

**3 May 2016**

Re: Implementable Action Plans from the ICJ to the new Parliament & Government

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Re: Implementable Action Plans from the ICJ to the new Parliament & Government

To assist the new Parliament and government in improving the rule of law and respect for human rights, the International Commission of Jurists (ICJ) has identified 14 areas in which the new government can immediately and in the long-term address human rights violation in Myanmar. While this list is not exhaustive, it seeks to clarify salient points and include areas that the ICJ has been closely working on in Myanmar. As the new government acts to adopt and implement legislation and policy, it is important that Myanmar's transition to democracy is driven by the rule of law, a respect for human rights including the principle of non-discrimination, and greater accountability, transparency and justice.

The ICJ is an international non-governmental organization that has been dedicated since 1952 to promoting the rule of law and the legal protection of human rights throughout the world.<sup>1</sup> As part of its work in Myanmar, the ICJ has worked with lawyers and civil society organizations as well as the Union Supreme Court of Myanmar, the Attorney General's Office, and the Directorate of Investment and Company Administration to strengthen respect for the rule of law and human rights. To this end, among other things, the ICJ analyzes draft and existing laws and practice in countries in light of international human rights standards.

The National League for Democracy received an overwhelming majority of the votes of Myanmar citizens in last year's elections. The formation of a new government with a popularly elected majority in parliament after decades of military-dominated rule promises to be a watershed moment for the promotion of the rule of law and human rights.

Access to justice for victims of human rights violations have been severely curbed in Myanmar over the past decades, with most of the population being consistently denied access to the courts and effective remedies as a result of unfair and discriminatory laws as well as poor court decisions. The military remains dominant in Myanmar, wielding undue influence over various sectors in the country, including the judiciary, and continues to enjoy impunity for gross violations of human rights and serious violations of international

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<sup>1</sup> See [www.icj.org](http://www.icj.org) for more information.

humanitarian law. As the new government pushes through legislation and implements plans to strengthen the rule of law and democracy, it is extremely important that compromises are not made in the protection and promotion of human rights.

Myanmar should immediately engage with the international human rights community. The government should expedite the establishment of an office of the United Nations High Commissioner for Human Rights in Myanmar with a full mandate. It should improve the operational environment for the United Nations and international NGOs by addressing blockages for visa and travel authorization applications. Myanmar must engage closely with the United Nations human rights system, including the treaty bodies and special procedures mandate holders. Myanmar should sign and ratify the International Covenant on Civil and Political Rights and ratify the International Covenant on Economic, Social and Cultural Rights. It should expedite ratification of the Convention against Torture and the Optional Protocol thereto, and the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.

The ICJ is pleased to share with you the following brief containing our general recommendations to the new government. We hope that you will find this useful and that we can build upon this initial assistance to work together in the furtherance of the rule of law and human rights in Myanmar.

1. Independence of Judges
2. Independence of Lawyers
3. Reform of the Union Attorney General's Office
4. Land Laws
5. Investment Law
6. Bilateral Investment Treaties
7. Special Economic Zones
8. Offenses Against Religion: Use of Blasphemy Laws
9. Discriminatory laws targeting women and minorities
10. Rights of the Rohingya
11. Discrimination on the basis of Sexual Orientation and Gender Identity
12. Criminal Defamation and Freedom of Expression
13. Peaceful Assembly Law
14. Ending impunity for violations of human rights

Sincerely,



Sam Zarifi  
Regional Director, Asia-Pacific Office  
International Commission of Jurists  
10/1 Soi Aree 2  
Phahonyothin Road  
Samsennai, Phayatai  
Bangkok 10400  
Thailand  
Tel: +662 619 8477 – 8 Extn 300  
Fax: +662 619 8479  
E-mail: [sam.zarifi@icj.org](mailto:sam.zarifi@icj.org)

## **1. Independence of Judges**

An independent judiciary is an indispensable component of the rule of law.<sup>2</sup> The integrity of the judicial system is central to the maintenance of a democratic society. The judiciary serves as an essential check on power and ensures that laws and measures adopted comply with human rights norms and rule of law principles.<sup>3</sup> International standards governing the independence of the judiciary are well established, including, in particular in the UN Basic Principles on the Independence of the Judiciary, and a State's legal framework for the administration must respect and implement those Principles.

By launching its 2015-2017 Strategic Plan on 24 February 2015,<sup>4</sup> the Office of the Supreme Court of the Union ("OSCU") has taken important steps<sup>5</sup> towards asserting its independence. The legislative and executive branches should encourage this process.

Significant obstacles remain. The executive still wields undue influence over the judiciary and interferes in politically sensitive and criminal cases. The executive unduly controls the appointment of the members of the Constitutional Tribunal,<sup>6</sup> and oversees the opaque budget process for the judiciary. Political and military influence over judges remains a major impediment to lawyers' ability to practice the profession effectively.<sup>7</sup> Despite improvements, and depending on the nature of the case, judges render

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<sup>2</sup> This principle is affirmed in the United Nations Basic Principles on the Independence of the Judiciary (UN Basic Principles), which provide that it is the basic responsibility of all institutions, governmental and otherwise, to respect the independence of the judiciary. 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 1.

<sup>3</sup> Principle 1, 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>4</sup> The Strategic Plan identified the judiciary's 4 core aims: promoting the rule of law and regional peace and tranquillity; 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. Available at:

[http://www.unionsupremecourt.gov.mm/sites/default/files/supreme/strategic\\_plane.pdf](http://www.unionsupremecourt.gov.mm/sites/default/files/supreme/strategic_plane.pdf).

<sup>5</sup> To further identify strategic issues and priorities, based on the Planning Team's Preliminary Report, a Working Level Meeting was held by the Office of the Union Supreme Court with UNDP and ICJ experts on 11 February 2014.

<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 ICJ's Press Release calling for the end of the practice of appointing military officers to the judiciary:

<http://www.icj.org/myanmar-end-practice-of-appointing-military-officers-to-judiciary/>.

decisions based on orders coming from government and military officials, in particular local and regional authorities.<sup>8</sup>

Corruption is prevalent and interferes with remedy for human rights abuses. Lack of resources contributes to the poor state of legal education and court facilities. Judges, particularly at the lower rungs of the judiciary, are unfamiliar with the law and court procedures.<sup>9</sup> Lawyers lack an independent self-governing professional body that can defend the profession's integrity and interests. The President nominates the Chief Justice of the Union, and, in co-ordination with the latter, the judges of the Supreme Court;<sup>10</sup> they are appointed with the approval of Parliament, who cannot refuse nomination unless it can clearly be proven that the person does not meet the required qualifications.<sup>11</sup>

The above are inconsistent with international law and standards.<sup>12</sup> Having a judiciary that is independent in structure and function of the other branches of government is a necessary condition for the fair administration of justice and inherent to respect for the rule of law.<sup>13</sup>

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<sup>8</sup> Right to Counsel: The Independence of lawyers in Myanmar, International Commission of Jurists, 2013, pg. 40. Available at: <http://www.icj.org/myanmar-lawyers-still-face-restrictions-despite-increased-independence-2/>.

