



‘Return to Sender:’ MNHRC Enabling Law Must be Returned to Parliament for Structural Reform

October 2018



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This report is the Myanmar chapter of the 2018 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia.

The Asian NGOs Network on National Human Rights Institutions (ANNI) was established in December 2006. It is a network of Asian non-governmental organisations and human rights defenders working on issues related to National Human Rights Institutions (NHRIs). ANNI has members that are national organisations from all over Asia. ANNI currently has 33 member organisations from 21 countries or territories. The work of ANNI members focuses on strengthening the work and functioning of Asian NHRIs to better promote and protect human rights as well as to advocate for the improved compliance of Asian NHRIs with international standards, including the Paris Principles and General Observations of the Sub-Committee on Accreditation (SCA) of the Global Alliance of NHRIs (GANHRI).

 info@forum-asia.org

 www.forum-asia.org

Written and published by:

Action Committee for Democracy Development - ACDD
Burma Monitor (Research and Monitoring) - BMG
Future Light Center - FLC
Generation Wave - GW
Genuine People’s Servants - GPS
Association of Human Rights Defenders and Promoters - HRDP
Human Rights Foundation of Monland - HURFOM
Kachin Women’s Association Thailand - KWAT
Loka Ahlinn (Social Development Network)
Progressive Voice - PV
Smile Education and Development Foundation - Smile
Synergy (Social Harmony Organization)

Contact Information:

[Progressive Voice](http://www.progressivevoicemyanmar.org)
www.progressivevoicemyanmar.org
info@progressive-voice.org



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1

Introduction

1. Introduction

This report seeks to analyse the performance of the Myanmar National Human Rights Commission (MNHRC or the Commission) in relation to the international standards of the Paris Principles and the General Observation of 2013. This report will also utilise the 2015 findings from the Global Alliance of National Human Rights Institutions Sub-Committee on Accreditation (GANHRI-SCA), which accredited the MNHRC with a ‘B’ status, thus indicating that it is not fully compliant with the Paris Principles. This report is based on desk research and will also build on previous ANNI reports that employed field research in the form of key stakeholder interviews. The authors of this report are Action Committee for Democracy Development, Burma Monitor (Research and Monitoring), Future Light Center, Generation Wave, Genuine People’s Servants, Association of Human Rights Defenders and Promoters Network (HRDP), Human Rights Foundation of Monland, Kachin Women’s Association – Thailand, Loka Ahlinn (Social Development Network), Progressive Voice, Synergy (Social Harmony Organization), and Smile Education and Development Foundation.





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Overview

2. Overview

The MNHRC was established on 5 September, 2011¹ by Presidential Decree and formalised through the passage of the enabling law – the Myanmar National Human Rights Commission Law (MNHRC Law) – in March 2014. As outlined in previous ANNI reports,² the Commission has suffered a public legitimacy deficit with concerns over the transparency of the selection process, the closeness of Commissioners to the previous military regime, a perceived lack of effectiveness, and lack of a human rights mindset. The GANHRI-SCA report of November 2015 did not accredit the MNHRC ‘A’ status which would denote full compliance with the Paris Principles.³ The SCA listed seven aspects of the Commission and its mandate that were problematic: a) selection and appointment, b) performance in situations of civil unrest or armed conflict, c) pluralism, d) adequate funding and financial independence, e) monitoring places of deprivation of liberty, f) interaction with the international human rights system, and g) annual report. In recent years, the MNHRC has made progress such as in prison monitoring and its engagement with civil society, and it has been open to assistance from international stakeholders. However, this progress has only been minimal in resolving the issues raised by GANHRI-SCA.

With reference to the GANHRI-SCA report, this report will analyse the MNHRC through the lens of the following criteria:

- Mandate and competence: a broad mandate, based on universal human rights norms and standards;
- Autonomy from the government and independence guaranteed by statute or the constitution;
- Pluralism;
- Adequate resources;
- Adequate powers of investigation.

The report will also examine the MNHRC’s response to the human rights situation in Myanmar today, including patterns of human rights violations and abuse since the establishment of the MNHRC in 2011. It will also analyse the key document that gives the MNHRC its mandate – the Myanmar National Human Rights Commission Law – and give recommendations for both legislative amendments and performance related operations.

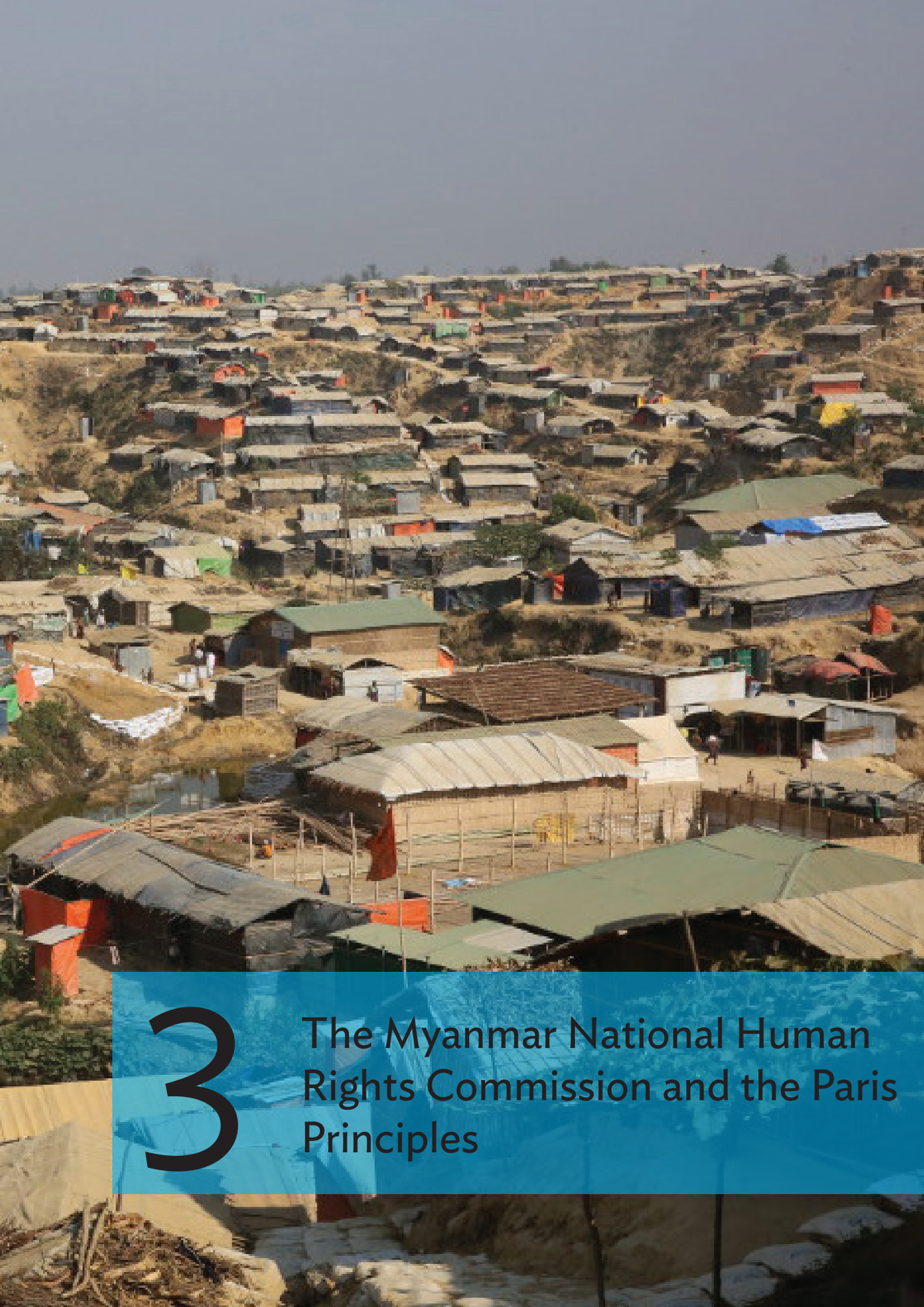
1 ‘Formation of Myanmar National Human Rights Commission’, President Thein Sein, 5 September, 2011. Available at <http://www.burmapartnership.org/2011/09/formation-of-myanmar-national-human-rights-commission/>

