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ARTICLE 19

# The Right to Information and Natural Resources in Myanmar

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July 2019

Report

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# I. Executive Summary

The right to information is a human right recognized under international law. The ability of individuals to access information is essential to their effective participation in decision-making relating to land use and natural resource governance. The right to information underpins anti-corruption measures, improves efficiency, and is essential for redressing past harms.<sup>1</sup>

Human rights abuses and conflict related to land use and natural resources are among the most widespread and serious issues facing Myanmar.<sup>2</sup> In recent years, land confiscation has emerged as a crucial concern for ethnic minority communities and other vulnerable populations.<sup>3</sup> Furthermore, the involvement of military-backed conglomerates in the extractive industries and other economic enterprises has given rise to a host of transparency concerns. The lack of information around land ownership and use, as well as the secrecy with which state, quasi-state and private entities operate, has driven conflict, undermined rule of law, and facilitated human rights abuses. The Special Rapporteur on the situation on human rights in Myanmar has highlighted the revenues flowing from extractives projects to the armed forces, ethnic armed organizations and state-owned economic enterprises, warning of a 'vacuum of transparency and accountability'.<sup>4</sup>

In recent years, the Myanmar government has taken some important steps towards integrating international right to information standards into Myanmar law. As described in this report, many new laws passed since the end of absolute military rule in 2011 make reference to general principles and values relating to transparency and public participation. Some additionally contain specific reporting or disclosure requirements promoting access to information, including the following:

- Under the *Companies Law* and *Investments Law*, businesses are required to report and publish information about their activities and finances.
- Laws governing land acquisition and use impose notice requirements and periods for public comment.
- Mandatory environmental impact procedures incorporate extensive requirements to consult communities and publish information concerning proposed and ongoing projects.

Additionally, government policies, including the *National Land Use Policy*, *National Environmental Policy* and *Climate Change Policy* contain strong commitments to promoting participation, transparency and access to information. Good faith adherence to these policies could go a long way in promoting the right to information. Myanmar's involvement in the Extractive Industries Transparency Initiative (EITI) and other international transparency initiatives is also encouraging.

A review of these and other provisions, policies and initiatives demonstrates that Myanmar still falls far short of meeting its obligations to respect, protect and fulfil the right to information. Most significantly, Myanmar has failed to pass a comprehensive right to information law, a step taken by over 120 other countries. Many laws governing natural resource and land use, even those including disclosure and transparency provisions, fail to incorporate applicable international standards and best practices. Other laws reference general principles relating to transparency and participation, but fail to establish the procedures and accountability mechanisms necessary to turn aspirations into reality. At times, the potential of various laws and regulations is undermined by poor implementation.

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<sup>1</sup> ARTICLE 19, 'Asia Disclosed: A Review of the Right to Information across Asia', 2015, <https://www.article19.org/data/files/medialibrary/38121/FINAL-Asia-Disclosed-full.pdf>.

<sup>2</sup> Saferworld, 'Security, justice and governance in southeast Myanmar: A knowledge, attitudes and practices survey in Karen ceasefire areas', January 2019, <https://www.saferworld.org.uk/resources/publications/1194-security-justice-and-governance-in-south-east-myanmar-a-knowledge-attitudes-and-practices-survey-in-karen-ceasefire-areas>.

<sup>3</sup> Human Rights Watch, 'The Farmer Becomes the Criminal: Human Rights Abuses in Burma's Karen State', 3 November 2016, [https://www.hrw.org/sites/default/files/report\\_pdf/burma1116\\_web\\_0.pdf](https://www.hrw.org/sites/default/files/report_pdf/burma1116_web_0.pdf).

<sup>4</sup> Human Rights Council, 'Report of the Special Rapporteur on the situation of human rights in Myanmar' (5 March 2019) UN Doc A/HRC/40/68, para 7.

Too often, Myanmar's laws are not used to uphold the right to information but rather to target those seeking information, as illustrated by the conviction and imprisonment of *Reuters* journalists Wa Lone and Kyaw Soe Oo under the *Official Secrets Act*. In recent years there has been a surge of intimidation, threats and prosecutions of those attempting to investigate or report on government abuses and misconduct. Those protesting natural resource extraction by private, military-backed and state-owned enterprises have faced similar persecution.

In early 2019, the Myanmar government convened a committee to review its Constitution. This process could provide an opportunity to strengthen constitutional provisions that impact the right to information.

This report reviews international standards and domestic law provisions relevant to the right to information in the context of natural resource and land use in Myanmar. In examining international treaties, guidelines and initiatives, ARTICLE 19 seeks to highlight standards that could guide Myanmar's efforts to strengthen the right to information through domestic law and policy. The report also reviews Myanmar's existing Union-level legal framework as it relates to natural resource and land use, with an eye toward identifying gaps and areas where provisions have deviated from international standards and best practices.

In the years to come, Myanmar's abundant natural resources could be a foundation for economic growth and sustainable development. However, in the absence of policies that ensure accountability and transparency, they could also drive conflict, corruption and displacement. To avoid these outcomes, Myanmar must embed the right to information in its legal and policy framework.

First, Myanmar should adopt comprehensive right to information legislation that incorporates international standards and best practices. The draft Right to Information Law developed by the Ministry of Information represents a potential point of departure. The Myanmar government should prioritize the passage of the draft law after further consultations with civil society and revisions to ensure alignment with international standards and best practices.

Second, authorities should continue to strengthen disclosure requirements for the private sector. In particular, Myanmar should require disclosure of beneficial ownership and ramp up disclosure requirements in licensing processes in the extractives sector in advance of 2020 EITI reporting.

Finally, the Myanmar government should initiate broader legal reforms to ensure that the right to information is respected, protected and fulfilled. The use of laws such as the *Officials Secrets Act* to target those seeking, receiving and imparting information undermines the protections offered elsewhere in Myanmar's legal framework. The adoption of whistleblower legislation should be part of a broader programme of legislative reform to open civic space and create an enabling environment for the right to information and freedom of expression. The Myanmar government should also consider amending its Constitution to explicitly include the right to information. In these efforts, the Myanmar government should be guided by international human rights law and standards. To this end, the Myanmar government must prioritize the ratification and implementation of the International Covenant on Civil and Political Rights.

## II. The Right to Information in International Law

The right to information is well established in international human rights law and guarantees that individuals—by themselves or in coordination—can seek, receive and impart information.

The right to information is also an enabling right that assists in achieving other human rights. The ability to request, receive and freely share information empowers individuals, journalists, communities, civil society groups and others to understand policies and actions impacting themselves and others, and to effectively advocate for their rights.

The right to information is enshrined in Article 19 of the Universal Declaration of Human Rights (UDHR) and is considered to be binding on all states under customary international law. The right is also established in many international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR) and others relating to specific topics such as pollution,<sup>5</sup> climate change,<sup>6</sup> persons with disabilities<sup>7</sup> and migrant workers.<sup>8</sup>

The right to information is bolstered by international standards set forth in declarations, guidelines and other non-binding documents by UN bodies and other institutions. As described in this report, there are many sets of standards that relate specifically to issues around land use, natural resource extraction, and business and human rights. These standards establish key principles relating to transparency and public participation, and provide guidelines on practices and procedures to promote the right to information in these sectors.

These treaties and standards represent an invaluable resource to inform legislative reform efforts. As described in the pages that follow, there are numerous standards applicable to the right to information in natural resource and land use. These standards should serve as guideposts to Myanmar authorities as they seek to reform existing laws and pass new ones in this area, and should also be used as the yardstick against which official efforts are measured.

### The ICCPR and ASEAN Human Rights Declaration

The International Covenant on Civil and Political Rights (ICCPR) is a core international human rights treaty<sup>9</sup> and the foundation for international standards relating to the right to information. Article 19 of the ICCPR guarantees all people the 'freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers'.<sup>10</sup>

While Myanmar has not signed or ratified the ICCPR, the obligations contained in the ICCPR largely reflect customary international law. They should, therefore, guide the Myanmar government's legislative reform and policy-making efforts, as well as inform interpretation of Myanmar's obligations under other international human rights instruments to which it is a State Party.

The UN Human Rights Committee's General Comment 34 provides authoritative guidance on the right to information. In the General Comment, the Committee, which is tasked with interpreting the

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<sup>5</sup> Stockholm Convention on Persistent Organic Pollutants (adopted 22 May 2001, entered into force 17 May 2004) 2256 UNTS 119; Minamata Convention on Mercury (adopted 10 October 2013, entered into force 16 August 2017).

<sup>6</sup> United Nations Framework Convention on Climate Change (adopted 30 April - 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.

<sup>7</sup> Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD).

<sup>8</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3.

<sup>9</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR). The ICCPR forms part of the International Bill of Human Rights alongside the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights.

<sup>10</sup> ICCPR, Article 19(2).

ICCPR, explains that Article 19 of the ICCPR ensures that all people have a right of access to information held by public bodies.<sup>11</sup> This includes the executive, legislative and judicial branches, as well as other public or governmental authorities at all levels: national, regional and local.<sup>12</sup>

To realize the right to information, the Committee urged governments to take a variety of measures. States should proactively disseminate information that is 'of public interest'.<sup>13</sup> They should 'make every effort to ensure easy, prompt, effective and practical' access to information.<sup>14</sup> The Committee also stated that fees for access must be reasonable, responses to requests for information must be timely, authorities must provide explanations for withholding information, and appeals mechanisms must be available.<sup>15</sup> To meet these standards, the Committee urged states to establish 'necessary procedures' to enable access to information, and suggested the passage of right of information legislation as a means of ensuring such access.

The Human Rights Committee elaborated on the right to information in the case of *Toktakunov v. Kyrgyzstan*, stating that restrictions of the right are acceptable only if they meet the criteria provided by Article 19(3) of the ICCPR, which requires that restrictions be provided by law and necessary to protect the rights or reputations of others, national security, public order, or public health or morals.<sup>16</sup> The Committee further stated that information should be provided without requiring that the requestor specify a direct interest in receiving the information or further explain the reason for making the request.

The ASEAN Human Rights Declaration recognizes the right to information using language that closely parallels the ICCPR, stating:

Everyone shall have the... freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.<sup>17</sup>

The ASEAN Human Rights Declaration has been widely criticized by civil society, human rights groups and diplomats for its state-centric approach to rights protection, 'cultural relativism', and lack of enforcement mechanisms.<sup>18</sup> 54 national and international organizations operating in the region condemned the Declaration as 'a declaration of government powers disguised as a declaration of human rights'.<sup>19</sup> The ASEAN Intergovernmental Commission on Human Rights, which was created by the Declaration, has likewise been condemned as powerless and ineffective.<sup>20</sup> Despite these concerns, the inclusion of the right to information in the Declaration represents a commitment by ASEAN nations to upholding the right.

## The ICESCR and other human rights treaties

The right to information is also incorporated into international standards relating to economic, cultural and social rights. The International Covenant on Economic, Social and Cultural Rights (ICESCR),

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<sup>11</sup> Human Rights Committee, 'General Comment No. 34 Article 19: Freedoms of opinion and expression' (12 September 2011) UN Doc CCPR/C/GC/34 (General Comment No. 34).

<sup>12</sup> *Ibid.*, para. 7.

<sup>13</sup> *Ibid.*, para. 19.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> Human Rights Committee, *Toktakunov v Kyrgyzstan*, Communication No. 1470/2006, 21 April 2011, [http://www.worldcourts.com/hrc/eng/decisions/2011.03.28\\_Toktakunov\\_v\\_Kyrgyzstan.pdf](http://www.worldcourts.com/hrc/eng/decisions/2011.03.28_Toktakunov_v_Kyrgyzstan.pdf).

<sup>17</sup> ASEAN Human Rights Declaration (adopted 18 November 2012).

