

MYANMAR

Navigating Paths to Justice in Myanmar's Transition

June 2014



Cover Image: Mandalay, 2012. Clay pots and red fabric form a public commemoration of the 8-8-88 uprising (Patrick Pierce/ICTJ).

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ICTJ assists societies confronting massive human rights abuses to promote accountability, pursue truth, provide reparations, and build trustworthy institutions. Committed to the vindication of victims' rights and the promotion of gender justice, we provide expert technical advice, policy analysis, and comparative research on transitional justice approaches, including criminal prosecutions, reparations initiatives, truth seeking and memory, and institutional reform. For more information, visit www.ictj.org

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ACRONYMS

ABSDF	All Burma Students' Democratic Front
ASEAN	Association of Southeast Asian Nations
CNF	Chin National Front
DFAT	Department of Foreign Affairs and Trade (Australia)
DfID	Department for International Development (UK)
MPC	Myanmar Peace Center
NCCT	Nationwide Ceasefire Coordination Team
NLD	National League for Democracy
USAID	United States Agency for International Development
UNDP	United Nations Development Programme
UNOCAL	Union Oil Company of California

1. Introduction

Since President Thein Sein and his government took office in 2011, Myanmar's transition has unfolded at a pace that has surprised many and earned the acclaim of western governments, financial institutions, and private-sector investment analysts.¹ The Burmese population of approximately 60 million has endured more than a half-century of military dictatorship, armed conflict, economic dysfunction, and political repression.² A meaningful transformation into a peaceful society that enjoys economic development and functions democratically now seems plausible, though it is far from guaranteed. Ultimately, the blanket immunity afforded by the 2008 Constitution shields the acts attributable to prior regimes from any form of accountability.³ Whether the reform process will evolve to include measures that address the massive and systematic injustices of the past remains less certain.

This report begins by examining some aspects of the changes currently underway, including the extent to which justice issues currently feature in national demands and international assistance relating to strategies for development, peace, and nation-building in Myanmar. It then moves to a review of the plans and priorities identified by development and peace-building actors, and outlines how these issues might be brought together through an evidence-based, pragmatic, local approach.⁴ Some may view transitional justice as a “spoiler” issue because addressing past abuses committed by actors who maintain political and military power could prompt a backlash from these sectors.⁵ This report proposes a contrary view: that dealing with the past is essential to achieving genuine progress on peacebuilding and sustainable development. It provides concrete recommendations to development and reform actors on how to incorporate transitional justice into relevant programmatic tools.

1 The World Bank describes a triple transition underway: political, economic, and social (which includes resolving long-standing conflicts between ethnic minorities and the ethnic Burman majority). See International Development Association and International Finance Corporation, *Interim Strategy Note for the Republic of the Union of Myanmar for the period FY13–14*, October 30 2012.

2 Official statistics from the era of military rule are unreliable. A new nationwide census was conducted in March and April 2014, and final results are expected in stages in 2015.

3 Article 445 of the Constitution of the Republic of the Union of Myanmar states, “All policy guidelines, laws, rules, regulations, notifications and declarations of the State Law and Order Restoration Council and the State Peace and Development Council or actions, rights and responsibilities of the State Law and Order Restoration Council and the State Peace and Development Council shall devolve on the Republic of the Union of Myanmar. No proceeding shall be instituted against the said Councils or any member thereof or any member of the Government, in respect of any act done in the execution of their respective duties.” Myanmar Const. art. 445 (2008) (English translation printed by the Printing and Publishing Enterprise, Ministry of Information, Republic of the Union of Myanmar, Sept. 2008, www.burmalibrary.org/docs5/Myanmar_Constitution-2008-en.pdf)

4 This analysis is drawn from both a desk review of major strategy documents of key development and peacebuilding actors as well as some preliminary consultations with both national and international stakeholders in Yangon in February–May 2013 then updated in early 2014. Although far from a comprehensive picture, and recognizing that the situation on the ground is changing almost daily, it is intended to prompt both further research and discussion by policy makers concerned with Myanmar's future.

5 A 2013 analysis of peace and development conflict sensitivity for the UN Country Team in Myanmar identified transitional justice as a potential conflict trigger, though a medium-risk one.

2. An Uneven Transition

Civil society groups in Yangon are enjoying new-found public space to discuss topics and activities long forbidden. Until recently, government officials had denied that there was armed conflict, poverty, or political detention in Myanmar. In February 2013, government-endorsed interlocutors met with a coalition of nonstate armed groups for the first time. A year later, the armed groups have formed the Nationwide Ceasefire Coordination Team (NCCT). Their negotiating points, such as independent ceasefire monitors and even some form of constitutional reform, are under active consideration, and in April 2014 the NCCT and the government's Union Peace-Making Work Committee agreed to the first seven chapters of a nationwide ceasefire.⁶ Following initial releases of political prisoners, the president established a high-level committee to review the status of remaining detainees. Despite wariness about such efforts, victims' groups and political parties have participated in the committee. By the end of 2013, most political prisoners had been released and the joint review committee continued to meet about the approximately 30 individuals who remain imprisoned, according to data from the Assistance Association of Political Prisoners.⁷

The cooperation between Daw Aung San Suu Kyi—the leader of Myanmar's opposition party, the National League for Democracy (NLD)—and her former jailors has been the subject of much attention. However, high levels of mistrust and skepticism regarding the genuineness of reforms are still prevalent in some arenas, particularly in areas like Kachin State, which is experiencing renewed conflict, and among advocacy groups that have pointed to ongoing abuses by the military. Among some ethnic minority communities where major fighting has stopped human rights monitors have shown how peace efforts have facilitated more confiscation of land for large-scale business enterprises, which have done little to support the livelihoods of local people.⁸ Still, a string of ceasefires, the formation of the NCCT, and a growing mass of national, regional, and international supporters have raised expectations that the current move toward substantive peace talks offers the nation the best chance of resolving conflicts between the military and armed groups (which largely comprise ethnic minorities).

A series of contemporary problems are disrupting attempts to put Myanmar's transition on a linear path to peace and development. These include the resumption and escalation of fighting in Kachin State after the collapse of a 17-year ceasefire; weak responses by state authorities to increasingly organized popular opposition to unabated land grabs for major infrastructure and other economic development projects (often led by business elites connected with the military regime); and the worsening anti-Muslim invective and violence by militant Buddhist nationalists that has now spread from Rakhine State to central Myanmar and beyond, which the authorities have, at the very least, failed to prevent or contain. Although some authorities have suggested such problems are inevitable by-products of authoritarianism and the country's religious and ethnic diversity, they are more accurately understood

6 Negotiations between government representatives and the NCCT mark a departure from previous practice of strictly bilateral discussions.

7 This does not include the hundreds of ethnic Rohingya who have been imprisoned for political reasons and discrimination based on their ethnicity.

8 See Karen Human Rights Group, "Losing Ground: Land conflicts and collective action in Eastern Myanmar," March 5, 2013.

as a continuation of negative past patterns.⁹ The instigators of human rights violations in the Kachin conflict area, around land-disputes, and in the anti-Muslim violence appear to be operating with a degree of impunity reminiscent of that enjoyed by those connected with previous military regimes. Tackling the root causes of these “conflict triggers” requires some measure of reckoning with the past that involves accountability and reform.