<sup>9</sup> Ibid. U Sit Aye, Senior Legal Adviser to President Thein Sein, had 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>10</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 mean 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>11</sup> See Constitution, S 308(b); Union Judiciary Law (the State Peace and Development Council Law No. 20/2010), S. 26-27; Constitution, S. 301 and 310; Union Judiciary Law (the State Peace and Development Council Law No. 20/2010), S. 30 and 48.

<sup>12</sup> While Myanmar is still not a state party to the ICCPR, the ICJ considers that its provisions and the elucidation of them by the Human Rights Committee should be among the standards that provide a helpful guide to the authorities in Myanmar on essential guarantees for respect of the rule of law, respect for human rights, and the independence of judges and lawyers. This is particularly the case given that authorities expressed a commitment, during the course of the 2011 Universal Periodic Review at the UN Human Rights Council, to "consider accession" to the ICCPR. Human Rights Council, Report of the Working Group on the Universal Periodic Review: Myanmar, UN Doc. A/HRC/17/9 (2011), Para. 104.6.

<sup>13</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.

## **Recommendations:**

- Adopt policy and directives to ensure the legislative or executive branches of Government desist from interference in the independence of the judiciary, including by refraining from acting to unduly influence judicial decisions;
- Support financially and administratively the implementation of the OSCU's Judicial Strategic Plan 2015-2017<sup>14</sup>;
- Support financially and administratively the OSCU to create a Judicial Code of Conduct in line with international standards on judicial independence and accountability<sup>15</sup>;
- Appoint only qualified legal experts as Judges and law officers through an open process on the basis of prescribed criteria based on merit and integrity, and without discrimination;
- Ensure that promotions within the judiciary are based on objective factors, particularly competency, integrity and experience, taking into account the need for gender balance and representation from minority communities;
- Commit resources to improving legal education and court facilities to tackle structural problems; and
- Provide reasonable conditions of service, adequate remuneration and, where applicable, tenure, pension and age of retirement in order to curb corruption.

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<sup>14</sup> Office of the Supreme Court of the Union, Advancing Justice Together: Judiciary Strategic Plan (2015-17), available here:

[http://www.unionsupremecourt.gov.mm/sites/default/files/supreme/strategic\\_plane.pdf](http://www.unionsupremecourt.gov.mm/sites/default/files/supreme/strategic_plane.pdf).

<sup>15</sup> Refer to Bangalore Principles of Judicial Conduct:

[http://www.unodc.org/pdf/crime/corruption/judicial\\_group/Bangalore\\_principles.pdf](http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf)

## **2. Independence of Lawyers**

A robust and independent bar is indispensable to the rule of law, fair administration of justice, and protection of human rights. International standards governing the role of lawyers are set out in the UN Basic Principles, among other instruments.

Despite a notable decrease since 2011 in government interference with the independence of the legal profession and lawyers in Myanmar, major challenges remain.<sup>16</sup> Authorities continue to take action against lawyers, and particularly against those involved in cases that are considered to be politically sensitive and in cases in which lawyers are representing individuals charged with criminal offences. Additionally, systemic barriers to independence of the legal profession, long veiled by previous military governments' persecution of lawyers, are now apparent and need to be meaningfully addressed. Freedom of association (and expression among lawyers) is not always respected. Lawyers are prevented from effectively carrying out their professional functions due to structural and legal impediments, which prevent individuals from accessing justice.

The following recommendations aim to enhance the ability of lawyers to perform their professional duties independently and without interference.<sup>17</sup> These recommendations are particularly relevant in the context of reprisals and sanctions against lawyers who represent individuals in cases that are considered to be politically sensitive, or in criminal cases.

### **Recommendations:**

- Corruption: Create a specialized, independent mechanism mandated with the prompt and effective criminal investigation of allegations of corruption of lawyers, with safeguards to ensure that it is not used as an instrument of persecution against lawyers who act independently in carrying out their professional functions; and
- Reform the Bar Council Act (amended 1989), Legal Practitioners Act 1999 and regulations applicable to disciplinary proceedings so that

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<sup>16</sup> For further guidance on the independence of lawyers see: ICJ Practitioners Guide No. 1: The Independence of Judges, Lawyers and Prosecutors. Available at: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/06/Principles-independence-lawyers-publication-2007.pdf>; Burmese Language: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2015/02/International-Principles-on-the-Independence-and-Accountability-of-Judges-Lawyers-and-Prosecutors-No.1-Practitioners----Guide-series-2015-Bur.pdf>.

<sup>17</sup> For further analysis see: ICJ Right to Counsel: The Independence of Lawyers in Myanmar: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/12/MYANMAR-Right-to-Counsel-electronic.pdf>; Burmese Language: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2015/07/MYANMAR-Right-to-Counsel-Publications-Thematic-Report-2015-BUR.pdf>.

allegations of professional misconduct by lawyers are determined in accordance with a code of professional conduct.<sup>18</sup>

- Bar Council and associations of lawyers:
  - Enact the necessary law to establish an independent, self-elected and self-regulated professional association;
  - The executive body *must not* include representatives of the executive, legislature or judiciary; and
  - Ensure that lawyers are able to form local, national or international organizations and recognize these as stakeholders in the administration of justice.
- Subsequent to its reform, allow the Bar Council to:
  - Reform the code of professional conduct, ensuring that it is in line with international standards and enforce its provisions through a fair disciplinary mechanism.
- Harassment and discipline:
  - Ensure that proper legal protections extend to lawyers to protect them against reprisals or sanctions (e.g. intimidation, hindrance, harassment or improper interference) as a consequence of their professional functions or legitimate exercise of human rights, including as a consequence of their association with unpopular causes or clients; and
  - Reform the contempt of court laws to ensure respect for the right to freedom of expression.
- Access to clients and information:
  - Ensure that lawyers have access without delay to their clients who are deprived of their liberty, including in particular those in police custody or in prison;
  - Ensure lawyers have access to all relevant information, files and documents at the earliest appropriate time and at all stages of proceedings, so as to enable lawyers to provide effective representation to their clients;
  - Legal education: Allocate more resources to legal education to improve the legal education essential to the further development of the rule of law; and
  - Allocate a legal aid budget: To ensure legal aid to those who cannot afford legal representation, the legal aid budget must ensure the proper assignment of legal aid lawyers and their adequate remuneration.

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<sup>18</sup> Basic Principles on the Role of Lawyers Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx>.

### **3. Reform of the Union Attorney General's Office ("UAGO")**

The UAGO is the supervisory authority of the country's prosecutors. The UAGO as currently constituted has largely promoted the interests of the military, defended vested interests and impeded an independent judiciary. The UAGO has been ineffective in tackling major problems like corruption and human rights violations while continuing to prosecute human rights defenders and political opponents.<sup>19</sup> The UAGO's performance could be improved by establishing reasonable conditions of service, adequate remuneration and, where applicable, providing for tenure, pension and an age of retirement.

