Guidance Note

HUMANITARIAN PRINCIPLES, LEGALITY, & ENGAGEMENT

Background

International humanitarian interventions are designed and launched in order to protect human lives and dignity in situations where domestic resources and mechanisms alone cannot adequately do so. By their very nature, many — if not most — situations in which humanity is so imperilled as to necessitate an outside intervention are in some way characterised — whether caused, perpetuated, or exacerbated — by a breakdown of law and order. Humanitarian actors frequently enter and operate within contexts where domestic legal systems, and the rule of law more broadly, are compromised, dysfunctional, or absent entirely. For humanitarian organisations, this is business as usual; humanitarian interventions are neither predicated nor dependent upon domestic law. Instead, all humanitarian interventions are guided by four core principles deeply rooted in international humanitarian law: humanity, impartiality, neutrality, and independence.[1]

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1   For further discussion, see, e.g., "Humanitarian Principles," *Emergency Handbook,* UNHCR, https://emergency.unhcr.org/protection/protection-principles/humanitarian-principles.

Even where domestic legal structures are intact and considered legitimate, the four fundamental principles of humanity, impartiality, neutrality, and independence supersede any influence domestic forces can have over the conduct of humanitarian activities. Elsewhere, in contexts where domestic legal systems lack any semblance of legitimacy — as in post-coup Myanmar, following the military's removal of the internationally-recognised government — there is no legal imperative for humanitarian responders to operate within the bounds of domestic 'law.' Since its 2021 inception, the State Administration Council (SAC) has been an unlawful regime, and as such it lacks the legal authority to create, modify, or enforce the laws of Myanmar. As a result, any rule, directive, policy or 'law' promulgated by the SAC is invalid on its face, and there has never been a legal basis for humanitarian actors to seek to comply with such measures. While laws adopted before the 2021 military takeover may have been valid and even in line with international standards (though many were not — legal reform in Myanmar was badly needed before the current crisis), the SAC lacks the legal authority to enforce even these; in its brutal assault on the people of Myanmar, the 'law' exists as just another tool the SAC weaponises to intimidate, attack, abuse and attempt to exert control over the population.

However, even without a legal basis, some international actors, at least initially, considered that there were operational and pragmatic reasons to pursue — or at least feign — varying degrees of cooperation with the SAC and its 'laws.' Many did so on an automatic basis in an effort to comply with their own organisational policies, for example by continuing to use the Myanmar banking system even after the SAC seized the Central Bank and began using financial surveillance and escalating restrictions as a means to identify and target its enemies. Some continue to send money into Myanmar through this system, though there is no 'legal' or operational imperative for doing so; it remains unlawfully controlled by the SAC, the SAC profits from these transactions, and safe alternative value transfer systems — such as Hundi networks — are available. Operational and organisational pressures to undertake some degree of SAC engagement have varied among response actors, but have perhaps been felt most acutely by United Nations (UN) agencies. UN agencies have had a unique and challenging path to forge following the SAC takeover, as they have had to navigate how to meet the drastically escalating needs of the people of Myanmar while operating as envoys of the UN itself — which is the world's largest intergovernmental organisation, and still counts Myanmar among its members. This has remained a challenging and ongoing calculus, even as SAC objections have characterised Myanmar's representation within the UN globally.[2]

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2   Procedural foot dragging has blocked the recognition of an SAC-chosen ambassador to the UN General Assembly and has enabled Kyaw Moe Tun, the previous ambassador appointed by the National League for Democracy (NLD) government, to retain his seat — in which he is now recognised by the National Unity Government (NUG), and not the SAC. "Kyaw Moe Tun to Remain Myanmar's UN Rep," Radio Free Asia, 21 September 2023, https://www.rfa.org/english/news/myanmar/myanmar-un-ambassador-09212023132108.html

Changing Landscape

Many aspects of the Myanmar response landscape remain unchanged since 2021: Myanmar still comprises a crowded patchwork of distinct and overlapping asymmetrical conflicts. A brutal regime continues to exact overwhelming harm on the civilian population, while a litany of armed resistance actors — some better trained, equipped with more awareness of international norms, and more compliant with international humanitarian law than others — are striving to break the behemoth and defend communities that are building pathways to better systems of governance and ways of life. Meanwhile, a range of transnational criminal enterprises and other actors are actively looking to exploit the resources and people of Myanmar while attention is, necessarily, focused elsewhere. At such a superficial glance, this scene could appear to be business as usual for post-coup, or even — in some locations — pre-coup Myanmar.

