

# Ill Fares the Land: Reparations for Housing, Land, and Property Rights Violations in Myanmar

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*International law includes provisions for restitution or compensation for victims of housing, land, and property (HLP) rights violations. Practical challenges remain for addressing violations of HLP rights in transitional societies characterized by the continuation of sporadic, low-intensity conflict or the incompleteness of regime change. The inability to address HLP rights violations in such contexts has resulted in “rights gaps,” weaknesses or absences of rule of law resulting in the inability to pursue accountability for those most responsible for violations that further enable the continuation of HLP rights violations under the successor regime. Without respect for HLP rights, practices such as land-grabbing perpetuate conflict, displacement, and illicit trade. Through a review of existing literature on land reform and transitional justice, this article considers complex histories of dispossession, using the case of land-grabbing in Myanmar’s Kachin State to consider means of reparation that go beyond land restitution and compensation in transitional societies. The article proposes alternative means of reparation, such as the incorporation of customary land tenure into statutory frameworks and the pursuit of foreign government and corporate accountability, which aim to achieve broader aspirations for victims of land-grabbing and resource-based conflict.*

## I. INTRODUCTION

Housing, land, and property (HLP) rights are fundamental to individual and collective identity, recognition, security, and development.<sup>1</sup> Violations of these rights may serve as determining or aggravating factors in the commission of other human rights violations, as well as in violence and armed conflict.<sup>2</sup> HLP rights violations often occur in three different contexts: during active armed conflict or state repression, in “insecure situations” where the state is unstable but still maintains control, and after the cessation of hostilities when societies are attempting to reestablish rule of law. During

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1. Francis Cheneval, *Property Rights as Human Rights*, in REALIZING PROPERTY RIGHTS 11, 11–17 (de Soto & Cheneval eds., 2006).

2. Agnès Hurwitz, *Beyond Restitution: Housing, Land, Property, and the Rule of Law*, in CIVIL WAR AND THE RULE OF LAW: SECURITY, DEVELOPMENT, HUMAN RIGHTS 193, 195 (Agnes Hurwitz & Reyko Huang eds., 2008).

periods of armed conflict and state repression, land and resources serve as a “pivot of power” for armed groups and anti-democratic regimes.<sup>3</sup> In insecure situations, armed groups, established elites, and political entrepreneurs alike often challenge tenuous state control to gain privileged access to land and natural resources<sup>4</sup> as a means of institutionalizing unequal distribution of landholdings, depriving people of access to land, or illegally or unjustly dispossessing landholders for the sake of gaining power. Even after hostilities cease, people are forcibly evicted or displaced using legal and extralegal means that exacerbate post-conflict problems and create potential for renewed conflict over illegal occupation, overlapping claims, lack of documentary evidence to ownership, and gender discrimination in access to land and property assets.<sup>5</sup> During transitions from conflict or repression, one issue that invariably arises is the status of the HLP rights of individuals.<sup>6</sup> Therefore, consideration of HLP rights in transitional justice processes becomes essential for remedying past violations and preventing their recurrence in new political systems.

The use of a transitional justice lens to examine HLP rights violations seeks to combine the provision of legal remedy for past violations in accordance with a juridical conception of justice, with the provision of present benefits to victims in accordance with a humanitarian conception of civilian protection and a political conception of community-building.<sup>7</sup> Reparations programs in particular have the potential to achieve these objectives both in states emerging from periods of protracted armed conflict and in those transitioning from anti-democratic to ostensibly more democratic regimes, which are addressed jointly due to numerous similarities in their transitional trajectories.<sup>8</sup> Bodies of international law that are applicable in times of peace and conflict—including international humanitarian law, international human rights law, and refugee law—provide for restitution of housing, land, and property. Yet law alone is rarely sufficient to guarantee state respect for human rights, particularly in transitional states.<sup>9</sup>

The practical challenges associated with achieving the juridical and normative objectives of reparations programs in transitional societies often result in “rights gaps” that enable the continuation of HLP rights violations

3. DEMETRIOS CHRISTODOULOU, *THE UNPROMISED LAND: AGRARIAN REFORM AND CONFLICT WORLDWIDE* 1 (1990).

4. David A. Lake & Donald Rothchild, *Containing Fear: The Origins and Management of Ethnic Conflict*, 21 *INT'L SECURITY* 41, 44–45 (1996).

5. Hurwitz, *supra* note 2, at 195.

6. JON ELSTER, *CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE* 168–87 (2004).

7. Pablo de Greiff, *Justice and Reparations*, in *THE HANDBOOK OF REPARATIONS* 451, 452–54 (Pablo de Greiff ed., 2006).

8. Chris Huggins, *Linking Broad Constellations of Ideas: Transitional Justice, Land Tenure Reform, and Development*, in *Transitional Justice and Development: Making Connections* 332, 343 (Pablo de Greiff & Roger Duthie eds., 2009).

9. SCOTT LECKIE & EZEKIEL SIMPERINGHAM, *HOUSING, LAND & PROPERTY RIGHTS IN BURMA: THE CURRENT LEGAL FRAMEWORK* 13 (2009).

under the successor regime. Rights gaps manifest in three primary ways during transitional periods. First, the highly technical nature of HLP systems<sup>10</sup> and the need to provide both immediate attention to and long-term support for HLP rights during periods of conflict and transition enable individuals and groups to capitalize on complex and contradictory regulations to seize land. Weaknesses in land titling and administration, particularly in states characterized by the continuation of sporadic, low-intensity conflicts in peripheral territories or incomplete regime changes, are often aggravated by tensions between customary rights and formal legal systems.<sup>11</sup> Second, rights gaps may result from lacunae between different bodies of international law that are applicable during armed conflict, or between international and domestic laws that are commonly suspended in emergency situations.<sup>12</sup> Determining the relevant body of law to address violations of HLP rights, its scope of application, and its enforceability can be complicated where legal infrastructures are severely damaged or absent and where capacities to enforce laws are limited in ungoverned spaces where the rule of law was previously weak. Third, rights gaps may result from difficulties determining who should be held accountable for massive human rights violations and how to pursue accountability.<sup>13</sup> Challenges associated with establishing legal-factual links of responsibility between perpetrators and their acts are particularly prevalent where evidence of a connection to the violation is weak or non-existent, or where political considerations prevent successor regimes from pursuing accountability.<sup>14</sup>

As a result of these rights gaps, many HLP rights violations committed in the context of armed conflict or anti-democratic regimes may continue, and even escalate, during the transitional period. This necessitates a more comprehensive conception of reparations that extends beyond the legal concept of restitution to provide redress for the myriad damages associated with HLP rights violations and build more inclusive communities after the transitional period. This article considers the challenges of providing reparations for past HLP rights violations when the complexities of the transitional period enable their perpetuation under the successor regime. First, the legal, normative, and contextual elements of reparations for past and ongoing HLP rights violations are explored through a transitional justice lens. Second, specific HLP rights violations are examined in detail using the

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10. Hurwitz, *supra* note 2, at 193.

11. Rep. of the Advisory Group of Experts for the 2015 Rev. of the U.N. Peacebuilding Architecture, *The Challenge of Sustaining Peace*, ¶ 16, U.N. Doc. A/69/968-S/2015/590 (Jun. 29, 2015).

12. Alexander Orakhelashvili, *The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?* 19 EUR J. INT'L L. 161, 165 (2008).

13. M. Cherif Bassiouni, *Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights*, in POST CONFLICT JUSTICE 383, 388–89 (M. Cherif Bassiouni ed., 2002), <https://perma.cc/JJL3-6WQA>.

14. Nelson Camilo Sánchez, *Corporate Accountability, Reparations, and Distributive Justice in Post-Conflict Societies*, in CORPORATE ACCOUNTABILITY IN THE CONTEXT OF TRANSITIONAL JUSTICE 114, 115 (Sabine Michalowski ed., 2013).

case study of land-grabbing in Myanmar's resource-rich Kachin State to create a typology of HLP rights violations. Third, the feasibility of various principles of reparations for HLP rights violations are explored and subsequently evaluated within the political context of Myanmar's transition. Finally, an examination of the traditional concepts of restitution and compensation is complemented by the consideration of customary land tenure reform and foreign government and corporate accountability as feasible means to address the broader needs and aspirations of victims. Based on analysis of existing literature and of the Myanmar case study, this article argues that legal and normative approaches to transitional justice should be combined to close rights gaps and achieve maximum satisfaction for victims.

## II. INTERNATIONAL LEGAL AND NORMATIVE CONSIDERATIONS FOR HOUSING, LAND, AND PROPERTY REPARATIONS

Transitional justice is comprehensively defined as the set of practices, mechanisms, and concerns that arise following a period of conflict, civil strife or repression, and that are aimed at confronting and dealing with past violations of human rights and humanitarian law.<sup>15</sup> The protection of victims' rights has become a central concern of modern transitional justice processes,<sup>16</sup> necessitating both restorative and reparative means of addressing social relations after conflict or massive human rights violations.<sup>17</sup> In the aftermath of massive human rights violations committed by the state and its agents, reparations play an important role in state-building by restoring victims to equal citizens, promoting trust in institutions, strengthening the rule of law, and encouraging social integration or reconciliation.<sup>18</sup> Central to this notion is the ability of reparations to acknowledge harm, accept some degree of responsibility, avow sincere regret, and promise not to repeat the offense.<sup>19</sup>

Reparations are the most victim-centered transitional justice mechanism because they have the potential to respond more directly to victims' needs

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15. Naomi Roht-Arriaza, *The New Landscape of Transitional Justice*, in TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE 1, 2 (Naomi Roht-Arriaza & Javier Mariezcurrena eds., 2006).

16. Diana Contreras-Garduño, *Are All Victims Entitled to Reparations? The Case of the Inter-American System of Human Rights*, in TRANSITIONAL JUSTICE: BETWEEN CRIMINAL JUSTICE, ATONEMENT AND DEMOCRACY 120, 120–141 (A. Mitr ed., 2012).

17. Margaret Urban Walker, *Restorative Justice and Reparations*, 379 JOURNAL OF SOCIAL PHILOSOPHY 37 (2006).

18. Pablo de Greiff, Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, *Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, ¶ 9, U.N. Doc. A/69/518 (Oct. 14, 2014).

19. G.A. Res. 60/147, ¶ 15–23 (Mar. 21, 2006).

and priorities when their rights have been violated.<sup>20</sup> Two different victim-centered notions of justice emerge in regards to reparations: the juridical notion of legal justice, which can be best understood as the achievement of justice as fairness for individuals in isolated cases; and the pragmatic notion of political justice, which considers the specific political, cultural, economic, and social context and the associated constraints during the design of massive reparations programs for a wider and more complex constellation of victims.<sup>21</sup> Therefore, it is important to combine attempts to address both the reparative needs of victims with their aspirations for a more democratic future in which they are full rights-holders.

### A. *International Legal Considerations*

A number of existing bodies of international law reference HLP rights. But before examining how the international legal regime addresses HLP rights, it is important to understand what these rights confer upon their beneficiaries. In a legal sense, land rights are those property rights that pertain to the access and ownership of land and natural resources, which typically concern the ability of title-holders to possess, make use of, or alienate property.<sup>22</sup> Property rights refer to a broad set of rights that includes “use rights,” which allow the right holder to use an asset for consumption and/or to generate income; “transfer rights,” which allow the right holder to sell, donate or bequeath; and “entitlement rights,” which allow the right holder to rent, mortgage, or pledge the asset for use and enjoyment by others.<sup>23</sup> Housing rights are included within the broader conceptualization of land and property rights to address the right to basic shelter and extend greater legal protection to tenants, cooperative dwellers, and individuals who lack secure tenure within property systems.<sup>24</sup> Yet even the more comprehensive grouping of HLP rights has been criticized for its failure to consider the collective interests and aspirations associated with ownership or access to natural resources, non-tangible goods, and legal infringements on “opportunities to appropriate.”<sup>25</sup> Therefore, any attempts to provide legal remedy for HLP rights violations must consider the complexities of the scope and applicability of such rights vis-à-vis a broad constellation of rights holders in the design of reparations programs.

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20. Lars Waldorf, *Anticipating the Past: Transitional Justice and Socio-Economic Wrongs*, 21 *SOC. & LEGAL STUDIES*, 171, 177 (2012).

21. de Greiff, *supra* note 7, at 452–54.

22. A.M. Honoré, *Ownership*, in *OXFORD ESSAYS IN JURISPRUDENCE* 112, 1122–28 (A.G. Guest ed., 1961).

23. Hamid Rashid, *Land Rights and the Millennium Development Goals: How the legal empowerment approach can make a difference*, in *LEGAL EMPOWERMENT: PRACTITIONERS' PERSPECTIVES*, 219, 219–220 (Stephen Golub ed., 2010).

24. Hurwitz, *supra* note 2, at 194.

25. Nahshon Perez, *Property Rights and Transitional Justice: A Forward-Looking Argument*, 46 *CAN. J. OF POL. SCI.* 135, 139 (2013).

