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Myanmar at the HLP Crossroads:

*Proposals for Building an Improved Housing, Land and Property
Rights Framework that Protects the People and Supports
Sustainable Economic Development*

October 2012



Executive Summary

Few issues are as frequently discussed and politically charged in transitional Myanmar as the state of housing, land and property (HLP) rights. The effectiveness of the laws and policies that address the fundamental and universal human need for a place to live, to raise a family, and to earn a living, is one of the primary criterion by which most people determine the quality of their lives and judge the effectiveness and legitimacy of their Governments. Housing, land and property issues undergird economic relations, and have critical implications for the ability to vote and otherwise exercise political power, for food security and for the ability to access education and health care.

As the nation struggles to build greater democracy and seeks growing engagement with the outside world, Myanmar finds itself at an extraordinary juncture; in fact, it finds itself at the HLP Crossroads. The decisions the Government makes about HLP matters during the remainder of 2012 and beyond, in particular the highly controversial issue of potentially transforming State land into privately held assets, will set in place a policy direction that will have a marked impact on the future development of the country and the day-to-day circumstances in which people live. Getting it right will fundamentally and positively transform the nation from the bottom-up and help to create a nation that consciously protects the rights of all and shows the true potential of what was until very recently one of the world's most isolated nations. Getting it wrong, conversely, will delay progress, and more likely than not drag the nation's economy and levels of human rights protections downwards for decades to come.

Myanmar faces an unprecedented scale of structural landlessness in rural areas, increasing displacement threats to farmers as a result of growing investment interest by both national and international firms, expanding speculation in land and real estate, and grossly inadequate housing conditions facing significant sections of both the urban and rural population. Legal and other protections afforded by the current legal framework, the new *Farmland Law* and other newly enacted legislation are wholly inadequate. These conditions are further compounded by a range of additional HLP challenges linked both to the various peace negotiations and armed insurgencies in the east of the country, in particular Kachin State, and the unrest in Rakhine State in the western region. The Government and people of Myanmar are thus struggling with a series of HLP challenges that require immediate, high-level and creative attention in a rights-based and consistent manner.

As the country begins what will be a long and arduous journey toward democratization, the rule of law and stable new institutions, laws and procedures, the time is ripe for the Government to work together with all stakeholders active within the HLP sector to develop a unique Myanmar-centric approach to addressing HLP challenges that shows the country's true potential. And it is also time for the Government to begin to take comprehensive measures - some quick and short-term, others more gradual and long-term - to equitably and intelligently address the considerable HLP challenges the country faces, and grounding these firmly within the reform process.

“Rule of law is a must for our administrative mechanisms, businesses, social welfare, political processes, international relations and judicial system. If rule of law prevails in our society, human rights, liberty and democracy would flourish automatically. Consolidation of every step of national building endeavors depends on the rule of law. So, we all are to serve that duty in unison and in concert.”

-President Thein Sein, 1 March 2012

Having thoroughly examined the *de facto* and *de jure* HLP situation in the country based on numerous interviews, reports and visits, combined with an exhaustive review of the entire HLP legislative framework in place in the country, this report recommends that the following four general measures be commenced by the Government of Myanmar before the end of 2012 to improve the HLP prospects of Myanmar:

Recommendation 1: Convene, in the immediate term, a National HLP Summit to launch a public discussion and deepen understanding by Government and key stakeholders of the numerous and complex rural and urban housing, land and property challenges facing Myanmar today and how to best address them.

Recommendation 2: Initiate a transparent, and consultative public process leading to a comprehensive New National Housing, Land and Property Law, using this process as a model for an inclusive democratic approach to lawmaking.

Recommendation 3: Actively address land grabbing, speculation and displacement with a range of new policies and legislation, including a moratorium on arbitrary forced displacement, expanding capital investment opportunities, imposing a land value tax and encouraging positive actions by investors and businesses.

Recommendation 4: Facilitate capacity building for Parliamentarians, government agencies, political parties and civil society actors on protecting and implementing HLP rights, applying international best practices and ensuring compliance with recognized international HLP standards.

Detailed descriptions of the precise measures under each recommendation can be found below in section 5 of the report.

A concerted and ambitious joint effort by the Government and civil society to implement these recommendations will ultimately have a marked impact on the enjoyment of HLP rights by everyone throughout the country. This effort will create the foundations within society that will propel the country into a secure, stable, peaceful and prosperous future for all.

“Over the past year there have been signs that the endeavours of those who believe in democracy and human rights are beginning to bear fruit in Burma. There have been changes in a positive direction; steps towards democratization have been taken... The potential of our country is enormous. This should be nurtured and developed to create not just a more prosperous but also a more harmonious, democratic society where our people can live in peace, security and freedom.”

-Aung San Suu Kyi, Nobel Lecture, 16 June 2012





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1 Introduction

By virtually any measure, the political changes sweeping through Myanmar are nothing short of dramatic. Though the permanence and depth of these forward-looking reforms remains to be seen, as of late-2012 and as the above quotes make clear, it appears that the possibilities of structural political change and respect for human rights within the country are far greater now than they have been for decades. Housing, land and property (HLP) rights are among the most fundamental human rights concerns in any society, and the new Government's approach to these sectors will have a profound influence on the eventual success of the overall reform process (See Box 1).

To properly appreciate just how extensive the HLP challenges facing the Government are, the situation needs to be analysed within the historical context of a vast array of HLP shortcomings that emerged during previous regimes, both in terms of law and practice. Most of these remain in place today and are now the responsibility of the Government to address and resolve. Continuing HLP challenges include a vast array of shortcomings: widespread landlessness in rural areas; large-scale land grabbing and land concessions which often result in displacement without either due process or compensation; almost universal tenure insecurity in both rural and urban areas and concomitant inadequate housing and living conditions; the inability of much of the population to access clean drinking water, sanitation options and reliable sources of energy; a dysfunctional, often arbitrary and opaque system of land administration and registration; forced evictions due to infrastructure projects and urban gentrification and re-development processes; rising rents in urban areas resulting in economic displacement; top-down, non-participatory and non-transparent HLP decision making; and complete inaction on the special HLP needs of particularly vulnerable groups (elderly, disabled, children, etc). All of these challenges are exacerbated by a legacy of top-down, non-participatory and non-transparent HLP decision-making processes and the absence of adequate legal and judicial remedies for people seeking to enforce their HLP rights.

*Photo by
Andrew Scherer
/ Displacement
Solutions*



(1) This report was prepared by Scott Leckie (Director, Displacement Solutions, director@displacementsolutions.org) and Andrew Scherer (Planning Law Professor, Columbia University and Fmr Director, Legal Services NYC, ascherer@andrewascherer.com). Displacement Solutions is grateful for the support provided by the Federal Department of Foreign Affairs (FDFA) of the Government of Switzerland which provided financial backing for this project. The authors are also grateful to all of those who shared their time and ideas with us, as well as those who were kind enough to provide detailed comments on earlier drafts of the report.

BOX 1:

What Are HLP Rights?

There is a very considerable body of international human rights laws and standards that can and should be used by the Government of Myanmar to build the legal, policy and institutional frameworks required to provide conditions in society conducive to the full enjoyment of housing, land and property (HLP) rights by all within the shortest possible time-frame. Source documents for these rights include the Universal Declaration on Human Rights (1948), the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966), the Convention on the Elimination of Racial Discrimination (1965), the Convention on the Rights of the Child (1989) and a range of other treaties, together with an array of equally important instruments

and interpretive standards such as the UN Committee on Economic, Social and Cultural Rights General Comment No. 4 on the Right to Adequate Housing (1991), General Comment No. 7 on Forced Evictions (1997), the UN Guiding Principles on the Rights of Internally Displaced Persons (1998), the UN 'Pinheiro' Principles on Housing and Property Restitution for Refugees and Displaced Persons (2005) and many others.

Human rights law provides that everyone, everywhere possesses a body of distinct HLP rights and every Government in every State is obliged to ensure the protection and enforcement of these rights. When combining together all of the entitlements and obligations inherent within this bundle of HLP rights, people everywhere

are meant to be able to live safely and securely on a piece of land, to reside within an adequate and affordable home with access to all basic services and to feel safe in the knowledge that these attributes of a full life will be fully respected, protected and fulfilled. If it can be shown that lost access to, use of, or ownership over housing, land or property incurred by people constitutes either direct or indirect violation of their HLP rights, then appropriate forms of reparation and restitution must be accorded. As with all other nations, people in Myanmar, in particular those who are subject to forced displacement or who live without adequate tenure security, are entitled under international human rights law to enjoy a series of rights that together constitute housing, land and property rights.

In essence, HLP law constitutes a composite of the following existing rights found within international human rights law:

- The right to adequate housing and rights in housing
- The right to security of tenure
- The right not to be arbitrarily evicted
- The right to land and rights in land
- The right to property and the peaceful enjoyment of possessions
- The right to privacy and respect for the home
- The right to HLP restitution/compensation following forced displacement
- The right to freedom of movement and to choose one's residence
- The right to political participation
- The right to information
- The right to be free from discrimination
- The right to equality of treatment and access
- The right to water
- The right to energy

In their totality, these HLP rights should fully inform a wide cross section of legislative, policy and practical decisions made by Governments. The degree to which these rights and underlying human rights principles such as participation, accountability, non-discrimination and transparency are woven into the contours of domestic law and policy will greatly affect how these decisions will be supported by individual rights-holders and to what extent they will actually be able to meet the underlying needs of the people affected. Governments must, therefore, adopt the policies, laws

BOX 1:

What Are HLP Rights? (continued)

and programmes required - to the maximum of their available resources - to continually and progressively expand the enjoyment of these rights and simultaneously ensure in policy, legal or other terms, that no deliberately retrogressive measures are taken that lead to the decline in the enjoyment of these basic rights. Of all the HLP rights, the right to adequate housing has advanced the farthest. In 1991, the UN Committee on Economic, Social and Cultural Rights adopted 'General Comment No. 4 on the Right to Adequate Housing' which indicates that the following seven components form the core contents of the human right to adequate housing: (a) legal security of tenure; (b) availability of services, materials, facilities and infrastructure; (c) location; (d) habitability; (e) affordability; (f) accessibility; and (g) cultural adequacy. General Comment No. 4 also reiterates that the right to adequate housing should not be interpreted in a narrow or restrictive sense which equates it with the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity, but that housing rights should be seen as rights to live somewhere in security, peace and dignity. To achieve these rights, States need to respect these rights by ensuring that no measures are taken which intentionally erode their legal or practical status. Governments need to comprehensively review relevant legislation, refrain from actively violating these rights by strictly regulating forced evictions and ensure that the housing, land and property sectors are free from all forms of discrimination at any time. States must also assess national HLP conditions, and accurately calculate, using statistical and other data and indicators, the true scale of non-enjoyment of these



rights, and the precise measures required for their remedy. Governments need to protect the rights of people by effectively preventing the denial of their rights by third parties such as landlords, property developers, social service providers and others capable of restricting these rights. To promote HLP rights, Governments should adopt targeted measures such as national HLP strategies that explicitly define the objectives for the development of the HLP sector, identify the resources available to meet these goals, the most cost-effective way of using them and how the responsibilities and time-frame for their implementation will be applied. Such strategies should reflect extensive genuine consultation with, and participation by, all those affected, including groups traditionally

excluded from the enjoyment of HLP rights. Finally, the obligation to fulfil these rights involves issues of public expenditure, the regulation of national economies and land markets, housing subsidy programmes, monitoring rent levels and other housing costs, the construction, financing and maintenance of public housing, the provision of basic social services, taxation, redistributive economic measures and any other positive initiatives that are likely to result in the continually expanding enjoyment of HLP rights.

*Photo by Andrew Scherer /
Displacement Solutions*

Many within the country may believe that the new political openness, the Government's avowed aim of significantly boosting GDP growth, much anticipated foreign investment, promulgation of new pro-business land laws (as occurred in March 2012) and gradual privatisation in Myanmar will resolve the country's multifarious HLP challenges in a fair and equitable manner consistent with the rights of the people concerned. However, history in a range of other countries that have undergone major political reforms shows unequivocally that such assumptions are misguided. Indeed, rather than improve the HLP prospects of ordinary citizens, deep political reforms that are premised exclusively on market-generated, largely non-transparent decision-making processes on HLP questions, without public participation or consultation, tend to result in even greater land inequality, larger-scale land grabbing, more frequent and often violent forced evictions, increased housing poverty, worsening access to basic services linked to housing, reduced tenure security and a vast array of additional HLP concerns that undermine both the enjoyment of human rights as well as the broader economic prospects of the countries concerned.⁽²⁾

It is clear, based on extensive research, interviews and field visits in Myanmar, that after eighteen months of reform, many positive steps forward and a fundamental change in approaches to governance, the country is facing major HLP challenges today. Without prompt and appropriate action, these challenges will inevitably spark future crises within the HLP sector, which will threaten both the reform process and overall economic and social vitality. Growing foreign investment and a number of other changes have already begun to create conditions within the HLP sector that further threaten the HLP rights of ordinary citizens and HLP rights holders. Given the experience gained globally in addressing HLP issues within the context of political transition during the past two decades, it is clear that even if political reforms in Myanmar continue apace, great care will need to be taken in attempting to deal with HLP themes. Given the unique history of the country, its massive economic and development potential, the still largely unresolved peace processes in many ethnic areas, and the country's widespread poverty and growing landlessness, many of Myanmar's 60 million ordinary citizens stand a very considerable chance of suffering an even worse crisis within the HLP sector if measures are not taken in the short- to medium-terms to build capacity within civil society and Government to address HLP challenges in the most equitable manner possible.

