Chapter 4

Operational-Level Impacts

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Chapter 4
OPERATIONAL-LEVEL IMPACTS

In the following Chapters:

The following chapters present the analysis and findings from a range of existing ICT activities in Myanmar, recognising that impacts are often very context-specific and importantly can be avoided or shaped by (good and bad) company practices. The information presented draws from desk and field research in 13 locations across 6 regions where ICT activities are underway.[217]

Each chapter present common operational-level impacts that are relevant to ICT activities, divided according to **10 key issues in Myanmar:**

Chapter 4.1 Freedom of Expression and Censorship
Chapter 4.2 Hate Speech
Chapter 4.3 Privacy
Chapter 4.4 Surveillance and Lawful Interception
Chapter 4.5 Cyber-Security
Chapter 4.6 Labour
Chapter 4.7 Land
Chapter 4.8 Groups at Risk
Chapter 4.9 Stakeholder Engagement & Grievance Mechanisms
Chapter 4.10 Conflict and Security

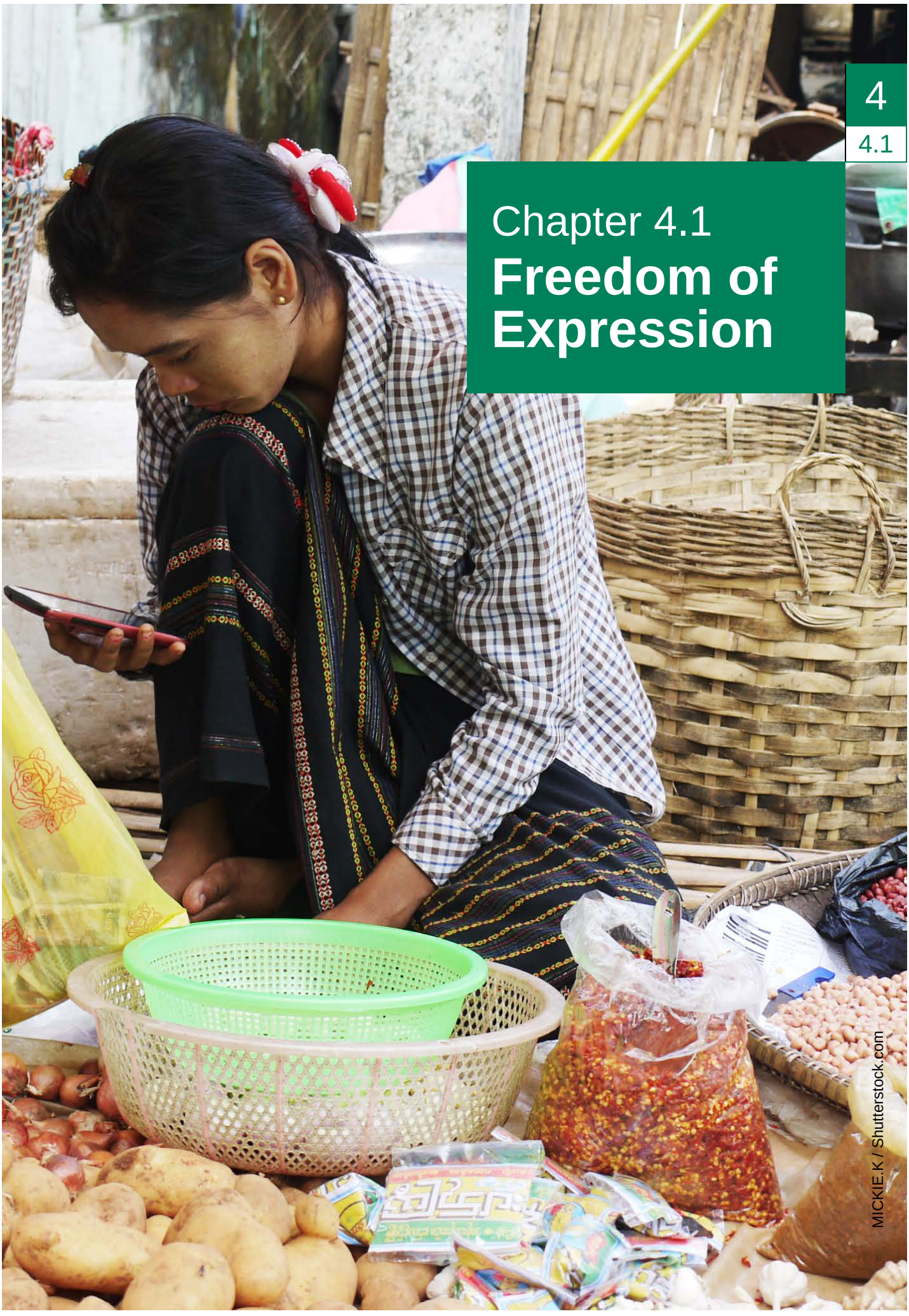
Each Chapter features sections on:

A. Context (national and international)
B. Field Research Findings
C. Recommendations on each of the 10 issues for ICT companies
D. International Standards and Guidance on each of the 10 issues.

MCRB has also published a list of **ongoing 'linked' initiatives** in Myanmar connected to the ICT sector and human rights that it will endeavour to keep updated to provide information on relevant initiatives and potential partners or sources of information for ICT companies.

[217] See Annex A for further information and a map of locations visited.

Chapter 4.1
Freedom of Expression



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4.1

Chapter 4.1
Freedom of Expression

In this Chapter:

A. Context
- Freedom of Expression, Opinion and Information and the ICT Sector
- Freedom of Expression and Opinion in Myanmar
- Access to Information in Myanmar
- International Human Rights Law on Freedom of Expression
- The Myanmar Legal Framework and its Current Application

B. Field Research Findings
C. Freedom of Expression Recommendations for ICT Companies
D. Relevant International Standards and Guidance on Freedom of Expression

A. Context

Freedom of Expression, Opinion and Information and the ICT Sector

Under international human rights law and standards, everyone has the right to hold opinions without interference and the right to freedom of expression, including the freedom to seek, receive and impart information. Technological developments and the growth of the ICT sector means the opportunities to express oneself have likewise grown exponentially. The expansion of the ICT sector has allowed individuals to communicate instantly and at a low cost. It has had a dramatic impact on journalism and the way in which we share and access information and ideas.

However the ICT sector can enable or impede the right to freedom of expression and access to information. For example, ICT companies may be asked by governments to illegitimately restrict online content or media broadcasts, or to hand over information on users and their communications. This censorship of content restricts freedom of expression and opinion. If users feel they are being watched, this can cause a 'chilling effect' on freedom of expression. There is growing concern from global civil society and some companies about this, accompanied by some corporate efforts to push back on Government requests for censorship. This can have positive implications for protecting the right to freedom of expression but also potential negative business consequences by risking formal or informal sanctions[218]. Companies in parts of the ICT value chain play a direct role in facilitating or denying the right to free expression, through the choices they make to allow, block or take down content as outlined in their Terms of Service policies.[219]

[218] See for example the Global Network Iniative and the Telcoms Sector Dialogue, and the UN Global Compact "Human Rights and Business Dilemma Forum: Freedom of Expression, Speech and Opinion" (last accessed August 2015).
[219] See for example, Council of European Union, "EU Human Rights Guidelines on Freedom of Expression Online and Offline" (2014).

Freedom of Expression and Opinion in Myanmar

The opening of the ICT market in Myanmar and loosening restrictions on freedom of expression since the 2011 reforms has meant that people have enjoyed wider opportunities to express themselves, share information and communicate in ways that were previously denied. The choices and rules that companies and the Government make as the ICT sector expands will have significant impacts in future on the right to freedom of expression and access to information. Recognising that Myanmar is starting from one of the lowest penetration rates for mobile or Internet in the world, the Government put ambitious requirements on telecommunications operators to expand coverage[220]. In addition, the World Bank is financing pilot projects to implement localised ICT infrastructure in locations not covered by the commercial operators.[221]

Since the reform process began in Myanmar during 2011, there have been signs of improvement in the rights to freedom of expression. This includes loosening restrictions in law and practice, on the media, and in the right to peaceful assembly and the ability to stage peaceful protests.[222] In August 2012 the Government lifted pre-publication censorship, under which the Government had previously required print media to be submitted for approval and censorship before publication. The authorities have also permitted the publication of independent daily newspapers and allowed exiled Myanmar media organisations to return to the country. Independent Myanmar media report regularly on criticism of the Government by civil society, protest demonstrations, and the authorities' crackdown on such demonstrations.

However, during 2014 journalists faced increased harassment and intimidation, and one journalist was shot dead when he reportedly tried to escape from military custody.[223] Reporting on corruption or the military remains problematic, as shown by the arrests of Unity journalists in July 2014, some of whom were sentenced to years of hard labour for an article on an alleged military weapons factory.[224] While the vast majority of those imprisoned solely for peaceful expression of their views have been released, including journalists, scores remain behind bars and others are at risk of arrest and imprisonment under a number of laws criminalising freedom of expression.[225] Indeed, in February 2015

[220] The government initially set a goal of 80 percent penetration rate by 2016, but adjusted this goal to 50 percent in a May press conference. See Jeremy Wagstaff, "Mobile revolution in Myanmar is on the cards, but too slow for many," Reuters (20 January 2013); Justin Heifetz, "'Beauty contest' for Myanmar's telecoms bid," *Mizzima* (14 May 2013); United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organisation of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, "Tenth Anniversary Joint Declaration: Ten Key Challenges To Freedom Of Expression In The Next Decade" (2010) setting out concerns about differences in access to the Internet..

[221] World Bank "Project Appraisal Document On a Proposed Credit in the Amount of SDR 20.60 Million ($31.5 Million Equivalent) to the Republic of the Union of Myanmar for a Telecommunications Sector Reform Project" (January 2014).

[222] In January 2013 the President abolished Order No. 2/88 of 18 September 1988, which had banned gatherings of five people or more. See: The Republic of the Union of Myanmar President's Office, "Order No. 3/2013" (28 January 2013) and "Order No 2/88".

[223] UN Information Centre, "Statement of the Special Rapporteur on the Situation of Human Rights in Myanmar" Yangon, (16 January 2015). The Committee to Protect Journalists (CPJ) has designated Burma as the 9th most censored country in the world.

[224] See for example, The Irrawaddy, "Burma Resorting to Police State Tactics' in Unity Trial: US Official" (17 July 2014).

[225] Amnesty International "Stop Using Repressive Law against Peaceful Protesters" (15 October 2014).

the UN High Commissioner for Human Rights noted that 10 journalists were imprisoned during 2014 "*under outdated defamation, trespassing and national security laws*".[226]

The right to freedom of expression includes the right to seek, receive and impart information. There is currently no law on freedom of information in Myanmar, although civil society is advocating for such legislation.[227] The Government is making preparations to join the Open Government Partnership, an international organisation that seeks strong commitments from participating governments to promote transparency, fight corruption, harness new technologies and increase participation of civil society to make the Government more open and accountable.[228] In order to join, the Government must meet certain criteria; however, it reportedly scored very low in a 2014 assessment.[229] Moreover a December 2014 Asia Foundation survey found very limited public knowledge about Government institutions and functions, and a low level of social trust.[230]

The Government imposed restrictions on the media during the November 2010 elections, which were widely believed to be neither free nor fair, although such restrictions were eased for the 2012 by-elections. Freedom of expression is thus especially important in the run-up to the General Elections scheduled to take place on November 8th 2015. Journalists and civil society will seek to inform the public about elections procedures, campaigning by political parties, and election results. Myanmar media is receiving training on election reporting and civil society working on electoral issues, and political parties have had several meetings with the Union Elections Commission on codes of conduct, voter registration and other election-related issues.[231] In addition, civil society groups are developing innovative ways to utilise new communication tools, including disseminating information about voter lists[232] and assisting with election monitoring.[233] However, mobile communications have been used in other elections to incite violence (see Kenya case study, in Chapter 3, Table 30).

Telecommunications and ICT policy and law in Myanmar is still in a nascent state and as a result, the Government has not yet addressed other areas that will have impacts on the freedom of expression, opinion and information such as intellectual property, defamation, net neutrality, competition[234] and online anonymity.[235] This means that, for the time being, individual ICT companies will manage these issues according to their own policies or Terms of Service. Of the wide range of actors in the ICT value chain in Myanmar, an increasing number are local start-ups and are likely to have little awareness of relevant

[226] UN OHCHR "Myanmar 'needs urgently to get back on track" Seid (25 February 2015).
[227] Eleven Media "Rights Group Pushes for Freedom of Information Law" (26 January 2015).
[228] Mizzima "Myanmar aims to join the Open Government Partnership", (12 November 2014). See also Open Government Partnership
[229] Myanmar Times "CSOs to give input on Open Government Partnership Bid" (22 October 2014).
[230] Asia Foundation "Asia Foundation Releases Results of Nationwide Myanmar Public Opinion Survey" (12 December 2014).
[231] New Light of Myanmar, "Elections and responsibility of the media" (7 March 2015) and Myanmar Times, "UEC to meet civil society, parties" (13 February 2015).
[232] Irrawaddy "Electoral Education Underway as Batch of Voter Lists is Released" (31 March 2015).
[233] Irrawaddy "Myanmar Civil Society Learns How To Harness ICT At USA 'Tech Camp'" (16 January 2014).
[234] VDB Loi "Myanmar's New Competition Law: A Pitbull or a Paper Tiger?" (8 March 2015).
[235] For a longer explanation of many of these issues, see for example: Special Rapporteur on Freedom of Expression, InterAmerican Commission on Human Rights, "Freedom of Expression and Internet" (2013).

discussions, standards and concerns around human rights issues and the ICT sector and their potential impact on the freedom of expression.

Access to Information in Myanmar

There are a number of different dimensions to 'access to information' — the right to seek, receive and impart information, the availability of services in local languages and the actual availability of service (in terms of intentional shutdowns or restrictions of telecommunications services and the blocking, filtering or takedown of content). Article 19 has identified international best practices for right to information legislation (Table 35).

Table 35: ARTICLE 19's Nine International Best Practices Principles on the Right to Information Legislation[236]

- **Maximum Disclosure:** Freedom of Information Legislation should be guided by the principle of maximum disclosure
- **Obligation to Publish:** Public bodies should be under an obligation to publish key information
- **Promotion of Open Government:** Public bodies must actively promote open government
- **Limited Scope of Obligations:** Exceptions should be clearly and narrowly drawn and subject to strict 'harm' and 'public interest' tests
- **Processes to Facilitate Access:** Requests for Information should be processed rapidly and fairly and an independent review of any refusals should be available
- **Costs:** Individuals should not be deterred from making requests for information by excessive costs
- **Open Meetings:** Meetings of public bodies should be open to the public
- **Disclosure Takes Precedence:** Laws which are inconsistent with the principle of maximum disclosure should be amended or repealed
- **Protection for Whistle-blowers:** Individuals who release information on wrongdoing – whistle-blowers – must be protected

Right to Information/Freedom of Information

The Myanmar Framework for Economic and Social Reforms Policy Priorities for 2012-15 (FESR) contains a clear commitment to both the right to information and the freedom of information, highlighting the need to "*move as quickly as possible to define, legalise and enforce the right to information and to improve citizens' access to information*" and to "*developing an institutional environment for free flow and access to information that empowers civil society*".[237] The FESR also states:

> "*GOM [the Government of Myanmar] intends that citizens are able to participate in the political process and to be well informed about policy decisions, which in turn will improve accountability. GOM has also emphasised cooperation with civil society, as a strong and active civil society is a critical counterpart to a more capable,*

[236] Article 19, *"*The Public's Right to Know*."* Article 19, an international NGO focused on Article 19 of the UDHR on freedom of expression, has also published "A Model Freedom of Information Law".
[237] Myanmar Framework for Economic and Social Reforms Policy Priorities for 2012-15 (FESR), para 114

responsive and accountable state as well as a stronger, more competitive and responsible private sector."[238]

Despite these commitments to "*move as quickly as possible*", there is currently no legislation guaranteeing right to information in Myanmar. The Asian Development Bank (ADB) e-Governance Master Pan emphasises the need for "*inclusive, integrated, and citizen-centric governance*". [239] Legislation guaranteeing a right to information would enhance this objective. Technology can also support citizen engagement and accelerate data collection through 'crowdsourcing', where the public submit information to a central platform which can help solve a particular social issue. For example, people can submit reports on local problems to the council through Fix My Street in the United Kingdom [240] or report updates on water supply availability through Next Drop in India.[241]

Preserving ethnic minority languages online

There are a wide range of languages spoken in Myanmar. There is concern that with the concentration of services in English and the predominant language Burmese, other languages will be increasingly marginalised in the online environment. Stakeholders from minority language groups may already be disadvantaged in relation to the physical accessibility of ICTs in their area, given that many of the ethnic minority groups live in the more remote areas of the country, further from the commercial and political capitals.

Denial of Access to Information – Restrictions, Blocking and Removing Content

Regulations restricting Internet usage in Myanmar can be traced back to January 2000 when the Government attempted to restrict the creation of webpages, sharing of Internet accounts, and posting of political content.[242] Research by the Open Network Initiative (ONI) indicates that the partial nationalisation of Internet service provider (ISP) Bagan Cybertech in 2004 was followed by further content censorship online, including the blocking of websites featuring content related to political opposition or human rights (including independent media websites), and the websites of email service providers.[243] Other services have also been briefly blocked to try to protect State telecommunications revenue, including GoogleTalk and Gmail in 2006 and Skype in 2011.[244]

In 2012, ONI conducted a test of blocked URL's on the ISP Yatanarpon Teleport. The results showed a drastic reduction in the amount of content filtered or blocked compared to previous testing in 2005. The categories of content blocked were: Pornography, content relating to alcohol and drugs, gambling sites, sex education, online dating sites and gay and lesbian content. Internet censorship circumvention tools were also blocked. A much smaller amount of content in the 'Political' category was blocked. Almost all of the

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[238] *Ibid*.
[239] ADB/InfoSys, "Republic of the Union of Myanmar: Design of e-Governance Master Plan and Review of Information and Communication Technology Capacity in Academic Institutions " (July 2015), pg 35.
[240] See: https://www.fixmystreet.com/
[241] See: http://nextdrop.org/
[242] BBC News Online "Burma Clamps Down On The Web" (20 January 2000).
[243] Open Network Initiative, ""Internet Filtering in Burma in 2005: A Country Study" (2005)
[244] Irrawaddy "Junta Blocks Google and Gmail" (30 June 2006) and DVB, "Internet Calls Banned As Junta Loses Out" (20 March 2011).

websites of opposition political parties, critical political content, and independent news sites previously found to be blocked were found to be accessible during 2012 testing.[245]

More recently, as the ICT sector has developed and more international services are available, these services are beginning to track and report on requests from the Government of Myanmar. The social networking site Facebook noted in its Government Requests Report that, in the period July-December 2014, the company restricted access to 5 pieces of content reported by the President's Office based on sections 295(A), 298, 504, and 505 of the Myanmar Penal Code, which covers "*Acts or words which intentionally cause outrage or wound religious feelings" and "Statements or insults which intentionally provokes a breach of the peace or causes public mischief*." [246] (See Chapter 4.2 on Hate Speech).

Network Shutdowns

Fulfilment of the right to access information also relies on the availability of telecommunications services, including mobile services and the Internet. Clause 77 of the *Telecommunications Law* grants MCIT the ability to "*temporarily suspend a telecommunication service, stop or prohibit any type of communication or use of telecommunication services*" when doing so would be "*for the benefit of the people*".[247] The lack of a clear legal framework puts mobile operators, and Internet Service Providers (ISPs) at substantial risk of being ordered to shutdown networks or services without clear legal justification, impacting their responsibility to respect human rights such as freedom of expression.[248]

Network shutdowns are regularly used by governments worldwide to stifle free expression by cutting off the means of delivering a message.[249] As more and more people become connected and rely on mobile and Internet services in their day-to-day lives, Government-ordered network and service disruption become increasingly disruptive and dangerous (see Table 36). Blocking of services during protests also impacts freedom of association, and often precedes further human rights violations.

Myanmar experienced a major Internet disconnection during the Saffron Revolution. In August 2007, protests grew throughout the country in a response to deteriorating economic conditions and political discontent. ICTs facilitated the flow of information from citizen journalists to media outlets around the world. [250] In an attempt to prevent information reaching media outside of Myanmar, particularly regarding police brutality and

[245] Open Network Initiative "Update On information Controls in Burma (23 October 2012).
[246] Facebook "Government Requests Report: Myananmar July 2014-December 2014" (accessed Aug 2015).
[247] *Myanmar Telecommunications Law*, Clause 77.
[248] IHRB, "Network Shutdowns in the DRC: ICT companies need clear rules" (19 Feb 2015).
[249] In 2013 and 2014 alone, Freedom House reported network disconnections, that were likely government-ordered, in Ethiopia, Iraq, Kazakhstan, Pakistan, Syria, Sudan, Uzbekistan, Yemen and Zimbabwe. See Freedom House, "Freedom on the Net" (2014). In Jan 2015, the government of the Democratic Republic of Congo ordered a near country-wide mobile network shutdown following protests over the President's unconstitutional decision to remain in power for a third term. In May 2015 in Burundi, following similar protests over the President's plan to seek another term, the government blocked access to Facebook, Twitter, Viber and WhatsApp. See IHRB, "Network Shutdowns in the DRC: ICT companies need clear rules" (19 Feb 2015).
[250] For further analysis see: Berkman Centre for Internet and Society, "The Role of the Internet in Burma's Saffron Revolution" (28 September 2008).

the killing of protesters, the Government responded by shutting down Internet and mobile phone service. At the time Internet services provided by both MPT and Bagan Cybertech went down from September 29 to October 4, 2007. This was followed by a partial shutdown from 4-12 October during which access was restricted to late night hours between 22:00 and 04:00.[251]

Table 36: Impacts of Government-Ordered Shutdowns or Service Disruptions

The impacts on human rights, the economy and national and personal security during network and service disruption can include:

- Restrictions on freedom of expression and access to information that may not be legal, necessary or proportionate.
- Injured people are unable to call emergency services, and emergency services are unable to communicate and locate people.
- People are unable to assure friends and relatives they are safe, causing panic.
- People are unable to call for help to be rescued from areas where protests are happening.
- Authorities are unable to disseminate important information to move people to safety, or to calm a concerned population.
- Human rights groups are unable to monitor situations effectively.
- Small businesses are unable to operate and livelihoods are affected. For example, businesses are unable to access data held in the cloud.
- Mobile banking transactions, relied on by millions of people, cannot take place.
- Transmission of health information on mobile phones also cannot take place.
- Students cannot access educational material.
- Doctors/ health workers are unable to access research or communicate in real time with each other.
- Other popular services carried out via mobile communications such as voting and birth registration are disrupted.
- Other services dependent on radio network may be disrupted e.g. cashpoints (ATM), public transport information.
- In national security emergencies, functioning communications are essential for an effective lawful interception system to help law enforcement locate and track people planning terrorist activity, subject to the process of law, court authorisation and sufficient oversight.
- Crimes cannot be reported to police via mobile phone.
- Hostages are unable to communicate with police.

More recently, Myanmar's Internet access went down for 1 hour and 19 minutes on 5 August 2013. Given its proximity to the anniversary of the 1988 uprising, there was speculation that the outage was intentional, though officially attributed to a damaged fibre optic cable near the SEA-ME-WE 3 submarine cable landing station in Pyapon.[252]

[251] Open Net Initiative "Pulling the Plug: A Technical Review of the Internet Shutdown in Burma" (2007).
[252] Irrawaddy "Burma's Internet Delays Continue Ahead Of 88 Uprising Anniversary" (5 August 2013).

Table 37: Key points for legislation on Network Shutdown to demonstrate a shutdown is necessary and proportionate

- Network shutdowns impacting the entire country should not be authorised.
- A shutdown must only be invoked if there is a real and imminent threat to national security or a national emergency, and a request must specify the reason for the shutdown.
- These situations must be prescribed by law, including which bodies or agencies are authorised to make a network shutdown request.
- A shutdown request must be approved or authorised by the highest level of the government.
- There must be a clear request process, with limited actors allowed to make the request to operators, and a designated person in the operator to receive the request.
- The shutdown request to the network operators must be in writing.
- The request must specify the duration and geographical reach of the shutdown, and demonstrating direct material necessity.
- Shutdowns should be limited in duration and geographical area.
- Where possible, the public must be informed of the shutdown, the duration, geography and services affected.
- Each shutdown must be logged/recorded, and a list published annually.
- The public must have access to emergency services.
- The legislation must be subject to review, including a review of each shutdown by an independent oversight body.[253]

The impact of network shutdowns on freedom of expression is so severe that Special Rapporteurs on freedom of expression from the United Nations (UN), the Organisation of American States (OAS), the African Commission on Human and People's Rights and the Representative on freedom of the media from the Organisation of Security and Co-operation in Europe (OSCE), have all concluded in a Joint Declaration that cutting off access to the Internet can never be justified under human rights law, including on national security grounds:

> "*Cutting off access to the Internet, or parts of the Internet, for whole populations or segments of the public (shutting down the Internet) can never be justified, including on public order or national security grounds. The same applies to slow-downs imposed on the Internet or parts of the Internet.*"[254]

In a second Joint Declaration, they concluded that shutting down entire parts of communications systems (mobile and Internet) during times of conflict can never be justified under human rights law.

> "…*using communication 'kill switches' (i.e. shutting down entire parts of communications systems)… are measures that can never be justified under human rights law.*" [255]

[253] See IHRB, "Corporate Responses to Mobile Network Shutdowns. Case Study Telenor Pakistan" (*forthcoming*).

[254] *Joint Declaration on Freedom of Expression and the Internet* (2011), Article 6b.

[255] *Joint Declaration on Freedom of Expression and Responses to Conflict Situation* (2015) Article 4c

While these statements cover Internet shutdowns and network shutdowns in conflict situations, there is ambiguity as to the impact of mobile shutdowns in a Government proclaimed 'emergency'.

The Government of Myanmar has an opportunity for leadership in this area by committing to a 'no shutdown' policy, and only taking control of telecommunications networks in the most urgent of circumstances, for example a natural disaster of the scale of Cyclone Nargis that hit the country in 2008 where control of the network may be necessary to organise rescue operations. Table 37 identifies key points for legislation on network shutdown which could underpin such a 'no shutdown' commitment.

Anonymity Online

The issue of anonymity when communicating on the Internet is a contentious area that splits expert opinion. One view holds that people should be identifiable and therefore responsible for what they express, speak, or post on the Internet, as online anonymity can be abused in order to bully or 'troll' others and target and exploit children. In addition, online anonymity permits State officials to assume false identities in order to spy on minority groups, for example gay rights activists on social networking websites. Therefore, it is right that online service providers insist on users registering accounts with their real name and if the name is found to be fake, the account could be removed.

The other view holds that in many countries, those who express themselves openly face severe consequences if they are found out, and they have legitimate reasons to conceal their identity. Journalists, human rights defenders, trade union leaders, opposition politicians, dissidents, whistle-blowers, and other activists fall in this category. Using pseudonyms to protect identity is a practice that pre-dates the Internet. Journalists have long used assumed names when exposing injustice or speaking out against authoritarian regimes, a practice deemed necessary in order to protect freedom of expression. Human rights law does not require people to reveal their identities, and drawing from that, it is not necessary for Internet users to communicate only using their real name. Requiring people to register and provide their personal information to authorities can have significant consequences in certain societies and it can create a 'chilling effect' on freedom of expression.

The MCIT issued draft regulations on the registration of SIM cards, which could have had the same effect through requiring SIM card owners to register personal information. No final regulations appear to have been issued. (See Chapter 4.3 on Privacy).

International Human Rights Law on Freedom of Expression

The Universal Declaration on Human Rights (UDHR) (Art. 19) and the International Covenant on Civil and Political Rights (ICCPR) (Art. 19) are the main international instruments that states commit to regarding the protection of freedom of expression.

Freedom of speech and expression carries with it special duties and responsibilities and is not absolute.[256]

Legitimate Restrictions on the Right to Freedom of Expression, Opinion and Information

Article 19(3) of the ICCPR provides that freedom of expression may be subject to certain restrictions which are: "*a) For respect of the rights or reputation of others; or b) For the protection of national security, or of public order (ordre public) or of public health or morals*." Any restrictions must pass a three-part, cumulative test which should assess whether they:

i. are provided for in national law which is clear and accessible to everyone (principle of legal certainty, predictability and transparency)
ii. have a legitimate aim or purpose, i.e. one of the purposes set out in Article 19.3 (principle of legitimacy), and
iii. are necessary and proportionate to the legitimate aim pursued, meaning that the restrictions must the least restrictive means required and justifiable (principles of necessity and proportionality).

The Myanmar Legal Framework and its Current Application

2008 Constitution

The right of citizens "*to express and publish freely their convictions and opinions*" (Article 354 (a)) is guaranteed by the 2008 Constitution, but with significant restrictions. Article 354 guarantees the rights to freedom of expression, peaceful assembly, and association; however exercising such rights must not contravene "*community peace and tranquillity*". These are very broadly and vaguely worded exceptions that could be (and have been) used to justify infringements to the guaranteed right that go well beyond the high bar imposed under international human rights law to justify restrictions on the freedom of expression.[257] Moreover, the right to freedom of expression is only guaranteed for Myanmar citizens.

Laws Enacted Before 2011 and Still In Force

Many laws that greatly restrict freedom of expression and peaceful assembly have not been repealed and the authorities continue to use them to arrest and imprison people for peaceful activities. These include, but are not limited to:

- 1908 Unlawful Associations Law
- 1950 Emergency Provisions Act
- 1923 Official Secrets Act
- Various articles of the Penal Code, especially Article 505(b)[258]

Before the reform process began, the vaguely worded provisions of the *1950 Emergency Provisions Act*, particularly Article 5, were most frequently used to sentence people to long

[256] See UN Human Rights Committee, "General Comment 34: Article 19 - Freedoms of opinion and expression" (11 September 2011).
[257] Legal Background paper commissioned for IHRB.
[258] For a discussion of these and other laws, see Amnesty International, "Justice on Trial" (July 2003).

terms of imprisonment solely for the peaceful expression of their views. Article 5(e) provides for a maximum sentence of seven years for spreading "*false news*", which is not sufficiently defined as required under international human rights standards to provide sufficient certainty. Article 5(j) provides for the same sentence for disrupting "*the morality or behaviour*" or "*the security or the reconstruction of the stability of the union*", also not sufficiently defined. International human rights standards require that all criminal laws are precise, so that people understand what conduct is prohibited, and can govern their conduct accordingly. Use of vague laws is open to abuse through criminalising conduct that is not understood as criminal before the event. Although the 1950 Emergency Provisions are currently used less frequently, they remain in force.

The *1908 Unlawful Associations Act* has also often been used in the past to imprison peaceful critics of the Government (see Chapter 2 for details).

The *1923 Official Secrets Act* has been used to sentence peaceful critics of the Government, sometimes along with other laws criminalising the rights to freedom of expression and association. Article 3 provides for 3 to 14 years' imprisonment *"(1) If any person for any purpose prejudicial to the safety or interests of the State…"* obtains or communicates information which might be useful to an enemy. "*The interests of the state*" is too broad and allows for the imprisonment of people with information that is not in fact a threat to the security of the State. Other provisions of the law provide for 2 years' imprisonment for anyone who receives, possesses or passes on official information deemed to be secret (Section 5).[259] In July 2014 five journalists from the weekly journal Unity were sentenced to 10 years, later reduced to 7 years, under the provisions of the *Official Secrets Act*, for a story on an alleged suspected military chemical weapons plant on seized land.[260]

Chapter XXI of the 1861 Penal Code, which derives from the British colonial era, provides for punishments of up to two years' imprisonment and/or a fine for defamation. Chapter VII(B), 130(B) provides for punishments for libel against foreign powers.[261] In December 2013 a journalist from Eleven Media was sentenced to three months' imprisonment on charges of trespass, abusive language, and defamation for reporting on a corruption case involving a local lawyer in Loikaw, Kayah State.[262] In March 2015 two journalists from the Myanmar Post were sentenced to two month's imprisonment each on charges of defamation against a military MP in the Mon State Parliament.[263]

Section 505(b) of the Penal Code is currently one of the most commonly used provisions to arrest and sentence people, often along with other laws, for peacefully expressing their views. In October 2014 two activists from the community-based Movement for Democracy Current Force were sentenced to two years' imprisonment under Section 505(b) in reference to a letter written about the need for an election of an interim government. Section 505(b) provides for imprisonment for anyone making, publishing or

[259] Amnesty International "Myanmar: Justice on Trial" (July 2003) pg 28-33.
[260] Human Rights Watch, "World Report" (2015).
[261] *Myanmar Penal Code 1861*
[262] Human Rights Watch "Burma: Repression Marks Press Freedom Day" (3 May 2014).
[263] The Irrawaddy "Journalists Handed 2-Month Prison Sentences on Defamation Charge" (18 March 2015).

circulating information which may cause public fear or alarm, and which may incite people to commit offences "*against the State or against the public tranquillity*".[264]

The *2004 Electronic Transactions Law* (the ETL) creates a range of offences for online content that are much broader than in the criminal code.[265] In addition, the law does not provide safeguards for the right to freedom of expression. Under Article 33 of the ETL, it is a criminal offence to do any act or to receive, send or distribute any information detrimental to a wide range of broadly defined interests: the security of the state, the prevalence of law and order or community peace and tranquillity, national solidarity, the national economy or national culture that go far beyond permitted restrictions to the freedom of expression under international law. These same provisions are replicated in the *Computer Sciences Development Law.* See Chapter 2 for more details.

Laws Enacted Since the 2011 Reform Process

The *Media Law* and the *Printing and Publishing Law*, both of which apply to print and Internet publications, were passed in March 2014. The vague provisions of the *2014 Printing and Publishing Law* and broad powers of a Government Registrar to grant or revoke publishing licenses, led to fears of press self-censorship.[266] However the *2014 Printing and Publishing Law* still represents a step forward compared to the repealed 1962 *Printers and Publishers Law*, which provided for wide censorship powers and imprisonment for operating without registration. Article 8 on content restrictions is broadly worded; for example, although the restriction on "*public order*" is a recognised legitimate objective under international human rights law to justify restrictions on freedom of expression, the law should be much more specific as to what types of statements are being prohibited.[267]

Articles 3 and 4 of the *2014 Media Law* guarantee respectively freedom from censorship and freedom to criticise the Government, but both must comply with the constitution (Article 3(a)), which itself has significant restrictions on freedom of expression. The *2014 Media Law* grants a media council, which is not independent from the Government, unrestricted control to regulate broadcast, print and Internet-based media, including on ethics.[268] However these laws have not – yet – been applied to prosecute users of Internet services such as social networking.

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[264] Amnesty International "Activist organization targeted again" (6 November 2014).
[265] Article 19, "Background Paper on Freedom of Expression in Myanmar" (2014), pg. 47.
[266] The Irrawaddy, "Burma Clampdown Gathers Pace as Legislation Passed" (17 March 2014).
[267] Article 19 "Myanmar: Printing and Publishing Law, Legal Analysis" (November 2014). See also PEN International, PEN Myanmar, PEN Norway, PEN American Center and MIDO "Contribution to the 23rd session of the Working Group of the Universal Periodic Review. Submission on the Republic of the Union of Myanmar" (23 March 2015).
[268] Article 19 "Myanmar: News Media Law, Legal Analysis" (July 2014) and an unofficial translation of the *Media Law*.

B. Field Research Findings

Freedom of Expression

Human Rights Implicated: Freedom of expression and opinion

Field Assessment Findings

- Many interviewees felt that **reference to the impact of behaviour resulting specifically from ICTs is currently excluded from existing laws** and regulations impacting freedom of expression in Myanmar.
- Interviewees highlighted a **lack of guidelines** across public and private institutions **on how to use social media** appropriately.
- Most interviewees felt that **monks were in positions of particular prominence and power** regarding their influence on public opinion and the messages they convey. They felt monks' sermons were generally abided by without question by their followers.
- Some interviewees **questioned the effectiveness of some service provider's 'real names policies'** in Myanmar as often people open many social media or other online accounts under fake names.
- Many interviewees wanted to see **educational campaigns and programmes** introduced by the Government, on TV/media, and in Myanmar schools on the impacts of **dangerous speech and the need for respect and tolerance.**
- Many interviewees **did not report online speech and content they found offensive to site administrators** because they **did not know this was possible** and **because Internet connection was too slow**. (See Chapter 4.2 Hate Speech)
- Although **filtering of online content** appears to have reduced, BlueCoat network equipment[269] (used for filtering) was observed in one ISP's data centre. While this equipment was noted as legacy hardware pre-2011, it was unclear who had access to the equipment in the data centre. Any formal process around managing requests to block or filter content was unavailable, as was a mechanism to communicate with customers regarding impacts of such requests on them.

Freedom of Opinion

Human Rights Implicated: Freedom of expression and opinion

Field Assessment Findings

- Some **clear tensions** were observed by researchers **between traditional Myanmar culture and the introduction of more modern or global cultural trends via ICTs**.
- **Many interviewees felt that women were more vulnerable to impacts** on their 'dignities' from others' behaviours online and needed to be protected or limited from such exposure.
- Researchers also received **many reports of users believing all information published online was true** and not yet understanding how social media and other platforms worked.

[269] See: CItizenLab, "Behind Blue Coat: An update from Burma" (29 November 2011).

Freedom of Information

Human Rights Implicated: Right to information

Field Assessment Findings

- Access to information has been a challenge in Myanmar for decades. **Many interviewees wanted the Myanmar Government and media to use ICTs to communicate to Myanmar people much more widely, particularly in rural regions**, and felt the introduction of the Internet and mobile technology would dramatically improve their ability to access information.
- Interviewees called for the establishment of **information centres** in rural areas to distribute information and act as knowledge resource hubs where people could seek information.

See also the Field Research Findings in Chapter 4.2 on Hate Speech.

Myanmar Good Practice Examples:

- One of the international licensees is committed to developing 200 community information centres. The aim of these is to foster user adoption of mobile services and digital literacy across Myanmar, to connect to the outside world for rural communities that traditionally have not had access to connectivity or the masses of information available online and boost user adoption of mobile connectivity and Internet in rural areas and improve digital literacy through nationwide initiatives for schoolchildren.[270]
- One company has reported that its Myanmar operations are governed by a Code of Conduct and Code of Business Ethics, covering land, labour, health and safety, the environment, anti-discrimination, and privacy/freedom of expression. It conducted a human rights impact assessment in 2013, which identified key risks that will be reflected in its management systems.[271]
- One company reported that it had no formal establishment, no manufacturing and no direct investment in Myanmar but does sell its products via its network of distributors. They initiated a human rights impact assessment prior to their market entry into Myanmar. It has a Global Human Rights Statement, applicable to Myanmar.[272]

C. Freedom of Expression: Recommendations for ICT Companies

- **Understand conflicts between national and international law:** Myanmar's laws on freedom of expression are not aligned with international laws and standards on freedom of expression. In addition, some clauses in the *Telecommunications Law* may allow censorship and surveillance (see Chapter 2). The World Bank has committed to carrying out a due diligence review of Myanmar's telecommunications laws as part of its Telecommunications Sector Reform project, but to date, none of the reviews have been made public.[273] Recent Government practice has indicated that the

[270] Telenor, "Telenor opens doors of Community Information Centre" (20 November 2014).
[271] Ericcson, "Response by Ericsson: Myanmar Foreign Investment Tracking Project", *Business & Human Rights Resource Centre* (last accessed September 2015).
[272] See further: Microsoft, "Response by Microsoft: Myanmar Foreign Investment Tracking Project", Business & Human Rights Resource Centre (last accessed September 2015).
[273] M. Igoe, "Is Myanmar ready for a telecommunications revolution?" (6 May 2014).

Government at various levels, from local to national, continues to apply the laws and at times draconian practices against journalists, protestors and human rights defenders exercising their right to freedom of expression. These actions risk implicating companies in contributing to these violations when companies are requested to comply with Government requests to take down content, block access, or turn over information.

- **Publicly commit to respecting freedom of expression:** Given these concerns, and the gaps in other areas of law relevant to the sector, companies operating in the sector will need to develop their own policies and procedures to ensure that they are meeting their responsibility to respect human rights. In line with the UN Guiding Principles on Business and Human Rights, companies should make their policy commitment to respecting human rights publicly available.[274] For some parts of the ICT value chain, the policy could provide more specific commitments on issues such as Government requests for data, censorship requests, illegal surveillance, or network shutdowns, including procedures for how to narrow requests that may be disproportionate or challenge requests not supported by law.[275] Further internal procedures setting out how the company will deal with Government requests would be an appropriate precautionary measure to put in place in Myanmar.[276]
- **Take positions on key concerns:** Speaking up in public as an individual company to respond to concerns about censorship or imprisonment in violation of the freedom of expression may be sensitive in Myanmar. But companies might seek opportunities through other means, such as industry associations, embassies, in collaboration with civil society, to express their concerns and convey the impact that the lack of rule of law has on willingness to invest in the country and the risks posed to companies. [277]
- **Collaborate with and learn from other ICT companies:** Companies operating in the sector can look to multi-stakeholder initiatives such as the Global Network Initiative (GNI) and other sources of guidance[278] for principles and guidance on dealing with challenges of being asked to comply with requests that violate human rights. They can also look to the example set by telecommunications operators in Myanmar that have publicly committed to pushing back on Government requests for surveillance until regulations are put in place. These commitments set important precedents for other companies and important signals to the Government on how requests that may violate the right to freedom of expression will be dealt with.
- **Build business partners' capability:** Many of the companies operating in the ICT value chain in Myanmar will be small companies, and many small local companies

[274] Numerous companies operating in the ICT sector have already developed policy commitments on human rights and made those publicly available. See for example the ICT companies among this list: http://business-humanrights.org/en/company-policy-statements-on-human-rights

[275] See: Human Rights Watch "Reforming Telecommunications in Burma: Human Rights and Responsible Investment in Mobile and Internet" (2013).

[276] See: European Commission, "ICT Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights" (2013), pg. 44-46, 59-60.

[277] This is done in other markets for example, the Global Network Initiative has been particularly active in commenting on the need for reform by a range of governments to bring their laws and practices into line with international human rights standards.

[278] The GNI Principles on freedom of expression state that: "*Participating companies will respect and protect the freedom of expression of their users by seeking to avoid or minimise the impact of government restrictions on freedom of expression, including restrictions on the information available to users and the opportunities for users to create and communicate ideas and information, regardless of frontiers or media of communication. Participating companies will respect and protect the freedom of expression rights of their users when confronted with government demands, laws and regulations to suppress freedom of expression, remove content or otherwise limit access to information and ideas in a manner inconsistent with internationally recognised laws and standards*." See also, European Commission, "ICT Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights" (2013).

may have had little exposure to discussions or concerns around freedom of expression and other human rights issues and their role and responsibilities. There is a clear need for further awareness raising and training that could be taken on by business partners, donors, and civil society. ICT companies may therefore find it necessary to put in place contractual requirements and follow up to ensure that their business partners are aligned with their human rights approach.

- **Prevent and mitigate impacts around the 2015 national elections:** Mobile operators and social media providers should consider experiences from other countries (see Table 30 case study on Kenya). They should consult relevant experts and other stakeholders, and devise appropriate responses to a range of pre and post-election scenarios to ensure that they are prepared to deal with unfolding events in a manner that best protects users.
- **Promote and preserve Myanmar languages online:** Companies may want to think creatively or collaboratively with other stakeholders (such as civil society or donors) about opportunities to facilitate access and use of minority languages. Companies should publish Terms of Service in local languages.
- **Understand what is being posted or discussed publicly in online company portals**: The wide range of languages in Myanmar has implications for those companies hosting content, such as social media pages, to be able to understand and decide upon whether content is consistent with the right to freedom of expression and in line with the company's terms of service. See also Chapter 4.2 on Hate Speech.
- **Review anonymity policies**: Companies should think through the implications of including 'real names' policies, and whether these are effective in the context of Myanmar (see Chapter 4.2 on Hate Speech). Companies should err on the side of allowing the use of pseudonyms particularly to individuals or groups who have a well-founded fear of possible prosecution. At the same time, companies may be required by law in some instances to reveal the identity of the user to the State (such as during an investigation into terrorism charges). In such a case, where appropriate, companies should inform the user that his or her identity has been compromised.
- **Provide and publish guidelines for employees and workers on the use of social media.** All companies should publish specific guidelines that educate staff on how to use social media and the Internet responsibly while at work.
- **Raise awareness** of how to use, why to use and the results of using social media platforms' 'content reporting' functions.
- **Promote public awareness of the link between ICT and human rights.** This can encourage more CSOs and media to understand and cover the issues.

