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The Intersection of Economic Development, Land, and Human Rights Law in Political
Transitions: The Case of Burma

THESIS

submitted in partial satisfaction of the requirements for the degree of

MASTER OF ARTS

in Social Ecology

by

Lauren Gruber

Thesis Committee:
Professor Scott Bollens, Chair
Associate Professor Victoria Basolo
Professor David Smith

2014

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ABSTRACT OF THE THESIS

The Intersection of Economic Development, Land, and Human Rights Law in Political Transitions: The case of Burma

By

Lauren Gruber

Master of Arts in Social Ecology

University of California, Irvine, 2014

Professor Scott Bollens, Chair

Over the past three years, Burma has begun a transition to democracy, triggering massive changes in a country led from the 1960s to 2011 by a repressive military government. The country is plagued with many serious problems from corruption and cronyism to grinding poverty to a lack of all kinds of infrastructure. One of the biggest problems in Burma today combines these three issues: land grabs. Burma has few legal protections for property rights and the wealthy military cronies act with impunity to achieve their financial goals and increase their business holdings. While by far not the only instances of land grabs in the country, this thesis looks at the Letpadaung copper mine and Myitsone dam and the surrounding events as case studies to analyze the tension between Burmese law and rights and economic development. This thesis uses three sources of law to analyze Burmese land rights and human rights: the Constitution, other domestic law, and international law. Many human rights groups are focused on the violence at the Letpadaung mine and suspension of the Myitsone dam as reflections on the new Burmese government's commitment, or lack thereof, to legal rights or human rights. The thesis looks at Burmese land grabs and Chinese involvement through a legal analysis and case studies. Burma's relationship with China is more complicated than many think, and Burma has

many neighbors it should look to when improving land and property rights, economic development, and human rights to determine best practices.

Introduction

Over the past three years the former military leaders of Burma¹ have initiated a transition to democracy, triggering massive change in an isolated country led since the 1960s by a repressive military government. On November 7, 2010, the first ostensibly free elections were held in the country since the mid-20th century, making Burma, at least nominally, a constitutional republic. Despite irregularities in the vote and the lack of full participation of all political parties, the ruling military party declared itself victorious. Shortly thereafter, in 2011, the ruling State Peace and Development Council (SPDC) disbanded, and President Thein Sein resigned from the military to become the first civilian leader since 1962, as a member of the Union Solidarity and Development Party (USDP).

While the major opposition party, the National League for Democracy (NLD), formed by Nobel Peace Prize Winner Daw Aung San Suu Kyi in 1988, was not allowed to participate in the 2010 parliamentary elections, it was allowed to participate in the April 2012 by-election, when it won 43 of 44 contested seats in Parliament. Meanwhile, even after the 2012 elections, the USDP still controls 58 percent of the Union Upper and Lower Houses of Parliament and their military appointed allies control another 25 percent of each house. The USDP and military party have a supermajority in Parliament, despite the gains made by the NLD and smaller opposition parties.²

Concurrently with internal reforms, Burma's relationships with Western nations have begun to thaw. High profile visits of former Secretary of State Clinton, President Obama, and

¹ The official name of Burma is the Republic of the Union of Myanmar. There is considerable debate regarding the use of Burma or Myanmar when speaking about the country. I have chosen to use the name Burma for several reasons: (1) It is the name activists and exiles in and from Burma tend to use; (2) United States protocol calls for using Burma rather than Myanmar; (3) many prominent human rights organizations call the country Burma; and (4) many believe that the name of a country cannot be changed without the consent of the citizenry-which was not the case in Burma. My choice is not based on a particular political perspective of the country's history or its people, though I recognize that either choice is politically charged. In addition, this choice in no way reflects opposition toward governments, international agencies, and local human rights organizations that use Myanmar or any preference towards the organizations and governments that use Burma.

² Richard Horsey, Social Science Research Council *Outcome of Myanmar's Elections* (2010).

British Prime Minister David Cameron have shaped their respective countries' policies towards Burma. In 2012 President Thein Sein visited the United States, and in March 2013 began an international tour, where he visited various European countries and Australia. The thaw in relations has led the United States to lift sanctions on Burmese banks,³ has increased foreign investment from the West,⁴ and has also triggered major involvement from the United Nations and international development agencies in rebuilding Burmese institutions.

Change has come very fast to Burma and is highly contested within the country. While no sector is untouched by change, certain sectors are more impacted than others, and land and property are among those. The role of foreign investors is a visible and charged issue in Burma. China, in particular, has partnered with the Burmese governments, military and democratic, in natural resource extraction projects that have been quite controversial. The actions at the Letpadaung copper mine, where the security forces put down a protest with highly dangerous white phosphorous, is one example of the conflict the government has yet to work out between economic development, human rights, property law, and domestic policing. Even outside of the Letpadaung mine, land use issues are pressing. Land tenure is shaky at best and the government has control over almost all aspects of farming. Additionally, Burma has been embroiled in ethnic and religious conflict since independence. Conflict has been ongoing in the border areas with Thailand and shows little chance of ending soon. Additionally, discrimination against Muslims is

³ REUTERS *United States eases sanctions on Myanmar banks* (Feb. 22, 2013), <http://www.reuters.com/article/2013/02/22/us-usa-myanmar-sanctions-idUSBRE91L10E20130222>

⁴ Prior to 2011, China had been Burma's major trading partner. Burma recently revamped its foreign investment laws and, with the ending of sanctions, industries from other countries are beginning to invest in Burma. For example, British company Vodafone is bidding on a telecom contract in Burma and foreign hotel chains are opening. THE GUARDIAN *Vodafone and China Mobile join Burma telecoms race* (April 4, 2013), <http://www.guardian.co.uk/business/2013/apr/04/vodafone-china-mobile-burma-telecoms>. The Japanese are also interested in entering the retail sector in Burma. THE ASAHI SHIMBUN *Myanmar opens retailing sector to foreign investors* (Feb. 1, 2013), http://ajw.asahi.com/article/asia/south_east_asia/AJ201302010079. On April 22, 2013, the EU lifted the last of its sanctions on Burma. BBC NEWS, *EU lifts sanctions against Burma* (April 22, 2013), <http://www.bbc.co.uk/news/world-asia-22254493>.

rampant in society, as the August 2012 riots against Rohingya Muslims in Arakhan State, the popularity of the 969 Movement,⁵ and sectarian violence show.

Despite these advances, the education system is subpar and the multitude of nascent civil society organizations face many challenges in interacting with foreign NGOs, funding their programs, and breaking the cycle of local disinvestment in the Burmese people. Prominent international NGOs, such as Human Rights Watch, International Bridges to Justice, the Open Society Foundation, the International Bar Association Human Rights Association, and EarthRights International all have ongoing initiatives in Burma. Among other topic areas, many of these international groups are focused on land rights. Land laws set the terms for land markets and distribution, in turn influencing development opportunities and potentially reducing poverty a major goal of many of these NGOs.

1. Historical Background

1. Historical Background

The area known today as Burma has been populated for millennia. Evidence of Neolithic caves along the Irrawaddy River date back to 6000 BCE and there is evidence from 1500 BCE of copper and bronze work and animal domestication.⁶ The tribes in this area were among the first in the world to domesticate chickens and pigs. By 500 BCE, evidence points that in the area of present day Mandalay, settlers had begun trading with China. The first permanent civilizations in Burma were Pyu city-states, which originated in Upper Burma somewhere around the second century BCE and lasted until the Bamans under King Anawrahta established a capital at Bagan,

⁵See Ray Downs, *Is Burma's Anti-Muslim Violence Led by "Buddhist Neo-Nazis"?*, VICE MAGAZINE (March 27, 2013), <http://www.vice.com/read/is-burmas-anti-muslim-violence-led-by-buddhist-neo-nazis>.

⁶ U Thant Myint, *see note 6, supra*.

known today as Pagan, in the ninth century. King Anawrahta founded the first unified Burmese state and also adopted Theravada Buddhism for his state. Bagan fell to the Mongols under Kublai Kahn and Burma was reunited under the Toungoo Dynasty in 1531 with the help of the Portuguese. The Toungoo Dynasty was at one point the largest empire in the history of Southeast Asia. The Toungoo Empire fell in the mid 18th Century to the Konbaung Dynasty, which laid the foundation for the modern Burmese state. The reforms propagated by the Konbaung Dynasty were insufficient to prevent British advancement into Burma from other surrounding British colonies. The Konbaung Dynasty was the last Burmese Dynasty, lasting over 100 years, and fell after the British wrested control of the area after the Anglo-Burmese wars.⁷ The majority of Burma became part of the British Empire through the Anglo-Burmese wars of 1824 and 1852. Finally, in 1885-1886, British forces captured Mandalay and controlled all of the Burmese territory. Burma then became an eastern province of British India and, fifty-one years later, in 1937, Burma became a separate crown colony from India. Shortly after, British Burma was occupied during World War II by Japanese forces beginning in 1942 and returned to its state as a crown colony following liberation in 1945. Burma finally gained its independence from Great Britain in 1948.⁸

The Japanese invaded Burma with help from the Japanese trained Burma Independence Party. During the occupation, the Burma Independence Party became the Anti-Fascist People's Freedom League (AFPFL) and began to resist Japanese control of Burma. General Aung San, considered the father of modern Burma, became a leader of the AFPFL and helped British forces liberate Burma at the end of the war. After the end of World War II, General Aung San continued to lead the AFPFL and he and other members of the military headed the independence

⁷ *Id.*

⁸ Wall Street Journal, Myanmar's Political History, WALL STREET JOURNAL (2014), <http://online.wsj.com/news/articles/SB10001424052970203633104576625323325873338>.

effort, setting up the military for a prominent position in Burmese society. General Aung San brokered a peace agreement with the British, establishing an interim government and negotiating a ceasefire between the Burmese military and armed ethnic groups along the Burma-Thailand and Burma-China borders.⁹ Former Prime Minister and British ally, U Saw, assassinated General Aung San, and six other members of the interim government, in 1947. U Nu, a member of the government that ruled Burma during the Japanese occupation, was asked to take over the AFPFL and government. In 1948, when Burma became independent, U Nu became the country's first Prime Minister.¹⁰

By the late 1950s, fractures were becoming evident in the Burmese government. Between 1958 and 1960, the country was led by a caretaker government, led by army Chief of Staff General Ne Win, following a split in the AFPFL. In 1960, however, in regular elections, U Nu's faction won a decisive victory. Fifteen years after General Aung San's assassination and two years after U Nu's electoral victory, on March 2, 1962, General Ne Win and the military took control of Burma through a coup d'état. Until 1974, a revolutionary council headed by the General ruled the country. During this time, almost all aspects of the economy were nationalized or brought under the control of the government by the Burmese Way to Socialism. In addition to nationalizing the economy, under the Burmese Way to Socialism, Ne Win formed a single party state, with the only party being the Socialist Program Party, and banned newspapers. General Ne Win and his successors ruled Burma from 1962 to 2011.¹¹

2. Late 20th Century and Early 21st Century Political Transition

⁹ U Thant Myint, *see* note 6, *supra*.

¹⁰ *Id.*

¹¹ *Id.* *See also* Wall Street Journal, note 8, *supra*, BBC News, Myanmar profile, BBC (July 16, 2013), <http://www.bbc.com/news/world-asia-pacific-12992883>.

In 1974, a new constitution was adopted that created a unicameral legislature, the People's Assembly, that was composed only of members of the Burma Socialist Program Party (BSPP). General Ne Win and other former military leaders headed the People's Assembly and the General became President at this time. Protests after the new constitution was implemented were quickly crushed by the military. General Ne Win retired from the presidency in 1981 in favor of retired General San Yu. Under San Yu, in 1982, the People's Assembly passed a law designating certain indigenous groups, including the Rohingya, as non-citizens. This law has many ramifications in contemporary Burma.¹²

In August 1988, Burma broke out in violent protests. Due to the mismanagement of the country by the Generals and BSPP, Burma was one of the most impoverished nations in the world. Hundreds of thousands of students, doctors, housewives, and monks protested against the government, its economic policies, and for democracy. On September 18, 1988 the protests ended after a successful coup led by the State Law and Order Restoration Council (SLORC). During these protests, Aung San Suu Kyi, General Aung San's daughter, became a prominent opposition figure. Due to the 1988 protests, in 1989, SLORC suspended the 1974 Burmese Constitution and declared martial law in Burma. That year, SLORC changed the name of the country to the Union of Myanmar. Unlike the BSPP, SLORC was not interested in Soviet style economic planning and reoriented the economy towards capitalism. In 1997, SLORC was renamed the State Peace and Development Council (SPDC).¹³

Motivated by the struggle for democracy, Aung San Suu Kyi entered politics and helped found the National League for Democracy (NLD). In consequence for her political action, she was placed under house arrest for the first time in the summer of 1989. In May 1990, SLORC

¹² *Id.*

¹³ *Id.*

held free elections and did not win. The NLD won 392 of the 489 contested seats, about 80 percent of all seats in parliament. Aung San Suu Kyi was placed under house arrest again following the election and the junta nullified the election results and refused to seat the elected representatives, despite international outcry and continued to rule the country. In 1993, SLORC called for a constitutional convention, but the convention was suspended when the NLD boycotted the effort.¹⁴

In 2003 the military junta, at this time led by Khin Nyunt, released a seven-point “road map” plan to transition the country towards democracy. The steps outlined in the plan were: (1) reconvening of the National Convention that has been adjourned since 1996; (2) after the successful holding of the National Convention, step by step implementation of the process necessary for the emergence of a genuine and disciplined democratic system; (3) drafting of a new constitution in accordance with basic principles and detailed basic principles drawn by the National Convention; (4) adoption of the constitution through national referendum; (5) holding of free and fair elections for Pyithu Hluttaws (legislative bodies) according to the new constitution; (6) convening of Hluttaws attended by Hluttaw members in accordance with the new constitution; (7) building a modern, developed and democratic nation by the state leaders elected by the Hluttaw and the government and other central organs formed by the Hluttaw.¹⁵ As of 2013, the government maintained that it has met step five and is working on achieving steps six and seven.

After reconvening the Constitutional Convention in in 2003 and closing it in 2007, in April 2008, the military junta released its proposed constitution and called for a May vote on its approval. While the military saw it is a return to democracy, opposition forces and pro-

¹⁴ *Id.*

¹⁵ David Arnott, *Burma/Myanmar: How to read the generals' "roadmap"* BURMA LIBRARY (February 2004), <http://www.burmalibrary.org/docs/how7.htm>.

democracy leaders saw the new constitution as a tool for continued military control under a different guise. The Constitution calls for a 440 seat People's Assembly (lower house) and a 225 seat National Assembly (upper house). Military members are reserved up to 56 of the seats in the National Assembly and 110 of 440 in the People's Assembly, guaranteeing them a significant voice regardless of the national electoral vote.¹⁶ According to the SPDC, the constitution was adopted by 92 percent of the electorate.

In August 2007, Burma found itself at the center of another set of protests, which came to be known worldwide as the Saffron Revolution. Monks, students, and political activists took to the streets, originally to protest the unannounced lifting of gas subsidies and subsequent increases in transportation and food prices.¹⁷ In response to the initial protests, the government began a crackdown on protestors and began to beat them in the streets. Protests lasted through November, with crowds rising to 100,000 on September 24.¹⁸ After the September 24 protest, the junta began to crack down on protestors, arresting, detaining, and beating them. The official death toll from the crackdown is unknown, ranging from 13 to 138 depending on the source.¹⁹ Small-scale protests continued after the end of the crackdown.²⁰ The Saffron Revolution significantly damaged the Burmese government's domestic and international reputation. Increasing discontent, shortly after the crackdown, in May 2008, Burma was devastated by Cyclone Nargis, where over 100,000 people died. After the cyclone, the government was accused of blocking aid and refusing entry to foreign humanitarian workers. Cyclone Nargis and

¹⁶ Esmer Golluoglu *Vote of confidence in Burmese president's appetite for reform* THE GUARDIAN (April 1, 2012) <http://www.guardian.co.uk/world/2012/apr/01/vote-confidence-burma-president-reform>.

¹⁷ Jonathan Head, *The hardship that sparked Burma's unrest*, BBC News (October 2, 2007), <http://news.bbc.co.uk/2/hi/asia-pacific/7023548.stm>.

¹⁸ *Id.*

¹⁹ Zarni Mann, *Recalling Monk Beatings That Sparked the Saffron Revolution*, THE IRRAWADDY (September 6 2013), <http://www.irrawaddy.org/saffron-revolution/recalling-monk-beatings-that-sparked-the-saffron-revolution.html>.