The Attorney General is Myanmar's most powerful legal officer: as a member of the Executive, the Attorney General provides legal advice to the President and Hluttaw, analyzes international treaties, drafts and amends laws and represents the government in judicial proceedings. The Attorney General also directs the Union Attorney General's Office and ensures that cabinet actions are legally valid, in line with the Constitution and international human rights law.

Respect for human rights and the rule of law requires the UAGO to investigate and prosecute criminal offences with impartiality and functional independence from all branches of government. Within the UAGO, prosecutors must act with integrity in an independent, impartial and objective manner and in the protection of the public interest. Prosecutors must exercise sound discretion in the performance of their functions and seek justice, not merely to convict. Under international standards, prosecutors are required to "respect and protect human dignity and uphold human rights" and "give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law." These principles are set out in the United Nations Guidelines on the Role of Prosecutors.<sup>20</sup>

#### **Recommendations:**

- Appoint an Attorney General committed to reform, the rule of law and human rights. The new Attorney General must show leadership and commitment to functional independence, impartiality and accountability, and ensure that the UAGO is appropriately staffed with

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<sup>19</sup> ICJ, Right to Counsel: The Independence of Lawyers in Myanmar. Available at: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/12/MYANMAR-Right-to-Counsel-electronic.pdf>; Burmese Language: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2015/07/MYANMAR-Right-to-Counsel-Publications-Thematic-Report-2015-BUR.pdf>.

<sup>20</sup> United Nations Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. Available at: <http://www.ohchr.org/Documents/ProfessionalInterest/prosecutors.pdf>.

competent, impartial jurists committed to the rule of law and human rights;<sup>21</sup>

- Support financially and administratively the UAGO's Strategic Plan for 2015-2019, which establishes important benchmarks for measuring the institution's development.<sup>22</sup> The Strategic Plan acknowledges the public's low confidence in the office and commits the UAGO to the rule of law, human rights, fair trials, prosecutorial ethics and accountability in accordance with international standards;
  - Support an independent UAGO. The UAGO must be free from unwarranted interference from the legislative and the executive branches of government. Likewise, it must not interfere with judges or lawyers in an independent judiciary;
  - Provide effective safeguards so that prosecutors can conduct investigations impartially, according to the law and in a functionally independent manner;<sup>23</sup>
  - Reform the Bar Council: The Bar Council must be wholly independent. The UAGO should allow independent lawyers associations, such as the newly formed Independent Lawyers Association of Myanmar, to have legal powers and administer the affairs of its members; and
- Establish a Code of Prosecutorial Ethics and Accountability for prosecutors. An enforceable code of ethics and accountability based on international standards is the hallmark of an independent prosecutors office.

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<sup>21</sup> Rule of Law Depends on Reform of the Union Attorney General's Office, available at: <http://www.mmtimes.com/index.php/opinion/18676-rule-of-law-depends-on-reform-of-union-attorney-general-s-office.html>.

<sup>22</sup> Union Attorney General's Office, Strategic Plan 2015-2019: Moving Forward to the Rule of Law. Available at: [http://www.mm.undp.org/content/dam/myanmar/docs/Documents/2016/UNDP\\_MM\\_UAGO\\_Strategic\\_plan1.pdf](http://www.mm.undp.org/content/dam/myanmar/docs/Documents/2016/UNDP_MM_UAGO_Strategic_plan1.pdf).

<sup>23</sup> ICJ Practitioners Guide No. 1: The Independence of Judges, Lawyers and Prosecutors. Available at: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/06/Principles-independence-lawyers-publication-2007.pdf>; Burmese Language: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2015/02/International-Principles-on-the-Independence-and-Accountability-of-Judges-Lawyers-and-Prosecutors-No.1-Practitioners----Guide-series-2015-Bur.pdf>.

#### **4. Land Laws**

Disputes over land ownership and use are a major source of social and economic tension in Myanmar as the country grapples with political transition and economic development. Land is essential for the realization of a range of internationally recognized human rights, including the right to an adequate standard of living, food, adequate housing and water, the right to enjoy one's own culture, the right to freely pursue economic, social and cultural development, equal treatment and the right to privacy and family life.<sup>24</sup> Myanmar has signed the International Covenant on Economic, Social and Cultural Rights<sup>25</sup> in 2015, signaling its intention to fulfill these rights.

The current land law does not protect human rights. New laws enacted in 2012 such as the Foreign Investment Law, the Vacant, Fallow and Virgin Land Law and the Farmland Law were designed to increase investment, encourage large-scale land use and promote agricultural income. Under this system fewer than half of Myanmar's people have land title. The protection of human rights in national law through national courts will improve the rule of law and thereby foster sustainable, rights-based development.

The new National Land Use Policy (NLUP), by contrast, recognizes a much wider variety of land rights, including customary land rights. It refers to participatory, transparent and accountable processes. The policy calls for Environmental and Social Impact Assessments (ESIAs) before land zoning, acquisition and resettlement.<sup>26</sup> The NLUP's references to responsible investment, human rights and the protection of the environment must now become the basis for land law reform. It does not, however, create dispute resolution mechanisms or provide for legal accountability. That is why a robust land law is required.

#### **Recommendations:**

- Ratify the International Covenant on Economic, Social and Cultural Rights;
- Endorse the NLUP as a foundational instrument that can be built upon and improved over time, as opposed to starting the consultation process again;<sup>27</sup>

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<sup>24</sup> ICJ, Practitioners Guide No. 8: Adjudicating Economic Social and Cultural Rights at the National Level. Available at: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2015/07/Universal-ESCR-PG-no-8-Publications-Practitioners-guide-2014-eng.pdf>.

<sup>25</sup> International Covenant on Economic, Social and Cultural Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with Article 27.

<sup>26</sup> See National Land Use Policy, January 2016, especially 29(b) and Part IV.

<sup>27</sup> Ibid.

- Draft new Law governing tenure and land use:
  - The law must be based on principles of public participation and international human rights standards, including the Convention of Economic, Social and Cultural Rights and the United Nations Guiding Principles on Forced Evictions, and the Voluntary Guidelines on the Responsible Governance of Tenure<sup>28</sup>; and
  - The law must create a process for justified, public purpose land acquisition based on the UN Guidelines on Evictions and Displacement that ensures transparency and accountability.
  
- Draft new law in consultation with civil society modelled on international best practice:
  - Seek the support of those who could be affected, prior to the drafting, and respond to their contributions;
  - Take into consideration existing power imbalances and ensure active, free, meaningful and informed participation of individuals and groups.

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<sup>28</sup> Basic Principles and Guidelines on Development – Based Evictions and Displacement, Annex 1 of the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, A/HRC/4/18. Available at: [http://www.ohchr.org/Documents/Issues/Housing/Guidelines\\_en.pdf](http://www.ohchr.org/Documents/Issues/Housing/Guidelines_en.pdf).

