faced persistent allegations of land grabbing, environmental pollution, and the excessive use of force against protesters.

Recommendations:

- Require SOEs to publicly and systematically make a commitment to the implementation of the UNGPs.
- Enact freedom of information legislation to address the lack of transparency within SOEs' corporate governance.
- Implement rigorous, independent, and effective oversight mechanisms for SOEs, including mandatory audits of SOE accounts.

**E. FREEDOM OF EXPRESSION**

Freedom of expression is a fundamental right under the Constitution. However, a number of laws, such as the Telecommunications Law and Peaceful Assembly Law, allow the government to impose conditions on this fundamental right. These conditions provide justifications for authorities to arrest, prosecute, and convict civil society actors, journalists, and human rights defenders (HRDs), particularly those attempting to expose or challenge business-linked human rights violations. This has created a chilling effect, preventing many from freely exercising their rights to freedom of assembly, association, and expression.

#### Recommendations:

- Amend the Telecommunications Law, the Peaceful Assembly Law, and other laws that may have implications on the rights to freedom of expression and assembly to ensure consistency with international human rights principles and standards.
- End reprisals and the use of force against HRDs, particularly those who advocate for corporate respect for human rights and protest against major development projects and associated land grabs.
- Ensure prompt, independent, and impartial investigation into all cases of retaliation against HRDs and affected community members who seek to expose or challenge business-linked human rights violations. Ensure those responsible for the abuses are held legally accountable.

#### **F. ACCESS TO REMEDY:**

Access to justice is hampered by systemic weaknesses in the judiciary, including a lack of independence and capacity of judges, in addition to high levels of corruption.

Victims of business-related human rights abuses face practical barriers to access to justice due to the high costs of legal proceedings and low levels of awareness of individual rights. Ethnic minorities and women face additional barriers related to language differences, discriminatory practices, and non-recognition of customary laws. Furthermore, the government can arbitrarily sanction lawyers representing clients in politically sensitive cases, including suspending their licenses and even disbarring them. This can have a chilling effect on the kinds of legal services lawyers are willing to offer, which can in turn limit access to justice for human rights victims.

Existing non-judicial mechanisms in Myanmar are bureaucratic and overloaded with claims. The Myanmar National Human Rights Commission (MNHRC), the most established non-judicial mechanism for human rights victims in Myanmar, lacks independence from the executive branch, expertise on human rights laws and principles, and standardized procedures in assisting victims processing their claims.

#### Recommendations:

- Create an independent body to address corruption in the judiciary.
- Set up an independent committee of experts to oversee the appointment, promotion, and dismissal of judges. Recruit judges on the basis of legal experience and expertise.

- Reform and strengthen the legal education of law students, members of the judiciary, and officials of administrative bodies alike so that their training focuses on human rights, legal ethics, due process, and legal writing and analysis.
- Amend the Bar Council Act to ensure the independence of the Bar Council. Prohibit arbitrary sanctions of lawyers representing clients in politically sensitive cases.
- Amend the law to allow legal aid in civil and administrative cases. Conduct awareness-raising campaigns regarding the availability of legal aid services and how to access them.
- Allocate sufficient funding for courts to hire qualified and trained interpreters for all legal proceedings.
- Take concrete steps to address issues surrounding MNHRC's effectiveness, transparency, independence, and expertise on human rights laws and principles. In particular, ensure that MNHRC complies with the Paris Principles Relating to the Status of National Human Rights Institutions, and provide training to strengthen MNHRC's competence in handling complaints, specifically in applying international business and human rights frameworks and providing victims with access to justice. Establish processes and procedures to ensure the confidentiality of the cases so that complainants are protected from reprisal.

## PILLAR I

<b>GUIDING PRINCIPLE 1</b>	
<p>States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.</p>	
<b>Commentary to Guiding Principle 1</b>	
<p>States' international human rights law obligations require that they respect, protect and fulfill the human rights of individuals within their territory and/or jurisdiction. This includes the duty to protect against human rights abuse by third parties, including business enterprises.</p> <p>The State duty to protect is a standard of conduct. Therefore, States are not per se responsible for human rights abuse by private actors. However, States may breach their international human rights law obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse. While States generally have discretion in deciding upon these steps, they should consider the full range of permissible preventative and remedial measures, including policies, legislation, regulations and adjudication. States also have the duty to protect and promote the rule of law, including by taking measures to ensure equality before the law, fairness in its application, and by providing for adequate accountability, legal certainty, and procedural and legal transparency.</p>	
<b>1.1. International and Regional Legal Instruments</b>	
Has the government signed and ratified relevant international and regional legal instruments?	
Indicators	Scoping Questions
<b>International Human Rights Legal Instruments</b>	Has the government signed and ratified relevant international human rights legal instruments, such as ICERD, ICCPR, ICESCR, CEDAW, CAT, CRC, ICMW, CPED, CRPD, the core ILO conventions, and any corresponding protocols?

## GUIDING PRINCIPLE 1

<b>Regional Human Rights Legal Instruments</b>	Has the government signed and ratified relevant regional human rights legal instruments, such as the African (Banjul) Charter on Human and Peoples' Rights; the American Convention on Human Rights; the European Convention for the Protection of Human Rights and Fundamental Freedoms; and any corresponding protocols?
<b>Other Human Rights Legal Instruments</b>	Are there any other relevant human rights legal instruments that the government has signed and ratified?

### Implementation Status

The Myanmar government has ratified/acceded to the following **international human rights legal instruments**:<sup>1</sup>

- 1) Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (ratified 1997);
- 2) Convention on the Rights of the Child (CRC) (ratified 1991);
- 3) Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (CRC-OP-SC) (ratified 2012);
- 4) Convention on the Rights of Persons with Disabilities (CRPD) (ratified 2011);
- 5) International Convention on the Prevention and Punishment of the Crime of Genocide (ICPPCG) (ratified 1956);
- 6) Protocol Amending the Slavery Convention (acceded 1957);
- 7) United Nations Convention against Transnational Organized Crime (UNTOC) (acceded 2004):
- 8) Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Organized Crime (acceded 2004)
- 9) Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Organized Crime (acceded 2004)
- 10) United Nations Convention Against Corruption (UNCAC) (ratified in 2012);
- 11) International Labour Organization (ILO) Conventions: Myanmar ratified 23 out of 189 Conventions; 18 of those 23 are in force, while two have been denounced, and three have been abrogated.<sup>2</sup>
  - a) Forced Labour Convention, C029 (fundamental) (ratified 1955);



## GUIDING PRINCIPLE 1

- b) Freedom of Association and Protection of the Right to Organise Convention, C087 (fundamental) (ratified 1955);
- c) Worst Forms of Child Labour Convention, C182 (fundamental) (ratified 2013);
- d) Hours of Work (Industry) Convention, C001 (technical) (ratified 1921);
- e) Unemployment Convention, C002 (technical) (ratified 1921);
- f) Night Work of Young Persons (Industry) Convention, C006 (technical) (ratified 1921);
- g) Right of Association (Agriculture) Convention, C011 (technical) (ratified 1923);
- h) Weekly Rest (Industry) Convention, C014 (technical) (ratified 1923);
- i) Minimum Age (Trimmers and Stokers) Convention, C015 (technical) (abrogated);
- j) Medical Examination of Young Persons (Sea) Convention, C016 (technical) (abrogated);
- k) Workmen's Compensation (Accidents) Convention, C017 (technical) (ratified 1956);
- l) Workmen's Compensation (Occupational Diseases) Convention, C018 (technical) (ratified 1927);
- m) Equality of Treatment (Accident Compensation) Convention, C019 (technical) (ratified 1927);
- n) Inspection of Emigrants Convention, C021 (technical) (ratified 1928);
- o) Seamen's Articles of Agreement Convention, C022 (technical) (abrogated);
- p) Minimum Wage-Fixing Machinery Convention, C026 (technical) (ratified 1954);
- q) Marking of Weight (Packages Transported by Vessels) Convention, C027 (technical) (ratified 1931);
- r) Workmen's Compensation (Occupational Diseases) Convention (Revised), C042 (technical) (ratified 1957);
- s) Holidays with Pay Convention, C052 (technical) (ratified 1954).

The Myanmar government has ratified/acceded to the following **regional human rights legal instruments**:

The Asia Pacific region does not currently have any regional human rights legally-binding instrument or mechanism.

### Gaps

The gaps in the legal international human rights obligations of the Myanmar government come in **three forms**.

**First**, Myanmar has yet to sign/ratify a number of core international human rights instruments.

## GUIDING PRINCIPLE 1

The Myanmar government has signed but not ratified the following **international human rights legal instruments**:<sup>3</sup>

- 1) International Covenant on Economic, Social, and Cultural Rights (ICESCR) (signed 2015);
- 2) Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (CRC-OP-AC) (signed 2015);
- 3) Convention to Suppress the Slave Trade and Slavery (signed 1957).

The Myanmar government has not signed the following **international human rights legal instruments**:<sup>4</sup>

- 1) International Covenant on Civil and Political Rights (ICCPR);
- 2) ICCPR – Optional Protocol 1;
- 3) ICCPR – Optional Protocol 2;
- 4) ICESCR – Optional Protocol 1;
- 5) CEDAW – Optional Protocol;
- 6) Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT);
- 7) CAT – Optional Protocol;
- 8) Convention for the Protection of All Persons from Enforced Disappearance (CED);
- 9) International Convention on the Elimination of All Forms of Racial Discrimination (CERD);
- 10) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW);
- 11) CRPD – Optional Protocol;
- 12) CRC – Optional Protocol (CRC-OP-IC)
- 13) International Convention on the Prevention and Punishment of the Crime of Apartheid;
- 14) Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery;
- 15) Convention relating to the Status of Refugees;
- 16) Protocol relating to the Status of Refugees;
- 17) Rome Statute of the International Criminal Court;

## GUIDING PRINCIPLE 1

18) ILO Conventions: Myanmar has not ratified 73 of the 189 ILO Conventions that are in force. In addition, Myanmar has only ratified three of the eight fundamental ILO Conventions. Below is the list of the five fundamental ILO conventions that Myanmar has not ratified:<sup>5</sup>

- a) Right to Organise and Collective Bargaining Convention, C87 (fundamental);
- b) Abolition of Forced Labour Convention, C105 (fundamental);
- c) Minimum Age Convention, C138 (fundamental);
- d) Equal Remuneration Convention, C100 (fundamental);
- e) Discrimination (Employment and Occupation) Convention, C111 (fundamental).

The lack of ratification and signature of these instruments creates significant gaps in Myanmar's human rights legal framework, which is a key issue identified during the first and second cycles of Myanmar's Universal Periodic Review.<sup>6</sup> In the March 2016 report to the UN Human Rights Council, the Special Rapporteur on the situation of human rights in Myanmar also urged the new National League for Democracy (NLD)-led government to ratify the ICESCR and to sign and ratify the ICCPR in order to support the consolidation of democracy and rule of law in the country.<sup>7</sup>

**Secondly**, in a number of international human rights instruments that Myanmar has ratified/acceded to, the Myanmar government has made a number of reservations that reject the jurisdiction of the International Court of Justice (ICJ) over disputes relating to the interpretation or application of the concerned instruments. These reservations, therefore, create risks of legal accountability gaps under the international treaties Myanmar has ratified/acceded to.

The Myanmar government has ratified/acceded to the following **international human rights legal instruments** with the following reservations, declarations or understandings:

- 1) CEDAW (ratified 1997)
  - a) Reservation on Article 29 on the administration of the Convention, more specifically concerning the submission to arbitration of any dispute between States when a dispute concerns the interpretation or application of the Convention, and concerning the referral to the ICJ of any dispute that is not settled by negotiation: "[The Government of Myanmar] does not consider itself bound by the provision set forth in the said article."<sup>8</sup>
- 2) United Nations Convention against Transnational Organized Crime (acceded 2004)

## GUIDING PRINCIPLE 1

- a) Reservation on Article 35 of the Convention, concerning the settlement of disputes: “The Government further wishes to make a reservation on Article 35 and does not consider itself bound by obligations to refer disputes relating to the interpretation or application of this Convention to the International Court of Justice.”<sup>9</sup>
- 3) Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Organized Crime (acceded 2004)
  - a) Reservation on Article 15 of the Protocol, which deals with the settlement of disputes concerning the Protocol: “The Government of the Union of Myanmar wishes to express reservation on Article 15 and does not consider itself bound by obligations to refer disputes relating to the interpretation or application of this Protocol to the International Court of Justice.”<sup>10</sup>
- 4) Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Organized Crime (acceded 2004)
  - a) Reservation on Article 20 of the Protocol relating to the settlement of disputes: “The Government of the Union of Myanmar wishes to express reservation on Article 20 and does not consider itself bound by obligations to refer disputes relating to the interpretation or application of this Protocol to the International Court of Justice.”<sup>11</sup>
- 5) United Nations Convention Against Corruption (ratified in 2012)
  - a) Reservation on Article 66 paragraph 2 of the Convention which provides the possibility to refer disputes to the ICJ: “With regard to any dispute between two or more States Parties concerning the interpretation or application of the United Nations Convention against Corruption, the Union of Myanmar does not consider itself bound by paragraph 2 of article 66 of the Convention.”<sup>12</sup>

**Thirdly**, there are gaps in the implementation of the instruments Myanmar has ratified/acceded to. For example, despite ratifying the CRC, the Myanmar government has yet to put in place the necessary domestic regulatory framework and policies for business and industry to ensure that they respect the rights of children, particularly in regards to extractive industry and large-scale development projects.<sup>13</sup> The Myanmar government adopted the Myanmar Programme on the Elimination of Child Labour 2014–17 in collaboration with the ILO, but child labor remains pervasive. It was reported that one in five children, aged 10 to 17, have to work instead of going to school.<sup>14</sup> The Committee on the Rights of the Child, during its consideration of the combined third and fourth periodic report of Myanmar in 2012, emphasized it was especially “concerned at the effects of child labour, particularly forced and hazardous labour, living conditions of children, environment degradation, health hazards and barriers to their freedom of movement.”<sup>15</sup>

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### 1.2. International and Regional Soft Law Instruments

Has the government signed relevant international and regional soft law instruments?

Indicators	Scoping Questions
<b>International Human Rights Soft Law Instruments</b>	Has the government signed relevant international human rights soft law instruments, such as the UDHR, other UN declarations and/or resolutions, and the ILO Tripartite Declaration?
<b>Regional Human Rights Soft Law Instruments</b>	Has the government signed relevant regional human rights soft law instruments, such as the American Declaration of the Rights and Duties of Man and the ASEAN Human Rights Declaration?
<b>Other Human Rights Soft Law Instruments</b>	Are there any other relevant human rights soft law instruments that the government has signed?

### Implementation Status

The Myanmar government has signed or indicated its support for the following **international and regional human rights soft law instruments**:

- 1) United Nations:
  - a) Universal Declaration of Human Rights (UDHR) (signed 1948);
  - b) Permanent Sovereignty Over Natural Resources, United Nations General Assembly Resolution 1803 (XVII) (adopted 1962);
  - c) Declaration on the Establishment of a New International Economic Order, United Nations General Assembly Resolution 3201 (S-VI) (adopted 1974);
  - d) Charter of Economic Rights and Duties of States, United Nations General Assembly Resolution 3281 (XXIX) (adopted 1974);
  - e) Draft UN Code of Conduct on Transnational Corporations (adopted 1983);
  - f) UNGPs (unanimously adopted in 2011 by the United Nations Human Rights Council in resolution 17/4, including Myanmar as a Member State);

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g) United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (adopted 2007). The Myanmar government voted in favor of the UNDRIP, but clarified with reference to the right of self-determination that, it “understood that such rights referred to activities which did not impair the territorial integrity or political unity of States.”<sup>16</sup>

2) International Labour Organization:

- a) Declaration on Fundamental Principles and Rights at Work (signed 1998);
  - i) As all members of the ILO, Myanmar signed the Declaration on Fundamental Principles and Rights at Work in 1998.
- b) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (4<sup>th</sup> Edition, signed 2014);
- c) Declaration on Social Justice for a Fair Globalization (signed 2008).

3) Association of Southeast Asian Nations (ASEAN):

- a) ASEAN Human Rights Declaration (signed 2012).

Myanmar is a member of several intergovernmental forums on human rights which have been established in the Asia Pacific region:

- 1) ASEAN Intergovernmental Commission on Human Rights (AIHCR) (created 2009);
- 2) South East Asia National Human Rights Institution Forum (SEANF) (joined 2012 by Myanmar National Human Rights Commission);
- 3) Asia Pacific Forum of National Human Rights Institutions (joined 2012 by Myanmar National Human Rights Commission).

### Gaps

Although the Myanmar government has signed or indicated support for the international and regional soft law instruments listed under “Implementation Status,” gaps remain in so far as there are soft law mechanisms that the government has not expressly supported. However, it is difficult to draw an exhaustive list of all international and regional soft law instruments that Myanmar has not supported as the majority of such instruments are adopted without a formal country-by-country vote.

### 1.3. UN Guiding Principles on Business and Human Rights

Is the State actively implementing the UNGPs?

#### Indicators

#### Scoping Questions

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<b>Formal Statement of Support</b>	Has the State given a formal statement of support for the UNGPs?
<b>Implementation Structures</b>	Has the State put in place relevant structures to ensure implementation of the UNGPs, for example, through the establishment or designation of a body tasked with implementation measures or through the allocation of internal resources?
<b>Capacity-Building</b>	Has the State put in place measures to capacitate government actors and local citizens with knowledge and information on the UNGPs, for example, through workshops, conferences, or other events?
<b>Information</b>	Has the State disseminated information about the UNGPs through public media sources, internal guidance documents, or other materials?
<b>Other UNGPs Implementation Measures</b>	Has the State taken any other measures to implement the UNGPs within the State?
<b>Implementation Status</b>	
<p>Myanmar has demonstrated <b>formal support for the UNGPs</b> in the following ways:</p> <ol style="list-style-type: none"> <li>1) The Myanmar government has not formally endorsed the UNGPs. However, at the closing session of the ASEAN Next-Gen CSR Forum held in Bali, Indonesia in February 2015, Economic Advisor to the former President of Myanmar, Prof. Aung Tun Thet, informally announced that the Myanmar government will develop a National Action Plan on the implementation of the UNGPs.<sup>17</sup> The United Nations also lists Myanmar as a State that is in the process of developing a National Action Plan on its website.<sup>18</sup></li> <li>2) The Myanmar National Human Rights Commission's (MNHRC) Strategic Plan 2014-2016 acknowledges the role that the MNHRC should take with respect to business and human rights issues, even though there is no express mention of the UNGPs.<sup>19</sup> The plan mentions business and human</li> </ol>	

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rights as a priority issue on which the MNHRC should carry outreach and prepare advice.<sup>20</sup> The MNHRC is also mandated to investigate and inquire into cases where human rights are affected by the business sector.

Concerning the **implementation structures** for the UNGPs, preliminary research has not revealed any formal steps taken by the Myanmar government to implement the UNGPs, except to the extent that business and human rights issues are included within the Strategic Plan 2014-2016 of the MNHRC.

Examples of **capacity-building efforts organized by the MNHRC** to capacitate government actors with knowledge and information on the UNGPs are listed below:

- 1) A consultative workshop on the implementation of the UNGPs was organized by MNHRC, the ASEAN CSR Network, and the Union of Myanmar Federation of Chambers of Commerce (UMFCCI) at Nay Pyi Taw in August 2016. A total of 37 representatives attended the event—including 24 from government ministries, nine from the National Parliament, one from the Supreme Court of the Union, one from the Union Attorney General's Office, and two from Myanmar Women's Affairs Federation (MWAF).<sup>21</sup>
- 2) The Danish Institute for Human Rights (DIHR) and the Myanmar Centre for Responsible Business (MCRB) conducted a learning course on business and human rights at the MNHRC from August to September 2015. The training included a four-week e-learning course and a face-to-face workshop. The course provided an introduction to business and human rights frameworks, including the UNGPs, and discussed specific issues such as the potential human rights impact related to land and the extractive industries.<sup>22</sup> 27 participants from the MNHRC attended the training session.
- 3) A delegation from the MNHRC participated in a Workshop on Business, Human Rights, and the Environment organized by the Raoul Wallenberg Institute and held in Bangkok, Thailand in April 2015. Participants discussed the implementation of National Action Plans on Business and Human Rights, international human rights instruments, international labor conventions, bilateral trade agreements, and investment laws.<sup>23</sup>
- 4) A Commissioner of the MNHRC, Soe Phone Myint, attended the Business and Human rights Consultation Session and the ASEAN Next-Gen CSR Forum held in Bali, Indonesia in February 2015. At this event, participants discussed issues including the UNGPs and the development of National Action Plans consistent with the UNGPs.<sup>24</sup>

Myanmar has attempted to **disseminate information** to the public on the UNGPs in the following ways:



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- 1) No dedicated government publication on the UNGPs could be found.

### Gaps

The Myanmar government has not officially stated its support for the UNGPs. The UNGPs were endorsed unanimously by the UN Human Rights Council on 16 June 2011. However, since their adoption and endorsement, the government has not started any formal implementation of the UNGPs. The NLD-led government, which took office on 30 March 2016, has not made any commitment with regard to the UNGPs. However, the NLD Manifesto for the general election of November 2015 mentioned that the NLD would take measures to “encourage foreign investment [is] in line with the highest international standards,” and lay down “paths for economic cooperation that can bring sustainable long-term benefits.”<sup>25</sup>

### 1.4. Other Relevant Standards and Initiatives

Is the State supporting or participating in other standards and initiatives relevant to business and human rights?

#### Indicators

#### Scoping Questions

#### Standards

Has the government supported other standards on business and human rights, such as the IFC Performance Standards, the OECD Guidelines for Multinational Enterprises, and the UN Global Compact?

#### Initiatives

Has the government participated in initiatives, multi-stakeholder or otherwise, on business and human rights, such as the Global Network Initiative (GNI), the International Code of Conduct for Private Security Service Providers Association (ICoCA), and the Voluntary Principles on Security and Human Rights (VPs)?

#### Implementation Status

The Myanmar government supports and is involved in the following **standards and initiatives**:

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- 1) International Finance Corporation (IFC) Performance Standards
  - a) By being a member of the IFC, Myanmar commits to upholding the IFC Performance Standards in funded projects.
  - b) An advisory services agreement was signed between the IFC and the Ministry of Electric Power and Ministry of Environmental Conservation and Forestry in September 2015. As part of this advisory services program, IFC is to train the government and the private sector on IFC's Performance Standards in order to improve environmental and social risk management in hydropower projects in Myanmar.<sup>26</sup>
- 2) UN Global Compact
  - a) The Myanmar Chamber of Commerce and 14 companies formally joined the Global Compact in a signing ceremony with UN Secretary-General Ban Ki-Moon in May 2012. A Global Compact Local Network was established by the Myanmar Chamber of Commerce and the Office of the UN Resident Coordinator in Myanmar. In August 2017, a Memorandum of Understanding was signed by the officials of UN Global Compact Network Myanmar, Local Resource Centre, Yangon Regional Government, and the Union of Myanmar Federation of Chambers of Commerce and Industry (UMFCCI) to promote the role of civil society organizations in the UN Global Compact, expand UN Global Compact widely, support corporate social responsibility, and encourage B4P "Business for Peace" progress.<sup>27</sup>
- 3) The Extractive Industries Transparency Initiative (EITI)
  - a) This initiative, led by a multi-stakeholder board, sets international transparency standards regarding countries' natural resources and their extraction.
  - b) Myanmar was accepted as an EITI Candidate on 2 July 2014, which means it is implementing the EITI but has not yet met all compliance standards.<sup>28</sup>
  - c) Myanmar's first EITI report was published in January 2016 and covered revenues from the oil, gas, and mining sectors from 1 April 2013 to 31 March 2014.<sup>29</sup>

### Gaps

The following explains some of the gaps in the Myanmar government's support or involvement in relevant **standards and initiatives**:

- 1) The Extractive Industries Transparency Initiative
  - a) Following the publication of Myanmar's first EITI report, several international and regional organizations expressed concern about the report's insufficient coverage of the country's multi-billion dollar jade industry.<sup>30</sup> International NGO Global Witness stated that the report

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gave too little information about the ownership of companies and the terms of contracts – both crucial to the public’s ability to hold companies and officials accountable.<sup>31</sup>

- b) There are concerns that the EITI Board might suspend Myanmar if it failed to submit its second report by the end of March 2017.<sup>32</sup> At the time of writing, the NLD-led government had still not reformed the multi-stakeholder group (MSG) to draft the second report.<sup>33</sup> Civil society MSG member Ma Moe Moe Tun said that suspension from EITI would be “shameful,” considering the NLD’s commitment to transparency and accountability.<sup>34</sup> There is no publicly available information as to whether Myanmar was able to submit its second report in March 2017.
- 2) Voluntary Principles on Security and Human Rights Initiative
    - a) This multi-stakeholder initiative promotes the implementation of the Voluntary Principles in order to help guide oil, gas, and mining companies in relation to human rights risks associated with security measures taken to protect their operations.<sup>35</sup>
    - b) Myanmar is not a participant in this initiative.<sup>36</sup>
  - 3) International Code of Conduct for Private Security Service Providers Association (ICoCA)
    - a) The ICoCA sets standards for the private security service industry and creates an independent and external oversight body.<sup>37</sup>
    - b) Myanmar is not a member of the ICoCA.<sup>38</sup>
  - 4) Joint International Labour Organization and International Finance Corporation Better Work Standards
    - a) This initiative focuses on the garment sector and aims to enhance the protection of labor rights and access to remedy within that industry.
    - b) Myanmar is not a participant in this initiative.<sup>39</sup>
  - 5) Open Government Partnership
    - a) This initiative is a partnership between civil society and governments aiming at pushing governments to “become sustainably more transparent, more accountable, and more responsive to their own citizens, with the ultimate goal of improving the quality of governance, as well as the quality of services that citizens receive.”<sup>40</sup>
    - b) In November 2012, former President Thein Sein declared the intent of the government to join the Open Government Partnership by 2016.<sup>41</sup> The Thein Sein administration started the application process to join this initiative, however, there is no publicly available information regarding Myanmar’s membership process.<sup>42</sup>

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### 1.5. National Laws and Regulations

Does the general law of the State provide protection against business-related human rights abuses?

Indicators	Scoping Questions
<b>Constitution</b>	Does the constitution contain wording aimed at human rights protection?
<b>Labor Law</b>	Has the government put in place labor laws and regulations to ensure the protection and promotion of workers' rights?
<b>Environmental Law</b>	Has the government put in place environmental laws and regulations to ensure the protection and promotion of the rights of its citizens to health, a healthy environment, and livelihoods including, for example, clean water, clean air, and cultivatable land?
<b>Property and Land Management Law</b>	Has the government put in place land management laws and regulations to ensure the protection of the rights of its citizens, including the recognition of customary land rights and the incorporation of human rights considerations into environmental and social impact assessments and related licensing practices?
<b>Health and Safety Law</b>	Has the government put in place health and safety laws and regulations to ensure the physical and mental health of workers and communities?
<b>Corporate and Securities Law</b>	Has the government put in place corporate and securities laws and regulations to support ethical corporate behavior and business respect for human rights, such as through financial reporting, incorporation/registration, and stock exchange listing requirements?

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<b>Tax Law</b>	Has the government put in place tax laws and regulations to support ethical corporate behavior?
<b>Trade Law</b>	Has the government put in place trade laws and regulations to support the protection and promotion of human rights within trade practices?
<b>Disclosure and Reporting</b>	Has the government put in place law to support disclosure and reporting by corporations on human rights, labor rights, environmental impacts, corporate social responsibility, or other ethical issues?
<b>Procurement Law</b>	Has the government put in place laws and regulations to support the incorporation of human rights considerations into the procurement by the State of goods and services from the private sector?
<b>Anti-Bribery and Corruption</b>	Has the government put in place laws and regulations aimed at promoting anti-bribery and combatting corruption within and across governments?
<b>Human Rights Defender and/or Whistleblower Protection</b>	Has the government put in place laws and regulations aimed at protecting the rights of human rights defenders and/or whistleblowers?
<b>Information and Communications Technologies (ICT) Law</b>	Has the government put in place laws and regulations to ensure the protection of access to information, freedom of expression, privacy, and other information- and communication-based rights, online as well as offline?
<b>Other Laws and Regulations</b>	Has the government put in place any other relevant laws and regulations aimed at protecting and promoting human rights from business-related harms, including torture, genocide, and crimes against humanity? Do such laws and regulations extend extraterritorially, as permitted by the UNGPs and international human rights law?

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### Implementation Status and Gaps: Constitution

The following language from the Myanmar **Constitution** is aimed at protecting human rights:

Provisions on human rights, found in Chapter VIII of the Constitution, include:

- 1) Right to non-discrimination;<sup>43</sup>
- 2) Freedom of expression, right of association, and right to peaceful assembly;<sup>44</sup>
- 3) Right to privacy and security;<sup>45</sup>
- 4) Freedom of religion;<sup>46</sup>
- 5) Right to education;<sup>47</sup>
- 6) Right to health;<sup>48</sup>
- 7) Right to vote and be elected;<sup>49</sup>
- 8) Right to property;<sup>50</sup>
- 9) Right to equality, liberty, and justice;<sup>51</sup>
- 10) Right to conduct business freely;<sup>52</sup>
- 11) Right of legal defense.<sup>53</sup>

While not included as one of the “fundamental rights” under Chapter VII, the Constitution also recognizes the rights of peasants and workers by providing that the Myanmar government shall enact necessary laws to protect the rights of the peasants and workers.<sup>54</sup>

The following explains the gaps that exist in the protection of human rights, including from business-related human rights abuses, under the Myanmar **Constitution**:

- 1) Beneficiaries of human rights granted under the Constitution:
  - a) A number of human rights enshrined in Chapter VIII of the Constitution apply only to “citizens” of Myanmar, although they refer at times to “any person.”<sup>55</sup> For instance, the rights to freedom of expression and peaceful assembly are accorded only to citizens, rather than to

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everyone, as required under the ICCPR.<sup>56</sup> However, the right to equality before the law and the right to life are guaranteed for “any person.”

- b) The definition of citizenship is very restrictive. Under the 2008 Constitution, a person has Myanmar citizenship only if both his/her parents are nationals of Myanmar or if they possessed citizenship when the 2008 Constitution came into force.<sup>57</sup> As such, the law denies citizenship to numerous persons who, under international law, should have a right to citizenship.<sup>58</sup> In addition, citizenship, naturalization, and revocation of citizenship are left to be determined by national law without any constitutional safeguards.
  - c) The cumulative effect of these provisions renders many people, such as the Rohingya and people of Chinese, Indian, and Nepali descent<sup>59</sup> in Myanmar, stateless and with no legally recognized rights under national law.<sup>60</sup>
- 2) Conditionality of human rights to national law:
- a) Most of the rights granted under Chapter VIII of the Constitution are qualified by the phrase “in accordance with the law” or similar language, which seems to condition the content and even the existence of the right to national law.<sup>61</sup> These provisions essentially reverse the ordinary primacy of constitutional rights over enacted laws.<sup>62</sup>
- 3) Limitations on human rights:
- a) Broad and vague limitations can be imposed on rights without any democratic requirement of necessity or proportionality. For instance, freedom of expression, the right to peaceful assembly, and the right of association can be limited on grounds of “Union security, prevalence of law and order, community peace and tranquility, or public order and morality.”<sup>63</sup>
  - b) Under the Constitution, all rights granted under Chapter VIII “shall be restricted or revoked through enactment to law” in instances when members of the military need to “carry out peace and security.”<sup>64</sup> This gives the military wide discretion to call a state of emergency. The Special Rapporteur on the situation of human rights in Myanmar, Yanghee Lee, said that this provision allows even non-derogable rights to be restricted or revoked in a state of emergency, and possibly in other circumstances.<sup>65</sup>
  - c) The Special Rapporteur on the situation of human rights in Myanmar also identified that duties imposed on citizens to uphold “non-disintegration of the Union” or “non-disintegration of national solidarity” could be used to restrict the rights of individuals. For example, anyone who criticizes the government or the military could be accused of violating the duty to uphold non-disintegration of national solidarity.<sup>66</sup>
- 4) Content of human rights protection:
- a) The Constitution is silent on the *jus cogens* norm of prohibition of torture, inhuman or degrading treatment or punishment, as well as on the presumption of innocence until proven guilty.<sup>67</sup>

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- b) The Constitution does not mention the rights of indigenous peoples, minorities, or persons with disabilities.<sup>68</sup>
  - c) The prohibition of forced labor is not absolute and is derogable.<sup>69</sup> Article 359 of the Constitution allows forced labor by the government if it is in the “public interest” to do so. The ILO recommended this provision be amended, suggesting that the current language “could be interpreted in such a way as to allow a generalized exaction of forced labor from the population.”<sup>70</sup>
  - d) Article 348 of the Constitution guarantees that discrimination is prohibited on grounds of race, birth, religion, official position, status, culture, sex, and wealth, but other grounds of discrimination prohibited under international human rights law such as color, language, political or other opinion, and national origin are not prohibited.<sup>71</sup>
  - e) Despite having ratified the CEDAW, the Myanmar Constitution does not provide a strong substantive equality guarantee, because there is no explicit reference to the principle of equality between women and men beyond the bare prohibition of discrimination on the basis of sex.<sup>72</sup> In addition, the definition of discrimination does not define what constitutes discrimination against women or describe direct discrimination (intentional act) and indirect discrimination (acts that have the effect of creating or perpetuating inequality between men and women).<sup>73</sup>
  - f) The Constitution does not recognize the right to security of persons and the right of arrested persons to be informed promptly about the nature and cause of the charge against them.<sup>74</sup>
  - g) Under Article 37 of the Constitution, the State “is the ultimate owner of all lands and all natural resources above and below the ground, above and beneath the water, and in the atmosphere in the Union.”<sup>75</sup> This provision, together with others in Myanmar land laws, enables the State to carry out compulsory, and at times arbitrary, acquisitions of land. (See Section 1.5 on land laws for further information.)
- 5) Institutional issues:
- a) Article 11(a) of the Constitution provides for the principle of separation of powers:
    - i) Executive power: The Constitution provides that the President shall exercise his/her powers in conjunction with the National Defence and Security Council (NSDC).<sup>76</sup> However, six out of the 11 members of the NSDC are appointed by the Commander-in-Chief of the military. Ministers responsible for defense and security, home affairs, and border affairs are also appointed by the Commander-in-Chief of the military.<sup>77</sup> Hence, while the Constitution provides that the executive power is entrusted with the presidency, the Commander-in-Chief of Myanmar military retains outsized political clout.<sup>78</sup>
    - ii) Legislative power: 25% of parliamentary seats are allocated to the military in both houses of Myanmar’s parliament. This provides the military a *de facto* veto power over any proposed constitutional amendments, which require more than 75%



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of the parliamentary votes to be adopted.<sup>79</sup> In June 2015, the parliament rejected a proposed change to Article 436 of the Constitution to lower the 75% threshold to 70%.<sup>80</sup>

### iii) Judiciary power:

- a. Civilian courts do not have jurisdiction over military matters and the Commander-in-Chief's decisions are deemed "final and conclusive."<sup>81</sup> A broad interpretation of Article 445 of the Constitution also grants the military and other governmental actors impunity for past and present human rights violations.<sup>82</sup>
- b. The Special Rapporteur on the situation of human rights in Myanmar noted in her 2016 report to the Human Rights Council that "[a]lthough the separation of powers and the independence of the judiciary in Myanmar are guaranteed by the Constitution of 2008, they are undermined by the control currently exercised by the executive power over the judiciary."<sup>83</sup> For example, the President has power to determine the composition, selection, tenure, and removal of members of the Supreme Court.