Reparation is one of the primary ways of providing legal remedy to victims of human rights violations. In the broadest conception, reparations refer to the measures that may be employed to redress the various types of harms that victims may have suffered as a consequence of certain crimes.<sup>26</sup> Although reparation includes both material and non-material elements, it is essentially a legal question containing political and moral dimensions that must be considered equally when addressing past injustice. In order to understand how HLP rights violations committed within the context of large-scale land-grabs could be rendered justiciable, it is important to examine different bodies of law that are applicable in times of both armed conflict and state repression.

Despite the fact that numerous HLP rights violations are committed during armed conflict, international humanitarian law is of limited use for protecting housing, land, and property. Specifically, this body of law does not apply to conflicts that are not of an international nature. When large-scale land-grabs occur within the context of armed conflict, they are commonly confined to the territory of a single state and are committed by a state's regular armed forces and identifiable armed groups, or between such armed groups fighting amongst themselves.<sup>27</sup> Therefore, the law of non-international armed conflict is the only applicable subset of law in such situations. The problem is that Article 3 common to the four Geneva Conventions and their Additional Protocol II—the only provisions regulating non-international armed conflict—do not grant civilian property a general protection.<sup>28</sup> Therefore, the state, its national armed forces, and identified groups are essentially absolved of responsibility for providing reparation to victims of HLP rights violations during non-international armed conflicts.

Potential recourse for HLP rights violations may be found in a more expansive reading of the prohibition on pillage in Article 4(2)f of Additional Protocol II of the Geneva Conventions—which the International Committee of the Red Cross (ICRC) commentary applies to “all types of property, whether they belong to private persons or to communities or the State,”<sup>29</sup> and which includes “acquisitions through contracts based on intimidation, pressure, or a position of power derived from the surrounding armed conflict.” Although the conventions extend the prohibitions to non-state actors—such as insurgents, corporations, and individual citizens<sup>30</sup>—specific reparations provisions in the law of armed conflict are still being

26. de Greiff, *supra* note 7, at 452.

27. Saturnino M. Borrás Jr. et al., *Towards a Better Understanding of Global Land Grabbing: An Editorial Introduction*, 38 J. OF PEASANT STUD. 209, 209–16 (2011).

28. HANS VAN HOUTTE ET AL., *POST-WAR RESTORATION OF PROPERTY RIGHTS UNDER INTERNATIONAL LAW: VOLUME I: INSTITUTIONAL FEATURES AND SUBSTANTIVE LAW* 202–03 (2008).

29. INT'L COMM. OF THE RED CROSS, *COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR* (Jean S. Pictet ed., 1958).

30. Andrew Clapham, *Human rights obligations of non-state actors in conflict situations*, 88 INT'L REVIEW OF THE RED CROSS 491, 491–523 (2006).

explored and their implementation is lacking.<sup>31</sup> In 2005, the ICRC asserted that states bear responsibility for reparations in both international and non-international armed conflicts.<sup>32</sup> The lack of state practice to support claims that such recognition signified the achievement of customary international law, combined with limited enforcement and monitoring mechanisms for violations, severely weakens this progressive interpretation.

International human rights law provides the basis for individuals to challenge state action both in times of peace and armed conflict. Provisions on remedies and reparations feature prominently in all human rights instruments, which provide avenues for individual claimants to pursue reparation through legally binding and quasi-judicial enforcement mechanisms.<sup>33</sup> Although there is currently no explicit reference to a general human right to land under international human rights law, both treaty and non-treaty law link land issues to the enjoyment of specific substantive human rights and provide the bases for property ownership and restitution.<sup>34</sup> Article 17 of the Universal Declaration of Human Rights (UDHR), parts of which have become customary international law and thus binding on all states,<sup>35</sup> provides for the right to own property, including adequate housing, and protects against the arbitrary deprivation of property.<sup>36</sup> Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interference with privacy or the home.<sup>37</sup> Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which implements the UDHR and is legally binding on all states, reaffirms the right to adequate housing and the right to continuous improvement of living conditions, and refers to property as one of the grounds on which

31. VAN HOUTTE ET AL., *supra* note 28.

32. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW*, 541 (2005) (“Rule 150. A State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused”).

33. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights ¶ 8 (December 10, 1948) (concerning “effective remed[ies]”); Organization of American States, American Convention on Human Rights art. 10, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (concerning adequate compensation) [hereinafter American Convention]; American Convention art. 63, 1144 U.N.T.S. 123 (concerning fair compensation); American Convention art. 10, 1144 U.N.T.S. 123 (concerning compensatory damages); International Covenant on Civil and Political Rights art. 9, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171 (mentioning “an enforceable right to compensation”); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 14, Dec. 10, 1984, 1465 U.N.T.S. 85 (mentioning “fair and adequate compensation, including the means for as full rehabilitation as possible”); Convention for the Protection of Human Rights and Fundamental Freedoms art. 41, Nov. 4, 1950, 213 U.N.T.S. 222 (concerning the “just satisfaction” of the victim).

34. Comm. on Human Rights, UN Doc. E/CN.4/2000/62 (Jan. 18, 2000) (recognizing a broad right to restitution). See also Comm. on the Elimination of Racial Discrimination, UN Doc. A/51/18 (Aug. 24, 1996) (mentioning the specific right to property restitution).

35. Richard B. Lillich, *Civil Rights, in HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES* 115, 116-7 (Theodore Meron ed., 1984).

36. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 71 (Dec. 10, 1948).

37. G.A. Res. 2200 (XXI) A, International Covenant on Civil and Political Rights, at 52 (Dec. 16, 1966).

discrimination is forbidden.<sup>38</sup> HLP rights have also been cited in numerous declarations affirming the rights of migrant workers,<sup>39</sup> disabled persons, elderly persons, and indigenous peoples.<sup>40</sup>

Perhaps the most substantive expansion of HLP rights under international human rights law has resulted from developments in refugee protection. The 1951 Convention relating to the Status of Refugees enshrines the rights of refugees to residence, property, housing, and freedom of movement. These include prohibitions related to forced displacement and deportation, and numerous rights including the right to return to one's home.<sup>41</sup> Since the early 1990s, support for the HLP rights of refugees and internally displaced persons (IDPs) has grown within the humanitarian community based on the recognition that securing access to adequate land and housing was crucial to both immediate and long-term attempts to meet some of the most basic shelter, protection, and livelihood needs in a manner that encouraged self-reliance rather than dependence.<sup>42</sup> The recognition of HLP rights for refugees and IDPs underscores the importance of securing these rights to long-term peace, stability, economic development, and justice.<sup>43</sup>

The development and implementation of property restitution policies, which aim to either restore the victim to the original situation before the rights violation occurred or provide substitution of in-kind goods,<sup>44</sup> have led to the emergence of a right to property restitution that derives from the right to an effective remedy under international human rights law.<sup>45</sup> The 2005 Pinheiro Principles asserted a post-conflict right to restitution of properties that displaced peoples left behind, as both a legal remedy for arbitrary displacement and a precondition for durable solutions.<sup>46</sup> The prohibition on forced, arbitrary, or illegal evictions, and the principle of tenure security, is particularly relevant to the protection of HLP rights in transitional contexts. In regards to land-grabbing, the Committee on Economic, Social, and Cultural Rights General Comment no. 7 underscores the impor-

38. G.A. Res. 2200 (XXI) A, International Covenant on Economic, Social and Cultural Rights, at 49 (Dec. 16, 1966).

39. G.A. Res. 45/158, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, ¶ 267 (Dec. 18, 1990).

40. G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, ¶ 4 (Sept. 13, 2007).

41. Rep. of the Economic and Social Council, *Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons*, U.N. Doc. E/CN.4/Sub.2/2005/17, ¶¶ 3-8 (Jun. 28, 2005) [hereinafter *Housing and Property Restitution*].

42. Norwegian Refugee Council and Int'l Federation of Red Cross and Red Crescent Societies, *The Importance of Housing, Land and Property (HLP) Challenges in Humanitarian Response, The Importance of Housing, Land and Property (HLP) Challenges in Humanitarian Response* (Apr. 29, 2016), <https://perma.cc/GN6F-F9SF>.

43. See, e.g., UNHCR Executive Comm., *Conclusion on Legal Safety Issues in the Context of Voluntary Repatriation of Refugees* U.N. Doc. A/AC.96/1003, ¶ h-i (Oct. 8, 2004).

44. VAN HOUTTE ET AL., *supra* note 28, at 250-257.

45. Rep. of the Comm. on the Elimination of Racial Discrimination on its Fifty-First Session, UN Doc. A/51/18, ¶ 309 (Aug. 24, 1996).

46. *Housing and Property Restitution*, *supra* note 41, ¶¶ 3-8.



tance of tenure security as a safeguard against forced evictions, including forced population transfers, internal displacement, and forced relocations.<sup>47</sup> Provisions of remedy or recourse for violations of the right to adequate housing are provided through legal appeals aimed at preventing planned eviction, illegal actions by landlords or their agents, and discrimination in the allocation of available housing.<sup>48</sup>

Despite numerous references to HLP rights in international law, legal provisions alone are rarely sufficient to guarantee state respect for such rights. Ultimately, states must accede to these mechanisms and agree to be bound by their provisions. Many states, including Myanmar, are not parties to the ICCPR or the ICESCR, and thus are not bound to adhere to their provisions. In addition, obligations embodied in international legal instruments are vague and abstract, and are difficult to implement. For example, the ICCPR and ICESCR do not provide for the right to peacefully enjoy adequate housing and property *per se*; they only entail prohibitions on discriminatory actions, which require legal measures designed to ensure consistent implementation.<sup>49</sup> Furthermore, most international human rights treaties are conceived and configured to respond to violations suffered by individuals rather than through massive programs.<sup>50</sup> The gap between international law and its successful implementation at the national and local levels enable the continuation of HLP rights violations under the successor regime.

### B. Normative Considerations

Although a universally applicable, codified right to housing and property restitution under international human rights law may not currently exist *in practice* in all circumstances of dispossession, its recognition as a core human right is gaining acceptance.<sup>51</sup> Yet international law may only play an indirect role in this phenomenon. For example, it has been argued that a “repa-

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47. U.N. Comm. on Economic, Social and Cultural Rights, *General Comment No. 7: The Right to Adequate Housing (Art.11.1): forced evictions*, U.N. Doc. E/1998/22, annex IV (May 20, 1997).

48. According to the committee, “Tenure takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property. Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.” U.N. Comm. on Economic, Social, and Cultural Rights, *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, ¶ 8, U.N. Doc. E/1992/23, (Dec. 13, 1991); *See also id.* at ¶ 16; U.N. Secretary-General, *Forced Evictions: Analytical Report Compiled by the Secretary General Pursuant to Commission Resolution 1993/77*, ¶¶ 153–158, UN Doc. E/CN.4/1994/20 (Dec. 7, 1993).

49. Richard Falk, *Reparations, International Law, and Global Justice*, in *THE HANDBOOK OF REPARATIONS* 478, 485 (Pablo de Greiff ed., 2006).

50. de Greiff, *supra* note 7, at 454.

51. Scott Leckie, *New Directions in Housing and Property Restitution*, in *RETURNING HOME: HOUSING AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS* 3, 12 (Scott Leckie ed., 2003).

rations ethos”<sup>52</sup> is developing based on the belief that individuals who have been injured in accordance with applicable international human rights standards should be compensated *restitutio in integrum*. This phenomenon may be more attributable to moral and political considerations in transitional periods, requiring a normative rather than a legal approach to move reparation for HLP rights abuses from theory to practice. According to this approach, large-scale administrative programs that are designed to respond to a large constellation of victims obviate some of the difficulties and costs associated with trying isolated, individual cases.<sup>53</sup> These programs maintain a complementary relationship with different justice measures, which may be employed to provide redress for the various types of harms that victims may have suffered as a consequence of certain crimes.

The diverse forms and functions of reparations can be found in the numerous UN non-binding standards that have greatly expanded the concept of reparations for victims of serious human rights abuses. The 1985 Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power anticipated reparations provisions for victims who have suffered harm “through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights.”<sup>54</sup> The Declaration paved the way for international recognition of a right to reparation while emphasizing the need for national legislation to enact and enforce the right to remedy at the domestic level. The 2005 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 defined the principles of reparation as restitution, compensation, rehabilitation, satisfaction, and guarantees of non-recurrence.<sup>55</sup> Although these principles did not specifically address HLP rights, they reflected the normative connection between international humanitarian and human rights law, and stressed the importance of, and obligation to, implement domestic reparations.<sup>56</sup>

Transitional justice practitioners often apply the Basic Principle and Guidelines to HLP issues during the design and implementation of restitution programs. Restitution is often the ideal approach for victims, and is the legally prescribed approach for states to facilitate return to one’s place of residence and return of property.<sup>57</sup> As previously described, attempts to restore land ownership to the situation predating the conflict or authoritarian regime often focus on restoring the condition and integrity of land registers

52. Falk, *supra* note 49, at 485.

53. de Grieff, *supra* note 18 ¶¶ 3–4.

