



Submission to the Independent International Fact-Finding Mission on Myanmar

Submitted February 15, 2018

1) Introduction

In response to the invitation of the Independent International Fact-Finding Mission on Myanmar (“FFMM”) to submit information relevant to its mandate to establish the facts and circumstances of alleged recent human rights violations in Myanmar, the Leitner Center for International Law and Justice at Fordham Law School (“Leitner Center”) respectfully submits the analysis and recommendations below. A full description of the Leitner Center, which is actively engaged in research, advocacy, and capacity-building collaboration with ethnic women’s rights defenders in Myanmar, can be found at the end of this submission.

2) Executive Summary

In 2013, the Myanmar Government unveiled its National Strategic Plan for the Advancement of Women (“NSPAW”), a ten-year plan intended to implement its obligations to promote and protect the rights of women and girls under domestic and international frameworks. While NSPAW can be seen as a welcome step towards achieving gender equality, it nonetheless poses substantial barriers to meaningfully addressing the types of gender-based violations identified in the FFMM’s mandate. Despite its purported reliance on international law frameworks that prioritize gender-based violence and discrimination against women and girls in conflict situations, NSPAW conspicuously lacks any meaningful guidance on addressing these important matters. In particular, as a national gender equality framework, NSPAW fails to include any serious attention to critical problems of rape and other forms of sexual violence in conflict situations, ongoing impunity for state-sponsored perpetrators of such violence, and the systematic exclusion of women participants from peace processes. Thus, an understanding of NSPAW’s limitations as a national framework is necessary for the FFMM to effectuate its mandate to, among other things, establish and report on the facts and circumstances of the alleged recent gender-based violations by military and security forces in Myanmar with a view to ensuring full accountability for perpetrators and justice for victims. Indeed, in light of NSPAW’s fundamental flaws as a national gender equality strategy, the Leitner Center recommends that the FFMM to take the opportunity presented by its mandate to urge the Government to speed up efforts to develop and implement a comprehensive national plan of action to implement its obligations under Security Council Resolution 1325 and other key instruments related to the women, peace and security agenda. At a minimum, this must include national strategies on the protection of women and girls from violence in situations of conflict, and women’s participation in decision-making on the prevention, management, and resolution of conflict.

3) Analysis

a) Overview of the Myanmar Government's National Strategic Plan for the Advancement of Women

In 2013, the Government unveiled NSPAW, proclaiming it a “comprehensive” ten-year plan embodying a “commitment to promoting and protecting the human rights of women” in Myanmar.¹ NSPAW’s stated objectives are to ensure that “[a]ll women in Myanmar are empowered and able to fully enjoy their rights with the support” of the Government, and to enable the creation of “systems, structures and practices . . . for the advancement of women, gender equality, and the realization of women’s rights.”²

In structuring NSPAW, the Government cites both domestic and international law as NSPAW’s primary foundations. Regarding domestic law, NSPAW aims to ensure that women are able to “fully enjoy their rights in accordance with the features of the Constitution.” As for international law, NSPAW is based in large part on the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”), to which the Government became a State Party in 1997, and the 12 priority areas under the Beijing Platform for Action, adopted at the Fourth World Conference on Women in Beijing in 1995.³

While NSPAW can be seen as a welcome step towards achieving gender equality, it nonetheless poses substantial barriers to meaningfully addressing the types of gender-based violations identified in the FFMM’s mandate, including sexual violence perpetrated by military and security forces in conflict situations. Thus, an understanding of NSPAW’s limitations as a national framework is necessary for the FFMM to effectuate its mandate to, among other things, establish and report on the facts and circumstances of the alleged recent gender-based violations by military and security forces in Myanmar with a view to ensuring full accountability for perpetrators and justice for victims.

b) Shortcomings of NSPAW Hindering Meaningful Action to Address Gender-Based Violations by Military and Security Forces

On its face, NSPAW fails to adequately acknowledge—much less meaningfully address—critical challenges of gender-based rights violations in conflict, including rape and other forms of sexual violence, impunity for state-sponsored perpetrators of such violence, and the lack of participation by women in peace processes. Moreover, while NSPAW does address gender-based violence and barriers to women’s participation in decision-making as general matters, it lacks practical, action-oriented implementation measures or any mechanisms to facilitate accountability for its implementation—or lack thereof. As a result, NSPAW reinforces systemic barriers preventing the Government from taking meaningful action to address the types of gender-based violations in conflict settings that the FFMM is mandated to investigate.

i) NSPAW Fails to Meaningfully Address Gender-Based Violations in Conflict and Post-Conflict Settings