2 See ‘Burma: All Shook Up,’ by Burma Partnership, Equality Myanmar, and Smile Education and Development Foundation, 18 September, 2015. Available at <http://www.burmapartnership.org/wp-content/uploads/2015/09/1-Burma-FINAL-04-August-2015.pdf> and ‘Suspicious Minds: The Myanmar National Human Rights Commission’s Trust Deficit’, by Action Committee for Democracy Development, Progressive Voice and Smile Education and Development Foundation, 29 September, 2017. Available at <https://progressivevoicemyanmar.org/2017/11/29/suspicious-minds-the-myanmar-national-human-rights-commissions-trust-deficit/>

3 Adopted by the UN General Assembly in 1993, the Paris Principles set forth minimum standards for the creation of a National Human Rights Institution (NHRI), along with its practical obligations and responsibilities.



Credit: Dhaka Tribune/Syed Zakir Hossain



3

The Myanmar National Human Rights Commission and the Paris Principles

3. The Myanmar National Human Rights Commission and the Paris Principles

3.1 Functions, Mandate, and Structure

A national institution shall... submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights.” (Paris Principles, A.3(a))⁴

Mandate

The Myanmar National Human Rights Commission was established by Presidential Decree in 2011. Its mandate was established in the Myanmar National Human Rights Commission Law of 2014 and is as follows:

- (a) to safeguard the fundamental rights of citizens enshrined in the Constitution of the Republic of the Union of Myanmar effectively;
- (b) to create a society where human rights are respected and protected in recognition of the Universal Declaration of Human Rights adopted by the United Nations;
- (c) to effectively promote and protect the human rights contained in the international conventions, decisions, regional agreements and declarations related to human rights accepted by the State;
- (d) to coordinate and cooperate with the international organisations, regional organisations, national statutory institutions, civil society and non-governmental organisations related to human rights.⁵

The MNHRC has five divisions: the Human Rights Policy and Legal Division, the Human Rights Promotion and Education Division, the Human Rights Protection Division, the International Relations Division, and the Administration and Finance Division.

While there are certain amendments to the MNHRC Law that must be made, especially in regards to the selection process, pluralism, and independence from the Executive as discussed below, the mandate of the MNHRC Law is relatively broad. It gives the MNHRC

4 Principles Relating to the Status of National Institutions (the Paris Principles), General Assembly Resolution 48/134, 20 December, 1993. Section A.3(a). Available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>

5 The Myanmar National Human Rights Commission Law, 28 March, 2014. Section 3. Available at http://www.burmalibrary.org/docs23/2014-03-28-Myanmar_Human_Rights_Commission_Law-21-en.pdf

far-reaching powers to investigate human rights violations, stating that it can verify and conduct “inquiries in respect of complaints and allegations of human rights violations” including “visiting the scene” of violations.⁶ It does not specifically exclude allegations of human rights violations committed by the Myanmar Military, which makes the MNHRC’s inadequate response to conflict-related human rights violations all the more disappointing.

Human Rights Protection

A consistent criticism of the MNHRC from civil society is the lack of action in conflict-related areas in northern and eastern Myanmar and violence-hit Rakhine State. As the GANHRI-SCA General Observation points out, “NHRIs, in their analysis of the human rights situation in the country, should be authorized to fully investigate all alleged human rights violations, regardless of which State officials are responsible.”⁷ A further criticism from civil society is how human rights defenders in the country are not adequately protected.

Since 2011, the Myanmar Military has regularly launched military offensives against ethnic armed organisations including the Kachin Independence Army, the ethnic Kokang’s, Myanmar National Democratic Alliance Army, the Ta’ang National Liberation Army, the Karen National Liberation Army, and the Shan State Army – North, displacing hundreds of thousands of civilians.⁸ Human rights violations such as forced labour, arbitrary arrest, indiscriminate shelling, torture, rape and sexual violence, and extrajudicial killings have been documented by local and international human rights organisations for many years.⁹ Yet, as the Chairperson U Win Mra stated early in its existence, the MNHRC would not investigate in conflict areas.¹⁰ As outlined in the section ‘Adequate Powers of Investigation’ below, two emblematic cases of the MNHRC’s response to victims of armed conflict – the cases of Ko Par Gyi and Ja Seng Ing – have further eroded trust, particularly from conflict-affected ethnic minority communities. It is clear that the MNHRC has neither the political will, nor sufficient independence from the all-powerful Myanmar Military, to adequately protect the rights of the victims of the military’s abuse. This is compounded by the military’s impunity, guaranteed in the 2008 Constitution which states that the military itself, not a civilian court, is the final arbiter on any human rights violation committed by military personnel.