²⁰ *2007 Uprising in Burma*, BURMA CAMPAIGN UK, <http://burmacampaign.org.uk/about-burma/2007-uprising-in-burma/>.

the government's management after dealt a significant blow to the junta's image, as thousands died waiting for aid.²¹ Finally, in December 2008, the SPDC signed an agreement to pipe natural gas into China over the objections of domestic and international human rights groups, further damaging the credibility of the government.²²

In 2009, the NLD offered to take part in the elections planned for 2010 under the conditions that the government freed all political prisoners, changed the constitution, and admitted international observers. On November 7, 2010 Burma held its first elections in almost 20 years. Although Daw Aung San Suu Kyi was released from house arrest that year, the NLD boycotted the elections due to its conditions for participation not being met. The elections were described as peaceful, although there were some irregularities that caused the UN and Western countries to deem to elections fraudulent. Officially, the turnout was 77 percent and the military party, now the civilian Union Solidarity and Development Party (USDP), declared that it had won 80 percent of the votes.²³ With 80 percent of the votes, plus the mandated quarter of seats going to the military, the military had a strong lock on Burmese politics.

The SPDC was disbanded on March 30, 2011 after the winners of the 2010 election had been sworn in. Since that date, Burma has been a nominally civilian led country, led by President Thien Sein. Thien Sein is a former military commander who was also prime minister from 2007 to 2011. Following the elections there was serious violence, particularly in the areas bordering Thailand.²⁴ Despite irregularities in the 2010 elections, Western powers began making overtures to the Burmese. In December 2011, Secretary of State Hillary Clinton visited Burma and met with both Aung San Suu Kyu and President Thein Sein. Shortly after, in January 2012, EU

²¹ *Cyclone Nargis*, BURMA CENTER PRAGUE, <http://www.burma-center.org/en/burma/history/cyclone-nargis/>.

²² See WALL STREET JOURNAL, note 11, *supra*, BBC, note 11, *supra*.

²³ *Id.*

²⁴ RICHARD HORSEY, Social Science Research Council *Outcome of Myanmar's Elections* (2010).

foreign policy chief Catherine Ashton, British Prime Minister David Cameron and UN Secretary-General Ban Ki-moon visited Burma to conduct talks on advancing the transition to democracy.²⁵

In April 2012, by-elections were held. The NLD participated in these elections and had a very strong showing. Of 46 open seats, the NLD fielded 44 candidates and won 43 seats. Aung San Suu Kyi, freed from house arrest, ran and won for a seat in the lower house for Kawhmu Township, her neighborhood in Rangoon. At the end of 2012, President Obama visited Burma and noted his support for Burma, if reforms continue. 2013 brought more riots and violence to Burma, particularly in the central parts of the state and violence was directed at the Muslim minority, specifically the Rohingya.²⁶

In 1997, Burma was admitted to the Association of Southeast Asian Nations (ASEAN). On October 10, 2013, Burma assumed its position as the leader of ASEAN for the upcoming year.²⁷ ASEAN rotates the chair position among member countries, and this is the first time that Burma was allowed to take its turn as chair; in 2006, Burma was not allowed to take the chair position due to its human rights violations.²⁸ Many human rights groups criticized Burma's leadership position this time for the same reason, arguing that Burma cannot "get its own human rights house in order," and that it should not be allowed to be in a position to lead on human rights issues.²⁹ Others, including Secretary General Ban Ki-moon, argue that the chairmanship is a good learning opportunity for Burma and a chance for the country to continue to build on the democratic transition and on socio-economic issues, while acknowledging the severe ongoing

²⁵ See WALL STREET JOURNAL, note 11, *supra*, BBC NEWS, note 11, *supra*.

²⁶ *Id.*

²⁷ James Pomfret, *Myanmar takes long-awaited ASEAN chair, but can it cope?*, REUTERS (October 10, 2013), <http://www.reuters.com/article/2013/10/10/us-asia-summit-myanmar-idUSBRE9990DV20131010>

²⁸ *Asean leaders approve Burma chairmanship bid*, BBC News (November 11, 2011), <http://www.bbc.co.uk/news/world-asia-15771531>.

²⁹ See Pomfret, note 27, *supra*.

human rights violations in the country.³⁰ As ASEAN chair, Burma will host over 1000 meetings in 2014.³¹

Modern Burma is about the size of France in land area, with a population of around 55 million. The majority of Burmese, approximately two thirds of the population, live in rural areas or in villages, most of whom are engaged in subsistence agriculture.³² Burma is an overwhelmingly Buddhist country, with the government claiming almost 90 percent of the country to be Buddhist, about 4 percent Christian, 4 percent Muslim, and 2 percent “other.” It is very likely, though, that these numbers underestimate the number of non-Buddhist. Some estimates put the number of Burmese Muslims as comprising least 10 percent of the population, dramatically changing the analysis of ethnic and sectarian violence currently ongoing in the country.³³

This thesis focuses on important questions on the relationship between political transitions, land rights, and human rights. The bulk of research on Burma has focused on questions of political prisoners, forced labor, displacement, ethnic conflict, and general repression. This thesis attempts to shed some light on abuses relating to land tenure and property rights, areas that are not mentioned as much in the work on political transitions. Understanding how these issues are dealt with will give, hopefully, more creative solutions to enjoying rights. Working to secure land and property law in Burma gives the country an opportunity to deal with its past to secure the future.

³⁰ *Id.*

³¹ *Id.*

³² Roy Prosterman and Darryl Vhguen, *Land to the Tillers of Myanmar* THE NEW YORK TIMES (June 13, 2012), http://www.nytimes.com/2012/06/14/opinion/land-to-the-tillers-of-myanmar.html?_r=0.

³³ Burma, U.S. DEPARTMENT OF STATE (November 10, 2013), <http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm?year=2012&dliid=208218>.

3. Scope

This paper does not include an analysis of property destruction by private parties, as has been seen in areas of ethnic violence, nor the destruction of property by the military in zones that the government classifies as live conflict areas. While most non-Bamar ethnic groups stopped fighting the Burmese government when General Aung San signed the independence related ceasefire, some did not.³⁴ Today, there are still rebel groups along the Thai and Chinese borders that do not recognize the independence treaty or concurrent ceasefire and continue to engage in clashes with the Burmese military over almost every issue, including land. In addition to these ongoing land conflicts, there are other land conflicts along the border, including refugee camps on the Thai side of the border. These conflicts not only implicate the Burmese government, rebel groups, and refugee communities, they also implicate the Thai government and would require an entirely different kind of legal and economic development analysis. While examining these questions are important to further developing the connection between land rights and human rights in Burma, this is a case study for a different paper.

Likewise, while this paper touches superficially on the Rohingya Muslims in Burma, their plight and lack of rights, including property rights, are not the focus of this paper. While these are interesting and hugely important topics on the intersection of land rights and human rights, it is difficult to engage in border and ethnic conflict issues from the United States, due to lack of primary and secondary information and access to actors. As mentioned, this is one significant limitation on this thesis. While the basic analysis of land rights and human rights in this paper can be applied to any land conflict in Burma, other variables, such as religion and lack of legal rights complicate the analysis.

³⁴ U Thant Myint, *see* note 6, *supra*.

Map 1: Map of Burma



(<http://achiisurachii.files.wordpress.com/2013/08/peta-myanmar.png>)

2. Research Question

With an eye towards future land reform, and using the Letpaduang copper mine and Myitsone dam as examples, what protections are provided for land rights and human rights under Burmese Law, and are they faithfully executed?

3. Methods

This thesis is a holistic field research based case study and is comprised of primary and secondary source qualitative research. All of the in person primary source research came from a March 2013 trip to Rangoon, Burma with the International Justice Clinic (“IJC” or “Clinic”) trip at the University of California, Irvine School of Law (“UCI Law”), while all secondary source research was conducted in Southern California.

This thesis is a field study and case study. These methods were selected for this thesis because of the paper’s focus on contemporary events and the author’s firsthand experiences in

the country. The case of land grabs in Burma's transitional democracy period is a unique case that examines the question of how land rights and human rights intertwine. A case study will allow me to provide descriptions and explanations of a phenomenon in a country that is known for its isolation and social control. Because there is little literature on contemporary Burma itself or Burmese development, the case study of the Letpadaung mine and Myitsone dam will build mostly on the literature of international and domestic property and human rights law and economic development, particularly Chinese foreign investment, in addition to the existing literature on Burma.

The Burmese case study is not specifically generalizable to other countries transitioning to democracy. Post-military dictatorship countries are in different states regarding their economic development, social development, foreign relations, and natural resources. These are all conditions that impact how the Burmese government interacts with the citizenry and how citizens interact amongst themselves. The broader study relating to the connections between human rights law and property law may be generalizable to other transitional democracies, as well as countries that are heavily dominated by Chinese investment.

1. Primary Sources

A. March 2013 International Justice Clinic Trip to Burma

Noting the position of Burma in its early transitional period and the amount of foreign resources flowing into the country, the Clinic was interested in whether it could make an effective and valuable contribution to rule of law programs and human rights work in Burma. After two months of class-based research, the IJC planned a mapping trip to Rangoon, Burma for March 2013. The intent of the trip was to provide a framework for the Clinic to understand the

needs of the civil society and legal communities in Burma by examining what services were already being provided and analyzing gaps. In preparation for traveling to Burma, the IJC examined three main areas of conflict in contemporary Burma: land grabs, transitional justice, and the rule of law. Background research included reading reports of past human rights focused trips to Burma and news analysis, outreach to groups who had conducted similar surveys in Burma, and networking with organizations and individuals with expertise in the country. This background research led us to groups in Thailand, Singapore, the United Kingdom, Burma, and the United States. Much of this background research informs and steers this thesis.

Representatives of IJC at UCI Law including the author, her fellow student Christopher Taylor, and Professor David Kaye, traveled to Rangoon, Burma, and Singapore from March 1 to March 14, 2013 to meet with civil society actors, lawyers, nongovernmental organizations, academics, and politicians to understand the needs of Burmese activists and lawyers and identify options for IJC engagement in the country over the next few years. The trip was planned about five weeks in advance. This amount of lead-time was too short to ensure that we would receive visas from the Burmese Embassy prior to travel. As such, we had to apply for visas from a tour group operator and we received our visas on arrival in Rangoon. Checking in and departing from LAX without valid visas was challenging, as all of our documentation ensuring we had visas on arrival was in Burmese. Ultimately we were issued tickets and our visas were processed easily in the Rangoon airport.

Over the course of the two-week trip, the team met with over two dozen individuals and organizations to discuss issues related to the rule of law and human rights. Prior to leaving for Burma, Chris Taylor, David Kaye, and I contacted over 30 organizations to try and set up meetings. Some of the groups were found online through a basic Google search, others were

referrals from related organizations, and the remainder of the subjects were found through personal connections. Other interviews were set up through our translator's connections and would not have been accessible to us otherwise. Some interviews were arranged in advance via email and others were arranged by phone once we landed in Rangoon. Table 1 shows the number of each kind of interviews we conducted, not including individual former political prisoners. The vast majority of interview subjects were men. Women are not viewed highly in professional circles in Burma and are often relegated to "lesser" professions, like teaching, and have little influence. Despite this, most of the women we met with had studied abroad either elsewhere in Asia or the United Kingdom. Few of the men we met with had this experience.

Each interview was about one hour long and took place in various locations around Rangoon based on the preference of the interviewee. Interviews were conducted in coffee shops, offices, restaurants, and hotels. Some interviews were conducted with the help of a Burmese-English translator, a Burmese citizen, and others were conducted only in English. The translator was an integral part of the group and provided us with context for certain things we saw while traveling through the city and introduced us to Burmese culture. The interviews were conducted confidentially to protect participants from the government becoming aware of their work with an American university. As such, the each interviewee will be referred to as a combination of type of interview and a number, for example Academic 1, except for those conducted in Singapore. During the interviews, we took notes by hand and then summarized them once we returned to the United States. No interview was recorded. Some interview subjects gave us documents relating to their work, for example charts of certain types of human rights abuses in a particular year. After returning, we spent many hours discussing and reconciling our notes, write-ups, and our recollections in order to prepare our final report. At the end of the semester, Chris Taylor and I

prepared a report on their recommendations for the future work of the Clinic in Burma and recommended focusing on legal education, short human rights training sessions, or research on subject specific questions for Burmese lawyers.³⁵

Table 1:

Type of Interview	Civil Society	Lawyers	Foreign Non Governmental Organizations	Academics	Politicians
Number of Interviews	10	5	5	2	1

The Burmese are known for being friendly and my experiences there were no different. Throughout the country there are posters and placards that say, “Warmly welcome and take care of tourists.” All of the interview subjects were very friendly and wanted to ensure that we were enjoying our introduction to Burma and Burmese culture. Many gave us recommendations for places we should make a point to see in Rangoon. We brought pens and lanyards from UC Irvine to distribute as gifts, as gifts are important to the Burmese. In some instances, interview subjects also gave us gifts. All offered us tea or other refreshment if we met in their offices. Interview subjects who agreed to meet with us did so despite the government, but were not resistant to speaking with outsiders. In fact, the opposite was true. The Burmese we met with were overjoyed to have a Western audience to explain their goals for their country and their organization to.

i. Civil Society

Each group of meetings in Burma and Singapore brought a different perspective to transitional justice and democratization. Civil society groups have a long history in Burma,

³⁵ More information on the International Justice Clinic trip and future plans for the Clinic can be obtained from the author.

despite years of repression and government imposed obstacles to their work. The civil society organizations we met with worked in a range of areas, but former political prisoners ran many of them. These men and women have dedicated their life post release to fighting for democracy. Former political prisoners had different positions throughout the organizations: some were leaders and some were students learning how to run their own groups. Each civil society group had a different function. Some held long term trainings and workshops to train other activists on human rights, democracy, English, computer skills, and critical thinking among other subjects. Others work to spread information about domestic and international NGOs and funding sources for local programming. Finally, another group works to document human rights abuses committed by the government and rebelling ethnic groups.

Like the other groups we met with, civil society interviewees were hungry for outside contact and support for their organization. One of the greatest government impediments to civil society is the requirement that all organizations must register with the government in order to operate. Through interviews, I learned that many groups were either not registered with the government, or were registered under a different purpose than their actual one. Other groups were able to register and still others had their application on hold by the government. Many former political prisoners are denied passports by the government to further restrict their interaction with civil society groups abroad.

ii. Lawyers

There were two main types of lawyers we met with in March. The first group of lawyers ran their own public interest law firms, and the second group work for non-governmental organizations in Burma and Thailand. Some of the lawyers focus on the direct representation of

clients in civil and criminal matters, while the others focus on connecting lawyers and improving the rule of law in Burma. The lawyers engaging in direct client work take on both paying and pro bono clients. Each of the lawyers considered himself an activist, although their approaches to activism were significantly different. All of the lawyers were very critical of the government, but they all took different approaches to working with and within it. Some of the lawyers were vocal in their opposition while others attempted to take a more cooperative approach and work within established parameters.

Many of the individual lawyers we spoke with were concerned with environmental and land grab claims against the government. Many of the lawyers were interested in working with the victims of the Letpadaung copper mine incident, but some of the lawyers had other preexisting land claims pending. The lawyers expressed dissatisfaction with the legal model in Burma and the cost associated with bringing a claim. The lawyers were all interested in opening justice centers or legal aid offices to solve problems regarding access to justice. Likewise, all of the lawyers we spoke with spoke of their desire to advance the rule of law in Burma. Across the interviews, “rule of law” was defined fairly consistently by each interviewee and included an independent judiciary, eliminating corruption, and developing the legal profession.

iii. Academics and Politicians

At the beginning of 2013, meetings with academics and politicians would not have been allowed by the government. In Rangoon we met with faculty of a public university, which is controlled by the government. Requests from foreigners to meet with faculty members had to be routed through the Ministry of Social Affairs and were routinely denied by the government. Our group was one of the first to meet directly, if informally, with professors at a state institution

since the transition began. At the university, we learned that professors couldn't develop department curricula or make changes to an established program without the government's approval. This is a major grievance of professors and staff and it severely constricts academic freedom. Due to government controls on the universities, they have seen their funding be cut time after time, mostly to control the amount of protest arising there. The academics with which we met hoped that soon the university would soon be much freer and less constrained by the government's fear. Professors had some access to the Internet, which they used to keep their courses as up to date as possible and outside of government hands.

In Singapore, the Clinic met with an academic expert on Southeast Asia and Burma. He, on his previous trip to Burma a few months earlier, had not been able to secure a meeting with the same professors with which we had met. We were able to fill him in on what we had learned and he shared his outsider's perspective on the necessary legal reforms in Burma. Chief among Burma's needs is an amended Constitution that reflects the diversity in Burma and established trends in world constitutions. He expressed the opinion that, through amending the 2008 Constitution, Burma will develop an institutional memory for reform and the democratic process, and that a new constitution should not be written.