<sup>18</sup> See, for example, Victoria Nuland, US Department of State, 'ASEAN Declaration on Human Rights', press statement, 20 November 2012, <https://2009-2017.state.gov/r/pa/prs/ps/2012/11/200915.htm>.

<sup>19</sup> 'Civil Society Denounces Adoption of Flawed ASEAN Human Rights Declaration', 19 November 2012, <https://www.hrw.org/news/2012/11/19/civil-society-denounces-adoption-flawed-asean-human-rights-declaration>.

<sup>20</sup> See, for example, Kasit Piromya, 'Time to rethink ASEAN's rights body', *Jakarta Post*, 12 June 2019, <https://www.thejakartapost.com/academia/2019/06/12/time-to-rethink-aseans-rights-body.html>.

which Myanmar ratified in 2017, is the chief treaty concerning economic, social and cultural rights, including the rights to work, food, water, housing, health and culture, as well as labour rights.

As described above, the right to information is an enabling right that is essential to the realisation of these rights, including by facilitating public participation and promoting transparency and accountability.

In General Comments, the Committee on Economic, Social and Cultural Rights has recognised the importance of the right to information in securing a number of these rights.<sup>21</sup> For example, in General Comment 7, the Committee set out procedural obligations relating to forced evictions, including:

- (a) an opportunity for genuine consultation with those affected;
- (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction;
- (c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected[.]<sup>22</sup>

In General Comment 24 on the obligations on states under ICESCR in the context of business activities, the Committee recognised the importance of incorporating principles relating to transparency into initiatives aimed at treaty implementation, including in national action plans on business and human rights.<sup>23</sup>

The Special Rapporteur on the situation of human rights in Myanmar has specifically noted Myanmar's obligations to promote transparency under the ICESCR, writing, 'Guaranteeing transparency in how revenues are used would greatly assist the Government in meeting its international obligations under ICESCR and responding effectively to the needs of the Myanmar people'.<sup>24</sup>

The right to information is also established in other human rights treaties to which Myanmar is a party. The Convention on the Rights of the Child (CRC), the Convention on the Elimination of all forms of Discrimination against Women (CEDAW), and the Convention on the Rights of Persons with Disabilities (CRPD) all contain multiple provisions concerning the right to information in relation to their specific subject matter.<sup>25</sup>

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<sup>21</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No. 7: The right to adequate housing (Art. 11.1): forced evictions' (20 May 1997) UN Doc E/1998/22; CESCR, 'General Comment No. 23: The right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)' (7 April 2016) UN Doc E/C.12/GC/23; CESCR, 'General Comment 21: Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)' (21 December 2009) UN Doc E/C.12/GC/21; CESCR 'General Comment No. 18: The right to work (Art. 6 of the Covenant)' (6 February 2006) UN Doc E/C.12/GC/18; CESCR, 'General Comment 15: The right to water (Arts. 11 and 12 of the Covenant)' (20 January 2003) UN Doc E/C.12/2002/11; CESCR, 'General Comment No. 14: The right to the highest attainable standard of health (Art. 12 of the Covenant)' (11 August 2000) UN Doc E/C.12/2000/4; *See also*, Human Rights Council, 'Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover' Addendum - Mission to Japan (31 July 2013) UN Doc A/HRC/23/41/Add.3; Committee on the Elimination of Discrimination against Women, 'General Recommendation No. 24: Article 12 of the Convention (Women and Health)' (1999) UN Doc A/54/38/Rev.1, chap. I.

<sup>22</sup> CESCR, 'General Comment No. 7', para. 15.

<sup>23</sup> CESCR, 'General Comment No. 24: State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities' (10 August 2017) UN Doc E/C.12/GC/24.

<sup>24</sup> Human Rights Council, 'Report of the Special Rapporteur on the situation of human rights in Myanmar' (5 March 2019) UN Doc A/HRC/40/68, para 9.

<sup>25</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, Articles 13, 17, 23(4) and 28(d) (contain language identical to ICCPR, Article 19); Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13, Articles 10, 14 and 16; CRPD, Articles 4(1)(h), 9(1), 9(2)(f) and (g), 21, and 23(1)(b).

## Business and human rights

The UN Guiding Principles on Business and Human Rights describe the responsibilities of both states and businesses. According to the Guiding Principles, both have a duty to ensure communication of information and transparency around the human rights impacts of business activities. Governments, in particular, should '[e]ncourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts',<sup>26</sup> and businesses should themselves communicate information on human rights impacts to affected stakeholders and formally report on severe impacts.<sup>27</sup>

The Working Group on Business and Human Rights has encouraged all states to develop national action plans on the implementation of the Guiding Principles, and has provided recommendations on specific measures that could be taken to advance each principle, including those relevant to the right to information.<sup>28</sup> The Myanmar government has also committed to producing a national action plan, but no formal consultations have been held or announced.<sup>29</sup>

## UN Convention against Corruption

The UN Convention against Corruption (UNCAC) is a binding international treaty imposing duties on member states to combat corruption.<sup>30</sup> Myanmar ratified UNCAC in 2012.

UNCAC obligations are often stated in general terms, with specific prescribed actions presented as exemplary rather than mandatory. For example, Article 10 on public reporting obligates states to 'take such measures as may be necessary to enhance transparency in its public administration', adding that 'such measures may include' establishing procedures for requesting and receiving information and proactively publishing information.<sup>31</sup> Similar disclosure initiatives and procedures to respond to requests for information are put forward as means of upholding state obligations in relation to public procurement and private sector corruption.<sup>32</sup> UNCAC commits states to ensuring public participation in anti-corruption measures, including by 'ensuring that the public has effective access to information', through 'public information activities', and by '[r]especting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption'.<sup>33</sup> UNCAC also requires states to establish legal protections for whistleblowers who report corruption, as well as other witnesses, victims and experts.<sup>34</sup>

## Land rights, forced evictions and displacement

The right to information enables individuals and communities to effectively participate in decisions relating to land use. The UN Office of the High Commissioner for Human Rights (OHCHR) has linked the right to information to development planning, concluding that, 'governments have a duty to produce and disseminate relevant information about their plans, projects, decisions and results'.<sup>35</sup>

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<sup>26</sup> Human Rights Council, 'Protect, respect and remedy: a framework for business and human rights: report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie' (7 April 2008) UN Doc A/HRC/8/5, Principle 3.

<sup>27</sup> *Ibid.*, Principle 21.

<sup>28</sup> UN Working Group on Business and Human Rights, 'Guidance on National Action Plans on Business and Human Rights' (December 2014), [http://www.ohchr.org/Documents/Issues/Business/UNWG\\_NAPGuidance.pdf](http://www.ohchr.org/Documents/Issues/Business/UNWG_NAPGuidance.pdf).

<sup>29</sup> UN Office of the High Commissioner for Human Rights (OHCHR), State national action plans on Business and Human Rights, <https://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>.

<sup>30</sup> United Nations Convention against Corruption (adopted 31 October 2003, entered into force 14 December 2005) 2349 UNTS 41.

<sup>31</sup> *Ibid.*, Article 10.

<sup>32</sup> *Ibid.*, Articles 9 and 12.

<sup>33</sup> *Ibid.*, Article 13.

<sup>34</sup> *Ibid.*, Articles 32 and 33.

<sup>35</sup> OHCHR, 'Land and Human Rights: Standards and Applications' (2015) UN Doc HR/PUB/15/5/Add.1.

The UN's Voluntary Guidelines on the responsible governance of tenure of land, fisheries and forests in the context of national food security set out extensive proposals for states to ensure the right to information in the context of land rights, including by publicising policies and decisions, and setting up transparent systems for recording land tenure.<sup>36</sup>

International standards also highlight the importance of the right to information in relation to forced evictions and displacement. Under the UN Guiding Principles on Internal Displacement ('Guiding Principles on Internal Displacement'), which protect against arbitrary displacement in the case of large-scale development projects not justified by compelling and overriding public interests, authorities are required to guarantee that those facing displacement have full information on the reasons for their displacement and procedures that will be followed.<sup>37</sup> States have a responsibility to seek the free and informed consent of those facing displacement, to involve those affected, particularly women, in the planning and management of their relocation, and to respect the right to a remedy, including by ensuring judicial review.<sup>38</sup> Protections are stronger for 'indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands'.<sup>39</sup>

The rights under the Guiding Principles on Internal Displacement were expanded in the UN's Basic Principles and Guidelines on Development-Based Evictions and Displacement. The Basic Principles require that countries:

Ensure the dissemination of adequate information on human rights and laws and policies relating to protection against forced evictions. Specific attention should be given to the dissemination of timely and appropriate information to groups particularly vulnerable to evictions, through culturally appropriate channels and methods.<sup>40</sup>

The Basic Principles and Guidelines also set out criteria for transparency and participation when countries are deciding whether to displace persons or communities. These include the guarantee of full and prior informed consent before relocation, the provision of sufficient information on the proposed use of the eviction site, and ninety days' notice prior to eviction.<sup>41</sup>

## Environmental protection

International environmental law provides for extensive rights of access to information related to development projects, pollution, the use of chemicals, forestry and other issues impacting the environment.

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<sup>36</sup> Food and Agriculture Organization of the United Nations, 'Voluntary Guidelines on the responsible governance of tenure of land, fisheries and forests in the context of national food security' (2012) <http://www.fao.org/docrep/016/i2801e/i2801e.pdf> ('17.3 States should strive to ensure that everyone is able to record their tenure rights and obtain information without discrimination on any basis. Where appropriate, implementing agencies, such as land registries, should establish service centres or mobile offices, having regard to accessibility by women, the poor and vulnerable groups. States should consider using locally-based professionals, such as lawyers, notaries, surveyors and social scientists to deliver information on tenure rights to the public... 17.5 States should ensure that information on tenure rights is easily available to all, subject to privacy restrictions. Such restrictions should not unnecessarily prevent public scrutiny to identify corrupt and illegal transactions. States and non-state actors should further endeavour to prevent corruption in the recording of tenure rights by widely publicizing processes, requirements, fees and any exemptions, and deadlines for responses to service requests.')

<sup>37</sup> UN High Commissioner for Refugees, 'Guiding Principles on Internal Displacement' (22 July 1998) UN Doc E/CN.4/1998/53/Add.2, Principle 7.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*, Principle 9.

<sup>40</sup> Human Rights Council, Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, 'UN Basic Principles and Guidelines on Development-Based Evictions and Displacement, Annex 1 of the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living (2007) UN Doc A/HRC/4/18, para. 35.

<sup>41</sup> *Ibid.*, para. 56.

Principle 10 of the Rio Declaration on Environment and Development (1992) emphasizes the need for access to information concerning the environment that is held by states and calls on states to facilitate and encourage public awareness on environmental and development issues.<sup>42</sup>

In the Bali Guidelines for the development of national legislation on access to information, public participation and access to justice in environmental matters, the UN Environment Program elaborated on the standards in the Rio Declaration by setting out 26 principles for countries to follow in adopting national laws.<sup>43</sup> The Guidelines affirm the rights of natural or legal persons to 'affordable, effective and timely access to environmental information held by public authorities upon request... without having to prove a legal or other interest'.<sup>44</sup> The Guidelines also outline the responsibility of states to proactively publish information about environmental impacts and policies and to establish procedures for requesting environmental information and making decisions about such requests, among other duties.<sup>45</sup>

In a 2014 resolution on human rights and the environment, the Human Rights Council emphasized the importance of states 'making environmental information public and enabling effective participation in environmental decision-making processes'.<sup>46</sup> The Human Rights Council went further in its 2017 resolution on the same topic, calling on states to adopt and implement laws ensuring the right to participation and access to information, and to facilitate public awareness and participation in environmental decision-making.<sup>47</sup>

Myanmar is one of 186 countries to have joined the Paris Agreement on climate change, which was adopted in 2015 and entered into force the following year. Under the Agreement, state parties are obligated to 'cooperate in taking measures, as appropriate, to enhance climate change education, training, public awareness, public participation and public access to information'.<sup>48</sup> The Agreement also establishes an 'enhanced transparency framework' involving member states providing information on their implementation of the Agreement.<sup>49</sup>

Some of these standards have also been adopted by regional bodies. The ASEAN Human Rights Declaration (2012) incorporates the right to a clean environment and water.<sup>50</sup> The ASEAN Singapore Resolution on Environment and Development (1992) in its section on 'Public Awareness' agreed that member states shall:

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<sup>42</sup> Rio Declaration on Environment and Development (12 August 1992), UN Doc A/CONF.151/26 (Rio Declaration) ('Principle 10: Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.').

