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**INTERNATIONAL COMMISSION OF JURISTS' (ICJ) SUBMISSION TO THE  
UNIVERSAL PERIODIC REVIEW OF  
THE REPUBLIC OF THE UNION OF MYANMAR**

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Composed of 60 eminent jurists and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

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# **ICJ's SUBMISSION TO THE UNIVERSAL PERIODIC REVIEW OF THE REPUBLIC OF THE UNION OF MYANMAR**

## **Introduction**

1. The International Commission of Jurists (ICJ) welcomes this opportunity to contribute to the Human Rights Council's (HRC) Universal Periodic Review (UPR) of the Republic of the Union of Myanmar (Myanmar).
2. In this submission, the ICJ wishes to draw the attention of the HRC's Working Group on the UPR, and that of the HRC itself, to the organization's concerns about:
  - (1) the independence of the judiciary and legal profession;
  - (2) the lack of legislation adequately protecting human rights and the environment;
  - (3) discriminatory laws targeting women and minorities; and
  - (4) the writ of habeas corpus.
3. The submission concludes with some recommendations addressing the above-mentioned concerns.

### **I. The independence of the judiciary and legal profession<sup>1</sup>**

4. An independent judiciary is fundamental to the rule of law, the right to a fair trial<sup>2</sup> and the right to liberty and security of person.<sup>3</sup> In times of crisis and transition, the judiciary serves as an essential check on the other branches of the State and ensures that any laws and measures adopted to address the crisis comply with human rights norms and rule of law principles.<sup>4</sup>
5. In Myanmar, the judiciary has taken important steps towards asserting its independence from the other branches of government. The 2015-2017 strategic plan adopted by the Supreme Court identified promoting the rule of law; enhancing public trust in the judicial system; adjudicating cases fairly and speedily in accordance with law; public access to justice; enhancing judicial independence and accountability; and ensuring equality, fairness and integrity of the judiciary as its critical aims.<sup>5</sup>
6. Significant obstacles, however, remain. Judicial independence has been undermined by the Executive branch's undue influence and interference, in particular, in politically sensitive cases, including criminal ones. The Executive controls the appointment of the members of the Constitutional Tribunal,<sup>6</sup> and its oversight of the judiciary's budget remains opaque.
7. The President nominates the Chief Justice of the Union, and, in co-ordination with the latter, the judges of the Supreme Court;<sup>7</sup> in turn, they are appointed with the approval of Parliament, who cannot refuse a nomination unless it can clearly be proven that the person concerned does not meet the required qualifications.<sup>8</sup>
8. Despite improvements, depending on the nature of the case, judges render decisions based on orders coming from government and military officials, in particular local and regional authorities.<sup>9</sup> Against this background, the political influence exercised over judges, in turn, remains a major impediment to lawyers' ability to practise the profession effectively.
9. Corruption is prevalent and interferes with the judiciary's role in awarding remedies for human rights abuses and ensuring that perpetrators face justice. Some judges may only render a favourable decision on receipt of a bribe. As a

result, legal aid and *pro bono* lawyers may find themselves paying judges out of their own pocket to have a chance of success. Pleadings by poor clients without representation are often dismissed outright.<sup>10</sup>

10. A lack of resources contributes to structural problems such as the poor state of legal education and court facilities. Judges, particularly on the lower rungs of the judiciary, are unfamiliar with the law and court procedures.<sup>11</sup>
11. Lawyers lack an independent, self-governing professional body that can defend the profession's integrity and interests.<sup>12</sup> The Myanmar Bar Council remains a government-controlled body that fails to adequately protect the interests of lawyers in the country and promote their role in the fair and effective administration of justice.
12. Lawyers in Burma have seen a substantial decrease in governmental harassment and interference during the transition from military rule, but significant challenges to their independence remain, particularly in politically sensitive cases. More than 1,000 of Burma's estimated 48,000 lawyers have been disciplined over the past 20 years, with many having their licenses revoked or suspended. As many as 200 lawyers who were disbarred for political reasons may remain without licenses.<sup>13</sup>
13. As outlined above, despite significant improvements in the independence of the judiciary and legal profession since 2011, major challenges remain. Continuing efforts to bolster the independence of judges and lawyers are required, including legal reform, in order to further strengthen the rule of law.
14. While Myanmar is still not a state party to the ICCPR, the ICJ considers that its provisions and the Human Rights Committee's authoritative interpretations of the rights enshrined in the Covenant should provide helpful guidance to the authorities in Myanmar on essential guarantees for respect for the rule of law, respect for human rights, and the independence of judges and lawyers. This is particularly the case given the authorities' expressed commitment,<sup>14</sup> during the course of the 2011 UPR, to "consider accession" to the ICCPR.<sup>15</sup>