### Implementation Status and Gaps: Labor law

The following is a non-exhaustive list of existing **labor laws** in Myanmar that protect various areas of workers' rights:

#### 1) Freedom of association, collective bargaining, and industrial relations

- a) Labour Organization Law<sup>84</sup> - This law aims to protect the rights of workers in accordance with Article 24 of the Constitution. This act was drafted on the basis of ILO Convention No. 87 on Freedom of Association and permits the exercise of freedom of association.<sup>85</sup> Specifically, the law grants workers the right to form and to join labor organizations by a minimum number of 30 workers or 10% of all workers. The law provides for five levels of labor organizations: basic level, township level, region or state level, federation level, and confederation level. The employer cannot dismiss an employee for joining a union and employees cannot be forced to join a union.
- b) The Settlement of Labour Disputes Law<sup>86</sup> - This law provides that parties to a labor dispute should consider using negotiation, conciliation, and arbitration as first steps before resorting to lockouts or strikes. Employers with more than 30 employees must form a workplace coordinating committee to help resolve disputes. Individual disputes should first go to the workplace coordinating committee and may be referred to a conciliation body set up at township level to mediate between employers and worker. On the other hand, for collective cases, there are two further stages of arbitration in case the disputes are not resolved at the negotiation and conciliation

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phases: (1) in the regional/state arbitration body tribunal and (2) in the tribunal formed by the arbitration council. A strike or lockout can only be carried out after the arbitration process fails. Despite the conciliation process, parties retain their right to sue in civil courts as the decisions in conciliation are not legally binding.<sup>87</sup>

### 2) Wages

- a) Minimum Wages Act<sup>88</sup> - This law provides a framework for the establishment of a minimum wage and for penalties if the employer fails to pay the minimum wage, which is set by a National Committee comprising of representatives from the government, employers, and labor organizations. The current minimum wage, entered into effect on 1 September 2015, is K3,600 per day (around US\$3 per day).<sup>89</sup> The Act covers those conducting part-time work and hourly jobs. It also mandates equal payment between men and women, grants salaried workers one day off per week, and requires overtime payment for those who work on days of leave.
- b) Minimum Wages Rules<sup>90</sup> - The Minimum Wage Rules allow employers to hire workers as apprentices for three months. During the apprenticeship period, employers may pay 50% of the minimum wage. After the apprenticeship period, employers may hire workers on a probation period for another three months where they pay them 75% of the minimum wage.
- c) 2016 Payment of Wages Law<sup>91</sup> - This law provides the definition of wages and obligations of employers regarding how and when to pay wages. The law also stipulates the expenses employers may deduct from wages, such as the costs of providing accommodation or transportation. It provides fines that an employer can impose, provided certain conditions are met if an employee causes intentional direct damage to company property. The law also mandates that overtime work must be paid according to the legally defined overtime rates.

### 3) Hours of work, weekly rest, and paid leave

- a) The Leave and Holidays Act<sup>92</sup> - The law provides for 14 days of public holidays where employees are granted full payment. However, in practice, the Myanmar government, on average, announces 25 public holidays per year.<sup>93</sup> The law also grants 10 consecutive days of full-paid annual leave after 12 months of full-time work (20 working days per month); six days of casual leave each year; and 30 days of medical leave, upon presentation of a medical certificate, with full salary for workers employed for more than six-month work or without pay for those employed for less than six months.<sup>94</sup> This law also includes provisions on maternity and paternity leaves.

### 4) Social security

- a) Social Security Law<sup>95</sup> - This law creates a health and social care insurance system. It allows employees to obtain cash benefits for disease, maternity, confinement, retirement, and funerals. The social security scheme is funded by monthly contributions from both the

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employer (3%) and the employee (2%). The law also provides an unemployment benefits insurance scheme, which ensures that unemployed persons receive cash benefits.

- b) Workmen's Compensation Act<sup>96</sup> - Employers who are not registered in accordance with the Social Security Law are required under the Workmen's Compensation Act to financially compensate employees who become injured or who die in accidents arising during and in consequence of their employment.
- 5) Migrant workers
- a) Registration of Foreigners Act<sup>97</sup> - This law sets out the rules concerning the registration of foreign workers. It allows authorities to arrest any person who violates the Act and imposes a penalty for such violations.
  - b) The Law relating to Overseas Employment<sup>98</sup> - This law grants migrant workers the right to claim full compensation or damages in cases of injury sustained at a foreign worksite, and the right to file a case for loss of worker's rights and privileges relating to overseas employment. It also provides for punishment if employment agencies are found to be violating the law.
- 6) Education, vocational guidance, and training
- a) Employment and Skill Development Law<sup>99</sup> - This law mandates the employers to provide training to employees and contribute an amount equivalent to 0.5% of the employee's salary to an Employee Skill Development Fund. This law also sets out that a written employment contract between employer and employee must be signed within the first 30 days of employment. Minimum terms must also be included in the contract.
- 7) Specific categories of workers
- a) Shops and Establishments Act<sup>100</sup> - This law contains the conditions of employment, such as working hours, overtime fee, and regular payment of wages, for employees working in shops and other establishments.
  - b) Law Amending Factories Act<sup>101</sup> - The Act provides that the standard working hours in factories are eight hours per day and 44 hours per week. It also provides rules on overtime wages and other worksite health and safety measures. The Act was amended in January 2016 with modifications pertaining to age limits for underage workers and new provisions on women workers' health, as well as new health and safety obligations for employers.<sup>102</sup>
  - c) Protection of the Farmer Rights and Enhancement of their Benefits Law<sup>103</sup> - This law aims to support farmers by providing suitable loans and assistance for investment, upon approval of the National Parliament.<sup>104</sup> It also provides measures to protect the rights of farmers possessing small plots of land, including arrangements to get necessary assistance and appropriate aid to qualified farmers in case of loss or damage caused by natural disasters.<sup>105</sup>

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- d) Myanmar Marine Fisheries Law<sup>106</sup> - This law provides that all fishermen have to be registered with authorities and that the master of the vessel can only hire registered fishermen. The master of the vessel is also responsible for the safety of the inspector, researchers, observers, and trainees who are on board the vessel.
  - e) Dock Workers Act<sup>107</sup> - This law regulates the employment conditions of dockworkers.
  - f) Oilfields Act<sup>108</sup> - The Act provides protection measures, such as health, safety, and worker welfare issues, for workers in the oil industry. The Act also deals with working hours, holidays, and employment of children, and mandates the establishment of an inspection mechanism.
- 8) Workers with disabilities
- a) The Rights of Persons with Disabilities Law<sup>109</sup>- Passed in 2015, this law mandates the creation of a National Committee for Disability Rights (NCDR) to be in charge of employment, discrimination, and vocational training issues. The law establishes a quota system, which requires the employers to employ a certain number of persons with disabilities. If the employer is unable to hire persons with disabilities, s/he must contribute to a dedicated fund.
- 9) Forced labor
- a) Law amending the Ward or Village Administration Act<sup>110</sup> - The law provides a definition of forced labor directly inspired by the 1930 ILO Convention on Forced Labour. The Act criminalizes forced labor, which is punishable by imprisonment, a fine, or both.<sup>111</sup>
  - b) The Anti Trafficking in Persons Law<sup>112</sup> - The law generally covers trafficking, including provisions on trafficking in men, women, and children, domestic and international trafficking, and trafficking for all forms of exploitation. It also foresees specific provisions on the protection and assistance of women, children, and youth survivors.<sup>113</sup>
- 10) Child labor
- a) The Child Law<sup>114</sup> - This law provides that every child has the right to work under their own volition in accordance with the law as well as the right to hours of employment, rest and leisure, and other reliefs. It also provides that the Ministry of Labour shall ensure the safety of children employees and prevent infringement of their rights. The law also provides that children or youth sentenced to imprisonment shall not be employed in rigorous labor.
  - b) Factories Act<sup>115</sup> and the Shops and Establishment Law<sup>116</sup> - As amended in January 2016, these laws raised the minimum working age to 14. These laws also provide special provisions for children above the age of 14. For instance, children between the ages of 14 and 16 can work only up to four hours a day and in a “non-hazardous environment.” However, children between the ages of 16 and 18 can work as adults if a doctor certified that they are fit and healthy.

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The following explains some of the serious gaps that exist in the protection of human rights, including from business-related human rights abuses, under Myanmar **labor laws**:

- 1) Freedom of association, collective bargaining, and industrial relations
  - a) Labour Organization Law
    - a. Most labor organizations deem the provision requiring 30 people or 10% of workers when establishing a trade union or labor organization as unreasonable as it restricts the rights of the workers to freely establish a trade union or labor organization.<sup>117</sup>
    - b. Although workers have the right to form and join labor organizations under the Labour Organization Law,<sup>118</sup> the lack of enforcement of this law allows employers to discriminate against workers who seek to exercise their freedom of association legally. In two reported cases, worker leaders who sought to organize unions were dismissed for creating “disturbances” at the workplace.<sup>119</sup>
    - c. In regards to the content of the law, the ILO recommended the Myanmar government to amend the law to mandate parties to engage in collective negotiation in good faith and strengthen the enforceability of the decisions made by labor arbitration mechanisms.<sup>120</sup> In addition, the current law imposes burdensome requirements for unions that seek to establish themselves beyond the company level.<sup>121</sup>
    - d. Myanmar still has existing laws that restrict the freedom to establish unions or labor organizations. The 1908 Unlawful Associations Act (amended in 1957),<sup>122</sup> for instance, contains sweeping provisions under which associations, such as trade unions and labor organizations, may be declared unlawful by the President even when they conduct their activities peacefully.
    - e. With regard to strikes and lockouts, the law restricts the full freedom of the labor organizations and trade unions’ right to strike by subjecting such right to the authority of a higher-level labor organization, which is the “relevant Labour Federation.” This contravenes the freedom of unions to formulate their own activities.<sup>123</sup>
    - f. The law further states that a majority of member workers is required for the approval of strike actions.<sup>124</sup> However, it is not clear whether this refers to a majority of all the member workers or only to those taking part in the poll to decide on the strike action.<sup>125</sup>



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and probation wages, which are considered “outright poverty wages,” for the first three to six months with a new employer if they do.<sup>136</sup>

### 3) Hours of work, weekly rest, and paid leave

- a) The Leave and Holidays Act - The Committee of the ILO in 2014 recommended the government to amend Article 4(3) of the Leave and Holidays Act to provide for at least 12 working days of leave for young workers under 16 years of age.<sup>137</sup>

### 4) Forced labor

- a) The Anti Trafficking in Persons Law<sup>138</sup> - This law provides that no prosecution shall be taken against the trafficked victims for any offense prescribed by this law. However, such protection is limited as it does not preclude prosecution of victims of trafficking for “any other offense arising as a direct consequence of trafficking in persons.”<sup>139</sup> For instance, victims of trafficking could potentially be charged for illegally entering Myanmar or for working without a legal permit. Victims of sex trafficking could also potentially be prosecuted for prostitution, which is a criminal offense in Myanmar.<sup>140</sup> The U.S. Department of State also reported in 2015 that “[i]nadequate efforts to screen for indicators of trafficking in thousands of anti-prostitution interventions may have led to the treatment of sex trafficking victims as criminals.”<sup>141</sup> In 2008, the CEDAW Committee expressed concern at reports that the anti-trafficking law has been abused and that innocent people have been arrested on false trafficking charges.<sup>142</sup> Finally, there is no provision in the law that specifically requires the State to consider the age, gender, and special needs of trafficked victims.<sup>143</sup>

### 5) Child labor

- a) The Child Law<sup>144</sup> - A “child” is defined as a person less than 16 years of age. This contravenes the CRC, which Myanmar is a party to. The definition of “child” as a person under the age of 16 is currently subject to the ongoing Child Law revision process.<sup>145</sup>

## Implementation Status and Gaps: Anti-corruption law

The following is a non-exhaustive list of relevant existing **Anti-Bribery and Corruption** laws in Myanmar:

- 1) Anti-Corruption Law<sup>146</sup> - Corruption can be prosecuted under several civil and criminal law provisions in Myanmar but is mainly addressed in the Anti-Corruption Law.<sup>147</sup> This law provides the specific offenses and sanctions in bribery cases committed both in the public and the private sectors. It applies to offenses committed by any person within Myanmar and citizens or permanent residents of Myanmar for actions committed

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outside the country. This law creates an Anti-Corruption Commission, which has investigation and prosecution powers. The Commission can also act in response to complaints from an aggrieved party.

The following explains the gaps that exist in the protection of human rights, including from business-related human rights abuses, under Myanmar **Anti-Corruption** laws:

- 1) Compared to relevant international instruments on corruption, the definition of “bribery” under the Anti-Corruption Law is vague and limited, stating that a bribe “includes money, property, gift, services fee, entertainment, and other illegal benefit” received free of charge.<sup>148</sup> This definition is not broad enough to cover instances where no gift or other tangible item is offered. In addition, the law does not cover small facilitation payments to public officials, which are thus not considered as bribes. This is problematic as small payments made to Myanmar public officials to obtain improper advantages are a widespread practice.<sup>149</sup>
- 2) Myanmar suffers from high-level corruption across all sectors. According to Transparency International’s 2016 Corruption Perception Index, Myanmar ranks 136<sup>th</sup> out of 176 countries.<sup>150</sup> In 2015, the U.S. Department of State also reported that corruption is prevalent in Myanmar and that bribes are routinely expected when conducting official transactions.<sup>151</sup> According to World Economic Forum Global Competitiveness Index 2015-2016, corruption is the fourth most problematic factor when doing business in Myanmar (after access to financing, inadequately educated workforce, and policy instability).<sup>152</sup>

### Implementation Status and Gaps: Environmental law

The following is a non-exhaustive list of existing **environmental laws** in Myanmar:

- 1) Environmental Conservation Law and Environmental Conservation Rules<sup>153</sup>- This law grants powers to the Ministry of Natural Resources and Environmental Conservation [MONREC– formerly the Ministry of Environmental Conservation and Forestry (MOECA)] to establish and administer a system of environmental impact assessment (EIA) and social impact assessment to evaluate whether a public or private project or activity may cause significant impact on the physical environment and ecosystems, as well as on the well-being of humans and other living beings (including negative health or socioeconomic impacts).



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- 2) The Environmental Impact Assessment Procedures<sup>154</sup> - The Environmental Impact Assessment Procedures were adopted and published in December 2015.<sup>155</sup> Under the law, if the MONREC decides that a project may have significant adverse impacts on the environment, the project developer must submit an EIA Report. A project which MONREC deems to have less adverse impact will be required to go through an Initial Environmental Examination (IEE). MONREC will issue an Environmental Compliance Certificate (ECC) to allow the project to proceed if it approves the EIA or IEE report. MONREC may also order a project to go through an EIA process if the IEE report is deemed unsatisfactory. These rules apply to existing projects, which are required to conduct environmental compliance audits to identify concerns related to the projects' environmental impacts and determine whether a retroactive IEE or EIA is necessary. The rules also provide for criminal sanctions and compensation to communities affected by a project in case of environmental damages.
- 3) Protection of Wildlife and Conservation of Natural Areas Law<sup>156</sup> - This law aims to protect wildlife and wild plants, conserve natural areas, support natural scientific research, and establish zoological gardens and botanical gardens.
- 4) Forestry Law<sup>157</sup> - This law aims to implement forest policy and environmental conservation policy to prevent the destruction of forests and biodiversity, ensure conservation of natural forests, and establish forest plantations.
- 5) The Conservation of Water Resources and Rivers Law<sup>158</sup> - This law aims to conserve and protect the water resources and rivers system. It establishes duties and powers of competent authorities responsible for managing and controlling all activities related to navigation, harboring, and conservation of rivers and creeks.
- 6) Pesticides law<sup>159</sup> - This law provides for the institution of the Pesticide Registration Board that, in close collaboration with the Myanmar Agricultural Service, undertakes all actions necessary to test all pesticides and ban the use of harmful pesticides and active ingredients. Companies or individuals who want to formulate, trade, distribute, or use pesticides must apply for a registration permit.
- 7) Fertilizer Law<sup>160</sup> - This law provides for the supervision and control of the fertilizer businesses to ensure the quality of fertilizers and the conservation of soil and the environment.
- 8) Seed Law<sup>161</sup> - This law aims to develop commercial flowers/fruits and cultivable plant seeds by cultivating and producing crops using pure seeds for the development of the agricultural sector in Myanmar.
- 9) Marine Fisheries Law<sup>162</sup> - This law aims to conserve marine fisheries and regulates the granting of fishing rights.

The following is a non-exhaustive list of existing **laws related to economic activities and containing relevant provisions on environmental protection** in Myanmar:

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- 1) Private Industrial Enterprise Law<sup>163</sup> - This law sets forth the avoidance or reduction of environmental pollution as a principle. The body in charge of granting or terminating the registration of private industrial enterprises must also ensure that private industrial enterprises do not harm the environment or cause pollution.
- 2) Myanmar Mines Law<sup>164</sup> - Recent amendments to the Myanmar Mines Law through the enactment of Law No. 72/2015 on 24 December 2015 contain provisions relating to environmental protection.<sup>165</sup> This law provides that foreign miners have an obligation to establish and contribute annually to a reserve fund for environmental conservation. In addition, miners have an obligation to prepare and carry out mine rehabilitation following closure. The amended law also expands inspection mechanisms to include the adverse social and environmental impacts of a project. Finally, the law introduces “feasibility studies,” which are defined to include the following information: (1) viability of the mineral project, including the methods of exploration, extraction, and processing; (2) financial analysis of the project, including information on planned investment and anticipated levels of commercial production; and (3) evaluation of social and environmental factors.<sup>166</sup>
- 3) Myanmar Investment Law<sup>167</sup> - The law, adopted in October 2016, provides that investment activities that may cause significant damage to the environment are restricted or prohibited. The law enumerates businesses where new investments will need to be approved by the Myanmar Investment Commission (MIC), including those that (1) are strategic to Myanmar; (2) are capital-intensive; (3) are likely to cause a large impact on the environment and the local community; (4) use state-owned land and property; or (5) are designated by the government to require the submission of a proposal to the MIC. This is a rollback of the 2012 Foreign Investment Law, which required all investments to be approved by the MIC.
- 4) Myanmar Special Economic Zones Law<sup>168</sup> - This law tasks the Management Committees of special economic zones (SEZs) to supervise and inspect the implementation of environmental conservation in accordance with applicable laws. It also provides that investors should abide by the Environmental Conservation Law and international standards and prevent social and health impacts in accordance with existing laws.

The following explains some of the gaps that exist in the protection of human rights, including from business-related human rights abuses, under Myanmar laws related to environmental protection:

- 1) Environmental Conservation Law<sup>169</sup> - Under Article 36 of the law, MONREC may exempt or relieve any governmental department, organization, or private business from complying with this law “for the interests of the Union and its people.” This exemption is broad and vague and may undermine the protections embedded under this law if applied in a non-transparent and subjective manner.<sup>170</sup> Moreover, it remains unclear

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whether the law mandates social impacts of the project to be included under the EIA, even though MONREC (then called MOECAP) reportedly advised informally that social and human rights impacts should also be addressed in the EIAs.<sup>171</sup>

- 2) The Environmental Impact Assessment Procedures<sup>172</sup> - Upon examination of the state of disclosure of EIA and IEE, the MCRB found that half of the oil and gas companies it surveyed did not publish an IEE or EIA as required under the law, which mandates disclosure of the IEE and EIA reports to civil society, persons affected by the project, and local communities.<sup>173</sup>
- 3) Myanmar Mines Law<sup>174</sup> - The enforcement of existing mining law and its regulations is reportedly weak and ineffective.<sup>175</sup> The absence of stringent environmental requirements in the 1994 Mines Law and its implementing rules is a major gap in view of the detrimental impacts of mining on the environment in Myanmar.<sup>176</sup> This gap remains in the recently adopted amendments to the Mines Law as they do not require companies to comply with the Environmental Conservation Law, Environmental Conservation Rules, and EIA Procedure. More specifically, the Myanmar Mines Law does not require compliance with the EIA Procedure and obtainment of an ECC from the relevant ministry in order to obtain a mining permit.<sup>177</sup> In addition, the fines provided by the amendments are insufficient to serve as an effective deterrent: K5 million (roughly US\$3,600) for operating without a permit and only K1 million (roughly US\$730) for environmental, health, and safety violations.<sup>178</sup>
- 4) Both the 1996 Myanmar Mines Law and its 2015 amendment do not contain provisions for consultation with local communities.<sup>179</sup> The Ministry of Mines is charged with granting mining permits based on information in a feasibility study, which does not require consultation with local communities, or an IEE/EIA process.
- 5) Myanmar Investment Law<sup>180</sup> - There are doubts regarding whether the MIC has the expertise and resources to determine whether an investment will negatively affect the public and the environment. Many believe the MONREC and the Environmental Conservation Department (ECD) are better positioned to make such determination. Moreover, the new Investment Law lacks clarity on how and when approval for a proposed investment may be obtained – it remains unclear if such decision is predicated on the outcome of an IEE or EIA at all, or if the company needs to first produce an Environment Management Plan (EMP) or obtain an ECC. Furthermore, Article 23 provides that all international agreements shall prevail over any inconsistent laws of Myanmar. Such provision could be detrimental where there are treaty provisions that may harm the people and the environment in Myanmar. MCRB highlights that the clause “may also (and more likely) be interpreted in line with international trade and investment agreements which commonly contain obligations that constrain policy-making and administrative action in protection of human rights and environmental protection.”<sup>181</sup>

**Implementation Status and Gaps: Land and property management law**

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The following is a non-exhaustive list of existing **Property and Land Management laws** in Myanmar:

- 1) Constitution<sup>182</sup> - Under Article 37 of the Constitution, the State “is the ultimate owner of all lands and all natural resources above and below the ground, above and beneath the water, and in the atmosphere in the Union.”
- 2) The Land Acquisition Act<sup>183</sup> - This law applies to lands not covered by other more specific land laws. It enables the State and companies to acquire land that is “likely to prove useful to the public.” The law also provides basic procedures for acquiring land, valuating land, and raising objections to proposed acquisitions. The law provides that compensation “at market value” shall be provided to those from whom land has been acquired. According to a representative from NGO Namati, the Act is under review by a closed-door group of experts as of October 2016.
- 3) The Farmland Act<sup>184</sup> - This law provides that all users of farmland, including individuals, government departments or organizations, NGOs, and companies, need to apply for land use certificates. The certificates grant the right to sell, exchange, access credit, and lease the land. Rights granted under the certificates are freely transferable. The law also provides that farmland may be repossessed “in the interests of the State or the public” provided that suitable compensation is paid to the farmland rights holder.
- 4) The Vacant, Fallow, and Virgin Land Act<sup>185</sup> - This law enables the State to lease State land which is considered “vacant, fallow, or virgin” (VFV). Under the law, foreign investors holding MIC permits, investors in joint ventures with government bodies, and Myanmar investors can apply for rights to cultivate and use VFV land. Under the VFV Rules, the Central Committee for VFV land management is granted the right to seize VFV land on several grounds, including where natural resources are discovered and for the implementation of projects “required in the interests of the State.”<sup>186</sup>
- 5) Myanmar Investment Law - The law, which combines the Foreign Investment Act and the Citizen’s Investment Law, now provides that foreign investors can obtain leases over land for a period of 50 years, with an option to extend for an additional 20 years. According to the law, companies investing in less economically developed and remote regions can apply for longer lease periods than the aforementioned lease period, with special approval from the MIC.
- 6) The Special Economic Zone Law<sup>187</sup> - This law applies to land located within SEZs. A land use or land lease permit can be issued to an SEZ investor or developer for 50 years, renewable for an additional 25 years. The law provides that the developer or investor shall bear the compensation and relocation costs associated with the land-related investments.
- 7) National Land Use Policy<sup>188</sup> - The NLD-led government adopted the National Land Use Policy (NLUP) in January 2016. The policy sets out a sound basis for land reform and refers specifically to human rights standards in its basic principles. It acknowledges the need to legally recognize and protect customary land tenure, ensure equality between men and women over land resources, provide correct and accurate land information,

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and establish inclusive and transparent processes for the planning and drawing of land maps. The NLUP requires that the process in which land projects are developed and managed needs to be participatory, transparent, and accountable. It also mandates the establishment of fair procedures relating to restitution and reclaiming land tenure and the respect of housing rights of internally displaced persons and returning refugees. Importantly, the policy provides that public interest should be prioritized over private companies in land use decision-making.<sup>189</sup>

The following explains some of the gaps that exist in the protection of human rights, including from business-related human rights abuses, under Myanmar **Property and Land Management laws**:

- 1) The Land Acquisition Act<sup>190</sup> - Under this law, the government can carry out land acquisition for a company if the government “is or was bound” to provide land under an agreement with a company, without any additional requirement of public interest. In such an event, the agreement between the company and the government must be published in the National Gazette and notified to the public. However, such notification measure is insufficient in practice as it does not require direct notification to the landowners or users, and such individuals rarely consult the National Gazette.<sup>191</sup> Absent effective notification deprives landowners or users of their right to object to the acquisition within the legal timeframe.<sup>192</sup> In addition, this law provides that compensation “at market value” shall be provided to those from whom land has been acquired. However, compensation is rarely paid in practice and is often not in line with market value.<sup>193</sup> In addition, compensation practices are perceived as subjective and often inconsistent as there are no standard evaluation methods and no independent oversight mechanism.<sup>194</sup>
- 2) The Farmland Act<sup>195</sup> - Under this law, without an official Land Use Certificate, those residing on or using the land do not possess any legal land use rights. This is highly problematic as a large majority of the rural population in Myanmar lives on and uses land under customary land practices, which are not adequately recognized and protected under national law. This renders many people in the rural and ethnic areas of the country vulnerable to displacement and other forms of abuse.<sup>196</sup> Secondly, the government retains the power to revoke land use certificates if any conditions of use are not met, which further weakens land tenure security for the users.<sup>197</sup> For instance, the land user can be fined or his/her land rights can be revoked if the farmland remains fallow “without a sound reason,” a crop other than the regular crop is cultivated without permission, or the farmland is cultivated without the permission of relevant farm management body.<sup>198</sup> Finally, this law does not provide adequate procedures for land users to object to land acquisitions, receive compensation, and seek legal recourse by way of independent judicial review.<sup>199</sup>
- 3) The Vacant, Fallow, and Virgin Land Act<sup>200</sup> - Civil society groups and farmers’ organizations have highlighted that there is a significant risk that lands deemed vacant, fallow, or virgin under this law have actually been used for generations by people who do not have any legal land titles or have been subject to shifting cultivation according to traditional practices.<sup>201</sup> The fact that the law does not recognize customary land rights may

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hence render many vulnerable to abuses, such as large-scale displacement, without access to legal recourse or appropriate compensation, and fuel tensions or even conflict over land disputes.<sup>202</sup> In addition, this law does not provide adequate procedures for land users to object to land acquisitions, receive compensation, and seek legal recourse by way of independent judicial review. Finally, this law provides strict criminal penalties for destruction of immovable property on the land, encroachment on the land without permission, or obstructing VFV land rights owners.<sup>203</sup> Many are concerned that these provisions may be used against people objecting to land acquisition or seeking remedy in case of land acquisition.<sup>204</sup>

- 4) The Special Rapporteur on the situation of human rights in Myanmar expressed concerns over the three laws described above and underlined how “existing laws, including the colonial Land Acquisition Act, the 2012 Farmland Law, and the Vacant, Fallow, and Virgin Land Law, give the Government discretion to confiscate land for projects deemed in the national interest. This framework is particularly problematic as many land users do not have formal land titles, and customary land use and community-managed resources remain unrecognized.”<sup>205</sup>
- 5) The Land Acquisition Act and the Farmland Act both contain a finality clause stating that decisions of the concerned statutory bodies are final, and thus are exempt from judicial review. Following the jurisdiction of Myanmar’s courts as provided for in the 2008 Constitution, the decisions of these bodies should not be considered as final. To ensure that the administrative bodies are acting reasonably and in accordance with law, courts must have the power of review over these administrative bodies’ decisions.<sup>206</sup>
- 6) The Foreign Investment Rules<sup>207</sup> - The 2013 Foreign Investment Rules provide certain protections against abuses related to leases by foreign companies investing under a MIC Permit. The MIC may terminate the lease of land to the foreign investor if the investor carries out business that is not compatible with the original proposal.<sup>208</sup> However, the 2016 Myanmar Investment Law does not contain any of these protections. At the time of writing, the Foreign Investment Rules required to implement the provisions of the 2016 Myanmar Investment Law have not yet been issued. Thus, in situations where provisions of the 2016 Myanmar Investment Law cannot be implemented yet because of a lack of implementing rules, the rules issued under the 2012 Foreign Investment Law will continue to apply to the extent that they do not directly conflict with the provisions of the new law.<sup>209</sup>
- 7) The Special Economic Zone Law<sup>210</sup> - The International Commission of Jurists notes that this law contains three chapters on investor’s benefits, without mentioning human rights.<sup>211</sup> The law also provides that the developer or investor shall bear the compensation and relocation costs associated with the investment. However, the law does not provide that communities affected by the special economic zone should be consulted.<sup>212</sup> Neither does it provide procedures for planning or carrying out resettlement for displaced communities.<sup>213</sup> Residents affected by the SEZ in Myanmar, notably in the Dawei SEZ in Tanintharyi Division and the Kyaukphyu SEZ in Rakhine State, accuse the government of land grabs and insufficient or unpaid compensation for relocation. They also claimed that the government did not conduct adequate public

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consultation. As such, the community suffered the loss of the heritage that was associated with the confiscated land.<sup>214</sup> Land confiscations also occurred in the Thilawa SEZ in Yangon Division and were highly criticized as neither the land acquisition processes nor the compensation offered to local residents complied with applicable laws.<sup>215</sup>

- 8) National Land Use Policy<sup>216</sup> - The NLUP was developed with an eye to enacting a new National Land Law and to harmonize existing land laws.<sup>217</sup> As a mere policy, the NLUP is not legally binding, and it does not create mechanisms to resolve land-related disputes and grievances.<sup>218</sup> The policy must be enshrined in law if it is to aid the resolution of land-related legal issues. Furthermore, due to the centralized governance structures it outlines in the policy, critics believe that the NLUP would facilitate continued centralized ownership, control, and land grabbing in ethnic states.<sup>219</sup>

### Implementation Status and Gaps: Health and safety law

The following is a non-exhaustive list of the main existing **Health & Safety laws** in Myanmar:

- 1) Factories Act - This law provides that any accident inside or outside a factory above a certain size must be reported to the Factories and General Labour Laws Inspection Department.<sup>220</sup> The Factories Act was amended in January 2016 with new provisions on women workers' health as well as new health and safety obligations for employers in factories.<sup>221</sup>
- 2) Oilfield Workers and Welfare Act<sup>222</sup> - This law provides protection measures for workers in the oil industry, including measures covering health, safety, and worker welfare.
- 3) Private Industrial Enterprise Law<sup>223</sup> - This law stipulates that the body in charge of granting or terminating the registration of private industrial enterprises must ensure that private industrial enterprises do not harm the health of the public in the vicinity of the enterprise or cause harm to the health of its workers.
- 4) Myanmar Mines Law<sup>224</sup> - This law provides that the holder of a mining permit must produce and implement plans relating to the welfare, health, and sanitation of workers in a mine. Inspections of mines include the health, sanitation, prevention of accidents, and welfare of personnel in the mine.
- 5) Social Security Law<sup>225</sup> - Victims of workplace accidents resulting in temporary disability are entitled to 12 months pay at 70% of their average salary at the rate they were being paid four months prior to the accident. In the event of permanent disability, victims are entitled to the same rate for a duration of five, seven, or nine years, depending on the gravity of the injury. If the employment injury resulted in death, the

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dependents are entitled to receive 30, 50, 60, or 80 times the deceased's average monthly wage in the four months before the death of the insured, depending on his/her contribution period.

The following explains the gaps that exist in the protection of human rights, including from business-related human rights abuses, under Myanmar's **Health and Safety** laws:

- 1) Myanmar has several laws in relation to health and safety, and it is in the process of adopting a new Occupational Health and Safety Act. Despite having health and safety standards, implementation of these standards remains weak. There is also a general lack of awareness among the workers of their rights in this area.<sup>226</sup> A 2014 research on the oil and gas sector in Myanmar found that artisanal oil extraction is carried out with little health and safety protection and is subject to few labor inspections.<sup>227</sup> Poor health and safety measures are also reported in the tourism and mining industry.<sup>228</sup>
- 2) According to the MCRB, the government is drafting a Mines Safety Law. Its current status is unknown, but it is believed to be at the stage of Parliamentary review. The draft law reportedly covers occupational health and safety issues in the mining industry and environmental impacts of the industry, with the hope of increasing efficiency of the mining production.<sup>229</sup> A review by the MCRB highlights weaknesses in the current draft of the Mines Safety Law. First, it is not clear how the requirement to submit to the Ministry and Department of Mines a mining plan, including a mine safety plan, would sit vis-à-vis the requirement to submit an EIA or Initial Environmental Investigation to the Environmental Conservation Department. Second, the draft definitions and provisions of the Mines Safety Law correspond only to those of the 1996 Mines Law, but not to those in the 2015 amended Mines Law. For instance, the definition of "environmental impact" in the Mines Safety law covers only changes to the physical environment which may have a physical or mental impact on people or animals, but not the social, socio-economic, health, cultural and other impacts as addressed by the EIA Procedure. Third, while the draft Mines Safety Law requires mining permit holders to take all necessary preventive measures to protect workers from accidental injuries and environmental pollution, it does not require mine operators to prevent foreseeable injuries related to the cumulative, long-term exposure to dust and chemicals. Finally, the scope of the safety provisions is limited as they apply only to mining and processing workers, but not to anyone hired or subcontracted by the mine permit-holder.<sup>230</sup>

**Implementation Status and Gaps: Corporate and securities law**



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The following is a non-exhaustive list of relevant existing **Corporate and Securities Laws and Disclosure and Reporting Laws** in Myanmar that support ethical corporate behavior and business respect for human rights:

- 1) Banks and Financial Institutions Act<sup>231</sup> - This law introduces governance measures to improve the functioning of boards of directors and prevent governance risks in banks. The law provides that the board shall adopt adequate internal practices and procedures that promote ethical and professional standards. It also states that the Central Bank may issue directives and regulations on non-bank financial institutions regarding governance requirements, transparency and disclosure requirements, and consumer protection.
- 2) Companies Act<sup>232</sup> - The 1914 Companies Act is currently under review and the government submitted a draft of the new Myanmar Companies Law to the parliament in July 2017. The new law reportedly aims to provide further standards on disclosure of corporate information. The draft law clarifies reporting requirements for directors by providing that the report “must include a fair review of the company’s business, including a description of the company’s primary business, an analysis of the company’s performance during the year, a description of risks and uncertainties facing the company and any other matters which may be prescribed.”<sup>233</sup>
- 3) Yangon Stock Exchange (YSE) Listing Criteria<sup>234</sup> - The YSE officially came into operation on 25 March 2016. The YSE Listing Criteria were published in August 2015 to provide guidelines on the types of information publically traded companies must disclose. Article 5(a) of Notification 2/2015 issued by the Securities and Exchange Commission requires that the Prospectus includes a business overview, which provides information regarding “performance of the company’s business, the principal activities and principal markets, the principal risks and uncertainties facing the company, material contracts, research and development, etc.”<sup>235</sup>

The following explains the gaps that exist in the protection of human rights, including from business-related human rights abuses, under Myanmar **Corporate and Securities Laws and Disclosure and Reporting Laws**:

- 1) Myanmar does not have robust legal standards on good corporate governance.<sup>236</sup> According to the IFC, “many local companies struggle with underdeveloped board of directors, ill-defined director duties, poor transparency, rudimentary control frameworks, and inadequate shareholder practices.”<sup>237</sup> In its investment policy review conducted in 2014, the Organisation for Economic Co-operation and Development (OECD) recommended the government introduce basic principles of corporate governance into the corporate legal framework and to consider requiring regular disclosure of financial statements to increase transparency of state-owned and military enterprises.<sup>238</sup>

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- 2) Under current law, there is no regulatory requirement on companies to report non-financial information.<sup>239</sup> The draft Companies Law released by the Directorate of Investment and Company Administration (DICA) in October 2016 does not provide an explicit requirement for non-financial reporting. The draft law only mandates that companies must include a Director’s Report in their financial statements to provide descriptions of the “risks and uncertainties facing the company and any other matters which may be prescribed.”<sup>240</sup> This is lacking as compared to the non-financial disclosure requirement in other jurisdictions. The 2014 European Union non-financial reporting directive, for example, requires companies to disclose information on their policies, risks, and outcomes as regards to the environment, social and employee matters as well as respect for human rights, anti-corruption, and bribery matters.<sup>241</sup>
- 3) Yangon Stock Exchange Listing Criteria<sup>242</sup> - The listing criteria provide vague disclosure requirements for public listing, with no specific disclosure obligations.<sup>243</sup> In other markets, publicly-traded companies are required to publish quarterly accounts or announce major transactions.<sup>244</sup> However, in Myanmar, the listing criteria only provide that companies should submit to the Securities and Exchange Commission of Myanmar and the YSE “relevant corporate information” and facts related to “matters which have a considerable impact on investment decisions of the investors,” such as risk factors and basic potential business activities. The criteria also require companies to include in their Prospectus an overview of the business operations, which includes “the principal risks and uncertainties facing the company.” There are no clear guidelines as to what company information is required to be submitted.

