

**ASIA-PACIFIC JOURNAL  
ON HUMAN RIGHTS  
AND THE LAW**

**Volume 13  
Number 1  
2012**

MARTINUS  
**NIJHOFF**  
PUBLISHERS

**Leiden – Boston**

# ASIA-PACIFIC JOURNAL ON HUMAN RIGHTS AND THE LAW

## EDITOR-IN-CHIEF

Dr Fernand de Varennes

*2004 Linguapax Laureate*

*Past Director, Asia-Pacific Centre for Human Rights and the Prevention of Ethnic Conflict*

*Visiting Professor, Peking University Faculty of Law, Beijing, People's Republic of China*

*Scientific Advisor, International Observatory on Language rights, Université de Moncton, Canada*

## EDITORIAL BOARD

Donna Z. Gasconia

*Former Executive Director, Foundation for the Philippine Environment*

Mario Gomez

*Faculty of Law, University of Colombo, Sri Lanka*

Prof. Sang-Myon Rhee

*College of Law, Seoul National University, Republic of Korea*

## INTERNATIONAL ADVISORY BOARD

Ms Ofelia Calcetas-Santos

*United Nations Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, Philippines*

Radika Coomaraswamy

*United Nations Special Rapporteur on Violence against Women, Sri Lanka*

Dato Param Cumaraswamy

*United Nations Rapporteur on the Independence of Judges and Lawyers, Malaysia.*

Clarence J. Dias

*International Centre for Law in Development, India & USA*

Somchai Homlaor

*Secretary General of the Asian Forum for Human Rights and Development, Thailand*

The Hon. Justice Michael Kirby AC CNG

*Justice of the High Court of Australia*

Nafsiah Mboi

*Rapporteur for the United Nations Committee on the Rights of the Child, Indonesia*

Dr José Ramos-Horta

*Nobel Prize Laureate, East Timor*

Kipal Sibal

*Chairman of the United Nations Working Group on Arbitrary Detention, India*

*Asia-Pacific Journal on Human Rights and the Law* (ISSN 1388-1906, E-ISSN 1571-8158) is published 2 times a year by Martinus Nijhoff Publishers, an imprint of Koninklijke Brill NV, PO Box 9000, 2300 PA Leiden, The Netherlands, tel +31 (0) 71 5353500, fax +31 (0) 71 5317532.

# ASIA-PACIFIC JOURNAL ON HUMAN RIGHTS AND THE LAW

VOLUME 13 ISSUE 1 2012

ISSN 1388-1906

## ARTICLES

- The Establishment and Development of the Myanmar National Human Rights Commission and its Conformity with International Standards  
*Niki Esse de Lang* 1
- Modern Debate on the Socio-political Rights of Muslim Women  
*Nehaluddin Ahmad* 42
- Unacknowledged Rights and Unmet Obligations: An Analysis of the 2009 Indian Right to Education Act  
*Nisha Thapliyal* 65

## SELECTED HUMAN RIGHTS DOCUMENTS

- Statement of the Asian NGO Network on National Human Rights Institutions on NHRIs and the Right to Development 91
- Sonipat Declaration 95
- Conclusions and Recommendations of the 2012 Workshop on Human Rights and Development in ASEAN 100
- Universal Declaration of Human Rights in Sundanese 103

MARTINUS  
**NIJHOFF**  
PUBLISHERS  
LEIDEN – BOSTON

## **Asia-Pacific Journal on Human Rights and the Law**

### **Abstracting & Indexing**

The *Asia-Pacific Journal on Human Rights and the Law* is indexed and/or abstracted by Index Islamicus, International Political Science Abstracts, Legal Resource Index (now LegalTrac). Koninklijke Brill NV incorporates the imprints Brill, Global Oriental, Hoteli Publishers, IDC Publishers and Martinus Nijhoff Publishers.

### **Subscription Rates**

The *Asia-Pacific Journal on Human Rights and the Law* is published twice a year. For institutional customers, the subscription price for the electronic-only edition of Volume 13 (2012, 2 issues) is EUR 225.00 / USD 315.00; Electronic + print: EUR 270.00 / USD 378.00; print only: EUR 248 / USD 347. Individual customers can only subscribe to the print edition at EUR 83.00 / US\$ 116.00. All prices include shipping & handling, but prices are exclusive of VAT (not applicable outside EU). Please check our website at [brill.com/aphu](http://brill.com/aphu). Subscriptions to this journal are accepted for complete volumes only and take effect with the first issue of the year.

### **Claims**

Claims for missing issues will be met, free of charge, if made within three months of dispatch for European customers and five months for customers outside Europe.

### **Subscription Orders, Payments, Claims and Customer Service**

Brill, c/o Turpin Distribution  
Stratton Business Park  
Pegasus Drive, Biggleswade  
Bedfordshire SG18 8TQ  
United Kingdom  
tel +44 (0)1767 604954  
fax +44 (0)1767 601640  
e-mail [brill@turpin-distribution.com](mailto:brill@turpin-distribution.com)

### **Back volumes — Martinus Nijhoff Publishers**

For back volumes or issues older than 2 years, please contact  
William S. Hein & Co. Inc., 1285 Main Street, Buffalo, NY 14209 USA.  
E-mail orders@wshein.com or visit William S. Hein's website [www.wshein.com](http://www.wshein.com)  
or  
Periodicals Service Company (PSC), 11 Main Street, Germantown, NY 12526, USA.  
E-mail [psc@periodicals.com](mailto:psc@periodicals.com) or visit PSC's website [www.periodicals.com](http://www.periodicals.com)

© 2012 by Koninklijke Brill NV, Leiden, The Netherlands  
Koninklijke Brill NV incorporates the imprints Brill, Global Oriental, Hoteli Publishers, IDC Publishers and Martinus Nijhoff Publishers.

All rights reserved. No part of this publication may be reproduced, translated, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photo-copying, recording or otherwise, without prior written permission of the publishers.

Authorization to photocopy items for internal or personal use is granted by the publisher provided that the appropriate fees are paid directly to the Copyright Clearance Center,  
222 Rosewood Drive, Suite 910, Danvers MA 01923, USA.  
Fees are subject to change.

Printed in The Netherlands on acid-free paper.

Visit our website: [brill.com/aphu](http://brill.com/aphu)

# **THE ESTABLISHMENT AND DEVELOPMENT OF THE MYANMAR NATIONAL HUMAN RIGHTS COMMISSION AND ITS CONFORMITY WITH INTERNATIONAL STANDARDS**

*Niki Esse de Lang\**

---

## **1. Introduction**

Recently, Myanmar has been in the international spotlight for opening up and improving its human rights situation. This has led to improvement of its international relations and towards the lifting and easing of economic sanctions.<sup>1</sup> However, civil society organizations ('CSOs') are questioning Myanmar's true intentions and call on the international community to not overlook ongoing human rights violations.<sup>2</sup> It is also in these changing times that a new national human rights commission was created. This article will discuss the different viewpoints on the newly established Myanmar National Human Rights Commission ('MNHRC' or 'Commission') and critically assess whether it complies with international standards.

---

\* LL.M. alumnus, University of Amsterdam. Mr. De Lang worked near the Myanmar border in Mae Sot, Thailand, from November 2011 until April 2012, as a volunteer human rights lawyer and lecturer at the Burma Lawyers' Council's Peace Law Academy.

<sup>1</sup> "Change in Myanmar, Follow my lead, The government moves, and gets its rewards", *The Economist*, 21 January 2012, available at: [www.economist.com/node/21543221](http://www.economist.com/node/21543221). See also: "In Myanmar, Government Reforms Win Over Some Skeptics", *New York Times*, 29 November 2011, available at: [www.nytimes.com/2011/11/30/world/asia/in-myanmar-government-reforms-win-over-countrys-skeptics.html?pagewanted=all](http://www.nytimes.com/2011/11/30/world/asia/in-myanmar-government-reforms-win-over-countrys-skeptics.html?pagewanted=all).

<sup>2</sup> Human Rights Watch, "World Report, Country Summary: Burma", January 2012, available at: [www.hrw.org/sites/default/files/related\\_material/burma\\_2012.pdf.pdf](http://www.hrw.org/sites/default/files/related_material/burma_2012.pdf.pdf). See also: Amnesty International, "The serious human rights situation in Myanmar requires the Human Rights Council's continued attention", 13 February 2012, available at: [www.amnesty.org/en/library/asset/ASA16/001/2012/en/8859ff1c-28c9-4143-ae91-3463e3ab86f8/asa160012012en.pdf](http://www.amnesty.org/en/library/asset/ASA16/001/2012/en/8859ff1c-28c9-4143-ae91-3463e3ab86f8/asa160012012en.pdf). See also: FIDH, "The serious human rights situation in Myanmar requires the Human Rights Council's continued attention", 12 March 2012, available at: [www.fidh.org/IMG/article\\_PDF/article\\_a11456.pdf](http://www.fidh.org/IMG/article_PDF/article_a11456.pdf).

According to one author who analyzed the establishment of NHRIs in South Asia,<sup>3</sup> NHRIs can be a “double-edged sword”. On one hand they can make an actual difference in protecting and promoting human rights at the national level, but on the other they can be used by governments to protect their policies from international scrutiny by serving as mere government-controlled institutes, with the goal of promoting their human rights images on the international and regional planes.<sup>4</sup>

It is thus crucial to assess the process of the MNHRC's establishment to discover the true motivating factors behind its initiative. Apart from these factors, the conformity of Myanmar's Commission with the *Paris Principles* will also be assessed, and it will finally be compared with another NHRI in the region, Komnas HAM in Indonesia. The conclusion will present concrete recommendations on how the MNHRC can become a truly human rights promoting and protecting institute at the national level.

## **2. The Myanmar National Human Rights Commission: Initial Actions and Criticisms**

This section will discuss the establishment of the MNHRC, some of its first actions and statements, as well as criticisms by both the media and civil society. It will also give a general description of the MNHRC's nature and motivating factors.

### *2.1. The Establishment of the Myanmar National Human Rights Commission*

On 5 September 2011 the Union Government of the Republic of the Union of Myanmar formed the Myanmar National Human Rights Commission by *Notification No. 34/2011*.<sup>5</sup> The only substance in the Notification is that the MNHRC was formed “with a view to promoting and safeguarding fundamental rights of citizens described in the Constitution of the Republic of the Union of Myanmar”, and a subsequent list of 15 names of retired

---

<sup>3</sup> Note that Myanmar is part of South East Asia and not South Asia; however, it used to be part of the former British Colonial India.

<sup>4</sup> Abul H.M. Kabir, “Establishing National Human Rights Commissions in South Asia: A Critical Analysis of the Processes and the Prospects”, (2001) *Asia-Pacific Journal on Human Rights and the Law*, Vol. 2, No. 1, 1-53, p. 4.

<sup>5</sup> Republic of the Union of Myanmar, “Notification No. (34/2011) of 5 September 2011”, *The New Light of Myanmar*, Vol. XIX, No. 138, 6 September 2011, available at: [www.burmalibrary.org/docs11/National\\_Human\\_Rights\\_Commission\\_Formed-NLM2011-09-06.pdf](http://www.burmalibrary.org/docs11/National_Human_Rights_Commission_Formed-NLM2011-09-06.pdf).

government officials and academics who would be sitting on the Commission.

A month later, on 7 October 2011, the MNHRC publicly announced it would accept complaints either by letter or in person.<sup>6</sup> The requirements for a complaint to be considered are:

- Complainant's name, full address and contact address (if any phone, fax and e-mail).
- Full account of how the complainant's rights were violated.
- Signed admission that the facts stated in the complaint are true.
- Copy of complainant's national registration card.
- The subject matter of the complaint cannot already have been brought before a court or be under the proceedings of a court.

The Commission claimed that it will interview the complainant – when necessary – and if it concludes that an alleged violation is true, it will take steps accordingly.

