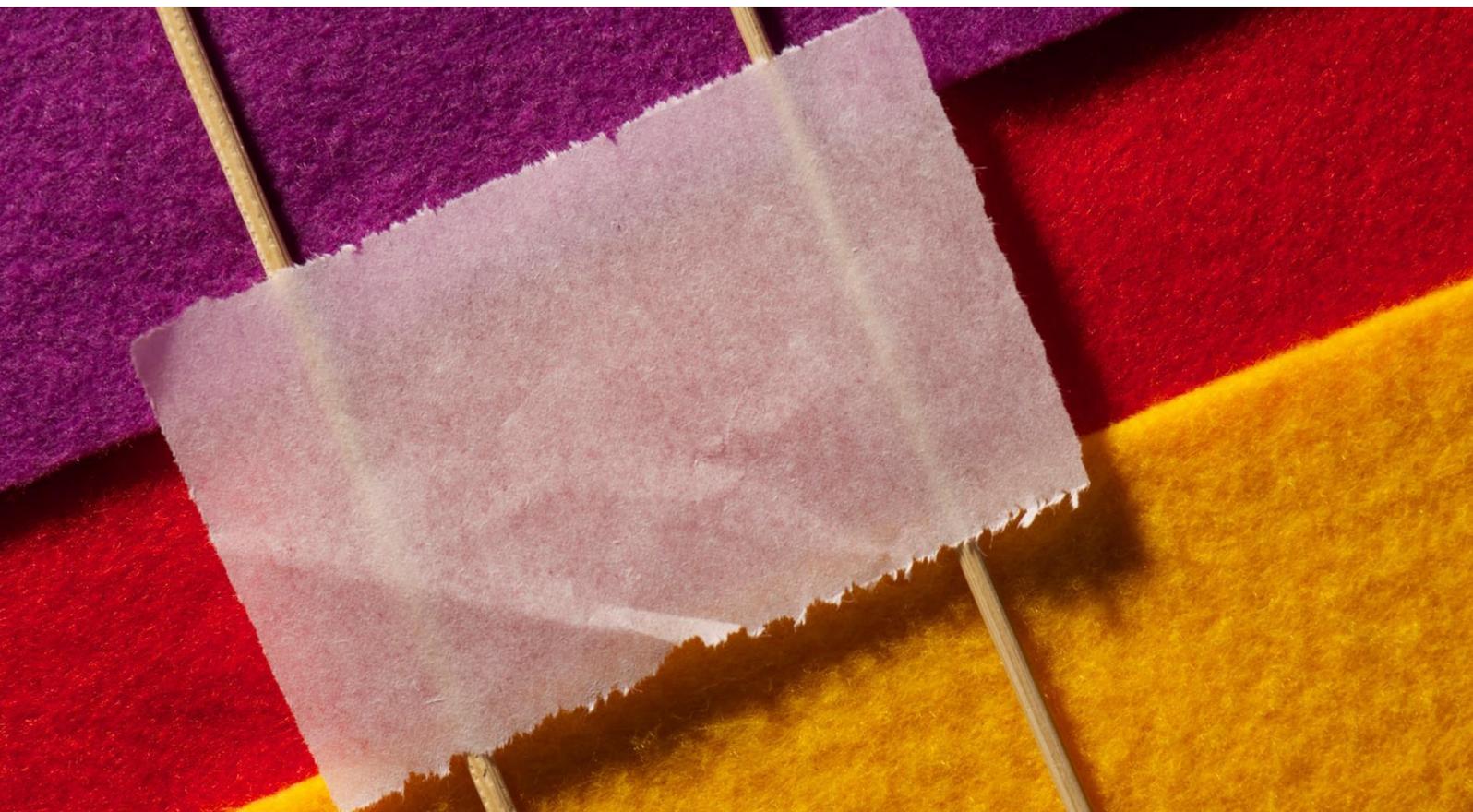


# Dealing with displacement in Myanmar's peace process



Working Paper

**Kirsten McConnachie**



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**Political Settlements  
Research Programme**

PoliticalSettlements@ed.ac.uk

[www.politicalsettlements.org](http://www.politicalsettlements.org)

@PolSettlements

## About the Author

Kirsten McConnachie is an assistant professor in law at the University of Warwick, and an Associate of the Political Settlements Research Programme ([www.politicalsettlements.org](http://www.politicalsettlements.org)). She has researched displacement from Myanmar since 2008, including extensive fieldwork in Thailand, India and Malaysia resulting in hundreds of interviews with refugees, NGOs, CBOs and others. She is the author of *Governing Refugees* (Routledge 2014), a book about camp management and administration of justice in refugee camps in Thailand. She has also written on the governance role of non-state armed groups.

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### **Political Settlements Research Programme (PSRP)**

Global Justice Academy  
School of Law  
Old College  
The University of Edinburgh  
South Bridge  
Edinburgh  
EH8 9YL

Tel. +44 (0)131 651 4566  
Fax. +44 (0)131 650 2005  
E-mail: [PoliticalSettlements@ed.ac.uk](mailto:PoliticalSettlements@ed.ac.uk)

[www.politicalsettlements.org](http://www.politicalsettlements.org)  
[@PolSettlements](#)

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## Introduction

Myanmar has been engaged in a process of political change since 2011. A central goal of reforms has been the attempt to resolve political conflicts between ethnic armed organisations (EAOs) and the Myanmar Government. Peace talks began under the 'civilian government' led by Thein Sein and have continued since 2016 under the National League for Democracy (NLD)-led Government. However, several years of talks have produced little concrete progress. Milestones to date include fifteen bilateral ceasefires, a Nationwide Ceasefire Agreement of 2015 (signed between the Myanmar Government and eight ethnic armed organisations)<sup>1</sup> and two '21<sup>st</sup> Century Panglong' summit meetings in August 2016 and May 2017. Nevertheless, there is a long road still to travel.

This is a complex peace process, which has only the partial inclusion of Myanmar's many ethnic armed organisations. Signatories to the Nationwide Ceasefire Agreement include one of the longest-running ethnic armed organisations, the Karen National Union/Karen National Liberation Army, but do not include large forces such as the Kachin Independence Organisation/Kachin Independence Army or the United Wa State Army. Fundamental political issues remain wholly unresolved, including political autonomy for ethnic states, demilitarisation of ethnic states and disarmament of ethnic armed organisations. Even in ceasefire-areas, the issues that gave rise to conflict continue to exist. In non-ceasefire areas, intense conflict continues, with serious human rights violations by the Burma Army and no condemnation by the Myanmar Government.

A host of political, humanitarian and developmental challenges must be addressed to secure lasting peace in Myanmar, from constitutional and military reform to control over natural resources. There is also an urgent need to address displacement. Myanmar has been one of the world's largest generators of forced migration for the past two decades yet displacement has received little attention in the peace process thus far. The Norwegian Refugee Council has named Myanmar as one of the world's "most neglected" refugee situations, assessed against criteria of political will to find solutions for displacement, lack of media attention and lack of economic support.<sup>2</sup> Most concerning of all, state violence causing large-scale displacement continues to occur. Violence in Rakhine State caused 75,000 people to flee from Myanmar to Bangladesh in December 2016, and a further 300,000 people in September 2017. Since 2011, more than 119,000 people have been displaced in Kachin and northern Shan States. There is also an urgent emerging problem of large-scale development and land acquisition projects creating further displacement.

These conditions of continuing conflict and displacement reflect Myanmar's deep-seated political problems, including the treatment of ethnic minorities and the continued power of the military. The scale of violence also raises legitimate concerns as to whether Myanmar's political environment is improving or deteriorating. It is important not to be naïve about the scale of the challenges in Myanmar's peace process, or indeed about the possibility that the peace process may break down entirely. However, it is also necessary to consider how the peace process should be managed to maximise the chances of securing a lasting peace.

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<sup>1</sup> Signatory organisations are: the Karen National Union (KNU); Democratic Karen Benevolent Army (DKBA); KNU/KNLA Karen Peace Council; Arakan Liberation Party; Pa-O National Liberation Organization (PNLO); Chin National Front (CNF); Restoration Council of Shan State/Shan State Army-South (RCSS-SSA-S); and All Burma Students' Democratic Front (ABSDF).

<sup>2</sup> See <https://www.nrc.no/the-worlds-most-neglected-displacement-crises/>

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Displacement has not been a priority in the peace process to date but this must change. There are more than a million IDPs and refugees from Myanmar,<sup>3</sup> and several times that number living as undocumented migrant workers throughout Southeast Asia. These people are important to Myanmar's future and their treatment has implications for wider peacebuilding objectives. If refugees and IDPs are able to return to their homes, they can help embed peace and contribute to economic, social and political transformation. On the other hand, if large numbers of people return and there are not enough jobs, or if there are disputes over land, or there is no physical security, then return may give rise to new political instability – and new patterns of displacement. Displacement is integral to and integrated with core aspects of political, economic and legal reform. Indeed, the existence of displacement reflects deeper problems of political conflict and militarisation, but also of ethnic discrimination, land distribution, and control of natural resources. From the outset, therefore, refugee and displacement issues should be understood as related to these areas and to long-term goals such as democracy and the rule of law; health; education; land distribution and ownership; gender equality and human rights protections. Recognising the relationship between displacement and these other objectives can help address the root causes of refugee movements and so prevent future displacement.

Dealing with displacement in Myanmar's peace process also requires a refugee-centred approach. Myanmar is undergoing rapid change but this has been most evident economically, as commercial interests, foreign governments and international agencies develop new 'turf' in Myanmar. The urgency of this new investment has been singularly absent from the peace process to date, and particularly from the topic of displacement. There is a risk that refugees and IDPs are being left behind in a crucial window of social and economic transformation in Myanmar, and being placed at risk of future displacement as a result of these new economic processes. Refugees and IDPs need advocates in this process, and they need funding support and political support that places their rights, needs and preferences at the heart of policy discussion and decision-making. This is a time-sensitive issue, and one where failing to act may have serious consequences, as reduced funding leaves refugees with few options other to return, but in potentially chaotic and disorganised circumstances.

Finally, as with all other aspects of the peace process, addressing displacement needs to be tailored to Myanmar's political and legal context, where there is widespread suspicion of the government and legal system (particularly in ethnic states) and where non-state actors may be seen as more legitimate and trusted (including ethnic armed groups, village leaders, religious leaders and civil society organisations). Any policy solutions for displacement in and from Myanmar must be aware of these dynamics of legal pluralism, overlapping authority and customary justice systems.

This working paper sets out the context and experience of displacement in and from Myanmar. It identifies three primary areas that must be addressed, including: the process of drafting a peace agreement, and displacement-specific provisions to include in a peace agreement; the timing, design and implementation of return and reintegration of displaced populations; and issues of legal protection, land governance and restitution. The working paper also identifies some cross-cutting themes, including the need to recognise a relationship between displacement and other aspects of peacebuilding (such as political autonomy for ethnic areas and land governance); the necessity of ensuring that displaced people themselves are central to the process of policy design, ideally through institutionalised mechanisms for dialogue, consultation and representation; and the importance of securing continued funding and donor support for refugees and IDPs with a continuing need of

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<sup>3</sup> See the most recent figures by the Internal Displacement Monitoring Centre (IDMC) at <http://www.internal-displacement.org/countries/myanmar>.

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international protection.

### *I. Displacement in peace agreements*

Drawing on comparative experience, Part I examines some of the issues that might be included in a peace agreement, such as: providing guarantees of safety and security for returnees; guarantees of access to humanitarian agencies; ensuring that returnees receive benefits or other forms of assistance; and creating institutions for effective enforcement and implementation of peace agreements. This paper considers how these might be adapted and implemented to suit the Myanmar context.

### *II. Voluntary return and reintegration of refugees and IDPs*

For real change and real peace in Myanmar, refugees and IDPs must be able to return home. However, the fundamental provision of international refugee law is the principle of *non-refoulement*: a refugee should not be returned to a country where his or her life or freedom is threatened. At present, the majority of refugees from Myanmar feel conditions are not yet suitable for return. Part II considers different forms of return process (including spontaneous return, organised repatriation and return following a declaration of 'ceased circumstances' of refugee protection) and barriers to return. It also examines past refugee repatriation programmes to identify mechanisms that would ensure refugees and IDPs from Myanmar can return voluntarily, safely and with dignity.

### *III. Land governance and restitution*

Land governance is a central issue, as a cause of displacement, an impediment to return, and a risk of future displacement. Part III examines restitution (i.e. the return of housing, land and property that was lost or stolen) to refugees and IDPs, and the possibility of creating new institutions to resolve land claims and disputes. It also considers the significance of Myanmar's domestic land law and land use policy to resolving current displacement and preventing future displacement.

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# I. An overview of displacement in and from Myanmar

During six decades of military rule in Myanmar, millions of people were displaced from their homes as a result of political violence, of militarisation and human rights violations, and as a result of natural disaster or development-induced displacement. Displacement in and from Myanmar is complex and perhaps best understood as multiple overlapping situations, with different drivers, different migration pathways and different conditions in exile. There is often a direct link between ethnicity and migration pathways, as outlined below.

*Internally displaced:* In 2016, the Internal Displacement Monitoring Centre estimated a population of 644,000 IDPs in Myanmar, including 400,000 in the south-east, 98,000 in Kachin and northern Shan states and 140,000 in Rakhine State. This population includes people displaced as a result of natural disasters, including Cyclone Nargis in 2008 and flooding during the 2015 monsoon. IDMC also identifies 479,000 refugees from Myanmar (as of 2015). This population includes refugees in Thailand, Malaysia, India and Bangladesh.