Despite these challenges, Thein Sein's government has already distinguished itself from previous regimes — the State Law and Order Restoration Council, and State Peace and Development Council—which ruled Myanmar from 1988 to 2011. This distancing may prove essential to demonstrating the credibility of the ruling party ahead of the 2015 elections. Whatever the motivations and however imperfect the results, fledgling steps toward holding government and elites more accountable are emerging, including official investigations into land confiscations, parliamentary complaints committees, the creation of a national human rights commission, and other high-profile inquiries into government corruption allegations and police abuse of protesters.¹⁰ Of course, official attempts to respond to public demands for accountability do not guarantee a smooth reception, as was seen in the hostile reaction to the findings of the inquiry chaired by Aung San Suu Kyi into the police crackdown on protesters at the Letpadaung copper mine. Yet, as parliament's willingness to review the constitution demonstrates, what was widely regarded as taboo yesterday can change in unexpected ways.

9 *Agence France-Presse* quotes Ye Htut, a spokesperson for President Thein Sein, as saying the wave of hate speech is a by-product of new freedoms and that the end of military rule has laid bare sectarian fault lines. (*Agence France-Presse*, “Chaos’ unavoidable on Myanmar’s democratic path,” April 5, 2013. For a contrasting view, see Igor Blazevic, “The Vicious Cycle of Extreme Nationalism,” *The Irrawaddy*, April 8, 2013. Blazevic explains that while conflict in the Balkans was commonly viewed as an inevitable outcome of generations of simmering intercommunal hatred, ethnic cleansing is “usually the work of well-trained paramilitary groups organized by elements of the security apparatus. Their task is to do the dirty work without showing the direct link with the regular forces, officials and their political patrons.”

10 See for example, “Military Involved in massive land grabs: parliamentary report,” *The Irrawaddy*, March 5 2013; “Crimes of former junta not off limits, says govt committee,” *The Irrawaddy*, February 22, 2013; “Thousands of bureaucrats snared in Myanmar blitz,” *Agence France-Presse*, February 7, 2013.

3. Development in Myanmar: Background

Myanmar falls squarely into the remit of contexts to which the World Bank's *World Development Report 2011: Conflict, Security and Development (WDR2011)* aims to offer guidance. It has historically received less development assistance (USD \$7 per person) than any other Least Developed Country. The 2013 Human Development Report ranked Myanmar 149th out of 186 countries on its human development index, with a quarter of the population living below the poverty line. (Poverty levels are likely far higher in outlying areas, such as Chin and Rakhine states.) In terms of public perceptions of corruption, in 2013 Myanmar ranked 157th out of 177 countries, an improvement from its 2012 ranking of 172nd, but still grading very poorly.¹¹ Economically it is seen as one of the last emerging market frontiers, although its wealth of natural resources (which are still largely untapped) has been controlled by elites connected to the military regimes. Otherwise, economic growth faces a legacy of outdated infrastructure and financial systems and a predominantly rural, undereducated workforce that is based in small-scale agriculture.

Conflict and high levels of political repression have racked Myanmar for more than 60 years, during which largely state-sponsored human rights violations became routine. Its security challenges include porous borders, illicit trade (including narcotics and human trafficking), well-armed nonstate actors (who still control significant parts of the country's territory), and high levels of mistrust among the plethora of ethnic and religious groups. That mistrust is already manifesting as open hostility, so far primarily by militant Buddhist nationalists against a range of Muslim communities, particularly the Rohingya in northern Rakhine State. The justice system and police are weak and ineffective, as law and order has been the domain of the military, which has operated with impunity since it seized political power in a coup d'état in 1962.

The 2013 Nay Pyi Taw Accord for Effective Development Cooperation declares the government of Myanmar's "high aspirations" for "people-centered development" through enhanced relations with the international community and improved data collection.¹² In doing so, it commits to participatory approaches with civil society and development partners, gives recognition to human rights and access to justice, and places a high premium on accountability of public actions through transparent processes.

Both Thein Sein and Suu Kyi have repeatedly highlighted rule of law and good governance as priorities alongside the development of a modern market economy and democracy.¹³ In August 2013, Thein Sein announced the formation of a national reform committee to lead these efforts, again emphasizing "people-centered development" with a focus, in the last 30 months of the administration, on basic needs, including electricity, water, and employment.¹⁴ For their part, international development

11 See Transparency International, *Corruption Perceptions Index 2013*.

12 The Accord was approved by acclamation at the First Myanmar Development Cooperation Forum, January 20, 2013. The Myanmar government convened the forum to enhance aid effectiveness and donor coordination around national priorities for development.

13 See in particular Thein Sein's "second wave" and "third wave" speeches, quoted in Lex Rieffel and James W. Fox, "Too Much, Too Soon? The Dilemma of Foreign Aid in Myanmar/Burma," *Nathan Associates Inc.*, March 2013.

14 "National reform leading committee led by the President has been formed separately to direct efforts on reform programme," *New Light of Myanmar*, August 10, 2013.

partners have committed to aligning their strategies with national priorities, as well as consulting with affected communities and strengthening participatory processes.

In the past, Western donors channeled the bulk of their aid through nongovernment partners due to restrictions on direct aid to the government. However, the move to a civilian government and largely positive assessments of the reform process have led to the lifting or suspension of most sanctions, the granting of debt relief, and the opening up of the provision of bilateral assistance. Current planning documents show that international donors continue to focus on traditional areas, such as health, education, and livelihoods, but they have supplemented those priorities with support to programming for issues that aims to strengthen state institutions, such as governance, rule of law, and transparency.¹⁵ Others are providing funds in support of the peace process and reconciliation efforts.¹⁶ While this shift has the potential to provide much-needed resources to address past human rights violations, none is explicit about this aspect of rule of law and reconciliation.

¹⁵ Australia's Department of Foreign and Affairs and Trade (DFAT), UK's Department for International Development (DfID), USAID, and UNDP all support this kind of programming.

¹⁶ This includes especially the EU, Norway, USAID, and DfID.

4. Transitional Justice: Matching International Rhetoric to Local Realities

For policies around development assistance to be most effective in Myanmar, they will need to take a conflict-sensitive approach and take into account the human rights legacy of the past authoritarian rule and armed conflicts. The *WDR2011* focused on the challenges that organized violence poses for developing countries. It drew on comprehensive research data to conclude that repeated conflict is not only a leading cause of human rights violations, but also a considerable obstacle to both human and economic development.

Those countries that have succeeded in breaking the conflict cycle have built public confidence through signaling a break with the past. Post-conflict governments may distinguish themselves from former regimes by encouraging the formation of inclusive political coalitions and ensuring citizens' security, justice, and jobs, with a view to improving the legitimacy of institutions capable of resolving disputes peacefully. *WDR2011* also recognized that transitional justice can be one of the "core program tools" to help communities break out of these crippling cycles of violence.¹⁷

Nuanced responses to legacies of mass violence can play a part in building this civic trust, such as when citizens' rights are taken seriously through reparations programs and apologies, when root causes of conflict are exposed through truth-telling exercises or public acknowledgement of past violations, or when judicial institutions operate fairly and independently. Crucially, vetting and other institutional reform measures that aim to prevent the recurrence of human rights abuses, particularly when implemented in combination with other measures of acknowledgement and redress, can help to affirm basic norms of accountability that build confidence within communities, and between communities and the state. *WDR2011* highlights how transitional justice initiatives

send powerful signals about the commitment of the new government to the rule of law. Even if institutional or political factors do not allow for full redress, early gathering of information on human rights violations and assisting victims can signal serious intent to overcome legacies of impunity and rights violations at both the community and national level.¹⁸

All states have legal obligations not only to protect fundamental human rights, but also to ensure that victims of serious violations have access to effective remedies and guarantees that such violations will not happen again.¹⁹ International policy makers acknowledge that resolving legacies of past violence

¹⁷ *World Development Report 2011: Conflict, Security and Development*, World Bank, 2011. The report notes that even when formal conflict ends, violence can evolve into new forms equally as destructive to community security and development, like violence associated with organized crime or illicit trade.