54. G.A. Res. 40/34, annex, Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power, ¶ 18 (Nov. 29, 1985).

55. G.A. Res. 60/147, *supra* note 11, ¶ 18.

56. CHRISTINE EVANS, *THE RIGHT TO REPARATION IN INTERNATIONAL LAW FOR VICTIMS OF ARMED CONFLICT* 37 (2012).

57. *Housing and Property Restitution*, *supra* note 41, ¶¶ 2.1, 2.2.

and conducting only as much registration and adjudication as necessary to confirm those titles.<sup>58</sup> In cases of gross violations of international human rights law, however, it is often materially, politically, economically, or legally impossible to re-establish the situation that existed before the wrongful act, or provide in-kind compensation.<sup>59</sup> Often, land registers are missing or irreparably damaged and titles—if they previously existed—are similarly missing or contested. This is particularly true in cases where land and property have been seized or destroyed in the context of armed conflict and where elements of the previous regime or belligerent groups gain or retain power after the hostilities cease. Competing claims and the rights of third parties create additional complications in the post-transition period. In such instances, compensation may be a more viable option.

Compensation refers to the transfer of money or goods dissimilar to the affected property and should be provided for any economically assessable damage as appropriate and proportional to the gravity of the violation and the circumstances of each case.<sup>60</sup> Financial or in-kind compensation is often considered more feasible than restitution because it provides more room for negotiation, it requires no search for lost goods, and it is easier to distribute.<sup>61</sup> Compensation is also preferable for victims who are unwilling to return to their homes based on fear of retribution, or for foreign investors who have lost confidence in the political and economic environment.<sup>62</sup> When consulted about how to meet their basic needs in the transitional period, a majority of victims often rank compensation as more important than trials.<sup>63</sup> Yet compensation also proves infeasible in many contexts. Financial disparities between formerly owned property and substitutes offered by the new regime can create issues of redistribution by focusing less on what one should own in light of past ownership than on what is the baseline of welfare to which one is entitled regardless of past entitlements.<sup>64</sup> Compensation is also inherently divisive, pitting individuals and groups against one another over who receives compensation and how much. In this regard, compensation has the potential to violate rights and incite new conflict.<sup>65</sup>

Rehabilitation typically concerns the provision of medical and psychological care, as well as legal and social services.<sup>66</sup> In a broader sense, rehabilitation also refers to measures that seek to rehabilitate the civic status of victims and their families after periods of conflict or repression.<sup>67</sup> Within

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58. Huggins, *supra* note 8, at 350.

59. VAN HOUTTE ET AL., *supra* note 28, at 255.

60. G.A. Res. 60/147, *supra* note 19, ¶ 20.

61. VAN HOUTTE ET AL., *supra* note 28, at 323.

62. *Id.* at 324.

63. Waldorf, *supra* note 20, at 177.

64. Perez, *supra* note 25, at 139.

65. *Housing and Property Restitution*, *supra* note 41, at Principle 17.4.

66. G.A. Res. 60/147, *supra* note 19, ¶ 21.

67. de Greiff, *supra* note 18, ¶ 37.

the context of HLP rights violations, rehabilitation may also consider the restoration of housing, land, and property titles to recover or sell property, settle inheritance disputes, and support members of society who are typically alienated from ownership, such as women and girls. The provision of housing support also underscores the humanitarian emphasis on HLP rights to meet basic shelter, protection, and livelihood needs.

Satisfaction for damages, particularly moral damages, aims to provide effective measures to provide full reparation.<sup>68</sup> Verification of the facts and full and public disclosure of the truth about HLP rights violations are commonly employed to address such violations in ways that establish the dignity and reputation of victims. Truth-seeking mechanisms such as commissions of inquiry and truth commissions collect facts to detail individual cases of dispossession, provide a means to hear testimony about the contested history of control over land, and highlight the full range of grave human rights violations in a way that increases the level of understanding for the need to redress HLP rights violations and creates an authoritative record for future accountability.<sup>69</sup> Although truth-seeking measures can help build the political and public support for governments to respond favorably to victims' needs,<sup>70</sup> addressing such "historical" issues involves political risks, including threats to post-conflict stability and reconciliation.

Guarantees of non-recurrence, which aim to prevent the reigniting of conflict or future commission of abuse, are essential to justice reconciliation. The structural causes of conflict or oppression, including both political and economic implications, must be carefully considered to address the root causes of violations.<sup>71</sup> In order to realize the broader goals of social transformation and the prevention of conflict driving transitional justice processes, it is important to identify the sources of the legitimate grievances that, if unaddressed, may erupt in renewed conflict.<sup>72</sup> Review and reform of the laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law are also important to provide greater legal clarity and protection against HLP rights violations in the future.<sup>73</sup> For instance, land tenure reforms, such as systematic land registration processes, have the potential to remedy inequitable access to and ownership of land by fundamentally re-structuring tenure systems and, in doing so, prevent future disputes.<sup>74</sup>

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68. Theo van Boven, Special Rapporteur, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, ¶ 48, UN Doc. E/CN.4.Sub.2/1993/8 (Jul. 2, 1993).

69. Huggins, *supra* note 8, at 353.

70. PRISCILLA HAYNER, *UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS* 163 (2nd ed. 2001).

71. Huggins, *supra* note 8, at 350.

72. Louise Arbour, *Economic and Social Justice for Societies in Transition*, 40 L. & POL. 1, 1-27 (2006).

73. *Basic Principles and Guidelines*, *supra* note 19, ¶ 23 (h).

74. U.N. Food & Agric. Org., *Land Tenure and Rural Development*, ¶¶ 3.31-3.37, FAO Land Tenure Studies, 3, <ftp://ftp.fao.org/docrep/fao/005/y4307E/y4307E00.pdf>.

The various principles of reparations illustrate the complementary relationship between international legal and normative concepts of justice and provide guidance for their application. Although the provision of benefits grouped under all five principles may be beyond the mandate of any reparation program, the shift from strictly legal reparations for individual victims to complex programs that distribute material and symbolic benefits to a greater constellation of victims reflects a broadening of the underlying normative goals and ideals of reparation in a given context.

### III. CONTEXTUAL REALITIES OF REPARATIONS FOR HLP RIGHTS VIOLATIONS

Providing redress in post-conflict and transitional periods is often a complex task with numerous financial, political, and administrative challenges. The provision of individual or collective reparations for HLP rights violations are particularly challenging in societies where large-scale displacement has rendered broad segments of victims, or where state financial or logistical capacity cannot respond to massive numbers of victims.<sup>75</sup> The sheer magnitude of such challenges often requires acknowledging practical limits to a successor regime's ability to provide adequate compensation for past injustices. Although 'comprehensive' reparations programs that extend benefits to the victims of all the violations that may have taken place during a given period of conflict or repression are preferred, no program to date has achieved total comprehensiveness.<sup>76</sup> Instead, many programs seek 'complexity' by combining material and symbolic benefits in complementary arrangements to maximize results and reach more victims.<sup>77</sup>

In transitional periods reparations must seek to both remedy individual injustices and repair the broader society through the creation of a new political community.<sup>78</sup> For example, when HLP rights violations are addressed, they tend to focus on the return of confiscated property to its rightful owners. Although this may be the correct policy in simple cases, it proves inadequate within the vastly complex framework of transitional justice.<sup>79</sup> This practice also has the opportunity to impose or institutionalize discriminatory laws, especially when they alienate specific segments of the population, such as women and girls, from owning housing, land, and property. Values such as stability, equity, and fairness<sup>80</sup> thus become important considerations in the design and administration of reparations programs for HLP rights violations.

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75. HAYNER, *supra* note 70, at 165.

76. de Greiff, *supra* note 18, ¶ 26.

77. de Greiff, *supra* note 7, at 454.

78. *Id.*

79. Perez, *supra* note 25, at 141.

80. Louis Bickford, *Transitional Justice*, in THE ENCYCLOPEDIA OF GENOCIDE AND CRIMES AGAINST HUMANITY, 1045-47 (Dinah Shelton ed., 2004).

Depending on the nature of HLP rights violations in the period preceding transition, attempts to remedy injustice may require looking beyond individual cases of dispossession to focus on the entire land tenure system.<sup>81</sup> In this context, transformative reparations have the potential to rectify past injustices by combining the more traditional concept of reparations grounded in corrective justice for past violations with the forward-looking concept of distributive justice that seeks to address the current needs of victims.<sup>82</sup> Transformative reparations are innovative in the sense that they do not seek to restore victims to their situation before conflict or repression, which is often one of inequality or impoverishment; rather, they seek to “transform” the structural causes of the conflict and change the situation in which the victims live.

The successor regime’s choice of how and when to address HLP rights violations often requires prioritizing which rights to address. For example, the assumption that the realization of economic, social, and cultural (ESC) rights will logically follow the enjoyment of civil and political rights suggests that human rights can be “sequenced” in transitional justice processes in ways that systematically afford greater priority to some rights over others.<sup>83</sup> Yet, this prioritization may contradict the victim-centered nature of some transitional justice mechanisms, which hold that transitional measures should be consultative and responsive to the needs identified by victims themselves. Although victims often prioritize reparative and redistributive justice over retributive justice, mechanisms that address violations of HLP rights often receive low priority during the design and implementation of transitional justice processes.<sup>84</sup> Guaranteeing the satisfaction of immediate needs is essential for transitional justice mechanisms to be perceived as a priority.<sup>85</sup>

Reform of HLP arrangements in the transitional period therefore requires both immediate attention to address pressing economic needs and long-term support to create economic stability and growth. Action on the part of the successor regime and international stakeholders immediately after cessation of hostilities or regime change is crucial for meeting basic shelter, protection, and livelihood needs. In addition, HLP access changes that occurred during the previous period become consolidated and compounded,

81. Huggins, *supra* note 8, at 352.

82. Rodrigo Uprimmy Yepes & M. Saffon, *Reparaciones Transformadoras*, in *JUSTICIA DISTRIBUTIVA Y PROFUNDIZACION DEMOCRATICA* 34-43 (C. Diaz et al. eds., 2009); Uprimmy, Visiting Professor to the UNESCO Chair in Education for Peace, Human Rights and Democracy, Inaugural Address at Utrecht University: Between Corrective and Distributive Justice: Reparations to Cross Human Rights Violations in Times of Transition (Oct. 21, 2009).

83. Arbour, *supra* note 72, at 10.

84. Waldorf, *supra* note 20, at 175.

85. Pablo de Greiff, *Articulating the Links between Transitional Justice and Development: Justice and Social Integration*, in *TRANSITIONAL JUSTICE AND DEVELOPMENT: MAKING CONNECTIONS* 29, 30 (Pablo de Greiff & Roger Duthie eds., 2009).

thereby decreasing abilities to rectify them as time passes.<sup>86</sup> Comparative experience suggests that delay or inactivity may be a self-defeating strategy as conflict exacerbates HLP violations, particularly in terms of population displacement and the potential for land-grabbing by political elites, who use rent seeking to accrue political authority after the cessation of conflict.<sup>87</sup>

Numerous other considerations—including the nature of the perpetrator regime, the type of HLP violation, the sheer volume of violations, the time variable, and economic impacts of legal struggles to reach final decisions on HLP status—compound the enormity of this undertaking.<sup>88</sup> The next section examines these contextual considerations in-depth using the case of land-grabbing in Myanmar to consider how reparations measures may be designed based on individual and societal needs.

#### IV. LAND-GRABBING IN MYANMAR: PAST AND PRESENT HLP RIGHTS VIOLATIONS

Land-grabbing is a serious threat to those who rely on the land and associated resources for their livelihoods. Land-grabs are “land acquisitions or concessions that take place in one or more of the following circumstances: (i) in violation of human rights, particularly the equal rights of women; (ii) in the absence of free, prior and informed consent of the affected land-users; (iii) in disregard of, or without thorough assessment of social, economic and environmental impacts, including the way those impacts are gendered; (iv) without transparent contracts that specify clear and binding commitments about activities, employment and benefits sharing, and; (v) in the absence of effective democratic planning, independent oversight and meaningful participation.”<sup>89</sup>

Land-grabs can be ‘real’ (for instance, outright confiscation) or ‘virtual’ (for instance, acquiring resource concession or appropriating subsidies).<sup>90</sup> Whether ‘real’ or ‘virtual’, land-grabbing is focused on controlling the power to decide how and for what purposes land and resources can be used now and in the future.<sup>91</sup> Generally speaking, land-grabbing tends to fix or consolidate forms of access to land-based wealth by capturing power to control land and other resources like water, minerals, or forests.<sup>92</sup>

86. Huggins, *supra* note 8, at 343.

87. Daniel Fitzpatrick & Akiva Fishman, *Land Policy and Transitional Justice After Armed Conflicts, in JUSTICE AND ECONOMIC VIOLENCE IN TRANSITION* 263, 267 (Dustin N. Sharp ed., 2014).