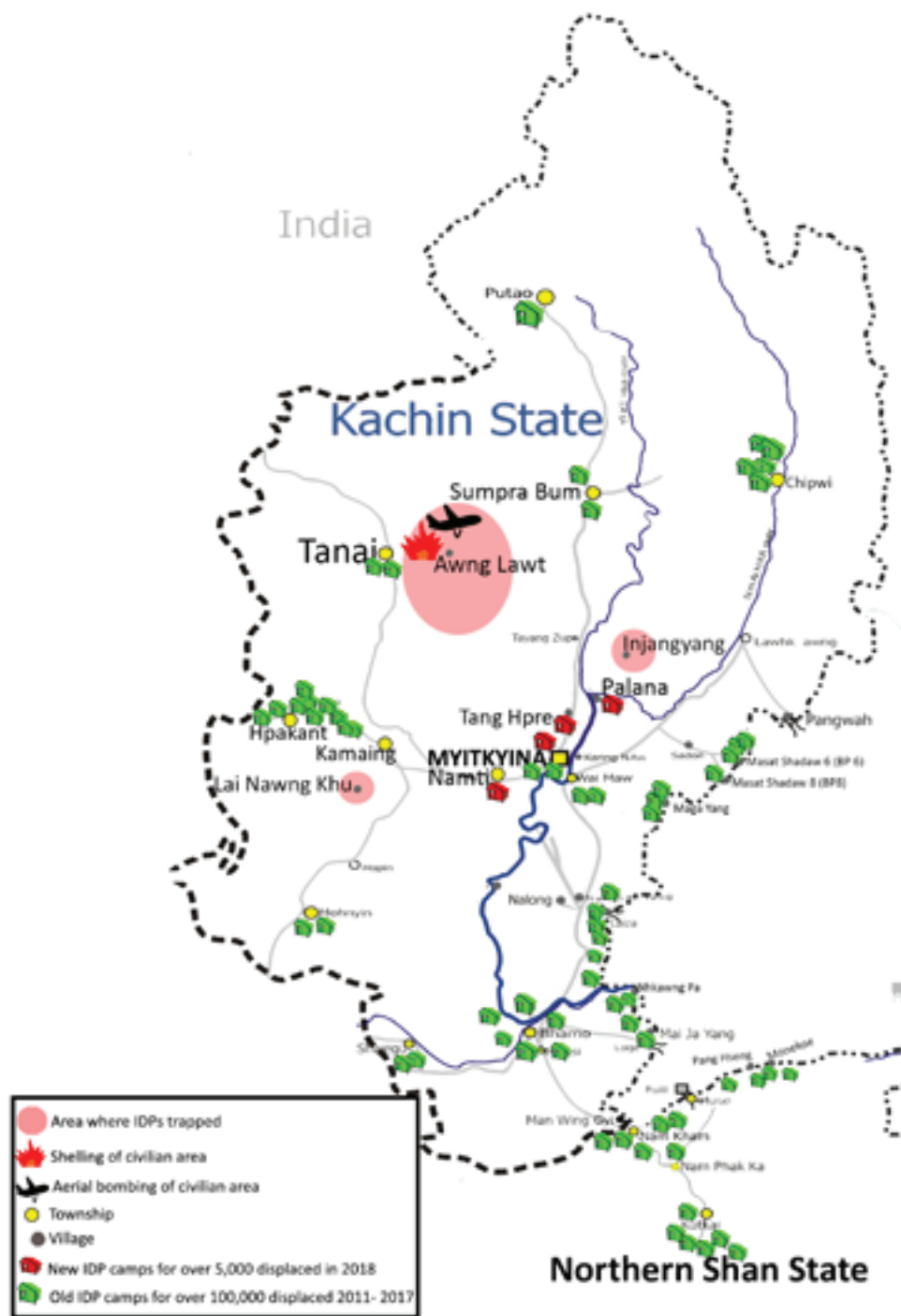
6 The Myanmar National Human Rights Commission Law, Section 22 (c) and (d).

7 General Observations of the SCA, Section 2.6.

8 ‘Myanmar: IDP Sites in Kachin and northern Shan States’, UN Office for the Coordination of Humanitarian Affairs, 28 February 2018. Available at <https://reliefweb.int/map/myanmar/myanmar-idp-sites-kachin-and-northern-shan-states-28-feb-2018-0>

9 See ‘A Far Cry From Peace: Ongoing Burma Army Offensives And Abuses In Northern Burma Under The NLD Government’, by Kachin Women’s Association Thailand, 15 November, 2016. Available at <http://kachinwomen.com/far-cry-from-peace-ongoing-burma-army-offensives-abuses-northern-burma-under-nld-government/> ‘Myanmar’s Borderlands on Fire,’ Amnesty International, <https://www.amnesty.org/en/latest/news/2017/06/myanmars-borderlands-on-fire/>

10 Patrick Winn, ‘A Human Rights Commission’s Shaky Rise in Burma/Myanmar,’ Public Radio International, 9 March, 2012. Available at <https://www.pri.org/stories/2012-03-09/human-rights-commissions-shaky-rise-bur-myanmar>



Location of Burma Army war crimes in April 2018. (Credit: Kachin Women's Association – Thailand)

The Rohingya crisis in northern Rakhine State is one of the most pressing human rights crises the country has ever faced. Two military operations have forced over 800,000 Rohingya to flee to Bangladesh, escaping what has been labelled “ethnic cleansing” by the UN,¹¹ and which bears hallmarks of genocide according to the UN Special Rapporteur on

11 Michelle Nichols, ‘U.S. urges U.N. to hold Myanmar military accountable for “ethnic cleansing”’, Reuters, 13 February, 2018. Available at <https://www.reuters.com/article/us-myanmar-rohingya-un/u-s-urges-u-n-to-hold-myanmar-military-accountable-for-ethnic-cleansing-idUSKCN1FX229https://news.un.org/en/audio-hub>

the situation of human rights in Myanmar.¹² Given the credible evidence of crimes against humanity that has been well documented by the UN and international and local human rights organisations, the failure of the MNHRC to even recognise the term Rohingya is shocking.¹³ After a visit to the affected area, the MNHRC released a statement, using the word ‘Bangali’ throughout, focusing on the acts of the ‘terrorist’ group, the Arakan Rohingya Salvation Army, not once mentioning the horrific crimes committed by the Myanmar Military, and even recommending more security posts to be established in the area.¹⁴ The GANHRI-SCA report “encourages the NHRC to interpret its mandate in a broad, liberal and purposive manner, and to promote and protect human rights of all including the rights of Rohingya and other minority groups”.¹⁵ Given the MNHRC’s demonstrated refusal to recognise the term, ‘Rohingya’ and thus their right to self-identify, this is very unlikely.



