

## **FOUR IMMEDIATELY IMPLEMENTABLE REFORMS TO ENHANCE MYANMAR'S NATIONAL HUMAN RIGHTS COMMISSION**

12 November 2019

### **Summary**

The Myanmar National Human Rights Commission (MNHRC), Myanmar's national human rights institution (NHRI), must do better to promote and protect human rights in the face of persistent rights violations and abuses throughout the country. To do so, it must also be empowered by legislative and other measures by the Government of Myanmar to fulfill its mandate independently, impartially and effectively, in line with international standards on NHRIs. The required legal and structural reforms are well known. They were identified by the Global Alliance of National Human Rights Institutions (GANHRI) in its 2015 accreditation assessment of the Commission. Many of its recommendations were reinforced by the MNHRC's own self-assessment in 2018. The MNHRC continues to command low levels of public confidence and presently operates with the minimum possible number of appointees (seven Commissioners of a possible 15).<sup>1</sup> A central impediment to its effectiveness is a lack of independence, owing largely to flaws in the selection and appointment process of its Commissioners, which also fails to facilitate a gender balance and diversity of backgrounds, and to weak legal protections accorded to the institution under law. The Commission's mandate, as provided in the 2014 MNHRC Law, and the manner in which that mandate has been interpreted by the Commissioners, serve to limit the MNHRC's effectiveness.

Earlier this year, in an effort to address these limitations and challenges, the MNHRC itself proposed amendments to its 2014 enabling law.<sup>2</sup> Civil society organizations have also called for law reform, and for the appointment of new Commissioners through a transparent process enabling the MNHRC to better reflect the diversity of Myanmar society.<sup>3</sup> The establishment of a Joint Committee to Amend the Constitution (Constitutional Amendment Committee) offers an additional opportunity to address the structural and legal challenges to the independence and effectiveness of the Commission.

In this briefing (available in Burmese and English), the International Commission of Jurists (ICJ) highlights steps required for the MNHRC to meet international standards on NHRIs, and to better protect the human rights of all persons in Myanmar:

1. The Union President and the Selection Board should appoint Commissioners through a transparent and fully consultative process that enables its composition to effectively protect human rights and appropriately reflect the full diversity of the population of Myanmar, including ethnic, religious, regional, gender and sexual identities;
2. Commissioners should take a broad and active interpretation of their mandate, including by taking steps to address the most serious violations, including crimes under international law, and certain human rights cases that have gone before courts;
3. The National League for Democracy (NLD)-dominated legislature should amend the 2014 MNHRC Law to include provisions that strengthen the MNHRC's capacity and independence, while improving the Commissioner selection process;
4. The Constitutional Amendment Committee should propose constitutional provisions, as part of the constitutional amendment process, that provide for a constitutionally mandated MNHRC, enabling the institution to have a permanent protected independent status that cannot be unilaterally undone by governments.

Each of these recommendations is immediately implementable. Given the pressing need to increase the number of Commissioners in order to ensure compliance with the obligation incumbent upon the Union President to maintain a quorum of members, several new commissioners should be selected as a matter of priority in line with the need for transparency and diversity. Reform of the 2014 MNHRC Law and the Constitution can and should be pursued concurrently, with legislative reform addressing present legal impediments to the effectiveness of the Commission, and constitutional reform further bolstering its independent protected status.

## Background

In Myanmar, the State's performance is consistently poor in meeting its obligations under international law to respect and protect the human rights of all persons throughout the country.<sup>4</sup> Justice sector actors – especially police, prosecutors and judges – generally lack the independence, will or ability to satisfactorily provide accountability and redress in cases of human rights violations by State actors or abuses by non-State actors.<sup>5</sup> This is most evident in cases considered politically sensitive, particularly when members of state security forces are alleged to be engaged in criminal conduct, including in relation to crimes under international law.<sup>6</sup> Myanmar's military, the Tatmadaw, remains the most powerful institution in the country, largely outside the control of the government presently led by the NLD party.<sup>7</sup> The MNHRC operates in this context.

The MNHRC was established in September 2011 by an executive administrative act known as a presidential notification (No. 34/2011).<sup>8</sup> This was part of a series of significant, albeit limited, legal and institutional reforms initiated by the quasi-civilian government led by the Tatmadaw-affiliated Union Solidarity and Development Party (USDP), which had begun its term in March 2011 following five-odd decades of military rule. The MNHRC was given the general mandate of "promoting and safeguarding fundamental rights of citizens described in the Constitution of the Republic of the Union of Myanmar." In 2014, the MNHRC was reconstituted after the Union Parliament passed an enabling law conferring upon it relatively greater independence than its status under the presidential notification,<sup>9</sup> and partially addressing criticisms of its initial legal and institutional configurations.<sup>10</sup>

In 2015, the MNHRC was first accredited by the then-International Coordinating Committee of National Human Rights Institutions (since renamed to the Global Alliance of National Human Rights Institutions).<sup>11</sup> The GANHRI is a formal association constituting most NHRIs from around the world and which has for its mandate the accreditation of NHRIs in line with the Principles Relating to the Status of National Institutions (Paris Principles), adopted by the UN General Assembly in 1993. It undertakes many of its promotional activities in collaboration with UN institutions. Pursuant to the review by the GANHRI, the MNHRC was found to be only "partially compliant" with the Paris Principles, and therefore was given a "B", rather than an "A" status, which remains current.<sup>12</sup> In its assessment, GANHRI highlighted seven areas that must be addressed for the MNHRC to be fully compliant with the Paris Principles, including: reforms to the selection and appointment process of commissioners; the need for commissioners to take a broad and active interpretation of their mandate, particularly in situations of internal unrest or armed conflict; the need for greater diversity and pluralism in its composition; and the need for ensured adequate funding and financial independence from the government.<sup>13</sup> These areas, and its activities more broadly, will likely be considered by Member States of the UN Human Rights Council during the UN Universal Periodic Review process for Myanmar, scheduled for late 2020.