88. Perez, *supra* note 25, at 141–46.

89. International Land Coalition, *TIRANA DECLARATION* (2011), <https://perma.cc/KG52-NWX9>.

90. *Id.*

91. Emily E. Harwell & Philippe Le Billon, *Natural Connection: Linking Transitional Justice and Development Through a Focus on Natural Resources, in TRANSITIONAL JUSTICE AND DEVELOPMENT: MAKING CONNECTIONS* 283, 290 (Pablo de Grieff & Roger Duthie eds., 2009).

92. John F. McCarthy et al., *Trajectories of land acquisition and enclosure: development schemes, virtual land grabs, and green acquisitions in Indonesia's Outer Islands*, 39 *JOURNAL OF PEASANT STUDIES* 521, 523 (2012).

Land-grabbing and associated crimes have been reported throughout Myanmar.<sup>93</sup> Reports of land-grabbing have been attributed to the construction of oil and gas pipelines along the southern coast and northern border areas,<sup>94</sup> to hydropower dams in the northern and eastern border areas,<sup>95</sup> to large-scale and artisanal mines in the north,<sup>96</sup> and to smaller industrial projects in urban centers in the middle of the state.<sup>97</sup> In a country where up to 70 percent of the labor force is estimated to be directly or indirectly engaged in agriculture,<sup>98</sup> and where approximately 25 to 40 percent of farmers are landless,<sup>99</sup> land-grabbing directly threatens the livelihoods of small-scale farmers and rural villagers. The consequences of land-grabbing and associated resource crimes are particularly acute in Myanmar's northern Kachin State—which has experienced the second-highest number of land grabs after neighboring Shan State—due to a shortage of available land and the Kachin State government's inability to combat the practice.<sup>100</sup>

Within this permissive environment, various actors have become skilled at using increasingly sophisticated legal and extra-legal means to gain power over land and resources. The primary perpetrators of land-grabbing include political and military leaders and their families, as well as military-affiliated Myanmar companies, cronies, ethnic armed groups (EAGs), and foreign companies. However, the lack of a clear distinction between the state, the government, and the armed forces (known as the Tatmadaw) from 1988 to 2010, when disputed elections ushered in an ostensibly civilian-led government headed by Thein Sein, complicates efforts to analyze past crimes attributable to these actors.<sup>101</sup> Further complicating matters, state and political authorities are linked to civil society actors and interest groups through domestic and foreign business concerns, some legal and other ille-

93. Yanghee Lee, Special Rapporteur of the Situation of Human Rights in Myanmar, *Report of the Special Rapporteur of the Situation of Human Rights in Myanmar*, ¶ 56, U.N. Doc. A/69/398 (Sep. 23, 2014).

94. Elizabeth Loewen, *Land Grabbing in Dawei (Myanmar/Burma): A (Inter)national Human Rights Concern* 1 (Paung Ku & Transnational Institute, 2012), <https://perma.cc/8HZ3-UBGF>; See also TRANSNATIONAL INSTITUTE, ACCESS DENIED: LAND RIGHTS AND ETHNIC CONFLICT IN BURMA 5 (2013), <https://perma.cc/8VS9-S26C>.

95. KACHIN DEVELOPMENT NETWORKING GROUP, LESSONS FROM THE KACHIN "DEVELOPMENT" EXPERIENCE 6 (2012), <https://perma.cc/RJR3-U6TZ>.

96. GLOBAL WITNESS, DESPITE PROLIFIC LAND GRABBING, MYANMAR ASSURES THE UN THAT HUMAN RIGHTS VIOLATIONS ARE NO LONGER AN ISSUE (2014), <https://perma.cc/WS6G-JCRZ>.

97. DISPLACEMENT SOLUTIONS, MYANMAR AT THE HLP CROSSROADS: PROPOSALS FOR BUILDING AND IMPROVED HOUSING, LAND AND PROPERTY RIGHTS FRAMEWORK THAT PROTECTS THE PEOPLE AND SUPPORTS SUSTAINABLE ECONOMIC DEVELOPMENT 1-38 (2012), <https://perma.cc/8879-UGF3>.

98. THE WORLD BANK GROUP, MYANMAR AGRICULTURAL DEVELOPMENT BANK: INITIAL ASSESSMENT AND RESTRUCTURING OPTIONS, 7 (2014), <https://perma.cc/QRV3-V6NR>.

99. Shivakumar Srinivas & U Saw Hlaing, (U.N. Food and Agric. Org.) *Myanmar: Land Tenure Issues and the Impact on Rural Development*, 19, (2015), <https://perma.cc/8GNQ-TYTX>.

100. Jack Board, *New government 'powerless' to overhaul rampant land grabbing in northern Myanmar*, CHANNEL NEWS ASIA (Dec. 19, 2016), <https://perma.cc/477R-5Q4N>.

101. ANDREW SELTH, BURMA'S ARMED FORCES: POWER WITHOUT GLORY (EASTBRIDGE, NORWALK, 2002).



gal.<sup>102</sup> This phenomenon is particularly prevalent in Kachin State, where the ‘military–state’ nexus is constructed by the interactions of a broad constellation of state actors, ranging from state land agency workers, surveyors, regional military officers, and local pro-government militia leaders, to non-state or quasi-state-like actors, such as businessmen, ethnic elite leaders, and non-government organizations (NGOs).<sup>103</sup>

A detailed examination of land-grabbing in Kachin State illustrates how persistent armed conflict and poor rule of law in areas where state and central government control is weak or non-existent creates rights gaps that perpetuate HLP rights violations. This section has two objectives. First, it traces the historical progression of land-grabs in Kachin State and illustrates how rights gaps during periods of political flux enabled the creation of legal and extra-legal measures that perpetuate HLP rights violations. Constructing this genealogy of HLP rights violations in Myanmar requires an understanding of the country’s complex history of armed conflict, illicit trade, cronyism, and racism against ethnic minorities. Second, it constructs a typology of the various manifestations of land-grabbing and the actors who engage in it in order to inform reparations measures that may be considered during a potential transitional justice process.

#### A. *Legalization of Land-Grabbing by Government, Cronies, and Capitalists*

Successive central governments in Myanmar have used land-grabbing and natural resource expropriation to consolidate power through the systematic political and socio-economic exclusion of ethnic minority populations.<sup>104</sup> These governments have used land-grabbing (1) to consolidate state authority through state-building; (2) to suppress ethnic struggles for autonomy in the restive borderlands; (3) to amass wealth from lucrative natural resources located within ethnic states; and (4) to create opportunities for investment by offering resource concessions and contracts for industrial projects.<sup>105</sup> Understanding the complex and dynamic interplay between successive central governments and the KIO/KIA with regards to HLP rights violations requires examining political geographies of land ownership over time.

Land-grabbing in Myanmar predates the formation of the state. The 1894 Land Acquisition Act legalized the British colonial administration’s appropriation of so-called “waste land,” defined as areas under active fallow

102. MARY P. CALLAHAN, STIMSON CENTER, POLITICAL AUTHORITY IN BURMA’S ETHNIC MINORITY STATES: DEVOLUTION, OCCUPATION, AND COEXISTENCE 3–4 (East-West Center Washington, 2007).

103. Kevin Woods, *Ceasefire capitalism: military–private partnerships, resource concessions and military–state building in the Burma–China borderlands*, 38 J. OF PEASANT STUDIES 747, 748 (2011).

104. NATALIA SCURRAH ET. AL, MEKONG REGION LAND GOVERNANCE, THE POLITICAL ECONOMY OF LAND GOVERNANCE IN MYANMAR, (2015), <https://perma.cc/6LQC-9BV3>.

105. Karen Dean, *Struggle Over Space in Myanmar: Expanding State Territoriality After the Kachin Ceasefire*, in AUTONOMY AND ARMED SEPARATISM IN SOUTH AND SOUTHEAST ASIA 113, 123–25 (Michelle Ann Miller ed., 2012).

cycles and used by villagers for livestock grazing and the collection of non-timber forest products.<sup>106</sup> In 1947, the majority ethnic Bamar government negotiated with the Kachin, Shan, and Chin ethnic groups to create the Panglong Agreement,<sup>107</sup> which promised full autonomy in internal administration and equal shares in the nation's wealth, particularly in relation to lucrative natural resource rights, if the ethnic groups agreed to enter into the Union of Burma.<sup>108</sup> Administrative recognition from Rangoon and resource rights never materialized, and hopes for autonomy were dashed when the 1947 Constitution of the Union of Burma formally designated the State as the ultimate owner of all agricultural land.<sup>109</sup>

A wave of land-grabbing followed independence in 1948 as the government attempted to consolidate state control over private land and natural resources. Under the 1953 Land Nationalization Act,<sup>110</sup> private land rights were replaced by a system in which the government formally owned, and could exert claims over, the country's land. With few exceptions, all agricultural land was subject to state reclamation and redistribution.<sup>111</sup> Frustrated by unfulfilled promises of autonomy and increasing subjugation to the Bamar ethnic majority, which included the imposition of Buddhism as the state religion and administrative acts that left them politically voiceless, Kachin nationalists formed the Kachin Independence Organization (KIO) and its armed wing, the Kachin Independence Army (KIA), in 1961 to wage its decades-long war against the government.<sup>112</sup>

After the military took power in 1962, successive governments used land-grabbing as a weapon in their counterinsurgency campaigns against EAGs like the KIO/A. The regime of General Ne Win used quasi-socialist policies to seize land in the lowland areas while waging counterinsurgency operations in the upland peripheries. Successive ceasefire negotiations between the central government, the Tatmadaw, and KIO/A enabled land grabs for the purpose of seizing and securitizing resource-rich land for state-

106. "Whenever it appears to the President of the Union that land in any locality is needed or is likely to be needed for any public purposes, a notification to that effect shall be published in the Gazette, and the Collector shall cause public notice of the substance of such notification to be given at convenient places in the said locality." Land Acquisition Act (1894), Part 2 4(1), (Myan) (English translation printed by Displacement Solutions), <https://perma.cc/GLQ6-QRKJ>.

107. Panglong Agreement, Feb. 12, 1947, <https://perma.cc/7YWW-M4BV>.

108. CARINE JACQUET, *THE KACHIN CONFLICT: TESTING THE LIMITS OF THE POLITICAL TRANSITION IN MYANMAR* 9, 19-21 (2015).

109. <https://perma.cc/Q85L-QHUM>

110. Art. 5(3) of the Land Nationalisation Act 1953 states, "The State shall, as from the commencement of this Act resume possession of all agricultural lands with exception of the agricultural lands specified in the sub-section 5 (1) and to the extent specified in the said schedule and sub-section 5 (2), notwithstanding anything contained in any other law for the time being in force or in any agreement, contract, deed, grant, lease of license, all rights whatsoever existing therein before the commencement of this Act other than the rights of the State shall thereupon cease absolutely; and no rights whatsoever other than the rights of the State shall, save as expressly provided in section 10, hereafter accrue on such land." <https://perma.cc/PD6V-C65E>

111. Scurrah et. al, *supra* note 104, at 2.

112. JACQUET, *supra* note 108, at 22-23.

building and natural resource extraction.<sup>113</sup> Following its takeover in 1988, the State Law and Order Restoration Council (SLORC) supplemented the counterinsurgency strategy by granting many EAG leaders lucrative business deals, such as timber and jade concessions, as inducements to enter into bilateral ceasefire agreements.<sup>114</sup> This ‘ceasefire capitalism’ resulted in massive economic benefits for entities controlled by the government, elements of the KIO/A, and ethnic Bamar and Chinese businessmen through centralization and land securitization.<sup>115</sup> During the previous ceasefire with the KIO/A, which lasted from 1994 to 2011, most of the reserves of timber, jade, gold, and other rare earth metals were located in areas controlled by the KIO/A. The ceasefire collapsed, in part, due to the failure to address the “indivisibility of resources” such as the control of border trade and of the natural resources-dependent economy.<sup>116</sup>

Upon taking office in 2011, the Thein Sein government pursued a strategy of negotiating a series of bilateral ceasefires with EAGs in order to distill the common elements of those ceasefires into a Nationwide Ceasefire Agreement (NCA).<sup>117</sup> Offers of ceasefires by the government to EAGs have long been criticized for jeopardizing the prospect of inclusive peace based on perceptions that such ceasefires are less about finding a mutually acceptable solution to conflict than consolidating control of territory and natural resources while indefinitely staving off ethnic minority demands for greater political autonomy.<sup>118</sup> Questions about the government’s commitment to peace have been raised repeatedly by the continuation of clashes between the Tatmadaw and EAGs, particularly the KIO/A, during ceasefire negotiations.<sup>119</sup> Even as the current government, led by Aung San Suu Kyi’s National League for Democracy (NLD), continues to build on successive ceasefire agreements towards national dialogue and reconciliation, the KIO/A continues to abstain from ceasefire negotiations, in part due to unresolved issues concerning natural resources and the belief that economic benefits from the illegal trade in natural resources undermine the incentive for a ceasefire.<sup>120</sup>

The relationship between land-grabbing and investment is a relatively recent phenomenon. The SLORC initiated the country’s first experiment in post-colonial capitalism. The Tatmadaw acted on orders to “do business”

113. Dean, *supra* note 105, at 123-125.

114. JAKE SHERMAN, BURMA: BEYOND THE CEASE-FIRES, IN THE POLITICAL ECONOMY OF ARMED CONFLICT: BEYOND GREED AND GRIEVANCE 225-55 (Karen Ballentine & Jake Sherman, eds., 2003).