## **5. Investment Law**

A human rights-compliant legal framework for investment (from inside and outside the country) is key to Myanmar's efforts to ensure responsible investment and sustainable development. Under international human rights law, including the UN Guiding Principles on Business and Human Rights, "States must protect against human rights abuse within their territory and/or jurisdiction by... business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication."

In order to ensure that economic investment contributes to the rule of law and human rights, Myanmar must align public policies with the implementation of development based on human rights and public participation.

Critically, a new investment law must not provide investors with standing to challenge government policy that is designed to protect and fulfill human rights before international Investor-State Dispute Mechanisms ("ISDM"). It must include provisions allowing the government to discharge its responsibility to protect human rights and the environment. These features must be strengthened and retained. A new investment law must refer to the various legal regimes, such as international human rights law, environmental conservation and national laws (such as the NLUP) with which it will interact.

A new investment law must not prevent the Government of Myanmar from adopting legitimate regulatory measures and public interest policies that affect investors, so long as such measures are adopted in good faith and applied in a non-discriminatory manner.

### **Recommendations:**

- Public Participation:
  - Ensure that any revision of the 2015 Draft Investment Law is done through a consultation process with an informed civil society.
- The Right to Regulate and Public Policy:
  - Include provisions protecting the right to regulate in line with human rights law in sections on expropriation, performance standards and general exceptions.
  - Ensure that there is no recourse to ISDM enshrined in national law. No country should provide advance consent to foreign investors to international arbitration in its national law.
  - Ensure that the Myanmar Investment Commission (MIC) and the Directorate of Investment and Companies Administration (DICA) retain a regulatory role sufficient to review and reject investment not deemed responsible, with potential to result in human rights abuses;

- Ensure that the Ministry of Resources and Environmental Conservation (MOREC, formerly MOECA) and new regulatory bodies have the legal mandate and capacity to oversee environmental and social protections. These duties include:
  - Prescribing environmental quality standards on emissions, effluents, solid waste, production procedures, processes and products;
  - Facilitating the settlement of environmental disputes;
  - Specifying categories and classes of hazardous wastes generated from the production and use of chemicals or other hazardous substances used in industry, agriculture, mineral production, sanitation and other activities;
  - Prescribing categories of hazardous substances that may significantly affect the environment;
  - Prescribing the terms and conditions for effluent treatment in industrial estates, buildings, and other sites and emissions of machines, vehicles and mechanisms;
  - Developing and implementing a system of environmental impact assessment (EIA) and social impact assessment (SIA);
  - Enforcing compensation by polluters for environmental impacts, collecting funds from organizations which benefit from natural ecosystems, and revenues from businesses which explore, trade and use natural resources, in order to support environmental conservation works;
  - To stipulate categories of business, work-sites, factories, or workshops, which cause environmental impacts to require "prior permission" and to enforce the Environmental Conservation rules on prior permission.
  
- Ensure that the investment law recognizes the intention to continually adopt new environmental and social regulation such as the 2016 Environmental Quality Standards (EQS), NLUP, Environmental Impact Assessment (EIA) and Social Impact Assessment (SIA) procedures. Investment law must inform investors to expect new conditions to be attached to existing investments, in order for them to comply with Myanmar's evolving environmental and social regulations.
  
- Land Rights:
  - Retain or improve upon protections in the current 2012 Investment Law (not included in 2015 Draft) that oblige investors to submit to the MIC a statement of agreement and satisfaction on their transfer and resettlement, including payment of the current price plus and damages;
  - Ensure that a new investment law conforms to the NLUP to ensure that investment does not result in forced evictions and

- the abuse of land-related human rights; and
- Ensure that a new investment law conforms to the new land law that protects all forms of land tenure and provides access to justice when human rights abuses occur.

## **6. Bilateral Investment Treaties**

Bilateral Investment Treaties (BITs) are designed to protect the interests of investors from arbitrary or discriminatory expropriation, thereby encouraging investment. But they often have the effect of sacrificing the protection of human rights for narrow interests of profit.<sup>29</sup> The access provided by BITs to Investor-State Dispute Mechanisms may be characterized as, and is certainly perceived as, conferring preferential treatment for foreign investors.

Myanmar's investment regulatory system is poorly developed and key elements are absent, remain in draft form or lack implementing rules and procedures. Myanmar's existing BITs fail to take into account the inadequacy of Myanmar's legal framework and practice at the national level to protect human rights and the environment. BITs, seeking to give legal certainty to investors through clauses on fair and equitable treatment, performance standards and expropriation, will lock in this regulatory regime. They allow investors to challenge public interest legislation.

ISDMs grant foreign investors standing to sue states before arbitral Judges in an international forum while people's rights are not yet enforced in Myanmar. Experience from other countries undergoing economic development demonstrates the potential problem of foreign investors misusing ISDM tribunals to hinder legitimate policies aimed at public benefit by claiming compensation for discriminatory expropriation or unfair and inequitable treatment. These lawsuits cause a regulatory chill where governments are reluctant to pass regulation in line with their human rights commitments.

Moving investment disputes to international forums will also stunt the development of Myanmar's judiciary, as it will remove from their jurisdiction a key protective function in respect of rights and the rule of law.

The flow of investment into this legal void, protected by the provisions contained in the BIT, will afford investors an inordinate influence over the nascent transitional policy making process in Myanmar. The new government must assure that BITs protect the right to regulate in favour of public policy to promote human rights.<sup>30</sup>

### **Recommendations:**

- Public Consultation:
  - Ensure that the Government of Myanmar undertakes genuine consultation with all concerned stakeholders and capacity

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<sup>29</sup> ICJ workshop to raise awareness about human rights obligations in relation to investment. (Nay Pyi Taw, 8/7/15) <http://www.icj.org/myanmar-icj-workshop-to-raise-awareness-about-human-rights-obligations-in-relation-to-investment/>.

<sup>30</sup> Ibid.

- building with civil society and media in line with international human rights standards before the negotiation of BITs<sup>31</sup>; and
  - Adopt a moratorium on all ongoing negotiations until all parties have been consulted, including labour unions, consumer unions, health professionals, environmental experts, human rights and civil society organizations.<sup>32</sup>
- Regulatory Chill and the Right to Regulate:
  - Undertake a cross-government assessment of the risk of litigation and regulatory chill posed by BITs;
  - Include provisions on the “right” and duty to regulate which take into account the Myanmar context and human rights obligations. These provisions must ensure that the right to regulate for public policies is fully preserved. It must ensure investment protection provisions shall not be interpreted as a commitment from governments that legal frameworks will remain unchanged. This clarifies that a measure that may negatively affect an investment or affect an investor’s expectations of profits is not inconsistent with the agreement; and
  - Ensure that articles on national treatment, fair and equitable treatment, expropriation and umbrella clauses are defined narrowly to avoid risk of litigation.
- International Arbitration
  - Raise human rights law arguments, thus obliging arbitrators to consider their application and take them into account, including when the human rights of non-parties to the arbitration may be relevant to the resolution of such disputes;
  - The Government of Myanmar should negotiate BITs that ensure the following:
    - That the filing of investment claims be made public;
    - Ensure that pleadings and other relevant documents be published in a timely manner, subject to redaction of confidential business information or other privileged information;
    - Hearings be open to the public;

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<sup>31</sup> ICJ: Myanmar Investment Commission and civil society discuss bilateral investment treaties and sustainable development with international experts [http://www.icj.org/myanmar-investment-commission-and-civil-society-discuss-bilateral-investment-treaties-and-sustainable-development-with-international-experts/?utm\\_source=rss&utm\\_medium=rss&utm\\_campaign=myanmar-investment-commission-and-civil-society-discuss-bilateral-investment-treaties-and-sustainable-development-with-international-experts](http://www.icj.org/myanmar-investment-commission-and-civil-society-discuss-bilateral-investment-treaties-and-sustainable-development-with-international-experts/?utm_source=rss&utm_medium=rss&utm_campaign=myanmar-investment-commission-and-civil-society-discuss-bilateral-investment-treaties-and-sustainable-development-with-international-experts).