¹⁸ *Ibid.*, at 125.

¹⁹ The UN General Assembly recognized these obligations through its adoption by consensus of the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (2005). Existing legal obligations are also collated in the *Updated set of principles for the protection and promotion of human rights through action to combat impunity* (2005). In 2011 the UN Human Rights Council established a UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence to assist states in meeting

and exclusion is contentious, but that “there is growing acceptance that legacies of violence that remain unaddressed, such as ongoing impunity for crimes committed or failure to establish a new truth about the nature and experience of violence and conflict, can be an ongoing source of grievance and fragility.”²⁰

There has been considerable convergence in other areas of the international peacebuilding agenda in recognizing that tackling issues of injustice is necessary for both security and development. Both the UN Secretary-General and the UN Security Council have recognized that impunity for serious human rights violations can threaten international peace and security, and that “transitional justice processes and institutional capacity-building are mutually reinforcing.”²¹ In the move toward more effective aid delivery, justice features as one of the five Peacebuilding and Statebuilding Goals adopted at Busan in the “New Deal for Engagement in Fragile States.” As part of this high-level initiative, policymakers identified the ongoing incidence of human rights violations as a way to measure levels of (in)security in communities and the level of impunity enjoyed by military and police officials as a way to gauge public distrust in these institutions.²²

International stakeholders have an opportunity to fulfill their commitments to human rights protections and ensure victims’ rights to remedy in their support of: development initiatives; reforms of the justice, security, and economic sectors; and peacebuilding in Myanmar. The following section explains how these goals are not only mutually reinforcing but also essential components of a successful reform process.

Justice-Sector Reform

Several Burmese lawyers consulted for this analysis saw attempts to seek justice for past violations as futile without a functioning justice system. Private-sector risk analysts, too, have consistently cited justice-sector reform as an urgent need to facilitate a confident foreign investment climate, not only in terms of regulatory clarity but also enforceability of contracts, protection of real and intellectual property rights, as well as rights relating to labor, consumers, and the environment.²³ While a functioning justice system is a priority, the view that justice for the past is restricted to criminal accountability reflects a limited understanding of justice and accountability as only achievable through the courts. While criminal justice should be considered as a central part of approaches to accountability and reform, reparations, truth seeking, and institutional reform are not simply substitutes in the absence of criminal justice, but provide forms of redress and accountability that are important in their own right.

As mentioned above, donors have responded to the democratic opening in Myanmar with support for governance and rule of law programming. Australia’s Department of Foreign Affairs and Trade (DFAT) supports the United Nations Development Programme (UNDP)’s work on democratic governance, including rule of law and access to justice. UNDP is working with Myanmar’s Office of the Attorney General of the Union and the Office of the Supreme Court of the Union on fair trials, judicial independence, and public accessibility as well as with civil society on access to justice. Following an assessment carried out in 2013, the US Agency for International Development (USAID) is now implementing a large program on rule of law, including development of a national rule of law strategy, improvements in legislation drafting, strengthened self-governance of the judiciary, and enhanced capacity of civil society organizations working on rule of law. The UK’s Department for International Development (DfID) has continued its support for paralegal activity for nongovernmental organizations. These efforts recognize

these obligations.

20 Pilar Domingo and Lisa Denney, “The Politics of Practice: security and justice programming in Fragile and Conflict Affected States,” Office of Development Initiatives, December 2012.

21 “The rule of law and transitional justice in conflict and post-conflict societies,” *Report of the Secretary-General*, UN Doc S/2011/634, October 12, 2011. See also, UN Security Council Resolution 1894, 63th Year. Resolutions and Decisions of the Security Council, 2009 (New York: Official Record S/RES/1894, 2009).

22 See “Progress Report on Fragility Assessments and Indicators,” International Dialogue on Peacebuilding and Statebuilding Working Group on Indicators, December 4, 2012. According to the “Joint submission to consultation on shared indicators” from the CSO Platform for Peacebuilding and Statebuilding, January 2013, one of the main criticisms by civil society to the proposed indicators is that there is a disproportionate focus on justice-service delivery rather than community perceptions and experiences of injustice, and a lack of any direct reference to transitional justice measures.

23 See “Reform in Myanmar: implications for business and political risks,” *Risk Advisory*, March 2013.

the need for reform at the highest levels as well as development of civil society's capacity to engage with the emerging justice sector.

However, several stakeholders interviewed for this paper emphasized that public trust in the rule of law is impacted most by community-level interaction with public administration. So far the national reform message has a long way to trickle down before low- to mid-level Burmese bureaucrats change their long-established ways of operating. Too often, citizens' attempts to assert newly confirmed rights are met with arbitrary or discriminatory reactions by local officials. UNDP has carried out a feasibility study on the establishment of Rule of Law centers aimed at supporting efforts to ensure local judges and other law enforcement personnel have the capacity to carry out their work. A governmental coordinating committee is slated to review options for establishing the centers in the first half of 2014. In order to build confidence in the reforms and sustain their momentum, development actors should draw from this approach and seek to incorporate the priorities of local populations—including land issues and freedom of assembly—into their programming.

Such assessments and public consultations should provide a clearer picture of how rule of law institutions operate and how people on the ground perceive them. A lack of public trust in the formal justice system, including for past crimes, is a major challenge for Myanmar's reform efforts, and alternatives that already function could fill some of the gap. In some areas, armed groups have organized well-established systems of public administration, including justice processes; in others, communities rely heavily on customary laws and methods of resolving disputes.²⁴ As part of both peace and development strategies in Myanmar, policymakers should give careful consideration to whether these can be scaled up to relieve the burden on an ill-equipped formal system that will likely take decades to rebuild. Deliberate effort will be needed to determine how and to what extent the informal justice system can be harmonized with other rule of law institutions, but these issues so far seem largely below the radar of both government and aid providers.²⁵

The Security-Development Nexus

While donor programming in Myanmar does not directly link development planning with security issues, some direct engagement with the Myanmar Armed Forces, the Tatmadaw, has begun. In March 2013, then Australian Prime Minister Julia Gillard announced a restoration of military cooperation aimed at encouraging the Tatmadaw to support democratization and reform.²⁶ The United Kingdom followed suit in July, assigning a defense attaché to Yangon and planning military-to-military trainings on human rights and the law of armed conflict.²⁷ In August, US Ambassador Derek Mitchell said initial US engagement with the Tatmadaw would focus on humanitarian issues, officer professionalization, and human rights.²⁸

Possible reforms of the security sector go to the heart of concerns about the fragility of the transitions underway. As a leading expert on Myanmar's opaque military emphasizes, "Leaders of the Tatmadaw have defined and controlled the process."²⁹ The uncertainty about the degree to which the president is able to really control the armed forces highlights both the importance and sensitivity of the issue. The publication of the 2013 military budget submitted to parliament was a significant first step, albeit far from complete, given the extent of income-generating enterprises controlled by military interests. An October 2013 letter signed by over one hundred ethnic civil society organizations to the governments of the UK, Australia, and the US raised concerns about their engagement with the Tatmadaw. The

24 Mary Callahan, "Political Authority in Burma's Ethnic Minority States: Devolution, Occupation, and Co-existence," East-West Center, 2007.

25 Discussions of "convergence" between official and parallel systems are taking place in areas such as health and education, and similar approaches could be extended to systems for resolving grievances and providing redress to victims of human rights violations. For discussion on the relevance to the peace process of service provision within areas controlled by armed groups, see Charles Petrie and Ashley South, "Mapping of Myanmar Peacebuilding Civil Society," prepared for the Civil Society Dialogue Network, March 2013.

26 *Associated Press*, "Myanmar to have closer ties, military cooperation from Australia," March 18, 2013.