Activities of the MNHRC are outlined in the annual reports available on its website.<sup>14</sup> A key achievement cited by the Commission was its influence on the State's signing and eventual ratification of the International Covenant on Economic, Social and Cultural Rights.<sup>15</sup> Commissioners have also advocated, so far unsuccessfully, for Myanmar to become party to the International Covenant on Civil and Political Rights.<sup>16</sup> Yet the MNHRC has been subject to widespread criticism, including in the media, and by UN independent experts, civil society organizations and others in response to specific incidents and controversies. They credibly question the independence, impartiality and effectiveness of the MNHRC.<sup>17</sup>

In December 2018, the MNHRC published a summary report of its own capacity assessment, developed with support from UN agencies and the Asia Pacific Forum of NHRIs.<sup>18</sup> Key weaknesses identified in the self-assessment largely relate to staffing and communications. The first of four priority areas identified for future work relates to the mandate and leadership required to "build trust in the MNHRC as an independent NHRI." Action points in this area include: increasing transparency in the selection of Commissioners and ensuring greater diversity of backgrounds, including human rights expertise; enabling engagement with court cases through *amicus curiae* (friend of the court) appearances; development of a strategic plan; and more frequent issuance of public statements.<sup>19</sup> A "consultation draft" of a strategic plan was released in July 2019, and the final version launched in October.<sup>20</sup>

The MNHRC website currently lists ten active Commissioners.<sup>21</sup> Three of these Commissioners were due to end their current appointed term in September 2019, including the Chairperson, who has held this position since 2011. Their current status is unclear.<sup>22</sup> Prior to their appointment, each of the ten Commissioners had a career in State service, including in the military, judiciary, government or government-affiliated universities. The Chairperson previously served for more than 40 years in the Ministry of Foreign Affairs, and the Vice-Chairperson was a military officer for more than 25 years prior to joining the civil service. Both the Chairperson and Vice-Chairperson are men. Of the ten listed Commissioners, there are nine men and one woman. Few, if any, have expertise in human rights, all appear to be over 60 years of age, and there is also an apparent lack of diversity in terms of the various ethnic, religious, regional, sexual orientations, gender identities and sex characteristics, along with other identities, present in society.<sup>23</sup>

### **International Standards for National Human Rights Institutions**

NHRIs play an important role in the protection and promotion of human rights. The Paris Principles<sup>24</sup> have guided States in the establishment of their respective NHRIs, setting out internationally agreed upon standards designed to govern the establishment and work of NHRIs in a credible, independent and effective manner. They define the role, composition, status and function of these bodies, requiring that an NHRI: be given "as broad a mandate as possible" that is either set forth in a constitutional provision or enabling law;<sup>25</sup> be established according to a procedure "which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights;"<sup>26</sup> have membership which includes broad representation such as from universities, the parliament, non-governmental organizations, civil society organizations and, in an advisory capacity only, government departments;<sup>27</sup> and have adequate funding guaranteed by the State.<sup>28</sup>

Under the Paris Principles, the main responsibilities of an NHRI should include, among others: (i) submitting to the Government, on an advisory basis or upon request, opinions, recommendations, proposals and reports on any matter concerning the promotion and protection of human rights, (ii) encouraging ratification of or accession to human rights instruments, (iii) contributing to reports which States are required to submit to UN bodies and committees, (iv) harmonizing national laws, regulations and practices with the international human rights instruments to which the State is a party, (v) assisting in the formation of programs to promote human rights awareness and education, (vi) cooperating with UN agencies and organizations and (vii) publicizing human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education campaigns (see annex for the full Principles).<sup>29</sup>

The 2018 GANHRI Statute sets out the accreditation process of NHRIs, including those seeking re-accreditation.<sup>30</sup> At present, there are six countries in Southeast Asia that have an NHRI: East Timor, Indonesia, Malaysia, Myanmar, the Philippines and Thailand. Of these, Myanmar and Thailand have "B" accreditation, while the rest enjoy "A" status (globally, 79 have "A" status, 34 have "B" status and 10 have "C" status).<sup>31</sup> In the region, the NHRIs of Indonesia, Malaysia, Myanmar and Thailand were established by ordinary legislation. In contrast, the NHRIs of East Timor and the Philippines were established under their respective constitutions. Significantly, the constitutional creation of the NHRI in East Timor and the Philippines was influenced by the transition that both countries were emerging from at the time of the NHRI's creation, as a measure to ensure structural independence and as a symbol of the government's commitment to uphold human rights.<sup>32</sup>

### **National law governing the Myanmar National Human Rights Institution**

#### *Selection of Commissioners*

Under the 2014 MNHRC Law, the MNHRC must be composed of seven to 15 members.<sup>33</sup> They are supported by a team of staff working in its sole office located in Yangon.<sup>34</sup> Section 6 of the 2014 Law outlines the general criteria for candidates to serve on the MNHRC, including relevant experience, being capable of executing duties with independence and impartiality, and being at least 35 years of age. A 10-member selection board prescribed under section 5 of the 2014 Law, which includes military and judicial representatives, draws up a list of nominees.<sup>35</sup> The President selects and appoints Commissioners from this list "in coordination

with the Speaker of the Lower House and the Speaker of the Upper House," though the President is ultimately responsible for these appointments.<sup>36</sup> A Commissioner is appointed for a term of five years, for a maximum of no more than two consecutive terms.<sup>37</sup> While the selection board under section 7 is obligated to ensure "equitable representation" based on gender and race in forming the MNHRC's overall composition, in practice, there is no regard for diversity in terms of age, gender, sexuality, ethnicity, religion, profession or otherwise.

Under this arrangement, the MNHRC's composition presently fails to reflect the diversity of society. By restricting candidacy to persons aged 35 years and over, the 2014 MNHRC Law effectively arbitrarily excludes people comprising more than 60 per cent of the population from being qualified to serve.<sup>38</sup> In practice, all persons under 60 years of age have been excluded. As mentioned, Commissioners all appear to be over 60 years old. Women, with just one exception, are also generally excluded. To address this systemic lack of diversity, the law governing the MNHRC, or the MNHRC itself through its internal policy, should include more detailed obligations requiring the selection board to duly ensure diversity in its appointments.