This report builds on a series of earlier efforts, including a 1245-page book prepared by Displacement Solutions in 2009 that for the first-time compiled all of the 94 laws in place at the time in Myanmar which have a bearing on the realisation of HLP rights.⁽³⁾ The analysis that follows provides a brief overview of the most pressing HLP challenges facing Myanmar at the moment, and examines the legislative framework for addressing these concerns combined with more thorough analysis of recent HLP legislative developments. The report concludes with a series of concrete recommendations designed to assist the Government to improve the overall HLP legislative and policy framework in a manner that provides protection and respect for the HLP rights of the entire population of the country, while simultaneously providing a solid basis for economic development, as well as national and international investment.

(2) See, for instance: Scott Leckie (ed) *Conflict and Housing, Land and Property Rights - A Handbook on Issues, Frameworks and Solutions*, (Cambridge University Press, 2011) and Scott Leckie (ed) *Housing, Land and Property Rights and UN Peace Operations - A Comparative Survey and Proposals for Reform* (Cambridge University Press, 2006).

(3) Scott Leckie and Ezekiel Simperingham, *Housing, Land and Property Rights in Burma: The Current Legal Framework* (Displacement Solutions & HLP Institute, 2009). The preparation of this book was made possible thanks to a generous grant from the Swiss Federal Department of Foreign Affairs (FDFA).

2 Key HLP Challenges in Transitional Myanmar

Few issues have received more media attention or provoked more societal discussion in recent months in Myanmar than the issues often referred to as 'land' but which are perhaps more accurately defined as housing, land and property rights. There is a clear recognition at all levels in society - from the Government, the political opposition, the private sector, civil society groups, the UN and donors - that the way in which HLP issues are addressed within the reform process will be a central factor in determining the social and economic (and political) destiny of the nation. Farmers and urban poor fearful of losing their land in land grabs have demonstrated loudly, with their protests covered almost daily in the mass media⁽⁴⁾. Government officials and presidential advisors have sought advice and assistance from local and international HLP experts in addressing these sectors, with UN Habitat and other organizations expressing clear willingness to expand their assistance in the country within the HLP sector. Large public gatherings have been hosted on HLP themes, such as the launch of the important Yangon Heritage Trust Project, a well-attended presentation by Joseph Stiglitz in February 2012 that he dedicated to HLP issues, and a Workshop on HLP Challenges Facing a Transitional Myanmar, hosted by UN Habitat in June 2012 (See Box 2). Foreign companies interested in investing in Myanmar are seeking clarity from the Government on a number of HLP questions prior to making final investment decisions. HLP issues figure centrally within the public welfare reforms outlined in the 19 June 2012 speech by the President. All told, HLP issues are a dominant issue in public discourse at the moment, and how these issues are addressed in the coming months will heavily influence the shape of Myanmar's democratic reforms and the degree to which ordinary citizens benefit or are left behind.

Thus far, the remarkable political and economic changes now underway in the country have yet to yield any meaningful HLP or socio-economic rights dividends for either farmers or the urban poor, and yet if pursued wisely and vigorously within a rights-based framework, major and tangible strides can be made in the coming months. Beyond the outmoded legislative framework, which will be addressed below, and the lack thus far of a national pro-poor HLP policy (which includes the rights of ethnic groups and internally displaced persons (IDP) population), a number of HLP practices and realities in Myanmar are of particular concern.

The political reform process commenced in early-2011 in an HLP rights reality in which a largely antiquated (and partially colonial-era) legislative framework ostensibly provided a legal basis upon which the successive military governments and assignees asserted absolute and unbridled domination over all aspects of this sector. Under the legal framework today, the state continues to own all land in the country and whatever rights over land that are accorded are exclusively leasehold rights, user rights, or rights to cultivate a certain land parcel subject to the approval of local Government bodies that are appointed by the central government. Under the prevailing law, farmers are not allowed to freely determine which crops to grow, find it virtually impossible to access credit for their efforts, and have inadequate protections against eventual eviction and displacement if local Government officers wish to acquire the land for other purposes. Indeed, because of new laws adopted earlier this year (in particular the *Farmland Law*) and intense investment pressures, farmers (and the urban poor) are probably even more vulnerable to possible loss of land and displacement and dispossession than they had been under the previous regime. These imperfections, which potentially affect some 80 percent of the population are, in turn, the result of a legal framework that in many respects is heavily skewed in favour of commercial interests; a framework which can result in heavy-handed land grabbing and the clearly unfair acquisition of large tracts of land by those who are more able to manipulate the legal process to achieve their investment aims. Similarly, at the urban level, Government-run housing is severely dilapidated, sub-standard housing is commonplace in the private sector and low-income informal settlements abound. All of these conditions will continue to grow without adequate HLP policy and legal reforms.

Land grabbing - the arbitrary or unjust accumulation of often large tracts of land usually taken by the economically or politically more powerful from low-income groups such as farmers or informal sector communities - is the HLP issue in the country that at present receives the most attention and which is the subject of most concern. A Guidance Note prepared by Displacement Solutions on 'Developing Policy Options for Addressing Land Grabbing and Specu-

⁽⁴⁾ See, e.g., "Court Detains 7 in Eviction Dispute" in *The Irrawaddy*, June 29, 2012.

lation in Myanmar' in July 2012, is available at: www.displacementsolutions.org. Almost daily, media reports in both the Myanmar and English language press carry stories of new cases of land grabbing in all corners of the country. While no national figures exist as to the scale of the land grabs carried out, several state/divisional-level studies of the problem have been prepared which estimate that over 1.5 million acres during the last 20 years have been lost to land concessions and grabbing that, in turn, has led to mass dislocation of farming families, often ending in landlessness⁽⁵⁾ In addition, there is abundant evidence of widespread HLP speculation in both rural and urban areas, partially as a result of the large-scale sell-off of public assets prior to the 2010 elections, and which has had a considerable impact on distorting both land and housing prices, as well as encouraging organized land invasions designed solely as a manipulative means of acquiring compensation and related payments from those intending to develop the land concerned, in particular government agencies. It is hoped that the recently established Parliamentary Committee on Land will provide an institutional means for addressing these serious challenges.⁽⁶⁾



Photo by Andrew Scherer / Displacement Solutions

BOX 2:

Experts Warn About Land Problems in Myanmar

Many important expert voices have joined those of local people in urging the new Government to take a more nuanced view on the land legislation process:

Joseph Stiglitz (Feb 2012) "The land laws under discussion in the Parliament will be very problematic if not right for the country. The draft laws require further discussion and analysis: "So right now there is discussion of the land reform and it is absolutely essential to have a land law but on the other hand, if it is not the right law, it could really be very, very troublesome. [...] It is important to have widespread civil society discussion of these laws, that it is transparent, and a lot of economic analysis

Human Rights Watch (Feb 2012) "There are growing problems in Burma with land confiscation and inadequate compensation, particularly for farmers. Burma should enact new land laws that provide security of land tenure for people, particularly small-scale farmers, and meet international human rights standards. Currently farmers cannot use land as collateral since they do not have legal land titles, creating economic hardship and rendering them vulnerable to forced eviction.... Too much authority appears to rest with farmland management bodies controlled by the state, including powers to order what can be cultivated on particular land.... Land reform should be undertaken together with other legal reforms to ensure access to justice when rights are violated."

New York Times (June 2012) "Myanmar's laws, institutions and regulations have kept the country's farmers, who till some of the most fertile earth in Asia, among the poorest people on the continent. Among the most needed legal and institutional reforms is providing Myanmar's farmers with secure rights to the land they till."

(5) "Government data show that the amount of land transferred to private companies increased by as much as 900 percent from the mid-1990s to mid-2000s and now totals roughly 5 percent of Myanmar's agricultural land." (Roy Prosterman and Darryl Vhugen, "Land to the Tillers of Myanmar", *NY Times* (13 June 2012).

(6) "Reps ignore ministry on land-grab committee" (Soe Than Lynn) in *The Myanmar Times*, July 30 - August 05, 2012. See also, Displacement Solutions' Guidance Note on Developing Policy Options for Addressing Land Grabbing and Speculation in Myanmar of July 2012.

The HLP legal framework does not adequately recognise the customary rights held by millions of farmers and land labourers and 'contract farmers', including shifting cultivators and pastoralists. As a result, these groups are particularly vulnerable. Though methods for registering land are included within the new *Farmland Law of 2012*, the obligation to register one's land under the new law may result in practice in *reductions* rather than strengthened security of tenure rights. This is so because farmers are likely to continue to be unaware of the requirement to register land prior to receiving a land certificate and because the bodies to which one must turn to register land (the farmland management committees) are generally staffed by government officials rather than independent persons. Without or even with land certificates, farmers can all too easily (and under prevailing law), be legally removed from the land, which is in turn often given in concessions to national and increasingly international businesses. And of additional concern, even when such certificates are held, they can now be sold under the new 2012 law with no assurance that the long-term HLP rights of the current residents are protected. This will inevitably result in displacement and increased landlessness as market forces tempt or coerce poor farmers to relinquish their landholdings for short-term gain.

As an indication of just how large future land grabbing and consequent displacement may become, it is estimated that some 28 million acres of land classified as cultivatable or arable could be put to tender for investors, including foreign investors which are already pouring into the country to exploit what is largely seen as an untapped market ⁽⁷⁾ Because most of this land is already home to people and communities, the prospect of larger-scale dispossession looms ominously large, particularly given the fact that farmers threatened with displacement have effectively no judicial recourse to resist. Though judicial remedies are increasingly seen as a theoretical means for redressing land disputes and alleged land grabs, such as the well-known case of Shwe Na Thar village in Yangon's Mingalardon township (See Box 3), it is clear that such measures are unlikely to provide the remedies required to secure residential justice for those affected. There is effectively no meaningful recourse to the courts authorized under law and no national legal aid programme to assist people in gaining access to the justice system. These conditions, combined with prohibitive filing fees and questionable independence of the judiciary virtually assure that, without a change in law and policy, the already sizable portion of the population classified as landless (estimated by many experts to numbers in the many millions) will grow rapidly in coming months and years, setting the stage for mass deprivation and social tumult.



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⁽⁷⁾ See, Roy Prosterman and Darryl Vhugen, 'Land to the Tillers of Myanmar', NY Times (13 June 2012) and TNI, *Financing Dispossession: China's Opium Substitution Programme in Northern Burma*, Transnational Institute, February 2012.

BOX 3:

Company lied about project for industrial zone: farmers

Dispossessed farmers in a rural part of Yangon's Mingalardon township are preparing to take their fight against one of the country's largest firms to the courts.

The farmers from Shwe Na Thar village say they only want their land back and are not seeking any compensation from the Zaykabar company, which acquired the land to construct Yangon Industrial Zone 4. Starting from February 2010, the company acquired 845 acres from 71 households with the help of two government officials in the village. About 100 acres remain in the hands of residents. Some of the farmers already received K300,000 each in compensation but they told The Myanmar Times on February 21 that they were tricked into accepting the money by the two officials.

"At first we were told that our land was being taken for a government project. All this farmland is owned by government and if the government wants it, we know we have to give it back. So we gave it to them without complaint," said farmer Daw Tin Sein.

"I am still keeping my other five acres. I didn't give it to them and didn't take any compensation," she added. Others have been left with nothing, however. "I gave my 16 acres of farmland to them. The future of our family depends on that land. I don't want anything from [Zaykabar] except my farm," said Daw Tin Yi, 48. Ma Hnin Nandar, 38, said that the company bought her farmland, which was full of toddy palms, for K5000 a tree. "The company cut down my plants but I still haven't got my money," she said. "For my children's education and health we need money and we can get money only from our farms. I can't do anything except farming. I want

my land back. Unless this happens my children will have many difficulties for their education." In mid-2011, the company began breaking down embankments, blocking canals and laying concrete roads. Farmers said the company told them on January 18 to move out by January 24 and that some of their land had already been sold to unknown buyers from outside Mingalardon township. U Nay Myo Wai, chairman of the Peace and Diversity Party, which is based in Mingalardon township and has been helping the farmers raise awareness about their plight, said existing laws prohibited the company from selling the land. "According to section four of the Act of Nationalisation of Farmlands (1953), farmland is not allowed to be bought or sold between civilians. And also the Law of Rental Lands for Cultivation (1963) states that civilians are not allowed to do other things with farmland besides agriculture," U Nay Myo Wai told The Myanmar Times. "If the company has sold the farmland to others, this is not legal under the law," he added. U Nay Myo Wai said the farmers had initially told him that their land was acquired by the government. "But later I came to understand that it was not the government - just a private company that took advantage of their lack of knowledge. So I decided to get involved," he said.

The notice the company distributed to farmers on January 18 gave some clues about the situation, he said. "According to the papers attached to the notice, the government didn't give the farmland to Zaykabar for an industrial zone. Secondly, I noticed that the government told the company to run an agriculture business if they got the farmland and thirdly the company was told to give back the land to farmers if they don't

do agriculture on this farmland. And I noticed that the company reported to the government that the farmers do not want to farm anymore because they want to do another business and that's why they gave up their farmland. But that's totally wrong," U Nay Myo Wai said. The farmers are now preparing to take legal action against the company but said they would drop the case if the company returns the land.

"We are lost. Unless we don't get back our farmland, we will starve," one Mingalardon farmer said. The farmers said that it appeared as though Zaykabar had suspended its project. Officials from Zaykabar took the unusual step of holding a press conference to deny the farmers' allegations. The company's general manager, Daw Mi Mi Thein Tan, told reporters on February 14 that the industrial zone project had government support. "After March 2011 we continued our project with the permission of the government. And we got that permission through the government procedure," Daw Mi Mi Thein Tan said. Another company official said it was not possible for Zaykabar to do the industrial zone on its own. "We got this agreement and allowance after reporting step by step to authorised people in the government. This is a joint project between Zaykabar, the Ministry of Construction and the Department of Human Settlement and Housing Development," he said.