The politician the Clinic met with was constrained by her relationship with and position within the Burmese government as well. The politician was a member of an opposition party, though not the National League for Democracy, and was clear about the kind of change she wished to see in the country. In addition to reforming education, the politician wished to work with the police on reducing the amount of state violence in Burma and increasing feelings of safety in cities, particularly for women. The politician was excited at Burma's opening and

improved relationships with foreign countries, and hopeful that increased exchange would promote further reforms in the country.

iv. Foreign Non-Governmental Organizations

Most of the international groups we met with were working on rule of law projects and human rights advancement. Some of the representatives of these organizations were highly critical of Daw Aung San Suu Kyi, as well as the government, for failing to address human rights and ethnic conflict on a wider scale. Other individuals were much more charitable to her and had a more optimistic view of the transition project. Some noted that their organizations were waiting for the upcoming 2015 elections to cement their plans, but none were particularly worried about being viewed as “spoilers,” groups and people that work hard to promote change but actually create a reactionary movement and end up dampening democracy. The interviewees were quite critical of people worried about foreign and domestic spoilers and did not seem to think it was a particular problem. International groups were more consistently vocally critical of the government than domestic civil society groups, perhaps because the worst thing that could happen is that they are forbidden from working in the country.

v. Transitional Justice

While we had no set list of questions that we asked in each interview, we consistently asked about views on transitional justice. We conceptualized transitional justice as being on a spectrum, encompassing amnesty, reparations, lustration, institutional reform, truth and reconciliation commissions, and criminal prosecutions. When we asked about transitional justice in interviews, we made sure not to describe transitional justice using any of these terms, instead

allowing interview subjects to define it as they saw fit and explain why or why not they thought it was appropriate in the case of Burma.

Across the interviews we found a reluctance to engage with the topic, regardless of the amount of criticism leveled against the government. The vast majority of interviewees did not want to have any sort of retrospective process that held military leaders accountable for the crimes and abuses they committed during the regime and preferred amnesty for all military leaders. Some interviewees were willing to accept the need for accountability, but were unwilling to explain what they meant by accountability. Only some of the more independent activist domestic interview subjects expressed affirmative interest in transitional justice and accountability, but they acknowledged that they did not know how to create a transitional justice framework. Unlike foreign actors in Burma, it seemed as if local activists were concerned with being spoilers and saw too much action as being a threat to progress. Many of the interviewees who expressed this point of view suggested that they were waiting for the upcoming 2015 presidential elections before thinking about transitional justice, although they were still noncommittal about engaging in transitional justice in the future.

vi. Basic Needs

The goal of the ICJ trip was to map the needs of organizations working on the transition in Burma and set a course for the next few years for the Clinic. As such, one of the focus points of our interview was to determine what a foreign legal clinic, staffed by unlicensed law students, could do to help and further the democratization process. We asked in each interview what that individual or organization needed and how they could use the skills and resources of foreign law students. Generally speaking, most of the domestic groups wanted the same things: money for

space, materials, and running programs. The international groups with which we met were better funded and had more resources, but were looking for support on establishing or running certain programs. Foreign nongovernmental organization 1 specifically requested UCI Law students to increase their research capacity. Domestic civil society groups, academics, and lawyers requested books and materials, while the politician did not have any particular requests.

vii. Themes

After returning to California, we reviewed our interview notes and recollections of the trip. We found eight themes that presented themselves throughout many of the interviews. These themes were: prison conditions, security sector reform, comparative law in transitioning countries, pro bono work, land grabs, international law obligations, debt protection, and federalism issues. These substantive themes lend themselves to remote research with an in person implementation or training component. We believed the benefit to research done on any of these topics was that the results could be shared with multiple actors in Burma and be used widely to institute reform or promote transitional justice. Student developed trainings and workshops could also benefit large groups of civil society actors and lawyers. General research on these topics was considered to be less relevant for international NGOs, as they have more resources and knowledge of these themes than local groups.

B. Other Primary Sources

Outside of interviews and observations from my fieldwork trip to Burma, other primary sources included Burmese laws and the 2008 Constitution. Three main laws, the Farmland Bill (2012), the Vacant, Fallow and Virgin Lands Act (2012), and the Land Nationalisation Act

(1953), drive the legal analysis of land and property rights in this thesis. Other laws are mentioned when applicable. While these three primary laws are from non-military governments, some of the other laws mentioned in this thesis are colonial laws and others are from either the BSPP or SLORC governments. The 2008 Constitution is the other main primary source that drives this paper. All of these laws are analyzed in their English translation. I was alerted to these laws through interviews and was given a bilingual constitution. The text of the laws was found through a basic Google search.

2. Secondary Sources

Traveling to Burma to speak with different actors and understand the feelings on the ground on these charged issues enabled me to return to California to do a more in depth legal analysis of the relevant history, laws, and sectors. Secondary sources include law review articles, journal articles, scholarly and general interest books on Burma, newspaper reports, United Nations reports, analyses by foreign governments and aid organizations, presentations on Burma, and magazine stories. The secondary sources add to the depth provided by primary sources by giving an analysis or explaining Burmese history, culture, and laws. Most of the secondary sources were used to conduct a literature review and situate this thesis within the transitional justice and foreign direct investment literature.

3. Limitations

This thesis faces many limitations. The one of the largest limitations is a lack of access. Specifically, there is a lack of continued access to all of the interview subjects in Burma, bad English translations of Burmese laws and articles, and an overall lack of scholarship on

contemporary Burma. Additionally, Irvine and Rangoon are almost a twenty-hour, \$1600 flight apart, making any in person follow-up close to impossible.

Traveling to Burma is a serious undertaking that cannot easily be done for further research on land grabs. While in Rangoon and Singapore, land grabs were discussed somewhat, but when they were discussed, it was most often in the larger context of what the Clinic could do for a particular organization and the goals of the organization, not the actual issues behind land grabs and property rights. While certain interview subjects provided documentation on land grabs and land rights, it has been hard to maintain contact with these subjects to ask follow up questions. Language barriers exacerbate this problem, as I do not speak Burmese and not all interview subjects spoke sufficient English to communicate with on my own.

Most of the written primary source material is lacking in its English translation. While most of the relevant laws have been found in English translation, the translations are often vague. In the case of the 2008 Constitution, the Farmland Bill, and the Vacant, Fallow and Virgin Land Management Act, the laws have been translated into English by the Burmese government, not a third party. Due to the language barrier, it is unclear if the laws themselves are as vague and imprecise in Burmese as they are in English, or if the translations are so poor that nuance is lost and that the English version loses the depth that exists in the original. For laws enacted prior to 2009, I have used the “Housing, Land and Property Rights in Burma: The Current Legal Framework” published by Displacement Solutions and the HLP Institute. This report details around 100 laws, current and repealed, in Burma that relate directly to housing, land, and property rights in the country. The authors of the Displacement Solutions book had similar issues

as I did in accessing laws but were able to gather copies of the laws and have them translated by professionals from Burmese into English.³⁶

Finally, there is an overall lack of scholarship on contemporary Burma. There are few scholarly articles, reports, books, or general interest pieces on Burma due to the country's status as an international pariah and lack of access for international scholars. Limitations on the work of Burmese scholars also mean that little has been written on the recent history of Burma from the perspective of civil society. Similarly, relatively little research, either domestically or internationally based, has been done on the ways that the average Burmese citizen interacts with the government. As Burma opens up to foreign investors, academics, and tourists, more information will come out that will grow the body of literature on Burma and these particular aspects of Burmese law. Similarly, as the education system is rebuilt, more homegrown research will come out of Burma illuminating the perspectives of civil society, the important issues to Burmese citizens, and perspectives on how land and human rights laws can both be respected.

This thesis faces several potential threats to validity. The two most major threats to validity are possible issues with interview subjects, such as a lack of forthrightness or problems in understanding, and a bias towards certain ideologies, both in the interviews and secondary source materials. Only those that were expressly comfortable with foreigners accepted our request to be interviewed. Many of the interview subjects were extremely outspoken about their feelings towards the government and their desire for democracy. Many of the civil society activists had clashed with the state apparatus and were not afraid of doing so again. Others were less outspoken, but their desire for democracy was not veiled either by language or their actions.

³⁶ Scott Leckie and Ezekiel Simperingham, *DISPLACEMENT SOLUTIONS, HOUSING, LAND, AND PROPERTY RIGHTS IN BURMA: THE CURRENT LEGAL FRAMEWORK* (2009), 1.

It is more likely that interviews were misinterpreted by poor translation for interviews conducted in Burmese, or a lack of understanding of the point in question for interviews done in English.

A more relevant threat to validity is a lack of ideological diversity in the interviews. We were only able to secure one interview with a politician, despite attempts to obtain more. The politician with whom we met was a member of an opposition party. We had no contact with members of the USDP and our meeting with the NLD was cancelled. Partially this was due to geography-most civil society groups and international NGOs are based in Rangoon, where I conducted my field research, and the government is based in Nay Pyi Daw. Obtaining appointments with the government also require much more lead time than the Clinic had. None of the civil society groups, academics, politicians, lawyers, or international NGOs we met with were affiliated with or in support of the government. This impacts the quality of analysis that can be done and establishes a definite bias. The same bias exists to a certain extent for written materials on Burma. Most scholars working on Burma approach the country from a pro-democracy, pro-human rights, and anti-military government perspective, but many are not. Literature on general themes, such as land tenure, political transitions to democracy, and international development come from a variety of sources and ideological perspectives, which improves the type of analysis done and allows for a broader discussion than relying solely on literature on these issues within Burma itself.

5. Literature Review

1. Political Transitions

A political transition is “the interval between one political regime and another,” and is defined by the dissolution of a regime and the emergence of another kind of governance,

democratic or not.³⁷ Despite the clear limits on this definition of a political transition, it seems evident that these clear limits are not always in place or evident at the time a transition is in progress. In the case of Burma, nearly three years after the inauguration of a democratically elected president, the political transition to democracy is still an ongoing and emerging project.

Broadly speaking, there are three kinds of transitions to democracy. The first is when a regime chooses to open the political system. This can be because of increasing costs of maintaining power, for example because of a lack of legitimacy, declining military consistency or due to financial costs, or because democratization appears to be an improvement over the status quo. Regimes also choose to open when they were installed to deal with a crisis that is now over. The second kind of transition is when the authoritarian regime is weakened, but still maintains power and dictates terms of the transition. The final type of transition is the most dramatic: where the authoritarian regime collapses.³⁸ Burma falls between the first and second theorization of transitions. The regime faced significant threats to its legitimacy after the late 1990s and early 2000s, indicating the first type of political transition, while at the same time, the military, through the USDP, maintains significant control over the goals and objectives of the transition, indicating the second. It is hopeful among civil society and international actors that the first type of democratization prevails.

Burma held its first democratic elections and seated the winners for the first time in a generation in 2010. Democracy is still fairly tenuous in Burma, at least in the minds of citizens. While led by civilian President Thein Sein, the President is a former member of the military junta who became a civilian to lead, and the majority of legislators are members of the military's

³⁷ Guillermo O'Donnell and Philippe Schmitter, *Transitions from Authoritarian Rule: Prospect for Democracy* (1986).

³⁸ Scott Mainwaring, *Transitions to Democracy and Democratic Consolidation: Theoretical and Comparative Issues*. Working Paper #130, November 1989, at 26.

political party. As a result, many are worried that when faced with a difficult problem or significant resistance, the government will return to its military roots and impose authoritarian rule on the country again. The next round of elections are scheduled to be held in November 2015, and will include a presidential election. Many activists in Burma see this future election, and then the installation of new leaders, as a marker of whether or not the country has succeeded in transitioning to democracy.³⁹

According to some scholars and theories regarding modes of democratic transitions, for example Linz and Stepan, Burma has reached a democracy and the democratic transition is already complete. Under this theorization, a democratic political transition is complete when a government comes to power that is the result of a free popular vote, when the bodies of government do not share power with other parties, and when this government has the ability and authority to create new laws and policies. In short, democracy exists when it is “the only game in town.”⁴⁰ Depending on the perspective, a lack of choice or the existence of choice, resulting in a default to democracy, does not create a true and functional democracy.

Like in many countries, democratization in Burma appears to be done on a top down basis. Initial reforms and the drafting of the 2008 Constitution were done without public input, and the final vote on the adoption of the Constitution was suspect. Also, the fact that the SPDC government alone moved for a new constitution and seven step plan shows that there was significant elite governmental pressure to democratize the country, and perhaps a decline in internal legitimacy, prior to external questions regarding legitimacy. At the same time, however, democratization processes are actually a combination of elites and the general population.⁴¹

³⁹ Interviews, Civil Society 2, 3, 4, 5, Politician 1. March 4, 5, 6, 7, 2013, Rangoon, Burma.

⁴⁰ Juan J. Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* 6 (1996).

⁴¹ See Scott Mainwaring, note 38, *supra* at 10.

Cracks in the military regime in the last two decades gave civil society groups an opening to push for further reforms, and ultimately, a say in the democratically elected government seated in 2010.

For a transition to democracy to succeed, the democratic movement must include more than elections and governing as “the only game in town.” A free civil society, political society, adherence to the rule of law, and a usable state infrastructure are also necessary for democracy to flourish.⁴² Each of these issues is also interrelated. In some ways, the Burmese government appears to be making a good faith effort in some of these areas to ensure a thriving democracy. Since 2011, many political prisoners have been released from jail or house arrest, but others remain imprisoned and still some continue to be arrested for their politics.⁴³ Additionally, adherence to the rule of law is not a given in all regions of Burma or for all Burmese citizens and residents, while new laws are being written daily.⁴⁴ Likewise, while associations and civil society are allowed, there are significant restrictions on these associations and civil society groups.⁴⁵ Burma appears to be a democracy on the surface, but scratching slightly below, it is clear that there is still significant work to do in its democracy project. The institutionalization of these elements of democracy and the commitment of both the government and the governed to democracy are necessary for a true democracy in Burma, not just the beginning stages of one.

⁴² See Juan J. Linz and Alfred Stepan, note 40, *supra* at 7.

⁴³ Assistance Association for Political Prisoners (Burma), ASSISTANCE ASSOCIATION FOR POLITICAL PRISONERS (BURMA), (2013), <http://www.aappb.org/>.

⁴⁴ This includes, for example, protection of minority rights. These rights are not protected today in Burma at all.

⁴⁵ For example, the Unlawful Associations Act forces civil society groups register and receive governmental approval before meeting. Some have argued that the Act is unconstitutional, because it violates Article 357 of the Constitution, which allows citizens to associate. However, association is not a fundamental right in Burma and is subject to derogations as the Union sees fit.

2. Land and Property Law and Policy

Land law reform during political transitions is a contentious and complex process, mainly due to four factors. These factors are: (1) the fact that land is a “multipurpose resource” that can be used for financial security and economic growth; (2) the number of stakeholders is large and consensus is hard to reach; (3) there deep cultural and emotional ties to particular pieces of land; and (4) individuals have vested interests that discourage reform.⁴⁶ Land rights are also peculiar compared to other rights, as each piece of land is not fungible, unlike other types of property. A piece of land’s special features are what defines it and creates its value. A non-arable piece of land has a different monetary value than a cultivable parcel, and family land has a different intrinsic worth than other land. In most transitioning countries, land reform and titling is done to increase economic productivity of land and to reduce poverty. Both are the drivers of land reform in Burma, although this thesis focuses on how land and property rights fit into a political transition and human rights, not goals or mechanics of land tenure programs.

Any person who occupies or acquires land must be able to enforce his rights to the land for the land to have any extrinsic value. Without the ability to enforce land rights, the farmer will not be able to make the best use of his land or control the land. Land has no inherent value without rights. This is particularly the case when governments attempt to seize land. When land can be expropriated easily and at a low cost, the land does not reach its full value as an asset, as it would if tenure were secure.⁴⁷ For tenure to be secure, others must recognize the tenure and method of acquiring tenure. If neighbors recognize tenure, as they generally do in Burma, the next step entails having the government recognize the same tenure system, or creating a new

⁴⁶ John W. Bruce et al., *Reforming Land Law to Achieve Development Goals*, in *Land Law Reform*. (2006).

⁴⁷ *Id.* 116.

tenure system the government and citizens recognize as legitimate.⁴⁸ If creating a new tenure system is necessary, five ideas should be incorporated into formalizing tenure. They are: allowing customary land tenure to be converted into formal tenure, dispute resolution processes for disputed land claims, ensuring the system is low cost and easy to navigate, creating a common language for land rights, and creating a system that recognizes pre-existing rights.⁴⁹

International development organizations such as the Bretton Woods organizations and international development banks push land reform as a way to spread benefits, but provide no clear way to do so, and land is often viewed through the lens of another substantive issue, such as gender parity, or if lack of land regulation threatens another project's objectives.⁵⁰ Bretton Woods organizations work to create robust regimes of property rights, including expanding access of disadvantaged groups to land, accommodating legal diversity, designing effective land use regulations, and reforming state land management.⁵¹ Land rights were not dealt with in any major way in 1945 and do not form a major part of any of the Bretton Woods institutions. This is partially because land was so ideologically charged during the Cold War and partly because of the call of these organizations.⁵² International treaties form the basis of what the Bretton Woods institutions do with land and property rights. International law is further discussed below.

There is a large literature on the connection between property rights and economic growth. Much of this literature focuses on the economic right to buy and sell land and increased efficiency, when coupled with institutions that can exploit this efficiency, such as banks. There is less consensus within the literature as to the impact these rights have for the poor.⁵³ Development

⁴⁸ *Id.*

⁴⁹ *Id.* 118.