27 Damien McElroy, "Britain to offer military training to Burma to help end ethnic conflicts," *The Telegraph*, July 14, 2013.

28 Tim McLaughlin, "US and Myanmar up military engagement," *Myanmar Times*, August 1, 2013.

29 Mary Callahan, "The generals loosen their grip," *Journal of Democracy*, October 2012.

letter included several recommendations related to transitional justice, including leveraging military-to-military engagement with preconditions of public acknowledgement by the military of human rights violations and establishment of legitimate justice and accountability mechanisms that apply to the military. Development actors engaging with the military and other security-sector institutions should take the concerns and recommendations of civil society organizations seriously or risk losing legitimacy in the eyes of local populations and civil society.

Economic Reform

The economic reform agenda remains a high government priority in Myanmar's transition, much of which seems aimed at opening up the country to international markets. As mentioned above, for the remainder of Thein Sein's term the newly formed national reform committee aims to focus on basic needs. In announcing this committee, the president also instructed ministers to decentralize many tasks to region and state governments, marking another policy shift away from previous regimes, which kept tight, centralized control over the economy.³⁰ International development assistance in the form of foreign aid, while significant, "will be dwarfed by flows of private capital."³¹

Failing to deal with the long legacy of human rights violations is likely to impact on economic development more broadly in Myanmar.³² Already evident is the increasingly organized public opposition to major projects that have proceeded without adequate community consultation or involvement. *WDR2011* confirms the real security risks inherent in the mixed blessings of a "resource curse," where economic reliance on the extractive industry raises national production levels but produces few employment opportunities. The sudden access to Myanmar's resources can concentrate economic benefits in the hands of a small elite and cause numerous other grievances. Within the context of an already-fragile community-state relationship, economic reform that leads to negative environmental and cultural impacts, while judicial remedies remain inadequate, could spark new forms of conflict.³³

Some of these issues are supposed to be recognized in the safeguards imposed as loan conditions by international financial institutions, such as impact assessments and the ability to provide adequate compensation for compulsory land acquisition.³⁴ However, these offer little reassurance to communities skeptical of a model that is based on facilitating large-scale agricultural or industrial development or natural resource extraction.

Private foreign investors are already calculating the reputational risk of dealing with business partners whose historical involvement in abuses may expose them to public critique or even legal liability. Corporate social responsibility standards contained in voluntary codes, such as the UN Global Compact or the Extractive Industries Transparency Initiative (which Myanmar has indicated it will join), represent important commitments to accountability.³⁵ However, they cannot immunize individuals and legal entities from possible litigation.³⁶ This is more than a theoretical risk, as Myanmar has already been seen in a US court case against the Union Oil Company of California (Unocal) for its complicity in forced labor, rape, and murder committed by government security forces during the construction of the Yadana pipeline.³⁷

30 "National reform leading committee led by the President has been formed separately to direct efforts on reform programme," *New Light of Myanmar*, August 10, 2013.

31 Lex Rieffel and James W. Fox, "Too Much, Too Soon? The Dilemma of Foreign Aid in Myanmar/Burma," *Nathan Associates Inc.*, March 2013.

32 *Ibid.*

33 For detailed economic analysis of how this is likely to affect Myanmar, see Stuart Larkin, Myanmar at the Crossroads: Rapid Industrial Development or De-industrialization, January 1, 2012; Vikram Nehru, Myanmar's Economic Policy Priorities, The Carnegie Endowment for International Peace, November 2012.

34 World Bank and the Asian Development Bank strategies are focusing on building the capacity of the government to comply with these safeguards and other requirements in order to lay the groundwork for future large-scale loans. See Asian Development Bank, "ADB-Myanmar Partnership Strategy," www.adb.org/countries/myanmar/strategy; World Bank, "Myanmar Overview: Strategy," April 2013, www.worldbank.org/en/country/myanmar/overview

35 Extractive Industries Transparency Initiative, "Myanmar Appoints EITI Lead," December 17, 2012, <http://eiti.org/news/myanmar-appoints-eiti-lead>

36 Sam Zarifi and Benjamin Zawaki, "Myanmar needs an effective legal system, and so do its foreign investors," *South China Morning Post*, March 28, 2013.

37 In 2000 a federal district court in Los Angeles found that the foreign companies involved knew of both the military's human

The *United Nations Guiding Principles on Business and Human Rights*, endorsed in 2011 by the UN Human Rights Council, likewise articulate an accountability framework both for corporate and state responsibility to “protect, respect and remedy” human rights violations. The extent to which these new tools will be used by justice advocates for both past and present claims, against both Myanmar nationals (some of whom remain on US government blacklists) and those international partners planning to provide technical assistance to the government or facilitate their own national trade and investment interests, remains to be seen.

So far, the “crony” business associates of the former regimes and the military’s own enterprises are among those best positioned to benefit from economic development in Myanmar. As the field continues to open, their preferential status may be threatened, risking both an escalation of violations as they try to consolidate land holdings and even a potential spoiler effect as their political power decreases.³⁸ Although many are now trying to rebrand themselves as legitimate and constructive social contributors, exposing their accountability for past violations may play into these tensions either positively or negatively. Similar dynamics may be relevant to some nonstate armed groups, whose incomes have been heavily dependent on illicit trade.

Peacebuilding

A lasting resolution of Myanmar’s more than 20 long-standing conflicts is inextricably connected to the overarching political and constitutional framework, coexistence of national and local identities, the legacy of Myanmar’s colonial past, and access to decision making and benefits around economic development.³⁹ Although it seems that there are moves on various sides to identify a framework for common issues across the numerous negotiations that could be tackled jointly, some will remain specific to particular conflicts or groups. It remains to be seen whether a common approach to issues of transitional justice can emerge from this complexity. The common thread that runs between the political imprisonment and torture experienced by urban-based political activists and the forced labor, displacement, and killings experienced in rural conflict-affected areas is the perception by the ruling juntas that the victims were enemies of the state and a threat to their power. However, a response to remedy the harm experienced in those two very different environments will need to take into account their diversity of experiences of harm, cultures, and political economies. In addition, the extent to which security and justice institutions are able to integrate former combatants and civilians into power-sharing arrangements will also fundamentally influence the character of those institutions and their attention to human rights and justice, both past and present.⁴⁰

As various national and international actors seek influence, the scope for greater inclusivity and resolution is accompanied by the potential for competing claims that make finding common ground even more challenging. In other post-Cold War peace agreements around the world, accountability and judicial reform were among the most common issues covered, although elections and security sector reform featured most frequently.⁴¹

In Myanmar, another key feature is the emergence of nongovernment initiatives, such as the Civil Society Forum for Peace and the International Peace Support Group, which are sharing information and providing linkages between formal and informal peace discussions. There are some indications that peace discussions are beginning to raise justice issues as a theme requiring further consideration.⁴²

rights record and that they benefited from these practices in the construction of the pipeline project, opening the way for a trial under the Alien Torts Statute on UNOCAL’s direct liability for human rights abuses. In 2005 UNOCAL settled the case and provided compensation to the villagers/plaintiffs. See www.earthrights.org/legal/doe-v-unocal-case-history

38 International Crisis Group, *Myanmar: the Politics of Economic Reform*, July 27, 2012.

39 See Ashley South, *Prospects for Peace: Opportunities and Threats*, PRIO, 2012; “Ending Burma’s conflict cycle? Prospects for ethnic peace,” Transnational Institute, February 2012.

40 For a discussion on transitional political arrangements, power sharing and power dividing, see Charles T. Call, *Why Peace fails: The Causes and Prevention of Civil War Recurrence*, Georgetown University Press, 2012.