The official said the company was following the orders of the Yangon Region government.⁽⁸⁾

(8) Source: Noe Noe Aung in *The Myanmar Times*, February 27 - March 4, 2012

Taking advantage of the transitional political environment, HLP speculation of various sorts has taken root in urban areas where housing prices have risen dramatically since early 2011. Houses in wealthy areas of Yangon can fetch multi-million dollar prices, while apartments (often without running water or electricity) can change hands at well over US\$1 million, resulting in real estate prices in some areas of Yangon that have surpassed those of Bangkok in neighbouring Thailand and on par with those in notoriously high end locales such as Manhattan in New York City. These artificially inflated prices are due primarily to the lack of other investment options for those in Myanmar with surplus capital to invest other than the real estate sector. This condition can and must be addressed if Yangon is not also to be the site of large-scale economic displacement in the months and years to come. Moreover, slums, informal settlements and satellite towns (*myo-thit*) are commonplace in urban areas, however, there does not appear to be any effort yet by the new Government to work in any significant way towards improving HLP conditions of the numerous popular settlements throughout Yangon. Yet these areas require special attention and support, and must be seen as a central element in any effective HLP rights strategy. State housing developments built decades ago for civil servants and members of the military are commonplace throughout Yangon but are almost universally in serious need of repair and renovation.

Likewise in rural areas, anticipated investment has encouraged business interests to acquire ever-larger tracts of land, increasing displacement as well as price appreciation. Increasing land prices have also encouraged speculative practices to be carried out on land parcels recently designated as Government project land. A related issue which is clearly causing the Government concern is the desire to address what are perceived to be organized land invasions by people hoping to secure large compensation payments as a result of having settled on land designated for State projects. However, the Government is severely hampered from addressing this issue in the absence of clear standards to determine who legitimately should have enforceable rights to the land concerned (particularly bearing in mind adverse possession rights which may be pertinent in such determinations), who is entitled to compensation, the lack of any standard methodology for determining the amount of compensation and the absence of any independent body to address compensation rights. Moreover, the lack of transparency and public input into the planning and decision-making processes around land utilisation only serves to support the public perception that the transfer of land in such cases is generally not undertaken for legitimate public purposes nor done in accord with the rule of law.

Overall, the current Government thus is grappling both with a legacy of more than five decades of calculated mismanagement within all corners of the HLP domain, combined with new HLP realities that have arisen since the reform process began. Tackling these vital issues will be imperative if the HLP rights of the people of Myanmar are to be met in full. Some of the key HLP challenges can be met with appropriate policy, whereas others will require reliance on the HLP legislative framework in Myanmar, which as discussed below, is in dire need of structural review and renewal.



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3 New HLP Legislation Since March 2011

Myanmar has an extensive HLP legal infrastructure, and a brief historical overview of the main aspects of the HLP Legal Code in Myanmar are included in Annex 1. Building on this extensive legacy, the new reform-minded Government has wasted no time in beginning its own process of examining the HLP legal infrastructure, and drafting new legislation to address burgeoning HLP issues. Two new and particularly significant HLP laws were adopted in March 2012, the *Farmland Law* and the *Vacant, Fallow and Virgin Lands Management Law*. Importantly, and in a clear sign of changing times, dialogue with the civil society Land Core Group of the Food Security Working Group between the circulation of the initial draft bill in late-2011 to its final adoption by the Hluttaw (Myanmar parliament) and approval by the President in March of 2012, led to the authorization under the law of a national farmers association and other modifications. Indeed, because of the debate generated by this consultative process, it took the Hluttaw several votes to settle on a final version of the statute. As discussed below, these nascent efforts to open up and democratize the legislative process should be formalized, and as the Hluttaw considers new HLP and other legislation, become the norm rather than the exception.

3.1 INADEQUACIES OF THE NEW HLP LEGISLATION

While the new Government's passage of the new HLP laws in March 2012 created some new benefits and were the first legislative efforts in a half century to at least receive public criticisms of the bills that resulted in the new laws, the general consensus of observers is that the resulting laws sacrifice security of tenure for commercial interests and have many other significant and potentially debilitating deficits. The concerns expressed by many were that, at best, these laws will fail to successfully address widespread land grabbing and other HLP rights violations and that, at worst, the laws will only serve to exacerbate the country's HLP problems. In the eyes of many, the laws are intentionally designed to facilitate, rather than deter, land grabbing and the concentration of land in fewer hands. These processes require substantial re-thinking if the country is to build upon the foundations of the rule of law, human rights and equity.

The *Farmland Law*, adopted on 30 March 2012, is widely perceived to be pro-business and lacking sufficient protection for the HLP rights of small landholding farmers. The specific deficits in this single piece of legislation are symptomatic of broad deficits in Myanmar's overall HLP legislative scheme. They include the following:

The Law fails to assure that small-scale farmers have security of tenure.

While the intent of the *Farmland Law* is ostensibly to protect small-scale farmers who have been living on and working on farmland, the *Law* will serve to diminish rather than increase security of tenure. Several aspects of the law undermine farmer tenure security. Chapter II, section 8 and Chapter III, section 9(a) of the law, for instance, permit privately negotiated property transfers for the first time since the adoption of the *Land Nationalisation Law* of 1953. This relaxation of the Government role in determining land transfers exposes farmers, particularly those who are poor, to the temptation to sell their rights to use the land for short-term gain and makes them vulnerable to speculators and large-scale corporate agriculture interests. Speculators and agribusiness invariably have far greater economic bargaining power and political access than the farmers and may be privy to information about development plans or other knowledge affecting the future value of the land that the farmers may not know. In addition, the *Law's* approach to land registration is likely to discourage rather than encourage registration by many who have long-standing distrust of Government authorities and because the authorities charged with administering the registration system may be affected by their own self-interest. In addition, there are major differences between the length of leasehold rights in rural areas (which now require annual registration and extensions) when contrasted with those in urban areas (where leasehold arrangements of up to sixty years are commonplace). Measures need to be taken to make leasehold lengths more comparable with one another. Some have suggested that the issuing of 25-year leases in farming areas would go some way to bridging this considerable gap. Finally, Chapter IV, Section 12 of the law severely restricts autonomous decision-making as to crop selection, and these outmoded restrictions also require re-thinking.

Some are calling for abandoning the nearly sixty-year-old system of State ownership and transfer of fee simple title to the current occupiers and users to foster farmer empowerment. However, the Government should be extremely cautious about pursuing the precipitous privatisation of agricultural land at this juncture, at least until, as discussed below, a comprehensive HLP Law is developed with well thought-out protections for housing, land and property rights. Under international law and norms, farmers are entitled to secure tenure rights and many other HLP protections, and Myanmar law should explicitly adopt measures that guarantee those rights. The manner in which those rights are implemented must be tailored to local conditions, concerns, customary law, national history and experience. It may be that granting farmers outright fee simple ownership is the most expedient and popular route to a sense of empowerment, but the land transfer ability that comes with fee simple ownership may incentivise rather than deter land grabbing and speculation. These matters are so crucial, that they simply must be the subject of a national discussion about how best to proceed.

It may in fact be the case that HLP rights can be better protected through a form of tenure short of fee simple ownership that, while retaining public ownership, provides the crucial tenure protections associated with fee simple ownership, including the right to just and satisfactory compensation should Government, in exceptional circumstances, choose to acquire land for a public purpose, the ability to use the land as collateral for financing and the power to determine what crops to plant. Moreover, there may be innovative forms of land tenure, such as protected leasehold arrangements, community land trusts or agricultural cooperatives, that can better serve long-term community interests in a stable non-speculative legal tenure framework. In any event, a thoughtful and deliberative approach to assuring tenure rights for farmers, as an element of a new comprehensive HLP law, as suggested below, is clearly preferable to immediate privatization. Notwithstanding which tenure systems eventually emerge, these must ensure full equality for men and women, with explicit provisions for the issuing of joint titles, equitable inheritance and succession rights and clear non-discrimination provisions protecting the equal rights of all to the full HLP protections provided under international law and best practice.

The Law sets up a system of land administration that lacks adequate procedural safeguards and fosters cronyism and corruption.

The *Farmland Law* sets up a vaguely defined administrative scheme that sorely lacks the kinds of safeguards that are necessary for a stable, HLP rights-protective land administration system. Registration and administrative decision-making processes are fundamentally inadequate because they grant administrative authority to parties and bodies that are not independent, neutral, non-self-interested or sufficiently sensitive to informal land claims. The *Farmland Law* (Chapter V) does not specify the number of appointees of the Central Farmland Management Body or the method of appointment other than stating that the “Union Government may form” the committee. However it designates the Minister of Agriculture and Irrigation as Chairman and populates that Body with other specific national executive branch office holders as well as the vague category of “relevant Government department officials.” The legislation in turn authorizes (but does not mandate) the central body to form (Chapter V) and prescribe the duties of (Chapter VI) additional bodies at the state or region, district, township, and ward or village levels. The bodies involved in these processes have excessive discretion, are appointed without any involvement of the Hluttaw at any level, and act within a framework which completely lacks legislative standards or guidance to assist in consistent and transparent decision-making. There is no representation of farmers on any of the levels of farmland management bodies, and a general lack of trust by farmers in these bodies, which they often see as representatives of the police and military. These conditions inevitably foster cronyism, corruption and arbitrary decision-making, all of which are practices that need to be solely associated with previous governing regimes.



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The Law denies access to independent judicial review and may undermine faith in the rule of law.

Disputes under the *Farmland Law* are handled at the ward or village level by the same body that made the initial determination (Chapter VIII, Section 22). Chapter VIII of the *Law* then sets up three levels of administrative appeal, together with strict time limits, and decisions become “final” at the state or region level. All of the bodies at the various levels have been appointed by the Central Farmland Management Body and judicial appeal is prohibited under Article XIII, Section 40, although access to the courts is available to resolve disputes involving matters of inheritance. Moreover, Chapter VII, Section 19 of the *Law* authorizes civil penalties, including fines and eviction, for failure to comply with obligations under the law and criminal penalties of up to two years imprisonment under Chapter XII for failure to comply with any order issued by a farm management body. These harsh civil penalties and the criminalization of non-compliance with administrative orders are of dubious value.

The vague rules with respect to farmers’ obligations, the multi-layered appeals process with each appellate level appointed by the same central authority and the harsh penalties provided by the *Law* make compliance with the process quite complex and the consequences for non-compliance quite severe. This will inevitably make farmers who have to deal with the administrative apparatus wary and intimidated. A simpler, more user-friendly and farmer-protective process would be far preferable. But even a simple administrative and dispute resolution process can be intimidating to people who lack the education and experience to navigate through it and thus the Government should institute measures like a barefoot paralegal land registration campaign to assist with initial registration and legal aid to assist with disputes.

For the *Farmland Law* to comply with even the minimum HLP standards arising from international norms, several major amendments will be required. The *Law* needs to provide a stable, easily accessible, non-corrupt system of land title and permission to use registration that has as its primary aim the conferral of enforceable, long-term tenure rights for those farming the land. Farmers need to have access to assistance to help them comply with the land registration requirements, and to have proper representation in negotiations between them and Government and business bodies. The administrative bodies with which farmers are required to interact through the land registration and land certificate process must be more representative, more independent and less associated with the personalities and practices of former Governments. Members of these bodies should receive training and capacity-building to ensure that they apply regulations in a manner that is consistent with the full spectrum of the HLP rights held by farmers. Recourse to judicial review and legal aid assistance should also be made available.

The *Vacant, Fallow and Virgin Lands Management Law*, which was also signed into law on 30 March 2012, vests an enormous amount of discretionary authority in a Central Committee for the Management of Vacant, Fallow and Virgin Lands. The Central Committee, which is appointed by the President, can grant permission to use vacant land, set a tax on the land and security fees for its use, and supervise compliance with the law. Permissible uses for the previously vacant land include agriculture, livestock, aquaculture, mining and “other purposes in line with the law.” Land use permission can also be granted to citizens, Government organizations, NGO’s, and joint ventures under the *Foreign Investment Law*. With unbridled discretion given to a Presidentially appointed Committee, no protections for small landholding farmers and no limits or standards to assure HLP rights, environment protection or sound land use planning, the *Vacant, Fallow and Virgin Lands Management Law*, like the *Farmland Law*, will do nothing to stem either land speculation or land grabbing.

Like the *Farmland Law* and the *Vacant, Fallow and Virgin Lands Management Law*, the new *Environmental Conservation Law*, also adopted in March of 2012, vests full authority and an enormous amount of discretion in a Ministry and Committee under the control of the President’s office. And while the law creates a vehicle for comprehensive environmental regulation with respect to physical impacts and cultural heritage, it is completely silent on the impact of development on social and community life. The most troubling aspect of the *Law*, however, is that Chapter XIII, Section 36 vests absolute and limitless discretion in the Environmental Ministry, with the approval of the Union Government, to ignore any of the terms of environmental regulation as follows: “The Ministry may, with the approval of the Union Government, exempt or relieve any Government department, organization or private business from complying with any provision contained in this Law for the interest of the Union and its people.” This broad loophole in the legislation has the potential to completely undermine the effectiveness of the *Law*.