### Implementation Status and Gaps: Information and Communications Technologies (ICT) law

The following is a non-exhaustive list of relevant existing **laws related to ICT** in Myanmar:

- 1) Telecommunications Law<sup>245</sup> - This law provides the rights and obligations of telecommunications service providers and regulators. It also details the licensing regime for the provision of certain telecommunications services.
- 2) Electronic Transactions Law<sup>246</sup> - This law addresses the certification and authentication of electronic data and electronic contracts. It also penalizes unauthorized interception of communications and hacking.
- 3) Computer Science Development Law<sup>247</sup> - This law aims at setting and implementing measures for the development of computer science and technology in Myanmar.

The following explains the gaps that exist in the protection of human rights under Myanmar **ICT related laws and general domestic laws of relevance to ICT**:

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- 1) Telecommunications Law<sup>248</sup> - Article 66(d) of the law imposes criminal penalties of up to three years in prison for “extorting, coercing, restraining wrongfully, defaming, disturbing, causing undue influence or threatening to any person by using any [t]elecommunications [n]etwork.” The Special Rapporteur on the situation of human rights in Myanmar stressed this section is problematic as it may be used to arrest, prosecute, and convict civil society actors, journalists, and human rights defenders. From 2013, when the Telecommunications Law was enacted, to January 2017, 48 cases have been brought to courts, nearly all of which were in relation to allegedly defamatory Facebook posts.<sup>249</sup> The Special Rapporteur also expressed concerns regarding Articles 76 and 77 of the Telecommunications Law, which grant the government broad powers to enter and inspect telecommunication services for matters relating to national defense and security or public interest and to intercept data in an emergency situation. The Special Rapporteur recommended that these provisions should be amended as a matter of urgency in order to bring it in line with international standards.<sup>250</sup>
- 2) Electronic Transactions Law<sup>251</sup> - The Special Rapporteur recommended the urgent amendment of Article 34 of this law, which allows up to five years’ imprisonment for persons creating, modifying, altering, or distributing information considered “detrimental to the interest of or to lower the dignity of any organization or any person” using electronic technology.<sup>252</sup>
- 3) Computer Science Development Law<sup>253</sup> - The Special Rapporteur recommended the urgent amendment of Article 34 of this law, which imposes penalties of up to 15 years’ imprisonment for anyone who uses information technology to distribute information or to carry out an act which undermines “State Security, prevalence of law and order, and community peace and tranquility, national unity, State economy or national culture.”<sup>254</sup>
- 4) Law Relating to the Registration of Organisations<sup>255</sup> - This law provides that groups that wish to register as organizations must do so at a specific administrative level (either at the township, state or national level). However, the organization may only operate at the administrative level where it registered, which may constitute a barrier to its operational activities.<sup>256</sup> In addition, under this law, ICT companies may be found criminally liable for aiding and abetting illicit activities if they provide services to prohibited organizations. Under the law, prohibited organizations include those “that attempt, instigate, incite, abet or commit acts that may in any way disrupt law and order, peace and tranquility, or safe and secure communications” and “[o]rganisations that attempt, instigate, incite, abet or commit acts that may [affect] or disrupt the regularity of state machinery.”<sup>257</sup> Civil society groups and human rights defenders continue to face major restrictions on their civil rights, harassment, and arbitrary arrests.<sup>258</sup> Such provision may encourage ICT companies to preemptively deny service to or restrict speech of certain organizations or individuals to avoid violating Myanmar law.<sup>259</sup>

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- 5) Unlawful Associations Act<sup>260</sup> - This law provides that the President may declare an organization unlawful if the President is of the opinion that its activities interfere or aim to interfere with the administration of the law or constitute danger to public peace. It provides penalties of imprisonment for members of illegal organizations. An ICT company may be found criminally liable under this law if it had assisted with promoting the organization in any way, such as through broadcasting information about a meeting the organization hosted.<sup>261</sup> The Special Rapporteur on the situation of human rights in Myanmar stressed that Article 17(1) of the law is problematic as it may be used to arrest, prosecute, and convict civil society actors, journalists, and human rights defenders. The Special Rapporteur recommended the urgent amendment of this law to bring it in line with international human rights standards.<sup>262</sup>
- 6) Official Secrets Act<sup>263</sup> - The 1923 Official Secrets Act punishes obtaining or communicating to any other person, information which might be useful to an enemy, “for any purpose prejudicial to the safety or interests of the State.” The Special Rapporteur on the situation of human rights in Myanmar stressed that the application of this law is problematic as it may be used to arrest, prosecute, and convict civil society actors, journalists, and human rights defenders.<sup>264</sup> Under the law, owners of internet cafes may face a maximum prison term of five years if they fail to monitor and block information which the authorities regard as jeopardizing state secrets or state interests.

### Implementation Status and Gaps: Human Rights Defender and/or Whistleblower Protection

The following is a non-exhaustive list of relevant existing laws related to **Human Rights Defender and/or Whistleblower Protection** in Myanmar:

- 1) Freedom of expression is a fundamental right under the Constitution.

The following explains the gaps that exist in **Human Rights Defender and/or Whistleblower protection** under Myanmar laws:

- 1) Myanmar does not have specific legislation on the protection of whistleblowers or human rights defenders.
- 2) The limitations to fundamental rights under the Constitution (and described under “Implementation Status and Gaps: Constitution”), including but not limited to freedom of expression, association, and peaceful assembly, significantly weaken the consolidation of a democratic space in Myanmar and the protection of human rights defenders and whistleblowers.
- 3) The abusive use of laws described under “Implementation Status and Gaps: Information and Communications Technologies (ICT) law,” as well as of the Peaceful Assembly Law and the Penal Code to arrest, prosecute, and convict civil society actors, journalists, and human rights defenders also remains a major concern.<sup>265</sup>

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### Implementation Status and Gaps: Public procurement

The following is a non-exhaustive list of relevant existing **Procurement** laws in Myanmar:

- 1) Myanmar does not have a general law related to procurement.
- 2) Directive No. 1/2013 of the President Office, on Tender Rules in Allowing to Conduct Investment and Economic Activities, published on 5 April 2013 - The Directive provides rules on government tenders. These rules also apply when the government offers a tender to sell a stake in a state-owned enterprise. The Directive is applicable to tenders in the oil and gas sector, the mining sector, and for government land, infrastructure projects, and provision of services such as telecommunications. The rules set forth “the need for transparency, accountability, responsibility, and the possibility to inspect” in allowing government departments and organizations to conduct investment and economic activities.<sup>266</sup>

The following explains the gaps that exist in the protection of human rights, including from business-related human rights abuses, under Myanmar **Procurement** laws:

- 1) Myanmar has unclear and insufficient policies and laws related to procurement. Each ministry is responsible to define its own procurement policies without any clear guidance. According to the OECD, “[t]here is no centralized framework, data collection point for different procurement techniques, or safeguards to ensure that tenders are advertised or otherwise using systems to ensure information is available to the public. There is also no independent procurement complaints review body.”<sup>267</sup>
- 2) There is a risk of corruption in public procurement in Myanmar. Public funds are often diverted, and favoritism may influence the decision of government officials.<sup>268</sup> The World Economic Forum’s 2015-16 Global Competitiveness Report shows that Myanmar’s government officials award contracts to well-connected companies. On a scale of 1 to 7 (with 1 indicating that the government always shows favoritism to well-connected companies and 7 indicating that it never shows favoritism), Myanmar scored 2.3 out of 7.<sup>269</sup> Furthermore, Transparency International reported that 32% of the firms it surveyed in 2016 expect to give gifts to secure a government contract.<sup>270</sup>

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### Implementation Status and Gaps: Tax law

The following is a non-exhaustive list of relevant existing **Tax Laws** in Myanmar:

- 1) Income tax law<sup>271</sup> - The top rate of taxation is 25% for companies.
- 2) Commercial tax<sup>272</sup> - Commercial taxes range from 5% to 120% depending on the types of goods and services.

The following explains the gaps that exist in the protection of human rights, including from business-related human rights abuses, under the Myanmar tax regime:

- 1) According to the International Monetary Fund, Myanmar's tax revenues between 2007 and 2014 were abnormally low, accounting for only 4% of the country's GDP in average.<sup>273</sup>
- 2) The OECD also identified tax avoidance, especially among the largest taxpayers, as a significant issue in Myanmar.<sup>274</sup> The OECD reports that "[t]he authorities have stressed the difficulty of enforcing compliance, especially in the natural resources extraction industry, which is dominated by the military and the elite[s]."<sup>275</sup>
- 3) According to a Global Witness study, in 2014, the State may have received less than 2% of the total jade revenues, which were estimated at US\$12 billion, even though jade companies are required to pay various fees, royalties, and taxes to the government.<sup>276</sup> This is reportedly due to widespread practices of tax evasion, money laundering, corruption, price-manipulation, and jade smuggling by the military.<sup>277</sup> The appropriation of extractive revenues and the lack of benefit sharing thereof with communities are also identified as a significant driver of Myanmar's armed conflicts.<sup>278</sup>
- 4) The Special Fund Relating to Necessary Expenditures for Perpetuation of the State Sovereignty Law<sup>279</sup> - This law provides that the military Commander-in-Chief, upon approval of the President, has the right to use public funds for broad "duties of non-disintegration of the Union, non-disintegration of National solidarity and perpetuation of sovereignty" without being subject to auditing or parliamentary oversight.<sup>280</sup>
- 5) The law in Myanmar does not provide a right of public access to information. The government has however undertaken several programs or initiatives to increase fiscal transparency. For example, it has started publicizing budget documents, revenues, and expenditures of the Ministry

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of Defense.<sup>281</sup> Furthermore, budget debates are now televised and recently, the Ministry of Finance introduced a “Citizen’s Budget” to make information more easily accessible to the public.<sup>282</sup>

### Implementation Status and Gaps: Trade law

The following is a non-exhaustive list of relevant existing **Trade Laws** in Myanmar:

- 1) Main laws related to trade
  - a) Myanmar Investment Law<sup>283</sup> - This law sets out requirements for foreign-invested companies and foreign projects.
  - b) Export and Import Law<sup>284</sup> - This law provides requirements for the imports and exports of goods.
  - c) Tariff Law<sup>285</sup> - This law determines the customs duties to be paid in respect to goods exported from and imported to Myanmar.
  - d) Myanmar Special Economic Zones Law<sup>286</sup> - This law regulates investments in SEZs.
  - e) Companies Act<sup>287</sup> - This law sets out details for corporate investment structures and governance requirements.
- 2) Regional trade agreements
  - a) ASEAN - As a member of ASEAN, Myanmar is a party to the ASEAN framework agreements on goods (ATIGA), services (AFAS), and investment (ACIA).<sup>288</sup>
  - b) ASEAN regional trade agreements - As an ASEAN member, Myanmar is a party to ASEAN’s free trade agreements (FTA) with Australia, China, India, Japan, Republic of Korea, and New Zealand. Myanmar is also negotiating with ASEAN FTA Partners (Australia, China, India, Japan, Republic of Korea, and New Zealand) a Framework for Regional Comprehensive Economic Partnership. This framework covers trade in goods, services, investment, competition, intellectual property, dispute settlement, and other issues.<sup>289</sup>
- 3) Unilateral trade preference programs
  - a) Global System of Trade Preferences among Developing Countries (GSTP) - Myanmar is a signatory to the GSTP, which aims to increase trade among developing countries.<sup>290</sup>
  - b) Myanmar is a beneficiary of a number of Generalized Systems of Preferences (GSP) including those accorded by the European Union, Norway, Australia, Belarus, Japan, New Zealand, the Russian Federation, Switzerland, and Turkey.<sup>291</sup> In September 2016, the United States announced the reinstatement of GSP to Myanmar, which went into effect in November 2016.<sup>292</sup>

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- 4) Bilateral investment treaties (BITs): Myanmar has entered BITs that are currently in force with China, India, Japan, the Philippines, Thailand, and Lao People’s Democratic Republic. BITs have also been signed with Israel, the Republic of Korea, and Viet Nam but none are in force yet.<sup>293</sup> A BIT with the European Union is in negotiation.<sup>294</sup>

The following explains the gaps that exist in the protection of human rights, including from business-related human rights abuses, under Myanmar **Trade regime**:

- 1) Article 91 of the 2016 Myanmar Investment Law provides that all international agreements shall prevail over any inconsistent laws of Myanmar. Such provision could be beneficial if it is used to safeguard the respect of international human rights and environmental norms in investment practices. However, the clause may also (and more likely) be interpreted in line with international trade and investment agreements, which commonly contain obligations constraining policy-making and administrative action in relation to the protection of human rights and environment.<sup>295</sup>
- 2) Free Trade Agreements and Bilateral Trade Agreements: Bilateral and multilateral trade agreements entered into by Myanmar provide investor-State dispute settlement (ISDS) clauses, which allow foreign companies the right to arbitration if a Myanmar government acts in a way that undermines the “rights” of investors (e.g. expropriation and discrimination). These dispute settlement agreements may undermine the ability of Myanmar government to regulate corporate activities that could harm the environment and human rights.<sup>296</sup>

### 1.6. Investigation, Punishment, and Redress Measures

Do relevant State agencies responsible for law enforcement address business and human rights?

Indicators	Scoping Questions
<b>Sector Risk Assessment</b>	Is the State undertaking or supporting any specific activities to identify specific business sectors or activities that may have particularly negative impacts on human rights, such as the extractive, apparel, and other sectors?



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<b>Vulnerable Group Assessment</b>	Is the State undertaking or supporting any specific activities to identify specific impacts on particularly vulnerable groups, such as women, children, minorities, and indigenous peoples?
<b>Police</b>	Have police authorities been provided with information and training on issues related to business and human rights? Are the police given statutory authority to address business-related human rights harms?
<b>Labor, Health, and Safety</b>	Are relevant labor, health, and safety authorities aware of potential or actual adverse impacts by business on labor, health, and safety? Are such State actors given statutory authority to address business-related human rights harms?
<b>Environment</b>	Have relevant environmental authorities been provided with information and training on issues related to business and human rights? Are such State actors given statutory authority to address business-related human rights harms?
<b>Tax</b>	Have relevant tax authorities been provided with information and training on issues related to business and human rights and connections to local tax laws? Are such State actors given statutory authority to address business-related human rights harms?
<b>Judicial Grievance Mechanisms</b>	Are the judiciary, including civil, criminal, and commercial courts, as well as employment and other administrative tribunals, and those with prosecuting authority informed and trained on issues related to business and human rights? Is the judiciary given statutory authority to address business-related human rights harms, including through civil, criminal, or administrative penalties for business-related human rights harms?

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<b>Non-Judicial Grievance Mechanisms</b>	Does the State support and/or participate in non-judicial grievance mechanisms aimed at securing redress for business-related human rights harms, including through entities such as National Human Rights Institutions, OECD National Contact Points, or ombudsmen?
<b>Legal Aid and Assistance</b>	Does the State support legal aid and assistance that aims to address barriers in accessing remedy for business-related human rights harms?
<b>Other Measures</b>	Are there any other measures taken by the State to promote the investigation, punishment, and redress of business-related human rights harms?

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The following is a list of efforts the Myanmar government is making to identify high-risk sectors or activities through **sector risk assessments** and to identify particularly vulnerable victims through **vulnerable groups assessments**:

1) Vulnerable Group Assessments:

- a) Trafficking/Migrant workers: Myanmar participates in the ILO Tripartite Action to Protect the Rights of Migrant Workers within and from the Greater Mekong Sub-region. This project aims to strengthen migrant recruitment and labor protection policies, and ensure that migrant workers have increased access to support services.<sup>297</sup> Myanmar government also signed a memorandum of understanding with Thailand on 13 February 2016 to allow migrant workers from Myanmar to work legally in Thailand.<sup>298</sup> Myanmar National Plan of Action to Combat Human Trafficking 2012-2016 also outlines prevention and awareness-raising activities, including through cooperation with the private sector.<sup>299</sup>
- b) Children: The Myanmar Government, in collaboration with the ILO, adopted the Myanmar Programme on the Elimination of Child Labour 2014–17 (My-PEC) with the aim of developing a comprehensive, inclusive, and efficient multi-stakeholder response to reduce child labor and its worst forms in Myanmar.<sup>300</sup> With the support of the Ministry of Labour, a Technical Working Group on Child Labour was set up to assist in the eradication of child labor and to monitor compliance with ILO Convention No. 182 on Worst Forms of Child Labour. The

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Working Group members include representatives from multiple government ministries, civil society organizations (CSOs), the United Nations Children’s Fund (UNICEF) and the ILO.<sup>301</sup>

The following is a non-exhaustive list of relevant **police training initiatives**:

- 1) There is no report of police training on business and human rights issues.
- 2) It is reported that the International Committee for the Red Cross (ICRC) trained senior police officers in September 2013 on the proper use of force, crowd control, and detention procedures.<sup>302</sup> The ICRC also provided training to the police in Rakhine State in December 2013 on international policing standards and the appropriate use of force.<sup>303</sup> In November 2013, the European Union also gave an 18-month training course to approximately 500 police officers on community policing and best practices in maintaining public order.<sup>304</sup>

The following is a list of ways through which Myanmar government’s **labor, health and safety, environmental and tax bodies** learn about business-related abuses and the authority they have to address those abuses:

- 1) There is no report of training on business and human rights issues given to labor, health and safety, environmental, and tax bodies.
- 2) However, several members of the MNHRC participated in business and human rights training. (See Section 1.3 for more information.)

The following is a non-exhaustive list of issues relevant to **judicial grievance mechanisms** in Myanmar. Such mechanisms will be discussed in more details in the forthcoming Pillar III section of the NBA:

- 1) The Constitution establishes three types of courts: Civilian courts, Courts-Martial, and the Constitutional Tribunal. Civilian courts are organized in four levels: a) the Supreme Court of the Union; b) State and Region High Courts; c) District Courts, and Courts of Self-Administered Divisions and Zones; and d) Township Courts. The Supreme Court is the highest organ of the judiciary and the final court of appeal. The Supreme Court does not have jurisdiction over cases involving Defense Services Personnel, including the military.<sup>305</sup>
- 2) There is no report of training on business and human rights issues given to the judiciary.
- 3) The Courts adjudicate criminal and civil cases under the Criminal Procedure Code, the Civil Procedure Code, and the Evidence Act.<sup>306</sup> For further discussion on the civil and criminal liability regimes for businesses, see Section 2.1 and 3.1.

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- 4) Jurisdiction is granted to civil and criminal courts to address business-related human rights abuses under various laws. For instance, cases of child labor and forced labor can be brought to township or district courts, whose decisions can be appealed in state high courts, and ultimately in the Supreme Court.<sup>307</sup> Under the Settlement of Labour Disputes Law, parties retain their right to sue in civil courts as the decisions in conciliation are not legally binding.<sup>308</sup>

The following is a non-exhaustive list of issues relevant to **non-judicial grievance mechanisms** that the Myanmar government either supports or participates in. Such mechanisms will be discussed in more details in the forthcoming Pillar III section of the NBA:

- 1) International non-judicial grievance mechanisms
  - a) National Contact Point (NCP) for OECD Guidelines for Multinational Enterprises: Myanmar is not a member of OECD and does not have an NCP. However, complaints about breaches of the OECD Guidelines on Multinational Enterprises by companies registered in OECD countries can be filed to the NCP of that country.<sup>309</sup>
  - b) Complaints about the social and environmental impacts of the IFC or Multilateral Investment Guarantee Agency of the World Bank can be mediated and/or investigated by the Compliance Advisor Ombudsman.<sup>310</sup>
  - c) Complaints related to investments funded by the Asian Development Bank can be mediated and investigated by the Asian Development Bank Accountability Mechanism.<sup>311</sup>
- 2) National non-judicial grievance mechanisms
  - a) Myanmar National Human Rights Commission: The Commission was created in September 2011 and its governing law was adopted only in 2014. The MNHRC has a wide mandate for promoting and monitoring compliance with human rights. It also has investigatory powers and can make recommendations.<sup>312</sup> The MNHRC Strategic Plan 2014-2016 acknowledges the role that the MNHRC should take with respect to business and human rights issues, even though there is no mention of the UNGPs.<sup>313</sup> The plan mentions business and human rights as a priority human rights issue on which the MNHRC should carry out research and prepare advice.<sup>314</sup> The MNHRC is also mandated to investigate and inquire into business and human rights violations.
  - b) Rule of Law and Stability Committee of the Parliament: This Committee was established in 2012 in order to enable the general public to lodge complaints against government bodies.<sup>315</sup>
  - c) Labor dispute settlement system: Employers with more than 30 employees must form a workplace coordinating committee to help resolve disputes. Individual disputes should first go to the workplace coordinating committee and may be referred to a conciliation body

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set up at the township level to mediate between employers and workers. For collective cases, there are two further stages of arbitration in case the disputes are not resolved at the negotiation and conciliation phases: (1) in the regional/state arbitration body tribunal; and (2) in the tribunal formed by the arbitration council. A strike or lockout can only be carried out if the arbitration process fails. Despite the conciliation process, parties retain their right to sue in civil courts as the decisions in conciliation are not legally binding.<sup>316</sup>

- d) Forced labor complaint mechanism: The Myanmar Government and the ILO have concluded a Supplementary Understanding (SU) which provides the right to access remedy for forced labor victims. As such, a Government Ministerial Working Group for the elimination of forced labor was set up to allow Myanmar citizens to lodge complaints alleging the use of forced labor, with the assistance of an ILO Liaison Officer. After receiving and reviewing the allegations in the complaint, the ILO Liaison Officer submits the facts together with his opinion and/or suggestion to the working group. The working group will then order an inquiry to review the facts and recommend appropriate action.<sup>317</sup>
- e) Mechanisms to deal with land disputes and confiscations: In 2012, the Parliament's Farmland Investigation Commission was set up to receive complaints and investigate past land disputes and confiscations.<sup>318</sup> In 2013, the Land Utilization Management Central Committee was set up to implement the recommendations of the investigation commission.<sup>319</sup> In early May 2016, the NLD-led government announced the creation of the Central Review Committee on Confiscated Farmlands and Other Lands.<sup>320</sup> This body is in charge of monitoring state and divisional government's handling of land disputes, and the restitution of land from government ministries, state-owned enterprises, and private businesses.<sup>321</sup>
- f) Anti-Corruption Commission: Cases of corruption can be brought to the Anti-Corruption Commission. The Commission can decide to refer a case to the competent regional or state high court after it has completed its investigations.<sup>322</sup>
- g) Investment Issues: Chapter XIX of the 2016 Investment Law requires the Myanmar government to establish a grievance mechanism for investors.

### Gaps

Although the information presented under "Implementation Status" explains how relevant Myanmar agencies for law enforcement address business and human rights, gaps remain.

The following explains some of the gaps that exist with regards to **sector risk assessments**:

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- 1) There are no publicly available information regarding efforts to undertake or support risk assessments in specific industry sectors.

The following explains some of the gaps that exist with regards to **vulnerable groups assessments**:

- 1) Ethnic minorities: Under the Myanmar Constitution, only “citizens” are protected from discrimination on the basis of race.<sup>323</sup> In addition, the definition of citizenship set forth in the 1982 Citizenship Law excludes several ethnic minorities, such as the Rohingya and people of Chinese, Indian, and Nepali descent.<sup>324</sup> This restrictive definition of citizenship renders these ethnic minorities stateless as well as rightless, and particularly vulnerable to human rights abuses (see Implementation Status and Gaps: Constitution under Section 1.5).

The following explains some of the gaps that exist with regards to training of the **police**:

- 1) There is no report of training on business and human rights issues given to the police. Moreover in 2014, the Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana, reported the excessive use of force by the police (including through the use of incendiary devices) and arbitrary arrest, detention, and criminal prosecution against those trying to claim their rights by peacefully protesting forced evictions and land confiscations.<sup>325</sup>

The following explains some of the gaps that exist in how State bodies involved in **judicial grievance mechanisms** address business and human rights. Such gaps will be discussed in more detail in the forthcoming Pillar III section of the NBA:

- 1) The President has the power to appoint judges, controls funding of the court system, and may have the power to dismiss lower court judges. The Parliament also has power regarding the funding of the court system and over the destitution of judges.<sup>326</sup> According to the OECD, despite constitutional separation of powers, the judiciary in Myanmar is considered to be “under-resourced, politically influenced, and lacking independence.”<sup>327</sup> In addition, the International Commission of Jurists reported that many judges in Myanmar lack legal knowledge and experience, because having a law degree or professional experience in the legal field was not a precondition to their appointments.<sup>328</sup> Corruption is also reported to be prevalent throughout the legal system “in the form of misuse of influence and monetary incentives for particular legal outcomes.”<sup>329</sup>

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The following explains some of the gaps that exist in how State bodies involved in **non-judicial grievance mechanisms** address business and human rights. Such mechanisms will be discussed in more detail in the forthcoming Pillar III section of the NBA:

- 1) Myanmar National Human Rights Commission: The Commission suffers from a severe legitimacy deficit as it lacks independence from the executive branch, and the selection and appointment of its members are conducted without a transparent screening process.<sup>330</sup> See Section 3.5 for further coverage of the MNHRC.
- 2) Land Acquisition Investigation Committee: There have been restitutions of confiscated land based on recommendations from the committee.<sup>331</sup> However, the number of restitutions remains very limited and the process suffers from extreme delays due to the lack of capacity of the government to deal with a large number of claims.<sup>332</sup>
- 3) Anti-Corruption Commission: Corruption charges against a political post holder can only be referred to the competent courts after approval from the government.<sup>333</sup> The Commission has also been criticized for its lack of capacity and effectiveness due to lack of funding and inadequate appointment of its members.<sup>334</sup>

## GUIDING PRINCIPLE 2

**States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.**

### Commentary to Guiding Principle 2

At present, States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction.

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There are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or supports those businesses. The reasons include ensuring predictability for business enterprises by providing coherent and consistent messages, and preserving the State’s own reputation.

States have adopted a range of approaches in this regard. Some are domestic measures with extraterritorial implications. Examples include requirements on “parent” companies to report on the global operations of the entire enterprise; multilateral soft-law instruments such as the Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development; and performance standards required by institutions that support overseas investments. Other approaches amount to direct extraterritorial legislation and enforcement. This includes criminal regimes that allow for prosecutions based on the nationality of the perpetrator no matter where the offence occurs. Various factors may contribute to the perceived and actual reasonableness of States’ actions, for example whether they are grounded in multilateral agreement.

### 2.1. Home State Measures with Extraterritorial Implications

Has the State adopted domestic measures which set out clearly the expectation that businesses domiciled in their territory and/or jurisdiction respect human rights abroad?

Indicators	Scoping Questions
<b>Expectation setting</b>	Has the State set out and fully disseminated to relevant government agencies (including embassies and consulates) clear policy statements on the expectation that all companies domiciled in its territory and/or jurisdiction respect human rights?
<b>Criminal or civil liability regimes</b>	Has the State introduced criminal or civil liability regimes that allow for prosecutions or civil lawsuits against corporations based on where the corporation is domiciled, regardless of where the offense occurs?
<b>“Duty of care” for parent companies</b>	Has the State established a “duty of care” for parent companies in terms of the human rights impacts of their subsidiaries, regardless of where the subsidiaries operate?



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<b>Reporting requirements</b>	Has the State introduced requirements on companies to publicly report on their operations abroad, including on human rights and labor issues?
<b>Support for soft law measures</b>	Does the State support and participate in relevant soft-law instruments, such as the OECD Guidelines and the Due Diligence Guidance for Responsible Supply Chains?
<b>Performance standards for over-seas investments</b>	Do State institutions that support overseas investment have and enforce performance standards that support the protection and promotion of human rights?
<b>Implementation Status</b>	
<p>The following is a non-exhaustive list of <b>criminal or civil liability</b> regimes in Myanmar that have extraterritorial implications for corporations:</p> <ol style="list-style-type: none"> <li>1) Penal code<sup>335</sup> - Chapter I of the Penal Code provides that the Code applies to any offense committed by any citizens of Myanmar wherever they may be. In addition, it provides that any “person” liable under the laws of Myanmar for an offense committed outside of Myanmar shall be treated as if the offense had been committed within Myanmar. Article 11 defines “person” to include “any company or association, or body of persons, whether incorporated or not.”<sup>336</sup></li> <li>2) Anti-Money Laundering Law<sup>337</sup> - This law applies to any person who commits money laundering: 1) within Myanmar; 2) on board a vessel, an aircraft, and any motor vehicle registered under the existing law of Myanmar; or 3) by a Myanmar citizen or any person residing permanently in Myanmar who commits the offense beyond the limits of the country. Under this law, the term “person” includes “a company, an association, an organization, or a group of persons that are formed legally or not.”</li> </ol> <p>The following is a description of <b>reporting requirements</b> of operations abroad imposed on corporations incorporated in Myanmar:</p> <ol style="list-style-type: none"> <li>1) See Section 1.5 for information on reporting requirements of financial and non-financial information.</li> <li>2) There is no publicly available information regarding reporting requirements for Myanmar companies’ overseas operations, including their human rights impacts.</li> </ol>	

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The following is a description of **soft law measures** and whether the Myanmar institutions responsible for supporting overseas investment enforce **performance standards** that are protective of human rights:

- 1) See Section 1.4 for information on support for soft law measures.
- 2) There is no publicly available information regarding performance standards that are protective of human rights for Myanmar overseas investments.

### Gaps

Although the Myanmar government has adopted measures discussed under “Implementation Status” that set out the expectation that businesses domiciled in Myanmar respect human rights throughout their operations, there remain notable protection gaps.

Below is a brief explanation of some of the gaps in Myanmar government activities for **expectation setting**:

- 1) There is no publicly available information with respect to dissemination of policy statements to relevant government agencies regarding expectations on the respect for human rights for Myanmar-domiciled companies in their overseas operations.

Below is a brief explanation of some of the gaps in the extraterritorial application of **criminal or civil liability** regimes. These gaps undermine other messages sent to corporations that they should respect human rights throughout their operations:

- 1) Anti-Corruption Law<sup>338</sup> - This law has an extraterritorial reach as it applies to corruption committed abroad by citizens and permanent residents of Myanmar. However, the term “person” is not defined in the law and there is no legal precedent in Myanmar holding legal persons, such as companies, criminally liable for corruption.<sup>339</sup> Indian case law, which is referenced as a secondary legal authority in Myanmar, provides that a company cannot be prosecuted in respect to an offense that requires proof of *mens rea* (the intention or knowledge of wrongdoing).<sup>340</sup> This would hence exclude corruption offenses.

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- 2) The Anti Trafficking in Persons Law<sup>341</sup> - This law has an extraterritorial reach as it applies to any persons who are Myanmar citizens or permanent foreign residents, regardless if the action was committed inside or outside Myanmar; or those who commit trafficking within Myanmar or on board of a vessel or an aircraft registered in Myanmar. However, the term “person” is not defined in the law and seems to apply only to natural persons to the exclusion of legal entities.

Below is a brief explanation of the gaps in measures relating to “**duty of care**” for parent companies and **reporting requirements**:

- 1) There is no codified, unified, or clear duty of care in Myanmar for parent corporations over their subsidiaries.<sup>342</sup>Reportedly, the upcoming Companies Act will explicitly provide for measures relating to duty of care.<sup>343</sup>
- 2) There is no publicly available information regarding reporting requirements of Myanmar companies’ operations abroad, including on their human rights impacts. (See Section 1.5 for information on gaps in reporting requirements of financial and non-financial information.)

The following is a description **soft law measures** and whether the Myanmar institutions responsible for supporting **overseas investment enforce performance standards** that are protective of human rights:

- 1) There is no publicly available information regarding performance standards that are protective of human rights regarding Myanmar institutions responsible for overseas investment.

### 2.2. Implementation of Recommendations from International or Regional Bodies

Has the State received and followed-up on recommendations from international or regional bodies, such as the UN Human Rights Council and UN treaty bodies, regarding steps to prevent abuse abroad by business enterprises domiciled within the State’s territory or jurisdiction?

Indicators	Scoping Questions
<b>Human Rights Council Recommendations</b>	Has the State noted and accepted recommendations from the UN Human Rights Council, such as through the Universal Periodic Review (UPR) process, that are relevant to preventing abuses abroad by companies domiciled within the State’s territory or jurisdiction? How has the State followed up on these recommendations and has the State monitored its implementation of the recommendations?