Companies can also take steps to promote **access to information**:

- **Be transparent around ICT licenses, contracts and their Terms:** While the process to license the telecommunications operators was more transparent than previous bidding processes in Myanmar, the Government did not make the terms of the licenses public. Few governments do provide transparency around the terms of telecommunications operating licenses, but the pressure for contract transparency and information on tariffs, fees and proceeds around public service contracts will continue to grow. The International Finance Corporation (World Bank Group) "*encourages*" the disclosure of information around telecommunications projects it finances.[279]

[279] IFC "Policy on Environmental and Social Sustainability" (2012), para 53: "*When IFC invests in projects involving the final delivery of essential services, such as the retail distribution of water, electricity, piped gas, and telecommunications, to the general public under monopoly conditions, IFC encourages the public disclosure of information relating to household tariffs and tariff adjustment mechanisms, service standards,*

- **Publicly report on Government requests for censorship:** Transparency enables governments and companies to demonstrate whether they are upholding key human rights principles and for other stakeholders to hold governments and companies accountable to such principles.[280] A key development in company transparency in the ICT Sector has been the annual or bi-annual release by some companies of information relating to Government requests companies receive for content takedown, or requests for user data.[281] Publishing information on Government requests and how the company responded increases awareness among users of the scale and scope of Government requests, and increases transparency about corporate responses. The first transparency report was published by Google in 2010. To date, there is not a standardised method of publishing the information, and therefore each company transparency report differs slightly, making comparison difficult, but as more companies publish reports, there has been an effort to move beyond publishing mere numbers and add context on the laws governing censorship and surveillance, including areas where companies are prevented by law from disclosing information. Providing this additional context highlights the responsibilities of the Government and areas where disclosure and transparency can be improved.
- **Report according to the US State Department Requirements for US Companies:** The State Department requires all companies investing US$500,000 or more in Myanmar to submit an annual report on their activities, covering areas including land, labour, environmental and other human rights. TPG Holdings, which through its jointly owned company Apollo Towers, is engaged in the construction and operation of telecommunications towers submitted a report in 2014.[282]
- **See also Chapter 4.4 on Surveillance.**

D. Relevant International Standards and Guidance on Freedom of Expression

Relevant International Standards:

- Universal Declaration of Human Rights (Article 19)
- International Covenant on Civil and Political Rights (Article 19)
- Freedom Online Coalition, Tallinn Agenda for Freedom Online (2014)

Relevant Guidance:

- Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/HRC/17/27 27th May 2011
- UN Human Rights Council, The Promotion, Protection and Enjoyment of Human Rights on the Internet, A/HRC/20/L.13 29th June 2012

investment obligations, and the form and extent of any ongoing government support. If IFC is financing the privatisation of such distribution services, IFC also encourages the public disclosure of concession fees or privatisation proceeds. Such disclosures may be made by the responsible government entity (such as the relevant regulatory authority) or by the client."

[280] Freedom Online Coalition, "Draft Report Executive Summary" Working Group 3: Privacy and Transparency (May 2015).

[281] See, Access Transparency Reporting Index, a record of transparency reports published by Internet companies and telecommunications companies.

[282] TPG Holdings, "Re: Report on Responsible Investment in Myanmar" Letter to the US Department of State (1 April 2014).

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4.2

Chapter 4.2
Hate Speech

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4.2

Chapter 4.2
Hate Speech

In this Chapter:

A. Context
- Hate Speech and the ICT Sector
- Hate Speech in Myanmar
- Hate Speech Under International Human Rights Law
  - Defining 'Hate Speech'
  - Permitted Restrictions on expression in International Human Rights Law
- National Legal Framework

B. Field Research Findings

C. Hate Speech Recommendations for ICT Companies
- Operators/Telcos/Internet Service Providers (ISPs)
- 'Over the Top' Services

D. Relevant International Standards and Guidance on Hate Speech

A. Context

Short Explanation of Hate Speech and the ICT Sector

The question of how to address certain forms of speech considered harmful has been the source of long-running global discussions. In particular, the rapid development of ICT platforms, such as the Internet and social media, has enabled wider and instantaneous dissemination of a wide range of content. It is inevitable that some of this content may be national/xenophobic, involve religious and racist hatred that incites discrimination, hostility and violence or even propaganda for war. While international human rights law and many national constitutions around the world provide for a presumption of freedom of expression, there are some legitimate, permitted restrictions of freedom of expression under international human rights law and standards (See Chapter 4.1 on Freedom of Expression). Some countries prioritise freedom of speech over most countervailing interests, even when the speech is filled with hatred. Under international human rights law and in many countries, hate-filled speech forfeits some or all of its free-speech protection in favour of protection for the dignity or equality of those who are attacked. Hate speech is not protected by international human rights law; it is prohibited and frequently punishable under national criminal law.

Hate Speech in Myanmar

In Myanmar, freedom of expression is a sensitive and complex issue. Long-running inter-communal tensions appear to be amplified by new-found expression on the Internet, which is finding a growing audience online. This issue has become particularly evident in

attacks against Muslims, women and LGBT people on popular social media websites.[283] The increasing anti-Muslim rhetoric has been particularly prevalent since the outbreak of inter-communal violence between Muslims and Buddhists in Rakhine State during 2012. While there are not many user-generated platforms currently operating in Myanmar, there are currently over three million users of Facebook, the most popular social media platform, and 12 million users of Viber, the most popular messaging app[284], with the market likely to dramatically expand.

The well-known activist Nay Phone Latt, himself imprisoned under the previous government and now leader of the free speech organisation Myanmar ICT Development Organisation (MIDO)[285] and the anti-"hate speech" campaign Panzagar,[286] has expressed concern that "hate speech" (see below) is damaging new-found freedom of expression in Myanmar. He is concerned that the Government will try to tackle it by creating new laws that may result in further restrictions on freedom of expression. In an April 2014 interview with Myanmar magazine *Irrawaddy* Nay Phone Latt said:

> *"I don't want to ask the government to control hate speech because if they control the hate speech, they will want to control all [opinions]. So it can harm freedom of expression. I prefer to monitor hate speech and report about that than limiting it through law."*[287]

This highlights the difficulties faced in finding the right balance between protecting those who are subject to hate speech and discouraging governments from extending restrictions to other types of speech a government might find offensive, such as criticism. The risk in opening the door to such restrictions may be particularly high in countries like Myanmar with a history of suppression of free speech. Civil society is justifiably concerned about giving up new and hard fought freedoms of expression.

What is said online does have the potential to spill over into real world violence. In July 2014, riots broke out in Mandalay following unconfirmed reports circulated online that a Buddhist woman was raped by Muslims.[288] Such reports proved to be false, but one Muslim and one Buddhist were killed during the violence. While President Thein Sein has publicly condemned the violence, and committed to take action against those who allegedly perpetrated it,[289] the authorities have not done enough to prevent and quash inter-communal violence and violence against Muslims. After the 2012 violence in Rakhine State, international human rights groups reported that the security forces stood by and did not adequately protect Muslims against Buddhist violence, nor did they sufficiently condemn such actions.[290] While some parts of Myanmar civil society are taking action to promote interfaith harmony,[291] they have received anonymous threats via SMS on their phones.

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[283] Inter-communal violence between Buddhists and the Muslim Rohingya minority broke out in Rakhine State during 2012, killing 250 people and displacing almost 140,000 people, most of them Muslims. Al Jazeera English "Facebook in Myanmar Amplifying Hate Speech?" (14 June 2014).
[284] DVB, Viber Leads the Apps for Myanmar Activists, But Is It Safe To Share? (10 August 2015).
[285] See: http://myanmarido.org/en
[286] See: https://www.facebook.com/supportflowerspeech
[287] San Yamin Aung, The Irrawaddy *Hate Speech Pours Poison Into The Heart* (9th April 2014)
[288] Thomas Fuller, New York Times, *Mandalay's Chinese Muslims Chilled By Riots* (12th July 2014)
[289] The Republic of the Union of Myanmar, President Office, *President U Thein Sein Appreciates Communal Unity in Mandalay*, (7 July 2014)
[290] See for example, Human Rights Watch, *All You Can Do Is Pray* (April 2013) p 10 and 15; and p 83 for government response to the violence.
[291] Samantha Michaels, Irrawaddy, *In Burma, Mixed Reactions to Suu Kyi's BBC Statements* (25 Oct 2013)

What is needed is a clear and unequivocal signal from the Government and all political parties condemning incitement to violence and other forms of hate speech and the violence itself. If powerful or influential figures use public addresses, the official press and other avenues to signal the unacceptability of speech that incites violence, hostility, or discrimination by anyone in the country this can already be an important step in limiting such speech with tools already available.

It is feared that the elections could see a rise in hate speech. There are reports that the Government of Myanmar intends to work with Facebook to remove posts which can incite violence [292]. Achieving the correct balance between addressing hate speech and restricting free speech is always challenging. There have been combined efforts in other countries by governments, business and civil society to reduce the spread of inciteful speech during elections that might provide important lessons learned.[293]

Rather than making sweeping restrictions on content or seeking to block whole ICT services that carry such messages, the Government should pro-actively use the power of ICTs to counter rumours with fact and promote messages of non-violence. These signalling actions have not yet been taken and should be a pre-cursor to be tested in the country before any further, more serious steps to restrict freedom of expression are considered.

Hate Speech under International Human Rights Law

Defining 'Hate Speech'

'Hate speech' [*a-moun sagar*] is now a well-used phrase in Myanmar (and globally), but it is not a term recognised in international human rights law. *The International Covenant on Civil and Political Rights* (ICCPR)[294] sets certain restrictions on the right to freedom of expression but does not use the term 'hate speech' (see the discussion below on Articles 19 and 20 of the ICCPR). 'Hate speech' has become a vague term that often encompasses both expression that can be restricted under international law, and legitimate, even if offensive, expression that cannot. It is not always easy to distinguish where freedom of expression ends and legitimate restriction on expression begins. What is considered hate speech in one country may not be considered hate speech in another; it may be region or culture-specific, rooted in a country's history. Hate speech often reflects deep-rooted societal tensions and attitudes, but the lack of an internationally agreed definition of 'hate speech' has made it difficult to clarify how such acts should be dealt with in the real world, including in the digital realm. The term 'hate speech' is, unsurprisingly, not defined in Myanmar's legal framework.

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[292] 'Provocative Facebook posts may be banned ahead of Myanmar elections', Burma Times, 25 August 2015

[293] The disputed 2007 Presidential election in Kenya resulted in an outbreak of post-election violence that left over 1,000 people dead and over 600,000 people displaced. Inquiries into the violence acknowledged the role of SMS messages and blogs in exploiting tensions between ethnic communities and inciting violence. In the run up to the 2013 elections, concerns of another outbreak of violence and fears over the potential of SMS to simultaneously send messages that incite violence led the major telecommunications operator and others to agree on protocols on sending political bulk SMS during the elections. See Table 30 case study and IHRB, "Corporate Responses to Hate Speech in the 2013 Kenyan Presidential Elections: Case Study: Safaricom"

[294] ICCPR, Article 19. Myanmar has not signed the ICCPR but has been consistently urged to do so and will be asked to explain its position on the Covenant at its forthcoming review in the UN Human Rights Council under the Universal Periodic Review procedure tentatively scheduled for 20 July 2015. The ICCPR provisions are based on similar provisions of the *Universal Declaration of Human Rights*.

Permitted restrictions on expression in International Human Rights Law

Freedom of expression does not only protect popular or uncontested sentiments. It also protects views that are unpopular, or may shock, offend, or disturb. This is the nature of freedom of expression: someone may express an opinion others disagree with, but they nonetheless have a right to say it, except in certain narrowly defined circumstances. When it comes to determining what speech should be restricted in order to protect the rights of others, international human rights law provides a very high threshold that must be met before the expression can be legitimately restricted[295] or even prohibited in order to protect a wide space for all kinds of expression.

The former UN Special Rapporteur on the Promotion and Protection of Freedom of Opinion and Expression, Frank La Rue, summarises this in a 2012 report:

> *"The right to freedom of expression implies that it should be possible to scrutinise, openly debate and criticise, even harshly and unreasonably, ideas, opinions, belief systems and institutions, including religious ones, as long as this does not advocate hatred that incites hostility, discrimination or violence against an individual or a group of individuals."*[296]

As such, expression that is "*any propaganda for war*" or "*advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*…"[297] should proactively be prohibited by law according to Article 20 of the ICCPR. Incitement is also recognised as a crime in other international human rights treaties. The UN *Convention on the Prevention and Punishment of the Crime of Genocide* (1948) criminalises a "*direct and public incitement to commit genocide*."[298] The *International Convention on Elimination of All Forms of Racial Discrimination* (1966) requires states to criminalise the dissemination of ideas based on racial superiority and assisting or financing racist activities.[299] One unfortunate omission, however, concerns gender which is not specifically considered in these instruments. Nor is advocacy of hatred that incites violence towards women provided for in the *International Convention on the Elimination of all Forms of Discrimination against Women* (1976).

National Legal Framework

The 2008 Myanmar Constitution does not prohibit incitement to hatred, as is the case in many domestic legal frameworks around the world. It does have constitutional protections against discrimination: Article 348 of the 2008 Constitution guarantees that discrimination by the Union against any citizen is prohibited on the grounds of race, birth, religion, official position, status, culture, sex and wealth. However, the internationally recognised grounds

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[295] Harmful speech can also be restricted under articles 18 and 19 of the ICCPR on the grounds respect for the rights of others, public order, or even sometimes national security if the restrictions meet the tests set out under Article 19 (see Chapter 4.1 on Freedom of Expression for an explanation of the tests).
[296] UN General Assembly, "Promotion and Protection of the Right to Freedom of Opinion and Expression. Note by the Secretary General". (10th August 2011), A/66/90, Para 30.
[297] *ICCPR*, Article 20. Hatred, by itself, would not be subject to restriction. It is only when advocacy of national, racial or religious hatred constitutes incitement to discrimination, hostility or violence that it must be restricted under international law.
[298] *UN Convention on the Prevention and Punishment of the Crime of Genocide* (1948) Article III(c).
[299] Article 4(a): *"Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof."*

of discrimination based on colour, language, political or other opinion and national origin are not prohibited. Moreover, Article 349 applies only to Myanmar citizens.

Several laws in Myanmar provide for broad and vague restrictions of the right to freedom of expression and peaceful assembly (see Chapter 4.1 on Freedom of Expression) that could be used to block such incitement. These are, however, problematic because they can also be used to restrict far wider types of expression. There are widespread concerns globally that governments use prohibition on incitement to prohibit much wider types of expression, using often vaguely defined national laws that opens the door for arbitrary application of these laws. [300] Sections 295(A), 298, 504, and 505 of the *Myanmar Penal Code*, covers "[a]*cts or words which intentionally cause outrage or wound religious feelings"* and "[s]*tatements or insults which intentionally provokes a breach of the peace or causes public mischief*." While these provisions have some overlap with Article 20 of the ICCPR, they cover a much wider set of issues than incitement to hatred and therefore are not sufficiently targeted to meet the legal tests set out in international human rights law to be considered legitimate restrictions of freedom of expression.[301] Phrases like "*causing public mischief*" can be used to justify suppression of politically problematic speech i.e. the type of speech that is protected under international human rights law to ensure open and vibrant democratic debate. The right to freedom of expression is intended to protect speech that may create "*outrage*" among some, to ensure governments do not become the sole arbiter of opinion and expression.

B. Field Research Findings

Methodology

In February-March 2015 IHRB/MCRB undertook qualitative research on social media in Myanmar by conducting a short monitoring survey. While by no means a comprehensive study, it aimed to provide a snapshot of the current atmosphere on social media in Myanmar to gain some contextual understanding of this relatively new issue of hate speech and provide useful observations and recommendations as part of this broader ICT SWIA. This short study drew on the authoritative work of Professor Susan Benesch of the Dangerous Speech Project.[302]

The 'Dangerous Speech' Framework

Academics have noted particular characteristics of speech that rise dramatically before an outbreak of mass violence. There have been efforts to test the direct correlation between such speech and subsequent acts, whatever the means of communication.[303] While such

[300] OHCHR, "Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence" (2012), para 15. See also, OHCHR, "Concept Paper on OHCHR's Expert Workshops on the Prohibition of Incitement to National, Racial or Religious Hatred" (2011).

[301] Article 19(3) of the *ICCPR* provides any restrictions must pass a three-part, cumulative test: be provided for in national law which is clear and accessible to everyone (principle of legal certainty, predictability and transparency); have a legitimate aim or purpose i.e. one of the purposes set out in Article 19.3 (principle of legitimacy); and must be necessary and proportionate to the legitimate aim pursued, meaning that the restrictions must the least restrictive means required and justifiable (principles of necessity and proportionality).

[302] See: http://www.dangerousspeech.org/

[303] See David Yanagizawa, "Propaganda and Conflict: Theory and Evidence from the Rwandan Genocide" (2012). A statistical study shows that killings were 65-77% higher in villages that received the Radio Television

examples of speech may not necessarily fall under the restrictions set out in the ICCPR, the development of the Internet and the use of social media provide a platform that can amplify this kind of speech. Attempts are underway to predict the likelihood of certain speech catalysing real world violence in certain situations.

The Dangerous Speech Framework aims to find patterns in speech common before an outbreak of violence by identifying speech which targets members of a particular group, and which may have the potential to catalyse an outbreak of violence by encouraging people to condone or take part in violent acts. The framework's guidelines are based on five variables[304], used to assess the potential impact of a particular speech.

The most dangerous speech would be one for which all five variables are present:

- A powerful speaker with a high degree of influence over the audience;
- The audience has grievances and fear that the speaker can cultivate;
- A speech act that is clearly understood as a call to violence;
- A social or historical context that is propitious for violence, for any of a variety of reasons, including longstanding competition between groups for resources, lack of effort to solve grievances, or previous episodes of violence;
- A means of dissemination that is influential in itself, for example because it is the sole or primary source of news for the relevant audience.

Questionnaires

MCRB and IHRB developed a questionnaire based on these variables, drawing on an existing questionnaire developed by Professor Susan Benesch and the Kenyan organisation Ushahidi, which ran the Umati [305] project monitoring dangerous speech before and during the Presidential elections in Kenya in 2013.

A mother-tongue Burmese-speaking researcher helped develop the questionnaire[306] for the Myanmar context and conducted research on social media websites in Myanmar. The researcher was asked specifically to search for examples of what they believed to be 'hate speech' and apply the questions outlined in the questionnaire to them. The researcher collected 42 examples of 'hate speech' over a two month period (February and March 2015), which were then analysed.

Reporting the Results

Studying hate speech presents an ethical dilemma: re-publishing examples may perpetuate the sentiments in the message. We have taken the decision not to re-publish statements and photographs here. The presentation of results below summarises the findings.

Libre de Milles Collines (RTLM) signal. Two RTLM executives were convicted of incitement to genocide in 2007. See also Koigi Wa Wamwere, *Negative Ethnicity: From Bias To Genocide* (2003), Seven Stories Press, New York. Pp103-105, which describes anonymous leaflets circulated in Nazi Germany propagating hatred against Jews. More recently, leaflets were circulated provoking ethnic hatred during the break up of Yugoslavia, during the violent end to apartheid in South Africa instigating violence between the Xhosas and Zulus and have also been circulated in Kenya warning certain communities to leave their homes or be killed.

[304] See: http://www.dangerousspeech.org/guidelines

[305] See: http://www.ihub.co.ke/umati

[306] MCRB, IHRB, DIHR, "SWIA Questionnaires" (May 2015).

Key Observations

Human Rights Implicated: Right to freedom of expression, opinion and information; Right to privacy

- All examples on Burmese social media were **written in Burmese**, with one exception.
- 88% of examples contained language **directed primarily at the Muslim community**.
- **12% of these fitted the criteria of the most dangerous forms of speech**:
  - There were several examples of a powerful or influential speaker who capitalised on a fear of the audience, including calls to action such as violence against a community where there have been previous episodes of inter-communal violence.
  - These examples were shared widely on social media, potentially reaching millions of users.
  - However, while this could be considered an influential means of dissemination, social media is not the sole or primary source of news in Myanmar.
- **All of the samples suggested the audience faced danger from Muslims**, either a threat that Muslims are becoming too dominant in society, or that they are spoiling the integrity of Myanmar, for example by marrying Buddhist women.
- **38% of samples included a call to action**, either to discriminate (e.g. by avoiding Muslim-owned shops and businesses), hostility (e.g. that Muslims should be denied citizenship or ethnic minorities should be driven out of the country) and actual calls to kill Muslims.
- **The researcher considered 30% of samples to have fake profile names** and were therefore anonymous or not identifiable. For example, several user names were recognisable as names of characters in Burmese novels, or translated into English as phrases like "*a beautiful evening*". Some user names had more intimidating translations, for example "*the person who guards ethnicity*" or phrases intended to be insulting to Muslims.
- **Around 10% of samples compared Muslims to certain animals.** The Dangerous Speech Framework includes, as part of the variable on 'speech', referring to people as other than human (e.g. vermin, pests, insects or other animals) as an attempt to de-humanise the victim and one indicator of violence.
- **17% of samples used language or symbols specific to Myanmar**, such as images of someone or something being stepped on, considered an insult in Burmese Buddhist society, or using the style of Buddhist teaching or proverb in a derogatory way to Muslims.
- **The posts that were shared most widely** were quotes by well-known Burmese figures, links to news articles or alleged accounts of killings of Buddhists by Muslims (all unconfirmed), or calls to boycott Muslim-owned shops and businesses.
- **The posts that received the most reaction/response were those made by a politician or religious leader.** One politician alleged a Muslim had set a school on fire, which was shared 1,300 times. The same politician advocated the burning of a mosque if it was built in a particular area, and received over 1,000 positive responses. A religious leader's post encouraging people not to give housing to Muslims received 1,300 positive responses and was shared 830 times.
- **When influential figures, such as a politician or religious leader, made statements against Muslims, supporting comments by normal users were the most violent** of the samples, including calls to kill Muslims.
  - In the recorded examples, explicit calls to kill Muslims were posted as comments

in response to a religious leader's post containing allegations that a Muslim man had raped a Buddhist woman.
  - Another call to kill Muslims was a comment on a widely shared news article, believed to be fake, that a Burmese soldier had been killed by a Muslim.
- Most of the examples of posts by normal users had few followers or reactions and were not shared widely. However, **the most popular post** of all the examples in the study was **a normal user sharing the alleged restrictions the country of Japan places on Muslims entering and living in the country**, which is untrue**.** This was shared over 18,000 times.
- Even where the user was not a well-known figure, **content relating to current events in Myanmar received the most reaction,** such as the Presidential revocation of 'white cards',[307] a temporary identification card, from displaced and stateless Muslims applying for citizenship, or advising women to be wary of Muslims during Thingyan (the Buddhist Water Festival in April).

Conclusion of Field Research Observations

The observation provoking the most serious concern from this short monitoring study is the impact of people in positions of influence, such as politicians or religious leaders, making statements that may incite violence, hatred, or discrimination. These public statements appear to encourage other users to repeat the sentiments, and even go further, such as issuing calls to kill people. This is particularly worrying as Myanmar approaches elections, because they have the potential to incite violence.

C. Hate Speech: Recommendations for ICT Companies

- **Identify the potential impacts a company may have**: For example, decisions taken by ICT companies on how to tackle hate speech have the potential to impact the right to freedom of expression by:
  - Providing access to platforms that allow user-generated hate speech content to flourish;
  - Making their own internal decisions to remove content
  - Responding to government requests to block access to certain websites or remove particular content that may be hate speech or may be other types of permitted speech that the government has chosen to label as hate speech.
- **Understand the legal framework:** As outlined above and in Chapter 4.1 on Freedom of Expression, the legal framework that could be applied to online communications contains vague and undefined terms. While these vague terms could be used to block access to national, racial or religious hatred in line with Article 20 of the ICCPR, those same provisions are so broadly worded that they could result in legitimate content being removed or blocked as well. The Government or other groups' (such as religious or ethnic groups) may request or require that companies restrict freedom of expression that does not fall within the permitted restrictions under Article 19 or the prohibitions under Article 20. In such cases, an ICT company will find it challenging to

[307] Radio Free Asia, Myanmat Authorities Step Up Collection of Temporary Identification Cards (6 April 2015).

meet its responsibility to respect human rights under the UN Guiding Principles, and may finding itself potentially contributing to government or non-state actors' abuses of individuals' human rights. Likewise, because the government does not have precise laws prohibiting hate speech, ICT companies may permit the transmission or hosting of expressions that would be considered incitement to national, racial or religious hatred.

- **Understand the local context:** It is important that ICT companies understand the context in which they are working and have processes in place to deal with Government and others' attempts to restrict freedom of expression. They need to be able to assess whether the requests are legitimate and do not amount to censorship and to understand what may be hate speech and therefore appropriately prohibited or deleted on platforms or services. Moreover, many services that can be accessed in Myanmar are provided by international companies which are not based in the country, and they may not even have offices or staff on the ground. They may therefore not have experience of the country or be aware of cultural and political sensitivities or have the appropriate language capabilities to screen content posted on their site. Additional measures will need to be taken to ensure a realistic and systematic understanding of the local context, such as obtaining independent expert advice. (See Chapter 4.1 on Freedom of Expression).

Different players in the ICT value chain will have different responsibilities:

Operators/Telcos/Internet Service Providers (ISPs)

- **Put in place processes to deal with Government requests**: Companies that provide Internet access may be asked by the Government to block access to whole websites due to the perceived spread of hate speech.[308] This reportedly happened in Myanmar during the riots in Mandalay in 2014. A high-ranking police officer said in an interview that the government had ordered the blocking of a popular social media website to stop the spread of "*unverified news*", which coincided with a curfew imposed on Mandalay residents.[309] The reason for blocking the website was to prevent the spread of further rumours fuelling violence. However, as noted above, because Myanmar laws are often vague and not aligned with international human rights law, such requests may also cover legitimate expression that should not be blocked or taken down. It is currently unclear how requests for blocking websites are made to ISPs in Myanmar, either by law enforcement agencies directly or a request made through the regulator. It is also unclear under what circumstances requests to block whole websites can be made as there is little legislation covering this area and therefore ISPs appear to be voluntarily blocking websites. In other countries, the most common reason for blocking websites is related to child exploitation, terrorism or copyright infringement.
- **Develop clear processes for blocking websites**: In the example of the Government request above, the order to block this particular website would have been made to the operator or ISP providing Internet access. Blocking whole websites may prevent

[308] Facebook's Government Requests Report noted that in the period July-December 2014, the company "restricted access to 5 pieces of content reported by the President's Office based on sections 295(A), 298, 504, and 505 of the *Myanmar Penal Code*, which covers "*Acts or words which intentionally cause outrage or wound religious feelings"* and "*Statements or insults which intentionally provokes a breach of the peace or causes public mischief*." https://govtrequests.facebook.com/country/Myanmar/2014-H2/

[309] Global Voices "Blocking Facebook: A Hot New Trend in Southeast Asia?" (11 July 2014). Original article in Burmese at http://burma.irrawaddy.org/interview/2014/07/04/61420.html.

certain people from spreading rumours, but it also prevents everyone else from seeking, receiving and imparting information and prevents authorities using it to disseminate factual information, counter rumours and appeal for calm. This may set a worrying precedent for blocking websites in the future that the government simply does not like. It is important that processes are put in place that make clear under what circumstances websites can be blocked, and how a request is made to an ISP. Requests to block from the Government of Myanmar should be made in writing; be accompanied by a court order/judicial authorisation that sets out the legal justification for the request and be time-bound.ISPs must check that requests are made in accordance with the law, and have the opportunity to clarify or request further information if needed.

'Over the Top' Services

- **Put in place processes to deal with requests from Government and users**: It is unlikely that an over the top company, such as social media sites, search engines, and blogging platforms, will be notified of or involved in a decision by the Government to cut off access to their whole service, as in the case of ISPs. They are more likely to receive requests from governments or users to remove particular pieces of offending content. Companies usually take the decision to remove content based on their own Community Standards or Terms and Conditions, which often set out what can and cannot be said on their platforms. Freedom of expression may be adversely impacted if the company's standards are not aligned with international human rights law and/or it does not properly assess the human rights impacts of the takedown request from the government or users. An example is removing content that merely expresses ideas and opinions the Government or others object to but that does not fall into a category of speech that can legitimately be restricted. However, content that falls into the category of incitement can, and should be, blocked.
- **Make Terms of Service accessible**: As most over the top companies set their own policies about which content can and cannot be posted, it is important that these Terms of Service are aligned with international human rights standards. Users then need to be aware what content is permissible on certain online services. 'Hate speech' is a relatively new concept in Myanmar and what users consider to be hate speech may differ from person to person. For example, during field research on the ground in Myanmar, some people considered swear words or general insults to be hate speech. It is important that a company's terms of service are translated into Burmese and ideally other ethnic languages, none of which are formally covered by major social media platforms. However users may use either non-Myanmar languages or transliterated forms of Myanmar ethnic minority languages. The company therefore risks hosting hate speech in any of those languages. This is an area where companies need to build up their capability to be able to screen and manage content in all languages on their sites.
- **Develop and promote reporting mechanisms:** Most online platforms have a mechanism for users to report content that is illegal, or falls under categories that the company would remove as it contravenes their terms of service, such as a user receiving abuse. As social media companies do not actively monitor all the content posted on their platform, the reporting process is important. It is unlikely the company would see this content otherwise. It also helps the company 'take the temperature' of societal attitudes and understand the context in which they are working. One of the ways in which the spread and impact of hate speech can be reduced is through a well-functioning mechanism of reporting such speech to the company hosting it, followed by a swift process of removing it from the site. This depends on (as noted above),

terms of service that are aligned with international human rights standards (given that the government currently does not have clear laws or guidance on this issue) and a transparent and accessible process for users to report content they consider hate speech. One company has developed a 'market specific' reporting mechanism unique to the Myanmar context, with an option to report specific kinds of content. One option is to report content that is, ***"****hateful towards a race, religion, gender, sexual orientation or ability. Examples: racism, insulting religious groups, anti-gay posts".* Another is to report content which is, *"a rumour or false information. Examples: false news stories, rumour based on the conflict of religious groups".*

- **Promote awareness of Terms of Service and reporting mechanisms.** Overall there is a low level of awareness of the impact of hate speech in Myanmar, and what may or may not be acceptable to post online. Many users in Myanmar are unaware of reporting functions, or do not know how to use them, or understand what action the company may take if they do report content. Companies could consider initiating a public awareness campaign focused on platform-specific guidelines and the impacts of hate speech spread through media. Materials need to be translated into local languages. Facebook Community Standards are now available in Burmese.
- **Develop other options to respond to hate speech:** Efforts are underway by civil society to educate users and combat hate speech in society. Telcos and over the top companies appear aware of the issue of hate speech in Myanmar, and some are supporting local groups to spread messages of non-violence. For example, Panzagar aims to promote responsible use of social media, and raise awareness of the implications resulting from online behavior. Panzagar has partnered with local graphic designers and Facebook to create a set of online 'stickers' with cartoons and peaceful messages, similar to emoticons, which can be downloaded and inserted onto user profiles, or included in online chat functions.[310]

D. Relevant International Standards and Guidance on Hate Speech

Relevant International Standards:

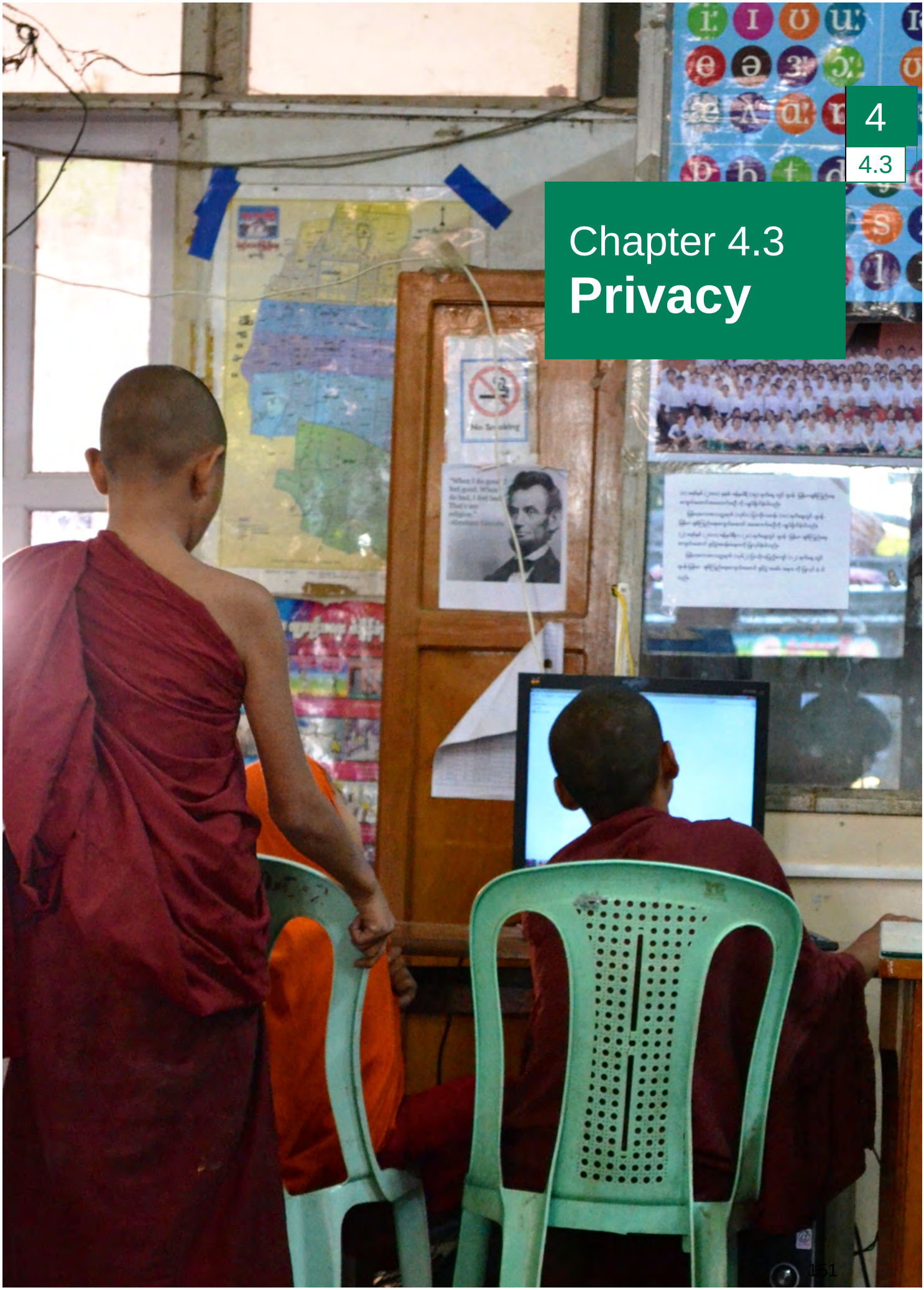
- UN OHCHR, "Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression" A/67/357 (7h September 2012).
- OHCHR "Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence" (2012).

Relevant Guidance:

- ARTICLE 19, "Towards an interpretation of Article 20 of the ICCPR: Thresholds for the prohibition of incitement to hatred (Work in Progress)". A study prepared for the regional expert meeting on article 20, Organised by the Office of the High Commissioner for Human Rights, Vienna, February 8-9, 2010.
- The Dangerous Speech Project
- United States Institute of Peace, Wielding Technology to Combat Dangerous Speech in Myanmar – PeaceTech Exchange Myanmar
- NipeUkweli – This is an initiative based in Kenya to counter negative online content by correcting false statements and spreading positive messages.

[310] Global Voices, "Can #Panzagar 'Flower Speech' Facebook Stickers End Hate Speech in Myanmar?" (22 Feb 2015).

Chapter 4.3
Privacy



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4.3

Chapter 4.3
Privacy

In this Chapter:

A. Context
- Data Privacy and Data Protection
- Concerns about Privacy and Data Protection in the ICT Sector
- Data Privacy in Myanmar
- International Human Rights Law on Privacy
- The Myanmar Legal Framework and its Current Application

B. Field Research Findings

C. Recommendations for ICT Companies
- General
- Web-Based Services

D. Relevant International Standards and Guidance on Privacy Issues

A. Context

Data Privacy and Data Protection

There are three dimensions to the right to privacy that are implicated by the collection, storage, use and access to digital information by ICT companies:

- data privacy or protection (the term used may differ from country to country[311]) of data held by businesses (covered in this Chapter 4.3 on **Privacy**),
- surveillance, including lawful interception and access to communications data (see Chapter 4.4 on **Surveillance**), and
- the protection of such data against attacks or threats of attack for criminal or other harmful purposes (see Chapter 4.5 on **Cybersecurity**).

In today's digital economy, the amount and type of personal information generated and stored electronically is unprecedented, ranging from email addresses, to bank account numbers, to national ID numbers. Whenever users interact with technology, such as mobile services or the Internet, 'communications data' (as it is commonly referred to in Europe), or 'metadata' (as it is commonly referred to in the U.S) is created and is typically stored by the service provider.[312] This type of data is created by a wide range of interactions with Internet services including email, web browsing, social media, search

[311] See: Baker Hostetler, "2015 International Compendium on Data Privacy Laws" (2015) and Norton Rose Fulbright "2014 Global Data Privacy Directory" (2014). Also see Francoise Gilbert "Privacy vs. Data Protection: What Is The Difference?" (1 October 2014).

[312] The National Information Standards Organization (NISO) defines metadata as "*structured information that describes, explains, locates, or otherwise makes it easier to retrieve, use, or manage an information resource.*" NISO, "Understanding Metadata" (2004), pg. 16. The former UN Special Rapporteur on Freedom of Opinion and Expression expressed particular concern over the increasing amount of metadata generated by ICT usage and its implication for user privacy. See OHCHR, "Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue" A/HRC/23/40 (17 April 2013).

engines, VoIP (e.g. Skype) and mobile phones. Globally, ICT companies use this information in various ways. For example, free applications or services frequently offer the advertisers who support them a platform for user-targeted advertisements, based on data collected from users. Geographic location data can be used to identify where a user is physically located and provide location based advertisements or services such as taxis, restaurant recommendations, or directions.

As a country's ICT sector grows, more and more personal data is collected and stored by governments and companies providing goods and services online. This more extensive and innovative use of personal data brings greater economic and social benefits, but also increases privacy risks.[313] How the information is shared and who has access to it determines whether or not privacy is protected and respected.

In many countries, national data protection laws require companies to secure and protect such information from access by unauthorised third parties. Data protection or data privacy laws[314] should safeguard user privacy. Such protections are intended to regulate how, when, and why a user's personal information or data may be used or stored by a third party.

They should put limits on governments and companies concerning the collection, storage and sharing of personal data generated by using ICTs when trading, or using goods and services online. This should ensure that it is gathered for a legitimate purpose and protected from misuse. There should be restrictions or limits in each country's data protection or data privacy legislation as to how this information is collected, stored and shared by companies for commercial reasons, or by governments obtaining this kind of information for services such as voting registration, health records or tax purposes.

Legislation that regulates data privacy typically details a consent mechanism to inform and request permission from users, provides a legal definition of what constitutes personal data, mandates an allowable timeframe for the use of any data after consent is given, and includes regulatory mechanisms for pursuing grievances about the use of data. However many national frameworks lack 'use limitations', instead allowing the collection of data for one legitimate aim, but subsequent use for others.[315] In addition, a lack of a data protection framework means there is no opportunity for individuals to seek redress or compensation in cases of unauthorised sharing or use of personal data.[316] Myanmar currently lacks a data protection law.

[313] OECD, "The OECD Privacy Framework", (2013).
[314] Outside Europe, the term 'data protection' and 'data privacy' is used to commonly mean the same thing.
[315] OHCHR, "The right to privacy in the digital age", A/HRC/27/37, (June 2014), para. 27.
[316] Privacy International, "UN Universal Periodic Review, Stakeholder Report 23rd Session, Myanmar, The Right To Privacy In Myanmar", (March 2015), para 32.

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4.3

Concerns about Privacy and Data Protection in the ICT Sector

The increasing availability of Internet services accessed via a personal computer (PC), laptop, mobile phone or other devices, has brought many benefits and is seen as crucial to continued innovation and development. But it has given rise to numerous privacy concerns about the data that is collected, stored and shared when using such services. The collection and use or misuse of sensitive data has the potential to be used for discriminatory purposes. This could include data on racial origin, political opinions or religious or other beliefs, personal data concerning health or sexual life, genetic data, biometric information, trade-union membership, and data relating to criminal convictions. Unauthorised intrusions to access or destroy data stored for use in criminal purposes – such as unauthorised access to bank accounts – is an issue rising rapidly up the list of key concerns for many businesses. New business models based on the collection and sale of a user's data by the company gathering the data, where data is used for purposes not explicitly revealed to the user who provided the data and without their permission, raise concerns about the respect for user privacy.[317]

While 'Big Data'[318] may carry important benefits, it also carries serious risks. Data mining of large data sets has the potential to be discriminatory. It may discriminate against specific groups and activities (such as in profiling) and it may be used to draw conclusions about large groups of people who may be excluded from data collection, further perpetuating exclusion.[319] In addition to more generalised areas of data protection, there are other areas of online protection that have generated real concern, particularly around the protection of children who are active online.

Table 38: Toward a Social Compact for Digital Privacy and Security[320]

Below are excerpts of the core elements that the Global Commission on Internet Governance advocates in building a new 'social compact' for digital privacy and security:

- "*Fundamental human rights, including privacy and personal data protection, must be protected online. Threats to these core human rights should be addressed by governments and other stakeholders acting both within their own jurisdiction and in cooperation.*
- *Businesses or other organisations that transmit and store data using the Internet must assume greater responsibility to safeguard that data from illegal intrusion, damage or destruction. Users of paid or so-called 'free services' provided on the Internet should know about, and have some choice over, the full range of commercial*

[317] The Global Commission on Internet Governance was established in January 2014, to articulate and advance a strategic vision for the future of Internet governance. With work commencing in May 2014, the two-year project will conduct and support independent research on Internet-related dimensions of global public policy, culminating in an official commission report.
[318] 'Big Data' refers to large datasets that are collected and analysed to find correlations or predict trends. For example, it can be used by business to predict which products will be popular, but can also be used for social issues, such as predicting outbreaks of disease in certain areas.
[319] See Privacy International, "Data Protection" (last accessed August 2015). See also, European Commission, "EU Data Protection Reform and Big Data, Factsheet" (April 2015).
[320] Global Commission on Internet Governance, "Toward a Social Compact for Digital Privacy and Security Statement" (2015).

use on how their data will be deployed, without being excluded from the use of software or services customary for participation in the information age. Such businesses should also demonstrate accountability and provide redress in the case of a security breach.

- *There is a need to reverse the erosion of trust in the Internet brought about by the non-transparent market in collecting, centralising, integrating and analysing enormous quantities of private information about individuals and enterprises — a kind of private surveillance in the service of 'big data', often under the guise of offering a free service."*

Increasingly, there are calls for standards and accountability mechanisms to bolster confidence in the use of the Internet. 'Data due process', access to remedy, and greater transparency – by governments and business – are all being advocated as important steps in maintaining an open and accessible Internet.

In addition, because companies may hold a lot of personal information, they may be subject to requests to hand over information about a user to a government - with or without legal authorisation - in a manner that is not in line with human rights. When a country's law enforcement or intelligence agencies request, access or intercept information collected and stored by ICT companies to support law enforcement or national security investigations, this triggers privacy concerns. This dimension is addressed in Chapter 4.4 on Surveillance.

Privacy in the Myanmar Context

In Myanmar, businesses and Government are transitioning from storing information in filing cabinets to electronic databases. Data can now be stored on remotely located servers, and accessed over the Internet, otherwise known as 'the Cloud'.[321] It means that users have access to an almost unlimited amount of storage of their data, which can be accessed from any computer. Cloud storage is most commonly used for email (such as Gmail) and storing data (such as Dropbox).

The improved efficiency and ease of access provided by digitally storing information is obvious, as are the potential human and commercial risks and need for accompanying legal frameworks. Myanmar companies who long operated in isolation may be finding that data protection requirements are now necessary if they are involved in the cross-border exchange of commerce and data. ASEAN has already put in place frameworks on data protection, as have other regional bodies,[322] including the EU, where appropriate data protection is a prerequisite of before any data can be transferred from the EU.[323]

[321] In the simplest terms, cloud computing means accessing files and applications over the internet, rather than on personal hard drives or servers, via third party services.
[322] See in particular, the basic principles on data protection in the OECD, "Guidelines Governing The Protection Of Privacy And Transborder Flows Of Personal Data" (2013).
[323] Under the EU Data Protection Directive, personal data may only be transferred to third countries i.e. countries outside of the European Union, if that country provides an adequate level of data protection. This created an incentive for some countries to increase data protection standards, due to the economic benefits through increased trade with EU countries.