<sup>32</sup> See more at: <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16650&LangID=E#sthash.0S859YoO.dpuf>

- Amicus Curiae be expressly allowed to submit briefs and participate in oral arguments, where the amici have an interest in the arbitration and have the potential to bring a different perspective from the disputing parties, taking into account the costs of participation to the disputing parties; and
- All orders, decisions and awards issued by the Tribunal be made public in a timely fashion, subject to redaction of confidential business information or other privileged information.

## **7. Special Economic Zones**

Myanmar has been heavily promoting Special Economic Zones (SEZs) in Dawei, Thilawa and Kyauk Phyu.<sup>33</sup> The law establishing SEZs seeks to attract investors by providing them with certain incentives and policy tools that include tax holidays, lenient regulation, streamlined permitting, tax exemptions and long-term land leases. But in the context of Myanmar's inadequate environmental and land laws, as well as an ineffective judiciary to provide appropriate judicial remedies, these massive development projects risk being counterproductive for sustainable development and the protection of human rights in Myanmar. The ICJ has written to investors, developers and SEZ Management Committees for public disclosure of key information relating to their activities in Myanmar's SEZs but has largely received no substantive responses.

The ICJ's work in Myanmar's SEZs has alerted us to serious concerns from local communities and civil society groups<sup>34</sup> about improper and inadequate compensation, lack of accountability for loss of land and livelihoods, inadequate consultation and forced evictions. To be consistent with international human rights law, any development project should be planned, designed and undertaken in respect to the fundamental principles of participation, transparency and accountability.<sup>35</sup> For Myanmar to embark on a path of sustainable development that advances, rather than undermines, the rights of its people, it must create a legal framework consisting of primary laws and secondary regulations.

### **Recommendations:<sup>36</sup>**

- Amend the SEZ law to include provisions to ensure transparency, consultation and participation in the decision-making process, including monitoring and reporting requirements, either in the law or in the rules and regulations;
- Clarify the duties of investors and developers and their compliance with domestic and international law on the protection of human rights and the environment, requiring comprehensive impact assessments in

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<sup>33</sup> Rights-compliant investment needed to keep SEZs fair for all, The Myanmar Times, 6 October 2014:

<http://www.mmmtimes.com/index.php/national-news/11845-rights-compliant-investment-needed-to-keep-sezs-fair-for-all.html>.

<sup>34</sup> Ibid.

<sup>35</sup> Silence on investment projects is not the answer, The Bangkok Post, 16 July 2015: <http://www.bangkokpost.com/opinion/opinion/624628/silence-on-investment-projects-is-not-the-answer>.

<sup>36</sup> The ICJ has a forthcoming report on SEZs in Myanmar based on its extensive research in Dawei, Thilawa and Kyauk Phyu. This report will have detailed analysis of the SEZ laws and provide comprehensive recommendations to tackle the human rights violations and environmental damage associated with SEZ investment projects.

advance of development and construction and ensuring affected persons' participation in decision-making;

- Establish mechanisms for consultation processes that provide opportunities for the meaningful participation of the affected people, to ensure that relevant information is regularly provided in forms understandable to the affected communities and that input is transparently and genuinely considered in the course of the decision making process;
- Ensure MOREC, DICA and MIC seek Free and Prior Informed Consent, where relevant to indigenous peoples, before transferring land for SEZ purposes;
- Adopt policy allowing MOREC, DICA, and the MIC to require ESIA's for all future SEZ development and reassess and modify any existing EIA in conformance with international law and standards;
- The MIC should require all companies in receipt of investment permits to establish Operational Grievance Mechanisms within six months in consultation with affected communities;
- Work collaboratively with community, civil society, and project proponents to ensure the creation of operational and effective grievance mechanisms that are community-driven and responsive to current and future grievances at SEZ sites; and
- Undertake meaningful steps to mitigate risks relating to corruption and unjust land acquisitions to protect Myanmar's vulnerable communities and ensure environmentally benign outcomes from investment deals.

## **8. Offenses Against Religion: Use of Blasphemy Laws**

Section 295(a) of Myanmar's Penal Code (the "blasphemy law") is an outdated colonial legacy, and is inconsistent with human rights, including: freedom of opinion and expression; freedom of thought, conscience and religion; the right to liberty; and the right to equality before the law without discrimination.<sup>37</sup> It is also applied arbitrarily, and accused people are often punished after unfair trials.<sup>38</sup> Section 295(a), enacted by British colonial authorities in 1927 to curb communal tension in India, states that "deliberate and malicious intention of outraging the religious feelings of any class by insulting its religion or religious beliefs" shall be punished with imprisonment, a fine or both.

Since the relative opening up of print and electronic media in Myanmar, courts have convicted individuals in the absence of evidence of any deliberate and malicious intent to insult a religion. People have been held criminally responsible simply because their acts of expression were perceived to be at odds with interpretations of a religion approved by politically influential clerical authorities.<sup>39</sup> Meanwhile, statements advocating violence and discrimination against members of minority religions go unchecked. These convictions violate international law, including a range of human rights recognized by the Universal Declaration of Human Rights and by international treaties, and are a worrying indicator of growing religious intolerance in the country.<sup>40</sup> Myanmar's Constitution guarantees the right to freedom of expression and conscience, and to freely profess and practice religion. This, together with the absence of proof of intent, makes the convictions difficult to reconcile with Myanmar's own laws.

### **Recommendations:**

- Repeal or fundamentally change blasphemy laws to ensure that criminal offences are prescribed by law and must conform to the principle of legality (i.e. must be formulated clearly and precisely to ensure individuals can regulate their conduct accordingly) and are consistent with freedoms of thought, conscience, belief, religion, expression and association;

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<sup>37</sup> ICJ, Blasphemy Statutes Deny Human Rights, 21 July 2015: <http://www.icj.org/blasphemy-prosecutions-invoke-dignity-of-religion-to-deny-human-rights-and-undermine-the-rule-of-law/>

<sup>38</sup> Sathisan, The Irrawaddy, Time for a Genuine Commitment to Rule of Law, 11 December 2015: <http://www.irrawaddy.com/contributor/102640.html>

<sup>39</sup> Ibid.