<sup>43</sup> United Nations Environment Programme (UNEP), 'Guidelines for the development of national legislation on access to information, public participation and access to Justice in environmental matters' (26 February 2010); See also, UNEP, 'Putting Rio Principle 10 into Action: An Implementation Guide for the UNEP Bali Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters' (2015).

<sup>44</sup> UNEP, 'Guidelines for the development of national legislation on access to information, public participation and access to Justice in environmental matters' (26 February 2010), Guideline 1.

<sup>45</sup> *Ibid.*, Guidelines 2-7.

<sup>46</sup> Human Rights Council, Resolution 25/21: 'Human Rights and the Environment' (15 April 2014) UN Doc A/HRC/RES/25/21.

<sup>47</sup> Human Rights Council, Resolution 34/20: 'Human Rights and the Environment' (6 April 2017) UN Doc A/HRC/RES/34/20.

<sup>48</sup> Paris Agreement (adopted 12 December 2015), Article 12.

<sup>49</sup> *Ibid.*, Article 13.

<sup>50</sup> ASEAN Human Rights Declaration, Article 28.

[C]ontinue to promote public awareness of environmental issues so as to bring about broader participation in environmental protection efforts, and to do so through greater exchange of information and experiences on approaches and strategies in environmental education.<sup>51</sup>

The 1990 Ministerial Declaration on Environmentally Sound and Sustainable Development in Asia and the Pacific ('The Bangkok Declaration') affirmed the right of individuals and non-governmental organisations to be informed of environmental problems relevant to them, to have necessary access to information, and to participate in the formulation and implementation of decisions likely to affect their environment.<sup>52</sup>

### **Environmental impact assessments and strategic environmental assessments**

Under international law and standards, environmental impact assessments (EIAs) play a key role in upholding the rights of communities to be informed and consulted on projects that impact their lives. EIAs are formal assessments of the environmental and social impact of planned development or industrial projects. According to a ruling of the International Court of Justice, EIAs are required under international law for projects that have significant trans-boundary impacts.<sup>53</sup> Additionally, nearly all countries around the world have adopted laws and practices that require EIAs for large scale projects with the potential for significant environmental impact. Similar to EIA's, Strategic Environmental Assessments (SEAs) are a mechanism for incorporating environmental considerations into policies, plans and programmes. Development assistance from international financial institutions and donor agencies is increasingly tied to the completion of EIAs and SEAs.

The Rio Declaration on Environment and Development (1992) called for states to adopt impact assessment requirements.<sup>54</sup> The Convention on Biological Diversity, which was adopted at the Rio Earth Summit and ratified by Myanmar in 1995, requires an EIA when a proposed project would affect biodiversity.<sup>55</sup>

These principles have also been adopted at the regional level through the 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources.<sup>56</sup> In 2017, a working group made up of representatives from the governments of Cambodia, Laos, Myanmar, Thailand and Vietnam, working with civil society and international experts, published a document, 'Guidelines on Public Participation in EIA in the Mekong Region', with the purpose of providing 'practical guidance for implementing meaningful public participation in the EIA process in the Mekong region'.<sup>57</sup> Among the principles advanced by the guidelines are access to information by affected parties and stakeholders, and the

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<sup>51</sup> ASEAN Cooperation on Environment, 'Resolution on Environment and Development' (18 February 1992), <http://environment.asean.org/resolution-on-environment-and-development-2/>.

<sup>52</sup> The Bangkok Declaration, Ministerial Declaration on Environmentally Sound and Sustainable Development in Asia and the Pacific (1990) A/Conf.151/PC/38.

<sup>53</sup> International Court of Justice, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Judgment) [2010] ICJ Rep 14.

<sup>54</sup> Rio Declaration, Principle 17 ('Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority').

<sup>55</sup> Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79. Article 14 of the treaty obliges countries to 'introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding minimising such effects and, where appropriate, allow for public participation in such procedures'.

<sup>56</sup> ASEAN Agreement on the Conservation of Nature and Natural Resources (adopted 9 July 1985), Article 14. ('1. The Contracting Parties undertake that proposals for any activity which may significantly affect the natural environment shall as far as possible be subjected to an assessment of their consequences before they are adopted, and they shall take into consideration the results of this assessment in their decision-making process. 2. In those cases where any such activities are undertaken, the Contracting Parties shall plan and carry them out so as to overcome or minimize any assessed adverse effects and shall monitor such effects with a view to taking remedial action as appropriate'.)

<sup>57</sup> Mekong Partnership for the Environment, 'Guidelines for Public Participation in Environmental Impact Assessment in the Mekong Region' (27 March 2017).

public availability of information.<sup>58</sup> The Guidelines also describe in detail the types of information that should be provided at each phase of the EIA process.<sup>59</sup>

### **Pollution**

A number of treaties also establish the right of individuals to access information regarding toxic chemicals that are produced, used or stored in their communities. Treaties on toxic chemicals generally require that governments collect information about pollutants and provide it to the public, as well and engage in public education about the subject.<sup>60</sup>

### **Forests**

At the 1992 Rio Conference, states agreed to the Forest Principles, which set forth agreed principles on forest use and conservation. The Forest Principles emphasised the necessity of providing 'timely, reliable and accurate information on forests and forest ecosystems' and the need for public participation in decision-making about forest resources, including by marginalised groups.<sup>61</sup> The Principles also state that national policies should ensure that EIAs are conducted 'where actions are likely to have significant adverse impacts on important forest resources'.<sup>62</sup>

At the East Asia Ministerial Conference in 2001, participating states adopted the Bali Declaration on Forest Law Enforcement and Governance, which included a commitment to involve stakeholders, including local communities, in decision-making in the forestry sector and to '[u]ndertake the demarcation, accurate and timely mapping, and precise allocation of forest areas, and make this information available to the public'.<sup>63</sup>

Under the UN Climate Change Framework Agreement, the UN has developed the Reducing Emissions from Deforestation and Forest Degradation (REDD+) Programme, which aims to reduce climate change gasses caused by deforestation. Myanmar joined the REDD+ program in 2011. A significant focus of the program is on enhancing transparency and public participation.<sup>64</sup>

### **Indigenous, minority and vulnerable communities**

States have heightened obligations to ensure access to information in decision-making in relation to actions that affect tribal, indigenous and minority communities, especially when policies and projects impact traditionally-held lands. The UN Human Rights Committee has highlighted the need for greater care in ensuring the participation of these communities, stating, 'decision-making that may substantively compromise the way of life and culture of a minority group should be undertaken in a process of information-sharing and consultation with affected communities'.<sup>65</sup>

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<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

<sup>60</sup> See e.g., Stockholm Convention on Persistent Organic Pollutants (adopted 22 May 2001, entered into force 17 May 2004) 2256 UNTS 119, Article 10 on Public information, awareness and education (ratified and in force in Myanmar since 2004); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (adopted 22 March 1989, entered into force 5 May 1992) 1673 UNTS 57 (ratified and in force in Myanmar since 2015); Rotterdam Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and for Pesticides in International Trade (adopted 10 September 1998, entered into force 24 February 2004) 2244 UNTS 337 (not yet signed by Myanmar); Minamata Convention on Mercury (adopted 10 October 2013, entered into force 16 August 2017) (not yet signed by Myanmar).

<sup>61</sup> UN General Assembly, 'Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests' (3-14 June 1992) UN Doc A/CONF.151/26 (Vol. III), paras. 2(c) and 5(b).

<sup>62</sup> *Ibid.*, para. 8(h).

<sup>63</sup> 'Summary Report of the Forest Law Enforcement and Governance East Asia Ministerial Conference', Bali, Indonesia (11-13 September 2001) <https://enb.iisd.org/crs/sdfile/sdvol60num1.html>.

<sup>64</sup> UN Reducing Emissions from Deforestation and Forest Degradation (REDD) Programme, 'Guidelines on Stakeholder Engagement in REDD+ Readiness With a Focus on the Participation of Indigenous Peoples and Other Forest-Dependent Communities' (20 April 2012).

<sup>65</sup> General Comment No. 34, para 18. citing *Poma v. Peru*, Communication No. 1457/2006, 27 March 2009.

ILO Convention 169 on Indigenous and Tribal Peoples, establishes a number of obligations to consult indigenous and tribal groups that may be impacted by legislative or policy decisions.<sup>66</sup> However, Myanmar is not a party to the treaty, which has only been joined by 23 countries since it was adopted in 1989.

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP)—a non-binding instrument, but with widespread support from nations—was adopted by the UN General Assembly in 2007.<sup>67</sup> Myanmar voted in favour of the Declaration, but noted that it would ‘seek to implement it with flexibility’.<sup>68</sup> The UNDRIP sets forth key principles on state engagement with indigenous communities. At the centre of state obligations towards indigenous communities is the concept of free, prior and informed consent. The UNDRIP requires the free, prior and informed consent of indigenous peoples in relation to their forcible relocation,<sup>69</sup> legislative or administrative measures impacting their communities,<sup>70</sup> or the storage or disposal of hazardous materials.<sup>71</sup>

As suggested by the inclusion of ‘informed’ in the term, the right to information is a foundational element of free, prior and informed consent. In short governments must ensure that individuals and groups have access to sufficient information to understand the range of potential impacts—positive and negative—of a policy or action impacting their community.

A UN expert body tasked with identifying key elements of free, prior and informed consent concluded that ‘informed’ should be understood to encompass:

- a. The nature, size, pace, reversibility and scope of any proposed project or activity;
- b. The reason(s) for or purpose(s) of the project and/or activity;
- c. The duration of the above;
- d. The locality of areas that will be affected;
- e. A preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit-sharing in a context that respects the precautionary principle;
- f. Personnel likely to be involved in the execution of the proposed project (including indigenous peoples, private sector staff, research institutions, government employees and others);
- g. Procedures that the project may entail.<sup>72</sup>

In 2018, these elements were affirmed and elaborated by a Human Rights Council-mandated ‘Expert Mechanism’, which emphasized the importance of both quantitative and qualitative information that is ‘objective, accurate and clear’ and ‘presented in a form understandable to indigenous peoples’.<sup>73</sup>

The UN Declaration on the Right of Peasants and Other People Working in Rural Areas, adopted by the UN General Assembly in 2018, affirmed the importance of access to information and mechanisms for ensuring transparency in upholding the rights of these vulnerable groups.<sup>74</sup> The Declaration affirms the right of peasants and those working in rural areas to ‘seek, receive, develop and impart

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<sup>66</sup> International Labor Organization Indigenous and Tribal Peoples Convention (adopted 27 June 1989, entered into force 5 September 1991) C169.

<sup>67</sup> United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295 (13 September 2007).

<sup>68</sup> UN General Assembly, ‘General Assembly adopts declaration on rights of indigenous peoples; ‘Major step forward’ towards human rights for all, says President’, 13 September 2007, <https://www.un.org/press/en/2007/ga10612.doc.htm>.

<sup>69</sup> *Ibid.*, Article 10.

<sup>70</sup> *Ibid.*, Article 19.