## **II. The rule of law and lack of legislation protecting human rights and the environment**

15. Without a proper regulatory regime for investment and environmental protection, coupled with a judiciary unable to ensure the administration of effective judicial remedies, economic development in Myanmar risks undermining human rights protection in the country, especially with respect to economic, social and cultural rights. In turn, this situation creates conditions for further human rights abuses in Myanmar.

### **(a) Environmental Law – inadequacy of legal protection for human rights and the environment**

16. The Environmental Conservation Law (ECL), enacted on 1<sup>st</sup> April 2012, is currently Myanmar's main legal and regulatory framework for environmental protection.<sup>16</sup>
17. Article 36 of the ECL allows for broad exemptions from environmental protection obligations with approval of the Union government. It provides the Ministry of Environmental Conservation and Forestry (MOECA) with the discretion to "exempt or relieve any Government department, organization or private business from complying with any provision contained in this Law for the interests of the Union and its people." The exemption from the duty to comply with otherwise relevant and binding legal provisions may apply not only to provisions in the 2012 Environmental Conservation Law, but also to

rules, notifications, orders, directives and procedures issued under that law. Exemptions from environmental protection obligations should be necessary for and limited to achieve “a legitimate purpose.”<sup>17</sup> The ICJ is concerned that the discretionary powers to grant broad exemptions open the door to abuses and corruption.

18. Chapter 4 of the ECL sets out the need for a “system of environmental impact assessment and social impact assessment” for any project undertaken by the government, organization or individuals.<sup>18</sup> There is still ambiguity about the implementation of environmental impact assessments (“EIAs”) and the EIA Procedures continue to remain in draft form.<sup>19</sup>
19. According to the Independent Expert on Human Rights and the Environment, John H Knox, human rights resources, including human rights treaty bodies, decisions of regional human rights tribunals, and statements by States in the context of the Universal Periodic Review, have now “developed a coherent body of environmental human rights obligations, with three principal elements”:<sup>20</sup> (a) human rights law imposes procedural obligations on states in relation to environmental protection; (b) there are minimum substantive standards; and (c) there are duties relating to vulnerable groups.<sup>21</sup>
20. In light of the above, the ICJ considers that the inadequate legal framework ensuring environmental protection is not in line with Myanmar’s obligations under international law.<sup>22</sup>

#### **(b) Foreign Investment Law**

21. Any legislation regulating foreign investment in the country should be consistent with Myanmar’s obligations under the UN Charter to promote the realization of human rights through international cooperation.
22. The International Finance Corporation (IFC),<sup>23</sup> in support of the Directorate of Company Administration (DICA),<sup>24</sup> has produced a draft Investment Law designed to consolidate the Foreign Investment Law (2012) and the Myanmar Citizen Investment law (2013) to create a level playing field for both local and foreign investors. The IFC consulted only private sector actors, selected parliamentarians and some government departments. After much pressure from civil society groups, including the ICJ,<sup>25</sup> DICA has now opened the process to civil society consultation.<sup>26</sup>
23. Aside from promoting investor protections, consistent with international investment treaties, the draft Investment Law does not clearly outline what an investor can and cannot do or clearly delineate the regulatory powers of the State.<sup>27</sup>
24. The previous Foreign Investment Law (2012) and the 2013 Myanmar Citizens Investment Law contained clauses that helped to clarify government regulatory powers.<sup>28</sup> The draft Investment Law removes all of the public interest elements for both foreign and domestic investors, and contains no reference to international human rights law. In light of this, the ICJ is concerned that, while granting stringent investment protection, the current draft of the Investment Law makes no reference to the need to protect human rights. Further, while Article 17 requires investors to comply with national legislation, it does not address the legal vacuum into which current investment is flowing.<sup>29</sup>
25. Establishing a legal and regulatory framework for investment provides important momentum to building a functioning judiciary in Myanmar. Under the draft Investment Law, however, the foreign investor is able to choose the venue in which to adjudicate the rights granted by the law. Granting foreign

investors access to extrajudicial grievance mechanisms and international dispute resolution mechanisms reduces the impetus to reform and develop the national legal system. The draft Investment Law promotes an alternative judicial system for investors and leaves the people of Myanmar at the mercy of a dysfunctional national system.<sup>30</sup>