A clearer selection process would improve the transparency and credibility of appointments. Greater diversity in the composition of the selection board, which is currently dominated by only those with governmental pedigree, would also boost the integrity of this process and the likelihood of appointing a more diverse group of Commissioners. The selection board should be reformed to incorporate participation from broader sectors of society – including independent lawyers, academics, civil society and other professionals – rather than being primarily restricted to government authorities. The Minister of Home Affairs, reporting to the Tatmadaw's Commander-in-Chief who, in turn, is credibly implicated in gross human rights violations and is unaccountable to civilian authorities,<sup>39</sup> should be removed from the selection board to satisfy principles of democracy, independence and impartiality.

#### *Independence*

As an outcome of the flawed selection process described above, the MNHRC does not effectively function independently from the government. Requisite reforms to the selection process, resulting in a Commission that is not dominated by former State agents, would serve to significantly improve its actual and perceived independence. An additional challenge for the MNHRC is that while the 2014 MNHRC Law provides that the State must provide funding to the MNHRC, there is no provision that makes funding mandatory to an extent adequate to support its work.<sup>40</sup> A further structural weakness potentially undermining the MNHRC's independence is its establishment through ordinary legislation, which can be easily amended or repealed by the government of the day. The lack of a budgetary guarantee and of legal protection exposes the MNHRC's precariousness, leading members to tread carefully in order to protect themselves, the institution, and their staff from possible retaliation.

A constitutionally created MNHRC would enjoy a more permanent and independent status, because any change in the Constitution would require a lengthier process than amending or repealing ordinary legislation. Constitutional status would ensure the MNHRC's place to protect human rights, regardless of Myanmar's political situation and electoral outcomes. Language in the Constitution specifically requiring the Union Parliament to automatically and regularly confirm and disburse the budget of the Commission would also better protect the MNHRC from political interference. The current set-up does not adequately protect members and staff of the Commission against possible reprisals from State agents and other powerful actors confronted by the exercise of its powers of inquiry, including in the form of budget cuts. By ensuring continued funding through a constitutional guarantee, the MNHRC would be better insulated from political vagaries accompanying the democratic transition. Absent constitutional reform, section 46 of the 2014 MNHRC Law should be reviewed to address the ambiguity of the government's obligation to provide "adequate funding" to the Commission, so that its funding can be better protected from executive interference.

#### *Mandate*

The 2014 MNHRC Law has express objectives to "safeguard the fundamental rights of Myanmar citizens" and to protect human rights contained in international human rights treaties and the Universal Declaration of Human Rights.<sup>41</sup> For these purposes, the primary mandate of the Commission is to investigate alleged human rights violations and abuses. This constitutes the bulk of the MNHRC's work in practice. As a matter of law, the power to

conduct an inquiry [Burmese: စုံစမ်းစစ်ဆေးခြင်း: *sone san sit sey chin*, commonly also translated as “investigation”] can be triggered upon the filing of a complaint by an individual, although the MNHRC is also empowered to inquire into the matter on its own initiative.<sup>42</sup> An individual may lodge the complaint either on his own behalf or on behalf of another person or group of persons with a similar cause of complaint concerning any alleged violation of human rights.<sup>43</sup> The Commission generally must conduct an inquiry with respect to the complaint, with some exceptions.<sup>44</sup> The MNHRC may also initiate an inquiry when it “becomes aware of widespread, systemic or entrenched situations or practices that violate human rights.”

While constitutional rights in Myanmar are mostly afforded only to citizens, international human rights law, including under human rights treaties, provide that, with very few exceptions such as the right to vote, the rights of all people under a State’s jurisdiction must be respected and protected irrespective of nationality or citizenship status. Given this, the MNHRC is bound to protect the human rights of all persons in Myanmar, regardless of citizenship status and as implied in the 2014 MNHRC Law (and in line with section 347 of the Constitution which guarantees equal rights and protection before the law for “any person”). However, this principle has not been applied in practice. Most strikingly, the MNHRC has said little if anything in relation to the situation of the Rohingya, a population many of whose citizenship rights have been stripped and whose population has been subjected to widespread violations amounting to the most serious crimes under international law.<sup>45</sup> Nor has the Commission made demonstrable efforts to protect the rights of the other 25 per cent of the country’s population who lack a documented legal identity.<sup>46</sup> The MNHRC has not initiated any substantive or credible investigation into the allegations of widespread and systematic human rights violations perpetrated in recent years by Tatmadaw soldiers largely against persons from ethnic minorities, despite these being recorded in detail, including in the reports of the UN Independent International Fact-Finding Mission on Myanmar. This lack of engagement in cases linked to the military suggests there is a lack of will to investigate allegations effectively, thoroughly and impartially, and is further evidence of its lack of independence.

Section 37 of the 2014 MNHRC Law further restricts the ability of Commissioners to fulfill their mandate, instructing them to refrain from inquiring into complaints that have come before courts: “The Commission shall not inquire into the complaint which violates any of the following: (a) cases under trial before any court, cases under appeal or revision on the decision of any court; (b) cases that have been finally determined by any court.” Many significant human rights cases come before the courts in one way or another. Even if such cases often take the form of judicial harassment of victims rather than possess the merits of a complaint, the hearing of a case in court may exclude the Commission from making inquiries. An illustrative example of the Commission concluding inquiries on this basis was the case of the death in military custody of journalist Ko Par Gyi, whose killers were secretly tried and acquitted in a military court.<sup>47</sup> Another infamous court martial case, where soldiers were convicted for their involvement in the massacre of ten Rohingya men in 2017, but soon after released, has not attracted public comment from the MNHRC. Two *Reuters* journalists who helped expose the massacre, and were charged and convicted under the Official Secrets Act in connection with their reporting, experienced flagrant violations of their fair trial rights, rendering their prosecution unlawful. Yet, the MNHRC was reluctant to advocate for their human rights, citing section 37.<sup>48</sup>

Looking into possible human rights violations does not necessarily require looking into the merits of the case that is the subject of the adjudication. For instance, an inquiry into whether fair trial rights have been observed or whether the right to appeal was accorded with respect to the case does not necessarily touch on the substantive matters of the case itself. The same can be said of pending cases. The existing language of section 37 therefore serves to seriously erode the capacity of the MNHRC to adequately and effectively address a wide range of human rights concerns. Coupled with its lack of adequate structural independence, the MNHRC is rendered toothless to effect meaningful inquiries into alleged human rights violations. Section 37 should therefore be amended or repealed altogether. In the meantime, Commissioners should read this provision with a broader interpretation in line with their mandate.