<sup>71</sup> *Ibid.*, Article 29.

<sup>72</sup> UN Economic and Social Council, ‘Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples’ (17 February 2005) UN Doc E/C.19/2005/3.

<sup>73</sup> ‘Free, prior and informed consent: a human rights-based approach, Study of the Expert Mechanism on the Rights of Indigenous Peoples’ (10 August 2018), UN Doc A/HRC/39/62.

<sup>74</sup> United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas, UNGA Res 73/165 (21 January 2019).

information, including information about factors that may affect the production, processing, marketing and distribution of their products', and describes the duty of governments to ensure access to 'relevant, transparent, timely and adequate information... to ensure... effective participation in decision-making in matters that may affect [peasants' and workers'] lives, land and livelihoods'.<sup>75</sup> Other provisions also reinforce obligations to ensure transparency and access to information in relation to the use and storage of chemicals,<sup>76</sup> health concerns<sup>77</sup> and occupational safety,<sup>78</sup> and call on states to protect rights through environmental impact assessments.<sup>79</sup>

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<sup>75</sup> *Ibid.*, Article 11.

<sup>76</sup> *Ibid.*, Article 14(4)(c).

<sup>77</sup> *Ibid.*, Article 23(3).

<sup>78</sup> *Ibid.*, Article 14(1).

<sup>79</sup> *Ibid.*, Article 5(2)(a).

### III. The Right to Information and Natural Resources in Myanmar

As described above, Myanmar has specific obligations in relation to the right to information. Moreover, international standards provide a robust set of guidelines concerning access to information, transparency, anti-corruption initiatives, and natural resource use that could serve as a roadmap for the Myanmar government's legislative reform initiatives.

However, Myanmar's domestic legal framework falls far short of these standards and Myanmar's obligations under international law.<sup>80</sup>

Although Myanmar's 2008 Constitution enshrines the right to freedom of expression in section 354(a), it does not explicitly mention the right to information. ARTICLE 19 suggest that the protections for freedom of expression under the constitution should be interpreted in line with international law and encompass the right to information. Nevertheless, the absence from the Constitution of language explicitly protecting the right to information is problematic. Moreover, key rights protections included in Myanmar's Constitution are undermined by an overly board limitations clause that subordinates rights to 'laws enacted for Union security, prevalence of law and order, community peace and tranquillity or public order and morality'.<sup>81</sup> Further, the constitutional provision on the right to freedom of expression only applies to Myanmar citizens, excluding many who should be entitled to this right under international law.<sup>82</sup>

Like Myanmar's Constitution, the country's legal framework offers relatively few guarantees for the right to information. Notably, Myanmar lacks comprehensive right to information legislation—despite developing several draft bills—leaving it with only piecemeal protections of the right. However, narrow disclosure requirements provide opportunities for media, civil society, business and the general public. This section examines portions of Myanmar's legal and policy framework that touch on the right to information as it relates to natural resource and land use in the country.

#### Investment and corporate law

Investment and corporate law has become an increasingly effective tool for generating disclosure from the private sector in Myanmar. The 2016 *Investment Law* gives investors the right to long term leases on land and requires 'effective compensation' for harms from logging or extraction of natural resources unrelated to the scope of the investment.<sup>83</sup> Investors are required to obtain permission from the Investment Commission for projects that would have a large potential impact on the environment, and conduct 'health assessment, cultural heritage impact assessment, environmental impact assessment and social impact assessment according to the type of investment business'. The law provides investors with 'the right to obtain the relevant information on any measures or decision which has significant impact for an investor and their direct investment',<sup>84</sup> but does not provide a corollary right to the public or those impacted by investment.

The 2017 *Investment Rules* contain several transparency provisions that apply to the private sector. Investors seeking to carry out projects requiring a permit must submit a proposal with information concerning the type, location, financing and extent of the project to the Myanmar Investment Commission, which is required to publish proposals for projects that require a permit.<sup>85</sup> Investors that have been issued permits are subsequently required to publish annual reports including audited financial statements, details on the project's progress, changes to the project, and details on

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<sup>80</sup> This report examines Myanmar's Union-level legal framework, and does not analyze regional or local laws or regulations.

<sup>81</sup> *Constitution of the Republic of the Union of Myanmar* (2008), Article 354.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Myanmar Investment Law* (2016).

<sup>84</sup> *Ibid.*, Section 48(a).

<sup>85</sup> *Myanmar Investment Rules* (2017), Sections 36, 38 and 45.

compliance with applicable laws.<sup>86</sup> The Commission is also required to publish annual investment reports on its website containing information about its activities, ‘investment trends’, ‘investor grievances’ and penalties issued.<sup>87</sup>

The *Myanmar Special Economic Zone Law* governs the development and use of special economic zones, but contains no significant transparency provisions.<sup>88</sup>

In 2018, a new *Companies Law* and corresponding *Regulations* replaced the previous *Myanmar Companies Act* 1914. The 2018 law requires companies to file an annual report with the Registrar containing information on company officials, activities, finances, capital and licenses.<sup>89</sup> Although the law does not require publication of the reported information, the Myanmar Centre for Responsible Business argues that ‘this information is in principle public’ and urges companies to publish it on their website.<sup>90</sup> Companies are required by the law to publish certain types of documents—such as prospectuses—and notices of certain activities—including changes to company registration, capital reductions, shareholder buy-backs or dissolution—in local newspapers, the Gazette, or both.<sup>91</sup> The Directorate of Investment and Company Administration has established an online directory allowing public access to basic registration information for registered companies.<sup>92</sup>

According to the Myanmar Centre for Responsible Business, companies are increasingly proactively disclosing information about their operations, even absent legal requirements. In its 2019 *Pwint Thit Sa* report, which assesses information disclosure by businesses in Myanmar, state-owned economic enterprises performed the most poorly.<sup>93</sup>

The 2013 *Anti-Corruption Law* established an anti-corruption commission and set out among its aims ‘to encourage transparency in order to encourage investment’.<sup>94</sup> A 2018 amendment extended the scope of the law to include private sector actors.<sup>95</sup> In addition to providing for the investigation of corrupt practices, the law requires that senior government officials annually disclose to the Commission information about the assets they hold.<sup>96</sup> However, the Commission is not obligated to publish or otherwise share this information with the public.<sup>97</sup>

## Land use law and policy

Under Article 37 of Myanmar’s 2008 Constitution, the state is ‘the ultimate owner of all lands’.<sup>98</sup> This provision, alongside a range of flawed legislation governing land tenure, leaves farmers and others vulnerable to land seizures for a variety of purposes, including development projects. Laws regarding land ownership and acquisition in Myanmar provide only limited guarantees for transparency and participation.

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<sup>86</sup> *Ibid.*, Sections 196 and 199.

<sup>87</sup> *Ibid.*, Section 148.

<sup>88</sup> *Myanmar Special Economic Zone Law* (2014).

<sup>89</sup> *Myanmar Companies Law* (2018).

<sup>90</sup> Myanmar Centre for Responsible Business, ‘Pwint Thit Sa: Transparency in Myanmar Enterprises’, 2019, [https://myanmar-responsiblebusiness.org/pdf/TiME/2019-Pwint-Thit-Sa\\_en.pdf](https://myanmar-responsiblebusiness.org/pdf/TiME/2019-Pwint-Thit-Sa_en.pdf), p. 22.

<sup>91</sup> See, *Myanmar Companies Law*, Sections 58, 116, 121, 203, 357, and 361.

<sup>92</sup> Directorate of Investment and Company Administration, Myanmar Companies Online (MyCO), <https://www.myco.dica.gov.mm/>.

<sup>93</sup> Myanmar Centre for Responsible Business, ‘Pwint Thit Sa: Transparency in Myanmar Enterprises’, 2019, [https://myanmar-responsiblebusiness.org/pdf/TiME/2019-Pwint-Thit-Sa\\_en.pdf](https://myanmar-responsiblebusiness.org/pdf/TiME/2019-Pwint-Thit-Sa_en.pdf), p8.

<sup>94</sup> *Anti-Corruption Law* (2013), Section 4(f).

<sup>95</sup> *2018 Amendment to Anti-Corruption Law*.

<sup>96</sup> *Anti-Corruption Law* (2013), Sections 13 and 47-50.

<sup>97</sup> See, Myanmar Centre for Responsible Business, ‘Pwint Thit Sa: Transparency in Myanmar Enterprises’, 2019, [https://myanmar-responsiblebusiness.org/pdf/TiME/2019-Pwint-Thit-Sa\\_en.pdf](https://myanmar-responsiblebusiness.org/pdf/TiME/2019-Pwint-Thit-Sa_en.pdf), p35.

<sup>98</sup> *Constitution of the Republic of the Union of Myanmar* (2008), Article 37.

## 2016 National Land Use Policy

The *National Land Use Policy*, adopted in January 2016, has been widely recognized as a positive step towards addressing the serious human rights challenges relating to land tenure and land use in Myanmar. The *Policy* recognizes the importance of information in the context of land, noting, 'it is required to have systematic land management system in order to approve, record and distribute land ownership, land tenure, land value and land use information'.<sup>99</sup> It includes as an objective to: 'promote people centered development, participatory decision making, responsible investment in land resources and accountable land use administration in order to support the equitable economic development of the country'.<sup>100</sup> Two of its 'guiding principles' are to 'ensure transparency, responsibility and accountability in land and natural resource governance',<sup>101</sup> and 'to promote people's participation and collaboration'.<sup>102</sup>

The *National Land Use Policy* sets out a number of important basic principles on transparency and access to information in Chapter III Section 8. Most relevant are:

- (b) To strengthen rule of law and good governance, including simplifying procedures, ensuring transparency, and increasing accountability and responsibility;
- (c) To promote effective land information management, including easy public access to information;
- (e) To promote inclusive public participation and consultation in decision making processes related to land use and land resource management;
- (i) To ensure easy access to judicial review or other dispute resolution mechanisms that are independent, fair, transparent and affordable;
- (o) To strictly and transparently enforce contracts related to land in compliance to the law[.]<sup>103</sup>

The *Policy* also includes a number of other important guidelines relevant to the right to information:

- Part II, Chapter I requires the delegation of roles and responsibilities of working committees to, '[t]ransparently provid[e] precise and correct land information that the stakeholders need to use when deciding the amount of land area necessary for projects related to national development, environmental conservation, land use planning and investment'.
- Part II, Chapter III on Land Information Management sets out in detail the need to ensure that there is an accurate, transparent system of information on ownership and use, and establishes that the public should have access to such information.<sup>104</sup>
- Part III, Chapters I and II contain several provisions on transparency and public participation in zoning, planning and changing land use, including a requirement to proactively provide access to information relating to local land use plans.<sup>105</sup>
- Environmental and Social Impact Assessments are required when there are changes in land use, and in grants and leases of land.<sup>106</sup>
- Fair and transparent procedures are required to be implemented in case of disputes.<sup>107</sup>

The *Policy* further requires the government to create an umbrella land law that is, 'participatory, transparent and accountable'.<sup>108</sup>

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<sup>99</sup> *National Land Use Policy* (2016), Foreword, para. 5.

<sup>100</sup> *Ibid.*, Chapter I, Section 6(e).

<sup>101</sup> *Ibid.*, Chapter II, Section 7(b).

<sup>102</sup> *Ibid.*, Chapter II, Section 7(c).

<sup>103</sup> *Ibid.*, Chapter III, Section 8.

<sup>104</sup> *Ibid.*, Part II, Chapter III.

<sup>105</sup> *Ibid.*, Part III, Chapters I and II.

<sup>106</sup> *Ibid.*, Part III, Chapter II and IV.

<sup>107</sup> *Ibid.*, Part VI.

<sup>108</sup> *Ibid.*, Part III, Chapter I, Section 19(d).