⁵⁰ See Bruce, note 46, *supra* at 5. See also John W. Bruce, Reform of Land Law in the Context of World Bank Lending 11 (2006).

⁵¹ *Id.* at 12.

⁵² *Id.* at 14.

⁵³ *Id.* at 12.

economists such as Hernando de Soto advocate for granting tenure to the untitled and thereby increasing the value of their land and unlocking “dead capital” to improve their access to markets.⁵⁴ Other economists posit that poverty decreases bargaining power and increases the poor’s desperation to sell, undermining their access to land and other markets.⁵⁵

Determining the amount of property rights that are considered acceptable varies by organization. In the past, the World Bank would not accept any scheme of land tenure below full ownership. Today, this requirement has been relaxed, particularly in areas such as Southeast Asia and Africa. In Southeast Asia, projects the World Bank finances allow the state to have ultimate title to the land, so long as individuals have substantial and secure rights of inheritance and transfer of land.⁵⁶ In Africa, World Bank projects often register customary rights to land, not just official title.⁵⁷ Neither the Letpadaung copper mine nor the Myitsone dam is a World Bank project, but the World Bank is involved in other resource extraction projects in Burma, such as a power plant in Mon State.⁵⁸ Inside or outside of the World Bank framework, recognizing customary land rights is not a priority for the Burmese government. The legal framework in existence does not value customary land rights, regardless of any potential for an international organization valuing them.

There are four main venues for land reform: legal reforms, administrative reforms, technical reforms, and judicial reforms. Legal reforms address changes in laws, for example standardization of legal processes in land registration, while administrative reform involves improved management of processes and capacity building. Technical reform addresses the

⁵⁴ Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (2000).

⁵⁵ See Bruce, note 46, *supra* at 13.

⁵⁶ *Id.* at 34.

⁵⁷ *Id.*

⁵⁸ Myanmar and WBG sign electricity and investment guarantee agreements at Annual Meetings, WORLD BANK (October 12, 2013), <http://www.worldbank.org/en/news/press-release/2013/10/12/myanmar-wbg-sign-electricity-investment-guarantee-agreements-at-annual-meetings>.

modernization of practices used to survey land, and finally, judicial reform ensures that all contracts and land tenure is treated in accordance with the law.⁵⁹ Expanding land and property rights in Burma is a large task that requires cooperation and collaboration across various government agencies and all four kinds of reform. Enforcing these expanded land rights requires enforcement across different areas of substantive law such as contract law and conflict resolution. Due to the sheer number of people depending on agriculture for their income, sustained and guaranteed access to land is vitally important in the short term and long term. The land market in Burma will likely expand based on improved land and property rights, improving both short term stability and possibly long term finances for the current rural farmer.

In order to achieve gains in long term land and property law protections, security of tenure is essential. Rule of law can strengthen tenure by creating formal relationships between parties and creating rules for standard operation.⁶⁰ With rule of law, outcomes can be predicted. Under a rule of law framework, laws must be fair, must address economic and social needs, strengthen legal institutions, and be free of corruption.⁶¹ Burma is making significant strides in improving the rule of law, but still has far to go, including through diminishing the role of the military, and reforming judicial and legislative bodies.⁶²

While this thesis deals primarily with rural land rights, land grabs, and tenure related issues, there are other property and land rights issues Burma faces that are just as important to the just resolution of the political transition. Some of these issues that are relevant in a country like Burma are the return of refugees and internally displaced persons to their homes, the absence of residential housing, corrupt dispute resolution mechanisms, discriminatory housing and

⁵⁹ Sovann Sar, *Land Reform in Cambodia* (2010).

⁶⁰ *See* Bruce, note 46, *supra* at 112.

⁶¹ *Id.* at 113.

⁶² New Perimeter, Perseus Strategies, and the Jacob Blaustein Institute for the Advancement of Human Rights, *MYANMAR RULE OF LAW ASSESSMENT*, (March 2013), at 2.

property laws, lack of appropriate land administration, destruction of records, and homelessness.⁶³ Housing, land, and property (HLP) rights are widely recognized as fundamental to long term peace, although there have been no two similar HLP reform processes established in post conflict countries.⁶⁴ An outgrowth of improvements in HLP rights will drive additional advances in the market for property and land and eventually create a larger market that will help lift Burmese out of poverty.

3. Burmese Legal Framework

This paper examines property rights in Burma through looking at three different sources of law: the 2008 Constitution, domestic laws, and international law. Each kind of law is explained in turn, with exemplars of each in the context of the intersection of land, human rights, and economic development. One of the biggest challenges in the Burmese legal framework is reconciling statutory domestic law, international law, and customary law.

A. The 2008 Constitution

In 2008, the Burmese military finalized a constitution that it had been promising the people for many years. The Constitution was written without the consultation of any of the opposition parties or the public, although there was a vote on its implementation.⁶⁵ The Constitution gives the basic rights and responsibilities of Burmese citizens and residents as well as delineating the structure of government. Modeled after the British system, the Burmese government has three branches: two houses of Parliament, the Upper and Lower House, a President from the ruling party, and the judiciary.

⁶³ Scott Leckie, UN Peace Operations and HLP Rights in Post-Conflict Settings 7-8 (2009).

⁶⁴ *Id.* at 12.

⁶⁵ See HORSEY, note 12, *supra*.

The Constitution is widely acknowledged as needing reform. Goals of reform are to create stronger checks and balances between the three branches, restrain the role of the military, enumerate the rights that are afforded to all ethnic groups, and move forward the decentralization of the government.⁶⁶ Some believe that the Constitution should be scrapped and a new one written, while others believe that to show the Burmese people that a Constitution is a permanent document that can be used by different rulers in a peaceful transition, the Constitution must only be heavily amended.⁶⁷ The process to amend the Constitution has not yet begun, as Parliament has chosen to amend and update old laws first. Calls by the government or public for a new Constitution and Constitutional Convention have not yet been made, either.

The 2008 Constitution is officially published in both English and Burmese; however, the English version is poor. It was either translated in a way that either loses all nuance, or the Burmese version lacks depth and subtleties that the English translation copies. Because Burma has been an international pariah for decades, little secondary material has been published on the Burmese Constitution in English. For these two reasons, analysis of the Constitution is scant and relies only on my own reading.

B. Domestic Law

Current Burmese domestic law is comprised of laws passed during British rule, laws passed in democratic Burma between 1948 and 1962, laws passed during the military dictatorship between 1962 and 2011, and laws that have been passed since 2011. Laws from all four periods of modern Burma are valid and in force today, unless they have been expressly repealed. As a former British colony, Burma is a common law system. The Union Parliament

⁶⁶ University of Sydney, *Sydney Law School leads constitutional discussions in Myanmar* THE UNIVERSITY OF SYDNEY (May 3, 2012), <http://sydney.edu.au/news/84.html?newsstoryid=11481>

⁶⁷ Andrew Harding, Interview, March 13, 2013.

writes domestic laws and would amend the Constitution, while the state and regional governments write local laws.

There is some debate as to whether Burmese legislators at the Union or state and regional levels have the institutional knowledge to write clear and effective laws. Most of the representatives, regardless of their party, have never held elected positions or positions that required legislative drafting skills. Good and thorough legislative drafting is required to ensure that laws are appropriate and targeted to their particular goals. Now that Burma is opening, there are more resources for members of Parliament to learn these skills from abroad. At the same time, as democracy and decentralization continue this expertise will grow and the problem will decrease over time.⁶⁸

Three domestic laws in particular are discussed in this paper: the Land Acquisition Act (1894), the Farmland Bill (2012), and the Vacant, Fallow, and Virgin Land Management Law (2012). The Land Acquisition Act deals with payment for lands taken. The last two were proposed and passed shortly after the first democratic Parliament under the 2008 Constitution was installed. They deal with restrictions on the land that the government sets forth and that all citizens must abide by, and are an attempt to clarify past regulations, like the Land Acquisition Act. These three laws are not the only land laws in force in the country, just three controversial ones critical to understanding the relationship between the state and the individual property owner.⁶⁹ Because Burma's population is still largely rural and agriculturally based, land laws and laws relating to farming are of more importance than they might be in a more urban country. The

⁶⁸ *Id.*

⁶⁹ HLP has a more complete list of laws that relate to housing, land, and property issues from the colonial period through 2009. Shelter Cluster's *Guidance Note on Land Issues Myanmar* has a chart of 59 different laws from colonial times through 1991 that deal with land.

sheer number of laws and mix of laws makes the system of land ownership and land transfer chaotic and inaccessible to most Burmese.

Like with the Constitution, some of the translations of these laws are superficial and not entirely clear. The clarity of the Burmese version is unknown. While Burma is a common law system, judicial opinions are not available in English to do any analysis of case law jurisprudence and all analysis relies on laws and statutes passed by Parliament. Some secondary source material is available on the Vacant, Fallow and Virgin Land Management Act and the Farmland Bill from the United Nations, but secondary sources are still scant.

C. International Law

Broadly speaking, there are two kinds of international law. The first kind of international law is customary international law. Customary law is soft law and is not considered to be as binding to a country as hard law. Customary law mainly derives from state practice, including declarations, general principles of law, public statements, or silence as consent and is a general practice that is accepted as law among countries and international bodies, such as the United Nations. Moreover, customary international law is not the same as *jus cogens*, another fundamental concept of international law. While the two are similar because they are not codified, unlike with customary international law, with principles of *jus cogens*, no derogation is ever accepted.⁷⁰ For example, customary international law forbids torture when states accept the norm, but torture is also always a violation of *jus cogens*, regardless of a state's adoption of the norm. While soft law may be more aspirational than hard law, it is not entirely without authority. Customary international law is applicable in this thesis, but *jus cogens* principles of international law are not applicable in this analysis of international law in Burma.

⁷⁰ Jeffery Dunoff, Steven Ratner, & David Wippman, *International Law: Norms, Actors, Process* 58-61 (2010).

The second kind of international law is hard international law. Hard international law is the main focus of this section of this thesis. Hard international law means that the laws in reference are binding and only subject to certain permissible and predetermined derogations. Hard law includes self-executing treaties, United Nations Security Council Resolutions, and international agreements. Hard law instruments have legally enforceable commitments for states and contain an enforcement mechanism. Since becoming an independent country, Burma has only ratified fifteen international treaties, the only international hard law that is discussed in this thesis.

International law is not hugely applicable to Burma at this point in time. While Burma is a member of the United Nations, it has only ratified or acceded to 15 treaties and signed six more.⁷¹ Any treaty that Burma has ratified binds the country not to violate the provisions of the treaty and opens Burma up to sanctions or judicial enforcement of any violations that occur. Burma violates land rights routinely, and is not in compliance with the land provisions of these treaties. However, like with all other international law, enforcement varies and remedies for violations are limited. Most often, individual Burmese citizens cannot bring a claim before a judicial body at the United Nations; as such bodies are limited to claims between states, not an individual against his state.⁷²

⁷¹ A list of the treaties Burma has ratified, acceded, or signed can be found at <http://www.altsean.org/Research/UN%20Dossier/UNTreaties.htm>. A separate list of environmental regional and international treaties can be found on page 22 of the BEWG paper.

⁷² The only individual complaints that can be heard at the United Nations come from the First Optional Protocol of the International Covenant on Civil and Political Rights, the Convention Against Torture, Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on the Elimination of All Forms of Discrimination Against Women. Burma is a party to the Convention on the Elimination of All Forms of Discrimination Against Women, and could be brought to the Committee in charge of hearings for violations committed under that treaty by damaged individuals. *See* Office of the United Nations High Commission on Refugees, UNITED NATIONS HIGH COMMISSION ON REFUGEES (2011), <http://www2.ohchr.org/english/bodies/petitions/individual.htm>.

While the Constitution says that signed and ratified treaties will be honored, it is not clear how international law is implemented in Burma.⁷³ Outside of provisions stating that Burma shall honor all international treaties, the Constitution also provides that the President “shall enter into, ratify, annul, or revoke” treaties that require the approval of the Upper House and “may enter into, ratify, annul, or revoke” treaties that do not require the approval of the Upper House of Parliament.⁷⁴ A similar provision gives the Upper House the power to give resolution on treaties submitted by the President and confers authority on the President to act on treaties without its approval.⁷⁵ It also states that the Supreme Court of Burma has original jurisdiction over treaties.⁷⁶ Because Burma is a former British colony, it is likely that the country ascribes to a dualist⁷⁷ view of treaties and that before they can be enforced, they must be incorporated into State law by the Parliament. While previous governments must have had a way of incorporating treaties into domestic law, that system is not clear from the Constitution or in other domestic laws found.

4. Private Property Rights

There are many views on private property, however, the most popular and common view in the United States and Western Europe is the absolutist view of real property. According to English legal theorist Blackstone, under this theory, private property is “the sole and despotic

⁷³ Constitution of the Republic of the Union of Myanmar, Article 456 of the Constitution states: “The Republic of the Union of Myanmar shall honour all legitimate obligations arising out of treaties or agreements which before the commencement of this Constitution have been in operation between the Government of the Union of Myanmar and the Government of other State, provided that such other State honours any reciprocal obligations towards the Union of Myanmar.”

⁷⁴ Constitution, Article 209

⁷⁵ Constitution, Article 108

⁷⁶ Constitution, Article 205(a)(i)

⁷⁷ A dualist view of treaties means that the treaty must be signed and ratified and then incorporated into domestic law. This is contrary to a monist view, where ratification is sufficient to bring the treaty into domestic law. *See* Jeffery Dunoff, Steven Ratner, & David Wippman, note 70, *supra* at 243-244.

domain which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”⁷⁸ The absolutist view reflects strong barriers to governmental action regulating land and intrusion by other parties, but is also seen on a scale.⁷⁹ In the Anglo-American tradition, property rights are viewed as a “bundle of sticks,” where each stick is a fundamental, yet separate, right to the land. For example, one stick is sub-surface rights, while another is the right to grant an easement on the land. Alternatively, each stick could be the right to exclude or the right to transfer land by the owner.

If a bundle of sticks is a set of rights an individual has to his property, it can be argued that the entire bundle of sticks must be present for full property rights. Any reduction of value, or unjustified taking, of any of the sticks is cause for a remedy. However, in a less absolutist view, the bundle of sticks metaphor also allows for an understanding of property rights when complete control is not possible, for example tenant farmers or environmental restrictions on land.⁸⁰ An absolutist understanding of land rights in the case of Burma is the most straightforward. Under current Burmese law, according to absolutists, land owners are missing some vital elements of the bundle of sticks, particularly because they are not the supreme owners of their land and cannot make decisions regarding their land, for example what kind of crops to grow under the Vacant, Fallow and Virgin Land Act. Even a less absolutist view that accepts lack of supreme ownership would likely find that fundamental sticks for Burmese property owners are missing as well, as current law allows them to hold land, but not exercise decision making power over it.

There are numerous justifications for private property and land that have arisen over the past centuries. Fundamentally, these moral, legal, and philosophical questions attempt to answer whether land rights are natural or positive, or man made, rights. If land is a natural right, an

⁷⁸ John G. Francis & Leslie Pickering Francis, *Land Wars: The Politics of Property and Community* 28 (2003).

⁷⁹ *Id.*

⁸⁰ *Id.* at 30-31.

absolutist view makes sense. Under a natural law conception of property, property is for man to have dominion of and use as he sees fit. If property is a positive right, social conventions allow more derogation from the bundle of sticks, and a less absolutist view would prevail. There is no answer as to whether land and property rights are natural or positive rights; the determination varies by worldview. As a result, there will always be conflict between perspectives on the strength of the rope tying the bundle of sticks.

Across the spectrum of absolutism, many invoke the idea that land and property rights should be embedded in the Constitution for ultimate protection. Burma has not taken this route in the current 2008 Constitution. Incorporating land rights into the Constitution would lessen the power that the government currently has over the largely rural population and protect what is likely their most valuable asset. If there is no remedy to a violation of the bundle of sticks, as is the current legal framework, a right is effectively unenforceable. While all rights in the bundle could be recognized through the constitutionalization of property rights, it is not necessary that they all be. Limited constitutional protection of parts of the bundle of sticks could protect the land rights of citizens, while maintaining that there are rights that are reserved for the government over citizens. Even only incorporating certain property rights would help protect citizens, and their other rights, as Burma looks to develop. Recognizing particular land rights in the Constitution lends itself to the conclusion that property rights are positive rights, not natural, and would be a good starting point for recognizing and protecting all rights, including property, of Burmese citizens.⁸¹

Scholars have argued that constitutionalization of rights is appropriate when there is a predictable risk of failure of the right and the democratic process.⁸² This is certainly the case in

⁸¹ *Id* at 38.

⁸² *Id.* at 47.