NSPAW purports to rely on international gender equality norms for its foundation and structure, particularly CEDAW and the Beijing Platform for Action.⁴ Indeed, NSPAW’s 12 areas of focus correlate with the Beijing Platform’s 12 critical areas of concern.⁵ However, while the Beijing Platform explicitly identifies women and armed conflict as its fifth critical area of concern, NSPAW’s corresponding section on “Women and Emergencies” conspicuously lacks meaningful guidance on conflict-related violations against women and girls.⁶ Meanwhile, critical NSPAW sections on “Violence Against Women” and “Women and Decision-Making” are silent on gender-based violence and discrimination in conflict situations.⁷ These troubling omissions signal the Government’s ongoing failure to undertake measures to protect women’s human rights at all times, to advance substantive gender equality before, during and after conflict, and to ensure that women’s diverse experiences are fully integrated into all peacebuilding, peacemaking, and reconstruction processes—as required by its commitments under international law, including under CEDAW, and under international instruments reinforcing state obligations on protecting the rights of women and girls in conflict contexts.⁸

(1) NSPAW Fails to Meaningfully Address Sexual Violence in Conflict

High levels of state-sponsored sexual violence occurring in Myanmar’s ethnic areas as part of on-going conflict have been widely documented and acknowledged.⁹ Rape and other forms of sexual violence have been reported in multiple conflict areas, and since 2010, there have been at least 118 documented incidents of sexual violence by the military.¹⁰ From 2002 to 2007, the nationwide number was at least 875—128 of which were rapes of girls under the age of 18.¹¹ Notably, these figures on state-sponsored sexual violence in conflict areas are likely far lower than in reality, as many cases go unreported.

Despite all this, NSPAW’s “Women and Emergencies” section, which implies a correlation to the Beijing Platform’s guidance on women and armed conflict, provides virtually no guidance on actual measures to address rape and other forms of sexual violence in conflict, particularly when perpetrated by military and security forces. For instance, while NSPAW includes welcome support for “training, technical support, [and] improved recording and handling of cases of violence against women by police, military, [and] local authorities,” it does not specifically acknowledge the complex challenges of addressing rape and other forms of sexual violence.¹² Moreover, while the “Women and Emergencies” section lists a “Plan of Action addressing Security Council Resolutions about conflict-related sexual violence” under “Implementation,” not a single reference is made to any specific action by the Government to develop—much less adopt or allocate funds to implement—any such plan.¹³ Making matters worse, despite attention to gender-based violence as a general matter in NSPAW’s other sections, including on “Violence Against Women,” not a single reference is made to rape and other forms of sexual violence in conflict and post-conflict situations.

(2) NSPAW Fails to Meaningfully Address Impunity for Perpetrators of Sexual Violence in Conflict

In Myanmar, state-sponsored acts of rape and other forms of sexual violence in conflict situations are made possible by a culture of impunity that insulates perpetrators. As the Special Rapporteur on the situation of human rights in Myanmar (“Special Rapporteur”) once noted, “[t]he failure to investigate, prosecute and punish those responsible for rape and sexual violence has contributed to an environment conducive to the perpetuation of violence against women and girls” in Myanmar.¹⁴ Such failures are further facilitated by structural deficiencies in Myanmar’s domestic legal system. This includes Article 445 of the Constitution, which guarantees that no proceeding shall be instituted against any member of the Government “in respect to any act done in the execution of their respective duties,” which the Special Rapporteur has described as “blanket immunity for State agents, contrary to the very essence of accountability for human rights violations.”¹⁵ The Constitution further entrenches impunity by establishing military autonomy over all its own judicial processes and giving the Commander-in-Chief “final and conclusive” authority over all cases and complaints, thereby placing all serious rights violations committed by the military—including rape and other forms of sexual violence—under the jurisdiction of a military-controlled judicial system.¹⁶ Making matters worse, flaws in Myanmar’s outdated, colonial-era laws such as the Penal Code, the Code of Criminal Procedure, and the Evidence Act, present substantial obstacles to addressing rape and other forms of sexual violence as a general matter.

NSPAW fails to meaningfully address any of these significant legal barriers to justice for victims of rape and other forms of sexual violence in conflict—particularly when perpetrated by military or security forces. For instance, NSPAW does not suggest any changes to the Constitution or current domestic legal structures or mechanisms to address the prevailing culture of impunity for state-sponsored sexual violence in conflict. As required by international law and as defined by mechanisms such as the CEDAW Committee, conflict and post-conflict settings require multiple specific remedies for women who experience sexual violence, including robust legal mechanisms and processes to ensure justice for victims and full accountability for perpetrators.¹⁷ As a framework for gender equality in Myanmar, NSPAW falls far short of these standards, and without addressing these fundamental barriers to justice under Myanmar’s legal system, sexual violence in conflict is likely to continue and become further entrenched.