Equally, whereas protection of privacy was until recently an unknown concept in Myanmar, awareness is growing among the Myanmar business community about the importance of personal data protection even without mandated privacy standards, such as for emerging services such as mobile money.[324] As users weigh competing services, companies that fail to provide strong data safeguards may start to find they lose customers, although currently, the public's awareness of the need to protect personal data is quite low. A recent high profile case involving a (now dismissed) employee of an operator giving unauthorised access to communications data to a friend will have further served to raise awareness[325].

In May 2013, Human Rights Watch sent a letter to mobile network operators shortlisted in the MCIT telecommunications license process seeking clarification regarding how new telecommunications firms entering Myanmar would seek to mitigate potential human rights impacts given Myanmar's lack of legislation related to privacy, censorship, and interception. Both Telenor and Ooredoo issued responses. Their company positions on data privacy took different approaches. MPT and Yatanarpon Teleport have not issued public statements on data privacy. Myanmar's remaining Internet service providers also do not provide any clarification on data privacy policies on their websites.

Ooredoo highlighted its "*commitment to Myanmar to use Singapore as a benchmark"* and the intent to "*implement policies and procedures that are compliant with the 2012 Singapore Data Protection Act.*"[326] The Singapore *Data Protection Act* (PDPA) defines personal data as "*data, whether true or not, about an individual who can be identified from that data; or from that data and other information to which the organisation has or is likely to have access.*" [327] The PDPA requires private sector companies to notify and provide individuals with an explanation when their personal data is collected and disclosed. With regard to telecommunications, the Singapore Personal Data Protection Commission has issued advisory guidelines for the telecommunications sector.

However, the Singapore PDPA does not provide adequate protection for human rights. It lacks references to specific and relevant human rights principles under international law, exempts Government agencies and entities working on their behalf, has ambiguous limitations on legitimate purpose for data collection and disclosure under the PDPA, exceptions to individual consent requirements, poor transparency and accountability mechanisms, and broad language that allows for organisations and data to be exempt from PDPA regulations in the future.[328]

Telenor's response to Human Rights Watch's letter cited Telenor's "*well established privacy and data protection regime*".[329] A section of the Telenor website explains that, "*Telenor Group only processes personal data for the purposes the data was originally*

[324] See Myanmar Times, "Preparing the Financial System for Digital Attacks" (March 2015)
[325] 'Ooredoo data breach brings legal action', 3 September 2015, Myanmar Times.
[326] Ooredoo response to Business and Human Rights Resource Centre's request for a response to HRW's Report: Burma Telecom Winners Should Safeguard Users
[327] Personal Data Protection Commission Singapore, "Legislation and Guidelines: Overview" (last accessed August 2015).
[328] Internal analysis prepared for the Institute of Human Rights and Business.
[329] Human Rights Watch, "Response from Ms. Oldgard, Vice President, Head of Group Corporate Responsibility, Telenor Group" (4 June 2013).

collected, and only for as long as the purpose exists. The companies in Telenor Group will ensure that:

- "Persons we process data about are properly informed when their personal data is being collected;
- All persons we process information about have the right to obtain relevant information on the processing of personal data related to them;
- Persons we process and store data about are able to exercise user choice and control and have appropriate rights to correct or delete their personal data;
- Personal data are kept in a form which permits identification of persons for no longer than is necessary for the purposes for which the data were collected;
- Transfer of personal data does not compromise an adequate level of protection;
- Risk based, planned and systematic measures are undertaken to ensure satisfactory information security in connection with the processing of personal data;
- The processing of personal data is properly documented;
- Appropriate training is given to relevant personnel involved in the processing of personal data."[330]

Telenor specifically cited its participation in privacy projects with the GSMA (where it is a full member),[331] and the European Telecommunications Network Operator's Association (ETNO) working group on data protection[332]. In their Mobile Privacy Principles, the global industry association GSMA defines personal data more specifically than Singapore does in the PDPA. While acknowledging that personal information ultimately depends on its local legal definition, the GSMA defines personal data as:[333]

- "Any data that is collected directly from a user (e.g. entered by the user via an application's user interface and which may include name and address, credit card details);
- Any data about a user that is gathered indirectly (e.g. mobile phone number, email address, name, gender, birth data, location data, IP address, IMEI, unique phone ID);
- Any data about a user's behavior (e.g. location data, service and product use data, website visits);
- Any user-generated data held on a user's device (call logs, messages, user-generated images, contact lists or address books, notes, and security credentials."

The ETNO works closely with the GSMA, and focuses on the review of legal frameworks impacting data protection in Europe. In terms of data protection and privacy, the draft EU General Data Protection Regulation (GPDR) is regarded as providing high standards in the protection of personal data by the international community.[334] As part of that process, the ETNO has supported the notion that there should be no preferential treatment in data

[330] Telenor Group, "Our Privacy Position" (last accessed August 2015).
[331] GSMA, "Mobile and Privacy" (last accessed August 2015). The GSMA is an industry association representing mobile operators worldwide.
[332] ETNO, "Data Protection, Trust & Security" (last accessed August 2015).
[333] GSMA, "Mobile Privacy Principles" (2012).
[334] See European Commission, "Proposal for a Regulation Of The European Parliament And Of The Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)" (25 January 2012). The legislation is not without criticism from global technology firms such as Google who have recently complied with users' "right to be forgotten and to erasure" requests under Article 17 of the GPDR. Telenor Myanmar is a wholly owned subsidiary of the Telenor Group per the license requirements stipulated by MCIT. Telenor Group is headquartered in Oslo, Norway. Norway is not a member state of the European Union but has implemented the EU Data Protection Directive 95/46/EC.

protection requirements between the private and public sectors.[335] This is a notable difference between the GPDR and the PDPA in Singapore.

As the UK NGO Privacy International notes in their submission to Myanmar's Universal Periodic Review (UPR) at the Human Rights Council, whilst some ICT companies, such as Telenor, have developed and adopted their own data protection and retention policies, the lack of national legislation regulating data retention and the circumstances under which the Government can request access to user data means that such internal policies may not be strong enough to protect the privacy of users and secure the freedom of services.[336]

In recent years, many other countries have passed data protection or data privacy legislation for the first time or updating them in response to the impact of ICTs on privacy.[337] In Asia, in addition to Singapore, Malaysia, and Taiwan have a "*Personal Data Protection Act*".[338] The law of Japan is called "*Act on the Protection of Personal Information*".[339] South Korea's law is called the "*Protection of Personal Data Act*".[340] The equivalent law of the Philippines is called the "*Data Privacy Act*".[341]

International Human Rights Law on Privacy

Every person has the right to privacy under international human rights law, including privacy of his/her communications.[342] Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR) provides:

> *"1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*

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[335] ETNO, "ETNO supports the choice of the legal instrument for the future Data Protection framework" (4 July 2014).
[336] Privacy International, "UN Universal Periodic Review, Stakeholder Report 23rd Session, Myanmar, The Right To Privacy In Myanmar" (March 2015), para 33. See also A Alderaro, "Digitalizing Myanmar: Connectivity Developments in Political Transition", *Internet Policy Observatory*, (2014) pg. 10.
[337] In the European Union, the suite of laws protecting personal data are currently being updatedIn 2012, the European Commission proposed to unify data protection in the EU under a single law, the General Data Protection Regulation (GDPR), to take into account technological developments such as social networking and cloud computing. A draft was presented at the European Parliament in March 2014. A final version is expected to be adopted by end 2015. See: Greens/EFA "EU General Data Protection Regulation State of play and 10 main issues by Jan Philipp Albrecht" (17 January 2015) and European Commission, "Commissioner Jourová: Concluding the EU Data Protection Reform is essential" (28 January 2015).
[338] See Malaysia and Taiwan *Personal Data Protection Acts*.
[339] Government of Japan, *Act on the Protection of Personal Information Act No. 57* (2003)
[340] Korean LII, "Personal Information Protection Act" (last accessed August 2015). See also Francoise Gilbert, "Privacy v. Data Protection. What Is The Difference?" (1 October 2014).
[341] Republic of the Philippines *Act No. 10173 2012 Data Privacy Act*.
[342] The right to privacy is also include in a wide range of international and regional human rights instruments, signalling its wide acceptance: Article 14 of the United Nations Convention on Migrant Workers; Article 16 of the UN Convention on the Rights of the Child; Article 10 of the African Charter on the Rights and Welfare of the Child; Article 4 of the African Union Principles on Freedom of Expression (the right of access to information); Article 11 of the American Convention on Human Rights; Article 5 of the American Declaration of the Rights and Duties of Man, Articles 16 and 21 of the Arab Charter on Human Rights; Article 21 of the ASEAN Human Rights Declaration; and Article 8 of the European Convention on Human Rights. See a compilation of privacy references in international and regional human rights instruments and see also http://gilc.org/privacy/survey/intro.html

2. Everyone has the right to the protection of the law against such interference or attacks."

Legitimate Restrictions on the Right to Privacy

Article 17 of the ICCPR on privacy is less specific about permissible reasons for restricting the right to privacy as compared to Article 19 on the freedom of expression (See Chapter 4.1 on the Freedom of Expression). Restrictions on the right to privacy must be neither "unlawful" nor "arbitrary".

A restriction is "unlawful" when the interference is not authorised by States on the basis of national law authorising interference. The national law must be sufficiently accessible, clear and precise and also must not conflict with other provisions of the ICCPR, such as the prohibition on discrimination, or the country's own constitution.

The protection against "arbitrary interference" means that the interference should be reasonable in the particular circumstances. It must be in proportion to the aim, and the least intrusive option available to accomplish the aim, and be necessary in the circumstances for reaching a legitimate aim.[343]

The Myanmar Legal Framework and its Current Application

The 2008 Constitution

Most countries have provisions to protect privacy as part of their constitution. At a minimum, these provisions usually include the rights of privacy in the home and of communications. The 2008 Constitution of Myanmar provides certain privacy protection:

"357. The Union shall protect the privacy and security of home, property, correspondence and other communications of citizens under the law subject to the provisions of this Constitution."[344]

The constitutional provisions provide for a wide scope of protection by using the term "*other communications*" but the protections are available to citizens only and are not specific about the kinds of protections it will offer. Moreover, the guarantees are "*subject to the provisions of this Constitution*" (Art. 357), which has numerous restrictions on these constitutional guarantees that are quite broad. There has been little constitutional jurisprudence developed in Myanmar, meaning there is little to rely on that might limit the application of these broadly worded restrictions.

[343] The limitation must also be shown to have some chance of achieving that goal while at the same time not being so overly restrictive that the restriction makes the exercise of the right meaningless. The onus is on the authorities seeking to limit the right to show that the limitation is connected to a legitimate aim. Where the limitation does not meet these criteria, the limitation would be unlawful and/or the interference with the right to privacy would be arbitrary. Pillay report

[344] *Constitution of Myanmar* (2008).

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Current Legal Framework and Gaps

Although the Constitution declares that privacy will be protected under the law, currently there are no separate privacy laws in Myanmar. In addition, there is no legal framework on data protection or data privacy. A Consumer Protection Law was adopted in March 2014 but its focus is on food safety[345]. As part of its ASEAN membership, Myanmar has agreed to develop best practices on data protection by 2015 but there have been no announcements to date on forthcoming plans.[346] Civil society have highlighted that Myanmar has an opportunity to leapfrog its peers in regulating privacy, data protection, Internet governance, freedom of speech/expression (partially due to the lack of legacy regulations) and to ensure that the push to improve access does not compromise these other issues. A civil society coalition suggested a proactive discussion among Government and civil society and operators, rather than waiting until the Government demands 'private' data (for purposes of national security).[347]

The integrity of technical processes for protecting user data in Myanmar is unclear, particularly in regards to Myanmar's National Certificate Authority. Certificates have significant impacts on user privacy, as they are used to verify a chain of trust whenever a user submits personal information (such as an account username and password) to an online service. These certificates are used to verify the website's validity and prevent users from submitting data to an unauthorised third party. Myanmar's certificate authority was established under the *Electronic Transaction Law* (No.5/2004).[348] Policies and practices related to Myanmar's existing certificate authority are unclear. Websites for Myanmar's Root Certification Authority, and Yatanarpon Certificate Authority are currently offline. As the Internet now represents a global community, a lack of clear processes and transparency among certificate authorities puts users' private information at risk and promotes distrust. Recently, Google and Mozilla took steps to de-trust all certificates signed by China's National Certificate Authority.[349]

Privacy International also noted in the UPR submission,

> *"In 2013, the government announced that it would replace the paper National Registration card with a smarter digital identification card to include biometric data. Whilst it seems plans have been put on hold for such a change because of financial constraints, it is an issue that must be closely monitored as if digitised the data stored will have privacy implications which will need to be considered to ensure that the right to privacy of citizens and their personal data are protected."*[350]

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[345] 'Burma President approves consumer protection law' Irrawaddy, 17 March 2014
[346] ZicoLaw, "ASEAN Insights, Personal Data Protection" Issue 4 (7 November 2013).
[347] Verena Weber "Diversifying the global content and apps market" (last accessed August 2015).
[348] *Myanmar Electronic Transactions Law* (2004).
[349] In April 2015, both Google and Firefox stopped trusting certificates issued by China Internet Network Information Center (CNNIC). Google noted that CNNIC had signed fake certificates for Google domains, while Firefox noted that CNNIC lacked documented PKI practices. For additional information please see: Emil Protalinski, VentureBeat "Google and Mozilla decide to ban Chinese certificate authority CNNIC from Chrome and Firefox" (April 2nd 2015)
[350] Privacy International, "UN Universal Periodic Review, Stakeholder Report 23rd Session, Myanmar, The Right To Privacy In Myanmar" (2015), para 33.

In 2014, the Myanmar Government held a public consultation on the issue of mandatory registration of personal information of SIM card and mobile phone purchasers' cards.[351] This indicates the Government may not be considering the data privacy implications of its telecommunications regulations. The mandatory registration of SIM cards in other jurisdictions has shown that there are a range of unintended consequences, prompting other governments to consider and then reject the idea.[352] MCIT proposed that mandatory SIM registration would enable new and innovative services (e.g., mobile money and mHealth services). However, where such sensitive data is exchanged, these services should be required to register for extra mobile-enabled services; such registration should always be service focused. Mandatory registration could act as a barrier to accessing mobile services because people may not have an address or registration number or may be reluctant to provide personal details due to distrust of the Government.

MCIT is yet to define its procedures for the lawful interception of user communications, or access to communications data (See Chapter 4.4 on Surveillance), though it has committed to doing so. This is a crucial and important procedure that requires further consultation and consideration before any mass collection of customer data through mandatory registration is considered. Without data retention requirements, large amount of data, held for an indefinite amount of time, would be susceptible to unlawful uses, including unauthorised surveillance, leaks, and security breaches resulting in negative, and in some cases, severe impacts on the enjoyment of the right to privacy.

B. Field Research Findings

Privacy Policies by Myanmar Companies

Human Rights Implicated: Right to privacy

Field Assessment Findings

- **MCRB reviewed the websites of 73 companies** as part of the Transparency in Myanmar Enterprises project (TiME) (or 'Pwint Thit Sa' in Burmese) to collect a small sample of the use and disclosure of privacy policies and protections by Myanmar companies.[353]
- Of the 73 company websites reviewed, **only 6 explicitly explaine how they handled and used** customers', users', workers' and others' data.
- **Only 1 company actually adopted a formal privacy policy** outlining in detail its security and data handling measures**.**
- **4 company's statements were contained within other operational policies,** such as a code of conduct or code of ethics**.**
- **1 ISP explicitly did not commit to any level of data protection**, instead confirming that it may monitor its service from time to time and disclose any information regarding customers or their use as required under national law, regulations, Government requests, or that it saw fit.
- **A majority of the companies reviewed presented no accessible information** about the ways in which they handle and use data.

[351] See: MCRB, "MCRB calls for Further Consideration of the Impacts of Requiring SIM Card Registration in Myanmar" (21 May 2014).
[352] Ibid.
[353] MCRB, "Pwint Thit Sa Project (TiME)" (2015).

- One company confirmed that it would **"*only*" guarantee the privacy of the company email system to the extent required by law**, whereas a separate statement in its Communications Policy stated that as a leading institution in Myanmar it would strive to be as open and transparent as possible while protecting privacy and personal information.

Stakeholder Engagement and Grievance Mechanisms

Human Rights Implicated: Right to privacy

Field Assessment Findings

- **The concept of privacy:** The concept of privacy as outlined in international human rights standards is not fully understood in the context of Burmese culture, in which people live in close proximity and often with extended family, making the notion of a truly private space in Myanmar uncommon. Stakeholders note that this lack of familiarity with the concept carries over into the digital space.
- **Lack of user concern about privacy**: There is, therefore, a lack of understanding of the importance of the right to privacy online, the basic steps users should take to protect it, e.g. using passwords to protect their online accounts and information, and the consequences of a failure to protect one's own privacy e.g. posting personal information such as bank details online.
- **Lack of awareness on appropriate protections on social media**: Users on social media were observed sharing sensitive personal data including bank statements and checks for donations or even more sensitive information about health status without appropriate protections. Users reported being unaware of how to configure privacy settings in their social media accounts. Users also reported being unaware of how to report on content on social media.
- **Lack of policies or clear communication of policies**: Data retention policies were absent, or in some cases not clearly communicated to the customer/user even when internally present (e.g. 5 years for retention of customer data on paper).
- **SIM Card Registration:** The Ministry of Communications and Information Technology (MCIT) has mandated a system that in theory requires an ID, which is recorded, to buy a SIM card. However in practice, people use their own ID and buy multiple SIM cards for their friends and family members. People have raised concerns regarding data protection and their ID being associated with another user's activity incorrectly. It was noted that in many other countries (e.g. Thailand and India), people are not required to show IDs or register with their IDs to purchase SIM cards.

Data Protection

Human Rights Implicated: Right to privacy

Field Assessment Findings

- **Physical protection of data**: There was variation in the level of access control in place for businesses with data centers. Some businesses logged visitors to data centers, while others had multiple levels of security in place (biometric such as a fingerprint reader, access card, and close circuit television).
- **Protection of data in case of emergencies**: Data backups or disaster response

policies were mostly absent. One bank maintained a data centre for production and a data centre for disaster recovery.

- **Protection of data from unauthorised access within the company**: Role-segregation varied among businesses collecting customer's personal data. One bank segregated employees conducting a 'Know Your Customer' check (where basic information was provided, such as a National Registration Card) from employees conducting financial transactions.
- **Affordability of data protection**: Many businesses used pirated software for internal business functions including email which presents a data protection risk. Small and medium size businesses complained about the cost of buying licensed software.
- **Lack of policies or clear communication of policies**: Data retention policies were absent, or in some cases not clearly communicated to the customer/user even when internally present (e.g. 5 years for retention of customer data on paper).

Myanmar Good Practice Examples:

- Companies are beginning to conduct threat and vulnerability assessments across their applications, network, and infrastructure on an ongoing basis to test the security of the data held in their systems. One bank uses two separate companies to perform assessments (one local and one international).

C. Privacy: Recommendations for ICT Companies

General

- **Understand contextual risks around Myanmar's history and Government action**: Given Myanmar's historical legacy of Government surveillance and information control, coupled with ICT policies and laws that are not aligned with international human rights standards, there exist significant risks for violation of ICT user rights to protection of privacy and anonymity. There are also risks for any ICT company that may be implicated in such violations. Risks related to the violation of the right to privacy in Myanmar with respect to Government actions can be categorised into at least two separate but closely related areas of concern:
  - Government monitoring and surveillance of user activity and content; and
  - Government access to user-identifying information (See Chapter 4.4 on Surveillance).
- **Use company procedures to plug gaps in the Myanmar legal framework:** As Myanmar currently has no legal requirements for mandatory protection of data of ICT users, this means that the protection of personal data is left to individual companies or Government departments, if at all. Sectors such as ICT or the financial sector are likely to be more aware of the importance of data protection. Companies in these sectors may have their own policies and procedures, or industry-specific standards to assist in developing systems and policies. But other companies will also need to develop systems to protect personal information, as well as externally available policies to inform customers about how their data is being handled (see next point).
- **Develop and implement appropriate policies and procedures to safeguard data privacy**: Companies in the ICT value chain, which often collect and store a large amount of personal information about their users, need processes and policies in place to ensure they protect user information. These must be clear about how they will collect, store and share user information with third parties, and under what circumstances the Government (or others) can have access to information or intercept communications. This information would usually be set out in a company's 'privacy

policy'. This policy should be written in easy-to-understand language, spelling out the implications of when the user's data would be shared, with whom, and why. They should be clearly made known to all staff, particularly those with accessnto sensitive data, and the sanctions for breaching them known. The International Standards and Guidance in section D below set out what issues to address when developing their policies and systems.[354]

- **Ensure that businesses' terms and conditions or privacy policies are publically available** so users or customers are aware of what personal data may be collected or shared. The policies should be available in Burmese and local languages. Putting in place robust data protection standards is a good way for local companies to show they are ready to meet data protection requirements from business partners, trading partners and users.

Web Based Services

- **Develop and promote privacy controls**: Overall digital literacy in Myanmar remains low. Many users are interacting with web-based services for the first time. Some international companies have controls in place that allow a user to manage his/her 'digital footprint' online in addition to their broader online experience. A large majority of users in Myanmar are not familiar with these features. On social media, privacy management controls allow the ability to selectively share or restrict information, including access to photographs, contact information or profile accessibility (e.g. public and private settings). For email communication such as newsletters or mailing lists, this involves the ability to unsubscribe or customise subscription settings. Companies need to raise awareness of these features through appropriate media and ensure these features are available in local languages.
- **Develop and promote content-reporting mechanisms**: Abusive or offensive content can violate a user's privacy. Larger social media platforms now maintain community standards, which outline acceptable use online, while also providing guidance to users on how to address violations of these standards in the case of prohibited content or behaviour. Content reporting mechanisms allow users to report abusive or invasive content to platform moderators. For first time users, understanding how and when to report content is a critical part of ensuring a safe experience online. Similar to privacy controls, companies must raise awareness of these features through appropriate media, and ensure that community standards and reporting tools are available in local languages[355].

D. Relevant International Standards and Guidance on Privacy Issues

Relevant International Standards:

- Asia Pacific Economic Cooperation Group (APEC) 2005 Privacy Framework
- EU Data Protection Directive 95/46
- EU Directive on Privacy and Electronic Communications 02/58

[354] See for example, European Commission, "ICT Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights" (2013), pg. 21, 45-46.

[355] In September 2015, Facebook launched a Burmese version of its community standards 'Facebook rules get local to tackle abuse', Myanmar Times, 10 September 2015

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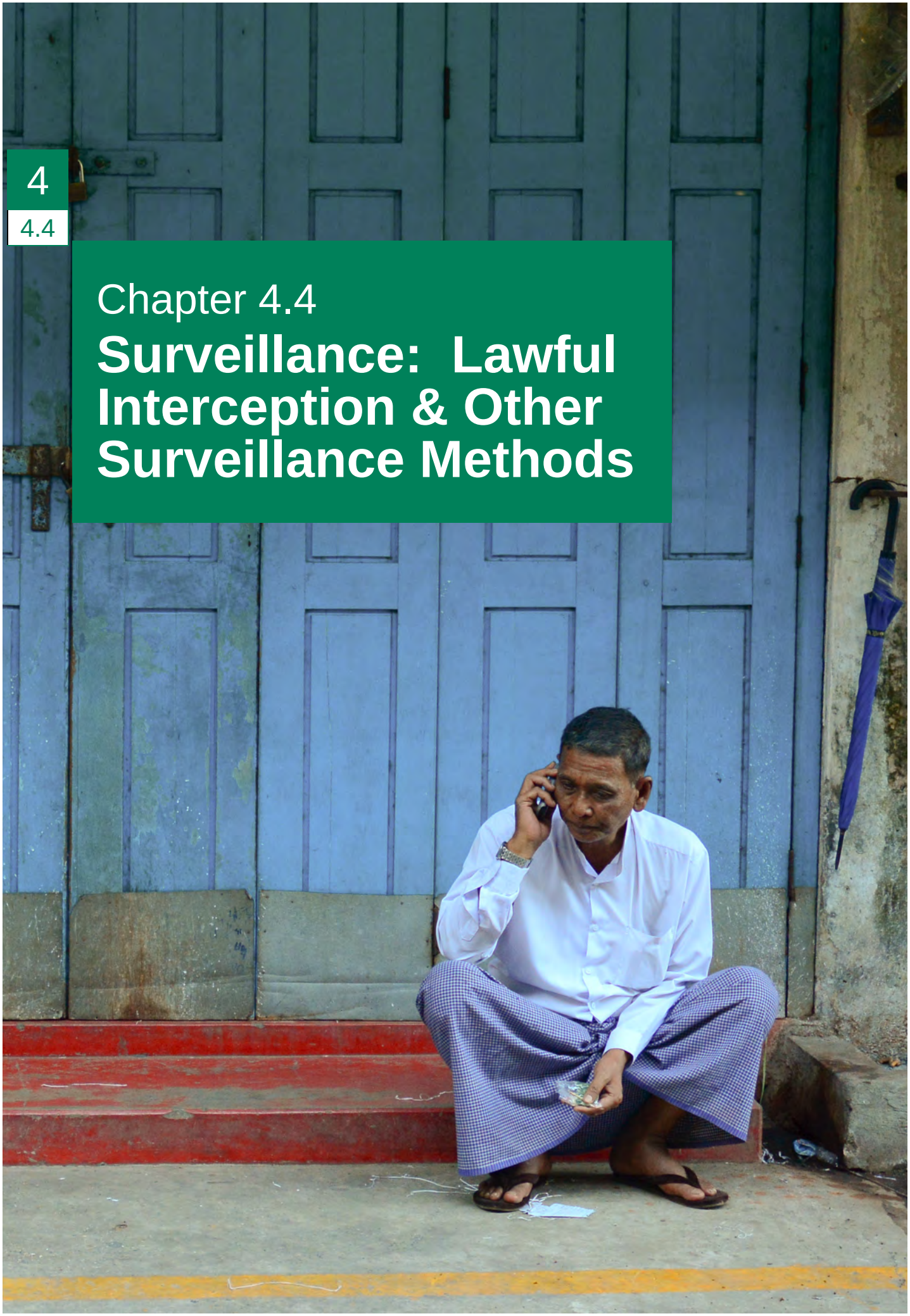
Chapter 4.4

Surveillance: Lawful Interception & Other Surveillance Methods



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Chapter 4.4

Surveillance: Lawful Interception & Other Surveillance Methods

In this Chapter:

- **A.** Context
  - Lawful Interception and Other Surveillance Methods
  - History of Surveillance in Myanmar
  - Legal Framework in Myanmar
- **B.** Field Assessment Findings
- **C.** Recommendations for ICT Companies
  - General
  - Tower Construction
  - Infrastructure
  - Telecommunications Operators
  - 'Over the Top' Companies (National and International)
  - Software
- **D.** Relevant International Standards and Guidance on Surveillance and Lawful Interception Issues

A. Context

Lawful Interception and Other Surveillance Methods

Governments have legitimate reasons to initiate surveillance of a person's communications i.e. intercept or monitor the communications of certain individuals or organisations. For example, the target may be legitimately suspected of planning to commit or having committed a serious crime, such as a terrorist act. There are two ways a person's communciations can be put under surveillance:

- Interception of the content of communications in real time (known as lawful interception); or
- Access to other, historical user data (known as 'communications data').

Lawful interception is permitted in most countries under legal statute in order to assist with criminal investigations, prosecute serious crime, or prevent national security emergencies. Usually, a telecommunications operator collects intercepted communications of private individuals or organisations, and then provides law enforcement officials with access. Lawful interception refers to the interception of, or access to, a person's communications in real time, as the communication is taking place.

- ***Content*** refers to what was said during a phone call or what can be read in the content of an email or other type of digital message. Interception of content,

depending on the country, usually requires that law enforcement authorities seek a judicial warrant from a court or an executive warrant signed by a senior government official, an important procedural safeguard to protecting the rights of those under scrutiny. (See the Annex to the Recommendations for more information).

In addition to this, authorities may require access to communications data, which is generated as a person uses communications services. This is often known as the 'who, where, when and how' of a communication. With the many different ways to communicate electronically currently in existence, there is a much greater array of data and interactions that can be collected and therefore demanded by law enforcement authorities.

- ***Communications Data*** (this sometimes referred to as metadata but will be described as communications data in this SWIA) is basically everything but the content. It includes telephone numbers of both the caller and the recipient, the time and duration of a call, unique identifying numbers (each subscriber is allocated one, as is each mobile device), email addresses, web domains visited and location data. This information is important as it builds up a detailed picture of a person's life and movements. Often intercepting the content of a call or email is not necessary. In contrast to content, there are often weaker legal protections around interception of stored communications data.

Intercepting communications is an intrusive process into someone's privacy. That is why any such intrusion should be governed by a strict legal framework to prevent arbitrary violations of privacy.

Legal Requirements

The Annex to the Recommendations provides more detailed recommendations on the kinds of considerations any government, including the Myanmar Government, should take into consideration in establishing its procedures for lawful interception or other forms of communications surveillance at each step of the process. These steps include the authorisation process, oversight and remedy procedures for lawful interception, and other communications surveillance, to ensure that the procedures and practice are in line with international law.

Technical Requirements

Telecommunication systems or networks in most countries must include, by law, the technical capability to intercept communications. For example, providing the technical means for interception is a legal requirement for European companies under a *1995 EU Resolution on Law Enforcement Operational Needs with respect to Public Telecommunication Networks and Services,*[356] which allows lawful interception to assist law enforcement in investigating and preventing crime.

In order for communications to be intercepted, the telecommunications system needs to be configured in a specific technical way according to a set of standards. The European Telecommunications Standards Institute (ETSI)[357] (one of many industry-led technical standardising bodies worldwide) has taken the lead in producing globally applicable

[356] Council of Europe (1995) "Council Resolution on law enforcement operational needs with respect to public telecommunication networks and services" (20 June 2001).
[357] See European Telecommunications Standards Institute (ETSI) (last accessed August 2015).

standards for ICTs, including lawful intercept requirements. ETSI defines lawful interception as:

> *"A security process in which a service provider or network operator collects and provides law enforcement officials with intercepted communications of private individuals or organisations."*[358]

It is not yet clear or certain which technical standards Myanmar will be using to implement the technical requirements of lawful interception.

Mass Surveillance

In contrast to lawful interception, mass surveillance is understood to refer to the bulk access and/or collection of many users' communications without prior suspicion of criminal activity by the individual targets. Therefore mass surveillance involves no individual target, no prior suspicion, is not time bound and due to the technology employed, is potentially limitless. In contrast to technology provided for lawful interception, much of the technology that allows mass surveillance is unregulated. The adoption of mass surveillance technology thus impinges on the very essence of the right to privacy. [359]

Products that Facilitate Surveillance

- ***'Dual use' technology*:** 'Dual use' is a legal term applied to products, services or technology that can be used for both military and civilian purposes. In the ICT sector, it can apply to technology that can be used for commercial functions, but may also contribute to infringements on human rights. For example, a technique called 'Deep Packet Inspection' (DPI) was developed to analyse network traffic to make sure the network runs smoothly. However, it is also capable of reading emails and governments wishing to conduct unlawful surveillance can abuse this. Many states known to censor the Internet also use DPI.[360] In January 2012, the European Union banned DPI exports to Syria because of the monitoring and interception capabilities, as it was thought they were being used against dissidents.[361]
- ***Unregulated technology*:** There is growing concern that an increasing number of companies may be selling technology that goes beyond regulated, targeted and controllable interception of individuals under prior suspicion. It is currently considered by many experts to be 'single use', because it is difficult to justify a legitimate use for technology that is capable of intruding so much into a person's correspondence and home. There is evidence that some governments are using the technology to track and detain political dissidents as part of a wider pattern of intimidation.[362] Examples

[358] Ibid, "Lawful Interception".
[359] See: UN General Assembly, "Promotion and protection of human rights and fundamental freedoms while countering terrorism*, A/69/397 (23 September 2014).
[360] Ben Wagner, Ludwig-Maximilians-Universität München and Universiteit Leiden, "Deep Packet Inspection and Internet Censorship: International Convergence on an 'Integrated Technology of Control" Global Voices Advocacy (2009).
[361] EU Council, "Regulation No. 36/2012 concerning restrictive measures in view of the situation in Syria and repealing Regulation (EU) No 442/2011" (18 January 2012) Annex V
[362] Citizen Lab, "From Bahrain With Love: Finfisher's Spy Kit Exposed" (2012); Electronic Frontier Foundation (EFF), Kidane Vs Ethiopia (last accessed August 2015).

include malware[363] that infects a target's computer and switches on webcams and microphones on devices, and zero-days[364], which exploits vulnerabilities in a computer application to enable hacking of communications, therefore reducing digital security for many others using the same application. Companies selling these technologies often try to portray these products as having the same status as statutorily mandated (and regulated) 'lawful intercept' functionality – often simply because they are sold to a government purchaser. However experience has shown that some governments are using these technologies quite specifically because they are not regulated and to avoid following lawful interception procedures.[365] With these tools, surveillance is not limited to those within a country's borders, which puts exiles or the diaspora overseas at risk of intrusive surveillance.[366] Companies who sell this type of technology are increasingly being targeted by law suits and other legal actions.[367]

Concerns about Surveillance and the ICT Sector

Under international human rights law[368], individuals are protected from any unlawful and arbitrary interference with their privacy, family, home, or correspondence. The act of surveillance, whether physical (such as a house search) or of a person's communications (such as monitoring phone calls and emails) is an inherently intrusive act and risks violating a person's privacy. In addition, surveillance of person's communications can limit the exchange of information and ideas resulting in a 'chilling effect' on freedom of expression, as people are less likely to express themselves freely if they know they are being observed or monitored.

Intercepting communications is under particular scrutiny by international organisations, civil society groups and governments due to the impact of surveillance on privacy and other human rights such as the right to receive and impart information. [369] The same technology that can help law enforcement prosecute criminals may also be misused by authorities, such as when specific groups (opposition parties, human rights defenders, ethnic, religious or sexual minorities) are placed under surveillance for the purpose of intimidating, persecuting and silencing them. There is evidence in some countries that the technology is being used to track and detain political dissidents as part of a wider pattern of intimidation, often with negative consequences or harm to the individuals.[370]

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[363] Software that is created and used to gain access to private computer systems, disrupt computer operations and/or gather sensitive information. Malware includes computer viruses, "Trojan horse" software and "worms".
[364] An attack on vulnerability in a computer application or operating system that developers have not yet addressed.
[365]Citizen Lab, "Shedding Light on the Surveillance Industry: The Importance of Evidence-based, Impartial Research" (20 December 2013).
[366] For example, there is evidence that the government of Ethiopia is using surveillance technology to target the diaspora overseas who may be critical of the government. Ethiopians living in the UK, US, Norway and Switzerland have been targeted with malware, resulting in an illegal wire-tapping case in the US. See Electronic Frontier Foundation (EFF), Kidane Vs Ethiopia (last accessed August 2015) and Reporters Without Borders "Enemies of the Internet" (2014).
[367] For examples of lawsuits and other official complaints, see OECD Watch and the Business and Human Rights Resource Centre.
[368] International Covenant on Civil and Political Rights, Article 17.
[369] See for example the Global Conference on Cyberspace 2015, the Global Commission on Internet Governance, the work of the United Nations and international civil society organisations such as Privacy International, Electronic Frontier Foundation, Citizen Lab, Access, and many local civil society organisations.
[370] See for example: Freedom House, "Freedom on the Net" (2013) details a particular example from Sudan:

Being able to locate a mobile phone also means being able to locate the person carrying the mobile phone, which is potentially a powerful tool for surveillance. It is important to have access to such information in emergency responses, such as abduction or identifying survivors in a natural disaster area. However mobile phone technology has unfortunately become increasingly dangerous for activists in some countries.

It is therefore critical that any intrusion into a person's privacy through the interception of communications is subject to legal process and includes protection for human rights. In countries where the relevant legal framework on lawful interception is absent or deficient, when there is a case of a misuse, companies within the ICT value chain that have had a role in that process (network providers, vendors, operators, over the top service providers) are often accused of contributing to the abuse of human rights through its operations. This may involve invasions of privacy or in some cases even more severe abuses such as torture. Some companies may actively assist the government in carrying out arbitrary surveillance by allowing secret access to their servers (often called a 'back door'). If the government responsible for the misuse is perceived to be repressive, this may increase scrutiny by human rights groups.

History of Surveillance in Myanmar

The former military government in Myanmar established an intrusive surveillance regime for many years, both online and offline, in order to suppress criticism and dissent and restrict access to information. The fear and threat of surveillance was part of life, especially for members of opposition political parties, student activists, and ethnic minorities in armed conflict areas.

Physical Surveillance

Under the former military government, intelligence agencies, some of which were originally established under British colonial rule, proliferated. Multiple organisations were charged with keeping people under surveillance. Intelligence activities expanded rapidly following the 1988 coup d'état which re-established military rule after its suppression of the nationwide pro-democracy movement. The hierarchy and structure of the intelligence agencies changed throughout the 1980s, 1990s and 2000's as the military government imprisoned or purged various members of the intelligence community. Before the reform process began in 2011, Myanmar's intelligence agencies played a consistent role in gathering information on real or impugned critics, in suppressing dissent, and in arresting and interrogating suspects.

The *Village Act* and *The Town Act* required everyone to report the identity of overnight guests to local officials, who could refuse "*permission*" for houseguests. The law was enforced by periodic household inspections by authorities, often accompanied by Special

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"The activist Mohamed Ahmed switched off his phone for a few days in early July 2012 to avoid arrest while in hiding from the NISS [National Intelligence and Security Service]. When he turned his phone back on as he was walking home to see his family, NISS officials roaming his neighbourhood managed to track his location based on the nearest telecommunications tower and arrested him later that night." pg. 14.

Branch agents, and mostly at night. It has been reported that these inspections were used as an opportunity to monitor, harass or arrest political activists and inspections increased during the pro-democracy uprisings in 1988, 1998 and 2007. [371]

In addition to intelligence agencies, a wide network of informants attached to various official groups operated throughout the country. A 2007 Human Rights Watch report stated that this group of informants systematically began to track down activists and organisers of the 2007 protest movement, often known as 'the Saffron Revolution'.[372]

Telecommunications surveillance

As early as 1990, reports surfaced that telephone calls and faxes were being monitored. A computer centre was reportedly set up which carried out more "*politically focused*" intelligence gathering, including monitoring communications of opposition groups both within and outside Myanmar.[373] This timing coincided with exiles fleeing the country in the wake of the 1988 crackdown on the pro-democracy movement and setting up exile media groups, newsletters and websites to report on the situation inside Myanmar.

It has also been suggested that wiretapping of phone conversations was common, in particular to identify leaders of activist movements. Once leaders had been identified, this would be followed up with a night-time "*inspection*".[374]

Online surveillance

Despite Myanmar's low Internet penetration, the Internet and its users were reportedly under near constant surveillance as the first Internet connections were established around the year 2000. For citizens wanting an email account, the only choice was to pay for an email account supplied by Myanma Post and Telecommunications (MPT), a state run telecommunications company. Users assumed these accounts were closely monitored. However, it is difficult to establish exactly what technology enabling online surveillance was purchased and utilised by the government.[375]

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[371] Fortify Rights, "Midnight Intrusions: Ending Guest Registration and Household Inspections in Myanmar" (2015), pg 12.
[372] A 2007 Human Rights Watch report found the local ward Peace and Development Councils, the Union Solidarity and Development Association (a movement supporting the military government, disbanded in 2010) and Swan Arr Shin (a local paramilitary group) all contributed informants who conducted surveillance activities and gathered intelligence. Human Rights Watch, "Crackdown. Repression of the 2007 Popular Protests in Burma" (2007), pg. 83.
373 Brian McCartan, "Myanmar on the Cyber-Offensive" *Asia Times* (1 October 2008).
[374] Fortify Rights, "Midnight Intrusions: Ending Guest Registration and Household Inspections in Myanmar" (2015) pg. 31.
375 See for example: Joe Havely, "When States Go To Cyber-War" *BBC News Online* (16 February 2000). The BBC reported that the government had acquired surveillance capabilities by borrowing equipment from other countries: *"Using monitoring equipment loaned by the government of Singapore, analysts say the junta has been able to track online critics of the regime."* A 2005 Open Net Initiative report on internet filtering in Myanmar also mentions online surveillance, reporting that the state *"maintains the capability to conduct surveillance of communication methods such as email…"* Open Net Initiative, "Internet Filtering in Burma in 2005: A Country Study" (2005), pg. 4. A 2007 Berkman report stated that the military government was buying surveillance technology from an un-named U.S company. Chowdhury, M. Berkman Centre for Internet and Society at Harvard University, "The Role of the Internet in Burma's Saffron Revolution" (2008) pg. 13.

Although the Internet penetration in the 2000's was less than 1%, activists were quick to make use of the limited service they had. Despite pervasive surveillance, the 2007 Saffron Revolution came to global attention thanks largely to activists anonymously uploading images and video to websites such as YouTube, which were then picked up by international news agencies, as journalists were prevented from entering the country. Some managed to email images to friends outside Myanmar to upload onto sites such as the Democratic Voices of Burma (DVB), or smuggle content out of the country on USB sticks. This was the first time in the country's history that ICTs played a significant role in disseminating information about protests and the security forces' violent suppression of such protests. In addition, the 2009 documentary Burma VJ[376] featured some of the video footage and images, and revealed that many of the activists involved had either been arrested and punished, or fled Yangon.

Surveillance of Cybercafés

Public Internet access inside Myanmar was previously only possible from a few Internet cafes in Yangon and Mandalay, the two largest cities. The first cybercafé opened in Yangon in 2002[377]. From around 2006, cybercafés required a license to operate from the Myanmar Information Communications Technology Development Corporation (MICTDC). They were licensed as Public Access Centres (PACs) managed by Myanmar Info-Tech, a state-owned company. Regulations[378] stated that users had to register at the cybercafé before accessing the Internet and café owners had to take screenshots of user activity every five minutes, delivering CDs containing these images to MICTDC at regular intervals.

In 2008, the Open Net Initiative reported: "*Anonymous Internet use is impossible; cybercafé licences require that patrons register their name, identification number, and address to gain access. Opportunities for anonymous communications are further hampered by the state's ban on free email sites such as Hotmail and Yahoo! mail."*[379]

[376] Anders Østergaard, *Burma VJ: Reporting From A Closed Country* (2008). Among other awards, the film was nominated for the Academy Award for Best Documentary Feature in 2010.
[377] Reporters Without Borders, "Internet Under Surveillance 2004- Burma" (2004).
[378] "Public Access Center Regulations by Myanmar Info-Tech" (2006). See an unofficial English translation by the Open Net Initiative (ONI), which includes a link to the original version in Burmese.
[379] Ibid, pg. 11

Surveillance since the 2011 Reform Process

Little is known about intelligence gathering practices in Myanmar since 2011.[380] It is believed that at least two intelligence agencies are still operational – the Military Affairs Security (MAS) and the Special Branch of the Myanmar Police Force[381] . In 2011, *Irrawaddy* reported that a new intelligence unit had begun to operate, staffed by military and police officers. It was reported that the new unit would not operate as a separate entity, as intelligence agencies had previously done, and had to reports to "*both military and civilian authorities, as well as administrative officials*". According to the report, the role of the unnamed intelligence unit was to *"investigate the movements of political parties, ethnic armed forces and cease-fire groups, violent domestic actions such as bomb explosions and any matter that affects the state's security and stability, including non-disintegration of the military, and take necessary measures*."[382]

It is unclear which elements of the surveillance apparatus are still operational, but it appears that authorities are still conducting a combination of physical and electronic surveillance by replacing old laws with something very similar, and utilising new technology. For example, in 2011, Reporters Without Borders reported that new updated regulations had been sent to cybercafé owners, *"including a requirement to keep the personal data of all their clients along with a record of all the websites they visit, and make it available to the authorities."*[383]

In 2012, *The Village Act* and *The Town Act* was replaced by The *Ward or Village Tract Administration Law,* which upholds the process of overnight guest registration and inspection. Although inspections have reportedly declined, and more people are ignoring the law as there are no longer the same fears of reprisal, there have been recent crackdowns on student protesters, forcing many to go into hiding.[384] Student's houses have reportedly been "*inspected*" in the middle of the night, had their mobile phones seized and their Facebook accounts hacked.[385]

Reports suggest that surveillance of community leaders, opposition political party members and journalists continue. Some reported being physically followed or enquired after, and some fear their phone conversations are monitored.[386] In 2013 it was reported that the website of the Myanmar news group Eleven Media, was under surveillance. One of its journalists was physically followed by intelligence agents while reporting on the war in Kachin State.[387] Journalists from Eleven Media and others working on Myanmar reported they had received notification from Google, which runs the Gmail email service,

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[380] Andrew Selth, "Burma's Security Forces: Performing, Reforming or Transforming?" *Griffith Asia Institute, Griffith University, Australia* (2013), pg. 16.
[381] The Hindu, "In Myanmar, Internal Spy Network Lives On" *Associated Press report* (30 July 2013).
[382] The Irrawaddy, "Burma Forms New Intelligence Unit" (3 May 2011).
[383] Reporters Without Borders, "Surveillance of Media and Internet Stepped Up Under New Civilian President" (2011).
[384] Wa Lone and Guy Dinmore, "Student Activists Go Into Hiding After Crackdown" *The Myanmar Times* (20 March 2015).
[385] Ibid
[386] Andrew Selth, "Burma's Security Forces: Performing, Reforming or Transforming?" *Griffith Asia Institute, Griffith University, Australia.* (2013), p17.
[387] Bertil Lintner, "The Military's Still In Charge" *Foreign Policy* (9 July 2013).

that their accounts may have been hacked by "*state-sponsored attackers*".[388] It is unclear if the purpose of these attacks were to gain access to journalist's emails and identify sources, or to stem the flow of information to and from Myanmar. It was also reported that government agents visited cybercafés to "*install some software*", widely believed to be 'keylogging' software, which records and stores keystrokes for later analysis. Some café owners have put up signs warning customers not to use the Internet for "*political reasons*".