The duties and powers of the MNHRC should also be expanded so as to include future legislation that would broaden the MNHRC’s mandate. A plain reading of section 22 may give the impression that the mandate of the MNHRC does not include powers and functions that

subsequent legislation may prospectively provide. To anticipate future legislative granting of powers to the Commission, adding a catch-all provision in section 22 is therefore warranted, which allows the MNHRC to exercise other powers and functions if provided for by other laws.

#### *Subpoena and other incidental powers*

When the MNHRC does undertake an inquiry, it is constrained by its limited powers. The 2014 MNHRC Law grants the MNHRC a subpoena power and such other powers “incidental or conducive to the implementation of any function of the Commission.”<sup>49</sup> The subpoena power, however, does not include (a) documents or evidence, the release of which would affect the security and defense of the State; and (b) “classified” documents.<sup>50</sup> To address this shortcoming, the subpoena power of the Commission should be amended to qualify what constitutes a “classified document” under section 36(b). Given the history of State authorities over-broadly construing the scope of protected state secrets and classified information, the MNHRC’s subpoena power is severely undermined by this exception. This contravenes the Paris Principles provision on giving NHRIs as broad a mandate as possible. Thus, the term “classified documents” in section 36 must be narrowly construed. Moreover, the definition of “classified information” in the Tshwane Principles on National Security and the Right to Information, the most recent iteration of the global principles on national security and the right to information, should be added as a qualification under section 36(b), or as an additional definition under section 2 of the 2014 MNHRC Law.<sup>51</sup> As Principle 10(A)(1) of the Tshwane Principles affirms, “There is an overriding public interest in disclosure of information regarding gross violations of human rights or serious violations of international humanitarian law, including crimes under international law, and systematic or widespread violations of the rights to personal liberty and security. Such information may not be withheld on national security grounds in any circumstances.”

The 2014 MNHRC Law is also silent as to consequences in the event that the summons is not complied with by the subject person or entity. Those defying a legal subpoena should be held legally accountable. This gap effectively impedes the MNHRC’s power of inquiry.

#### *Geographical coverage*

To expand the impact of the MNHRC geographically, enabling it to inquire into the various human rights issues affecting racial and gender minorities, the composition of the Commission must include people from different parts of the country, and additional offices should be established throughout. This would diversify the range of matters that the Commission can inquire into, increase accessibility toward it, and signify an important move towards addressing discrimination and conflict-related issues particularly prevalent in border areas including Rakhine, Kachin and Shan states. This may also help address criticism that the Commission is selective in its interventions.<sup>52</sup> An initiative to establish an MNHRC Office in Rakhine State, understood to be underway, should be welcomed and replicated elsewhere.

### **Summary of key recommendations**

#### *The Union President and Selection Board for the MNHRC should select new Commissioners reflecting a diverse set of profiles*

The selection and appointment process of the MNHRC should be done in a transparent and widely consultative manner with the nominees and selected members reflecting a diverse set of professional profiles and backgrounds, reflective of the range of gender and other identities throughout Myanmar, and better enabling the independence and impartiality required of them.<sup>53</sup> Given the expired term of some Commissioners in September 2019, and the unclear status of any reappointments or new appointments, this must be done promptly in order to meet the minimum number of commissioners required by the 2014 MNHRC Law.<sup>54</sup> The selection board should take special steps to ensure the credibility of this process.

#### *Commissioners should take a broad and active interpretation of their mandate*

This necessarily includes taking steps to address the most serious violations including crimes under international law, by initiating its own inquiries. Commissioners should read section 37 with a broader interpretation in line with their mandate, and consistent with international human rights law and standards. This would allow inquiries into cases that are potentially unlawful due to, for instance, fair trial rights violations associated with detention, or incompatibility with other constitutional rights and human rights.

*The NLD-dominated legislature should address deficiencies in the MNHRC independence and mandate through law reform*

Amendments to the 2014 MNHRC Law broadening the powers and functions of the Commission and clarifying its mandate are needed. These reforms can also be included in the chapter on the MNHRC in the amended Constitution, as indicated below. First, to anticipate future legislative grant of powers to the Commission, the following provision should be inserted in the 2014 MNHRC Law under section 22 (“Duties and Powers of the Commission”) or as a constitutional provision: “(n) exercising such other powers and functions as may be provided by law.” Second, to aid the MNHRC in discharging its mandate effectively, section 37’s restriction of the MNHRC’s subpoena power must be repealed or a narrow definition of “classified documents” added to the law. The MNHRC should also be granted the power to ensure compliance with its subpoena power. The ICJ suggests the following language for this purpose: “To aid the Commission in the lawful exercise of its powers and functions, the Commission may invoke the aid of other government institutions, including the courts. The Commission may file the applicable contempt proceedings against the person or entity for failure to comply with a summons issued in accordance with sections 35 and 36.”

*The Constitutional Amendment Committee should propose to protect and strengthen the MNHRC through constitutional reform*

A constitutionally established MNHRC would enjoy a stable and permanent status, because any change in the constitution would require a lengthier process than amending or repealing ordinary legislation. This would ensure the MNHRC’s place to protect human rights, the rule of law and democratic principles whatever Myanmar’s political situation and electoral outcomes. In this regard, the practice of East Timor and the Philippines can serve as examples of how constitutional mandates have helped establish the role and importance of NHRIs in countries transitioning to democracy. It is also crucial for the effective exercise of the MNHRC of its mandate to review existing laws and pending bills consistently with international human rights treaties that Myanmar has ratified.