26. By failing to carve out a 'right to regulate' to protect and realize human rights, Myanmar's draft Investment Law falls short of international standards. Myanmar is bound by international human rights law and the UN Charter<sup>31</sup> to take separate and joint action with other States to promote respect for, and observance of, human rights and fundamental freedoms for all without discrimination.<sup>32</sup>
27. It is a fundamental principle of international human rights law that States have an obligation not only to respect human rights in their own conduct, but also to protect persons under their jurisdiction from the conduct of other actors,<sup>33</sup> including business enterprises and other non-State actors.<sup>34</sup>

### **III. Discriminatory laws targeting women and minorities**

28. A package of four draft laws described as aiming to "protect race and religion" – currently being debated in parliament – includes provisions that are discriminatory on religious and gender grounds. These draft laws are inconsistent with international human rights law and standards, including Myanmar's legal obligations as a state party to the Women's Convention and the CRC.
29. The Religious Conversion Bill stipulates that anyone who wants to convert to a different faith will have to apply through a state-governed body, in clear violation of the right to choose one's own religion. It would establish local "Registration Boards", made up of government officials and community members who would "approve" applications for conversion. The bill only guarantees the right to freedom of religious belief and worship to "citizens" – in effect excluding the Rohingya minority, who are denied citizenship in Myanmar.<sup>35</sup> Given the alarming rise of religious tensions in Myanmar, the ICJ is concerned that if the draft legislation is adopted it would provide a further tool to abuse and further harass religious minorities.<sup>36</sup>
30. The Buddhist Women's Special Marriage Bill explicitly and exclusively targets and regulates the marriage of Buddhist women with men who hold different religious beliefs. It blatantly discriminates on both religious and gender grounds.<sup>37</sup>
31. In light of the above, the ICJ considers that the Religious Conversion Bill and the Buddhist Women's Special Marriage Bill are inherently flawed and their enactment would violate international human rights law and standards.
32. The Population Control Healthcare Bill is ostensibly aimed at improving living standards among poor communities; however it lacks human rights safeguards.<sup>38</sup> The bill establishes a 36-month "birth spacing" interval for women between child-births, though it is unclear whether or how women who violate the law would be punished. The lack of essential safeguards to protect women who have children more frequently than at 36-month intervals potentially creates an environment that could lead to forced reproductive control methods such as coerced contraception, forced sterilization or abortion.<sup>39</sup>
33. Finally, the Monogamy Bill introduces new provisions that could constitute

arbitrary interference with one's privacy and family—including by criminalizing extra-marital relations—instead of clarifying or consolidating existing marriage and family laws.

#### **IV. Writ of Habeas Corpus**

34. The Writ of Habeas Corpus is guaranteed in article 378 (a) of Myanmar's Constitution in its chapter on fundamental rights and duties of citizens. This right safeguards the right to liberty and security of person and provides protection against human rights violations including torture and other ill-treatment, arbitrary detention and enforced disappearance. The right to habeas corpus should also result in the police complying with the procedures for arrest and detention under Myanmar law. An effective habeas corpus procedure therefore can also contribute to a positive perception of justice and the rule of law and instill confidence in Myanmar's transition to civilian rule.
35. An examination of habeas corpus laws and their application since 2008 reveals concerns about the current effectiveness of this procedure. Since its reintroduction, the Writ of Habeas Corpus has never been issued and nobody appears to have been able to bring proceedings to challenge the lawfulness of their detention before a court, with many petitions dismissed erroneously or on spurious technical grounds.<sup>40</sup> In 2014 there were no petitions for the Writ to the Supreme Court.
36. The re-institution of habeas corpus writs is regarded by many as reviving the writs as an essential element of democratic reform. However, the duplication in Article 296(b) of the 2008 Constitution of the 1947 provision, which suspends applications to issue writs in the areas under declared states of emergency, is inconsistent with international human rights standards.<sup>41</sup> Moreover, limiting jurisdiction to issue Writs to the Supreme Court places a heavy burden on the individuals concerned and their lawyers.<sup>42</sup>