<sup>40</sup> ICJ, Faith-based and other groups commit to strengthen freedom of religion or belief in Southeast Asia. The ICJ convened a two-day conference held in Bangkok, and first of its kind, committed to working to enhance the right to Freedom of Religion or Belief in Southeast Asia. <http://www.icj.org/faith-based-and-other-groups-commit-to-strengthen-freedom-of-religion-or-belief-in-southeast-asia/>; Conference Declaration on Freedom of Religion or Belief in Southeast Asia 1 October 2015, Bangkok, Thailand <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2016/01/South-East-Asia-Declaration-Freedom-of-religion-Advocacy-2016-ENG.pdf>.

- Ensure the protection of Constitutional and internationally recognized rights such as freedom of expression, freedom of religion, equal protection of the law, and the right to a fair trial;
- Ensure proper exercise of prosecutorial discretion in charging and prosecuting those alleged to have violated Section 295(a) of the Penal Code to avoid selective prosecution and interpretation; and
- Immediately and unconditionally release those imprisoned under Section 295(a) or other laws for exercising their legitimate right to religion or belief.

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

A package of four bills described as aimed to “protect race and religion” – the Religious Conversion Bill, Buddhist Women’s Special Marriage Bill, Religious Conversion Bill and the Buddhist Women’s Special Marriage Bill – were signed into law last year.<sup>41</sup> They include provisions that are discriminatory on religious and gender grounds. These laws do not accord with international human rights law and standards, including Myanmar’s legal obligations as a state party to the Convention on the Elimination of Discrimination Against Women (“CEDAW”) and the Convention on the Rights of the Child (“CRC”).<sup>42</sup>

The Religious Conversion Law 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.<sup>43</sup> The bill only guarantees the right to freedom of religious belief and worship to “citizens” – in effect excluding the Muslim Rohingya minority, who are denied citizenship in Myanmar. Under international law, freedom of religion cannot be contingent on nationality status. This law may well be abused to exacerbate the discrimination against the Rohingya and religious tensions in Myanmar, and so give rise to further harassment of religious minorities.

The Buddhist Women’s Special Marriage Law explicitly and exclusively targets and regulates the marriage of Buddhist women with men from another religion. It blatantly discriminates on both religious and gender grounds.<sup>44</sup> The Population Control Healthcare Law – ostensibly aimed at improving living standards among poor communities – lacks human rights safeguards. 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 prosecuted. The Monogamy Law 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.

### **Recommendations:**

- Thoroughly review all family, property and matrimonial laws, such as the Buddhist Women’s Special Marriage Law, Christian Marriage Act, Married Women’s Property Act, Hindu law of Inheritance Amendment Act, to ensure compliance with international human rights law and standards;

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<sup>41</sup> ICJ, Myanmar: Parliament must reject discriminatory ‘race and religion’ laws: Joint statement by Amnesty International and the International Commission of Jurists. Available at: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2015/03/Myanmar-Reject-discriminatory-race-and-religion-draft-laws-Advocacy-2015-ENG.pdf>.

<sup>42</sup> Ibid.

<sup>43</sup> It would establish local “Registration Boards”, made up of government officials and community members who would “approve” applications for conversion.

<sup>44</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.

- Ensure that all laws relating to custody of children put the interest of the child as the primary consideration, as required by the CRC;
- Repeal or significantly amend the quartet of “race and religion” laws because of their religious and gender discriminatory nature and other human rights violations they will likely bring about; and
- Repeal or significantly amend the Population Control and Healthcare Law, and closely scrutinize the law and the possibilities for abusive or discriminatory implementation of the law, in consultation with health and sexual reproductive rights experts, women’s rights organizations and representatives of potentially affected communities and individuals.

## **10. Ending human rights violations against the Rohingya**

Since the eruption of violence in Rakhine state in 2012, an estimated 140,000 people, mostly Rohingya, have been displaced from their homes and taken shelter in camps around Rakhine State. Some of this group are Rakhine Buddhists, while the majority are Muslim Rohingya, who live in deplorable conditions in camps around Rakhine State. Another 40,000 Rohingya live in isolated non-camp communities. The government has failed to arrest or prosecute those responsible for the violence against the Rohingya, or for the systemic and wide-ranging discriminatory violence that could amount to crimes against humanity.<sup>45</sup>

The systematic persecution of Rohingya includes denial of citizenship under Myanmar's 1982 Citizenship Act. The law distinguishes between three categories: citizenship, associate citizenship and naturalized citizenship. The stipulations of the law effectively deny the Rohingya the possibility of acquiring citizenship, and the accompanying rights, and do not recognize the ethnic minority as one of the national races. In addition to public vilification by the state media and state officials, the Rohingya have been subjected to restrictions on marriage, domestic travel and observation of religious ceremonies. The Rohingya are particularly vulnerable to other serious human rights violations faced by the general population in Myanmar. The people of Rakhine State, including the Rohingya, have also been systematically denied economic, social and cultural rights and the authorities have lacked the political will to address the situation and should allocate resources for the enjoyment of minimal essential levels of food, water, housing, health and education.

The government's Rakhine State Action Plan requires Rohingya to meet stringent verification requirements for citizenship. Under the policy, Rohingya must supply proof of a six-decade residency to qualify for naturalized citizenship—a second-class citizenship that would classify them as "Bengali" rather than Rohingya, indicating they have illegally emigrated from neighbouring Bangladesh. Those who fail to meet the requirement or refuse the Bengali classification would be housed in camps, and then deported. The Rakhine State Action Plan does not recognize the term Rohingya, referring throughout to "Bengalis," an inaccurate and derogatory term commonly used by Government officials and nationalist Buddhists.

One of the bedrock principles of international human rights is that governments cannot engage in discrimination, including on the basis of religion or national origin. This is one of the pillars of international law, including the UN Charter and the Universal Declaration of Human Rights.

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<sup>45</sup> Human Rights Watch, "All You Can Do is Pray," Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma's Arakan State. Available at: <https://www.hrw.org/report/2013/04/22/all-you-can-do-pray/crimes-against-humanity-and-ethnic-cleansing-rohingya-muslims>.

Notwithstanding the legal status of the Rohingya, or any other ethnic and religious groups, they are protected by international law, and the government of Myanmar is obliged to protect their rights.<sup>46</sup>

**Recommendations:**

- Repeal the 1982 Citizenship Law or amend it in accordance with the recommendations of the U.N. Special Rapporteur on the situation of human rights in Myanmar to grant Rohingya full citizenship and accompanying rights;<sup>47</sup>
- Develop a citizenship plan based on the principle of non-discrimination;
- Reject the Rakhine State Action Plan in its current form;
  - Find durable solutions to displacement, including voluntary returns to places of origin, in line with international standards;
  - Ensure that returns and resettlement are not linked to citizenship verification;
  - Permanent segregation of communities must be avoided.
- Scrap laws, such as the Buddhist Women's Special Marriage Bill, that discriminate against minorities and to actively prosecute acts of violence fuelled by discrimination as well as crimes of hate speech;
- Improve basic living conditions for the Rohingya and Arakanese population in Rakhine State by enhancing respect for and protection of their economic, social, and cultural rights.<sup>48</sup>

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<sup>46</sup> ICJ, How Rohingyas are viewed by human rights activists in Burma: <http://www.icj.org/how-rohingyas-are-viewed-by-human-rights-activists-in-burma/>.