41 A World Bank and UNDP Statebuilding project that followed the Paris Aid Effectiveness declaration examined 27 peace agreements since 1989. Although “overall almost all agreements include at least one justice-related provision,” unlike elections and security reform, the justice provisions had fewer references to international assistance in implementation. Astri Suhrke, Torunn Wimpelmann, and Marcia Dawes, *Peace Processes and Statebuilding: Economic and Institutional Provisions of Peace Agreements*, Chr. Michelsen Institute, 2007, 24–26.

42 In April 2013, a Civil Society Forum for Peace meeting included a thematic discussion of justice and peace for the first time, and

Development actors involved in these initiatives, including the European Union and DfID, should continue to provide support to civil society organizations seeking to engage with the peace process by, among other efforts, improving their capacity to raise and advocate around their concerns, including those related to addressing the past.

More formally, the Myanmar Peace Center (MPC) has been established with the government's endorsement to coordinate and provide strategic policy guidance to peace initiatives, like the government's own peace committees, and to act as a "one-stop service center" for other groups that wish to support the processes. MPC is also the conduit through which many international donors are directing funds in support of peace.⁴³ In early 2014, ethnic opposition groups formed the Pyidaungsu Institute for Peace and Dialogue as a research and study center to support ethnic organizations, including armed groups, to develop a "common voice" in negotiations with the government. So far it is unclear how these structures will operate to service various thematic topics that may start to emerge once a framework for substantive political talks is agreed on. Many of those involved see the government's hope of not just holding political dialogue but finalizing peace agreements with all armed groups before the 2015 elections as extremely ambitious.

Given the depth of ethnic grievances regarding human rights violations and the prospects of greater community inclusion in the processes, it is foreseeable that justice options may soon begin to feature in peace discussions. Even in terms of addressing immediate community needs, humanitarian agencies and a range of other groups have found a high level of mistrust by ethnic groups of officially endorsed initiatives. Indeed, some groups view any effort to provide limited forms of development assistance with suspicion or even as an attempt to reduce fundamental grievances about lack of self-determination to simple economic disadvantage. Trust-building measures that include an acknowledgement of past wrongs may go some way to easing these dynamics. Addressing this trust deficit should be included in donor support for humanitarian and development work in conflict-affected areas if those programs are to be effective and sustainable.⁴⁴ At the same time, any steps taken have to be more than superficial acts of tactical convenience. Genuine steps are needed that persuade citizens that there is a sincere shift from authoritarianism to respecting the fundamental rights of citizens as citizens.

The Myanmar government declined to support a declaration supported by 113 other countries at the 2013 UN General Assembly pledging not to allow amnesties for sexual violence in peace agreements. There is also a risk that armed groups might push for amnesties not only for acts connected to their illegal status, but also for crimes they have committed, which would preclude criminal proceedings.⁴⁵ It is worth noting that international guidelines for mediators have increasingly recognized the importance of complying with international human rights standards, which disallow amnesties for crimes of international concern.⁴⁶

Progress toward political dialogue is edging forward, though more slowly and precariously in Kachin State. The NCCT, which represents over a dozen armed groups, and the government's negotiating team exchanged drafts of a nationwide ceasefire agreement in December 2013. Since then, informal and

participants agreed to continue discussions and activities on transitional justice issues.

43 For instance Japan and the EU, among others.

44 The depth of this mistrust cannot be underestimated, as was demonstrated by initial community protests over inadequate local consultations regarding a Myanmar Peace Support Initiative pilot project to provide emergency assistance to internally displaced persons in Kyauk Kyi.

45 The current ceasefire with the Chin National Front (CNF) contains a provision that may be interpreted as an amnesty for crimes committed. However, the same provision has also been interpreted as limited to arrests related to status as members of the CNF or associated persons. The relevant provision reads: "The parties agreed that the Union-level Peace Team submit to the President the need to declare amnesty to anyone who have been arrested and imprisoned on account of CNF and CNA since the establishment of the organization, effective the date of the signing of the agreement." Chin National Front-Government Agreement, Unofficial Translation by the Chinland Guardian. There is a risk that provisions in a national ceasefire agreement or in political dialogue intended to allow members of armed organizations to travel to negotiations without fear of arrest would be written or interpreted as a broad amnesty for human rights violations and breaches of international humanitarian law.

46 For example, *The United Nations Guidance for Effective Mediation* was overhauled from 2005–6 and now makes clear that UN mediators cannot endorse any agreement that allows amnesty for crimes against humanity, war crimes, genocide, or gross violations of human rights. See Priscilla Hayner, *Negotiating Justice: Guidance for Mediators*, Centre for Humanitarian Dialogue and International Center for Transitional Justice, 2009.

technical meetings have taken place to narrow the gap between the two drafts, resulting in common agreement on seven chapters as of mid-April 2014. There seems to be broad consensus among ethnic groups on the importance of starting discussions based on the framework of regional autonomy provided in the 1947 Panglong Agreement, or at least in a similar “spirit of Panglong.” The Working Group for Ethnic Cooperation, which has overlapping membership with the NCCT and also includes civil society groups, proposed a process for comprehensive national dialogue addressing 19 thematic topics, with task forces and thematic committees proposing drafts with options and background analysis on a range of issues for approval through the conference.⁴⁷

So far, the government's negotiating team has indicated openness and flexibility, although these are early days and it is difficult to say how the current crisis of anti-Muslim violence will impact peace-process dynamics, for instance, in favor of greater acknowledgement of serious human rights violations committed against a range of ethnic minorities. Any approach to accountability and reform needs to be alert to the divisive potential of contributing to a situation where one group is perceived to benefit more than others, including regarding issues of reparations or recognition of identity-based rights. The legacy of colonial-era policies in this regard is only too clear: the British administration's differential treatment of “Ministerial Burma” and the “Frontier Areas,” the system of privileging certain ethnic minority groups in the army during British rule as a means of minimizing a Burman-led anti-colonial rebellion, and ultimately its sacrifice of some groups' aspirations in preparations for the country's transition to independence.⁴⁸

47 The draft document suggests all parties agree on the need for a “just and genuine peace” and that they acknowledge the suffering caused by over 60 years of conflict. Among the recommendations that the Working Group on Enhanced Coordination outlines is the creation of a mechanism to address “historical injustices against ethnic nationalities.” It also envisions a transitional justice process that will take place after the political dialogue process.

48 Although an important historical marker, the Panglong process itself was neither fully inclusive (it only involved Kachin, Chin, and Shan) nor uncontroversial at the time: Matthew J. Walton, “Ethnicity, Conflict and History in Burma: The myths of Panglong,” *Asian Survey*, Vol. 28 No. 6 (2008), 889–910.

5. An Appetite for Transitional Justice?

The growing space for public expression has produced mixed results in terms of justice claims taking root. On the one hand, there is an understandable wish, particularly by those enjoying new-found freedoms, to simply enjoy what has already been achieved in three years. Many people fear the potential disruption by hardliners within the military or other spoilers, whose past and ongoing privileges may be threatened by current reforms. International stakeholders appear particularly concerned not to push too far too fast. This is acutely evident regarding any direct discussion about criminal accountability. However, efforts to grapple with other forms of accountability for the past are already bubbling to the surface.