#### **V. Recommendations**

37. In light of the above-mentioned concerns, the ICJ calls upon the Working Group on the UPR and the Human Rights Council to make the following recommendations to the Myanmar authorities:

##### *Concerning the independence of the judiciary*

- (i) create a Judicial Code of Conduct in line with international standards on judicial independence and accountability;<sup>43</sup>
- (ii) create a specialized, independent mechanism mandated to promptly and effectively investigate allegations of corruption. This body should also be mandated to make recommendations to combat systemic corruption;
- (iii) significantly reform the Bar Council to ensure its independence;
- (iv) commit resources to improving legal education and court facilities to tackle structural problems; and
- (v) strengthen cooperation with the Special Rapporteur on the situation of human rights in Myanmar and issue an open invitation to the Special Rapporteur on the Independence of Judges and Lawyers to visit Myanmar.

##### *Concerning the lack of legislation adequately protecting human rights and the environment*

- (i) pass the EIA Procedures without further delay;

- (ii) enact and enforce legislation that makes it compulsory for business enterprises to assess the environmental and social impacts of their activities on human rights and to publicly disclose EIA results;
- (iii) ensure public participation in environmental decision-making, including by protecting the rights of expression and association;
- (iv) provide access to effective remedies for human rights violations and abuses resulting from environmental harm;
- (v) draft the Foreign Investment Law in consultation with civil society organizations; and
- (vi) ensure the draft Investment Law recognizes and complies with Myanmar's obligations under various legal regimes, including international human rights law, and environmental conservation and land laws.

*Concerning discriminatory laws targeting women and minorities*

- (i) withdraw the Religious Conversion Bill, the Buddhist Women's Special Marriage Law, the Monogamy Bill and the Population Control and Healthcare bill; and
- (ii) thoroughly review all family laws to ensure compliance with international human rights law and standards;
- (iii) amend the 1982 Citizenship Law to reflect basic principles of human rights, including equality and non-discrimination.

*Concerning the writ of habeas corpus*

- (i) revise the law and Constitution governing arrest, detention and the right to habeas corpus in a manner consistent with international standards;
- (ii) clarify the practice and jurisprudence;
- (iii) ensure that the law, as amended, is implemented in a manner consistent with international human rights standards; and
- (iv) ensure training for lawyers and judges; and
- (v) raise awareness of the public, including the media, about the laws, jurisprudence and international standards related to arrest and detention and the right to habeas corpus.

**ENDNOTES**

<sup>1</sup> The International Commission of Jurists conducted a series of workshops in the country with the Supreme Court of Myanmar on issues involving Judicial Ethics and the Independence and Accountability of Judges. Such workshops brought together high-level judges in Myanmar and renowned international legal experts, including ICJ's Commissioners Justices Ketil Lund of Norway, Radmila Dacic of Serbia, Azhar Cachalia of South Africa, Michelle Rivet of Canada and Shrestha of Nepal. In December 2013, the ICJ published the report *Right to Counsel: The Independence of lawyers in Myanmar*, which is annexed to this submission and is also available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/12/MYANMAR-Right-to-Counsel-electronic.pdf>. See also *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*, A Practitioner's Guide, Practitioners' Guide Series N°1, ICJ, Geneva, Switzerland, 2004, [http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/04/icj\\_independence\\_of\\_judiciary\\_guide\\_2004.pdf](http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/04/icj_independence_of_judiciary_guide_2004.pdf).

<sup>2</sup> See, among others, International Covenant on Civil and Political Rights (ICCPR), Article 14(1); the Universal Declaration of Human Rights (UDHR), Article 10; the Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crimes and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Principle 6; Universal Charter of the Judge, Article 1; and the Bangalore Principles of Judicial Conduct, Value 1 and 2.

<sup>3</sup> See, among others, ICCPR, Article 9 and General Comment No. 35 on Article 9 (Liberty and security of person), CCPR/C/GC/35, Adopted by the Committee at its 112th session (7-31 October 2014).

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<sup>4</sup> Principle 1, the Declaration on Upholding the Rule of Law and Role of Judges and Lawyers in Times of Crisis (The Geneva Declaration), International Commission of Jurists, December 2008.