In January 2012, the MNHRC responded to an enquiry from an NGO based in the Thai-Myanmar border town of Mae Sot, Thailand. In its standardized response letter, the MNHRC repeated some of the content of its earlier notifications.<sup>7</sup> The letter was signed by Secretary Sit Myaing for the Chairman. Interestingly, it gave more information on its “responsibilities and entitlements” than was published previously. According to this letter, the MNHRC has the responsibilities and powers:

- a) To accept complaint letters on the violation of a citizen's fundamental rights stipulated in the *Constitution of the Republic of the Union of Myanmar*, to investigate the complaints and to forward the findings of this investigation to relevant government departments and organs so that necessary action can be taken;
- b) To investigate the information provided on the violation of the fundamental rights of citizens, and to forward the findings to relevant government departments and organs so that necessary action can be taken;
- c) To assess whether the rights defined in international human rights treaties to which Myanmar is a party are fully enjoyed, and to

---

<sup>6</sup> Republic of the Union of Myanmar, Myanmar National Human Rights Commission, “Accepting of complaint”, *The New Light of Myanmar*, Vol. XIX, No. 169, 7 October 2011, available at: [www.burmalibrary.org/docs12/NLM2011-10-07.pdf](http://www.burmalibrary.org/docs12/NLM2011-10-07.pdf).

<sup>7</sup> There is no public source of this letter. A copy of this letter is on file with the author.

- advise on Myanmar's reports to be submitted to international human rights organizations;
- d) To assess whether Myanmar should join human rights treaties to which Myanmar is not yet a party, and to present recommendations on this issue;
  - e) To contact and work with UN agencies and partner organizations both inside the country and those abroad which work for promotion and protection of human rights;
  - f) To assist on the matter of human rights capacity-building programs and research programs;
  - g) To initiate and assist in raising public awareness on human rights promotion and protection;
  - h) To carry out tasks entrusted occasionally by the State President with regard to human rights promotion and protection.

The letter also stated that the MNHRC “shall report directly to the President on its conduct and human rights developments in annual reports” and it can “call upon relevant persons for questioning” and “[i]t can call for viewing of relevant documents with the exception of those particularly prohibited under state requirements”. Also “[n]o one can sue the [MNHRC] [...] whether in criminal or in civil proceedings”. The letter concluded at length with the Chairman's and members' mandate, which is “the same as that of the State President, and they can serve for two terms”.

### *2.2 Open Letters to the President and Political Prisoners/Prisoners of Conscience*

On 10 October 2011 the MNHRC sent an open letter to Myanmar's President U Thein Sein. In this letter U Win Mya (also spelled as U Win Mra) wrote on behalf of the MNHRC reaffirming that the Commission is based on the *Paris Principles* and was formed with a view to promote and safeguard fundamental rights of citizens enshrined in the *Constitution of Myanmar*. He also reiterated that the MNHRC was vested with the competence and responsibility to receive complaints on violations, investigate them and communicate its findings to the relevant departments and bodies of the Government for further action. The Chairman “humbly” requested that the President of Myanmar release prisoners of conscience while referring to the expectations of the UN Secretary General and a number of countries.<sup>8</sup>

---

<sup>8</sup> Win Mya, Chairman of the Myanmar National Human Rights Commission, “Request submitted in open letter by Myanmar National Human Rights Commission to President of Republic of Union of Myanmar”, 10 October 2011, *The New Light of Myanmar*, Vol. XIX,

In the follow-up to its first open letter, the MNHRC sent a second one on 12 November 2011, where the Commission indicated it was “greatly heartened that the President on 11 October 2011 granted amnesty to 6359 prisoners”.<sup>9</sup> The Commission stated that the granting of amnesty generated greater interest and recognition of the MNHRC by both the domestic and international communities. The Commission also tried to clarify the difference in numbers between the released prisoners of conscience, 200, and the prisoners allegedly still in jail, 1800. It claimed that, when checking the international prisoners of conscience list, only 500 on this list were actually in prison, and of these 500, 200 had been released. It claimed there were still 300 “referred to as prisoners of conscience” remaining in jail, and subsequently “humbly” requested that the President – as a reflection of his “magnanimity” – release them in a subsequent amnesty.<sup>10</sup>

At a press conference on 14 November 2011 Aung San Suu Kyi announced that according to her party, the National League for Democracy (‘NLD’), there were still 591 political prisoners in Myanmar, of who, she said, “we are sure that all of them are in prison”.<sup>11</sup> Allegedly, the President has their release in mind, according to reports by the Kyodo News Agency on 19 November 2011 following an interview with the President’s Chief Political Adviser Ko Ko Hlaing.<sup>12</sup>

Subsequently, on 16 January 2012 the Government released 651 prisoners, among those leaders of ethnic groups, leaders of the 1988 Generation Student Movement, and other prominent political prisoners. Their release was based on Article 401 of the *Criminal Procedure Code*, which allows sentences to be suspended or remitted, but not cancelled, as was the case in

---

No. 173, 11 October 2011, available at: [www.burmalibrary.org/docs12/NLM2011-10-11.pdf](http://www.burmalibrary.org/docs12/NLM2011-10-11.pdf). A copy of the original open letter in Burmese is available at: [www.enburma.net/images/files/STATEMENTS/Request-Submitted-in-Open-letter-by-MNHRC-to-President-Burmese-Version.pdf](http://www.enburma.net/images/files/STATEMENTS/Request-Submitted-in-Open-letter-by-MNHRC-to-President-Burmese-Version.pdf).

<sup>9</sup> Win Mya, Chairman of the Myanmar National Human Rights Commission, “Myanmar National Human Rights Commission sends open letter to President”, *The New Light of Myanmar*, Vol. XIX, No. 206, 13 November 2011, available at: [www.burmalibrary.org/docs12/NLM2011-11-13.pdf](http://www.burmalibrary.org/docs12/NLM2011-11-13.pdf).

<sup>10</sup> *Ibid.*

<sup>11</sup> Myo Thein, “Suu Kyi says Burma’s judicial system is not fair; prevents development”, *Mizzima News*, 14 November 2011, available at: [www.mizzima.com/news/inside-burma/6183-suu-kyi-says-burmas-judicial-system-is-not-fair-prevents-development.html](http://www.mizzima.com/news/inside-burma/6183-suu-kyi-says-burmas-judicial-system-is-not-fair-prevents-development.html).

<sup>12</sup> Christine Tjandraningsih and Myat Thura, “Myanmar’s president opts to release all political prisoners: adviser”, *Kyodo News Japan*, 19 November 2011, available at: [democracyforburma.wordpress.com/2011/11/19/burma\\_myanmar-president-has-decided-to-release-all-political-prisoners-adviser](http://democracyforburma.wordpress.com/2011/11/19/burma_myanmar-president-has-decided-to-release-all-political-prisoners-adviser).

the 11 October 2011 amnesties. This means that when the released are rearrested, they will have to serve the remainder of their original sentence. One of the released 1988 Generation activists, Nilar Thein, said that the released prisoners did not include all the political prisoners, and she stated: “[W]e have to work harder for our remaining colleagues who are still in prison”.<sup>13</sup>

The above shows how the new human rights commission wants to present itself as an influencing factor in the Government’s decision to release political prisoners. They do not criticize the Government in the process nor even refer to ‘political prisoners’ but use instead the terms “what is referred to as prisoners of conscience”.

### *2.3. Statements of the MNHRC’s Chairman*

The Chairman was interviewed by the *Myanmar Times* and one of the questions he was asked was: “You are all retired government officials. Do you feel the government still has any influence over you?” Chairman U Win Mya answered the following:

Yes, we were government officials in the past. Government officials have to follow the policy of the government, whether it matches their personal beliefs or not. Now we have been appointed to work freely. I believe that we will be successful if we can use the experience we gained from our previous posts. The Paris Principles do not state that the [human rights] committee should not include former government officials. Even current government officials can sit on the commission – they are not allowed to vote on decisions but they can advise and give their opinions freely. Our commission won’t hesitate to decide fairly on human rights issues concerning the government.<sup>14</sup>

The Chairman claimed that the MNHRC is based upon the *Paris Principles*, according to which, he said: “the Commission must be allowed to make decisions independently [and] shouldn’t be under a government ministry”. The Chairman also explained in this article how the

---

<sup>13</sup> Burma Partnership, “Release of Political Prisoners: One Step of Many Needed for Democracy in Burma”, 16 January 2012, available at: [www.burmapartnership.org/2012/01/release-of-political-prisoners-one-step-of-many-needed-for-democracy-in-burma](http://www.burmapartnership.org/2012/01/release-of-political-prisoners-one-step-of-many-needed-for-democracy-in-burma).

<sup>14</sup> Yadana Htun, “We won’t be influenced by the govt”, *The Myanmar Times*, 19-25 September 2011, available at: [www.mmtimes.com/2011/news/593/news59318.html](http://www.mmtimes.com/2011/news/593/news59318.html).

Commission will work: its main task will be to investigate complaint letters, and if it finds a violation of human rights it will then contact the concerned person, company or government department. The Chairman affirmed explicitly: “If they need to change, we will tell them to change. If they don’t listen, we will send a letter to the president advising him to take action”.<sup>15</sup>

The Chairman was also asked what he thought of the composition of the Commission. In his answer, he stated that the members were chosen by the President from various ethnic groups, including Chin, Karen, Kachin and Shan. The Chairman himself is Rakhine and he believes that as the commissioners have different backgrounds in foreign affairs, education, law, environment, labor and social welfare, the MNHRC has the experience and knowledge to solve many issues.<sup>16</sup>

Chairman U Win Mra further stated that between 20 and 30 letters of complaint are received by the Commission every day, and were mostly about general issues with regard to land confiscation by the Government or private companies. The Chairman indicated that, as follow-up to the complaints, recommendations on action to be taken were forwarded to the relevant ministries.<sup>17</sup>

Four members of the MNHRC visited Kachin State, a conflict area in the north of Myanmar involving the Kachin Independence Organization (‘KIO’) and the Myanmar Government. During the visit, the MNHRC urged the Government and the KIO to “engage in a dialogue process”.<sup>18</sup> One human rights’ NGO, Burma Partnership, criticized the visit and the MNHRC’s subsequent statement claiming the MNHRC did not investigate allegations of war crimes or crimes against humanity, supposedly committed by the army, even though NGOs that have visited the area have evidence for this.<sup>19</sup> In a subsequent interview with ‘Voice of America’, the

---

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> Simon Roughneen, “Human Rights Commission in Burma Rules Out Inquiry”, *Worldpress.org*, 17 February 2012, available at: [worldpress.org/Asia/3884.cfm](http://worldpress.org/Asia/3884.cfm).

<sup>19</sup> Burma Partnership, “Burma’s NHRC: An Empty Gesture” (2012 updated version), 10 January 2012, p. 8, available at: [www.burmapartnership.org/wp-content/uploads/2011/10/Burmas-NHRC-Updated-Jan-2012.pdf](http://www.burmapartnership.org/wp-content/uploads/2011/10/Burmas-NHRC-Updated-Jan-2012.pdf). For an overview of crimes against humanity and other atrocities allegedly committed by the army and the Kachin Independence Organization (KIO) in Kachin State, see: Matthew F. Smith, “Where Myanmar Keeps Trampling Rights”, Human Rights Watch, *International Herald Tribune*,

MNHRC's Chairman commented that he had not read any of such reports and dismissed the allegations.<sup>20</sup>

Recent statements by the same Chairman also raise questions about the MNHRC's competence. On Tuesday 14 February 2012 the Chairman stated, at a press conference in Thailand, that the MNHRC cannot investigate allegations of human rights abuses in ethnic minority areas as the national reconciliation is a political process and therefore investigations in conflict areas would not be appropriate at this time.<sup>21</sup> He stated that "[w]ith the establishment of [...] peace, other problems like human rights violation and atrocities supposed[ly] committed against ethnic groups will also recede into the background".<sup>22</sup>

#### *2.4 Media and Civil Society Criticisms*

According to the BBC, "analysts [...] question whether the retired civil servants and scholars on the panel will have the will or the ability to challenge the government". The BBC calls it an attempt by the Government to receive more international recognition after the highly criticized elections of November 2010.<sup>23</sup>

The Irrawaddy, an English-language news source founded by Burmese exiles living in Thailand, reported that Burmese human rights groups have doubts on how independent the MNHRC will be, and they question the role of key members who were past defenders of Myanmar's human rights record. One example was given by the Director of the Thailand-based Human Rights Education Institute of Burma and member organization of the Burma Forum on the Universal Periodic Review.<sup>24</sup> According to him, the MNHRC Chairman stated in May 2004 during a UN Committee on the Rights of the Child session that there was no religious discrimination in

---

Op-Ed, 15 March 2012, available at: [www.nytimes.com/2012/03/16/opinion/where-myanmar-keeps-trampling-rights.html?\\_r=1&ref=global](http://www.nytimes.com/2012/03/16/opinion/where-myanmar-keeps-trampling-rights.html?_r=1&ref=global).