Despite these broad similarities with the past, Myanmar has undergone a series of drastic transformations in recent years. Local economic realities, political processes, governance systems, conflict dynamics, displacement patterns, and IT connectivity have all undergone seismic shifts, and continue to fluctuate with varying degrees of magnitude and predictability. **Within this whirlwind of transformation, perhaps two elements demand particular consideration from international responders: first, throughout Myanmar, hyper-local actors carry out the overwhelming majority of the emergency response, and; second, the SAC is visibly** [faltering](#).

The implications of these last two points are manifold, but for the international response, they shine light on a critical new reality: while there has never been a 'legal' imperative for humanitarian actors to comply with SAC demands and directives, there is now virtually no operational benefit to be gained from regime compliance either. Typically, humanitarian actors negotiate with all parties to obtain operational permissions and access to vulnerable populations. Now, SAC 'permission' to programme throughout Myanmar and SAC-afforded 'access' to vulnerable populations are largely irrelevant; outside isolated (and shrinking) regime strongholds, local authorities do not recognise such approvals. Even where SAC authorisation could afford access, an international presence, particularly if accompanied by SAC personnel, could spark new rounds of concerns over the potential politicisation of aid and the alleged lack of neutrality among humanitarian actors — but it would be unlikely to improve either the quantity or quality of support delivered to people in need.

With there now potentially less than ever to be gained from SAC engagement and compliance, a question looms: how should humanitarian responders adapt?

Looking Ahead

International actors that do not carefully assess and reconsider their operating modalities now will be in danger of blindly continuing on a path of SAC compliance that could place them squarely in violation of core humanitarian principles or even render them complicit in international crimes. The weakened SAC is ratcheting up its efforts to use 'the law' as a means to inject new life into its assault on the people of Myanmar. The recent Conscription Law, by design, affords the SAC a 'legal' pretext to transform nearly the entirety of its opposition into cannon fodder — as well as to selectively round up and instrumentalise members of disadvantaged groups as a means to foment intercommunal tensions and incite violence. International entities should carefully reflect before deciding whether to comply with 'laws' enforced by the SAC; those that do opt to comply should be prepared to defend their decision before an international tribunal — and justify it to the people of Myanmar.

Across SAC areas, there are people trapped and civilians suffering, both in camps and within communities. These people have urgent humanitarian needs, and some degree of SAC cooperation and compliance may enable a limited set of international actors to help provide necessary support. However, for the majority of international actors, SAC compliance does not enhance organisational capacity to deliver support. For most, SAC cooperation introduces legal and reputational risks that could imperil their humanitarian operations and reduce their ability to reach communities with critical needs.

Within this reality, all international actors need to exercise extreme care in determining their level of compliance with any SAC regulations. Organisations must recognise where adherence to unlawful SAC policies could find them contributing to the furtherance of SAC criminal designs, in breach of core humanitarian principles, and possibly even implicated in the commission of any number of the SAC's alleged international crimes. All response actors should undertake new risk assessments, reflecting the reality that SAC obedience may no longer be an operational necessity, and might actually present international actors with unacceptable levels of reputational and legal risk.

Response Implications

At the same time, in locations where the SAC is receding from local governance, alternative, sometimes newly emergent entities are filling the void. Despite SAC claims that these entities are "terrorists", "enemies of the people and/or the State", or any other colourful and sweeping derogatory declaration the SAC may attempt to make, emergent governance actors are no such thing. They are neither 'legal' nor 'illegal', since they exist in a space without a recognised legal fold. The SAC is a criminal regime, but the National Unity Government lacks the full international recognition of a State. In this context, there is no single body with the legal standing to say who or what is governing 'legally' in Myanmar. Various bodies of international law (humanitarian, human rights, and criminal) can help identify who is falling short of international norms and should therefore be approached with most caution — or avoided

entirely. Sanctions lists can further help inform decision making with respect to engagement with alternative governance actors. Certain individuals and entities face overlapping international sanctions and should be carefully avoided — but these most notably include the SAC, its leadership, their cronies and their collective business interests. Others involved in transnational crimes, particularly narcotics and human trafficking, also face varying degrees of international sanctions and could present particularly high levels of security and legal risk.