As amendments to the 2008 Constitution are currently being deliberated, the Constitutional Amendment Committee of the Union Parliament should include provisions in the Bill to Amend the Constitution to establish the MNHRC as a constitutional body vested with financial and structural independence, and with a clear articulation of its relationship vis-à-vis the different branches of government and ministries. This proposal seems modest, yet can have potentially significant impact on formally entrenching human rights in the country’s legal system. The ICJ thus suggests an amended Constitution with at least the following provisions: “There is hereby created an independent office called the Myanmar National Human Rights Commission, which shall comply with the applicable international principles relating to the status of national human rights institutions, including but not limited to the Paris Principles;” and “The approved annual appropriations of the Commission shall be automatically and regularly released.”

*UN Member States, UN agencies and development partners should support reforms*

The recommendations contained in this briefing, and those of civil society actors as well as the Commissioners themselves, and of the GANHRI, should inform international actors in their efforts to improve the protection of human rights in Myanmar, including as tangible steps toward addressing the accountability deficit for gross human rights violations.

### **Annex 1: About the International Commission of Jurists**

Established in 1952 and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession. The ICJ has had a continuous presence working in Myanmar since early 2014, and first began monitoring the situation of the justice system in the country more than fifty years ago.<sup>55</sup> As part of this work, the ICJ has enjoyed constructive engagement with the MNHRC, including collaboration on joint activities to promote human rights protections.<sup>56</sup> The ICJ sought the MNHRC’s advice and inputs to inform the development of this briefing paper.

## **Annex 2: Principles relating to the Status of National Institutions (Paris Principles)**

Adopted by General Assembly resolution 48/134 of 20 December 1993

### Competence and responsibilities

1. A national institution shall be vested with competence to promote and protect human rights.
2. A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.
3. A national institution shall, inter alia, have the following responsibilities:
  - (a) To submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights; the national institution may decide to publicize them; these opinions, recommendations, proposals and reports, as well as any prerogative of the national institution, shall relate to the following areas:
    - (i) Any legislative or administrative provisions, as well as provisions relating to judicial organizations, intended to preserve and extend the protection of human rights; in that connection, the national institution shall examine the legislation and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights; it shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures;
    - (ii) Any situation of violation of human rights which it decides to take up;
    - (iii) The preparation of reports on the national situation with regard to human rights in general, and on more specific matters;
    - (iv) Drawing the attention of the Government to situations in any part of the country where human rights are violated and making proposals to it for initiatives to put an end to such situations and, where necessary, expressing an opinion on the positions and reactions of the Government;
  - (b) To promote and ensure the harmonization of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation;
  - (c) To encourage ratification of the above-mentioned instruments or accession to those instruments, and to ensure their implementation;
  - (d) To contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations and, where necessary, to express an opinion on the subject, with due respect for their independence;
  - (e) To cooperate with the United Nations and any other organization in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the protection and promotion of human rights;
  - (f) To assist in the formulation of programmes for the teaching of, and research into, human rights and to take part in their execution in schools, universities and professional circles;
  - (g) To publicize human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and by making use of all press organs.

### Composition and guarantees of independence and pluralism

1. The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of:



- (a) Non-governmental organizations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organizations, for example, associations of lawyers, doctors, journalists and eminent scientists;
  - (b) Trends in philosophical or religious thought;
  - (c) Universities and qualified experts;
  - (d) Parliament;
  - (e) Government departments (if these are included, their representatives should participate in the deliberations only in an advisory capacity).
2. The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.
3. In order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured.

#### Methods of operation

Within the framework of its operation, the national institution shall:

- (a) Freely consider any questions falling within its competence, whether they are submitted by the Government or taken up by it without referral to a higher authority, on the proposal of its members or of any petitioner,
- (b) Hear any person and obtain any information and any documents necessary for assessing situations falling within its competence;
- (c) Address public opinion directly or through any press organ, particularly in order to publicize its opinions and recommendations;
- (d) Meet on a regular basis and whenever necessary in the presence of all its members after they have been duly concerned;
- (e) Establish working groups from among its members as necessary, and set up local or regional sections to assist it in discharging its functions;
- (f) Maintain consultation with the other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of human rights (in particular, ombudsmen, mediators and similar institutions);
- (g) In view of the fundamental role played by the non-governmental organizations in expanding the work of the national institutions, develop relations with the non-governmental organizations devoted to promoting and protecting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialized areas.

#### Additional principles concerning the status of commissions with quasi-judicial competence

A national institution may be authorized to hear and consider complaints and petitions concerning individual situations. Cases may be brought before it by individuals, their representatives, third parties, non-governmental organizations, associations of trade unions or any other representative organizations. In such circumstances, and without prejudice to the principles stated above concerning the other powers of the commissions, the functions entrusted to them may be based on the following principles:

- (a) Seeking an amicable settlement through conciliation or, within the limits prescribed by the law, through binding decisions or, where necessary, on the basis of confidentiality;
- (b) Informing the party who filed the petition of his rights, in particular the remedies available to him, and promoting his access to them;
- (c) Hearing any complaints or petitions or transmitting them to any other competent authority within the limits prescribed by the law;
- (d) Making recommendations to the competent authorities, especially by proposing amendments or reforms of the laws, regulations and administrative practices, especially if they have created the difficulties encountered by the persons filing the petitions in order to assert their rights.

### **Annex 3: ICJ letter to the Constitutional Amendment Committee**

U Tun Tun Hein @ U Tun Aung  
Chairperson  
Constitutional Amendment Committee  
Pyidaungsu Hluttaw  
Nay Pyi Taw, Myanmar

25 October 2019

#### **Re: Jurists' recommendations on the Bill to amend the 2008 Constitution**

Dear Chairperson,

The International Commission of Jurists (ICJ) is an international nongovernmental organization working globally to strengthen national and international justice systems. Composed of 60 eminent jurists and lawyers from all regions of the world, the ICJ promotes the rule of law and the protection of human rights throughout the world. Since 2012, the ICJ has worked with various justice sector actors in Myanmar, including with the Office of the Union Attorney General and with judges and lawyers.