<sup>20</sup> Danielle Bernstein, "Burma's President Orders Ceasefire in Kachin State", *Voice of America*, 14 December 2011. See also: *Ibid.*, "Burma Partnership 2012", p. 9.

<sup>21</sup> *Supra* note 18. The reason for the Chairman's presence in Thailand is a fact-finding mission as part of an itinerary where the MNHRC will visit Malaysia, Indonesia and India as well in the near future to assess how NHRCs operate in those countries.

<sup>22</sup> "No probe into ethnic abuse", *AFP*, 15 February 2012, available at: [www.dvb.no/news/no-probe-into-ethnic-abuse-burma-rights-body/20255](http://www.dvb.no/news/no-probe-into-ethnic-abuse-burma-rights-body/20255).

<sup>23</sup> "Burma sets up human rights commission", *BBC*, 6 September 2011, available at: [www.bbc.co.uk/news/world-asia-pacific-14807362](http://www.bbc.co.uk/news/world-asia-pacific-14807362).

<sup>24</sup> Ko Htwe, "Human Rights Commission Met with Skepticism", *The Irrawaddy*, 6 September 2011, available at: [www.irrawaddy.org/article.php?art\\_id=22025](http://www.irrawaddy.org/article.php?art_id=22025).

Myanmar and insisted that the Rohingya was not a racial group.<sup>25</sup> His position that “religious intolerance or discrimination is non-existent in Myanmar” was still upheld by Myanmar’s representatives at the country’s most recent Universal Periodic Review (UPR) session.<sup>26</sup>

Burma Partnership also gave other examples of similar forms of “denial” from Commission members.<sup>27</sup> Win Mra claimed in November 1997 during a UN General Assembly session while Ambassador to the UN in New York that human rights violations did not occur in Myanmar. He also stated there was no impunity in Myanmar and called it an “outrageous” and “totally unacceptable” statement.<sup>28</sup> In a further statement during the annual session of the International Labour Organization in June 2001, he denied the existence of forced labor in Myanmar.<sup>29</sup> In addition, MNHRC Vice-Chairman, U Kyaw Tint Swe, who also serves as Myanmar’s representative to the ASEAN Intergovernmental Commission on Human Rights (‘AICHR’),<sup>30</sup> has made similar statements in the past: while serving as Ambassador to the UN in New York, he defended the Burmese army by denying allegations of their involvement in recruiting child soldiers, the Depayin massacre<sup>31</sup> or rape and other abuses against civilians in Shan and other states. He called such allegations untrue and maliciously fabricated

---

<sup>25</sup> UN Committee on the Rights of the Child, 36th session, “Summary Record of the 960th Meeting: Myanmar”, *CRC/C/SR.960*, 6 June 2004. See also: *Ibid.* Rohingya’s are an ethnic Muslim minority living in Arakan state and have often been portrayed in the media and by the UN as a persecuted community within Burma, see: *Supra* note 2, HRW World Report 2012, p. 2. See also: Akbar Ahmed and Harrison Akins, “Little help for the persecuted Rohingya of Burma”, *The Guardian*, 1 December 2011, available at: [www.guardian.co.uk/commentisfree/belief/2011/dec/01/rohingya-burma](http://www.guardian.co.uk/commentisfree/belief/2011/dec/01/rohingya-burma).

<sup>26</sup> UN Human Rights Council, “Report of the Working Group on the Universal Periodic Review, Myanmar, Addendum”, *A/HRC/17/9/Add.1*, 27 May 2011, para 11.

<sup>27</sup> *Supra* note 19, “Burma Partnership 2012”, p. 6.

<sup>28</sup> UN General Assembly, 52<sup>nd</sup> session, “Statement by H.E. U Win Mra, Permanent Representative of the Union of Myanmar to the UN, on the Draft Resolution A/C.3/52.L.63 Situation on Human Rights in Burma”, 24 November 1997, available at: [www.ibiblio.org/obl/reg.burma/archives/199803/msg00043.html](http://www.ibiblio.org/obl/reg.burma/archives/199803/msg00043.html). See also: *Supra* note 19, “Burma Partnership 2012”, pp. 5-6.

<sup>29</sup> Thomas Crampton, “But Government Maintains No Abuses Exist: Burma Pledges to Help on Forced Labour Issue”, *New York Times*, 4 July 2001, available at: [www.nytimes.com/2001/07/04/business/worldbusiness/04iht-a9.html](http://www.nytimes.com/2001/07/04/business/worldbusiness/04iht-a9.html). See also: *Supra* note 19, “Burma Partnership 2012”, p. 6.

<sup>30</sup> U Kyaw Tint Swe - Representative of Myanmar to the ASEAN Intergovernmental Commission on Human Rights, available at: [www.aseansec.org/documents/AICHR/cv06.pdf](http://www.aseansec.org/documents/AICHR/cv06.pdf).

<sup>31</sup> The Depayin Massacre occurred on 30 May 2003, when at least 70 people associated with the National League for Democracy were killed. See: Saw Yan Naing, “The Depayin Massacre, Five Years Later”, *The Irrawaddy*, 30 May 2008, available at: [www.irrawaddy.org/article.php?art\\_id=12393](http://www.irrawaddy.org/article.php?art_id=12393).

by NGOs.<sup>32</sup> He also repeatedly claimed during UN General Assembly sessions that Myanmar is a victim of a “systematic disinformation campaign”.<sup>33</sup>

Two other MNHRC members, Hla Myint and Nyunt Swe, were former high-ranking officials in the Myanmar Army and Nyunt Swe also served as a Deputy Foreign Minister from 1994 to 1998.<sup>34</sup> Burma Partnership noted that in 2007, Nyunt Swe, while serving as Deputy Ambassador to the UN in Geneva, stated during a session of the Human Rights Council:

No forced recruitment is carried out and all soldiers joined the armed force of their own accord [and] Myanmar is not a nation in a situation of armed conflict.<sup>35</sup>

Human Rights Watch (‘HRW’) is also not very optimistic about the newly formed MNHRC. It has stated that the Commission was established by decree, bypassing the new Parliament, and was led by former military officers, retired senior bureaucrats and academics. HRW named the MNHRC’s call to enact an amnesty of the prisoners of conscience “clearly orchestrated from above” and called the requirement to provide complainants’ full names and national identification details dangerous and a deterrent for potential complainants.<sup>36</sup> HRW called upon the UN and donor states to not consider support for the new Commission until it is in

---

<sup>32</sup> UN General Assembly, 58<sup>th</sup> session, “Statement by H.E. Kyaw Tint Swe, Permanent Representative of the Union of Myanmar to the UN, on the Draft resolution Situation on Human Rights in Burma”, 23 November 2003, available at: [www.ibiblio.org/obl/docs/Tint%20Swe.htm](http://www.ibiblio.org/obl/docs/Tint%20Swe.htm). See also: *Supra* note 19, “Burma Partnership 2012”, pp. 6-7.

<sup>33</sup> UN General Assembly, 62<sup>nd</sup> session, “Memorandum on the Situation of Human Rights in the Union of Myanmar, prepared by H.E. Kyaw Tint Swe under agenda item 70 (c)”, 5 November 2007, available at: [www.un.int/wcm/content/site/myanmar/cache/offonce/pid/2669](http://www.un.int/wcm/content/site/myanmar/cache/offonce/pid/2669). See also: *Supra* note 19, “Burma Partnership 2012”, pp. 6-7.

<sup>34</sup> *Supra* note 19, “Burma Partnership 2012”, p. 7.

<sup>35</sup> UN Human Rights Council, 4<sup>th</sup> session, “Statement by the Deputy Permanent Representative U Nyunt Swe, the Union of Myanmar and Leader of the Myanmar Observer Delegation at the Fourth Session of the Human Rights Council”, 23 March 2007, available at: [missions.itu.int/~myanmar/pressrelease\\_PMgev/4th%20Session%20HRC%20speech%2007.htm](http://missions.itu.int/~myanmar/pressrelease_PMgev/4th%20Session%20HRC%20speech%2007.htm). See also: *Supra* note 19, “Burma Partnership 2012”, p. 7.

<sup>36</sup> Human Rights Watch, “Burma’s Continuing Human Rights Challenges”, 7 November 2011, pp. 6-7, available at: [www.hrw.org/sites/default/files/related\\_material/Burma%20one%20year%20anniversary%20brief%20final.doc](http://www.hrw.org/sites/default/files/related_material/Burma%20one%20year%20anniversary%20brief%20final.doc).

conformity with the *Paris Principles*. It finally stated that significant changes in the Commission's mandate and membership were needed.<sup>37</sup>

Burma Partnership is of the opinion that the creation of the MNHRC occurred at a very convenient time for Myanmar, just before ASEAN had to decide on Myanmar's 2014 chairmanship of the organization and before the UN General Assembly was to vote on an annual resolution on the situation of human rights in Myanmar. Burma Partnership opined that Myanmar has "been trying to win over the international community".<sup>38</sup> The MNHRC's creation was therefore probably not coincidental, occurring also around the time the Government opened a dialogue with Daw Aung San Suu Kyi, when the UN Special Rapporteur visited the country, and just before the release of 220 political prisoners.<sup>39</sup> The Burma Partnership was of the view that the MNHRC is "nothing more than an empty gesture designed to please ASEAN and the international community at a time Burma's regime needs their support when seeking the ASEAN chairmanship and the lifting of the sanctions".<sup>40</sup>

This sort of view on national human rights institutions is neither new nor isolated: the International Council on Human Rights Policy, an independent international think tank, made similar observations in their own report on these institutions:

Governments presiding over continuing serious violations of human rights calculate that establishing a commission will be a low-cost way of improving their international reputation.<sup>41</sup>

Discussions on the MNHRC were recently in Myanmar's Parliament in March 2012. Parliament, it was reported, refused to approve the MNHRC's budget for the stated reason that the Commission had been created by presidential decree, and was therefore not in conformity with the *Constitution*. An Amnesty International researcher for Myanmar stated that "the impasse appears to be procedural in nature and will likely be

---

<sup>37</sup> *Ibid.*, p. 7.

<sup>38</sup> Burma Partnership, "Burma's NHRC: An Empty Gesture", 24 October 2011, p. 1, available at: [www.burmapartnership.org/wp-content/uploads/2011/10/BP-Briefer-Burmas-NHRC.pdf](http://www.burmapartnership.org/wp-content/uploads/2011/10/BP-Briefer-Burmas-NHRC.pdf). Note that an updated version (not containing the text referred to here) of this document was released on 10 January 2012, see: *Supra* note 19, "Burma Partnership 2012".

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> International Council on Human Rights Policy, "Performance & Legitimacy: National human rights institutions", 2004, p. 1.

resolved” as the MNHRC is “too politically useful, frankly, to both the executive and parliamentary branches of government”.<sup>42</sup>

The MNHRC responded to the Parliament’s refusal to approve its budget in a statement on 27 March 2012 which affirmed that:

[It] was established in order to promote and protect the fundamental rights of the citizens of Myanmar enshrined in the Constitution as well as to interact with the United Nations and other international organizations. This is to enable the enhanced enjoyment of human rights and to contribute to the current democratization process both in form and essence.

The Commission is an institution formed by the President under the executive power vested in him. The fact that it is not part of the Leading Bodies of the State and that its budget had been revoked has no effect on the existence and functioning of the Commission.

Most remarkably the statement is made that:

[I]n order to fully comply with the Paris Principles and act as an independent institution, it needs to become an institution established under an act of Pyidaungsu Hluttaw [Assembly of the Union, i.e. the Myanmar Parliament].

...