Unfortunately, there has been limited implementation of the *Policy* since its adoption.<sup>109</sup> The government has failed to adopt a comprehensive Land Law, or to ensure other legislative reforms to implement the access to information requirements and other standards set out in the *Policy*.<sup>110</sup> However, the government has formed a new Central Committee for Rescrutinising Confiscated Farmland and Other Lands to examine previous land confiscations and ownership issues.<sup>111</sup> In January 2018, the government established the National Land Use Council, tasked with implementing the policy, which met for the first time in April 2018<sup>112</sup> and the second time in November 2018.

The UN Special Rapporteur on the situation of human rights in Myanmar has regularly called for the Myanmar government to implement the National Land Use Policy, pass a new land law through a transparent and consultative process, and comply with international standards relating to land use.<sup>113</sup>

### **1894 Land Acquisition Act**

The colonial-era 1894 *Land Acquisition Act* governs the public acquisition of land. It contains several provisions requiring the government to provide notice to the public in relation to the planned acquisition of land. The Act requires the government to publish certain information, as well as to provide for an objection period, in relation to the public acquisition of land.

When conducting a 'preliminary investigation' into the possible public use of land, the government is required to provide public notice.<sup>114</sup>

After a decision is made to acquire land, the government is required to publish its declaration in the Gazette, including information on, 'the district or other territorial division in which the land is situate, the purpose for which it is needed, its approximate area, and, where a plan shall have been made of the land, the place where such plan may be inspected'. It later requires 'public notice to be given at convenient places on or near the land to be taken, stating that the Government intends to take possession of the land, and that claims to compensation for all interests in such land may be made to [the Collector],'<sup>115</sup> as well as notice to the occupier of land.<sup>116</sup>

Investigations into the public acquisition of land have revealed large-scale projects where these provisions were ignored. According to a report of the 2012 Land Confiscation Investigation Commission, the rules of the *Land Acquisition Act* have largely not been followed. A 2017 report by the International Commission of Jurists stated that notice requirements were not followed in relation to land acquired for the Kyauk Phyu Special Economic Zone.<sup>117</sup>

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<sup>109</sup> 'The lie of the land', *Frontier Myanmar*, 6 July 2017, <https://frontiermyanmar.net/en/the-lie-of-the-land>.

<sup>110</sup> Human Rights Council, Special Rapporteur on the situation of human rights in Myanmar, 'End of mission statement: Mission to Thailand and Malaysia', 18 July 2019,

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24832&LangID=E>

<sup>111</sup> 'VP pushes for resolution of land grabbing issues', *Global New Light of Myanmar*, 27 May 2016,

<http://www.globalnewlightofmyanmar.com/vp-pushes-for-resolution-of-land-grabbing-issues/>.

<sup>112</sup> Human Rights Watch, "Nothing for our Land": Impact of Land Confiscation on Farmers in Myanmar', 17 July 2018, <https://www.hrw.org/report/2018/07/17/nothing-our-land/impact-land-confiscation-farmers-myanmar>; 'VP U Henry Van Thio: More pragmatic, strategic decisions needed for land use', *Global New Light of Myanmar*, 7 April 2018, <http://www.globalnewlightofmyanmar.com/vp-u-henry-van-thio-pragmatic-strategic-decisions-needed-land-use/>.

<sup>113</sup> Human Rights Council, 'Report of the Special Rapporteur on the situation of human rights in Myanmar' (1 March 2017) UN Doc A/HRC/34/67; Human Rights Council, 'Report of the Special Rapporteur on the situation of human rights in Myanmar' (9 March 2018) UN Doc A/HRC/37/70; Human Rights Council, 'Report of the Special Rapporteur on the situation of human rights in Myanmar' (5 March 2019) UN Doc A/HRC/40/68.

<sup>114</sup> Land Acquisition Act (1894), Section 4(1).

<sup>115</sup> *Ibid.*, Section 9(1).

<sup>116</sup> *Ibid.*, Section 9(3).

<sup>117</sup> International Commission of Jurists, 'Special Economic Zones in Myanmar and the State Duty to Protect Human Rights', 2017, <https://www.icj.org/wp-content/uploads/2017/02/Myanmar-SEZ-assessment-Publications-Reports-Thematic-reports-2017-ENG.pdf>, p. 70.

The government is currently drafting a Land Acquisition Bill that would replace the 1984 law and includes a series of transparency provisions, including provisions concerning consent. However, it has been criticized for its vague language about the permissible justifications for public land acquisition, for containing extremely short notice period requirements for acquisition, and for contradicting the *National Land Use Policy* and Myanmar's Constitution.<sup>118</sup>

### **Farmland Law**

The 2012 *Farmland Law* governs the designation of land for agricultural purposes.<sup>119</sup> It requires that townships and other bodies issue Land Use Certificates, but provides for limited transparency in the issuance of those certifications and contains few protections against confiscation of land for development purposes.

The *Rules* promulgated under the *Farmland Law* include notice requirements. They provide that upon receipt of an application for right to work on a piece of land, the relevant township department office is required to 'issue notice... for the objection with firm evidence' at the relevant township and ward or village offices.<sup>120</sup> Objectors are required to object within thirty days of the notice being posted. Similar notice requirements and objection periods are set out for inheritors of land who request a name change to a land use certificate.<sup>121</sup>

### **Vacant, Fallow, and Virgin Lands Management Law**

The *Vacant, Fallow, and Virgin Lands Management Law*,<sup>122</sup> passed alongside the Farmland Law in 2012, allows the government to designate land as vacant, fallow or virgin and to grant the use of the land to third parties for agriculture, mining or other purposes. It has been broadly criticized by civil society and human rights organizations, which have warned that the law could be used to facilitate land grabbing and displacement, with a disproportionate impact on ethnic minority communities.<sup>123</sup> The law contains only limited transparency provisions.

The *Rules* promulgated under the *Vacant, Fallow, and Virgin Lands Management Law* require that notice to the public of applications to use vacant, fallow or virgin land be posted at the relevant state or regional, township, and ward or village tract offices.<sup>124</sup>

A 2019 amendment to the *Vacant, Fallow, and Virgin Lands Management Law* exacerbated the underlying problems with the law by requiring those currently using land classified as vacant, fallow, and virgin land—82% of which is located in ethnic minority areas—to apply for a land use permit. Upon obtaining permission, those using the land receive only the right to continue using the land for 30 years, a limited right that fails to reflect many minority peoples' historical and traditional claims to

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<sup>118</sup> Human Rights Council, 'Report of the Special Rapporteur on the situation of human rights in Myanmar' (9 March 2018) UN Doc A/HRC/37/70, para 30; Myanmar Centre for Responsible Business, 'MCRB submits comments to Parliament on the draft Land Acquisition Act', 20 August 2018, <https://www.myanmar-responsiblebusiness.org/news/draft-land-acquisition-act.html>.

<sup>119</sup> *Farmland Law* (2012).

<sup>120</sup> Ministry of Agriculture and Irrigation, 'Designating the Date of Coming into force of Farm Land Law', Notification No. 62/2012 (2012).

<sup>121</sup> *Ibid.*, Sections 29-30.

<sup>122</sup> *The Vacant, Fallow and Virgin Lands Management Law* (2012).

<sup>123</sup> See, 'Civil Society Organization's Statement on the Vacant, Fallow & Virgin Land Management 2018 and Related Announcement, 16 November 2018, <https://progressivevoicemyanmar.org/2018/11/16/civil-society-organizations-statement-on-the-vacant-fallow-virgin-land-management-2018-and-related-announcement/>; Human Rights Watch, 'Myanmar: Halt Land Law Implementation', 9 March 2019, <https://www.hrw.org/news/2019/03/09/myanmar-halt-land-law-implementation>.

<sup>124</sup> *The Vacant, Fallow and Virgin Lands Management Rules*, Notification No. 1/2012 (2012), Section 9(c).

land.<sup>125</sup> While the amendment exempts 'customary lands' this term is not defined or protected under Myanmar law, causing serious uncertainty about whether traditionally held lands will be protected.<sup>126</sup>

Information regarding the law and its implementation has not been adequately disseminated to those affected. According to a 2019 survey conducted by Namati, only one percent of farmers are aware that customary land is excluded from the definition of 'vacant, fallow and virgin' land.<sup>127</sup> In her 2019 report to the Human Rights Council, the Special Rapporteur argued that the law 'contradicts the National Land Use Policy, which aims to legally recognise and protect legitimate land tenure rights, as recognised by the local community'.<sup>128</sup>

## Environmental law

Myanmar law establishes limited disclosure requirements in relation to environmental information held by public and private bodies, but fails to provide broader mechanisms or procedures to promote access to information.

The *Environmental Conservation Law* 2012 includes an objective 'to promote public awareness and cooperation in educational programmes for dissemination of environmental perception'.<sup>129</sup> However, the law does not specify any rights of public access to information or government disclosure requirements.

Under the *Environmental Conservation Rules* (2014), the Environmental Conservation Department is responsible for '[i]mplementing the dissemination of environmental information and enhancement of environmental awareness' and '[d]eclaring the environmental situation to the whole country, to each region or for a particular case to the public in accord with the guidance of the Ministry'.<sup>130</sup> The *Rules* also require the Environmental Conservation Committee established by the law to proactively disseminate information on environmental conservation through the media and other means and to carry out broader research, education and awareness-raising initiatives.<sup>131</sup> However like the *Law*, the implementing *Rules* fail to set out mechanisms for public access to environmental information held by the Committee or Ministry.

The *Prevention of Hazard from Chemical and Related Substances Law* and *Rules* govern the creation, holding or use of certain chemicals and other dangerous substances, and set out procedures for recordkeeping and licensing.<sup>132</sup> The *Rules* impose certain labelling requirements on those producing and transporting substances governed by the law,<sup>133</sup> but do not set out a general duty to provide public notice, or right to access to information, about the use of dangerous chemicals in a community.

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<sup>125</sup> Jason Gelbort, 'Implementation of Burma's Vacant, Fallow and Virgin Land Management Law: At Odds with the Nationwide Ceasefire Agreement and Peace Negotiations', Transnational Institute, 10 December 2018, <https://www.tni.org/en/article/implementation-of-burmas-vacant-fallow-and-virgin-land-management-law>.

<sup>126</sup> Ben Dunant, Frontier Myanmar, 'Why a land law change is sparking fears of mass evictions', 19 November 2018, <https://frontiermyanmar.net/en/why-a-land-law-change-is-sparking-fears-of-mass-evictions>.

<sup>127</sup> Victoria Milko, 'Defending the jhum in the Naga hills', *Frontier Myanmar*, 26 May 2019, <https://frontiermyanmar.net/en/defending-the-jhum-in-the-naga-hills>.

<sup>128</sup> Human Rights Council, 'Report of the Special Rapporteur on the situation of human rights in Myanmar' (5 March 2019) UN Doc A/HRC/40/68, para 20.

<sup>129</sup> *The Environmental Conservation Law* (2012), Section 3(f).

<sup>130</sup> *Ibid.*, Sections 26(c) and (j).

<sup>131</sup> Ministry of Environmental Conservation and Forestry, *Environmental Conservation Rules*, Notification No. 50/2014 (2014), Section 7.

<sup>132</sup> *Prevention of Hazard from Chemical and Related Substances Law* (2013); *Prevention of Hazard from Chemical and Related Substances Rules*, Notification No. 85/2015-2016 (2016).

<sup>133</sup> *Prevention of Hazard from Chemical and Related Substances Law* (2013), Section 5(e); *Prevention of Hazard from Chemical and Related Substances Rules*, Notification No. 85/2015-2016 (2016), Sections 54 and 55.