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4 Opportunities to Move Forward on HLP Issues

The HLP challenges facing the new Government are extensive and prevalent in both rural and urban areas, and it is clear that the new Government clearly recognizes the significance of HLP issues, as evidenced by the adoption of new laws and the creation of new bodies to engage on these issues. Clearly, to resolve these HLP challenges in an equitable manner consistent with international HLP standards will require a consolidated effort designed to secure for everyone, within the shortest possible time-frame, the full array of housing, land and property guarantees that modern nations are expected to secure for their populations. Everyone in Myanmar, at a minimum needs to have security of tenure, access to affordable and safe housing and to basic services. To its credit, the Government has already initiated a range of measures within the HLP sector, including legislation, political attention and growing engagement with the domestic and international communities. The momentum already underway, combined with a deeper understanding of the benefits and flaws of the existing HLP legal code in the country, provides a solid basis for further action in support of HLP rights for the entire population.

4.1 THE NEW CONSTITUTION PROVIDES SUPPORT FOR STRENGTHENING HLP RIGHTS

The 2008 Myanmar *Constitution* does not explicitly single out recognition of general housing, land or property rights, as such, but it does recognize a series of central HLP rights themes, and may, therefore, be useful as a foundational basis in pursuing an improved HLP legal environment in the country. Chapter VIII of the *Constitution* outlines fundamental rights and duties of citizens, and contains the following provisions which are relevant to the framework of housing, land and property rights:

Art. 347 The Union shall guarantee any person to enjoy equal rights before the law and shall equally *provide legal protection*.

Art. 348 The Union *shall not discriminate* any citizen of the Republic of the Union of Myanmar, based on race, birth, religion, official position, *status, culture, sex and wealth*.

Art. 353 Nothing shall, except in accord with existing laws, be *detrimental to the life* and personal freedom of any person.

Art. 355 Every citizen shall have the *right to settle and reside in any place* within the Republic of the Union of Myanmar according to law.

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

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

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

Viewed as an integral whole, the solid beginnings of a constitutionally entrenched legal framework is, therefore, in place which can form the legal bedrock of renewed legislative activity in support of HLP rights. Many comparably-worded constitutional principles have been successfully relied upon in other jurisdictions to protect and strengthen HLP rights, and there is no reason to believe that similar initiatives would not also be possible within Myanmar. At the same time, the amendment of the *Constitution* to include a specific series of HLP rights would be highly advisable. Scores of countries have constitutionally recognized specific HLP provisions, as of course, have dozens of international human rights and other legal standards. There is no reason why similar forms of constitutional recognition could not also occur in Myanmar.

4.2 THE NEW GOVERNMENT IS INTERESTED IN ADVANCING HLP RIGHTS

Since taking power in early 2011, the new Government has undertaken a number of measures indicating a growing interest and concern with HLP issues. These actions include the dramatic decision to cancel the Chinese-backed Myitsone dam on the Irrawaddy River, (a project of seven dams that would have resulted in considerable displacement and land losses by dwellers in the flood zone)⁽⁹⁾ to the adoption of new laws affecting the HLP reality of significant sectors of society and the establishment of new governmental committees entrusted with various HLP mandates.

In July 2012, the Government gave new responsibilities within the HLP policy sector to the Ministry of Environmental Conservation and Forestry (MECF), focusing in particular on land administration, land tenure and land management. The new entity will be chaired by the Minister of MECF, and the Director General of the Forest Department will act as General Secretary. The responsibilities of the new body will include land use policy, land use and management planning, investment planning and others. In addition, Presidential Advisors have also explored how best to address the joint scourges of land grabbing and land speculation. Furthermore, the Presidentially-appointed National Human Rights Commission has indicated that the vast majority of the 30 or more complaints they receive every day, deal with land disputes and other related HLP concerns and that they are concerned with and interested in addressing HLP issues.

In December 2011, a mission by UN Habitat to Myanmar examined a range of land governance issues, signifying the first time the UN has ever been requested to provide assistance on land issues to the Government.⁽¹⁰⁾ A UN Habitat project providing homes to 431 internally displaced persons who were displaced by Cyclone Nargis may have paved the way for this new cooperation. This is highly symbolic, and augers well for further constructive engagement by the international community in assisting the Government to improve its approach to this vital sector.

In Yangon, two encouraging developments within the HLP sector include the plan to establish an Urban Planning Unit within the Yangon City Development Committee (YCDC) and the recent launch of an independent Yangon Heritage Trust which aims to preserve and then restore many of Yangon's historical buildings constructed during the pre-1948 colonial period. The Trust, the brainchild of the Architects Association of Myanmar and the University of Koln, and now headed by Dr. Thant Myint-U, has secured considerable political support as well as the commitment from the YCDC to impose a demolition moratorium within a section of the historical town centre, which has been designated as a heritage zone.

Government officials and advisors have been grappling with how best to address the many HLP challenges facing them, both legacies from the former regime and newer problems associated with the opening of the economy, and appear to welcome international advice and expertise on these matters. There is, therefore, a reasonably solid basis on which to construct an improved HLP reality and legislative framework in the coming months and years.

At the same time, however, there is all too little evidence that Myanmar has learned the extremely painful lessons of many of its immediate neighbours and from countries in other regions which have sought quick fixes to dogged HLP questions, and been unwilling to intervene in HLP questions in a manner beneficial to the population as a whole. There is clearly an awareness amongst some of the more internationally-oriented officials about the mistakes made in some countries, in particular Cambodia, but there is not sufficient awareness at present within the Government as a whole about just how important it will be for the future of country to address HLP concerns in the best possible manner.

There is still time, domestic and international good will, receptivity to constructive suggestions for change and thus a very good opportunity for the people of Myanmar to get it right and to pursue a wholly original, forward-looking approach to these issues. But time is passing quickly and space for re-positioning legislative and policy initiatives on HLP issues is becoming ever smaller as the voracious demand for land from international and

(9) While the protection of HLP rights may not have been the primary motivation for suspending the controversial project, the net result was the prevention of both displacement and land inundation on the country's most central river.

(10) Dr. Clarissa Augustinus (UN Habitat) *Mission to the Republic of the Union of Myanmar Report*, UN Habitat, 15 December 2011.

domestic investors continues to accelerate. Any country moving from largely State-owned land resources to more individual forms of land ownership needs to do so in a cautious manner, for swinging the HLP pendulum from one extreme to another will guarantee a dismal HLP future for just about everyone but the top 1% of wealth holders in the country, an outcome that must be avoided at all costs.

4.3 MAKING THE BUSINESS CASE FOR PROTECTING HLP RIGHTS

HLP rights are not only essential for the well-being of Myanmar's people, they are also good for business, and a central element of healthy national economic development. Effective enforcement of HLP rights fosters faith in Government and diminishes discontent and unrest. It enhances personal comfort and privacy, food security, health and education. All of this promotes social stability, which in turn, creates a welcoming business climate, a domestic market for goods and services and a reliable workforce.

Indeed, a system of strong HLP rights will enhance and protect the reputation of the country and the international and domestic businesses that operate there. In effect, it enhances the brand value of the nation and its products in a world that is increasingly aware of and concerned with the human and environmental impact of business practices. Moreover, a solid HLP rights approach is good for tourism. Myanmar is a nation with an extraordinarily rich and well-preserved cultural heritage, strikingly beautiful rural and urban settings and a population that is warm and welcoming. It is thus well-positioned to take its rightful place as a world class tourist destination. However, landlessness, slums, housing decay and homelessness are all serious obstacles to making Myanmar a prime destination for world tourism⁽¹¹⁾ and the country's failure to address its formidable HLP challenges would foreclose that possibility. Clearly, much work remains to be done to make HLP rights a reality in today's Myanmar.

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(11) See, 'Myanmar Tourism Industry Determined to Avoid Traps', *Bangkok Post*, 18 June 2012.

5 Concrete Recommendations for Improving HLP Rights in Myanmar

Myanmar thus stands at an HLP crossroads today. The HLP choices it makes in the coming months in line with the President's avowed efforts to develop the nation and improve people's welfare will be highly influential in determining the country's HLP future. Will Myanmar face the tumult, inequities and highly unfortunate HLP outcomes suffered by so many other nations in transition, or will Myanmar chart an HLP path which ushers in a truly new HLP dawn whereby every one of the country's 60 million citizens can - as rapidly as possible - enjoy growing security of tenure, continuously improving housing and living conditions, ever greater access to clean water and consistent supplies of electricity, and ultimately all of the HLP rights promised to citizens everywhere under human rights law and international best practices?

Myanmar can become a global leader and model new and improved approaches to HLP rights, but to do so will require both great skill and wisdom. It is clear that there is a strong interest, at least on the part of the President and other influential voices within Government, in having the Government distance itself from the HLP practices of the past, and to be increasingly associated with international best practices. This is a solid basis for building the laws and institutions required to enable the country to be the first transitional nation in the past quarter century to treat the HLP sector with the importance it needs to be accorded through concerted public interventions that reduce the worst HLP excesses and promote solution-oriented measures that best serve the majority of people. It can prove that it is possible to get it right on HLP rights through legal and policy approaches that enable everyone to benefit; an approach where fair and equitable policies and laws relating to ownership, control, use and transfer of land prevail; an approach where, far from being a source of daily hardship, housing, land and property resources become the source of true economic and social justice, liberation and progressive change; an approach where equality and justice are the organising credos of policy-makers within the HLP domain; and an approach that is sufficiently backed at the highest levels, so that once in place, it simply cannot be reversed.

There is a clear realisation within Government that it will need to address human settlement requirements and find new ways of securing land for the considerable landless population, that peace agreements need to be concluded with all armed groups in the ethnic states and that the way by which the country deals with HLP challenges must generally be modernised. There is now a palpable sense of hope in the country that a new dawn has come and that substantial improvements can be made within the HLP sectors. But what measures can be undertaken, starting today, to build the structures and perspectives required to ensure that the horrible HLP errors so commonplace in other countries are not repeated in Myanmar? On the basis of this analysis, this report concludes with four specific recommendations that, if implemented by Government in partnership with civil society, will greatly assist in improving the HLP prospects of everyone in Myanmar:

5.1 RECOMMENDATION 1: CONVENE A NATIONAL HLP SUMMIT IN THE IMMEDIATE TERM

The central importance of the HLP sector to the present and future economic, social and political evolution in Myanmar demands that new, transparent and democratic means be found to address these serious challenges. *An excellent place to start the process of developing Myanmar-based HLP solutions would be the prompt convening of a multi-stakeholder National HLP Summit, jointly hosted by Government, civil society actors and the UN.*

The widest possible cross-section of actors should be invited to such a Summit. The Summit should be organized by a still to be formed *HLP Steering Group* comprised of government, the UN and civil society.



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The Summit would create a venue for identifying national HLP priorities, new policies and legislation needed to protect HLP rights. It would provide a very powerful statement to the nation, as well as to the world, that the Government recognises that an all-inclusive, multi-stakeholder approach to developing HLP policy and law will far better serve society than the top-down, non-transparent policies which have traditionally dominated law-making in the country. Such a process would facilitate the full and genuine consultation and participation of civil society and create a common platform for determining a shared vision of Myanmar's HLP future. The HLP Summit would provide a forum where efforts could be made to begin to find an equitable balance between the need for economic growth and the HLP rights of the significant section of society that now lives without these rights being met. It would provide a neutral forum for all societal sectors to debate and discuss openly the dramatic changes taking place in Myanmar, and to find a mutually satisfactory way to move forward on the complex HLP front.

To have effect, the HLP Summit should conclude with the approval of a statement of principles to guide national policy- and law-making on HLP issues. The Summit should also establish a consultative body comprised of both Government and civil society that would be entrusted with formulating specific recommendations for future efforts in these sectors. The body should be democratic in nature, represent the broad spectrum of interests in society and provide a coordinated means of overseeing HLP decision-making.

5.2 RECOMMENDATION 2: INITIATE PROCESSES LEADING TO A NEW NATIONAL HLP LAW

The HLP legal code of Myanmar is extensive, complex and largely inadequate as a means of addressing the immense HLP challenges facing the nation. The scores of laws which together form this framework either date from colonial times or were adopted without public input during periods of military rule. Viewed in its entirety, the current HLP legal framework will not be a sufficient means of securing HLP rights for the entire population. Major legislative changes will be required if the broader reforms are to successfully protect HLP rights. While considerable attention has been paid by the media, civil society and the Government to the two new land laws of March 2012, it is clear that far more significant HLP legislative reform is required if everyone within the country is to have access to the HLP rights promised to them by the international human rights regime.

A comprehensive forward-thinking *National Housing, Land and Property* Law should be drafted and adopted that assures HLP rights, encourages sustainable economic development, and places Myanmar in the global forefront on HLP rights. As Myanmar moves toward a stable democratic society and opens up to local and international development, it has a unique opportunity to forge its own path toward a system that guarantees HLP rights and which reflects and preserves its rich cultural heritage. The patchwork of HLP laws that now exist do not adequately serve to protect Myanmar's people from land grabbing, forced displacement and other HLP violations. Nor does the current legal framework protect the nation from the kind of furiously-paced and chaotic development that can lead to costly and painful environmental degradation and cultural submission with long term consequences for the well-being of the nation and its people.

It is recommended, therefore, that to avert an HLP disaster and to protect its cultural identity, Myanmar embark on a concerted and deliberative effort to forge its own path toward securing HLP rights for everyone. A new HLP law would, at a minimum, ensure universal security of tenure rights because at present neither rural nor urban dwellers have sufficient protections under current law against arbitrary eviction and displacement. A new HLP law would accord enforceable security of tenure rights to all dwellers, which, once in place will lead to a far greater level of rights protection for citizens, less land grabbing, empowerment of farmers and slum dwellers so that they are at last treated as rights holders, and increased provision of credit for the purposes of HLP investment at the household level.