However, these high-risk criminal actors are not to be easily confused with emergent entities struggling to provide humanitarian assistance in Sagaing Region, for example. These are — for the most part — powerful, recognisable and well-established criminal operators; they are individuals and entities that would have little to gain from posing as local service providers and would be unlikely to be confused for any new community emergency response group. For most humanitarian organisations — those looking to provide lifesaving support and empower local actors to better provide lifesaving support — there is limited legal risk to engaging with most alternative governance actors. It is true that many such actors are actively engaged in ongoing conflicts (either directly or through affiliations with armed entities); still, engagement with them presents a infinitesimal fraction of the political, reputational and legal risk of engaging with the SAC — and it might present a tremendous opportunity to drastically improve the inclusiveness and effectiveness of nascent service provision or even enhance compliance with international humanitarian norms.

Because of their rapid assumption of multiple service delivery roles, often in conflict-affected, highly-isolated areas, many alternative governance actors in Myanmar stand to have direct, dramatic impact on very vulnerable communities. Through early engagement with these entities, response actors can work towards improving their acceptance or provision of humanitarian support in their areas, and may advocate for more inclusive governance that takes into account the needs of marginalised community members. Engagement with a range of alternative governance actors can thus enable response actors to better operationalise their conflict sensitivity strategies, by promoting humanitarian norms and inclusive governance/ service delivery practices across all programme areas in an effort to improve the situation of vulnerable persons across Myanmar. Considering the proximity and overlap of alternative governance actors and armed resistance actors, support could potentially effectively include focus on the conduct of hostilities and the protection of civilians in conflict. Unlike the SAC, Myanmar's emergent armed actors do not have a 70-year track record of flouting international humanitarian law (IHL); many might appreciate IHL support and even be able to incorporate key norms into training across their operations. In turn, this could help to improve the situation of some of Myanmar's most hard-to-reach and conflict-affected communities. No engagement with alternative governance actors should be undertaken blindly, and any potential engagement should entail thorough and continuous assessments of risk, but the same is true of engagement with all local response actors, anywhere in the world.

As has been the case since February 2021, there is no 'one size fits all' approach that would be suitable for all humanitarian actors to navigate the current crisis landscape. UN agencies will likely need to continue to walk a tightrope, balancing their individual mandates against the baggage of their mother organisation's intergovernmental identity. Other international actors will likewise remain strictly limited by their respective organisational policies. INGOs and international donors may find themselves better able to take advantage of opportunities to initiate and expand engagements with resistance governance bodies in order to expand their reach and humanitarian impact in locations where support is most needed.

Final recommendations

To fulfil their core purpose and protect the lives and dignity of people throughout the country, humanitarian actors must tailor their efforts to the reality in which they are working. In the context of an unlawful regime visibly crumbling, this means — at the very least — distancing humanitarian operations from the reach of the SAC, so that if it should fall, it would not take down life-saving operations along with it. Better still, response actors should seek to revisit and consider reinventing all aspects of their programmes and engagement strategies, to identify and capitalise on new opportunities presented by potential cooperation with emergent structures and to navigate more effectively the changing dynamics of Myanmar's many conflicts.

1. **Donors should not require local actors to comply with SAC regulations.** These are not and have never been 'legal'; any residual compliance requirements should be ended immediately. Any legacy boilerplate language from global partnership agreements should be amended or omitted to eliminate any pressure on partners to endanger their staff, operations or beneficiaries through SAC engagement.

2. **Donors should provide financial and technical support to help local partners more safely navigate regime policies.** This should include, at a minimum, greater support for digital and physical security training. Where requested by partners, it should also include the express allocation of budget lines to support partners' efforts to undertake strategic non-compliance with abusive SAC 'laws' and to help their staff safely evade SAC arrest.

3. **International actors should base response strategies upon the fundamental humanitarian principles, careful contextual analysis, and detailed risk assessments.** Domestic law should not factor directly into programme design; SAC 'law' (and the SAC more broadly) is an obstacle to navigate in risk assessment and security planning, but it is not a relevant basis to dictate the broader contours of humanitarian response.

4. **International actors should develop strategies to engage with governance actors in a manner that maximises potential humanitarian impact and minimises legal, reputational and security risks.** SAC engagement is extremely high risk, but may be necessary for certain actors to assist specific populations in need; engagement with alternative governance actors is relatively low-risk, but should be carefully evaluated prior to initiating any activities. Risk assessments should be updated on a continual basis.

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