The Rohingyas are living in these rickety huts made of bamboo and plastic sheets in the Cox’s Bazar refugee camps. (Credit: Dhaka Tribune/Syed Zakir Hossain)

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- 12 Nina Larson, ‘Rakhine conflict has ‘hallmarks of genocide’: Yanghee Lee’ Frontier Myanmar, 13 March, 2018. Available at <https://frontiermyanmar.net/en/rakhine-conflict-has-hallmarks-of-genocide-yanghee-lee>
- 13 The Rohingya are widely viewed as illegal Bengali immigrants attempting to gain political capital by ‘creating’ a new identity.
- 14 ‘Statement by the Myanmar National Human Rights Commission with regard to the terrorist attacks that occurred in MaungDaw and Buthidaung townships of Rakhine State Statement No. (11/2017)’, The Myanmar National Human Rights Commission, 3 October, 2017. Available at <http://www.mnhrc.org.mm/en/statement-by-the-myanmar-national-human-rights-commission-with-regard-to-the-terrorist-attacks-that-occurred-in-maung-daw-and-buthidaung-townships-of-rakhine-state-statement-no-112017/>
- 15 ‘Report and Recommendations of the Session of the Sub-Committee on Accreditation’, International Coordination Committee of National Institutions for the Promotion and Protection of Human Rights, Section 2.3, 16–20 November, 2015. Available at <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA%20FINAL%20REPORT%20-%20NOVEMBER%202015-English.pdf> At the time of this report, the Global Alliance of National Human Rights Institutions (GANHRI) was called the International Coordination Committee of National Institutions for the Promotion and Protection of Human Rights (ICC). Henceforth the ICC will be referred to as GANHRI.

Human Rights Promotion

Instead of making substantive efforts in human rights protection, recommendations towards which were made in the 2017 ANNI report, the MNHRC has focused its activities on human rights promotion and education with the Chairperson believing that “education is the best way towards peace” as it is “more sustainable than any type of ceasefire”.¹⁶ Many trainings and workshops have been given by the MNHRC, including to the General Administration Department, government officials, department heads, and trainees at military training centres. While this long-term strategy is encouraged, this must go hand-in-hand with - and not at the expense of - more robust human rights protection in the short term. Furthermore, given the continued severity of human rights violations committed by the Myanmar Military, it is questionable how effective such a strategy has been thus far.



IDPs from Awng Lawt fleeing in the jungle. (Credit: Kachin Women's Association - Thailand)

Accountability and Publication of Findings and Reports

To increase the independence, transparency and credibility of the MNHRC it must be accountable to the President, the Parliament and most importantly to the public in general, and as such its reports must be made widely available. The public and other stakeholders must be able to find out about the work of the Commission including complaints received and investigated, monitoring undertaken, and advice given to the Government.

To ensure regular, wide and systematic dissemination of the MNHRC's reports and findings in as many local ethnic minority languages as possible, and therefore foster its transparency and credibility, several amendments to the MNHRC Law must be made. Section 22(m)¹⁷ requires that special reports “on human rights issues” be submitted to the President, but this must be expanded to the Parliament, while ensuring that the public are included in the process. This is an issue that the GANHRI-SCA also raised.¹⁸ Also, Section

16 ‘Suspicious Minds’, 2017.

17 The Myanmar National Human Rights Commission Law, Section 22.

18 GANHRI-SCA, Section 2.7.

39 states that upon the completion of an inquiry, the MNHRC may disclose the findings to the public “as may be necessary”.¹⁹ This latter clause must be removed to make clear that the public must be aware of all inquiry findings.

While the MNHRC has asserted that it has established a relationship with Parliament, specifically the Citizens, Fundamental Rights, Democracy and Human Rights Committees from both the Upper and Lower House, this must be institutionalised as part of a legal amendment.

3.2 Autonomy from the Government and Independence Guaranteed by Statute or the Constitution

In order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution’s membership is ensured. (Paris Principles, B.3)²⁰

Budgetary Autonomy and Financial Independence

One area which the MNHRC has improved in relation to the Paris Principles is its autonomy regarding its budget. Previously, the annual budget was submitted to the President’s Office for approval. This was an issue raised by the GANHRI-SCA, which noted that the MNHRC “...must be provided with an appropriate level of funding in order to guarantee its independence and its ability to freely determine its priorities and activities. It must also have the power to allocate funding according to its priorities.”²¹ In a positive development, however, since the 2016–2017 fiscal year, its budget is submitted to and allocated by the Parliament, thus giving the MNHRC financial autonomy from the Executive. However, the MNHRC Law must be amended to institutionalise this procedure and also require that a specific line in the national budget be added for the MNHRC.

Interaction with, and State Submissions to, the International Human Rights System

As part of the mandate for NHRIs, the MNHRC has undertaken engagement with the international human rights mechanisms, such as the Universal Periodic Review (UPR) process and the Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW). It submitted a report to CEDAW in June 2016 and to the UPR in November 2015. However, despite the MNHRC’s assertion that they did submit independent reports to CEDAW and the UPR, the GANHRI-SCA raised questions about the MNHRC’s autonomy regarding state submissions to international human rights mechanisms, noting

19 The Myanmar National Human Rights Commission Law, Section 39.

20 The Paris Principles, Section B.3.

21 GANHRI-SCA, Section 2.3.

that, “while it is appropriate for the NHRIs to provide information to the government in the preparation of the State report, NHRIs must maintain their independence and where they have the capacity to provide information to human rights mechanisms should do so in their own right”.²²

The MNHRC has also recommended that the Myanmar Government accede to the International Covenant on Economic, Social and Cultural Rights which Myanmar did ratify in October 2017.²³ While this push to the Government is welcome, given that Myanmar has only ratified the Convention on the Rights of the Child, CEDAW, and the Convention on the Rights of Persons with Disabilities, the MNHRC must now continue to push for the ratification of the remaining core international human rights treaties, including optional protocols.

Selection and Appointment

The selection and appointment of Commissioners has been a problem raised by the GANHRI-SCA and civil society for many years. The selection and appointment mechanism is one of the most important ways to guarantee the independence and pluralism of NHRIs.

The current Selection Board, as established by Section 5²⁴ of the legislation, does not offer such guarantees for multiple reasons. Firstly, one of the ten members of the Selection Board is the Union Minister of Home Affairs who is always a serving military general, proving problematic as many reported human rights violations are committed by the military itself. Section 5(b) must be amended so that the composition of the Selection Board does not include military or military-affiliated members. Secondly, while Section 5(f) stipulates that two Selection Board members are from the Parliament, it does not specify who the two parliament representatives should be and how they will be selected. While this selection procedure must be transparent through due parliamentary process, this is also problematic given that 25 percent of the seats in Parliament are allocated to military personnel. Thus, Section 5(f) must be amended to ensure that the two Parliament representatives, or any other number that might be depending on overall amendment of the MNHRC Law, are selected by the Parliament itself through due legislature process rather than appointment or selection by the President. Thirdly, Section 5(h) requires that two representatives of a registered non-governmental organisation (NGO) be part of the Selection Board. This is too restrictive as civil society is not limited to registered NGOs but also includes journalists, individuals, union members and academics. The language of Section 5(h) must be changed to “independent members of civil society”.