*Thailand:* There are nine camps in Thailand, currently holding a verified population of 102,359 refugees. Since 2005, more than 100,000 people have been resettled from these camps to “third countries” including the United States, Australia, Norway, UK and others. The camp population is overwhelmingly of Karen and Karenni ethnic origin. Thailand’s refugee policy directly excluded Shan from Myanmar from refugee status and indirectly excluded many others by adopting a narrow definition of a refugee as “people fleeing fighting”. An estimated two million undocumented migrant workers from Myanmar are present in Thailand.

*Malaysia:* In 2017 there were 133,648 refugees and asylum seekers from Myanmar registered with UNHCR in Malaysia and potentially tens of thousands more who are unregistered. All of Myanmar’s ethnic nationalities are present in the country, with particularly large populations of Chin and of Rohingya. There are also many undocumented migrant workers from Myanmar living in Malaysia. Since 2016, UNHCR Malaysia has adopted a differentiated policy of registration of refugees from Myanmar, under which only people from areas of active conflict (Kachin State, Shan State and Rakhine State) eligible for refugee status determination.

*India:* In 2017, more than 14,000 Myanmar refugees and asylum seekers were registered with UNHCR in Delhi, with Chin and Rohingya as the largest population groups. Refugee status determination for Myanmar refugees is only available in New Delhi. Tens of thousands of Chin from Myanmar are living in northeast India as undocumented migrant workers.

*Bangladesh:* Refugees from Bangladesh are almost exclusively from Rohingya and other Muslim groups, who have been subjected to increasing violence and persecution in recent years. In 2017, the population of registered refugees in Bangladesh was 33,128 but the population of unregistered refugees was at least ten times larger. Many of these people have been displaced recently: the UNHCR estimated that more than 168,500 Rohingya have fled from Myanmar between 2012 and 2016, with a further 300,000 believed to have left Myanmar in 2017.<sup>4</sup> Conditions in Bangladesh are extremely difficult, forcing many to embark on dangerous onward migration journeys, often by boat.

China does not recognise refugees from Myanmar, and attempted arrivals from Kachin State have reportedly been pushed back over the border on a number of occasions over the years.<sup>5</sup> However, there are many

<sup>4</sup> UNHCR (2017), ‘Mixed Movements in South-East Asia’, <https://unhcr.atavist.com/mm2016>; Al-Jazeera, ‘Rohingya exodus to Bangladesh nears 300,000:UN’, 9 September 2017.

<sup>5</sup> E.g. Human Rights Watch (2012), *China: refugees forcibly returned to Burma*. August 24, 2012.

forced migrants from Myanmar living and working in China, and in 2017, more than 20,000 ethnic Kokang were being housed in relief camps in Yunnan province. China is also an increasingly important political player in Myanmar's peace process.<sup>6</sup>

### An overview of displacement

All displaced persons have experienced the loss of their home, and often their property and land. They have also lost life opportunities: for their education and that of their children, for a fulfilling work life, and for a peaceful and stable life in their own home. Beyond these core shared experiences, however, there are many experiences of displacement. For some, it is temporary and short-lived. For others, it has meant decades in exile and a life of deep insecurity. For example, IDPs in southeast Myanmar (including Mon State, Karen State and Karenni State) have often experienced repeated displacement over several decades and until 2011 had almost no access to international aid. With the mass arrival of development agencies to Myanmar, IDPs in the southeast currently receive more international assistance than ever before. In contrast, most IDPs in Shan State and in Kachin State were displaced recently (after 2011), but people displaced in non-government controlled areas are still denied access to international aid. The experience of refugees is similarly varied. Refugees in camps in Thailand historically received most international assistance but recent funding cuts have made conditions in camps much more difficult. Refugees in India and Malaysia do not live in camps but they face many other problems. Malaysia has no formal legal protection for refugees and they live in constant fear of arrest and detention.<sup>7</sup> In India, refugees' primary problems relate to poverty, insecurity and discrimination. Those living in New Delhi have a serious risk of sexual violence.<sup>8</sup> Rohingya refugees in Bangladesh live in extremely difficult conditions of poverty and insecurity, with very limited access to international aid. This variety in experiences of forced migration makes it difficult – and perhaps undesirable – to adopt a single plan for all IDPs and refugees from Myanmar, particularly when considering prospects for return and other durable solutions. Refugees and IDPs from areas experiencing continuing high-intensity conflict and persecution (such as Kachin State, Shan State and Rakhine State) have very little prospect of return at present. The situation for Rohingya is even more challenging, both because of the degree of persecution that they face inside Myanmar and the absence of any acknowledgement that they are Burmese citizens entitled to return.

The scope of forced migration from Myanmar is not limited to IDPs and those with formal refugee status. Shan in Thailand have been unable to receive refugee status and have lived as undocumented migrant workers, as have many members of other ethnic groups. There are believed to be more than two million undocumented migrants from Myanmar working in Thailand.<sup>9</sup> Many of these people were forcibly displaced from Myanmar and it may be important to also consider their needs, for principled and pragmatic reasons. A survey conducted with more than 5000 migrant workers in Thailand found that 80% would like to return to Myanmar if the political situation improves.<sup>10</sup> A survey response is very different from actual return, but if this survey estimate was borne out in practice across the entire migrant worker population it would have significant implications for the labour markets of Thailand

<sup>6</sup> Yun Sun (2017), *China and Myanmar's Peace Process*. US Institute of Peace, Special Report.

<sup>7</sup> International Rescue Committee (2012), *In Search of Survival and Sanctuary in the City: Refugees from Myanmar/Burma in Kuala Lumpur, Malaysia*.

<sup>8</sup> Jesuit Refugee Service (2014), *Chin Refugees in Delhi: Realities and Challenges*, Chin Refugee Committee (2011), 'Lives of Chin Refugees in Delhi: Case Studies'.

<sup>9</sup> A recent report by the Migrant Worker Rights Network suggests that there are 2.5 to 3 million migrant workers from Myanmar in Thailand. 'See <http://www.burmalibrary.org/docs17/MWRN-2014-02.pdf>

<sup>10</sup> Bangkok Post, 'Most Burmese migrants want to go home, says IOM', 19<sup>th</sup> December 2013 <https://www.dvb.no/news/35418-burma-myanmar/35418>

and Myanmar.

There are also refugees from Myanmar outside the Asian region, including people who applied for asylum in-country as well as those resettled from Thailand, India and Malaysia. The largest population of these are currently living in the United States, with other destination countries including Australia, Canada, Norway and Finland. People living overseas can be influential voices either in support of or opposition to a peace process. Some may choose to return to Myanmar and contribute to rebuilding the country (and indeed, many have already done so). Others will prefer to remain in their new country but may play a role in Myanmar's development by sending remittances to support their families. The value of such a contribution is illustrated by the peace process and subsequent refugee repatriation in El Salvador (1990-1992), when many refugees did not return but instead sent money to their friends and family. This greatly assisted the transition and ultimately "contributed to successful implementation of the peace accords", not only through the money itself but because fewer numbers of people returning reduced competition for jobs and land in El Salvador.<sup>11</sup> A similarly important role for remittances is apparent among refugees in camps in Thailand, many of whom are now dependent on support from family members and friends who have been resettled to 'third countries'. However, more could be done to nurture a constructive role for refugees from Myanmar in resettlement countries, including by ethnic armed organisations. For example, as recently as June 2017 there were complaints from Karen living in Canada that the KNU's vice chairman was visiting Canada but had not made time to visit the Karen community in the country.<sup>12</sup>

### Barriers to return: Refugees' perspectives

One of the ironies of political change in Myanmar is that as conditions inside Myanmar have begun to improve, life for refugees outside the country has become more difficult. First, many international organisations have moved their operations inside Myanmar and reduced funding and/or services to refugees. Inside Myanmar, aid is diffused across many sectors, and IDPs are a low priority. As one illustration of this, the primary agency supporting refugees and IDPs in the Thailand border regions, The Border Consortium, has reduced food rations to all refugees and from September 2017 will cease assistance to IDPs entirely. This loss of funding will have severe consequences for IDPs who are unable to return to their areas of origin and are dependent on external support for their survival. Second, refugee status determination is becoming harder to access. In 2013, UNHCR in New Delhi accepted 98% of refugee status determination claims from Myanmar applicants. By 2014, recognition had become closer to 50%. In Malaysia, a process of 'recalibration' by UNHCR has restricted refugee status determination to people from Kachin, Shan and Rakhine States, excluding those from areas under ceasefire agreements.<sup>13</sup> Third, international resettlement for refugees from Myanmar has been reduced, with other national groups viewed as a higher protection priority. As local integration remains impossible in all countries of refuge in the Southeast Asian region, the only remaining durable solution is return to Myanmar: yet this is very difficult for refugees to contemplate in the absence of stable peace and a lasting political settlement. Refugees are trapped in an increasingly difficult struggle for survival, with no way forward and no way back.

Repatriation is discussed in detail in Part III. At this point it is important to note that experiences of exile and preparedness for return vary along a wide spectrum. Return to Myanmar is impossible for Rohingya (who are not accepted as Myanmar citizens), as it is for refugees from areas which are still at

<sup>11</sup>S.J. Stedman, (2002), *Ending Civil Wars: The Implementation of Peace Agreements*, (Boulder: Lynne Rienner), 12.

<sup>12</sup> Saw Yan Naing, KNU Vice Chairman's 'Tight Schedule' Upsets Karen Community in Canada, *Irrawaddy* 5 June 2017.

<sup>13</sup> Interviews with UNHCR New Delhi (July 2014) and refugees in Malaysia (June 2017).

war (including Kachin and Shan States). Within groups where there is arguably greater potential for return, such as Karen, Karenni, Chin, Mon, some refugees and IDPs have already returned to Myanmar or may be willing to consider it in the near future, but others remain highly resistant. Reports from the refugee communities in Thailand, Malaysia and India show that many feel conditions inside Myanmar are not yet conducive to return.<sup>14</sup> This was also the predominant view that I encountered among refugees in India and Malaysia during research interviews in 2013–2015 and in continuing communications thereafter. Refugees profoundly mistrust the Myanmar Government – even an NLD-led Government – and are sceptical that ethnic armed organisations’ political demands for political self-autonomy and federalism will be met. They are concerned that return would be premature when there is no formal peace agreement and several ethnic states remain in a state of war and under restricted international aid access. There are concerns about landmines (Myanmar is one of the world’s most heavily land-mined countries and southeast Myanmar is the country’s most-affected region), which pose a serious barrier to travel and farming and subsistence. Finally, those who have been displaced say that they cannot return because they have nothing to return with or to: they have no land, house or money and they do not believe that they would be able to find jobs or support their families in the country’s current state of development. Related concerns include a lack of identity documentation, lack of recognition for educational qualifications gained outside Myanmar, and concerns about educational opportunities for children who have been raised outside Myanmar and do not speak or read/write Burmese.<sup>15</sup> Some refugees *have* chosen to return to Myanmar in recent years, including an estimated ten thousand people from camps in Thailand.<sup>16</sup> Of course, this does not necessarily reflect faith in the peace process. Particularly in Thailand, refugees in camps feel political pressure to return and are struggling with the loss of funding support and reduced food rations. Return in these conditions may be more related to the push factor of impossible living conditions in Thailand than to a pull factor of conditions in Myanmar.

### Consultation and participation with displaced communities

Any policy to address displacement must begin by understanding the needs of displaced persons, which should be based on consultation with those populations to understand their analysis of the situation, their fears and their preferences for the future. Consultation has been a contentious issue in Myanmar thus far, in relation to the peace process generally and in the specific context of refugee/IDP return.<sup>17</sup> This is particularly unfortunate, as Myanmar’s displaced populations possess exceptionally strong civil society networks and organisations, which operate in camps in Thailand, in cities in Malaysia and India, and in IDP areas. The work of community-based organisations (including organisations linked to ethnic armed groups) has been crucial to coping with displacement, whether by providing education and basic health care, taking care of vulnerable members of the community, or promoting human rights and gender equality. These organisations are an asset for Myanmar’s

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<sup>14</sup> Burma Partnership (2015), Voices of Refugees <http://www.burmapartnership.org/wp-content/uploads/2015/04/27.04.05-Voices-of-Refugees-Along-Thailand-Burma-Border-FINAL.pdf>; Progressive Voice (2016), *Where do we go from here? A Snapshot of Recent Developments for Refugees Along the Thailand-Myanmar Border*.

<sup>15</sup> Many people now living outside Myanmar destroyed their identity documentation before leaving the country, for fear that they would be stopped by Burma Army soldiers while trying to leave. Now, with no proof of identity and citizenship, they fear it will be difficult to return. In my conversations with refugees, they have frequently expressed a fear that those who return will be punished or persecuted for having left; and that they will be easily identifiable because of their lack of documentation. There is an important need for political reassurance on this issue.

<sup>16</sup> UNHCR Strategic Roadmap for Voluntary Repatriation: Refugees from Myanmar in Thailand 2015–2017, January 2017.

<sup>17</sup> EAOs have also been criticised for failure to consult with civil society and to include women as full and equal participants in the peace process. Burma Partnership (2015), Voices of Refugees <http://www.burmapartnership.org/wp-content/uploads/2015/04/27.04.05-Voices-of-Refugees-Along-Thailand-Burma-Border-FINAL.pdf>; Progressive Voice (2016), *Where do we go from here? A Snapshot of Recent Developments for Refugees Along the Thailand-Myanmar Border*.