Calls for acknowledgement and remedy from former political prisoners and democracy activists are gaining voice, amid a flourishing of general civic activity. The plight of those who have lost the most productive years of their life to torture, inhuman treatment, and political imprisonment is spurring support for rehabilitation efforts and ways of honoring their suffering.⁴⁹ This call for acknowledgement was a prominent theme during the 25th anniversary commemoration events of the 8-8-88 uprising, in 2013. Survivors of a litany of human rights violations, not all of which were perpetrated by military regimes, have begun to publish memoirs, and people are discussing the incidents freely in Yangon tea shops. For example, after remaining largely silent for twenty years to avoid giving the regime further propaganda to use against the democracy movement, former members of the All Burma Students' Democratic Front (ABSDF), many of whom were tortured and killed in a vicious internal purge in 1992, are now speaking out, and both judicial and non-judicial investigations are underway.⁵⁰

Public commemorations of past violence are not only taking place but also enjoying at least tacit official approval. In the 2013 commemoration of the 1989 Tharrawaddy Prison strike, when authorities brutally cracked down on political prisoners who were on a hunger strike in protest of prison labor requirements, survivors called for their experiences to be acknowledged by the government and society at large, for younger generations to learn lessons from their experiences, and for activists to guard against the recurrence of such atrocities. In mid-March 2013, activists called publically for what they have designated as Human Rights Day to be recognized as a public holiday, linking acknowledgement of past atrocities to efforts to prevent recurrence. At an emotional commemoration ceremony honoring political prisoners who died while in custody, 88 Generation leader Min Ko Naing called on members of the former regime to take responsibility, saying, "If they are honest enough to confess their guilt, our national reconciliation process will be a lot easier."⁵¹ Recently deceased NLD co-founder U Win Tin, whose foundation has been providing assistance to released political prisoners, had echoed calls for an

49 Associated Press, "Forgetting the Past is the price of change in Myanmar: 2 years into reforms," *Washington Post*, March 28, 2013.

50 See "ABSDF survivors, relatives prepare petition and lawsuit," *The Myanmar Times*, September 24, 2012; Bertil Lintner "Old atrocity, new implications," *Democracy for Burma*, October 31, 2012, quoting a source as saying "if the students after 20 years haven't forgotten and forgiven those who killed their own comrades, what about justice for all those thousands of people who were killed by the military's bullets in 1988 or were tortured and had to spend most of their youth in dark prison cells?"

51 "Calls for Apology Over Deaths in Custody Under Burma's Junta," *The Irrawaddy*, January 2, 2014.

apology and for the state to provide rehabilitation to released political prisoners. Of his foundation's work, he said, "Now we are doing what they (the members of the regime) are supposed to do."⁵²

Lawyers and community groups too are beginning to test the boundaries of the new constitutional rights regime (limited though it is), including by filing habeas corpus suits for cases of enforced disappearance and compiling dossiers of land-grab cases.⁵³ In the face of entrenched corruption and a lack of judicial independence, such efforts are unlikely to produce results in the near future unless political will is matched by meaningful reform in the judicial sector. At the same time, attempts to challenge the system and make it work offer important indicators of where specific reform efforts could be directed. Judicial independence from executive interference, judicial transparency, and the repeal of key laws that authorities continue to abusively use should be priorities. Those international development actors with judicial reform programs, including USAID and UNDP, should coordinate with—and reinforce the efforts of—local lawyers and community groups to strengthen the judicial process and independence in accordance with international standards. The holding of regular meetings among international and local actors working in the rule of law sector is a positive step in this direction.

A 2011 study by the Ethnic Nationalities Council lists ethno/religious discrimination in appointment to public positions, corruption, and impunity for human rights abuses by state authorities as issues that persist despite ceasefires.⁵⁴ Shan groups have also identified language rights, militarization, protection of farmers and their land, access to natural resource benefits, and problems with mega-development projects as major concerns.⁵⁵ Similarly, environmental degradation, forced labor, and land confiscations are exacerbated by armed conflict, though such abuses are not limited to ethnic areas, as claims around the Dawei Special Economic Zone demonstrate.⁵⁶

Humanitarian agencies report that, for now at least, the demands of communities displaced by fighting are focused on basic security and protection needs. Other priorities, besides calls for demilitarization and de-mining, are access to land for farming and compensation for destroyed property. However, without a solid political settlement in place to cement peace deals, neither the military nor the armed groups are likely to give up any strategic advantages (such as the locations of troop bases or landmines) in this regard, even if more egregious practices such as using civilians as minesweepers do cease.

Given the diversity of interests, demands, and even the varying and evolving relationships between the armed groups and their respective communities, reaching any such settlement—and identifying what might constitute justice for the past—is no easy task. In some negotiations, but not all, the parties have made such claims explicit. For instance, in its first agreement with the government, the Karen National Union proposed a range of points, including the release of political prisoners, resolution of land-rights disputes, and an end to the use of forced labor. Making efforts to seek out a representative range of voices from those directly affected, however, is critical to formulating any justice response, and so far little has been done in this regard.⁵⁷ Providing financial and technical support to a broad range of stakeholders interested in engaging with the peace process could contribute to the inclusion of more representative views.

52 "Despite a Frugal Existence, a Former Inmate Spends and Spends," *The Irrawaddy*, December 18, 2013.

53 Ko Htwe, "Burma's Supreme Seat of Power," *Democratic Voice of Burma*, Jul. 3, 2013 and Simon Denyer, "In Burma, fear gives way to anger toward well-connected business elite," *Washington Post*, March 26, 2013.

54 Paul Keenan, Ethnic Nationalities Council, "Discrimination, Conflict and Corruption: the Ethnic States of Burma," 2011.

55 In June 2012 a group of 80 Shan groups issued a joint statement of their concerns, followed by the November 2012 release of the results of a survey of more than 2,500 Shan community members from 39 townships.

56 Land Grabbing in Dawei, *Myanmar/Burma: A (inter)national human rights concern*, Paung Ku and Transnational Institute, September 2012. See also *Access Denied: Land Rights and Ethnic Conflict in Burma*, Transnational Institute, May 2013.

57 A noteworthy exception was put together by the Centre for Peace and Conflict Studies as part of its "Listening Project" in mid-2011. Its research was small in scale (23 interviews with civil society leaders and workers in Yangon) and framed around the proposal for an international inquiry into human rights crimes, which has since lost momentum. However, the report remains relevant in its presentation of a range of perspectives on where justice for past abuses fits with other competing priorities, and what form justice and reconciliation mechanisms inside the country might take. See *Myanmar Voices on the Commission of Inquiry*, Centre for Peace and Conflict Studies, July 2011.

6. Integrating Transitional Justice in Reforms and the Peace Process

Many of the issues raised in this report suggest that demands for a reckoning with the harsher aspects of the past will continue to emerge and gain momentum. Both national and international actors could, therefore, benefit from some strategic preparedness to help ensure that this happens in constructive ways, while mitigating the risks that these issues may trigger new conflicts in the current transitional process.

Data Gathering/Research

An initial step in dealing with the past should be to ground approaches and aspirations in the local and national context. This should include making serious efforts to find out how systematic violations have manifested themselves, to understand what the victims and affected communities believe ought to be done, and to evaluate those findings as policies are developed. For foreign actors involved in development or peace process assistance, a common view is that there is no obvious public demand for accountability for past crimes. The UN Special Rapporteur on the Situation of Human Rights in Myanmar has reiterated his call for parliamentary consideration of a truth commission, while acknowledging that Myanmar's elite seems uninterested in such a proposal.⁵⁸ Such a view raises a common conundrum: to what extent is a call for justice and accountability flawed if it appears to be “supply-led” (as opposed to “demand-led”)?

It is unsurprising that a rights-based discourse requiring accountability for systematic abuse is not fully formed in Burmese civil society. This is a product of decades of repression much more than a reticence to take human rights seriously. The first step in promoting a rights-based society is awareness of rights and the relationship of state to citizen in guaranteeing those rights. The strength of the appetite for accountability and the priority it receives can only be meaningfully assessed when there is a sufficient awareness of the rights involved.