It is also unclear what kind of relationship Myanmar's existing intelligence agencies have with foreign counterparts, and what kind of intelligence exchange agreements exist. It is thought that Embassies routinely reported on the activities of the diaspora.[389]

The Legal Framework in Myanmar

There are currently few protections in Myanmar's legal framework to prevent the kind of pervasive surveillance previously conducted by intelligence agencies and about which there is justifiable concern. It is unclear under which legal regime the existing intelligence agencies are operating, what their remit is and how they are exercising their powers. Although Article 357 of the 2008 Constitution does provide for privacy[390], there are no privacy protections in national legislation. The existing legal framework referring to surveillance is vague. Article 75 of the 2013 Telecommunications Law [391] grants unspecified government agents the authority *"to direct the organisation concerned as necessary to intercept, irrespective of the means of communication, any information that affects the national security or rule of law".* Although the clause adds this should be undertaken without impacting the fundamental rights of citizens, there are no further details on the process or privacy protections.

Most states have a specific legal framework in place to govern instances where interception of communications is permitted in real time (lawful interception). However Myanmar currently has no specific legal framework or regulations governing lawful interception, leaving an important gap in the regulatory framework. The MCIT has confirmed its interest in developing a law in accordance with international standards. It has committed to a public consultation of draft lawful interception regulations.[392] One of the current telecommunications operators, Telenor, has stated publicly that they will not respond to any interception requests from law enforcement officials until the legal framework is in place.[393]
The EU has agreed to provide technical support to the Government to develop its regulations in line with human rights. The programme of work will come within the Council

[388] Thomas Fullller, "E-Mails of Reporters in Myanmar Are Hacked" *New York Times* (10 February 2013).
[389] Andrew Selth, "Burma's Security Forces: Performing, Reforming or Transforming?" *Griffith Asia Institute, Griffith University, Australia* (2013), pg. 18.
[390] "*357. The Union shall protect the privacy and security of home, property, correspondence and other communications of citizens under the law subject to the provisions of this Constitution.*"
[391] See unofficial English translation of the Myanmar *2013 Telecommunications Law*.
[392] In November 2013, MCIT published draft proposed rules, stating: *"The Ministry will be drafting other rules and procedures on a variety of issues such as standardization, type approval, and lawful interception in due time. Such rules and procedures also will be subject to a public consultation process."* MCIT, "Proposed Rules for Telecommunications Sector Relating to Licensing, Access and Interconnection, Spectrum, Numbering, and Competition" (4 November 2013), Section I, B5 (pg. 5).
[393] Telenor, "Myanmar sustainability presentation" (19 August 2014), pg. 8 of the transcript.

of Europe programme on cybersecurity, particularly focused on the Council of Europe Convention on Cybercrime.[394] Regulations are needed to govern the use of surveillance to ensure any infringement of privacy rights is legal, necessary and proportionate and the act of surveillance is not abused to cover people who are not suspected of carrying out a crime but whom the government may disagree with.

The Government has already committed to requiring judicial authorisation of any request for lawful interception, which is an important first step. Given the weak state of the Myanmar judiciary, it is clear that any judicial authorities involved in such authorisation processes will require thorough training, both in the technicalities of lawful interception, but also in the importance of the legal safeguards that an independent review represents. See Chapter 4.9 on Stakeholder Engagement and Access to Remedy for a short overview of the judiciary.

The idea of a judicial authority challenging and even denying authorisation to the executive branch to carry out surveillance for what the government claims is a national security issue or emergency, will be an unfamiliar concept in Myanmar. Even in countries with highly developed judicial systems, there is little open scrutiny of the decisions made by judicial authorities on lawful interception. The challenges of establishing a gatekeeping system in Myanmar that respects rights and establishing a proportional, targeted approach to security are therefore significant. The companies involved in executing lawful interception requests may currently be one of the few credible counterpoints in the system. (See Section C providing Surveillance Recommendations for ICT Companies) The Annex to the Recommendations also suggests the main issues for the Government of Myanmar to take into account in developing lawful interception law and procedures.

B. Field Research Findings

Current Status of Lawful Interception in Myanmar

Human Rights Implicated: Right to Privacy, Freedom of Expression

Key Findings

- Many people in Myanmar **grew up under a repressive surveillance regime**, and are familiar with methods of physical surveillance, such as being followed. However, the majority do not know how digital surveillance is carried out and who has access to their data, phone records, etc.
- There is a prevailing **lack of trust** between the public and the government, as well as a belief that the government will not protect or respect citizens' privacy or personal data. There is a feeling among the general public that there is still physical surveillance and that government agencies likely monitor their digital communications.
- There is **no oversight body** (parliamentary or otherwise) for lawful interception, and no clear process in place.
- **There is currently a lack of legal framework for lawful interception:** In May 2015 with support from international consultants, MCIT held an initial "*fact finding*" session, focused on cyber-crime and electronic evidence, in which MCRB participated. The next steps are unclear. In the interim, PTD has requested

[394] Council of Europe, *Convention on Cybercrime* (CETS 185) (2001).

operators comply with requests for data in cases related to human trafficking, terrorism, and drug offenses.

- There are **inconsistent policies for handling data requests from law enforcement.** One operator mentioned that they have an in-house policy regarding lawful interception, allowing them to provide data to the government in serious criminal cases. This operator has a specific department for lawful interception to review requests. Requests must have an authorised signature of Ministry of Communications Information Technology to be reviewed by the operator before providing any data.
- A mobile network operator's regional office noted that little scrutiny is applied when law enforcement requests location data or call records. The information is usually provided.
- One operator has designated **a small internal team** to review the legitimacy of any data requests received from law enforcement.

C. Surveillance and Lawful Interception: Recommendations for ICT Companies

The following section focuses on the use of ICT for surveillance, rather than physical surveillance. (See also Chapter 4.3 on Privacy)

General

- **Understand Myanmar's history**: ICT companies that operate within those parts of the ICT value chain that may be subject to surveillance requests from the Government should understand the extensive historical level of surveillance in the country and its often severe consequences. The population and civil society organisations are therefore justifiably sensitive to the possibility of continued surveillance, and the current lack of appropriate legal safeguards on surveillance.
- **Understand the wider global discussion about surveillance**: Just as foreign companies coming into Myanmar need to understand the historical context around surveillance and its connotations for the population and its customers, local companies also need to understand the wider context of the active, on-going debate around surveillance and its implications for human rights.

Tower Construction

- **Be aware of the possibility of interception and misuse of base stations:** It is possible for other actors to intercept signals sent from cell towers by setting up technology that essentially pretends to be a base station and collects the information[395]. There is some evidence this being done elsewhere to locate activists and political opposition[396]. There are different types of hardware that can act as a base station and enable interception of mobile signals. The devices do not necessarily have to be in the vicinity of the cell tower or real base station to work. Tower

[395] One such example is an International Mobile Subscriber Identity (IMSI) catcher which works by masquerading as a base station, in order to track a mobile phone's location in real time. IMSI catchers are subject to export control in the US and EU.

[396] For example, during the 2014 Euromaidan protests in Ukraine, protestors in the vicinity of one march in the Ukrainian capital Kiev were sent unsigned text messages reading: *"Dear subscriber, you are registered as a participant in a mass disturbance".* Local mobile operators denied sending the message to their subscribers on behalf of the government, and one insisted that the messages were sent from a "*pirate base station*". Heather Murphy, "Ominous Text Message Sent To Protesters in Kiev Sends Chill Around The Internet" *New York Times* (22 January 2014).

construction companies should therefore be aware that their infrastructure may be targeted by actors wishing to illegally intercept mobile phone signals for the purposes of surveillance, impacting both freedom of expression and privacy. When tower construction companies carry out their regular checks and maintenance, they should therefore be especially vigilant for any signs that cell tower or base station equipment has been tampered with.

Infrastructure

- **Do not provide lawful interception services until a legal framework is in place:** Lawful intercept solutions provided as part of the network infrastructure of operators should not be operational until national legal framework and regulations are in place and it is clear which set of technical standards Myanmar will adopt (ETSI standards or another). Without legal safeguards in place, companies requested to take action by the government to action lawful interception may be contributing to human rights violations of the right to privacy and potentially further severe impacts, depending on the action taken by the government once it has secured the information. Vendors should be prepared for such requests and consider through their due diligence processes the human rights risks associated with these transactions. This includes due diligence pre-sale, during the sale in putting appropriate conditions or procedures in place in sale documents or contracts, and in post-sale due diligence.[397]
- **Train operator personnel:** In addition to carrying out the appropriate due diligence, vendors should ensure that equal attention is given to training of operator personnel as part of the sale of technology products, including lawful interception systems. Myanmar staff may not be informed or even consider the wider implications of their actions unless they are provided with specific training.
- **Send clear messages about business relationships**: The opening of the Myanmar ICT market has seen a rush of new companies to the market. Unlike other bigger footprint sectors, smaller ICT companies have far fewer downside risks in entering and exiting markets quickly. Some of the companies selling unregulated surveillance technology market themselves by asserting that their technology can be added to a particular vendor's network as lawful intercept 'solutions' when in fact they provide capabilities that go well beyond what is lawful. Network vendors should publicly distance themselves from these companies, ensuring that their company's logo and name are removed from any marketing literature by such enterprises and by providing a clear message to the Government that they do not condone such products.

[397] See for example guidance on dealing with government requests: European Commission,"ICT Sector Guide on Implementing the Corporate Responsibility to Respect Human Rights" (2013), pg. 32-33. IHRB, "Human Rights Challenges for Telecommunications Vendors: Addressing the Possible Misuse of Telecommunications Systems. Case Study: Ericsson" (2014).

Telecommunications Operators

- **Challenge lawful interception requests without appropriate legal safeguards**: Operators are the party in the ICT value chain that receives any request from the government for interception of the content of phone calls and emails, or access to other information such as user/subscriber information and records. As noted above, Article 75 of the *2013 Telecommunications Law* includes a sweeping provision on surveillance. Subsequent regulations for assistance with real time surveillance are not in place. One of the current telecommunications operators, Telenor, has stated publicly that they will not respond to any interception requests from law enforcement officials until the legal framework is in place.[398]. Even when such regulations are in place and even assuming that they are aligned with international law, given the history and current state of development of Myanmar's judiciary, the operators may be one of the few credible actors in the process capable of challenging overly broad or inappropriate requests.
- **Develop robust systems for responding to government requests** to avoid over-complying with illegal requests.[399] Such a company system could include for example, ensuring that there is a process in place to review each request submitted; a designated contact person in the company; a list of government departments authorised to request information; a requirement that the request to the company must be made in writing (or at least followed up in writing if such a request is made during the course of an emergency); challenging requests that do not comply with the law or human rights standards; developing criteria for escalation of requests; and where feasible, notifying affected customers or users. See the Annex to the Recommendations for further information.
- **Be transparent about the number of requests for surveillance:** Out of three telecommunications operators in Myanmar, only one telecommunications operator issues a transparency report disclosing interception requests from law enforcement, including cases the company has complied with.

'Over the Top' Companies (National and International)

- **Challenge requests for user information without appropriate safeguards:** Like telecommunications operators, over the top companies which store data on servers inside Myanmar need robust systems for screening and responding to such requests to ensure that they do not contribute to potential human rights violations. [400] While certain information about a user may be publicly accessible, for example by looking at a public profile on social media, companies store much additional personal information about their users, such as names, addresses, contact numbers and private online conversations. Depending on the service, companies will also have a lot of information about a person's movements, how they spend their time and money and the opinions they hold, which could potentially be used in gathering intelligence. Over the top companies may also be requested to turn over user information by the Government as part of its surveillance activities.

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[398] Telenor, "Myanmar sustainability presentation" (19 August 2014), pg. 8 of the transcript.
[399] See for example guidance on dealing with government requests: European Commission, "ICT Sector Guide on Implementing the Corporate Responsibility to Respect Human Rights" (2013), pg. 44-45 and the Telecommunications Industry Dialogue.
[400] See for example guidance on dealing with government requests: European Commission, "ICT Sector Guide on Implementing the Corporate Responsibility to Respect Human Rights" (2013), pg. 44-45 and the Global Network Initiative (GNI), "Principles and Implementation Guidance" (last accessed August 2015) on dealing with government requests.

- **Establish clear company terms of service** which are understandable to local users, setting out what information the company collects and stores and under what legal justification that information can be accessed by the government.

Software

There are many different kinds of software, but the focus of this chapter is the tools that can aid surveillance; that is, the software that can be added to a telecommunications network in order to increase surveillance capabilities.

- **Do not sell surveillance software to Myanmar.** Surveillance software is not a new issue for Myanmar. As far back as 2000 it was reported that Burmese exiles were being targeted with malware. However, this kind of technology has advanced rapidly in recent years. While the goal of the military government in the 2000's may have been to stop information exchange or communication by freezing computers or taking websites offline, viruses, malware and spyware contained in infected emails are now capable of doing much more intrusive surveillance. Companies selling surveillance equipment, whether 'off the shelf' or bespoke services are under particular scrutiny due to the clear implications for human rights.[401] Sellers of such technologies often justify their use by saying they are intended to support law enforcement or protect the public welfare (e.g. through protecting against terrorist activity), but they often can also be used to facilitate human rights violations by the purchasers. There are currently debates in Europe about tightening export controls to restrict the kinds of surveillance technology that can be exported, particularly to governments with a poor human rights record.[402] Due to the lack of legal framework around surveillance, interception and privacy protections, Myanmar should be a no-go area for companies selling surveillance technology.[403]

D. Relevant International Standards on Surveillance and Lawful Interception

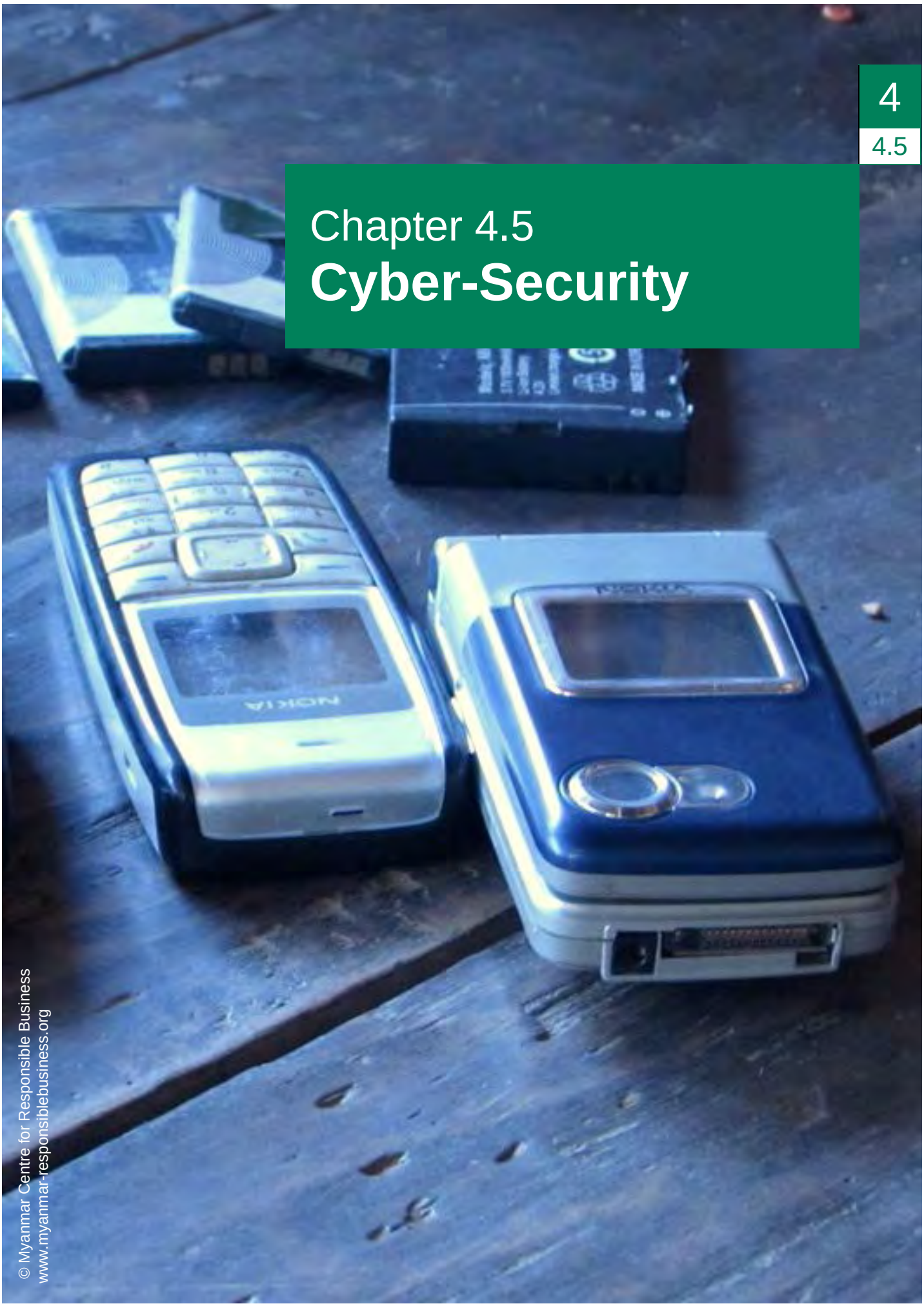
Relevant International Standards:

- International Principles on the Application of Human Rights to Communications Surveillance (Necessary and Proportionate Principles) 2014

Relevant Guidance:

- Universal Implementation Guide for the International Principles on the Application of Human Rights to Communications Surveillance (2015)
- Electronic Frontier Foundation (EFF) Human Rights and Technology Sales: How Corporations Can Avoid Assisting Repressive Regimes (2012).

[401] See commentary by the Chair of the OECD Working Party on Responsible Business Conduct, "Responsible Business Conduct in Cyberspace" (30 April 2015).
[402] For example, the Stockholm International Peace Research Institute (SIPRI) is working on a data collection program in support of the European Commission's ongoing impact assessment for the review of the EU dual-use regulation.
[403] For more guidance, see Tech UK "Assessing CyberSecurity Export Risks" (2014).



Chapter 4.5

Cyber-Security

Chapter 4.5
Cybersecurity

4
4.5

In this Section:

- **A.** Context
  - Cybersecurity
  - Cybersecurity in the Myanmar Context
- **B.** Field Assessment Findings
- **C.** Recommendations for ICT Companies
- **D.** Relevant International Standards for Cybersecurity

A. Context

Cybersecurity

A safe and secure Internet is a global Internet governance priority. There are many threats that can undermine the security and stability of cyberspace, impacting governments, business, civil society groups and individual users. Cyber-attacks, or cybercrime, can come in many forms, resulting in loss of services or loss of control over services, stolen personal information (such as credit card details), fraud and identity theft and receiving a high volume of spam messages. A range of actors execute cyber-attacks, including: national governments, criminals, business, hacker groups or individual hackers[404]. Attacks can be carried out by spreading computer viruses, denial of service attacks (DDoS)[405], phishing[406], or hacking.

Governments, business, civil society groups and individual users can all be victims of cyber-attacks, and there have been some high profile examples in recent years. Estonia suffered a three-week long cyber-attack in 2007 that disabled banks, companies, government ministries and newspapers. Experts from the North Atlantic Treaty Organisation (NATO) had to be called in to help the country defend and rebuild its cyber capabilities.[407] In 2014, Sony Pictures systems were hacked, reportedly by North Korea, resulting in a leak of employee details, employee emails and yet-to-be-released films.[408]

Encryption[409] is the technique by which data (when in transit or when at rest on devices) is scrambled to make it unreadable without using specific passwords or keys. It is important to keep personal data safe from criminals and therefore extremely important for the

[404] A hacker is someone who seeks and exploits weaknesses in a computer system or computer network. Sometimes this can be for malicious intent (known as 'black hat' hackers) or it can be dome for ethical reasons, such as helping make services more secure (known as 'white hat' hackers)
[405] A *Distributed Denial of Service* (*DDoS*) attack is an attempt to make an online service unavailable by overwhelming it with traffic from multiple sources.
[406] Phishing is the act of sending an email to a user falsely claiming to be an established legitimate enterprise in an attempt to scam the user into surrendering private information that will be used for identity theft.
[407] Ian Traynor, "Russia accused of unleashing cyberwar to disable Estonia" *The Guardian* (17 May 2007).
[408] Vlad Savov, "Sony Pictures Hacked: The Full Story" *The Verge* (8 December 2014).
[409] A recent report by the UN Special Rapporteur on Freedom of Expression, David Kaye, defines encryption using the SANS Institute definition from the Sans Institute, "History of Encryption" (2001), a mathematical "*process of converting messages, information, or data into a form unreadable by anyone except the intended recipient*".

Internet economy. With encryption comes security of user data, authentication, confidentiality and consumer trust in services. People undertake an increasing amount of legitimate activities over the Internet that involve personal information, such as banking, buying and selling goods, filing tax returns, and so on. Without encryption, e-commerce would never have taken off and cannot survive.

Table 39: Definitions of Cybersecurity

Definitions of cybersecurity differ slightly according to international and regional bodies, but the common theme to describe cybersecurity is protecting:

- The availability of services
- The integrity (security) of network infrastructure
- The protection of private information

Cyber security is defined by:

- **the International Telecommunications Union** (ITU) (and cited by ASEAN) [410] as: …*the collection of tools, policies, security concepts, security safeguards, guidelines, risk management approaches, actions, training, best practices, assurance and technologies that can be used to protect the cyber environment and organisation and user's assets..*"[411]
- **the European Union** as: "…*the safeguards and actions that can be used to protect the cyber domain, both in the civilian and military fields, from those threats that are associated with or that may harm its interdependent networks and information infrastructure. Cyber-security strives to preserve the availability and integrity of the networks and infrastructure and the confidentiality of the information contained therein*."[412]
- **the Freedom Online Coalition** as: *"… the preservation – through policy, technology, and education – of the availability*, confidentiality* and integrity* of information and its underlying infrastructure so as to preserve the security of persons both online and offline*." *as defined by ISO 27000 standard.[413]

Concerns about Cybersecurity, Human Rights and the ICT Sector

Recent research by Citizen Lab has shown that CSOs around the world face the same threats of attack as governments and business, but have fewer resources to fend off a cyberattack.[414] The attacks on CSOs are intended to undermine communications, by taking websites offline or disrupting other communications.

Encryption is not just important for safe transactions, it is also important for human rights defenders[415] and people at risk, so that they are able to communicate without the fear of their confidential communications being intercepted arbitrarily by intelligence agencies.[416]

[410] ASEAN, "Joint Ministerial Statement on ASEAN Cybersecurity Cooperation" (2013).
[411] ITU, "Overview of Cybersecurity" (2008).
[412] European Commission, "Cybersecurity Strategy of the European Union: An Open, Safe and Secure Cyberspace (2013), footnote 4.
[413] Freedom Online Coalition, "WG 1 – An Internet Free and Secure" (last accessed August 2015).
[414] Citizen Lab, "Targeted Threats Against Civil Society" (2015).
[415] New technology is emerging to support field data collection by civil society organizations working in sensitive communities. See Martus.
[416] Various tools are available to provide human rights defenders and people at risk with higher levels of encryption. The Tor Browser is a web browser that allows users to browse the internet anonymously. Additionally, Pretty Good Privacy (PGP) can be used for encrypting email messages.

However some governments are already specifically targeting civil society groups because they use encryption and Internet security techniques. One of the charges against the jailed Zone 9 bloggers in Ethiopia is their use of encrypted communication and participating in trainings on Internet security.[417] Such training is provided by the well-recognised Berlin-based organisation Tactical Technology Collective, which has developed the popular tool, *Security In A Box*, a publicly available resource used by thousands of human rights defenders worldwide.[418]

Cybersecurity attacks can jeopardise user privacy. Companies are increasingly attractive targets for cyberattacks, jeopardising the confidentiality, availability and integrity of network systems and personal data.

Myanmar Context

As technology becomes increasingly personal and prevalent in Myanmar life, services will evolve and risks will increase. Personal data will be stored, transmitted, and accessed by smart-phone applications, or web-applications for services such as online-banking, e-commerce, or e-government. International examples demonstrate that failing to maintain the integrity and security of these services has severe implications. In Myanmar, some have described recent ATM fraud in Myanmar as the first wave of cybercrime as networked services expand.[419]

Figure 4: Breakdown of cybersecurity incidents in 2013

As of September/2013

Type of Incident	No. of Incident
Scanning	2
DoS	14
DDoS	4
Malware	8
Exploiting Known Vulnerability	18
Login Account	1
Unauthorized Use	2

Source: 2013ASEAN-Japan Symposium on Cyber Security "ICT Usage & Cyber Security Issues in Myanmar" (October

Figure 4 above shows a breakdown of incidents reported by the Myanmar Computer Emergency Response Team (MMCERT) as of September 2013.

[417] See Trial Tracker Blog, "Contextual translation of the charges of the Zone9 bloggers" (19 July 2014) and Tactical Technology Collective, "Tactical Tech's and Front Line Defenders' statement on zone 9 bloggers" (last accessed August 2015).
[418] See Burmese language version of Security in a Box.
[419] See The Irrawaddy "Foreigners Charged over ATM Scams in Rangoon" (November 2014). In November 2014 thieves used cloned ATM cards to steal 25.2 million Myanmar Kyats across Yangon.

Phishing

Simple "phishing", where fraudulent emails are sent with the intention of extracting money or obtaining personal information such as bank details, have been seen in Myanmar for over a decade. Myanmar recipients have been taken in by fake 'You have won the lottery!' emails, and letters from the President of the World Bank.

DDoS Attacks

Myanmar suffered a huge DDoS attack in 2010, just before the election. The main Internet service provider, MPT, was overwhelmed and the attack essentially took the country offline. The attack was discovered by the research organisation Arbour Networks, which reported the attack was larger than the 2007 attack on Estonia, but could not establish its origin. Speculation ranged from placing blame on the Government of Myanmar in order to disrupt the election, to external hackers with unknown motives.[420]

In 2011, Irrawaddy reported they had been victim to likely DDoS attacks, forcing the website to be temporarily shut down. Hackers also penetrated Irrawaddy's central server and planted false new stories on the website's front page, claiming a popular Burmese actress had died. It was also suspected hackers had gained access to confidential information stored on the server, such as the identity of sources. The Irrawaddy hired European security specialists to investigate the attacks, who traced to an IP address in London.[421]

A variety of hacker groups have been reported as active in Myanmar. These groups include the Kachin Cyber Army, Bangladeshi Cyber Army and Indonesian Cyber Army. [422] Blink Hacker Group has also been reported to be active.[423] Attacks have typically included website defacement or service takedown via a denial of service attack (DDoS).[424]

Targeting Burmese Exiles with Malware

Throughout the 2000's, there were repeated reports that Burmese exiles were being targeted by the state with malicious software, or "malware", by concealing computer viruses in emails, sent to targets with titles such as 'Happy Birthday' or 'I need help'. The purpose of these attacks at this stage appears to have been to disrupt computers, rendering them unusable, or crashing exile media websites, rather than for the purpose of monitoring user activity.[425] However more recently, the purpose of malware attacks seem to have been to gain access to confidential information (See above and Chapter 4.4 on Surveillance).

Existing Cyber Security Management and Policy in Myanmar

As the ICT sector grows in Myanmar, and more services are introduced online, such as e-banking, maintaining the availability of services, integrity of systems and protection of

[420] See Infosecurity, "Massive DDoS Attack Knocks Burma Offline" (5 November 2010).
[421] Shawn W. Crispin, "Burmese Exile News Site Endures Hacking, DDoS Attacks" *Committee to Protect Journalists (CPJ)* (2 May 2011).
[422] Bill O'Toole, "Email Hacking Exposes Cybercrime in Myanmar" *The Myanmar Times* (20 February 2013).
[423] Softpedia, "1,000 Myanmar Websites Hacked by Blink Hacker Group" (3 January 2013) and Blink Hackers Group.
[424] A denial of service attack involves flooding a network with information, which overwhelms a website or services server used for hosting. This can involve a single attacker, or a group of compromised computers (bot-net) that flood the network (called a distributed denial of service attack).
[425] Rehmonnya.org "'I Need Help' Email Virus Attacks Burmese Exile Groups" (4 October 2008).

information against attacks will become a central issue to the Government of Myanmar's internet governance policy. However, there is currently no legal framework in Myanmar that clearly defines what constitutes Personally Identifiable Information (PII) or stipulates any requirements around the collection, management, or transfer of personal data for companies. Hacking is criminalised under article 34 of the Electronic Transactions Law (No 5/2004).[426] A cyber-security/cyber-crime law is rumoured to be in development by either the Ministry of Information and Communication Technology or the Ministry of Home Affairs, both with likely support from the Myanmar Computer Federation (MCF). A specific timeline for the law's development is unclear. In 2014 it was reported that the Government was seeking support and knowledge sharing opportunities from private companies in the cybersecurity space, such as Microsoft.[427]

One of the high priority items under the 2011–2015 ICT Master Plan's Infrastructure component is the establishment of a "Cyber Security Centre"[428], including the creation of a *Cyber Information Act* and Information Security Committee to select the specific technology (hardware and software) that would be used by the Cyber Security Centre. The follow up report to the 2005-2010 ICT Master Plan states the intention to build a Cybersecurity Protection Agency to protect Myanmar's critical information and infrastructure[429], whose role is to enhance Internet security and creating a safe Internet environment. It states the strategic objectives of this agency are to *"Prevent cyber-attacks against Myanmar's critical infrastructures; Reduce national vulnerability to cyber-attacks; Minimise damage and recovery time from cyber-attacks that do occur".* In addition, the agency would protect citizen's personal information, provide guidance and training for Internet and information security, protect critical infrastructure by analysing and evaluating weaknesses in facilities, strengthening security for electronic government services and protection of public information. In 2015, MCIT published a draft ICT Master Plan for public consultation.[430] It outlined plans to create and publish a national cyber security policy by 2016, but did not repeat the specifics outlined in the 2011 follow up report.

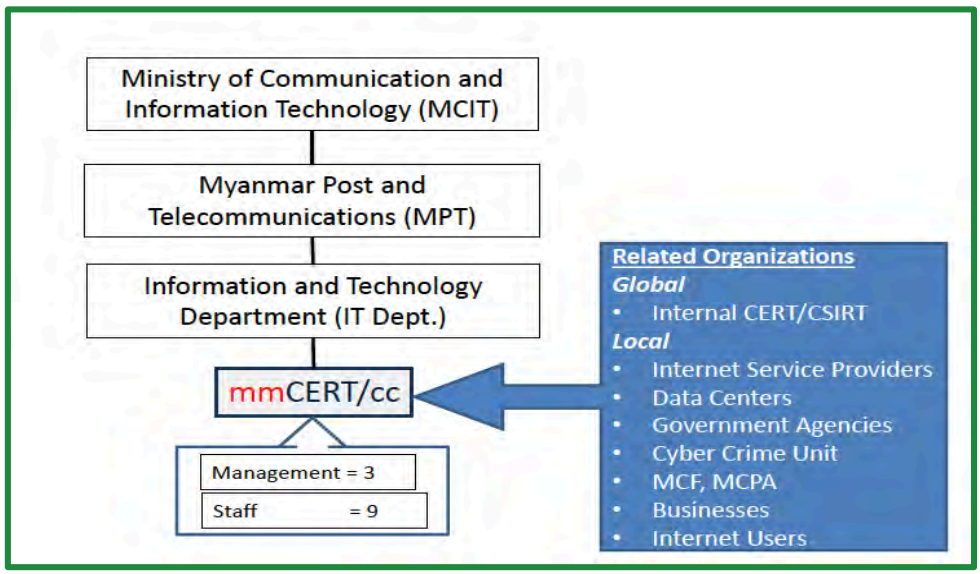
[426] Myanmar *Electronic Transactions Law*.
427 Htun Htun Minn, "Microsoft Tapped To Assist Myanmar Develop Cyber Security Measures" *Myanmar Business Today* (24 June 2014).
[428] See, Ministry of Communications and Information Technology, "The Follow-Up Project of the Establishment of an ICT Master Plan: Final Report" (2011), pages 89-94.
[429] Ibid, Section 3.6.1.6.
[430] See MCIT, "Draft Telecommunications Masterplan" (7 August 2015) and MCRB, "Comments on the draft Myanmar Telecommunications Master Plan" (30 July 2015).

The Role of the Myanmar Computer Emergency Response Team (MMCERT).

Cybersecurity is currently managed by a single organisation called the Myanmar Computer Emergency Response Team (MMCERT), under the Ministry of Communications and Information Technology (MCIT). It is unclear how MMCERT will operate under the planned restructure outlined in the Telecoms Master Plan, where it is not mentioned at all.

Currently, MMCERT exists to disseminate advice and best practices regarding cyber security, provide technical assistance through workshops and seminars, and to cooperate with law enforcement officials on cyber-crime or security issues. MMCERT maintains a ticketing system for case management of cyber security issues. Users can submit a case report via email. [431] MMCERT posts updates regarding known software security vulnerabilities on their home page (e.g. WordPress, Microsoft, Oracle, etc).

Figure 5: Relationship between MMCERT and MCIT



Source: *International Telecommunications Union (ITU)*

MMCERT is an operational member of the Asia Pacific Computer Emergency Response Team (APCERT).[432] The purpose of APCERT is to provide coordination among regional computer emergency response teams, develop responses to large-scale security threats and facilitate research and development among APCERT members. MMCERT is also a member of International Multilateral Partnership Against Cyber Threats (IMPACT).[433]

Outside of these affiliations, stakeholders in Myanmar's ICT business community note that MMCERT lacks the "funding, sponsorship, and support" needed to adequately address cyber-security threats in Myanmar's rapidly evolving ICT sector. Some private

[431] MMCERT, "Incident Report" (last accessed September 2015).
[432] APCERT defines an operational member as a, "*CSIRT [Computer Security Incident Response Team]/ [Computer Emergency Response Team] CERT in the Asia Pacific region, which performs the function of CSIRT/CERT on a full time basis as a leading or national CSIRT/CERT within its own economy.*" See: Asia-Pacific Computer Emergency Response Team, "Operational Framework" (2009).
[433] IMPACT is a partner of the United Nation's International Telecommunication Union (ITU). The IMPACT/ITU partnership is primarily based on implementing the ITU's Global Cyber Security Agenda (GCA).

stakeholders view Myanmar's lack of existing infrastructure as an opportunity, allowing Myanmar to "leapfrog" legacy technology and implement cutting edge infrastructure. For many Myanmar businesses, a desire to deploy modern technology has overshadowed the importance of cyber-security and data protection policies.

B. Field Assessment Findings

See also field research findings in Chapter 4.3 on Privacy, which are also relevant for cybersecurity issues**.**

Cyber Security
Human Rights Implicated: Right to privacy
▪ **Low awareness of cybersecurity risk by business**: The majority of companies did not have policies in place to test their systems against threats. Only one company interviewed carried out ongoing penetration and vulnerability tests to mitigate risk. ▪ **Lack of awareness of cybersecurity risks among users**: Users on social media were observed sharing sensitive personal data including bank statements and checks for donations. Users also reported being unaware of how to configure privacy settings in their social media accounts. ▪ **Use of pirated applications in mobile shops:** Many users also download pirated applications on their mobile phones at phone shops, unaware of the specific application permissions the software required or that an application could contain malware. ▪ **Lack of identified Personally Identifiable Information**: An independent cyber-security professional noted that companies in Myanmar have not defined what constitutes Personally Identifiable Information (PII) (information that can used to "distinguish or trace" an individual's identity), or who has the ability to access this information internally.[434]

C. Cybersecurity: Recommendations for ICT Companies

- **Raise awareness of users about protecting themselves online**: Users in Myanmar generally have a very low level of awareness around cybersecurity, including the use of passwords or keeping personal information safe. Both government and business should address the need to raise cybersecurity awareness among users.
- **Employ the maximum security for user communication:** At a minimum, companies that provide online communications and transactions, such as email, social networking and shopping, should use industry standard encryption such as 'https', which encrypts traffic between a web browser and the server of the service being accessed, strengthening the privacy of communications and transactions online.[435]
- **Be prepared for a cyber-attack by developing a response plan**. As noted above, there are currently no laws on cybersecurity, data protection and little in the way of support from overstretched government resources in terms of supporting smaller or newer businesses in developing their cybersecurity approach. This could be an important area of collective action by the larger multinational ICT companies to

[434] National Institute of Standards and Technology, "Guide to Protecting the Confidentiality of Personally Identifiable Information (PII)" (2010).
[435] Mike Shema, "*Web Security: Why You Should Always Use HTTPS*" *Mashable* (31 May 2011).

support local industry associations or other initiatives to improve protection among local businesses. It should be possible to detect an attack quickly and respond to secure data and minimise damage. If companies do not do all they can to keep services available, maintain the integrity of their systems, and protect the confidentiality of user data they could suffer a loss of trust from users, impose costs and liabilities on users and potentially on themselves.

- **Clearly communicate to customers or users what data is being collected and why**: Field research findings demonstrate that few companies in Myanmar have privacy policies or communicate their policies to users (See Chapter 4.3 on Privacy).
- **Conduct on-going vulnerability assessments and penetration tests**: It is critical that businesses are aware of potential vulnerabilities in their internal systems. This involves ensuring that all "information assets" (servers, applications, databases, paper files) are protected from unauthorised access. Using licensed software means that companies will have access to the latest available version from the developer and fixes for security vulnerabilities through software updates.
- **Particularly protect vulnerable users:** Civil society groups are often the target of cyberattacks, either to disrupt the spread of information or gain confidential information, such as journalist sources, from email accounts and servers. (See Chapter 4.8 on Groups at Risk). Companies could open a channel of communication with Myanmar's civil society groups so they can quickly be notified if such events occur. In the event of a data breach, companies should notify users if there has been a data breach or if they suspect a state-sponsored attack has taken place on their email accounts.[436] This enables users to take action to secure information or warn others. In 2013, a number of journalists covering issues in Myanmar received these warnings.[437]

D. Relevant International Standards on Cyber Security

Relevant International Standards:

- Council of Europe, Convention on Cybercrime (Budapest Convention)

Relevant Guidance:

- Council on Cyber Security, "The Critical Security Controls for Effective Cyber Security Defense, version 5.1"
- Australian Department of Defense, "Strategies to Mitigate Cyber Intrusion"
- Council of Europe, "Global Alliance on Cyber Crime – GLACY"

[436] Google Online Security Blog, "Security Warnings for Suspected State-Sponsored Attacks" (5 June 2012).
[437] John Ribeiro, "Google Warns Reporters Covering Myanmar of 'State-Sponsored' Attacks on Gmail Accounts" (11 February 2013).

Chapter 4.6
Labour

4
4.6

Chapter 4.6
Labour

In this Chapter:

- **A.** Context
  - ILO Fundamental Principles and Rights at Work
    - Freedom of Association and the Right to Collective Bargaining
    - Discrimination
    - Forced Labour
    - Child Labour
  - Revision of Myanmar Labour Laws
  - Awareness and Enforcement of Labour Rights in Myanmar
- **B.** Field Research Findings
- **C.** Recommendations for ICT Companies
  - Using International Standards
  - Recommendations on Workplace Issues
  - Forced Labour and Other Forms of Labour Exploitation
  - Child Labour
  - Discrimination
  - Health & Safety
  - Expectations of Local Employment
- **D.** Relevant International Standards and Guidance on Labour Issues

A. Context

Worker rights in Myanmar have experienced numerous challenges. For 50 years, independent trade unions and employer organisations were prohibited; laws covering labour protection were antiquated and/or restrictive; forced labour of civilians by the military and civil authorities was common; and child labour is still an ongoing problem. There have however been positive developments since the 2011 reform process began.

The 2008 Constitution includes protection from discrimination and freedom of association, though these constitutional provisions contain some significant gaps in protecting workers rights. Article 358 of the Constitution prohibits slavery and human trafficking, but Article 359 provides for "*hard labour*" as part of a criminal sentence. The rights to peaceful assembly and freedom of association are also provided for, but another part of the Constitution subjects the exercise of these rights to a wide qualifier that the exercise of the rights cannot be contrary to laws on *inter alia* "*community peace and tranquillity*". Article 31 of the Constitution aims to reduce unemployment. Under Article 349(b), citizens have the enforceable right to equal opportunity in occupation.[438]

An estimated 70% of the population is engaged in agriculture or related activities; 23% in services, and 7% in industry.[439] Low-paid and insecure jobs (often only on a daily basis) characterise the employment situation. The 2014 Census results indicate an

[438] Legal Analysis of the 2008 Constitution, Appendix 1, commissioned by IHRB.
[439] Labour Background Paper commissioned for IHRB, p 2 (on file with IHRB).

unemployment rate of 4% for workers age 10 and over; 3.9% for over 15s; and 4% for ages 15-64. The Census reports a labour force participation rate of 57% for those aged 10 and over; 64.4% of those 15 and over; and 67% of those aged 15 – 64.[440] Underemployment in Myanmar was 37% in 2010, affecting rural and urban areas, poor and non-poor, male and female alike, and young people in particular.[441] To improve the quality of statistical data on labour, the Ministry of Labour, Employment and Social Security, with International Labour Organisation (ILO) support, is undertaking a comprehensive national labour force survey,[442] with results expected in late 2015. The lack of reliable statistics and accurate data hold true for the ICT industry workforce.

According to the General Secretary of the Myanmar Computer Federation, Myanmar has an estimated 1,600 software engineers, 1,000 network engineers, including those working in the telecom companies and about 1,000 service technicians, including handset repair technicians. No statistics on fibre installation or tower construction workers are available. It is also estimated that by 2025, Myanmar will have 25,000 engineers. Currently, there are 26 Computer Universities in Myanmar. There is no existing data on the employment rate of ICT university graduates.

The development of the ICT industry has led to a dramatic increase in jobs in the sector. According to a survey conducted by work.com.mm, an online job search company, during the month of April 2015, the highest number of job announcements was in the field of engineering, followed by the software and IT sector. [443] There is however a mismatch between demand and the quality of supply, a consequence of poor quality ICT education. There are many ICT graduates, but few who are qualified, and those there are often leave Myanmar for better work opportunities abroad.

As to the international telecom operators, Ooredoo currently has around 1,000 employees of whom 87% are Myanmar nationals (41% male/59% female). Ooredoo has committed to the Government to employ 99% Myanmar nationals within 5 years. Telenor Myanmar currently has 478 employees (64% male/36% female) of whom 80% are Myanmar nationals. There are no statistics on the number of people working as SIM card and phone vendors at points of sale, but operators have set targets: Ooredoo promises 240,000 SIM card sale points and 720,000 top-up locations; Telenor aims for 70,000 SIM card sale points and 95,000 top-up locations.