(3) NSPAW Fails to Meaningfully Address the Need for Greater Participation by Women in the Peace Process

It is widely acknowledged that women are systematically excluded from participating in negotiations for peace and transitional processes in Myanmar. Indeed, the Special Rapporteur has found that “women have been largely excluded and have not been a part of the negotiating teams.”¹⁸ As is widely documented, women’s exclusion from peace processes leads to irreversible losses, since crucial conflict-related issues of concern to women go unmentioned and therefore unaddressed in peace accords, thereby exacerbating women’s marginalization in the economy, society, and politics.

Despite all this, NSPAW avoids taking a position on the need to include women in peace negotiations and other transitional processes as required by international law. Sections of NSPAW that call for increasing women's participation make no reference to the applicability in a peace-building context. Without addressing the lack of meaningful participation by women in these important dialogues, the voices of women remain silenced and marginalized.

ii) NSPAW Lacks Practical, Action-Oriented Implementation Directives and Mechanisms for Implementation Accountability

In addition to NSPAW's specific shortcomings concerning failures to address gender-based rights violations in conflict—including sexual violence in conflict situations, impunity for state-sponsored perpetrators of such violence, and the lack of participation by women in peace processes—NSPAW also fundamentally lacks practical, action-oriented implementation directives and mechanisms for implementation accountability. First, NSPAW does not include any articulation of precise and specific practical actions to be undertaken by the Government to achieve both substantive gender equality and eliminate discrimination in law and in effect. Despite aspirational language describing women's rights and empowerment, NSPAW lacks description of actual, meaningful steps to be taken by the Government. Second, NSPAW fails to include any specificity with regard to measurable outputs or benchmarks by which to measure NSPAW implementation. Thus, there are no mechanisms to support accountability for Government implementation of NSPAW—or lack thereof. Third, NSPAW lacks specific commitments to allocate and provide adequate funding and resources towards its implementation, or to clearly articulate the duties and obligations of any individuals or administrative bodies charged with implementations.

Unsurprisingly, actual implementation of NSPAW appears to have been stalled indefinitely. Thus, even to the extent that NSPAW's generalized sections on "Violence Against Women" and "Women and Decision-Making" could theoretically be implemented to address gender-based violence and discrimination in conflict situations, the fundamental structural barriers to actual NSPAW implementation have substantially dimmed such prospects.

4) Recommendations

While NSPAW can be seen as a welcome step towards achieving gender equality, as explained above, it nonetheless poses substantial barriers to meaningfully addressing gender-based violence and discrimination against ethnic women and girls in Myanmar, including rape and other forms of sexual violence in conflict, impunity for members of the military and security forces who perpetrated such violence, and the ongoing lack of participation by women in the peace process. In light of NSPAW's fundamental flaws, the Leitner Center recommends that the FFMM use the opportunity provided by its mandate to urge the Government to speed up its efforts to develop a national plan of action on the implementation of Security Council Resolution 1325 and other key instruments under the women, peace, and security agenda—including meaningful national strategies on the protection of women and girls from violence in situations of armed conflict and substantive women's participation in decision-making for the prevention, management, and resolution of conflict.

About the Leitner Center for International Law and Justice at Fordham Law School

As a research, advocacy, and education center at Fordham Law School in New York City in the United States, the Leitner Center works in solidarity with grassroots activists and social justice organizations to promote the rule of law, access to justice, and strong protections for human rights. In relation to the mandate of the FFMM, the Leitner Center has been actively engaged in promoting human rights in collaboration with partners in Myanmar, with particular focus on research, advocacy, and capacity-building in areas of gender equality for ethnic women and girls and prevention of gender-based violence and discrimination in conflict and post-conflict settings.

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Notes

¹ Myanmar National Committee of Women's Affairs ("MNCWA"), NATIONAL STRATEGIC PLAN FOR THE ADVANCEMENT OF WOMEN (2013-2022) (2013) ("NSPAW"), pages 1-2, available at: http://myanmar.unfpa.org/sites/default/files/pub-pdf/NSPAW2013-2022_0.pdf. NSPAW was officially issued through the Department of Social Welfare, a division of Burma's Ministry of Social Welfare, Relief and Resettlement. Government responsibility for NSPAW has since been allocated to the Myanmar National Committee for Women's Affairs. See Georgetown Institute for Women, Peace and Security, WOMEN'S PEACEBUILDING STRATEGIES AMIDST CONFLICT: LESSONS FROM MYANMAR AND UKRAINE (2018), page 19, available at: <https://giwps.georgetown.edu/wp-content/uploads/2017/01/Womens-Peacebuilding-Strategies-Amidst-Conflict.pdf>.