One of the greatest challenges to a range of interventions now is the lack of reliable data on public expectations and needs, including on experiences of injustice. Baseline assessments and surveys that are already being planned could include references to indicators of impunity and popular sentiment on the issues.⁵⁹ Research needs to take into account the country's diversity and include attention to the drivers of past and ongoing conflict.

Because of the country's huge diversity, there are great dangers in extrapolating broader trends across lines of ethnicity, religion, geography, conflict affectedness, and development levels. Gender-based disparities of experience, particularly in conflict zones, are also critical to include. Generic research on

⁵⁸ Report of the Special Rapporteur on the situation of human rights in Myanmar, Tomas Ojea Quintana A/HRC/22/58, March 6, 2013.

⁵⁹ A useful tool for this purpose is the *Impunity Watch Research Instrument*: www.impunitywatch.org/en/publication/2

popular attitudes to peace, justice, and development need to be accompanied by more targeted inquiries about potential remedies to deal with the legacy of sustained human rights abuses.

For rule of law based on human rights to take hold, it will need to incorporate trustworthy modes of redress for violations of citizens' rights (whether past, present, or future). One key piece of this is to gather data and analysis about community grievances and perceptions of injustice and to track how they may evolve over time. In conflict zones (including recent ceasefire areas), basic protection concerns and demilitarization may be what people articulate now; once these are met, it should not be assumed that other concerns—including fulfilling rights to truth, reparation, and justice—will not surface quickly.

In addition to community engagement currently emerging around peace discussions, popular education and consultation processes ahead of the elections in 2015 offer space to gather views on justice and the ongoing impact of past violations. Analysis of the 2014 census process—the data as well as the methodological flaws that occurred in the process of data collection—could also be a key source for understanding the composition and distribution of ethnic groups, which will be essential for designing any transitional justice response in a conflict-sensitive way.⁶⁰

Many people interviewed for this research emphasized the importance of timing and the pervading sense that while reforms are real, much remains uncertain, particularly in relation to the role of hardliners in the military and, to a lesser degree, the model of economic development. Pragmatic starting points could lay the groundwork for more comprehensive initiatives in the future.

Institutional Capacity Building

Rebuilding institutional capacity specifically around the justice sector needs high-level focus (constitutional reform, judicial independence), but it may also involve connections with other sectors. One interviewee commented that any serious investigation into crimes by regimes and nonstate armed groups (including for nonjudicial purposes, such as a truth commission, vetting, or identifying reparations beneficiaries) will likely require access to military archives and the cooperation of key individuals from inside the system. Such steps are unlikely at this stage in the transition, but groundwork can be laid by including, for example, support for freedom of information and transparency in policies around legislative reform and public administration capacity-building measures.⁶¹

These are often part of the array of formidable challenges inherent in rebuilding a badly broken justice or security sector that has been heavily complicit in state-sponsored abuse of human rights, highlighting the links between the legacy of past violations and preventing new ones. As one international development representative consulted for this report summed up, “You need vetting before you start capacity building, otherwise you will just be rewarding the wrong people.” The counter-argument, however, is that some basic investment in this regard can help embolden reform-minded change agents, even within the weakest institutions.

For all of these reasons, capacity development in justice and security programming should include training, performance reviews, and oversight mechanisms that incorporate attention to the remedy provisions of international human rights standards. Specialized skills to investigate and prosecute serious human rights violations, like sexual and gender-based violence, will be needed for police, prosecutors, judges, and lawyers as part of future-oriented efforts; but they can also lay the groundwork for past cases. Similarly, skills in forensic accounting and asset tracing that are part of transparency initiatives have proven useful in Peru and the Philippines for tracking the connections between human rights

60 For example, information about single woman-headed households may suggest areas where higher number of husbands died or fled due to conflict.

61 Support for transparent government is a priority of a number of development actors, and USAID specifically mentions potentially supporting advocacy for Freedom of Information laws and asset disclosure by government officials. United States Agency for International Development, Burma, www.usaid.gov/burma.

violations and economic crimes.⁶² At the same time, as more of the old guard retire, greater opportunities will emerge, which means the current period can be used for gathering documentation, reforming laws, and consolidating skills.

Leveraging Incentives

The transition in Myanmar provides an opportunity for authorities to realign the relationship between the state and citizens. The government has made efforts to rehabilitate its reputation before the Human Rights Council, yet its brief response to the 2013 report of Special Rapporteur Quintana shows that old habits of officially denying the existence human rights violations will take longer to break.⁶³ International actors supporting reforms should leverage incentives to uphold the rights of victims of human rights violations to truth, justice, reparations, and guarantees of non-recurrence.

Aside from well-established processes, such as complaints mechanisms under the International Labor Organization and other human rights treaty body reviews, key milestones in the near future may offer both incentives and leverage points for demonstrating concrete progress on issues of respect for human rights in general and the country's progress in providing effective remedies for past violations. An invitation to the newly established UN Special Rapporteur for the promotion of truth, justice, reparations, and guarantees of non-recurrence could be a constructive step for the government to take in this regard. Likewise, international partners could make better use of the accepted frameworks contained in the Updated Principles in Combating Impunity and the Basic Guidelines on victims' rights to remedies in their design and assessment of support to reform processes. Where addressing social and economic inequalities are identified as development priorities already, consideration should be given to how reparations programs offer opportunities such as reducing the vulnerability and stigmatization of certain groups, including child soldiers and victims of gender-based violence.

As the first country to assume the ASEAN chair after the adoption of the ASEAN Human Rights Declaration, throughout 2014 Myanmar may find itself (and the ASEAN meetings it hosts) under greater scrutiny about the application of the rights enumerated in the declaration, including the rights to peace and development. In 2015 the ASEAN economic community will also enter into force, which will raise the stakes in terms of broadening a pool that has been dominated by military-owned enterprises and their business partners.

Looking further ahead, engaging the military under its new leadership will be critical to both the future trajectory of the transition and prospects for accountability. In consciously stepping back, the Tatmadaw has ceded profile, voice, and status to the new civilian leaders, many of whom, of course, recently left military careers themselves. But to head off any backlash to reforms, particularly that could be provoked by "justice talk," the armed forces need to see tangible benefits in the process, including through the rehabilitation of the reputation of both the institution and individuals.

Offers of training, rehabilitation, or resource/infrastructure support, some of which may be provided through defense cooperation arrangements or other justice/police/security reforms (including those around anti-corruption responses), could be linked not just to human rights training but also to the review and removal of those responsible for the most serious human rights violations. In March 2014, the UN Secretary General's Special Advisor on Myanmar, Vijay Nambiar, discussed with the Commander-in-Chief of Myanmar's Defence Services, Senior General Min Aung Hlaing, a potential

62 "A Complementary Relationship: Reparations and Development," Naomi Roht-Arriaza and Katharine OrlovskyRoht-Arriaza and Orlovsky, in *Transitional Justice and Development: Making Connections*, Pablo de Grieff and Roger Duthie, eds. (2009), 202, citing "The Fondo Especial de Administración de Dinero Obtenido Ilícitamente a Perjuicio del Estado (FEDEDOI) holds funds recovered from ex-president Alberto Fujimori and his officials. According to the National Human Rights Commission, it has been used for the Comprehensive Reparations Plan. Informe CCDDHH 2006, citing Proyecto de Ley 110-2006-PE" and Conference of the States Parties to the United Nations Convention against Corruption, Digest of Asset Recovery Cases (Draft), November 2013 (CAC/COSP/2013/CRP.10), 10, para. 16.

63 Myanmar's second Universal Periodic Review will take place in 2015. See the official response to the Special Rapporteur's report at UN Document A/HRC/22/58/Add1, 6 March 2013.