<sup>5</sup> The Supreme Court launched its 2015-2017 Strategic Plan on 24 February 2015. The plan identifies the judiciary's 4 core aims: promoting the rule of law and regional peace and tranquility; enhancing reliability and public trust in the judicial system; adjudicate cases fairly and speedily in accordance with law; and upgrading the integrity of the courts. The Strategic Plan has identified 5 "strategic action areas" to advance these core aims: protecting public access to justice; promoting public awareness; enhancing judicial independence and accountability; maintain commitment to ensuring equality, fairness and integrity of the judiciary; and strengthening efficiency and timeliness of case processing.

<sup>6</sup> See Constitution, S. 321. The President and the two Houses of Parliament nominate three Justices each, who are appointed for five-year terms concurrent with the term of the Pyidaungsu Hluttaw (see Constitution, S. 335).

<sup>7</sup> See Constitution, S 308(b); Union Judiciary Law (the State Peace and Development Council Law No. 20/2010), S 44-45. The President also prepares the nomination of the Chief Justices of Regions' and States' High Courts, in co-ordination with the Chief Justice of the Union and the pertinent Region or State Chief Minister. Other judges of the High Courts are nominated by the Chief Minister of the Region or State concerned, in co-ordination with the Chief Justice of the Union. The President again appoints the High Courts' Chief Justices and judges with the approval of the Region or State Parliament, who cannot refuse the nomination unless it can clearly be proven that the person does not meet the required qualifications. Notably, the criteria for appointment do not require a candidate for judicial office to hold a law degree or have experience as a legal professional. Instead, being "a person who, in the opinion of the President, is an eminent jurist" may suffice.

<sup>8</sup> See Constitution, S 308(b); Union Judiciary Law (the State Peace and Development Council Law No. 20/2010), S. 26-27; and Constitution, S. 301 and 310; Union Judiciary Law (the State Peace and Development Council Law No. 20/2010), S. 30 and 48. The Supreme Court is tasked with appointing lower court judges, which it reportedly has delegated to a Civil Service Selection and Training Board. See International Bar Association's Human Rights Institute (IBAHRI), *The Rule of Law in Myanmar: Challenges and Prospects*, December 2012, p. 57.

<sup>9</sup> Right to Counsel: The Independence of lawyers in Myanmar, International Commission of Jurists, 2013, pg. 40.

<sup>10</sup> Right to Counsel: The Independence of lawyers in Myanmar, International Commission of Jurists, 2013, pg. 40. This situation may have a particularly negative impact on victims of violations and abuses of economic, social and cultural rights, including in situations of development-based evictions and displacement, when individuals are seeking protection from the courts.

<sup>11</sup> Right to Counsel: The Independence of lawyers in Myanmar, International Commission of Jurists, 2013, pg. 40. U Sit Aye, Senior Legal Adviser to President Thein Sein, stated that "judges lack the knowledge to conduct free and fair trials," although he noted that programmes are to be undertaken by the government with international assistance that should improve capacity.

<sup>12</sup> UN Basic Principles on the Role of Lawyers, Principle 24; Draft Universal Declaration on the Independence of Justice (Singhvi Declaration), Article 97; International Bar Association (IBA), Standards for the Independence of the Legal Profession, Standard 17. Also see e.g. Special Rapporteur on the independence of judges and lawyers, Report to the Human Rights Council on missions to Mozambique, UN Doc. A/HRC/17/30/Add. 2 (2011), para. 79.

<sup>13</sup> Burma lawyers see greater freedom, but still far to go, The Irrawaddy, 3 December 2013: <http://www.irrawaddy.org/burma/burma-lawyers-see-greater-freedom-still-far-go.html>.

<sup>14</sup> Human Rights Council, Report of the Working Group on the Universal Periodic Review: Myanmar, UN Doc. A/HRC/17/9 (2011), Para. 104.6. International standards prescribe a procedure that provides safeguards against appointment for improper motives, leading to the selection of individuals of integrity and ability, with appropriate qualifications and training. See among others, UN Basic Principles on the Independence of the Judiciary, Principle 10; Human Rights Committee, General Comment No 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/GC/32 (2007), para. 19. The Human Rights Committee and the Special Rapporteur on the independence of judges and lawyers have repeatedly recommended the use of bodies that are independent from the executive, plural and are composed mainly (if not solely) of judges and members of the legal profession. They should apply transparent procedures. See, among others, Human Rights Committee: Concluding Observations on the Congo (CCPR/C/79/Add.118, para. 14), Liechtenstein (CCPR/CO/81/LIE, para. 12), Tajikistan (CCPR/CO/84/TJK, para. 17), Honduras (CCPR/C/HND/CO/1, para. 16), Azerbaijan (CCPR/C/AZE/CO/3), para. 12), Kosovo (Serbia) (CCPR/C/UNK/CO/1, para. 20); Special Rapporteur on the independence of judges and lawyers: Report to the Human Rights Council (A/HRC/11/41, para. 28-29, 32) and Preliminary Report to the Human Rights Commission on a mission to Ecuador (E/CN.4/2005/60/Add.4, para.