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<b>UN Treaty Body Recommendations</b>	Has the State noted and accepted recommendations from UN treaty bodies that are relevant to preventing abuses abroad by companies domiciled within the State’s territory or jurisdiction? How has the State followed up on these recommendations? Has the State monitored its implementation of the recommendations?
<b>Other International or Regional Body Recommendations</b>	Has the State noted and accepted recommendations by any other international or regional bodies regarding steps to prevent business-related human rights abuses abroad?
<b>Implementation Status</b>	
<p>The following includes information about recommendations received from the <b>UN Human Rights Council, UN Treaty Bodies, and other international or regional bodies</b> and any follow up by the Myanmar government:</p> <ol style="list-style-type: none"> <li>1) UN Human Rights Council:           <ol style="list-style-type: none"> <li>a) UN Human Rights Council Resolutions: The UN Human Rights Council’s resolutions on the situation of human rights in Myanmar in 2012, 2013, 2014, and 2015 included language encouraging “the international community” to comply with the UNGPs when investing in Myanmar. Such language focused on responsibilities of foreign companies.<sup>344</sup>The 2016 UN Human Rights Council’s resolution placed a greater focus on Myanmar domestic companies, as the language was changed to encourage “<i>all business enterprises</i>, including transnational corporations and domestic enterprises, to respect human rights in accordance with the Guiding Principles on Business and Human Rights, and calls upon the Government of Myanmar and the home States of business companies operating in Myanmar to fulfill their duty to protect human rights”<sup>345</sup> [emphasis added]. However, the resolution does not address the prevention of abuses committed abroad by Myanmar companies.</li> <li>b) Universal Periodic Review: Myanmar’s second cycle of UPR took place in 2015. It received a total of 281 recommendations from 93 member states.<sup>346</sup> The final report did not give any particular focus on business and human rights.<sup>347</sup></li> </ol> </li> <li>2) UN Treaty Bodies:           <ol style="list-style-type: none"> <li>a) Committee on the Rights of the Child: The Committee on the Rights of the Child, during its consideration of the combined third and fourth periodic report of Myanmar in 2012, recommended the government to establish the necessary regulatory framework and policies</li> </ol> </li> </ol>	

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for business and industry, in particular with regard to the extractive industry and large-scale development projects, to ensure that they respect and protect the rights of children in line with the UNGPs.<sup>348</sup> The Committee was especially “concerned at the effects of child labour, particularly forced and hazardous labour, living conditions of children, environment degradation, health hazards, and barriers to their freedom of movement.”<sup>349</sup> However, these recommendations did not pertain to abuses committed by Myanmar companies outside of Myanmar.

- b) Committee on the Elimination of Discrimination Against Women: The CEDAW Committee has not made recommendations related to business and human rights during its 2008 review.<sup>350</sup>

### Gaps

Recommendations made by the UN Human Rights Council and UN Treaty Bodies to Myanmar do not address abuses committed abroad by business enterprises domiciled within Myanmar or its jurisdiction. This is likely due to the fact that foreign investment by Myanmar companies remains very limited due to the years of economic isolation of the country and of trade sanctions imposed by other countries.<sup>351</sup> On the other hand, foreign direct investment in Myanmar has been growing over the last ten years, in particular in the oil and gas, mining, and energy sectors.<sup>352</sup> Human rights abuses committed by foreign companies in Myanmar constitute a significant concern, and the issue of extraterritorial jurisdiction of home states is critical in this context to ensure access to justice and to remedies to affected communities.<sup>353</sup>

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In meeting their duty to protect, States should:

- (a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;
- (b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;
- (c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations;
- (d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.

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### Commentary to Guiding Principle 3

States should not assume that businesses invariably prefer, or benefit from, State inaction, and they should consider a smart mix of measures—national and international, mandatory and voluntary—to foster business respect for human rights.

The failure to enforce existing laws that directly or indirectly regulate business respect for human rights is often a significant legal gap in State practice. Such laws might range from non-discrimination and labour laws to environmental, property, privacy and anti-bribery laws. Therefore, it is important for States to consider whether such laws are currently being enforced effectively, and if not, why this is the case and what measures may reasonably correct the situation.

It is equally important for States to review whether these laws provide the necessary coverage in light of evolving circumstances and whether, together with relevant policies, they provide an environment conducive to business respect for human rights. For example, greater clarity in some areas of law and policy, such as those governing access to land, including entitlements in relation to ownership or use of land, is often necessary to protect both rights-holders and business enterprises.

Laws and policies that govern the creation and ongoing operation of business enterprises, such as corporate and securities laws, directly shape business behaviour. Yet their implications for human rights remain poorly understood. For example, there is a lack of clarity in corporate and securities law regarding what companies and their officers are permitted, let alone required, to do regarding human rights. Laws and policies in this area should provide sufficient guidance to enable enterprises to respect human rights, with due regard to the role of existing governance structures such as corporate boards.

Guidance to business enterprises on respecting human rights should indicate expected outcomes and help share best practices. It should advise on appropriate methods, including human rights due diligence and how to consider effectively issues of gender, vulnerability and/or marginalization, recognizing the specific challenges that may be faced by indigenous peoples, women, national or ethnic minorities, religious and linguistic minorities, children, persons with disabilities, and migrant workers and their families.

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National human rights institutions that comply with the Paris Principles have an important role to play in helping States identify whether relevant laws are aligned with their human rights obligations and are being effectively enforced, and in providing guidance on human rights also to business enterprises and other non-State actors.

Communication by business enterprises on how they address their human rights impacts can range from informal engagement with affected stakeholders to formal public reporting. State encouragement of, or where appropriate requirements for, such communication are important in fostering respect for human rights by business enterprises. Incentives to communicate adequate information could include provisions to give weight to such self-reporting in the event of any judicial or administrative proceeding. A requirement to communicate can be particularly appropriate where the nature of business operations or operating contexts pose a significant risk to human rights. Policies or laws in this area can usefully clarify what and how businesses should communicate, helping to ensure both the accessibility and accuracy of communications.

Any stipulation of what would constitute adequate communication should take into account risks that it may pose to the safety and security of individuals and facilities, legitimate requirements of commercial confidentiality, and variations in companies' size and structures.

Financial reporting requirements should clarify that human rights impacts in some instances may be "material" or "significant" to the economic performance of the business enterprise.

### 3.1. Development and Enforcement of Relevant Laws and Regulations

What laws and regulations exist that directly or indirectly regulate business respect for human rights?

Indicators	Scoping Questions
<b>Corporate and Securities Law</b>	Has the State put in place corporate and securities laws and regulations to support ethical corporate behavior and business respect for human rights, such as those relating to financial reporting, articles of incorporation, registration, corporate board, director, and stock exchange listing requirements?
<b>Labor Law</b>	Has the State put in place labor laws and regulations to ensure business respect for workers' rights?

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<b>Environmental Law</b>	Has the State put in place environmental laws and regulations to ensure business respect for the rights of its citizens to health, a healthy environment, and livelihoods including, for example, clean water, clean air, and cultivatable land?
<b>Property and Land Management Law</b>	Has the State put in place land management laws and regulations to ensure business respect for the rights of its citizens, including the recognition of customary land rights and the incorporation of human rights considerations into environmental and social impact assessments and related licensing practices?
<b>Health and Safety Law</b>	Has the State put in place health and safety laws and regulations to ensure business respect for the physical and mental health of workers and communities?
<b>Consumer Law</b>	Has the State put in place consumer laws and regulations to ensure business respect for human rights and to promote consumer interest in the human rights impacts of purchased products and services?
<b>Non-Discrimination Law</b>	Has the State put in place anti-discrimination laws and regulations to support ethical corporate behavior and business respect for human rights?
<b>Tax Law</b>	Has the State put in place tax laws and regulations to support ethical corporate behavior and business respect for human rights?
<b>Trade Law</b>	Has the State put in place trade laws and regulations to support business respect for human rights within trade practices?



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<b>Privacy and Technology Law</b>	Has the State put in place information security and privacy laws and regulations to support ethical corporate behavior and business respect for human rights?
<b>Disclosure and Reporting</b>	Has the State put in place laws and regulations to support disclosure and reporting by corporations on human rights, labor rights, environmental impacts, corporate social responsibility, or other ethical issues?
<b>Procurement Law</b>	Has the State put in place laws and regulations to support the incorporation of human rights considerations into the procurement by the State of goods and services from the private sector?
<b>Anti-Bribery and Corruption</b>	Has the State put in place laws and regulations aimed at promoting anti-bribery and combatting corruption within and across governments?
<b>Human Rights Defender and/or Whistleblower Protection</b>	Has the State put in place laws and regulations aimed at supporting business respect for the rights of human rights defenders and/or whistleblowers?
<b>Criminal Law</b>	Has the State put in place criminal laws and regulations to ensure that corporate crimes that are related to human rights are investigated, prosecuted, and properly sanctioned?
<b>Civil Law</b>	Has the State put in place civil laws and regulations to ensure investigation, punishment, and redress of business-related human rights harms?
<b>Other Law</b>	Has the State put in place any other laws and regulations to ensure business respect for human rights?
<b>Implementation Status</b>	

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For further discussion of corporate and securities, labor, environmental, property and land management, health and safety, tax, trade, disclosure and reporting, procurement, anti-bribery and corruption, and whistleblower protection laws, see Sections 1.5 and 1.6.

For further discussion of disclosure and reporting laws, see Sections 1.5 and 2.1.

1) Civil liability:

- a) Any foreign company that wishes to conduct business in Myanmar must obtain a permit from the President of Myanmar. If it does not comply with this requirement, the company and every officer or agent of the company shall be liable to fines.<sup>354</sup> Each partner of an unincorporated joint venture may still be jointly and severally liable for all debts arising from the partnership under the Partnership Act.<sup>355</sup>

2) Criminal liability:

- a) Corporations may be found criminally liable under specific laws, such as the Environmental Conservation Law and of the Anti-Money Laundering law.

3) For further discussion of Myanmar criminal and civil liability laws, see Section 2.1.

### Consumer Law

1) Consumer Protection Law.<sup>356</sup>

- a) This law sets out the obligations and rights of consumers and manufacturers with regards to consumer products. It provides for the general rights of consumers a list of prohibited business practices when dealing with consumers and establishes the regulatory bodies responsible for implementation and enforcement.<sup>357</sup> Under the law, consumers have the right to safe goods and services as well as receive complete and accurate information on the goods or services purchased. Prohibited business practices under the law include manufacturing and/or trading of goods that do not bear the required product safety information, and advertising practices which do not inform consumers about the risks posed by the goods or services advertised.<sup>358</sup> Sanctions include warnings, temporary suspensions of the sale of goods, withdrawal of goods from the market, and temporary or permanent termination of business licenses. Prohibited business practices, such as the sale of dangerous or expired goods, are punishable by imprisonment of maximum three years and/or a fine of maximum K5 million (roughly US\$3,600).<sup>359</sup>

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### Privacy and Technology Law

- 1) The Constitution provides that “[t]he Union shall protect the privacy and security of home, property, correspondence, and other communications of citizens under the law subject to the provisions on this Constitution.”<sup>360</sup>
- 2) Law Protecting the Privacy and Security of Citizens<sup>361</sup> - This law prohibits intrusion on an individual’s privacy to freedom of movement, residence, and speech. It also protects the security of private affairs of citizens, including the security of residence or residential compound and building in the compound, possessions, correspondence and other communications of citizens.
- 3) Telecommunications Law<sup>362</sup> - Article 17 of the law requires Service Licensees to securely maintain the information, contents, and confidential personal information of each individual user that are transmitted or received through their telecommunication services, and not disclose and inform third parties of such information except where allowed under existing laws. Article 69 also requires a court order for the disclosure of information kept in secured or encrypted systems.<sup>363</sup>
- 4) For further discussion of ICT laws, see Section 2.1.

### Non-Discrimination Law

- 1) Ethnic minorities: The 2008 Constitution makes no reference to ethnic minorities. Instead, Article 348 of the Constitution guarantees protection from discrimination for “national races.” Under the Citizenship Law, “national races” cover people from Kachin, Kayah, Karen, Chin, Bamar, Mon, Rakhine or Shan and ethnic groups who had settled in Myanmar prior to 1823, or were born to parents who were citizens at the time of birth.<sup>364</sup> Notably excluded from the list are people of Indian, Nepali or Chinese descent, and the Rohingya people.
- 2) Religious minorities: The 2008 Constitution recognizes the “special position of Buddhism” and identifies Christianity, Islam, Hinduism, and Animism as religions existing in Myanmar. It also prohibits discrimination on the basis of religion. Myanmar’s Penal Code, adopted in 1860 and still in use today, criminalizes words or representations made with the “deliberate and malicious intention of outraging the religious feelings of any class.” At the time of writing, members of Myanmar’s civil society and international advisors are analyzing a draft law entitled “Prevention of Racial and Religious Conflicts, and Peaceful Co-existence among People of Different Religions,” which would criminalize writing and speech that cause “hate, discrimination, dissension, any kind of violence or riot” on the basis of religion, and would prohibit the destruction of religious

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buildings and the disturbance of religious ceremonies. Further, the law would prohibit hate speech, such as the spreading of words, symbols, expressions or rumors intended to “belittle, tarnish, bring forth hatred, hostility, division and distraction” of religions.<sup>365</sup>

- 3) Women: The Constitution prohibits discrimination on the basis of sex, and guarantees equal opportunities in public employment, occupation, trade and business, and matters related to technology and science. The Constitution also stipulates that women are entitled to the same rights and salaries as men for similar work.
- 4) LGBT community: Article 377 of Myanmar’s Penal Code prohibits “carnal intercourse against the order of nature with any man, woman or animal.” This provision carries a prison sentence of up to 10 years.<sup>366</sup>

### Gaps

For further discussion of corporate and securities, labor, environmental, property and land management, health and safety, non-discrimination, tax, trade, disclosure and reporting, procurement, anti-bribery and corruption, and whistleblower protection laws, see Sections 1.5 and 1.6.

For further discussion of disclosure and reporting laws, see Section 2.1.

### Consumer Law

- 1) Consumer Protection Law:<sup>367</sup>
  - a) This law, adopted in 2014, is the first piece of legislation in Myanmar specifically dedicated to consumer rights.<sup>368</sup> It was adopted in the context of widespread concerns about the safety of food sold in Myanmar.<sup>369</sup> The Consumer Protection Association of Myanmar expressed concerns regarding the law’s enforcement given the lack of capacity and funding of the Food and Drug Administration.<sup>370</sup>
  - b) This law also provides that consumers must not make their concerns about a product public, including on social media, without sufficient evidence. This provision could potentially infringe on the right to freedom of expression.<sup>371</sup>

### Privacy and Technology Law

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- 1) Article 357 of the Constitution provides that “[t]he 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.”<sup>372</sup> This is particularly problematic because it only applies to “citizens” of Myanmar. (See Section 1.5 Beneficiaries of human rights granted under the Constitution for further details.) Moreover, the Constitution itself contains numerous restrictions on the enjoyment of the right to privacy.<sup>373</sup> (See Section 1.5 Conditionality of human rights to national law and Limitation on human rights for further details.)
- 2) Citizens Privacy and Security Protection Law - This law prohibits actions infringing privacy, including entry into a citizen’s private residence, surveillance, interception of communications, and slander without an order, permission, or warrant from the authorities. However, it does not outline the process on how to seek permission, or delineate under what circumstances such permission may be given. It similarly does not specify how much data shall be kept, and for how long, if one was able to obtain such permission. The vague provisions of the law might even impede, rather than give protection to, freedom of expression.<sup>374</sup>
- 3) Telecommunications Law<sup>375</sup> - Under Articles 76 and 77, the authorities have extensive powers to enter and inspect telecommunications services for matters relating to national defense and security or public interest and to intercept information in case of emergency.<sup>376</sup> These provisions are very broad and unclear as to what constitutes a “national security” or “public interest” concern or an “emergency situation” that would justify the government’s access to information.<sup>377</sup>
- 4) Myanmar does not have a specific privacy law or a legal framework on data protection or data privacy.<sup>378</sup>
- 5) For further discussion of ICT laws, see Section 2.1.

### Non-Discrimination Law

- 1) Ethnic minorities: Under the Constitution, protection from discrimination is reserved for Myanmar citizens only. The definition of citizenship set forth in the 1982 Citizenship Law excludes several ethnic minorities, such as the Rohingya and people of Chinese, Indian, and Nepali descent.<sup>379</sup> This definition deprives these ethnic groups of protection of their human rights. In its June 2016 report, the Human Rights Council concluded that “[t]he human rights situation of the Rohingya and other minorities in Myanmar is a cause of utmost concern. The scope and patterns of violations and abuses reported cannot be ignored; systematic and systemic discrimination and policies of exclusion and marginalization are all too often at the root of future conflicts.”<sup>380</sup> The majority of the Rohingya living in northern Rakhine State are required to obtain official travel authorization from township authorities to move between, and often within, townships.<sup>381</sup> Regional orders circulated in 2008 on “spot-checking” Rohingya homes mandate that “[a]ction must be taken against those who travel without the travel certificate (certificate to leave the village).”<sup>382</sup> Violations

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of these orders are punishable by imprisonment, a fine, or both under Article 188 of the Penal Code (Disobedience to order duly promulgated by public servant). The Human Rights Council reported that these restrictions on freedom of movement for Muslim communities severely constrain their access to livelihoods and impact access to adequate education.<sup>383</sup> In addition, Rohingya Muslims' access to education is also restricted as the Ministry of Education's 2012 admission guide limits higher education opportunities to only "full citizens."<sup>384</sup>

- 2) Religious minorities: Under Article 354 of the Constitution, only citizens of Myanmar are protected from discrimination based on religion. A research supported by Freedom House and conducted by five organizations found that the military actively restricts and punishes those who wish to practice Christianity. On the other hand, the military rarely punishes those who destroyed religious buildings, houses, or businesses belonging to religious minorities. Authorities also regularly place restrictions on religious minorities' activities, discriminating against them when they attempt to buy or sell housing. In schools, authorities are complicit in forced religious conversions of minorities to Buddhism. In particular, farmers who cannot afford to send their children to regular schools send them instead to Na Ta La schools, which are controlled by the Ministry of Border Affairs. In these schools, children are forcibly converted to Buddhism. Many parents are persuaded to have their children attend these schools through intimidation and enticements, such as employment opportunities after graduation for Na Ta La graduates.<sup>385</sup>
- 3) Women: The laws of Myanmar on women do not define what constitutes discrimination against women.<sup>386</sup> Neither do they describe direct or indirect discrimination. This is especially problematic as a number of laws make specific distinctions between men and women.<sup>387</sup> For example, Article 352 of the Constitution provides that even though discrimination in the appointment of government posts on the basis of sex is prohibited, "appointment of men to the positions that are naturally suitable for men" is allowed. The Constitution also does not provide special measures or actions to be taken to ensure women's equal participation in traditionally male-dominated fields or in the government.<sup>388</sup> In terms of wages and salaries, the Constitution stipulates that women are entitled to the "same rights and salaries" as men when performing similar work. However, the CEDAW Committee reported that there is a wide gender wage gap, with women estimated to earn 30% less than men. Moreover, women are more concentrated in the informal sector. The Committee also expressed concern at the lack of data on cases of sexual harassment in the workplace and measures taken to address them, and regarding the fact that the right to maternity leave is not applicable in all sectors of employment.<sup>389</sup>
- 4) LGBT community: The UN Special Rapporteur on Human Rights in Myanmar described Article 377 of the Myanmar Penal Code as a violation of international human rights law. One study showed that the police often engaged in rent-seeking against the LGBT community, threatening arrest

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based on the provision’s prohibition against “carnal intercourse against the order of nature with any man, woman or animal.” The same study reported that it is common for the police to threaten members of the LGBT community with prosecution under the ‘after dark’ provision in the Police Act, which states that “any person found between sunset and sunrise having his face covered or otherwise disguised who is unable to give a satisfactory account himself . . . may be taken into custody.”<sup>390</sup> This law carries a maximum sentence of three months and confers upon the police the authority to arrest anyone who seems to be acting “suspiciously” or found in a “suspicious” place after dark.<sup>391</sup> In the workplace, members of the LGBT community, more specifically women and the transgender men, reported being given workloads of men, yet receiving the same lower level of wages as other women. Moreover, because of the lack of income and employment opportunities, some female members of the LGBT community are also often constrained to turn to labor-intensive and low-paying work as construction workers or rickshaw drivers. Others who are unable to find work remain at home with their parents, without a source of income.<sup>392</sup>

### 3.2. Relevant Policies

Have policies that seek to foster business respect for human rights been adopted and publicly communicated by the State?

Indicators	Scoping Questions
<b>National Action Plans (NAPs)</b>	Has the State introduced and/or implemented policies to help facilitate business respect for human rights through the adoption of National Action Plans (NAPs) on business and human rights, corporate social responsibility, development, anti-discrimination, government transparency, women’s rights, or human rights in general?
<b>Sector-Specific Policies</b>	Has the State introduced and/or implemented sector-specific policies to help facilitate business respect for human rights within particularly high-risk industries, such as the extractive, apparel, and other sectors?
<b>Other Policies</b>	Have other policies been adopted by the State that aim to foster business respect for human rights?
<b>Implementation Status</b>	

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### National Action Plans (NAPs):

- 1) For information regarding a NAP on business and human rights, see Section 1.3.
- 2) Sector-Specific Policies:
  - a. Myanmar Mines Law<sup>393</sup> - The 2015 Amended Myanmar Mines Law mandates companies to avoid harm to the socio-economic well-being of the local people.

### Other Policies:

- 1) National Land Use Policy - For further information on the National Land Use Policy, see Section 1.5.

### Gaps

### National Action Plans (NAPs):

- 1) For information regarding a NAP on business and human rights, see Section 1.3.

### 3.3. Corporate Reporting and Public Communications

What type of reporting and public communications by business enterprises on how they address their human rights impacts is required by law?

Indicators	Scoping Questions
<b>Financial Reporting</b>	Is corporate financial reporting required by the State? Is the law clarifying that, in some cases, human rights impacts are “material” to the economic performance of the reporting company?
<b>Non-Financial Reporting</b>	Is corporate non-financial reporting required and enforced by the State? Is the law clarifying that, in some cases, human rights impacts are “material” to the performance and operations of the reporting company?



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<b>Public Consultations</b>	Are there legal requirements for companies to have public consultations before, during, and after the commencement of a major project that may impact local communities? Is there a requirement for the free, prior, and informed consent (FPIC) of impacted communities? Is there a mandatory public release of environmental and social impact assessments by companies?
<b>Other Public Communications</b>	Are there any other legal requirements on companies in terms of public communications?
<b>Implementation Status</b>	
<p>For a discussion of <b>financial and non-financial reporting</b> requirements, see Section 1.5.</p> <p><b>Public Consultations</b></p> <ol style="list-style-type: none"> <li>1) The Forest Law – Article 6 of this law requires public consultation when determining the boundaries of reserved or protected public forests.<sup>394</sup></li> <li>2) Wildlife and Protected Area Law<sup>395</sup> - According to the MCRB, this law allows communities living in the proposed protected areas to make claims within 90 days after the government declares an area as protected.<sup>396</sup></li> <li>3) The Environmental Impact Assessment Procedures<sup>397</sup> - Companies are required to publish reports on their environmental and social impact assessments no later than 15 days after submitting to the Environmental Conservation Department. The report must be disclosed to civil society, communities affected by the project, local communities, and other stakeholders. Such disclosure shall be carried out by means of posting on the project’s or company’s website, through local media (e.g. newspapers), at public meeting places (e.g. libraries, community halls), and at the offices of the company proposing the project.</li> <li>4) Myanmar voted for the UNDRIP (adopted 2007), which contains the concept of free, prior, and informed consent (FPIC).<sup>398</sup> According to the MCRB, FPIC is referenced in a number of government documents as a good practice, yet there are no legal requirements for FPIC.<sup>399</sup></li> <li>5) National Land Use Policy<sup>400</sup> - This policy was adopted by the NLD-led government in January 2016. It sets forth inclusive public participation and consultation in decision-making processes related to land use and land resource management as one of its basic principles.</li> </ol>	
<b>Gaps</b>	

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For discussion of **financial and non-financial reporting** requirements, see Section 1.5.

### Public Consultations

- 1) The Forest Law - Article 6 of this law refers to consultation of the “public,” but it is not clear whether this term applies only to Myanmar citizens or also includes indigenous peoples and certain local communities who are excluded under the definition of citizenship.<sup>401</sup> For further discussion of the restrictive definition of citizenship, see Section 1.5.
- 2) There is no national legal requirement or legal framework for FPIC.<sup>402</sup> Aside from mentioning the principle of FPIC in a few government documents, the Myanmar government has made no known effort to implement such requirement.<sup>403</sup>
- 3) National Land Use Policy<sup>404</sup> - The policy mentions the principle of FPIC only in one article as a way to “address the problem of land monopolization and speculation.”<sup>405</sup> However, the wording of this article is vague as “land monopolization and speculation” are not defined by the policy.<sup>406</sup>
- 4) Environmental Impact Assessment Procedures - The Myanmar government is currently involved in developing national guidelines on public participation set in the EIA procedures.<sup>407</sup> Furthermore, government and non-government members from Myanmar, Cambodia, Lao PDR, Thailand, and Vietnam are developing a draft Regional Guidelines on Public Participation in Environmental Impact Assessment. The Guidelines aim to “provide a regional ‘good practice’ approach to public participation in EIA”<sup>408</sup> and will complement existing national laws and policies.

### 3.4. Guidance and Incentives

Does the State provide guidance and incentives for companies in terms of business respect for human rights?

Indicators	Scoping Questions
<p><b>Guidance based on industry sectors, human rights issues and company size</b></p>	<p>Has the State developed guidance for businesses on respecting human rights that is appropriate to different industry sectors (for example, high-risk sectors such as extractives), particular human rights issues (for example, working conditions, discrimination), and different types of corporations (for example, MNEs, SMEs)?</p>

<b>GUIDING PRINCIPLE 3</b>	
<b>Guidance on expected outcomes and best practice</b>	Has the State provided indicators of expected human rights outcomes, information regarding relevant national laws and regulations, and examples of best practice and due diligence methods?
<b>Incentives</b>	Has the State provided incentives for business respect for human rights, such as favorable treatment following non-mandatory self-reporting by companies of human rights policies and practices?
<b>Implementation Status</b>	
1) There is no publicly available information on any State guidance and incentives for companies in terms of business respect for human rights. <sup>409</sup>	
<b>Gaps</b>	
1) There is no publicly available information on State guidance and incentives for companies in terms of business respect for human rights. <sup>410</sup>	
<b>3.5. National Human Rights Institutions (NHRIs)</b> Has the State formally recognized and supported the role of NHRIs in promoting implementation of the UNGPs?	
<b>Indicators</b>	<b>Scoping Questions</b>
<b>NHRI Establishment, Recognition, and Support</b>	Has the State established a National Human Rights Institution (NHRI)? If so, how was the NHRI established, and what kind of recognition and support does the State provide for the NHRI?

## GUIDING PRINCIPLE 3

### NHRI Focus on Business and Human Rights

Does the NHRI’s mandate include business and human rights? Does the State finance NHRI activities within the field of business and human rights? Does the State support the NHRI in providing guidance on human rights to business enterprises? Does the State support the NHRI in monitoring the national business and human rights situation and to provide access to justice for victims of corporate-related human rights abuses? Has the role of the NHRI in promoting implementation of the UNGPs been formally recognized, and, if so, does the State support the NHRI in that role?

### Implementation Status

#### NHRI Establishment, Recognition, and Support

- 1) The MNHRC was created in September 2011 and its governing law was adopted only in 2014. The MNHRC has a wide mandate to promote and monitor compliance with regards to human rights. It also has investigatory powers and can make recommendations.<sup>411</sup>

### NHRI Focus on Business and Human Rights

- 1) The MNHRC Strategic Plan 2014-2016 mentions business and human rights as a priority issue on which the Commission should carry out research and prepare advice.<sup>412</sup> The Commission is also to investigate and inquire into business and human rights violations.
- 2) A consultative workshop on the implementation of the UNGPs was organized by MNHRC, the ASEAN CSR Network, and the UMFCCL. A total of 37 representatives attended the event—including representatives from government ministries, the National Parliament, the Supreme Court, Attorney General’s Office, and MAAF.

### Gaps

#### NHRI Establishment, Recognition, and Support

- 1) The MNHRC does not fully comply with the Paris Principles and was accredited with a “B” status by the Subcommittee on Accreditation of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights in November 2015.<sup>413</sup> The

### **GUIDING PRINCIPLE 3**

Subcommittee, the Special Rapporteur on the situation of human rights in Myanmar, as well as several States in the second cycle of the UPR of Myanmar recommended the government to make reforms with regard to the functioning of the MNHRC.<sup>414</sup> The opacity of the appointment process of members of the Commission, and the lack of adequate funding and financial independence from the Executive branch were highlighted as major concerns.<sup>415</sup>

#### **NHRI Focus on Business and Human Rights**

- 1) While the MNHR Strategic Plan identifies business and human rights as a priority issue, it does not expressly mention the UNGPs and the role of the NHRI in promoting the implementation of the UNGPs has not been formally recognized by the Myanmar government.<sup>416</sup>

### **GUIDING PRINCIPLE 4**

**States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.**

#### **Commentary to Guiding Principle 4**

## GUIDING PRINCIPLE 4

States individually are the primary duty-bearers under international human rights law, and collectively they are the trustees of the international human rights regime. Where a business enterprise is controlled by the State or where its acts can be attributed otherwise to the State, an abuse of human rights by the business enterprise may entail a violation of the State’s own international law obligations. Moreover, the closer a business enterprise is to the State, or the more it relies on statutory authority or taxpayer support, the stronger the State’s policy rationale becomes for ensuring that the enterprise respects human rights.

Where States own or control business enterprises, they have the greatest means within their powers to ensure that relevant policies, legislation and regulations regarding respect for human rights are implemented. Senior management typically reports to State agencies, and associated government departments have greater scope for scrutiny and oversight, including ensuring that effective human rights due diligence is implemented. (These enterprises are also subject to the corporate responsibility to respect human rights, addressed in Chapter II.)

A range of agencies linked formally or informally to the State may provide support and services to business activities. These include export credit agencies, official investment insurance or guarantee agencies, development agencies and development finance institutions. Where these agencies do not explicitly consider the actual and potential adverse impacts on human rights of beneficiary enterprises, they put themselves at risk—in reputational, financial, political and potentially legal terms—for supporting any such harm, and they may add to the human rights challenges faced by the recipient State.

### 4.1. Businesses Owned or Controlled by the State

Does the State exercise special measures to support the human rights performance of State-owned or -controlled business enterprises?

Indicators	Scoping Questions
<b>Human Rights Due Diligence Requirements</b>	What types of human rights due diligence measures by State-owned or -controlled business enterprises are required by the State? How do associated government departments ensure that effective human rights due diligence is being carried out? What type of scrutiny and oversight do such government departments have over these enterprises (for example, inclusion of human rights performance information in management reports to relevant State agencies)?

## GUIDING PRINCIPLE 4

<b>Supply Chain Management Requirements</b>	<p>What types of supply chain management measures by State-owned or -controlled business enterprises are required by the State? How do associated government departments ensure that effective supply chain management is being carried out? What type of scrutiny and oversight do such government departments have over these enterprises (for example, inclusion of supply chain information in management reports to relevant State agencies)?</p>
<b>Other Measures</b>	<p>Has the State set out any other special measures to support the human rights performance of State-owned or -controlled business enterprises?</p>

### Implementation Status

Below is a non-exhaustive list of relevant existing **human rights due diligence requirements** for State-owned or controlled business enterprises in Myanmar:

- 1) There is no publicly available information on human rights due diligence requirements for State-owned or controlled business enterprises in Myanmar.
- 2) In order to improve the transparency of the natural resource extraction industry, which is dominated by State-owned enterprises, the Thein Sein administration joined the EITI initiative. Myanmar was accepted as an EITI Candidate on 2 July 2014 and its first report was published in January 2016. The report covered revenues from the oil, gas, and mining sectors from 1 April 2013 to 31 March 2014.<sup>417</sup>
- 3) According to Global Witness, some government officials are demonstrating a genuine willingness to greater transparency, and both the Ministry of Mines and the Myanmar Gems Enterprise, owned by the Ministry of Mines, have provided information on the jade industry to Global Witness.<sup>418</sup>

### Gaps

## GUIDING PRINCIPLE 4

Below is a brief explanation of some of the gaps in Myanmar government activities for **human rights due diligence requirements** for State-owned or controlled business enterprises:

- 1) The State-owned Economic Enterprises Law:<sup>419</sup>
  - a) The law does not set forth human rights due diligence requirements for State-owned or controlled business enterprises. With regard to the governance of state-owned enterprises, the State-owned Economic Enterprises Law provides only that “the Government may prescribe such procedures as may be necessary, and the respective Ministries may issue such orders and directives as may be necessary.”<sup>420</sup> The law grants state-owned enterprises monopoly in key sectors (banking, insurance and telecommunications, natural resource extraction industries, and electricity generation). However, private companies, including foreign investors, can conduct business in these sectors by entering into a joint venture with state-owned enterprises when it is deemed to be “in the interest of the Union.”<sup>421</sup> The OECD reported that the Myanmar government promotes such public-private joint ventures, but has done little to supervise the management and finances of these business relationships, resulting in serious issues relating to transparency and accountability.<sup>422</sup>
- 2) Centralized oversight:
  - a) There is little publicly available information on Myanmar State-owned enterprises and State-affiliated military enterprises, whose operations remain largely opaque.<sup>423</sup> Research from the Natural Resource Governance Institute also indicates that there are no explicit rules governing the operations and reporting structure of Myanmar’s State-owned enterprises in the oil, gas, and mining industry vis-à-vis government ministries.<sup>424</sup> The same study suggests that State-owned enterprises are managed according to each ministry’s internal procedures, rendering it difficult for public monitoring to ensure accountability.<sup>425</sup>
- 3) Transparency and governance:
  - a) The U.S. Department of State reported that “[c]orporate governance of state-owned enterprises (SOEs) is not transparent, and they are not required by law to publicly release annual reports.”<sup>426</sup> The OECD also recommended the creation of a corporate governance framework for state-owned enterprises, including accounting and auditing standards, as well as transparent rules governing board nomination and election.<sup>427</sup>
  - c) Following the publication of Myanmar’s first EITI report, several international and regional organizations expressed concern about the report’s insufficient coverage of the country’s multi-billion dollar jade industry.<sup>428</sup> International NGO Global Witness stated that the report gave too little information about the ownership of companies and the terms of contracts – both crucial to the public’s ability to hold companies and officials accountable.<sup>429</sup>



## GUIDING PRINCIPLE 4

- d) A March 2016 report by international and Myanmar environmental organizations analyzed the Myanmar timber industry and the Myanmar Timber Enterprise (MTE), a State-owned enterprise which has a monopoly to extract timber and authority to subcontract extraction tasks to private companies.<sup>430</sup> According to the report, there is institutionalized corruption within the MTE, many of whose senior staff are members of the military. The MTE reportedly accepts bribes routinely in exchange for timber extraction contracts<sup>431</sup> and fails to scrutinize logging activities, allowing illicit and over-extraction of timber in violation of harvesting rules.<sup>432</sup>
- 4) Military-controlled enterprises: The Union of Myanmar Economic Holdings Limited (UMEHL) and Myanmar Economic Corporation (MEC) have preeminent positions in the Myanmar economy, and both are managed by active and retired military officers and public officials.<sup>433</sup> Although these entities are private companies, these companies reportedly play “important quasi-official roles in determining who gets access to mining projects and in distributing the benefits of extraction.”<sup>434</sup> UMEHL has been particularly criticized for its joint venture with Chinese-owned Wanbao Mining Ltd to develop a copper mine at Letpadaung in Sagaing Division.<sup>435</sup> The project has faced persistent allegations of land grabbing, environmental pollution, and the excessive use of force against protesters.<sup>436</sup> UMEHL, as one of the largest companies operating in the jade mining industry in Kachin State, is also criticized for the opacity of its activities and revenues.<sup>437</sup>

Below is a brief explanation of some of the gaps in Myanmar government activities for **supply chain requirements** for state-owned or -controlled business enterprises:

- 1) There is no publicly available information regarding guidelines for sustainable supply chain management for state-owned or -controlled business enterprises in Myanmar.