In addition, Section 8 states that the Selection Board shall adopt “procedures for nominating prospective Members of the Commission”.²⁵ International standards recognise

22 GANHRI-SCA, Section 2.3.

23 ‘The Myanmar National Human Rights Commission Annual Report 2016 (English)’, The Myanmar National Human Rights Commission, 9 September, 2017. Available at <http://www.mnhrc.org.mm/en/publication/2016-annual-report-english/>

24 The Myanmar National Human Rights Commission Law, Section 5.

25 The Myanmar National Human Rights Commission Law, Section 8.

that it is of critical importance that the terms and conditions for selection and appointment are transparent and set out in the founding law of NHRIs. Thus, the procedures for nominating potential members of the MNHRC must not be left to be established by the Selection Board but must be set out in the law. These procedures must include broad consultations with civil society throughout the process and broad advertisement of vacancies.

In practice, the selection process has been lacking transparency. A reshuffle in September 2014 resulted in the number of Commissioners being reduced from 15 to 11 and seven members being replaced.²⁶ These changes were made subsequent to the passing of the MNHRC Law earlier in the year and resulted in a replacement of the Commissioners that had been in place when the MNHRC's mandate was established by Presidential Decree in 2011. Significantly, none of the members who were replaced were aware of the process and one even questioned the legality of the reshuffle.²⁷ There was no clear indication regarding whether or not the Selection Board had been convened to appoint new Commissioners or if it had been instituted in a top-down process by then-President Thein Sein, or by another authority. This lack of transparency was also apparent in the recent appointment of three new Commissioners which was announced through a short statement on the Facebook page of the President's Office with no details regarding the selection process.²⁸ This contradicts the explicit stipulation in the General Observation that there must be "a clear, transparent, merit-based and participatory selection and appointment process".²⁹



The Myanmar National Human Rights Commission, Yangon. (Credit: Progressive Voice.)

26 Bill O'Toole, 'Rights body shake-up under fire', The Myanmar Times, 29 September, 2014. Available at <https://www.mmmtimes.com/national-news/11803-rights-body-shake-up-under-fire.html>

27 Ibid.

28 Myanmar President Office Facebook Page, accessed 10 May, 2018, <https://www.facebook.com/myanmarpresidentoffice.gov.mm/posts/1624255190955544>

29 General Observations of the SCA, Section 2.6.

Dismissal Procedures

Freedom from arbitrary dismissal is crucial to an NHRI's independence. Since the MNHRC has the authority to comment on the government's actions in respect to human rights, its members must be protected from retaliation. For this reason, the enabling legislation must specify in detail the circumstances under which a member may be dismissed. Dismissal must be limited to serious wrongdoing, clearly inappropriate conduct or serious incapacity. In addition, mechanisms for dismissal must be independent from the executive. Section 18 of the MNHRC Law does not offer these guarantees. Instead, it states that the President, in coordination with the speakers of the Upper and Lower Houses of Parliament, has the authority to dismiss a member of the MNHRC.³⁰ It is imperative that Section 18 be amended so that it guarantees the establishment of an independent mechanism for dismissal. International guidelines suggest a two-third majority vote of the Parliament or an independent board of judges. However, in the specific context of Myanmar, it is important to note that the Parliament's composition (25 percent military-assigned seats) and a politically pliant judiciary that is subordinate to the military do not offer these guarantees of independence either.

3.3 Pluralism

The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights..."(Paris Principles, B.1)³¹

Lack of pluralism is one of the most problematic aspects of the MNHRC, which is evident in the current composition of Commissioners, the selection process itself, and the recruitment of staff, all of which have been a major contribution towards a lack of public trust in the Commission.

Pluralism of Commissioners

As the GANHRI-SCA General Observations on the Paris Principles points out, "Where the members and staff of NHRIs are representative of a society's social, ethnic, religious and geographic diversity, the public are more likely to have confidence that the NHRI will understand and be more responsive to its specific needs."³² Myanmar is a hugely diverse country in terms of religion, ethnicity, language and culture, and the domination by the ethnic and religious majority, Burman Buddhists, has been a key factor in the ongoing civil wars and persecution of minorities such as the Rohingya. It is thus vital that the Selection Board ensures an ethnically, religiously diverse commission that is gender-bal-

30 The Myanmar National Human Rights Commission Law, Section 18.

31 The Paris Principles, Section B.1.

32 General Observations of the SCA, Section 1.7.

anced to move towards a more accurate representation of the country's population. To secure pluralism, the legislation must specify a significant number of representatives of minority backgrounds. Thus, Article 7(c) must be amended so that it clearly requires that at least one-third of the total number of the Commissioners are representatives of women, one-third are representatives of ethnic nationalities, and one-third come from religious minorities. The current composition includes one Muslim member, and two from ethnic nationalities – one Karen and one Rakhine.

One of the most striking aspects of the MNHRC's current composition is that there is only one female Commissioner out of a total of ten. In fact, for a long period of time – between October 2016 and April 2018 – there were no female Commissioners. This was the situation since the Ava Tailoring case in 2016 in which MNHRC Commissioners pressured the families of two domestic workers who were tortured at the hands of a tailoring shop family to accept financial compensation rather than seek criminal justice.³³ After public outcry over the MNHRC's handling of the case, four Commissioners resigned, including the only two female Commissioners. It took eighteen months since this occurred for three new Commissioners to be appointed, which included one woman.³⁴ Even though Section 7(c) of the MNHRC Law stipulates that selection must “ensure the equitable representation of men and women, and of national races”, it is lamentable that only one MNHRC Commissioner is female.³⁵

Pluralism of Staffing

The requirements set out in Section 7³⁶ of the MNHRC Law for the plurality of the Commissioners such as gender balance, ethnic and minority representation, and human rights experience, must also be added as requirement for staff under Chapter VIII.

Consultation with Civil Society

The Paris Principles recognise that relationships with civil society can help NHRIs to protect their independence and pluralism and enhance their effectiveness by deepening their public legitimacy. The MNHRC Law does give power to the MNHRC to consult and engage with civil society organisations.³⁷ However, Section 22(f) must specifically emphasise that the consultation and engagement be “regular” and “inclusive” of civil society organisations, community-based organisations and networks regardless of their registration status, to enable meaningful engagement, instead of simply allowing engagement at the Commission's discretion.

In practice, the MNHRC has taken steps in recent years to engage further with civil society, including making a commitment to develop regular communication with the

33 ‘Suspicious Minds’, 2017.