<sup>47</sup> Yozo Yokota, "Situation of Human Rights in Myanmar" E/CN.4/1993/3, 17 February 1993; Yanghee Lee, "Situation of Human Rights in Myanmar" A/70/412, 6 October 2015. Para 41.

<sup>48</sup> Andaman Sea humanitarian crisis demands regional response centered on human rights <http://www.icj.org/andaman-sea-humanitarian-crisis-demands-regional-response-centered-on-human-rights/>.

## **11. Discrimination on the basis of Sexual Orientation and Gender Identity**

Myanmar retains a colonial-era law that criminalizes consensual homosexual activity among adults. Section 377 of Myanmar's Penal Code states: "Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine". Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) communities in Myanmar have documented how Section 377 has been a tool for discrimination, blackmail, extortion, and violence by state and non-state actors on the basis of sexual orientation and gender identity.<sup>49</sup> It has adversely affected HIV/AIDS prevention efforts, and has also reinforced harmful social stereotypes and taboos against sexual minorities.

The ICJ has spoken with various LGBTI groups in Myanmar to understand their concerns and advocacy efforts.<sup>50</sup>

By criminalizing consensual same-sex adult sexual conduct, Section 377 is inconsistent with Myanmar's obligations under international human rights law, including in respect of the rights to sexual autonomy, equality, non-discrimination, privacy, dignity, free expression, and life. Many of these rights are guaranteed in Myanmar's Constitution. The Yogyakarta Principles – which apply international human rights law to issues of sexual orientation and gender identity – clarify that the rights to equality, non-discrimination and privacy require states to "repeal all laws that criminalize consensual sexual activity among persons of the same sex who are over the age of consent."

Laws criminalizing consensual sexual activities – whatever sex, gender identity and sexual proclivities of those involved, and whatever the actual sexual conduct (among consenting adults) – conflict with international human rights law and, among other things, undermine enjoyment of the rights to freedom from discrimination, equality before the law and equal protection of the law, privacy, and personal integrity.<sup>51</sup>

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<sup>49</sup> Myanmar's transgender people not just chasing rainbows in fight for equality, in The Guardian, 2 February 2016. Available at: <http://www.theguardian.com/global-development/2016/feb/02/myanmar-transgender-people-lgbt-colors-rainbow-equality>.

<sup>50</sup> Myanmar lawyers and activists discussed key SOGI issues with international experts in May 2016: <http://www.icj.org/myanmar-lawyers-and-activists-discuss-key-sexual-orientation-and-gender-identity-issues-with-experts/>

<sup>51</sup> See generally: Report of the UN Commissioner for Human Rights, Discrimination and violence against individuals based on their sexual orientation and gender identity, UN Doc. A/HRC/29/93 (2015); Office of the High Commissioner of Human Rights, Born Free and Equal: Sexual Orientation and Gender Identity in Human Rights Law (2012); Report of the UN Commissioner for Human Rights, Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, UN Doc. A/HRC/19/41 (2011).

**Recommendations:**

- Abolish Section 377 of the Penal Code and ensure no criminal prosecution or other sanction against persons on the basis of their sexual orientation, gender identity or sexual conduct among consenting adults;
- Direct other bodies to take positive actions to implement equal opportunities as part of legislation that Parliament enacts, for example through inclusive policies in local government, health, housing and education;
- Engage with and support local LGBTI organizations in the development and review of policies and assess the needs of LGBT people;
- Initiate gender-sensitivity programmes for government authorities so that they would refrain from inflammatory or denigrating statements against LGBTI persons.

## **12. Criminal Defamation and Freedom of Expression**

Criminal defamation laws in Myanmar, which impose harsh sanctions, such as imprisonment, are constituted and applied in a manner to violate the right to freedom of expression, in contravention of international standards.<sup>52</sup> The laws used to charge and detain the accused in Myanmar are usually the Electronic Transaction Law, specifically under provision 34(d), the Myanmar Telecommunications Law, specifically under provision 66(d), and Article 500 of the Penal Code.<sup>53</sup> The judiciary of Myanmar currently struggles to adjudicate such criminal defamation cases with impartiality and competence.<sup>54</sup>

The prospect of arrests, detentions, criminal trials and prison time results in the violation of a number of laws and chills the exercise of free expression and exchange of information.<sup>55</sup> Myanmar's 2008 Constitution provides for the protection of freedom of expression, but sets out broad and ambiguous restrictions that limit the enjoyment of these rights.<sup>56</sup>

### **Recommendations:<sup>57</sup>**

- Immediately and unconditionally release those imprisoned for criminal defamation under Article 500 of the Penal Code, 34(d) of the Electronic Transaction Law and 66(d) of the Myanmar Telecommunications Law for exercising their legitimate right to freedom of expression and

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<sup>52</sup> ICJ, Why Myanmar needs to stop prosecuting people over facebook posts, 23 October 2015: <http://yangon.coconuts.co/2015/10/23/why-myanmar-needs-stop-prosecuting-people-over-facebook-posts>.

<sup>53</sup> ICJ, Myanmar: Briefing paper on Criminal Defamation Laws. See summary at: <http://www.icj.org/myanmar-briefing-paper-on-criminal-defamation-laws/>. Full analysis in English available at: [Myanmar-Criminal Defamation Laws-Advocacy-Position paper-2015-ENG](#); In Burmese at: [Myanmar-Criminal Defamation Laws-Advocacy-Position paper-2015-BUR](#).

<sup>54</sup> ICJ, Right to Counsel: The Independence of Lawyers in Myanmar. Available at: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/12/MYANMAR-Right-to-Counsel-electronic.pdf>; Burmese Language: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2015/07/MYANMAR-Right-to-Counsel-Publications-Thematic-Report-2015-BUR.pdf>.

<sup>55</sup> Last year, three people faced criminal defamation charges and were detained pending trial for posting material on Facebook that allegedly defame either the Myanmar army or a political leader. Kachin activist Patrick Kum Jaa Lee was arrested in Yangon for allegedly posting a Facebook post showing someone stepping on a photo of an army Commander-in-Chief Senior General; Chaw Sandi Tun was arrested for a Facebook post pointing out that an army official was wearing clothes of a similar colour to those of then opposition leader Aung San Suu Kyi; and Maung Saungkha was arrested for allegedly posting a poem on Facebook he had written about having a tattoo of the President on his penis. Chaw Sandi Tun and Patrick Kum Jaa Lee have each been sentenced to six months in jail.