### 4.2. Businesses Receiving Substantial Support and Services from State Agencies

Does the State exercise special measures to support the human rights performance of businesses receiving substantial support and service from State agencies (for example, export credit agencies, public banks, public pension funds, official investment insurance or guarantee agencies, development agencies, or development finance institutions)?

Indicators

Scoping Questions

## GUIDING PRINCIPLE 4

<b>Human Rights Considerations</b>	Has the State required that businesses receiving substantial support and services from State agencies take into account human rights considerations?
<b>Human Rights Due Diligence Requirements</b>	What types of human rights due diligence measures by State-supported businesses are required by the State? How do associated government departments ensure that effective human rights due diligence is being carried out? What type of scrutiny and oversight do such government departments have over these businesses?
<b>Other Measures</b>	Has the State set out any other special measures to support the human rights performance of State-owned or -controlled business enterprises?
<b>Implementation Status</b>	
<p>Below is a non-exhaustive list of other relevant and existing measures that require <b>human rights considerations</b>:</p> <ol style="list-style-type: none"> <li>1) The Small and Medium Enterprises Development Law<sup>438</sup> - One of the basic principles of the law is to ensure that small and medium-sized enterprises (SMEs) manage resources in a sustainable manner that has “minimum impacts on natural and socio-economic development.”<sup>439</sup> In the registration process of SMEs, the law requires the Small and Medium Enterprises Development Agency to take into consideration the impacts of the company on public health and safety, as well as the natural and socio-economic environment.<sup>440</sup></li> </ol>	
<b>Gaps</b>	
<p>Below is a brief explanation of the gaps in the Myanmar government activities for <b>human rights considerations</b> and <b>due diligence</b> requirements.</p> <ol style="list-style-type: none"> <li>1) The Small and Medium Enterprises Development Law does not provide specific human rights considerations.<sup>441</sup></li> <li>2) There is no publicly available information regarding human rights due diligence required by the State for State-supported businesses.</li> </ol>	

## GUIDING PRINCIPLE 5

States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.

### Commentary to Guiding Principle 5

States do not relinquish their international human rights law obligations when they privatize the delivery of services that may impact upon the enjoyment of human rights. Failure by States to ensure that business enterprises performing such services operate in a manner consistent with the State's human rights obligations may entail both reputational and legal consequences for the State itself. As a necessary step, the relevant service contracts or enabling legislation should clarify the State's expectations that these enterprises respect human rights. States should ensure that they can effectively oversee the enterprises' activities, including through the provision of adequate independent monitoring and accountability mechanisms.

#### 5.1. Public Service Delivery

Does the State ensure that human rights are protected in situations where private enterprises provide for government services that may impact upon the enjoyment of human rights?

Indicators	Scoping Questions
<b>Legislative or Contractual Protections</b>	Has the State adopted legislative or contractual protections for human rights in delivery of privatized services by the central or local government, for example, for the provision of services related to health, education, care-delivery, housing, or the penal system? Do such protections include a State-performed human rights impact assessment of the potential consequences of a planned privatization of provision of public services, prior to the provision of such services? Do public procurement contracts clarify the State's expectation that businesses respect human rights in delivering services and comply with human rights standards?
<b>Awareness-Raising</b>	What measures does the State take to promote awareness of and respect for human rights by businesses that the State commercially contracts with?

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<p><b>Screening</b></p>	<p>What kind of screening processes does the State have in place to promote business respect for human rights? Does the State engage in selective processes that give preferential treatment to companies that demonstrate respect for human rights? Does the State exclude from the bidding process those companies that have demonstrated poor respect for human rights (such as poor and hazardous working conditions, as well as excessive use of force or maltreatment of individuals receiving care)?</p>
<p><b>Monitoring and Oversight</b></p>	<p>Do relevant State agencies effectively oversee the activities of the enterprises that provide services on behalf of the State? Does the State provide for adequate independent monitoring and accountability mechanisms of the activities of the private providers? Does the State provide for specific oversight of high-risk services, such as those related to health and security?</p>
<p><b>Other Measures</b></p>	<p>Is the State a party to the Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict? If so, how does it incorporate commitments into national laws? Is the State party to the International Code of Conduct for Private Security Providers, and if so, how does it incorporate commitments into national laws and procurement processes? Is the State party to the Voluntary Principles on Security and Human Rights? If so, how does it incorporate commitments into national laws, including around the provision of public security? Has the State put any other measures in place to ensure that public service delivery by private enterprises does not have any negative human rights impacts?</p>

### Implementation Status

Below is a non-exhaustive list of other relevant and existing **legislative or contractual protections** in Myanmar to support human rights in government procurement:

- 1) See Section 1.5 for information on the legal framework on public procurement.
- 2) The Thein Sein administration announced a cautious policy in the privatization of public utilities and infrastructure industries “that are critical to the functioning of the economy and are strategic as natural monopolies.”<sup>442</sup> For instance, the policy stated that the privatization process of the

## GUIDING PRINCIPLE 5

telecommunication sector should be participatory and consistent with international best practice, and that the government should seek technical assistance from international organizations and multilateral agencies.<sup>443</sup> The Thein Sein administration also announced that it would continue reforming state-owned enterprises “from corporatization to privatization, in a transparent and efficient manner to produce greater benefits to the population without causing adverse environmental and social consequences.”<sup>444</sup>

Below is a non-exhaustive list of other relevant and existing **monitoring and oversight** mechanisms provided by State agencies to support human rights in government procurement:

- 1) A Privatization Commission was created in order to evaluate privatized enterprises and to assess whether they “promoted national interests.”<sup>445</sup>

### Gaps

Below is a non-exhaustive list of the gaps in the Myanmar government activities for **legislative or contractual protections** to support human rights in government procurement:

- 1) See Section 1.5 for information on gaps in the legal framework on public procurement.
- 2) No common policies or procedures for privatization of state-owned enterprises exist in Myanmar.<sup>446</sup> During its Investment Policy Review of Myanmar in 2014, the OECD recommended the establishment of a framework for privatization to ensure that processes for transferring assets are well-structured, competently managed, and held to high standards of corporatization.<sup>447</sup> The OECD also recommended that the rationale behind each privatization be communicated to the public in a transparent manner and that the administrative bodies in charge of privatization be competent and subject to high standards of accountability and transparency.<sup>448</sup>

Below is a non-exhaustive list of the gaps in the Myanmar government **awareness-raising measures** to support human rights in government procurement:

- 1) There is no publicly available information regarding awareness-raising measures to support human rights in government procurement.

## GUIDING PRINCIPLE 5

Below is a non-exhaustive list of the gaps in the Myanmar government activities for **screening processes**:

- 1) There is no publicly available information regarding screening processes to support human rights in government procurement.

Below is a non-exhaustive list of the gaps in the **monitoring and oversight** provided by State agencies to support human rights in government procurement:

- 1) There is no publicly available information on the activity of the Privatization Commission since 2011.<sup>449</sup>
- 2) Several major waves of privatization occurred in the past under the Than Shwe military government, often with little transparency over the price or buyer of the public assets sold.<sup>450</sup> It is reported that a massive “fire-sale”-like privatization of public assets occurred in February 2011 before the military junta left the government.<sup>451</sup> The Asian Development Bank noted that, without proper regulatory oversight, such privatization “may create the conditions for implicit monopolies, oligopolies, and rampant rent-seeking.”<sup>452</sup> Media sources also indicated that the massive privatization of state assets in 2011 mainly benefited military leaders and business tycoons closely tied to the military.<sup>453</sup>
- 3) Under the Thein Sein administration, it is reported that privatization mainly proceeded through the leasing of public assets and enterprises to private entities, such as in the form of land concessions for commercial agricultural uses.<sup>454</sup> Such practices proceeded in the absence of a common legal framework on privatization and land laws that are compliant with international human rights standards (see Section 1.5 for information on land legislation).<sup>455</sup> Media have also reported a wave of fast-tracked privatizations of state assets before the Thein Sein administration left office in March 2016.<sup>456</sup> In February 2016, an NLD Member of Parliament submitted a motion to the Lower House of Parliament calling on the Thein Sein administration to scrutinize and explain permits granted to sell or lease state-owned assets to private companies.<sup>457</sup> Criticizing these practices, the Member of Parliament also claimed that a number of forced evictions of communities occurred as a result of the government licensed-private business operations.<sup>458</sup> The Thein Sein administration declined to respond to the allegations, stating that it was not accountable to the NLD-led Parliament.<sup>459</sup>

**Other measures:**

## GUIDING PRINCIPLE 5

- 1) Myanmar is not a party to the Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies during Armed Conflict.<sup>460</sup>
- 2) Myanmar is not a party to the ICoCA.<sup>461</sup>
- 3) Myanmar is not a party to the Voluntary Principles on Security and Human Rights.<sup>462</sup>

## GUIDING PRINCIPLE 6

States should promote respect for human rights by business enterprises with which they conduct commercial transactions.

### Commentary to Guiding Principle 6

States conduct a variety of commercial transactions with business enterprises, not least through their procurement activities. This provides States—individually and collectively—with unique opportunities to promote awareness of and respect for human rights by those enterprises, including through the terms of contracts, with due regard to States’ relevant obligations under national and international law.

### 6.1. Public Procurement

Which types of requirements or incentives to respect human rights can be found in legislative measures or in terms of public procurement?

Indicators	Scoping Questions
<b>Planning for Procurement Needs and Risks</b>	Have State agencies decided whether their contractors must comply with specific human rights or protect against defined human rights harms as a contract obligation? If so, have State agencies made an effort to expand the scope of protection and clarify specific human rights definitions to resolve vagueness?

## GUIDING PRINCIPLE 6

<p><b>Providing Notice During Bid Solicitation</b></p>	<p>Do State agencies notify potential contractors when there is a significant risk of a human rights violation that undermines fair competition? Does such notice trigger specific disclosure and compliance obligations?</p>
<p><b>Screening and Selection</b></p>	<p>In addition to evaluating price and capacity, do State agencies evaluate whether potential contractors are responsible, based on integrity and business ethics and on compliance with domestic law that protects the safety and health of workers and communities? Do State agencies engage in selective or targeted public procurement, such as preferential award to discriminated groups (for example, ethnic minorities) or to companies working to achieve specific human right objectives (for example, gender equality)? Do State agencies require contractors to certify that they know their subcontractors, including specific locations of production or supply, and that they have management systems to ensure compliance? Do State agencies exclude companies with commercial contracts in high-risk countries or a bad human rights record from public procurement?</p>
<p><b>Award Stage</b></p>	<p>Do State agencies have criteria and sub-criteria for what constitutes the most economically advantageous tender, including human rights criteria? Have State agencies taken steps to clarify how human rights standards and policies might be used to form part of the award criteria for a particular contract? Do State agencies require contractors to disclose information on their supply chain, including specific subcontractors and the addresses of factories or sites of supply? Do State agencies confirm a contractor’s assurances and required development of compliance plans during the award stage?</p>
<p><b>Contract Terms</b></p>	<p>Is the State taking steps to ensure that human rights requirements, material to the procured good or service, are a part of contractual performance clauses? Have State agencies inserted compliance obligations into contract terms? When a State agency identifies a risk of harm or human rights violations, does it authorize contract officers to insert into the contract an obligation to comply with the domestic law of the country of production or supply?</p>



## GUIDING PRINCIPLE 6

<p><b>Auditing and Monitoring</b></p>	<p>Do State agencies have information systems to audit and monitor contractors to ensure that the contractor meets its performance or compliance obligations and does not adversely impact human rights? Do such systems respond to work complaints? Are such systems independent from, yet accountable to, the State?</p>
<p><b>Enforcement of Contract Terms and Corrective Action</b></p>	<p>Do State agencies dedicate staff to enforcement of the contract terms and provide them with detailed policies? Have State agencies put in place procedures to correct adverse human rights impacts identified, such as financial or other remedies if a contractor violates human rights? Do the procedures favor changing the behavior of the contractor to improve their human rights performance rather than simply terminate the relationship? Do State agencies provide for due diligence as both a defense and as a remedy for breach of compliance standards?</p>
<p><b>Other Measures</b></p>	<p>Have State agencies put any other measures in place to ensure that public procurement complies with human rights protection?</p>

**Implementation Status**

1) See Sections 1.5 and 5.1 for information on public procurement in Myanmar.

**Gaps**

- 1) See Sections 1.5 and 5.1 for information on the gaps in public procurement in Myanmar.
- 2) There is no publicly available information regarding the specific indicators under this section.

## GUIDING PRINCIPLE 6

### 6.2. Other Commercial Activities

Has the State taken measures to promote awareness of and respect for human rights by other enterprises with which the State conducts commercial activities?

Indicators	Scoping Questions
<b>Business Partnerships</b>	Does the State take measures to promote respect for human rights among other businesses with which it engages in commercial relationships, such as through business partnerships for economic development and innovation (for example, growth funds, or strategic support for innovation in certain sectors, such as green energy or medical technology)?
<b>Implementation Status</b>	
1) The development of a framework for public-private partnerships was a policy priority for the Thein Sein administration during the period 2012-2015. <sup>463</sup> The Asian Development Bank provided technical assistance on the development of such framework from 2014 to the end of 2015. <sup>464</sup>	
<b>Gaps</b>	
1) Myanmar does not have an overarching legal or policy framework guiding public-private partnerships. <sup>465</sup> 2) There is no publicly available information regarding measures to promote awareness of and respect for human rights by other enterprises with which the Myanmar government conducts commercial activities.	

## GUIDING PRINCIPLE 7

Because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by:

- (a) Engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships;
- (b) Providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence;
- (c) Denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation;
- (d) Ensuring that their current practices, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.

### Commentary to Guiding Principle 7

Some of the worst human rights abuses involving business occur amid conflict over the control of territory, resources or a Government itself—where the human rights regime cannot be expected to function as intended. Responsible businesses increasingly seek guidance from States about how to avoid contributing to human rights harm in these difficult contexts. Innovative and practical approaches are needed. In particular, it is important to pay attention to the risk of sexual and gender-based violence, which is especially prevalent during times of conflict.

It is important for all States to address issues early before situations on the ground deteriorate. In conflict-affected areas, the “host” State may be unable to protect human rights adequately due to a lack of effective control. Where transnational corporations are involved, their “home” States therefore have roles to play in assisting both those corporations and host States to ensure that businesses are not involved with human rights abuse, while neighboring States can provide important additional support.

To achieve greater policy coherence and assist business enterprises adequately in such situations, home States should foster closer cooperation among their development assistance agencies, foreign and trade ministries, and export finance institutions in their capitals and within their embassies, as well as between these agencies and host Government actors; develop early-warning indicators to alert Government agencies and business enterprises to

## GUIDING PRINCIPLE 7

problems; and attach appropriate consequences to any failure by enterprises to cooperate in these contexts, including by denying or withdrawing existing public support or services, or where that is not possible, denying their future provision.

States should warn business enterprises of the heightened risk of being involved with gross abuses of human rights in conflict-affected areas. They should review whether their policies, legislation, regulations and enforcement measures effectively address this heightened risk, including through provisions for human rights due diligence by business. Where they identify gaps, States should take appropriate steps to address them. This may include exploring civil, administrative or criminal liability for enterprises domiciled or operating in their territory and/or jurisdiction that commit or contribute to gross human rights abuses. Moreover, States should consider multilateral approaches to prevent and address such acts, as well as support effective collective initiatives.

All these measures are in addition to States' obligations under international humanitarian law in situations of armed conflict, and under international criminal law.

### 7.1. Guidance

Does the home State play a role in assisting both corporations and host States to ensure that businesses are not involved with human rights abuse in conflict-affected areas?

Indicators	Scoping Questions
<b>Host State relationship</b>	Does the State seek to ensure that it is informed of the role of corporations headquartered within its jurisdiction in conflict-affected areas? Does the home State engage with the host State in ensuring that businesses are respecting human rights?
<b>Business Guidance</b>	Does the State provide guidance for companies operating in conflict-affected areas on what specific human rights issues that the companies should be aware of and pay specific attention to in their due diligence process (such as gender and sexual violence, discrimination, and contributing to conflict through finance)?
<b>Implementation Status</b>	

## GUIDING PRINCIPLE 7

Measures that the Myanmar government takes to **engage with the host State** and to be informed about the activities of Myanmar-headquartered companies in the host State include the following:

- 1) There is no publicly available information regarding engagement of Myanmar government with host States to ensure that Myanmar-based companies respect human rights when operating in conflict-affected areas.

Measures the Myanmar government has developed to help **guide businesses** to respect human rights in conflict-affected areas include the following:

- 1) National Land Use Policy<sup>466</sup> - In January 2016, the Myanmar government adopted the NLUP, which states that the government should apply “international best practices and human rights standards” when managing the relocation, compensation, rehabilitation, and restitution of communities displaced during civil wars, and ensure participation by township, ward, or village tract level stakeholders, civil society, representatives of ethnic nationalities and experts during these processes.

### Gaps

Major gaps remain in the **guidance** the Myanmar government provides regarding businesses operating in conflict-affected areas:

- 1) There is no publicly available information regarding engagement of the Myanmar government with host States to ensure that Myanmar-based companies respect human rights when operating in conflict-affected areas.
- 2) The potential impact of business on civil conflicts constitutes a major issue in Myanmar. Business investments have, in some cases, fuelled local grievances and stimulated ethnic conflict.<sup>467</sup> According to research from the Transnational Institute, “[e]conomic grievances among ethnic groups – often tied to resources being extracted from the borderlands to sustain the government and business elites – have played a central part in fuelling the civil war.”<sup>468</sup> In addition, some of the most attractive destinations for natural resource investment in Myanmar are located in ethnic minority regions, which continue to be areas of conflict.<sup>469</sup> According to the Karen Peace Network, “[t]he exploitation of local natural resources and disrespect for land rights by central military authorities are two key causes of the more than 60 years of conflict in ethnic areas of Myanmar.”<sup>470</sup>
- 3) National Land Use Policy: The NLUP lacks details on which “international best practices and human rights standards” companies should follow and how this provision will be enforced.

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- 4) Several civil society groups representing ethnic minorities have called on all stakeholders in Myanmar’s peace process “to recognize the crucial role that high-value natural resource extraction can have on the outcome of peace negotiations” and have urged the government to issue a moratorium on high-value natural resource extraction and large-scale development projects until political agreement and new legislation are adopted to ensure decentralized management of natural resources.<sup>471</sup>

### 7.2. International Frameworks and Initiatives

Has the State officially supported or implemented international frameworks and initiatives on the private sector role in conflict-affected areas?

#### Indicators

#### Scoping Questions

#### Promotion of Initiatives

Does the State participate in and/or promote relevant initiatives (for example, the Voluntary Principles or the International Code of Conduct for Private Security Service Providers)?

#### Implementation Status

The following is an explanation of the Myanmar’s government efforts regarding the **promotion** of international frameworks and initiatives:

The EITI provides standards to promote open and accountable management of natural resources.<sup>472</sup> Myanmar was accepted as an EITI Candidate on 2 July 2014,<sup>473</sup> and the first EITI report on Myanmar was published in January 2016, which covered revenues from the oil, gas, and mining sectors for the period from 1 April 2013 to 31 March 2014.<sup>474</sup> While there were concerns that the EITI Board might suspend Myanmar if it failed to submit its second report by the end of March 2017, at the time of writing, the NLD-led government has yet to reform a multi-stakeholder group to draft the second report.<sup>475</sup>

#### Gaps

The following is an explanation of the gaps in the Myanmar government efforts in the **promotion** of international frameworks and initiatives:

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- 1) Myanmar is not a party to the Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies during Armed Conflict.<sup>476</sup>
- 2) Myanmar is not a party to the ICoCA.<sup>477</sup>
- 3) Myanmar is not a party to the Voluntary Principles on Security and Human Rights.<sup>478</sup>

### 7.3. Supportive Measures

Does the State investigate company activities in conflict-affected areas, act upon these investigations, and provide redress?

Indicators	Scoping Questions
<b>Investigative Measures</b>	Does the State have a procedure for investigating company activities in conflict-affected areas (for example, through the appointment of a mission that may report to the Parliament or asking the local embassy to investigate in the host State and report to relevant authorities in the home State)?
<b>Follow-Up and Remedial Measures</b>	Does the State have a procedure for follow-up on issues identified through the investigative process (for example, through the denial or withdrawal of existing public support or services to business enterprises that are involved in human rights abuse or other crimes)? Has the State developed mechanisms of extraterritorial criminal liability? Is it possible for the State to impose sanctions on persons and entities for example, by seizing equipment or freezing assets?
Implementation Status	
<p><b>Investigative measures</b> that the Myanmar government takes include the following:</p> <ol style="list-style-type: none"> <li>1) See Sections 1.5 and 1.6 for information on the judiciary in Myanmar.</li> <li>2) Investigation Commissions: Investigation commissions are formed via presidential or parliamentary orders on an <i>ad hoc</i> basis: <ol style="list-style-type: none"> <li>a. Letpadaung Investigation Commission: The Letpadaung copper mine project started in 2010 and was established as a joint venture between the Myanmar government, the UMEHL (controlled by the Myanmar military), and Wanbao Mining, a Chinese company.<sup>479</sup> Amnesty International reported that thousands of villagers have been forcibly evicted from their homes during the development of the mine.<sup>480</sup> In</li> </ol> </li> </ol>	

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addition, the project discharged hazardous waste materials in 1995 and 1996 into a local river, which created serious concerns over its environmental and health impacts.<sup>481</sup> The police have repeatedly denied local communities' request to hold peaceful assemblies to voice opposition to the mining operation. Protesters were arrested and detained for demonstrating without a permit in Monywa, Mandalay, and Yangon.<sup>482</sup> In November 2012, the police violently repressed protests by firing smoke-bombs containing white phosphorous, which caused fires and extensive burns to many of the protesters.<sup>483</sup> President's Office Notification No. 92/2012 formed an investigation commission consisting of 30 members and chaired by the NLD leader Aung San Suu Kyi on 1 December 2012. The Commission was formed to assess whether the Letpadaung project should be continued considering, among many factors, the multiple protests against the project and the injuries to the community as a result of police suppression of the protests. The Commission was also tasked to investigate the "causes of protests that demanded the shutdown of the copper mine project."<sup>484</sup> These clauses were later removed from the mandate of the Commission when it was ordered to be reconstituted. The mandate of the reconstituted Commission was narrowed to investigate only the "true situation" of the project, focusing largely on whether it adhered to international social and environmental standards and whether the copper mine project will be beneficial to the State and to the people as a whole.<sup>485</sup>

The Commission found that Wanbao had improperly compensated local farmers for the lands acquired for the project, and the mine had been developed without strong environmental protection measures. The Commission also acknowledged that 108 people had been injured by the police and its use of phosphorus bombs.<sup>486</sup> The Commission made recommendations in relation to these issues, but it did not recommend halting the project.<sup>487</sup> The report further stated that a decision to close the mine could negatively affect the country's international reputation, undermining its ability to attract foreign investment.<sup>488</sup>

b. Hydropower Scrutiny Commission: The Myitsone hydropower dam project in Kachin State is the result of a joint venture between the Myanmar Ministry of Electric Power, Asia World Company, and the state-owned China Power Investment Corporation.<sup>489</sup> The planned dam is located at the confluence of the Mali and N'Mai rivers, which forms the start of the Irrawaddy River in Kachin State. Environmental groups warned that the project would flood one of the world's richest biodiversity hotspots and cause the extinction of many animal and plant species.<sup>490</sup> The project would also displace 15,000 people, mostly from the ethnic Kachin minority, and would destroy the river confluence, which constitutes a cultural heartland for the Kachin people.<sup>491</sup> However, without consultation with local communities and disclosure of the social, environmental, and health impact assessments,<sup>492</sup> construction of the dam started in December 2009.<sup>493</sup> The project has resulted in severe impacts on the health and livelihoods of the local communities, who were forcibly relocated due to the project. These impacts include



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inadequate housing with insufficient drinking water and little compensation for land confiscations.<sup>494</sup> In view of significant public outcry and concerns over the detrimental environmental and social impact of the dam, then President Thein Sein eventually decided to suspend the project in September 2011.<sup>495</sup> The NLD-led government, which took office in March 2016, has not yet indicated whether it would agree to resume the project but may consider “redesigning” the project by moving the dam further upstream and away from an active seismic fault line.<sup>496</sup> A hydropower scrutiny commission was formed to review the Myitsone contract on 12 August 2016.<sup>497</sup> The commission submitted an initial assessment in November 2016, but the commission has yet to hear back from the President about the report.<sup>498</sup> The hydropower scrutiny commission was given only three months to conduct such a wide-ranging review of the Myitsone contract.<sup>499</sup> However, there is no available information on whether human rights standards are being taken into consideration in the assessment of the continuation of the project.

The Myanmar government takes the following **follow-up and remedial measures** when problems are identified through the investigative process:

- 1) Letpadaung Implementation Committee: In March 2013, then President Thein Sein formed an Implementation Committee responsible for implementing the investigative report on the Letpadaung copper mine project. Minister of the President's Office of Myanmar Hla Tun said that as of March 2015, the committee has implemented 37 out of 42 recommendations of the investigative commission in its report.<sup>500</sup> On the other hand, Amnesty International reported in February 2015 that many of the recommendations of the Letpadaung Investigation Commission had not been implemented. The majority of the people who were affected by the forced evictions have yet to receive compensation.<sup>501</sup>
- 2) Under the Anti-Money Laundering Law, which has extraterritorial reach (for information on extraterritorial criminal liability, see section 2.1), authorities may provisionally freeze assets and property of individuals and companies that have committed money laundering.<sup>502</sup>

### Gaps

**Investigative measures** that the Myanmar government takes include the following:

- 1) Investigation Commissions:
  - a. Letpadaung Investigation Commission: The report of the investigation commission was heavily criticized by local communities, especially for urging the project to continue, despite protests.<sup>503</sup> The residents further said that the committee has not done “anything pragmatic so far to ease the adverse educational, social and environmental effects on the locals.”<sup>504</sup> Human rights considerations were not mentioned

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in either of the Presidential Notifications that established the investigation commissions, although there was a reference to upholding the “rule of law.”<sup>505</sup> The residents of the mine area also complained that the commission did not include anyone selected by them to assist in compiling its report.<sup>506</sup>

- b. Hydropower Scrutiny Commission: Activists and human rights organizations have criticized the government and the commission for not giving the public any information about the scrutiny process.<sup>507</sup> Neither the government nor the commission released any facts about the first report after its submission.

- 2) See Sections 1.5 and 1.6 for information on gaps in the judiciary in Myanmar.

The following exemplify gaps regarding **follow-up and remedial measures** the Myanmar government takes when problems are identified through the investigative process:

- 1) Letpadaung Implementation Committee: In determining the liability of the police officers involved, the report of the investigative commission failed to address the police officers’ use of white phosphorus to disperse protesters.<sup>508</sup> The report merely recommended that the government seek training on riot-control techniques, faulting the police for not understanding how to deploy the smoke bombs during the raid, which was labeled as harsh by rights groups.<sup>509</sup>

In December 2014, Aung San Suu Kyi, the chair of the investigation commission, said that the implementation committee failed to fully implement the recommendations.<sup>510</sup> Mining operations resumed in May 2016, which triggered new waves of protests and the arrest of two protesters.<sup>511</sup> Protesters call for a halt to the project, maintaining that Wanbao did not adhere to the recommendations of the Investigation Commission, notably the recommendation to compensate local farmers for crops lost to land confiscations.<sup>512</sup> In September 2016, the NLD-led government made its first concerted effort of addressing grievances about the project through a meeting between locals opposing the Letpadaung copper mine in Salingyi township and two Sagaing Region ministers.<sup>513</sup>

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### 7.4. Gross Human Rights Abuses

Has the State put in place measures for addressing the risk of business involvement in gross human rights abuses?

Indicators	Scoping Questions
<b>Early-Warning Procedures</b>	Has the State put in place procedures to warn business enterprises of the heightened risk of being involved with gross abuses of human rights in conflict-affected areas?
<b>Cross-Unit Cooperation</b>	Has the State put in place efforts with the aim of fostering closer cooperation among its development assistance agencies, foreign and trade ministries, and export finance institutions in its capitals and within its embassies, as well as between these agencies and host State actors?
<b>Civil and/or Criminal Liability</b>	Has the State introduced civil or criminal liability for enterprises domiciled or operating in their territory and/or jurisdiction that commit or contribute to gross human rights abuses, including abuses outside of its territorial jurisdiction, as permitted by the UNGPs and international human rights law?
<b>Multilateral Approach</b>	Has the State engaged in multilateral approaches to prevent and address acts of gross human rights abuses? Does the State accept the jurisdiction of the International Criminal Court (ICC)?
<b>Implementation Status</b>	
<p><b>Early warning procedures</b> worldwide are still under development and are focused on conflict prevention rather than conflict as it relates to business.</p> <p>See Sections 1.5, 1.6, and 2.1 for a discussion of <b>civil and criminal liability</b>, including existing gaps.</p>	

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### Gaps

Major gaps remain in the Myanmar government’s approach to ensuring corporations are not involved with the commission of gross human rights abuses:

- 1) Myanmar does not have early-warning procedures to alert businesses to the risks of these abuses.
- 2) The Myanmar government does not have a permanent coordinating body that addresses human rights abuses.
- 3) Inherited colonial law recognizes **civil and criminal liability** for companies, including state-owned enterprises, but these provisions have not yet been used to ensure corporate accountability.<sup>514</sup>

Myanmar’s **multilateral approach** to prevent and address acts of gross human rights abuses:

- 1) Myanmar is not a party to the Rome Statute that established the International Criminal Court.<sup>515</sup> During the second cycle of the UPR that took place in November 2015, the government rejected all recommendations calling for the ratification of the Rome Statute.<sup>516</sup>

### 7.9. Role of Export Credit Agencies and Insurance Agencies

Does the State ensure that Export Credit Agencies and Insurance Agencies do not contribute or financially benefit from negative human rights impacts and abuse?

#### Indicators

#### Scoping Questions

#### Special Measures

Has the State put in place special measures to ensure that export credit agencies and insurance companies are not contributing to, or financially benefitting from, negative human rights impacts and abuse? Are there rules and incentives for such institutions to take human rights impacts into consideration in their financing and investment procedures?

#### Implementation Status

## GUIDING PRINCIPLE 7

The following is an explanation of the **special measures** the Myanmar government takes to ensure that Export Credit Agencies and Insurance Agencies do not contribute or financially benefit from negative human rights impacts and abuse:

- 1) There is no publicly available information on special measures taken by the Myanmar government to ensure that export credit agencies and insurance companies are not contributing to, or financially benefitting from, negative human rights impacts and abuse.
- 2) There is no publicly available information on rules and incentives for such institutions to take human rights impacts into consideration in their financing and investment procedures.

### Gaps

The following is an explanation of the gaps in the **special measures** that the Myanmar government takes to ensure that Export Credit Agencies and Insurance Agencies do not contribute or financially benefit from negative human rights impacts and abuse:

- 1) There is no publicly available information on special measures taken by the Myanmar government to ensure that export credit agencies and insurance companies are not contributing to, or financially benefitting from, negative human rights impacts and abuse.
- 2) There is no publicly available information on rules and incentives for such institutions to take human rights impacts into consideration in their financing and investment procedures.

## GUIDING PRINCIPLE 8

States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State's human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support.

### Commentary to Guiding Principle 8

## GUIDING PRINCIPLE 8

There is no inevitable tension between States’ human rights obligations and the laws and policies they put in place that shape business practices. However, at times, States have to make difficult balancing decisions to reconcile different societal needs. To achieve the appropriate balance, States need to take a broad approach to managing the business and human rights agenda, aimed at ensuring both vertical and horizontal domestic policy coherence.

Vertical policy coherence entails States having the necessary policies, laws and processes to implement their international human rights law obligations. Horizontal policy coherence means supporting and equipping departments and agencies, at both the national and subnational levels, that shape business practices—including those responsible for corporate law and securities regulation, investment, export credit and insurance, trade and labour—to be informed of and act in a manner compatible with the Governments’ human rights obligations.

### 8.1. Policy Coherence

Have efforts been made within the State to support knowledge and understanding for human rights and business and the State duty?

Indicators	Scoping Questions
<b>Clear Commitment</b>	Has the State developed a firm written commitment to business and human rights, and has this commitment been communicated to governmental departments? Further, does this commitment help to clarify the role of different departments (for example, labor, business, development, foreign affairs, finance, or justice)?
<b>Roles and Responsibilities</b>	Has the State developed a clear division of responsibilities to help coordinate human rights and business issues between and across different government agencies and departments?
<b>Resources</b>	Has the State provided the responsible entity or office with adequate resources in terms of economic funding and political backing, in order for it to work actively in contributing to meeting the duty of the State to protect human rights within individual areas of responsibility and expertise?

## GUIDING PRINCIPLE 8

### Guidance and Training

Has the State developed guidance material and training to help clarify the roles of different departments in promoting and protecting human rights with regard to the role of business? Does this guidance include specific information on protection of human rights and how this relates to international and regional obligations and commitments (for example, UN, OECD, and regional obligations and commitments)? Does this guidance include specific information on the protection of human rights in trade, with an emphasis on the role of regional bodies and international organizations (for example, the WTO, IFIs (WB, IFC, etc.), and regional IFIs (EBRD, EIB, etc.)? Further, does the guidance provide information on the roles and responsibilities across ministries or agencies (for example, enterprise, labor, development, foreign affairs, agriculture, environment and climate change, financial sector, health, information society policy, and national financial institutions and funds)?

### Implementation Status

- 1) See Section 1.3 for information on the Myanmar government's **commitment** to business and human rights.
- 2) Regarding **roles and responsibilities**, see Section 1.5 for a discussion of national laws and regulations relating to business and human rights and Section 1.6 for information regarding relevant state bodies that address business and human rights.
- 3) See Sections 1.3 and 1.6 for information on the Myanmar government's **training** to governmental departments and agencies.

### Gaps

- 1) There is no publicly available information demonstrating a **clear commitment** of the Myanmar government to business and human rights. See Section 1.3 for more information.
- 2) There is no publicly available information regarding development by the Myanmar government of the **roles and responsibilities** among agencies and departments with regard to business and human rights.
- 3) There is no publicly available information regarding human capital resources and other additional information on available **resources** to support business and human rights.

## GUIDING PRINCIPLE 8

- 4) There is no publicly available information regarding the **development of guidance and training** materials by the Myanmar government to help clarify the roles of different departments in promoting and protecting human rights with regard to the role of business. See Section 1.3 and 1.6 for more information.

## GUIDING PRINCIPLE 9

States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.

### Commentary to Guiding Principle 9

Economic agreements concluded by States, either with other States or with business enterprises—such as bilateral investment treaties, free-trade agreements or contracts for investment projects—create economic opportunities for States. But they can also affect the domestic policy space of Governments. For example, the terms of international investment agreements may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so. Therefore, States should ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such agreements, while providing the necessary investor protection.