34 Myanmar President Office Facebook Page, accessed 10 May, 2018, <https://www.facebook.com/myanmarpresidentoffice.gov.mm/posts/1624255190955544>

35 The Myanmar National Human Rights Commission Law, Section 7.

36 The Myanmar National Human Rights Commission Law, Section 7.

37 The Myanmar National Human Rights Commission Law, Section, 22.

organisations that authored this report. Other activities include cooperating with a human rights organisation working on behalf of political prisoners by consulting them on a draft prison law and using training materials from a human rights education organisation. This is a welcome improvement over the years and it is recommended that the MNHRC maintains, deepens, and institutionalises this engagement with wider range of civil society groups who are working to improve various human rights situations.

Degree of Trust

The opaque selection process, lack of pluralism in membership, the unwillingness to investigate major abuses by the Myanmar Military, and the backgrounds of the Commissioners, including two former military personnel, are major factors in the trust deficit among the public and civil society, despite the improved efforts taken by the MNHRC to engage with civil society. Many of the Commissioners lack previous experience in human rights work, and their commitment to the universality of human rights is questionable. The terms of the current Commissioners end in 2019, and this gives the current National League for Democracy (NLD)-led Government an opportunity to amend the MNHRC Law, especially to make the Selection Board more inclusive and independent, and thus ensure a more transparent and open selection process for a more effective, representative and action-orientated MNHRC.



Tatmadaw delegates to the 21st Century Panglong Union Peace Conference listen to the opening speeches on July 11. (Credit: Frontier/ Nyein Su Wai Kyaw Soe)

3.4 Adequate Resources

The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding.” (Paris Principles, B.2)³⁸

The GANHRI-SCA General Observations on the Paris Principles stipulates that “to function effectively, an NHRI must be provided with an appropriate level of funding in order to guarantee its independence and its ability to freely determine its priorities and activities”.³⁹ The MNHRC Law states that “The State shall provide the Commission with adequate funding”⁴⁰ yet the Commission believes it is underfunded, especially as regards staffing, with Vice-Chair, Sitt Myaing, claiming in 2017 that they needed 300 staff to fulfil their mandate but only could afford to hire 57.⁴¹

In the 2016 Annual Report the MNHRC stated its intention to open regional offices in Mandalay, Naypyidaw and one other unspecified location.⁴² As the GANHRI-SCA General Observations points out, “Another means of increasing the accessibility of NHRIs to vulnerable groups is to ensure that their premises are neither located in wealthy areas nor in or nearby government buildings. This is particularly important where government buildings are protected by military or security forces. Where an NHRI’s offices are too close to government offices, this may not only compromise the perceived independence of the Institution but also risk deterring complainants.”⁴³ The current office is in Yangon, the wealthiest part of the country and is difficult to access for those marginalised communities of the country.

Thus, it is a welcome move to make access to the Commission easier by opening more offices. However, Naypyidaw, the custom-built and heavily militarised city for government, would likely deter victims from approaching the Commission. The proposed opening of a regional office here is thus unlikely to serve any purpose, rendering it unnecessary. Funds should be prioritised elsewhere. In Myanmar, the most marginalised populations and those that experience the most severe and regular human rights violations are in ethnic minority areas in the ‘borderlands’ of the country. In order to be more effective, the MNHRC must prioritise the opening of offices in each of the regional state capitals and advocate for funding for full staffing and adequate resources for these offices.

38 The Paris Principles, Section B.2.

39 General Observations of the SCA, Section 1.10.

40 The Myanmar National Human Rights Commission Law, Section, 46.

41 ‘MNHRC failing to protect human rights, says NGOs’, DVB, 4 December, 2017. Available at <http://www.dvb.no/news/mnhrc-failing-to-protect-human-rights-say-ngos/78709>

42 The Myanmar National Human Rights Commission Annual Report 2016 (English).

43 General Observations of the SCA, Section 1.10.

3.5. Adequate Powers of Investigation

A national institution may be authorized to hear and consider complaints and petitions concerning individual situations... In such circumstances... the functions entrusted to them may be based on the following principles;

...(d) Making recommendations to the competent authorities, especially by proposing amendments or reforms of the laws, regulations and administrative practices, especially if they have created the difficulties encountered by the persons filing the petitions in order to assert their rights.” (Paris Principles, D(d))⁴⁴

Powers of Investigation

The MNHRC Law sets out the mandate to investigate cases and make recommendations to the relevant government departments and organisations. The law also instructs these government departments and organisations to respond within 30 days, stating what action they will take based on the MNHRC’s recommendations.⁴⁵ In addition to this stipulation, an article must be added that would give the Commission the power to take follow-up action if the authorities are not responsive to the Commission or their answer is not satisfactory. Without such mechanisms, the Commission’s power to compel authorities to address human rights violations is seriously limited. For example, according to the 2016 annual report – the latest available – there were only 165 replies from relevant government ministries and departments out of 311 cases referred by the Commission – just over half.⁴⁶ As the GANHRI-SCA General Observations 1.6 points out, “In fulfilling its protection mandate, an NHRI must not only monitor, investigate and report on the human rights situation in the country, it should also undertake rigorous and systematic follow up activities to promote and advocate for the implementation on its recommendations and findings, and the protection of those whose rights were found to have been violated.”⁴⁷ Thus, an article must be added that gives the power to the MNHRC to submit memorandums to the President and the Parliament if a department or organisation does not reply in good time or does not take satisfactory action to address human rights violations.

The Paris Principles require that NHRIs have access to all documents and all persons necessary for it to conduct an investigation. This includes the power to compel the production of documents and witnesses. Section 35 of the MNHRC Law grants the MNHRC such powers. Section 36(a) and (b) further list limitations to such powers.⁴⁸ While acknowledging the necessity to protect classified documents for national security reasons as Section 36(a) outlines, Section 36(b) limits the Commission’s access to “classified documents in

44 The Paris Principles, Section D(d).

45 The Myanmar National Human Rights Commission Law, Section 38.

46 The Myanmar National Human Rights Commission Annual Report 2016 (English).

47 General Observations of the SCA, 1.6.

48 The Myanmar National Human Rights Commission Law, Section 35.

the departments and organizations of the government”.⁴⁹ The language used is extremely broad and such limitation could be used to seriously limit the Commission’s investigative powers. It is recommended that Section 36(b) be removed.