## Environmental impact assessments

The *Environmental Conservation Law and Rules* require environmental impact assessments for certain projects.<sup>134</sup> In 2015 the Ministry adopted the *Environmental Impact Assessment Procedure (EIA Procedure)*.<sup>135</sup> The *EIA Procedure*, drafted with the assistance of the Asian Development Bank, has been praised as a crucial step forward by clarifying when companies need to consult with communities and what they must disclose.<sup>136</sup>

The *EIA Procedure* requires that all proposed projects that may have an ‘adverse impact’ on the environment, social well-being, community health or a number of other conditions undergo an environmental impact assessment or a less stringent initial environmental examination, depending on the severity of impact.<sup>137</sup> It applies to all types of projects including road building, mining, factories, dams, chemical processing, oil and gas exploration and extraction.

Under the *EIA Procedure*, a public or private entity proposing a project must provide information to communities, civil society and those impacted at different stages of project development and extensive information on the project is required to be published in a variety of forms.

For example, during the ‘scoping’ phase of an EIA, information about the project must be provided to the public through the media and postings at the site of the project, and consultations must be held with affected communities, civil society and other stakeholders.<sup>138</sup> During the EIA investigation, the project proponent must disseminate ‘all relevant information about the proposed Project and its likely Adverse Impacts’ through the media, its website, postings at public buildings and project site, press conferences and media interviews.<sup>139</sup> Further consultations must also be held at the national, region or state, and local levels.<sup>140</sup> The final EIA report must include the result of consultations,<sup>141</sup> and within 15 days of submission must be posted on the project proponent’s website, made available at its offices and public centres, and distributed through the media.<sup>142</sup> After receiving the report, the Environmental Consultation Department is required to make the report public, hold consultations on its contents and solicit feedback.<sup>143</sup> Similar, although less stringent, consultation and disclosure requirements govern an initial environmental examination.<sup>144</sup> Strategic environmental assessments required for government policies or programs are subject to the same processes as Environmental Impact Assessments, including the consultation and disclosure requirements.

The Department’s decision to accept or reject an EIA report must also be made public.<sup>145</sup> After a project is approved, the project proponent is required to submit ‘monitoring reports’ to the Ministry every six months, which must also be disseminated through the same channels as the EIA report,<sup>146</sup> though any information that may relate to ‘National Security’ is exempted from public disclosure.<sup>147</sup> The EIA itself must be shared publicly and with civil society within 15 days of submission.<sup>148</sup>

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<sup>134</sup> *Ibid.*, Chapter XI.

<sup>135</sup> Ministry of Environmental Conservation and Forestry, *Environmental Impact Assessment Procedure (EIA Procedure)*, Notification No. 616/2015 (2015).

<sup>136</sup> Htoo Thant, ‘New environmental impact rules released’, *Myanmar Times*, 15 January 2016, <https://www.mmtimes.com/business/18490-new-environmental-impact-rules-released.html>.

<sup>137</sup> *EIA Procedure*, Section 3, citing Section 2(g).

<sup>138</sup> *Ibid.*, Section 50.

<sup>139</sup> *Ibid.*, Section 61(a).

<sup>140</sup> *Ibid.*, Section 61(b).

<sup>141</sup> *Ibid.*, Section 63.

<sup>142</sup> *Ibid.*, Section 65.

<sup>143</sup> *Ibid.*, Sections 66-67.

<sup>144</sup> *Ibid.*, Sections 31-43.

<sup>145</sup> *Ibid.*, Section 70.

<sup>146</sup> *Ibid.*, Section 103.

<sup>147</sup> *Ibid.*, Section 110.

<sup>148</sup> Human Rights Council, ‘Report of the Special Rapporteur on the situation of human rights in Myanmar’ (1 March 2017) UN Doc A/HRC/34/67, para. 43.

The UN Special Rapporteur on the situation of human rights in Myanmar has welcomed the EIA regulations but noted concerns about implementation and poor understanding of the consultation requirements.<sup>149</sup>

According to the Environmental Conservation Department's website, more detailed *EIA Guidelines*, referenced in the *Rules* are currently under consideration.<sup>150</sup> Ministry officials have reportedly stated that the *Guidelines* will provide further guidance on EIA consultation requirements.<sup>151</sup>

### Recent policy commitments

On 5 June 2019, Myanmar commemorated World Environment Day by announcing two new national policies: the *National Environmental Policy* and the *Climate Change Policy*.<sup>152</sup> Both documents include strong commitments to promoting participation, transparency and access to information.

The *National Environmental Policy* incorporates key concepts from Principle 10 of the 1992 Rio Declaration, stating:

Environmental decision making at all levels will be inclusive, transparent and accountable to relevant stakeholders, with communities and citizens having the right to participate in decision making processes and access information that could affect their lives and property.<sup>153</sup>

The *Policy* also commits the government to promoting, '[e]nvironmental education, public awareness raising and quality research'.<sup>154</sup>

The *Myanmar Climate Change Policy* also integrates principles relating to transparency and access to information. In particular, the policy aims to '[a]dopt transparent, participatory, and responsive processes to ensure that decision-making at all levels is inclusive, equitable, and accountable to all people in Myanmar, in accordance with the rule of law',<sup>155</sup> and to '[e]nsure transparency and accountability of all stakeholders through open decision-making, promoting public awareness and participation, and by providing access to information and access to justice'.<sup>156</sup>

While these policies merely establish general principles to guide future government action, they point in the right direction and could lead to positive legislative and administrative reform, if public officials commit to their good faith implementation.

### Extractives and forestry

The extractives and forestry sectors are governed by a range of laws that contain only limited transparency requirements. However, in recent years the government of Myanmar has also signed onto a number of voluntary initiatives that require increased transparency and disclosure by state and non-state actors.

The UN Special Rapporteur has regularly highlighted the need for reform of the extractives industries, calling specifically for the government to include transparency requirements and human rights

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<sup>149</sup> Human Rights Council, 'Report of the Special Rapporteur on the situation of human rights in Myanmar' (1 March 2017) UN Doc A/HRC/34/67; Human Rights Council, 'Report of the Special Rapporteur on the situation of human rights in Myanmar' (9 March 2018) UN Doc A/HRC/37/70, para. 26.

<sup>150</sup> Environmental Conservation Department, 'Legal Structure of EIA,' <http://www.ecd.gov.mm/?q=node/360>.

<sup>151</sup> Human Rights Council, 'Report of the Special Rapporteur on the situation of human rights in Myanmar' (1 March 2017) UN Doc A/HRC/34/67.

<sup>152</sup> UN Environment Programme, 'Myanmar announces national environment and climate change policies to mark World Environment Day 2019', 5 June 2019, <https://www.unenvironment.org/news-and-stories/press-release/myanmar-announces-national-environment-and-climate-change-policies>.

<sup>153</sup> *National Environmental Policy* (2019), para. 7(c)(17).

<sup>154</sup> *Ibid.*, para. 7(c)(19).

<sup>155</sup> *Myanmar Climate Change Policy*, Section 12(g).

<sup>156</sup> *Ibid.*, Section 14(g)(i).

protections in existing or proposed laws and regulations.<sup>157</sup> In her most recent report to the Human Rights Council, she noted the lack of accountability for military-run conglomerates and state-owned economic enterprises conducting resource extraction, and called for legislation requiring 'disclosure of beneficial ownership details of extraction companies' in order to meet EITI 2020 standards.<sup>158</sup>

## Mining

Extraction of natural resources through mining is governed by the *Mining Law*, which was amended in 2015 and contains limited transparency provisions. In February 2018, the new *Rules* implementing the amended *Mining Law* were officially adopted, after limited consultation.<sup>159</sup> The *Rules* include requirements that companies provide evidence of consultation with and agreement from local communities on proposed mining projects.<sup>160</sup> It's unclear how these obligations will be implemented in practice, and whether procedures will be put in place to ensure that consultations are meaningful.<sup>161</sup> While the *Rules* reference the *EIA Procedures*, the Myanmar Centre for Responsible Business notes that, 'the requirements for conducting an Environmental & Social Impact Assessment (EIA) for mining set out in the Mining Rules are inconsistent with the requirements of the EIA Procedure leading to legal uncertainty'.<sup>162</sup>

In early 2019, Myanmar passed a new *Gemstone Law* after a limited consultation process that did not include meaningful civil society participation.<sup>163</sup> The law, which has been widely criticised by human rights and transparency groups, requires that the Ministry of Natural Resources and Environmental Conservation provide public notice when it designates a tract for gemstone mining,<sup>164</sup> but otherwise does not include disclosure or access to information requirements for government bodies or mining companies.

NGOs and civil society have warned that the *Gemstones Law* is inconsistent with a *Gemstones Policy* that the government is currently developing through a highly consultative process and that includes much stronger human rights protections.<sup>165</sup> In her 2019 report to the Human Rights Council, the Special Rapporteur stated, 'the Law does not do enough to improve the governance framework or prevent companies with a record of human rights and environmental abuse from obtaining new licenses, and fails to adequately address the fundamental issues [affecting the extractives

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<sup>157</sup> See, for example, Human Rights Council, 'Report of the Special Rapporteur on the situation of human rights in Myanmar' (1 March 2017) UN Doc A/HRC/34/67; Human Rights Council, 'Report of the Special Rapporteur on the situation of human rights in Myanmar' (9 March 2018) UN Doc A/HRC/37/70.

<sup>158</sup> Human Rights Council, 'Report of the Special Rapporteur on the situation of human rights in Myanmar' (5 March 2019) UN Doc A/HRC/40/68, para 10.

<sup>159</sup> Kyaw Lin Htoon, 'Long-delayed mines law come into effect', *Frontier Myanmar*, 2 March 2018, <https://frontiermyanmar.net/en/long-delayed-mines-law-comes-into-effect>; Myanmar Centre for Responsible Business, 'Myanmar Sector-Wide Impact Assessment of Myanmar's Mining Sector', 8 March 2018, <http://www.myanmar-responsiblebusiness.org/pdf/SWIA/Mining/05-Legal-and-Policy-Framework.pdf>.

<sup>160</sup> *Myanmar Mines Law* (1994); *Myanmar Mines Rules* (1996), Sections 51(c), 67(c) and 85(c). See, Myanmar Centre for Responsible Business, 'Main Laws Applicable to the Mining Sector in Myanmar', 23 May 2018, [https://www.myanmar-responsiblebusiness.org/pdf/SWIA/Mining/Main-Myanmar-E\\_and\\_S-Laws-Mining-Sector.pdf](https://www.myanmar-responsiblebusiness.org/pdf/SWIA/Mining/Main-Myanmar-E_and_S-Laws-Mining-Sector.pdf), p. 2.

<sup>161</sup> Myanmar Centre for Responsible Business, 'Main Laws Applicable to the Mining Sector in Myanmar', 23 May 2018, [https://www.myanmar-responsiblebusiness.org/pdf/SWIA/Mining/Main-Myanmar-E\\_and\\_S-Laws-Mining-Sector.pdf](https://www.myanmar-responsiblebusiness.org/pdf/SWIA/Mining/Main-Myanmar-E_and_S-Laws-Mining-Sector.pdf), p. 69.

<sup>162</sup> *Ibid.*, p. 2.

<sup>163</sup> Thompson Chau, 'Parliament passes gemstone bill amid criticism', *Myanmar Times*, 8 February 2019, <https://www.mmtimes.com/news/parliament-passes-gemstone-bill-amid-criticism.html>; Hanna Hindstrom, 'Back to business as usual in Myanmar's jade mines?', *Frontier Myanmar*, 28 November 2018, <https://frontiermyanmar.net/en/back-to-business-as-usual-in-myanmars-jade-mines>;

<sup>164</sup> *Myanmar Gemstone Law* (2019), Section 4(a).