ILO Fundamental Principles and Rights at Work: Freedom of Association and the Right to Collective Bargaining in Myanmar

For the first time in 50 years, the 2008 Constitution and new labour laws provide for independent trade union activity, though some gaps in protecting freedom of association remain. The 2011 *Labour Organisation Law* permits the exercise of freedom of association and the 2012 *Settlement of Labour Dispute Law* provides for disputes resolution institutions and mechanisms. Parliament amended the latter law in October 2014 providing for *inter alia* increased fines for employers who break this law, but rejected

[440] The Republic of the Union of Myanmar, "2014 Myanmar Population and Housing Census, Census Report Volume 2-A" (May 2015).
[441] Underemployment refers to people who worked or had a job during the reference week but were willing and available to work more. ILO, "Underemployment Statistics" (last accessed August 2015).
[442] ILO, "Myanmar sign agreement on National Labour Force Summary", (14 November 2013). The survey is intended to inform national labour policy and will examine youth employment, child labour, forced labour, and social security.
[443] Internet Journal, "The top job in the field of telecommunications services" (15 May 2015) (Burmese).

the President's proposal which provided for imprisonment of such employers.[444] In May 2015, the ILO reported that over 1660 independent trade unions have been registered, mostly at the enterprise level.[445] While these are predominantly based within the apparel, other manufacturing or farming sectors, at least one of the international telecommunications operators, Telenor, has a global framework agreement with the union representing service sector workers around the world. The agreement provides a platform and framework for dialogue between UNI Global and Telenor on fundamental labour rights that can also cover a dialogue on working conditions in Myanmar.[446]

On a national scale, there is an opportunity to build from scratch the sort of 'development' model of industrial relations the country needs. However, the current laws relating to freedom of association and collective bargaining mentioned above promote fragmentation of industrial relations by making it difficult for unions to establish themselves beyond the enterprise level. A lack of understanding, or in some cases entrenched attitudes, might see the new rights-based industrial relations framework drift towards a conflict model. This risk has been increased by the perceptions created by several high profile labour disputes and the weaknesses in the law and its implementation, which mean that, in practice, employers can discriminate against workers who seek to exercise their rights in accordance with the new laws, including by dismissing them from their jobs.

Early 2015 saw a number of strikes and protests in Yangon by garment factory workers calling for higher wages and better working conditions. Although some disputes were resolved by employer-worker meetings, others were not, leading to protest demonstrations and arrests of workers.[447] An ILO official noted in August 2014 that factory owners appear to be dismissing employees because of their union activities and recommended that the Government outlaw this practice.[448] The ILO has recommended a number of amendments to the new laws on freedom of association to improve their functioning, including an obligation on parties to engage in collective bargaining in good faith, and to strengthen the enforceability of decisions of the labour arbitration bodies.

[444] Unofficial translation of The Republic of the Union of Myanmar, Board of Information, Issue No (5/2014), October 14, 2014, announcing the Draft Bill which amends the Settlement of Labour Dispute Law, on file with IHRB/MCRB.
[445] Mizzima "Unions have hit a glass ceiling" (10 March 2015).
[446] Telenor, "Telenor renews global agreement with UNI Global Union" (May 2015).
[447] Myanmar Times "Time for government to step up on labour disputes" (17 March 2015).
[448] DVB, "Burma's Industrial Relations at a Crossroads" (30 August 2014).

ILO Fundamental Principles and Rights at Work: Discrimination in Myanmar

Article 348 of the 2008 Constitution guarantees that discrimination by the Union against any citizen is prohibited on grounds of race, birth, religion, official position, status, culture, sex and wealth. However, the internationally recognised grounds of discrimination based on colour, language, political or other opinion and national origin are not prohibited by the Constitution, leaving significant gaps in protection against discrimination. Labour leaders, religious and ethnic minorities, women and children, people living with disabilities and LGBT people (as discussed in further detail in Chapter 4.8 on Groups at Risk) all face discrimination in hiring and in the workplace.

ILO Fundamental Principles and Rights at Work: Forced Labour in Myanmar

A major concern in Myanmar has been the widespread and systematic use of forced labour of civilians by the *tatmadaw* (the Myanmar army) and the civil administration for several decades, despite the fact that the Government had ratified *ILO Forced Labour Convention (No. 29)* in 1955. The ILO first established an office in Myanmar during 2002 after the Government and the ILO reached an "*understanding*" and the appointment of an ILO Liaison Officer. The Understanding provided that the Liaison Officer would conduct activities aimed at the elimination of forced labour in the country. The Understanding remains in force and in 2007 the ILO and the Government agreed a Supplementary Understanding. The Supplementary Understanding established a complaints mechanism to allow victims of forced labour to seek redress/remedies from the authorities.[449] Since the reform process began in 2011, many observers, including the ILO, have welcomed the decrease in forced labour, but noted that the practice is still continuing in some areas.[450] President U Thein Sein made a public commitment to end forced labour by 2015.

Although there is now less risk to communities and companies of forced labour being used by the military in relation to projects, such as road construction, there is a need to remain vigilant, as it was a common practice for several decades, and local Government and other authority figures still sometimes resort to it. The ILO noted that while there are currently relatively few complaints of forced labour in the private sector, this may be because in Myanmar forced labour is generally perceived to be associated with the Government[451].

ILO Fundamental Principles and Rights at Work: Child Labour in Myanmar

Child labour is widespread throughout Myanmar, including as tea shop or restaurant attendants, street vendors, manual labour, waste collectors or beggars, in food processing and light manufacturing, and on farms in rural areas. The risk of child labour to companies operating in Myanmar is high, as they are working in a wide variety of industry sectors. Moreover, ascertaining someone's age in Myanmar is not always straightforward. Birth registration in urban areas was reported at 94%, but in rural areas the rate was only 64%.[452] Many people, especially under-18s and ethnic minorities, do not have any form of official identification which indicates their date of birth.

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[449] See: ILO, "ILO in Myanmar" (last accessed August 2015).
[450] ILO Committee on the Application of Standards, "Extract from Record of Proceedings" (June 2012), para18
[451] ILO, "Update on the operation of the complaint mechanism in Myanmar", *Report of the ILO Liaison Officer to ILO Governing Body, 319th Session, Geneva* (16-31 October 2013), GB.319/INS/INF/2. Please note that complaints include underage military recruitment.
[452] UNICEF, "Situation Analysis of Children in Myanmar 2012" (2012).

An August 2014 report by one telecoms operator noted that on-site inspections of its supply chain found cases of underage labour (15 – 17 years old) and child labour (under 15 years old), including on tower construction sites.[453] In May 2015 the same company reported they had uncovered additional cases of child and underage labour in its supply chain, as they continued their work to eradicate all such cases in tower construction sites. The Government's ratification of *ILO Convention No 182 on the Worst Forms of Child Labour* in December 2013[454] is part of the Ministry of Labour's reported aim to eradicate the worst forms of child labour by 2015. Parliament approved the ratification of the convention in July 2014, with full implementation pledged by the Government in December 2014 although this has yet to take place.[455]

Overview of the Revision of Myanmar Labour Laws

In addition to the laws on freedom of association and collective bargaining noted above, new labour laws passed by Parliament since the 2011 elections include the 2013 *Minimum Wage Act,* the 2012 *Social Security Law*, and the 2013 *Employment and Skills Development Law*. Other laws are believed to be in draft form or in the process of being drafted, including a *Shops and Enterprises Act*, an *Occupational Health and Safety Act,* a *Factories Act Amendment Bill* and a *Foreign Workers Act.* The ILO is currently working with the Government to come up with an overall legal and policy framework on labour, with the aim of drafting one comprehensive labour code after 2015 that would consolidate these laws and draft laws into a coherent code or framework.[456] Given the rapid enactment of labour laws, it is likely that there will be overlap and contradiction within the laws, at least until the more comprehensive labour code is in place.

Working hours are generally very long but with new labour laws in place, there is a focus on reducing hours. The 2012 *Minimum Wage Law* provides for a minimum wage to be set. This finally took place in August 2015 when the rate was set at 3,600 MMK per day.[457] The *Minimum Wage Law* requires that salaried workers should have one day off per week with pay, and the payment of over-time if a salaried worker works on the day of leave (Article 16d). Protections for daily wage workers are predictably less. However, if a worker in a daily wage job works less than the set hours per day because the employer requires fewer hours, the worker should still receive the full wage for the day (Article 16(e)). The law covers part-time work, hourly jobs and piecework (Article 16c) and provides that both men and women should receive the minimum wage without discrimination (Article 16f). The *Minimum Wage Law* also provides for penalties if the employer fails to pay the minimum wage.[458]

The 2012 *Social Security Law* provides for a health and social care insurance system; a family assistance insurance system; invalidity benefit, superannuation benefit and survivors' benefit insurance system; and an unemployment benefit insurance system from

[453] Telenor Myanmar, "Business Sustainability Update" (19 August 2014). Children were immediately removed from the sites. The company's policy states that no one under 15 will be employed and that workers must be at least 18 years of age to work on tower construction sites, as the company considers the work to be potentially hazardous. It also works to educate and train local suppliers and the community on its child labour policies. See also Myanmar Times, "Telenor works to address its child labour troubles", (22 May 2015).
[454] Eleven Media, "Myanmar Vows To Root out Child Labour By 2015" (4 May 2014).
[455] The Irrawaddy, "Govt to Start Child Labor Elimination Policy in December" (18 July 2014).
[456] ILO is expecting to put in place a full Decent Work country programme in 2016.
[457] Myanmar Times, "Minimum wage set at K3600" (19 August 2015).
[458] Myanmar Ministry of Labour, Employment and Social Security, *2012 Minimum Wage Law*.

a social security fund, which both employers and workers pay into. The Law revokes the 1954 *Social Security Act*,[459] and came into effect on 1 April 2014.[460] The *Social Security Rules* (Notification No. 41/2014) are also in place.[461] However, as of January 2015 only 1.5% of the population was registered in the social security system, according to a Ministry of Labour official.[462] It appears that companies with two or more employees, including those in the ICT sector, are required to pay social security.[463]

The 2013 *Employment and Skills Development Law* provides for skills training and a fund into which employers pay. The law also provides for the establishment of an employment and labour exchange office by the Ministry of Labour, Employment and Social Security. Significantly, written employment agreements between employer and employee will now be required under Chapter 3 of the law. The law went into effect on 30 November 2013 and revoked the 1950 *Employment and Training Act*.[464]

The 1951 *Leave and Holiday Act* was amended in July 2014 and provides for leave, holiday, maternity leave and covers daily wage, temporary and permanent workers.[465] The forthcoming *Occupational Health and Safety Act* is expected to be passed by Parliament by September 2015.

Chapter II (Article 3) of the *Settlement of Labour Dispute Law* requires an employer with more than 30 workers to form a Workplace Coordinating Committee (2 representatives of workers, 2 representatives of employer) whether or not there is a labour organisation (e.g. union) in the enterprise.

Awareness and Enforcement of Labour Rights in Myanmar

There is an overall lack of awareness by workers and employers of these new legal rights and safeguards, including lack of understanding of the concept of a minimum wage. The ILO, trade unions, and other labour activists are helping to inform both workers and employers about the new labour laws and poorly understood concepts such as collective bargaining and a minimum wage. So far enforcement of the new laws is piecemeal, and full-scale implementation will be a long-term process. Although the Factories and General Labour Law Inspection Department (FGLLID) is the main Government agency responsible for occupational safety and health, a number of other agencies in other ministries are responsible for specific areas or sectors related to safety and health at work and/or public safety and health in general. These include the Ministry of Mines, Ministry of Industry (boilers and electrical equipment), Ministry of Construction, Ministry of Agriculture and Ministry of Health etc.[466] The Government recognises the need for a greater number of trained labour inspectors for worksites and is reportedly taking steps to increase the number of qualified inspectors.

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[459] *The Social Security Law*, 2012, on file with IHRB.
[460] New Light of Myanmar, "State is also exerting efforts to ensure fair protections without affecting the interest of both workers and employers" (1 May 2014).
[461] Myanmar Garment Manufacturers Association "Labour Laws and Regulations" (accessed August 2015).
[462] Mizzima "Social Security Sign-up slow in coming"(5 January 2015).
[463] This excludes except for government departments, international organisations, seasonal farming and fishing, non profit organisations, establishments operating less than three months, family and domestic businesses. *Social Security Law*, August 2012, Section 11, a) and b) and Section 12, b), on file with IHRB/MCRB.
[464] *Employment and Skill Development Law* (2013), unofficial translation on file with IHRB.
[465] Myanmar Garment Manufacturers Association "Labour Laws and Regulations" (last accessed August 2015).
[466] Labour Briefing paper commissioned by IHRB, August 2013, on file with IHRB.

B. Field Research Findings

The following findings concerning respect for the rights of workers, while not universal, were found to be widespread in the field. Examples of good practice observed are included at the end of the chapter.

ILO Fundamental Principles and Rights at Work:
Freedom of Association & the Right to Collective Bargaining

Human Rights Implicated: Right to peaceful assembly; Right to freedom of association and collective bargaining

Field Assessment Findings

- There was a general **lack of worker-management engagement** in most companies across the ICT value chain, and only a few companies provided grievance mechanisms through which workers could raise complaints regarding their jobs and seek a resolution.
- **Unskilled workers tend to be relieved to secure a job at all** because the supply of workers exceeds work available. This leads to a tendency for workers to **refrain from raising workplace and employment related complaints**, such as unpaid or inadequate wages, poor health and safety standards, or barriers to unionising.
- **At fibre factories, workers were unaware of their basic association and collective bargaining rights,** or the requirements to form a union, such as that there must be a minimum of 30 members**.** They did not feel the company would allow it even if it was permitted under national law. They were also concerned that joining a political party could also affect their jobs.
  - Workers were **able to raise complaints at meetings or anonymously through a letter box system**, but issues previously raised, such as deductions from daily wages and bonuses had **failed to be addressed**.

ILO Fundamental Principles and Rights at Work:
Non-Discrimination

Human Rights Implicated: Right to non-discrimination; Right to work; Right to just and favourable conditions of work

Field Assessment Findings

- It was very unusual for **any women to work on tower construction**.
  - This was often justified on the grounds that it unsafe for them due to night work and distances between the site and their village/ accommodation.
  - Where women were able to work on tower construction sites, they were only allowed to do certain manual tasks, such as backfilling or moving materials.
- **Racial and religious tensions were observed in some areas, mainly where communities identified the company or its workers as Muslim** This followed intercommunal violence in other parts of the country**:**
  - Researchers heard of several incidents in which subcontractors of a company from a majority Muslim country were disturbed by communities protesting the company's presence.
  - Workers were denied accommodation due to working for that company;
  - Communities threw stones at cars carrying workers of companies that were perceived to be owned by Muslims.

ILO Fundamental Principles and Rights at Work: Forced Labour and Child Labour

Human Rights Implicated: Right to freedom from forced labour and servitude; Right to freedom from child labour; Right to an adequate standard of living; Right to education

Field Assessment Findings

- Researchers heard of **several cases where workers were brought on to dig fibre cable trenches due to a debt owed to the group leader**. This often arose where workers asked for advance payments during the rainy season in order to make ends meet until the next crop yields. As such, workers were often in positions of **debt bondage**, reporting that where they expressed a wish to quit or move to another job the creditor threatened to increase interest rates.
  - This impact was heightened where workers were also required to purchase food, water and other supplies from labour leaders, often at inflated prices and on a credit-based system.
- Occasional practices of reviewing identification to verify workers' age were reported, but many more instances of lack of identification cards or documents were described to researchers, indicating a **general lack of basic measures to prevent underage workers in fibre cable digging in particular**.
- Fibre cable line workers often had to travel long distances from their homes in order to take up work. They sometimes brought their children with them as they could not afford child care or because it was difficult to reliably arrange due to moving from site to site regularly. As such, **children were regularly left with someone connected to the works in the worker camps during the 10 hour shift periods**.

Employment Status

Human Rights Implicated: Right to just and favourable conditions of work; Right to equal payment for equal work

Field Assessment Findings

- Across the ICT value chain **employment contracts were not being used** in the majority of observed cases**,** with the limited exception of direct, permanent employees of a tower company.[467]
  - Consequently, **wage slips** itemising pay and deductions were not being provided.
- It was reported that manual labourers and construction workers regularly secured jobs through relatives/connections. Wages were already negotiated and contracts were not given, as workers will "take what they are given".

[467] The research team was not permitted to meet the staff of the telecoms operators so this does not necessarily apply to those employers.

Working Hours, Wages and Benefits

Human Rights Implicated: Right to just and favourable conditions of work; Right to an adequate standard of living

Field Assessment Findings

- **Daily wage workers** typically worked every day possible to maximise income while work was available, thereby exceeding legal working time limits
- **Awareness of rights to wages and benefits varied considerably**. Many workers admitted to a **very low level of understanding of their rights** vis-à-vis employers or the Government. There was also little to no information regarding labour rights or working conditions shared proactively by most companies with their workers, which will be important as a number of new labour laws such as the *Minimum Wage Law* have recently come into force.
- **For tower construction:**
  - It was regularly reported to researchers that **workers did not receive any rest days until after the completion of a site**, i.e. usually a 1-1.5 month build period.
  - **Working hours** were often 7 or 8 a.m. until 5 or 6 p.m. with a (usually 30-60 minute) lunch break. A second night shift was occasionally reported of 7 p.m. to 11 p.m.
  - **Wage rates varied** depending whether workers were directly employed by tower companies, labour sub-contractors, or brought on for peak periods (such as on foundation sections) as day labourers from nearby villages.
    - Worker daily wages were reported anywhere between 5,000 MMK per day up to 15,000 MMK (30,000 MMK if able to work a double shift)
    - Overtime was not usually paid. Where it was reported as a practice, for example where workers worked beyond 11 p.m., the rate given was not specified.
- **For fibre line digging:**
  - **Working hours** were commonly cited as 6 or 7 a.m. to 6 or 7 p.m. by managers, but workers often reported that they were often pressured to continue until target distances were dug regardless of the hours worked.
  - **Workers were not given set rest days** as they were not paid until their target distance had been dug, which was dependent on soil conditions and the number of workers grouped together.
  - **Wages often did not amount to levels sufficient to cover basic needs:**
    - Workers were paid according to distance dug, with no reflection of soil conditions or geography where it takes more time and effort to achieve the same distances. In terrain where distances were harder to achieve, workers regularly struggled to earn enough to feed themselves or families.
    - **Sick pay was not provided**. As such, workers continued to work 12 hour days of hard labour even when ill in order to ensure their incomes.
- **For fibre cable factories:**
  - Working hours:
    - Working hours lasted around 8 hours per day.
    - Overtime was only paid after 8 years of continuous work.
  - Wages:
    - The basic daily wage rate was 2,200 MMK ($2.00), but workers reported not receiving salary increases or promotion despite 4 or 5 years continuous service.

  - Bonuses were reportedly provided for regular attendance.
- Leave:
  - Workers received one and a half days off per week.
  - Workers were able to take public holidays off with pay.
  - Workers did not receive paid sick leave or company-provided insurance.
  - Workers received 10 days unpaid annual leave.
  - Female workers were entitled to three months paid maternity leave at the basic salary band.

Working Conditions and Provision of Facilities to Workers

Human Rights Implicated: Right to an adequate standard of living; Right to just and favourable conditions of work; Right to non-discrimination

Field Assessment Findings

- **Observed working conditions for fibre cable digging were particularly harsh:**
  - **Workers had to dig long distances of trenches manually**, without any mechanical digging or drilling equipment, even in mountainous and rocky areas.
  - As noted above, **12 hour work days** were common practice.
  - **Workers were expected to dig set distances each day,** ranging from 2 – 10 metres each day per worker.
  - **If a worker was injured, they had to repay any medical expenses** covered by their company.
  - **Language barriers** were a commonly reported problem between managers and workers. Researchers heard that workers were often unsure whether any complaints or issues they raised were properly reported to the managers responsible.
- **Little to no facilities or equipment were provided to fibre cable diggers:**
  - **Workers were not provided with any equipment** such as shovels and pick axes and had to pay for their own tools or had the costs deducted from their salaries.
  - **Workers were not provided drinking water** and had to source their own, for example requesting from surrounding residents or boiling ground water.
  - **Workers had to find or build their own accommodation with their own money**, despite often being transported long distances from their homes for long periods of time in order to continue working on the lines. This **usually consisted of make-shift tents from tarpaulins and sticks**. Camp areas were commonly in nearby fields or off the side of the road and did not have any running water, power or adequate sanitation facilities.
  - Workers had to **pay for all food and supplies while on the job**, despite relocating far from home for long periods of time to undertake the work.
    - Workers were **commonly required to buy food through the wife of the group labour leader**, and several reports were received of **charging workers prices far above market value** for their food supplies.
    - Workers often had to **similarly pay for other supplies:** candles, blankets, mattresses, buckets of water to cook or shower with, and wood for cooking.
- **Some fibre factory workers were provided with accommodation** in permanent structures that were heated and had running water and electricity.
  - Workers' families were allowed to stay with them.
  - Rooms were reportedly 10 square feet, though researchers were unable to visit them due to time constraints.

- Workers were provided three meals per day, consisting of unlimited rice and up to two cuts of meat.

Health, Safety & Environment (HSE)

Human Rights Implicated: Right to the highest attainable standard of physical and mental health; Right to life, liberty and security of the person

Field Assessment Findings

- Workers of subcontractors were commonly not informed about which tower construction company or telecoms operator the tower was being built for, which implies that the operator's and their 1st tier subcontractor's **health and safety and other operational standards may not have been transmitted to the site level**.
- **Workplace attention to health and safety varied greatly** amongst the tower and fibre sites visited by researchers.
- Field teams regularly witnessed tower construction workers and fibre trench workers **without personal protective equipment (PPE)**, for example:
  - Not fastening **safety harnesses** when climbing the towers
  - No **gloves**, e.g. while digging fibre cable trenches
  - **Canvas shoes** rather than hard toed shoes
  - No **hard hats**
- **Even where workers had PPE to hand:**
  - Researchers observed a number of occasions where **workers asked if they "*actually needed to wear it*"** or companies reporting workers not wearing it due to discomfort, such as not wearing safety suits in hotter weather, indicating lack of enforcement of PPE use by all workers while on site.
  - It was common for workers to have to **buy or replace their own PPE, or compensate the value if they damaged it while working**.
- **Failure to ensure that emergency first aid kits were available at tower sites** was also a common occurrence**.**
  - Where companies did provide first aid kits or fire extinguishers, workers reported they **did not know how to use them** in cases of emergencies and had not been provided any training.
- **For fibre factories:**
  - PPE in the form of cotton gloves was provided.
  - Workers received training on how to work machines and use the fire extinguisher.

Conflict Areas

Human Rights Implicated: Right to life, liberty and security of the person; Right to take part in the conduct of public affairs; Right to information

Field Assessment Findings

- There were some cases in which companies attempted to negotiate access to areas to lay fibre cables with non-state armed groups (NSAGs). **In some cases a fee was paid for this access.**
- Researchers received reports of cases of operational delays, where local groups, including armed groups, **blocked access to sites, due to lack of consultation at the site level.** While some consultation with local leaders may have been undertaken, this may not have been communicated to or accepted by all stakeholders.

- Researchers observed **fire-arms being carried by NSAGs** present during roll-out in ceasefire areas. While researchers neither observed not heard reports of shots being fired, the presence of fire-arms is a risk.
- Researchers also received reports from workers that they were aware that landmines **may have been sowed in the past, with land mines around infrastructure in conflict areas**. This led workers to avoid walking through certain areas. The measures companies took to protect their workers in such circumstances were unclear.

Business Relationships

Human Rights Implicated: Right to just and favourable conditions of work

Field Assessment Findings

- **Tower company acknowledgement and action concerning their responsibility for the safety of workers was uneven.**
  - Some tower companies indicated worker safety was **the responsibility of their subcontractors alone**. They did not provide any safety guidelines or training to subcontractor managers or workers, did not regularly monitor site safety or track incidents.
  - **Others undertook subcontractor skills-based and safety training and regular site monitoring to ensure safety standards** were upheld and practices corrected.
  - Of those tower companies who had systems in place for incident reporting and raising issues to more senior levels of the company depending on the severity of the incident, it was reported that **labour subcontractors may fear reporting incidents for fear of reprisal or lost business**.
- **Choosing to operate without contracts between tower companies and their subcontractors was a common occurrence**. This indicates the more rigorous control of working conditions by telecoms operators is not consistently carried through to business partners by contractual conditions committing sub-contractors to meeting business partners' standards.

Myanmar Good Practice Examples:

- Some subcontractors ensured PPE was provided to their workers and used, provided emergency first aid kits and fire extinguishers, and paid workers' medical bills where incidents arose, despite not receiving safety guidelines or training from tower companies or telecoms operators.
- A small number of fibre cable digging companies provided workers with digging equipment, PPE and tents and supplies for accommodation without charge.
- One company has reported it has a zero tolerance policy for employment discrimination, and child and forced labour, stating health and safety and a living wage are key considerations.[468]
- One company has reported that its Myanmar operations are governed by a Code of Conduct and Code of Business Ethics, covering land, labour, health and safety, the environment, anti-discrimination, and privacy/freedom of expression. It conducted a

[468] See further: Apollo Towers Myanmar, "Response by Apollo Towers: Myanmar Foreign Investment Tracking Project", *Business & Human Rights Resource Centre* (last accessed September 2015).

human rights impact assessment in 2013, which identified key risks that will be reflected in its management systems.[469]

- One company has reported that it has no manufacturing facilities but does have a small sales force in Myanmar. It applies its global policies on labour rights, health and safety, child and forced labour, living wage, anti-discrimination, and the environment.[470]

C. Labour: Recommendations for ICT Companies

Using International Standards

- **Use international standards as a basis for relationships with workers:** Given the large number of labour laws being enacted, it is likely that there will be overlap and contradiction between and within the laws. As noted above, the ILO is working with the Government to develop one harmonised, overarching labour code that is expected to be better aligned with ILO standards. Until such time, using international standards rather than Myanmar law is a better basis for developing policies and practices that respect the human rights of workers (see Part D).

Recommendations on Workplace Issues

- **Engage constructively on freedom of association and trade unions:** Since trade unions are unlikely at present to be able to provide information to workers about their labour rights, ICT companies should provide relevant information to employees and other workers, particularly in light of the many new labour laws. Given non-existent or only nascent awareness and understanding of the right to freedom of association and collective bargaining, companies should ensure that their workers are aware of and able to exercise their rights, and engage constructively with trade unions where workers choose to establish them. Moreover, they should ensure that workers who lead or join a union are not discriminated against, dismissed or otherwise impeded in carrying out their trade union functions.
- **Support business partners in respecting labour laws and standards:** Local Myanmar companies will need support in meeting a wider range of contracting requirements around quality, working conditions, health and safety and anti-corruption. Telecoms operators, network equipment providers, tower companies, and the other main contractors should put in place specific contractual requirements together with monitoring, support, training, and relevant incentives and disincentives with business partners supplying goods and services to prompt uptake and respect for relevant international, national and company standards.
- **Pay particular attention to the rights of workers of subcontractors**: Working conditions, including health and safety issues, were raised by workers of sub-contractors met during field assessments. These workers were in lower-skilled, lower paid, manual labour positions, working on a temporary or irregular basis in which working conditions and preventative measures could be haphazard, with unclear access to company-provided health services or facilities.

[469] Ericcson, "Response by Ericsson: Myanmar Foreign Investment Tracking Project", *Business & Human Rights Resource Centre* (last accessed September 2015).
[470] See further: LG Electronics, "Response by LG Electronics: Myanmar Foreign Investment Tracking Project", Business & Human Rights Resource Centre (last accessed September 2015).

- **Exercise vigilance around the continued but declining risk of forced labour:** The ILO is not yet proposing to disband the Forced Labour Complaints Mechanism, indicating an ongoing if decreasing problem.[471] Even though the incidence of forced labour in Myanmar is diminishing, ICT tower construction companies and fibre cable operators in particular should remain vigilant to the potential risks of forced labour. There is still the potential for forced labour by the *tatmadaw* and local authorities in connection with road building and infrastructure construction, although the assessment did not find this is happening in connection with the rollout of the ICT infrastructure.
- **Be alert to and eliminate other forms of labour exploitation:** As a least developed country (LDC) with a high degree of rural poverty; a generally uneducated population; underemployment; corruption and a current lack of worker awareness about their rights and few trade unions, there is a high risk for exploitative working conditions. Many of the jobs for local communities will be in unskilled, daily wage jobs, often controlled via third party labour brokers operating either formally or informally – such as in the construction of the network infrastructure.
- **Be alert to working conditions for migrant and temporary workers:** ICT companies should be aware that while the prevailing pattern has been one of out-migration from Myanmar to other countries in search of work, as the economy develops, that trend may reverse. In any case, internal labour migration is widespread. Migrant workers are often particularly vulnerable to labour exploitation.[472] These circumstances create the possibility of exploitative working conditions and practices that can in some cases fall within the definition of forced labour, where work is undertaken by a person under the threat of a penalty. Workers indicated they are keen for any kind of paid work, so they are often very reluctant to speak out about what can be exploitative working conditions.
- **Carry out due diligence on labour brokers/labour agencies**: ICT companies will need to pay careful attention to the working arrangements and conditions for day labourers or temporary workers engaged through a third party labour agency or broker (who could also be a worker/team leader) to ensure that they are not directly linked to situations of exploitation. The field assessments indicated formal recruitment agencies and labour brokers are not yet commonly visible in network rollout operations. However they are present in other industries (e.g. pipeline construction) where various sub-standard practices have been observed, including not providing basic protections for workers, such as failure to uphold basic working conditions, provide written and understandable contracts, or pay a living wage, and charging workers for PPE provision (see the Oil & Gas Sector-Wide Impact Assessment, Part 4.4) [473]. International labour standards prohibit labour brokers from taking fees from workers for job placements; instead, any placement fees should be paid by the employer. While the Myanmar Government has not ratified the relevant ILO Convention,[474] it is a global standard in this emerging area of human rights risk that serves a relevant guide for company practice. Employers should:

[471] The ILO reports a reduction in occurrences generally throughout the country but notes that "forced labour remains a problem," and that the "number of reported cases of forced labour in the private sector is relatively small … but that this does not necessarily reflect the actual situation as there appears to be a general belief that forced labour is in some way an offence committed only by the Government." ILO, "Update on the operation of the complaint mechanism in Myanmar" GB.319/INS/INF/2 (October 2013).
[472] See the IHRB, *Dhaka Principles for Migration with Dignity*.
[473] MCRB, IHRB, DIHR, "Myanmar Oil & Gas Sector-Wide Impact Assessment" (2014).
[474] ILO, *C181 - Private Employment Agencies Convention* (No. 181) (1997).

- set in place a clear recruitment policy for hiring of staff or use of labour brokers
- ensure that supervisors and managers are aware of the signs of exploitation
- pay the recruitment fees for workers themselves and prohibit accepting payments or other inducements from labour brokers or workers
- monitor the allocation of jobs and use of agencies for signs of suspicious practices
- ensure that all workers, including temporary workers, have access to a grievance mechanism to complain about potential or actual violations of their labour rights

- **Monitor business relationships**: ICT companies should monitor business partners to ensure that they are upholding national labour laws and international labour standards, including through regular surprise field visits. The risks of labour rights violations tend to increase with each tier of the supply chain, where workers are in lower-skilled, lower paid, manual labour positions which are temporary or irregular.

Child Labour

- **Monitor business partners for child labour violations:** While there is a very low likelihood of child labour in direct employment situations within skilled operations of the ICT sector, the prevalence and general acceptance of child labour in Myanmar and the difficulties of validating age means that companies need to be vigilant. Companies should be alert to the possibility of child labour being used in supplying products or services, such as in construction or catering, directly linked to their operations. There are an increasing range of tools available to assist companies in assessing risks to children from their operations.[475] (See also Chapter 4.8 on Groups at Risk).

Discrimination

- **Seek to increase female representation in the workforce:** Dscrimination against women and girls in education and the workplace is widespread in Myanmar.[476] The current rate of female employment in the ICT sector is low, as it is in many other countries. (See also Chapter 4.8 on Groups at Risk).
- **Be alert to ethnic and religious discrimination in the workforce:** Companies need to be aware of the potential for ethnic and religious tensions and discrimination in recruitment and in the workplace. The ethnicity or religion of company managers, particularly in human resources, can have significant consequences.[477] Workers' ethnicity/religion will not be readily apparent, particularly to non-Myanmar managers. However it may not be wise for employers to collect data on the religious and ethnic make-up of their workforce; this may create more tension. Furthermore, many Myanmar people are of mixed heritage or self-identify in various ways. A better approach may be management awareness of the sensitivities, clear company policies on non-discrimination, reinforcement of those messages and modelling an approach to equal opportunities that includes active measures to achieve those outcomes. There are few easy answers on how to address hostility that may spill over into the

[475] UNICEF and the Danish Institute for Human Rights, "Children's Rights in Impact Assessments - A guide for integrating children's rights into impact assessments and taking action for children" (2013).
[476] For example, in Coca Cola's report to the US State Department on its activities in Myanmar, the company highlighted that it found that women were being paid approximately 11% less than male colleagues for the same work.
[477] From IHRB, "From Red Flags to Green Flags: The corporate responsibility to respect human rights in high risk countries" (2011), pg. 73-76.

workplace; specialised expertise and re-emphasising a commitment to non-discrimination are a good place to start.

- **Community composition considerations:** Companies should aware of the ethnic composition of communities where they operate and from where they may recruit workers. Myanmar's ethnic minorities make up an estimated 30 – 40% of the population, and ethnic states occupy some 57% of the total land area along most of the country's international borders.[478] One location may have a mixture of ethnicities. For example there are many different ethnic groups in Shan State besides the Shan, including the Pa-O, Palaung (Ta-ang), and Bamar. Kayin State comprises other groups besides Kayin, including Mon, Pa-O and Bamar. Different ethnicities have different languages and traditions, which need to be taken into account in the workplace. This is especially important given the current rollout phase and expansion into new ethnic minority areas. As of March 2015, nearly 250 towers are planned for construction in Northern Shan State. 300 are planned for Rakhine state, and over 350 in Kachin State.
- **Take the opportunity to increase employment of people living with disabilities:** People living with disabilities are an invisible but substanial group in the Myanmar population and even more invisible in the workforce. As in many other countries, it requires positive steps by employers to recruit and retain disabled workers, and help them to become an integrated part of a workforce not accustomed to disabled co-workers.[479] Where possible, companies may consider incorporating the principles of universal design (defined as the design of products, environments, programs and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialised design). (See also Chapter 4.8 on Groups at Risk).
- **Be alert to discrimination against lesbian, gay, bisexual and trans-gender (LGBT):** Employers need to be aware of discrimination against LGBT people in the workplace and society more generally, and the fact that same-sex relationships are still criminalised in Myanmar. (See also Chapter 4.8 on Groups at Risk).

Health & Safety

- **Focus on safety in network construction:** There is a clear need for greater attention to basic health and safety throughout network construction activities, particularly tower construction and fibre cable digging. The field research indicated that in numerous operations, there was a failure to meet even the most basic health and safety provisions such as drinking water, and personal protective equipment (PPE). There are clear challenges in transmitting standards to subcontractors' and other business partners. Companies need to use contractual requirements, monitoring and support to build the awareness and skills of local where around HSE management. Myanmar has few labour inspectors and installations often take place in remote areas, where self-regulation by the ICT companies as the only safeguard. Thus it is even more incumbent on the sector to provide safety equipment and take strict safety measures. More robust protection is required in post- and active conflict areas, especially where armed groups may be active near site locations, or where there are risks of land mines around infrastructure.[480]

[478] Transnational Institute/Burma Centrum Netherland "Access Denied: Land Rights and Ethnic Conflict in Burma" (May 2013).
[479] See MCRB and Deaf Resources Centre Guide, "Corporate Social Responsibility and Disability (CSR-D) – A Guide for Companies" (2014). See also, ILO "Disability in the Workplace: Company Practices" (2010).
[480] A concern which was raised during the consultations to the World Bank "Myanmar - Telecommunications Sector Reform Project: environmental and social management framework" (2013), pg 63.

- **Address other sector-specific health and safety risks:** There are a number of sector specific occupational health and safety risks in connection with the installation of communications equipment, such as exposure to electrical fields, electromagnetic fields (EMF) and exposure to laser light during cable connection and inspection activities or working at elevations.[481]
- **Address public concerns about health impacts of mobile phones:** One of the most commonly cited public concerns is over the potential health effects associated with exposure to EMF (such as from mobile phone base stations). To date, there is no empirical data demonstrating adverse health effects from exposure to typical EMF levels from power transmissions lines and equipment[482]. However, the WHO will conduct a formal risk assessment of all studied health outcomes from radiofrequency field exposure by 2016.[483] Exposure to the radiofrequency fields emitted by mobile phones is generally more than a thousand times higher than from base stations, so the greater likelihood of any adverse effect from handsets means that research has almost exclusively been conducted on possible effects of mobile phone exposure.[484] However, two international bodies have developed exposure guidelines for workers (and the general public), based on a detailed assessment of the available scientific evidence, albeit they are now quite dated (2005 and 2009 respectively). [485] There is no data available on whether Myanmar has EMF standards for workers[486] which means that companies should use appropriate international or regional standards for appropriate safeguards for workers.
- **Address other health risks:** The rollout of telecommunications infrastructure across the country requires frequent use of motor transport. Give the poor state of Myanmar's roads and the steadily increasing rate of motor accidents and fatalities,[487] companies should prepare and implement motor vehicle safety programs to protect the safety of their workers and the communities in which they operate.[488] In some countries long-haul truckers have significantly higher rates of sexually transmitted diseases than the host communities. A specific education and training program for transportation contractors may be necessary if there are a lot of trucking services to be used.

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[481] For a discussion and suggested safeguards, see IFC, "Environmental, Health, and Safety Guidelines – Telecommunications" (2007), section 1.2.
[482] Ibid.
[483] WHO, "Electromagnetic fields and public health: mobile phones" *Fact sheet N°193* (October 2014). The fact sheet lists the "Key Facts" as follows: **"***Mobile phone use is ubiquitous with an estimated 6.9 billion subscriptions globally; The electromagnetic fields produced by mobile phones are classified by the International Agency for Research on Cancer as possibly carcinogenic to humans; Studies are ongoing to more fully assess potential long-term effects of mobile phone use; WHO will conduct a formal risk assessment of all studied health outcomes from radiofrequency fields exposure by 2016."*
[484] WHO "What are the health risks associated with mobile phones and their base stations?**"** (20 September 2013). An earlier WHO 'Backgrounder' on basestations and wireless technology from 2006 noted: "*Recent surveys have indicated that RF exposures from base stations and wireless technologies in publicly accessible areas (including schools and hospitals) are normally thousands of times below international standards*."
[485] Institute of Electrical and Electronics Engineers (IEEE), "Standard for safety levels with respect to human exposure to radio frequency electromagnetic fields, 3 kHz to 300 GHz, IEEE Std C95.1" (2005) and International Commission on Non-Ionizing Radiation Protection (ICNIRP), "Statement on the Guidelines for limiting exposure to time-varying electric, magnetic and electromagetic fields (up to 300 GHz)" (2009).
[486] WHO, Global Health Observatory, Legislation, "EMF Standards" (accessed 28 April 2015).
[487] UNESCAP, "Present State of Road Safety in Myanmar" (2013).
[488] See, IFC "General Enviornmental, Health and Safety Guidelines" (2007), section 3.4.

Expectations of Local Employment

- **Be aware of different perceptions of 'local':** There are high expectations of employment from local communities. According to the *2012 Foreign Investment Law*, all unskilled workers must be Myanmar nationals. While companies may meet 'local hire requirements' by hiring workers from other parts of Myanmar, for local communities 'local' hiring means from the immediate area. This mismatch in terminology and perceptions may create longer-term tensions around projects. Genuinely 'local' workers are likely to be frustrated with the limited numbers and levels of jobs available which will be largely unskilled, low wage and temporary, as they lack relevant skill sets.

D. Relevant International Standards and Guidance on Labour Issues

Relevant International Standards:

- IFC Performance Standard 2 and Guidance Note – Labour and Working Conditions
- IFC General Environmental, Health and Safety Guidelines
- IFC/World Bank Group Environmental, Health, and Safety Guidelines for Telecommunications
- ILO, Declaration on Fundamental Rights and Principles at Work
- UN Guiding Principles on Business and Human Rights

Relevant Guidance:

- IFC:
  - "Good Practice Note: Non-Discrimination and Equal Opportunity"
  - "Good Practice Note: Workers' accommodation: processes and standards"
  - "Measure & Improve Your Labor Standards Performance: Performance Standard 2 Handbook for Labor and Working Conditions"
- IHRB:
  - "Dhaka Principles for Migration with Dignity"
  - "ICT Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights"
- ILO:
  - "Indicators of Forced Labour"
  - "Combating forced labour: a handbook for employers and business"
  - "The Labour Principles of the UN Global Compact – A Guide for Business"
  - ILO pages on Postal and Telecommunications Workers
- Verite, "Help Wanted programme and Fair Hiring Toolkit"

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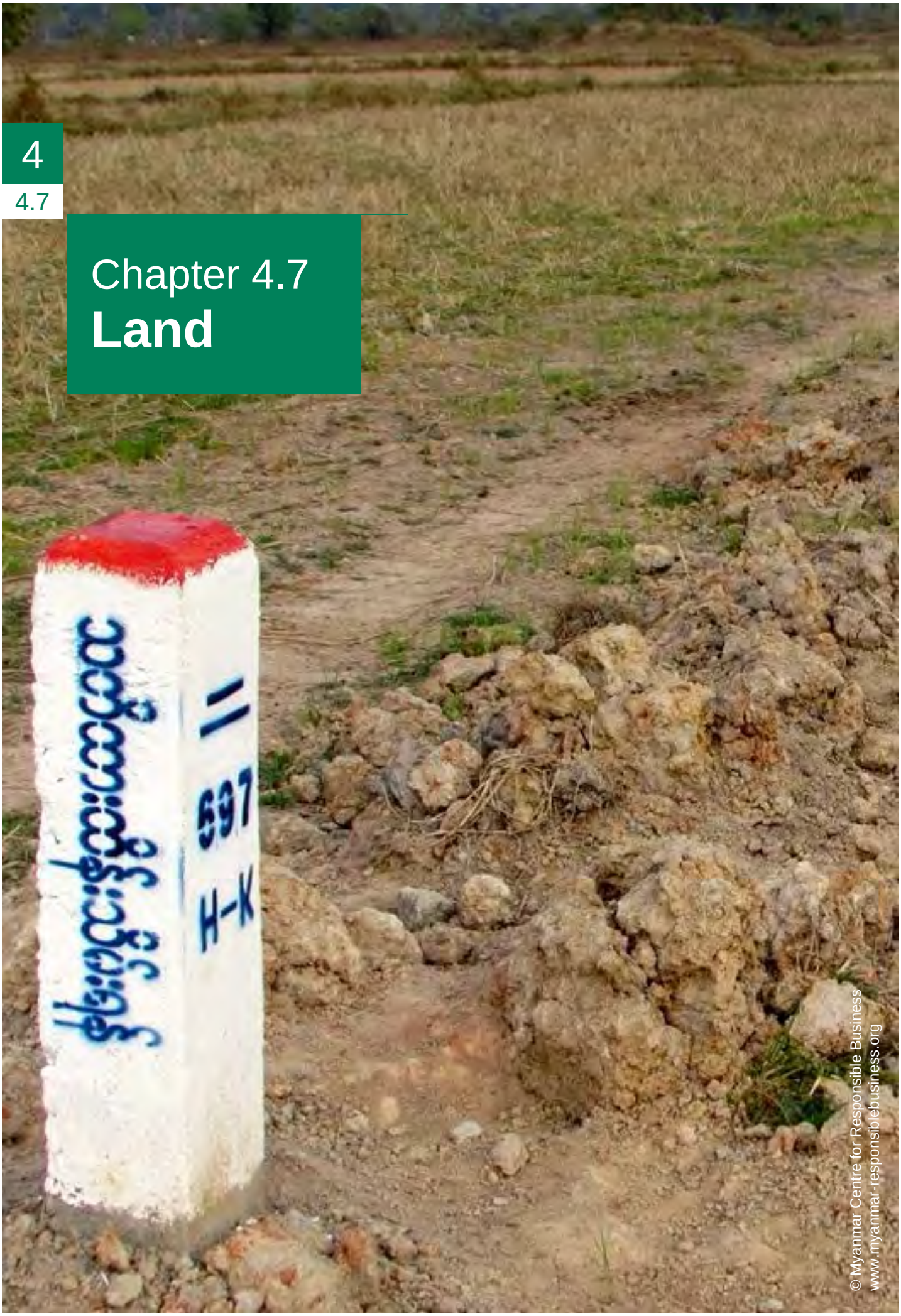
4.7

Chapter 4.7
Land



Chapter 4.7
Land

In this Chapter:

A. Context
- Land Use for the Telecommunications Sector
- Land Policy Framework
- Legal Framework for the Acquisition or Lease of Land

B. Field Research Findings

C. Recommendations for ICT Companies
- Relevant International Standards and Guidance on Land Issues
- Considerations for Land Acquisition / Use

D. Land in Areas Affected by Armed Conflict & Communal Tension

A. Context

Land is often the most significant asset of most rural families in Myanmar. An estimated 70% of Myanmar's population lives in rural areas and is engaged in agriculture/aquaculture and related activities.[489] Many farmers use land communally (that is, share the use of land amongst themselves), establishing longstanding land use patterns informally by custom rather than law.[490] These customary land tenure systems are especially prevalent in upland areas inhabited by ethnic minorities. Because much of Myanmar's rural land is not formally registered, land use is characterised by weak or non-existent protection of usage rights and tenure for small-scale farmers, communities, ethnic minorities and other groups at risk of land expropriations.