Court Cases

Section 37 states that the Commission shall not inquire into any complaint that involves current proceedings before the court.⁵⁰ To acknowledge the complementarity of the Commission and the court system and to broaden the powers of the MNHRC, Section 37 must be amended so that the Commission, with authorisation of the court, can inquire into matters pending before that court. This is especially important given the lack of rule of law in the country and the weak, politically pliant judiciary. Unless moves towards establishing the rule of law are made, finding justice for human rights violations through the Myanmar court system is vulnerable to political interference, corruption and military influence over the court system. Furthermore, judges do not act in accordance with international human rights standards. A salient example is that of child rape cases, where victims have to go through a costly, time consuming process only for perpetrators to receive relatively light sentences.⁵¹ Thus, it is vital that the MNHRC plays a role in filling this accountability gap.

Inspection of Prisons, Jails, Detention Centres and Places of Confinement

Sections 43, 44 and 45 of the MNHRC Law relate to the inspection of prisons, jails, detention centres and places of confinement and Section 44(a) gives the MNHRC the power to visit such places but only after notifying the relevant authorities.⁵² However, NHRIs should have the power to enter any place of detention without prior warnings. The GANHRI-SCA report “encourages the NHRC to conduct ‘unannounced’ visits as this limits opportunities for authorities to hide or obscure human rights violations and facilitates greater scrutiny”.⁵³ It is also recommended that the requirement for the MNHRC to notify the relevant authorities of the time of its visits in Section 44(a) be removed.

In practice, this has been an area in which the MNHRC has been most active including visiting prisons and police and court detention centres, making recommendations to the Ministry of Home Affairs, and cooperating with a civil society organisation that works on the rights of political prisoners. The 2017 ANNI report gave an example of how recommendations by the MNHRC to the President’s Office and the Ministry of Home Affairs resulted in overcrowding being addressed in a prison in Kachin State by adding an extra storey to the building.⁵⁴ Other positive results include female prisoners now receiving regular

49 The Myanmar National Human Rights Commission Law, Section 36.

50 The Myanmar National Human Rights Commission Law, Section 37.

51 ‘Rape Victims Struggle to find Justice in Myanmar’, Myanmar Now. 17 February, 2016. Available at <http://www.myanmar-now.org/news/i/?id=aa0320cc-cb14-4750-ad79-25d085739969>

52 The Myanmar National Human Rights Commission Law, Section 43, 44 & 45

53 GANHRI-SCA, Section 2.3.

54 ‘Suspicious Minds’, 2017.

supplies of sanitary items and more places of worship being made available for prisoners.⁵⁵ This response from the Ministry of Home Affairs and the President's Office demonstrates that more can be done and advocated for by the MNHRC for other essential reforms.

Cases Studies

While the MNHRC is also criticised for its lack of will to address the cases of human rights defenders in relation to freedoms of expression and assembly, the Commission has also been dogged by three controversial cases that have represented some key failures of the use of its powers of investigation;



Chyahkyi Hkawn Bu nurses her 20-month-old daughter Myitung Roi Roi Aung after their IDP camp, Mung Lai Hkyet, north of Laiza, was shelled by the Myanmar army in the early morning of December 18, 2016. (Credit: Frontier/Steve Tickner)

- (a) **Brang Shawng**– In October 2012, Brang Shawng, an ethnic Kachin, submitted a complaint letter to the MNRHC after his 14-year-old daughter – Ja Seng In- was shot and killed by the Myanmar Military. In addition to not conducting an investigation in the case – which independent civil society investigated on their own – the MNHRC failed even to protect the complainant from being criminally charged by the Myanmar Military for making ‘false charges’.⁵⁶ Brang Shawng was forced to attend court 45 times before finally being convicted of the charges, and was compelled to pay a fine.⁵⁷ Not only does this demonstrate

55 Correspondence with MNHRC, July 2018.

56 ‘Myanmar: Overturn Wrongful Conviction of Brang Shawng’, by Fortify Rights, 18 February, 2015. Available at <http://www.fortifyrights.org/publication-20150218.html>.

57 Saw Yan Naing and Andrew D. Kaspar, ‘Kachin Man Accusing Army of Killing Daughter Found Guilty of Defamation’, The Irrawaddy, 17 February, 2015. Available at <http://www.irrawaddy.org/burma/kachin-man-accusing-army-killing-daughter-found-guilty-defamation.html>.

how the MNHRC failed to protect the complainant from retaliation, but also how powerless the MNHRC is in the face of the Myanmar Military.

- (b) **Ko Par Gyi** – Ko Par Gyi was a freelance journalist covering armed conflict between the Democratic Karen Benevolent Army and the Myanmar Military when he was taken into custody, tortured, and killed by Myanmar Army soldiers.⁵⁸ The MNHRC launched an investigation after public outcry, yet the final report did not address the clear signs of torture on Ko Par Gyi’s body and contained many inaccuracies.⁵⁹ Furthering the contention that the MNHRC is powerless in the face of the Myanmar Military, despite the Commission’s recommendation for the case to be tried in a civilian court, the two soldiers involved were acquitted in a closed-door military tribunal.
- (c) **Ava Tailoring Case** – As outlined earlier, four Commissioners resigned after the bungling of a case in which two domestic workers had been tortured over a period of five years while working for the family of a prominent tailoring shop.⁶⁰ After receiving the case, Commissioners pressured the victims’ families to accept financial compensation in lieu of pursuing criminal proceedings. This lack of a human rights mindset in this case and the controversy surrounding it has hugely damaged the public trust in the MNHRC.⁶¹

58 ‘Missing Reporter Killed in Custody of Burma Army: Report’, The Irrawaddy, 24 October, 2014. Available at <http://www.irrawaddy.org/burma/missing-reporter-killed-custody-burma-army-report.html>.

59 Kyaw Hsu Mon, ‘The Report was Fabricated’, The Irrawaddy, 3 December, 2014. Available at <http://www.irrawaddy.org/interview/report-fabricated.html>.

60 Lawi Weng, ‘Rangoon Family Who ‘Enslaved’ Girls for Years Settle Case for \$4,000’, The Irrawaddy, 19 September, 2016. Available at <https://www.irrawaddy.com/news/burma/rangoon-family-who-enslaved-girls-for-years-settle-case-for-4000.html>.

61 ‘Open letter to President Regarding Myanmar National Human Rights Commission Reform’, by 142 Civil Society Organisations, 28 September, 2016. Available at <http://www.burmapartnership.org/2016/09/26837/>





4

Conclusion

4. Conclusion

The MNHRC has been established for nearly seven years and has yet to prove itself as an institution that is committed to defending human rights. The MNHRC Law, while flawed, does give the MNHRC a broad mandate which the Commission can exercise for the effective protection of people's rights if it has the will to do so, but it has yet to fulfill that mandate. While it has focused on promotion, especially in regard to giving trainings and human rights talks, the protection side, as evidenced by the three emblematic cases – Brang Shawng, Ko Par Gyi, and Ava Tailoring Shop – has demonstrated serious problems.