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5(d)). Also see Draft Universal Declaration on the Independence of Justice (Singhvi Declaration), Article 11; Universal Charter of the Judge, Article 9.

<sup>15</sup> The Basic Principles on the Role of Lawyers, and the Guidelines on the Role of Prosecutors, as well as provisions of the Universal Declaration of Human Rights and the provisions of the International Covenant on Civil and Political Rights (ICCPR), all set out an authoritative framework aimed at ensuring the independence and impartiality of the judiciary and individual judges, and the legal profession.

<sup>16</sup> The ECL and the 2014 Rules empower the Ministry of Environmental Conservation and Forestry (MOECAF) to act as a "gate keeper" for business activities. The MOECAF is primarily responsible for assessing investors' compliance with Myanmar's environmental law and it is also empowered by the ECL to establish a "prior permission scheme" for a range of business activities that may "cause impact on environmental quality". See also, Article 45 in Chapter 1 of the 2008 Constitution which states, "the Union shall protect and conserve natural environment." Article 390 also calls on every citizen to assist the State in environmental conservation. Chapter 4, Article 196 mandates that State and Divisional legislatures have the power to regulate environmental protection. However, the national legislature can enact environmental protection and natural resource laws but need not. See Chapter 4, Section 96, Constitution of the Republic of the Union of Myanmar.

<sup>17</sup> This caveat is very wide, and gives no indication of what purpose an exemption may serve. It is also unclear whether MOECAF would issue public notifications to disclose its reasons behind granting such exemptions.

<sup>18</sup> The by-laws are currently being drafted with the help of other ministries and local and international experts and non-governmental organizations. Even though impact assessments are required for all major development projects under the new Foreign Investment Law, the precise environmental and social standards expected to be followed by investors have yet to be articulated.

<sup>19</sup> The Environmental Impact Assessment Rules under the law were drafted in early 2013 and submitted for a 90-day review. The EIA Procedures are still in draft form and the Asian Development Bank is assisting the Myanmar government with its current draft. Vani Sathisan, Rights-compliant investment needed to keep SEZs fair for all, The Myanmar Times, 6 October 2014: <http://www.mmtimes.com/index.php/national-news/11845-rights-compliant-investment-needed-to-keep-sezs-fair-for-all.html>.

<sup>20</sup> Statement by John H. Knox, Independent Expert on Human Rights and the Environment at "The Development of Environmental Human Rights" - See more at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15274&LangID=E#sthash.S0yT9Jtn.dpuf><http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15274&LangID=E#sthash.S0yT9Jtn.dpuf><http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15274&LangID=E#sthash.S0yT9Jtn.dpuf><http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15274&LangID=E#sthash.S0yT9Jtn.dpuf>

<sup>21</sup> Ibid.

<sup>22</sup> Article 24 of the Convention on the Rights of the Child (CRC), to which Myanmar is a party, sets out the right of the child to the enjoyment of the highest attainable standard of health and to clean drinking-water, taking into consideration the dangers and risks of environmental pollution. Article 6 of the CRC emphasizes the child's right to life and to the maximum extent possible the child's survival and development. General Comment No. 16 of the Committee on the Rights of the Child on State obligations regarding the impact of the business sector on children's rights underscores that "environmental degradation and contamination arising from business activities can compromise children's rights to health, food security and access to safe drinking water and sanitation" (para. 19). In light of this, the Committee elucidates measures that States parties to the Convention should take to comply with their obligation to fulfil children's rights, including "clear and well-enforced law and standards on... health and safety, environment, anti-corruption, land use and taxation that comply with the Convention and the Optional Protocols thereto", (para. 29), CRC/C/GC/16, adopted by the Committee at its sixty-second session (14 January – 1 February 2013). Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women, to which Myanmar is a party, enshrines women's right to access to health care services free from discrimination. Article 3 of the Women's Convention enshrines women's right to their full development and advancement of women in order to guarantee them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men. The Convention on the Rights of Persons with Disabilities, to which Myanmar is a party, enshrines in Article 25 the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. Further, while Myanmar is still not a party to the International Covenant on Economic, Social and Cultural Rights, the ICJ considers that its provisions and the Committee on Economic, Social and Cultural Rights' authoritative interpretations of the rights enshrined in the Covenant should provide helpful guidance to the authorities in Myanmar on essential guarantees for respect for the right to the highest attainable standard of health as well as the right to water, under Articles