Indonesia, Malaysia, the Philippines and Thailand from ASEAN and many countries of the world have established national human rights commissions to promote and protect human rights. In the initial stages of establishing their commissions, many of the countries established them under a Presidential decree or decree by the Prime Minister. Subsequently enabling acts of national human rights commissions were enacted and those commissions functioned in accordance with those acts. According to international reaction, the fact that the MNHRC is the fifth national human rights institution in ASEAN has enhanced the image of the country. For these reasons, to strengthen the MNHRC

---

<sup>42</sup> “Burma’s Parliament Rejects Funding for Human Rights Commission”, *Voice of America*, 28 March 2012, available at: [blogs.voanews.com/breaking-news/2012/03/28/burma%E2%80%99s-parliament-rejects-funding-for-human-rights-commission](http://blogs.voanews.com/breaking-news/2012/03/28/burma%E2%80%99s-parliament-rejects-funding-for-human-rights-commission). See also for Burmese language articles: [www.voanews.com/burmese/news/--03\\_16\\_12\\_my-news-burma----142945115.html](http://www.voanews.com/burmese/news/--03_16_12_my-news-burma----142945115.html) and [www.bbc.co.uk/burmese/burma/2012/03/120316\\_human\\_rights\\_commission.shtml](http://www.bbc.co.uk/burmese/burma/2012/03/120316_human_rights_commission.shtml).

in the long run, the Commission, pursuant to the guidance of the President of the Republic of the Union of Myanmar, is already drafting an enabling national human rights commission act. The Commission will submit the draft to the President and, if approved, present to the Pyidaungsu Hluttaw for adoption.<sup>43</sup>

The above would seem to show how the MNHRC is beginning to be transformed by international and regional expectations, leading it to be involved even in the drafting a national human rights commission act which currently does not exist, to be submitted to the President and, if approved, presented to the country's legislative assembly. Human rights' NGOs working outside Myanmar and mostly based in Thailand have jointly issued a statement on 10 May 2012 where they welcomed the decision by the MNHRC to become an institution established under an act of Parliament, and calling for a transparent and participatory drafting process of this legislation.<sup>44</sup>

### 3. The UN System and the MNHRC

In a 28 November 2011 press release, the UN High Commissioner for Human Rights, Navi Pillay, on a mission to Bali where she met with the AICHR, four ASEA NHRIs and civil society organizations, stated:

During my talks with the four existing ASEAN National Human Rights Institutions, and with Aung San Suu Kyi, we agreed it was important to engage with the fifth national human rights institution created in Myanmar in September. It will inevitably require time and support to establish the independence and credibility it needs to be fully accepted on both the national and international stages.<sup>45</sup>

---

<sup>43</sup> Statement of the Myanmar National Human Rights Commission on its establishment and its current status of functioning, Statement No 2/2012, 27 March 2012, *The New Light of Myanmar*, Vol. XIX, No. 342, 28 March 2012, p. 16, available at: [www.burmalibrary.org/docs13/NLM2012-03-28.pdf](http://www.burmalibrary.org/docs13/NLM2012-03-28.pdf) See also: President sends message to Pyidaungsu Hluttaw Speaker stating issues related to low salaries of union level personnel, increased pensions of retired service personnel and establishing Myanmar National Human Rights Commission, *The New Light of Myanmar*, Vol. XX, No. 9, 29 April 2012, p. 1, available at: [www.burmalibrary.org/docs13/NLM2012-04-29.pdf](http://www.burmalibrary.org/docs13/NLM2012-04-29.pdf).

<sup>44</sup> Statement Calling for a Transparent and Participatory Drafting Process of the Myanmar National Human Rights Commission's Enabling Law, 10 May 2012, available at: [www.burmapartnership.org/wp-content/uploads/2012/05/Statement-Myanmar-National-Human-Rights-Commission%E2%80%99s-Enabling-Law-Eng-1005201210401.pdf](http://www.burmapartnership.org/wp-content/uploads/2012/05/Statement-Myanmar-National-Human-Rights-Commission%E2%80%99s-Enabling-Law-Eng-1005201210401.pdf).

<sup>45</sup> UN Office of the High Commissioner for Human Rights, "Next two years key to human rights development in ASEAN region – UN human rights chief", Press Release, available at: [www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11649&LangID=E](http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11649&LangID=E).

The next section will discuss how the MNHRC has engaged itself with the UN and will show how for their part the UN and its members have engaged with Myanmar regarding the MNHRC.

### *3.1 Seminar and Training Programmes*

An example of the MNHRC's engagement with the UN is a jointly organized human rights seminar for government service personnel by the MNHRC and the regional UN Office of the High Commissioner for Human Rights ('OHCHR') for South East Asia in Yangon from 14 to 15 November 2011. The Regional Representative of the OHCHR, Dr. Homayoun Alizadeh and Chairman Mya were both present and gave speeches.<sup>46</sup>

This illustrates how the MNHRC is beginning to work together with the UN with regard to human rights education. More recently, Myanmar's Ministry of Foreign Affairs and the United Nations Institute for Training and Research ('UNITAR') jointly organized the opening ceremony of an international law course for officials, though the MNHRC was not involved in this training.<sup>47</sup>

### *3.2 The MNHRC at the Universal Periodic Review*

During the Universal Periodic Review ('UPR')<sup>48</sup> of Myanmar, between 24 January and 4 February 2011, the topic of the Myanmar National Human Rights Commission was raised by a number of countries, and indeed even by Myanmar itself in its State report under the UPR process.

Myanmar explained the previous role of its Myanmar Human Rights Committee led by the Minister for Home Affairs from 26 April 2000, which was subsequently transformed into the Myanmar Human Rights

---

<sup>46</sup> "Seminar on human rights for government service personnel commences", *The New Light of Myanmar*, Vol. XIX, No. 208, 15 November 2011, p. 2, available at: [www.burmalibrary.org/docs12/NLM2011-11-15.pdf](http://www.burmalibrary.org/docs12/NLM2011-11-15.pdf).

<sup>47</sup> 'Course on International Laws opened', *The New Light of Myanmar*, Vol. XIX, No. 222, 29 November 2011, available at: [www.burmalibrary.org/docs12/MA2011-11-29.pdf](http://www.burmalibrary.org/docs12/MA2011-11-29.pdf).

<sup>48</sup> The Universal Periodic Review is a relatively new process held every four years, under the auspices of the Human Rights Council, which entails a review of the human rights of all the 192 UN Member States. The States will be given the opportunity to respond to the allegations and recommendations done by other States. See: 'Basic facts about the UPR', Office of the High Commissioner for Human Rights, November 2008, available at: [www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx](http://www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx).

Body on 14 November 2007. The obligations of the latter body were outlined in the report,<sup>49</sup> including that the Minister for Home Affairs, in his capacity as Chairman, accepted complaints and communications from those whose human rights were allegedly violated. In response he carried out necessary investigations and took proper actions although they were not included in the Body's mandate.<sup>50</sup>

Myanmar responded in the interactive dialogue that they have issued a public notice in the press in 2006 announcing that complaints could be sent to the ministries concerned and that, from January to August 2010, the Ministry of Home Affairs had received 503 submissions. They stated action had been taken on 199 complaints, while 101 were found false and the remaining 203 complaints were still under investigation.<sup>51</sup> Myanmar concluded that it hoped the Body would emerge as a national human rights commission in accordance with the *Paris Principles*.<sup>52</sup>

Eight countries made recommendations to Myanmar regarding a national human rights commission during the UPR:

That the new Commission be equipped with all the necessary safeguards to ensure its true independence in accordance with the Paris Principles (Timor-Leste);

Establish a National Human Rights Commission in line with the Paris Principles to provide for effective promotion and protection of human rights at the national level (Thailand);

Continue strengthening its system of promotion and protection of human rights in accordance with international human rights instruments, ensure the creation of a national human rights institution that complies with the Paris Principles and continue cooperating with the United Nations system mechanisms (Nicaragua);

---

<sup>49</sup> UN Human Rights Council, "National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1, Myanmar", 10 November 2010, *A/HRC/WG.6/10/MMR/1*, paras 20-21.

<sup>50</sup> *Ibid.*, para 23.

<sup>51</sup> UN Human Rights Council, 17<sup>th</sup> session, "Report of the Working Group on the Universal Periodic Review, Myanmar", 24 March 2011, *A/HRC/17/9*, para. 88.

<sup>52</sup> *Supra* note 49, para 24.

Upgrade its human rights body into an independent and credible National Human Rights Institution in accordance with the Paris Principles (Indonesia);

Expedite the establishment of a national human rights institution that is fully compliant with the Paris Principles (India);

Further enhance the mandate of the Myanmar Human Rights Body so that it can discharge its duties in accordance with the Paris Principles (Jordan);

Take necessary steps for the reformation of the Myanmar Human Rights Body as the Human Rights Commission in accordance with the Paris Principles (Azerbaijan);

Establish an independent human rights institution in conformity with the Paris Principles (Portugal).<sup>53</sup>

Myanmar responded to these recommendations as follows:

The existing human rights body was reconstituted in April 2011. Myanmar is endeavoring that the body will be commissioned in the future in accordance with Paris Principles.<sup>54</sup>

In the stakeholders' submissions to the UPR, however, Human Rights Watch (HRW) reported that the Myanmar Human Rights Body lacked real independence and did little to investigate human rights violations or promote Myanmar's compliance with international law.<sup>55</sup>

The OHCHR reported in their compilation report for the UPR that, as of 24 August 2010, Myanmar did not have a national human rights institution accredited by the Sub-Committee of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (more on the Sub-Committee in Section 4.4 below). The UN country team noted, similarly, that the Government did establish the

---

<sup>53</sup> *Supra* note 51, paras 106(23) - 106(30).

<sup>54</sup> *Supra* note 26, para 5.

<sup>55</sup> UN Human Rights Council, "Summary [of stakeholders' submissions] prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1, Myanmar", *A/HRC/WG.6/10/MMR/3*, 18 October 2010, para. 13.

Myanmar Human Rights Body in November 2007, but that it did not meet requirements of the *Paris Principles*.<sup>56</sup>

The UN committees implementing human rights treaties to which Myanmar is a party, the Committee on the Rights of the Child (‘CRC’) and the Committee on the Elimination of All Forms of Discrimination against Women (‘CEDAW’), for their part have both encouraged Myanmar to accelerate the process of establishing a national human rights institution in accordance with the *Paris Principles* and urged it to include a complaints procedure.<sup>57</sup> Unfortunately, it is noteworthy that at the same time, Myanmar’s delegation<sup>58</sup> has continuously denied reports of forced labor, sexual violence against women, child soldiers, religious intolerance and other abuses.<sup>59</sup> An example of one of such statements:

The allegations of sexual violence against ethnic women and children are baseless and merely aimed at discrediting the Myanmar Armed Forces.<sup>60</sup>

### *3.3 The visits of the UN Special Rapporteur on the Situation of Human Rights in Myanmar*

The United Nations Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana (‘Special Rapporteur’), reported to the United Nations General Assembly (‘UNGA’) on 16 September 2011 that he “repeatedly highlighted the importance of investigations into alleged human rights violations being carried out by an independent and impartial body”.<sup>61</sup>

---

<sup>56</sup> UN Human Rights Council, “Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council Resolution 5/1, Myanmar”, *A/HRC/WG.6/10/MMR/2*, 15 November 2010, para 10.

<sup>57</sup> *Ibid.*, para 11.

<sup>58</sup> The Myanmar delegation at the UPR consisted of: H.E. Dr. Tun Shin, Deputy Attorney General of the Union of Myanmar; Mr. Wunna Maung Lwin, Ambassador, Permanent Mission of the Union of Myanmar to the United Nations Office and other international organizations in Geneva; Ms. Daw Myint Kyi; Ms. Ni Lar Tin; Mr. U. Zaw Win; Mr. U. Ye Htut; Mr. U. Bo Win. It has to be noted here that none of the above are members of the new MNHRC. See: UN Human Rights Council, 10<sup>th</sup> Session of the Universal Periodic Review 24 January - 4 February 2011, archive of 27 January 2011, available at: [www.un.org/webcast/unhrc/archive.asp?go=110127](http://www.un.org/webcast/unhrc/archive.asp?go=110127).

<sup>59</sup> *Supra* note 49. See also: *Supra* note 26.

<sup>60</sup> *Supra* note 49, para 94.