### 9.1. Bilateral and Multilateral Investment Agreements and Arbitration of Disputes

Has the State put in place policies, guidance, monitoring, and reporting for relevant ministries or agencies with regard to the conclusion of bilateral and multilateral investment agreements and with regard to the arbitration of disputes?

#### Indicators

#### Scoping Questions

**Human Rights Provisions in IIAs and BITs**

Has the State worked at promoting the inclusion of specific human rights provisions in International Investment Agreements (IIEs) and Bilateral Investment Treaties (BITs)?



## GUIDING PRINCIPLE 9

<b>Inclusion of Social Issues in IIAs and BITs</b>	Has the State worked at promoting the inclusion of social issues, such as the environment, labor rights, or social rights, in International Investment Agreements and Bilateral Investment Treaties?
<b>Stabilization Clauses</b>	Has the State put in place measures to ensure that stabilization clauses do not limit the host government's ability to meet its human rights obligations?
<b>Implementation Status</b>	
<p>The inclusion of <b>human rights provisions and social issues in International Investment Agreements (IIAs) and BITs</b> have been promoted by the Myanmar government in the following ways:</p> <ol style="list-style-type: none"> <li>1) There is limited publicly available information regarding agency efforts to include human rights in IIAs and BITs. However, the following investment agreements entered into by Myanmar contain provisions aiming at preserving the State's policy space to regulate for legitimate public-interest purposes:                     <ol style="list-style-type: none"> <li>a) The ASEAN Comprehensive Investment Agreement (to which Myanmar is a party as an ASEAN member) contains general exceptions to ensure that measures taken by the host State for public-interest objectives do not trigger the State's liability under the investment treaty.<sup>517</sup> This includes measures that are "necessary to protect public morals or to maintain public order," measures "necessary to protect human, animal or plant life or health," and those "relating to the conservation of exhaustible natural resources."<sup>518</sup> To benefit from these exceptions, the State has to demonstrate that the measures in question do not constitute an "arbitrary or unjustifiable discrimination" or a "disguised restriction on investors of any other Member State."<sup>519</sup> The Myanmar-Japan BIT, the ASEAN-China Agreement on Investment, and the ASEAN-Korea Agreement on Investment contain similar general exceptions provisions.<sup>520</sup></li> <li>b) The ASEAN Comprehensive Investment Agreement and the ASEAN Investment Agreement with Australia and New Zealand (to which Myanmar is a party as an ASEAN member) contain provisions protecting the host State from investor claims alleging that certain government measures amount to indirect expropriation. These treaties provide that determining whether a government expropriation has occurred requires a case-by-case analysis, which takes into account the "character of the government action, including its objective and whether it is disproportionate to the public purpose it pursues."<sup>521</sup> In addition, these agreements clarify that non-discriminatory regulatory measures</li> </ol> </li> </ol>	

## GUIDING PRINCIPLE 9

seeking to protect legitimate public interest objectives, such as public health, safety, and the environment, do not amount to indirect expropriation.<sup>522</sup>

- c) The BIT concluded between Myanmar and Japan contains a provision requiring each State, in accordance with its laws, to ensure that measures are taken to prevent and combat corruption.<sup>523</sup>
- d) Myanmar and the European Union are currently in the process of negotiating an Investor Protection Agreement (IPA).<sup>524</sup> The European Commission is currently conducting a sustainability impact assessment (SIA) to assess the economic, social, environmental, and human rights impacts of the prospective agreement.<sup>525</sup> A final SIA report issued in June 2016 recommends that human rights safeguards be incorporated into the IPA, including mechanisms to monitor, regulate, and remedy human rights impacts.<sup>526</sup> The SIA report also suggests that the right to regulate should be designed to allow both the European Union and Myanmar to engage in legitimate regulatory actions without risk of liability to investment dispute and compensation claims.<sup>527</sup> The SIA report recommends including a provision on sustainable development in the IPA, which may encourage responsible business conduct by European companies operating in Myanmar.<sup>528</sup> In addition, a leaked copy of the 2015 draft of the IPA included language stating that Parties of the IPA are committed to “refer and adhere to internationally recognized guidelines and principles on CSR and responsible business conduct, such as the OECD Guidelines for Multinational Enterprises, the UN Global Compact, the UN Guiding Principles on Business and Human Rights, ISO 26000, and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.”<sup>529</sup>

The Myanmar government has put in place the following measures to ensure that **stabilization clauses** do not limit the government’s ability to meet its human rights obligations:

- 1) There is no publicly available information regarding measures taken by the State to ensure that stabilization clauses do not limit the host government’s ability to meet its human rights obligations.

### Gaps

There is still room for the Myanmar government to improve in promoting the inclusion of **human rights provisions and social issues** in IIAs and BITs:

- 1) Myanmar’s investment treaties do not contain any provisions expressly dealing with human rights.

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- 2) The BITs entered into by Myanmar with China, India, Israel, and the Philippines, as well as the ASEAN Investment Agreement with Australia and New Zealand, do not contain general exceptions clauses aiming at preserving the State’s policy space to regulate for legitimate public-interest purposes.<sup>530</sup>
- 3) The BITs entered into by Myanmar as an individual State and the ASEAN-China Agreement and ASEAN-Korea Agreement on investment (to which Myanmar is a party as an ASEAN member) do not clarify the meaning of “indirect expropriation.” This may expose the Myanmar government to potential investor claims challenging the State’s right to regulate for legitimate public-interest purposes, and to wide interpretations of the notion by arbitral tribunals.<sup>531</sup>
- 4) Civil society groups urged the European Commission to include binding measures on human rights in the prospective IPA between the European Union and Myanmar and to ensure that investment settlement dispute mechanisms take due account of human rights norms.<sup>532</sup> In response to the publication of the draft SIA report by the European Commission in March 2016, civil society groups recognized improvements to address human rights concerns but called for clearer and more specific recommendations aimed at ensuring effective human rights protection.<sup>533</sup> For instance, civil society groups called for the inclusion of a clause recalling that corporations have the duty to respect human rights and that State parties should implement the UNGPs, including by encouraging investors to take necessary measures to meet their duty of care and human rights due diligence.<sup>534</sup> It was also suggested that the IPA include human rights as an exception to the conditions constituting indirect expropriation in order to safeguard the State’s policy space to regulate for the protection of human rights.<sup>535</sup>

### 9.2. Government Agreements

Has the State put in place policies and guidance for relevant ministries and agencies with regard to the conclusion of government agreements?

Indicators	Scoping Questions
<b>Human Rights in Government Agreements</b>	Does the State take measures to ensure that human rights considerations are made in agreements between the State and corporations? Are such agreements aligned with the UN’s principles for responsible contracts? <sup>536</sup>

## GUIDING PRINCIPLE 9

### The Role of the Home State

How does the home State ensure that companies headquartered within its jurisdiction respect the principles of responsible contracting when those companies enter into agreements with host States?

### Implementation Status

List all relevant efforts for the promotion of business respect for responsible contracting principles.

The consideration by the Myanmar government of **human rights in government agreements** is addressed below:

- 1) See Sections 1.5 and 6 for discussions on procurement.

The Myanmar's **role as the home State** of companies headquartered within its jurisdiction is as follows:

- 1) See Section 1.5 for information regarding industry-specific protections and Section 2.1 for a discussion of home State measures with extraterritorial implications.
- 2) See also Section 7.1's assessment of home State efforts with regard to protecting human rights in a business environment in conflict areas.

### Gaps

Gaps exist in the Myanmar government policy regarding **human rights in government agreements**:

- 1) See Sections 1.5 and 6 for gaps in procurement law.
- 2) The following examples of agreements between the Myanmar government and corporations provide evidence of a lack of consideration of human rights violations in the conclusion and implementation of such agreements:
  - a) Letpadaung copper mine: The Letpadaung copper mine project started in 2010 and was established as a joint venture between the Myanmar government, the UMEHL (controlled by the Myanmar military), and Wanbao Mining, a Chinese company.<sup>537</sup> Amnesty International reported that thousands of villagers have been forcibly evicted from their homes in connection with the development of the mine.<sup>538</sup> In addition, the project discharged hazardous waste materials in 1995 and 1996 into a local river, which created serious concerns over its environmental and

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health impacts.<sup>539</sup> Local communities were also denied authorization by the police to hold peaceful assemblies to voice opposition to the mining operation, and protesters were arrested and detained for demonstrating without a permit in Monywa, Mandalay, and Yangon.<sup>540</sup> In November 2012, the police violently repressed protests by firing smoke-bombs containing white phosphorous, which caused fires and extensive burns to many of the protesters.<sup>541</sup> In December 2012, an investigation commission was formed by Presidential Notification 92/2012 to assess whether the project should be continued, considering, among many factors, the “control of protests and injuries to members of the Sangha” (community of monks).<sup>542</sup> The mandate of the Commission was subsequently narrowed pursuant to Notification No. 95/2012, which focused the scope of the investigation to the “true situation” of the project, including whether it adhered to international social and environmental standards.<sup>543</sup> Neither of the notifications mentioned the consideration of human rights in the investigation, although they referred to the “rule of law.”<sup>544</sup>

The Commission found that Wanbao had improperly compensated local farmers for the lands acquired for the project, and the mine had been developed without strong environmental protection measures. The Commission also acknowledged that 108 people had been injured by the police and its use of phosphorus bombs.<sup>545</sup> The Commission made recommendations in relation to these issues, but it did not recommend halting the project.<sup>546</sup> The report further stated that a decision to close the mine could negatively affect the country’s international reputation, undermining its ability to attract foreign investment.<sup>547</sup> The report was heavily criticized by local communities. In 2013, it was reported that the majority of villagers refused compensation, and instead called for the return of confiscated land.<sup>548</sup> In December 2014, the police used firearms in response to the protesters, killing one person and injuring others.<sup>549</sup> Mining operations resumed in May 2016, under the new NLD-led government, which triggered new waves of protests and the arrest of two protesters.<sup>550</sup> Protesters called for a halt to the project, maintaining that Wanbao did not adhere to the recommendations of the Investigation Commission, notably the recommendation to compensate local farmers for crops lost to land confiscations.<sup>551</sup> In September 2016, the NLD-led government convened a meeting between locals opposing the Letpadaung mine in Salingyi township and two Sagaing Region ministers in an attempt to mediate the conflicts.

- b) Shwe gas field and pipeline: The Shwe gas project is a large-scale natural gas project developed by Daewoo International Ltd (South Korea), Korea Gas Corporation, ONGC Videsh Ltd (India), and GAIL Ltd (India), in a joint venture with the state-owned Myanmar Oil and Gas Enterprise (MOGE).<sup>552</sup> In 2000, Daewoo signed a production-sharing contract with MOGE to explore sea gas reserves and sell any underwater gas reserves found.<sup>553</sup> Daewoo’s operation discovered the Shwe gas in 2004 in western Myanmar in the Bay of Bengal.<sup>554</sup> The Thein Sein administration then received numerous offers to purchase gas from the Shwe fields, but finally awarded purchasing rights to the Chinese

## GUIDING PRINCIPLE 9

government, through the state-owned China National Petroleum Corporation (CNPC), in 2008.<sup>555</sup> In 2009, the parties signed another contract, which granted CNPC the right to build two overland pipelines crossing two States in Myanmar (Rakhine State and Shan State) to Yunnan Province in China.<sup>556</sup> The pipelines transit routes run through areas of active conflict between ethnic armed groups and Myanmar's military.<sup>557</sup> International and Myanmar civil society groups denounced the lack of consultation with impacted communities and reported serious human rights and environmental impacts caused by the construction of the pipelines by CNPC.<sup>558</sup> EarthRights International reported cases of land confiscations with no or inadequate compensation, forced relocation, and damage to fishing areas and to farmers' land.<sup>559</sup> The UN Special Rapporteur on the situation of human rights in Myanmar also noted reports of forced labor to build roads and infrastructure in areas near the Shwe gas pipeline.<sup>560</sup> Local communities protesting against the project have also been arrested and detained by authorities in 2009 and 2013.<sup>561</sup> Media reported that local farmers planned protests in April 2016 to demand compensation for land damaged by the Shwe gas pipeline, and are preparing to take legal action against CNPC and MOGE.<sup>562</sup>

- c) Myitsone dam: The Myitsone hydropower dam project in Kachin State is the result of a joint venture between the Myanmar Ministry of Electric Power, Asia World Company, and the state-owned China Power Investment Corporation.<sup>563</sup> The planned dam is located at the confluence of the Mali and N'Mai rivers, which forms the start of the Irrawaddy River in Kachin State. Environmental groups warned that the project would flood one of the world's richest biodiversity hotspots and could cause the extinction of many animal and plant species.<sup>564</sup> The project would also displace 15,000 people, mostly from the ethnic Kachin minority, and would destroy the river confluence, which constitutes a cultural heartland for the Kachin people.<sup>565</sup> There are various issues facing local communities forcibly relocated due to the project, including inadequate housing with insufficient drinking water, little compensation for land confiscations, which led to severe negative impacts on local communities' health and livelihoods.<sup>566</sup> Local CSOs also criticized the absence of consultation of local communities and of transparency over the social, environmental, and health impact assessments of the project.<sup>567</sup> Construction of the dam and the resettlement of communities living in the construction areas started in December 2009.<sup>568</sup> In view of significant public outcry and concerns over the environmental and social detrimental impacts of the dam, then President Thein Sein eventually decided to suspend the project in September 2011.<sup>569</sup> The NLD-led government, which took office in March 2016, has not yet indicated whether it would agree to resume the project but may consider "redesigning" the project by moving the dam further upstream and away from an active seismic fault line.<sup>570</sup> A hydropower scrutiny commission was formed to review the Myitsone contract on 12 August 2016.<sup>571</sup> The commission submitted an initial assessment in November 2016, but the commission has yet to hear back from the President about the report.<sup>572</sup> The hydropower scrutiny commission was given only three months to conduct such a wide-ranging review of the Myitsone contract.<sup>573</sup> However, there is no available information on whether human rights standards are taken into consideration in the assessment of the continuation of the project.

## GUIDING PRINCIPLE 9

d) Dawei Special Economic Zone (DSEZ): The DSEZ is a bilateral economic cooperation project between the governments of Thailand and Myanmar. After the project failed to secure sufficient investment, concession rights for the project were transferred to the Dawei SEZ Development Company Limited, jointly owned by the governments of Thailand and Myanmar.<sup>574</sup> The project aims to build one of the largest industrial estates in Southeast Asia that includes a deep seaport and dockyards, an oil refinery complex, steel mill, fertilizer and petrochemical plants, and one or more electric power plants.<sup>575</sup> The project was launched in 2008 but has been stalled since 2013 due to the withdrawal of an investor.<sup>576</sup> On 15 February, Thailand's Transport Minister Arkhom Termpittayapaisith, who led a Thai delegation to meet Myanmar's officials, confirmed that work on the long-delayed Dawei development project will continue.<sup>577</sup> Civil society groups reported adverse environmental and human rights impacts, including forced evictions, displacement, loss of livelihoods, as well as damage and loss to property.<sup>578</sup> It is also reported that affected communities have not been adequately informed and consulted about the DSEZ.<sup>579</sup> In December 2015, the Japanese government took a one-third equity stake in the Dawei SEZ Development Company Limited and joined as an investor to the DSEZ.<sup>580</sup> In March 2016, civil society groups and local residents living in the DSEZ area have called on the Japanese, Thai, and Myanmar governments to address human rights violations before allowing the project to resume.<sup>581</sup> There is no available information on whether human rights standards are taken into consideration in the assessment of the continuation of the project.

Gaps exist regarding Myanmar's **role as the home State** of companies headquartered within its jurisdiction:

- 1) There is no publicly available information regarding measures taken by Myanmar to ensure that companies headquartered within its jurisdiction respect the principles of responsible contracting when those companies enter into agreements with host States.
- 2) See Section 2.1 for gaps in home State measures with extraterritorial implications.
- 3) See Section 7.1's assessment of gaps in home State efforts with regard to protecting human rights in a business environment in conflict areas.

## GUIDING PRINCIPLE 10

States, when acting as members of multilateral institutions that deal with business-related issues, should:

- (a) Seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights;
- (b) Encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights and, where requested, to help States meet their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity-building and awareness-raising;
- (c) Draw on these Guiding Principles to promote shared understanding and advance international cooperation in the management of business and human rights challenges.

### Commentary to Guiding Principle 10

Greater policy coherence is also needed at the international level, including where States participate in multilateral institutions that deal with business-related issues, such as international trade and financial institutions. States retain their international human rights law obligations when they participate in such institutions.

Capacity-building and awareness-raising through such institutions can play a vital role in helping all States to fulfil their duty to protect, including by enabling the sharing of information about challenges and best practices, thus promoting more consistent approaches.

Collective action through multilateral institutions can help States level the playing field with regard to business respect for human rights, but it should do so by raising the performance of laggards. Cooperation between States, multilateral institutions and other stakeholders can also play an important role.

These Guiding Principles provide a common reference point in this regard, and could serve as a useful basis for building a cumulative positive effect that takes into account the respective roles and responsibilities of all relevant stakeholders.

#### 10.1. Membership in Multilateral Institutions

How does the State seek to ensure that the institutions it is a member of neither restrain its duty to protect nor hinder the business responsibility to respect?

Indicators

Scoping Questions



## GUIDING PRINCIPLE 10

<p><b>Internal Procedures and Commitment</b></p>	<p>Has the State established procedures and measures to ensure support for business and human rights frameworks, including the UNGPs, in positions taken internationally and regionally (for example, on human rights screening and documenting of negotiating positions, as well as training of trade and development officials on business and human rights frameworks)?</p>
<p><b>Promotional Activities</b></p>	<p>Does the State promote its duty to protect and the corporate responsibility to respect in multilateral institutions, including international trade and financial institutions, the UN system, regional institutions, and with business organization and workers associations? Has the State taken measures to promote awareness of the UNGPs and the broader business and human rights agenda?</p>
<p><b>Implementation Status</b></p>	
<ol style="list-style-type: none"> <li>1) There is no publicly available information regarding the Myanmar government’s <b>internal procedures and commitments</b> to ensure support for business and human rights frameworks, including the UNGPs, in positions taken internationally and regionally.</li> <li>2) There is no publicly available information regarding the Myanmar government’s <b>promotional activities</b> around business respect for human rights within multinational contexts.</li> </ol>	
<p><b>Gaps</b></p>	
<ol style="list-style-type: none"> <li>1) There is no publicly available information regarding the Myanmar government’s <b>internal procedures and commitments</b> to ensure support for business and human rights frameworks, including the UNGPs, in positions taken internationally and regionally.</li> <li>2) There is no publicly available information regarding the Myanmar government’s <b>promotional activities</b> around business respect for human rights within multinational contexts.</li> </ol>	

## PILLAR III

### GUIDING PRINCIPLE 25

As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.

#### Commentary to Guiding Principle 25

Unless States take appropriate steps to investigate, punish and redress business-related human rights abuses when they do occur, the State duty to protect can be rendered weak or even meaningless.

Access to effective remedy has both procedural and substantive aspects. The remedies provided by the grievance mechanisms discussed in this section may take a range of substantive forms the aim of which, generally speaking, will be to counteract or make good any human rights harms that have occurred. Remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition. Procedures for the provision of remedy should be impartial, protected from corruption and free from political or other attempts to influence the outcome.

For the purpose of these Guiding Principles, a grievance is understood to be a perceived injustice evoking an individual's or a group's sense of entitlement, which may be based on law, contract, explicit or implicit promises, customary practice, or general notions of fairness of aggrieved communities. The term grievance mechanism is used to indicate any routinized, State-based or non-State-based, judicial or non-judicial process through which grievances concerning business-related human rights abuse can be raised and remedy can be sought.

State-based grievance mechanisms may be administered by a branch or agency of the State, or by an independent body on a statutory or constitutional basis. They may be judicial or non-judicial. In some mechanisms, those affected are directly involved in seeking remedy; in others, an intermediary seeks remedy on their behalf. Examples include the courts (for both criminal and civil actions), labour tribunals, national human rights institutions, National

## GUIDING PRINCIPLE 25

Contact Points under the Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development, many ombudsperson offices, and Government-run complaints offices.

Ensuring access to remedy for business-related human rights abuses requires also that States facilitate public awareness and understanding of these mechanisms, how they can be accessed, and any support (financial or expert) for doing so.

State-based judicial and non-judicial grievance mechanisms should form the foundation of a wider system of remedy. Within such a system, operational-level grievance mechanisms can provide early stage recourse and resolution. State-based and operational-level mechanisms, in turn, can be supplemented or enhanced by the remedial functions of collaborative initiatives as well as those of international and regional human rights mechanisms. Further guidance with regard to these mechanisms is provided in Guiding Principles 26 to 31.

### 25.1. Redress for Business-Related Human Rights Abuses

Has the State put in place measures to ensure redress for business-related human rights abuses?

Indicators	Scoping Questions
<b>Sanctions</b>	Has the State put in place mechanisms that introduce civil liability, criminal sanctions, and administrative sanctions, such as fines or limited access to government funding, for human rights abuses?
<b>Financial or Non-Financial Compensation</b>	Has the State put in place mechanisms that introduce compensation, such as fines or restoration of livelihoods, for human rights abuses?
<b>Prevention of Harm</b>	Has the State put in place mechanisms that introduce processes for the prevention of harm, such as injunctions or guarantees of non-repetition, for human rights abuses?
<b>Apologies</b>	Has the State put in place mechanisms to promote apologies for human rights abuses?

## GUIDING PRINCIPLE 25

<b>State-Based Mechanisms</b>	Has the State put in place judicial and non-judicial, criminal and civil mechanisms where grievances can be raised and addressed? Has the State identified and removed barriers (financial, legal, practical, and evidentiary) to accessing those mechanisms? Are such mechanisms available to address extraterritorial harms, as permitted by the UNGPs and international human rights law?
<b>Non-State-Based Mechanisms</b>	Has the State supported non-State based mechanisms?
<b>Other Measures</b>	Has the State put in place other measures to ensure redress for business related human rights abuses?

### Implementation Status

Below is a non-exhaustive overview of **sanctions** available under Myanmar’s legislation for business-related human rights abuses:

- 1) Examples of civil and criminal sanctions include:
  - a) Remedies in civil actions usually are monetary damages. Injunctive relief is mainly available in cases of public nuisance or where property is being misused, damaged, or wasted.<sup>582</sup> In addition, the Code of Civil Procedure also allows a court to grant temporary injunctions to “prevent the ends of justice from being defeated.”<sup>583</sup>
  - b) Criminal sanctions include prison sentences and fines as prescribed under the Penal Code and under specific legislation.
  - c) One may also file a complaint to the Supreme Court claiming a violation of fundamental rights under Chapter VIII of the Constitution. In such case, the Supreme Court may issue the following judicial orders: Writ of Habeas Corpus; Writ of Mandamus; Writ of Prohibition; Writ of Quo Warranto; and Writ of Certiorari.<sup>584</sup> The application is reviewed by an Applications Review Board within the Supreme Court, which consists of three judges including the Chief Justice, or if the Chief Justice is not available, a person appointed by him.<sup>585</sup>
  - d) See Section 26.1 for further information on civil and criminal sanctions.
- 2) Examples of administrative sanctions include:
  - a) Administrative fines may, for instance, be imposed by the MOECA in case of violation of the Environmental Impact Assessment Procedure.<sup>586</sup>

## GUIDING PRINCIPLE 25

Below is a non-exhaustive overview of **financial or non-financial compensation** available under Myanmar’s legislation for business-related human rights abuses:

- 1) See Section 26.1 for examples of financial compensation available under Myanmar’s legislation for business-related human rights abuses.
- 2) There is no publicly available information regarding non-financial compensation under Myanmar’s legislation for business-related human rights abuses.

Below is a non-exhaustive overview of mechanisms available under Myanmar’s legislation for the **prevention of harm** from business-related human rights abuses, including injunctions or guarantees of non-repetition:

- 1) The Code of Civil Procedure allows a court to grant temporary injunctions to “prevent the ends of justice from being defeated.”<sup>587</sup>
- 2) There is no publicly available information regarding other mechanisms available under Myanmar’s legislation for the prevention of harm from business-related human rights abuses.

**State-based mechanisms** where business-related human rights grievances can be raised and addressed are discussed in detail in the sections on Guiding Principles 26, 27, and 31.

**State support of non-State-based mechanisms** where business-related human rights grievances can be raised and addressed are discussed in detail in the sections on Guiding Principle 28.

### Gaps

Below is a non-exhaustive overview of the gaps in **sanctions** available under Myanmar’s legislation for business-related human rights abuses:

- 1) Examples of civil liability and criminal sanctions include:
  - a) The Code of Civil Procedure allows a court to grant temporary injunctions to “prevent the ends of justice from being defeated.”<sup>588</sup> However, the Code of Civil Procedure does not provide details as to the conditions for granting such a remedy.
  - b) See Section 26.1 for further information on gaps in civil and criminal sanctions.

## GUIDING PRINCIPLE 25

Below is a non-exhaustive overview of the gaps in **financial or non-financial compensation** available under Myanmar’s legislation for business-related human rights abuses:

- 1) See Section 26.1 for gaps in financial compensation available under Myanmar’s legislation for business-related human rights abuses.
- 2) There is no publicly available information regarding non-financial compensation under Myanmar’s legislation for business-related human rights abuses.

Below is a non-exhaustive overview of the gaps related to mechanisms available under Myanmar’s legislation for the **prevention of harm** from business-related human rights abuses, including injunctions or guarantees of non-repetition:

- 1) The Code of Civil Procedure allows a court to grant temporary injunctions to “prevent the ends of justice from being defeated.”<sup>589</sup> However, the Code of Civil Procedure does not provide details as to the conditions for granting of such a remedy.
- 2) There is no publicly available information regarding other mechanisms available under Myanmar’s legislation for the prevention of harm from business-related human rights abuses.

Below is a non-exhaustive overview of the gaps in State mechanisms to promote **apologies** for business-related human rights abuses:

- 1) There is no publicly available information regarding mechanisms to promote apologies for business-related human rights abuses.

Gaps in **State-based mechanisms** where business-related human rights grievances can be raised and addressed are discussed in detail in the sections on Guiding Principles 26, 27, and 31.

Gaps in the **State support of non-State-based mechanisms** where business-related human rights grievances can be raised and addressed are discussed in detail in the sections on Guiding Principle 28.

## GUIDING PRINCIPLE 25

### 25.2. Roles and Responsibility Within States

Has the State defined clear roles and responsibilities within the State on access to effective remedy?

#### Indicators

#### Scoping Questions

#### Competent Authorities

Has the State defined competent authorities to investigate allegations of business-related human rights abuse? If so, are these authorities equipped with the knowledge necessary in order to attribute the abuses to the relevant redress mechanism?

#### Implementation Status

- 1) See the sections on Guiding Principle 26, 27, and 31 for steps that the Myanmar government has taken to define **competent authorities** to investigate allegations of business-related human rights abuses.

#### Gaps

- 1) See the sections on Guiding Principles 26, 27, and 31 for gaps in the Myanmar government's efforts to define **competent authorities** to investigate allegations of business-related human rights abuses.

### 25.3. Public Information-Sharing and Accessibility

Has the State developed measures through which to inform about grievance mechanisms available, grievances received, and relevant processes?

#### Indicators

#### Scoping Questions

## GUIDING PRINCIPLE 25

<p><b>Public Information on the Mechanism</b></p>	<p>Has the State made efforts to promote public awareness and understanding of remediation mechanisms, including how they can be accessed and their accessibility? Does the State inform about the outcome of grievances and actions for follow-up when systemic issues are identified?</p>
<p><b>Accessibility</b></p>	<p>Does the State ensure that the mechanisms are available to all affected stakeholders (including, for example, women, peoples with disabilities, children, and indigenous peoples)? This includes providing services such as legal aid and legal counseling, as well as support to, for example, the NHRI, CSOs, or trade unions that work to ensure greater accessibility within grievance mechanisms.</p>
<p><b>Implementation Status</b></p>	
<p>Steps that the Myanmar government has taken to provide <b>public information on remediation mechanisms</b> are addressed under the section on Guiding Principle 31.</p> <p>Steps that the Myanmar government has taken to ensure <b>accessibility</b> of remediation mechanisms are addressed under the section on Guiding Principles 27 and 31.</p>	
<p><b>Gaps</b></p>	
<p>Gaps in the Myanmar government’s efforts to provide <b>public information on remediation mechanisms</b> are addressed under the section on Guiding Principle 31.</p> <p>Steps that the Myanmar government’s efforts to ensure <b>accessibility</b> of remediation mechanisms are addressed under the section on Guiding Principle 31.</p>	



## GUIDING PRINCIPLE 26

States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.

### Commentary to Guiding Principle 26

Effective judicial mechanisms are at the core of ensuring access to remedy. Their ability to address business-related human rights abuses depends on their impartiality, integrity and ability to accord due process.

States should ensure that they do not erect barriers to prevent legitimate cases from being brought before the courts in situations where judicial recourse is an essential part of accessing remedy or alternative sources of effective remedy are unavailable. They should also ensure that the provision of justice is not prevented by corruption of the judicial process, that courts are independent of economic or political pressures from other State agents and from business actors, and that the legitimate and peaceful activities of human rights defenders are not obstructed.

Legal barriers that can prevent legitimate cases involving business-related human rights abuse from being addressed can arise where, for example:

- The way in which legal responsibility is attributed among members of a corporate group under domestic criminal and civil laws facilitates the avoidance of appropriate accountability;
- Where claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim;
- Where certain groups, such as indigenous peoples and migrants, are excluded from the same level of legal protection of their human rights that applies to the wider population.

Practical and procedural barriers to accessing judicial remedy can arise where, for example:

- The costs of bringing claims go beyond being an appropriate deterrent to unmeritorious cases and/or cannot be reduced to reasonable levels through Government support, “market-based” mechanisms (such as litigation insurance and legal fee structures), or other means;

## GUIDING PRINCIPLE 26

- Claimants experience difficulty in securing legal representation, due to a lack of resources or of other incentives for lawyers to advise claimants in this area;
- There are inadequate options for aggregating claims or enabling representative proceedings (such as class actions and other collective action procedures), and this prevents effective remedy for individual claimants;
- State prosecutors lack adequate resources, expertise and support to meet the State’s own obligations to investigate individual and business involvement in human rights-related crimes.

Many of these barriers are the result of, or compounded by, the frequent imbalances between the parties to business-related human rights claims, such as in their financial resources, access to information and expertise. Moreover, whether through active discrimination or as the unintended consequences of the way judicial mechanisms are designed and operate, individuals from groups or populations at heightened risk of vulnerability or marginalization often face additional cultural, social, physical and financial impediments to accessing, using and benefiting from these mechanisms. Particular attention should be given to the rights and specific needs of such groups or populations at each stage of the remedial process: access, procedures and outcome.

### 26.1. Judicial Mechanisms

Has the State put in place a judicial mechanism with the competency to adjudicate business-related human rights abuses within the national jurisdiction of the State? If so, are these mechanisms in line with the criteria of impartiality, integrity, and ability to accord due process?

Indicators	Scoping Questions
<b>National and Regional Courts</b>	Do the national and regional courts have the competency to adjudicate business and human rights abuses, including for abuses that take place outside of their territorial jurisdiction, as permitted by the UNGPs and international human rights law? If so, do they do so in a way that is impartial and with integrity and ability to accord due process?
<b>Labor Tribunals</b>	Do national labor tribunals have the competency to adjudicate business and human rights abuses? If so, do they do so in a way that is impartial and with integrity and ability to accord due process?

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### Other Mechanisms

Do other judicial mechanisms have the competency to adjudicate on business related human rights abuses? If so, do they do so in a way that is impartial and with integrity and ability to accord due process?

### Implementation Status

Below is a non-exhaustive overview of the ability of **national and regional courts** to adjudicate business-related human rights abuses:

- 1) Supreme Court:
  - a) Pursuant to the Constitution, an application can be filed with the Supreme Court for the protection and enforcement of the fundamental rights provided under Chapter VIII of the Constitution.<sup>590</sup> The Supreme Court holds the power to enforce fundamental rights under the Constitution through the issuance of judicial orders.<sup>591</sup>
- 2) Criminal law claims:
  - a) There is no special criminal law for human rights violations or specific human rights courts in Myanmar. As such, human rights violations that constitute criminal offenses are prosecuted as a criminal act under the Penal Code or other relevant laws.<sup>592</sup> Chapter I of the Penal Code provides that the Code applies to any offense committed by any citizens of Myanmar wherever they may be. In addition, it provides that any person liable under the laws of Myanmar for an offense committed outside of Myanmar shall be treated as if the offense had been committed within Myanmar. The Penal Code provides for corporate criminal liability. Article 11 also defines “person” to include “any company or association, or body of persons, whether incorporated or not.”<sup>593</sup>
- 3) Civil law claims:
  - a) There is no special civil law for human rights violations or specific human rights courts in Myanmar. Allegations of human rights violations may be brought in courts under related laws pursuant to the Code of Civil Procedure to seek civil remedies.<sup>594</sup> However, there are no reported examples of successful attempts to do so.<sup>595</sup> Regarding extraterritorial jurisdiction, the Code of Civil Procedure provides for service and required procedures when the defendant resides outside the jurisdiction of the relevant court, including in foreign countries, as well as the possibility for courts to issue commissions to examine witnesses living outside their jurisdiction. However, there is no publicly available information regarding laws in Myanmar that seek to hold corporations to account for their activities outside of Myanmar.<sup>596</sup>
- 4) Forced labor:

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- a) “Unlawful” compulsory labor is prohibited under Article 374 of the Penal Code.<sup>597</sup>
- 5) Criminal prohibition on torture:
  - a) The Penal Code provides that “voluntarily causing grievous hurt to extort a confession is prohibited.”<sup>598</sup>
- 6) The Anti Trafficking in Persons Law:<sup>599</sup>
  - a) The law creates criminal liability for human trafficking offenses.
  - b) The law applies only to natural persons and not to private businesses. However, business executives and employees can be liable for violations of the law.
  - c) The law applies to extraterritorial violations.
- 7) Anti-Corruption Law:<sup>600</sup>
  - a) The law creates criminal liability for corruption offenses.
  - b) The law applies only to natural persons and not to private businesses. However, business executives and employees can be liable for violations of the law.
  - c) The law applies to extraterritorial violations.
- 8) Anti-Money Laundering Law:<sup>601</sup>
  - a) The law creates criminal liability for money-laundering offenses. Companies can be fined for up to K5 million (roughly US\$ 3,700), and the court may impose an additional prison sentence for up to seven years for the company owner.
  - b) The law applies to extraterritorial violations.
- 9) Environmental Conservation Law:<sup>602</sup>
  - a) The law applies to natural persons and private businesses.
  - b) The law creates criminal liability in case of violations. MOECF may also impose administrative fines when the Environmental Impact Assessment Procedure is violated.<sup>603</sup>
- 10) Impartiality, integrity, and due process:
  - a) During its first UPR, the Myanmar government accepted the recommendation to “[c]ontinue to improve its domestic legislation and judiciary system to be in line with international human rights standards and obligations including intensifying human rights education and training, especially for its military and law enforcement officers, in order to enhance their awareness and promote greater accountability.”<sup>604</sup> In its second UPR review, the Myanmar government also accepted the recommendation to “guarantee in law and in

## GUIDING PRINCIPLE 26

practice that lawyers and judges can perform their professional functions without improper interference and legally form and join self-governing professional associations.”<sup>605</sup>

- b) The NLD-led government pledged in its election Manifesto to establish a judicial system that is fair, unbiased, and supports the rule of law, as well as a judiciary that is “free of the influence and control of the executive branch.”<sup>606</sup>
- c) In January 2016, the Union Attorney General Office (UAGO) launched its Strategic Plan 2015-2019, with the support of the United Nations Development Programme (UNDP), which pledges to safeguard the rule of law in accordance with international standards, and draft laws that protect the human rights of Myanmar people.<sup>607</sup> The plan also commits the Attorney General to prosecute under principles of fair trials, uphold prosecutorial ethics and accountability, inspire public trust, and take an active role in justice sector reform.<sup>608</sup>
- d) The judiciary has also taken important steps towards reform by adopting the Supreme Court’s Strategic Plan 2015-2017.<sup>609</sup> The plan identified promoting the rule of law; enhancing public trust in the judicial system; adjudicating cases fairly and speedily in accordance with the law; public access to justice; enhancing judicial independence and accountability; and ensuring equality, fairness, and integrity of the judiciary as its main priorities.<sup>610</sup>

Below is a non-exhaustive overview of the competency of **labor tribunals** to adjudicate business-related human rights abuses:

- 1) Myanmar does not have judicial labor tribunals.