The ICJ welcomes the initiative of the Union Parliament to examine amendments to the 2008 Constitution of the Republic of the Union of Myanmar, with a view to drafting a bill to amend the Constitution. The ICJ has reviewed the "Report of the Joint Committee to Amend the Republic of the Union of Myanmar Constitution (2008): Findings and Observations," published in July 2019. We note that in this report, it is indicated that your Committee will seek to obtain input from a range of stakeholders, including "jurists" (section 23(i) of the Report). It is in our capacity as jurists that we respectfully write to your Committee, with two recommendations for consideration.

Elsewhere, the ICJ has produced legal analysis on specific constitutional provisions that must be amended to bring the military under the control of civilian authorities, in line with core rule of law and democratic principles. We would be pleased to share such analysis at your invitation. However, aware that you are already considering a series of such reforms, in this letter we share two new, different recommendations:

1. Provide for a strong and constitutionally mandated Myanmar National Human Rights Commission (MNHRC), enabling the present institution to enjoy a permanent status with protected independence and enhanced ability to promote and protect human rights.
2. In Chapter 8 of the Constitution, expand the narrow definition of "fundamental rights" to constitutionally protect the full range of human rights of all persons in Myanmar, without discrimination (with limited exceptions restricted to specific political rights). In applicable provisions, the term "citizens" should be replaced with "any persons," in line with section 347 of the Constitution.

The ICJ is pleased to share the attached proposal elaborating on these recommendations. We would be pleased to meet and discuss the proposal.

Should you have questions, kindly contact myself, or Daw Hnin Win Aung, ICJ legal adviser.

Respectfully,

Sean Bain



Legal Adviser  
International Commission of Jurists  
[sean.bain@icj.org](mailto:sean.bain@icj.org)

[Note: full proposal on file with ICJ and available on request].

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<sup>1</sup> While the MNHRC webpage still lists ten active commissioners, the ICJ understands that the mandate of three Commissioners ended in September 2019.

<sup>2</sup> See: Myanmar National Human Rights Commission, "Strategic Plan 2020-2024: Consultation Draft," (15 July 2019) Goal 1.1. <http://www.mnhrc.org.mm/en/publication/strategic-plan-2020-2024-consultation-draft/> (Accessed 29 August 2019)

<sup>3</sup> In 2019, 24 organizations formed a "CSO Working Group on MNHRC Reform" dedicated to proposing structural reforms of the MNHRC. The working group is understood to have called on the President to extend current terms of the commissioners, and for the parliament to in the meantime enact amendments to the 2014 MNHRC Law that would enable an improved selection process, to be followed by the appointment of commissioners in accordance with an amended law. See: CSO Working Group on MNHRC Reform, "Recommendations on Reform of the Myanmar National Human Rights Commission Law", 3 August 2019.

<sup>4</sup> See, e.g. Independent International Fact-Finding Mission on Myanmar, Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar (2018 FFM Report), UN Doc. A/HRC/39/CRP.2 (2018); Special Rapporteur of the Human Rights Council on the situation of human rights in Myanmar, Situation of human rights in Myanmar, UN Doc. A/74/342 (2019).

<sup>5</sup> For a detailed assessment of barriers to accountability and redress for human rights violations in Myanmar, including an analysis of the role of justice sector actors and of the MNHRC, see: ICJ, "Achieving Justice for Gross Human Rights Violations in Myanmar – a baseline study," January 2018, available at: <https://www.icj.org/myanmar-reverse-laws-and-practices-that-perpetuate-military-impunity-new-icj-report/>

<sup>6</sup> The UN Independent International Fact-Finding Mission concluded that crimes under international law have been perpetrated in Kachin, Rakhine and Shan States – and that an investigation of the crime of genocide against Rohingya is warranted. In its report to the UN Human Rights Council in 2018, they found that challenges and negative trends have emerged with respect to "democratic space and the exercise of fundamental freedoms." See: 2018 FFM report (citation above).

<sup>7</sup> See: ICJ, "Questions and Answers on Human Rights Law in Rakhine State," November 2017, pp. 3-4, available at: <https://www.icj.org/myanmar-rule-of-law-must-drive-responses-to-rohingya-crisis/>

<sup>8</sup> A government-run "human rights committee," established in 2002 under the State Peace and Development Council regime was a short-lived initiative that did not result in the creation of a NHRI compliant with the UN-endorsed "Paris Principles." See: Jonathan Liljeblad, "The Efficacy of National Human Rights Institutions Seen in Context: Lessons from the Myanmar National Human Rights Commission," in *Yale Human Rights and Development Law Journal*, Volume 19.1, 2017, pp. 102-3; David Kinley and Trevor Wilson, "Engaging a Pariah: Human Rights Training in Burma/Myanmar," in *Human Rights Quarterly*, Volume 29(2), 2007, p. 383.

<sup>9</sup> Presidential Ordinance No. 34/2011 of 5 September 2011; Myanmar National Human Rights Commission Law (MNHRC Law), No. 21/2014 of 28 March 2014. See also: Jonathan Liljeblad, (citation above), pp. 97-98.

<sup>10</sup> Presidential Ordinance No. 34/2011 (citation above); MNHRC Law, (citation above). See also: Jonathan Liljeblad, (citation above), pp. 97-98.

<sup>11</sup> Given the change of name, all references to the International Coordinating Committee of National Human Rights Institutions will be GANHRI.

<sup>12</sup> GANHRI is a global network of human rights institutions responsible for coordinating the relationship between NHRIs and the United Nations human rights system. The GANHRI reviews the accreditation of NHRIs every five years, classifying them as one of three grades of accreditation: "A" for those fully compliant with the Paris Principles; "B" for partial compliance; and "C" for non-compliance. See: UN General Assembly, National institutions for the promotion and protection of human rights, UN Doc. A/Res/48/134 (1993).