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future, just as they have been throughout the years of conflict. Civil society among displaced populations can strengthen support for peace initiatives and improve the effectiveness of repatriation programmes. One example of the power of an organised displaced community is the peace process in Guatemala. In the 1980s, refugees from Guatemala in Mexico elected representative 'Permanent Commissions' which took a leading role in engaging with the government and with international actors. These Commissions were included in repatriation dialogue with the Government and UNHCR and eventually signed an agreement with the Government. The Agreement created a continuing role for displaced populations, as participants in a Consultative Assembly of the Displaced (ACPD) and as members of a Technical Commission created to oversee implementation of the Agreement.

Refugee return negotiations are typically conducted through tripartite discussions between the government of the hosting country, the government of the country of origin and the UNHCR. This model is increasingly being challenged, with calls to move to a quadripartite model where refugees and their representatives are part of the negotiations.<sup>18</sup> A quadripartite model would have significant advantages in Myanmar in ensuring that repatriation policies meet refugees' needs and advancing wider objectives of the peace process in terms of inclusion and social transformation.

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<sup>18</sup> Crisp and Long; see also Discussion Note on Protection Aspects of Voluntary Repatriation EC/1992/SCP/CRP.3 1 April 1992 <http://www.unhcr.org/excom/scip/3ae68cd314/discussion-note-protection-aspects-voluntary-repatriation.html>

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## II. Displacement in Peace Agreements

A peace process may give rise to multiple agreements, with a common pathway including an initial ceasefire agreement, followed by a more detailed peace agreement (potentially accompanied by individual framework agreements with in-depth provisions on central issues, such as displacement), leading to an implementation agreement that outlines how and when the terms of the agreement will be delivered. Myanmar is currently in the very earliest stage of this process. Since 2011, there have been fifteen bilateral ceasefire agreements between EAOs and the Myanmar Government, and a Nationwide Ceasefire Agreement with eight signatory EAOs. However, NCA signatories represent only an estimated 20% of Myanmar's armed ethnic organisations, while non-signatories include sizable armed groups such as the United Wa State Army, Kachin Independence Army and Shan State Army.<sup>19</sup> Furthermore, a ceasefire alone is not enough. The example of Kachin State shows that return to war is still possible after many years of ceasefire, if the underlying political issues and inequalities remain unresolved. The 'scorched earth' strategies of the Myanmar Army against several hundred Rohingya villages in Rakhine State in September 2017 showed that the military mind-set remains one of complete power and total impunity.

Myanmar's recent peace talks have been convened under the banner of "21<sup>st</sup> Century Panglong". The summit in May 2017 led to a formal statement of 37 principles which are apparently intended to form part of a subsequent Union Peace Accord. These principles mention the need to establish a durable solution for internally displaced and refugees and to create conditions for IDPs and refugees to be able to live safely in a place of their choosing, but the provisions are framed in very vague and general terms.<sup>20</sup> Agreement was not reached on provisions relating to self-determination and secession for ethnic states, which are the most critical political issues of Myanmar's peace process. Concerns have also been expressed at the designation of this text as a "Union Accord" when it did not have the participation of all relevant ethnic armed organisations and was signed by only one representative (Kwe Htoo Win of the Karen National Union) on behalf of all NCA signatories.<sup>21</sup> This highlights a central challenge for the Myanmar Government in reaching a final peace agreement: the agreement must be acceptable to multiple ethnic armed organisations and must have their full support.

A peace agreement also represents an opportunity to address other central social and political priorities, which for Myanmar must certainly include displacement. In comparative practice, some countries which experienced massive displacement addressed it only briefly in a peace agreement, while others drafted more detailed provisions or even a dedicated protocol text. The Dayton Agreement for Bosnia and Herzegovina is a rare example of a peace agreement where responding to displacement was at the heart of the entire agreement. This reflects the central role of ethnic cleansing as a tool of conflict in Bosnia, which made the return of refugees essential to ensure that ethnic cleansing did not succeed.

### Peace agreements with detailed provisions or dedicated protocols on displacement

Sudan (2004), Comprehensive Peace Agreement. Agreement on Wealth and Sharing.<sup>22</sup>

Burundi (2000), Arusha Agreement, Protocol IV, 'Reconstruction and Development'<sup>23</sup>

<sup>19</sup> <http://www.atimes.com/article/peace-process-pieces-myanmar/>

<sup>20</sup> The various agreements to date have mentioned topics including political arrangements, security and military reform, political prisoners, land governance, drug control policy, humanitarian aid and national development. Displacement has had relatively little attention, mentioned in only one of the fifteen bilateral ceasefire texts (with the KNPP); in a 7 point agreement between the Myanmar Government and the KIO; and in two provisions of the Nationwide Ceasefire Agreement.

<sup>21</sup> <http://english.panglong.org/2017/06/03/aftermath-of-second-21st-century-panglong-opinion-on-union-accord-and-linking-non-session-clause-to-ethnic-rights-of-self-determination/>

<sup>22</sup> [http://www.usip.org/sites/default/files/file/resources/collections/peace\\_agreements/wealth\\_sharing\\_01072004.pdf](http://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/wealth_sharing_01072004.pdf)

<sup>23</sup> [http://www.brookings.edu/~media/projects/idp/laws%20and%20policies%20added%20after%202012/burundi\\_arusha%20peace%20and%20reconciliation%20agreement%20for%20burundi.pdf](http://www.brookings.edu/~media/projects/idp/laws%20and%20policies%20added%20after%202012/burundi_arusha%20peace%20and%20reconciliation%20agreement%20for%20burundi.pdf)

**Tajikistan (1997)**, General Agreement on the Establishment of Peace and National Accord in Tajikistan, Protocol on Refugees s<sup>24</sup>

**Bosnia (1995)**, Dayton Peace Agreement Annex 7: Agreement on Refugees and Displaced Persons<sup>25</sup>

**Guatemala (1994)**, Agreement on Resettlement of the Population Groups Uprooted by the Armed Conflict<sup>26</sup>

**Cambodia (1991)**, Agreement on a Comprehensive Political Settlement on the Cambodia Conflict, Annex 4 on Repatriation of refugees and displaced persons<sup>27</sup>

#### Less detailed provisions on displacement

**Mali (2014)** Agreement for Peace and Reconciliation in Mali Resulting from the Algiers Process<sup>28</sup>

**South Sudan (2014)**, Agreement on Cessation of Hostilities Between the Government of the Republic of South Sudan and the Sudan People's Liberation Movement<sup>29</sup>

**Uganda (2007)** Agreement on Comprehensive Solutions, Article 9<sup>30</sup>

**Liberia (2003)**, Accra Comprehensive Peace Agreement<sup>31</sup>

**Nepal (2006)**, Comprehensive Peace Accord between Nepal Government and the Communist Party of Nepal<sup>32</sup>

**Sierra Leone (1999)**, Lomé Peace Agreement), Article XXII-XXIII<sup>33</sup>

**Kosovo (1999)** Interim Agreement for Peace and Self-Government<sup>34</sup>

**Liberia (1993)** Cotonou Agreement, Article 18<sup>35</sup>

**Mozambique (1992)**, General Peace Agreement, Protocol III, Article IV (general principles for return of refugees and displaced persons)<sup>36</sup>

<sup>24</sup> Annex III, Protocol on Refugees, appended to Letter dated 24 December 1996 from the Permanent Representative of the Russian Federation to the United Nations Secretary-General S/1997/56. Available at

<http://www.un.org/Depts/DPKO/Missions/unmot/prst9757.htm>

<sup>25</sup> [http://www.ohr.int/dpa/default.asp?content\\_id=375](http://www.ohr.int/dpa/default.asp?content_id=375)

<sup>26</sup> [http://www.usip.org/sites/default/files/file/resources/collections/peace\\_agreements/guat\\_940617.pdf](http://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/guat_940617.pdf)

<sup>27</sup> [http://www.usip.org/sites/default/files/file/resources/collections/peace\\_agreements/agree\\_comppol\\_10231991.pdf](http://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/agree_comppol_10231991.pdf)

<sup>28</sup> <http://www.jurist.org/paperchase/Agreement%20on%20Peace%20and%20Reconciliation%20in%20Mali.pdf>

<sup>29</sup> [http://peacemaker.un.org/sites/peacemaker.un.org/files/SS\\_140123\\_CessationHostilitiesGov-SPLMAOpposition.pdf](http://peacemaker.un.org/sites/peacemaker.un.org/files/SS_140123_CessationHostilitiesGov-SPLMAOpposition.pdf)

<sup>30</sup> [http://peacemaker.un.org/sites/peacemaker.un.org/files/UG\\_070502\\_AgreementComprehensiveSolutions.pdf](http://peacemaker.un.org/sites/peacemaker.un.org/files/UG_070502_AgreementComprehensiveSolutions.pdf). This agreement was signed by the parties, but ultimately the Lord's Resistance Army refused to ratify it and affirm an overarching peace agreement, leaving its status unclear.

<sup>31</sup> [http://www.usip.org/sites/default/files/file/resources/collections/peace\\_agreements/liberia\\_08182003.pdf](http://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/liberia_08182003.pdf)

<sup>32</sup> [http://peacemaker.un.org/sites/peacemaker.un.org/files/NP\\_061122\\_Comprehensive%20Peace%20Agreement%20between%20the%20Government%20and%20the%20CPN%20%28Maoist%29.pdf](http://peacemaker.un.org/sites/peacemaker.un.org/files/NP_061122_Comprehensive%20Peace%20Agreement%20between%20the%20Government%20and%20the%20CPN%20%28Maoist%29.pdf)

<sup>33</sup> [http://www.usip.org/sites/default/files/file/resources/collections/peace\\_agreements/sierra\\_leone\\_07071999.pdf](http://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/sierra_leone_07071999.pdf)

<sup>34</sup> [http://peacemaker.un.org/sites/peacemaker.un.org/files/990123\\_RambouilletAccord.pdf](http://peacemaker.un.org/sites/peacemaker.un.org/files/990123_RambouilletAccord.pdf) (note this agreement was not ultimately agreed between the parties)

<sup>35</sup> <http://www.refworld.org/docid/3ae6b5796.html>

<sup>36</sup> [http://www.usip.org/sites/default/files/file/resources/collections/peace\\_agreements/mozambique\\_1991-92.pdf](http://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/mozambique_1991-92.pdf)

Generally speaking, the issues that should be included in a peace agreement are those where it is necessary to have binding agreement between all parties. The question of scope is crucial: how much should be included in a peace agreement? Is it better to 'aim high', with the risk that this delays an agreement or reduces the likelihood of it being implemented? Or should negotiators 'aim low', and concentrate on the most achievable aspects? There is no clear answer to this question, which must be answered by weighing up all aspects of the negotiations and their political implications. However, a peace agreement does represent a valuable opportunity to secure agreement on principles and processes to resolve past injustice and it is arguably preferable to advocate for implementation of an agreement that has been made than to try to bring in new principles later.

A survey of provisions addressing displacement in peace agreements shows several recurring themes, all of which are relevant for Myanmar: (i) defining the scope of the agreement; (ii) affirming general principles of human rights and refugee law; (iii) guaranteed access to humanitarian agencies; (iv) issues related to return and repatriation; (v) housing, land and property rights (including general principles and a specific right to restitution and providing for institutions to resolve land disputes); (vi) monitoring and enforcement mechanisms. These will now be considered in more detail.

### Defining the scope of an agreement

International obligations are different in relation to internally displaced people and refugees. The term 'refugee' has a specific legal meaning, defined in the 1951 Refugee Convention as a person who has left their original country and is unable to return due to a "well-founded fear of persecution" on grounds of their race, religion, nationality, membership of a particular social group or political opinion. Most countries in Southeast Asia have not signed the 1951 Refugee Convention, and have not adopted domestic law to recognise refugees. Nevertheless, they remain bound by principles of customary international law, which includes the fundamental principle in international refugee law of non-*refoulement*: a refugee cannot be returned to a place where he or she will face persecution.

Internally displaced persons do not have the same international legal regime as refugees, because they remain in their country of origin and are assumed to be the responsibility of their own government. The *Guiding Principles on Internal Displacement* address this gap in international law by outlining a framework for protection of IDPs in areas including humanitarian assistance and return, resettlement and reintegration. The Guiding Principles define internally displaced persons as:

"persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border."

As IDPs are not otherwise protected through international law, a peace agreement represents a valuable opportunity to define their status and establish a binding commitment to their protection. Peace agreements that have done this include Nepal's Comprehensive Peace Agreement (2006), the Inter-Congolese Political Negotiations (2003) and Sudan's Comprehensive Peace Agreement (2005). The Great Lakes Protocol (2006) incorporated the Guiding Principles in full. The 37 Principles adopted at the Panglong Summit in May 2017 refer to IDPs and refugees due to natural disasters, human activities and armed conflicts.<sup>37</sup> This definition evidently seeks to be inclusive, though the phrasing

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<sup>37</sup> <http://www.moi.gov.mm/> (last accessed 5<sup>th</sup> June 2017). See "Social Sector Agreement" 1 and 2.

does not appear to be consistent with the accepted definition of a refugee in international law. An alternative – and simpler – phrasing was used in peace agreements in Mozambique, Liberia, Rwanda and Bosnia-Herzegovina, which applied to “all refugees and displaced persons”.