Given the choice between a piecemeal approach to HLP law reforms and more comprehensive measures, the latter approach is clearly preferable. Analysing, repealing, amending, supplementing and perhaps in some cases re-issuing the laws now comprising the Myanmar HLP Legal Code would be immensely time-consuming. Moreover, it would be unlikely to yield the systemic changes required in a modern and soon to be rapidly developing country. Rather, a series of new laws, commencing with a new HLP Law are needed to provide the legal framework required to provide clarity on HLP matters and to address a wide range of shortcomings within the current HLP legal frame-

work. In particular, a new legal framework is needed to address vital issues of land ownership, land reform to benefit landless families, protection against forced displacement through far more strict interpretations of compulsory acquisition powers by the State, the provision of compensation in the event of acquisition of property by the State, recognition of customary land and shifting cultivators, and the development of dispute resolution procedures and other mechanisms designed to build in a pro-poor bias within the HLP legislative framework in a manner that can co-exist with other measures in support of private and State investment.

A formalized, mandatory process for adopting legislation must be established that is transparent and consultative and that fosters thorough discussion and open debate.

Some welcome and positive steps were taken toward transparency in the process of adopting the relatively narrow recent HLP legislation. There is also a growing, robust public discussion around HLP rights. However, it is clear that there are some large and fundamental legislative issues, involving both process and substantive rights, that must be addressed if an approach that meaningfully addresses HLP rights is to be implemented. While the Government is to be commended for advancing the rule of law and taking initial steps to address HLP issues, including the recently established rule of law parliamentary committee headed by Aung San Suu Kyi, there are background principles of legislative process that are so flawed that it is impossible to generate confidence in the process or result. Moreover, the recent hastily conceived and approved HLP legislation of March 2012 does little, if anything, to substantively advance HLP rights.

If HLP and other human rights are to be fully realized and the rule of law is to be respected, Myanmar should build upon the beginnings of a consultative process witnessed in the development of the *Farmland Law*, and adopt a formal set of steps that must be taken in the development of legislation that fosters transparency, consultation and robust public and legislative debate. This approach should be taken with all legislation so that, as it continues to move toward a nation characterized by respect for the rule of law, the Myanmar Government in fact becomes a model of democratic governance.

While the consultation and public discussion that led up to the adoption of the *Farmland Law* is to be applauded for breaking with the previous long-standing lack of Government transparency, these measures fall far short of the kind of transparency and public discussion and debate that is appropriate in a country that respects the rule of law. In fact, the minimal transparency and public discussion regarding the adoption of the new *Farmland Law* was very much the exception rather than the rule. Indeed, there has been recent public discussion by Government officials of the need to amend the *Farmland Law*. However, they have been silent on the content of any contemplated amendments.⁽¹²⁾ And in another glaring example, the new national Human Rights Commission - a body with the capacity to make an important contribution to democratization and the rule of law - has drafted a new *Human Rights Bill* and submitted the language to the President. However, under current norms, the draft cannot be circulated until it has actually been adopted by the legislature. It is particularly ironic that the development of human rights legislation is being undertaken with such a flagrant lack of transparency, itself an approach that undermines the rule of law.

A new HLP law must start from the premise that everyone in Myanmar must have clear, strong and enforceable security of tenure rights, both in rural and urban areas.

Law-makers may wish to seek guidance from the 2012 UN voluntary guidelines on land tenure, which provide an exhaustive range of relevant tenure issues.⁽¹³⁾ Special consideration should also be given to the lengthy, bottom-up process leading to the *Urban Reform Law of Brazil* (the 'City statute') that has led to the extraordinary pro-people transformation of many of Brazil's largest cities. There needs to be a stable, easily accessible and non-corrupt system in place providing security of tenure within any new HLP law.

(12) See, "Farmland Laws Should be Amended: Committee," in *Myanmar Times*, 25 June 2012.

(13) *FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (11 May 2012).

The new HLP law should explicitly recognise customary land ownership rights

Likewise, the new HLP law must appropriately address the complex, but vital question of customary land ownership and harmonize customary rules with national land policies and laws. Successive military regimes have severely disrupted customary land use patterns and effectively denied the existence of customary land use in the country. Such forms of land ownership are common in rural and highland areas and remain a primary source of authority in terms of land management. Various ethnic groups have established practices regarding land ownership, natural resources, cultivation, watershed and decision-making processes at village, district and state levels that retain considerable legitimacy with the populations concerned. The role of customary law in regulating land use and acquisition should be addressed by the Government and recognised and respected where this form of land use and allocation retains legitimacy among local communities. Where appropriate, elements of customary laws should be woven into new HLP laws. This is particularly true within the peace processes underway within the ethnic States, none of which have thus far fully addressed the complex HLP issues that will invariably arise within eventual peace agreements. Given the almost complete disavowal of customary law by successive regimes in Myanmar since independence, a major shift in consciousness will be required that embraces customary law where it functions fairly and equitably as a rights-augmenting force, and considers improved ways of customary governance where such traditional rules may be oppressive or discriminatory. Above all, a comprehensive land use policy should be considered which is fully compatible with relevant international standards, and which ensures full legislative equality within the HLP sector.

The new HLP law should set limits on the size of newly acquired land.

Particularly during this tumultuous period of reform and transition, it may serve the people of Myanmar best if limits are set on the scale of land that can be legally acquired. Setting limits on the size of economic land concessions that can be acquired by individuals or business interests can help to reduce the likelihood of both land grabbing and speculative endeavours. Such limits may protect the rights of poorer households by limiting pressures exerted by those seeking ever-larger land holdings. In lieu of legislation to this effect, an executive order could be considered which puts in place special measures to examine all land deals over a certain size. One option could be setting a limit of 50 acres. Additionally, it may be useful to establish a national independent land transfer oversight panel for all land parcels larger than 50 acres, with all land transfers larger than 50 acres requiring the formal approval by this new body.

The new HLP law will also need to clearly define a comprehensive Government land use planning and decision-making process that involves transparency and public input.

There appears to be little tradition in Myanmar of comprehensive land use planning nor of Government transparency or consultation with civil society in the decisions made regarding allocation of land to particular uses. The country's long-standing *ad hoc* decision-making and lack of comprehensive long-term strategic land use planning can only foster environmental degradation, speculation, disruption of cultural heritage, misallocation of resources, conflict and tension. The lack of transparency and community input can only foster mistrust in Government, cronyism and profiteering. The new law must be sensitive to these issues and formalize a deliberative, transparent, consultative process for land use planning and mapping that advances the rule of law and respect for Government and that minimizes conflict. Furthermore, democratically-decided land zoning and planning measures can also protect against land grabbing and speculation, as well as helping to ensure the orderly planning of major urban areas.

The new HLP law should include incentives for social developers to build affordable housing in various locations in both Yangon and Mandalay and approve urban expansion planning measures.

Given the general lack of comprehensive planning or zoning, as well as technical mapping, urban expansion planning measures under a new transparent, consultative and standardized approach should be commenced quickly as a means of helping to relieve pressure on urban core land prices and speculation. Developing an urban planning system in Yangon by the local Government could assist in building a planning framework far more beneficial to the urban poor. Every effort should be made to promote measures of community-led urban development planning to ensure that democratic processes also guide the growth of the urban areas in the country.

The new HLP law will need to explicitly prevent arbitrary eviction and standardize methods for compensation for use or expropriation, in the exceptional event that land needs to be compulsorily acquired.

Although compensation is commonly paid to those subjected to expropriation measures, consistent standards are not yet in place, which creates conditions ripe for either the non-payment of compensation and arbitrary standards of reparation. A new standardized system needs to be put in place so that the people of Myanmar can be assured that decisions about expropriation are made solely in the public interest and for public purposes, that compensation amounts reflect uniform standards for determining value throughout the country and that the decisions are made by neutral, unbiased parties and can be reviewed by an independent judiciary⁽¹⁴⁾

5.3 RECOMMENDATION 3: ACTIVELY ADDRESS LAND GRABBING, SPECULATION AND DISPLACEMENT THROUGH ADDITIONAL POLICY AND LEGAL REFORMS

There is nothing inevitable or inherent about the inequitable acquisition and concentration of ever-larger quantities of land in fewer and fewer hands. Indeed, Governments wishing to protect the HLP rights of rural and urban dwellers and properly regulate the land acquisition process can succeed in reducing the prevalence of land grabbing and speculation, improve the human rights prospects of current landholders and ultimately strengthen both democratic processes and macro-economic perspectives. HLP rights need to be conferred as soon as possible on all dwellers as a means of protecting their existing land holdings and right to remain. Regulations can be developed to subject all development and land-based investment projects to oversight, with permission to acquire to be denied if land grabbing was involved in the procurement of the land concerned. Indeed, enforceable legal procedures for revoking unlawfully acquired land should be established in the near term. Land grabbing needs to be treated as a form of corruption and prevented through additional measures such as requiring proof of occupation or use that shows clear long-term control. Land grabbing also needs to be penalized through fines and other penalties, depriving the perpetrators of the right to acquire additional land and other measures.

Declare a Moratorium on Arbitrary Forced Displacement leading to the eventual abolition of the practice.

When land grabbing and speculation are tolerated, these practices all too often result in human rights violations, including forced evictions and displacement, loss of HLP rights, landlessness and dispossession. These practices are brutal, ruin lives and are difficult to reverse in a fair and just manner. In a country based on the rule of law and guided by principles of equality and natural justice, these practices need to be prevented to the maximum possible extent, and laws and policies are needed to protect HLP ownership and user rights as a means of preventing new forms of displacement and dispossession.

Proper forms of protecting HLP rights, increasing levels of security of tenure and developing the administrative and judicial remedies required to secure these rights are vital components in any effective HLP framework. Measures should be taken to protect slum dwellers rights and those potentially affected by resource extraction

(14) The President recently announced the creation of a 'Land Allocation and utilisation Scrutiny Committee for Urban Development Projects and Investment Projects.' See, 'Activists Call for Adherence to Land Policy' in *Myanmar Times*, 25 June 2012. No details about the Committee, its membership, its standards or its mandate have yet been announced, so it remains to be seen whether the creation of the Committee will improve the current approach to land use decision-making and compensation.

projects in rural areas, and allow them all to enjoy, as is stipulated in the International Covenant on Economic, Social and Cultural Rights, the “continuous improvement in living conditions” and protection against forced evictions and loss of housing rights.

Expand capital investment opportunities.

Steps should be taken immediately to expand capital investment opportunities for investors as a means of relieving pressures on the real estate sector in urban areas. This could include the establishment of a stock exchange or other investment vehicles that would divert funds away from real estate thus reducing land grabbing, residential land prices and speculative profit seeking.

Consider a land value tax to prevent speculation.

Another valuable tool at the Government’s disposal to prevent speculation is the imposition of a land value tax. In addition to raising Government revenue, land value taxes can help induce investment in and use of land in a productive manner and serve to reduce or undermine speculatively driven land acquisition. Such a new tax should be levied on new land transfers and purchases (as well as acquisitions contrary to legal norms). Long-term occupiers and low-income households should be exempted from any new land tax. All new land transfers and purchases should be subject to strict monitoring and only approved once a series of criteria have been met. Frameworks could be developed to earmark 50% of the proceeds from the new tax to rebuild and renovate the severely dilapidated public housing stock in Yangon where many civil servants and members of the armed forces reside.

Carefully regulate foreign company ownership and leasehold rights.

Many countries already strictly regulate foreign ownership of land, and such measures should be strenuously pursued in Myanmar. Though allowing foreign ownership of land will be tempting to some sectors of society for a variety of reasons, non-citizens should not be allowed to own land on a freehold basis, particularly not at this fragile stage of the reform process. There is nothing extraordinary about such restrictions, with many countries having such restrictions on the book including, of course, neighbouring Thailand. Similarly, leasehold rights should be strictly regulated. Both measures are needed to prevent land speculation and growing political and economic influence by non-Myanmar corporate entities that may not always have the country’s best interests at heart. The HLP rights of everyone in society and the needs of investors need to carefully balance. Myanmar clearly needs investment, but this should never be to the detriment of its people. When and if leases are provided to non-Myanmar entities, compliance with a model contract should be secured to ensure that if land is leased, labor requirements are met, adequate rent payments are made, that a defined minimum number of local people are employed and so forth. In addition, such contracts could include provisions that protect food security by barring the replacement of food crops with other forms of agricultural production exclusively for purposes of export.

Myanmar should develop a workable system of access to the justice system that is suitably tailored to its history, culture, values and resources.

The Myanmar people must be enabled to exercise their rights and take advantage of the protections afforded by the HLP laws. Laws and rights become meaningless unless there is a mechanism to assert and vindicate them. Unlike the vast majority of the world’s Governments, Myanmar currently has no Government-supported legal aid system or other tools to provide access to the justice system for those who have claims. When people have no meaningful recourse to assert their rights, those rights lose their meaning and people lose faith in Government and the rule of law. The housing, land and property rights domain is an excellent place to commence expanded access to judicial remedies because these sectors are so immediate and fundamental, with implications for peace, food security and overall stability.

Establish a national legal aid institute.

The creation of a national legal aid institute would fill a sizable gap in the protection of HLP rights in Myanmar. While such an institute should provide free legal assistance to citizens alleging violations of their rights in any sphere, beginning with a focus on HLP issues will surely assist in clarifying law, improving faith in Government and considerably improving access to justice for those claiming abuses of their HLP rights.

Address urban and rural HLP Issues.

