

MYANMAR A LITTLE LESS CONVERSATION, A LITTLE MORE ACTION PLEASE

Analysis on the Performance of the Myanmar National Human Rights Commission in
the Context of Protection of Human Rights Defenders and
Shrinking Civil Society Space in Myanmar



Myanmar: A little Less Conversation, A Little More Action Please

This report is the Myanmar Chapter of the 2019 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia.

The Asian NGOs Network on National Human Rights Institutions (ANNI) was established in December 2006. It is a network of Asian non-governmental organisations and human rights defenders working on issues related to National Human Rights Institutions (NHRIs). ANNI has members that are national organisations from all over Asia. ANNI currently has more than 30 member organisations from 21 countries or territories. The work of ANNI members focuses on strengthening the work and functioning of Asian NHRIs to better promote and protect human rights as well as to advocate for the improved compliance of Asian NHRIs with international standards, including the Paris Principles and General Observations of the Sub-Committee on Accreditation (SCA) of the Global Alliance of NHRIs (GANHRI).

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Contents List of Abbreviations

ANNI	Asian NGO Network on National Human Rights Institutions
APF	Asia Pacific Forum
CSO	Civil Society Organization
EAO	Ethnic Armed Organization
GANHRI	Global Alliance of National Human Rights Institutions
GANHRI-SCA	Alliance on National Human Rights Institutions' Sub-Committee on Accreditation
HRD	Human Rights Defender
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists
IDP	Internally Displaced Person
IIFMM	Independent International Fact-Finding Mission on Myanmar
KIA	Kachin Independence Army
MNHRC	Myanmar National Human Rights Commission
NGO	Non-Governmental Organization
NHRI	National Human Rights Institution
NLD	National League for Democracy
OHCHR	Office of the United Nations High Commissioner for Human Rights
SCA	Sub-Committee on Accreditation
UN	United Nations
UNDP	United Nations Development Programme
UPR	Universal Periodic Review

Contents

List of Abbreviations.....	d
Introduction	1
Overview	1
MNHRC’s Performance in Protecting and Promoting Human Rights	6
Shrinking of Democratic Space in Myanmar	9
The Role of MNHRC in Democratic Backsliding and Contraction of Civic Space.....	12
Reuters Journalists.....	12
Youth Peace Movement Protests	13
Conclusion	14
Recommendations.....	14
To the Myanmar Government:.....	14
To the Parliament:	15
To the MNHRC:.....	16
To the International Donor Community:.....	16

1

Introduction

This report is based on desk and field research and covers the period of 2018 with key events from the first few months of 2019. Given the thematic focus of protection of human rights defenders (HRDs) and shrinking civil society's space, the lead author participated in four consultations with HRDs and interviewed several HRDs in Myanmar, both male and female, to ensure their perspectives and insights on the Myanmar National Human Rights Commission (MNHRC) are reflected in this chapter as well

as through its recommendations. They have not been named in this report to ensure their safety and security. The desk research consisted of document analysis of MNHRC statements, its founding law, its own capacity assessment, media reports, and reports by civil society. Several of the co-authors of this report are members of the CSO Working Group on MNHRC Reform, which was founded in early 2019.

2

Overview

The MNHRC was established by presidential decree in 2011¹ and its 2014 enabling law – the Myanmar National Human Rights Commission Law (MNHRC Law) – set its formal mandate.² It currently has 10 commissioners and has gone

through one round of accreditation by the Global Alliance of National Human Rights Institutions' (GANHRI) Sub-Committee on Accreditation (SCA). It was awarded with 'B' status in November 2015.³ The SCA outlined seven areas of

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

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

3 International Coordination Committee of National Institutions for the Promotion and Protection of Human Rights, 'Report and Recommendations of the Session of the Sub-Committee on Accreditation', Section 2.3, 16-20 November, 2015, available at: <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA%20FINAL%20REPORT%20-%20NOVEMBER%202015-English.pdf>. At the time of this

concern regarding the MNHRC's mandate and 'A' status that it had hoped for. These are: work, which explains why it did not receive the



SELECTION AND APPOINTMENT - The SCA noted that the selection process of the commissioners does not guarantee independence from either the executive or the all-powerful military. The Selection Board, which nominates members of the commission for the President's Office to choose from, comprises people in positions that are mostly aligned to either the government or the military. This includes a military appointee, the Minister of Home Affairs. It also does not adequately include civil society representatives, stipulating that civil society members of the Selection Board must be registered, a problem in Myanmar where many rights-based CSOs are not registered due to restrictive legislation.