Below is a non-exhaustive overview of the competency of **other judicial mechanisms** to adjudicate business-related human rights abuses.

- 2) In Myanmar, martial courts function independently from the civilian judiciary structure and have constitutional power to adjudicate matters relating to Defense Services personnel. As such, complaints alleging business and human rights violations involving members of the military are adjudicated by martial courts.

### Gaps

Below is a brief explanation of the gaps in the ability and efficacy of **national and regional courts** to adjudicate business-related human rights abuses:

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- 1) There are no special criminal or civil laws for human rights violations or specific human rights courts in Myanmar.
- 2) Forced labor:
  - a) Under Article 374 of the Penal Code, only “unlawful” forced labor is prohibited, but there is no clarity as to what constitutes “unlawful.”<sup>611</sup> Article 359 of the Constitution allows forced labor by the government if it is in the “public interest” to do so.
- 3) Criminal prohibition on torture:
  - a) The Convention against Torture prohibits “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person,” for purposes such as obtaining confession or information, punishing, intimidating or coercing, or for any reason based on discrimination of any kind.<sup>612</sup> However, the Myanmar Penal Code only prohibits “hurt and grievous hurt” inflicted by a public servant during interrogation for the purpose of extorting confession or information or constraining to restore any property or to satisfy any claim. It does not use the term “torture,” and its definition of “hurt and grievous hurt” is limited to bodily pain, disease, or infirmity.<sup>613</sup> Moreover, it limits the scope of the offense to interrogations and its purpose to extorting confession or information, or to constraining the restoration of property or satisfaction of a claim. Thus, the Myanmar Penal Code does not comprehensively and fully prohibit “torture” as understood under international law.
- 4) The Anti Trafficking in Persons Law:<sup>614</sup>
  - a) Although the law applies to individuals such as executives and employees, it does not yet apply to corporations as legal persons.
- 5) Anti-Corruption Law:<sup>615</sup>
  - a) Although the law applies to individuals such as executives and employees, it does not yet apply to corporations as legal persons.
- 6) Criminal prohibition on genocide:
  - a) Myanmar is not a party to the Rome Statute and has not criminalized genocide.
- 7) Criminal prohibition on war crimes:
  - a) Myanmar is not a party to the Rome Statute and has not criminalized war crimes.
- 8) Criminal prohibition on crimes against humanity:
  - a) Myanmar is not a party to the Rome Statute and has not criminalized crimes against humanity.
- 9) Criminal prohibition on forced recruitment of child soldiers:
  - a) Myanmar has not criminalized acts of forced recruitment of child soldiers.
- 10) Adjudication of cases:

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- a) In 2012, the U.S. Department of State reported that although complainants can use provisions of the Penal Code and civil law to seek civil remedies for human rights violations in Myanmar, there were no reported examples of successful attempts to do so.<sup>616</sup> Similarly, corporate liability for human rights violations may be sought under Myanmar laws. However, Myanmar's courts have not adjudicated any cases concerning business and human rights abuses.<sup>617</sup>
- b) Some of Myanmar laws have an extraterritorial scope, however, Myanmar's courts have not exercised extraterritorial jurisdiction to adjudicate business and human rights violations.<sup>618</sup>
- c) According to EarthRights International, there is no effective access to justice for victims of business-related human rights violations in Myanmar, which has prompted victims to seek remedy in other jurisdictions.<sup>619</sup> For instance, in 1996, Myanmar nationals brought a suit against Unocal and Total in the U.S. courts under the Alien Tort Statute, alleging complicity in serious human rights abuses related to the Yadana Gas Pipeline in Myanmar, including forced labor, murder, torture, and rape committed by Myanmar's military.<sup>620</sup> The claims against Total were dismissed, but the case continued against Unocal and it was eventually settled out of court in 2009. In 2002, four Myanmar citizens filed a lawsuit against Total in the Belgian courts under Belgium's 1993 Law on universal jurisdiction (now repealed), alleging complicity in crimes against humanity linked to the construction and operation of the Yadana Gas Pipeline. The case was eventually dismissed for lack of standing.<sup>621</sup>

### 11) Impartiality, Integrity, and Due Process:

- a) To date, judicial independence in Myanmar continues to be weak. Under the military rule, judges were accustomed "[t]o act as administrators rather than arbiters, basing decisions on state policy, instead of legal reasoning and the application of precedent."<sup>622</sup> While the Constitution upholds the principle of separation of powers, the executive branch has great influence over the judiciary. The President has the power to appoint judges, controls funding of the court system, and can dismiss lower court judges. Such power allows the executive branch to intervene in individual cases. The International Commission of Jurists reported that the judiciary is subject to undue influence and interference from the executive branch, particularly in politically sensitive cases.<sup>623</sup> A 2013 report by the parliamentary Rule of Law and Stability Committee also reported that judges often render decisions based on orders coming from local and regional government or military authorities.<sup>624</sup>
- b) UAGO has been criticized for being influenced by the military and for its lack of effectiveness in tackling corruption and human rights violations. It was also criticized for prosecuting human rights defenders and political opponents.<sup>625</sup> The UAGO Strategic Plan 2015-2019 recognizes the public's low confidence in the Attorney General's office.<sup>626</sup>

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- c) According to a parliamentary report from the Judicial and Legal Affairs Complaints and Grievances Investigation Committee issued in December 2015, Myanmar’s judiciary remains one of the country’s most corrupt institutions.<sup>627</sup> The report confirmed the existence of a “chain of bribery” in the judiciary, with judges taking orders from their superiors to influence the outcome of cases.<sup>628</sup>
- d) According to the Myanmar country report produced by the U.S. Department of State, the courts generally respect some basic due process rights in ordinary criminal cases, but there is a fundamental lack of due process in politically sensitive cases. For instance, “[d]efendants do not enjoy the right to presumption of innocence; to be informed promptly and in detail of the charges against them; to a fair and public trial without undue delay; to trial by jury; or, except in capital cases, to consult an attorney of their choice or have one provided at government’s expense.”<sup>629</sup>

Below is a brief explanation of the gaps in the ability and efficacy of **labor tribunals** to adjudicate business-related human rights abuses:

- 1) Myanmar does not have judicial labor tribunals. Gaps in non-judicial labor tribunals are discussed in Sections 1.5 and 27.1.

Below is a non-exhaustive overview of the gaps in the competency of **other judicial mechanisms** to adjudicate business-related human rights abuses:

- 1) Numerous human rights violations related to business activities controlled by or otherwise linked to the military have been reported, notably in cases of land confiscations and the jade mining and extractive industries.<sup>630</sup> For instance, a 2013 report by the Land Investigation Committee identified the military as the primary perpetrator of land confiscations.<sup>631</sup> According to Article 319 of the Constitution, the courts-martial have independent jurisdiction over all cases concerning the military. This exempts the military from civilian oversight regarding the prosecution of human rights abuses committed by the military. In addition, the military Commander-in-Chief has final authority as his decisions in military justice are deemed “final and conclusive.”<sup>632</sup> A broad interpretation of Article 445 of the Constitution also grants the military and other governmental actors impunity for past and present human rights violations, which effectively restricts access to justice for victims of human abuses.<sup>633</sup>

### 26.2. Barriers for Access to Judicial Remedy

Has the State taken measures to ensure that there are no barriers to access to judicial remedy for addressing business-related human rights abuses?



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Indicators	Scoping Questions
<b>Legal Barriers</b>	Has the State taken measures to ensure that there are no legal barriers to prevent legitimate cases from being brought before the courts? This includes: (1) ensuring that it is possible to hold corporations accountable under domestic criminal and civil laws, meaning that liability exists under the law; (2) ensuring that all members of society can raise complaints, including indigenous peoples, migrants, women, and children, and are afforded the same legal protection as for the wider population; (3) ensuring that extraterritorial harms can be addressed within the courts, as permitted by the UNGPs and international human rights law; and (4) ensuring that issues such as conflicts of law, statutes of limitations, parent company liability, and standards of liability do not result in barriers to victims of business-related human rights harms in accessing the courts?
<b>Practical and Procedural Barriers</b>	Has the State taken measures to ensure that there are no practical or procedural barriers to prevent legitimate cases from being brought before the courts? This includes: (1) ensuring financial support, (2) providing legal representation or guidance, (3) providing opportunities for class-actions and multi-party litigation; (4) allowing for recovery of attorneys' fees; (5) preventing retaliatory actions against claimants; (6) reforming access to evidence; and (7) providing training for prosecutors and judges.
<b>Social Barriers</b>	Has the State taken measures to ensure that there are no social barriers to prevent legitimate cases from being brought before the courts? This includes: (1) addressing imbalances between the parties, (2) targeted awareness-raising among vulnerable groups (for example, women, indigenous people, and children), (3) availability of child-sensitive procedures to children and their representatives, (4) legal aid and other type of assistance, (5) efforts to combat corruption, and (6) protection of human rights defenders.
<b>Implementation Status</b>	
Below is a non-exhaustive overview of measures the Myanmar government has taken to ensure there are no <b>legal barriers</b> to prevent legitimate cases from being brought before the courts:	

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- 1) Corporate criminal and civil liability:
  - a) See Sections 25.1 and 26.1 for information on corporate criminal and civil liability regimes in Myanmar.
- 2) Ensuring all members of society can raise complaints:
  - a) UNDP worked with Myanmar's government and the judiciary from 2013-2015 to develop the legal awareness and ability of vulnerable groups to access justice, notably by supporting paralegal services in remote areas.<sup>634</sup>
  - b) Under the Child Law, children may bring complaints with respect to their rights before the relevant government department or court.<sup>635</sup> The law also provides that every child has the right to sue and be sued in accordance with the law.<sup>636</sup>
- 3) Parent company liability:
  - a) In limited liability companies, parent companies can be held liable for any liability of the subsidiary to the extent of the value of their shares, i.e. to its contribution to the share capital.<sup>637</sup> For corruption or other offenses, liability may extend to the parent company, depending on the nature of the offense and the level of knowledge of the parent company.<sup>638</sup>
- 4) Statute of limitations:
  - a) General time limits for recourse in civil and criminal cases are laid out in the Limitation Act unless otherwise specified in other legislation.<sup>639</sup>

Below is a non-exhaustive overview of measures the Myanmar government has taken to ensure there are no **practical and procedural barriers** to prevent legitimate cases from being brought before the courts:

- 1) Ensuring financial support:
  - a) The Code of Civil Procedure provides that any legal proceeding can be instituted without payment of court fees if the claimant is a "pauper," which is defined as those whose property value is no more than K50,000 (around US\$36).<sup>640</sup>
- 2) Providing legal representation or guidance:
  - a) Myanmar's Constitution provides that every citizen shall enjoy the right of equality, liberty, and justice.<sup>641</sup> A law on legal aid was adopted in January 2016.<sup>642</sup>
  - b) According to the 2016 Legal Aid Law, any victim and defendant in criminal cases can request legal aid assistance. Moreover, witnesses who are in particular need can ask for help for any specific matters relating to the criminal case. The Legal Aid Law refers to "rules" for the establishment of specific qualification criteria, but identifies some categories as generally eligible to request for legal aid (such as the

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detained, the poor, children, women, those in need of special care, elderly, disabled, asylum seeker, crime victims, those detained, arrested, accused, punished and imprisoned due to offense, and witnesses to crimes).

- 3) Providing opportunities for class-actions and multi-party litigation:
  - a) The Code of Civil Procedure allows collective action in two instances. First, several parties may bring together a single suit if their cause of action arose from the same act or transaction. Secondly, a court may group multiple claimants together if their claims pertain to any common question of law or fact.<sup>643</sup>
- 4) Reforming access to evidence:
  - a) The Evidence Act of 1872 governs the admissibility of evidence in legal proceedings and sets forth the form, content, and source of admissible evidence.<sup>644</sup> The Act was amended in 2015 but there is currently no publicly available English translation of the new law.<sup>645</sup>
- 5) Recovery of attorneys' fees:
  - a) There is no legal prohibition on the use of contingent fee in civil cases.<sup>646</sup> As such, it may be possible for a victim to negotiate fee arrangement with the attorney.<sup>647</sup>
- 6) Providing training for judges and prosecutors:
  - a) From 2013-2015, UNDP supported the Myanmar government in developing a training framework for UAGO and judges on rule of law reform, human rights, and access to justice.<sup>648</sup> The 2015-2017 Supreme Court Strategic Plan foresees trainings for judges and court staff to improve the efficiency and timeliness of case processing, communication skills with the public, and ethical and professional standards.<sup>649</sup>

Below is a non-exhaustive overview of measures the Myanmar government has taken to ensure there are no **social barriers** to prevent legitimate cases from being brought before the courts:

- 1) Targeted awareness-raising:
  - a) Under the 2015-2017 Supreme Court Strategic Plan, promoting public awareness of the justice system is a priority to improve public trust and confidence in the courts.<sup>650</sup> Planned activities to reach this objective include various public outreach programs.<sup>651</sup>
- 2) Child-sensitive procedures:
  - a) UNICEF works with the judiciary, the police force, and the UAGO to support the establishment of child-sensitive laws, policies, and procedures. In 2014, UNICEF trained 198 judges on child rights and child-friendly judicial proceedings.<sup>652</sup>
- 3) Legal aid and other type of assistance:

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- a) A law on legal aid was adopted in January 2016.<sup>653</sup> The 2015-2017 Supreme Court Strategic Plan also includes actions to facilitate access to courts through the creation of self-help information counters in courts and public intake centers.<sup>654</sup>
- 4) Efforts to combat corruption:
  - a) The 2015-2017 Supreme Court Strategic Plan identifies the enhancement of judicial independence and accountability as a strategic action area and sets forth measures to ensure a unified court budget and transparent use of resources.<sup>655</sup> The plan also foresees training for judges to “achieve equality, fairness, and integrity.”<sup>656</sup> See Section 26.1 for further information on efforts to combat corruption.
- 5) Protection of human rights defenders:
  - a) In its second UPR review that took place in November 2015, the Myanmar government accepted recommendations regarding enhancing protection of human rights defenders, and creating a safe and enabling environment for civil society, defenders, and journalists.<sup>657</sup>

### Gaps

Below is a brief explanation of the gaps in the Myanmar government activities to combat **legal barriers** to access to judicial remedy:

- 1) Corporate criminal and civil liability:
  - a) Although Myanmar law permits corporate liability, courts have not adjudicated cases concerning business and human rights abuses.<sup>658</sup>
- 2) Ensuring all Members of society can raise complaints:
  - a) Ethnic minorities:
    - i) Myanmar’s Constitution mandates that “any person” should have equal rights and legal protection under the law.<sup>659</sup> However, the Constitution also specifies that “[e]very citizen shall enjoy the right of equality, the right of liberty and the right of justice.”<sup>660</sup> This is problematic because the definition of citizenship set forth in the 1982 Citizenship Law only recognizes a limited number of ethnic groups as citizens, excluding several ethnic minorities, such as the Rohingya and people of Chinese, Indian, and Nepali descent.<sup>661</sup> This restrictive definition of citizenship denies these groups from the enjoyment and protection of certain fundamental rights, which are only afforded to “citizens.”
    - ii) The High Commissioner for Human Rights, in his June 2016 report on the Situation of human rights of Rohingya Muslims and other minorities in Myanmar, identified that access to justice for victims of human rights violations is severely lacking and that “[m]inorities face additional obstacles further limiting their access to justice, including language, geography, and fears of reprisal.”<sup>662</sup>

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- iii) Myanmar's land laws do not recognize customary land tenure. In the absence of any formal land use rights, rural communities, particularly indigenous peoples, cannot assert their customary rights over land in courts. (See Section 1.5 for further information on land laws.<sup>663</sup>)
- iv) A June 2016 UN Women study on access to justice in Myanmar found that ethnic minority claimants face particular hurdles in accessing the judicial system, notably for two reasons: 1) the claimants' inability to speak Burmese, the only language used by the courts, prevents them from engaging with court officials, and 2) minimal awareness of legal terminology, technical processes, and procedural requirements affects their ability to understand the judicial proceedings and participate meaningfully.<sup>664</sup>

### b) Women:

- i) Certain Myanmar laws dating from the colonial era, such as the Penal Code of 1861, are still in effect. These laws perpetuate gender discriminations that result in inadequate legal protection from women.<sup>665</sup> The Global Justice Center reported that “[a] gender perspective and sensitivity to gender issues is almost completely absent in the drafting of laws, law enforcement practices, and the administration of justice” in Myanmar.<sup>666</sup>
- ii) Women in Myanmar, in particular from rural and ethnic minorities, face additional obstacles to access justice due to language barrier, geographical location, and fear of reprisal.<sup>667</sup> In its 2016 Concluding Observations, the CEDAW Committee expressed concern about social and cultural stigma which deters women and girl victims of sexual and gender-based violence from reporting.
- iii) Access to justice is also significantly impeded by the widespread use of informal justice mechanisms based on customary laws to resolve disputes. These traditional rules generally purport gender discriminations against women and are usually left to the interpretation of male elders.<sup>668</sup>
- iv) In its 2008 Concluding Observations, the CEDAW Committee noted the “inadequate knowledge of the rights of women under [CEDAW], its concept of substantive gender equality and the general recommendations ... among the judiciary at all levels, as indicated by the absence of information on any court decisions that refer to [CEDAW].”<sup>669</sup> The Committee hence recommended the government to “ensure that judges at all levels be adequately trained in human rights and the provisions of [CEDAW] and that women have access to the courts on equal terms with men.” The Committee also urged the government to “remove any impediments faced by women in gaining access to justice” and implement training for the judiciary on gender equality.<sup>670</sup>
- v) The prohibitive legal costs and processes—of paying for a lawyer, arranging transport, and at the same time organizing childcare while having to continue to contribute economically to the household—particularly discourage women in Myanmar from pursuing litigation.<sup>671</sup>

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- c) LGBT community:
  - i) The fact that it is illegal in Myanmar to engage in same-sex sexual activities, compounded by the cultural stigma against the LGBT community, acutely hinders the capacity of the victims to obtain legal support.<sup>672</sup>
  - ii) A study by Colors Rainbow reveals that the main perpetrators of violence and discrimination against the LGBT community include law enforcement officials themselves who frequently target the LGBT community and threaten them with arrest (or are arrested and forced to bribe their way out). With law enforcement agents as the key perpetrators of cases of harassment, it has been difficult for LGBT victims to report such abuses.<sup>673</sup>
- 3) Extraterritorial harms can be addressed by the courts:
  - a) Some of Myanmar's laws have extraterritorial application, but there are no reported cases in which Myanmar's courts exercised extraterritorial jurisdiction to adjudicate business and human rights abuses.<sup>674</sup>
- 4) Eliminating other legal barriers:
  - a) Laws restricting freedom of expression: As identified in Section 1.5, various laws, including those related to the ICT sector and human rights defender and/or whistleblower, may be used to arrest and detain human rights defenders. The abusive use of such laws may have a chilling effect on individuals trying to seek remedy for human rights violations.

Below is a brief explanation of the gaps in the Myanmar government activities to combat **practical and procedural barriers** to access to judicial remedy:

- 1) Ensuring financial support:
  - a) Research from UN Women on access to justice in Myanmar released in June 2016 found that claimants are impeded from filing cases with the police or courts due to prohibitive costs (including to the payment of bribes) and the lack of affordable and available legal representation.<sup>675</sup>
- 2) Providing legal representation or guidance:
  - a) One can request litigation support from a legal aid office if s/he falls into one of the following categories: the poor, children, women, those in need of special care, elderly, persons with disabilities, those with HIV or other infected diseases, the stateless, political asylum refugees, foreigners, and migrant laborers. Victims, witnesses, and defendants in a criminal case may also seek legal aid.
  - b) The International Bar Association identified that the legislative framework for the regulation of the legal profession in Myanmar allowed the government to arbitrarily sanction lawyers representing clients in politically sensitive cases. It is reported that over 1,000 lawyers have been

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reprimanded, suspended, or disbarred under these laws. Despite a substantial decrease in governmental harassment and interference during the transition from military rule, many lawyers report that they still feel intimidated and frequently suffer from harassment by authorities who attend their meetings, document their proceedings, and ask for attendance lists.<sup>676</sup> This can have a chilling effect on the kinds of legal services that lawyers are prepared to offer, which can in turn limit access to justice for human rights victims.

- 3) Providing opportunities for class-actions and multi-party litigation:
  - a) Even where the conditions set forth by the Civil Code of Procedure are fulfilled for collective action, the court retains the right to separate the actions if it considers that the group litigation “may embarrass or delay the trial of the suit.”<sup>677</sup>
- 4) Preventing retaliatory actions against claimants:
  - a) In Myanmar, victims who seek remedy for human rights violations face threats of reprisals from authorities. As reported by EarthRights International, this is why plaintiffs in the case against Unocal brought proceedings under “John Doe” pseudonyms.<sup>678</sup> Recent cases include the arrest of Sein Than while going to the UN office in Myanmar to submit information on land confiscations, and the prosecution of Shayam Brang Shawng in connection with allegedly making “false charges” against the military in a letter sent to the MNHRC, calling for an investigation into the shooting of his 14-year-old daughter.<sup>679</sup>
- 5) Reforming access to evidence:
  - a) The International Commission of Jurists reported the fabrication of evidence by the police in certain cases deemed sensitive and “political.”<sup>680</sup>
  - b) Colors Rainbow reported that when LGBT victims file a complaint of abuse at the police station, the police often dismiss the complaint for not having sufficient evidence or blame them for the assault they suffered.<sup>681</sup>
- 6) Providing training for prosecutors and judges:
  - a) The legal education system in Myanmar has been weakened by decades of neglect and under-investment under the military regime.<sup>682</sup> The Special Rapporteur notes that the training of individuals holding judicial positions is inadequate,<sup>683</sup> which affects the ability of lawyers to provide quality advice, and judges to interpret and apply the law in an independent and professional manner.<sup>684</sup> It is also reported that judges, especially on the lower levels of the judiciary, are unfamiliar with the law and courts procedures.<sup>685</sup>

Below is a brief explanation of the gaps in the Myanmar government activities to combat **social barriers** to access to judicial remedy:

- 1) Imbalances between parties:
  - a) In Myanmar, access to justice for human rights violations is hampered by government interference, notably in politically sensitive cases. Amnesty International reported that victims of the Letpadaung Copper Mine police violence faced barriers when filing a civil case against the

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Minister of Home Affairs and the Chief of Police. For instance, court and notaries' officials refused to notarize documents given the "politically sensitive" nature of the case.<sup>686</sup> In addition, the police refused to register even an initial criminal complaint about the attack.<sup>687</sup>

- b) Access to justice for human rights violations against LGBT individuals is severely limited as law enforcement officers are frequently the perpetrators of abuses.<sup>688</sup>
- 2) Targeted awareness-raising:
  - a) Public awareness regarding the people's legal rights and the judicial system is low, which impedes the use of and access to the justice system.<sup>689</sup> The lack of awareness and information is aggravated by the inadequacy of public consultation on draft laws and the government's practice of drafting some laws in secret, as reported by the former Special Rapporteur on the situation of human rights in Myanmar.<sup>690</sup>
- 3) Legal aid and other type of assistance:
  - a) The International Bar Association reported that the law on legal aid was passed without prior public consultation and was highly criticized by civil society.<sup>691</sup>
- 4) Efforts to combat corruption:
  - a) Since the formation of the Anti-Corruption Commission in March 2014, the Commission has filed only five cases against high-level public servants in the judiciary sector.<sup>692</sup> A commission member said that this is because "[they] can only take action upon complaints [they] receive."<sup>693</sup>
- 5) Protection of human rights defenders:
  - a) Despite accepting several UPR recommendations in March 2016 regarding the protection of human rights defenders, the government in its comments noted that "there is no arbitrary arrest or detention in the country on political grounds. Actions are taken against only those who violate the existing laws of Myanmar."<sup>694</sup> Such a statement overlooks the fact that a number of laws in Myanmar are used to arrest and charge human rights defenders and activists (See Section 1.5 for the gaps in ICT laws and laws related to Human Rights Defender and/or Whistleblower protection).<sup>695</sup> It is also reported that women human rights defenders face intimidation, harassment, and are frequently threatened with sexual violence.<sup>696</sup>

### 26.3. Remedy for Abuses Taking Place in Host-States

Has the State taken measures to address the issue of access of victims to judicial remedy for abuses by domiciliary companies in host States?

Indicators

Scoping Questions



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<b>Remedy of Extraterritorial Effect</b>	Has the State put in place measures to promote access to remedy of claimants (including vulnerable groups such as indigenous peoples, women, and children) that have been denied justice in a host State, enabling them to access home State courts?
<b>Forum Non Conveniens</b>	Does the State allow a court considering a forum non conveniens motion to consider factors against dismissal in addition to factors in favor of dismissal?
<b>Implementation Status</b>	
1) There is no publicly available information regarding any measures adopted by the Myanmar government to promote access to remedy of claimants that have been denied justice in a host State, enabling them to access home courts in Myanmar.	
<b>Gaps</b>	
1) There is no publicly available information regarding measures to promote access to remedy of claimants that have been denied justice in a host State, enabling them to access home State courts.	

## GUIDING PRINCIPLE 27

States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse.

### Commentary to Guiding Principle 27

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Administrative, legislative and other non-judicial mechanisms play an essential role in complementing and supplementing judicial mechanisms. Even where judicial systems are effective and well-resourced, they cannot carry the burden of addressing all alleged abuses; judicial remedy is not always required; nor is it always the favored approach for all claimants.

Gaps in the provision of remedy for business-related human rights abuses could be filled, where appropriate, by expanding the mandates of existing non-judicial mechanisms and/or by adding new mechanisms. These may be mediation-based, adjudicative or follow other culturally appropriate and rights-compatible processes—or involve some combination of these—depending on the issues concerned, any public interest involved, and the potential needs of the parties. To ensure their effectiveness, they should meet the criteria set out in Principle 31.

National human rights institutions have a particularly important role to play in this regard.

As with judicial mechanisms, States should consider ways to address any imbalances between the parties to business-related human rights claims and any additional barriers to access faced by individuals from groups or populations at heightened risk of vulnerability or marginalization.

### 27.1. Types of Non-Judicial Mechanisms

Has the State provided effective and appropriate non-judicial grievance mechanisms?

Indicators	Scoping Questions
<b>Mediation-Based Mechanisms</b>	Does the State provide access of claimants to mediation-based non-judicial mechanisms such as National Contact Points under the OECD Guidelines? Can these mechanisms be used for remedying business-related human rights abuses? Do these mechanisms meet the effectiveness criteria set out in UNGP 31?
<b>Adjudicative Mechanisms</b>	Does the State provide access of the claimant to adjudicative mechanisms such as government-run complaints offices? Can these mechanisms be used for remedying business-related human rights abuses? Do these mechanisms meet the effectiveness criteria set out in UNGP 31?

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### Other Mechanisms

Does the State provide access to other types of non-judicial mechanisms? Can these mechanisms be used for remedying business-related human rights abuses? Do these mechanisms meet the effectiveness criteria set out in UNGP 31?

### Implementation Status

Below is a non-exhaustive list of **mediation-based mechanisms**:

- 1) Labor dispute settlement system:
  - a) Pursuant to the Settlement of Labour Disputes Law, employers with more than 30 employees must form a workplace coordinating committee to help resolve disputes.<sup>697</sup> Individual disputes are treated at the workplace coordinating committee and may be referred to a conciliation body. Collective disputes must pass through arbitration processes in addition to the negotiation and conciliation phases. Despite the conciliation process, parties retain their right to sue in civil courts as the decisions in conciliation are not legally binding.<sup>698</sup>

Below is a non-exhaustive list of **adjudicative mechanisms**:

- 1) Myanmar National Human Rights Commission:
  - a) See Sections 27.2, 27.3, and 31 for information on the MNHRC.
- 2) Forced labor complaint mechanism:
  - a) The Myanmar government and the ILO have concluded an SU in 2007 which grants Myanmar citizens the right to lodge complaints alleging the use of forced labor.<sup>699</sup> As part of this complaint mechanism, a Government Ministerial Working Group for the elimination of forced labor was set up. After review of the complaint by the ILO, this working group can order an inquiry to review the facts and recommend appropriate action.<sup>700</sup>
  - b) See Section 27.3 for further information on the Forced Labor Complaint Mechanism.
- 3) Land disputes settlement mechanisms:
  - a) Reinvestigation Committee for Confiscated Farmlands and Other Lands: The NLD-led government established a Reinvestigation Committee for Confiscated Farmlands and Other Lands at each level of government to replace the Parliamentary Investigation Committee, and address some types of outstanding restitution claims.<sup>701</sup>

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- b) Central Review Committee on Confiscated Farmlands and Other Lands: Early May 2016, the NLD-led government announced the creation of the Central Review Committee on Confiscated Farmlands and Other Lands.<sup>702</sup> This body is in charge of monitoring state and divisional government's handling of land disputes. It can order restitution of land from government ministries, state-owned enterprises, and private businesses.<sup>703</sup> On 25 June 2016, Vice President Henry Van Thio announced the return of 6,400 acres of confiscated land in the Irrawaddy Division, and stated that "[t]he government is making systematic efforts to ensure transparency in order to hand over confiscated lands back to farmers."<sup>704</sup>
- c) See Section 27.3 for further information on the Land disputes settlement mechanisms.
- 4) Anti-Corruption Commission:
  - a) Cases of corruption can be brought to the Anti-Corruption Commission. The Commission will refer a case to the competent regional or State high court after it completed its investigations.<sup>705</sup>
  - a) The President, Speakers of the Lower House and Upper House of the Parliament, or the victim of bribery allegation may file a complaint with the Anti-Corruption Commission.<sup>706</sup> Following investigations, the Commission can decide whether to press charges at the court of the relevant region or state.<sup>707</sup>
- 5) Rule of Law and Stability Committee:
  - a) This Committee was established in 2012 in order to enable the general public to lodge complaints against government bodies.<sup>708</sup>

### Gaps

Below is a brief explanation of the gaps in the Myanmar government's **mediation-based mechanisms**:

- 1) Labor dispute settlement system: The Settlement of Labour Disputes Law provides that an employer who fails to abide by arbitration awards shall, on conviction, be fined for a minimum of K100,000 (US\$73).<sup>709</sup> The International Trade Union Confederation (ITUC) suggested that the law should be amended to impose dissuasive fines when the employer fails to respect arbitration awards.<sup>710</sup> In addition, the ILO recommended the Myanmar government amend the law in order to provide an obligation on parties to engage in collective negotiation in good faith and strengthen the enforceability of decisions of the labor arbitration mechanisms.<sup>711</sup> Furthermore, the ITUC reported that the dispute resolution mechanisms are usually unknown to most worker organizations and that more education is needed among unions and employers to raise awareness about the mechanisms.<sup>712</sup>

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- 2) National contact point for OECD guidelines for multinational enterprises: Myanmar is not a member of the OECD and does not have an OECD NCP. However, complaints about breaches of the OECD Guidelines on Multinational Enterprises by companies registered in OECD countries can be filed to the NCP of that country.<sup>713</sup> According to the OECD Database on Specific Instances, only five complaints have been filed to NCPs in OECD countries regarding breaches of the OECD Guidelines by companies operating in Myanmar.<sup>714</sup>

Below is a brief explanation of the gaps in the Myanmar government's **adjudicative mechanisms**:

- 1) Myanmar National Human Rights Commission:
  - a) See Sections 27.2, 27.3, and 31 for information on the MNHRC.
- 2) Forced labor complaint mechanism:
  - a) See Section 27.3 for further information on the gaps in the forced labor complaint mechanism.
- 3) Land disputes settlement mechanisms:
  - a) Land Reinvestigation Committee: Unlike the Parliamentary Investigation Committee, the Land Reinvestigation Committee has the power to issue binding decisions, and not merely to formulate recommendations. However, human rights groups criticize continuous lack of impartial and transparent procedures and discriminatory practices against individuals who do not have land possession documents that support their claims.
  - b) Central Review Committee on Confiscated Farmlands and Other Lands: There is no publicly available information regarding the functioning or composition of this newly established committee. Global Witness has called on the NLD-led government to ensure that the Central Review Committee investigates military land disputes as part of its mandate and to provide the Committee with decision-making powers as well as the necessary financial and administrative resources to conduct investigations.<sup>715</sup> Moreover, Namati notes that due to the direct or indirect involvement of the military in land grabbing cases, the absence of a civil service independent from the military is likely to continue to pose problems for farmers who have lodged their complaints with the Central Review Committee on Confiscated Farmlands and Other Lands.<sup>716</sup> Finally, no appeals process is provided for decisions made by the Committee. While the Constitution provides that citizens can appeal to the Supreme Court, most practitioners believe otherwise. Officials interviewed by Namati are unaware of any cases that had reached the Supreme Court.<sup>717</sup> See Section 27.3 for further information on gaps in the Land disputes settlement mechanisms.
- 4) Anti-Corruption Commission:

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- a) The law requires the investigatory team to obtain consent from the Union Government in relation to corruption charges filed against Political Post Holders, to be distinguished from High Ranking Officers, Persons in Authority, Public Officers, and Public Servants.<sup>718</sup> A Political Post Holder is a person who has been declared as such by relevant notifications issued by the commission from time to time, with the approval of the Union Parliament.<sup>719</sup>
- b) The Commission has also been criticized for its lack of capacity and effectiveness due to lack of funding and inadequate appointment of its members.<sup>720</sup>

### 27.2. Role of the NHRI

Has the State provided specific competency to the national human rights institution (NHRI) to perform the role as a non-judicial mechanism for addressing grievances?