<sup>13</sup> *Report and Recommendations of the Session of the Sub-Committee on Accreditation*, International Coordinating Committee of National Human Rights Institutions, (2015). GANHRI, "Chart of the Status of National Institutions accredited by the Global Alliance of National Human Rights Institutions: Accreditation status as of May 2019," pp. 9. <https://nhri.ohchr.org/EN/Documents/Status%20Accreditation%20Chart%20%289%20May%202019%29.pdf> (Accessed 29 August 2019).

<sup>14</sup> See the publications section of the website. <http://www.mnhrc.org> (Accessed 29 August 2019). While recent annual reports have not been uploaded in English language, these are available in the Burmese language section of the website.

<sup>15</sup> See: International Commission of Jurists, "ICJ and Myanmar National Human Rights Commission Forum on Economic, Social, and Cultural Rights," November 2018, available at: <https://www.icj.org/icj-and-myanmar-national-human-rights-commission-forum-on-economic-social-and-cultural-rights/>

<sup>16</sup> Ministry of Information, "Signing ICCPR is a step towards building democracy with human dignity." <https://www.moi.gov.mm/moi:eng/?q=news/9/06/2019/id-18010> (Accessed 6 November 2019)

<sup>17</sup> See, e.g.: *Return to Sender: MNHRC Enabling Law Must be Returned to Parliament for Structural Reform*, Asian NGOs Network on National Human Rights Institutions (2018). [https://progressivevoicemyanmar.org/wpcontent/uploads/2018/10/MNHRC\\_Report\\_English\\_Web.pdf](https://progressivevoicemyanmar.org/wpcontent/uploads/2018/10/MNHRC_Report_English_Web.pdf) (Accessed 6 November 2019); *Suspicious Minds: The Myanmar National Human Rights Commission's Trust Deficit*, Asian NGOs Network on National Human Rights Institutions (2017). <https://progressivevoicemyanmar.org/wp-content/uploads/2017/11/Report-on-MNHRC-Eng1.pdf> (Accessed 6 November 2019); Naw Betty Han, "CSOs question human rights commission's effectiveness," *Myanmar Times* (12 October 2018, available at <https://www.mmtimes.com/news/csos-question-human-rights-commissions-effectiveness.html>); Equality Myanmar, "MNHRC Must Take Stand on Extrajudicial Killings of Rakhine Villagers" (25 May 2019), available at <https://equalitymyanmar.org/mnhrc-must-take-stand-on-extrajudicial-killings-of-rakhine-villagers/>; Ye Mon, "Human Rights Commission is a shield for military violations, say CSOs," *Frontier Myanmar* (9 October 2018), available at <https://frontiermyanmar.net/en/human-rights-commission-is-a-shield-for-military-violations-say-csos>

<sup>18</sup> Myanmar National Human Rights Commission, "Capacity Assessment Report," December 2018. <http://www.mnhrc.org.mm/app/uploads/2019/03/MNHRC-CA-Report-design-01-Executive-Summary-2.pdf> (Accessed 29 August 2019)

<sup>19</sup> MNHRC, Capacity Assessment Report (citation above), p. 7.

<sup>20</sup> MNHRC, Strategic Plan 2020-24: Consultation Draft (citation above). Several organizations made submissions or published commentaries. See, e.g.: Freedom of Expression Myanmar, "5 gaps in MNHRC's draft Strategic Plan," 19 August 2019, available at: <http://freeexpressionmyanmar.org/5-gaps-in-mnhrcs-draft-strategic-plan/> (Accessed 29 August 2019). Myanmar Centre for Responsible Business, "MCRB Provides Comments on the Myanmar National Human Rights Commission Draft Strategic Plan 2020-2024," 16 August 2019, available at: <https://www.myanmar-responsiblebusiness.org/mnhcr-draft-strategic-plan-2020-2024.html> (Accessed 29 August 2019). The INGO Forum of Myanmar also made a private submission in August 2019. Public consultation on the strategic plan was limited beyond publication of the draft.

<sup>21</sup> Profiles of the commissioners are featured on the MNHRC website, available here: <http://www.mnhrc.org.mm/en/about/commissioners/> (Accessed 28 August 2019).

<sup>22</sup> This is despite the ICJ making direct enquiries to the MNHRC during 2018 and 2019.

<sup>23</sup> The age of the commissioners is not publicly available; however, based on a review of their professional experience, it appears that they are generally over sixty years of age.

<sup>24</sup> UN General Assembly, National institutions for the promotion and protection of human rights, UN Doc. A/Res/48/134 (1993).

<sup>25</sup> A/Res/48/134, p. 4.

<sup>26</sup> A/Res/48/134, p. 5.

<sup>27</sup> A/Res/48/134, pp. 5-6.

<sup>28</sup> A/Res/48/134, p. 6.

<sup>29</sup> A/Res/48/134, pp. 4-5.

<sup>30</sup> GANHRI Statute, articles 10 and 15.

<sup>31</sup> As Per GANHRI website and as of May 2019- Of 123 NHRIS, 79 had A status, 34 had B status, and 10 had C status (not at all compliant): <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Pages/default.aspx>

<sup>32</sup> The *Provedoria dos Direitos Humanos e Justica* was established under section 27 of the 2002 Constitution of the Democratic Republic of Timor-Leste and operationalized through ordinary legislation. It received "A" accreditation from the GANHRI in 2008. Similarly, the Commission on Human Rights of the Philippines was established under section 17 of the 1987 Constitution of the Republic of the Philippines. It received "A" accreditation from the GANHRI in 1995. <http://pdhj.tl/about/budget/?lang=en>; <http://chr.gov.ph/about-chr/> (Accessed 29 August 2019)

<sup>33</sup> MNHRC Law (citation above), section 4.