Burma, as the Letpadaung mine and Myitsone dam takings and other instances of takings that have occurred show. Customary land law is not recognized or protected in Burma by the current government, and this must be remedied. This is not to say that the Anglo-American bundle of sticks must be the same bundle recognized in Burma, only that a bundle of sticks must be recognized and protected, as customary land rights are routinely ignored. Constitutionalizing land rights would protect not only the majority Bamar ethnic group, but also minority ethnic groups whose rights are more routinely violated and whose land is more frequently confiscated regardless of traditional or customary tenure recognition. It is possible, but not a given, that the constitutionalization of property rights could also lead to increased recognition of other substantive rights and an increase in equity in the Burmese legal system. Constitutionalization does not have to recognize land rights identical to those in any other nation and can be flexible in certain ways, but any Constitutional recognition of land rights could improve the standing of rural farmers, the overwhelming majority in Burma, and their rights in the face of foreign development projects, crony capitalism, and land exploitation projects.

5. Foreign Investment: Sino-Burmese Relations

During the second half of the 20th century, China's relationship with Burma ebbed and flowed significantly. Post independence through the mid 1980s, China supported the Communist Party of Burma, the primary opposition party to the military. After the August 1988 protests, the relationship between China and Burma grew closer, with China beginning to heavily invest in Burma. In 1997, Burma was granted entry into ASEAN, in a move to limit Chinese influence. At the same time, India began to invest more heavily in Burma to combat Chinese investment. In the early 2000s, China began to exert more influence in Burmese politics, although Burma is

technically a non-aligned nation.⁸³ China, along with other investor countries, has shown an unwillingness to push for political reform, democratization, or a transitional justice and reconciliation program in Burma in order to protect its own economic investments, which it fears, not unjustly, will be shut down if significant reforms were to take place.

Today, China accounts for one third of all foreign investment in Burma. Since 1988, China has invested almost \$15 billion in the country. After China, in descending order, Thailand, Hong Kong, Great Britain, South Korea, Singapore, and Malaysia are Burma's largest investors. The United States ranks 13. While Thailand has promised the second most amount of money to Burma's development projects, Hong Kong's actual investment rate places it as Burma's second largest investor.⁸⁴ The Burmese government has made it a goal to diversify foreign investments to ensure that a single country does not dominate investment or attempt to control public policy. This policy is mostly aimed at China, although China does still receive some favorable treatment.⁸⁵

The Sino-Burmese relationship is more complex than many believe. Among the most common misconceptions of the relationship are the beliefs that Burma is a client state of China, that China dominates Burma so much that Burma will never break free of Chinese influence, that the Burmese political transition is dependent on China's acquiescence, and that prior attempts in regime change were unsuccessful because of Chinese intervention.⁸⁶ In truth, China and Burma are increasingly dependent on each other. Chinese investments in Burma are immobile, giving Burma greater leverage in negotiations, at least when the government is a party to negotiations,

⁸³ Alstair D.B. Cook, *Myanmar's China Policy: Agendas, Strategies, and Challenges*, 48 CHINA REPORT 3 (2012), at 270-273.

⁸⁴ <http://www.ibtimes.com/myanmar-fdi-china-accounts-one-third-foreign-investment-myanmar-14-billion-1446282>

⁸⁵ See Alastair D.B. Cook, note 83, *supra*, at 269.

⁸⁶ David L. Steinberg & Hongwei Fan, *Modern China-Myanmar Relations: Dilemmas of Mutual Dependence* xvii-xviii (2012).

for increased investment and improved financial returns on investment. At the same time, China is greatly in need of the resources coming from Burma and sees a path through Burma as the best way to gain access to the Indian Ocean and compete in that space with India.⁸⁷

A major reason Chinese investment has grown so significantly in Burma in the past decade is because of a domestic push within China to reduce the amount of opium coming into the country. Attempting to reduce the quantity of opium crossing the border into Yunnan province, the provincial government created a poppy substitution development program for Burma and Laos. The Chinese government has actively begun promoting the scheme and encourages Chinese companies to buy land in Burma to stem the land available for poppy cultivation.⁸⁸ The program gives subsidies and tax breaks for Chinese companies operating in Burma.⁸⁹ The top-down development model that currently predominates in Burma's Chinese backed development projects, without any sort of local livelihood component to the projects, is the result of the poppy substitution development program.⁹⁰ This is explored more below in Section 6.

Foreign investment in Burma ranges from manufacturing to tourism to land, but recent Chinese investment has mainly focused on land and resource extraction. Aside from the poppy substitution scheme, this is due to the fact that in 2011, President Thein Sein and Chinese President Hu Jintao entered into a "comprehensive strategic cooperative partnership."⁹¹ Importantly, as a result, China has exploitation rights on Burma's oil and gas fields. Oil and gas exploitation are particularly important for China to both strengthen the economy in southwestern

⁸⁷ *Id.* at 292-294.

⁸⁸ Transnational Institute, Financing Dispossession, TRANSNATIONAL INSTITUTE (February 2012), at 3.

⁸⁹ *Id.*

⁹⁰ China has similar programs in coca growing regions of the world. *Id.* at 3. An analysis of similar crop replacement programs in Colombia and Peru show that the programs are typically ineffective, ecologically destructive, and economically damaging. *Id.* at 25.

⁹¹ See Alastair D.B. Cook, note 83, at 274.

China and to give China access to the Indian Ocean.⁹² Chinese investment and exploitation does not come without its problems, however. In order to exploit resources, the Chinese government has signed ceasefire agreements with some of the ethnic groups on the China-Burma border, while the Burmese government has yet to sign ceasefire treaties with certain ethnic groups. Working with the Chinese, these ethnic groups have the funds to finance strikes on the Burmese government and some have done so.

China is frequently accused of conducting land grabs in developing and poor countries, particularly in other Asian or African countries. In addition to the poppy abatement program, this is due to rising demand for resources that cannot be obtained either domestically in China or in more stable countries. These more stable countries that China cannot enter for resource exploitation are countries that are often dominated by Western multinational corporations and/or have stronger government oversight regarding land laws.⁹³ Most agricultural land grabs happen in African countries, while Asia is the focus for land and water investments. China is a major presence throughout Asia, not only in Burma. In Asia alone in 2012, there were 59 confirmed Chinese land investment projects totaling 2.5 million hectares (6,177,634 acres).⁹⁴

Chinese investments in Burma have focused on farming and exporting resources, which “can lead to ‘major social conflicts...when small farmers have their land and thus their livelihoods taken away.’”⁹⁵ In 2008, *The Financial Times* claimed that the Ministry of Agriculture in China proposed to make “offshore land acquisition by domestic agricultural companies a central government policy.”⁹⁶ The Chinese deny claims that they are engaging in

⁹² *Id.*, See also David L. Steinberg & Hongwei Fan, note 86, *supra*.

⁹³ See David L. Steinberg & Hongwei Fan, note 86, *supra* at 196.

⁹⁴ Carin Smaller, Qui Wei and Lui Yalan, *Farmland and Water: China invests abroad*, THE INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (2012), 8.

⁹⁵ *Id.* at 2.

⁹⁶ *Id.*

neo-colonial practices in Africa and Asia, however that the Chinese demand for energy and manufacturing cannot be met in China alone.⁹⁷ China's involvement in acquiring and building the Letpadaung copper mine and the Myitsone dam has led to these "major social conflicts" and are not the only instances of such issues in Burma. While China may be formally non-interventionist, exploitation rights give China a major say in Burmese economic, infrastructure, and social development.

6. Case Studies: The Letpadaung Copper Mine and the Myitsone Dam -- Balancing Economic Development with Human Rights and Property and Land Laws

1. November 29, 2012: The Letpadaung Copper Mine State Violence

A 2010 World Bank report stated that Chinese investors target countries with weak land laws, like Burma, for investment, hoping for an easy path forward to income generation.⁹⁸ This targeting ultimately culminates with transfers of land, transfers that contradict that country's existing land rights scheme, to the benefit of the Chinese government and Chinese investors. Many of these deals take place under utmost secrecy, where impacted communities, and sometimes even government officials, do not know the terms of the deal.⁹⁹ This is how the deal for the Letpadaung copper mine took place. As shown, Burma has weak land laws and few concrete protections for property and land rights. Not knowing the full terms of the deal, local residents faced significant obstruction from both the Chinese and Burmese governments when attempting to increase their knowledge and assert their legal rights to the land, eventually culminating in the November 2012 police violence against farmer protesters and religious figures

⁹⁷ *Id.* at 3.

⁹⁸ *Id.* at 9.

⁹⁹ *Id.* at 9.

at the mine. Despite having been dispossessed of their land, many farmers and monks remained in the area, hoping to have their few land rights addressed by the government. Because of the obstruction present, local residents attempted to protest the mine deal and make it more transparent. This had the effect of making the mine a focal point of local emerging civil society and observers of the democratic transition in Burma.

To build the Letpadaung copper mine, almost 8000 acres of land were taken from 26 different villages surrounding the site. The land takings, rather than the actual construction of the mine or the land exploitation itself, have been the focal point of the controversy since the inception of the mine project. Despite the widespread local opposition to the takings, the Letpadaung mine did not become a flash point for international and domestic activists and lawyers until November 2012, when state sanctioned violence occurred towards protesters. In the early morning hours of November 29, 2012, acting under the orders of the Ministry of Home Affairs, the Burmese police, dressed in riot gear, deployed water cannons, white phosphorus, and engaged in baton charges to disperse Buddhist monks and local farmers assembled in protest of the mine and in protest of their confiscated land around the mine location. The police violence destroyed six protest camps housing up to 550 people, a combination of monks and farmers, including some families. Over 100 of these protesters suffered severe chemical burns from the white phosphorus.

Although many Burmese, local to the region and in other regions of the country, were opposed to the project before the attack, the outcry against the takings for the mine, the Union government overall, the government's land policies, and the mine's Chinese partner Wanbao, increased after the white phosphorus, water cannon, and baton attack.¹⁰⁰ Showing a break with

¹⁰⁰ JUSTICE TRUST/LAWYERS NETWORK, REPORT OF EVIDENCE REGARDING CONTROVERSIES AT LETPADAUNG HILL COPPER MINE PROJECT (2013).

the past practices of the military regime, President Thien Sein suspended activity at the mine, but reinstated activities in the spring of 2013 with additional environmental safeguards and an offer of compensation for farmers who had their land confiscated at \$1200 to \$1500 per acre.¹⁰¹ Recognizing the importance of restitution, many believe this number is not high enough to stand in for the value of the land.¹⁰² This offer also does not take into account individuals whose land has been damaged by the mining process, for example through concussive shock or chemical infiltration, but not taken by the government.¹⁰³

The Letpadaung copper mine is located in the Sagaing Region of Upper Burma, northwest of the city of Mandalay and on the west bank of the Chindwin River. The mine is a joint venture between the military-owned Union of Myanmar Economic Holdings Ltd. (UMEH) and China's Wanbao Company, a subsidiary of China's state-owned arms firm Norinco. Like other deals involving the Burmese government, very little is known about the terms of the deals or the plans behind the deal. The deal for the Letpadaung mine was signed in 2010 between Chinese Premier Wen Jiabao and U Thein Sein, in his prior capacity as Prime Minister of the military junta government. Reportedly, Wanbao is investing more than \$1 billion over the course of 60 years in the mine. Under the original terms of the deal, Wanbao reportedly pays all production costs and receives 49 percent of the copper mined, with some of the profit going to UMEH and the Burmese government. Local villagers and villages get no profit or other benefits from the mine, nor are jobs created. Even though no compensation is required for victims of land grabs under Burmese law, so far, Wanbao has spent over \$5 million of the \$1 billion, to

¹⁰¹ Aung Zaw, *The Letpadaung Saga and the End of an Era* THE IRRAWADDY MAGAZINE (March 14, 2013), <http://www.irrawaddy.org/archives/29405>. <http://www.rfa.org/english/news/myanmar/letpadaung-10152013190656.html>

¹⁰² *Id.*

¹⁰³ Zarni Mann, *Eight Detained as Opposition to Burma's Letpadaung Copper Mine Continues*, THE IRRAWADDY (February 4, 2014), <http://www.irrawaddy.org/burma/eight-detained-opposition-burmas-letpadaung-copper-mine-continues.html>.

compensate affected villages for confiscating their land, as mentioned above.¹⁰⁴ In a bid to assuage public sentiment about the land takings, mine construction, and subsequent violence, in addition to offers for compensation, the terms of the deal between the Burmese military backed UMEH and Wanbo have changed in Burma's favor. Now, Wanbao receives 30 percent of the mine's revenue and the UMEH receives 19 percent, with the remainder going to the government. In addition, two percent of the revenues of the property go to corporate social responsibility projects in Burma, focusing on immediately impacted communities in the Sagaing Region.¹⁰⁵

Map 2: Detail Map of Letpadaung Mine Area



(<http://www.rfa.org/english/news/myanmar/copper-mine-01312013183434.html>)

After the attack on villagers and monks, outcry against the copper mine increased dramatically throughout the country. Opposition to the mine grew so strong that the Union government felt the need to create a commission to investigate the attack and the police practices used. President Thein Sein tapped Daw Aung San Suu Kyi, his party's main political rival, to

¹⁰⁴ See JUSTICE TRUST/LAWYERS NETWORK, note 100, *supra*.

¹⁰⁵ *Residents Protest Letpadaung Copper Mine Resumption*, RADIO FREE ASIA (October 15, 2013), <http://www.rfa.org/english/news/myanmar/letpadaung-10152013190656.html>.

investigate the attack. Choosing Aung San Suu Kyi was a deliberate choice on the part of President Thein Sein. Before the attack, many villagers hoped Aung San Suu Kyi, as the leader of the opposition and a known advocate for human rights in Burma, would help them get their land back, shut down the mine, and be a strong advocate in their corner in the future. In fact, Burmese throughout the country hoped that Aung San Suu Kyi would fill this role for the Letpadaung mine and other exploitative projects across the country. However, Aung San Suu Kyi is a politician, and a vulnerable one, having been subject to some of the excesses of the military government and the early Union government. By selecting Aung San Suu Kyi, a likely presidential candidate in 2015 and venerated woman among many Burmese, President Thein Sein likely hoped that she would not say anything to damage her standing in the government or reduce the reliability of Burma as a place for investing, as both of these are necessary for her to continue her political career, rather than side with the farmers who saw her as an advocate and natural partner against cronyism and the Burmese military. The selection has the additional benefit of repeatedly showing Aung San Suu Kyi in a less positive light to the Burmese population that adores her and using her position against her in future campaigns.¹⁰⁶

Although Aung San Suu Kyi is in a tight political position, she has expressed some support in the past for Burmese forced from their land in some instances. Not coincidentally, she was scheduled to visit the Letpadaung mine on November 29, 2012, the same day as the police raid occurred, to express her support for the farmers and monks removed from their property and temples. As a result of the raid, she did not visit that day. However, despite her past statements against the mine, after being given the role of investigating the attack, Aung San Suu Kyi has distanced herself from the victims of the takings. She and her commission released a report on

¹⁰⁶ Aung Thane, March 3, 2013. *See also* Anthony Kuhn, *Now a Politician, Aung San Suu Kyi is the Object of Protesters*, NPR (March 16, 2013), <http://www.npr.org/blogs/thetwo-way/2013/03/16/174431490/now-a-politician-aung-san-suu-kyi-is-the-object-of-protesters>.

the brutality of the early morning crackdown in mid-March 2013. Her report recommended that the mine stay open and that the country continue business as usual with the Chinese, and other foreign partners, to show that investment in Burma is not an overly risky proposition, provided the environmental concerns of the mine are addressed.¹⁰⁷ Heavily criticized for her report by local and international activists, Aung San Suu Kyi has been made to look like a pawn of the government, rubber-stamping its controversial actions to preserve her position in government. The committee's report acknowledged that police should check their weaponry and its effects before a riot, but also blames protesters for violating the rule of law.

Several months passed before the Letpadaung mine opened again in late 2013, after renegotiations on profit sharing and supposed environmental mitigation took place. Subsequent to reopening, protests by local farmers, peasants, and monks have continued, saying environmental and social degradation continues in the villages surrounding the mine. Although there have continued to be confrontations with the authorities, there has not been the same level of violence that occurred in 2012. Recent protests in early 2014 surrounded the removal of a prominent Buddhist pagoda in the area of the mine. Local villagers claim that they were not consulted about the removal of the pagoda and that the relocation is another instance of the government not listening to the demands of the people.¹⁰⁸ Relatively small protests continue on a regular basis in villages around the Letpadaung mine, as takings continue for smaller ancillary projects, such as fences, and in the face of continuing environmental harms not mitigated by UMEH, Wanbao, or the Burmese government.¹⁰⁹

¹⁰⁷ Mines and Communities, *Burma: Suu Kyi tells communities to halt copper mining protests*, MINES AND COMMUNITIES (2013), <http://www.minesandcommunities.org/article.php?a=12188>.

¹⁰⁸ Zarni Mann, *Govt Plan to Move Pagoda in Letpadaung Area Angers Villagers*, THE IRRAWADDY (February 27, 2014), <http://www.irrawaddy.org/burma/govt-plan-move-pagoda-letpadaung-area-angers-villagers.html>.

¹⁰⁹ Zarni Mann, *Eight Detained as Opposition to Burma's Letpadaung Copper Mine Continues*, THE IRRAWADDY (February 5, 2014), <http://www.irrawaddy.org/burma/eight-detained-opposition-burmas-letpadaung-copper-mine-continues.html>.