### Human rights and humanitarian access

Many peace agreements include a general statement guaranteeing to respect the human rights of refugees and displaced persons. Particular rights may be identified, including the right to non-discrimination, the right to equality between men and women, the right to home and family life, the right to freedom of movement. Myanmar’s Nationwide Ceasefire Agreement includes several references to human rights, including an opening article which pledges to “implement this Nationwide Ceasefire Agreement in accordance with the following basic principles [...] guarantee equal rights to all citizens who live within the Republic of the Union of Myanmar; no citizen shall be discriminated against on the basis of ethnicity, religion, culture or gender.”<sup>38</sup>

An example of a human rights statement with particular reference to displaced populations is that of Cambodia (1991):

“There must be full respect for the human rights and fundamental freedoms of all Cambodians, including those of the repatriated refugees and displaced persons, in recognition of their entitlement to live in peace and security, free from intimidation and coercion of any kind.”<sup>39</sup>

Another mechanism to help ensure that refugees can return safely is to guarantee access for humanitarian agencies. Several peace agreements have included such provisions, e.g:

Burundi: “The Government shall allow international organizations and international and local non-governmental organizations unrestricted access to returnees and other sinistrés for purposes of the delivery of humanitarian assistance. It must guarantee the safety of the staff of such organizations and must also facilitate the provision of short-term aid for repatriation, appropriately supervised and without discrimination.”<sup>40</sup>

This is highly relevant for Myanmar, where humanitarian aid has so often been blocked by the government. For IDPs in Kachin State and in Rakhine State, restrictions on humanitarian access have not only been maintained under the NLD-led government but since late 2016 have actually been increased. Of approximately 100,000 IDPs in Kachin State and northern Shan State, almost half are living in non-government controlled areas. International aid – including food and medicine – has been blocked to non-government controlled areas, leaving IDPs in these areas dependent on the limited support available from civil society and local organisations. In Rakhine State, denial of aid access to Rohingya IDPs has led to acute malnutrition, particularly among children, prompting a joint statement of concern from the governments of fifteen nations.<sup>41</sup> These increasing restrictions feed perceptions among refugees and IDPs that little has changed in Myanmar’s politics with regard to the treatment of non-Burman ethnic nationalities. Denial of aid is viewed as a deliberate counterinsurgency strategy, which Kachin civil society organisations have described as the “fifth cut” (i.e. an extension of the infamous junta strategy of “four cuts” against ethnic self-determination movements). Unrestricted international humanitarian aid access is essential to build confidence among displaced populations

<sup>38</sup> The Nationwide Ceasefire Agreement Between the Government of the Republic of the Union of Myanmar and the Ethnic Armed Organisations, Chapter 1, Article 1(c)

<sup>39</sup> Annex 4, Part II (4): See page 32 for more examples.

<sup>40</sup> Burundi (2000), Protocol III, Article 7. See the appendix for further examples.

<sup>41</sup> <http://reliefweb.int/report/myanmar/joint-statement-humanitarian-access-northern-part-rakhine-state>

and should be a priority demand of the EAOs in the peace process.

### Implementation and enforcement

It is relatively easy to include human rights statements in a peace agreement; it is much more difficult to ensure that those rights are enforceable. Monitoring provisions are one route to promote implementation and enforcement. A peace agreement often provides for general monitoring and enforcement institutions to oversee the entire agreement. Sometimes additional provision is made for monitoring measures specific to displaced populations (such as humanitarian aid access or repatriation programmes). Ultimately, implementation of a peace agreement depends on many factors, including the political will of the government and other actors as well as funding and the outcome of elections. To improve the prospects for implementation, relevant considerations include: dedicated monitoring institutions to ensure implementation; legal reforms to incorporate an agreement's provisions into national law; and ensuring that any promised services or benefits are accessible to displaced persons. Each of these aspects presents its own challenges.

#### *Monitoring mechanisms*

Myanmar's Nationwide Ceasefire Agreement created two monitoring mechanisms: a Joint Ceasefire Monitoring Committee (JMC) for military matters and a Union Peace Dialogue Joint Committee (UPDJC) for the political process. Each of these is a multi-stakeholder entity. The UPDJC is comprised of 48 members: 16 each from the ethnic armed organisations, government and military, and political parties. In 2017 it established 15-member working committees in the areas of Political Affairs, Social Affairs, Economic Affairs, Security Affairs and Land and Natural Environment. The Joint Ceasefire Monitoring Committee operates at Union, State and Local level. The Union-level JMC has twenty six members: ten representatives from NCA-signatory ethnic armed organisations, ten representatives from government and military, and six independent civilians (three nominated by government, and three nominated by EAOs). In 2016, Aung San Suu Kyi also established a National Reconciliation and Peace Centre (replacing the Myanmar Peace Centre), located within the government administration and staffed primarily by civil servants. The JMC and UPDJC are intended to provide equitable representation but their structure is tripartite, involving EAOs, military and political actors. They are not explicitly inclusive of wider civil society, nor of sectors with particular needs, such as gender and displacement. The JMC is also limited in its jurisdiction to monitoring areas which have signed up to the Nationwide Ceasefire Agreement, when the worst military violations are occurring in the territory of non-signatory EAOs.<sup>42</sup>

#### *Displacement-specific monitoring institutions*

Some peace agreements create a dedicated institution to monitor implementation of provisions for refugees and displaced persons. This can be particularly valuable where the population of displaced people is very large and/or where it is distributed across several countries (as is the case for Myanmar). In Guatemala, a Technical Commission was created to oversee the implementation of the 1994 Agreement on Resettlement of the Population Groups Uprooted by the Armed Conflict. The Commission had six members: two government representatives, two representatives of the displaced

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<sup>42</sup> Landmines are not under JMC jurisdiction. This is problematic as Myanmar is one of the world's worst affected countries for landmines, and the Myanmar Government has to date not allowed any landmine removal to take place. The implication is that they are still considered an active weapon of war. The International Campaign to Ban Landmines names Myanmar as the only country in the world consistently still laying landmines ([www.icbl.org](http://www.icbl.org)). In September 2017, the Myanmar army was accused of laying landmines in the path of Rohingya fleeing from Myanmar to Bangladesh. See <https://www.theguardian.com/world/2017/sep/10/myanmar-accused-of-planting-landmines-in-path-of-fleeing-rohingya>

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population and two (non-voting) representatives from the international community. The Technical Commission was created in 1994 and concluded operations in 2001 and has been described as “a key factor in resolving both political and technical problems throughout the process”, despite slow Government implementation of the agreement;<sup>43</sup> though it has also been criticised for focusing on refugee resettlement in rural areas and thus excluding hundreds of thousands of IDPs and urban-dwellers from its work.<sup>44</sup> In Tajikistan, a Commission on National Reconciliation was created to oversee the peace agreement, including its provisions on returning refugees. The Commission had 26 members. Tajikistan also benefited from a sustained process of unofficial dialogue between government and opposition groups. Between 1993 and 2003, the Dialogue members met on 35 occasions (with the peace agreement reached in 1997).<sup>45</sup>

The examples of Guatemala and Tajikistan illustrate the value of developing a long-term timeframe for dialogue and implementation, which extends far beyond the immediate period of drafting a peace agreement. In these instances, monitoring committees were provided for in the initial peace agreement. In other contexts – such as Sudan – a dedicated Implementation Agreement was drafted after the initial framework Peace Agreement. There are a variety of possibilities, but given the importance of implementation monitoring there are obvious advantages to considering it at the earliest opportunity.

Monitoring roles must be given to an appropriate actor: any entity with responsibility for overseeing implementation of services to displaced persons must be trusted by that population. In Colombia, a law providing for restitution of property to IDPs gave the responsibility for oversight to the national military – but the military had *caused* displacement for many IDPs. Similarly in Myanmar, given the lack of trust between displaced populations and the government (as well as the military) it may be desirable to consider an independent actor or to design a genuinely inclusive monitoring structure which has the participation of refugees and IDPs. UNHCR has had an oversight role in many repatriation programmes. This can be effective during the immediate period of repatriation but is less suited to long-term monitoring as UNHCR may not have the resources or political authority to conduct monitoring over five or ten years, or even more. UNHCR’s repatriation and reintegration activities will normally be complete within three years, with some scope for extension. If UNHCR no longer has operational reasons to be in return areas, it will be harder for the agency to effectively monitor conditions. It may also be harder to negotiate access from the Government.<sup>46</sup>

*ii. Incorporating the principles of an agreement or of international human rights into national law*

The legal status of a peace agreement is not always clear. Where an agreement is between a government and non-state armed groups (as it will be in Myanmar) it may be necessary to clarify its legal status, ideally by making provision for its terms to be incorporated into national law.<sup>47</sup> Similarly, international principles such as the Guiding Principles on Internal Displacement and the United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons (the *Pinheiro Principles*) should be adopted in national law to ensure that they are enforceable.

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<sup>43</sup> Marcie Mersky (2005), ‘Human Rights in Negotiating Peace Agreements: Guatemala’. International Council on Human Rights Policy Review Meeting, Belfast, 7-8<sup>th</sup> March 2005.

<sup>44</sup> IDMC, (2008). *Guatemala: 12 years after conflict, few solutions for IDPs or other victims*.

<sup>45</sup> Harold H. Saunders, (2005) ‘Sustained Dialogue in Tajikistan’, in R. J. Fisher, *Paving the Way: Contributions of Interactive Conflict Resolution to Peacemaking*, (Oxford: Lexington Books), p134

<sup>46</sup> UNHCR (2008), Policy Framework and Implementation Strategy: UNHCR’s role in support of the return and reintegration of displaced populations, paras 64-5.

<sup>47</sup> Christine Bell (2008), *On the Law of Peace*, (Oxford University Press) p157-8.

*iii. Ensuring accessibility of processes or services*

If displaced people are to be given benefits or entitlements, programmes must be designed so that they are accessible to those populations. This requires sensitivity to the continued fear and distrust that many refugees and IDPs have for government interventions, as well as awareness of practical barriers to accessing administrative support. For example, many of Myanmar's displaced have very low levels of education (so cannot complete complex administrative forms) and are not literate in Burmese. They are likely to be returning to rural areas with poor road networks (so cannot be expected to travel to towns to collect benefits) and with limited access to internet, phone or even electricity. They are also unlikely to have personal resources such that they can pay-out and claim subsequent reimbursement. Claims procedures should be aware of these limitations. They should also be designed to avoid discrimination on any grounds, including gender.

**Funding**

Implementation of a repatriation programme will also require adequate funding. Many peace agreements call on international agencies and foreign governments to provide support to programmes for displaced persons, typically for repatriation. Voluntary repatriation programmes are often supported by the UNHCR, which is itself almost totally reliant on voluntary contributions: 97% of the agency's operating budget is received from donations by governments (with top donors in 2016 including the United States, European Union, Germany, Japan, Canada and the UK), intergovernmental organisations and the private sector. This makes the budget vulnerable to changing government priorities and makes long-term project planning difficult. Many of UNHCR's programmes, including repatriation programmes, have been under-funded.<sup>48</sup> Since 2011, Myanmar has benefited from massive investment from international agencies and foreign governments. This financial support may continue but it is far from assured, particularly in light of other global challenges such as the continuing conflict in Syria.

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<sup>48</sup> Stein comments that funding has been particularly challenging "for reintegration programs in countries affected by armed conflict, such as Afghanistan, Azerbaijan, Georgia, Liberia, Rwanda, Somali, and Tajikistan." Barry Stein (1997), *Refugee Repatriation, Return and Refoulement During Conflict*. USAID Conference 1997. p10

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### III: Return and Reintegration

The United Nations High Commissioner for Refugees recognises three ‘durable solutions’ in refugee situations: resettlement to a third country, repatriation to the country of origin and local integration in the country of exile. Each of these solutions can be difficult to achieve. Resettlement depends on national governments agreeing to accept resettled refugees. Based on 2014 figures, less than one per cent of the world’s refugee population will have access to resettlement.<sup>49</sup> Local integration depends on the hosting government agreeing to allow refugees to integrate; an approach that has in the past been rejected by both Thailand and Malaysia in relation to refugees from Myanmar. The durable solution that seems most likely for the majority of refugees from Myanmar is voluntary repatriation. For the past two decades repatriation has been by far the most frequently implemented durable solution, but as protracted refugee situations have become the norm, voluntary repatriation is less feasible and “refugee numbers have jumped to an all-time high, while repatriation levels have dropped to an historic low.”

Crisp and Long consider repatriation from Thailand to Myanmar to be the only protracted refugee situation where there is currently “a degree of optimism about the potential for safe and voluntary return”. However, while there may be some cause for cautious optimism there are also many causes for concern: not least continuing forced displacement from Myanmar. UNHCR’s population of concern in and from Myanmar increased by 19% in 2015 and escalated further in 2016 and 2017.<sup>50</sup> This has been the result of continuing conflict (primarily, though not exclusively, in non-ceasefire areas) and is of clear concern when assessing the feasibility of repatriation. As with other aspects discussed in this working paper, the possibility of repatriation varies by region of Myanmar and by ethnic group. Conditions in Kachin and northern Shan States makes return to these areas impossible at present, while the situation for Rohingya remains uniquely challenging due to the strong opposition from political, military and civilian actors to the possibility of their acceptance in Myanmar, and to the extreme persecution that they are currently experiencing.