115. Woods, *supra* note 103, at 747.

116. Matthew O. Jackson & Massimo Morelli, *Reasons for Wars – an Updated Survey*, in THE HANDBOOK ON THE POLITICAL ECONOMY OF WAR 34-58 (Chris Coyne ed., 2011).

117. JACQUET, *supra* note 108, at 11.

118. Dean, *supra* note 105, at 113.

119. Kevin Woods, *A political anatomy of land grabs*, MYANMAR TIMES, Mar. 3, 2014, <https://perma.cc/4JMC-CP84>.

120. YUN SUN, STIMSON CENTER, CHINA, THE UNITED STATES AND THE KACHIN CONFLICT 6 (2014), <https://perma.cc/T6DD-XHGN>

by seizing lands and forcibly displacing landholders to clear the land for foreign investors.<sup>121</sup> Between 1994 and 2009, approximately 3,300 villages were decimated and thousands were displaced.<sup>122</sup> The international sanctions regime in place at the time deterred foreign investment,<sup>123</sup> but since 2011, the easing of sanctions in response to tentative democratic developments and the implementation of neoliberal economic and legal reform policies have precipitated an influx of foreign investment.<sup>124</sup> In a country where the economy is predicted to quadruple from \$45 billion in 2010 to more than \$200 billion in 2030, the industrialization that land-grabbing enables will be a boon for the economy.<sup>125</sup>

To facilitate foreign and domestic investment in large-scale agriculture and industrial projects, the SLORC's successor, the State Peace and Development Council (SPDC), used legislative measures to disenfranchise landowners while streamlining regulations over land and natural resources.<sup>126</sup> The SPDC effectively institutionalized state ownership of all land and natural resources in the 2008 Constitution.<sup>127</sup> The Farmland Law and the Vacant, Fallow, and Virgin Land Management Law ("the 2012 laws") were passed in 2012 to clarify ownership under the Constitution and provide protections to land owners. Although the laws guaranteed more individual ownership rights, they further consolidated state control over the land. Chapter X of the Farmland Law<sup>128</sup> allows the State to confiscate any land for a project in the national interest while the Vacant, Fallow and Virgin Land Management Law<sup>129</sup> enables the government to reallocate farms and forestlands to domestic and foreign investors if they appear to lay fallow. These laws disregard customary land tenure systems to take control of villagers' traditional forestlands and newly demarcated community forests. Furthermore, the laws have also created a complex system of land registration and administration that excludes local consultation<sup>130</sup> and appear to

121. Woods, *supra* note 119.

122. Paulo Sergio Pinheiro, *Ending Burma's System of Impunity*, N.Y. TIMES, May 27, 2009.

123. Brian McCartan, *Land-grabbing as big business in Myanmar*, ASIA TIMES, Mar. 8, 2013, <https://perma.cc/T6DD-XHGN>

124. Woods, *supra* note 119.

125. HEANG CIHGOR ET AL., MCKINSEY & COMPANY, MYANMAR'S MOMENT: UNIQUE OPPORTUNITIES, MAJOR CHALLENGES 4 (JUN. 2013).

126. Lee Jones, *The Political Economy of Myanmar's Transition*, 152 J. OF CONTEMP. ASIA 44, 160 (2014).

127. Art. 37 of the Myanmar Constitution states, "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": CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR, 2008, art. 37, 2008 (English translation printed by the Printing and Publishing Enterprise, Ministry of Information), Republic of the Union of Myanmar, Sept. 2008, <https://perma.cc/MG3Z-ZGQ4>

128. MYANMAR FARMLAND LAW, Unofficial Translation by UN-HABITAT, Mar. 30, 2012, <https://perma.cc/N3RP-ZT6P>.

129. THE VACANT, FALLOW AND VIRGIN LANDS LAW, Unofficial Translation by UN-HABITAT, Mar. 30, 2012, <https://perma.cc/8HG8-32AQ>.

130. McCartan, *supra* note 124.

have failed to provide protections against HLP rights violations, such as arbitrary and forced displacement or land grabs.<sup>131</sup>

The SPDC government actively supported investments by providing large-scale concessions, thereby exacerbating already-severe land scarcity.<sup>132</sup> For example, the 2014 Special Economic Zone Law and 2012 Foreign Investment Law provide extensive investment incentives that have encouraged land-grabbing for large industrial projects. Large-scale land acquisitions for commercial agricultural production in Myanmar have also increased 170 percent since 2010.<sup>133</sup> It was estimated that 5.3 million acres of land nationally had been leased to investors for commercial agriculture projects by 2013, most of which had taken place without the consent of its owners.<sup>134</sup> By 2010, private corporations operating in Kachin State had invested in large-scale commercial farming contracts totaling 393,292 acres.<sup>135</sup> The 2015 Draft Foreign Investment Law, which is currently under review, has been criticized for failing to provide protections or remedies for land grabs and other human rights violations.<sup>136</sup>

The lack of opportunities for legal recourse to address HLP rights violations has led the dispossessed and their supporters to take matters into their own hands. These attempts are often met with violent retaliation, arrest, and prosecution. Protests against the proposed construction of the \$3.6 billion Chinese-backed Myitsone Dam in Kachin State—which would have required the forced relocation of as many as 12,000 people from 63 villages—resulted in violent skirmishes between the Tatmadaw and KIA in 2011.<sup>137</sup> In another instance, in August 2014, police allegedly beat and shot farmers gathered to protest the confiscation of land by the Tatmadaw two decades prior that was subsequently handed to the CEO of the Chinese-owned Great Wall Company.<sup>138</sup> The government has cited infractions of the 2012 Law on the Right to Peaceful Assembly and Peaceful Procession and

131. DISPLACEMENT SOLUTIONS, *LAND ACQUISITION LAW AND PRACTICE IN MYANMAR: OVERVIEW, GAP ANALYSIS WITH IFC PS1 & PS5 AND SCOPE OF DUE DILIGENCE RECOMMENDATIONS 9* (2015), <https://perma.cc/E2YM-C7ZM>.

132. USAID, *PROPERTY RIGHTS AND RESOURCE GOVERNANCE PROFILE: BURMA 20-21* (May 2013), [http://www.usaidlandtenure.net/sites/default/files/country-profiles/full-reports/USAID\\_Land\\_Tenure\\_Burma\\_Profile.pdf](http://www.usaidlandtenure.net/sites/default/files/country-profiles/full-reports/USAID_Land_Tenure_Burma_Profile.pdf).

133. KEVIN WOODS, *COMMERCIAL AGRICULTURE EXPANSION IN MYANMAR: LINKS TO DEFORESTATION, CONVERSION TIMBER AND LAND CONFLICTS 14* (2015).

134. GLOBAL WITNESS, *GUNS, CRONIES AND CROPS: HOW MILITARY, POLITICAL AND BUSINESS CRONIES CONSPIRED TO LAND GRAB IN MYANMAR 4* (2015), <https://www.globalwitness.org/en-gb/campaigns/land-deals/guns-cronies-and-crops/>.

135. FOOD SECURITY WORKING GROUP (FSWG), *UPLAND LAND TENURE SECURITY IN MYANMAR: AN OVERVIEW 9* (2011), [http://www.burmalibrary.org/docs16/FSWG-Upland\\_Land\\_Tenure\\_Security-2011-02-ocr-en-red.pdf](http://www.burmalibrary.org/docs16/FSWG-Upland_Land_Tenure_Security-2011-02-ocr-en-red.pdf).

136. Sean Turnell, *Legislative Foundations of Myanmar's Economic Reforms, in Law, Society, and Transition in Myanmar 187* (Melissa Crouch & Tim Lindsey eds., 2014).

137. *Myanmar govt shelve \$3.6 bln mega dam – officials*, REUTERS, Oct. 1, 2011, <http://in.reuters.com/article/idINIndia-59646920110930>.

138. ASIAN HUMAN RIGHTS COMMISSION, *BURMA/MYANMAR: VILLAGERS STILL WITHOUT REMEDY FOR POLICE ATTACKS ON PROTESTORS* (Feb. 13, 2015), <https://perma.cc/HZ2C-UW93>.

the Myanmar Penal Code, which was previously used to incarcerate political activists, to arrest and prosecute people exercising their rights to peacefully protest land-grabbing and large-scale development projects.<sup>139</sup> In June 2013 alone, criminal charges were leveled against 149 farmers and activists.<sup>140</sup> As continued land-grabbing fuels further HLP rights violations, civil and political rights violations increase against those who actively resist land grabs.<sup>141</sup>

*B. Illegal and Extra-legal Land-Grabbing by Tatmadaw  
and Ethnic Armed Groups*

The Tatmadaw and KIA seize land to consolidate power and profit from lucrative natural resources through a process that has been characterized as “peace as a business venture.”<sup>142</sup> The Tatmadaw uses land-grabbing (1) to target presumed sympathizers of the KIA as part of a counterinsurgency strategy; (2) to consolidate territorial gains for military installations, buffer zones, and supply routes; and (3) to monopolize control over lucrative natural resources with the backing of private and state-owned Myanmar and Chinese enterprises.<sup>143</sup> The KIA has also been accused of land-grabbing and self-enrichment during the 1994-2011 ceasefire period, which led to charges of “cronyism” due to lucrative business relations that helped some KIA leaders consolidate territory and amass personal wealth from natural resources.<sup>144</sup> Through land-grabbing, both actors create insecurity that exacerbate poverty, poor governance, and protracted armed conflict.

Counterinsurgency strategies often involve the forced displacement of communities in order to “drain the sea” of civilian support.<sup>145</sup> The Tatmadaw has a long history of destroying villages and the livelihoods of civilian populations in ethnic states as a means of severing local populations’ support for insurgents and punishing communities suspected of supporting armed groups.<sup>146</sup> One strategy—known as the “Four Cuts” strategy because it aimed to cut insurgents off from food, supplies, intelligence, and recruits—resulted in widespread and systematic human rights

139. Yanghee Lee (Special Rapporteur of the Situation of Human Rights in Myanmar), *Report of the Special Rapporteur of the Situation of Human Rights in Myanmar*, ¶¶ 12–18, UN Doc. A/HRC/28/72 (Mar. 23, 2015) [hereinafter *Report of the Special Rapporteur*].

140. U.N. G.A., *Situation of Human Rights in Myanmar: Note by the Secretary-General*, ¶ 20, UN Doc. A/68/397 (Sept. 23, 2013).

141. See *Report of the Special Rapporteur*, *supra* note 139, ¶ 50; See also HUMAN RIGHTS WATCH, BURMA: “THEY CAME AND DESTROYED OUR VILLAGE AGAIN”: THE PLIGHT OF INTERNALLY DISPLACED PERSONS IN KAREN STATE 26-27 (JUN. 2005).

142. Woods, *supra* note 103, at 748-49.

143. Dean, *supra* note 105, at 123-25.

144. JACQUET, *supra* note 108, at 75. See also Woods, *supra* note 103, at 749-50; L GUM JA HTUNG, LAND GRABBING AS A PROCESS OF STATE-BUILDING IN KACHIN AREAS, NORTH SHAN STATE, MYANMAR, 9-10 (July 2014).

145. Huggins, *supra* note 8, at 346.

146. HUMAN RIGHTS WATCH, *supra* note 141, at 9.

violations and displacement.<sup>147</sup> In the 1990s, Kachin civilians suspected of sympathizing with the KIA were forcibly relocated to Tatmadaw-controlled areas and subjected to abuses including summary executions, rape, torture, forced portering, and destruction of property.<sup>148</sup> Since the collapse of the ceasefire in June 2011, approximately 90,000 people have been displaced from over 100 villages.<sup>149</sup> As many as 75,000 people sought protection in some 30 IDP camps along the China border in KIA-controlled areas.<sup>150</sup> Land-grabbing that had taken place prevented return of Kachin civilians and exacerbated problems associated with their displacement.