<sup>56</sup> Article 354, 2008 Constitution of Myanmar, limits the freedom of expression to the extent that it is "not contrary to the laws, enacted for the Union security, prevalence of law and order, community peace and tranquility or public order and morality": [http://www.burmalibrary.org/docs09/Myanmar\\_Constitution-2008\(en&bu\)-red.pdf](http://www.burmalibrary.org/docs09/Myanmar_Constitution-2008(en&bu)-red.pdf).

<sup>57</sup> ICJ, Myanmar: Briefing paper on Criminal Defamation Laws. See summary at: <http://www.icj.org/myanmar-briefing-paper-on-criminal-defamation-laws/>. Full analysis in English available at: [Myanmar-Criminal Defamation Laws-Advocacy-Position paper-2015-ENG](#); In Burmese at: [Myanmar-Criminal Defamation Laws-Advocacy-Position paper-2015-BUR](#).

opinion;

- Instruct prosecutors to exercise their discretion and drop charges of criminal defamation aimed at silencing freedom of expression; and
- Myanmar's Parliament must abolish or extensively amend its criminal defamation laws, such as the Penal Code, Electronic Transactions Law and Myanmar Telecommunications Law, to ensure the protection of the right to freedom of opinion and expression.

### **13. Peaceful Assembly Law**

Several human rights activists have been imprisoned with hard labour for exercising their legitimate freedom of expression and right to peaceful assembly. The ICJ has been monitoring the trial of U Nay Myo Zin, Daw Naw Ohn Hla, Daw Sein Htwe, Ko Tin Htut Paing, Daw San San Win and U Than Swe. They were convicted of violating Article 18 of the Peaceful Assembly and Peaceful Procession Law and sections 147, 505(b) and 353 of the Penal Code, specifically rioting, publishing or circulating information which may cause public fear or alarm and may incite persons to commit offences against the State or against the public tranquillity, and assaulting or preventing a public servant from the discharge of his duty.

#### **Recommendations:**

- Unconditionally release all those detained under Article 18 of the Peaceful Assembly and Peaceful Procession Law for participating in peaceful protests.
- Amend the Peaceful Assembly and Peaceful Procession Law and the Penal Code to:
  - Require only notification, not prior government approval, for holding peaceful protests;
  - Eliminate criminal sanctions for unauthorized peaceful protests; and
  - Significantly narrow the overly broad statutory restrictions on free expression, including by removing the ban on “incorrect” information and limits on political speech, and ending the requirement to identify chants in advance.

## **14. Ending impunity for gross violations of human rights**

Article 445 of the Myanmar Constitution prohibits the prosecution of officials and former military juntas belonging to the State Law and Order Restoration Council and its successor, the State Peace and Development Council (SPDC).<sup>58</sup> This constitutional provision has impeded access to justice and effective remedies and reparation for victims who had suffered serious human rights violations under decades of military rule. Senior General Than Shwe, the head of State of Myanmar from 1993 to 2011 as Chairman of the SPDC, continues to avoid justice and accountability for crimes under international law, including gross violations of human rights and serious violations of international humanitarian law committed under his regime. These include war crimes and crimes against humanity.<sup>59</sup>

Security forces in Myanmar, including the police and army, have consistently failed to protect the rights of the people of Myanmar, particularly members of the minority groups in the country. In many cases, they have used unnecessary and excessive force that has led to severe injuries and even deaths. Such use of lethal force constitutes extrajudicial execution and is a crime under international law. Rape has been used as a weapon by Burmese military and police in Kachin and Northern Shan States.<sup>60</sup> This sexual violence has been documented and reports cite that it has been used as a tool by the military against ethnic communities.

The recently propagated Presidential Security Act,<sup>61</sup> which provides former Presidents with legal immunity for crimes committed during their terms in office, must be amended to accord with international law and standards. Amnesties and immunities for persons accused of crimes under international law and gross human rights violations are forbidden under international law. A succession of military governments, ruled in a strict chain of command by the country's military head of State, have perpetrated gross violations of human rights and crimes under international law in Myanmar. Victims and survivors of these gross human rights violations in Myanmar, even violations constituting crimes under international law, have not received effective legal

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<sup>58</sup> Article 445, Myanmar Constitution: "All policy guidelines, laws, rules, regulations, notifications and declarations of the State Law and Order Restoration Council and the State Peace and Development Council or actions, rights and responsibilities of the State Law and Order Restoration Council and the State Peace and Development Council shall devolve on the Republic of the Union of Myanmar. No proceeding shall be instituted against the said Councils or any member thereof or any member of the Government, in respect of any act done in the execution of their respective duties."

<sup>59</sup> The Special Rapporteur of the Commission of Human Rights on the situation of human rights in Myanmar, *Report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in Myanmar*, para. 11, U.N.Doc.E/CN.4/1994/57 (Feb 16, 1994).

<sup>60</sup> TIME, Rape is a weapon in Burma's Kachin State, but the women of Kachin are fighting back, 11 February 2014: <http://time.com/6429/burma-rape-in-kachin/>.

<sup>61</sup> Presidential Security Act, Law No. 25/2016, passed on 29 January 2016: [http://www.pyithuhluttaw.gov.mm/sites/default/files/25.-28-1-16-president-dutuy\\_0.pdf](http://www.pyithuhluttaw.gov.mm/sites/default/files/25.-28-1-16-president-dutuy_0.pdf).

redress. In particular, those responsible for such violations have not been brought to justice.

Chapters 2 and 4 of the Presidential Security Act, which provide immunity from prosecution for former presidents, systematize and perpetuate the impunity that enables perpetrators to evade accountability for gross human rights violations and serious crimes.<sup>62</sup> Unless these provisions of the Presidential Security Act are amended to ensure that there is no immunity for gross human rights violations and crimes under international law, the Act will remove an important deterrent to future perpetrators and constitute a serious breach of Myanmar's national law and international human rights obligations.

### **Recommendations:**

- Amend the Presidential Security Act so as to remove the immunities for crimes under international law, including gross human rights violations and serious violations of international humanitarian law;
- Ensure that those guilty of committing gross international crimes are held accountable in a court of law;
- Remove legal barriers to accountability of security forces in Myanmar and end their impunity;
- Ensure security forces are adequately trained on human rights protection and human security, in line with international human rights law and standards;
- Pass the National Law on Protection and Prevention of Violence against Women to prevent sexual and gender-based violence;
- Ensure proper documentation and archival of evidence of sexual violence used as a tool by the military and police, provide sufficient witness protection and sensitive treatment of survivors of sexual and gender-based violence; and
- Strengthen efforts to re-establish a respect for human rights and the rule of law by not fostering a climate of impunity.

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<sup>62</sup> The International Commission of Jurists has referred to its own English translation of the Myanmar Presidential Security Act, originally in Burmese language and available here: [http://www.pyithuhluttaw.gov.mm/sites/default/files/25.-28-1-16-president-dutuy\\_0.pdf](http://www.pyithuhluttaw.gov.mm/sites/default/files/25.-28-1-16-president-dutuy_0.pdf).