NATIONAL INSTITUTIONS OPERATING IN SITUATIONS OF INTERNAL UNREST OR INTERNAL ARMED CONFLICT - The SCA noted how the MNHRC could do more to exercise its' mandate in the context of "human rights violations occurring as a result of situations of armed conflict between the government and different ethnic groups, as well as internal unrest between different ethnic and religious groups."⁴ This will continue to be a pressing issue as conflict between the ethnic armed organization, the Arakan Army, and the Myanmar military has intensified in 2019, and several reports of extrajudicial killings by the Myanmar military are emerging.⁵



PLURALISM – The SCA noted the importance of a diverse MNHRC, in terms of both commissioners and staff. This is vital in a country as diverse as Myanmar with many religious and ethnic minorities marginalized. The MNHRC currently does not have adequate gender balance, with one out of 10 commissioners who is female. For a period between October 2016 and April 2018, they had no female commissioners.

report, the Global Alliance of National Human Rights Institutions (GAHNRI) was called the International Coordination Committee of National Institutions for the Promotion and Protection of Human Rights (ICC).

4 Ibid.

5 Stephanie Nebehay, 'U.N Investigator Reports possible Fresh War Crimes in Myanmar,' Reuters. 3 July 2019, available at : <https://www.reuters.com/article/us-myanmar-rights-un/u-n-investigator-reports-possible-fresh-war-crimes-in-myanmar-idUSKCNITX2JV> .



ADEQUATE FUNDING AND FINANCIAL INDEPENDENCE - The SCA recommended that the MNHRC's funding should be allocated as a separate budget line so as to give more independence from the President's Office. This has been reportedly addressed but not by law. However, civil society and the MNHRC itself continue to have concerns over adequate amount of funding for staffing and regional office.



MONITORING PLACES OF DEPRIVATION OF LIBERTY – The SCA noted that while the MNHRC can visit prisons, and detention centres, it cannot do so unannounced and recommends for this to change, as it would limit opportunities for detaining authorities to hide human rights violations and instead facilitate greater scrutiny.⁶



INTERACTION WITH THE INTERNATIONAL HUMAN RIGHTS SYSTEM – The SCA encourages the MNHRC to cooperate with international human rights bodies independently of the government. While the MNHRC has been active in engaging with several international human rights bodies and processes, for example the Universal Periodic Review process, the SCA urged the MNHRC to ensure it engages with such mechanisms “in their own right.”⁷



ANNUAL REPORT – The SCA recommends that special reports are submitted to the Parliament, not just the President, and all reports are widely circulated and discussed in the Parliament.⁸

While the MNHRC has taken steps towards addressing some of these concerns such as in relation to advocating for more funding and financial independence, issues regarding a lack of pluralism, and how it operates in situations of internal unrest of armed conflict remain pertinent.

Civil society has been active in advocating for re-

form of the MNHRC, and its calls and criticisms reflect some of the recommendations made by the SCA. This includes an open letter to the President urging reform of the MNHRC signed by 142 civil society organisations (CSOs) in 2016.⁹ CSOs also shared their recommendations in a submission to GANHRI-SCA on the accreditation process, and in previous ANNI reports.¹⁰ At

6 International Coordination Committee of National Institutions for the Promotion and Protection of Human Rights, 'Report and Recommendations of the Session of the Sub-Committee on Accreditation.'

7 Ibid.

8 Ibid.

9 142 Civil Society Organisations, 'Open letter to President Regarding Myanmar National Human Rights Commission Reform', 28 September, 2016, available at: <http://www.burmapartnership.org/2016/09/26837/>.

10 ANNI, 'Return to Sender' by 12 Myanmar civil society organisations, October 2018, available at: https://progressivevoicemyanmar.org/wp-content/uploads/2018/10/MNHRC_Report_English_Web.pdf ;

the launch of the 2018 ANNI report, which was co-authored by 12 CSOs, a press conference was held in Yangon where the MNHRC was accused of acting as a shield to cover abuses committed by the Myanmar military.¹¹ Furthermore, the CSO Working Group on MNHRC Reform was formed in early 2019. At the time of writing, the CSO Working Group on MNHRC Reform consists of 24 Myanmar CSOs and advocates for an independent and effective commission.