Repatriation has been most extensively discussed for refugees in camps in Thailand and to a lesser extent, for refugees in Malaysia.<sup>51</sup> A pilot voluntary repatriation was conducted from Thailand in October 2016, organised by UNHCR in cooperation with the Myanmar Government. Only 71 refugees volunteered for this programme, under which they were provided with travel to Myanmar and a reintegration package including three months’ subsistence assistance. The confidence-building objectives of this programme were undermined by initial reports back to the camps which claimed that there was no concrete provision for essential aspects (including education and health), that 17 of those repatriated to Yangon had no housing on arrival and that some returnees claimed they regretted leaving the camp.<sup>52</sup>

#### Timing and sequencing

Organised repatriation programmes can take place either before or after a peace agreement has been adopted. As the previous sections discussed, peace agreements often contain provisions on the return of displaced populations. More detailed provisions for the repatriation of displaced populations

<sup>49</sup> See the UNHCR’s pages on third-country resettlement: <http://www.unhcr.org/pages/4a16b1676.html>

<sup>50</sup> At end 2015, UNHCR’s population of concern in Myanmar (including IDPs, returned refugees and stateless people) was 1,414,357. <http://reporting.unhcr.org/sites/default/files/pdfsummaries/GA2017-Myanmar-eng.pdf>

<sup>51</sup> Strategic Roadmap for Voluntary Repatriation: Refugees from Myanmar in Thailand 2015-2017 (Update January 2017)

<sup>52</sup> <http://www.unhcr.org/5912d97e2c.html>

are often made in 'voluntary repatriation' agreements between Governments and the UNHCR. These agreements are usually tripartite between the refugee hosting state, the state of origin and the UNHCR and do not involve refugees or non-state groups. One notable exception is Guatemala, where refugee-led 'Permanent Commissions' demanded to be included in discussions around repatriation and were signatories on the agreement with the Government. This model of quadripartite dialogue would be valuable in Myanmar to help build trust between refugees and the Government.

In principle, organised returns should take place based on an accurate assessment of the conditions in the country and the needs of displaced people. In reality, political pressure for return often comes from host governments or from the government of origin. Governments might want refugees and IDPs to return in order to legitimise a process of peace-talks or political reform and signal to constituencies at home and abroad that conditions have truly changed (as, for example, in Namibia, Cambodia and Mozambique, where refugees were encouraged to return before national elections were held). There are risks in attempting to return people too soon and in waiting for too long. If large scale returns occur prematurely, without a real peace agreement and without resolving the conditions that created displacement, it risks creating conditions that will undermine peace and development. On the other hand, an organised programme for refugees and IDPs should not be delayed for so long that people have already returned in large numbers. If this happens, it is possible that elites will claim the best land and the best resources, creating problems for those who come later. It also creates the potential for unfair and uneven service provision, with returnees in some areas receiving good support while returnees in other areas receive nothing.

After a peace agreement, organised return may begin quite quickly. For example, in 2005, the UNHCR began organised repatriation from Ethiopia, Uganda and Kenya just five months after the Comprehensive Peace Agreement was signed between the Sudanese government and the Sudan People's Liberation Army/Movement<sup>53</sup> However, a peace agreement does not guarantee lasting peace. Several hundred thousand people returned to Sudan between 2005 and 2007, many with UNHCR support, and South Sudan went on to become the world's newest independent State in 2011. The optimism vested in this process rapidly fell away as renewed conflict broke out. Civil war in South Sudan since 2013 has generated more than 4 million refugees and IDPs, creating a new cycle of displacement for many returnees.

#### Applicable principles for voluntary return

The African Union Refugee Convention includes provisions on refugees' rights on return, but there is no equivalent regional refugee convention for Southeast Asia. Myanmar, India, Malaysia and Thailand are not state parties to the 1951 Refugee Convention, though remain bound by customary international law obligations including the principle of *non-refoulement* (prohibiting return of refugees to an area where they will face a threat to life or freedom). Other principles for return and restitution can be found in 'soft law' texts such as the *Guiding Principles on Internal Displacement* and the *Pinheiro Principles on Restitution of Property for Refugees and Displaced Persons*.

In Thailand, UNHCR's approach to repatriation from the refugee camps is guided by a Strategic Roadmap for Voluntary Repatriation which was most recently updated in January 2017. The Strategic Roadmap distinguishes different types of return process (spontaneous, facilitated and promoted returns) and outlines UNHCR's benchmarks for each form of return. It specifies that UNHCR will only promote voluntary repatriation "when the overall conditions of legal, material and physical safety

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<sup>53</sup>Alexandra Kaun (2008), *When the displaced return: Challenges to 'reintegration' in Angola*, UNHCR New Issues in Refugee Research, Research Paper 152, p39.

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throughout south-east Myanmar are conducive to return for the vast majority of refugees.” Benchmarks for individual or group return include a UNHCR assessment of no significant protection risks in location of return, mine risk education, monitoring access for “UNHCR and/or humanitarian partners”, “plans developed in consultation with refugees, local community and local authorities to ensure a sustainable return” and security of tenure where land is allocated. Benchmarks for an organised repatriation process are somewhat higher, including a durable ceasefire, free and fair general elections, humanitarian access (for UNHCR and/or humanitarian partners”, framework for mine action and a tripartite agreement which confirms protection of returning refugees.<sup>54</sup>

The benchmarks in the Strategic Roadmap identify key barriers to return (livelihoods, landmines, ongoing monitoring of security) but they set a relatively low threshold. Mine risk education is not a substitute for landmine removal, and monitoring access should be guaranteed for *international* humanitarian agencies rather than merely “humanitarian partners” (which could be Myanmar government partners, which many refugees and IDPs would not consider a trustworthy monitor of their safety and security). A much more robust set of benchmarks is contained in the Karen Refugee Committee’s 10 point statement of preconditions for repatriation, which includes sustainable peace, landmine-free relocation areas, opportunities for sustainable livelihood and recognition of education qualifications.<sup>55</sup> The KRC benchmarks acknowledge refugees’ core concerns for physical security and sustainable livelihoods for themselves and their children. They are also closer to the UNHCR’s global policy benchmarks for repatriation. UNHCR has been involved in refugee repatriation for more than fifty years and has developed core principles for such programmes, notably that return should be voluntary, and that refugees should be able and assisted to return in safety and in dignity.<sup>56</sup> These standards require a little more explanation:

- “Voluntary” means an individual, free and informed choice, made on the basis of complete, accurate and objective information on conditions in the country of origin. Refugees should neither be forced to repatriate nor prevented from returning. Coercive measures are not limited to the use of force but can occupy a large spectrum of actions, including the imposition of restrictions and conditions intended to make living conditions more difficult and force refugees to leave. This has been the case in Thailand, where reduced funding has impacted on services and food rations and where restrictions on movement outside of camps have made it more difficult for refugees to supplement the rations provided. Voluntariness also requires a “free and informed” choice, but the slow pace of the peace process combined with apparently deteriorating political conditions inside Myanmar make it very difficult for refugees to make a truly informed decision: will the ceasefire be converted into genuine peace in Karen State and Karenni State, or might these areas return to war? Kachin State stands as a cautionary example of the latter. In addition, the camp population in Thailand includes many children and elderly, who have relatively low levels of education and limited access to information about the details of the peace negotiations or the likely process of repatriation. They are not able to make a fully informed decision about their future, and are to a large extent relying on others (including the Refugee Committees, EAOs and UNHCR) to act in their best interests.<sup>57</sup> Anxiety and stress regarding the future, combined with escalating hardship in the

<sup>54</sup> UNHCR Strategic Roadmap for Voluntary Repatriation: Refugees from Myanmar in Thailand 2015-2017, January 2017.

<sup>55</sup> <http://karennews.org/2013/03/karen-refugees-committees-10-points-to-repatriation.html/>

<sup>56</sup> UN High Commissioner for Refugees (UNHCR), *Information Note on the Development of UNHCR’s Guidelines on the Protection Aspects of Voluntary Repatriation*, 3 August 1993, EC/SCP/80, available at: <http://www.refworld.org/docid/3ae68cbd4.html>; UN High Commissioner for Refugees (UNHCR), *Conclusion on Legal Safety Issues in the Context of Voluntary Repatriation of Refugees*, 8 October 2004, No. 101 (LV) - 2004, available at: <http://www.refworld.org/docid/417527674.html>

<sup>57</sup> K. Joliffe (2015), *Refugee decision-making processes, community-based protection and potential voluntary repatriation to Myanmar.*

camps, is believed to underlie a rise in suicide in the refugee camps, which in 2016 was more than three times the global average.<sup>58</sup>

A study in Malawi found that refugees placed higher value on information received from personal contacts than from institutions.<sup>59</sup> Strategies currently used by UNCHR and The Border Consortium in Thailand include support for “go and see visits”, which should in principle be followed by a report back to other refugees. However, those who return from such a visit may be reluctant to reveal their plans to the community at large, and/or anxious that they may inadvertently give the wrong advice and place others in danger. Go and See visits are valuable, but international agencies also have a role to play in monitoring conditions and communicating their findings. Information should be accessible, an issue of both language and format which has different implications across Myanmar’s various refugee populations. For example, some camps in Thailand have very limited electricity and internet access, while in Malaysia and India, the vast majority of refugees possess smartphones and are tech-savvy.

It goes without saying that information provided to displaced populations about conditions in return areas must be accurate, current and frequently updated. In the early 1990s when people returned to Cambodia after almost two decades in camps in Thailand, the most popular return destination was Battambang province, where refugees believed they would be safe and have good livelihoods opportunities. In fact, this area was the first area to return to conflict. Eastmond and Ojendal suggest that refugees had received “inadequate or inaccurate information about Battambang” in reaching their decision to return.<sup>60</sup>

- “Safety” includes immediate physical safety (e.g. landmine removal), legal safety (e.g. that there will be no reprisals against those who return) and material safety (access to land and livelihoods).<sup>61</sup> To ensure that refugees feel safe to return, it may be necessary for the government and armed groups to provide assurances or guarantees that those who return will not be punished for having left the country illegally.<sup>62</sup> In my interviews with refugees in India and Malaysia this was a point of particular concern. Formal assurances of safety against criminal prosecution can only be given by the Myanmar government but informal guarantees of safety and protection in return areas within the ethnic states may well be provided by ethnic armed organisations, perhaps supplemented by civil society organisations. International actors may also have a role to play in monitoring the implementation of such assurances.<sup>63</sup> As mentioned above in relation to the repatriation of refugees to Sudan in 2005, a peace agreement is not necessarily a sufficient guarantee of safety after return. A peace agreement must be tied to wider issues – demilitarisation, the creation of a new social contract, perhaps transitional justice and accountability – to maximise its potential for durable change.
- “Dignity”. The concept of dignity is less clearly defined. The UNHCR Handbook on Voluntary

<sup>58</sup> <https://www.irrawaddy.com/news/suicide-rate-alarming-thai-camp-myanmar-refugees-study.html>

<sup>59</sup> Khalid Koser (1997), ‘Information and Repatriation: The case of Mozambican refugees in Malawi’, *Journal of Refugee Studies* 10(1): 1-17.

<sup>60</sup> Marita Eastmond and Joakim Öjendal, “Revisiting a Repatriation ‘Success’”, in Richard Black and Khalid Koser, eds. *The End of the Refugee Cycle?* (Berghahn Books) p43-4.

<sup>61</sup> UNHCR (1996), *Handbook Voluntary Repatriation: International Protection*, at 2.4. Available at <http://www.unhcr.org/4164f6404.html>

<sup>62</sup> For example: “Voluntary repatriation may also be facilitated by the provision of formal guarantees for the safety of returning refugees and/or the promulgation of amnesties by the countries of origin. It is desirable that appropriate steps be taken to ensure that the text of such guarantees or amnesties are brought to the notice of the refugees.” UNHCR Note on Voluntary Repatriation 27 August 1980, EC/SCP/13.

<sup>63</sup> UNHCR (2004), *Conclusion on Legal Safety Issues in the Context of Voluntary Repatriation of Refugees*, paragraph (g).

Repatriation identifies a number of elements that might be considered necessary for dignified return, including full restoration of human rights, maintaining family unity, attention to the needs of vulnerable groups and elements of 'honour and respect'. This may require legal reforms in the country of origin to repeal discriminatory laws and to ensure human rights protection.<sup>64</sup>

These principles of a voluntary, safe and dignified return are essential to ensure that return is a genuinely *durable* solution. Return must be conducted in conditions that allow people to return and begin to build a future in Myanmar, and not in a climate of instability that catalyses a new cycle of displacement. It is very difficult for refugees (and IDPs) to feel secure about returning to Myanmar. The peace process is highly uncertain, the Burma Army presence continues in ethnic states (and indeed has increased during the ceasefire period), and there are limited opportunities for sustainable livelihoods. Myanmar has endured decades of violent conflict and underdevelopment and it would be unrealistic to expect overnight transformation. Nevertheless, the consequences of misjudging the situation are severe and it is important to take a broad contextual analysis in determining whether conditions are sufficiently secure for voluntary return: Is there continued militarisation and risk of return to conflict? Has the area been demined? What pressure has been exerted on refugees to return? It is essential to recognise where future risks of displacement may arise and avoid returning refugees to areas where there is a foreseeable likelihood of future displacement.

Refugee organisations have argued for inclusion in decision-making, arguing that there should be "nothing about refugees, without refugees". Refugee-led civil society organisations have also advocated for refugees' needs in return, including recognition of educational qualifications and awareness of gendered needs. However, the Karen Refugee Committee has complained that it was not consulted by UNHCR in the pilot repatriation process,<sup>65</sup> nor has there been a structured process of refugee consultation by the Karen National Union and other EAOs. This is where an institutional mechanism for consultation could be beneficial. The structure provided by representative Refugee Committees or quadripartite dialogue commissions would ensure that refugee representatives are given a clear mandate for consultation and feeding into a decision-making process, rather than irregular meetings where their opportunity to provide meaningful information (and the impact of doing so) is not clear.