<sup>61</sup> UN General Assembly, “Report of the Special Rapporteur on the situation of human rights in Myanmar”, 16 September 2011, *A/66/365*, para 76.

During the Special Rapporteur's visit to Myanmar from 21 to 25 August 2011, the Myanmar Human Rights Body was chaired by the Minister for Home Affairs and had been established under *Notification No. 53/2007*. This brought criticisms from the Special Rapporteur for not operating under any legislation, but rather under a notification emanating from executive powers. *Notification No. 53/2007* outlined the Body's composition and its terms of reference, including the following:

- to examine and make proposals on work related to the United Nations and international human rights;
- to examine and make proposals on the establishment of a human rights commission in Myanmar;
- to set up working groups as necessary.<sup>62</sup>

The Special Rapporteur noted that there was no reference to any investigative capacity or complaints receiving mechanism.<sup>63</sup> Furthermore, the Special Rapporteur stated that he was made aware the Government would replace the human rights body with a national human rights institution. This replacement is the current MNHRC, created on 5 September 2011, again through a non-legislative notification.

The Special Rapporteur raised in his report questions about the role and functioning of the new MNHRC and whether it would comply with the *Paris Principles*. If so, it could become an important mechanism for receiving complaints, investigating violations and thereby playing a central role in human rights promotion and protection.<sup>64</sup> The Special Rapporteur also indicated that the institutions and instruments of government, including the MNHRC but also other executive and judicial branches, should meet international standards for investigation of human rights violations. He also reiterated that the right to an effective remedy and reparations must be addressed.<sup>65</sup>

The Special Rapporteur concluded his report with the following two recommendations to Myanmar on the MNHRC:

Ensure that the new Myanmar Human Rights Commission is established in such a way as to comply with international

---

<sup>62</sup> *Ibid.*, para 76.

<sup>63</sup> *Ibid.*, para 76.

<sup>64</sup> *Ibid.*, para 78. The *Paris Principles* will be discussed in depth in Section 4.

<sup>65</sup> *Ibid.*, para 79.

standards, particularly the Paris Principles. The human rights institution should be established by a law adopted by the Parliament that should provide for an inclusive and transparent selection process of the members that includes a selection committee comprising all sectors of the society. The law should provide for functional and budgetary independence and meet other requirements of the Paris Principles;

Ensure that the Commission should be equipped with the necessary resources and capacity in order to ensure effectiveness. The Government should seek technical assistance from OHCHR in the development of this new institution.<sup>66</sup>

Within 6 months of the above report, the Special Rapporteur conducted a fifth visit and published a press statement on 5 February 2012.<sup>67</sup> The visit's official report to the Human Rights Council was published in March 2012 and possibly another visit will occur before October 2012, which will then be reported to the General Assembly.<sup>68</sup> He reported in the press statement that it was his first opportunity to engage with the MNHCR since its establishment. He was informed by the members of the MNHCR that the funding and number of staff might be increased in the future. He was also informed that the draft rules of procedure for the MNHCR were being examined by the judiciary and were awaiting approval of the Council of Ministers. The Rapporteur stated however that this was a wrong signal as it showed the MNHRC's dependency on decisions from the Government for its own rules of procedure.<sup>69</sup> Furthermore, the Rapporteur mentioned the dependence on presidential authorization of the MNHRC's prison visits and information he received that interviews during these visits were conducted in the presence of prison officials. The above resulted in the Special Rapporteur repeating his concern that the MNHCR is not fully independent and not in compliance with the *Paris Principles*.

The Rapporteur indicated that the technical and substantive capacity of the Commissioners and their staff needed to be enhanced on human rights issues. The Rapporteur was hopeful nevertheless, since the MNHCR's Commissioners showed their willingness to seek training and technical

---

<sup>66</sup> *Ibid.*, para 94(g)(h)

<sup>67</sup> "Statement of the Special Rapporteur on the Situation of Human Rights in Myanmar by Tomas Ojea Quintana", 5 February 2012, available at: [www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11800&LangID=E](http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11800&LangID=E).

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

assistance from the OHCHR and the international community on the application of the *Paris Principles* and other areas, such as handling human rights complaints and prison monitoring.<sup>70</sup>

### *3.4 Observations on the MNHCR*

The above section identifies recommendations on the MNHCR by states through the UPR process, by the Special Rapporteur and the High Commissioner for Human Rights. It also shows there is some cooperation between the OHCHR and the MNHRC regarding human rights training, a very important part of the 'promotion' mandate of the MNHRC. It is clear that the international community welcomes the MNHRC's establishment and is willing to support it in becoming a truly human rights promotion and protection institution. It also shows some openness on Myanmar's side by accepting and responding to the UPR recommendations, and by letting the Special Rapporteur visit and meet some MNHRC members. However, this all falls perfectly within the goal of promoting Myanmar's human rights image and it does not yet show any real promotion and protection of human rights in Myanmar itself.

## **4. The *Paris Principles* and Beyond**

The *Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights* ('*Paris Principles*' or '*Principles*') were developed in 1991 and were adopted by the UN General Assembly on 20 December 1993.<sup>71</sup> The *Paris Principles* are a set of standards and guidelines that are not legally binding, but a NHRI can only be considered credible if it complies with the *Principles*. A toolkit developed by the UN Development Programme and the OHCHR ('UNDP-OHCHR Toolkit' or 'Toolkit') defines a NHRI as follows:

[A]n institution with a constitutional and/or legislative mandate to protect and promote human rights. NHRIs are independent, autonomous institutions that operate at the national level. They are part of the State, are created by law, and are funded by the State.<sup>72</sup>

---

<sup>70</sup> *Ibid.*

<sup>71</sup> "Annex: Principles relating to the status of national institutions", UN General Assembly Resolution 48/134, *A/RES/48/134* adopted on 20 December 1993 and published on 4 March 1994.

<sup>72</sup> UN Development Programme ('UNDP') and UN Office of the High Commissioner for Human Rights ('OHCHR'), "UNDP-OHCHR Toolkit for collaboration with National

The Asia Pacific Forum (APF), a regional forum and resource centre for the establishment of independent NHRIs in the region, stated that there are now over one hundred NHRIs worldwide, of which no two are identical, though they share a number of common functions:

- monitoring the State to ensure that it meets its international and domestic human rights commitments;
- receiving, investigating and resolving complaints of human rights violations; and
- raising awareness and providing human rights education for all parts of the community.<sup>73</sup>

This section will discuss and analyze the oft-cited *Paris Principles*. The goal is to answer these questions: What are these principles, who checks their compliance and what are criticisms on these principles?

#### 4.1 The Paris Principles

The *Paris Principles* document itself is divided into four parts: (1) Competence and responsibilities, (2) Composition and independence, (3) Methods of operation, and (4) Additional principles.

##### 4.1.1 Competence and Responsibilities

Regarding the competence of a national human rights institution, the *Paris Principles* suggest that a NHRI should be given as broad a mandate as possible, clearly set forth in a constitutional or legislative text, to promote and protect human rights. Regarding the responsibilities it is suggested that the NHRI should send its opinions, recommendations, proposals and reports on human rights to the Government, Parliament and any other competent body, on an advisory basis. Further, the NHRI should ensure harmonization of national laws with international human rights standards; encourage ratification of international human rights instruments; contribute to states' reports to UN treaty bodies and committees; co-operate with international, regional and other national human rights institutions; assist in human rights education; and publicize and promote human rights.<sup>74</sup>

---

Human Rights Institutions”, December 2010, p. 2, available at: [www.ohchr.org/Documents/Countries/NHRI/1950-UNDP-UHCHR-Toolkit-LR.pdf](http://www.ohchr.org/Documents/Countries/NHRI/1950-UNDP-UHCHR-Toolkit-LR.pdf).

<sup>73</sup> Asia Pacific Forum, “What are NHRIs?”, available at: [www.asiapacificforum.net/establishment-of-nrhis/what-is-an-nhri](http://www.asiapacificforum.net/establishment-of-nrhis/what-is-an-nhri).

<sup>74</sup> *Supra* note 41, p. 1.

#### 4.1.2 Composition and Independence

According to the *Paris Principles*, independence can be guaranteed when three criteria are met. The first is that the institution's composition ensures a pluralist presentation of the social forces (of civilian society) involved in the promotion and protection of human rights. The second is that the funding and infrastructure allows it to be independent of the Government and not subject to its financial control. The third is that the NHRI's mandate should be established by law.<sup>75</sup>

#### 4.1.3 Methods of Operation

The *Paris Principles* suggest that a NHRI should be able to freely consider any questions falling within its competence whether referred to it by the Government, NHRI's members or any petitioner. It should also consult other (governmental) bodies responsible for human rights and develop relations with NGOs.<sup>76</sup>

#### 4.1.4 Additional Principles

The *Paris Principles* give some additional and optional principles concerning the status of commissions with quasi-judicial competence. These are basically guidelines for hearing and considering complaints. The Paris Principles explicitly state that a NHRI is not obliged to hear and consider complaints.<sup>77</sup> Further aspects on the issue of complaints will be considered in section 4.3.

### 4.2 Main Requirements under the Paris Principles

In December 2010 the UNDP and OHCHR jointly published a toolkit on NHRIs in which a chapter was dedicated to the *Paris Principles*. According to the toolkit, there are six main aspects to the *Paris Principles* that NHRIs should meet to be successful. These are:

1. A broad mandate, based on universal human rights standards;
2. Autonomy from government;
3. Independence guaranteed by statute or constitution;

---

<sup>75</sup> *Ibid.*, pp. 1-2.

<sup>76</sup> *Ibid.*, p. 2.

<sup>77</sup> *Ibid.*, p. 2.

4. Pluralism including through membership and/or effective cooperation;
5. Adequate resources; and
6. Adequate powers of investigation.<sup>78</sup>

These six principles will be discussed below. It is important to note that they are linked with each other, overlap and cannot always be considered separately.

#### 4.2.1 Principle 1: A Broad Mandate

According to this principle, a NHRI's mandate should be as broad as possible. It should have a broad subject-matter jurisdiction, including as many human rights as possible, as well as a broad object-matter jurisdiction, meaning for example jurisdiction over State organs, the State itself, and over the private sector (with a public function). Lastly, a NHRI should have a broad time jurisdiction, including over past acts and current acts without limitation of time.<sup>79</sup>

Some examples of responsibilities that should be given to an NRHI:

- To provide advice on its own initiative and directly without referral;
- To publicize the advice without referral or prior approval;
- To encourage harmonization of national legislation and practices with international human rights instruments;
- To encourage ratification of international human rights instruments and cooperate with their bodies;
- To take part in education and research in human rights;
- To familiarize people with human rights through publicity, education, information, and press organs.<sup>80</sup>

#### 4.2.2 Principles 2 and 3: 'Autonomy' & 'Independence'

These principles are intrinsically linked to each other and will be discussed together. A NHRI is a state-sponsored body that, on the one hand depends on an act of the State and its funding, but on the other hand should be autonomous and independent. Interference by the Government in a NHRI's activities is unacceptable. This is nevertheless difficult since a

---

<sup>78</sup> *Supra* note 72, p. 242.

<sup>79</sup> *Ibid.*, pp. 241-246.

<sup>80</sup> *Ibid.*, pp. 241-245.

NHRI will still have to account to the Government for its actions and spending.<sup>81</sup>

To prevent interference a NHRI should have its mandate set out in a constitutional provision or in the legislation that creates it. There are two main reasons for this: first, a constitution or legislation cannot easily be changed or withdrawn; secondly, the democratic nature of the NHRI's inclusion in a constitution or legislation improves its visibility and transparency because the public can read what the NHRI is meant to do and what its powers are.<sup>82</sup>

#### 4.2.3 Principle 4: Pluralism

Pluralism and diversity enhance a NHRI's independence, credibility and effectiveness; they increase the likelihood of cooperation and collaboration with other stakeholders, and they demonstrate that the institution itself takes equality seriously.