Since the recent political reform process began in 2011, there has been consistent reporting of protests against 'land grabs'[491] in many parts of the country in the press and by non-Governmental organisations. In addition, large-scale land allocation by the Government has increased significantly in the past decade.[492] While some of these 'land grabs' are new, many of them originate in land expropriations under the previous military Government, a legacy which Myanmar people are now challenging, including through mechanisms provided by the Government. Some land in Myanmar has been returned to farmers and others since the reform process began. However, there are still tens of thousands of rural people who have lost their land due to Government expropriation. Moreover, dozens of farmers and land rights activists have been arrested recently for peacefully protesting against land expropriations by the authorities.[493] There have also been several land disputes in major metropolitan and semi-rural areas. For example in the Thilawa Special Economic Zone near Yangon, dozens of families have had their land

[489] See UNDP, "About Myanmar" and CIA, "World Factbook, Burma, Economy"(last accessed August 2015).
[490] Transnational Institute, "Access Denied" (May 2013), pg 11.
[491] The term 'land grab' in Myanmar is used to cover a wide range of situations, including land disputes and government/military expropriation of land for companies and its own use.
[492]OECD, "OECD Investment Policy Reviews: Myanmar 2014" (March 2014), pg. 324.
[493] See for example Amnesty International "Annual Report 2014/2015, Myanmar country entry" (Feb 2015).

expropriated by the Government and have protested about the deprivation of livelihoods and inadequate conditions in their resettlement area.

In addition to the significant confusion caused by different types of land tenure systems in the country, Myanmar has large displaced communities that retain a claim to their lands, even though they do not currently have possession. Some ethnic minorities in the east of the country have been displaced for decades, leading to very weak tenure over their original land, which they may not have occupied for years, and may now be used by others. More recently, since mid-2011 some 200,000 ethnic minority civilians have been displaced in northern Myanmar as a result of ongoing internal armed conflict, and almost 140,000 have been displaced by inter-communal violence in Rakhine State since June 2012. These newly displaced populations may not be allowed to occupy and use their land when they attempt to return to it.

As a result, ascertaining the provenance of land ownership in Myanmar is not straightforward: existing land records may not reflect true ownership; many people do not have sufficient documentation of their land rights; and many have claims to land through customary land tenure systems which are not officially recognised by the Government.[494]

Land Use for the Telecommunications Sector

ICT companies will usually lease (or for some local companies potentially purchase) land for their operations, whether it is for offices, ICT parks or infrastructure development. Compared to some of the sectors increasing their operations in Myanmar such as agriculture and mining, the ICT sector has a smaller and far more dispersed land footprint. The infrastructure is characterised by small tower sites (although nearly 8,000 towers are planned for 2015) as well as over 5,000 kilometres of narrow trenches for laying cable and fibre. The remainder of the footprint is essentially office space for day-to-day operations across the sector, some of which has been grouped together into 'ICT Parks'. There is negligible manufacturing in the sector so this part of the value chain currently has no footprint to speak of but could increase. For the most part, the 'over the top' services sector does not have a physical presence in the country. SIM cards and equipment are distributed through a myriad of small shops, often selling a wide range of goods.

Tower construction companies acquire land for towers by leasing the land from the owners for a long-term period of typically 15 years.[495] A mobile operator publicly commented that the Government had set a fixed price for leasing land held by ministries or administrative bodies (such as Yangon City Development Corporation in Yangon) if leased for tower construction.[496] The specific price is not public.

As detailed below, companies ask permission from the owners and their immediate neighbours to rent the site and then construct and operate the towers. Some of the land being used for towers is paddy land,[497] which is protected for food security reasons and cannot easily be converted to other uses. Moreover, permission for conversion of paddy land on which rice is being grown needs to be granted by the national level authorities

[494] For a more detailed discussion of land issues, see: Myanmar Centre for Responsible Business, "Briefing Paper on Land Issues in Myanmar" (March 2015).
[495] Myanmar Times "Ooredoo builds 100 towers as launch looms closer, (26 May 2015).
[496] Telenor, "Myanmar Sustainability Briefing" (12 May 2015).
[497] *Myanmar Farmland Management Rules*

before it can be reclassified for other uses. This slows the process considerably, and increases the opportunity for officials to ask for bribes as the requests move through various levels of bureaucracy. Tower companies have been helping landowners to get the land reclassified from paddy land to grant land[498] so that it can then be leased out.

Some of the land used for towers is farmland (other than paddy land) which also requires a conversion process to change the designation, but this can be done at the state level. Even in urban areas, the lack of proper land documentation is causing delays. Companies and authorities are also confused about what documents are needed to change land registration status and to register long term leases, resulting in delays. .

The companies laying fibre/cable are digging trenches, laying fibre/cable, then covering the trenches. As such, they are not entering into lease arrangements but instead may be making a one-time payment for the disturbance of the land, usually without further formal arrangements.

Several tower companies have joined together to highlight identified bottlenecks in the current processes to use of farmland for the placement of towers, the registration of leases and the use of Government land, and have proposed several solutions to the authorities to expedite the process.

World Bank Guidance for Land Use by the Telecommunications Sector

The World Bank is currently financing and implementing a $31.5 million telecommunications sector reform project in Myanmar that includes a programme to extend coverage in selected remote pilot locations that are commercially non-viable for operators to service without a one-time subsidy and are not part of the networks being rolled out by the licensed operators.[499] It has a set of environmental and social safeguard policies [500] that apply to most World Bank projects and that are applicable to this telecommunications sector reform project. As part of the environmental and social management framework (ESMF)[501] for the project, the World Bank developed a set of land lease guidelines for the roll out of pilot telecommunications infrastructure in rural areas[502]. All sites where telecommunication masts/ towers will be installed to extend connectivity will be selected and managed in line with the ESMF.

As the ESMF notes *"[r]ecognising that land markets are poorly developed and there are few or no experiences with land leasing arrangements for telecommunications towers and masts in Myanmar, principles for such arrangements have been developed under this ESMF*" because "*tenure rights are rapidly evolving in rural Myanmar*". The Guidance notes that because land tenure is not fully established in rural Myanmar and rural

[498] Grant land is "Owned and allocated by the state, grant land is common in cities and towns, but rare in village areas. The state may lease grant land out for extendable periods of ten, thirty, or ninety years. Grant land is transferable, is subject to land tax and may be reacquired by the state during a lease period in accordance with laws governing compulsory acquisition." USAID, "Property Rights and Resource Governance: Burma" (date unknown) pg. 10-11.
[499] World Bank, Telecommunications Sector Reform Project (last accessed August 2015).
[500] World Bank, "Consultations on the Second Draft of Environmental and Social Framework" (1 July 2015).
[501] Myanmar - Telecommunications Sector Reform Project: environmental and social management framework (2013). The Environmental and Social Management Framework describes the baseline project environmental conditions and impact, provides guidance for environmental and social assessment processes.
[502] World Bank, "Myanmar - Telecommunications Sector Reform Project: environmental and social management framework (Vol. 2): Land lease guidelines" (English) (2013).

populations may have informal claims to the land, care should be exercised to clarify if indigenous claims to lands identified for housing infrastructure exist – and whether any individuals use the land to gain a livelihood – before a decision is made to determine where infrastructure should be built. The series of steps set out are intended to mitigate impacts on rural communities.

When building their infrastructure in accordance with the ESMF, the rural telecommunications service providers are expected to make a long-term lease contract on a commercial basis with willing land owners/occupants. The procedures require verification of all land leases being carried out with appropriate arrangements and on a commercial basis, without coercion or under duress, and with no legacy issues in any land transactions. If land markets are underdeveloped in the pilot area, as will be the case for most pilot sites, the lease fees should be set at a price that will be broadly sufficient to cover the long-term livelihood loss as a result of the leasing.[503] The project will not ask the Government to acquire land by exercising its power of eminent domain, nor will the Government be asked to move people involuntarily. The rural telecommunications service providers will be expected to put in place feedback mechanisms to handle grievances and compliance will be monitored by the World Bank task team.

Land Policy Framework

Reform of land policy and law in Myanmar remains incomplete. The current land regime is characterised by a patchwork of new and old laws that often leads to overlap, contradiction and confusion for current and prospective owners and users. Moreover, the land registration system is considered inefficient and insufficient, with complex requirements and lack of benefits for registering land.[504] The cadastral (land mapping) system is outdated, which further exacerbates land disputes, as land classifications and mapping used by different Government ministries may overlap nor reflect current land use patterns.

Land in Myanmar is classified into several different categories, including Freehold Land, Grant Land, Reserved Forest Land, Farmland, Grazing Land, Religious Land, among others. This means for example that a plot of land may be classified on maps as Reserved Forest land, when in fact the land may now be used as farmland, without a change in the classification.[505] As a result, land tenure rights – the right to use, control, or transfer land[506] – are often insecure, posing a major problem.

The new land laws[507] do not sufficiently recognise customary land rights or the rights of informal land occupiers or users who lack formal documentation of their 'usufruct' rights (i.e. individual rights to use and enjoy the property of another).[508] Experts have recommended that the Government formally recognise customary law for land use rights and provide mechanisms for communal ownership of land to ensure *inter alia* ethnic

[503] Ibid.
[504] OECD, "OECD Investment Policy Reviews: Myanmar 2014" (March 2014), pg 108.
[505] Food Security Working Group's Land Core Group, "Legal Review of Recently Enacted Farmland Law and Vacant, Fallow and Virgin Lands Management Law", (Nov. 2012), pg. 7-10.
[506] FAO "What is land tenure" (last accessed September 2015).
[507] *Myanmar Vacant, Fallow and Virgin Lands Management Law* (2012) and *Farmland Law* (2012). See for further description, Land Core Group, "Legal Review of Recently Enacted Farmland Law and Vacant, Fallow and Virgin Lands Management Law" (Nov. 2012).
[508] "*…the written and unwritten rules which have developed from the customs and traditions of communities…*" Ibid. pg. 15-16.

minority rights are protected.[509] In addition, the Government may be declaring land vacant that in reality is not. This has resulted in large numbers of landless who would not appear in any Government records but who may nonetheless be affected by displacement. They should be compensated for at least economic displacement if they have lost their livelihoods. Further livelihoods support could be addressed through social investment programmes.

It is expected that demands for land will inevitably increase with further economic development and investment. There is a recognised need in Myanmar for a written National Land Use Policy and comprehensive umbrella national land law. To that end, a working group of a Government committee which included civil society representation and external experts formulated a draft Land Use Policy. The 6th Draft of the Policy was published in May 2015 for further consultations among a wide group of stakeholders.[510] The draft National Land Use Policy is expected to be sent to the President after further meetings took place at the end of June 2015.[511] The Policy will reportedly guide the drafting of an umbrella Land Law, also expected to be discussed during public consultations. However, a new "*Land Law"* will not be passed by the current Parliament in 2015. While the development of such an overarching policy document is a needed and welcome step, civil society in Myanmar fear that poor farmers' land rights will not be adequately protected under the new Land Use Policy.[512]

Legal Framework for the Acquisition or Lease of Land[513]

Acquisition by/with the Myanmar Government

The 2008 Constitution provides that the State is the ultimate owner of all land in Myanmar, but also provides for ownership and protection of private land property rights.[514] The Government can carry out compulsory acquisitions in the state or public interest (see below). A private investor may acquire land or land use rights from either the Government or from a private land owner. A foreign investor can lease land.

With respect to lands not covered by other, more specific land laws (either the 2012 *Vacant, Fallow and Virgin (VFV) Land Management Law* or the 2012 *Farmland Law* – see below), land acquisition is governed by a 120 year old law, a holdover from the former British colonial period. The 1894 *Land Acquisition Act* provides that the Government can carry out land acquisitions for a company when the acquisition is "*likely to prove useful to the public*" (Article 40(1)(b)). The Government has responsibility for carrying out the acquisition and distributing compensation but the funds for compensation are to be provided by the company acquiring the land. Land in kind can be provided in place of monetary compensation. The law sets out basic procedures governing the acquisition of the land, including undertaking preliminary investigations on the land, and a procedure for notification of, and objections to be raised by, persons interested in the land.

[509] Ibid, pg. 23-24.
[510] 6th Draft of the National Land Use Policy, English version, May 2015, on file with IHRB/MCRB.
[511] Myanmar Times "Delayed land-use forum scheduled for June" (29 April 2015).
[512] Irrawaddy "NGOs, Farmers Concerned After Reviewing Draft Land Use Policy" (1 November 2014).
[513] For a more detailed discussion of the legal framework for acquiring land, see Myanmar Centre for Responsible Business, "Land Briefing" (March 2015).
[514] *Myanmar Constitution* (2008), Articles 35, 37, 356 and 372.

VFV Lands Management Law and the Farmland Law

The 2012 *Vacant Fallow and Virgin (VFV) Lands Management Law* and *VFV Rules* are clearly aimed at providing a legal framework for implementing Government land policies to maximise the use of land as a resource for generating agricultural income and tax revenues. Tenure security is deliberately circumscribed to allow the Government the flexibility to do what they believe is needed for development. Civil society groups and farmers organisations have pointed out that land regarded as VFV may in fact be occupied by people or subject to shifting cultivation according to traditional farming practices, but which the Government classifies as "*vacant*" under the VFV. The complicated registration procedures under the 2012 *Vacant Fallow and Virgin (VFV) Lands Management Law* and the 2012 *Farmland Law* mean that smallholder farmers, a large percentage of Myanmar's population, will struggle to register their land tenure claims and are at risk of having their land registered by more powerful interests. By not recognising informal land rights, and formalising land rights through titling despite pre-existing informal claims, the new laws may reinforce existing inequality and/or create new injustices. This has potential to create or exacerbate tensions and disputes.[515]

With respect to farmland, the 2012 *Farmland Law* makes clear that applicants who are individuals must be citizens (Articles 6(a)(v), 7(a), (iv)). Under the 2012 *Foreign Investment Law* (FIL), there are restrictions on foreign investment in agriculture under Article 4(h), but Article 5 provides for the Myanmar Investment Commission, with approval from the Government, to allow investment.[516] The 2012 *Farmland Law* also allows for the repossession of farmland "*in the interests of the state or the public*"[517] provided that "*suitable compensation and indemnity is to be paid and the farmland rights holder must be compensated "without any loss*" (Article 26). As with the *VFV Law*, the *Farmland Law* and *Rules* do not provide for procedures for objections to be made to the acquisition or compensation awarded, or for judicial review.

Non-Citizens' Use of Land

Private investors may acquire land rights from private persons through ordinary contractual agreement, subject to the following legal restrictions. First, land ordinarily cannot be sold or transferred to a foreigner through private transaction.[518] The Government may however allow exemptions from these restrictions and *Union Government Notification No. 39* of 2011[519] sets out the circumstances in which a foreign investor may lease land. Second, private investors cannot acquire VFV land rights or farmland through private transactions without the permission of the Government (Article 16(c) *VFV Law*) (Article 14 *Farmland Law*). Under the 2012 *Foreign Investment Law*, foreign investors can obtain leases for an even longer period, 50 years, extendable for 10 years twice, depending on the type of business, industry and amount of investment. Leases can be even longer for land in "*the least developed and less accessible regions*".[520]

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[515] Transnational Institute, "Access Denied: Land Rights and Ethnic Conflict in Burma", (May 2013)
[516] *Myanmar Foreign Investment Law 2012*.
[517] The distinction drawn between interests of the state and interests of the public is troubling, but it may be premature to draw conclusions without knowing the nuances of the provision in Burmese.
[518] The 1987 Transfer of Immoveable Property Restriction Act prohibits the sale or transfer of immoveable property, and the lease of such immoveable property for more than one year, to a foreigner or foreigner-owned company (Articles 3-5).
[519] Notification 39/2011 on the Right to Use of Land relating to the *Myanmar Foreign Investment Law*.
[520] Ministry of Planning and Economic Development, "Notification 11/2013, Foreign Investment Rules", (31 Jan 2013).

It should be noted that the 2012 *Foreign Investment Law* and the 2013 *Citizens Investment Law* are currently being redrafted to create a single law for all investors and these provisions could change.[521]

Resettlement

Myanmar has only limited standards governing the resettlement process for land confiscated from people for projects. As discussed above, the *1894 Land Acquisition Act* does provide for compensation for land the Government has acquired in the public interest, but with only limited safeguards and no provisions concerning resettlement. In addition, the current *Foreign Investment Rules* appear to provide some general prohibitions on involuntary resettlement.

B. Field Research Findings

The field research focused on parts of the ICT value chain where land acquisition processes were most significant (for infrastructure roll out)[522] and where land owners or users were most at risk (i.e. rural communities). It did not consider land acquisition for office use in cities where land registration and markets are more developed. The findings are based on the roll-out experience of private sector telecoms operators. While the field research team discussed land acquisition with state-owned enterprise MPT, the team did not have the opportunity to discuss land acquisition with military-owned enterprise MECtel. MECtel usually locates infrastructure inside military compounds or on land held by the military.

Consultation Prior to Land Acquisition

Human Rights Implicated: Right to take part in the conduct of public affairs; Right to information

Field Assessment Findings

- There were numerous cases where individuals and communities claimed there was **no informed consultation and participation** about land acquisitions or tower or fibre projects using land in immediate proximity to their homes.
- In cases where there was consultation and participation, it was predominantly **only with the land owner/user and the (two to four) immediate neighbours,** who, under the land acquisition process, were needed to sign consent forms. In many of those cases, **those asked to sign agreements were unclear of their purpose or content.**
- There were **very few cases** found where any ICT company or Myanmar Government had done **wider community consultation regarding the network rollout,** land needs and plans, and the ways in which the rollout would affect their lives and livelihoods, positively or negatively.
- In many cases, community members:

[521] Myanmar Centre for Responsible Business "Comments on the latest draft of the Myanmar Investment Law" (27 March 2015).

[522] For example, TowerXchange reports in October 2014 that "*based on the volume of orders they are seeing, the tower installation firms have spoken to are more bullish than the GSMA's forecast of 17,300 towers by 2017, with many feeling that the tower count in Myanmar by 2017 will be 25,000*". TowerXchange "The Myanmar tower rollout: FAQs" (updated June 2015).

- received **no prior information about the intention to acquire their land or land near their homes**, only understanding the reason was to build a tower or lay the cable line once it became apparent during construction or digging
- were **not consulted** or given an opportunity to become informed about the **broader project of building the network**. Instead, information was given only with respect to the land registration process (see Due Process below) and compensation
- were given **no choices** or opportunity to negotiate about the plot of land or restrictions on land use
- often **did not know for which telecom operator** the tower construction company was building, or the cable line was being dug
- were **not given any information to make contact or complain** either with the cable laying company, tower construction company or telecom operator
- It was a regular occurrence for communities to **host tower construction managers and/or groups of workers, in their homes** during the build period, without compensation for the accommodation, water or laundry use. While this was by agreement, it often lasted for a period longer than originally agreed and some cases involved more workers than agreed and/or also their spouses and children (and sometimes pets)

- **Commonly raised community concerns included:**
  - **not knowing which company was involved** in the construction (whether fibre cable or tower)
  - **not having a company contact** in cases of problems or emergencies
  - **not being provided with basic information on the safety of the tower** including:
    - whether the tower could withstand earthquakes or severe weather
    - whether they would be subjected to unsafe levels of radiation from the tower
    - whether they would be electrocuted by the tower during rain showers
  - **noise from generators powering the towers** causing a disturbance, headaches, and small cracks in walls/floors
  - **tower sites being fenced in but not locked**, compelling villagers to "*guard*" the site to ensure children or others do not wander in
- Community members expressed a desire for **strong mobile phone reception** (which comes with good tower coverage) but **did not want towers built nearby their villages** – which reflects the common NIMBY ('not in my backyard') phenomenon.
  - There was also the perceived dilemma of the benefits of regular income from lease payments versus concerns about health risks from living near a mobile phone tower.

Due Process in Acquisition

Human Rights Implicated: Right to not be arbitrarily deprived of property; Right to an adequate standard of living; Right to freedom of expression

Field Assessment Findings

- The field assessment findings **affirmed the complexity and opacity of the land acquisition process and regulatory framework** outlined in the National Context section above for the tower companies and land owners.
- Some called for a **model lease contract template, approved by the authorities**

and **available in local languages**.

- Reports were received of **construction taking place on paddy land or farmland**, **without the necessary documentation, including land conversion approval**. Private companies noted that receiving the land conversion approval for farm or paddy land was "*impossible*" due to administrative delays, bribery, and in some cases farmers lacking requisite documentation needed to apply for the conversion. However a regional-level minister expressed awareness of the complexity of the approval process, and suggested that regional-level Government is working to ease the process for both landowners and companies engaged in the roll-out.
- **For tower construction**, interviews indicated a **relatively consistent process was followed by most companies that resulted in a signed lease for land owners**:
  - A 'site hunter' comes to the home/farm to investigate the land and suitability for a tower site.
  - If suitable, they discuss with the village leader/administrator their intention to build on the land, how much land they will need (usually about 50 square metres) and where, how long construction will take (usually a 28 day target), and their rental and compensation rates.
  - The village leader/administrator and site hunter(s) discuss with the land owner their intention to build the tower:
  - The company usually facilitated the process of getting the land registered as "*grant land*" under the required Form 105. (If paddy land, this was first applied for at regional level, then approved at national level before it could be issued). This generally took 1-2 months
  - The landowner must get the signed consent of (usually 2-4) immediate neighbours confirming they do not object to the construction
  - A contract (usually a land lease) is signed between the landowner and company.
- **Fees and costs for registering as grant land** were generally incorporated into the lease agreement (not putting land owners out of pocket), but the **fees and costs cited varied greatly** from 500 MMK ($0.46) up to 40 MML ($3,709), by location.
- It was often the tower site hunter's or village leader/administrator's job to **verify who was the true land owner**:
  - Citizenship Scrutiny cards, Household Lists, and land titles were cited as among key initial documents sought. However, there are still high risks of misidentifying 'true' land ownership in Myanmar even using such evidence, given wide-spread practice of customary ownership and the fact that Myanmar only recently completed its first census in 30 years, which is still widely regarded as problematic because *inter alia* people in some areas of armed conflict and inter-communal violence were not counted.
  - Depending on the circumstances, companies may bring in local lawyers to meet the land owner and assist them in applying for the needed documents.
  - Researchers heard general estimates that around 10% of prospective sites fail because documents cannot be obtained.
  - Researchers heard of some cases in which Myanmar officials obliquely requested bribes in order to return the proper documentation.
- Though contracts were commonly signed with landowners confirming the lease arrangements, a **copy of the contract was often not provided to the land owner** and researchers were regularly told by **land owners that they did not fully understand the content of what they were signing**.
  - Most contracts appeared to include **automatic renewal clauses**, meaning unless the landowner gives notice of their wish to cancel or renegotiate the agreement prior to the completion of the agreed term they will automatically be

tied into a renewed term.

- As companies involved in **laying fiber** were not using land for an extended period of time, they did not use more formalised processes or documents to negotiate access. **One time compensation for disturbance of land was sometimes paid.**

Compensation for Land Acquisition and Use

Human Rights Implicated: Right to not be arbitrarily deprived of property; Right to an adequate standard of living; Right to an effective remedy

Field Assessment Findings

- **Compensation rates for rental of tower sites varied greatly** (including both rooftop and ground towers), **from 2 MML monthly ($185) up to 72 MML ($6,676) monthly,** depending on the location and the land tax to be paid**.**
- **Most landowners were agreeing to lease periods of 10-15 years** for positioning towers on their land, though periods of 5 and 25 years were also reported. As above, contracts often included **automatic renewal clauses.**
- **Lease payments were usually paid annually**, though some companies paid owners every quarter, some every 6 months and others every 2 years.
  - **Some landowners expressed a preference for larger (e.g. 3 year) up-front payments** in order to have sufficient capital to start a business or new venture.
  - As above, **application fees for registering the land** in order to host the **tower were usually incorporated into the payment for the lease.**
  - Some companies paid additional **monthly security fees to the land owner to look after the tower site.**
- **Most lease agreements included percentage increases**, often 3-5%, every 3-5 years.
- **For fibre construction on religious land** it was found that leases and lease payments were not formalised and no official approval had been required. Instead, companies **simply made donations**.
- **For tower construction on religious land** the formal authorisation required at the township level was obtained. Neighbour consent was also obtained. Stakeholders did report difficulty receiving satisfactory information from company representatives regarding the lease, acquisition, and construction process.
- Most companies seemed to operate according to standard compensation ranges. Some **provided site hunters with financial incentives to ensure lease agreements within the specified ranges**, e.g. allowing them to keep the amount left over between the agreed fee and top of the specified range, or receive a commission for staying within the range.
- A few cases were reported of **lack of compensation for trees/crops cut down** to make room for towers or loss of income from their yields.

Access to Remedy for Land Grievances

Human Rights Implicated: Right to an effective remedy; Right to take part in the conduct of public affairs; Right to information

Field Assessment Findings

- As mentioned above, there were **regular reports of communities and land owners not knowing which company was responsible** for fibre cable digging or tower construction, including whom to contact in cases of emergency or grievance.
- **Cases of noise disturbance from generators powering towers were generally**

resolved, in some cases by the village administrator.

- **Some communities complained of damage by the company of roads, as well as of company-provided road repairs that failed to restore the quality** of the road prior to the company's use**.**

Conflict Areas

Human Rights Implicated: Right to life, liberty and security of the person; Right to take part in the conduct of public affairs; Right to information

Field Assessment Findings

- There were some cases in which companies attempted to negotiate access to areas to lay fibre cables with non-state armed groups (NSAGs). **In some cases a fee was paid for this access.**
- Researchers received reports of cases of operational delays, where local groups, including armed groups, **blocked access to sites, due to lack of consultation at the site level.** While some consultation with local leaders may have been undertaken, this may not have been communicated to or accepted by all stakeholders.
- Researchers observed **fire-arms being carried by NSAGs** present during roll-out in ceasefire areas. While researchers neither observed not heard reports of shots being fired, the presence of fire-arms is a risk for both the civilian population and the company itself.
- Researchers also received reports from workers that they were aware that in the past landmines **may have been sown around infrastructure in conflict areas**. This led workers to avoid walking through certain areas. The measures companies took to protect their workers in such circumstances were unclear.

Myanmar Good Practice Examples:

- **Written lease agreements were regularly signed with landowners for towers** (though, as above, copies were often not provided to land owners or they claimed they did not understand the content fully).
- **Most lease agreements included percentage increases**, often 3-5%, every 3-5 years.
- **Companies often facilitated the registration application process, reducing or removing the burden on landowners**.
- Given the lack of a uniform and accessible land registry, regular reports were received of companies accepting alternative forms of documentation. This can offer a significant protection but can also be a significant risk if this is used to bypass customary owners. As a result, **some companies also seemed to be undertaking more detailed due diligence to identify the 'true' landowners**, including direct discussions with villagers and local authorities.
- One company has reported it leases some 1,000 land parcels for its towers with full written approvals and documentation from landowners.[523]

[523] See further: Apollo Towers Myanmar, "Response by Apollo Towers: Myanmar Foreign Investment Tracking Project", Business & Human Rights Resource Centre (last accessed September 2015).

C. Land Recommendations for ICT Companies

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4.7

Considerations for Land Acquisition / Use

- **See Chapter 4.9 on Stakeholder Engagement and Access to Remedy** for further recommendations on stakeholder engagement and land acquisition processes.
- **Be sensitive to concerns about 'land grabbing':** There has been extensive reporting in recent years of outright 'land grabs' with little pretence of following the law, and of villagers being deprived altogether of compensation, with or without official expropriation, receiving reduced payment for land, or being denied any recognition of ownership [524] by Government authorities, the military and business. There may therefore be legitimate concern about land grabs in connection with existing and planned ICT projects. Even though the vast majority of land transactions for ICT infrastructure is through long-term leases between willing lessee/lessor, this issue could be a source of tension with local communities and subject of advocacy by civil society groups. Operators and tower companies should expect close public scrutiny of their approach to land issues.
- **Ensure effective, transparent and equitable procedures:** The rollout of the ICT infrastructure has an extensive footprint throughout the country, even if the footprint of each individual transaction is not large. When added together, the network rollout will entail thousands of transactions with thousands of landowners. Companies should adopt consistent and effective procedures for consultation and compensation to make sure that this wide range of people impacted by operations are dealt with equitably and transparently across these many transactions.
- **Provide an easy-to-understand guide to the rollout process**: This should identify step-by-step each part of the construction and rollout process that is understandable by villagers, in their local language.
- **Provide an easy-to-understand guide to the contracting process**: This should include a step-by-step process with checklists that identifies steps, documentation and permitting required that is shared with landowners and local authorities to promote greater transparency. It should provide an easy to understand explanation of the contents of the lease contract. This and any contracting documentation should be provided in local languages and in form that local landowners can readily understand.
- **Recognise customary land titles:** Given the lack of a uniform and accessible land registry establishing land ownership; the lack of recognition of customary ownership; and the significance of land-based livelihoods and attachment to ancestral lands, any approach to land use should recognise those customary rights and deal with customary owners on the same basis as more formal land owners. This requires detailed due diligence to understand who the customary owners are, often with direct consultation with communities and local authorities.
- **Provide or pay for legal assistance for landowners**: Some stakeholders highlighted good practice of providing landowners with legal assistance where there were more

[524] The Land Core Group, a grouping of Myanmar and international NGOs working on land issues, has documented 13 cases of land confiscations in central Myanmar in September 2012 (Land Core Group, "13 Case Studies of Land Confiscations in Three Townships of Central Myanmar" Sep. 2012, on file with IHRB.). Over the last several years the Transnational Institute has focused on land rights problems in Myanmar's borderlands where ethnic minorities live. See for example TNI, "Financing Dispossession, China's Opium Substitution Programme in Northern Burma" (Feb. 2012); TNI, "Developing Disparity: Regional Investment in Burma's Borderlands" (Feb. 2013), and TNI, "Access Denied: Land Rights and Ethnic Conflict in Burma", (May 2013). Myanmar civil society, including those which are ethnic minority-based, have also reported on land grabs without compensation or recognition of customary ownership. The Karen Human Rights Group has documented land disputes and land grabs in Karen areas over a number of years. See KHRG, "Losing Ground: Land conflicts and collective action in eastern Myanmar" (Mar. 2013). The Human Rights Foundation of Monland has also reported on such abuses, particularly at the hands of the military, in ethnic Mon areas. See for example Human Rights Foundation of Monland, "Disputed Territory: Mon farmers' fight against unjust land acquisition and barriers to their progress", (Oct. 2013).

complicated legal issues to address in the land registration or leasing process. It should be made clear in those circumstances whose interests are represented if there are choices or a conflict of interest between the tower company's interest and the landowner's interests. If the legal representative cannot take a neutral position, independent legal assistance should be provided to landowners so that they can make informed choices about disposition of their land and the implications of signing longer-term leases.

- **Ensure farmers are not disadvantaged by lack of paperwork**: Paddy land or other farmland is preferred for tower construction because it is flat and easy to reach. Under the current land classification, it is not allowed to be used for anything other than cultivation without Government approval, which is not always immediately forthcoming. Where towers have been constructed without or before approval, subsequent strict enforcement of land laws could potentially result in farmers being penalised for renting to tower companies, and create a risk to their livelihoods. If farmers are penalised, companies should be ready to put in place remedial compensation to ensure that there is no impact on their livelihoods.
- **Be alert to speculation:** Companies should also be aware that there have reportedly been cases in other sectors involved in land acquisition of speculators moving in to acquire land in areas where it is thought that investment projects may be implemented. These speculators seek to acquire land cheaply from original land users who are unaware of the development, hoping to profit from compensation payments. This can create tensions with the original users, who may feel cheated when land use compensation is subsequently paid

Land in Areas Affected by Armed Conflict & Communal Tension

- See Chapter 4.10 on Conflict and Security.

D. Relevant International Standards and Guidance on Land Issues

Relevant International Standards:

- ILO Convention 169, Indigenous and Tribal Peoples Convention (1989), Part II – Land
- FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (2012)
- The World Bank Myanmar Telecommunications Environmental and Social Management Framework (ESMF) Land lease guidelines (English)
- IFC Performance Standard 5 and Guidance Note – Land Acquisition and Involuntary Resettlement
- The IFC/World Bank Group Environmental, Health, and Safety Guidelines for Telecommunications also provide relevant guidance on siting infrastructure and other aspects of community safety.

Chapter 4.8
Groups At Risk

Chapter 4.8

Groups at Risk

In this Chapter:

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D. Relevant International Standards and Guidance on Groups at Risk

A. Context

Myanmar is one of the most culturally diverse countries in Southeast Asia, making for a complex interplay of ethnic identities. Many ethnic minority leaders believe that the Burman (Bamar)-dominated central Government instituted a policy of 'Burmanisation' to suppress ethnic minority cultures, languages and religions, and treat ethnic minorities as 'second-class citizens'.[525] There are also several other groups that are at risk of marginalisation. These groups are particularly vulnerable to the impacts of increasing change in the country, due to poverty; lack of stature to make their voices heard in the process of shaping those changes; and an inability to resist more powerful forces. They risk being left behind in Myanmar's rush to transform itself.

Human Rights Defenders

According to the United Nations, a 'human rights defender' is a term used to describe people who, individually or with others, act to promote or protect human rights. Human rights defenders are identified primarily by what they do. It is through a description of their actions and of some of the contexts in which they work that the term can best be explained.[526] As in most countries, there are many human rights defenders in Myanmar, including people working in civil society organisations (CSOs) and ethnic minority community-based organisations (CBOs), trade union, student and religious leaders, journalists, and Myanmar people working in INGOs and UN agencies.

A vibrant and resourceful network of CSOs and CBOs is active at both the national and local levels in Myanmar, including many ethnic minority-based groups. In the aftermath of

[525] For a further explanation and discussion of these issues, please see Transnational Institute/Burma Centrum Netherlands reports from 2011 to 2013.

[526] See further: Office of the UN High Commissioner for Human Rights.

Cyclone Nargis in May 2008, Myanmar CSOs greatly expanded and organised as they worked to help survivors. They remain a significant positive force in the country and have been able to engage with the Government to some extent. Since 2011 Myanmar civil society groups have been granted a greater degree of latitude by the Government and have taken that opportunity to increase their activities to help people claim their rights.

While many developments since the 2011 reform process have increased the space for human rights defenders to operate, there have been some disturbing recent developments, such as the arrests and imprisonment of several local journalists (see Chapter 4.1 on Freedom of Expression); the continuing arrests of peaceful demonstrators under the 2011 *Peaceful Assembly Law*, many of them protesting against land grabs[527]; and unchecked inter-communal violence. The run-up to the General Elections scheduled to take place in November 2015; the uncertain constitutional amendment process; and the ongoing peace talks with armed ethnic minority groups are all factors which have led and may lead to greater tensions between civil society, including journalists, and the Government, and within civil society itself.[528] Moreover, people staging peaceful public protests in the context of the upcoming elections may be at risk of arrest and imprisonment by the authorities.

Religious Communities

Buddhist and Muslim

After the controversies around how ethnic minorities could identify themselves in the March-April 2014 census, the Government decided not to publish ethnicity and religion data.[529] Analysis of census information reveals that an estimated total of 1,206,353 people were not enumerated in parts of Rakhine State, Kachin State and Kayin State. This represents 2.34 percent of the population. However the number was counted in the overall Myanmar population total figure of 51,486,253.[530]

The percentage of Muslims in the population is also an extremely sensitive issue in the light of recent violence and Buddhist fears of an increasing Muslim population.[531] Muslims, who live in many parts of Myanmar, are a minority of the population. Anti-Muslim sentiment and discrimination are widespread in Myanmar, not only against the Rohingya,[532] a Muslim group living in Rakhine State, but also against other Muslims in different parts of the country. Inter-communal violence between Buddhists and Muslims broke out in Rakhine State during June 2012 but has also affected other areas of the country. Moreover, there has been Buddhist violence against Muslims since June 2012 not only in Rakhine State, but also in Meiktila, and to a much lesser degree in Mandalay and other parts of the country.[533]

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[527] Burma Partnership and the Assistance Association for Political Prisoners in Burma, "How to Defend the Defenders?" (July 2015).
[528] Myanmar Centre for Responsible Business "Civil Society Organisations and the Extractives Industries in Myanmar – a Brief Overview" (October 2014).
[529] Republic of the Union of Myanmar, "2014 Myanmar Population and Housing Census, Census Report Volume 2-A" (May 2015).
[530] Ibid.
[531] For a discussion of Muslim population figures in the context of the March-April 2014 census, see International Conflict Group, "Myanmar Conflict Alert: A Risky Census", (Feb. 2014).
[532] The Myanmar Government does not accept the term 'Rohingya' and refers to the population as 'Bengali'.
[533] In Meiktila in the centre of the country, over 40 people were killed in March 2013. In July 2014 further inter-communal violence broke out in Mandalay, Myanmar's second largest city, resulting in two deaths and dozens arrested and wounded DVB, "Mandalay riots reveal splintered community, complex agendas" (8 July 2014).

In the wake of the 2012 violence, almost 140,000 people in Rakhine State remain displaced,[534] many of them in camps in extremely poor conditions, most of them Muslim. Muslims living in camps in Rakhine State are not able to travel in order to access employment or health care. Muslims who live in north-western Rakhine State also face longstanding restrictions on movement and cannot leave their townships without official permission, greatly impacting their livelihoods.[535] On 11 February 2015 the President revoked all temporary identity cards, known as White Cards, leaving many Muslims, including Rohingyas, but also some ethnic minorities, without a valid form of identity card, impacting on their ability to travel, obtain employment and vote.[536] In June former White Card holders did not appear on the voter lists and were thus disenfranchised and will be unable to participate in the November 2015 elections.[537]

Some members of the Buddhist Sangha (clergy) in Myanmar lead the '969' movement, which claims, amongst other things, that Muslims are trying to take over the country. The '969' movement encourages Buddhists to boycott Muslim businesses, and has some popular support.[538] Of the two international telecoms companies granted licenses in Myanmar, Ooredoo is based in Qatar, a Muslim-majority country. After the awards were granted, some radical nationalist Buddhist monks called for a boycott of the company and a general boycott of all Muslim-owned shops and businesses in Myanmar.[539] This has impacted on the company's ability to obtain tower sites in some areas.

Moreover, building on widespread anti-Muslim sentiment, some Buddhist leaders called on the Government to enact legislation to "*protect*" Buddhism. There are three laws in Parliament restricting the following: religious conversion to non-Buddhist religions; inter-faith marriage; population; and polygamy. The *Population Control Healthcare Bill* was passed by Parliament in April 2015. Parliament enacted the Buddhist *Women's Special Marriage Act* in July 2015. This law requires Buddhist women (but not men) to seek permission from the authorities to marry a non-Buddhist man.[540] International human rights organisations have noted that the *Population Control Healthcare Bill* may be used selectively against certain ethnic and religious minorities as there is no non-coercion or discrimination clause in the bill.[541]

Other faiths

People of other faiths also face discrimination and marginalisation. Christians comprise a small minority in the country, but most Chin and Kachin ethnic groups are Christian, with smaller numbers of Karen and Karenni Christians. Christians, like other members of minority religions, are generally not promoted to senior positions within the civil service or military. Ethnic minority Christians face restrictions on their religious freedom, including

[534] USAID, "Burma - Complex Emergency Fact Sheet #1, Fiscal Year (Fy) 2015" (6 Feb 2015).
[535] Brief Overview of the current human rights situation in Northern Arakan/Rakhine State, Myanmar, February – July 2014, Arakan Project, on file with IHRB.
[536] The White Cards expired on 31 March 2015. International Crisis Group, "CrisisWatch No 139" (2 March 2015), pg 12.
[537] Myanmar Times, "Former white card holders cut from Rakhine voter lists" (24 June 2015).
[538] ICG, The Dark Side of Transition: Violence Against Muslims in Myanmar" (Oct 2013).
[539] Nationalists call for Ooredoo boycott, Myanmar Times, 6 June 2014,
[540] The Irrawaddy, "Union Parliament Passes 'Interfaith Marriage Bill" (18 July 2015).
[541] See Amnesty International and International Commission of Jurists, "Myanmar: scrap 'race and religion laws' that could fuel discrimination and violence" (3 March 2015); Report of the Special Rapporteur on the situation of human rights in Myanmar, Yanghee Lee, Advance Unedited Edition, A/HRC/28/72, p 9-10, 9 March 2015; and "Burma's Population Control Bill Threatens Maternal Health Program", Physicians for Human Rights, 22 April 2015, *Population Control Healthcare Bill*.

limitations on building places of worship and destruction of religious venues and artefacts. These abuses are particularly acute in the context of the armed conflict in Kachin and northern Shan States.[542]

Women

Myanmar acceded to the *UN Convention against All Forms of Discrimination against Women* (CEDAW) in July 1997. The 2008 *Myanmar Constitution* does not include an effective constitutional guarantee of substantive equality[543] nor in practice do women receive equal pay for work of equal value.[544] Although the law guarantees equality between men and women, enforcement is weak and women are under-represented in Government and in most traditionally male occupations. In order to address some of these issues, in October 2013 the Government launched a 10 year action plan for the advancement of women.[545] The ADB and the UN have supported the Government in carrying out a Gender Status Analysis that provides a detailed assessment of the status of women in the country; the results were announced during January 2015.[546]

Women can be particularly at risk of negative impacts because they have fewer livelihood options than men, due to social status, family and cultural roles and expectations, and lower literacy levels,[547] and as a result, are disproportionally affected by poverty.[548] While the 2014 census reported an overall female literacy rate of 86.9%,[549] girls are often not able to attend school, particularly in remote mountainous border regions, which means that women are on the whole are less educated, leading to a lower literacy rate. Without access to education, women cannot access the job market, remain in low paid positions and are more prone to exploitation.