² MNCWA, NSPAW, pages 2, 5.

³ Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (Myanmar acceded to the Convention on July 22, 1997); Beijing Declaration and Platform for Action, Fourth World Conference on Women (Sept. 1995), available at: www.un.org/womenwatch/daw/beijing/platform/.

⁴ MNCWA, NSPAW, pages 2, 4-5.

⁵ *Id.*

⁶ *Id.*, pages 16-18.

⁷ *Id.*, pages 13-16, 21-24.

⁸ See Committee on the Elimination of Discrimination against Women, General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations, U.N. Doc. CEDAW/C/GC/30 (2013), available at:

<http://www.ohchr.org/Documents/HRBodies/CEDAW/GComments/CEDAW.C.CG.30.pdf>; U.N. Security Council Resolution 1325, U.N. Doc. S/RES/1325 (Oct. 31, 2000), available at: <http://www.refworld.org/docid/3b00f4672e.html>.

⁹ See U.N. Security Council, Conflict-Related Sexual Violence: Report of the Secretary General, U.N. Doc. S/2015/203 (Mar. 23, 2015), available at: [http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-](http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2015_203.pdf)

[CF6E4FF96FF9%7D/s_2015_203.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2015_203.pdf); Report of the Special Rapporteur on the situation of human rights in Myanmar to the Human Rights Council (Yanghee Lee), ¶ 48 U.N. Doc. A/HRC/31/71 (Mar. 18, 2016), available at: [https://documents-dds-](https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/055/13/PDF/G1605513.pdf)

[ny.un.org/doc/UNDOC/GEN/G16/055/13/PDF/G1605513.pdf](https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/055/13/PDF/G1605513.pdf).
¹⁰ Women's League of Burma, IF THEY HAD HOPE THEY WOULD SPEAK: THE ONGOING USE OF STATE-SPONSORED SEXUAL VIOLENCE IN BURMA'S ETHNIC COMMUNITIES (2014), available at: <http://womenofburma.org/if-they-had-hope-they-would-speak/>.

¹¹ Global Justice Center and Leitner Center for International Law and Justice, PROMISES NOT PROGRESS: BURMA'S NATIONAL PLAN FOR WOMEN FALLS SHORT OF GENDER EQUALITY AND CEDAW (2015), page 71, available at:

http://www.leitnercenter.org/files/GJC_final_v3.pdf (citing International Center for Transitional Justice, IMPUNITY PROLONGED: BURMA AND ITS 2008 CONSTITUTION (2009), at page 14, available at: <https://ictj.org/sites/default/files/ICTJ-Myanmar-Impunity-Constitution-2009-English.pdf>); see also Women's League of Burma, SAME IMPUNITY, SAME PATTERNS (2014), at page 12, available at: http://womenofburma.org/wp-content/uploads/2014/01/SameImpunitySamePattern_English-final.pdf.

¹² MNCWA, NSPAW, page 17.

¹³ *Id.*

¹⁴ Global Justice Center and Leitner Center for International Law and Justice, PROMISES NOT PROGRESS: BURMA'S NATIONAL PLAN FOR WOMEN FALLS SHORT OF GENDER EQUALITY AND CEDAW, page 72 (citing

Report of the Special Rapporteur on the situation of human rights in Myanmar to the General Assembly (Paulo Sergio Pinheiro), ¶ 30, U.N. Doc. A/61/369 (Sept. 26, 2006), available at: <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Myan%20A61%20369.pdf>).

¹⁵ Constitution of the Republic of the Union of Myanmar (2008); Report of the Special Rapporteur on the situation of human rights in Myanmar to the General Assembly (Tomás Ojea Quintana), ¶ 55, U.N. Doc. A/64/318 (Aug. 24, 2009), available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N09/491/51/PDF/N0949151.pdf>.

¹⁶ Constitution of the Republic of the Union of Myanmar (2008), Article 343.

¹⁷ See Committee on the Elimination of Discrimination against Women, General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations, U.N. Doc. CEDAW/C/GC/30 (2013), available at:

<http://www.ohchr.org/Documents/HRBodies/CEDAW/GComments/CEDAW.C.CG.30.pdf>; U.N. Security Council Resolution 1325, U.N. Doc. S/RES/1325 (Oct. 31, 2000), available at: <http://www.refworld.org/docid/3b00f4672e.html>.

¹⁸ Report of the Special Rapporteur on the situation of human rights in Myanmar to the General Assembly (Yanghee Lee), ¶ 58, U.N. Doc. A/70/412 (Oct. 6, 2015), available at: <https://undocs.org/A/70/412>.