The *Paris Principles* state that a NHRI's composition should ensure "a pluralist presentation of the social forces (of civil society) involved in the promotion and protection of human rights." A NHRI's composition should include representatives of most social forces, including NGOs, trade unions and professional associations; include representatives of most vulnerable groups (ethnic and religious minorities, persons with disabilities, etc.) and demonstrate gender balance.<sup>83</sup>

One guideline from the Asia-Pacific Forum's (APF) *Guidelines for the process of establishing National Institutions in accordance with the Paris Principles* states that "the initial stimulus to create a national institution may come from [the] Government [...] [but] [w]hatever the initial stimulus, the process should be inclusive from the outset".<sup>84</sup> According to APF Guideline No. 3, participation in the establishment should include:

---

<sup>81</sup> Anne Smith, "The Unique Position of National Human Rights Institutions: A Mixed Blessing?", *Human Rights Quarterly*, 28 (2006), p. 906.

<sup>82</sup> *Supra* note 72, pp. 246-252.

<sup>83</sup> *Ibid.*, pp. 252-253.

<sup>84</sup> Asia Pacific Forum, "Guidelines for the process of establishing National Institutions in accordance with the Paris Principles", October 2007, Guideline No.2, available at: [www.asiapacificforum.net/members/international-standards/downloads/best-practice-for-nhris/APF%20-%20Guidelines%20on%20Establishing%20NHRI.doc](http://www.asiapacificforum.net/members/international-standards/downloads/best-practice-for-nhris/APF%20-%20Guidelines%20on%20Establishing%20NHRI.doc).

- key figures in Government, including the Head of Government and responsible ministers;
- representatives of major political parties;
- parliamentarians, particularly where parliamentary Human Rights Committees exist;
- relevant government agencies;
- human rights NGOs, including specialised organizations such as NGOs focusing on the rights of women and children and on social issues such as health, housing, education and so on;
- members of the judiciary and jurists;
- trade unions and professional groups, including associations of teachers, lawyers, journalists;
- human rights experts and academics.<sup>85</sup>

APF Guideline No. 13 states that a steering committee should be set up first which should, among others, “arrange public meetings to provide opportunities for non-governmental organisations and for members of the public to put their views”.<sup>86</sup>

The above shows that the creation of a NHRI in accordance with the *Paris Principles* is not an easy task and cannot be done hastily without consulting and including a wide range of actors. Furthermore, after its creation a NHRI should keep consulting national, regional and international bodies and NGOs responsible for promoting and protecting human rights. Joint programming with these bodies and NGOs such as awareness raising and education should also be strived for.<sup>87</sup>

#### 4.2.4. Principle 5: Adequate Resources

A NHRI requires adequate resources which will ensure financial autonomy and independence. An institution with little or no control over its finances or its spending cannot be independent. The source and nature of funding for the NHRI should be guaranteed by law and, at a minimum, be sufficient for the institution’s basic functions.<sup>88</sup>

---

<sup>85</sup> *Ibid.*, Guideline No. 3.

<sup>86</sup> *Ibid.*, Guideline No. 13.

<sup>87</sup> *Supra* note 72, pp. 252-253.

<sup>88</sup> *Ibid.*, p. 254

#### 4.2.5. Principle 6: Adequate Powers of Investigation

This principle requires that a NHRI should be able to consider any question, on its own initiative, or on the proposal of its members, the Government or from any petitioner (as long as it falls within its broad mandate and responsibility to promote and protect human rights).

Some examples of powers a NHRI should have:

- The right to hear any person and obtain any document;
- The right to enter any premises to further an investigation;
- The institution has the legal authority to enter and monitor any place of detention without previous notice.<sup>89</sup>

#### 4.3 Optional Principles for a Complaints Mechanism

The *Paris Principles* do not require that a NHRI need consider an individual's complaint credible to accept it, but it does indicate that if the NHRI accepts complaints there are additional and optional principles in light of its 'quasi-jurisdictional' functions, which are:

- To seek an amicable settlement through conciliation, a binding decision or on the basis of confidentiality;
- To inform petitioners of their rights, and available remedies, and promote access to them;
- To hear complaints and transmit them to competent authorities; and
- To make recommendations to competent authorities.<sup>90</sup>

#### 4.4 An 'A' or 'B' or 'C' status and the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights

The 'International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights' ('ICC') is the only non-UN body whose internal accreditation system grants access to UN committees.

---

<sup>89</sup> *Ibid.*, p. 255

<sup>90</sup> International Council on Human Rights Policy and the Office of the United Nations High Commissioner for Human Rights, "Assessing the Effectiveness of National Human Rights Institutions", 2005, p. 7, available at: [www.ohchr.org/Documents/Publications/NHRlen.pdf](http://www.ohchr.org/Documents/Publications/NHRlen.pdf).

The ICC is constituted as a non-profit entity under Swiss law.<sup>91</sup> The *ICC Statute* regulates its functions; under Section 5 Article 11.1, is provided that:

All applications for accreditation under the Paris Principles, shall be decided under the auspices of, and in cooperation with, OHCHR by the ICC Bureau after considering a report from the Sub-Committee on Accreditation on the basis of written evidence submitted.<sup>92</sup>

The Sub-Committee on Accreditation consists of four representatives from ‘A status’ NHRIs from each of the regional groupings (Africa, Americas, Asia-Pacific and Europe).<sup>93</sup> The Sub-Committee recommends to the ICC whether a NHRI should receive international accreditation status. The Sub-Committee has *Rules of Procedure*<sup>94</sup> for this process, and also developed *General Observations*,<sup>95</sup> as guidance for NHRIs that want to receive accreditation. Rule 5 of the *Rules of Procedure* provides that a NHRI that fully complies can get an ‘A status’, a NHRI that partially complies a ‘B status’ and a NHRI that does not comply receives a ‘C status’.

An ‘A status’ NHRI is allowed to be a full member, which includes voting rights, of the International Coordinating Committee (ICC), and also allows it to participate in the work and discussion of the UN Human Rights Council. ‘B status’ allows a NHRI to participate in the meetings of the ICC but not to vote. Additionally, a ‘B status’ NHRI is not allowed to participate in UN Human Rights Council meetings.<sup>96</sup>

---

<sup>91</sup> Asia Pacific Forum, “International Coordinating Committee of National Human Rights Institutions”, available at: [www.asiapacificforum.net/working-with-others/icc](http://www.asiapacificforum.net/working-with-others/icc).

<sup>92</sup> Association International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, “Statute”, Section 5 Article 11.1, available at: [www.asiapacificforum.net/working-with-others/icc/downloads/icc-statute](http://www.asiapacificforum.net/working-with-others/icc/downloads/icc-statute).

<sup>93</sup> Asia Pacific Forum, “Sub-Committee on Accreditation”, available at: [www.asiapacificforum.net/working-with-others/icc/listing\\_content/sub-committee-on-accreditation](http://www.asiapacificforum.net/working-with-others/icc/listing_content/sub-committee-on-accreditation).

<sup>94</sup> International Coordination Committee of National Institutions for the Promotion and Protection of Human Rights, Sub-Committee on Accreditation, “Rules of Procedures”, available at: [www.asiapacificforum.net/working-with-others/icc/sub-committee-on-accreditation/listing\\_content/downloads/rules-of-procedure/SCA\\_Rules\\_of\\_Procedure.pdf](http://www.asiapacificforum.net/working-with-others/icc/sub-committee-on-accreditation/listing_content/downloads/rules-of-procedure/SCA_Rules_of_Procedure.pdf).

<sup>95</sup> International Coordination Committee of National Institutions for the Promotion and Protection of Human Rights, Sub-Committee on Accreditation, “General Observations”, available at: [www.asiapacificforum.net/members/working-with-others/icc/sub-committee-on-accreditation/downloads/general-observations/General\\_Observations\\_June\\_2009.pdf](http://www.asiapacificforum.net/members/working-with-others/icc/sub-committee-on-accreditation/downloads/general-observations/General_Observations_June_2009.pdf).

<sup>96</sup> Asia Pacific Forum, “Paris Principles”, available at: [www.asiapacificforum.net/members/international-standards](http://www.asiapacificforum.net/members/international-standards). See also: *Supra note 92*,

It can be concluded here that in order for a NHRI to claim it conforms to the *Paris Principles* it needs to show it has received 'A status' from the ICC following recommendation of the Sub-Committee on Accreditation. At the time of writing, the MNHRC had not yet applied for accreditation at the ICC.<sup>97</sup>

#### *4.5 Criticisms of the Paris Principles*

The International Council on Human Rights Policy ('ICHRP') has taken the position that while the *Paris Principles* are a vital reference point, they are still "curiously inadequate in a somewhat paradoxical way". On the one hand the *Principles* require a NHRI to have an appointment process that genuinely guarantees social pluralism and to have adequate funding, two things that are not met by any national institution in the world. On the other hand it does not require the acceptance of individual complaints, since here the *Principles* only proposes optional guidelines, although most people working in this area would regard this as an essential characteristic.<sup>98</sup>

It seems that some NHRIs are more or less in conformity with the *Paris Principles* but completely ineffective, while others do not conform and yet had a very positive impact on the human rights situation in their country.<sup>99</sup> It is important according to the ICHRP that NHRIs are developed in consonance with the political and institutional traditions of the country, as long as the NHRI meets certain basic standards such as independence and impartiality; it should not, however, be an imported 'international' model.<sup>100</sup>

---

Section 5 "note" of the ICC Statute. For more information on NHRIs' participation in the Human Rights Council see: UN Human Rights Council, "Information for National Human Rights Institutions", available at: [www2.ohchr.org/english/bodies/hrcouncil/nhri.htm](http://www2.ohchr.org/english/bodies/hrcouncil/nhri.htm).

<sup>97</sup> It has not been reported in the media whether the MNHRC has applied for accreditation, and it was not scheduled for this purpose in the Sub-Committee on Accreditation's review calendar for 2009-2013, see: ICC Sub-Committee on Accreditation, "Calendar for Sub-Committee sessions 2009-2013", available at: [www.asiapacificforum.net/working-with-others/icc/sub-committee-on-accreditation/listing\\_content/downloads/nhri-review-timetable/SCA\\_Review\\_Calendar\\_2009-2013.doc](http://www.asiapacificforum.net/working-with-others/icc/sub-committee-on-accreditation/listing_content/downloads/nhri-review-timetable/SCA_Review_Calendar_2009-2013.doc). See also: Chart of the Status of National Institutions Accredited by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, Accreditation status as of December 2011, available at: [www.asiapacificforum.net/working-with-others/icc/sub-committee-on-accreditation/downloads/accreditation-status](http://www.asiapacificforum.net/working-with-others/icc/sub-committee-on-accreditation/downloads/accreditation-status).

<sup>98</sup> *Supra* note 41, p. 2

<sup>99</sup> *Ibid.*, p. 2-3.

<sup>100</sup> *Ibid.*, p. 4.

#### 4.6 *The Paris Principles in Practice*

The *Paris Principles* are a complicated set of principles entailing a very broad range of standards. Even though the principles are non-binding they have gained international recognition because of UN General Assembly and Human Rights Council (previously Human Rights Commission) resolutions that identified the importance of the *Paris Principles* as guides, and gave the ICC and its Sub Committee accreditation powers. Criticisms and comments on the *Paris Principles* have nevertheless been raised, such as the necessity of a complaints mechanism and the importance of a NHRI being developed in consonance with political and institutional traditions, instead of being an imported ‘international model’.

### 5. MNHRC’s Compliance with the *Paris Principles*

The MNHRC does not yet have any international status since it has not applied for accreditation at the ICC.<sup>101</sup> The present section will discuss its likely status if it did apply. The assessment is based on the available facts on the MNHRC’s establishment, its mandate and actions and compares them with the requirements of the *Paris Principles* as outlined in the previous section.