2. The Myitsone Dam Suspension

The Myitsone dam is a cautionary tale for Burma and provides a lesson for how to not handle the aftermath of the Letpadaung mine state violence, or any other forthcoming internationally financed development projects. Emblematic of the Chinese poppy replacement scheme, the Myitsone dam did not involve the local population. Much of the opposition to the Myitsone dam project, leading to its ultimate suspension, came as a result of this failure to be inclusive. The feeling of being sidelined was particularly acute for the Kachin, the local majority ethnic group, who were active in protesting.

The deal for the Myitsone dam was struck between China and Burma in 2007, also prior to the transition to democracy. It is a large dam on the Irrawaddy River in Upper Burma, and is another joint project between the Chinese and Burmese governments. The Myitsone Dam was to be the furthest south in a series of seven Chinese dams in Burma. Like the Letpadaung Mine, the primary beneficiaries of this project are the Chinese, particularly those in Yunnan Province; the dam was projected to produce 6 gigawatts of power, with only ten percent going to Burma.¹¹⁰ In addition to providing relatively no power benefits to the Burmese in the region, it also caused significant environmental harms to the area. The creation of the dam was expected to flood close to 300 square miles of land and displace around 10,000 people. In addition to the human costs, the dam was built close to a major earthquake fault line. In opposition to the plan, in April 2010, three bombs were set off, possibly created with money that originated in China, injuring four Chinese workers. President Thein Sein's government blamed the Kachin Independence Party,¹¹¹

¹¹⁰ See, Financing Dispossession note 88, *supra* at 28.

¹¹¹ The Kachin Independence Party signed a ceasefire with the Burmese government in 1994, but maintains an active army with approximately 8000 troops. See *Burma Rebels Killed in Clashes with Government Troops*, THE GUARDIAN (May 4, 2012), <http://www.theguardian.com/world/2012/may/04/burma-rebels-killed-clashes>.

the predominant local ethnic rebel group, although they denied responsibility. Today it is still unknown who detonated these bombs.

Map 3: Myitsone Dam Detail



(<http://www.rfa.org/english/news/myanmar/myitsone-01062014173251.html>)

In 2011, the Myitsone dam became an issue of national importance, having been taken up by local civil society groups and activists primarily in Rangoon. The adoption of the cause was partially due to the cultural significance of the Irrawaddy River, but also because of the publication of the environmental and social impacts of the dam.¹¹² As a result of the increased publicity, in September 2011, President Thein Sein was forced to suspend the construction of the dam for the duration of his presidency, through 2015. Civil society and Western nations urging for increased democratization in Burma hailed the decision as one respecting the rights of local populations and environmental concerns; however, some were concerned about the potential for the government to renege on this promise and restart the project prior. Still others did not believe that the move was for in the interest of respecting the “people’s voices,”¹¹³ but a symbol of the

¹¹² See, Financing Dispossession note 88, *supra* at 28.

¹¹³ *Id.*

growing rift between China and Burma. Concurrent with the domestic and international praise and criticism of the move, the Chinese were blindsided by the decision and have decried the suspension of the dam. Three years later, the Chinese continue to urge the Burmese government to respect Chinese rights to their property in Burma and reopen construction.¹¹⁴ Many academics and scholars believe that at least a portion of the reason President Thein Sein suspended the dam is because he wanted to signal to the world a decreased independence by China on Burma and an increase in other international engagement.¹¹⁵ Whether or not the suspension of the dam has been a main cause of increased international cooperation, there has in fact been increased trade with other countries.

Today, the stay on construction of the Myitsone dam is still in place and the dam remains only five percent complete.¹¹⁶ The site is blocked to general access by the Burmese military.¹¹⁷ While the construction stay is almost three years old, it has come to renewed prominence because of the upcoming presidential elections in 2015, after which the new president will be required to make a decision on the fate of the construction. Although she is using the dam project as criticism against the USDP government, after her support for the Letpadaung mine, Aung San Suu Kyi's position on the project is unknown. When asked, she states that the government should justify its position and "be brave" by making a final decision on the construction, likely so she, if elected president, will not have to.¹¹⁸ China continues to advocate for resuming construction and lifting the stay through official government channels and through public

¹¹⁴ *Id* at 28-29.

¹¹⁵ *Id*.

¹¹⁶ Shibani Mahtani, *Dispute Over Dam Tests New Myanmar*, WALL STREET JOURNAL (February 23, 2014), <http://online.wsj.com/news/articles/SB10001424052702304888404579381284256176034>.

¹¹⁷ Peter Hadfield, *Burmese villagers exiled from ancestral home as fate of dam remains unclear*, THE GUARDIAN (March 4, 2014), <http://www.theguardian.com/environment/2014/mar/04/burma-village-myitsone-dam-project-china>.

¹¹⁸ See Shibani Mahtani, note 116, *supra*.

engagement with Kachin State residents¹¹⁹; estimates show that the delay is costing China \$50 million a year.¹²⁰ While some believe that political realities of the Sino-Burmese relationship practically ensure that the dam construction will resume, activists believe that if so, the surrounding areas would turn into a site of active conflict by the Kachin Independence Army and others dispossessed of their land, also impacting the calculus of the feasibility of construction and further development in the area.¹²¹

If President Thein Sein, or any future President's government, does choose to permanently cancel the Myitsone dam project, the government must deal with the land and property rights of the individuals that were impacted by the initial construction and displacement. While canceling the project will cease Chinese involvement in that one particular area, the impacts of the initial Chinese involvement and deal must be reckoned with. While the impacted individuals cannot easily be made whole and have their land returned to them, how the government decides to handle their land claims, as well as the liabilities to China for breach, will speak volumes about the new democratic government and respect of rights. Burma can implement, on a small scale, a reformation of land tenure, or do nothing for the removed residents. Likewise, if any government does decide to revive construction, these same land issues will need to be dealt with regardless. They should be dealt with in a more constructive way than they were when the project was begun under the military government, similarly to if the project is not renewed. In either case, the way the government deals with China and its domestic

¹¹⁹ Colin Hinshelwood, *China's CPI offers to meet Kachin NGO after Myitsone war of words*, DVB.NO (January 25, 2014), <http://www.dvb.no/news/chinas-cpi-offers-to-meet-kachin-ngo-after-myitsone-war-of-words-burma-myanmar/36387>, May Sit Paing, *Thein Sein Violated the Official Contract*, THE IRRAWADDY (March 11, 2014), *See also* Peter Hadfield, note 117, *supra*.

¹²⁰ *See* Shibani Mahtani, note 116, *supra*.

¹²¹ *See* Peter Hadfield, note 117, *supra*.

population will speak volumes about how rights are respected and whose rights are respected in the new Burma.

7. Legal Analysis of Land Rights in Burma

1. Land Rights Provided by the Constitution

The Constitution is the supreme law of Burma. As such, it is the first place to begin an examination of laws and their protections in the country, including protections for land and private property rights and human rights. While the Constitution has numerous provisions that are relevant to land and property rights, it never establishes land or property rights as being of supreme importance in the country's legal scheme. The first place a property right could appear is in Article 21, the article that lays out the fundamental rights of all Burmese citizens. No property or land right appears in this article, though.¹²² The right to property and inheritance are guaranteed later in the Constitution, but they are not fundamental rights because they can be revoked. Like other Constitutional rights, the rights to property are subject to subsequent domestic laws. Some of these laws are discussed in the subsection below. Even if property rights were considered fundamental rights, they would still be subject to restrictions from other laws, but other laws could not obviate these rights, as happens legally in contemporary Burma.

Other provisions of the Constitution are relevant to land rights in Burma, even if they do not deal directly with land or private property. For example, the Constitution ensures that Burma is a market economy.¹²³ This has significant ramifications for land and property rights.

Presumably, a market economy protects property rights, as private property is the basis of

¹²² Article 21 lists fundamental rights as: the right of equality, the right of liberty, and the right of justice; that a citizen shall not be detained for more than 24 hours without court's permission.

¹²³ Constitution, Article 35

enterprise and the foundation for the acquisition of wealth. The Constitution also does permit private property, but it is subject to restrictions. Article 37 lays out that the Union:

(a) is the ultimate owner of all lands and all natural resources above and below the ground, above and beneath the water and in the atmosphere in the Union; (b) shall enact necessary law to supervise extraction and utilization of State-owned natural resources by economic forces; (c) shall permit citizens right of private property, right of inheritance, right of private initiative and patent in accord with the law.

Under this provision, the Burmese government could rescind property rights at any time. If this is true, the bundle of sticks of property rights does not effectively exist. There is no indication of any limitation on the government's power to confiscate private property, a limitation that surely should be in place to prevent abuses. Article 37 contains the only mention of the words "private property" in the entire Constitution. When the right to private property conflicts with another goal of the government, this Article makes it easy for the government to run roughshod on citizens to achieve short-term benefits. Additionally, there is no remedy for any violation of private property rights, leaving open the question as to whether the right is effectively protected at all.

Theoretically, the judiciary provides a backstop on decisions and actions regarding land and property rights. However, the judiciary is known as being horribly corrupt and inefficient.¹²⁴ Even if the poor and dispossessed could get their cases claiming a violation of their property rights heard in court, the judicial branch provides no true remedy. At some point in the future, after widespread reform, the judiciary could become a venue for protecting rights, but as it stands, the judges do not effectively enforce any laws, particularly those pertaining to the rights of the poor, particularly when the government is the defendant in a takings case.

¹²⁴ Civil Society 1, Interview, March 4, 2013.

Finally, the Constitution establishes Burma as a republic with states, regions, and the national government. All levels of government have their own legislative and governing powers. States and regions can enact laws that further protect land and property rights, so long as they do not conflict with the Constitution and their assigned duties. Regional and state legal development could provide a venue for creating stronger property and land rights before they are enshrined in the Union Constitution, although similar problems would be faced with the enforcement of these rights and laws.

2. Land Rights Under Domestic Law

A. Land Tenure in Burma

Land tenure forms the basis of property rights. In contemporary Burma, land tenure is shaky at best for the majority of the population. Burmese are liable to have their land confiscated by the government with no recourse and very few enumerated protections. Burmese land rights have changed greatly over time. Understanding the historical tenure system is important to understanding the current issues facing land and property laws and rights.

Under the last Burmese kingdom, there were four classes of property: royal land, official land, waste land, and private land. Royal land was the property of the king and rent was paid to him. People who were required to provide service to the king, for example officials, soldiers, and the royal family held official land.¹²⁵ Waste land was cultivable but unoccupied, while private land was held under allodial rule,¹²⁶ known as *dama-u-gya*, and land was acquired by clearing

¹²⁵ Cheng Siok Haw, *Land Tenure Problems in Burma, 1852 to 1940*, 38 JOURN. MALAYSIAN BRANCH ROYAL ASIATIC SOC. 1 (1965), 106.

¹²⁶ Allodial lands are held by absolute ownership and not subject to any rent or service.

and cultivating the vacant land. Land became vacant after being left uncultivated for ten to twelve years.¹²⁷ Once the British arrived, they established their own land tenure system.

Under early British rule, four types of tenure were developed. The first was a squatter system that was similar to the previous *dama-u-gya*, where a person could settle on any vacant land he improved. He was liable for eviction, but in most cases was allowed to remain so long as taxes were paid. After twelve years, the cultivator who continuously worked the same land and paid appropriate taxes was given title. Squatting was popular in already inhabited areas.¹²⁸ Another system that developed was the *patta* system. A *patta* meant the British granted a small plot of land, usually between 15 and 50 acres, to a designated farmer. This farmer was exempt from land taxes depending on the particularities of his plot of land. No loans were allowed against *patta* land and the farmer had to prove he was capable and had sufficient resources to farm the land without moneylenders.¹²⁹ The *patta* and squatter systems were often administered on adjacent lands, making claims difficult for both kinds of tenure.¹³⁰ The third system was the lease system. Under the lease system, a set revenue was collected for five to ten years, during which time the farmer could take up any surrounding land and pay no additional tax. This system was very costly for the British and abandoned quickly.¹³¹ The final system was the grant system, which was supposed to induce the wealthy to develop and cultivate the land with cheap labor and generous terms. Most of these grant lands were not taken by farmers, but by speculators or members of the government and civil service.¹³²

¹²⁷ See Cheng Siok Haw, note 125, *supra*.

¹²⁸ *Id.* at 107.

¹²⁹ *Id.* at 108.

¹³⁰ *Id.* at 109.

¹³¹ *Id.* at 109-110.

¹³² *Id.* at 110.

In the early 20th Century, the British came up with a new land tenure system that was supposed to collapse the previous four types of land into one while becoming more efficient. The new “colonization” system created government estates for selected British colonists. With this system, groups of Burmese “peasant proprietors” were created where, as farmers, they worked the land.¹³³ This created a system where most land was owned by non-agriculturalists, rather than agriculturalists and the majority of the Burmese were, therefore, officially landless.¹³⁴ Over time, further reforms limited the way that land could be traded between farmers and non-farmers, the inheritance of land, and more.¹³⁵

Today, Burma has a mix of customary and statutory law in place on tenure, sometimes at the same time and on the same plot. Here, customary law encompasses local, traditional ethnic, and social system strictures. This makes disentangling the multitude of land use laws in Burma onerous. Land is divided into eleven different categories in modern Burma. These categories are: freehold land; grant land; agricultural land; garden land; grazing land; culturable land, fallow land and waste land; forest land; town land; village land; cantonments; and monasteries. Each of these kinds of land is granted differently and have distinct responsibilities assigned to them by the state.¹³⁶

Generally speaking, in the past, in the ethnic areas of Upper Burma customary laws prevailed, while in Lower Burma, statutory land laws were followed. There were many exceptions to this general rule, and as movement of people increases throughout the country, customary land laws are reduced in their significance, although at the same time, their

¹³³ *Id.*

¹³⁴ *Id.* at 111-112, 115.

¹³⁵ *Id.* at 116.

¹³⁶ UN HABITAT AND UNHCR, GUIDANCE NOTE LAND ISSUES MYANMAR (2010), 6.

importance is rising in understanding competing claims on land.¹³⁷ This is because no statutory law recognizes customary land use or land tenure systems, making these kinds of tenure claims invalid.¹³⁸ While customary land titles may be recognized by the state in non-official capacities, when the state is looking for land for a joint venture project non-statutory title is not recognized.¹³⁹ Discussed in more detail below, even those with statutory tenure to their land have weak tenure.

B. Domestic Laws on Land and Property

The Constitution leaves many gaps for domestic law to fill in, particularly with regard to protections against the right of the government to confiscate land. While Parliament should be passing laws that reflect the importance of private property for all in Burma, it is instead passing laws that help the government further control the land and facilitates the unlimited land grabs allowed under the Constitution. The Constitution requires that the government “enact necessary laws to protect the rights of peasants,”¹⁴⁰ but like the rest of the Burmese Constitution, exactly what is required is unknown and parliamentary lawmaking does not focus on the rights of the poor and vulnerable.

One of the older laws still in force on this topic is the Land Acquisition Act of 1894. This law provides that the government must compensate, at market rate, those whose land is taken by the government for a public purpose and establishes a procedure for doing so. Public purpose is not clearly defined. The Land Acquisition Act governs all issues relating to takings of land, despite its age and the fact that it is not in line with current government practice. Today, the

¹³⁷ THE BURMA ENVIRONMENTAL WORKING GROUP, BURMA’S ENVIRONMENT: PEOPLE, PROBLEMS, POLICIES (2011), 37.

¹³⁸ *Id.* at 38.

¹³⁹ *Id.*

¹⁴⁰ Constitution, Article 23

government does not usually provide any meaningful compensation as required by the Act, and takes land for any reason. Much of the forced confiscation of land that has taken place since the 1962 military coup has been justified through this law.¹⁴¹

In 2012, the Parliament passed two laws that dramatically changed land and property rights in Burma. The first law is the Farmland Bill. The Farmland Bill attempts to put into place a system to secure rural tenure with a land use certificate and registration system. This gives those with secure tenure the rights to sell, exchange, mortgage, inherit, and lease land. The process of applying for a land certificate and registration are not clear and are left under the Bill to the executive branch. The Farmland Bill is progress for secure land tenure, but because of Article 37 of the Constitution and § 3(d) of the Bill, the government retains ultimate title and can take back land rights if the conditions of use are not met or a justification can be made that they are not. Farmers are no more than hired workers and the government is the landlord.

The Farmland Bill sets up a feudal land system. Under the Farmland Bill, farmland is defined as “paddy land, *ya* land, *kiang* land, sifting-cultivating land (*taung ya*), perennial plant land, *dhani* (coastal) land, orchards, and alluvial land”¹⁴² and is for boosting agricultural production.¹⁴³ The Farmland Bill requires farmers to get permission from the Farmland Management Body to change the use of the land, including the type of crop that is grown.¹⁴⁴ This complicates the market orientation of Burma and violates the idea of independent land ownership. This portion of the Farmland Bill restricts a significant portion of the bundle of sticks.