Perhaps indicative of the still largely rural nature of society, the vast majority of attention to the HLP sphere since the new Government took power has been upon HLP issues largely affecting various classifications of land in the countryside. While these rural issues are vital and certainly in need of serious attention, urban housing conditions also require structural attention by the Government. Measures should be taken to build on the positive steps recently undertaken in Yangon to preserve certain portions of the city and the intention of the YCDC to establish an urban planning department. For example, the Government should do whatever possible to maintain Yangon's unique position as the only large urban area in Asia where virtually no high-rise towers have been built, and only provide planning permission for high-rises in areas located far outside the urban core.

All relevant international treaties recognising HLP rights should be ratified without reservations by the Government of Myanmar.

This should begin with the ratification of the International Covenant on Economic, Social and Cultural Rights, and then be followed by all remaining core international human rights instruments. Moreover, given the history of International Labour Organisation involvement in the country, the full ratification of all ILO Conventions by the Government would send a very strong, positive signal to the international community as a whole.

Finally, a Code of Conduct for Businesses Investing in Myanmar committing the companies to a no-grabbing-no eviction-no displacement policy in all projects in which they are involved should be promoted by companies already engaged in responsible investment.

Every company investing in Myanmar should be strongly encouraged to sign such a Code of Conduct and act in a manner fully consistent with the HLP rights of everyone in the country. Companies need to ensure that they are active supporters of the democratization process and that they fully respect the rule of law, basic human rights and environmental protection measures and that they generally join forces with the Government and civil society to build a modern, fair and equitable Myanmar. In addition to taking responsibility for their own actions, companies should insist on assurances, in entering into agreements with the Myanmar government, that there have been no HLP violations in the land acquisition and transfer process.

**5.4 RECOMMENDATION 4:
FACILITATE TRAINING AND CAPACITY BUILDING FOR PARLIAMENTARIANS,
GOVERNMENT OFFICIALS AND POLITICAL PARTIES ON HLP RIGHTS
BEST PRACTICE AND INTERNATIONAL STANDARDS**

Rapid and comprehensive training and capacity building on HLP rights issues should be provided to Parliamentarians, Ministers, relevant ministry officials and political parties. Given the long absence of democratic practices and lack of legislative experience and standard administrative practices, there is a deficit in legislative and administrative sophistication within many political entities in Myanmar. This is particularly true as this relates to the protection of HLP rights. Intensive and practical training of MP's, relevant Government officials and political parties is a priority and an activity that should be pursued in the immediate term.



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ANNEX 1:

6 A Brief Historical Overview of the HLP Legal Framework of Myanmar

The current legal framework originates with laws that were put in place during the British colonial period, many of which apparently have never been repealed nor necessarily used in practice.⁽¹⁵⁾ starting with the *Caste Disabilities Removal Act (1850)*, which banned laws and practices that impair property rights or impact the rights of inheritance based on religion or caste status, these laws establish a wide range of HLP rights and obligations along with administrative provisions for implementation and enforcement. The development of the current legal framework can be roughly divided into five periods: the colonial era, starting in 1850 and concluding a century later with Burmese independence in 1948; the early years of post-colonial independence, from 1948 to 1962; the “socialist” period of military rule, from 1962 to 1988; the latter period of military rule from 1988 to 2009; and the current period of accelerating reform and democratization that began in 2009.

For over 800 years, from the 11th to 19th centuries, the people of central Burma lived under an absolute monarchy. During this period, the social structure of Burma was expressed in legal texts (dhammathats) interpreted and applied by specialist lawyers (shene). The annexation of Burma by the British began in 1825 and continued for the next 62 years. By 1886, all of Burma was incorporated into the British Raj and was administered as a province of India. The British implemented complete legal, governmental and administrative reform. All Burmese law was replaced with the then current Anglo-Indian law. The Privy Council was instituted as the highest court in Burma and when much of the common law was codified in India, it was similarly adopted in Burma and compiled into the 13 volumes of the Burma Code. In addition to the Burma Code and common law, and akin to the policy enacted in British India, respective religious laws (Buddhist, Muhammadan and Hindu) were to be retained in the area of “succession, inheritance, marriage or caste or any religious institution”. This position was formalised in the *Burma Laws Act (1898)*.

In 1850, the initial Burmese law addressing a component of HLP rights was adopted. As the first of a series of laws designed to remove certain discriminatory results from the application of religious laws, the *Caste Disabilities Removal Act (1850)*, sought to ensure that: “Any law or usage that inflicts the forfeiture of property rights or impairs rights of inheritance by reason of an individual renouncing or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced by law”. In 1856, the *Hindu Widows’ Remarriage Act*, ensured that Hindu widows would be capable of contracting a second valid marriage and that the offspring of such marriages would be considered legitimate and capable of inheriting property. The subsequent *Married Women’s Property Act (1874)* provided that the wages, earnings and property of a married woman were to be considered her separate property. Further, a married woman was entitled to effect an insurance policy on her own behalf, independently of her husband; maintain a suit for the recovery of her separate property and have the same remedies and liabilities, both civil and criminal, as if she was unmarried.

Several decades later, a variety of similar laws were approved. The *Hindu Disposition of Property Act (1916)* removed “certain disabilities” in the disposition of property by Hindus. The Act provided that “no disposition of property by a Hindu, whether by transfer inter vivos or by will, shall be invalid by reason only that any person for whose benefit it may have been made was not in existence at the date of such disposition”. The *Hindu Inheritance (Removal of Disabilities) Act (1928)* designated that no person governed by Hindu law, “shall be excluded from inheritance by reason of any disease, deformity or physical or mental defect”. The *Hindu Gains of Learning Act (1930)* provided a uniform rule as to the rights of a member of a Hindu family to property acquired through means of their “learning”. The *Specific Relief Act* was approved in 1877 to govern the law related to specific relief of the Courts. The Act covers the recovery of possession of property (movable and immovable property); the specific performance of contracts; the rectification of instruments; the rescission of contracts; the cancellation of instruments; declaratory decrees; the appointment of receivers and the enforcement of public duties.

(15) The full texts of all Myanmar HLP laws, both extant and repealed through 2009, can be found in English in Leckie and Simperingham, *Housing, Land and Property Rights in Burma: The Current Legal Framework*, Displacement Solutions/HLP Institute, 2009.

Through the adoption of progressive land and revenue laws, the British created, for the first time, a legal arrangement recognising private ownership of land as well as a system of land revenue tax collection. Due to the separate annexation of Lower and Upper Burma separate legislation was passed to suit these different jurisdictions. The *Land and Revenue Act (1879)* was the first major land law enacted in Burma and governed the acquisition of land rights for private persons as well as the procedures for assessment and collection of land revenue taxes. Following this legislation, the *Upper Burma Land and Revenue Regulation (1889)* was adopted and applied similar principles of land ownership and land revenue tax collection. Under these laws, all lands in Burma were for the first time divided into either "State land" or "non-State land". The *Acts* did not apply to land within the limits of any towns, nor to reserved forestry, fisheries land, military cantonments or specified religious sites. Provision was made for the accrual of land rights (ordinarily attached to a calculated period of possession of land). Further, a landowner was deemed to have a permanent heritable and transferable right of use and occupancy in his land (subject to payment of revenue, taxes and the reservation in favour of the government of all mines and mineral products).

The creation of a system of land revenue tax collection was complemented with a system of cadastral surveying and land registration. The cadastral surveys distinguished the following classes of land: land under grant (long and medium grants); leasehold lands; temporary lease lands (seasonal only); new colonies (newly opened lands); inundated and 'island' lands found only in riverine areas (lands submerged under rivers during Monsoon season, which re-appear when river water recedes). The land and revenue arrangements instituted by the British led to far greater state involvement with the land sector as well as far greater private ownership of land than had previously been the case, in effect, usurping longstanding customary land usages. Further, the implementation of land and revenue arrangements as well as the practice of the British led to taxes on land becoming the single largest source of state revenue.

The *Transfer of Property Act (1882)* governed the law relating to the transfer of property (movable and immovable), including, sales, mortgages, charges, leases, exchanges and gifts. Although it appears that this Act is still technically in force, many of the relevant HLP provisions have been superseded, primarily by the *Land Nationalisation Act (1953)*, though this Act was repealed in accordance with the *Farmland Law* adopted in 2012. The *Transfer of Property Act* complements the position enshrined in the *Land and Revenue Act* that a landowner had a permanent heritable and transferable right of use and occupancy in his land.

The *Lower Myanmar Town and Village Act (1899)* governs land rights of private persons in towns and villages (in contrast to the Land and Revenue arrangements that cover land outside of towns). The *Act* provides that the following rights to land accrue for hereditary land: the right to keep under occupant control (to live and to dwell on the land); the right to cultivate; the right to mortgage; the right to sell and the right to inherit. For Government lands, people have rights to keep under occupant control, cultivate and inherit. The *Act* states that "no rights against the Government shall be deemed to have been or shall hereafter be, acquired by any person over any land in any town or village, except as provided under this Act". Similar to the *Lower Burma Land and Revenue Act*, land ownership is mostly based on possession, again, normally attached to a calculated period of possession. The *Act* provides that landholder's rights cease after two years of abandonment, and also covers eviction procedures from any unauthorized possession and use of state land.

The *Partition Act (1893)* governs the law relating to the partition of immovable property. Specifically the *Act* provides that where a decree for partition has been made and by reason of the nature of the property, or the number of shareholders, a division of the property cannot be reasonably or conveniently made, the Court may direct a sale of the property and a distribution of the proceeds.

The very important *Land Acquisition Act (1894)* empowers the state to acquire land where it is needed for any public purpose. The *Act* provides for the relevant procedures, including the required notice to be given, proce-



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dures for objections to acquisition, the method of valuation of land, the process for taking possession of land, court processes and appeals, procedures for the temporary occupation of land and the acquisition of land for corporations. The *Act* requires the authorities to provide compensation to the original owners of the land, however, in practice, compensation often falls far short of basic minimum standards on just and satisfactory compensation. Much of the forced displacement and land confiscation that has taken place since 1962 has been justified on the basis of the *Land Acquisition Act*. The earlier *Land Acquisition (Mines) Act (1895)*, applies to cases in which minerals or mines are situated under land which is desired to be acquired under the *Land Acquisition Act*.

The *Towns Act (1907)* provides for the administrative governance of towns, for example, the division of towns into wards and blocks and the election, duties and powers of ward headmen and elders of a block - including the obligation on residents to announce the arrival and departure of non-residents to a town. The *Towns Act* is complemented by the *Village Act (1908)* which addresses many of the same governance concerns for villages. The *Act* provides for rules and procedures relating to the administrative structure of villages, including the duties and powers of village committees, village headmen, rural policemen, sub-divisional and township officers as well as the duties of villagers. The *Village Act* also contains an express obligation on villagers to announce the arrival and departure of non-residents, including a requirement to seek permission from the village committee for a non-resident to take up residence in a village, to construct a hut, house or enclosure. Permission is also required from the Deputy Commissioner prior to establishing a new village or group of houses. The *Act* provides an exception for cultivators or fishermen to construct dwellings where their vocation is carried out. The *Act* empowers the Deputy Commissioner to sell and remove property illegally built on State land. These two laws are currently in the process of being amended.

The *Embankment Act (1909)* regulates the law relating to embankments. The *Act* requires the maintenance of a list of able-bodied persons for employment on embankments (where work needs to be quickly executed to protect loss of life or property). Every owner or occupier of immovable property in the vicinity of an embankment is required to assist in the work by labouring themselves, or providing a labourer as a substitute. The *Act* authorises an embankment officer (or authorised person) to enter into any immovable property in the vicinity of an embankment and take possession of, appropriate or remove and use any relevant materials for the purpose of such work (for example, timber, bamboo, mats, boats, carts and oxen). The *Code of Civil Procedure (1909)* provides for the jurisdiction of the Courts in civil matters, for example, property liable to attachment and sale in execution of a decree. The *Registration Act (1909)* governs the rules, regulations and procedures relevant to the registration of instruments of immovable property (for example, gifts and leases). The *Act* also provides for the registration of dwellings as well

as general administrative procedures, including, the timeframe for registration, the appearance of required witnesses to registration, relevant fees and penalties for non-registration.

In 1921, a series of laws relating to the then capital city, Rangoon, were approved. The first of these, the *Rangoon Development Trust Act (1921)*, created the Trustees for the Development of the City of Rangoon (The Board). The Board includes representatives from the National Housing and Town and Country Planning Board, the port of Rangoon, the Municipal Corporation of the City of Rangoon as well as representatives appointed by the President of Rangoon. The powers and duties of the Board (subject to the control of the President) include undertaking works, the improvement, expansion and development of the City and the ability to purchase and hold immovable property. The *Act* extends the application of the *Land Acquisition Act* so that the President (on behalf of the Board) is empowered to acquire land for the purposes of the *Act*. The *Act* was augmented one year later by the *City of Rangoon Municipal Act (1922)* which provides for rules and procedures related to municipal issues of the City of Rangoon. The duty of carrying out the provisions of the *Act* was vested in the Municipal Corporation of the City of Rangoon (The Corporation). The *Act* provides for the constitution of the Corporation and provides for relevant powers and duties, including, for example, water-works, registration of births and deaths, vaccination, markets, lodging houses and public parks. The Corporation is also vested with discretionary duties, including maternity homes and schools (with certain limitations).

State powers to control the HLP sector were further increased under the *Cantonments (House Accommodation) Act (1923)* which provides for State appropriation of houses situated in cantonments. Under the *Act*, the President has the power to declare the *Act* operative in any cantonment or part of any cantonment, whereby every house situated in such operative cantonment is liable to appropriation by the Government. Where a military officer states that he is unable to secure suitable accommodation for himself or his mess and where no suitable house belonging to Government is available, the *Act* provides for state appropriation of housing. The *Act* regulates the procedure and rules in such cases, including, vacation of the house, liability for repairs to the house, the required notice to be served, the annual rent to be paid and the option to sell the house to the State.