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11 and 12 of the International Covenant on Economic, Social and Cultural Rights (as per General Comment No. 15 of the Committee), the right to adequate food and adequate housing under Article 11 of the Covenant (as per General Comment 12 and 4 respectively of the Committee).

<sup>23</sup> The IFC, a member of the World Bank Group, is the largest global development institution focused exclusively on the private sector in developing countries. Specifically, The IFC is an international financial institution that offers investment, advisory, and asset management services to encourage private sector development in developing countries.

<sup>24</sup> In 1993, under the Ministry of National Planning and Economic Development, the Directorate of Investment and Company Administration was formed. Major functions of DICA include scrutinizing and appraisal of projects that are proposed for investment in Myanmar, monitoring and reporting the implementation of permitted enterprises, registration and administration of Limited Companies, Joint Ventures, Partnerships and Associations, and taking part in regional cooperation relating to investment matters.

<sup>25</sup> See, Myanmar's investment law drafting process at critical phase, ICJ public statement published on 9 February 2015, <http://www.icj.org/myanmars-investment-law-drafting-process-at-critical-phase/>.

<sup>26</sup> The ICJ conducted a workshop with DICA on bilateral investment treaties in July 2014. In November, the ICJ submitted feedback on the Draft Investment Law providing expert analysis and identifying issues of concern. An initial consultation on the Draft Investment Law was held on 29 January 2015. The ICJ, along with other civil society organizations, met with the IFC and DICA.

<sup>27</sup> Chapter on Investor's Rights, Article 15, would grant all investors rights to national treatment, most favoured nation and fair and equitable treatment. These protections can all be expected to generate an increasing number of disputes at investor-State tribunals at great expense to States. Article 15 also protects all investors from indirect expropriation, which can be construed to include regulation that may be expected to negatively affect the investor's profit.

<sup>28</sup> Chapter II, Relevant businesses, Article 4 (a, b and c) restricted investment in business that would harm culture and customs, affect public health or damage the environment. Chapter 4 clearly sets out the purpose of the law and its Basic Principles, helping to explain to investors what to expect as fair and equitable treatment. The Basic Principles delimited what investment would be permitted according to Myanmar's needs. In order to be permitted, investment must be conducted according to principles such as: 8(i) improving local areas and 8(l) protecting the environment. While these provisions were inadequate in terms of human rights protection, they did go part of the way in addressing broader public interest concerns beyond those of international investment. Likewise, the, Chapter III on Basic Principles explains that investment must support the objectives of national economic planning, as well as environmental conservation and protection. Chapter IV on applicable business restricts investment that negatively affects the traditional culture and customs of ethnic groups; affects the public's environment or public health or; causes damage to the environment and ecosystem. Article 7 requires the commission to consult the Pyidaungsu Hluttaw on investment that can affect citizens. Chapter VII sets out duties for investors that include in 15(f) 'not to cause environmental pollution, damage in accord with existing Laws in respect of investment business.'

<sup>29</sup> The draft Law as currently formulated runs the risk of hindering progressive regulation to protect human rights in Myanmar. The draft law's proposed legal framework would provide all investors the right to be consulted and to challenge any new national law or regulation that may impact their profits. This framework would allow businesses to challenge government policies aimed at addressing legitimate needs within the country, and it could create a regulatory chilling effect in which Myanmar's government would find itself in the troubling position of evaluating whether the passage of new social policies would lead to costly lawsuits from investors.

<sup>30</sup> Creating a two-tier system (arbitration in the first instance for investors, courts for everyone else) removes a powerful force for the development of an effective and independent judiciary, in which judges become accustomed to dealing with the disputes to which the government is a party. Establishing arbitration as the default option for all investment disputes is a regressive step for the development of the judicial system in Myanmar.