¹⁴¹ See Scott Leckie and Ezekiel Simperingham, note 36, *supra* at 23.

¹⁴² Farmland Bill (2012), § 3(a)

¹⁴³ *Id.* at § 3(b)

¹⁴⁴ *Id.* at § 12(h)

The Farmland Bill repealed the hated 1954 Land Nationalisation Act. The Land Nationalisation Act recognized some private ownership of agricultural land, but it restricted the sale and transfer of such land and allowed the state to confiscate fallow lands for any reason. The law did not allow for outright private ownership and required that all land be leased from the state. Despite the repeal of the Land Nationalization Act, the government is still the ultimate titleholder of all land and can revoke land rights if it deems necessary. The idea to repeal this law was a good start to ensuring title and land and property rights, but was only a first step, as the Farmland Bill does not ensure many more rights for farmers and the poor.

The other law was the Vacant, Fallow and Virgin Land Management Law. The Law says that any vacant, fallow, or virgin land can be taken by the government then claimed by investors. The law aimed to clarify ownership under the Constitution, but has mostly benefitted business. Under the Law, the president establishes a central committee that grants permission to use land, establish tax rates, and request security fees. The central committee also determines if land is being appropriately used or if it should be considered virgin, vacant, or fallow under the law and, if so, it is capable of being confiscated.

Often times, the land that is taken by the central committee is actually being occupied and farmed, but by individuals without adequate title to the land. Without title, the government does not recognize their claims and sees the land as being unoccupied. As unused land it can then be sold to investors or government cronies.¹⁴⁵ While the land can be sold to foreigners, preference is given to citizens.¹⁴⁶ Article 25 of the law states that the government and central committee should work to determine a way of ensuring the security of land tenure for farmers who are cultivating the land even if they do not have title and may practice traditional farming methods

¹⁴⁵ Kyaw Kyaw, *Land Reform Key to Burma's Future* THE DIPLOMAT (August 25, 2012), <http://thediplomat.com/2012/08/25/land-reform-key-to-burmas-future/>.

¹⁴⁶ Vacant, Fallow, Virgin Land Management Law (2012), Article 12.

that include leaving land fallow. This has not yet happened and it is likely that the Law will continue to benefit big business, as the Letpadaung copper mine and Myitsone dam would have.

This Law has the potential to be particularly damaging because of its interplay with the Farmland Bill. Under the provisions of the Farmland Bill, crops cannot be changed without the consent of the government. As the price of rice, Burma's main agricultural crop, falls worldwide, more farmers are suffering losses and leaving their land fallow rather than going into further debt.¹⁴⁷ With the lands lying fallow, the government can then expropriate the land and sell it, leaving the poor farmers without any land to work. This law is damaging to those with the least secure property and land rights in the country and opens up more possibilities for grabs by international and domestic actors, like those that occurred around the Letpadaung mine and Myitsone dam.

3. Burma's Obligations Under International Law

Only the fifteen international treaties it has ratified or acceded to, only two of which are fundamental human rights treaties, bind Burma. Of these treaties, only one is on point to land or property rights, the Universal Declaration on Human Rights (UDHR). Of these other fourteen treaties, only three of them deal with land and property rights in any regard. The three treaties are: the ILO Convention 29 on Forced Labor ("ILO 29"), the Convention on the Rights of Persons with Disabilities ("CRPD"), and the Convention to Eliminate Discrimination against Women ("CEDAW").

Burma was one of the first signatories of the UDHR in 1948. Article 17 of the UDHR states that "(1) Everyone has the right to own property alone as well as in association with others

¹⁴⁷ Jason Szep, *Special Report: As Myanmar reforms, discontent grips countryside* TIME MAGAZINE (Aug. 9, 2012) <http://www.reuters.com/article/2012/08/09/us-myanmar-farms-idUSBRE87800V20120809>.

and; (2) No one shall be arbitrarily deprived of his property.”¹⁴⁸ At the same time, international law does not positively determine what property is or set forth a standard for arbitrary deprivation. This is critical, particularly in cases like Burma, because the feasibility of a sustainable property regime rests on a standard definition of property that encompasses the variances in property law across the country and compensation that is due after land has been taken arbitrarily. Without recognition of the need for compensation, the right to property has little inherent value, as is currently the case in Burma.

Article 19 of ILO 29 states:

1. The competent authority shall only authorize recourse to compulsory cultivation as a method of precaution against famine or a deficiency of food supplies and always under the condition that the food or produce shall remain the property of the individuals or the community producing it.
2. Nothing in this Article shall be construed as abrogating the obligation on members of a community, where production is organized on a communal basis by virtue of law or custom and where the produce or any profit accruing from the sale thereof remain the property of the community, to perform the work demanded by the community by virtue of law or custom.

Under the Farmland Bill, Burma can require compulsory cultivation of a particular crop at any time. This is not a protection against famine or a lack of foodstuffs, but a measure of control for the government. The government also does not let individual farmers keep their crops for sale. Burma is liable under 19(1) for its multiple breaches of the ILO 29. Burma is not granted an exception under 19(2) because production is not “organized on a communal basis.” Despite the Burmese Way to Socialism and nationalization of industry, farming was never done on a communal level and is not done that way today under the contemporary market economy.¹⁴⁹ The benefits of the sale of goods did not accrue to the community; rather any benefits there were went to the government.

¹⁴⁸ Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

¹⁴⁹ U Thant Myint, *see* note 6, *supra*.

Article 12(5) of the CRPD states that:

States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

The CRPD is the most recent treaty Burma has bound itself to and went into force in 2012.

Overall, domestic laws on disability discrimination are unknown but are likely not yet in compliance with the CRPD, as focus has been on financial and investment reform. With regard to property laws, the Constitution does grant inheritance rights, but does not recognize land and property rights as a fundamental right. Discrimination against the disabled may or may not be enshrined in law, but is likely to be a customary practice that could arbitrarily deprive the disabled of their property. More access to domestic laws and information regarding stigmas surrounding the disabled would further an analysis of Burma's compliance with this Article and property rights.

Finally, Article 16(h) of CEDAW states that there are, "the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration." As explained above, there is no fundamental right to property or land in Burma. In order to be in compliance with this treaty provision, men and women would have to be treated equally with regard to property rights. If the letter of the law provides for equality but the execution of the law does not, Burma is not complying with its international obligations.

Regardless of Burma's compliance with the text of these treaties, Burma is violating each human rights treaty it has signed. The 1982 Burma Citizenship Law revoked the citizenship of

different ethnic groups in Burma, most notably the Rohingya Muslims.¹⁵⁰ The Rohingyas are descendants of workers the British brought in from other parts of British India to work, but have lived in Burma for generations. The Rohingya are currently considered stateless and are internally displaced within Burma. As a result of their non-citizen status, the Rohingya are not protected under any Burmese law and receive no benefits. While they are not technically forbidden from maintaining agricultural land,¹⁵¹ they effectively are. This is a gross violation of international law and puts Burma in violation of all of its treaty obligations that would protect this group. The status of the Rohingya is not the subject of this thesis, but serves as an important illustration as to why land and property laws are important and intertwined with international law, not just relevant to domestic legal issues.

8. Creating Land Rights for Burmese Citizens

1. Creating Land Tenure in Burma

Once a state decides to undertake creating new land rights, these new land rights are created in two main ways, by the State granting rights to individuals or groups, or by individual application of customary tenure.¹⁵² Creating private rights to land is thought to increase the productivity of land and tenure goes directly to a discrete individual. The other method, individualization of land, often takes place in African countries. With this method, land becomes a commodity when it was not in the past, which creates new incentives to exploit land.¹⁵³ The goal of both of these kinds of land tenure is to create economic value. While that is an important

¹⁵⁰ *Burma Citizenship Law* REFWORLD (2013), <http://www.refworld.org/cgi-bin/tehis/vtx/rwmain?docid=3ae6b4f71b>.

¹⁵¹ See UN HABITAT AND UNCHR, note 139, *supra*.

¹⁵² See Bruce, note 46, *supra* at 70, 143.

¹⁵³ *Id* at 70-79.

outcome in increasing land and property rights in Burma, the primary incentive to creating land and property rights in Burma should be to improve security and adherence to the rule of law.

Throughout history there are many examples of state or private actors confiscating property without consent or compensation. Restitution for these thefts is not largely discussed, but can be found in the transitional justice literature. This framework is appropriate here, as land restitution should be a core component of any move towards democracy, and would be a central component of any transitional justice framework where property theft occurred. Within the transitional justice literature, there are three main options for creating land rights, once that path is decided upon. While these come directly from the transitional justice literature, they are not limited to that context. Any of these three methods could apply in the case of Burma to determine what, if any, new land rights should be granted and how to grant them.

The first option is to maintain the status quo. In choosing to maintain the status quo, Burma would not look backward at any land dispossession that had occurred. Instead, those who currently hold land would continue to hold land, regardless of the means of acquisition. While this type of property disposition has certain benefits, it also has significant drawbacks. Maintaining the status quo “ensures that investment and trade are not attenuated by protecting existing investment-backed expectations”¹⁵⁴ and reassures investors and property owners that their land will not be expropriated and given to a perceived victim of land grabs. This option also requires the least amount of government intervention.¹⁵⁵ The lack of government intervention makes maintaining the status quo easier to implement and least likely to case new administrative hurdles. However, maintaining the status quo legitimizes an unfair land tenure scheme.¹⁵⁶ Those who benefitted under the SLORC rule and received land would get to keep their land, regardless

¹⁵⁴ Bernadette Atuahene, Property and Transitional Justice, 58 UCLA L. REV. DISCOURSE 65, 73 (2010).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 74

of the equity of the issue or their lack of proper title. As a result, this land transfer program is the most likely to cause social upheaval and draw out anti-government sentiment.¹⁵⁷ While administratively Burma might choose this kind of program, particularly because of general disinterest in a comprehensive transitional justice program, in order to secure land tenure for all and cement the rule of law in the country, this is not the path Burma should take.

The second option Burma could take, returning to a prior status quo, is a much more difficult one to take. Before any restitution for property theft could take place, Burma must first identify how far back it wished to look in granting restitution and determine how to identify those who would receive benefits. It is possible that Burma would look to land holdings in post-constitution 2008, pre-1988 protests, pre-1974 takeover, pre-coup 1962, post-independence 1948, post-Crown colony status 1937, or any number of other dates, or combination of dates, of significance. Determining which date would privilege certain Burmese over others, a necessary evil. However, this reversion has a second problem in Burma—attempting to determine who is eligible for restitution. In areas of Burma that had assigned land on a customary basis and no deeds were held, establishing who actually had tenure would be quite difficult. Even with deeds, this process could be quite arduous. This system also fails to take into account the landless peasants who suffered when land was taken out of cultivation. Finally, the Burmese government would also have to identify a fair price for each piece of property. To establish this price, outside of the present fair market value, the government could look to factors like subsidies the land has received, such as subsidies to build a mine or dam, or the conditions of the land theft.¹⁵⁸

If Burma decided to take this second option, two types of restitution programs exist: reparations or restoration. With reparations programs, if one can prove property was wrongly

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 78

confiscated, the dispossessed and their heirs would have a window of time to file a claim on the land. The current status of the dispossessed landowner and his family is irrelevant under a reparations scheme.¹⁵⁹ The claim would then be verified and compensation, either in the form of money or other land, granted.¹⁶⁰ With restitution, scholars argue, an individual can only benefit if he or she is economically dependent on the state. Under this type of restitution program, the goal is to cure social ills and reinforce the social contract, not just allow access to land. Because of the nature of restitution, more options are available for harmed individuals, including land and payment, but also in-kind payments of services like education.¹⁶¹ Like the return to the status quo, exercising this option will leave out many who had been dispossessed, either because their claim was not covered or they could not prove their rights. Likewise, turning the clock back is not always feasible and will cause market disruption. Conversely, this scheme, unlike the first, does grant individuals more rights to land and it guarantees them by law.

The third scheme requires creating an entirely new land regime. If done correctly, this new property scheme could equalize wealth and promote consistency. Essentially a redistribution program, there are two main options for execution. First, through a tax and transfer system, the government can move wealth from the high end of the spectrum to the low. Like the redistribution program mentioned as a potential second option, taxes address larger issues than just income and property inequality and start to tackle social inequalities.¹⁶² Wealth redistribution is technically difficult to administer and can incentivize wealthy individuals to move their assets out of the country.¹⁶³ The second option is through land redistribution. Land redistribution programs do not deal with past land claims, but rather grant all citizens increased

¹⁵⁹ *Id.* at 75-76

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 84

¹⁶³ *Id.* at 85

access to land. This method of creating a new land regime would likely be the best received among those dispossessed of their land. Land can either be equalized, so all individuals and companies have the same access to land, or redistributed, so that land can only be acquired through legitimate sale.¹⁶⁴ Burma is still over three quarters a rural agrarian society: security of tenure and increased access to land through land equalization, coupled with further changes in the law regarding production, would improve lives and livelihoods significantly. Additionally, these programs capture the entire population of eligible landowners, not just those that owned land and can prove their former tenure.

Despite the benefits creating a new land regime could bring, either through taxation or general land redistribution, it is unlikely to occur. Large-scale transfer of property in Burma is unlikely for several reasons. First, the Union is the owner of all land. The government benefits from maintaining weak property laws and from the stability of investment allowed as a result of maintaining the status quo. Second, the Burmese state is weak and corrupt. It does not have the institutional capacity or desire to institute widespread land programs or tax reforms. Finally, there is an overall lack of interest in transitional justice and protest movements. While individuals and small groups are interested in preventing land grabs or requiring compensation for land grabs, the population overall is not urging the government to undertake reforms, as happened in countries like South Africa, nor has there been any international pressure for reform.¹⁶⁵ Unfortunately, Burma will likely have to work to strengthen the property rights it does have and ensure that property laws are followed to improve land tenure.

¹⁶⁴ *Id.* at 87-88.

¹⁶⁵ *Id.* at 89-90

2. Regional Examples of Improved Land Tenure and Property Protections

As Burma will not engage in a radical change in property rights, looking around Southeast Asia could provide insight into how economic development can be paired with the protection of property and land rights and provide a new model for development in Burma and prevent the harms that have been caused by Chinese investment and the harms that could be caused as a result of the interplay of the Farmland Bill or the Vacant, Fallow, and Virgin Land Management Law. This section examines two separate issues—natural resource extraction moratoriums and land title reform. Moratoriums in Laos and the Philippines are examined as a path that Burma is currently walking, and land title reform in Cambodia and Vietnam provide contrasting examples as to how land reform can work or not.

In 2012, Laos instituted a four-year moratorium on new mining projects and rubber concessions.¹⁶⁶ Like Burma, Laos' population is heavily reliant on the agricultural sector and many of the country's land and mineral resources have been sold off to foreign companies, particularly China, Vietnam and Thailand.¹⁶⁷ The goals of the Laos moratorium are threefold—to increase job opportunities for Laotians in mining, to improve the environmental impact of mining, and to ensure that mining companies comply with the contracts they have signed.¹⁶⁸ Once the moratorium is lifted, the social and environmental impact of each mine will be assessed before new projects are approved. Currently, the Laos government is conducting audits of projects.

¹⁶⁶ *Mining moratorium on new projects introduced in Laos*, AUSTRALIAN BROADCASTING NETWORK (Jul. 23, 2012), <http://www.abc.net.au/news/2012-07-05/an-laos-mining-moratorium/4112172>.

¹⁶⁷ *Id.*

¹⁶⁸ *Laos to accept new mining investment proposals in 2015*, ASIA NEWS NET (September 22, 2013), <http://www.asianewsnet.net/Laos-to-accept-new-mining-investment-proposals-in--51934.html>.

Similar to Laos, the Philippines had a two-year moratorium on mine exploration that expired in March 2013.¹⁶⁹ Like in Burma, in the Philippines, China had a strong interest in mineral extraction and ran several mining projects, mostly for chromium, coal, copper, gold and nickel.¹⁷⁰ Prior to the moratorium in many regions of the Philippines, residents protested and rejected the entry of Chinese mining firms, even when promised benefits and improved infrastructure.¹⁷¹ Filipinos claimed that Chinese companies abused loopholes to acquire small mines on land set aside for local miners. Additionally, they claimed that the Chinese mining companies gave concessions to the government and local landowners to avoid certain mining regulations as well as exploiting favorable laws for small mine ownership to mask their level of participation in the mining sector. Environmental concerns, land abuse, and concerns of corruption caused the Department of Environment and Natural Resources to impose an eighteen-month moratorium on mining projects.¹⁷² The legislation lifting the moratorium did not rearrange responsibility for small-scale mining, despite the fact that is where much of the abuse occurred, and continues to occur. Overlapping laws on environmental protection help in this area, as shown from a high profile Filipino bust of Chinese illegal manganite mining.¹⁷³

Profit for the country should not come at the expense of property and land rights for citizens. The Laotian moratorium has not yet expired and the Filipino ban has been so recently lifted, that their effectiveness cannot be evaluated as a potential path forward for Burma on all natural resource extraction. The experience of the Myitsone dam shows that, at the very least,

¹⁶⁹ *Philippines lifts moratorium on new mine exploration*, STRAITS TIMES (March 14, 2013), <http://www.straitstimes.com/breaking-news/se-asia/story/philippines-lifts-moratorium-new-mine-exploration-20130314>.