In 1934, Burma became a separate colony of Britain. Between 1931 and 1941, the colonial government initiated a combined British and Burmese Land Committee that was primarily concerned with alleviating rural poverty through land reform measures. Its stated goals were to slow down the rate of land alienation to absentee landlords, readjust tenancy laws and redistribute family-sized plots to farming households. The *Land Purchase Act (1941)* empowered the Government to purchase large, non-agricultural blocks at market prices for redistribution as family-sized plots to rural farming households. The *Land Alienation Act (1941)* was intended to reduce the speed of land alienation by absentee landlords.

Following the conclusion of the Second World War, the *Custodian of Movable Property Act (1945)* was passed in order to provide for the recovery and return to owners of movable property that was confiscated from them during the war. The *Act* provided for the appointment of a Custodian of confiscated property and provided: "where owing to circumstances arising out of the war an owner of movable property relinquished possession thereof within the Union of Burma, it shall be presumed, until the contrary is proved, that he has continued to be the owner of such property and that he has had no intention of abandoning the same or any rights thereto". The *Act* has clear importance in creating precedence for any eventual HLP restitution programme. The *Act* further provides that no proceedings (civil or criminal) would be instituted: "in respect of any movable property possession of which was relinquished by the owner thereof owing to circumstances arising out of the war against any person who has come into possession of that property if such person delivers up such property to the owner or to a Custodian within such [prescribed] period".

In 1947, the final two pieces of HLP legislation were adopted under colonial rule. The *Public Property Protection Act (1947)* governed the law relating to public property (including property belonging to the armed forces). The *Act* specifically created an obligation on persons who find abandoned or lost public property to not tamper with and to report the finding of such property. Under the *Act*, the burden of proving authorised use of any public property is on the person using the property. The *Requisitioning (Emergency Provisions) Act (1947)* provided for the requisition of land and premises in certain circumstances. Specifically, the President, where necessary or expedient, was empowered to requisition land and premises for a public servant whose work connected with the Government. With this latter *Act*, the pre-independence HLP law-making process came to a close.

Independence Onwards

On 4 January 1948, the Union of Burma gained independence and ended all legal ties with Britain. A *Constitution* had been drafted prior to independence and was adopted on 24 September 1947. The drafters were inspired by the Constitutional provisions and practices of a number of western liberal democracies and provided for an institutional structure of Government that followed the Westminster separation of powers model. Chapter VIII supported a competent and independent judiciary, including through the requirement that every judge make and subscribe to a declaration of judicial independence. Chapter II provided a statement of fundamental rights and was inspired by both the Universal Declaration of Human Rights and the Constitution of the United States of America. The *Constitution* further guaranteed that existing laws, provided these were not inconsistent with the provisions of the *Constitution*, would continue to be in force until repealed or amended.

In terms of HLP rights, section 17(iv) of the *Constitution* recognised “the right of every citizen to reside and settle in any part of the Union [and] to acquire property” and section 16 provided that “No citizen shall be deprived of his personal liberty, nor his dwelling entered, nor his property confiscated, save in accordance with law”. However, although the *Constitution* guaranteed the protection of a number of human rights, including limited HLP rights, it also specifically restricted rights to own and hold property. Article 30 of the *Constitution* provided: 30. (1) The State is the ultimate owner of all lands. (2) Subject to the provisions of this *Constitution*, the State shall have the right to regulate, alter or abolish land tenures or resume possession of any land and distribute the same for collective or co-operative farming or to agricultural tenants. (3) There can be no large land holdings on any basis whatsoever. The maximum size of private land holding shall, as soon as circumstances permit, be determined by law. Further, Article 23 provided: 23. (1) Subject to the provisions of this section, the state guarantees the rights of private property and of private initiative in the economic sphere. (2) No person shall be permitted to use the right of private property to the detriment of the general public. (3) Private monopolist organizations, such as cartels, syndicates and trusts formed for the purpose of dictating prices or for monopolizing the market or otherwise calculated to injure the interests of the national economy, are forbidden. (4) Private property may be limited or expropriated if the public interest so requires but only in accordance with law which shall prescribe in which cases and to what extent the owner shall be compensated. (5) Subject to the conditions set out in the last preceding sub-section, individual branches of national economy or single enterprises may be nationalized or acquired by the State by law if the public interest so requires.



The content of Articles 23 and 30 quickly found legislative substance in the *Land Nationalisation Act (1948 and amended in 1953)*. Until its repeal in 2012 under the *Farmland Law*, this *Act* was arguably one of the most important of all HLP laws in Burma, forming the cornerstone of HLP law and policy in Burma during the rule of previous regimes. Under the *Land Nationalisation Act*, the State nationalised all agricultural lands (with certain exceptions) and abolished all lease, rental and sharecropping agreements. The *Act* did not recognise private ownership of land, instead recognising different categories of land use rights - contingent on the land being used productively, as defined by the State. The sale and transfer of ownership were restricted and size limits were established on agricultural holdings according to land classification, use and size of the family in possession of the land.

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Both the *Constitution* and the *Land Nationalisation Act* set the tone for how HLP issues in Burma would subsequently be addressed. Vesting extraordinary State control over land, accompanied by the process of land nationalisation, created an HLP reality whereby far from benefiting from what was a significant land reform effort, ordinary citizens experienced ever declining rights and degrees of control within the HLP sector. These growing restrictions were set to decline yet further with the installation of military rule in 1962; a process which grew steadily more draconian in subsequent decades.

The Socialist Military Regime: 1962-1988

On 2 March 1962, the military, led by General Ne Win, staged a coup d'etat overthrowing the democratically elected Government and establishing a Socialist Revolutionary Council that ruled by decree. The Revolutionary Council launched its own political party, the Burma Socialist Programme Party (BSPP), whose membership was drawn largely from the ranks of the military. All democratic structures including parliament, the civil administration and the judicial system were dismantled and abolished. The 1947 *Constitution* was not formally repealed, however, the dismantling of all major democratic institutions left many of the provisions inoperative or irrelevant. One of the first decrees of the Revolutionary Council was that all laws would continue to be in force unless specifically repealed.

In 1971, the BSPP transformed itself into a civilian government. A one party State was created with no separation of powers doctrine. The socialist regime created the "People's Judicial System" with the vast majority of judges being drawn from the ranks of the party and having no legal qualifications. The bar of freelance lawyers was converted into salaried People's Attorneys who received their income from the State. In addition to codified law, traditional Burmese notions of community, harmony, fair play and socialist concepts were among the factors which affected court decisions. Further, in 1973, the Government published a Courts Manual that stated that judges should not refer to any decisions from other countries nor earlier decisions of Burma's courts.

In terms of legislative treatment of HLP rights during the socialist period and acting under the slogan "the Burmese Way to Socialism", the State embarked on an expanded programme of large-scale nationalisation of agriculture, building on the *Land Nationalisation Act* and including the nationalisation of rice production in 1962. The first HLP law approved by the new regime, the *Protection of the Right of Cultivation Act (1963)*, stated that the following were protected: (1) agricultural land; (2) cattle and ploughing implements; (3) tractors and machinery; (4) other implements whether animate or inanimate; (5) prohibition from confiscation for any reason of agricultural produce and arrest of cultivators. It was also stipulated that such protection would not apply in the case of: (a) non-payment of dues owing to the state; (b) disputes arising from inheritance cases or actions taken by the state for security reasons. The *Act* also empowered the State to confiscate land in lieu of debts, or if "State security" is threatened.

The *Tenancy Act (1963)* and *Tenancy (Amendment) Act (1965)* further took control of land from agriculturalists and placed it into the hands of the state.⁽¹⁶⁾ The *Tenancy Act* provided that the government may order any land to be leased to tenants, usurping the right of landowners to lease their land. The subsequent *Tenancy (Amendment) Act (1965)* further strengthened the hold on land by the State and provided the Government with authority to issue regulations for tenants working on the lands leased from the State. The cultivators who, under the *Land Nationalisation Act*, possessed the right to own land now become lessees under the laws. Both the *Land Nationalisation Act* and the *Tenancy Act* empowered the state to determine which crops agriculturalists grow. Non-compliance with this and other conditions could result in confiscation of land, fines and imprisonment.

After 12 years in power, the socialist military regime approved a new *Constitution* in 1974. The *Constitution* entrenched the position of the BSPP as the only legal political party in the country and the non-separation of powers and the non-independence of the judiciary become constitutionally formalised and complete. As one commentator has noted, "a monolithic political structure without checks and balances was constitutionalised". The *Constitution* proscribed socialism as the official ideology of the state and the rights and freedoms granted were circumscribed by an overriding duty on the part of citizens to refrain from undermining: (a) the sovereignty and security of the state; (b) the essence of the socialist system; (c) the unity and solidarity of the national races; (d) peace and tranquillity and (e) public morality.

The 1974 *Constitution* did not explicitly repeal the 1947 *Constitution*, and asserted that existing laws and rules, so long as they were not inconsistent with the 1974 *Constitution*, remained in force until they were repealed or amended by the Council of State. This may be significant as arguably some of the provisions of the 1947 *Constitution* are still in force. One example is compensation for private property that has been expropriated in the public

(16) Hudson-Rodd, *supra* n47.

interest. In terms of HLP rights, the 1974 *Constitution* reiterates that the State is the ultimate owner of all natural resources and also of land; and that it shall develop, extract, exploit and utilize the natural resources. The *Constitution* rejected the economic rights that had been protected in the 1947 *Constitution*. Notably, the *Constitution* does not stipulate rights to compensation for expropriation of private property, thus establishing a legal framework leading inevitably to homelessness and landlessness.

Article 22 of the *Constitution* ensures that all citizens shall “be equal before the law, regardless of race, religion, status, or sex”, “enjoy equal opportunities” and have “the right to inherit according to law”. Article 160 protects the privacy and security of home, property, correspondence and other communications of citizens subject to the *Constitution*. Article 161 protects every citizen's income, savings, property and residential buildings lawfully earned and acquired.

After the adoption of the new *Constitution*, HLP legislative activity effectively ceased for the next quarter century, with the exception of *Notification No. 4/78 (1978)* which stated that any failure to sow the allotted land with the earmarked crop to obtain optimum results or failure to sell the full quota at the stipulated price during a determined period would result in confiscation of the land. Presently such powers are entrusted to village and township administration and the cultivators are compelled to follow their dictates without voicing any protest.

This was followed nearly a decade later by the adoption of the *Transfer of Immovable Property Restriction Act (1987)*. The *Act* provides for restrictions on the ability to sell or give away immovable property to foreigners or foreign owned companies. The *Act* provides that in the case of a deceased, “totally departed” or deported foreigner, the concerned Ministry may allow inheritance according to the law or confiscate the immovable property as State-owned property. The *Act* provides for an exception for approved diplomatic missions and UN organizations.

Overall, the multitude of laws adopted between 1850 and 1988 generated the development of a complex array of different land classifications, which remains in place today. Understanding how land is allocated and defined is vital in determining the different types of rights that are associated to each of the eleven forms of land that exist under Burmese law today. While we have not been able to access information as to the percentage of the total land mass of Burma that each type of land currently occupies, we do know that eleven types of land exist under law. These are:

1. **Freehold land** - This type of land is transferable, largely urban in nature and no land revenue taxes are required to be paid on it. Such land can only, in terms of law, be expropriated in the public interest, subject to the payment of compensation, in accordance with the *Land Acquisition Act*. When this *Act* is invoked, it is the responsibility of the General Administration Department under the Ministry of Home Affairs to provide compensation in the form of cash, alternative land plots or in other forms.
2. **Grant land** - This type of land is owned by the State which is leased on a long-term basis to citizens on 10, 30 and 90 year terms. Grant land is transferable and lessees are required to pay land tax. In Rangoon, grant land is provided by the Yangon City Development Committee and in Mandalay by the Mandalay City Development Committee.
3. **Agricultural land** - This type of land is used for agricultural purposes and governed according to the terms of the *Tenant Act (1963)*. After 1953 and the *Land Nationalisation Act*, all agricultural land became State land. At present, agricultural land is allocated by Village Peace and Development Councils, bodies which are under the full control of the SPDC. Agricultural land is not transferable and the military retains the right to determine which types of crops are grown on such land and to force the grower to sell the crop directly to the State. If such rules are contravened, the military can re-possess the land in question based on at least six grounds, including failure to cultivate on the allocated land without a good reason; sub-letting the land to others; selling, mortgaging or transferring the land to others; ceasing to farm the land; failing to grow the stipulated type of crop or failure to sell the full quota of the stipulated crop within the price and time-frame set by the junta.
4. **Garden land** - This type of land is similar to agricultural land but the types of crops grown on it often differ, and land revenues on garden land is far higher than on agricultural land. Garden land is not transferable.
5. **Grazing land** - This type of land is used for grazing purposes and land revenues are not required.

6. Culturable land, fallow land and waste land - These types of land can be allocated by the regime to State-owned economic organisations, joint ventures, and other organisation and institutions on a commercial basis. The rules governing this type of land are established under the Procedures Conferring the Right to Cultivate Land / Right to Utilise Land for Agriculture and Live-Stock Breeding Purposes.

7. Forest land - This type of land is governed under the *Forest Law* which requires the granting of permission for extracting timber, firewood or other economic uses of forest land. License fees are required. Under the *Forest Law*, forest dwellers can be forcibly evicted from the areas despite long-term traditional residence there.