Sexual violence against women in the context of internal armed conflict in Myanmar has been reported for many years.[550] However an October 2014 report by the Gender Equality Network discussed violence against women in non-conflict situations, such as intimate partner violence, including marital rape, and sexual assault and harassment outside the home. The report recommended that companies implement policies to address and effectively respond to sexual harassment and violence in the workplace.[551]

Women's organisations in Myanmar speak out on a range of issues, including on the impact of business operations.[552] Article 19 has published a report, 'Censored Gender',

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[542] United States Commission on International Religious Freedom, "2013 Annual Report" (2013), pg 22-25.
[543] Article 350 guarantees that women have the enforceable right to the "same rights and salaries" as that received by men "in respect of similar work." The use of the term "similar work" will not achieve the same equalities outcome as the principle of equal pay for work of equal value used in CEDAW. Myanmar Legal Framework Background Paper for IHRB, p 83, on file with IHRB.
[544] UNFPA Myanmar, "The 100th International Women's Day celebrated in Yangon, Myanmar" (8 Mar. 2011).
[545] UNDP,"Women's National Strategic Plan for Women Advancement Released" (4 October 2013).
[546] UNFPA, "Myanmar's Gender Status Analysis gets the Go-ahead" (18 January 2015).
[547] The Republic of the Union of Myanmar, "2014 Myanmar Population and Housing Census, Census Report Volume 2-A" (May 2015). pg. 37 on literacy ratios: male 92.6%, female 86.9%
[548] US Department of State, "Burma 2013 Human Rights report" .
[549] The Republic of the Union of Myanmar, "2014 Myanmar Population and Housing Census, Census Report Volume 2-A" (May 2015).
[550] UN General Assembly, "Report of the Special Rapporteur on the situation of human rights in Myanmar, Yanghee Lee" A/HRC/28/72 (9 March 2015), para 35.
[551] Gender Equality Network "Behind the Silence: Violence against women and their resilience in Myanmar" (October 2014).
[552] The Tavoyan (Dawei) Women's Union reported in February 2015 that women who protested about damage to livelihoods and the environment caused the Dawei Special Economic Zone and related projects in

examining how the right to freedom of expression and information applies to women in Myanmar and what gender-based violence is experienced by women as a result of what they say.[553] Some women's organisations campaigning against discrimination against women have received anonymous death threats via Facebook and their mobile phones.[554]

Other women's organisations are focussing on the gap between men and women working in the ICT sector. The founder of 'Geek Girls', a women in technology community in Myanmar, noted that 60% of the students at computer universities are female, but that women are lagging behind men in employment in the ICT sector, including in start-ups.[555]

Children

The Myanmar Government ratified the *International Convention on the Rights of the Child* (CRC) in 1991, and acceded to the *CRC Optional Protocol on the Sale of Children, Child Prostitution, and Child Sexual Abuse Images* in January 2012[556] and *ILO Convention No. 182 on the Worst Forms of Child Labour* in December 2013. Nonetheless Myanmar law diverges from the CRC in some significant areas. For example, the provisions of the *1993 Child* Law define a child as becoming an adult at 16 rather than 18 years, and sets the minimum age of criminal responsibility at seven years old. Although the Government has said that it will reform the law to bring it into line with the CRC, this has not yet occurred.

When discussing potential private sector impacts on children, the usual and often exclusive focus of companies is on child labour. However, ICTs can have a wider set of impacts on children, as a consequence of their physical and cognitive immaturity and vulnerability to exploitation. There is an increasing range of tools regarding children available to assist companies in identifying and understanding potential impacts on children.[557]

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the southeast of the country also experienced harassment. Tavoyan Women's Union "Women activists facing harassment by proponents of the Dawei Special Economic Zone" (25 February 2015).
[553] 'Censored gender: women's right to freedom of expression in Myanmar' Article 19, June 2015
[554] See The Irrawaddy, "We Will Not Back Down" (19 June 2014).
[555] The Irrawaddy, "In Myanmar, Men are Leading the ICT Industry and "omen are Lagging" (8 May 2015).
[556] UN Treaty Collection
[557] UNICEF and the Danish Institute for Human Rights, "Children's Rights in Impact Assessments - A guide for integrating children's rights into impact assessments and taking action for children" (2013).

Child Labour

The 2008 Constitution reaffirms the State's responsibility to provide free basic education and health care for children.[558] The majority of children attend primary school, but the net completion rate is only 54%. Of these, only 58% go on to secondary school. [559] Due to widespread poverty and the unstable economic situation, many children drop out of school and work for low pay to help earn money for their families.[560]

Child labour is widespread and visible throughout Myanmar in various sectors (see census data in Chapter 4.6 on Labour). Children also end up as beggars on the streets, bus and railway stations and at tourist attractions. One survey found that one third of child labourers worked as street vendors.[561] The Government is working with the ILO and UNICEF to reform laws and end the worst forms of child labour. The minimum age for the employment of children is set at 13 years, which is in line with international standards for light work, but not in line with the international standard of 15 years for regular work.[562] The 1993 *Child Law* classifies children between the age of 14 and 17 as youths, and allows them to engage in "*light duties*". However, the term "*light duties*" is not defined.[563] Children are frequently victims of economic exploitation, as employers generally pay them less despite their high contribution of labour.[564]

Child Sexual Abuse Images Online

The increasing use of ICTs to distribute and access child abuse images[565] has given rise to numerous global coalitions and initiatives to identify and protect child victims and disrupt posting of and access to such images.[566] Distribution and accessing child abuse images are violations of children's rights and are a crime under international law. As noted by one of the leading NGOs working on disrupting the availability of child sexual abuse content hosted anywhere in the world, many legitimate online services are misused by those wishing to distribute child sexual abuse imagery.[567] Given the relatively low penetration of ICTs in Myanmar to date,[568] this has not been a major concern for children protection groups, but this is changing as the country opens further.[569]

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[558] Ibid, pg. 4-5
[559] UNICEF, "Situation Analysis Myanmar" (July 2012) pg. 76 and 83.
[560] Democracy for Burma, "Child labour continues in Burma" (4 February 2011).
[561] UNICEF, "Situation Analysis of Children" (2012), p 116.
[562] Freedom House, "The Global State of Workers' Rights – Burma" (31 August 2010).
[563] US Department of State, "2013 Country reports on Human Rights practices, Burma 2013 Human Rights report" (2013).
[564] Child Rights Forum of Burma, "CRC Shadow Report Burma" (29 April 2011).
[565] A note on terminology: although the Optional Protocol to the UN Convention on the Rights of the Child uses what was the common term at the time to protocol was adopted "child pornography", the terminology has shifted to using the term "child abuse images" in order to convey more cleary the concept that any involvement with such images is a crime.
[566] See for example: European Commission, "A Global Alliance against Child Sexual Abuse Online" (last accessed August 2015).
[567] Internet Watch Foundation, "New tactics mean 137% increase in identified child sexual abuse imagery" (13 April 2015)
[568] See for example UNICEF, "Situation Analysis Myanmar" (July 2012), which highlighted many other existing child protection concerns in the country, but as of the 2012 date, there would have been little significant data or practice available about online exploitation. See also, Myanmar Centre for Responsible Business,

Under Section 66 of Myanmar's *Child Law*, the production or resale of child sexual abuse images can result in maximum fine of 10,000 MMK and a two-year prison sentence.[570] The use of a computer to sell, let to hire, distribute, publically exhibit, or put into circulation obscene objects is criminalised[571] under the Myanmar *Penal Code*, including for legal persons.[572] However, Myanmar does not have explicit provisions requiring Internet Service Providers (ISPs) to report suspected child sexual abuse images to law enforcement or other agencies upon discovering suspected child sexual abuse images or other types of child abuse/child sexual exploitation circumstances on their network.[573]

Ethnic Minorities

Ethnicity is a complex, contested and politically sensitive issue. Ethnic groups have long believed that the Government manipulates ethnic categories for political purposes.[574] (See Chapter 4.10 on Conflict and Security for information about ethnic minority armed groups). Myanmar's ethnic minorities make up an estimated 30 – 40% of the population, and ethnic states occupy some 57% of the total land area along most of the country's international borders.[575] Political boundaries in Myanmar are to some extent organised according to ethnic demographics. The seven states are named after seven large ethnic minority groups – namely, Kachin, Kayah, Kayin, Chin, Mon, Rakhine, and Shan States. Although the Bamar do not have a specific state named after them, they are the dominant ethnic group living in the country, especially in the seven Regions (Sagaing, Magwe, Tanintharyi, Mandalay, Yangon, Ayeyarwady, and Bago). There are also six self-administered areas that are part of Regions or States, each named after the minority national race that forms the majority in the relevant area (Naga, Danu, Pa-O, Palaung, Kokang and Wa Self-Administered Areas)[576].

The term 'Indigenous Peoples' is not widely understood in Myanmar, nor generally used. The 2008 *Myanmar Constitution* makes no reference to ethnic minorities or indigenous peoples, instead using the term "*national races*". However, "*national races*" is not defined, and is generally interpreted by applying the 1982 *Myanmar Citizenship Law*, which defines 135 national races in its 1983 *Procedures*.[577] Under the *Myanmar Citizenship Law*, nationals of Myanmar include the "*Kachin, Kayah, Karen, Chin, Bamar, Mon, Rakhine or Shan and ethnic groups as have settled in any of the territories included within the State as their permanent home from a period anterior to 1185 B.E., 1823 A.D.*"[578]

Article 22 of the Constitution, provides for *"(i) development of language, literature, fine arts and culture of the national races; and (ii) promotion of solidarity, mutual amity and respect*

"Myanmar Tourism Sector Wide Impact Assessment" that highlighted rising concern and attention to the exploitation of children in tourism, pg. 157-158.
[569] See for example, UNCEF, "Child Safety Online – Global Challenges and Strategies" (2011).
[570] Burma Library, "SLORC's Child Report – 4" (26 January 1997).
[571] *Myanmar Penal Code*, Section 292.
[572] Ibid, Section 11.
[573] International Centre for Missing and Exploited Children, "Myanmar Country Report" (2014).
[574] International Crisis Group, "Myanmar Conflict Alert: A Risky Census" (Feb. 2014).
[575] Transnational Institute/Burma Centrum Netherlands, "Access Denied: Land Rights and Ethnic Conflict in Burma", (May 2013).
[576] *Myanmar Constitution* (2008), Article 56.
[577] See: Burma Library, "Burma Citizenship Law of 1982" (last accessed August 2015).
[578] *Myanmar Citizenship Law*, Article 3.

and mutual assistance among the national races; and promotion of socio-economic development including education, health, economy, transport and communication, of less-developed national races".

Almost all Rohingya are denied citizenship under the 1982 *Myanmar Citizenship Law,* either because they do not meet its stringent and discriminatory citizenship requirements, or where they do, because they lack the documentary evidence required. People of Chinese, Indian or Nepali heritage are mostly denied full citizenship under this law because they do not automatically qualify under "*national races*".

The 2014 national census used the 135 categories of national races, with people required to check one of them, or indicate "*other*"; there was no option to indicate the frequent mixed heritage of many residents. This 135 national races categorisation is strongly contested by ethnic minorities, as they believe it does not accurately represent their true ethnicity and also that the Government, comprised primarily of ethnic Bamar, is using this to lower the real number of each broad ethnic group. A last minute Government decision prevented those Muslims in Rakhine State identifying as Rohingya to write in "*Rohingya*" as their ethnic group during the census process.[579] The Government has not yet released 2014 census ethnicity data.

The Protection of the Rights of National Races Law[580] enacted on 24 February 2015 gives further effect to Article 22 of the 2008 Constitution. Article 3 includes the purposes of the law: "*(e) to aim for the socio-economic development of less-developed national races including education, health, economics and transportation*." While Article 3 of the law provides for "*access to equal citizenship rights for all ethnic groups*", and for "*ethnic groups to have full access to rights enshrined in the Constitution*", it does not explicitly protect ethnic minorities against discrimination. The law states that no one can behave with intent to incite hatred, animosity and disunity among "*national races*" and that ethnic rights and entitlements cannot be restricted without a sound reason.

The 2015 Law establishes a Minister for National Races to be appointed by the president with the approval of the union Hluttaw. This has not yet taken place. In article 9 the Ministry's duties and mandate includes: "(e) *carry out all round development activities including education, health, economics and transportation of less developed national races for their socio-economic development and article*;" and (j) "*carry out activities to develop, maintain, protect and improve language, literature, arts, culture and traditions of minority and ethnics' tribes in danger of extinction*". It is not yet clear whether this will extend to supporting the development of online content in ethnic minority languages.

[579] See International Crisis Group, "Counting the Costs: Myanmar's Problematic Census" (15 May 2014).
[580] Available at: http://www.pyithuhluttaw.gov.mm/lawdatabase/?q=my/law/431 (Burmese only).

People Living With Disabilities

The 2014 Census reported a disability rate of 4.6% of the total population.[581] A 2010 study noted that people with disabilities in Myanmar suffer from widespread discrimination and exclusion within their communities, families, and from society as a whole. Disabled children and women were identified as the most vulnerable.[582] Moreover, Myanmar activists have reported that people living with disabilities are not adequately protected by law and have called for stronger protection for this population, as they are at risk of abuse.[583] There is a severe lack of education for people living with disabilities; a Myanmar Government study reported that almost 50% of disabled people received no education whatsoever. The survey also reported that 85% of disabled people were unemployed.[584] There have been very few employment training programs for people with disabilities, and there is a need for more vocational training and employment, supported by funding.

Myanmar acceded to the *International Convention on the Rights of Persons with Disabilities* (CRPD) in December 2011.[585] The Ministry of Social Welfare is the Myanmar Government entity responsible for people with disabilities (PWD) [586]. A Disability Rights Law 30/2015, drafted with input from disabilities advocacy organisations, was adopted in June 2015[587]. This provides for the creation of a National Committee for Disability Rights with extensive government and NGO participation (but not business). The Committee will address issues such as access to employment, discrimination and vocational training. Tax relief will be available for goods produced by PWDs, and for organizations or private business *'that employ more than the designated quota of PWDs'*.

No further details are given about the envisaged quota system, which it appears will be defined by the National Committee. The Law sets out the responsibilities of employers to obey and implement the policy of National Committee for creation of job and training opportunities for PWDs; employ PWDs (including those who are registered at township Labour Offices) in suitable workplace in accordance with the quota system. Where the employer is unable for whatever reason to employ PWDs, they shall contribute to a fund for PWD rights according to a rate to be laid down. The Ministry of Social Welfare is expected to begin work on bye-laws in late 2015.

The Myanmar Centre for Responsible Business (MCRB), along with the Deaf Resources Centre, has published a bilingual Guide for companies wishing to integrate people with disabilities into their Corporate Social Responsibility (CSR) policies, increase the level and quality of employment for people with disabilities, and contribute to the improvement of products and services for people with disabilities.[588]

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[581] The report listed four types of disability: walking, seeing, hearing, intellectual/mental. The Republic of the Union of Myanmar, "2014 Myanmar Population and Housing Census, Census Report Volume 2-A" (May 2015).
[582] Salai Vanni Bawi, "Understanding the Challenges of Disability in Myanmar" (2012).
[583] Myanmar Times, "Activists call for stronger laws to protect Myanmar's disabled" (21 January 2013).
[584] The Irrawaddy, "In Burma, Children with Disabilities Struggle to Access Schools" (5 November 2013).
[585] United Nations Treaty Collection.
[586] Myanmar Ministry of Social Welfare.
[587] http://www.pyithuhluttaw.gov.mm/?q=download/file/fid/5478 only availability in Burmese
[588] MCRB and Deaf Resources Centre "Corporate Social Responsibility and Disability (CSR-D)" (Aug 2014).

Lesbian, Gay, Bisexual and Transgendered (LGBT) People

Article 377 of the *Penal Code*, based on British colonial law, criminalises any activity that the Myanmar authorities decide constitutes "*carnal intercourse against the order of nature*".[589] The LGBT Rights Network in Myanmar has called for the abolition of this article, which can be used against people in same-sex relationships. Although greater freedom has led to greater visibility for LGBT activists, this has meant that they are now exposed to more abuse. LGBT activists have reported widespread discrimination, and general societal lack of support.[590] The US State Department's 2014 Annual Human Rights Report states that LGBT people in Myanmar face discrimination in employment, including denial of promotions and dismissal. Openly gay men and lesbians also report limited opportunities for work and harassment by the police.[591] LGBT activists have reported online abuse; homophobic groups shared photos of some prominent LGBT activists. After the wedding of two gay men, there was a spike in such abuse online, including death threats against all gay people. Online abuse against the LGBT community is a serious problem in Myanmar and ICT companies should be aware of the potential for such abuse.

B. Field Research Findings

Religious Communities

Human Rights Implicated: Right to non-discrimination

Field Assessment Findings

- As noted in Chapter 4.6 on Labour, **racial and religious tensions were observed, mainly where communities identified the company or its workers as Muslim:**
  - Researchers heard of several incidents in which subcontractors of a company from a majority Muslim country were disturbed in their work by communities protesting the company's presence in their area.
  - Workers were denied accommodation due to working for a Muslim company.
- Communities threw stones at cars carrying workers of companies that were perceived to be owned by Muslims.

Gender

Human Rights Implicated: Right to non-discrimination

Field Assessment Findings

- With respect to the acquisition or leasing of land for tower or cable sites, in principle, there is no legal impediment to **providing payment for land or lease compensation to women or women-headed households**. Nonetheless, households are registered in the husband's name and therefore in general compensation was handed over to the male household head. However, widows or single mothers would also be able to obtain compensation same way as male headed households.

[589] Lawyers' Collective, "LGBT Section 377" (23 November 2010). This *Myanmar Penal Code* is still used by many countries formerly ruled by the British, including India, Malaysia, and Myanmar.
[590] The Irrawaddy "LGBT Groups Call for Burma's Penal Code to Be Amended" (29 November 2013).
[591] US State Department, "Burma 2013 Human Rights Report" (2013) pg. 40 – 41.

- As noted in Chapter 4.6 on Labour, it was very unusual for **any women to work on tower construction**.
  - This was often justified on the grounds it was unsafe for them due to night work and the distances between the site and their village/ accommodation.
  - Where women were able to work on tower construction sites, they were only allowed to do certain manual tasks, such as backfilling or moving materials.
- **Perceptions of women working in the ICT sector were mixed** amongst interviewees. Given traditional cultural norms in Myanmar, many indicated women and girls should not work and should stay at home to support their families. However, just as many indicated that female workers were excelling at programming and that there were more female students than male students at computer universities, including at masters level.
- Some stakeholders suggested that in order to protect women against such online harassment or hate speech, the **draft Anti-Violence Against Women Law** should include provisions addressing these problems.

Children & Young People

Human Rights Implicated: Rights of the child

Field Assessment Findings

- Field researchers heard **repeated appeals for better curricula and facilities within schools and universities, especially regarding technology and engineering:**
  - Myanmar universities and the ICT industry were seen as disconnected; many students felt the university curriculum needed to be redesigned in consultation with industry.
  - The computer and tech university curriculum was seen as 10 years behind, for example teaching students Visual Basic programming language (created in 1991) rather than the more recent successor visual basic.NET (created in 2002). Companies seeking to hire qualified local staff noted skill gaps, and low job-readiness skills as limiting factors.
  - Primary schools have not yet integrated ICT education into curricula, leading to a lack of basic skills needed to successfully pursue university programmes on ICT amongst the majority of Myanmar young people
- **Numerous cases of the negative impacts of over-use or misuse of the Internet were shared with researchers**, particularly by concerned parents. This was mainly ascribed to the sudden exposure to the Internet without any education on the safe or balanced use of technology. As in many other parts of the world, **parents expressed concern about children** becoming 'addicted' to computer games either offline or online. In some cases this has led to children dropping out of school.
- As noted in Chapter 4.6 on Labour, occasional practices of reviewing identification to verify workers' age were reported in fibre cable installation projects, but many more instances of lack of identification cards or documents were described to researchers, indicating a **general lack of basic measures to prevent underage workers in fibre and cable installation in particular**.
  - Fibre cable line workers often had to travel long distances from their homes in order to take up work. Due to lack of childcare, and shifting worksites, they would bring children with them. As a consequence **children were regularly left waiting in the worker camps during the 10 hour shift periods**.

Myanmar Good Practice Examples:

- One company has reported that their Code of Conduct covers human rights and also has a Myanmar-specific statement on human rights due diligence requirements. They have established a community outreach program with State Liaison Officers to act as a link between ethnic groups and the company, and a local hotline to which people may report grievances related to sustainability issues.[592]

C. Groups At Risk: Recommendations for ICT Companies

Understanding and Addressing Differentiated Impacts of Projects

- **Understand the Myanmar context:** Myanmar has a very diverse population in a complex and often conflict-ridden environment. Myanmar legal standards often fall below international legal standards to protect groups at risk. The groups at risk are often (at best) neglected parts of the population and at worst, subject to persecution by the Government or others. In these situations, in addition to international guidance on engagement and employment or contractual arrangements with groups at risk, experts on the specific vulnerable group in question should be consulted.
- **Identify and engage:** A first step in understanding what potential impact a project or services may have on groups at risk is to identify which vulnerable groups may be in the potential workforce and surrounding community as part of the company's due diligence process. The ICT value chain is spread across the country and their workers and stakeholders will vary in different locations. This assessment may require additional specialist sociological or anthropological expertise and methods to identify, locate and engage individuals or groups at risk of abuse and marginalisation. Engagement may often need to be done separately, and sometimes discretely.
- **Ensure assessments and prevention are differentiated:** The objective of an assessment is to better understand how impacts may affect each potential group at risk, and in particular, to understand who could experience adverse impacts from the proposed project or service more severely than others. Disaggregated data and community consultations/focus groups will be needed to identify, assess and discuss potential impacts. Differentiated prevention or mitigation measures may be required to address the greater severity of impacts. Monitoring should track impacts on individuals or groups on a disaggregated basis.
  - Groups at risk should also be able to benefit from ICT sector equally with others. This too may require distinct measures. For example, if job training is offered, there may be a need for specialised or separate training provided for individuals from groups at risk who face exclusion from the dominant group, e.g. people living with disabilities.
- **Consider the potential exposure of users at risk:** As noted elsewhere (See in particular Chapter 4.1 on Freedom of Expression and Chapter 4.4 on Surveillance and Chapter 4.2 on Hate Speech), some of those groups highlighted in this Chapter are subject to specific risks within Myanmar. ICT companies who provide services for or affecting these groups (such as by hosting online content) should consider these vulnerabilities in advance of offering services. They should consider what steps can be taken to modify policies, procedures or services to avoid or minimise negative impacts on them, which might derive from hate speech, bullying or unlawful surveillance.

[592] See further: Telenor, "Response by Telenor: Myanmar Foreign Investment Tracking Project", Business & Human Rights Resource Centre (last accessed September 2015).

- **Address child safety online**: As Myanmar does not have specific laws covering child safety online and is unlikely to be able to prioritise these issues, given the wide range of other child protection challenges in the country, it will fall to companies to take action to protect young users and to disrupt the use of their services to transmit child abuse images. Telecommunications operators and web based services, as well as software companies, need to consider the range of potentially severe impacts on children that can occur through different forms of violence and exploitation. For example, the online sale and trading of child abuse images is considered a crime in most jurisdictions and prohibited under international human rights law. Other negative impacts arise from broader child safety issues online, such as 'cyber bullying', 'grooming', the illegal sale of products such as alcohol or tobacco to children, or graphic content encouraging self-harm. Companies should report clearly abusive images or behaviours promptly to law enforcement authorities once they become aware of them. Beyond this, there is a range of approaches that companies should draw on, including:
  - making it clear how users can report abusive images or behaviour such as bullying
  - training moderators of online forums and services for children to help identify and respond to concerning or suspicious behaviour
  - implementing effective age and identity verification mechanisms at the level of individual users
  - implementing appropriately heightened security measures for personal information that has been collected from children (including any location-related information, which can pose particular risks to children)
  - seeking parental consent before using or disclosing information collected from children;
  - considering any unintended consequences of decisions on child safety (for example, posting information about unaccompanied children on privately-run, post-disaster family reunification websites), and
  - engaging with external child safety and children's rights experts, including relevant civil society organisations and the Government, to provide on-going feedback and guidance on the company's approaches.[593]

Business Leadership

- **Model equal opportunity:** Addressing entrenched discrimination demands a change in societal attitudes, which often requires prompts from many directions to tip the balance towards broader acceptance. These can include messages from the political leadership – the President's office has repeatedly called for building an "*inclusive and sustainable*" Myanmar – as well as changes in law and changes in peer countries. However, changes can also start with the private sector modelling equal opportunity and demonstrating the benefits. This is an important role that businesses of all sizes in the ICT value chain can play, through leadership messages and by creating workplaces that are not only visibly free of discrimination but also moving towards equal opportunity for the groups at risk of marginalisation noted above.

[593] See for example: ITU et al, "Guidelines on Child Protection Online"; GSMA, "The Mobile Alliance against Child Sexual Abuse Content", European Commission, "Global Alliance on Child Sexual Abuse Online" (last accessed August 2015). The ASEAN Commission on the Promotion and Protectin of the Rights of Women and Children has not made online protection a priority in its "Work Plan (2012-2016) and Rules of Procedures (ROP)" (2012).

- **Highlight impacts on investment climate:** Societal discrimination and exclusion are not unique to Myanmar. However, if discrimination and exclusion becomes more entrenched and overt, it will undermine ongoing political and economic reforms. Businesses, collectively or individually, should highlight how the negative impacts of discrimination and inter-communal violence, and an inadequate response from the Government on protecting those at risk, can harm the investment climate.
- **Design ICTs for vulnerability and accountability:** As outlined in Chapter 3 on sector-level impacts, there are more opportunities for positive impact from the ICT sector than potentially any other industry developing within Myanmar's fast moving landscape. The nature of the ICT sector – able to bridge long distances affordably and in real time – positions it to combat exclusion and vulnerability. For example, ICT can increase access to doctors and medical services for the elderly, disabled or displaced who are in desperate need of healthcare but often unable to travel or afford it; provide people with disabilities with accessible online employment opportunities; and offer hotlines for groups at risk.

D. Relevant International Standards and Guidance on Groups at Risk

Relevant International Standards:

- IFC Performance Standard 2 and Guidance Note – Labour and Working Conditions
- ILO, Discrimination (Employment and Occupation) Convention (No. 111)
- UN Convention on the Elimination of Discrimination Against Women
- UN Convention on the Rights of Persons with Disabilities
- UN Convention on the Rights of the Child

Relevant Guidance:

- European Commission, "ICT Sector Guide on Implementing the UN Guiding Principles on Business & Human Rights"
- IFC, "Good Practice Note, Non-Discrimination and Equal Opportunity"
- ILO, "Working Conditions of Contract Workers in the Oil & Gas Industry"
- ILO, "Disability in the Workplace – Company Practices"
- CSR-D, "Guide on Corporate Social Responsibility and Disability" and in Burmese, MCRB and DRC, "Corporate Social Responsibility and Disability (CSR-D) – A Guide for Companies in Myanmar"
- UNICEF, UN Global Compact, Save the Children, "Children's Rights and Business Principles"
- UN Global Compact, "Women's Empowerment Principles"
- UN "Inter-Agency Handbook on Housing and Property Restitution for Refugees and Displaced Persons: Implementing the 'Pinheiro Principles'"

Chapter 4.9

Stakeholder Engagement & Grievance Mechanisms

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Chapter 4.9

Stakeholder Engagement & Grievance Mechanisms

In this Chapter:

- **A.** Context
  - Freedom of Expression
  - Freedom of Peaceful Assembly
  - Freedom of Association
  - Corruption
  - Lack of Transparency
  - Accountability: Judicial and Non-Judicial Mechanisms
- **B.** Field Assessment Findings
- **C.** Recommendations for ICT Companies
  - Stakeholder Engagement
  - Accountability and Grievance Mechanisms
- **D.** Relevant International Standards and Guidance

A. Context

Stakeholder consultation and engagement in Myanmar are complex for a number of reasons. Until recently people's rights to speak freely or assemble peacefully had been forcefully suppressed for five decades. As a result, many individuals are still reluctant, even fearful, about speaking out against the Government or military in particular. Ethnic diversity, and experience of armed conflict and inter-communal violence, have resulted in significantly different perspectives on the role of the Government and business which may be difficult for outsiders to access and understand. The ability to organise NGOs to address key concerns was extremely difficult until Cyclone Nargis in May 2008, when the authorities began to tolerate the participation of civil society in humanitarian work, although CSO leaders were also arrested and imprisoned at the time. The Government has historically placed itself as the main interface between companies and communities. This approach will take time to change, but is now beginning to happen.

The country has suffered and continues to suffer an accountability deficit that will take far longer to change, starting with changing mind-sets. At the highest level, reformers in the Government have indicated their willingness to be held accountable and have taken several significant steps to join international initiatives to begin to address both international and domestic concerns. These include joining the Extractive Industries Transparency Initiative (EITI),[594] and initiating its application to the Open Government Partnership (See Chapter 3 on Sector Impacts). Both of these initiatives require active

594 Myanmar EITI is based on a number of principles including transparency and accountability. EITI membership also requires that civil society are able to operate freely and "*are able to speak freely on transparency and natural resource governance issues, and ensure that the EITI contributes to public debate*." EITI, "Civil Society Protocol" (1 January 2015).

engagement of a civil society that is able to speak freely. The experience of getting them launched highlights the challenges ahead in changing mind-set at all levels of Government. Those changes are important for many reasons, not least because the more formal structures for citizens and others to hold Government to account – such as a functioning independent judicial system – are very weak and will take years to address. In the meantime, the highest levels of Government need to ensure that they are sending clear and consistent signals on the importance of accountability and transparency. This, and putting in place mechanisms like the E-Governance Master Plan, may help reduce the governance gap (See Chapter 3 on Sector Impacts).

Freedom of Expression

See Chapter 4.1

Freedom of Peaceful Assembly

In December 2011 Parliament enacted the *Law Relating to Peaceful Assembly and Peaceful Procession*, which permits peaceful assembly for the first time in several decades. However, prior permission from the Government (the Township Police) is still required for an assembly/procession of more than one person and the requirements for seeking such permission are unduly onerous. Article 18 of the law has often been used to target activists and human rights defenders, many of whom have been arrested and imprisoned under its provisions. It acted as a significant deterrent as it provided for up to one-year imprisonment for those who demonstrate without prior permission.[595] Parliament amended the law on 19 June 2014; new amendments now reportedly oblige the authorities to grant permission for peaceful demonstrations unless there are "valid reasons" not to do so, and punishment for failing to seek prior permission and holding a demonstration without such permission was reduced from one year to six months.[596] However, the amended law still provides for the arrest and imprisonment of peaceful protesters. Arrests and imprisonment of such activists increased throughout 2014 and the first half of 2015.

Protests, including against private sector projects, particularly those in the extractive industries, have been suppressed in the past, sometimes violently. The authorities continue to crack down on such protests, with participants arrested and sometimes subjected to beatings and other ill-treatment.[597]

[595] Pyidaungsu Hluttaw, *The Right to Peaceful Assembly and Peaceful Procession Act* (Dec. 2011). Requirements include an application form submitted at least five days in advance; the biographies of assembly leaders and speakers; the purpose, route, and content of chants; approximate number of attendees, amongst other things. See Chapter 3, 4.
[596] DVB, "Peaceful Assembly Bill passed, now awaits President's signature" (19 June 2014).
[597] Norwegian Council on Ethics, Pension Fund Global, "Recommendation on the exclusion of Daewoo International Corporation, Oil and Natural Gas Corporation Ltd., GAIL India and Korea Gas Corporation from the investment universe of the Government Pension Fund Global" (2012). See also the 2013 Recommendation concerning the post-construction phase of the project.

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Freedom of Association

A network of civil society and community-based organisations is active at both the national and local levels, including many ethnic minority-based groups. In the aftermath of Cyclone Nargis, Myanmar CSOs greatly expanded and organised as they worked to help survivors. They have remained a significant positive force in the country and have been able to engage with the Government to some extent. Since 2011 Myanmar civil society groups have had more freedom to organise and have taken that opportunity to increase their activities to help people claim their rights, including those affecting local communities.

An early draft of the *Association Registration Law* required all groups to be formally registered, with severe penalties for failing to do so. CSOs raised this as a key concern, with the EITI CSO group asking for clarification before agreeing to participate in EITI. The law was adopted in July 2014 with this provision removed. It retains another provision of concern to CSOs, which requires groups who do decide to register to do so at township, state or national level, thereby potentially restricting their area of operation.[598] The website of the International Centre for Not-for-Profit Law (ICNL) provides information on laws relating to Myanmar civil society.[599]

Corruption

Myanmar ranks 156th out of 175th on Transparency International's Corruption Perception Index. In December 2012 the President announced that the Government would tackle pervasive corruption in its ranks,[600] and ratified the UN Convention against Corruption (UNCAC).[601] An Anti-Corruption Law was enacted on 7 August 2013 by the legislature although the President's Office submitted comments highlighting weaknesses and inconsistencies with UNCAC.[602] The law is to be implemented by the recently established Anti-Corruption Commission appointed in February 2014. The Commission comprises 15 members, five of who are appointed by the President, with another five each appointed by the speakers of both houses. However MPs have raised concerns that the Commission is not effective, noting in September 2014 that it had only dealt with three out of 533 cases.[603]

While it is encouraging that the Myanmar Government has acknowledged the problem of widespread corruption and begun to take steps to address the issue, it remains a major risk for companies investing in Myanmar. Given the home state anti-corruption laws that apply to many of the larger international ICT companies and the significant fines for violations, this will be an on-going issue, as it will take time for corruption to be

[598] DVB, "Activists relay worries of draft association law to parliament" (5 June 2014).
[599] ICNL, "NGO Law Monitor: Myanmar (Burma)" (accessed 25 July 2014).
[600] Third phase of reform tackles govt corruption, President says, *The Irrawaddy*, 26 December 2012.
[601] United Nations Convention against Corruption Signature and Ratification Status as of 2 April 2014, United Nations Office on Drugs and Crime (accessed 15 July 2014).
[602] The Republic of the Union of Myanmar President's Office, "Press Release on the Promulgation of Anti-Corruption Law" (8 August 2013). The Law incorporates provisions that are in certain respects narrower than those used in the Organization for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention). The definition of "bribe" incorporated in the law is narrower than that used in the OECD Convention. Further, Myanmar's anti-corruption law does not include provisions that address accounting and record-keeping standards.
[603] The Irrawaddy, "MPs Voice Doubts Over Burma's Anti-Corruption Commission" (24 September 2014).

significantly reduced in all levels of the Myanmar Government. Speaking out publicly about tackling corruption is an important contribution businesses can make towards this.

Lack of Transparency

Interactions between the Government and the people of Myanmar have been marked by a lack of transparency on the part of the authorities, including about business operations. Recently the Government has begun to take limited steps to improve transparency through Government-controlled media and the President's and Ministry websites.[604] For example the Ministry of Labour, Employment, and Social Security publishes the text of recent laws and provides information about benefits.[605] However, there is currently no freedom of information (FoI) law in Myanmar. Civil society is advocating for FoI legislation, and the Open Myanmar Initiative (OMI), a consortium of CSOs, is conducting research and convening discussions on such a law.[606] Local government generally does not provide relevant information to communities about business operations in their areas, as revealed by SWIA field assessments in the ICT, tourism, and oil and gas sectors. (See Chapter 4.1 on Freedom of Expression).

Accountability: Judicial and Non-Judicial Mechanisms

The previous Government was characterised by a lack of accountability for human rights violations and violations of international humanitarian law. Those who dared complain about the authorities or companies were at risk of reprisals, including arrest, torture, and imprisonment. Since the reform process began in 2011, there has been a marked increase in calls by communities to provide redress for abuses, particularly around "land grabs" and labour rights. The Government's response has been at times contradictory, which may be partially explained by the different levels of Government involved in responses, at the Union and local levels. The President has repeatedly exhorted all levels of Government to be more accountable, but at the local level, and indeed in some Union Ministries, such accountability is still absent. The lack of clarity may also be due to tensions between reformers in the Myanmar Government and its more conservative elements.

Both the EITI and the Open Government Partnership include independent, third party checks on whether the Government is meeting its obligations to promote more open civil society that can hold the Government to account. This external, third party review can provide an important avenue for civil society to raise concerns.

Arrests of peaceful protestors increased during 2014, and in March 2015 police beat and arrested student demonstrators in Letpadan, Bago Region. The Myanmar National Human Rights Commission has called for prosecution of the security forces involved.[607] It is not known whether the government – which is currently prosecuting the beaten students – will follow up.

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[604] See for example: Republic of the Union of Myanmar President's Office and Myanmar Ministry of Home Affairs.
[605] See: Myanmar Ministry of Labour, Employment and Social Security.
[606] Eleven Media, "Rights group pushing for freedom of information law" (last accessed August 2015).
[607] 'Rights Commission urges action against the police' Myanmar Times, 14 September 2015

With respect to the judiciary, reforming the rule of law in Myanmar has been a major focus of President U Thein Sein's administration. The Government's "*Framework for Economic and Social Reforms*" notes "*the lack of effectiveness and predictability of the judiciary*".[608] The judicial system is widely considered to be "*under-resourced, politically influenced and lacking in independence*".[609] However, reform will take a long time, and substantial resources – and not least – changes in attitude to the rule of law, starting from the bottom up, with attention to legal education. The legal education system has been eroded by decades of under-investment, and the legal profession greatly constrained by long-term political restrictions, leading to a major shortage of lawyers taking up cases.[610]

Judicial independence in Myanmar to date has been essentially non-existent,[611] with judges accustomed to acting "*as administrators rather than arbiters, basing decisions on state policy, instead of legal reasoning and the application of precedent*".[612] While there are basic principles of separation of powers provided by the Constitution, it is not complete. A 2013 report by the parliamentary Rule of Law and Stability Committee, led by Daw Aung San Suu Kyi, found "*continued intervention by administrative officials in the judicial system*".[613] This indicates that structural changes will be required to put in place a rigorous separation of powers. There is no Ministry of Justice.

Systemic corruption in the administration of justice is a major concern, manifesting itself through bribes, delays, and obstructions,[614] with a widespread local perception that the courts in Myanmar are corrupt and unfair.[615] As a result, many would "*[resort] instead to local-level dispute resolution mechanisms they perceive to be more reliable, accessible and affordable*".[616] These local-level mechanisms generally involve village leaders and/or elders' councils. Although the village leader has an obligation to inform the police about serious crimes, smaller issues and petty crimes can be settled by the village leader and/or the elders' council, a small group of respected men in a village. If one party to the problem does not agree with the solution reached, they can take the matter to the township level, but this rarely happens because it is seen as being too expensive, considering both the administrative legal costs and bribes that would have to be paid.
There is currently little in the form of a legal aid system in Myanmar, making it impossible for many to afford the time and cost commitments of using the court system. In conflict areas, the issue may be taken to the administration of the controlling armed group.[617] In addition to the courts, other bodies responsible for the administration of justice, including

[608] Government of Myanmar, "Framework for Economic and Social Reform - Policy Priorities for 2012-2015 towards the Long-Term Goals of the National Comprehensive Development Plan (FESR)" (January 2013), para 116
[609] OECD, "OECD Investment Policy Reviews: Myanmar 2014" (March 2014), pg. 27.
[610] See: International Commission of Jurists (ICJ), "Right to Counsel: The Independence of Lawyers in Myanmar", (Dec 2013)
[611] Human Rights Resource Centre, "Rule of Law for Human Rights in ASEAN: A Baseline Study" (May 2011), pg. 163, citing Asian Legal Resource Centre, Amnesty International, "Myanmar: No Law At All – Human Rights Violations under Military Rule" (1992).
[612] International Bar Association's Human Rights Institute, "The Rule of Law in Myanmar: Challenges and Prospects" (Dec 2012), pg. 56.
[613] The Irrawaddy, "Interference in Judicial System Harming Burmese People: Lawmakers" (14 August 2013).
[614] ICJ, "Right to Counsel: The Independence of Lawyers in Myanmar", (Dec 2013)
[615] See: USIP, "Burma/Myanmar Rule of Law Trip Report" (June 2013), pg. 5 and 34.
[616] Ibid, pg. 5.
[617] Ibid.

the police, lack the training and capacity to enforce the rule of law (though the EU has been providing training to improve the human rights performance of Myanmar's police).[618]

The Government has also taken a number of actions to provide non-judicial grievance mechanisms to the public in the absence of a fully functioning judiciary (see Table 40 below). However, these mechanisms are already overloaded with complaints and hindered by limited mandates. Since the reform process began, these committees and the Myanmar National Human Rights Commission have received thousands of complaints from the public about abuses at the hands of the Government and military, but, as noted above, many of these people still await a resolution to their problems.

Many businesses commonly seek to incorporate safeguards into their investment contracts by ensuring access to international – rather than domestic – arbitration tribunals in the event of an investment dispute.[619] Myanmar acceded to the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards in April 2013, which entered into force July 2013.[620] This solidifies the ability of foreign investors to submit disputes with Myanmar Government and commercial partners to international arbitration. The Myanmar legislature is now reportedly considering a new law based on the 1985 *UNCITRAL Model Law on International Commercial Arbitration* to replace the 1944 Arbitration Act, which would enable Myanmar courts to recognise and enforce international arbitral awards.[621]

An equivalent assurance of access to remedies for most Myanmar people affected by private sector operations is still a practical impossibility. Accountability in Myanmar is a new phenomenon and one that will take time to become established. Given the inefficiencies and acknowledged corruption in the judiciary and the inability of even the ad hoc commissions to resolve complaints, there is a clear lack of access to effective avenues for individuals and communities to express their grievances, engage with responsible parties in the Government or to seek redress if harms have occurred – especially at the local level.

Table 40: Existing Non-Judicial Grievance Mechanisms in Myanmar

- Daw Aung San Suu Kyi was appointed to head up a new **parliamentary Rule of Law and Stability Committee** formed in August 2012 to serve as a mechanism for the general public to lodge complaints about Government departments. In one month it received over 10,000 complaint letters regarding courts within the Yangon Division alone.[622]
- The **President's Office opened a public access portal** for people to submit opinions and complaints directly to the President.[623]
- A non-judicial **labour dispute settlement system** to resolve disputes between

[618] EU Delegation to Myanmar, "EU Crowd Management Training Supports Reform of Myanmar Police Force" (Feb 2014).
[619] More recently, the EU and Myanmar have begun discussions on an investor-state dispute settlement mechanism with Myanmar. See for example: Herbert Smith Freehills, "Myanmar and the European Union to enter into an investment protection agreement" (13 March 2014).
[620] *New York Convention on the Recognition of Foreign Arbitral Awards* (1958) (last accessed August 2015).
[621] Singapore International Arbitration Blog, "Draft Arbitration Bill in Myanmar" (June 2014).
[622] Regarding the various bodies noted, see further: Hnin Wut Yee, "Business & Human Rights in ASEAN – A baseline study: Myanmar chapter" (April 2013).
[623] Government of Myanmar, "FESR - Policy Priorities for 2012-2015 towards the Long-Term Goals of the National Comprehensive Development Plan" (January 2013), para 114.

employers and workers is in place, involving requiring workplaces to establish Workplace Coordination Committees, but implementation is still weak due to lack of adequate knowledge about the newly enacted labour laws.

- There are a number of mechanisms to hear land disputes, including a **parliamentary committee on land confiscation inquiry**, but without a mandate to give binding decisions. (See Chapter 4.7 on Land)
- The **Myanmar National Human Rights Commission** (MNHRC) was established in September 2011, but the *MNHRC Law* was only enacted on 28 March 2014. The MNHRC has a broad mandate of promoting and monitoring compliance with human rights. It is empowered to investigate complaints and contact the concerned person, company or Government department and can recommend action. It can also make its recommendations public. It can undertake inquiries and will prepare an annual report to the President and Parliament. It is also mandated to consult different stakeholders including CSOs. The President selects members after proposals by a selection board. While the law provides that proposed members should have expertise or knowledge in different areas relevant to human rights including from civil society, it does not guarantee pluralism, nor a total independence from the Executive, in accordance with the Paris Principles.[624] It received over 1700 complaints in its first 6 months of operation, a majority of which involved land grabs.
- The **ILO and Myanmar Government have agreed a complaints mechanism** to allow victims of forced labour an opportunity to seek redress/remedies from Government authorities in full confidence that no retaliatory action will be taken against them.[625] The October 2013 report by the Myanmar Liaison Officer notes an increasing number of complaints about forced labour in association with land confiscation, with people either losing their livelihoods completely or being required to work on land which they have traditionally occupied.[626]

B. Field Assessment Findings

Engagement and Remedy on Privacy Issues

Human Rights Implicated: Right to privacy; Right to freedom of expression and opinion; Right to take part in cultural life and to benefit from scientific progress; Right to take part in the conduct of public affairs; Right to information

Field Assessment Findings

- **Lack of awareness of privacy concerns among users**: Users on social media were observed sharing sensitive personal data including bank statements and checks for donations or even more sensitive information about health status without appropriate protections. Users reported being unaware of how to configure privacy settings in their social media accounts. Users also reported being unaware of how to report on content on social media.
- **Lack of policies or clear communication of policies**: Data retention policies were absent, or in some cases not clearly communicated to the customer/user even when internally present (e.g. 5 years for retention of customer data on paper).

[624] OHCHR, "OHCHR and NHRIs" (last accessed August 2015).
[625] ILO, "Forced Labour Complaint Mechanism" (last accessed August 2015).
[626] Section 6, ILO, "Update on the operation of the complaint mechanism in Myanmar, report of the ILO Liaison Officer to ILO Governing body" (319th Session, Geneva, 16-31 October 2013), GB.319/INS/INF/2.