#### 5.1 *Autonomy, Independence, Pluralism and Adequate Resources*

The MNHRC was created by an executive notification rather than by parliamentary legislation. It is thus not “set forth in a constitutional or legislative text” as required under Principle 3. The UNDP-OHCHR Toolkit states that a NHRI created by decree – such as a notification – does not meet international standards as a decree does not require the approval of the country’s elected representatives. The UNDP-OHCHR Toolkit gives several reasons why it is important for a NHRI’s mandate to be set out in a constitutional provision or in legislation:

[I]t enhances the institution’s permanence (since its mandate cannot be changed or withdrawn merely by executive order or, if there is a constitutional basis, even by law) and independence (since there is less fear of a changed or withdrawn mandate). Having a NHRI’s mandate set out in legislation that has been approved by the nation’s elected officials improves visibility and transparency. The public

---

<sup>101</sup> *Supra* note 97.

can refer to a text that sets out what that institution is meant to do, as well as what powers it has, and can measure an institution's performance against defined expectations.<sup>102</sup>

The Burma Partnership's briefer on the MNHRC also stated that:

No legal steps have been taken by Burma's parliament towards the NHRC's creation or the definition of its mandate. No consultation meeting has been organized by the regime. Instead, the regime and the NHRC itself are only sporadically releasing Notifications with limited information about the commission and its mandate. It therefore seems likely that this body will exist based solely on Government Notifications rather than through a legally recognized act of parliament. As its activities will not be undergirded by public legislation, it is hard to believe that the commission will be able to act independently, consistently and transparently, contravening the essential elements of what a legitimate NHRC should be.<sup>103</sup>

As indicated previously, the MNHRC is planning on drafting its own legislation on its mandate and powers, which would then be accepted by the President and Parliament; obviously, it still remains to be seen how democratic this draft legislation, and how participatory and transparent the drafting process, will be.

Currently, the MNHRC does not consist of – and its members are not selected by – a wide range of actors, including from Parliament or civil society. Its current composition is therefore contrary to the pluralism stipulated in Principle 4, which harms the MNHRC's credibility from the start. As the MNHRC's Chairman has stated, the MNHRC's members were chosen by the President,<sup>104</sup> and they are composed of former military officers, retired senior bureaucrats and academics; there is no representation of non-governmental organizations responsible for human rights, trade unions, concerned social and professional organizations (such as associations of lawyers, doctors, journalists and scientists) or former members of Parliament. Most of the current members have no proven background on human rights, and the Chairman and Vice Chairman, as well as other Commission members, have previously defended Myanmar's military-ruled government against allegations of human rights violations.

---

<sup>102</sup> *Supra* note 72, p. 247.

<sup>103</sup> *Supra* note 19, "Burma Partnership 2012", p. 3.

<sup>104</sup> *Supra* note 14.

This would appear to be inconsistent with the required independence, and creates an impression of partiality.<sup>105</sup>

It can be concluded that the composition of the MNHRC is not “in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society)”.<sup>106</sup> Pluralism is important as it enhances the MNHRC’s “independence, credibility and effectiveness”, increases the likelihood of “cooperation and collaboration with other stakeholders”, and it demonstrates that the institution itself “takes equality seriously”.<sup>107</sup> The UNDP-OHCHR Toolkit further states on the operational independence requirement of a NHRI that an institution’s recommendations, reports or decisions should not be subject to an external authority’s approval or require their prior review.<sup>108</sup> Until now everything related to the MNHRC has only been published in the Burmese and English language state-owned and controlled newspapers.<sup>109</sup> Before anything is published in these newspapers, it will likely be reviewed by the Government. Furthermore, the Special Rapporteur on the situation of human rights in Myanmar was recently informed that the MNHRC’s draft rules of procedure were examined by the judiciary and await approval by the Council of Ministers.<sup>110</sup> Both examples show the MNHRC does not conform with Principles 2 and 3 regarding an institution’s autonomy and independence. Finally, while the *Notification* lists all of the Commission’s members, it does not specify the duration of their mandate: this does not ensure a stable mandate “without which there can be no real independence”, as the *Paris Principles* make clear.<sup>111</sup>

Principle 4 on adequate funding requires that a NHRI, in order to be independent of the Government and not subject to its financial control, must have adequate funding to enable it to have its own staff and premises. The Special Rapporteur in his most recent visit was informed by the

---

<sup>105</sup> See: Sections 2.4 and 2.5 of this article.

<sup>106</sup> *Supra* note 71, under “Composition and guarantees of independence and pluralism”, Section 1.

<sup>107</sup> *Supra* note 72, p. 252.

<sup>108</sup> *Ibid.*, p. 252.

<sup>109</sup> The Burmese and English language state controlled media, in which Government notifications and the MNHRC’s statements are published, are available at: [www.myanmar.com](http://www.myanmar.com) under ‘New Light of Myanmar’, ‘Myanmar Ahlin’, ‘Kyaymon (*The Mirror*)’ and also [www.mrtv3.net.mm](http://www.mrtv3.net.mm) under ‘Newspapers’.

<sup>110</sup> See: Section 3.2.

<sup>111</sup> *Supra* note 72, under “Composition and guarantees of independence and pluralism”, Section 3.

members of the MNHRC that the funding and number of staff might be increased in the future, which might be an indication that there is currently a lack of funding and staff.<sup>112</sup>

### *5.2 A Broad Mandate and Adequate Powers of Investigation*

The MNHRC's mandate is not clearly defined and its sphere of competence is not specified in *Notification No. 34/2011*, nor in the subsequent publication in the media of the MNHRC's 'Accepting of complaint' process which only provided that: "Any citizen may send [a] complaint to the Myanmar National Human Rights Commission when his or her fundamental rights in the Constitution of the Republic of the Union of Myanmar are violated".<sup>113</sup> There is no detail on how the MNHRC will take action against those accused of violations, and the complaints are limited to fundamental rights in the *Constitution*. Reportedly, the MNHRC had to request presidential authorization before conducting prison visits and the visits could only be conducted in the presence of prison officials.<sup>114</sup> This raises serious doubts as to whether the MNHRC has 'adequate powers of investigation'.

It is also important to note that Article 445 of the 2008 *Myanmar Constitution* states that, "No proceeding shall be instituted against the said Councils or any member thereof or any member of the Government, in respect of any act done in the execution of their respective duties." This shows how the power of the MNHRC is already limited by the *Constitution*, as Government officials seem to have immunity for crimes and other offences, as long as they were committed as a result of their official duties. Burma Lawyers' Council's (BLC) Chairman, U Thein Oo, gives some examples:

The military general who committed war crimes, the chief of intelligence who arrested and tortured political dissidents, the army commander who used forced labor for construction projects; all of these characters could find refuge from the consequences of their acts.<sup>115</sup>

---

<sup>112</sup> See: Section 3.3. See also: *Supra* note 67.

<sup>113</sup> *Supra* note 6.

<sup>114</sup> See: Section 3.3. See also: *Supra* note 67.

<sup>115</sup> U Thein Oo, "Revealing Burma's System of Impunity", Burma Lawyers' Council, September 2011, p. 2, available at [www.nd-burma.org/documentation/other-resources/item/download/73.html](http://www.nd-burma.org/documentation/other-resources/item/download/73.html).

### 5.3 *The MNHRC and Paris Principles in Practice*

There is still limited information available on the functioning of the MNHRC and its exact mandate, but from the facts and information currently available it is clear that the MNHRC could only receive a ‘C status’ at the ICC, as the MNHRC does not seem to comply with any of the *Paris Principles*. Perhaps the most important lacunae are the lack of democratic legislation as a foundation for the institution, and the non-pluralistic selection of its members by the President. However, recent developments where the Parliament refused to approve the MNHRC’s funding and the MNHRC’s statement it is in the process of drafting an act to be presented to Parliament for adoption, are hopeful. The next section will discuss how Komnas HAM, Indonesia’s NHRI obtained an ‘A status’, as a possible example for the path the MNHRC should take and complete before Myanmar will chair ASEAN in 2014.<sup>116</sup>

## 6. The Indonesian Example

Four other countries in the ASEAN region have NHRIs with an ‘A status’ accredited by the ICC.<sup>117</sup> Of these NHRIs the Indonesian Komnas HAM could serve as an example of how an unrecognized NHRI, set up by executive decree, can develop into an ‘A status’ institution, set up by legislation.

### 6.1 *The Establishment of the Indonesian National Commission on Human Rights (Komnas HAM)*

On 7 June 1993 the Indonesian National Commission on Human Rights (*Komisi Nasional Hak Asasi Manusia* or Komnas HAM) was founded by *Presidential Decree No 50/1993* issued by President Suharto.<sup>118</sup> The *Decree* was issued just before the World Conference on Human Rights in Vienna, where Indonesia was an advocate of a view of human rights that denied their universality and claimed the existence of ‘Asian’ human rights values.<sup>119</sup> The presidential decree was drafted by a committee convened by the Ministry of Foreign Affairs, Ali Alatas, and it seemed as if the purpose

---

<sup>116</sup> Ba Kaung, “Burma Awarded 2014 Asean Chair”, *The Irrawaddy*, 17 November 2011, available at: [www2.irrawaddy.org/article.php?art\\_id=22480](http://www2.irrawaddy.org/article.php?art_id=22480).

<sup>117</sup> *Supra* note 97, “Accreditation Status Chart”.

<sup>118</sup> President of the Republic of Indonesia, “The National Commission of Human Rights, Presidential Decree No. 50, 1993, available at: [www.hurights.or.jp/archives/database/nhri-law-indonesia.html](http://www.hurights.or.jp/archives/database/nhri-law-indonesia.html).

<sup>119</sup> *Supra*. note 41, p. 21.

of the new commission was to divert international criticism of Indonesia.<sup>120</sup> The composition of Komnas HAM when it was created seemed to support this purpose. It was chaired by a senior army officer and former chief justice, Ali Said. Other appointed members were senior civil servants or ruling party insiders. It has to be said that other members were academics that, although lacking experience in human rights, enjoyed a degree of integrity and independence. Some NGO human rights activists were invited to serve on the Commission but they refused. The Secretary-General, Baharuddin Lopa, was also Director General of Corrections in the Ministry of Justice, and in the beginning Komnas HAM operated from his office at the ministry.<sup>121</sup>

The National Human Rights Commission operated under the *Decree* until 1999 when *Act No. 39 of 1999*<sup>122</sup> passed the Indonesian House of Representatives.<sup>123</sup> After this, Komnas HAM had democratic legitimacy as it operated under a legislative act, one of the requirements of the *Paris Principles*. The earlier *Decree No 50/1993* only gave very limited guidance regarding the Commission's powers and mandate. Its guiding philosophy was said to be the national ideology of *Pancasila* (see Article 2 of the *Decree*) which means the five principles: faith in God, humanity, nationalism, representative government and social justice. Article 4 stated that its objectives were:

- a. To help develop a national condition which conducive to the implementation of human rights in conformity with the State Philosophy of Pancasila, the 1945 Constitution, the United Nations Charter and the Universal Declaration of Human Rights; and
- b. To enhance the promotion and protection of human rights in order to help achieve national development goals, namely, the full development of the Indonesian person and the overall development of the Indonesian society.

---

<sup>120</sup> *Ibid.*, p. 22

<sup>121</sup> *Ibid.*, p. 23.

<sup>122</sup> The House of Representatives of the Republic of Indonesia, "Legislation Number 39 of 1999 Concerning Human Rights", available at: [www.asiapacificforum.net/members/full-members/indonesia/downloads/legal-framework/indonesiaact.pdf](http://www.asiapacificforum.net/members/full-members/indonesia/downloads/legal-framework/indonesiaact.pdf).

<sup>123</sup> The National Human Right Commission Indonesia, "APF Report 2009 Information on activities of Komnas HAM carried out during the period of September 2008 - July 2009, submitted to the 14th Annual Meeting of the Asia Pacific Forum on National Human Rights Institutions", 2009, available at: [www.asiapacificforum.net/members/full-members/indonesia/downloads/apf-annual-meeting/Indonesia.doc](http://www.asiapacificforum.net/members/full-members/indonesia/downloads/apf-annual-meeting/Indonesia.doc).

In order to achieve these objectives the Commission's activities were listed in Article 5 of the *Decree*, and would include to:

- a. disseminate information on the national as well as international outlook on human rights both to the Indonesian society and to the international community;
- b. examine various united Nations instrument on human rights with a view to presenting suggestions regarding the possibility of accession to and/or ratification of these instruments;
- c. monitor and investigate the implementation of human rights and present views, considerations and suggestions to state institutions on the implementation of human rights; and
- d. foster regional and international co-operation in the promotion and protection of human rights.