Natural resources can “motivate, sustain, and aggravate human rights violations committed by armed groups” by financing and rewarding conflict.<sup>151</sup> The government’s monopolization of licit business and trade excludes the Tatmadaw and KIA from engaging in such dealings, thus creating greater incentive for both actors to turn to illicit industries that often lead to land-grabbing.<sup>152</sup> Three primary and interconnected developments have contributed to the perpetuation of conflict-driven land-grabbing in Kachin State: (1) The Tatmadaw and the KIA rely on revenue from natural resources, particularly jade and teak, to finance civil war; (2) private and state-owned Bamar and Chinese enterprises simultaneously invest in illegal jade mining and teak logging enterprises in conflict-affected areas; and (3) Chinese enterprises receive sizable mining and agricultural concessions from the Myanmar government—the latter as part of an opium substitution program led by the Chinese government in Kachin and Shan States. As the following analysis illustrates, overlapping jade extraction and opium cultivation patterns continue amid the dramatic rise in domestic and foreign industrial agricultural land concessions that fuel dispossession of local communities.

The intrinsically linked processes of ethnic insurgency and state-building in Kachin State have created a political territory that permits increased ‘military territorialization’<sup>153</sup> and profiteering from natural resource extraction.<sup>154</sup> The families of politically influential retired generals, including senior general Than Shwe, profit personally from their control of many of the

147. *Id.* at 15–16.

148. HUMAN RIGHTS WATCH, *WORLD REPORT 1992: EVENTS OF 1991* 347–348 (1992), <https://perma.cc/3U8D-39D4>.

149. UNITED NATIONS DEVELOPMENT PROGRAM (UNDP), *THE STATE OF LOCAL GOVERNANCE: TRENDS IN KACHIN* 18 (2015).

150. HUMAN RIGHTS WATCH, “UNTOLD MISERIES”: WARTIME ABUSES AND FORCED DISPLACEMENT IN BURMA’S KACHIN STATE 10 (2012), <https://perma.cc/QU9M-XDK2>.

151. Harwell & Le Billon, *supra* note 91, at 288.

152. GLOBAL WITNESS, *supra* note 134, at 11.

153. Woods defines ‘military territorialization’ as “military–state agencies and officers exhibiting power and authority over land and populations, and thus the creation of militarized territory,” Woods, *supra* note 104, at 748.

154. *Id.* at 748–749.

largest licensed jade mining companies.<sup>155</sup> Top KIA leaders also profit personally from the jade trade while the army finances the ethnic armed struggle by taxing revenue from profitable mines located on territory under its control, which serves as the single largest source of the group's income.<sup>156</sup> Both actors operate through proxies to ensure that a lack of transparency prevents the central government from interfering directly in business affairs. When the KIA and the Tatmadaw perceive threats to the jade business, they often respond by escalating the conflict. For example, during key points in ceasefire negotiations that include discussions of natural resource rights and access that could potentially threaten the Tatmadaw and KIA's profiteering, both groups have engaged in skirmishes to derail peace. A pattern has been documented whereby, sensing a threat to the jade business, the Tatmadaw seizes on a pretext to attack the KIA base closest to the mines, detonates bombs around strategic jade mining tracts, and displaces and terrorizes the local population to derail the ceasefire process.<sup>157</sup> These actions indicate that both sides have a vested interest in undermining the incentive of a ceasefire.

Regional Tatmadaw commanders also use military territorialization to seize and securitize vital, resource-rich lands and collude with relevant state agencies to allocate resource concessions to Chinese investors.<sup>158</sup> The creation of securitized resource extraction sites, which are often situated within ceasefire zones, represent forms of counterinsurgency border development financed by different levels of the Chinese state and overseen by local military officers and regional Tatmadaw commanders.<sup>159</sup> This process allows for resources to be transported out of extraction sites with greater security. For example, billions of dollars' worth of precious jadeite is smuggled unimpeded from mines in Kachin State into markets in Mandalay, and onward to China to meet the luxury demands of the growing Chinese middle class.<sup>160</sup> Yet the same civilians who are most affected by the conflict are also excluded from considerations of ownership, management, and benefits of the jade trade. While Myanmar's jade trade accounted for \$31 billion in 2014 alone, rampant corruption continues to divert revenue away from much-needed development projects, exacerbating poverty, fueling conflict, and driving desperate civilians to seek out maladaptive livelihoods strate-

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155. GLOBAL WITNESS, JADE: MYANMAR'S 'BIG STATE SECRET' 40 (2015), <https://perma.cc/JD2P-4Q2N>.

156. Mike Davis, *Reviving a jaded peace process: Why natural resources must be a top priority in efforts to end conflict in Kachin State*, MYANMAR TIMES, Jul. 6, 2016, <http://www.mmtimes.com/index.php/opinion/21236-reviving-a-jaded-peace-process-why-natural-resources-must-be-a-top-priority-in-efforts-to-end-conflict-in-kachin-state.html>.

157. *Id.*

158. Woods, *supra* note 103, at 748–749.

159. *Id.*

160. Dan Levin, *Searching for Burmese Jade, and Finding Misery*, N.Y. TIMES, Dec. 1, 2014, <https://perma.cc/D8GF-4P3H>.



gies.<sup>161</sup> Moreover dispossessed landholders are often conscripted or forced to work in illicit industries to finance the ongoing civil war between the Tatmadaw and the KIA.<sup>162</sup>

One effect of land grabbing that has received particular attention is the livelihood strategy of opium poppy cultivation. Opium poppy is grown near areas controlled by the Tatmadaw, and commanders leverage a one-time tax between \$4,167–15,625 USD from all poppy farmers nearby.<sup>163</sup> Although heroin is illegal in Myanmar, opium poppy cultivation in northern Myanmar has increased from 21,600 hectares in 2006 to 55,500 hectares in 2015.<sup>164</sup> Absent an effective government counter-narcotics campaign, a Chinese opium crop substitution program—which offers subsidies, tax waivers, and import quotas for Chinese companies who provide substitution crops—has promoted short-term economic gains for China without providing a rural livelihoods component for farmers.<sup>165, 166</sup> Without the ability to grow opium poppies, some dispossessed farmers are forced to seek out farmable land on distant forested hills, migrate to work as wage laborers, or participate in dangerous small-scale resource extraction enterprises.<sup>167</sup> The inflow of dispossessed farmers into Tatmadaw and Chinese-owned mines has also fueled an epidemic of heroin addiction and H.I.V. infection among many miners, including child laborers using the drug to increase productivity.<sup>168</sup> Many women alienated from land ownership engage in prostitution around mining sites while others are subjected to forced marriage and human trafficking across the border in China.<sup>169</sup>

The examination of HLP rights violations in Kachin State illustrates how land grabs and resource crimes contribute to armed conflict and systematic oppression, threatening the very lives and livelihoods of vulnerable populations. HLP rights violations perpetuate cycles of violence, and pose serious threats to the security of the individual and the state. At the individual level, economic deprivation can lead to loss of livelihood and increase the risk of grave human rights violations, including despoilment, dispossession, and death. These abuses can disproportionately affect women and girls, who are often unable to inherit land and property, and thus turn to maladaptive livelihoods that further increase their vulnerability.<sup>170</sup> At the state level, the

161. Davis, *supra* note 156.

162. SUN, *supra* note 120, at 6.

163. Dean, *supra* note 105, at 125.

164. U.N. Office on Drugs and Crime, Southeast Asia Opium Survey 2015: Lao PDR, Myanmar 3 (Dec. 15, 2015), <https://perma.cc/3YXE-4BEF>.

165. TOM KRAMER & KEVIN WOODS, FINANCING DISPOSSESSION: CHINA'S OPIUM SUBSTITUTION PROGRAMME IN NORTHERN BURMA 79 (2012), <https://perma.cc/B529-2NSX>.

166. Scurrah et. al, *supra* note 104, at 5.

167. KRAMER & WOODS, *supra* note 165, at 4.

168. Jonah M. Kessel, *Jade's Journey Marked by Drugs and Death*, N.Y. TIMES, Dec. 1, 2014, <https://perma.cc/2SY9-LHQV>.

169. Dean, *supra* note 105, at 127; EARTHRIGHTS INTERNATIONAL, MINING, GENDER, AND THE ENVIRONMENT IN BURMA 7 (n.d.), <https://perma.cc/3K66-6UX5>.

170. Rashid, *supra* note 23, at 224.

creation of land tenure insecurity and misappropriation of revenue from natural resources can undermine sustainable economic development, weaken rule of law, and entrench corruption; it can also contribute to deforestation, loss of biodiversity, increased soil erosion, and depleted water sources,<sup>171</sup> becoming a form of “slow violence”<sup>172</sup> that incrementally robs populations of their means of survival over time. Therefore, each of these HLP rights violations creates generational challenges that must be addressed specifically through reparations processes.

## V. REPARATIONS FOR PAST AND PRESENT HLP RIGHTS VIOLATIONS IN MYANMAR

Prospects for transitional justice in Myanmar have been complicated by the incomplete democratic transition, the persistent armed conflict in ethnic states, and the uncertainty of how the new government will address continuing human rights violations.<sup>173</sup> The landslide victory of the politically untested National League for Democracy (NLD) in the 2015 national elections was buoyed largely by rural discontent over ethnic marginalization and the party’s promises to provide redress for abuses, such as land grabs.<sup>174, 175</sup> Amidst high hopes for wide ranging political and economic reforms, the new government has even formed a task force to oversee the restitution process, with the aim of solving all land grab cases within one year.<sup>176</sup> Yet structural causes of conflict and exclusion that perpetuate land-grabbing have gone largely unaddressed while mechanisms for legal redress remain inaccessible to the general population.

One of the primary impediments to combating land-grabbing is the poor state of Myanmar’s legal infrastructure, which does not effectively address victims’ HLP rights.<sup>177</sup> Since 1962, rule of law has been effectively absent in Myanmar.<sup>178</sup> In fact, previous military regimes conceived of law not as a means to protect rights, but as a means to control the population.<sup>179</sup> Attempts by previous military governments to remove legal protections for average citizens created a vague and inconsistent legal regime.<sup>180</sup> Many re-

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171. Michael Peel, *Myanmar: The dispossessed*, FINANCIAL TIMES, Mar. 1, 2016, <https://perma.cc/2WGA-TU8E>.

172. ROB NIXON, SLOW VIOLENCE AND THE ENVIRONMENTALISM OF THE POOR 2 (2011).

173. Patrick Pierce and Caitlin Reiger, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, NAVIGATING PATHS TO JUSTICE IN MYANMAR’S TRANSITION (2014), <https://perma.cc/77JG-HAF4>.

174. *Myanmar’s Election: Minority Report*, ECONOMIST, Nov. 21, 2015, <https://perma.cc/N3CY-8AWF>.

175. Jonah Fisher, *Myanmar election: Can NLD win over ethnic minorities?* BBC NEWS, Oct. 2, 2015, <https://perma.cc/6V32-EAQ7>.

176. Aubrey Belford, et. al., *Suu Kyi Tackles Military Land Grabs in Test of New Myanmar Government*, REUTERS, Aug. 3, 2016, <https://perma.cc/M8Z6-JAS9>.

177. Leckie & Simperingham, *supra* note 9.

178. DAVID L. STEINBERG, BURMA: THE STATE OF MYANMAR (2001).

179. *Id.*

180. Leckie & Simperingham, *supra* note 9, at 9.

maining laws are also inconsistent with international standards due to Myanmar's failure to ratify important international human rights treaties.<sup>181</sup>

The poor state of rule of law in Myanmar prevents efforts to hold perpetrators of HLP rights violations accountable. The concept of civilian control over the military has no legal or institutional basis in Myanmar. The 2008 Constitution, which was written by the previous military regime, shields acts attributable to both previous and current regimes from any form of accountability.<sup>182</sup> The Constitution also mandates military representation in state institutions.<sup>183</sup> As a result, the Tatmadaw retains the top positions in key ministries, such as Defense, Border Affairs, and Home Affairs. The many military members from the previous regime who continue to serve in the NLD-led government<sup>184</sup> also form a powerful voting bloc capable of vetoing proposed Constitutional amendments.<sup>185</sup> As a consequence, attempts to combat impunity within the current legal system, including by reforming the Constitution, are essentially untenable. Absent both political support and legal means to hold perpetrators responsible for HLP rights violations to account, this culture of impunity enables future HLP rights violations.

Within this system of institutionalized impunity, transitional justice has been cited as a "spoiler" issue.<sup>186</sup> Critics claim that addressing past violations committed by officials of the former regime that maintain political and military power could prompt a backlash from those sectors.<sup>187</sup> In this regard, any attempt to address past injustices is perceived as a threat to the country's tentative democratic transition. Although the recent opening of

181. Myanmar is party only to the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women.

182. Art. 445 of the Myanmar Constitution 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." CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR 2008, art. 445 (English translation printed by the Printing and Publishing Enterprise, Ministry of Information), <https://perma.cc/2QA8-JQ2H>.