Myanmar contribution to UN peacekeeping operations and said the UN Department of Peacekeeping Operations would consider a request from Myanmar according to standard procedures for UN member states.⁶⁴ This may also provide an opportunity to leverage transitional justice concerns with the Myanmar government's wishes to be more fully engaged in the international community. Significant progress has been made in ensuring that domestic individual records on human rights are taken into account, as some senior Nepalese and Fijian military officers have recently discovered.

Likewise, the ultimate transformation of nonstate armed groups into political actors or regional security forces, or integration into other state structures, may mean some similar issues come into play, not just for those armed groups without close relationships with the communities under their control. Even in cases where armed groups enjoy high levels of local legitimacy and support, their own human rights records will be subject to scrutiny once a discussion about past abuses begins in earnest.

Preserving Space for Organic Responses to the Legacy of Human Rights Violations

In a still-uncertain transition, where those widely viewed as responsible for human rights violations continue to wield significant power, it is understandable that any consideration of justice for past violations requires a context-driven and conflict-sensitive approach. Just as a genuinely Burmese approach cannot be lifted from South Africa or Indonesia, even assuming there can be a single national narrative or framework would not be appropriate, given the diverse history and experiences of the many peoples and parts of the country. Support for reform initiatives should preserve space for organic responses.

Local articulations of justice for the past may focus on such issues as the effects of long- and short-term displacement, the lack of a land title system, language use, and economic autonomy and making sure that the Burman majority knows what has happened in ethnic areas.⁶⁵ It is important for various stakeholders to recognize that victims may begin to express a desire for justice once the novelty wears off of simply being able to go about one's daily business without "politics" being used as a constant threat.

With an increase in public discussions and writing about the human rights legacy of military rule, it is important for policy makers, both national and international, to attend to what is being said and how public discourse evolves. The role of political leaders—old and new—in the lead up to the 2015 elections will be crucial to how they identify and appeal to their constituencies, what manifestos they choose as competitive, and how, in turn, community views are represented. Likewise civil society, media, and business leaders will also have opportunities to shape and reflect portrayals of Myanmar's past. Community-based forms of truth telling or conflict-resolution ceremonies that draw from local religious or customary practices would already be in use, and it would be worth investing in learning more about them if they could be appropriately utilized. The challenge for outside support is to know where to look and listen, and to know how contributions can channel maximum results.

64 "Myanmar Rights Post Set for Yanghee Lee, As UN Invites Peacekeepers," *Inner City Press*, March 4, 2014.

65 Although South Africa is often referred to as the example par excellence in this regard, the truth commissions in Peru and Guatemala, or recent transitional justice efforts in Colombia, may offer more relevant practice for Myanmar, as those countries' conflicts took place largely outside urban centers and impacted significantly on indigenous minority communities. Many indigenous victims have testified to the importance of having the majority community know and recognize what they suffered, and that the armed conflict was a continuation of a "permanent state of war" against attacks on land, culture, language, and political self-determination. See www.ictj.org/news/transitional-justice-and-struggle-indigenous-rights

7. Conclusions

In a period of rapid political and social change in Myanmar, key policy actors, national and international, have not made accountability and nonrepetition measures a priority. Despite the lack of willingness or a strategy to deal with the past, grievances related to human rights violations are emerging in various sectors, including from released political prisoners, conflict-affected communities, and displaced farmers. The urge to “leave the past behind” is based on a misperception that a before-and-after line can be drawn easily between the previous military regimes and the current reform government. For displaced farmers whose land has been taken, they still do not have their land. For survivors of torture and political imprisonment, the mental and physical harm they suffered may have lingering or worsening effects. On a broader scale, the atrocities committed by the previous regimes against ethnic communities and political dissidents have fractured any trust these groups may have once had in the state.

Between now and the 2015 elections, the government of Myanmar faces many challenges in its efforts to continue the reform and peace processes while also facing the contemporary problems that threaten to disrupt reforms. At the heart of these challenges is the need to curb the skepticism about the genuineness of reforms and peace efforts. As the government tries to transform the ceasefire agreements into a national political dialogue, it faces ongoing armed conflict in Kachin and northern Shan states. Grievances over land confiscation have increased since 2011, and anti-Muslim violence has created a sense of insecurity and fear in many parts of the country. Addressing these contemporary conflicts must involve some attempt to deal with the past in order to tackle their root causes.

During this volatile period, the government has an opportunity to distinguish itself from previous regimes. Security and livelihood concerns are a priority for most of the population. Integrating transitional justice approaches into the reform agenda will strengthen economic, judicial, and security-sector reform efforts. As the *WDR2011* demonstrates, addressing grievances for past human rights violations can increase the likelihood that development is sustainable. Transitional justice need not be a conflict trigger in the peace and reform process. As former UN Secretary-General Kofi Annan has said, “You first need to stop the killing, but if you do not have justice and people do not feel that their grievances have been dealt with, it is extremely difficult to get serious reconciliation.”⁶⁶

In policy documents, donors and international advisors have made commitments to victims' rights, and their obligation to help protect these rights has been recognized through a range of UN bodies and documents. Translating those values into priorities on the ground in Myanmar must entail customizing them to the local context, engaging with people potentially affected by those policies, and recognizing that communities emerging from armed conflict are likely to have delayed demands for justice. But a sustainable peace and a durable reform process will depend in part on those demands being addressed.

66 “Peace versus Justice: A False Dilemma,” (video) ICTJ, May 2011.

Recommendations

The following recommendations are for donors and policy makers engaged in development, rule of law, peacebuilding, and other sectors related to democratic reform in Myanmar.

Incorporate Transitional Justice in Development and Peacebuilding Programming

- Apply the guidance from *WDR2011* that recognizes transitional justice as an effective tool to break cycles of violence.
- Make use of the frameworks provided in the *Updated Principles in Combating Impunity and the Basic Guidelines* on victims' rights to remedy in the design and assessment of support to the reform process.
- Encourage actors involved in the peace process to include technical assistance or advising on ways to address the past.
- Do not support a peace agreement that includes amnesty for serious crimes.

Research

- Include reference to indicators of impunity and popular sentiment on justice in baseline assessments and surveys.
- Gather data and analysis of community grievances and perceptions of injustice and how those can affect the implementation of community development projects.
- Support targeted research about potential remedies for legacies of sustained human rights abuses.
- Support efforts to investigate and document community-based forms of truth telling or conflict-resolution, including local justice systems, that are currently in use.

Build Capacity

- Include training, performance reviews, and oversight mechanisms that incorporate international human rights standards in all capacity-development programming related to justice and security sectors.
- Include specialized skills to investigate and prosecute serious human rights violations, including sexual and gender-based violence, in capacity building for police, prosecutors, judges, and lawyers.
- Condition military-to-military engagement and technical support on public acknowledgment of human rights violations and establishment of legitimate justice and accountability mechanisms that apply to the military.
- Condition offers of training, rehabilitation, or resource/infrastructure support for defense cooperation agreements or security sector reforms on review and removal of those responsible for the most serious human rights violations.

Leverage Incentives

- Leverage incentives for support of development, rule of law, and peacebuilding with encouragement to uphold the rights of victims of human rights violations to truth, justice, reparations, and guarantees of non-recurrence.
- Where reduction of economic and social inequality has been identified as a development goal, encourage the development of reparations programs aimed at reducing vulnerability and stigmatization of certain groups, including victims of gender-based violence and child soldiers.

Preserve Space for Organic Responses

- Recognize the shifting pace of public discourse about past military rule and anticipate the emerging programming needs for transitional justice.
- Identify community-based forms of truth telling or conflict-resolution ceremonies that draw from local religious or customary practices and how they may be utilized to support development, peace building, and rule of law efforts.