<sup>165</sup> Global Witness, 'Myanmar's flawed new Gemstone Law set to restart Gemstone permits in tainted sector', 20 December 2018, <https://www.globalwitness.org/en/press-releases/myanmars-flawed-new-gemstone-law-set-to-restart-gemstone-permits-in-tainted-sector/>.

industry]'.<sup>166</sup> She advised the government to adopt the *Gemstone Policy* 'as the basis for further legislative reform'.<sup>167</sup>

## Oil and gas

Myanmar's oil and gas sector is governed by a range of laws that contain limited transparency provisions, including the 1918 *Oil Fields Act*, 2010 *Law Amending the Oilfields Act*, 1918 *Oil Fields Rules*, 2017 *Petroleum and Petroleum Products Law*, 1937 *Petroleum Rules* (Petroleum and Petroleum Products Rules are being drafted), 1951 *Oil Fields Labour and Welfare Act*, 1957 *Petroleum Resources Development Regulation Act* (in the process of revision), 1969 *Amended Petroleum Resources Development Regulations Act*, 1962 *Myanmar Petroleum Concession Rules*, and 2017 *Petroleum Hand-dug Well Law*.<sup>168</sup> The country's first EITI report acknowledged that many of these laws are outdated and don't reflect the policies of the Ministry of Energy in regards to contracts for oil and gas extraction.<sup>169</sup> The Ministry enters into contracts through the state-owned enterprise Myanma Oil and Gas Enterprise, and the award of contracts and distribution of revenues through this system has been largely opaque.<sup>170</sup> According to Myanmar's EITI report, contracts in the oil and gas sector include confidentiality provisions, which constitute a major barrier to the disclosure of data and information on oil and gas extraction.<sup>171</sup>

## Forests

Forests and the forestry industry are governed by the *Forest Law* and *Forest Rules*. The *Forest Law* and *Forest Rules* provide limited transparency requirements concerning the process of declaring land to be a reserved or public protected forest.<sup>172</sup> Those who fail to submit grievances within ninety days of the declaration of planned demarcation are deemed to have no grievances.<sup>173</sup> The *Forest Law* was updated in 2018, although commentators note that the main changes were to strengthen penalties. The law has been criticised for failing to account for practices of local people who rely on forests for their livelihoods and the overuse of criminal trespass provisions to target those asserting their traditional rights to the forest.<sup>174</sup>

## Voluntary and multi-stakeholder initiatives

Myanmar has joined a number of initiatives to promote transparency in the extractives industry.

Myanmar became a member of the Extractives Industries Transparency Initiative (EITI) in 2014, and submitted its first report in 2016. In March 2017, the country produced a roadmap towards

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<sup>166</sup> Human Rights Council, 'Report of the Special Rapporteur on the situation of human rights in Myanmar' (5 March 2019) UN Doc A/HRC/40/68.

<sup>167</sup> *Ibid.*, para. 11.

<sup>168</sup> Myanmar Extractive Industries Transparency Initiative (MEITI), 'The Fourth Myanmar EITI Report For the Period 1 April 2016 to 31 March 2017 (FY 2016 - 2017): Oil and Gas, Gems and Jade, Other Minerals and Pearl', 30 March 2019, [https://eiti.org/sites/default/files/documents/4th\\_meiti\\_report\\_30\\_march\\_2019\\_1.pdf](https://eiti.org/sites/default/files/documents/4th_meiti_report_30_march_2019_1.pdf).

<sup>169</sup> MEITI, 'EITI Report for the period April 2013-March 2014: Oil, Gas and Mining Sectors', December 2015, [https://eiti.org/sites/default/files/migrated\\_files/meiti\\_reconciliation\\_report\\_2013-2014\\_final\\_version.pdf](https://eiti.org/sites/default/files/migrated_files/meiti_reconciliation_report_2013-2014_final_version.pdf), Section 3.2.2.

<sup>170</sup> Myanmar Centre for Responsible Business, 'Myanmar Oil and Gas Sector-Wide Impact Assessment Executive Summary', 4 September 2014, <http://www.myanmar-responsiblebusiness.org/pdf/SWIA/Oil-Gas/02-Executive-Summary.pdf>.

<sup>171</sup> MEITI, 'EITI Report for the period April 2013-March 2014: Oil, Gas and Mining Sectors', December 2015, [https://eiti.org/sites/default/files/migrated\\_files/meiti\\_reconciliation\\_report\\_2013-2014\\_final\\_version.pdf](https://eiti.org/sites/default/files/migrated_files/meiti_reconciliation_report_2013-2014_final_version.pdf), Section 3.2.7.

<sup>172</sup> Ministry of Environmental Conservation and Forestry, *The Forest Rules* (1995), Sections 6 and 13(a).

<sup>173</sup> *Ibid.*, Section 13(b).

<sup>174</sup> Human Rights Watch, 'The Farmer Becomes the Criminal: Human Rights Abuses in Burma's Karen State', 3 November 2016, <https://www.hrw.org/report/2016/11/03/farmer-becomes-criminal/human-rights-and-land-confiscation-karen-state#page>.

transparency on beneficial ownership, to be implemented by 2020.<sup>175</sup> The latest Myanmar EITI report covers the period of 2016-2017, but Myanmar has yet to be assessed against the 2016 updated standard.<sup>176</sup>

Myanmar is also engaging in the Forest Law Enforcement, Governance and Trade (FLEGT) process, a European Union programme to reduce illegal trade in timber. Under FLEGT, EU companies are required to monitor their supply chains to ensure that the timber they use has not been illegally harvested. A Directive sets out principles requiring traceability and monitoring of timber products,<sup>177</sup> and countries enter into legally-binding Voluntary Partnership Agreements with the EU. Authorities are required to ensure that the information is made available under EU environmental regulations.<sup>178</sup>

In 2013, Myanmar began to engage with the FLEGT process and in 2015 set up an Interim Task Force comprised of government, business and civil society.<sup>179</sup> In August 2018, the Interim Task Force was transformed into a Multi Stakeholder Group, which will be expected to lead negotiations with the EU on a Voluntary Partnership Agreement in the future.<sup>180</sup>

## Indigenous and minority communities

Ethnic and religious minorities face grave threats in Myanmar, including from a restrictive citizenship law, discriminatory administrative policies, and armed conflict between the central government and non-state armed groups. Moreover, the many ethnic minority areas are rich in natural resources, leading to problems with unchecked investment and unaccountable development projects.

As described above, free, prior and informed consent is a pillar of the rights protections for indigenous and minority communities. Myanmar law does not explicitly incorporate the right to free, prior and informed consent per its meaning under international law, although the government has made policy commitments in this direction. Further, there is significant debate in Myanmar around the use of the terms 'ethnic minority,' 'ethnic nationality,' and 'indigenous peoples'.<sup>181</sup>

Myanmar's 2008 Constitution provides some protections for 'national races', a problematic term that is not defined in the Constitution but has been applied through the use of a controversial list of 135 groups recognized as such by the Union government. In this regard, the Constitution and other legal provisions relating to ethnicity and citizenship reflect a state-centric approach to nationality and have contributed to widespread disenfranchisement and discrimination. Article 365 of the Constitution states that, 'any particular action which might affect the interests of one or several other of the national races shall be taken only after coordinating with and obtaining the settlement of those affected'.<sup>182</sup>

Article 5 of the 2015 *Protection of the Rights of National Races Law* provides that indigenous peoples 'should receive complete and precise information about extractive industry projects and other business activities in their areas before project implementation so that negotiations between the

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<sup>175</sup> MEITI, 'Draft Beneficial Ownership Roadmap of Myanmar', 2019, [https://eiti.org/sites/default/files/documents/bo\\_roadmap\\_-\\_myanmar.pdf](https://eiti.org/sites/default/files/documents/bo_roadmap_-_myanmar.pdf).

<sup>176</sup> MEITI, 'Overview', 1 July 2019, <https://eiti.org/myanmar>.

<sup>177</sup> Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market.

<sup>178</sup> *Ibid.*, preamble para. 13 and 23; Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC.

<sup>179</sup> Forest Law Enforcement, Governance and Trade (FLEGT) Myanmar, 'What is FLEGT', <http://www.flegtmyanmar.com/en/what-is-flegt-vpa/>.

<sup>180</sup> *Ibid.*

<sup>181</sup> SiuSue Mark, 'What's in a term? The challenge of finding common terminology for ethnic alliance-building in Myanmar's peace process', n. 72, Torino World Affairs Institute.

<sup>182</sup> *Constitution of the Republic of the Union of Myanmar* (2008), Article 365. See also, Institute for Human Rights and Business, Myanmar Centre for Responsible Business, and Danish Institute for Human Rights, 'Briefing Paper: Indigenous Peoples' Rights and Business in Myanmar', February 2016, <https://www.myanmar-responsiblebusiness.org/publications/indigenous-peoples-rights-and-business-in-myanmar.html>.

groups and the Government/companies can take place'.<sup>183</sup> However, it does not appear that this provision has been implemented consistently, nor have disclosure or access to information provisions contained in other laws governing investment or the extractives industry been applied consistently in ethnic minority areas. Displacement Solutions noted in a 2015 report:

The concept of 'Free, Prior and Informed Consent' (FPIC) in the vast majority of cases of land acquisition leading to involuntary resettlement appears to be effectively ignored or unknown by those acquiring land, and other than the legally mandated payment of 'compensation' (which rarely occurs in practice in a just and satisfactory manner), the non-defined term 'for public purposes' is all that is required to justify land acquisition actions in the country.<sup>184</sup>

## Draft Right to Information Law

In 2016, the Ministry of Information released a draft Right to Information Law. UNESCO subsequently helped facilitate civil society consultations on the draft.<sup>185</sup> Human rights and media groups, including ARTICLE 19, noted some positive aspects of the draft law, but overall found it to fall far short of international standards relating to the right to information.<sup>186</sup> In July 2017, and again in December 2017, the Ministry released subsequent drafts of the law. The new drafts included significant improvements over the 2016 draft, although the Centre for Law and Democracy noted that the December draft was 'substantially weaker' than the July draft, in particular in relation to the scope of the rights provided and the exceptions to access to information.<sup>187</sup>

Overall, the draft legislation would, if amended to align with international human rights law and standards, go a long way towards strengthening the right to information in Myanmar. As currently conceived, the draft law establishes a right to access information or records held by public bodies, and a responsibility by public bodies to proactively disclose information and records, subject to certain specified exceptions.<sup>188</sup> The establishment of this right and duty alone would represent a major advancement for the right to information in Myanmar.

The draft legislation also establishes a process for individuals or entities to submit information requests and mandates that public bodies respond to those requests within 24 hours, 7 days, 15 days or 30 days, depending on the type of information requested and the extent of the search necessary to locate it.<sup>189</sup> It would also require public bodies to proactively publish certain kinds of information, and establish the position of information officer to carry out this duty.<sup>190</sup>

Despite these strong points, the proposed legislation has numerous weaknesses.

The law limits the right request information to 'Myanmar citizen[s] who likes to request information, foreigners from respective fields living in Myanmar and foreign organizations'. Under international law, all persons have a right to information. The draft law's eligibility provision would likely be used to limit access to information by Myanmar's many ethnic minorities, or others who have not been able to register as citizens due to discrimination or economic hardship.

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<sup>183</sup> *Protection of the Rights of National Races Law* (2015), Article 5.

<sup>184</sup> Displacement Solutions, 'Land Acquisition Law and Practice in Myanmar: Overview, Gap Analysis with IFC PS1 & PS5 and Scope of Due Diligence Recommendations', May 2015, <http://displacementsolutions.org/wp-content/uploads/2015/05/LAND-ACQUISITION-LAW-AND-PRACTICE-IN-MYANMAR.pdf>, p17.

<sup>185</sup> UNESCO, 'UNESCO facilitates consultation on Right to Information Law in Myanmar', 10 March 2016, <https://bangkok.unesco.org/content/unesco-facilitates-consultation-right-information-law-myanmar>.