183. The 2008 Constitution drafted by the junta gives the Tatmadaw one-quarter of the seats in the upper and lower houses of the national parliament and one-third of the seats in the state/regional parliaments (see Articles 141, 109, and 161). Since, Article 436 of constitutional amendments must receive more than 75 percent of the vote in parliament, the military's mandated 25 percent voting bloc gives it effective veto power over any proposed changes.

184. INTERNATIONAL CRISIS GROUP, ASIA REPORT NO. 282, MYANMAR'S NEW GOVERNMENT: FINDING ITS FEET?, 3-4, 10-11 (Jul. 29, 2016).

185. Art. 436 of the Myanmar Constitution states, "If it is necessary to amend. . .this Constitution, it shall be amended with the prior approval of more than seventy-five percent of all the representatives of the Pyidaungsu Hluttaw, after which in a nation-wide referendum only with the votes of more than half of those who are eligible to vote." <https://perma.cc/MG3Z-ZGQ4>

186. 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.

187. PIERCE & REIGER, *supra* note 173, at 1.

political space has been interpreted as a barometer for democratic reform, prospects for domestic trials, truth-seeking mechanisms, or security sector reform are poor.

Nascent attempts to address past human rights violations in Myanmar have focused on documenting violations of civil and political rights, including the denial of basic freedoms and forced labor,<sup>188</sup> without consideration of ESC rights violations, such as land-grabbing. Efforts to localize transitional justice in pre-transition Myanmar focused on catalyzing democratic change through community-based human rights documentation trainings led primarily by organizations focused on civil and political rights violations.<sup>189,190</sup> Although civil and political rights violations may be more amenable to advocacy and justiciable in a court of law,<sup>191</sup> the poor legal architecture and complex climate in Myanmar necessitates approaches to justice and reconciliation that look beyond the narrow scope of accountability for prosecutions for civil and political rights violations. Proponents of addressing ESC rights in transitional justice processes argue that such violations can be more widespread than civil and political rights violations, involve more perpetrators and affect more victims, and inflict harm on individuals and society that is just as serious as other violations.<sup>192</sup> Due to the pervasiveness of land-grabbing and the broad constellation of victims in Myanmar, it is important to consider reparations for structural exclusion and inequalities, particularly HLP rights violations.

Any potential reparations program should look beyond the limits of domestic law to combine redress for past crimes in the form of restitution and compensation, wherever possible, with forward-looking measures to achieve satisfaction and guarantees of non-recurrence. Despite the progress that has been made documenting abuses and advocating for justice, competing policy priorities and entrenched impunity raise questions about the commitment and ability of the government of the poorest nation in Southeast Asia to enact such a massive reparations program.<sup>193</sup> Seeking a reparations program for victims of decades of abuse while attempting to address the root causes of persistent conflict requires wide-ranging reforms. Therefore, reparations for HLP rights violations should include not only restitution and compensation but also land tenure reform at the national level and foreign government and corporate responsibility at the international level.

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188. International Labor Organization (ILO), *Welcome Changes in Burma on Forced Labour and Freedom of Association: Cautious Optimism* by FTUB (Jun. 12, 2012), <https://perma.cc/2ZGQ-789T>.

189. Patrick Falvey, *Local Transitional Justice in Pretransition Burma*, in LOCALIZING TRANSITIONAL JUSTICE: INTERVENTIONS AND PRIORITIES AFTER MASS VIOLENCE 253 (Rosalind Shaw & Lars Waldorf, eds., 2010).

190. Assistance Association for Political Prisoners (AAPP), *Human Rights Documentation and Transitional Justice Training* (Jul. 30, 2015).

191. Waldorf, *supra* note 20, at 173.

192. Roger Duthie, *Toward a Development-Sensitive Approach to Transitional Justice*, 2 INTERNATIONAL JOURNAL OF TRANSITIONAL JUSTICE 292–309 (2008).

193. PIERCE & REIGER, *supra* note 173, at 13–14.

### A. Restitution and Compensation for HLP Rights Violations

Provisions for restitution and compensation under international law have the potential to restore the situation that existed before the violations or provide assessable damages arising from the violations.<sup>194</sup> As previously discussed, however, the practical implementation of restitution and compensation programs in transitional states is not a straightforward process. For example, although Myanmar citizens filed more than 26,000 complaints regarding past land-grabs committed by the Tatmadaw from 2012 to 2015, fewer than 10 percent of these complaints have received attention and fewer still have been resolved.<sup>195</sup> In August 2013, Parliament urged the government to expedite procedures to allow grabbed farmland to be restituted to its original owners across the country.<sup>196</sup> That same year, the General Administration Department (GAD) set forth guidelines for companies, ministries, and the Tatmadaw to “release” previously grabbed land to the state, including land acquired under the Land Acquisition Act.<sup>197</sup> Yet less than a quarter of the approximately 2,700 complaints sent to the Defense Ministry—which processes land claimed by the Tatmadaw—have been addressed so far, and only 300 out of 6,559 complaints lodged with state and regional governments have been settled.<sup>198</sup>

Similar to restitution efforts, attempts at compensation have not been adequate. On average, compensation for land confiscation is either not paid or falls far short of the market-value provisions found in the Land Acquisition Act.<sup>199</sup> In fact, compensation for dispossessed landholders has varied widely from 800 to 300,000 kyats per acre.<sup>200</sup> Furthermore, cases of compensation remain rare, are largely ad hoc in nature, and are more commonly motivated by improving public relations than securing the rights of victims.<sup>201</sup> According to the Secretary General of the Parliamentary Land Confiscation Commission, as of June 2015 only 882 of the approximately 30,000 cases submitted to the Commission were deemed fit for compensation.<sup>202</sup> Without state-sponsored compensation for development purposes in

194. See Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/56/10, at 98-105 (2001).

195. HILARY OLIVIA FAXON, *THE PRAXIS OF ACCESS: GENDER IN MYANMAR'S NATIONAL LAND USE POLICY*, CONFERENCE PAPER NO. 17, 3 (May 2015), <https://perma.cc/UT4L-LBZC>.

196. Shwe Aung, *Parliament calls for land grab recommendations to be expedited*, DEMOCRATIC VOICE OF BURMA, Aug. 30, 2013, <https://perma.cc/NM5Z-NYW4>.

197. NAMATI, *STREAMLINING INSTITUTIONS TO RESTORE LAND AND JUSTICE TO FARMERS IN MYANMAR* 3 (2016), <https://perma.cc/TD6U-4B5H>.

198. GLOBAL WITNESS, *DESPITE PROLIFIC LAND GRABBING*, *supra* note 96.

199. EarthRights International, *There is no benefit, they destroyed our farmland* (2014), <https://perma.cc/H48Q-LAME>.

200. See *DISPLACEMENT SOLUTIONS*, *supra* note 131, at 20.

201. *Id.* at 17.

202. NAMATI & LANDSEA, *RECOMMENDATIONS FOR IMPLEMENTATION OF PRO-POOR LAND POLICY AND LAND L. IN MYAN.: NAT'L DATA AND REGIONAL PRACTICES* 24 (2015), <https://perma.cc/4V5P-9ASZ>.

the absence of statutory land titles, returning asylum-seekers, IDPs, and small-scale farmers still remain vulnerable to land-grabbing.

Other approaches to restitution and compensation have been pursued with mixed results. The recognition and restitution of land titles and tenure rights have been advocated during the negotiation of ceasefire agreements to protect existing, displaced, and returning ethnic populations.<sup>203</sup> Formal recognition of land titles and tenure rights would enable the parties to enter negotiations over restitution, in particular the implementation of the right of dispossessed landowners to return to their lands and reclaim their property. As the government tries to pursue new ceasefire agreements with EAGs such as the KIA, and transform existing ceasefire agreements into the NCA, however, it faces challenges of sequencing and prioritization of demands. In terms of sequencing, natural resource rights and the distribution of resource revenues remain among the most politically contentious issues of the peace process that observers argue should be tabled for discussion during the National Political Dialogue.<sup>204</sup> In terms of prioritization, communities continue to focus their demands on meeting basic security and protection needs, with access to land and compensation for destroyed property cited as secondary concerns.<sup>205</sup> Recognition and restitution of HLP rights create a causality dilemma, as both are predicated on the achievement of a political settlement for sustainable peace. Based on the current status of negotiations, however, neither the military nor the EAGs appear likely to forfeit their strategic advantages.<sup>206</sup>

A potential approach to compensation is the creation of victims' funds with the earnings amassed by past military rulers and their allies. Albeit primarily symbolic in nature, the creation of such funds could provide a model for financing reparations programs.<sup>207</sup> For example, the jade mining concessions that are held by families of former Senior General Than Shwe and political figures Maung Maung Thein and Ohn Myint amount to pre-tax sales of U.S. \$220 million.<sup>208</sup> Although these individuals enjoy consti-

203. See Yanghee Lee (Special Rapporteur of the Situation of Human Rights in Myanmar), *Report of the Special Rapporteur of the Situation of Human Rights in Myanmar*, ¶ 32, U.N. Doc. A/68/397 (Sept. 23, 2013).

204. See INT'L CRISIS GROUP, MYAN.'S PEACE PROCESS: GETTING TO A POL. DIALOGUE 12–13 (Oct. 19, 2016), <https://perma.cc/6K57-NW5G>. The previously-agreed five areas are set out in the Framework for Political Dialogue, which is being amended. The three thematic areas proposed to be dropped were: social issues (including culture, language, gender, resettlement, human rights, drugs), economic issues (including foreign investment, tax and revenue distribution and regional development) and issues around land and natural resources (including resource management and revenue sharing). Myan. News Agency, *NCA to guide 21st Century Panglong Conf.*, GLOBAL NEW LIGHT OF MYAN. May 28, 2016, <https://perma.cc/7QGZ-ETAQ>.

205. Pierce & Reiger, *supra* note 173, at 14.

206. INT'L CRISIS GROUP, *supra* note 205.

207. Examples of such funds include those created with the US\$9 million seized from Augusto Pinochet, the US\$97 million seized from Alberto Fujimori, and the US\$2 billion seized from Ferdinand Marcos.

208. GLOBAL WITNESS, *supra* note 155, at 10.

tutional immunity, their syndicates could be targeted for asset recovery and redistribution programs to support victims. Pursuing asset seizure and redistribution may prove to be a politically costly move during the transitional phase because such privileged individuals have the potential to use their economic power to become spoilers.

Finally, other transitional justice mechanisms, such as truth-seeking mechanisms, can be used as a complement to restitution and compensation. Such mechanisms can provide satisfaction to victims by authenticating claims for future administrative approaches to land issues or creating a record of abuses to pursue future claims. Truth and reconciliation commissions are an important step towards recognition of abuses in which the victims can describe the impact of the HLP rights violations they suffered in their own terms and advocate on their own behalf for redress.<sup>209</sup> Similarly, special commissions of inquiry—either purely domestic in composition or including international advisers—can serve as intermediate measures between truth-seeking and accountability, with the power to issue recommendations for prosecutions and revoke concession licenses.<sup>210</sup> In 2012, the Land Confiscation Investigation Commission became the first such body established to receive complaints from affected individuals and communities about cases of past land-grabbing.<sup>211</sup> The Commission's first report analyzed cases associated with more than 117,000 acres of land acquired in violation of existing laws, rules, and regulations since 1989.<sup>212</sup> Other commissions of inquiry, such as the Myanmar National Human Rights Commission<sup>213</sup> and the Government's Rule of Law Committee have heard thousands of cases of government corruption and police violence against individuals protesting land grabs.<sup>214</sup> Yet neither body possesses judicial or enforcement powers, making it difficult to ensure compliance with decisions.<sup>215</sup>

209. Huggins, *supra* note 8, at 354.

210. Harwell & Le Billon, *supra* note 91, at 295–296.

211. DISPLACEMENT SOLUTIONS, *supra* note 97, at 17.

212. Noe Noe Aung, *Most acquisitions broke land laws, says commission*, MYANMAR TIMES, Apr. 1, 2013, <https://perma.cc/CR7M-3J3E>.

213. “[T]he majority of over 1700 complaints received by the Myanmar National Human Rights Commission (MNHRC) in the first six months of its operations concerned land grabbing cases reportedly committed by army-owned companies, joint ventures and other economically and politically powerful operations with connections to the military. As of September 2012, according to U Win Mra Chairman of the MNHRC, ‘around 30 complaint letters come daily to Myanmar National Human Rights Commission and most are related to farmland problems.’” HNIN WUT YEE, *BUS. AND HUM. RIGHTS IN ASEAN: A BASELINE STUDY* 247 (2013).