### Right to return and right not to return

People should not be prevented from returning to their country. A right to return to one's country is stated or implied in several leading human rights treaties, including the Universal Declaration of Human Rights, the International Covenant for Civil and Political Rights, the International Convention on the Elimination of Racial Discrimination, and many General Assembly and Security Council Resolutions. However the most fundamental protection for refugees in international law is *non-refoulement*: refugees cannot be returned to a country where they face a threat of persecution.<sup>66</sup> Refugees must be free to choose not to return to their country of origin if they face such a threat. Both the Convention Against Torture (Article 3) and the ICCPR (Article 7) prohibit return of a person to a place where they are likely to experience torture. IDPs' rights in this respect are weaker, as there is no explicit protection against *refoulement* for displaced populations who are in their own country.<sup>67</sup> In

<sup>64</sup> UNHCR (2002), Global Consultations on Voluntary Repatriation.

<sup>65</sup> See <http://nd-burma.org/briefing-paper-challenges-to-repatriation/>

<sup>66</sup> See, e.g. 1951 Refugee Convention Article 33(1).

<sup>67</sup> The Guiding Principles on Internal Displacement include 'the right to be protected against forcible return to or resettlement in any area where their life, safety, liberty, and/or health would be at risk.' This provision could be adopted in a peace agreement to strengthen protection for IDPs.

practice, states have committed *refoulement* on many occasions. In the 1980s, Thailand, Malaysia and Indonesia conducted mass forced returns of refugees from Cambodia and Vietnam. The early 1990s saw many cases of large scale forced returns, including of refugees from Iran and Pakistan to Afghanistan and of Sri Lankan Tamils from India. Thailand has forced refugees from Myanmar to return on several occasions, as has Bangladesh. UNHCR participated in several of these “imposed return” processes including a mass repatriation of more than 200,000 Rohingya from Bangladesh to Myanmar in 1994.<sup>68</sup> This process is worth examining in some detail, given its relevance to current return discussions.

This was not the first process of return of Rohingya from Bangladesh to Myanmar, but it was the first to secure UNHCR cooperation.<sup>69</sup> Returns were agreed between the Bangladesh and Myanmar governments. UNHCR’s role moved from initial cooperation to non-cooperation in 1992 and 1993 (when it was clear that returns were coerced) and then to cooperation from 1994 (after Memoranda of Understanding were agreed with the Government of Bangladesh and the Government of Burma)<sup>70</sup>. A number of conditions were intended to ensure that the process was safe for returnees. The Government of Bangladesh agreed to respect for voluntariness, confirmed in individual screening interviews by UNHCR. The Government of Myanmar agreed that UNHCR would have access to return sites and that returnees “will be issued with the appropriate identification papers and that the returnees will enjoy the same freedom of movement as all other nationals”. The safeguards for individual voluntariness foundered in 1994 when UNHCR moved from individual screening to mass repatriation, on the basis that conditions in Rakhine State (then Arakan State) were conducive to return. The safeguards for returnees in Myanmar were abandoned when UNHCR monitoring access was restricted by the Myanmar Government.

Around 230,000 Rohingya were returned from Bangladesh to Myanmar between 1992 and 1997. UNHCR at the time hailed the process as a success and an example of the potential for repatriation to “end a cycle of exodus”, yet it was clear to other observers that the process had many risk and problems.<sup>71</sup> Human Rights Watch criticised the information provided by UNHCR to returnees as unduly optimistic about their future safety. This has tragically been borne out in subsequent decades, as Rohingya in Myanmar have come under ever-increasing discrimination and oppression – with the return sites from this repatriation (in Buthidaung, Rathedaung and Maungdaw townships) among the worst-affected areas. This process illustrates a number of points which are highly relevant to possible returns to Myanmar from Thailand, Malaysia and India. First, it demonstrates the risks of repatriation in a context where the underlying political dynamics have not been resolved or fully addressed. Second, it highlights the importance of safeguards for refugees, and the importance of ensuring that those safeguards are enforceable. In this case, the Myanmar Government signed a Memorandum of Understanding which agreed to provide unhindered monitoring access to UNHCR and the restoration of identity documentation to Rohingya, but neither of these conditions were adequately implemented in practice. These are powerful lessons which acquire particular resonance in light of Burma Army attacks on Rohingya villages in September 2017, occurring with an intention described by the UN as ethnic cleansing and named by an increasing number of other observers as genocide.

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<sup>68</sup> Crisp and Long (2016), 155; Human Rights Watch (2000), *Burma/Bangladesh: Burmese Refugees in Bangladesh: Still no durable solution* (May 2000).

<sup>69</sup> Crisp and Long (2016), 155

<sup>70</sup> The MoU with the Government of Burma was signed on 5 November 1993. See:

<http://www.burmalibrary.org/reg.burma/archives/199401/msg00058.html>

<sup>71</sup> Human Rights Watch (1996) *Burma: The Rohingya Muslims? Ending a cycle of exodus*.

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### *Declaration of 'ceased circumstances'*

International law allows for non-voluntary return only in very limited circumstances, in accordance with Article 1C(5) of the 1951 Refugee Convention (which allows for the cessation of refugee status if conditions in the country of origin have changed to such an extent that the reasons for granting international protection no longer exist). This is a very high threshold, requiring evidence of substantial, fundamental change which is lasting and enduring.<sup>72</sup> It also requires effective protection to have been restored in the country of origin. The criteria for effective protection is broad and includes the ability for basic livelihoods as well as political freedoms of democracy and the rule of law.<sup>73</sup> After a declaration of 'ceased circumstances' has been made, repatriation can take place without determining an individual choice to return - though individuals must be able to retain refugee status if they establish a continuing well-founded fear of persecution. The cessation clause can be invoked by states or by UNHCR. Bonoan identifies 22 declarations of cessation between 1973 and 2003.<sup>74</sup> More recently, cessation declarations have been made for refugees from Burundi in Tanzania and for refugees from Rwanda. Any process of return after a declaration of ceased circumstances must provide for individual case review to ensure that people with a continuing risk of persecution are not returned.

### **Reintegration and Reconstruction**

Successful return of displaced populations entails much more than their physical movement from one area to another but requires creating conditions that will allow returning refugees and IDPs to sustainably support themselves and their families. Refugee return is the beginning of a long-term process of development and rebuilding, captured in the UNHCR's concept of the "four Rs": repatriation, reintegration, rehabilitation and reconstruction.<sup>75</sup>

Many issues have to be considered before sustainable return will be possible, including aspects of physical security, social development and legal reforms as well as financial and material support. The country of origin must also be prepared to receive a large population of returnees and able to support them when they return. In Myanmar, this includes managing returns to areas where houses and villages have been destroyed (and where those returning have no proof of land ownership); and ensuring opportunities for jobs and livelihoods. Legal and administrative reforms will also be necessary: to provide refugees who return with full citizenship and a status that is identical to those who did not leave the country; to register births, marriages and deaths in exile; and perhaps to recognise education and qualifications gained in exile. Landmine removal is also a central issue. Southeast Myanmar is one of the world's most heavily mined areas, yet the Myanmar government has not conducted any landmine removal or authorised landmine removal by international agencies; nor have landmines been included within the remit of the ceasefire Joint Monitoring Committee. It will be essential for the Government and EAOs to take coordinated action on landmine clearance if refugees and IDPs are to return home.

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<sup>72</sup> UNHCR (2003), Guidelines on International Protection: Cessation of refugee status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the 'Ceased Circumstances' Clauses). Available at <http://www.unhcr.org/3e637a202.html>, paras 10-14.

<sup>73</sup> Ibid, para 15.

<sup>74</sup> Raphael Bonoan, (2003) Cessation of Refugee Status: a guide for determining when internal displacement ends? *Forced Migration Review* 17, 9.

<sup>75</sup> Agenda for Protection Goal 5, Objectives 2 and 3; UNHCR *Handbook for Repatriation and Reintegration Activities*.

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*Assistance packages*

Return and reintegration processes usually provide assistance to those who return. This assistance is usually coordinated by UNHCR, e.g.:

- Mauritanian refugees returning from Senegal (2008): assistance package from UNHCR with cooking materials, blankets, buckets, mosquito nets, sanitary kits. Three months of food rations from World Food Programme. A tent and some construction materials for a shelter. Reintegration projects in the areas of return, including health, water and education.<sup>76</sup>
- Afghan refugees returning from Pakistan (2014): assistance package from UNHCR with non-food items (cooking pots, buckets, soap, mosquito nets, sleeping mats, blankets, tarpaulins, quilts and sanitary kits). A transportation grant of between US\$30-70 and a short-term assistance grant of US\$150. Training on land mine awareness and advice on access to education and other services. Basic health care and vaccinations for children.<sup>77</sup>
- Pilot programme for Karen refugees returning from camps in Thailand (2016): assistance package from UNHCR including individual counselling to ensure voluntariness of return, transport assistance to a location of their choice in Myanmar and three months' subsistence allowance.

Refugees from Myanmar have different needs and abilities, and varied levels of preparedness for return. Some have been living outside Myanmar for decades while others have been displaced very recently. Many young refugees have never been to Myanmar at all. Whether people have spent their years of exile in camps in Thailand or in the huge cities of Kuala Lumpur and Delhi, they have encountered a very different world. If they go back to Myanmar they may not want to go 'home', either because they have no home to return to, because they no longer have the skills necessary to survive in their area of origin (such as subsistence agriculture), or because they would prefer to live in a different area (such as a city rather than a rural village). Living in Myanmar will present new challenges of culture, of livelihoods, perhaps of language. Different returning populations will have different levels of development. Some refugees and IDPs are living in conditions of utmost poverty and insecurity while others have managed to achieve relatively stable lives. Some have completed university degrees while others have no education at all. Some will be able to provide for their families through farming; others will not. Returnees will prioritise different things: education, health, access to land and other livelihoods. Any package of benefits must be flexible to these different levels of development, and consider ways to integrate all classes of returnees into Myanmar rather than assuming that everyone will be returning to farm in rural areas of the ethnic border territories. It is also necessary to consider the particular needs of specific social groups, including women, youth, the elderly, people with disabilities and minority groups.

Flexible funding is one way in which returnees can be better supported. If people decide to return, money should be available to support their decision. Ideally, funding would not be dependent on participating in an organised repatriation, but responsive funding made available to flexible categories of population (IDPs, spontaneous returns and voluntary returns) at a time of their choosing. If returnees can control when the money is received, they may be able to plan ahead to ensure that this payment coincides with e.g. planting/harvesting seasons or with available support from relatives overseas. Funding delivery systems should also be sensitive to refugees' fears of engaging with government actors. Many refugees and IDPs are extremely afraid of being photographed and

<sup>76</sup> UNHCR Briefing Note: Senegal: Voluntary return of Mauritanian Refugees. <http://www.unhcr.org/47da5a5f19.html>

<sup>77</sup> UNHCR Voluntary Repatriation and Border Monitoring Monthly Update (December 2013).

registered by the Government. While some registration is probably unavoidable if returns are to be appropriately processed, any return process that depends on refugees engaging with government actors on a continuing basis (for example to receive funds and other assistance) is likely to result in returnees not engaging and potentially falling into an uncategorised and unsupported status.

#### *Incorporating support for local communities*

Limited resources are likely to make it difficult to provide financial benefits to everyone that has experienced displacement in and from Myanmar. Instead, other benefits may be offered that can help people rebuild their lives: scholarships for education (including higher education), free healthcare and support, infrastructure to facilitate access to employment and markets. It is desirable that people returning receive similar value of benefits in all areas, though the precise content of a benefits package may be different for e.g. rural and urban returnees. It may also be desirable to balance benefits between returnees and those who were not displaced. If people are returning to poor areas where the local population have very little, it may lead to conflict. This is perhaps particularly the case if the local population have also endured displacement (which is overwhelmingly the case in Southeast Myanmar), and where there may be dynamics of resentment between those who endured militarisation in Myanmar versus those who fled to other countries. One way to reduce the risk of such dynamics is to try to raise the standard of development for an entire community, including building roads, schools and clinics. If the budget is very limited, it is better to incorporate benefits-in-kind that can be provided to all returnees (training and infrastructure to ensure access to markets) rather than to try to reduce costs by restricting the number of eligible people (i.e. by restricting benefits to only refugees returning from one country, rather than providing them to all displaced populations). Peace recovery and development plans agreed as part of (or subsequent to) peace deals offer one model for developing a shared vision on these issues, and for securing donor commitment to support implementation.

#### *Participation and the importance of social networks*

Repatriation of displaced populations has obvious implications for the people who are living in the areas that they are returning to. Local relationships can influence the success of return and reintegration processes. Some repatriation programmes have had serious problems with conflicts between those who return and the local population. One possible indicator of likely conflict is scarcity of land and resources. For example, in Mozambique there were fewer land conflicts than in Cambodia, Rwanda and Burundi; but land scarcity was a greater problem in the latter three contexts. Another factor is the strength of community relationships and the ability to resolve problems at community level. A study of Cambodian returnees five years after return found that livelihood and income after return was linked to community networks, social structures and status. It concluded that "One of the most important variables which can influence the reintegration process is demonstrated to be conditions in refugee settlements in exile, and specifically the extent to which refugees have been allowed to gain a degree of self-reliance."<sup>78</sup> A third factor is the availability of mechanisms to resolve disputes between returnees and local populations. Community-based dispute resolution processes may be valuable here, as in Timor-Leste, where during two phases of return (1999-2002 and 2006) "the use of traditional structures and customary practice played a large role in successfully creating the conditions for IDPs to return in safety and security to their communities."<sup>79</sup>

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<sup>78</sup> Eastmond and Ojendal, *ibid*, note 57.