¹⁷⁰ Joel D. Adraino, *China Shafts Philippine Mines*, ASIA TIMES (May 19, 2011), http://www.atimes.com/atimes/Southeast_Asia/ME19Ae01.html.

¹⁷¹ Jennifer C. Li, *China's Rising Demand for Minerals and Emerging Global Norms and Practices in the Mining Industry*, 22 MINERALS & ENERGY 103 (2007), 113.

¹⁷² *Id.*

¹⁷³ *Philippines Detains 18 Chinese for illegal mining*, AGENCE FRANCE-PRESSE (August 6, 2013), <http://globalnation.inquirer.net/82429/philippines-detains-18-chinese-for-illegal-mining>.

Burma is considering moratoriums on particular controversial projects. A moratorium on all new mine contracts would give the Burmese government time to stabilize, give the Union government and local governments time to create actionable land and property rights, and decrease exploitation of the land and people. After the Letpadaung copper mine conflagration, a moratorium would likely be favored by a large segment of the population, including rural farmers, monks and nuns, and human rights defenders. The government would likely oppose any total ban or moratorium for undermining foreign confidence and investment in the country. Burma could also benefit from an audit program, like the one in Laos, to ascertain the actual status of mines, land grabs, and the environmental impact of mining. This would require Burma to assert significant independence against China and its huge level of investment in Burma, but it is not an impossible task.

It is important that Burma work to create reform land tenure laws during the political transition. Neighboring Cambodia provides an example of what Burma should not do to secure property rights. Like Burma, Cambodia spent decades under dictatorship and in civil war. In 1991, Cambodia signed the Paris Peace Agreement, ending decades of conflict and establishing the UN Transitional Administration in Cambodia (UNTAC). UNTAC did not prioritize HLP rights, and as a result, Cambodian land rights have suffered significantly.¹⁷⁴

In Cambodia, land titling is done on a cadastral system.¹⁷⁵ Cambodia's 1992 Land Law states that after five years of peacefully occupying land, occupants receive tenure. This law was poorly understood and inconsistently implemented, which created gaps in registration, as only

¹⁷⁴ Rhodri C. Williams, *Stability, Justice, and Rights in the Wake of the Cold War-The Housing, Land, and Property Rights Legacy of the UN Transitional Authority in Cambodia* (2009), at 19-21.

¹⁷⁵ A cadastral system is one based on the public record, survey, or map of the value, extent, and ownership of land as a basis of taxation.

certain types of land were eligible for concessions.¹⁷⁶ Under this law, the State was the legal owner of all land, but there were rights of possession for agriculture for farmers.¹⁷⁷ The 1992 Land Law did not secure tenure or create effective land management and was replaced with a 2001 Land Law that created a new framework for land tenure. Under this new framework, land distribution was to take place through “social land concessions” rather than the individual self help system established a decade earlier, but tenure for individuals who had begun their occupation under the 1992 law was recognized.¹⁷⁸ The new land regime also sets out comprehensive rights for indigenous groups to their traditional lands and states that all land is to be mapped and interests demarcated and registered.¹⁷⁹

Between 2001 and 2006, zero concessions were granted to individuals, despite economic concessions for foreign businesses.¹⁸⁰ This has negatively impacted tenure for the poor and rural Cambodians. Like in Burma, many people do not have clear knowledge of the bounds of their land and do not have any paperwork to register their land under the 2001 law. When they cannot register the land, tenure is unstable. Additionally, most of the land registration has occurred in urban and peri-urban areas.¹⁸¹ For this kind of system to be successful in Burma, land registration must extend to all areas, particularly given that so much of Burma’s population is based in rural areas.

Cambodia and Burma have significantly similar characteristics in land and property law. Learning from Cambodia, the decision to not address HLP rights in the Burmese transition would be a failure of prospective thinking. The lack of clarification of land and property rights in

¹⁷⁶ Rhodri C. Williams, *see note 174, supra*.

¹⁷⁷ *See* Sovann Sar, note 59, *supra*, at 5.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ FOOD SECURITY WORKING GROUP’S LAND CORE GROUP, LEGAL REVIEW OF RECENTLY ENACTED FARMLAND LAW AND VACANT, FALLOW AND VIRGIN LANDS MANAGEMENT LAW (November 2012), 32.

Cambodia exacerbated problems of land grabbing, speculation, and exploitation of natural resources.¹⁸² These problems all already exist in Burma and should be dealt with sooner rather than later. At the same time, if Burma is like Cambodia in the exodus of farmers from rural areas to cities and peri-urban areas, new problems, such as squatting, can be headed off.

Another neighbor, Vietnam, provides a better example of the path Burma can take in reforming land and property laws. In 1986, the Vietnamese government transitioned from a centrally planned economy to a market economy. As part of this reform, the government dismantled rural collective property and assigned land rights to farmers and allowed individuals to buy and sell animals and crops.¹⁸³ Through these reforms, agriculture became one of the preeminent drivers of economic growth in the country, lifting many Vietnamese out of poverty and creating many incentives to invest in land and agriculture.¹⁸⁴ Subsequent reforms in the 1990s continued and solidified these reforms at a slower pace of change.¹⁸⁵

Land reform in Vietnam has not given fee simple title to individuals. In 1993, the Land Law extended land tenure rights to twenty years for annual crops and fifty for perennial crops. The 1993 Land Law also allowed for the exchange, lease, inheritance and mortgaging of land for the first time. Within six years almost 90 percent of peasant households had been granted certificates for 78 percent of Vietnam's agricultural land.¹⁸⁶ Concurrent reforms helped further the impact of land tenure reform. One of the major limits on land reform in Vietnam was agricultural commercialization. The 1993 Land Law was amended in 2001, 2003, and 2004. The 2001 amendments allowed foreign investors to acquire land rights, while the 2003 amendments

¹⁸² Rhodri C. Williams, *see* note 174, *supra*.

¹⁸³ Michael Kirk and Nguyen Do Anh Tuan, Land-Tenure Policy Reforms Decollectivization and the *Doi Moi* System in Vietnam, IFPRI Discussion Paper 00927, at 1.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 8.

introduced reforms to make the market for land operate more efficiently. The 2003 changes also allowed land certificate holders to buy and sell their usufruct rights¹⁸⁷ and change the assigned nature of their land. Finally, in 2004, the law was amended to improve gender parity in land tenure by adding the wife's name to the title.¹⁸⁸

Like Cambodia, Vietnam also uses a cadastral system to register land and provide title. However, Vietnam's Comprehensive Land Law (1993) is much more inclusive than Cambodia's Land Law, making it much more successful.¹⁸⁹ The Comprehensive Land Law and its subsequent amendments contain all land classifications and maintain zoning requirements that the Cambodian law is missing.¹⁹⁰ In Vietnam, secure tenure has led farmers to some contradictory points. Some farmers have adopted environmentally friendly policies such as anti-soil erosion programs and reforestation measures, while others have used their secure tenure to convert their land to more invasive and more profitable uses.¹⁹¹ The fact that these rights exist, though, is the reason that individuals can make the choice to use their land rights as they see fit.

3. Increasing Land Tenure and Property Protections in Burma

Realistically, Burma will not create a new land tenure program like one of those outlined in subsection 1 above. There is no political will to undertake such a massive project, particularly as those in charge would lose some of their power and benefits. While a democratically elected government runs the country, two thirds of the government comes from the military party or military affiliated parties, who will not voluntarily agree to decrease their financial benefits

¹⁸⁷ Usufruct rights come from Roman law and mean the rights to enjoy the use and advantages of a third party's property short of destruction or waste of its use.

¹⁸⁸ *Id.*

¹⁸⁹ FOOD SECURITY WORKING GROUP'S LAND CORE GROUP, *see* note 123, *supra*.

¹⁹⁰ *Id.* at 34-35.

¹⁹¹ *See* Michael Kirk and Nguyen Do Anh Tuan, note 183, *supra*.

coming from their land. Additionally, transitional justice is not a popular idea in contemporary Burma and the country's population would largely prefer to move forward rather than look backward to redress wrongs. Changing the land tenure system would constitute a large transitional justice project that does not have support at this point in time.

While changing tenure so fundamentally is not likely to occur, there is a movement in the country to heavily amend the 2008 Constitution, or even call for a new constitutional convention. Many believe amending the current Constitution is preferable to creating a new one,¹⁹² but the process of amending the Constitution could create an opening to improve land tenure rights. In amending the Constitution, the Parliament could revoke some of the more egregious land and property restrictions, for example, it could remove the clause in Article 37 that the Union government is the ultimate owner of all land and enshrine property and land rights as fundamental in Article 12.

In the interim, while Constitutional amendments are being debated and voted upon, the Parliament could take remedial measures to protect land and property rights. For example, Burma could take cues from Vietnam in drafting a comprehensive law covering all land issues, but do more to protect all citizens' tenure, farmers and non-farmers alike. As shown in Vietnam, widespread land rights will help expand the economy more than land grabs for joint ventures between the Burmese and foreign governments. At the same time, without limiting liberalizing the agricultural economy, Burma can attempt to place safeguards on the land, preventing some of the abuses like those that have already happened in Burma, as well as in Laos, the Philippines, Cambodia, and Vietnam. Burma can learn from each of these countries in constructing strong property and land law a secure land tenure system, even if the government retains ultimate ownership of land.

¹⁹² See Harding, note 67, *supra*.

Creating a strong land law system and land tenure program is vital to Burma's development; the government cannot afford to dispossess peasants from the land economically or socially, as so much of the population is dependent on agriculture and land for their survival. As the transition continues, it is likely that property and land issues will rise to the surface beyond reactions to land grabs and resulting crackdowns, even if the government tries to hold these issues down. Prominent among these issues will likely be the return of refugees and internally displaced persons to their hometowns and villages looking to reclaim their land or purchase new land, the increase of urban populations seeking shelter and the formalization of tenure for those without it, and the role of the judicial system in arbitrating land disputes. Burma can prepare for some of these eventual issues through passing legislation that increases land security and makes clear the rights that all Burmese should have under domestic and international law.

4. Increasing Economic Development in Burma for Ethnic and Rural Populations

While not related to the Farmland Bill or the Vacant, Fallow, and Virgin Land Management Law, the violent demonstrations ensuing from the takings at the Letpadaung copper mine and Myitsone dam are exemplary of the land grabs that have been taking place across Burma for some time. The Farmland Bill and the Vacant, Fallow, and Virgin Land Management Law are likely to exacerbate tensions surrounding land and make situations like the state violence at the Letpadaung copper mine more common. The two laws give the government an additional set of tools to use to continue appropriating land without any check on its power. The situation reflects the ongoing tension between economic development, human rights, and property and land laws in Burma.

Internationally financed development projects in Burma, either created and financed by the World Bank, IMF, or Asian Development Bank, or other countries such as China, will not end soon. There is too much need within the country, too much land that can be exploited, and too much desire for international prominence for this to occur. Beginning to work with ethnic groups in the areas in which major construction projects are happening, as well as including a work or land element for local populations, will greatly reduce the amount of tension in these deals and facilitate economic development, as will including land and agricultural support programs in development projects.

In the case of the Letpadaung mine, Article 37 property rights were less important than what the government could gain from the partnership with Wanbao, and accordingly took the land required for the deal. There were no limits on confiscating land, and the short term gains from the copper mine were more important to the government than a strong base of property rights for citizens and a natural, but slower, expansion of the market. This is not to say that the market would not develop quickly; as an emerging economy Burma could experience high levels of growth, levels that could be sustained over a longer period if proper protections are in place. In the rush to develop the country, incidents like the attack at the Letpadaung mine may become more common as villagers stand up for their rights and face the government. Similarly, complete shutdowns like that at the Myitsone dam could become commonplace as residents protest for recognition of their rights. Enhanced protections of property rights could ease these problems.

While economic development in Burma may not be the primary concern of Chinese investors, it should be a prominent concern of the Burmese government, regardless of the party in charge. Increasing the amount of economic growth for the “regular” Burmese would require significant changes in the law and policy, though. Primarily, it would be necessary to make deals

that are to the primary benefit of the Burmese population, rather than another deal that benefits military junta cronies or other elites in Burma. A change in land laws that allow farmers full ownership of their land and the ability to decide which crops to grow, how to sell surplus goods, and the ability to transfer land freely, would be one such change. This type of change will hopefully come eventually as Burma continues to engage on a global stage and realizes that stability promotes growth. Another possibility, although less likely, is a new land regime, including transfers of land to those who have been stripped of their land, and significant additional protections for land rights, perhaps including constitutionalization of land and property rights. Strengthened land and property laws would protect Burmese citizens from foreign corporations or companies attempting to plunder the land for their benefit, as any resistance makes such attempts much more difficult and costly. With any of these steps the beginning of a truly protective land and property regime could exist in Burma, creating opportunities for great economic growth, while also allowing for the development of human rights and adherence to the rule of law.

9. Next Steps

The issues discussed in this paper barely scratch the surface of land and property rights in Burma. To better understand the interplay between property law and other aspects of domestic law, a deeper analysis is needed into the other laws that influence land and property rights. Each section of this paper has unasked and unanswered legal questions. First, in order to fully understand Burma's current land system, further analysis of past land use is necessary. This includes older law, both customary and explicit, as well as an analysis of Japanese law during the occupation. How did early land use and property law change between regions in Burma or different Burmese kingdoms? What changes did the Japanese make to the British-Burmese

system that stayed after the end of the war and into the democratic era? Second, more research is necessary as to the connections between international and domestic law. This is complicated by the fact that not all Burmese law is readily available in English. Having up to date and accurate domestic laws would help in interpreting Burma's obligations under international law and identifying places where the country and its laws are in violation of a treaty provision and how the violation could be remedied. Third, an analysis of state and regional laws on land and property rights is necessary. Trying to find these laws, and in an English translation, may also prove challenging. Regional protections for land and property are as important as the protections afforded by the Union. The Union's Constitution is a floor, not a ceiling on the protections for any of a citizen's rights. State and Regional laws are divergent between themselves, but give another important venue for understanding how rights are respected in different parts of the country. Fourth, further analysis of domestic laws relating to land and property rights is necessary. Many more than three laws deal with these issues and must be examined to fully understand the obliterations the government has and the holes that should be filled by new legislation. Fifth, additional research should be done to understand how neighboring countries that have undergone a similar democratic transition are adapting their laws and legal framework to better protect all rights, not just land or property rights. More techniques for protecting land and property rights should also be analyzed in light of what is currently allowed under Burmese law.

Finally, there are many topics that this paper does not touch on. For example, abuses of property laws between private actors or between private actors and the military and potential remedies are not discussed. Because Burma is in such a state of conflict, knowing what protections individuals have against government abuses of their property rights, if any, would

paint a much fuller picture of land and property rights. Similarly, after the anti-Muslim violence of March and April of 2013 knowing what rights to their property and land the victims have under law would help in understanding the balance between property and land rights and other goals of the government. The same holds with other minority ethnic groups in Burma. Not until this balancing is known can reforms be made to achieve a potentially more optimal balance. In looking at any remedies for violating domestic laws, the judiciary and judicial system become important. In Burma the justice system is incredibly corrupt and does not adequately respond to the needs of citizens in any matter.¹⁹³ Anti-corruption measures may help enforce land and property rights; however, the extent to which that may be possible cannot be known without further information and legal analysis.

10. Conclusion

Despite reforms, Burmese land and property laws do not adequately protect land and property rights as they should under the Constitution or under domestic laws. In fact, land and property rights are being eroded by new laws for a large segment of the population of Burma, the peasant farmer. Even those that do not work the land have attenuated rights to their land, due to the government's ownership of all lands and resources in the country. The government is increasing its ability to take lands in violation of international norms and established property and land rights. This enhances opportunities for foreign investment and joint partnerships, but at the expense of the rights of the citizenry. Land and property rights are essential to the growth of the Burmese market economy and will also promote other rights currently lacking. Their importance cannot be overstated. The government must begin respecting these rights more fully

¹⁹³ Lawyer 1, Interview, March 8, 2013.

to achieve any of its further goals for the country, or it is likely that more protests and riots will take place.

There are various methods to obtain the end objective of increased protections for land and property rights and human rights in the face of growing economic development. Constitutionalization of rights is one way, as is granting land tenure and establishing a clear and uniform system to acknowledge tenure in the future. Political will in Burma is currently too low to accomplish any of these daunting tasks, but as the political transition grows and democracy deepens, it is possible that new protections will take hold, and that older protections are recognized. The next democratically elected government will have the opportunity to cement some of the positive reforms Burma has undertaken, as well as promote further reforms to stabilize and grow the country. Recognizing that human rights and land and property rights can be respected, while engaging in positive economic development will help advance Burma's position in the 21st century and allow the country to prosper further.