- See Chapter 4.3 on Privacy

Engagement on Freedom of Expression and Opinion

Human Rights Implicated: Right to freedom of expression and opinion; Right to take part in cultural life and to benefit from scientific progress; Right to participate in public life

Field Assessment Findings

- See Chapter 4.1 on Freedom of Expression
- See Chapter 4.2 on Hate Speech

Engagement with Workers

Human Rights Implicated: Right to freedom of association; Right to freedom of peaceful assembly; Right to form and join trade unions and the right to strike; Right to just and favourable conditions of work; Right to freedom of expression and opinion

Field Assessment Findings

- There was a general **lack of worker-management engagement** in most companies across the ICT value chain, and only a few companies provided grievance mechanisms through which workers could raise complaints regarding their jobs and seek a resolution.
- **At fibre factories, workers were unaware of their basic association and collective bargaining rights,** for example understanding there must be a minimum of 30 members in a union**.** They did not feel the company would allow it even if it was acceptable under national law, and were concerned that joining a political party could also affect their jobs.
- **Awareness of rights to wages and benefits varied considerably**. Many workers admitted to a **very low level of understanding of their rights** vis-à-vis employers or the Government. There was also little to no information regarding labour rights or working conditions shared proactively by most companies with their workers, which will be important as a number of new labour laws, such as the *Minimum Wage Law* have recently come into force.
- See Chapter 4.6 on Labour.

Grievance Mechanisms for Workers

Human Rights Implicated: Right to freedom of association; Right to freedom of peaceful assembly; Right to form and join trade unions and the right to strike; Right to just and favourable conditions of work; Right to freedom of expression and opinion

Field Assessment Findings

- **Unskilled workers tended not to raise workplace and employment related complaints**, such as unpaid or inadequate wages, poor health and safety (H&S) standards, or barriers to unionising because they were relieved to have a job at all.
- Workers at fibre factories were able to raise complaints at meetings or anonymously through a letter box system, but **issues previously raised, such as deductions from daily wages and bonuses had failed to be addressed.**
- **Language barriers** were a commonly reported problem between managers and workers. Researchers heard that workers were often unsure whether any complaints or issues they raised were properly reported to the managers responsible.

- See Chapter 4.6 on Labour.

Engagement on Land Issues

Human Rights Implicated: Right to an adequate standard of living; Rights of minorities; Right to freedom of expression and opinion; Right to take part in cultural life and to benefit from scientific progress; Right to take part in the conduct of public affairs; Right to information

Field Assessment Findings

- There were numerous cases where individuals and communities claimed there was **no participation in informed consultation** about land acquisitions or tower or fibre projects using land in immediate proximity to their homes.
- In cases where there was prior informed consultation and participation, it was predominantly **only with the land owner/user and the (two to four) immediate neighbours** who, under the land acquisition process, were needed to sign consent forms. The wider community surrounded the tower were not believed to have been consulted. In many of those cases, **those asked to sign agreements were unclear of their purpose or content.**
- There were **very few cases** found where any ICT company or Myanmar Government had done **wider community consultation regarding the network rollout,** land needs and plans, and the ways in which the rollout would affect their lives and livelihoods, positively or negatively.
- In many cases, community members:
  - received **no prior information about the intention to acquire their land or land near their homes**, only understanding the reason was to build a tower or lay the cable line once it became apparent during construction or digging
  - were **not consulted** or given an opportunity to become informed about the **broader project of building the network**. Instead, information was given only with respect to the land registration process (see Due Process below) and compensation
  - were given **no choices** or opportunity to negotiate about the plot of land or restrictions on land use
  - often **did not know for which telecom operator** the tower construction company was building, or the cable line was being dug
  - were **not given any information to make contact or complain** either with the cable laying company, tower construction company or telecom operator
  - Commonly raised community concerns included:
  - **not knowing which company was involved** in the construction (whether fibre cable or tower).
  - **not having a company contact** in cases of issues or emergencies.
  - not being provided basic information on the safety of the tower, including:
  - whether the tower could withstand earthquakes or severe weather
  - whether they would be subjected to unsafe levels of radiation from the tower
  - whether they would be electrocuted by the tower during rain showers
  - **noise from generators powering the towers** causing a disturbance, headaches, and small cracks in walls/floors.
  - **tower sites being fenced in but not locked**, compelling villagers to "*guard*" the site to ensure children or others do not wander in.
- See Chapter 4.7 on Land

Access to Remedy for Land Grievances

Human Rights Implicated: Right to an effective remedy; Right to take part in the conduct of public affairs; Right to information

Field Assessment Findings

- As mentioned above, there were **regular reports of communities and land owners not knowing which company was responsible** for fibre cable digging or tower construction, including whom to contact in cases of emergency or grievance.
- **Cases of noise disturbance from generators powering towers were generally resolved,** in some cases by the village administrator.
- Some communities complained of **damage by the company of roads,** as well as of company-provided road repairs that failed to restore the quality of the road prior to the company's use**.**
- See Chapter 4.7 on Land

Conflict Areas

Human Rights Implicated: Right to life, liberty and security of the person; Right to just and favourable conditions of work; Right to take part in the conduct of public affairs; Right to information

Field Assessment Findings

- There were some cases in which companies attempted to negotiate access with non-state armed groups (NSAGs) to areas to lay fibre cables. **In some cases a fee was paid for this access.**
- Researchers received reports of cases of operational delays, where local groups, including armed groups, **blocked access to sites, due to lack of consultation at the site level.** While some consultation with local leaders may have been undertaken, this may not have been communicated to or accepted by all stakeholders.
- Researchers observed **fire-arms being carried by NSAGs** present during roll-out in ceasefire areas. While researchers neither observed not heard reports of shots being fired, the presence of fire-arms is a risk to the civilian population and to workers.
- Researchers also received reports from workers that they were aware that in the past landmines **may have been planted around infrastructure in conflict areas**. This led workers to avoid walking through certain areas. The measures companies took to protect their workers in such circumstances were unclear.
- See Chapter 4.10 on Conflict and Security

Myanmar Good Practice Examples:

- The Myanmar Centre for Responsible Business convened a stakeholder consultation at the request of an ICT company operating in the sector to discuss potential human rights risks for their forthcoming operations.[627]
- From 4 November to 2 December 2013, MCIT issued a call for public comments on "*Proposed Rules for Telecommunications Sector Relating to Licensing, Access and Interconnection, Spectrum, Numbering, and Competition*". Responses by 21 organisations[628] (including private sector companies, civil society organisations, and foreign governments) were posted online at www.myanmarpublicconsultation.com. This may have been the first online consultation by the Myanmar Government. Unfortunately the website is now defunct and the consultation documents and responses are no longer publicly available.
- On 21 May 2015 one of the telecoms operators held its first public sustainability seminar in Yangon, outlining human rights risks and ongoing compliance initiatives. The event was held with two-way translation.
- In March 2015, MCIT held a public forum in Yangon, focused on the health impacts on Myanmar mobile networks, with the support of the mobile industry association and one of the network providers. Research was presented focusing on international protection limits compared to radiation levels at base stations in Yangon and Mandalay. Findings showed that EMF radiation levels were far below acceptable limits set by the World Health Organisation (WHO). MCIT also produced an information brochure, including information on EMF radiation and international standards in Burmese. While the session and production of the brochure are positive steps, plans around translating the brochure into ethnic languages are unclear. This is especially important given the current geographic focus of the national telecommunications rollout. It is also unclear whose responsibility it is to distribute the brochure.
- One company has reported that their Code of Conduct covers human rights and also has a Myanmar-specific statement on human rights due diligence requirements. They have established a community outreach program with State Liaison Officers to act as a link between ethnic groups and the company, and a local hotline to which people may report grievances related to sustainability issues.[629]

[627] MCRB, "MCRB facilitates discussion between Ericsson and civil society groups" (25 July 2014).
[628] Companies that responded were Aether Company, Apollo Towers Myanmar Ltd, AVP Viom Networks, Digicel Myanmar Tower Company, Ericsson, Frontiir, GSMA, KDDI, LIRNEasia, Pan Asia Majestic Eagle Ltd, Ooredoo, Orange, Redlink, SingTel, SK Telecom, Telenor, VDB Loi, YTP. Others responding were MIDO and the US Government. See MCRB's submission: MCRB "Proposed Rules for the Telecommunications Sector" (4 December 2013).

[629] See further: Telenor, "Response by Telenor: Myanmar Foreign Investment Tracking Project", Business & Human Rights Resource Centre (last accessed September 2015).

C. Recommendations for ICT Companies on Stakeholder Engagement and Grievance Mechanisms

Stakeholder Engagement

- **Build relationships with stakeholders**: In the ICT sector, many of the stakeholders are also potential customers. Companies in the ICT value chain should have an even greater incentive to get stakeholder consultation right from the start, whether it is with communities where services are being introduced (including on-line communities) or with individuals. Since many stakeholders will not be familiar with ICTs, there is a need for basic awareness raising of ICT users on the main issues that could affect them such as data protection (see Chapter 4.3 on Privacy), protecting identity online (see Chapter 4.1 on Freedom of Expression) and appropriate behaviour (see Chapter 4.2 on Hate Speech).
- **Do not rely on Government to provide public information:** Field research indicated very little Government engagement with local communities. This means it is left to companies to inform local communities about forthcoming changes in telecommunications services, about network roll out in their area, and about forthcoming construction of this network, while keeping local government involved and informed.
- **Engage with ('offline') communities independently to build trust:** Appropriate engagement from the start matters because it: i) demonstrates respect for the community, who have experienced either neglect or reprisals until very recently; ii) is a process for providing information to and receiving information from users or communities relevant to operations; iii) enables users or communities to raise concerns and grievances; and iv) helps both companies and users or communities to understand one another's needs and expectations. There is still a high level of fear and distrust of Government and the military particularly in ethnic minority areas, given the history of human rights violations linked to the military. Companies should seek to consult communities as far as possible without the presence of military or police, and with minimal presence of local civilian authorities, so as to encourage open discussion. In some cases, trusted intermediaries may be required.
- **Engage effectively with online communities:** The growing availability of ICTs in Myanmar provides the opportunity for ICT companies (and others) to use social media, interactions through their websites, and text messaging to interact with stakeholders in a way that was not previously possible. Given the lack of online experience among the general population, companies will need to provide clear and accessible guidance, including what action is expected of stakeholders and how stakeholder views will be considered and reflected. Advertisements in official government newspapers should not be used as the sole means to publicise consultations. They are rarely read.
- **Protect the identity of those consulted where they may be at risk:** For online and offline consultation, companies will need to be concerned about the safety and security of those participating in the consultation and provide accurate information to participants about any risks of surveillance in participating in the consultations. Companies must also be particularly sensitive to undermining or exposing human rights defenders, especially land rights activists, to potential arrest and imprisonment, and respect anonymity if this is required.
- **Engage meaningfully on network rollout:** The ICT network's physical footprint is individually small, but extensive when repeated multiple times at tower sites or along hundreds of kilometres of cable trenches. It ultimately affects a significant number of individuals. It is therefore important for the network providers and their contractors

(such as tower companies and fibre cable digging companies) to have robust stakeholder engagement procedures that are grounded in a concept of respect for rights holders. This should be backed up with training to ensure that site hunters understand the core concepts of treating stakeholders fairly. With such a large number of stakeholders to deal with, and the race to construct infrastructure to meet licensing targets, there is a clear risk of stakeholders being treated only as one more item in a long checklist. While many interactions with stakeholders will be routine, the lack of awareness of many stakeholders of even what the network rollout activities are all about, much less their rights, makes many of the stakeholders, particularly in rural areas, at risk of unfair practices. This is an area where the tensions could arise between commercial pressures on tower companies and fibre laying companies to meet time targets and good practice on stakeholder engagement and even on respecting rights. While the fee companies pay for access to land for infrastructure varies according to a number of factors including assessed damages to crops, or overall disruption by workers on site, the procedures should be consistent, transparent and accessible to stakeholders and in particular those with whom companies are negotiating. See Chapter 4.7 on Land for further information.

- **Provide accurate, accessible and timely information:** Companies should be prepared to engage with stakeholders with a very low level of literacy, scientific knowledge or understanding. They should be prepared to respond in a way that is simple, accurate, balanced and understandable in local languages. This includes health and safety issues (whether the tower could withstand earthquakes or severe weather; concerns about unsafe levels of radiation from the tower (see below); concerns about being electrocuted by the tower during rain showers); information about which companies are involved in the tower site and where future questions or concerns should be directed. They should also provide clear explanations to potential customers about potential costs (such as for roaming), privacy, etc.
- **Require and monitor engagement carried out by business partners:** Sub-contractors are often the first 'face' of forthcoming operations for the rollout of the network, sales of SIM cards or sales of other ICT equipment or services. Many of these will be local companies, including very small shops. Most companies operating in Myanmar, local and foreign, are unfamiliar with the concept of stakeholder engagement, including opening their business up to receiving complaints directly from workers and local communities through grievance mechanisms. Sub-contractors, particularly in construction, will need training and incentives/ disincentives to develop positive relationships with local communities from the earliest phase of roll-out.
- **Engage constructively with civil society:** Local and international civil society organisations provide necessary support to local communities to hold government and companies to account. Companies are encouraged to engage openly with civil society and community based groups to understand their concerns and provide accurate and timely information. They should model behaviour about the right to freedom of expression that demonstrates support for the right, both in law and in practice. Dealing with criticism through constructive engagement should encourage the authorities to do the same, rather than accusing civil society groups of "*stirring up opposition*", or even arresting them [630]. When there are arrests or violence in connection with a company's operations that violate human rights, companies should raise the issue with the Government, whether quietly or publicly, individually or collectively, to express their concerns.

[630] See OHCHR, "Report of the Special Rapporteur on the situation of human rights defenders, Michel Forst" A/HRC/28/63 (29 December 2014), reporting on risks faced by land and environmental activists around some extractive projects.

- See also Chapter 4.10 on Conflict and Security concerning **stakeholder engagement in conflict areas**.

Accountability and Grievance Mechanisms

- **Provide alternative avenues to express concerns, including through operational level grievance mechanisms:** Accessing remedies in Myanmar is very difficult if not impossible in many cases. There is – with good cause – little or no faith that the judicial system can currently deliver effective remedies. The frustration over lack of access to effective remedy for real or perceived damages to livelihoods can increase tensions between communities and ICT companies and their sub-contractors. Operational level grievance mechanisms – i.e. processes that allow concerns to be raised and remedied at the operational level, rather than at far away headquarters – are therefore even more important in Myanmar, where there are: few other outlets to resolve concerns[631]. Additional Myanmar factors include unresolved legacy issues; emerging opportunities to express concerns openly; a lack of experience in local Government in addressing complaints constructively and effectively; and in some cases a lack of organisations in communities with the experience and expertise to assist in moderating and mediating between the private sector and communities. In addition, there is frequent community frustration with buck-passing between a bewildering array of contractors and sub-contractors without a core focal point for engagement and grievances.
- **Make operational level grievance mechanisms part of a broader community engagement strategy.** This should start by developing the mechanism with input from stakeholders wherever possible. Using lessons learned from the grievance process can improve ongoing engagement with communities and avoid repeating activities that have led to previous grievances. A grievance process can help companies better understand how ICT activities are being perceived and impacting, positively or negatively, on local communities, acting as an 'early warning' system.
- **Pay attention to language and literacy:** Given the variations in literacy in communities and among workers and users, there should be ways of expressing views and complaints that do not rely on reading/writing and are available to speakers of ethnic minority languages. Technical lectures to communities should be avoided.
- **Make grievance mechanisms accessible and understandable:** The field research indicated that except in a limited number of cases when some fibre companies had posted emergency contact numbers on landmarks along the cable path, communities had no information on who to turn to with concerns about telecommunications infrastructure e.g. noise, safety etc. Once the infrastructure is installed, it should include contact phone numbers on the infrastructure so that local villagers are able to contact the responsible company if they have concerns about the equipment. There should then be a process in place behind the contact numbers to ensure that the complaints are addressed. Grievance mechanisms should be implemented according to the criteria established in the UN Guiding Principles on Business and Human

[631] MCRB recently held workshops on grievance mechanisms and community engagement. See MCRB, "MCRB Holds Workshop for Business on Operational Grievance Mechanisms" (16 June 2015) and "Community Engagement by Extractive Companies is Essential for Success in Myanmar" (2 February 2015). See also the companies that have reported on their operations in Myanmar, some of which report that they have put specific operational level grievance mechanisms in place; Business and Human Rights Resource Centre, "Myanmar Foreign Investment Tracking Project", *ICT Sector* (last accessed September 2015).

Rights.[632] Good practice guidance specifically for the ICT sector is available (see section D).

- **Make online grievance mechanisms secure**: Considering the large number of potentially impacted rights holders in the ICT sector, an online grievance mechanism or reporting system accessible in the local language may be the best channel. Due to the potential vulnerability of impacted stakeholders wanting to report a violation to the company, it is important that any online grievance mechanism receives and transmits information securely. In order to build and maintain trust, companies should commit adequate resources to receiving, evaluating and responding to complaints submitted through a grievance mechanism.
- **Access to other mechanisms:** Operational-level grievance mechanisms should not impede access to other remedies, judicial or non-judicial. Additional remedy options are expected to continue to evolve in Myanmar, given the focus by the Government and donors on improving the rule of law in the country.

Table 41: Grievance Mechanisms for the ICT Sector

Existing grievance mechanisms in the ICT sector are predominantly internal corporate mechanisms, such as 'whistleblowing' systems aimed at remedying issues of labour violations, or issues arising in the supply chain, such as the use of conflict minerals. Corporate grievance mechanisms addressing violations of freedom of expression or privacy are underdeveloped, if they exist at all. Some industry initiatives, such as the Telecommunications Industry Dialogue, are reportedly still in the stages of examining options for implementing relevant grievance mechanisms.[633]

In the past decade, access to remedy for negative impacts involving ICT companies has usually been judicial rather than non-judicial. There have been court cases involving Yahoo! in China, IBM in South Africa, Cisco in China and AT&T in the USA. The Yahoo! case, which centred on the company handing over details of users who had posted pro-democracy material and were subsequently arrested and jailed, was one of the catalysts for the establishment of the Global Network Initiative (GNI).

The events of the 2011 'Arab Spring' and the 2013 revelations of mass surveillance by secret services worldwide changed the landscape of legal cases brought against ICT companies for human rights abuses, now focused more in recent years on the sale of surveillance technology and associated negative impacts on human rights. There is currently one case being considered by French courts over the sale of surveillance technology to Libya, where the company is accused of complicity in torture.[634] A verdict which goes against the company could result in the company being blacklisted or ordered to pay substantial fines.

Privacy groups have utilised other avenues to raise complaints associated with the sale or use of surveillance technology, such as the OECD National Contact Points.[635]

[632] See OHCHR, "UN Guiding Principles on Business and Human Rights" (2011), Principle 31.
[633] See Telecommunications Industry Dialogue Guiding Principles in English and Burmese
[634] FIDH, "The Amesys Case: the victims anxious to see tangible progress" (11 February 2015).
[635] See the complaints brought by Privacy International regarding the sale of surveillance technology to Bahrain: OECD Watch, "Privacy International et al. vs. Gamma International" (last accessed September 2015). See also the involvement of 6 telecommunication companies associated with the Tempora programme (where UK secret services allegedly tapped undersea fiber optic cables coming into the UK with the permission of the companies that owned them): OECD Watch, "Issue: HR violations facilitated by 6 UK telecom companies" (last accessed September 2015).

However, such complaints focus on the implementation of the OECD Multinational Guidelines and do not result in sanctions or fines against the company.

D. Relevant International Standards and Guidance on Stakeholder Engagement and Grievance Mechanisms

Relevant International Standards:

- UN Guiding Principles on Business & Human Rights (especially Principles 29-31)
- IFC: PS 1 – Assessment and Management of Environmental and Social Risks and Impacts

Guidance on Stakeholder Engagement:

- European Commission, "ICT Sector Guide on Implementing the UN Guiding Principles on Business & Human Rights"
- IFC, "Stakeholder Engagement – Good Practice Handbook for Companies Doing Business in Emerging Markets"
- Shift, "Conducting Meaningful Stakeholder Consultation in Myanmar"

Guidance on Grievance Mechanisms:

- European Commission, "ICT Sector Guide on Implementing the UN Guiding Principles on Business & Human Rights", particularly part 3.VI
- IFC, "Good Practice Note: Addressing Grievances from Project-Affected Communities"
- Access, "The Forgotten Pillar: The Telco Remedy Plan"
- European Union Agency for Fundamental Rights (FRA) "Access to Data Protection Remedies in EU Member States"
- FRA, Ongoing Project: "National Intelligence Authorities and Surveillance in the EU: Fundamental Rights Safeguards and Remedies"

4

4.10

Chapter 4.10
Security & Conflict

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Chapter 4.10
Security & Conflict

In this Chapter:

A. Context
- The race to roll out
- Armed Conflict in Myanmar
- Ongoing Conflicts
- Post-Conflict Areas and the Peace Process
- Intercommunal Violence
- Other Security Issues

B. Field Research Findings
C. Recommendations for ICT Companies
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- Engagement in Conflict Affected Areas
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- Company Employed & Contracted Security Providers

D. Relevant International Standards and Guidance on Security and Conflict

A. Context

The race to roll out

Myanmar will probably have the fastest take-up of mobile communications in history. There is currently a race taking place to roll out the telecommunications network and secure customers among the Myanmar people, many of whom will be subscribing for the first time. Tower site hunters are continuing to actively search for sites, with an estimate of 250 towers being rolled out per month. Operators have improved coverage significantly in central and lower Myanmar, but are now beginning construction and roll out in areas such as Kachin State and Northern Shan State, with areas including Chin State and Rakhine State slated for rollout in late 2015. Operators are working to ensure that geographic targets set by the Ministry of Communication and Information Technology (MCIT) are met, including providing voice services to 75% of the country and data services for 50% of the country in 60 months[636]. This prompts companies to maximise population coverage within the confines of the geographic limits. Such dynamics may push companies to consider roll out to areas that still have active armed conflicts, as they will have dwindling options to choose 'safe' (i.e. non-conflict) areas. Other parts of the ICT value chain are increasingly operating in all parts of the country as well.

The Myanmar Government, particularly the *tatmadaw* (army), is still viewed by many ethnic minority populations with deep suspicion as a violent and predatory force. Business, especially the extractives sector, have similarly been viewed as predatory, and

[636] Myanmar Ministry of Communications and Information Technology (MCIT), "End of the Expression of Interest stage regarding the tender for two Nationwide Telecommunications Licences in the Republic of the Union of Myanmar" (21 November 2013).

there is a risk that the ICT sector could be caught up by the broader suspicions of business. Ethnic minority armed group leaders might worry that ICT will be a very well-received service, seen as being delivered or facilitated by the Government, thereby undermining their agendas and support from their communities. In other words, the telecommunications roll out may become associated with state penetration into former insurgent areas. In addition, ICTs bring 'modernisation' and the market economy which will impact on traditional cultures and livelihoods patterns. On the other hand, ICT will be seen, at least by some, as contributing to the 'peace dividend', including by providing jobs and potentially supporting ethnic languages and cultures. ICT may promote the mobility that was so long denied, for example by helping migrant workers minority groups maintain links with home. The rollout of services in ethnic areas will help ensure that a 'digital divide' is not created that could further reinforce inequality in these areas.

Armed Conflict in Myanmar

Myanmar is very ethnically diverse. However, due to complexities and nuances in terms of language, culture and self-identification, it is difficult to identify a definitive list of ethnic minorities. The current figure of 135 "*national races*" used by the Government is contested by many ethnic minority leaders who highlight its weak anthropological underpinning and believe it is an attempt to overstate the complexities for political ends. See Chapter 4.8 on Groups at Risk (specifically the sections on ethnic minorities and on the latest census).

Much of Myanmar's border areas where many of the ethnic minorities live, have been mired in non-international armed conflict for decades, and it has become a way of life for many armed groups. In the process lives, livelihoods, economies and the environment have been severely affected and sometimes destroyed (see also Chapter 4.8). Ethnic minority armed groups began fighting against the central Government shortly after independence in 1948. The *Tatmadaw* in turn launched counter-insurgency offenses. Ethnic minority armed groups operate in all seven States – Kayin, Kayah, Shan, Mon, Chin, Kachin, and Rakhine States and parts of Tanintharyi Region. Ceasefires between the Government and several armed groups began to be agreed in 1989 but were essentially only security agreements, with 'ceasefire groups' allowed to retain their arms and to control some territory. This resulted in a freeze, rather than a halt, to some of the conflicts. However fighting continued in parts of the Kayin, Kayah, and Shan States in the east of the country as armed groups there continued in their armed struggle for greater autonomy from the central Government.

In its decades-long counter-insurgency campaigns against various ethnic minority armed opposition groups, the *Tatmadaw* has committed a wide range of violations of international human rights and humanitarian law. As troops entered ethnic minority villages, they seized foodstuffs, destroyed villages, used civilians for forced labour, particularly portering, killed and tortured civilians, and forcibly displaced them. Armed ethnic minority opposition groups have also committed abuses, although to a lesser degree.[637] Ethnic grievances have centred on these abuses; the lack of self-governance and resource sharing with the central Government; discrimination and marginalisation; religious freedom; and lack of education in ethnic minority languages.

[637] For a full discussion of the human rights situation in the counter-insurgency context, see reports from Amnesty International from 1988 – 2008, and Human Rights Watch.

Conflict has greatly inhibited economic development in the ethnic border areas, and poverty rates in these areas are high. For example 73% of the population in Chin State lives below the poverty line, 44% in Rakhine State (though the World Bank's reinterpretation of the data suggests a rate of 77.9%) and 33% in Shan State; the national poverty rate is 26% (the World Bank's reinterpretation of the data reveals a 37.5% rate).[638]

Ongoing Conflicts

In June 2011 a 17-year ceasefire between major armed group, the Kachin Independence Organisation (KIO), and the Government broke down. Fighting continues in Kachin and Northern Shan States between the two groups, with some 100,000 people displaced.[639] Other armed groups there are also fighting against the *tatmadaw*, including the Ta-ang (Palaung) National Liberation Army, which is allied to the KIO. In February 2015 the Myanmar National Democratic Alliance Army, an ethnic Kokang (Han Chinese) armed group, launched an offensive against the tatmadaw in northern Shan State, where fighting is ongoing. 30,000 Kokang civilians fled to China; others were displaced internally. The President declared a state of emergency and martial law the same month, granting wide powers to the *tatmadaw* in the conflict area.[640] Since the resumption of fighting in 2011, some 200,000 people have been displaced in Kachin and northern Shan States.[641]

All of these conflicts have delayed and complicated the nationwide peace process. Moreover, both international and Myanmar NGOs have reported violations of international human rights and humanitarian law, including forced displacement and labour; torture; and arbitrary arrests by the *tatmadaw* of ethnic minority civilians in the context of the KIO/TNLA – *tatmadaw* conflict.[642]

Post-Conflict Areas and the Peace Process

From late 2011 the Thein Sein Government started a new peace initiative, engaging in talks with almost all groups and agreeing written documents. A total of 14 individual ceasefire agreements have been signed, with active talks on a nationwide ceasefire agreement ongoing between the Government and armed groups. As a result, fighting has been reduced in Kayin, Kayah, and eastern Shan States as armed groups in those areas have agreed ceasefires with the Government. On 31 March 2015 the Government and armed groups agreed on a draft text for a Nationwide Ceasefire Accord (NCA); in May armed groups met among themselves for further discussions on the draft NCA. Formal signing of the agreement has yet to take place, with both sides needing to reach a consensus inter alia on which groups are eligible to sign the document.[643] While these are historic developments, much work remains to take the next step of determining the highly political and complex questions around the Government's structure and division of power and the shape of the future armed forces. With the November 2015 elections approaching and a new Government taking power in March 2016, both the Government and armed ethnic minority groups are aware that time is running out for the National Ceasefire Agreement.

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[638] ADB, "Interim Country Partnership Strategy: Myanmar 2012 – 2014, Poverty Analysis (Summary)" (2012).
[639] UN HCR, "2015 UNHCR country operations profile - Myanmar" (last accessed September 2015).
[640] International Crisis Group, "Crisis Alert: Deteriorating situation in Myanmar" (2 March 2015).
[641] Transnational Institute in The Nation, "Consequences of the Kokang crisis for peace, democracy in Myanmar" (29 July 2015).
[642] See for example Human Rights Watch, "Untold Miseries: Wartime Abuses and Forced Displacement in Kachin State" (March 2012).
[643] International Crisis Group, "Myanmar" (1 April 2015).

Although fighting continues in Kachin and northern Shan States, ceasefires in other ethnic minority areas are mostly holding as a post-conflict landscape emerges. Fighting has largely ceased in Kayin, Kayah, and Chin States, and the 1995 ceasefire between the New Mon State Party and the Government remains intact in Mon State. However there are legacy issues emerging, such as landmines planted by most parties to the conflicts, including non-state armed groups. The Government is not yet a state party to the Mine Ban Treaty, although in 2012 it stated an interest in acceding to it.[644] A major mine clearance operation in many parts of the border areas has yet to begin.

Ethnic minority ceasefire areas are rich in natural resources, including hydropower, hardwoods, and minerals. Ceasefires have made land more available to commercial interests, some of which are linked to the central Government and the military. Ethnic minority ceasefire groups also have business interests in their territories. At the same time these areas are highly militarised, including Myanmar troops and allied militias, ethnic minority armed groups, and armed criminal elements.

The nationwide ceasefire process will not necessarily bring an end to insecurity in Myanmar's border areas. In addition to the major armed groups at the peace table, there are numerous small splinter groups, village militias (some with hundreds of troops), and armed criminal gangs. Lack of economic opportunities, an easy availability of weapons, and weak security and rule of law mean that these areas will be characterised by insecurity for some time to come. If the peace process eventually leads to disarmament, demobilisation, rehabilitation and reintegration – which is still likely some years off – there will be the additional dynamic of former combatants with limited opportunities for lawful employment, who may resort to extortion, racketeering and other criminal activities to support themselves, as indeed some are already doing.

Intercommunal Violence

There has been a long history of inter-communal violence in Myanmar, dating back to colonial times. In 1977 and again in 1991 there were major exoduses of Rohingya Muslims [645] from northern parts of Rakhine state into Bangladesh, as a result of intercommunal clashes and abuses by state security forces. Most of the 250,000 who fled were subsequently repatriated under UN auspices, but there were no real efforts at re-integration, and the majority have no citizenship papers and were registered as "*foreign residents*" (white card holders) with fewer rights. These white cards were also withdrawn in 2015, leaving them without papers. Moreover, Rohingyas did not appear on voter lists displayed in Rakhine State during June 2015, leaving them effectively disenfranchised and unable to vote in the 2015 elections.

For over 20 years credible international organisations have reported on human rights violations against the Rohingya, including forced labour, forcible displacement, restrictions on marriage and freedom of movement, as well as the more recent violence against them.[646] Moreover successive UN Special Rapporteurs on the situation of human rights in Myanmar have expressed concerns about such violations against the Rohingya.[647]

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[644] Landmine and Cluster Munitions Monitor, "Myanmar/Burma" (November 2014).
[645] The Myanmar Government refuses to accept the term 'Rohingya' and refers to the population as 'Bengali'.
[646] See for example Amnesty International, "Myanmar: The Rohingya Minority: Fundamental Rights Denied", Index number ASA 16/005/204 (May 2004). Human Rights Watch, "All you can do is pray: Crimes Against

A new round of deadly violence erupted across much of the state in 2012. This has mainly been anti-Muslim violence by Buddhist mobs, although in northern Rakhine State where the Muslim population is a large majority, there has also been Muslim-on-Buddhist violence. (See also Chapter 4.8 Groups at Risk). However, the most recent manifestation has been among the most intense and sustained and is partly linked to the new political realities and the competition for political power in Rakhine State. Under the military regime, the Rakhine minority was seen as a threat and systematically side-lined, and so there was effectively no political power to compete for.

Currently, there are almost 140,000 internally displaced persons in Rakhine State, many living in very poor conditions; the large majority are in Sittwe Township. Other Muslim populations have lost, or are at risk of losing, their livelihoods, compounded by longstanding restrictions on movement that prevent them travelling in search of work. Access to these populations for humanitarian organisations is a major challenge, with local Rakhine communities accusing them of pro-Muslim bias, and often intimidating humanitarian workers and blocking access to Muslim communities.

Other Security Issues

On a more general basis, to date there have been few reports of security issues around ICT infrastructure. Based on experience in other countries, once the presence of bunkers of fuels around tower base stations becomes more widely known, there could be increased incidence of theft, leading to the need for more stringent security measures or guarding of tower facilities.

B. Field Research Findings

Land
Human Rights Implicated: Right to life, liberty and security of the person; Right to take part in the conduct of public affairs; Right to information
Field Assessment Findings ▪ There were some cases in which companies attempted to negotiate access to areas to lay fibre cables with non-state armed groups (NSAGs). **In some cases a fee was paid for this access.** ▪ Researchers received reports of cases of operational delays, where local groups, including armed groups, **blocked access to sites, due to lack of consultation at the site level.** While some consultation with local leaders may have been undertaken, this may not have been communicated to or accepted by all.

Labour
Human Rights Implicated: Right to life, liberty and security of the person; Right to just and favourable conditions of work
Field Assessment Findings

Humanity and Ethnic Cleansing of Rohingya Muslims in Burma's Arakan State" (April 2013) and International Crisis Group, "The Dark Side of Transition: Violence Against Muslims in Myanmar" (Oct. 2013).

[647] Office of the High Commissioner for Human Rights, "UN rights expert calls on Myanmar to address worrying signs of backtracking in pivotal year" (18 March 2015).

- Researchers observed **fire-arms being carried by NSAGs** present during roll-out in ceasefire areas. While researchers neither observed not heard reports of shots being fired, the presence of fire-arms presents a security and safety risk.
- Researchers also received reports from workers that they were aware that in the past **landmines may have been sown around infrastructure in conflict areas**. This led workers to avoid walking through certain areas. The measures companies took to protect their workers in such circumstances were unclear.

C. Security & Conflict: Recommendations for ICT Companies

Interactions with Myanmar Military

- **Undertake enhanced due diligence regarding company interactions with the Myanmar military:** Due to the legacy of armed conflict in certain areas, and clashes still occurring in some areas, ICT companies will have to be particularly aware of the risks of human rights violations being committed by the Myanmar military near their areas of operations. Neither the field research nor other reports have indicated that the Myanmar military is providing security in connection with infrastructure rollout. However, the *tatmadaw* has played a role in security strategic assets like oil and gas pipelines in the country. The military has a long history of human rights violations in ethnic minority areas including forced labour and torture of civilians by troops, illegal taxation, and land confiscation.
- **Where military involvement is unavoidable, use international standards such as the Voluntary Principles on Security and Human Rights (the VPs**). If it is unavoidable to work have the Myanmar military provide security for network infrastructure construction or operations, operators should identify safeguards that could be put in place with them to prevent human rights abuses in connection with any of their operations. The VPs are an international initiative on security forces and human rights developed for the extractives sector but applicable more widely. They provide useful guidance for incorporating human rights into arrangements with public and private security providers (see below, Security Providers). Companies, rather than countries, can take the initiative to apply the VPs to their operations. Myanmar therefore does not need to 'join' the VPs before the standards can be adopted in-country. However since doing so requires cooperation with security forces, to be effective, the Government should understand and support the VPs and their application. Some oil and gas companies are considering advocacy to the Government to support of the VPs[648].
- **Be aware of the potential for surveillance and address consumer fears:** ICT companies that operate within those parts of the ICT value chain which may be subject to surveillance requests from the Government should understand the historical context of surveillance in Myanmar, in particular in areas of armed conflict and its often severe consequences. Currently there is a lack of appropriate legal safeguards on surveillance (see Chapter 4.4 on Surveillance). There may therefore be justifiable sensitivity among the population and civil society organisations to the possibility of continued surveillance, particularly in ethnic minority regions. There is a possibility for misunderstandings and tension if ICT companies are seen to be facilitating (and spreading) Government surveillance.

[648] See MCRB, "Myanmar Oil & Gas Sector Wide Impact Assessment" (2014), pg. 151-152.

Security Risks

- **Assess the risk of land mines**: Land mines were previously planted around Myanmar's infrastructure as (reportedly) a means of preventing sabotage by local armed groups. In addition, large swathes of the border areas are still seeded with landmines and other explosive remnants of war. There are no accurate maps of such areas seeded and in the parts of the country where conflicts are still active, new land mines are being planted. There has been no systematic de-mining in Myanmar. Ethnic armed groups generally know where land mines are in their areas of control. ICT companies will need to assess the risk of land mines being present near tower sites they are building or upgrading, as well as areas for fibre lines. Companies should avoid these areas to protect the safety of their staff and contractor staff.
- **Security risks for Muslim staff:** There exist potential security risks to Muslim staff, or staff of a company believed to be Muslim where local communities hold anti-Muslim sentiments.
- **Security risks for expatriate staff:** There exist potential security risks to expatriate ICT company staff in Rakhine State given recent protests directed at international aid workers
- **Exposure to criminal gangs:** Companies operating in conflict areas may become targets for bandit attacks, or extortion by armed groups or criminal gangs seeking to control access to areas or extort money to "*protect*" workers or facilities.

Engagement in Conflict Affected Areas

- **Consulting with non-state armed groups (NSAGs):** There are particular challenges in conducting effective consultations in conflict-affected areas. Many ethnic minority border areas have never historically come under the administrative control of the central state. Companies should build an understanding the history and dynamics of the conflict and the key stakeholders that need to be consulted, through a conflict mapping and stakeholder analysis. In areas where non-state armed groups (NSAGs) operate, it is critical to engage with them and the ethnic minority civil society groups operating in their areas. Most of these groups have bilateral ceasefire agreements with the Government that in principle authorise them to travel freely within the country (without arms) and meet with whomever they wish. They are, however, technically illegal (see Chapter 2 on the Unlawful Associations Act). It is important to recognise that some of these groups have areas of political influence and authority that are far wider than the limited territory over which they have military control. The larger NSAGs run parallel administrations, from health and education through to land registration, forestry and revenue collection. As the de facto authority in their areas, their agreement is necessary for any activities to take place. Companies should be aware of whom they are consulting with (or who those acting on their behalf are consulting with), and understand the risks of not consulting with NSAGs (but see below). It will also be important for companies engaging local contractors to understand the relationship between sub-contractors and NSAGs.
- **Consulting with communities in conflict areas:** Companies should not assume that the NSAG is representative of the views of all communities; in some cases relations may be coercive; in some cases the NSAG may be dominated by one ethnic minority and not others in the area. Companies should identify others who are representative of different constituencies, including those whose voices may not always be heard, such as women's groups or marginalised communities; as well as the main power holders (who may not always be representative). In some cases – for example, meetings with leaders of NSAGs – contacts may have to be established

through a trusted third party, who can provide a channel of communication and/or convene meetings. Experienced third party facilitators will need to be engaged to ensure that effective community consultations can take place in an atmosphere where people will be safe and confident to speak freely, something that the presence of either Government or NSAG representatives might hamper. In conflict contexts in particular, consultations with key stakeholders should be seen as a relationship-building exercise more than an information-collection exercise; if handled poorly the consultation process could put communities at risk; if handled well, the sector could provide new models for business in post-conflict areas.

- **Consultations in inter-communal conflict areas**: In areas where there are inter-communal tensions and violence, such as parts of Rakhine State, similar challenges exist. Consultations themselves could present a risk of increasing tensions or prompt violence if Rakhine communities object to consultation with Muslim communities, or object to the provision of services to other communities due to their concerns that this may give legitimacy to that community and its viewpoints. Such situations need to be handled with great delicacy, and require a detailed understanding of local dynamics; local authorities are often not neutral.
- **Understand the debate on benefits sharing:** Many of Myanmar's ethnic minority areas are resource rich with considerable economic potential, but have been exploited for the benefit of the local elite, or Naypyidaw, while the community has experienced only the negative impacts. The expectation is that discussion on this will take place as part of the post-ceasefire political dialogue. This has classically been an extractives sector issue, but given the positive benefits of access to modern telecommunications, there is a risk that ICT companies will experience similar tensions if ICTs are not rolled out to local ethnic minority populations. Universal access is thus an important objective for collective action by the sector, civil society and the Government.

Land Considerations

- **Undertake additional due diligence on land in conflict affected areas:** In conflict-affected areas, acquiring land use permits by ICT companies has added complexities. Many of these areas are not included in the national cadastre, or are considered Vacant, Fallow or Virgin lands by default. Some NSAG administrations have their own systems of land registration, including recognition of communal rights, customary rights, and shifting cultivation. Weaknesses in these systems, corruption and lack of transparency mean that local populations are not always consulted on decisions, including the granting of land use rights for private sector operations. In any due diligence, companies should consult closely with the affected communities. In some areas of contested authority, communities may not be aware that such rights have been granted, or by whom. Local armed group commanders may give authorisations without the knowledge of their headquarters.[649] The widespread planting of anti-personnel land mines in much of the border areas has restricted the use of this land by communities and other potential land users. The fact that the land has not been used by rights holders for long periods due to land mines increases the chances of dispossession of these original rights holders. Land will be particularly susceptible to land grabbing if future demining programs render it safe to use.
- **Additional land due diligence in areas of inter-communal violence:** In areas of inter-communal tension, such as Rakhine State where almost 140,000 people remain

[649] See Karen Human Rights Group, "Losing Ground: Land conflicts and collective action in eastern Myanmar" (March 2013) and TNI, "Financing dispossession" (Feb. 2012).

displaced by inter-communal violence, ICT companies will need to carry out particularly careful due diligence on the provenance of any land they seek to use. They should first establish whether there is a connection to persons displaced by inter-communal violence. Since displaced populations should be entitled to return to their homes, it is important for companies to avoid contributing to the problem, or appear to give tacit support to, or benefit from, the activities which have resulted in the displacement. Companies should obtain advice from local experts including relief agencies and CSOs operating in the area before deciding how to proceed.

Company Employed & Contracted Security Providers

- **Security Providers:** Some companies in the ICT value chain will require security guards for their towers and generators (where there are some reports of fuel and equipment theft), data centres or office buildings. It is important to ensure that contracted security providers (whether contracted directly or through a service) have had background checks to ensure security service owners, managers or guards have not been linked to past human rights abuses. They also need appropriate training on respecting human rights. Companies should ensure that working conditions and employment contracts, in line with international labour rights standards, are integral parts of the contract with the security provider, as security providers are often very poorly paid in Myanmar. Companies should consider prioritising members of local communities for security jobs, but bear in mind where this may exacerbate inter-communal tensions, depending on the choices made. As noted above, the Voluntary Principles on Security and Human Rights provide relevant guidance, despite being developed for the extractives sector. In addition, if the ICT companies find that they need active protection from private security guards, there is now an International Code of Conduct for Private Security Providers [650] that sets private security industry principles and standards based on international human rights law. The code is open to signature by companies providing security services and will soon put in place a certification system that will help to ensure company compliance with the code, providing additional assurance that service providers are trained in international human rights law principles.[651] This is a relevant reference for screening potential service providers and should serve as a goal for company commitment within a specified time period.[652]
- **Use of weapons:** Private security guards are unarmed in Myanmar, which lowers the level of risks to human rights posed by private security providers but does not eliminate all risks. Appropriate training in human rights will still be needed.[653] However in ethnic minority areas, guards may be armed, which heightens risks and requires more immediate training on the appropriate use of force and in human rights.

[650] International Code of Conduct Association, "International Code of Conduct for Private Security Providers" (2010).
[651] Ibid. See also, MCRB, "Myanmar Oil & Gas Sector Wide Impact Assessment" (2014), Chapter 4.7.
[652] See: Myanmar Times, "The rise of private security" (5 January 2015).
[653] For further guidance, see Voluntary Principles on Security and Human Rights, "Implementation Guidance Tools" (2011).

D. Relevant International Standards and Guidance on Security and Conflict

Relevant International Standards:

- The Voluntary Principles on Security and Human Rights is an initiative that includes governments, companies in the extractives sector, and NGOs. The Principles are designed to guide companies in maintaining the safety and security of their operations within an operating framework that encourages respect for human rights and which addresses working with public and private security providers.
- International Code of Conduct for Private Security Providers

Guidance:

- The IFC/World Bank Group Environmental, Health, and Safety Guidelines for Telecommunications provide guidance on siting infrastructure and other aspects of community safety.[654]
- The World Bank-supported Myanmar Telecommunications Sector Reform Project Land Lease Guidelines provides valuable guidance for other ICT companies involved in land acquisition, including calling for the identification of the presence of ethnic minorities during scoping and screening phases.[655]

[654] IFC, "Environmental, Health, and Safety Guidelines for Telecommunications" (April 2007).
[655] World Bank, "Myanmar - Telecommunications Sector Reform Project: environmental and social management framework (Vol. 2): Land lease guidelines" (English) (2013).