<sup>31</sup> Charter of the United Nations, Article 55 and 56.

<sup>32</sup> It is also party to a number of international human rights treaties, including the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), the CRC, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography and the Convention on the Rights of Persons with Disabilities.

<sup>33</sup> Notably, the 1993 Vienna World Conference on Human Rights states that it is the duty of States to promote and protect all human rights and fundamental freedoms, regardless of their political, economic and cultural systems, Vienna Declaration and Programme of Action Adopted by the World Conference on Human Rights in Vienna on 25 June 1993. In addition, the Maastricht Principles on Extraterritorial Obligation of States in the area of Economic, Social and

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Cultural Rights clarify that human rights law on States' responsibilities to regulate conduct of non-state actors extends to: a) acts and omissions of non-State actors acting on the instructions or under the direction or control of the State; and b) acts and omissions of persons or entities which are not organs of the State, such as corporations and other business enterprises, where they are empowered by the State to exercise elements of governmental authority (adopted on 28 September 2011, at a gathering convened by Maastricht University and the International Commission of Jurists, by a group of experts in international law and human rights).

<sup>34</sup> According to the Committee on the Rights of the Child, General Comment 16 on State obligations regarding the impact of business on children's rights, the CRC requires Myanmar to take "all appropriate legislative, administrative and other measures" to meet children's rights obligations. Myanmar has the obligation to respect human rights and to make sure that investors do the same. Policies adopted should frame how business can impact on children's rights. With respect to business and human rights, certain elements of this obligation to protect have been set out in The United Nations Guiding Principles on Business and Human Rights (UNGPs). The UNGPs reiterate the important obligations of States to take effective measures to regulate investment and ensure access to remedy for citizens. Not only must Myanmar protect against human rights abuse within their territory and/or jurisdiction by third parties (UNGP 1), UNGP 9 provides that it should maintain adequate domestic policy space to meet their human rights obligations. Myanmar must also provide individuals access to remedy for human rights abuses. This obligation includes a duty to investigate allegations of abuse, the possibility to establish legal responsibility, an effective and independent mechanism, fair trials, sanctions and reparation (UNGP 25).

<sup>35</sup> The bill also contains provisions prohibiting the following: conversions with an intent to insult, degrade, destroy or misuse religion (Article 14); compelling conversion through bonded debt, inducement, intimidation, undue influence or pressure (Article 15); and preventing, interfering or hindering people from converting (Article 16). These provisions could be interpreted as providing additional protection to people in Myanmar, but in the current context of ethnic and religious tensions, they could more likely be interpreted as creating additional grounds for unlawful government interference, abuse and discrimination. To avoid such an interpretation, any legislation addressing these issues should include safeguards against abusive or discriminatory application of the law.

<sup>36</sup> Article 4 of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, which provides that States shall take measures where required to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law.

<sup>37</sup> The bill discriminates against Buddhist women as well as against non-Buddhist men who face significantly more burdens than Buddhist men should they marry a Buddhist woman. In addition to being discriminatory, the draft law appears to grant courts the power to force two people to marry against their will (Article 27(f)), in violation of Article 16(1)(b) of the Women's Convention which guarantees women, on the basis of equality with men, the right to freely choose a spouse and to enter into marriage only with their free and full consent.

<sup>38</sup> See Myanmar: Parliament must reject discriminatory 'race and religion' laws - Joint statement by Amnesty International and the International Commission of Jurists, 3 March 2015, <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2015/03/Myanmar-Reject-discriminatory-race-and-religion-draft-laws-Advocacy-2015-ENG.pdf>.

<sup>39</sup> As a state party to the Women's Convention, Myanmar is legally bound to ensure the right of women, on the basis of equality with men, to decide freely and responsibly on the number and spacing of their children – in addition to having access to the information, education and means to enable them to exercise these rights (Article 16(e)). In contrast, the draft Population Control Healthcare Law contains no provisions reaffirming women's right to decide on these matters.

<sup>40</sup> Many judges, lawyers and members of civil society are unaware or unclear about the procedure's application.

<sup>41</sup> Human Rights Committee General comment 29, Human Rights Committee, General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), Para 16.

<sup>42</sup> Nay Pyi Taw is a remote and expensive destination for the people of Myanmar. Habeas Corpus should be issued at the state or regional level.

<sup>43</sup> Refer to Bangalore Principles of Judicial Conduct.