The next few years are going to be vital for the future of the MNHRC. In 2019, the terms of the current Commissioners will end or be up for renewal; there will be general elections in 2020 with a new parliament and government for 2021; and the GANHRI-SCA will review the MNHRC's accreditation status in 2020.

Thus, there is still time and opportunity to prove it is fully committed to defend the rights of the people and reinvigorate its work. The starting point will be for the Parliament to amend the MNHRC Law to make it even stronger, so that it is in full compliance with the Paris Principles and other international standards for NHRIs such as the Belgrade Principles. The Selection Board can also breathe fresh air into the MNHRC by selecting candidates from a broader and more pluralistic field through an inclusive and transparent process. If these two processes go hand-in-hand while the Commission itself makes significant improvements in carrying out its protection mandate, and thus reducing the public confidence deficit, the MNHRC could potentially be accredited with an 'A' status at the next GANHRI-SCA process as an NHRI that is compliant with the Paris Principles. This would give the MNHRC voting rights in regional and international bodies of NHRIs as well as allow the MNHRC to take the floor in sessions of the UN Human Rights Council. It is also an opportunity for the NLD-led Government to set a benchmark for its first term in office – that of the foundations of an independent and effective MNHRC that can start to build public trust and be a genuinely progressive stakeholder in the advancement of human rights in Myanmar.



Credit: Frontier/ Nyein Su Wai Kyaw Soe



5

Recommendations

5. Recommendations

To the Myanmar Government (Executive):

- To provide support to the Parliament to reform the MNHRC Law to:
 - Explicitly mandate the MNHRC to investigate violations in conflict zones and to allow them unrestricted access to active conflict and ceasefire areas;
 - Expand the stipulation for the composition of the Selection Board to include civil society representatives from non-registered NGOs;
 - Establish a quota for different criteria regarding pluralism, such as by specifying that at least a third of both the body's membership and staff are women and are from ethnic and religious minorities respectively, as well as from civil society with human rights experience;
 - Establish an independent mechanism for dismissal of Commissioners;
 - Make the processes of selection more transparent, following due process, with a requirement to publicise the members of the Selection Board, in order to remove executive influence from the formation of the Selection Board including ensuring that the two parliament representatives of the Selection Board are selected by the Parliament itself rather than the President;
 - Make the process of selection of the Commissioners transparent and open by setting out procedures for nominating potential members of the MNHRC, which should include broad consultations with civil society;
 - Ensure staff recruitment procedure is open and transparent, such as advertising the positions publicly;
 - Remove the clause about prior notification to allow for unannounced visits to prisons, jails, detention centres and places of confinement;
 - Allow the MNHRC to initiate an investigation into a case if a case is under trial before any court or if a Myanmar court has “finally determined on a case”;
 - Set out procedures for nominating potential members of the MNHRC, which should include broad consultations with civil society;
 - Give the MNHRC authority to take actions if the response provided by relevant ministries is not satisfactory or if there is no response at all;
 - Specifically stipulate that the funds for the MNHRC should be allocated through parliamentary vote;
 - Ensure that the budget is public, such as by adding a line in the national budget for the MNHRC budget;
 - Ensure regular, wide and systematic publication of the MNHRC's reports and findings by deleting “as appropriate” from Section 22(j) and Section

45; “as may be necessary” from Section 39; and by adding “to the public” to Section 22(m);

- Refrain from interfering in MNHRC investigations and demonstrate the political will to respect and undertake recommendations from the Commission; and
- Amend the 2008 Constitution to bring the military under civilian control, end impunity and include the MNHRC as a constitutional body to enshrine its mandate of independence and impartiality to protect human rights.

To Parliament:

- Encourage meaningful, regular debate on the role of the MNHRC, and on its annual report, in parliamentary sessions, and as required where urgent and/or necessary matters arise;
- Hold public hearings on the MNHRC, including on amendments of the MNHRC Law; and
- Table a motion to amend the MNHRC Law as described above.

To the MNHRC:

- Interpret the MNHRC Law in a “broad, liberal, purposive”⁶² manner that is more consistent with the Paris Principles;
- Be more proactive in pressuring the Government and Parliament to reform the enabling MNHRC Law in accordance with the Paris Principles;
- Review and implement the recommendations made by the GANHRI-SCA;
- Ensure that the work of the MNHRC adheres to international agreements relevant to NHRIs such as the Paris Principles, the Merida Declaration and the Belgrade Principles;⁶³
- Take the initiative to seek out and act upon information about human rights abuse, rather than waiting for a complaint to be filed to the Commission;
- Ensure discretion and confidentiality when sharing information between the Executive, Parliament, the Myanmar Military and branches of law enforcement to ensure that complainants and relevant witnesses are protected from reprisal;
- Accompany human rights investigations and recommendations with public pressure to ensure that relevant parties, especially government ministries, respect and implement them;
- Support programmes that provide long-term, systematic support and rehabilitation for the victims of human rights violations;
- Solicit assistance from civil society to deal with all aspects of human rights protection, including receiving complaints and carrying out investigations;
- Open more branch offices in the rural areas with sufficient resources to educate

62 GANHRI-SCA, Section 2.3.

63 The Merida Declaration describes the role of NHRIs in implementing the Sustainable Development Goals and the Belgrade Principles outline how NHRIs and legislative bodies should work together.

marginalised, vulnerable, particular ethnic and religious minority communities about the MNHRC's mandates to protect and promote human rights;

- Ensure all materials produced are translated into as many non-Myanmar ethnic languages as possible and distribute widely to respective communities; and
- Engage in more outreach with smaller civil society organisations and grassroots community based organisations.

To the International Donor Community:

- Encourage the Parliament and the Government to reform the MNHRC Law and to open and recognise the space for civil society to strengthen the MNHRC;
- Assist the MNHRC to effectively advocate for the Government and the Parliament to amend the MNHRC Law and enact necessary reforms of the Commission; and
- Support civil society's human rights work and their efforts to ensure the MNHRC becomes fully effective and in compliance with the Paris Principles, and all other declarations and principles relevant to NHRIs, including the Belgrade Principles, the Merida Declaration, the Edinburgh Declaration.

To Domestic Civil Society:

- Campaign for amendment of the MNHRC Law to enhance effectiveness of the MNHRC; and
- Hold the MNHRC accountable by engaging with the Commission rigorously/pro-actively, monitoring the Commission's performance, highlighting situations where it is failing to meet its mandate, such as by bringing issues to the attention of the media and international human rights mechanisms, and making concrete recommendations.

Contact Information:

Progressive Voice

www.progressivevoicemyanmar.org

info@progressive-voice.org