<sup>186</sup> ARTICLE 19, 'Myanmar: Draft right to information law needs adequate public consultation', 17 March 2016, <https://www.article19.org/resources/myanmar-draft-right-to-information-law-needs-adequate-public-consultation/>.

<sup>187</sup> Toby Mendel, Centre for Law and Democracy, 'Analysis of the Draft Right to Information Law', March 2018, [https://www.law-democracy.org/live/wp-content/uploads/2018/04/Mol-Draft-RTI.17-12.Note\\_.pdf](https://www.law-democracy.org/live/wp-content/uploads/2018/04/Mol-Draft-RTI.17-12.Note_.pdf). Using an 'RTI Rating' developed in partnership with Access Info Europe, the Centre for Law and Democracy found that the July draft would rank 21<sup>st</sup> out of 111 countries having RTI legislation, whereas the December draft would rank 42<sup>nd</sup>.

<sup>188</sup> *Draft Right to Information Law*, December 2017, Sections 39 and 40.

<sup>189</sup> *Ibid.*, Chapter 9, Request for Information.

<sup>190</sup> *Ibid.*, Chapter 8, Responsibilities of Public Bodies.

The definition of public bodies covered by the draft law excludes bodies that are merely established by law. Although nongovernmental organisations formed with public funds are covered, it is not clear that other bodies created, funded or controlled by public bodies—or private companies which was owned by a public body—would be included. The definition also fails to cover private bodies which undertake a public function.

Some of the exemptions to disclosure requirements extend beyond those permissible under international law. These include information that ‘harm[s] race and religion’, ‘can cause contempt of court’ and ‘is related to the personnel protected against existing laws’.<sup>191</sup> Other exemptions are defined in vague terms allowing for wide divergence in interpretation or fail to incorporate an element of harm into the criteria. Worryingly, the draft law does not mention a public interest override requiring information to be disclosed despite the applicability of an exemption where the public benefit flowing from disclosure outweighs the harm that would be caused to the protected interest.

The draft law also fails to require public bodies to provide appropriate notice to requesters whenever their requests for information are refused.<sup>192</sup> According to international standards such notice should include a description of the legal grounds for refusal.

The draft law provides sanctions for individuals who wilfully act to undermine the right to information, including through the unauthorised destruction of information.<sup>193</sup> However, it does not include sanctions for public bodies that fails to meet their obligations established under the law.

As for proactive disclosure, the draft legislation calls on public bodies to provide information ‘that the public should be aware of’ and to ‘publish information in an up-to-date fashion’.<sup>194</sup> This is a very broad and general obligation, which does not provide details of specific categories of information implicated. Unless much more clearly articulated in implementing rules and regulations, these requirements could allow public bodies to interpret them to their own advantage, rendering them toothless.

Certain ambiguous language inserted into the latest draft, could also provide a trap door allowing public bodies to escape their obligations. Section 48 states that ‘information must be shared if it does not disturb activities of public body or have problem for the record’, giving rise to the possible implication that information that does ‘disturb’ a public body must not be released.

In 2018 and 2019, progress towards adopting right to information legislation seems to have stalled. Civil society remains engaged on the issue, but government responses to inquiries have been noncommittal.<sup>195</sup>

Further, in mid-2019, the government of Myanmar introduced, without public consultation, a *National Records and Archives Bill* that would significantly weaken access to information in Myanmar.<sup>196</sup> It would provide the government full discretion, without independent review, to classify documents such that they would not become public for thirty years.<sup>197</sup> The bill would provide prison sentences for those ‘accessing or publishing information without government permission’.<sup>198</sup>

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<sup>191</sup> *Ibid.*, Chapter 10, Exemptions, Sections 51(c)(2), (d) and (i).

<sup>192</sup> *Ibid.*, Chapter 9, Request for Information.

<sup>193</sup> *Ibid.*, Sections 18(e), 24, and 60-63.

<sup>194</sup> *Ibid.*, Section 41.

<sup>195</sup> See, Myanmar Centre for Responsible Business, ‘Third Myanmar Digital Rights Forum Ends With Call for Better Regulated, Freer, Safer Online Space, Emphasises Need For Consultation’, 22 January 2019, <https://www.myanmar-responsiblebusiness.org/news/digital-rights-forum-2019-report.html>.

<sup>196</sup> Thompson Chau, ‘Public access to info: Planned archives law alarms civil society’, *Myanmar Times*, 22 July 2019, <https://www.mmmtimes.com/news/public-access-info-planned-archives-law-alarms-civil-society.html>.

<sup>197</sup> *Ibid.*

<sup>198</sup> Free Expression Myanmar, ‘New Bill a big step backwards for RTI’, 18 July 2019, <http://freexpressionmyanmar.org/new-bill-a-big-step-backwards-for-rti/>.

## IV. Conclusion & Recommendations

International law requires that the Myanmar government uphold the right to information in relation to natural resource and land use. In recent years, the Myanmar government has taken many steps towards integrating international right to information standards into Myanmar law. Most of the disclosure and access to information provisions described in this report are included in laws that have been adopted since the end of absolute military rule in 2011.

Nevertheless, major gaps remain in the legal framework, impeding individuals' ability to obtain information. The right to information as it relates to natural resource extraction and land use is found in piecemeal provisions in various laws governing business, investment, land, the environment, the extractives industry, forestry and the treatment of minority groups. The few existing transparency requirements that do exist are often undermined by poor implementation and a lack of accountability.

To bring Myanmar's legal framework in line with international law and standards, ARTICLE 19 recommends that the government: (1) adopt comprehensive right to information legislation incorporating international standards and best practices, (2) strengthen disclosure requirements for the private sector, and (3) initiate broader legal reform to ensure that the right to information is respected, protected and fulfilled. These recommendations are described in greater detail below.

### Adopt Right to Information Law

Human rights experts, scholars and governments around the world are increasingly acknowledging that comprehensive right to information legislation is essential to ensuring compliance with international human rights obligations. Over 120 countries, including 20 in Asia, have right to information laws or binding national regulations. Others, including Myanmar, have taken steps toward adopting such a law.

Adopting right to information legislation in line with international standards would be the single most impactful action the Myanmar government could take to promote the right. Not only would such a law facilitate access to information and records held by public bodies, it would also protect those seeking information, help to entrench a culture of transparency, and widen civic space generally.

Most right to information laws are very similar in structure and function, and include the following key elements and principles:

- *Right of access.* All individuals, groups, organisations or other legal or unincorporated entities have the right to demand information from public bodies without having to provide justification or demonstrate a legal interest.
- *Definitions.* Key terms are clearly defined, establishing who is a public authority, what is meant by public information, etc.
- *Duty to provide information upon request.* Public bodies have a duty to respond to requests for information, and mechanisms for handling requests and time limits for responding to requests are established.
- *Exemptions.* Criteria are provided for withholding of certain categories of clearly defined information, requiring the demonstration of a likely and serious harm to an interest provided by international human rights law. A public interest test should be prescribed to allow access to exempt information for the greater public benefit, such as revealing corruption, abuses or environmental hazards.
- *Appeals and oversight.* Internal and external appeals mechanisms are provided to allow the requestor to challenge refusals to disclose. External appeals should be heard by an independent information commission, ombudsman or the court system.
- *Proactive publication.* Government bodies are obliged to proactively publish certain categories of information relating to their structures, decisions and expenditures.

- *Sanctions.* Penalties are set for officials who unlawfully destroy, modify or refuse to release information, and for bodies that fail to comply with the orders of the external review system.
- *Promotional measures and reporting.* Public bodies are required to promote understanding of the law and the right to information generally.

The patchwork of transparency provisions currently in Myanmar's legal framework, although at times facilitating disclosure and transparency, fails to establish an affirmative right to access information that applies across sectors.

The draft *Right to Information Law* developed by the Ministry of Information includes most of the elements and functions described above and would be a major step forward in upholding the right to information in Myanmar. However, the right does not incorporate international standards and best practices in all places and must be improved.

ARTICLE 19 recommends that the Myanmar government prioritize the passage of the draft *Right to Information Law* after further consultations with civil society and revisions to ensure alignment with international standards and best practices. ARTICLE 19 urges the government to include a provision stating that the law supersedes all other laws—such as, for example, the *Official Secrets Act*—that place restrictions on the access to information.

### **Strengthen disclosure requirements for the private sector**

While a comprehensive right to information law would strengthen access to information held by public bodies, legislation requiring disclosure by the private sector is essential in the context of natural resource extraction and land use. As described in this report, new laws and recent amendments to existing legislation have strengthened access to information held by corporate actors. In particular, the *Investment Law* and *Companies Law* include mandatory reporting requirements that can be utilized by journalists, civil society and communities impacted by business activities. Further, the EIA Procedures establish notice requirements, consultation processes and reporting procedures that could serve as a conduit for information to key stakeholders with an interest in large scale development projects.

Despite these recent improvements, business practices behind land use, the extractives industries, forestry, development projects and other economic activities remain opaque. In part, poor or lagging implementation of existing legal provisions continues to undermine the enjoyment of the right to information. Moreover, as pointed out in this report and by ARTICLE 19's partners in Myanmar, many laws in Myanmar, including those passed in recent years, fall short of international standards and best practices relating to the right to information.

Given the broad spectrum of laws impacting the right to information in Myanmar, it is beyond the scope of this report to identify all necessary reforms in this area. However, in advance of 2020 EITI reporting, Myanmar should pass legislation to ensure disclosure of beneficial ownership and ramp up disclosure requirements in licensing processes in the land and extractives sector. In further reform initiatives, Myanmar authorities should consult the extensive work done by local organizations such as the Myanmar Alliance for Transparency and Accountability, Pyi Gyi Khin, Free Expression Myanmar, The Ananda, Equality Myanmar, the Myanmar Media Lawyers Network and the Myanmar Centre for Responsible Business. In particular, the Myanmar Centre for Responsible Business's Sector Wide Impact Assessments and Pwint Thit Sa annual reports offer valuable analysis and recommendations on standards governing private actors.

### **Undertake comprehensive legal reform**

Enjoyment of the right to information in Myanmar is not only impeded by the absence of legal requirements to disclose information, but also by the existence of laws used to target those seeking, receiving and imparting information. In particular, the overly broad language of the *Official Secrets Act*

and *Unlawful Associations Act* restrict the right to information to a degree that is impermissible under international human rights law. Moreover, these laws have been used in a targeted way against journalists and others seeking information about human rights violations and ongoing armed conflict, as illustrated by the conviction and imprisonment of *Reuters* journalists Wa Lone and Kyaw Soe Oo.<sup>199</sup> These laws should be prioritized for reform, as should the wider range of legislation that restricts freedom of expression and the right to information.<sup>200</sup>

More broadly, the Myanmar government should take steps to open civic space and create an enabling environment for freedom of expression. A key step in this regard could be passing whistleblower legislation protecting those who reveal information to advance the public interest.

To comply with international best practices on the right to information, Myanmar should amend its Constitution to explicitly recognize a right to information, as many other countries in the region have done. It should also amend provisions relating to freedom of expression to apply to all, not only citizens of Myanmar.

In these efforts, the Myanmar government should be guided by international human rights law and standards. To this end, the Myanmar government must prioritize the ratification and implementation of the International Covenant on Civil and Political Rights.

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<sup>199</sup> ARTICLE 19, 'Myanmar: Reuters journalists convicted for role in uncovering massacre by state security forces, sentenced to seven years' imprisonment', 3 September 2019, <https://www.article19.org/resources/myanmar-reuters-journalists-convicted-for-role-in-uncovering-massacre-by-state-security-forces-sentenced-to-seven-years-imprisonment/>.

<sup>200</sup> See, ARTICLE 19, 'Myanmar: Criminalisation of free expression', 7 June 2019, <https://www.article19.org/resources/myanmar-criminalisation-of-free-expression/>.