<sup>34</sup> Staff of the MNHRC appear to be subject to rules governing civil servants. See: MNHRC Law, sections 54 and 61. Related law and policy include section 21 of the Myanmar Penal Code, and also the Civil Service Personnel Law, Civil Service Personnel Rules, and Civil Service Code of Conduct.

<sup>35</sup> Section 5 of the MNHRC Law states that the President shall form a section board comprising the following: "(a) Chief Justice of the Union; (b) Union Minister, Ministry of Home Affairs; (c) Union Minister, Ministry of Social Welfare, Relief and Resettlement; (d) Attorney-General of the Union; (e) a representative from the Bar Council; (f) two representatives from the Pyidaungsu Hlutaw; (g) a representative from the Myanmar Women's Affairs Federation; (h) two representatives from registered Non-Governmental Organizations." The Minister of Home Affairs is directly appointed

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by, and effectively reports to, the Commander-in-Chief of the Tatmadaw, as per section 232(Bii) of the 2008 Constitution. With respect to non-government organizations, section 7 of the 2014 Law Relating to Registration of Organizations specifies that registration is voluntary for Myanmar organizations. See: Law Relating to Registration of Organizations specifies that registration is voluntary for Myanmar organizations, Law No. 31/2014, 18 July 2014.

<sup>36</sup> MNHRC Law, section 4: "The President shall establish a Myanmar National Human Rights Commission consisting of not less than seven and not more than fifteen members."

<sup>37</sup> MNHRC Law, sections 9, 13, and 14.

<sup>38</sup> The 2014 Census shows the total population under 35 years of age to be 31,401,622; this constitutes 62.5 per cent of Myanmar's total population of 50,279,900. See: Republic of the Union of Myanmar, "The 2014 Myanmar Population and Housing Census: The Union Report, Census Report Volume 2," May 2015. [https://reliefweb.int/sites/reliefweb.int/files/resources/Census%20Main%20Report%20%28UNION%29%20-%20ENGLISH\\_1.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/Census%20Main%20Report%20%28UNION%29%20-%20ENGLISH_1.pdf) (Accessed 28 August 2019).

<sup>39</sup> 2018 FFM Report (citation above).

<sup>40</sup> Other forms of financial contribution are allowed provided the funding sources do not prejudice the independence of the Commission in fulfilling its mandate. MNHRC Law, sections 46 and 47.

<sup>41</sup> MNHRC Law, section 3.

<sup>42</sup> MNHRC Law, section 28, 29, and 33.

<sup>43</sup> Under section 30 of the MNHRC Law, the MNHRC can decide not to do so for any of the following reasons: (a) the complaint is not made in good faith, (b) the complaint is not within the competence of the Commission; or (c) a more appropriate remedy or reasonable channel of complaint is available to the complainant. Further, under section 32, if it rejects a complaint, the Commission can still look into the matter *motu proprio* pursuant to its general power of inquiry.

<sup>44</sup> MNHRC Law, section 32.

<sup>45</sup> 2018 FFM Report (citation above); *Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute"* 6 September 2018, International Criminal Court, Request Under Regulation 46(3) of the Regulations of the Court, No. ICC-RoC46(3)-01/18.

<sup>46</sup> More than 25 per cent of persons enumerated in the nationwide 2014 Census lack a documented legal identity. Republic of the Union of Myanmar, "The 2014 Myanmar Population and Housing Census: The Union Report," Census Report Volume 2," May 2015, pp. 207-210. [https://reliefweb.int/sites/reliefweb.int/files/resources/Census%20Main%20Report%20%28UNION%29%20-%20ENGLISH\\_1.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/Census%20Main%20Report%20%28UNION%29%20-%20ENGLISH_1.pdf) (Accessed 28 August 2019); For further discussion, see: ICJ, "Citizenship and Human Rights in Myanmar: Why Law Reform is Urgent and Possible," June 2019, p. 5, available at: <https://www.icj.org/myanmars-discriminatory-citizenship-laws-can-and-must-be-immediately-reformed/>

<sup>47</sup> See: ICJ, "Achieving Justice for Gross Human Rights Violations in Myanmar" (citation above), pp. 27-28; ICJ, "Five years without justice for journalist Ko Par Gyi's killing highlights need to reform 1959 law that facilitates military impunity," October 2019, available at: <https://www.icj.org/myanmar-five-years-without-justice-for-journalist-ko-par-gyis-killing-highlights-need-to-reform-1959-law-that-facilitates-military-impunity/>

<sup>48</sup> Based on ICJ discussions with Commissioners in 2018.

<sup>49</sup> MNHRC Law, sections 22(k), 35, and 36.

<sup>50</sup> MNHRC Law, section 36.

<sup>51</sup> The Global Principles on National Security and the Right to Information (The Tshwane Principles) recognize as classified those documents that are of legitimate national security interest as reflected in applicable international standards, provided, that disclosure of information regarding gross violations of human rights or serious violations of international humanitarian law, including crimes under international law, and systematic or widespread violations of the rights to personal liberty and security, shall not be withheld on national security grounds in any circumstances. See: Tshwane Principles, Principles 3 and 10(A).

<sup>52</sup> ICJ, "Achieving Justice for Gross Human Rights Violations in Myanmar" (citation above), p. 27.

<sup>53</sup> Section 11 of the MNHRC Law requires commissioners to act with independence and impartiality. See also MNHRC Law, sections 6(c) and 24.

<sup>54</sup> Under section 13 of the MNHRC Law, the term of members of the Commission shall be five years." Section 14 provides that members "shall not serve more than two consecutive terms."

<sup>55</sup> See, e.g.: ICJ, "Military Rule in Burma", *Bulletin of the International Commission of Jurists*, Volume 15 (1963), pp. 4-10, available at <https://www.icj.org/wp-content/uploads/2013/07/ICJ-Bulletin-15-1963-eng.pdf>

<sup>56</sup> See, e.g.: ICJ, "ICJ and Myanmar National Human Rights Commission Forum on Economic, Social and Cultural Rights," 26 November 2018, <https://www.icj.org/icj-and-myanmar-national-human-rights-commission-forum-on-economic-social-and-cultural-rights/>