Indicators	Scoping Questions
<b>Complaints-Handling Role</b>	Has the State given the NHRI the mandate that allows it to receive and handle complaints relating to corporate human rights abuses?
<b>Supportive Role</b>	Has the State given the NHRI the mandate that allows the NHRI to be in a supportive role to claimants, such as through mediation, conciliation, expert support, or legal aid?
<b>Awareness-Raising</b>	Has the State given the NHRI the mandate to promote awareness on remedy to and redress for corporate human rights abuses?
<b>Training</b>	Has the State given the NHRI the mandate to provide training of relevant stakeholders on their access to remedy for corporate human rights abuses?
<b>Counseling</b>	Has the State given the NHRI the mandate to provide counseling on which remedy to access?
<b>Implementation Status</b>	

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- 1) Complaints-handling role:
  - a) The mandate of the MNHRC includes “verifying and conducting inquiries in respect of complaints and allegations of human rights violations” and “visiting the scene of human rights violations and conducting inquiries, on receipt of a complaint or allegation or information.”<sup>721</sup> Such broad mandate allows the MNHRC to receive and handle complaints relating to corporate human rights abuses. The MNHRC established the Human Rights Protection Division to handle the investigation of complaints and allegations of human rights violations.<sup>722</sup> In 2014, the MNHRC received 1855 complaints, a large number of which concerns land disputes.<sup>723</sup>
  - b) In the MNHRC Strategic Plan 2014-2016, monitoring and investigating of human rights violations and the assistance of victims to obtain remedy is listed as a strategic goal. This includes investigations and inquiries into business and human rights violations.<sup>724</sup>
- 2) Awareness-raising
  - a) The mandate of the MNHRC includes “promoting public awareness of human rights and efforts to combat all forms of discrimination through the provision of information and education.”<sup>725</sup> The Human Rights Promotion and Education Division of the MNHRC is in charge of carrying out promotion and education activities on human rights.
  - b) The first goal of the MNHRC Strategic Plan 2014-2016 is to increase awareness and support for human rights. Implementation activities include providing human rights information and education to the general public, government officials, students, and the media.<sup>726</sup>
- 3) Training
  - a) The mandate of the MNHRC includes promoting public awareness of human rights through the provision of information and education.<sup>727</sup>
  - b) The MNHRC Strategic Plan 2014-2016 foresees general human rights education and awareness-raising in the primary, secondary, and college curricula, as well as for government officials and authorities.<sup>728</sup>
- 4) Counseling
  - a) Assisting victims to obtain remedy is one of the strategic goals for the MNHRC outlined in its Strategic Plan 2014-2016.<sup>729</sup>

### Gaps

- 1) Complaints-Handling Role:

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- a) The MNHRC mandate appears to be limited to complaints from “citizens” regarding the infringement of rights under the Constitution, rather than all human rights violations.<sup>730</sup> This is problematic as the definition of citizenship excludes a number of ethnic minorities, and as the Constitution does not fully guarantee the protection of human rights in accordance with international human rights standards (see Section 1.5 for more information on gaps in the Constitution). The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights reviewed the MNHRC in November 2015. The Committee recommended the MNHRC “[t]o interpret its mandate in a broad, liberal and purposive manner, and to promote and protect human rights of all including the rights of Rohingya and other minority groups.”<sup>731</sup>
  - b) The MNHRC has discretion regarding disclosure of information and it is criticized for not safeguarding the confidentiality of complaints.<sup>732</sup> This is a serious concern as complaints to the MNHRC have previously resulted in retaliatory actions from the government against complainants. For instance, Shayam Brang Shawng was criminally prosecuted for making “false charges” against the Burmese army in a letter sent to the MNHRC on October 1, 2012, alleging that soldiers had shot and killed his daughter.<sup>733</sup> In the absence of safeguards on confidentiality, women victims of sexual violence may also be reluctant to bring complaints to the MNHRC.<sup>734</sup>
  - c) The MNHRC does not have the power to adjudicate complaints. The Commission can only refer its findings to the relevant government department or organization with recommendations.<sup>735</sup> The concerned department or organization must respond to the Commission within 30 days regarding follow-up actions to implement the recommendations. At the end of an inquiry, the MNHRC may report its findings to the President and the Parliament and publish them.<sup>736</sup> According to the MNHRC 2014 annual report, most government departments fail to respond to the Commission’s recommendations or do so with delay. In addition, there does not seem to be any mechanism in place to provide remedies in cases where human rights violations have been found by the Commission.<sup>737</sup>
  - d) Despite individuals or groups of individuals being able to file complaints with the Commission, the MNHRC can decide not to inquire into a complaint if “a more appropriate remedy or a reasonable channel of complaint is available to the complainant.” Furthermore, the MNHRC cannot initiate an investigation if a case is under trial before any court or if a Myanmar court has “finally determined on case.”<sup>738</sup>
- 2) Supportive Role
- a) The mandate of the MNHRC does not include a supportive role to claimants, such as through mediation, conciliation, expert support, or legal aid.<sup>739</sup>
  - b) Assisting victims with obtaining remedy is one of the goals outlined in the MNHRC Strategic Plan 2014-2016.<sup>740</sup> However, the Strategic Plan does not delineate concrete measures on how such assistance would be provided.



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- c) As the MNHRC's Strategic Plan has expired in 2016, there is no publicly available information as to the Commission's plan in the succeeding years.
  
- 3) Awareness-Raising
  - a) One of MNHRC's mandates is to promote public awareness of human rights in general. This is reflected in MNHRC's Strategic Plan 2014-2016.<sup>741</sup> However, the Strategic Plan does not include specific measures to promote awareness of redress for corporate human rights abuses.
  - b) As the MNHRC's Strategic Plan has expired in 2016, there is no publicly available information as to the Commission's plan in the succeeding years.
  
- 4) Training
  - a) The mandate of the MNHRC includes promoting public awareness of human rights through the provision of information and education, and the MNHRC Strategic Plan 2014-2016 contains activities on general human rights education.<sup>742</sup> However, the Strategic Plan does not include specific training on access to remedy for corporate human rights abuses.
  - d) As the MNHRC's Strategic Plan has expired in 2016, there is no publicly available information as to the Commission's plan in the succeeding years.
  
- 5) Counseling
  - a) The mandate of the MNHRC does not include providing counseling on which remedy to access.
  - b) Providing assistance to victims to obtain remedy is a strategic goal under the MNHRC Strategic Plan 2014-2016.<sup>743</sup> However, the Strategic Plan does not provide concrete measures on which such assistance should be provided.
  - c) As the MNHRC's Strategic Plan has expired in 2016, there is no publicly available information as to the Commission's plan in the succeeding years.

### 27.3. Barriers for Access to Non-Judicial Remedy

Has the State taken measures to ensure that there are no barriers to access to non-judicial remedy for addressing business-related human rights abuses?

Indicators

Scoping Questions

## GUIDING PRINCIPLE 27

<p><b>Practical and Procedural Barriers</b></p>	<p>Has the State taken measures to ensure that there are no practical or procedural barriers to prevent legitimate cases from being heard by non-judicial mechanisms? Measures to prevent procedural barriers include:</p> <ol style="list-style-type: none"> <li>1. Financial support;</li> <li>2. Providing guidance;</li> <li>3. Ensuring that the information on the mechanism is provided in a language that is understandable to potential claimants;</li> <li>4. Ensuring accessibility despite geographical issues or difficulties (for example, long distances).</li> </ol>
<p><b>Other Barriers</b></p>	<p>Has the State taken measures to ensure that there are no other barriers to prevent legitimate cases from being heard by non-judicial mechanisms? Measures to prevent other barriers include:</p> <ol style="list-style-type: none"> <li>1. Addressing imbalances between the parties;</li> <li>2. Targeted awareness-raising among vulnerable groups (such as women, indigenous peoples, or children);</li> <li>3. Expert advice or type of assistance;</li> <li>4. Efforts to combat corruption;</li> <li>5. Protection of human rights defenders.</li> </ol>
<p><b>Implementation Status</b></p>	
<p>Efforts made by the Myanmar government to ameliorate <b>practical and procedural barriers</b> to access to remedies in the mechanisms listed in Section 27.1 are detailed below:</p> <ol style="list-style-type: none"> <li>1) Myanmar National Human Rights Commission:             <ol style="list-style-type: none"> <li>a) Financial support: There is no fee for filing a complaint with the Commission.</li> </ol> </li> </ol>	

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- b) Providing guidance: A library is open to the public upon appointment and an e-library with resources on human rights is available on the MNHRC website.<sup>744</sup>
  - c) Language considerations: The MNHRC website is available in Burmese and English.<sup>745</sup>
  - d) Accessibility: Members of the MNHRC may be contacted through their contact details as posted on the MNHRC website.<sup>746</sup>
- 2) Land disputes:
- a) There is no publicly available information regarding measures taken by the Land Reinvestigation Committee and the Central Review Committee on Confiscated Farmlands and Other Lands to address financial support, guidance, language considerations, and accessibility.
- 3) Forced Labor Complaint Mechanism:
- a) Financial support: There is no fee for the filing of a complaint with the ILO mechanism.
  - b) Providing guidance: The ILO website provides guidance and documentation on the process to make a complaint.<sup>747</sup>
  - c) Language considerations: The ILO website provides guidance and documentation in Burmese regarding the process to make a complaint for forced labor.<sup>748</sup>
  - d) Accessibility: A complaint to the ILO complaint mechanism can be made through local government representatives at village, township, and district level, or by contacting the ILO Liaison Officer by phone/fax/email/regular post/visit in person/delivery of a written complaint by hand.<sup>749</sup>

Efforts made by the Myanmar government to ameliorate **other barriers** to access to remedies in the mechanisms listed in Section 27.1 are detailed below

- 1) Myanmar National Human Rights Commission:
- a) Efforts to combat corruption: The law establishing the MNHRC provides that the MNHRC can receive unconditional financial contributions from any individual or organization “that do not prejudice the independence of the Commission concerning the promotion and protection of human rights.”<sup>750</sup>
  - b) Protection of human rights defenders: The law establishing the MNHRC provides that “[a] person shall not victimize, intimidate, threaten, harass or otherwise interfere with any person on the ground that that person, or any associate of that person” introduced a complaint to the MNHRC.<sup>751</sup> The government department proposing follow-up actions to the recommendations of the MNHRC must also indicate which measures are taken to protect complainants from reprisals.<sup>752</sup>

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### 2) Land disputes:

- a) There is no publicly available information regarding measures taken by the Land Reinvestigation Committee and the Central Review Committee on Confiscated Farmlands and Other Lands to address imbalances between the parties, dispense targeted awareness-raising and expert advice, combat corruption, and protect human rights defenders.

### 3) Forced Labor Complaint Mechanism:

- a) Targeted awareness-raising: The ILO regularly provides targeted training to the local government personnel, judiciary, police, and fire service on forced labor issues. The ILO also organizes awareness-raising seminars throughout Myanmar that are open to local authorities, local military personnel, employer and worker representatives, civil society, community-based organizations, and the general public.<sup>753</sup>
- b) Protection of human rights defenders: The SU concluded between the ILO and the Myanmar government guarantees protection from harassment, prosecution, and any other form of reprisal.<sup>754</sup> The ILO provides free and confidential access to the victims, complainant(s), his/her representative or any other relevant person to verify that no retaliatory action has been taken against them.<sup>755</sup>

## Gaps

Gaps in the Myanmar government's efforts to ameliorate **practical and procedural barriers** to access to remedies in the mechanisms listed in Section 27.1 are detailed below:

### 1) Myanmar National Human Rights Commission:

- a) Providing guidance: The MNHRC webpage does not provide information about the specific process or the procedure to file a complaint.<sup>756</sup> The MNHRC Strategic Plan 2014-2016 does not provide concrete measures to guide and assist victims to access remedy.<sup>757</sup>
- b) Accessibility: MNHRC Commissioners may be contacted via email. Complaints may be filed via registered mail or delivered to the MNHRC in person.<sup>758</sup> However, complaints may not be filed via email.

### 2) Land disputes settlement mechanisms:

- a) Providing guidance: The Human Rights Foundation of Monland reported a lack of information regarding how to lodge a complaint concerning land rights violations and lack of transparency on how the complaints, once received, are processed.
- b) There is no further publicly available information regarding gaps in the measures taken by the Land Reinvestigation Committee and the Central Review Committee on Confiscated Farmlands and Other Lands to address financial support, guidance, language considerations, and accessibility.

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Gaps in the Myanmar government's efforts to ameliorate **other barriers** to access to remedies in the mechanisms listed in Section 27.1 are detailed below:

1) Myanmar National Human Rights Commission:

- a) Targeted awareness-raising: According to the MNHRC's annual report 2014, there were no awareness-raising activities focused on vulnerable groups.<sup>759</sup>
- b) Expert advice: Providing assistance to victims in accessing remedy is one of the strategic goals outlined in the MNHRC Strategic Plan 2014-2016.<sup>760</sup> However, the Strategic Plan does not provide concrete measures as to how advice is provided to victims in accessing remedy.
- c) Efforts to combat corruption: The Subcommittee on Accreditation of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, during its latest review of the MNHRC, expressed concern over the substantial control of the executive branch of the government over the MNHRC's budget.<sup>761</sup>
- d) Protection of human rights defenders: The MNHRC enjoys wide discretion regarding the disclosure of information, and its abuse of such discretion has been widely criticized.<sup>762</sup> Complaints to the MNHRC have previously resulted in retaliatory actions from the government against complainants. For instance, Shayam Brang Shawng was criminally prosecuted for making "false charges" against the Myanmar army in a letter sent to the MNHRC on 1 October 2012, alleging that soldiers had shot and killed his daughter. The prosecution came after the MNHRC forwarded the letter to the military.<sup>763</sup>

2) Land disputes settlement mechanisms:

- a) Efforts to combat corruption: The Human Rights Foundation of Monland reported that public authorities both at the local and national level have failed to address land disputes involving the military. Local farmers also expressed concerns regarding corruption in the land investigation committees, particularly regarding cases of collusion with the military.
- b) There is no further publicly available information regarding gaps in the measures taken by the Land Reinvestigation Committee and the Central Review Committee on Confiscated Farmlands and Other Lands to ameliorate other barriers to access to remedies.

## GUIDING PRINCIPLE 28

States should consider ways to facilitate access to effective non-State-based grievance mechanisms dealing with business-related human rights harms.

### Commentary to Guiding Principle 28

One category of non-State-based grievance mechanisms encompasses those administered by a business enterprise alone or with stakeholders, by an industry association or a multi-stakeholder group. They are non-judicial, but may use adjudicative, dialogue-based or other culturally appropriate and rights-compatible processes. These mechanisms may offer particular benefits such as speed of access and remediation, reduced costs and/or transnational reach.

Another category comprises regional and international human rights bodies. These have dealt most often with alleged violations by States of their obligations to respect human rights. However, some have also dealt with the failure of a State to meet its duty to protect against human rights abuse by business enterprises.

States can play a helpful role in raising awareness of, or otherwise facilitating access to, such options, alongside the mechanisms provided by States themselves.

### 28.1. Facilitating Access to Mechanisms

Has the State supported access to effective non-State-based grievance mechanisms dealing with business-related human rights harms?

Indicators	Scoping Questions
<b>Business-Based Grievance Mechanisms</b>	Has the State supported access to business-based grievance mechanisms (such as whistleblower mechanisms or project-level grievance mechanisms) through efforts such as dissemination of information and support for access (for example, through guidance documents and tools)?

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<b>Multi-Stakeholder Grievance Mechanism</b>	Has the State supported access to multi-stakeholder grievance mechanisms through efforts such as dissemination of information and support for access?
<b>Organizational-Based Grievance Mechanisms</b>	Has the State supported access to organizational-based grievance mechanisms (including the union systems) through efforts such as dissemination of information and support for access?
<b>International Grievance Mechanisms</b>	Has the State supported access to international grievance mechanisms through efforts such as dissemination of information, support for access (for example, through legal aid) as well as support for establishing contact between the claimant in international system?
<b>Regional Grievance Mechanisms</b>	Has the State supported access to regional grievance mechanisms through efforts such as dissemination of information and support for access (for example, through legal aid)?
<b>Other Mechanisms</b>	Has the State supported access to other grievance mechanisms through efforts such as dissemination of information and support for access?
<b>Implementation Status</b>	
<p>Below is a brief explanation of the implementation status of the Myanmar government’s support of <b>business-based grievance mechanisms</b>:</p> <ol style="list-style-type: none"> <li>1) The Management Committee of the Thilawa Special Economic Zone (SEZ) issued a Notice to Ensure the Responsible Investment in the Thilawa SEZ (Notification No. 04/2015) stating that business investing and doing business in the SEZ should establish effective grievance mechanisms.<sup>764</sup> The Notice made explicit reference to Guiding Principles 29 and 31 of the UN Guiding Principles.</li> </ol> <p>Below is a brief explanation of the implementation status of the Myanmar government’s support of <b>multi-stakeholder grievance mechanism</b>:</p>	

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- 1) MPRL E&P, a privately-owned oil and gas exploration and production company, has established a multi-stakeholder grievance mechanism for its operations in Mann field.<sup>765</sup> The Mann Field Grievance Mechanism (MFGM) is the first mechanism that is facilitated and managed by both the host community and the operator of Mann Field, MOGE, a state-owned enterprise.<sup>766</sup> MPRL E&P regularly reports MFGM's progress on its website<sup>767</sup> and has installed similar mechanism in other projects operated by MPRL E&P.<sup>768</sup>

Below is a brief explanation of the implementation status of the Myanmar government's support of **organizational-based grievance mechanisms**:

- 1) Asian Development Bank Accountability Mechanism:
  - a) Complaints related to investments funded by the Asian Development Bank can be mediated and investigated by the Asian Development Bank Accountability Mechanism.<sup>769</sup>
  - b) As a member of the Asian Development Bank, the Myanmar government supports the Asian Development Bank Accountability Mechanism.
  - c) Article 7 of the EIA Procedures states that projects that involve involuntary resettlement or may have an adverse impact on indigenous people must adhere to international good practice on such matters, which are defined as those accepted by international financial institutions including the World Bank Group and Asian Development Bank.<sup>770</sup> Given the lack of directions provided in the 2014 SEZ Law and 2015 SEZ Rules, this provision establishes a legal procedure for any resettlement process that includes obligations and procedures.<sup>771</sup> Moreover, this provision can be interpreted to require projects to install grievance mechanisms, such as those of World Bank or the Asian Development Bank.
- 2) The Food and Agriculture Organization (FAO) Voluntary Guidelines for the Responsible Governance of Tenure of Land, Fisheries, and Forests (VGGT):
  - (a) The VGGT, an internationally negotiated document of the FAO, stresses the importance of access to grievance mechanisms. Overarching values for the implementation of the VGGT include human dignity, equity and justice, gender equality, holistic and sustainable approach, consultation and participation, the rule of law, transparency, accountability, and continuous improvement.<sup>772</sup>
  - (b) The VGGT states that businesses should both provide operational-level grievance mechanisms and cooperate in other non-judicial grievance mechanisms to remedy human rights abuses and land tenure disputes.<sup>773</sup>
  - (c) The NLUP adopted in January 2016 by the Thein Sein administration made express reference to the VGGT.<sup>774</sup>



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Below is a brief explanation of the implementation status of the Myanmar government's support of **international grievance mechanisms**

- 1) There is no publicly available information regarding Myanmar government's support of international grievance mechanisms.

### Gaps

Below is a brief explanation of the gaps in the Myanmar government's support of **business-based grievance mechanisms**:

- 1) According to research conducted by the MCRB in the tourism, and oil and gas sectors, business-based grievance mechanisms remain "largely absent or misunderstood" in Myanmar.<sup>775</sup> MCRB reports that communities are often reluctant to submit complaints because they think that nothing would change.<sup>776</sup> Some hesitate to accept any compensation offered out of fear and mistrust that accepting any compensation would prohibit them from raising issues or grievances in the future.<sup>777</sup>
- 2) In addition, field research conducted by the MCRB in the oil and gas sector indicates that local communities complained of being repeatedly sent from local authorities to the relevant Ministry, to companies, and back to the authorities without any resolution of their grievance.<sup>778</sup>

Below is a brief explanation of the gaps in the Myanmar government's support of **multi-stakeholder grievance mechanism**:

- 1) There is no publicly available information regarding gaps in the Myanmar government's support of multi-stakeholder grievance mechanisms.

Below is a brief explanation of the gaps in the Myanmar government's support of **organizational-based grievance mechanisms**:

- 1) The Food and Agriculture Organization Voluntary Guidelines for the Responsible Governance of Tenure of Land, Fisheries, and Forests:
  - (a) Myanmar's NLUP adopted in January 2016 by the outgoing government makes express reference to the VGGT.<sup>779</sup> The new NLD-led government is already beginning to implement the new NLUP that could ensure a more human rights compliant approach to land tenure.

Below is a brief explanation of the gaps in the Myanmar government's support of **regional grievance mechanisms**:

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- 1) Despite having the mandate “[t]o promote and protect human rights and fundamental freedoms of the peoples of ASEAN,” the ASEAN Intergovernmental Commission on Human Rights (AICHR) does not handle individual complaints.<sup>780</sup> There is hence no regional human rights grievance mechanism in the Asia-Pacific region.

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In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be:

- (a) **legitimate:** enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;
- (b) **Accessible:** being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;
- (c) **Predictable:** providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;
- (d) **Equitable:** seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;
- (e) **Transparent:** keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism’s performance to build confidence in its effectiveness and meet any public interest at stake;
- (f) **Rights-compatible:** ensuring that outcomes and remedies accord with internationally recognized human rights;
- (g) **A source of continuous learning:** drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;

Operational-level mechanisms should also be:

- (h) **Based on engagement and dialogue:** consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.

### Commentary to Guiding Principle 31

## GUIDING PRINCIPLE 31

A grievance mechanism can only serve its purpose if the people it is intended to serve know about it, trust it and are able to use it. These criteria provide a benchmark for designing, revising or assessing a non-judicial grievance mechanism to help ensure that it is effective in practice. Poorly designed or implemented grievance mechanisms can risk compounding a sense of grievance among affected stakeholders by heightening their sense of disempowerment and disrespect by the process.

The first seven criteria apply to any State-based or non-State-based, adjudicative or dialogue-based mechanism. The eighth criterion is specific to operational-level mechanisms that business enterprises help administer.

The term “grievance mechanism” is used here as a term of art. The term itself may not always be appropriate or helpful when applied to a specific mechanism, but the criteria for effectiveness remain the same. Commentary on the specific criteria follows:

- (a) Stakeholders for whose use a mechanism is intended must trust it if they are to choose to use it. Accountability for ensuring that the parties to a grievance process cannot interfere with its fair conduct is typically one important factor in building stakeholder trust;
- (b) Barriers to access may include a lack of awareness of the mechanism, language, literacy, costs, physical location and fears of reprisal;
- (c) In order for a mechanism to be trusted and used, it should provide public information about the procedure it offers. Time frames for each stage should be respected wherever possible, while allowing that flexibility may sometimes be needed;
- (d) In grievances or disputes between business enterprises and affected stakeholders, the latter frequently have much less access to information and expert resources, and often lack the financial resources to pay for them. Where this imbalance is not redressed, it can reduce both the achievement and perception of a fair process and make it harder to arrive at durable solutions;
- (e) Communicating regularly with parties about the progress of individual grievances can be essential to retaining confidence in the process. Providing transparency about the mechanism’s performance to wider stakeholders, through statistics, case studies or more detailed information about the handling of certain cases, can be important to demonstrate its legitimacy and retain broad trust. At the same time, confidentiality of the dialogue between parties and of individuals’ identities should be provided where necessary;
- (f) Grievances are frequently not framed in terms of human rights and many do not initially raise human rights concerns. Regardless, where outcomes have implications for human rights, care should be taken to ensure that they are in line with internationally recognized human rights;

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- (g) Regular analysis of the frequency, patterns and causes of grievances can enable the institution administering the mechanism to identify and influence policies, procedures or practices that should be altered to prevent future harm;
- (h) For an operational-level grievance mechanism, engaging with affected stakeholder groups about its design and performance can help to ensure that it meets their needs, that they will use it in practice, and that there is a shared interest in ensuring its success. Since a business enterprise cannot, with legitimacy, both be the subject of complaints and unilaterally determine their outcome, these mechanisms should focus on reaching agreed solutions through dialogue. Where adjudication is needed, this should be provided by a legitimate, independent third-party mechanism.

### 31.1. Alignment with the Effectiveness Criteria

Does the State ensure that State-based non-judicial grievance mechanisms meet the effectiveness criteria?

Indicators	Scoping Questions
<b>1. Legitimate</b>	Has the State taken measures to ensure that the mechanisms enable trust from the stakeholder groups for whose use they are intended (including that it has a firm mandate, is independent and transparent, includes ensuring non-interference with fair conduct, and includes feedback mechanisms for when foul play is detected)?
<b>2. Accessible</b>	Has the State taken measures to ensure that the mechanisms are accessible (including language and literacy issues, cost associated with raising complaints, geographical issues, fear of reprisal, and vulnerability of claimant, for example, due to gender, age, religion, or minority status)?
<b>3. Predictable</b>	Has the State taken measures to ensure that the mechanisms are predictable (including clear and public information about the procedure, timeframes for the procedure, and information on the process and outcome of the mechanism)?
<b>4. Equitable</b>	Has the State taken measures to ensure that the mechanisms are equitable (including access of all parties to information, advice, and expert resources)?

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<p><b>5. Transparent</b></p>	<p>Has the State taken measures to ensure that the mechanisms are transparent (including regular communication about grievance resolution progress as well as wider public information on cases received and in process in order to identify and address societal trends)?</p>
<p><b>6. Rights compatible</b></p>	<p>Has the State taken measures to ensure that the mechanisms are rights-compatible (including that grievances are framed in terms of human rights when they do raise human rights concerns and that the institutions and authorities managing the mechanisms are aware of human rights and how these relate to the cases dealt with)?</p>
<p><b>7. A source of continuous learning</b></p>	<p>Has the State taken measures to ensure that the mechanisms are a source of continuous learning (including State support for regular analysis of the frequency, patterns, and causes of grievances to promote a strengthening of the mechanism)? Has the State incorporated lessons learned through operation of the mechanisms to improve the mechanisms' effectiveness?</p>

### Implementation Status

Below is an assessment of the Myanmar National Human Rights Commission:

- 1) Legitimate
  - a) Selection and appointment: Chapter III of the law establishing the MNHRC outlines the conditions for the selection of the Commission's members.<sup>781</sup> It defines the composition of the Selection Board, the criteria for the nomination of Commissioners, the role of the Selection Board, and the authority granted to the President to ultimately select and appoint nominees.
  - b) Mandate: The mandate of the MNHRC is set forth in a legislative act, which defines the duties and powers of the Commission.<sup>782</sup>
  - c) Independence: Documents and information delivered to the Commission are to be protected "from censorship or interference," and the Commission's premises are also protected from searching and requisition.<sup>783</sup> The law establishing the MNHRC also provides that the Commission can receive unconditional financial contributions from any individual or organization "that do not prejudice the independence of

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the Commission concerning the promotion and protection of human rights.”<sup>784</sup> In 2015, the MNHRC was reported to have received funding from the government, the Raoul Wallenberg Institute of Human Rights, and the Swedish International Development Cooperation Agency.<sup>785</sup>

- d) Non-interference with fair conduct: The law establishing the MNHRC provides that members of the Commission shall act impartially and independently, and shall not hold other office or engage in activities that may conflict with their functions.<sup>786</sup> The law also prohibits any act that “threatens, hinders, obstructs, molests or interferes with a member of the Commission.”<sup>787</sup>
- 2) Accessible
  - a) See Section 27.3 for information regarding accessibility to the MNHRC.
- 3) Predictable
  - a) The process for the filing and adjudication of complaints is set forth in the law establishing the MNHRC.<sup>788</sup>
- 4) Equitable
  - a) A library is open to the public upon appointment and an e-library with resources on human rights is available on the MNHRC website.<sup>789</sup>
- 5) Transparent
  - a) At the conclusion of an inquiry, the Commission may decide to publish its findings and recommendations for public information.<sup>790</sup> A number of findings and recommendations are published on the MNHRC’s website in English and Myanmar languages.<sup>791</sup>
  - b) The MNHRC Annual Report 2015 lists down the field investigations, conciliations, and inspection of prisons and detention centers conducted by the Commission in 2015.<sup>792</sup>
- 6) Rights compatible:
  - a) According to the MNHRC Annual Report 2015, trainings were organized to build the capacity and awareness of the MNHRC’s staff on good practices on the promotion and protection of human rights.<sup>793</sup>
- 7) A source of continuous learning

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- a) The MNHRC Strategic Plan 2014-2016 sets forth as an objective the development of the Commission's structures, processes, and staff so that it is as effective as possible. The Strategic Plan also states that the MNHRC should put in place appropriate monitoring and evaluation systems to evaluate the Commission's work including annual internal evaluations, periodic external evaluations, annual reporting, and annual staff performance appraisals.<sup>794</sup>

Below is an assessment of the forced labor complaint mechanism with the **effectiveness criteria**:

- 1) See Section 27.1 for information on the forced labor complaint mechanism.

Below is an assessment of the land disputes mechanisms with the **effectiveness criteria**:

- 1) See Section 27.1 for information on the land disputes mechanisms.
- 2) There is not enough publicly available information to properly assess compliance of the Land Investigation Committee and the Central Review Committee on Confiscated Farmlands and Other Lands with the effectiveness criteria.

### Gaps

Myanmar National Human Rights Commission:

- 1) Legitimate:
  - a) Selection and appointment: The Subcommittee on Accreditation of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (SCA), during its latest review of the MNHRC, expressed concerns regarding the composition of the Selection Board of the MNHRC. The SCA noted that the Selection Board is composed of a large number of government officials and that the designation of and process for selecting civil society representatives (limited to registered organizations) is not sufficient to ensure a transparent and participatory selection process.<sup>795</sup> Article 4(h) of the MNHRC law requires that a representative from a registered NGO be part of the selection board. However, this requirement is too restrictive as civil society is not limited to

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registered NGOs, but includes journalists, individuals, union members, and academics as well.<sup>796</sup> In addition, the SCA received reports alleging that the recent selection of MNHRC members was not made public and conducted in accordance with the law.<sup>797</sup>

- b) Pluralism: The SCA noted the lack of gender balance in the composition of the MNHRC. Previously, there were only two women out of the 11 MNHRC members.<sup>798</sup> In October 2016, the two female MNHRC members resigned, leaving not a single woman in the 11-member body. CSOs have also expressed concern over the lack of ethnic diversity among MNHRC members, with ethnic representation in the MNHRC being limited to Mon and Shan.<sup>799</sup> In a 2015 study of the Asian NGO Network on National Human Rights Institutions (ANNI), ANNI reported that ethnic representation in MNHRC also included Arakan and Karen.<sup>800</sup> However, there is no publicly available information as to whether this representation has been maintained after the Commission was dismantled in 2014.<sup>801</sup> Moreover, the MNHRC did not indicate as to whether Chin, Karen, Kachin, or other ethnic groups are represented.<sup>802</sup>
- c) Adequate funding and financial independence: The SCA expressed concern over the substantial control of the executive branch of the government on MNHRC's budget. The SCA recommended the amendment of the MNHRC enabling law to ensure the adequacy of the Commission's funding and to safeguard its financial independence.<sup>803</sup>

### 2) Accessible

- a) See Section 27.1 for information regarding gaps in accessibility to the MNHRC.

### 3) Predictable

- a) According to the MNHRC 2014 annual report, most government departments failed to respond to the Commission's recommendations or did so with delay. There is also no mechanism in place to provide remedies in cases where human rights violations have been found by the Commission.<sup>804</sup>

### 4) Equitable

- a) In view of the MNHRC enabling law, the MNHRC Strategic Plan 2014-2016, and the annual report 2014, there is no specific measure taken by the Commission to include access of all parties to information, advice, and expert resources.

### 5) Transparent



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- a) The SCA noted that the Selection Board is composed of a large number of government members and that the designation of and process for selecting civil society representatives (limited to registered organizations) is not transparent and participatory.<sup>805</sup> In addition, the SCA received reports alleging that the recent selection of the MNHRC members was not made public and conducted in accordance with the law.<sup>806</sup>
  - b) The budget and the accounts of the MNHRC are not publicly available.
- 6) Rights compatible:
- a) According to the Paris Principles, a national human rights institution should have a mandate as broad as possible. However, the MNHRC appears to limit its mandate to complaints from “citizens” and regarding the infringement of rights under the Constitution, rather than on all human rights violations.<sup>807</sup> This is problematic as the definition of citizenship excludes a number of ethnic minorities and as the Constitution does not fully guarantee the protection of human rights in accordance with international human rights standards (see Section 1.5 for more information on gaps in the Constitution). The limit of MNHRC’s purview to only rights under the Constitution is equally problematic, as certain international human rights are not recognized by the Constitution. For instance, women may be particularly negatively affected by the limited scope of complaints, because the Constitution does not guarantee certain rights recognized under the CEDAW Convention.<sup>808</sup> In addition, it is reported that the MNHRC is subject to interference by the military, which compromises the ability of the Commission to conduct independent investigations, notably in conflict zones.<sup>809</sup>
- 7) A source of continuous learning
- a) The MNHRC was initially established in 2011 by a Presidential Decree and was highly criticized for its lack of independence, and limited authority and powers. A new enabling law was adopted in 2014 by the Parliament to respond to these deficiencies, and the former President Thein Sein reconstituted a new Commission. However, these actions were taken with limited input from civil society.<sup>810</sup>
  - b) The MNHRC Strategic Plan 2014-2016 suggests monitoring and evaluation systems to evaluate the Commission’s work.<sup>811</sup> However, no external evaluations or annual report 2015 have been published yet.

Below is an assessment of gaps in the forced labor complaint mechanism with the **effectiveness criteria**:

- 1) See Section 27.1 for information on the forced labor complaint mechanism.

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Below is an assessment of the land disputes mechanisms with the **effectiveness criteria**:

- 1) See Section 27.1 for information on the gaps in the land disputes mechanisms.

## ENDNOTES

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The UN's principles for responsible contracts are:

- Project negotiations preparation and planning: The parties should be adequately prepared and have the capacity to address the human rights implications of projects during negotiations.
- Management of potential adverse human rights impacts: Responsibilities for the prevention and mitigation of human rights risks associated with the project and its activities should be clarified and agreed before the contract is finalized.
- Project operating standards: The laws, regulations and standards governing the execution of the project should facilitate the prevention, mitigation and remediation of any negative human rights impacts throughout the life cycle of the project.

- Stabilization clauses: Contractual stabilization clauses, if used, should be carefully drafted so that any protections for investors against future changes in law do not interfere with the State's bona fide efforts to implement laws, regulations or policies in a non-discriminatory manner in order to meet its human rights obligations.
- "Additional goods or service provision": Where the contract envisages that investors will provide additional services beyond the scope of the project, this should be carried out in a manner compatible with the State's human rights obligations and the investor's human rights responsibilities.
- Physical security for the project: Physical security for the project's facilities, installations or personnel should be provided in a manner consistent with human rights principles and standards.
- Community engagement: The project should have an effective community engagement plan through its life cycle, starting at the earliest stages.
- Project monitoring and compliance: The State should be able to monitor the project's compliance with relevant standards to protect human rights while providing necessary assurances for business investors against arbitrary interference in the project.
- Grievance mechanisms for non-contractual harms to third parties: Individuals and communities that are impacted by project activities, but not party to the contract, should have access to an effective non-judicial grievance mechanism
- Transparency/Disclosure of contract terms: The contract's terms should be disclosed, and the scope and duration of exceptions to such disclosure should be based on compelling justifications.

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