<sup>79</sup> Todd Wassel (2014), *Timor-Leste: Links between peacebuilding, conflict prevention and durable solutions to displacement*. (Brookings Institute), pii

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This finding of the importance of traditional structures and community relations has implications for Myanmar given the very strong social networks among displaced populations inside and outside of the country. Social and community networks in Myanmar vary greatly between and within different ethnic states but there is certainly scope for community structures and traditional leaders in return areas to play a role in facilitating return and resolving land disputes. However, these structures have limited capacity to deal with the most urgent land issues arising in Myanmar today, which relate to the acquisition of land by commercial and military actors. This relates to crucial challenges of land governance and land reform which are discussed in detail in the next section.

## IV: Transitional Justice, Restitution and Land Claims

A common challenge in peace agreements is whether and how to address past human rights violations. This is an area of obvious concern in Myanmar, where serious human rights violations have been committed over many years, by ethnic armed groups as well as by Government and military actors. Several analysts have assessed that human rights violations committed in Myanmar may constitute crimes against humanity, including the Burma Army's actions in Eastern Myanmar, in Chin State and against Rohingya in Rakhine State.<sup>80</sup> International standards mandate that there should be no amnesty for international crimes and that victims of such crimes are entitled to a remedy.<sup>81</sup> Criminal prosecution is one possible remedy, as are truth-seeking mechanisms, reparations or restitution, institutional reform of abusive institutions (police, military or other state institutions) or memorialisation. Many of those displaced in and from Myanmar have experienced serious human rights violations such as arbitrary arrest, forced labour and torture.<sup>82</sup> The discussion below considers only the issue of forced displacement, and the related questions of land and property rights. Nevertheless, these issues should not be seen in isolation. To be dealt with effectively, there must also be a broader process of transitional justice and accountability, which is designed with sensitivity to Myanmar's historical and political circumstances and fits with wider developmental goals for the country.

### Restitution, compensation and reparations

The most comprehensive statements of international principles are in the *Basic Principles on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (2005) and the *Pinheiro Principles on Housing and Property Restitution for Refugees and Displaced Persons* (2005). These documents are 'soft law', i.e. they are not binding on governments, but they reflect international standards in this area.

The mechanism that is usually seen as most immediately necessary and appropriate for displaced populations is restitution (i.e. the return of property that was lost or stolen) or, if the property has been destroyed or cannot be found, compensation or reparations for its loss. The Pinheiro Principles prioritise restitution, and emphasise that all displaced persons have the right to have their property and land restored to them or, if this is not possible, to receive compensation. The Principles also establish a number of other relevant principles, including the need to create independent and effective national institutions to assess and resolve land disputes; the right of refugees and displaced persons to be consulted and included in decision making; the creation of land registration systems; non-discrimination and the promotion of gender equality. The Pinheiro Principles are an important set of standards for individual property restitution, though they primarily emphasise individual property

<sup>80</sup>Harvard Human Rights Clinic, (2014), *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar*. Available at: <http://hrp.law.harvard.edu/wp-content/uploads/2014/11/2014.11.05-IHRC-Legal-Memorandum.pdf>, Physicians for Human Rights (2011), *Life Under the Junta: Evidence of Crimes Against Humanity in Burma's Chin State*; Irish Centre for Human Rights (2010), *Crimes against Humanity in Western Burma: The Situation of the Rohingyas*.

<sup>81</sup> See, e.g. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>

<sup>82</sup> See, for example, International Centre for Transitional Justice (2014), *Navigating Paths to Justice in Myanmar's Transition* (New York: ICTJ), <https://www.ictj.org/sites/default/files/ICTJ-Myanmar-Development-Report-2014.pdf>

ownership, whereas much land in Myanmar is operated communally for grazing, agriculture and/or fishing. Template standards for recognition of communal property ownership/land tenure can be found in the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests. The Pinheiro Principles also do not specifically address the challenges of designing and implementing restitution programmes in a legal climate where there are multiple authorities and where the state law may lack legitimacy, as is the case in Myanmar's ethnic states.

Several peace agreements have made provision for restitution of property to displaced persons, including:

- The Dayton Agreement for the former Yugoslavia provided for property restitution to those who had left the country, through a Restitution Commission for Refugees and Displaced Persons (with compensation to be given where restitution was impossible) and a Compensation Fund (which was never created). The Commission successfully processed 200,000 claims for property restitution.
- A national law adopted by the Colombian Government, the 'Victims and Land Restitution Law' (2011), was an official acknowledgement of the armed conflict in the country for the first time, and provided IDPs with a right to return to their land. However, the law was drafted before a peace agreement had been concluded, when it was impossible to have widespread return and restitution in a context of ongoing violence. In the early stages of implementation, farmers seeking to return to their land were met with violence (including killings and rape) by those who were occupying their land.<sup>83</sup> This illustrates the importance of ensuring that rights provided for by law are accompanied by real political will from the Government to ensure that victims can enforce their rights quickly and safely.

Restitution of property is not always possible, for example if the property has been destroyed. In this case, compensation may be more appropriate.

- Turkey adopted a national Compensation Law, which gave returning IDPs a right to financial compensation for property that was lost, and for the inability to access their property when they were displaced. This law was created after years of denial that displacement even existed, so represented an overdue acknowledgement of displacement (though not of state responsibility for causing it). More than one million IDPs were eligible to apply for compensation. There have been a number of criticisms of the process. Claims are decided by Provincial Compensation Commissions. Six out of seven Commissioners are government officials, and IDPs are afraid and distrustful of the government. Claims must be supported by evidence, and many IDPs do not have proof of their ownership of land or property. By October 2010, nearly 43% of applications had been rejected.<sup>84</sup> The sums awarded are relatively low in comparison to the value of the property lost. By 2011, the Turkish Government had paid out more than one billion euros (US\$1.1bn) to more than 133,000 applicants: but this was still an average of only 7500 euros (US\$8400) per person.<sup>85</sup> The Compensation Law was adopted when Turkey sought to enter the European Union; a process that required it to comply with human rights reforms, including IDP return. It is a case that illustrates the importance of continued international pressure and continued monitoring, in a context where there remains

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<sup>83</sup> Amnesty International (2014), A land title is not enough: Ensuring sustainable land restitution in Colombia, p29

[https://www.amnesty.nl/sites/default/files/public/land\\_restiution\\_eng.pdf](https://www.amnesty.nl/sites/default/files/public/land_restiution_eng.pdf)

<sup>84</sup> Dilek Kurban (2012), Reparations and Displacement in Turkey: Lessons Learned from the Compensation Law. Brookings/ICTJ, p14

<sup>85</sup> *Ibid*, p16.

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fundamental mistrust between a government and IDP populations.

### Land claims

Property restitution for refugees and IDPs from Myanmar has been examined in detail by Displacement Solutions, Norwegian Refugee Council and the Transnational Institute.<sup>86</sup> Particular challenges for Myanmar include the ongoing conflicts in ethnic areas, political dispute regarding ethnic self-determination of natural resources in ethnic states, and the problem of large scale land acquisition by military, government and commercial actors.

For those returning to rural areas in ethnic states, land may be more valuable than property restitution or financial compensation. Not all returnees will want to become farmers but many refugees and IDPs do prefer to return to the lands that they left. Mass returns can lead to disputes between returnees and those who remained, particularly when (as in Myanmar) most people do not have proof of property ownership. People who return may fall within a number of categories:

- People returning who can prove their ownership of a house or land;
- People who claim that they lived there, but have no proof or evidence;
- People with nowhere to return to, either because they were born outside the country, sold their property before departure, or for any other reason.

There are also a number of possible obstacles and reasons for disputes:

- 'Secondary occupiers' have taken residence in the property;
- The original property has been destroyed;
- The property records or proof of ownership has been destroyed;
- The institutions to determine ownership are not effective;
- The land has been confiscated by the national government or sold/licensed to a commercial actor

Mechanisms should be created to decide claims to ownership over land, and to allocate land to those who are otherwise homeless. It may be possible to offer either land or a cash alternative, to create more flexibility for those who wish to move to urban areas. This requires consideration of possible institution models, and of the appropriate roles of refugees and their representatives, EAOs and national or local Government. Ideally, all displaced persons will receive restitution of their property or compensation for its loss, but this is likely to be difficult to achieve in Myanmar unless the Government is willing to fund such a programme. Turkey's Compensation Law, as mentioned above, was drafted under some international pressure as part of Turkey's pursuit of European Union membership. It is not clear who or what might be able to exert similar pressure on the Myanmar Government.

Institutions can be created to resolve land disputes and determine property ownership. Some possible

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<sup>86</sup> See, e.g. Displacement Solutions and Norwegian Refugee Council (2017), Restitution in Myanmar <http://displacementsolutions.org/wp-content/uploads/2017/03/Restitution-in-Myanmar.pdf>; Transnational Institute (2017), Re-Asserting Control: Voluntary Return, Restitution and the Right to Land for IDPs and Refugees in Myanmar, <http://reliefweb.int/report/myanmar/re-asserting-control-voluntary-return-restitution-and-right-land-idps-and-refugees>

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models for this have been created in national laws rather than in peace agreements. Lebanon created a national Ministry of the Displaced in 1993 to address claims originating in the Lebanese civil war (which ended in 1990). The scope of the Ministry's work has extended to include later claims arising from Israeli actions in Lebanon in 1996 and 2006. In Albania, Committees for Restitution and Compensation of Property were created at national and local levels to confirm property ownership for returning refugees. Rwanda drafted a government order that allowed returning refugees to apply to have their property returned by applying to local chairman, who would refer their request to a Commission.

Property restitution in Rwanda was resisted by 'secondary occupiers', as it was in Burundi and in Bosnia. Mozambique and Angola are examples of countries that had relatively few conflicts between returnees and the local population. In these countries, the role of local and customary leaders seems to have been a factor in resolving disputes quickly and efficiently. Local leaders and customary practices have very important roles in Myanmar, and could be valuable in mediating land and property disputes for return. However, community-based governance structures tend to be highly localised systems and therefore not shared or understood by people outside a small geographical area. An important challenge, therefore, is to find a way to 'scale up' local mechanisms which have a limited, partial, shifting jurisdiction. A second is related challenge is how to integrate legal orders operating at multiple levels. Customary systems may have considerable legitimacy within a small constituency, but will lack authority to e.g. challenge a mining company that has been issued a government issued licence (a familiar problem in Myanmar at present). Unruh notes that in both El Salvador and Mozambique "formidable land tenure pluralities significantly aggravated the peace process", but that the recognition of pluralism in the respective peace agreements and subsequent legislation enabled local orders to become "a primary vehicle to facilitate the reintegration of much of the population into productive activities."<sup>87</sup> If customary systems are to play a role in protecting land and preventing land-grabbing in Myanmar, they need a defined jurisdiction that provides real authority in Myanmar law. This should be a central demand of EAOs in their negotiations with the Myanmar government. NGOs and EAOs should also continue to facilitate dialogues with local communities to ensure that their rights to use and access land are recognised and that their voices are heard in the negotiations with the Myanmar government. Donors and international agencies are often concerned that customary systems may fall short of international standards in issues such as gender equality and non-discrimination. As one example of how this might be addressed in a peace agreement, the Comprehensive Peace Agreement for Sudan (2004) agreed to a process for developing and amending land laws that would incorporate customary laws *and* international standards.

### Land registration, tenure and land reform in Myanmar

Political conflicts are often about underlying patterns of land ownership, and those same patterns of land ownership can be a continuing source of conflict during and after return. Indeed, it is a frequently documented pattern that property conflicts increase when political violence stops.<sup>88</sup> In El Salvador and Guatemala, unfair land distribution was one issue underlying the conflict and land reform was incorporated into the peace process to redistribute land to returnees. In Burundi, the agreement provided for a survey and register of rural land ownership, and for a Sub-Commission on Land to

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<sup>87</sup> J. Unruh (2007), 'Humanitarian approaches to conflict and post-conflict legal pluralism in land tenure', in *Uncharted territory: Land, Conflict and Humanitarian Action* (ODI).

<sup>88</sup> Liz Alden Wily (2009) Tackling land tenure in the emergency to development transition in post-conflict states: From restitution to reform. *Uncharted territory: Land, Conflict and Humanitarian Action* (ODI).

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resolve disputes. Special protection was to be given to vulnerable groups, including children, women, the elderly and disabled. In Timor-Leste, a Land Claims Commission was created by the 1999 peace agreement to resolve disputed claims over title. The 2016 peace agreement between the Colombian Government and FARC included provision for a Land Fund to distribute land to those without land or with insufficient land, with priority to be given to women and displaced persons. A Comprehensive Victim Reparation Programme is given responsibility for return and land restitution for the displaced.<sup>89</sup>

Recognising land ownership and resolving land disputes will be important in responding effectively to displacement, but most of those displaced in and from Myanmar have no proof of ownership of their land or property. In the absence of formal property registration documents, recognition of customary land ownership and title can be one mechanism to help resolve property claims and disputes. This is a major challenge in Myanmar, where the Constitution states that all land is the property of the State and where there is currently no formal legal recognition of customary systems of land ownership.