214. See, e.g., Htet Naing Zaw & Aye Kyawt Khaing, *Mil. Involved in Massive Land Grabs: Parliamentary Rep.*, THE IRRAWADDY, Mar. 5, 2013, <https://perma.cc/U7LX-8HZY>; Tha Lun Zaung Htet, *Crimes of Former Junta Not Off Limits, Says Govt Committee*, THE IRRAWADDY, Feb. 22, 2013, <https://perma.cc/3MHZ-BVHF>; INT’L CTR. FOR TRANSITIONAL JUST., *NAVIGATING PATHS TO JUST. IN MYAN.’S TRANSITION 3* (2014), <https://perma.cc/49PL-FVDG> (citing *Thousands of bureaucrats snared in Myan. blitz*, AGENCE FRANCE-PRESSE, Feb. 7, 2013).

215. DISPLACEMENT SOLUTIONS, *supra* note 97, at 17.

### B. Customary Land Tenure Reform

Customary land tenure reform is an important means of providing guarantees of non-recurrence for HLP rights violations and resource crimes as Myanmar continues its transition. Despite the recognition of customary land ownership under the British colonial administration, successive military governments disrupted customary land use patterns and effectively denied the legal recognition of customary land use.<sup>216</sup> These customary land tenure arrangements exist in practice alongside statutory laws in many remote parts of the country, particularly in ethnic borderlands, where they still do not enjoy formal legal recognition in Myanmar.<sup>217</sup> Despite customary laws' complexity and patchwork application, there is opportunity to integrate the two systems into one comprehensive and comprehensible land tenure system. Therefore, recognizing and gradually formalizing customary rights and usages within statutory land tenure arrangements is an important means of enfranchising marginalized populations.

The incorporation of customary land tenure into existing statutory frameworks requires sensitivity and special attention to areas of compatibility with relevant international standards. For example, specific elements of customary land tenure also prove discriminatory and exclusionary, including communal ownership, documentation and registration, and shifting agriculture and vacant and fallow land. Patrilineal inheritance systems, such as the Kachin kinship system, also result in the exclusion of women from land ownership.<sup>218</sup> Furthermore, despite areas of incompatibility with international human rights norms, customary law is both derived from and accompanied by a strong sense of legal and social obligation.<sup>219</sup> The importance of social relationships and the principle of reciprocity in most customary land tenure systems underscore the need to balance "reconciliation" and legal rights in land tenure systems.<sup>220</sup> Therefore, the more progressive and functional elements of customary laws should be incorporated carefully into new statutory land laws, where applicable, with particular attention to compatibility with international standards.

Perhaps the most significant step the Myanmar government has taken towards customary land tenure reform has been the drafting of the National Land Use Policy (NLUP). The sixth draft iteration of the NLUP specifically addresses restitution through (1) development of fair procedures; (2) application of international human rights standards; (3) equal right of men and women; (4) monitoring and evaluation for procedural compliance; and (5)

216. Leckie & Simperingham, *supra* note 9, at 43.

217. *Id.*

218. FAXON, *supra* note 195, at 5.

219. RACHAEL S. KNIGHT, FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, STATUTORY RECOGNITION OF CUSTOMARY LAND RIGHTS IN AFRICA 20 (2010), <https://perma.cc/X5CE-H4RS>

220. Huggins, *supra* note 8, at 356.



conducting research on best procedures for restitution of HLP rights of those who had to abandon their residences due to illegal appropriation of land, armed conflict, and other natural and manmade causes.<sup>221</sup> Furthermore, in the specific case of “ethnic nationals who lost their land resources where they lived or worked due to civil war, land-grabbing or natural disasters,” the NLUP states that “adequate land use rights and housing rights shall be systematically provided in accordance with international best practices.”<sup>222</sup> This policy, created through a consultative public process, marks the first step toward reforming and ultimately replacing the 2012 laws.

The government adopted the NLUP in January 2016, providing recognition to traditional land management practices. Critics have claimed that the centralized governance structures, unclear wording, and lengthy sections on government land acquisition renders the policy incompatible with the realities on the ground and would facilitate continued centralized ownership, control, and land grabbing in the ethnic states.<sup>223</sup> Furthermore, the lack of a specific classification for customary lands would create bureaucratic obstacles to the customary practice of managing all community lands.<sup>224</sup> Despite these shortcomings, the NLUP illustrates the ability of the government to acknowledge and take steps to address the fundamental concerns and aspirations expressed by victims of the gravest HLP rights violations, such as refugees and IDPs seeking return to their place of origin, while also providing protections at the policy level to guarantee respect for the statutory and customary land rights of all people.<sup>225</sup>

### C. *Foreign Government and Corporate Responsibility*

Although transitional justice processes tend to focus on dismantling repressive regimes and promoting more open political systems, the secondary actors who provide economic support for and financially benefit from the regimes are seldom held responsible.<sup>226</sup> The redirection and redistribution of scarce resources from those whom the conflict directly and indirectly enriched into reparations programs is important consideration for states during transitional justice processes. In addition to the potential for restitution of grabbed land and resources, the pursuit of foreign government and corporate responsibility through the voluntary acceptance of international agreements could provide potential guarantees of non-recurrence. Measures based variously on principles of distributive justice and corrective justice

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221. NAT'L LAND RES. MGMT. CENT. COMM., THE REPUBLIC OF THE UNION OF MYANMAR, NATIONAL LAND USE POLICY ¶¶ 8(h), 38, 75(f), 78(d), 80(n) (2016).

222. *Id.*, ¶ 72.

223. Ethnic Community Development Forum, *Our Customary Lands: Community-Based Sustainable Natural Resource Management in Burma* 10 (2016), available at <https://perma.cc/JDS4-ARQ7>.

224. *Id.*

225. Jenny Franco, *The Right to Land at Crossroads in Myanmar*, TRANSNATIONAL INSTITUTE (Jul. 06, 2016), <https://perma.cc/C5AD-W9FC>.

226. Sanchez, *supra* note 14, at 114.

could be combined in coercive and voluntary ways to create a norm of “foreign government and corporate social responsibility.” These measures should seek to enhance victims’ economic, political, and social power under the new political order.

Any attempt to restore illegally accumulated housing, land, and property, or redistribute the wealth amassed by private companies or foreign affiliates during periods of armed conflict or state repression, must consider both the degree of responsibility of the perpetrator and the type of evidence available to prove responsibility.<sup>227</sup> In order to prove responsibility for HLP rights violations and associated violence, a legal-factual link that establishes an evidentiary connection to the violations and proves the legal harm that allows for the redistribution of resources must be identified in each case.<sup>228</sup> Although some jurisprudence exists in this regard—including judgments that knowingly receiving goods obtained against the will of the true owner constitutes pillage<sup>229</sup>—the requirement of a legal-factual link that connects the corporation to specific HLP rights violation is incredibly difficult to prove in transitional contexts where rights gaps enable legally ambiguous business transactions.<sup>230</sup>

Foreign governments and private investors have begun to calculate political risk when considering investment in Myanmar amid ongoing human rights violations that may damage their reputations or even expose them to legal liability. Some states have even begun to institute human rights requirements for doing business in Myanmar. For example, in 2013, the U.S. began requiring businesses investing over \$500,000 in Myanmar to submit annual reports on how they are addressing human rights, labor, corruption, and environmental risks associated with their projects or supply chains, including disclosure of any land acquisitions.<sup>231</sup> Yet many foreign investors, such as China, have agreed to no such regulations.<sup>232</sup>

Voluntary acceptance of non-binding international standards indicates an international progression towards corporate and state accountability for investments. The United Nations Guiding Principles on Business and Human Rights, endorsed in 2011 by the UN Human Rights Council, provides an accountability framework for both corporate and state responsibil-

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227. *Id.* at 120.

228. *Id.* at 115.

229. Int’l Comm. of the Red Cross, *Business and International Humanitarian Law: An Introduction to the Rights and Obligations of Business Enterprises Under International Humanitarian Law* 22 (2006).

230. Sanchez, *supra* note 14, at 115.

231. BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP’T. OF STATE, U.S. GOVERNMENT APPROACH ON BUSINESS AND HUMAN RIGHTS 13 (2013), <https://perma.cc/ZBC3-22ML>.

232. “Private companies owned by foreign nationals from China, South Korea, Japan or other ASEAN countries may practice some form of CSR, but such practices are largely absent in the Burmese market.” INT’L BUS. PUBLICATIONS, INC., MYANMAR: DOING BUSINESS AND INVESTING IN MYANMAR GUIDE VOLUME 1 STRATEGIC, PRACTICAL INFORMATION AND CONTACTS 126 (2016).

ity to “protect, respect and remedy” human rights violations.<sup>233</sup> Other international agreements on corporate social responsibility standards, such as the UN Global Compact or the Extractive Industries Transparency Initiative, represent important commitments to accountability. Myanmar has indicated its willingness to join this voluntary code, which provides no immunities from possible litigation.<sup>234</sup> It is unclear to what extent these principles will be utilized for past and present claims against both Myanmar nationals—some of whom remain on international sanction lists—and foreign nationals and legal entities pursuing their own national trade and investment interests.

## VI. CONCLUSION

Reparations are an important means for individuals and societies to address past injustice and create a better future. In transitional societies, HLP rights are particularly important for the restoration of basic livelihoods and the creation of durable solutions, for victims of dispossession. Therefore, reparations for HLP rights violations in the aftermath of armed conflict or repressive regimes are key to the creation and preservation of peaceful inter-communal relations and the development of democratic systems.<sup>235</sup> At the global level, significant normative developments have occurred in establishing the rights of victims to reparations, which has translated to some important practical developments in the administration of reparations programs. In Myanmar, combating land grabs and implementing comprehensive land reform has become a priority of the NLD-led government, which seeks to build on early successes such as the adoption of the NLUP. Despite these positive developments, the various measures presented to provide reparation, restore victims’ rights, and halt HLP violations during the transitional period are presently an aspiration.

Dispossessed farmers and small-scale landholders in Myanmar who lack formal ownership of land and who suffer HLP rights violations undoubtedly face many challenges in their attempts to change discriminatory systems. As a practical matter, convincing the majority Bamar government and its powerful allies to right generations of wrongs by devoting finite resources to a complex reparations program for marginalized ethnic populations is politically difficult. Additionally, cronies and the Tatmadaw, who are best positioned to benefit from co-opting or spoiling land tenure reform, will likely defend their preferential status by escalating land-grabs to consoli-

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233. U.N. Office of the High Comm’r for Human Rights, *Guiding Principles on Business and Human Rights*, HR/PUB/11/04 (2011).

234. Dyeke Rogan, *Myanmar Appoints EITI Lead*, EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE (Dec. 17, 2012), <https://perma.cc/G8N3-NSPX>.

235. Hurwitz, *supra* note 2, at 196.

date land holdings if their political power is threatened.<sup>236</sup> Similar dynamics may also manifest among the KIO/A, due to their financial dependence on illicit trade. Furthermore, in a country where the government remains either unable or unwilling to provide domestic legal protections for victims of continuing HLP rights violations, and where most victims lack the political clout to demand their provision, it is highly unlikely that calls to enforce compliance with international legal obligations will be recognized and respected.

This article has presented select approaches to reparations for HLP rights violations that are practicable where technical complexity, legal lacunae, and accountability challenges deny victims their rights. Some approaches, such as restitution and compensation, are meant to restore victims and their families to the situation they enjoyed before the violation, or repair their situation by changing the system that permitted the initial violation. Others, such as customary land tenure reform and foreign government and corporate compliance with human rights standards, have the potential to affect greater structural change in HLP rights schemes and prevent the recurrence of future incidents of HLP rights violations. Combining both legal and normative elements of reparations within complex arrangements thus presents an opportunity to maximize satisfaction for victims while minimizing inconsistencies in human rights protection.

In spite of persistent rights gaps in Myanmar's ethnic borderlands, the tentative opening of political space across the country has enabled a groundswell of grassroots resistance against HLP rights violations and broad-based demands for justice. Land rights activists and local populations are finding new ways to non-violently oppose continuing land grabs and advocate for the return of land grabbed under the previous regime. Lawyers and community groups are beginning to test the boundaries of the new constitutional rights regime, including by compiling dossiers of land-grab cases.<sup>237</sup> Although the progress to date has been limited, the process of seeking reparations may be a satisfying endeavor in its own right. Involvement in a struggle for reparations allows victims to restore their dignity by seeking recognition of the violations, develop civic trust by spreading knowledge of the violations, and achieve solidarity by building communities of support.<sup>238</sup> As civil and political reforms progress, and awareness of the dangers of land-grabbing in Myanmar increases attention on ESC rights, complex reparations that provide greater HLP rights to dispossessed landholders may soon become a reality.

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236. INTERNATIONAL CRISIS GROUP, MYANMAR: THE POLITICS OF ECONOMIC REFORM, ASIA REPORT NO. 231, 18 (Jul. 27, 2012).

237. Ko Hwe, *Burma's Supreme Seat of Power*, DEMOCRATIC VOICE OF BURMA, Jul. 3, 2013; Simon Denyer, *In Burma, fear gives way to anger toward well-connected business elite*, WASHINGTON POST, Mar. 26, 2013.

238. de Greiff, *supra* note 7, at 460-466.