8. Town land - This type of land is urban land that does not fall under the freehold or grant land categories and is often referred to as 'La Na 39 Land'. Having access to this form of land enables the rights-holder to use the land for agricultural, construction of housing or other purposes. Town land is transferable and can be transformed into grant land.

9. Village land - This type of land is transferable and situated outside of urban areas. Land revenues are collected on this form of land.

10. Cantonments - This type of land is land acquired by the junta for the exclusive use of and administration by the military. When land is given this classification, the Ministry of Home Affairs issues a declaration that leads to the land being compulsorily acquired under the *Land Acquisition Act*. Under law, compensation is meant to be paid to former owners but only if such land was formally classified as freehold, grant or town land. Other forms of land acquired in this manner do not receive compensation. In fact, for other forms of land, reliance on the *Land Acquisition Act* is not required and the land in question can simply be declared to be Cantonment Land by the Ministry of Home Affairs. Land revenues are not required, but such land is to be surrendered to the government when it is no longer required for military use.

11. Monastery land - This type of land once declared as such, eternally retains this distinction and cannot be altered. Land revenues are exempted.⁽¹⁷⁾



When the SLORC assumed control of the government in 1988 they inherited a legal code which approached questions of land as just outlined. Over the past two decades, both the SLORC and its successor the SPDC, have essentially relied upon this same land typology. As we will see shortly, however, the latest incarnation of military rule in Burma has proven even more adept than its predecessors at using the HLP legal code as a fundamental tool in entrenching its control in the country as a whole.

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⁽¹⁷⁾ UNHCR Repatriation and Protection Unit, 1999, *Salient Legal Features about Land and Land Ownership in Myanmar: A Discussion Paper*, UNHCR Office of the Chief of Mission (Yangon, Myanmar).

The State Law and Order Restoration Council: 1988-1997

On 8 September 1988, the military, reorganised as the State Law and Order Council (SLORC) staged another coup d'état and established a martial law regime. The 1974 *Constitution* was suspended, all institutions of State that operated under the *Constitution* were abolished and SLORC assumed all executive, legislative and judicial authority. Following the practice of the Revolutionary Council, SLORC similarly asserted that all laws would continue in force unless specifically repealed. The System of People's Justice was abolished and a new Supreme Court was established as the highest court in the country. In December of 1988, SLORC issued an order declaring that persons with permission to grow paddy had the duty to yield harvests to the full capacity of the field. Only after the paddy season was over and the set quota sold to the Government would other income earning agricultural products or cash crops be permitted to be grown. In 1989, the official name of the country was changed to Myanmar, and in 1990, SLORC issued further directives to gain total control over land required for fruit orchards, brick production, rice mills, salt production and other purposes. Farmers were forced to grow paddy as the dominant crop; growing other cash crops, fruits or vegetables was severely restricted, limiting the variety of food available for household consumption (and increasing the people's vulnerability to malnutrition).

Further, a Squatter Clearance Scheme was adopted by SLORC in the late 1980s with a view to evicting squatters from vacant public land, and Government premises such as factory compounds, railway yards and tracks, private lands needed for public purposes and areas and compounds designated for religious purposes. During most of its period in power, the junta pursued an urban beautification programme in Rangoon and other cities which has involved the forced relocation of hundreds of thousands of urban dwellers to new, distant and very poorly serviced satellite towns. In one 12-month period (during 1988-1989) 260,000 squatter residents were forcibly evicted from Yangon. A further 500,000 people were moved to ten satellite cities around Yangon in the 1990s, all of which lacked adequate facilities, employment opportunities and basic services. Many of those evicted were formal rights holders over their homes and lands, with judicial options to resist these evictions effectively absent. Minute amounts of compensation were provided to some of the evictees, and in many instances those forcibly relocated were in fact forced to pay for land plots in the far-off resettlement sites.

As a further indication of this attitude towards its most vulnerable citizens, SLORC approved the *Electricity Law* (1984). This *Act*, as amended in 1990 by the *Electricity (Amendment) Law*, provides that whoever commits enumerated prohibited acts, including the theft of electrical energy, is liable to prosecution and also to paying the market value of any destroyed electrical materials and equipment; clauses which could be used against slum dwellers who, throughout the developing world including Burma, often tap into electricity grids in order to access electricity when this is either not provided by the authorities or not otherwise accessible to the urban poor.

Much of the urban redevelopment and forced eviction processes in place since the SLORC's emergence into power has been based on the *City of Yangon Development Law* (1990) which gives dramatic powers to the Yangon City Development Committee (YCDC). Under this law, the YCDC is vested with authority to "convert Yangon with the characteristics of a city of international standards", including the official role of relocating squatters on the orders of the state. The YCDC has extensive duties and responsibilities, including a number of functions previously held by the Housing Department: the preparation of civil projects and establishment of new towns within the limits of the City of Yangon Municipality; administration of lands within the limits of the City of Yangon Municipality; determining the population which should be allowed to settle properly in the City of Yangon; construction, repairing and demolition of buildings; demolition and re-settlement of squatter huts, squatter buildings and squatter wards; construction of roads, bridges and maintenance thereof; stipulation of conditions for traffic and parking of vehicles and slow-moving vehicles; construction of gardens, parks, playgrounds and recreation centres and maintenance thereof; carrying out works for lighting of roads; carrying out works for water supply; construction of reservoirs and pipelines and maintenance thereof; carrying out works for sanitation; carrying out works for public health; construction, maintenance and administration of markets; stipulation of conditions in respect of roadside stalls; and carrying out precautionary measures against fire.

Changes in land laws were made in 1991 with the establishment of the Central Committee for the Management of Cultivable Land, Fallow Land and Waste Land. The Committee was empowered to scrutinize and grant all applications for commercially using cultivable land, fallow land and waste land for agriculture, livestock breeding, aquaculture enterprises or other economic development enterprises. It was also granted the power to allocate control over much

larger holdings of land for the purpose of State owned enterprises. For perennial crops such as rubber, oil palm and coffee, the Committee could assign blocks of 5,000 acres. If the land was developed, more land could be granted up to a possible 50,000 acres. For orchard crops, smaller limits of 1,000 to 3,000 acres were established. Large land-holdings for livestock and aquaculture operations were made possible. Non-citizens as approved by the Myanmar Investment Commission were able to apply for land allocations. By 2001 more than one million acres were allocated involving about 100 enterprises and associations.⁽¹⁸⁾

In 1992, the significant *Law for the Repeal of Laws* was enacted. The purpose of the *Act* is stated simply: "Whereas it is expedient to provide for the repeal of certain laws from among existing laws, which on scrutiny have been found to be no longer in conformity with the changing circumstances, laws which have not been in use for a very long time and laws for which there are no reasons for use in future, the State Law and Order Restoration Council hereby enacts this Law". The law then proceeds to list the laws repealed. Among these a range of laws impinging on the HLP sector were removed from the legal code, including:

- The Land Improvement Loans Act (1883)
- The Government Establishment of Private Estates Act (1892)
- The Municipal Act (1898)
- The Government Buildings Act (1899)
- The Ancient Monuments Preservation Act (1904)
- The Highways Act (1907)
- The Local Authorities Loans Act (1914)
- The Disposal of Police Officers' Estates Act (1922)
- The Land Alienation Act (1939)
- The Burma Land Purchase Act (1941)
- The Monthly Leases (Termination) Act (1946)
- The Buildings (Regulation of Construction and Repair) Act (1946)
- The Tenancy Act (1946)
- The State Urban Planning Act (1961)

The remaining SLORC years were also witness to the adoption of several additional laws directly pertinent to HLP rights. The *Forest Law* (1992) implements the forestry and environmental conservation policy of the Government and is ostensibly designed to ensure compliance with international agreements relating to forestry and conservation of environments as well as contribute to fuel requirements in Myanmar. Under the *Act*, the Minister concerned can constitute and demarcate reserved forests; including inquiring into the rights affected of the public and can grant permission for the extraction of forest produce. The *Act* designates penalties for trespassing and encroaching in a reserved forest.



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⁽¹⁸⁾ *id*

Under the *Narcotic Drugs and Psychotropic Substances Law (1993)* a Central Body for the Prevention of the Danger of Narcotic Drugs and Psychotropic Substances is given responsibilities to, as necessary, seize as exhibits immovable property involved in an offence under this *Law* as well as money, property and benefits derived from the transfer and conversion of property involved in the offence.

The *Development Committees Act (1993)* provides that the Ministry of Home Affairs may form further "Development Committees" in addition to the development committees for Yangon and Mandalay. Such Committees are empowered to order the demolition of squatter buildings. The *Child Law (1993)* was enacted to, inter alia, implement the provisions of the Convention on the Rights of the Child. The *Act* provides that every child had the right to citizenship; every child has the right of inheritance and every child has the right of possessing and holding property. The *Development of Border Areas and National Races Law (1993)* aims to "develop economic, social works and road and communications of the national races at the border areas...in accordance with the aims of non-disintegration of the Union". The *Act* creates a Central Committee for the Implementation of the *Development of the Border Areas and National Races Law* and provides for the relevant responsibilities of the Committee, including, providing guidance and policy for development and works in these areas. And finally, the *Myanmar Mines Law (1994)* makes provision for the acquisition of land for mineral production.



Photo, Displacement Solutions,
June 2012

The State Peace and Development Council: 1997-2011

On 15 November, 1997 the SLORC was abolished and reconstituted as the State Peace and Development Council (SPDC). Most but not all members of the abolished SLORC were in the SPDC. In 1998, the SPDC introduced the *Protection and Preservation of Cultural Heritage Regions Law* which enabled the Ministry of Culture, with the approval of the government, to designate and demarcate areas as ancient monumental zones. The Ministry may also dismantle a building (which is not an ancient monument) and which obstructs the view of an ancient monument. The Ministry can also prohibit ploughing and cultivation with the boundary of an ancient monument or site and prohibit building within the same areas.

The *Highways Law (2000)* provides for the duties and powers of the Ministry of Construction, including, scrutinizing and permitting construction across highways, as well as construction and building within the boundary of highways. Under the *Act* it is an offence to build on or within the boundary of a highway. The *City of Mandalay Development Law (2002)* created a "City of Mandalay Development Committee". The responsibilities of the Committee include: constructing, maintaining and demolishing buildings and demolishing and resettlement of squatter houses, squatter buildings and squatter wards. Finally, *Order No. 3 (2007)* confers certain powers on the Nay Pwi Taw Development Committee similar to those exercised by the City of Yangon and City of Mandalay Development Committees.

Beyond these measures, both the SLORC and SPDC used the HLP sectors as a means of simultaneously entrenching political power and subjugating the HLP domain to a household level tool of social control of the population. In accordance with the law, people's homes are universally recorded and registered. Households on land parcels, delineated as individual property, (eing/myay paing saing mhu) are registered by local authorities and village headmen. This recording and registration process enumerates the head of household, location and type of house and family characteristics. Local authorities at various community levels are obligated to know the whereabouts and movements of the local population, which has the net effect of constant monitoring, surveillance and control of dwellers by the local authorities. This degree of social control, the absence of privacy rights and an overall environment of housing insecurity was worsened further during the past two decades as a result of massive forced eviction programmes pursued by both SLORC and SPDC.

In January 1993 a National Convention was formed for the purpose of drafting the *Constitution*. Of the 700 initial delegates to the National Convention (on 28 November 1995, the NLD withdrew its 86 representatives) nearly 600 were handpicked by the SPDC. The establishment and the manner of functioning of the National Convention raise serious questions of legality under both Burmese domestic law and international human rights law. Bearing those criticisms in mind, after 18 years a new *Constitution* was adopted on 29 May 2008. The *Constitution* came into force after the scheduled 2010 elections. The *Constitution* follows the practice of the Revolutionary Council and SLORC in providing that "existing laws shall remain in operation in so far as they are not contrary to this *Constitution* until and unless they are repealed or amended". The *Constitution* reconfirms the position of the State as the primary land owner in the country: "the Union is the ultimate owner of all lands and all natural resources above and below the ground, above and beneath the water and in the atmosphere in the Union". As noted below, in terms of individual HLP rights, the new *Constitution* enshrines rights for citizens including: the right of private property, right of inheritance, right of private initiative and patent in accord with the law; the right of citizens to settle and reside in any place within the Republic of the Union of Myanmar according to law; the right to ownership, use of property and the right to private invention and patent in the conducting of business if it is not contrary to the provisions of this *Constitution* and the existing laws; and the guarantee that the Union will protect according to law movable and immovable properties of every citizen that are lawfully acquired.

This colourful patchwork of laws, developed under widely different systems of governance, has left Myanmar with a complex, almost impenetrable, legal framework for housing, land and property regulation. Indeed, it is often more confusing than a source of the clarity, and overall constitutes a serious obstacle to building the rule of law and greater transparency and fairness. Lax enforcement of long-standing land rights registration requirements and other formalities required by law has left the system of land registration and mapping in severe disarray and the Myanmar people extremely vulnerable to land grabbing and other violations of HLP rights in this volatile time. Moreover, virtually all decision-making is left to the unbridled discretion of appointees of the central Government with little or no recourse to judicial review.



MYANMAR AT THE HLP CROSSROADS: PROPOSALS FOR BUILDING AN IMPROVED
HOUSING, LAND AND PROPERTY RIGHTS FRAMEWORK THAT PROTECTS THE
PEOPLE AND SUPPORTS SUSTAINABLE ECONOMIC DEVELOPMENT

Displacement Solutions, October 2012



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Federal Department of Foreign Affairs FDFA
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Human Security Division:
Peace, Human Rights, Humanitarian Policy, Migration

Rue des Cordiers 14, 1207 Geneva, Switzerland
4 Hetty Court, Rye VIC 3941, Australia

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