Business and commercial investment in Myanmar has expanded exponentially in the past five years, and land confiscation and 'land grabs' are becoming a major problem. This practice is often legal under Myanmar's law, undertaken under licences issued by the Government. Nevertheless, it is also often backed by coercive practices which force people from their land and penalise activists and protesters. The inrush of extractive industries and agribusiness to Myanmar is opportunistic, taking advantage of the window between a ceasefire (which makes it possible to operate in ethnic states) and a peace agreement (which would likely place greater controls on the use and extraction of natural resources in ethnic states). Human Rights Watch reports that the peace process has created a window of opportunity for economic investors, with the result that "powerful interests are gaining land through questionable means while farmers are losing it, often without adequate compensation."<sup>90</sup> Much of this industry is environmentally destructive, including massive mining of coal, gold, tin, jade and other gems, and involving the construction of massive dams that will profoundly alter the rivers and those who depend on them. Many of the large scale development projects currently under construction were contractually agreed under the military regime - yet they are going ahead under a purportedly democratic government. Myanmar's ethnic armed organisations have been engaged in decades-long struggles for autonomy and control of ethnic lands, but those lands are at risk of irreparable damage through land-grabs, extractive industries and large-scale development projects. At a minimum, EAOs should demand a moratorium on natural resource extraction and land acquisition until formal political agreement is reached on the management of those resources and the political governance of the ethnic states.

Many of the complaints received by the Myanmar National Human Rights Commission (created in 2011) are related to land grabs, while the ILO's Forced Labour Mechanism has also received complaints about forced labour linked to land confiscation.<sup>91</sup> Large scale land purchases are dispossessing communities and individuals who lack formal land titles, leading to landlessness, poverty and food insecurity. These land law issues affect everyone in Myanmar, not only potential returnees.

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<sup>89</sup> See <http://www.altocomisionadoparalapaz.gov.co/herramientas/Documents/summary-of-colombias-peace-agreement.pdf>. The status of this peace agreement is uncertain, having been approved by the Colombian Congress in December 2016 but with some provisions (not those relating to restitution and provision for the displaced) challenged in the constitutional courts.

<sup>90</sup> Human Rights Watch (2016) *The Farmer Becomes The Criminal: Human Rights and Land Confiscation in Karen State* [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) <https://www.hrw.org/report/2016/11/03/farmer-becomes-criminal/human-rights-and-land-confiscation-karen-state>

<sup>91</sup> Myanmar Centre for Responsible Business (2014), *Myanmar Oil and Gas Sector-wide Impact Assessment: Project-Level Impacts: Land*, p101. <http://www.myanmar-responsiblebusiness.org/pdf/SWIA/Oil-Gas/09-Land.pdf>

They have particular relevance for the ethnic states, where much of the land is occupied under customary land tenure with no formal property registration. Pressing issues to be resolved therefore include: protection for existing land users, recognition of informal tenure, recognition of communal land tenure (in agriculture, forestry and communal grazing) and protection against land confiscation. Civil society organisations and ethnic political organisations have been actively engaged on these issues, both by surveying customary land ownership and registration practices and seeking to develop policies and proposals for extractive industries and management over natural resources. The Karen National Union has developed a comprehensive Land Policy to protect and support informal and formal land use rights and to conduct land registration. This policy acknowledges the Pinheiro Principles and reiterates a right to compensation and restitution. The Land Policy has been accompanied by a process of registering land ownership which has registered thousands of title deeds. However, this process is not currently recognised under Burmese law and the effects of KNU title registration are therefore unclear.<sup>92</sup> Clarification of the authority and significance of community registration of title is another displacement issue that must be addressed in the peace process and defined in Myanmar's national law.

Land title issues are problematic for those who are currently living on their land, but the issue is magnified for those who were displaced and have not occupied their land for several years or even decades. Large-scale land acquisition and large-scale infrastructure projects generate momentum for other, similar projects and create a recognised vulnerability to displacement that is likely to persist over many years. The presence and practices of these companies needs to be considered in assessing suitability to return.

Myanmar's national laws have failed to prevent (and in some cases actively enabled) forced migration over the past decades. They are now continuing that role by enabling land grabs and the extraction of resources. Legislation on land in Myanmar is spread across many different statutes.<sup>93</sup> New laws were drafted in 2012, including the Farmland Law and the Vacant, Fallow and Virgin Land Law. These continue to grant the Government wide-ranging legal authority to expropriate land "in the interests of the public" or "if likely to prove useful to the public", or subject to a contractual agreement with a company. There are few avenues for appeal against a decision to expropriate property.<sup>94</sup> These laws are also problematic for designating land as 'vacant' or 'fallow' that may not be vacant at all, but is occupied by communities practicing shifting cultivation farming techniques.

A National Land Use Policy for Myanmar was adopted in January 2016, after several redrafts.<sup>95</sup> The land use policy recognises customary land tenure, requires ethnic leaders to be involved in decision making processes related to land tenure rights, and specifically mentions the need to provide "adequate land use rights and housing rights" to ethnic nationals who lost their land resources due to war, land grab or natural disasters.<sup>96</sup> These provisions are a step towards protection for customary land tenure and land use practices, though as yet do not fully protect against commercial land acquisition (and at this stage remain only a policy rather than a legal statute).

Land law reform has clear implications for the peace process, as it affects control over environmental

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<sup>92</sup> KNU Land Policy December 2015 <http://www.theborderconsortium.org/media/69780/2016-06-16-KNU-land-policy-eng.pdf>

<sup>93</sup> Scott Leckie and Ezekiel Simperingham (2009), *Housing, Land and Property Rights in Burma: The current legal framework*. (Displacement Solutions).

<sup>94</sup> Ibid, p105

<sup>95</sup> Global Witness submission on Myanmar's draft national land policy, November 2014 .

[http://www.globalwitness.org/sites/default/files/library/Feedback%20on%20Myanmar%20draft%20national%20land%20policy\\_EN\\_1.pdf](http://www.globalwitness.org/sites/default/files/library/Feedback%20on%20Myanmar%20draft%20national%20land%20policy_EN_1.pdf); also Transparency International.

<sup>96</sup> Article 63-65; 72.

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resources as well as relationships between ethnic nationalities and the Burmese Government. It also has implications for displacement. For those who are currently displaced, the extent to which customary land rights are recognised and the mechanisms for solving land disputes will affect the process of return to their land. Furthermore, land law reform has a crucial role to play in preventing future displacement, particularly through 'land grabs' and expropriation of land. Given the centrality of land rights to a peaceful future in Myanmar, serious thought must be given to the intersecting links between the peace process, possible voluntary repatriation of refugees and IDPs, and the proposed national land law.

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## V. Conclusion

This is a critical moment for Myanmar. The coming years will define the terms that shape Myanmar's political future, for better or for worse. The peace process is being conducted between the Myanmar Government and EAOs but external actors have vital roles to play, including international agencies and NGOs, foreign governments and donors. External actors must think carefully about the outcome that they wish to promote. Is it a lasting political solution which has widespread support among those most affected by conflict and respects the rights of all - or a free-for-all for investors which turns a blind eye to continued human rights violations and feeds insecurity? The latter will happen naturally, but the former will need sustained pressure, and considerable more urgency than has been shown to date.

There is no formula to determine why some peace processes work while others fail, but the chances of building a sustainable peace are substantially enhanced when the process genuinely engages with and seeks to correct the inequalities and injustice that gave rise to conflict. Current political conditions in Myanmar, including massive human rights violations committed by the Burma Army in Rakhine State, raise serious questions about the willingness and capacity of the Myanmar government to embark on genuine transformation. Real change would require addressing displacement and integrating displacement into wider political, economic and legal reforms. This working paper has identified a number of areas to be considered, including the process of drafting of a peace agreement, the creation of monitoring institutions, the timing, design and implementation of repatriation and reintegration programmes, and wider issues of legal protection, land governance and property restitution. Three issues cut across all of these areas:

- **Institutional mechanisms to ensure inclusion:** There is a familiar pattern of technocratic approaches to peacebuilding and development which rely on international expertise and fail to acquire deep historically and politically-informed understanding of the local context. To avoid falling into this trap it is essential that displaced communities shape the policies that affect their futures. This requires consultation by ethnic armed organisations as well as by international agencies. A valuable model for institutionalised participation and consultation can be found in the representative Refugee Committees which were formed in multiple countries to allow refugees from Guatemala to inform and shape the peace process and eventual repatriation. A more limited (but still valuable) model would be quadripartite repatriation discussions, which include refugee representatives in addition to the Government of Myanmar, Government of Thailand and UNHCR. These consultation committees would ideally be created as soon as possible to shape a process of organisation repatriation before it begins in earnest.
- **Funding:** An effective strategy for dealing with displacement will require considerable financial support, not least for return and reintegration programmes. UNHCR is operating under intense global budget pressures and previous appeals for funding for Myanmar have failed to produce sufficient voluntary donations from states. All stakeholders must consider how to raise resources. Myanmar has vast natural resources and a burgeoning extractive industries sector. As most natural resources are located in the ethnic territories, one avenue to explore may be corporate contributions, and corporate social responsibility to invest in the future of those areas through support for returnees. Funding is also extremely important in terms of where it goes and who decides. Particularly in relation to refugee and IDP returns, funding streams should be flexible, responsive to people's needs, appropriate for multiple categories of returnees (including IDPs, spontaneous returns and organised returns) and sensitive to the needs of surrounding communities in return areas. It would be desirable to build donor support around an integrated vision for return and Myanmar's development, perhaps in the form of a Peace Recovery and Development Plan.

### Recommendations for displacement-specific provisions in a peace agreement

Past peace agreements vary in the extent to which they address displacement, from a brief mention in a peace agreement to a detailed protocol text. Some issues that are frequently included are: providing guarantees of safety and security for returnees; guarantees of access to humanitarian agencies; ensuring that returnees receive

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benefits or other forms of assistance; and creating institutions for effective enforcement and implementation of peace agreements. These provisions could all be usefully adapted and implemented to suit the Myanmar context, including by:

- Adopting an inclusive definition of the population of Myanmar's displaced, such as "all refugees and displaced persons", and ensuring that all programmes are extended to a wide population.
- Affirm human rights and freedoms for refugees and displaced persons (including the right to non-discrimination) and affirm relevant international standards including the *Guiding Principles on Internal Displacement*, the *Pinheiro Principles on Restitution of Property after Displacement*, the *Voluntary Guidelines for Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* and the *UN Voluntary Guidelines on Responsible Business and Human Rights*.
- Guarantee unrestricted international humanitarian access to displaced populations anywhere in Myanmar. This is an essential guarantee of security and an essential component of building trust in the Government's commitment to peace. It is particularly important that access is guaranteed for international organisations and not only for national agencies.
- Establish monitoring mechanisms, potentially including a dedicated institution for monitoring programmes related to displacement but at a minimum ensuring representation of displaced people on any monitoring institutions that are created during the peace process.
- Provide for legal reforms to facilitate returnees' reintegration, including guarantees of safety and non-prosecution for returnees; provision of education in ethnic languages, recognition of educational qualifications gained in exile and a full restoration of citizenship documentation.

### Recommendations for policies shaping refugee and IDP return

For real change and real peace in Myanmar, refugees and IDPs must be able to return home. However, the fundamental provision of international refugee law is the principle of *non-refoulement*: a refugee should not be returned to a country where his or her life or freedom is threatened. Past refugee repatriation programmes show the risks of premature repatriation and indicate approaches to ensure refugees and IDPs from Myanmar can return voluntarily, safely and with dignity. In particular:

- UNHCR should continue to uphold a high threshold for organised returns, and any assessment of safety and security in return areas should take into account the likelihood of future displacement through land grabs and large-scale development projects. Monitoring of return conditions should be continuous, including ongoing communication to refugees and IDPs using accessible formats (the nature of which will vary in different displacement environments).
- Planning for return should take into account the full scope of Myanmar's displaced and develop equitable policies that respond to the diversity of need. This will require a holistic approach from EAOs as well as UNHCR and international NGOs to ensure that returnees are not isolated from other aspects of development and political administration in return areas.
- Many refugees and IDPs do not yet feel that conditions are suitable for return. A number of legal and policy reforms could help to remove barriers to return and build confidence among displaced populations. This includes landmine removal, restoration of citizenship documentation, recognition of educational qualifications gained in exile, and dedicated educational support for children who have been educated outside Myanmar and are not literate in Burmese.
- Any benefits and entitlements provided to returnees must be accessible to those populations. That will require sensitivity to levels of education and language literacy and awareness of transport and communications infrastructure in return areas. Many refugees and IDPs continue to have a deep fear and mistrust of engaging with government actors, which could affect their willingness to collect benefits if

they require repeated engagement with authorities.

### Recommendations for land reform, land governance and property restitution

Land governance is a central issue, as a cause of displacement, an impediment to return, and a risk of future displacement. Addressing displacement must include provisions related to land, such as:

- Refugees and IDPs have a right to restitution of housing, land and property, and this should be recognised in the peace process and affirmed in an eventual peace agreement. New institutions may need to be created to decide land claims and allocate land where necessary.
- New land and property issues are arising in Myanmar that risk exacerbating past discrimination and entrenching the opposition between Myanmar's central government and ethnic states. This includes land grabbing and displacement due to large-scale agriculture and development projects. Addressing these issues is critically important for the future governance of Myanmar, for the successful return and reintegration of refugees and IDPs, and to prevent future displacement. Pressing issues to be resolved include protection for existing land users, recognition of informal tenure, recognition of communal land tenure (in agriculture, forestry and communal grazing) and protection against land confiscation.
- Ethnic armed organisations must ensure that land governance is at the heart of their political negotiations with the Myanmar government. Local communities' land use rights should be recognised and their voices heard by the Myanmar Government. To prevent further environmental degradation as a result of exploitation of natural resources, EAOs should seek an immediate moratorium on extractive industries and large-scale land acquisition.
- International NGOs had an important influence in the drafting of Myanmar's National Land Use Policy. They must continue to exert pressure on the Myanmar Government to ensure that this policy is fully translated into legal reforms that provide real protection for local people and communities, including protection for customary ownership and community-based land title registration as well as the creation of mechanisms to resolve land claims which have the participation of local populations and are enforceable in Myanmar law.

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