The *Decree* did not yet provide for a complaints function, and the Commission had almost no investigative powers, such as the power to compel the attendance of witnesses. It also did not have real authority to ensure its recommendations were complied with.<sup>124</sup>

The presidential decree was criticized for not complying with the *Paris Principles*: the selection of members was unclear, which raised questions about its pluralistic and independent membership, nor was it embedded in a constitutional or legislative text.<sup>125</sup> In other terms, Komnas HAM in 1993 was very similar to the current Myanmar National Human Rights Commission, and similar criticisms were heard for these reasons. The next section will show how this changed after 1999.

### 6.2 Change: From an Executive Decree to Legislation

Things changed in 1999 when *Act No. 39/1999* was adopted by the House of Representatives.<sup>126</sup> This legislation was a big step in the promotion and

---

<sup>124</sup> *Supra*. note 41, p. 23.

<sup>125</sup> Ken Setiawan, "Challenges for Indonesia: the case of Komnas HAM", paper presented at the National Human Rights Institutions Workshop, Melbourne Law School, 22 July 2009, p. 2, available at: [iilah.unimelb.edu.au/files/NHRI\\_Panel\\_2\\_Ken\\_Setiawen.pdf](http://iilah.unimelb.edu.au/files/NHRI_Panel_2_Ken_Setiawen.pdf) (pdf file has been removed). For the workshop programme see: [intranet.law.unimelb.edu.au/staff/events/files/NHRI%20Workshop%20program.pdf](http://intranet.law.unimelb.edu.au/staff/events/files/NHRI%20Workshop%20program.pdf).

<sup>126</sup> *Supra* note 122.

protection of human rights as it lists a series of fundamental human rights and freedoms in Chapter II and III. Komnas HAM was included in Chapter VII, where its investigatory powers were strengthened (attendance of witnesses could now be compelled, Article 89(3)(d) *juncto* Articles 94 and 95 of Act No. 39/1999) and a complaints process was added (Article 90). Unfortunately, Komnas HAM does still not have the power to enforce its recommendations, which have no legal binding power, and can thus be ignored by the Government and the courts. The way the Commission operates is that it publicizes the case through the media and submits its recommendations to the House of Representatives, who can then decide to act.

Another important change after the *Act No. 39/1999* was the composition of Komnas HAM and its budget allocation. In Article 83 it is provided that the Commission has 35 members selected by the House of Representatives, as recommended by the Commission, and validated by the President. Article 86 provides that provisions regarding the election, appointment, and discharge of members and the leadership of the Commission are set forth in the rules and regulations of Komnas HAM.

Article 84 of *Act No. 39/1999* also lists the eligibility criteria for the Commission's members:

- a. have experience in the promotion and protection of individuals or groups whose human rights have been violated;
- b. are experienced as lawyers, judges, police, attorneys, or other members of the legal profession;
- c. are experienced in legislative and executive affairs and in the affairs of high level state institutions; or
- d. are religious figures, public figures, members of NGOs, or from higher education establishments.

The rights and obligations of Komnas HAM's members are listed in Article 87 and in the rules and regulations of Komnas HAM. The budget of Komnas HAM comes from the National Budget as Article 98 provides, which means it is ensured of a continuous source of funding.

### 6.3 Praises and Criticisms on Komnas HAM

During the existence of Komnas HAM there have been serious human rights violations reported in Indonesia, especially in East Timor, Papua (previously Irian Jaya) and Aceh. In Papua and Aceh there are still independence movements being harshly repressed by the armed forces.<sup>127</sup> It is reported that Komnas HAM has, over the years, attended to various human rights cases, and participated as a negotiator, advisor, mediator, evaluator, arbitrator and even whistle-blower to resolve disputes, especially between the community and corporate entities in human rights related cases.<sup>128</sup>

According to one author, Komnas HAM's underlying legal basis is solid and in line with the *Paris Principles*, but the Commission itself has not yet been able to become a driving force in protecting human rights in Indonesia. The main reason for this is that it needs more support from other state bodies to perform effectively and this is hard in Indonesia's political climate. Many members of the political and military elite still resist human rights.

The same author stated that among the more positive aspects to the effectiveness of Komnas HAM are its advantages over civil society organizations, since it has better access to government bodies and legitimacy within the state. Furthermore it is allowed, by law, to investigate severe human rights violations.<sup>129</sup>

### 6.4 Komnas HAM as an NHRI

Komnas HAM should not be seen as a perfect and exemplary NHRI, but it is clear that the MNHRC could learn some lessons from Komnas HAM's development since 1993. The most important lesson is probably the role of legislation which changed the Indonesian NHRI into a pluralistic human rights institution with investigatory powers and allowed it to make rather strong recommendations. Nevertheless, a weakness that still remains for Komnas HAM is its inability to enforce these recommendations. It seems, from one of the Myanmar National Human Rights Commission's most recent statements (see section 2.4 above), that it is aware of Indonesia's

---

<sup>127</sup> *Supra* note 41, p. 21.

<sup>128</sup> "National Human Rights Commission, Indonesia", BASESwiki, available at: [baseswiki.org/en/National\\_Human\\_Rights\\_Commission\\_Indonesia](http://baseswiki.org/en/National_Human_Rights_Commission_Indonesia).

<sup>129</sup> *Supra* note 125, pp. 8-9.

development from a NHRI established by decree to a NHRI backed up by democratic legislation.

## 7. Conclusions and Recommendations

The discussion on the establishment of the MNHRC, its initial statements and actions, and criticisms from media and civil society have combined to create a 'suspicion' that the MNHRC seemed to be part of or an extension of Myanmar's government, protecting its policies from international scrutiny, and promoting Myanmar's human rights image in the world. It is especially worrisome that former defenders of Myanmar's military regime are now chairing the new Commission.

Myanmar's engagement with the UN, regarding the MNHRC, and the MNHRC's own engagement with the UN and *vice versa* was discussed. It seems that Myanmar and the MNHRC are becoming more prone to accepting and participating in trainings and seminars on human rights and international law. In that sense, it can be concluded that Myanmar is becoming more open in its discussion of human rights and in its participation in the UN human rights system.

It is clear that the international community welcomes the MNHRC's establishment and is willing to support it in becoming a truly human rights promotion and protection institution. It also shows openness on Myanmar's side by accepting and responding to the UPR recommendations and by letting the Special Rapporteur visit the country and meet some MNHRC members. At the same time, the MNHRC does not seem anything more than the Government's 'Ministry of Human Rights' – as a figure of speech – to promote Myanmar's human rights image. It also has to be noted that during the last UPR session, Myanmar's delegation, although not members of the MNHRC, was still denying the existence of forced labor, sexual violence against women, child soldiers, religious intolerance and other abuses.

The *Paris Principles* require a pluralistic, independent and autonomous commission established by legislation with a broad mandate, adequate resources and adequate powers of investigation. It should develop in consonance with political and institutional traditions of the country and not be an imported 'international model'. Furthermore, even though a complaints mechanism is not required by the *Paris Principles*, it should follow the *Principles*' additional guidelines and include such a mechanism.

There is still limited information available on the functioning of the MNHRC and its exact mandate, but from the facts and information currently available it can be concluded that the MNHRC does not conform to many aspects of the *Paris Principles*, and likely could not receive more than a ‘C status’ from the ICC’s Sub-Committee on Accreditation. The more significant flaws are the lack of legislation undergirding the institution and the non-pluralistic selection of the MNHRC’s members by the President. Still, one of the most recent statements released by the MNHRC gives some hope, as it expressed its intent to present a national human rights commission act to the President and Parliament for adoption.<sup>130</sup>

Although it is not perfect, Indonesia’s Komnas HAM could be an example for Myanmar and its MNHRC. The establishment, initial composition and first actions of both commissions were very similar, and in this sense MNHRC’s future developments could follow a similar path. The most important lesson that can be learned from Komnas HAM is the role of legislation which changed Komnas HAM into a pluralistic human rights institution with investigatory powers and allowed it to make recommendations. A weakness and a challenge that remains for Komnas HAM, one that the MNHRC should try to avoid, is the inability to enforce recommendations.

Recommendations as to how the MNHRC could improve and become a real ‘A status’ national human rights protection and promotion institution, in conformity with international standards and without being limitative, are offered below:

---

<sup>130</sup> In the time between submission and publication of this article some more statements were made by the MNHRC regarding issues ranging from the violence in Rakhine State and Kachin State to the signing of a Plan of Action for Prevention against Recruitment of the Under-Aged Children for Military Service between the Government of the Republic of the Union of Myanmar and the United Nations. See respectively: Statement No (4/2012) of Myanmar National Human Rights Commission concerning incidents in Rakhine State in June 2012, 11 July 2012, *The New Light of Myanmar*, Vol. XX, No. 82, 11 July 2012, p. 10, available at: [www.burmalibrary.org/docs13/NLM2012-07-11.pdf](http://www.burmalibrary.org/docs13/NLM2012-07-11.pdf). Statement of Myanmar National Human Rights Commission on its trip to the Kachin State (5/2012), 14 August 2012, *The New Light of Myanmar*, Vol. XX, No. 116, 14 August 2012, p. 7, available at: [www.burmalibrary.org/docs13/NLM2012-08-14.pdf](http://www.burmalibrary.org/docs13/NLM2012-08-14.pdf). Myanmar National Human Rights Commission welcomes signing of Plan of Action for Prevention against Recruitment of the Under-Aged Children for Military Service, *The New Light of Myanmar*, Vol. XX, No. 74, 3 July 2012, p. 8, available at: [www.burmalibrary.org/docs13/NLM2012-07-03.pdf](http://www.burmalibrary.org/docs13/NLM2012-07-03.pdf).

- Amend the 2008 Constitution and include a section on the MNHRC and/or create democratic legislation concerning the MNHRC;
- Include procedural provisions in the new legislation on investigative powers, complaints handling, powers to enforce recommendations, impartiality, independence, selection of its members and budget allocation;
- Include substantive provisions in the Constitution and/or new legislation on fundamental human rights in conformity with international human rights standards;
- Abolish or amend Article 445 of the 2008 Myanmar Constitution on immunities so that Government officials can be held responsible for their violations of human rights;
- Include stakeholders in this drafting and amending process and request advise from the UN Office of the High Commissioner for Human Rights and countries with 'A status' institutions such as the ASEAN four (Indonesia, Philippines, Thailand and Malaysia);
- Ensure that the MNHRC's members are selected in a transparent process, which includes consultation of civil society, and their selection is based on proven merit in human rights;
- Ensure, that the Commissioners' past records do not raise doubts about their impartiality and independence;
- Ensure the members demonstrate gender balance and equal representation of vulnerable groups (ethnic and religious minorities, persons with disabilities, etc.);
- Ensure funds are allocated to the MNHRC for the commissioners' salary, staff, equipment and for disseminating its recommendations in the media;
- Ensure the MNHRC and its members can freely distribute their views and recommendations without Government scrutiny.

As for how the Myanmar National Human Rights Commission itself could more consistently comply with the *Paris Principles*:

- Distribute views and recommendations on human rights through the media including the internet;
- Organize and participate in trainings and seminars regarding human rights in collaboration with the Government, parliamentarians, local NGOs and the regional and international community;
- Promote international human rights standards and ratification of the core human rights treaties;

- Work together with NHRIs in ASEAN, the recently instated ASEAN Inter-governmental Commission on Human Rights and the Asia Pacific Forum;
- Investigate possible human rights violations proactively;
- Inform complainants and petitioners of their human rights, available remedies, and promote access to them;
- Ensure that complainants' and petitioners' identities are protected;
- Hear complaints and transmit them to competent authorities;
- Make recommendations to competent authorities;
- Find a balance and become a mediating partner between the Government and civil society;
- Work in a transparent way and prevent any notions of partiality and dependence on the Government.

Finally, the international community (countries, international and regional organizations and local and international civil society organizations) could do more to assist both the Government of Myanmar and the MNHRC:

- Engage actively with the MNHRC;
- Advise in the drafting process of the new act;
- Approach the MNHRC for information on the human rights situation in the country and alleged violations;
- Invite the MNHRC's Chairman and members for seminars and trainings;
- Provide a platform for NHRIs in the region and the ASEAN Intergovernmental Commission on Human Rights to share experiences and lessons learned;
- Disseminate information to local communities on how to file complaints with the MNHRC and support them in drafting these complaints.