The background of the commissioners, two of whom are former military personnel, and their links with the old regime in other roles such as in the Foreign Service or as civil servants, has long hampered civil society's trust in the commission. Given their background, many HRDs question if

the commissioners have a human rights mindset and what previous experience of human rights qualifies them for this work.

The MNHRC also conducted its own capacity assessment process in 2018, with facilitators from the Asia Pacific Forum (APF), the UN Development Programme (UNDP) and the Office of the UN High Commissioner for Human Rights (OHCHR).¹² This process included interviews with the MNHRC commissioners, staff, other stakeholders such as MPs and CSOs and analysis of key documents. This capacity assessment identified four 'priority strategies' for the MNHRC to focus on in the next three to five years:

MANDATE AND LEADERSHIP – Building trust in the MNHRC as an independent NHRI.

STAFF, EQUIPMENT & RESOURCES – Build a team of well-qualified, highly competent staff at all levels of the organization.

FUNCTIONS – Increase the MNHRC's capacity to effectively promote and protect human rights in every region and state.

RELATIONSHIPS AND COOPERATION – Deepen the MNHRC's capacity to cooperate and engage nationally, regionally and internationally.¹³

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

11 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> .

12 MNHRC, 'Capacity Assessment Report,' December 2018, available at: <http://www.mnhrc.org.mm/app/uploads/2019/03/MNHRC-CA-Report-design-01-Executive-Summary-2.pdf>.

13 Ibid.

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If the assessment's recommendations are implemented, the functioning of the commission may improve, but unless it is completely reinvigorated, such improvements would have a limited impact on the MNHRC's ability to protect the most vulnerable and marginalised communities in Myanmar.

While the assessment is a useful tool in dealing with some of the low-hanging fruit, it does not address the deeper structural and political issues that are preventing the MNHRC from becoming a staunch ally of HRDs in Myanmar. If the assessment's recommendations are implemented,

the functioning of the commission may improve, but unless it is completely reinvigorated, such improvements would have a limited impact on the MNHRC's ability to protect the most vulnerable and marginalised communities in Myanmar.

3

MNHRC's Performance in Protecting and Promoting Human Rights

The work of the MNHRC itself is much more focused on promotion rather than protection. Although not limited by its enabling law, the leadership of the MNHRC has decided to focus disproportionately on 'long-term' human rights promotion, which comes at the expense of protection.

The MNHRC is cooperating with a prominent CSO to engage with communities in several states and regions, to give the MNHRC the opportunity to explain its mandate and for the public to air grievances and make complaints. This allows the MNHRC to explain its limitations on budget and why it cannot investigate many complaints. The commission has also worked to improve its outreach, including by being more active on Facebook.¹⁴ While popular worldwide, Facebook is particularly crucial in the dissemination of information in Myanmar due to its extremely wide user base. Furthermore, the

same civil society organisation that is helping the MNHRC give human rights talks has produced a leaflet in Myanmar language explaining the complaint procedure, which the MNHRC gave input on. These are positive steps that the MNHRC has taken and while challenges remain, including working with more CSOs, positive steps such as outreach with the public are to be encouraged.

Another positive step that the MNHRC has taken is regarding prison inspections. In 2018 they inspected 25 prisons, 22 labour camps, 32 police lock-ups, and 32 court lock-ups, an increase on previous years.¹⁵ They have worked closely with a CSO that focuses on political prisoners to make recommendations to the Parliament for prison law reform. It has also cooperated with international organisations such as the International Commission for Jurists on its submission of a national report on the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁶

¹⁴ See: <https://www.facebook.com/myanmarnhrc/>.

¹⁵ MNHRC, Statement by Myanmar National Human Rights Commission to mark the 70th Anniversary of Universal Declaration of Human Rights which falls on 10 December 2018, available at: <http://www.mnhrc.org.mm/en/statement1192018/>.

¹⁶ Ibid.

While the MNHRC has focused on promotion, its protection work needs to improve. This will be expanded upon in the following sections but one of the stipulations in the enabling law that constrains the MNHRC is Article 37 which states that the commission shall not inquire into any complaint that involves current proceedings before the court.¹⁷ To acknowledge the complementarity of the commission and the court system and to broaden the powers of the MNHRC, Article 37 should be amended by law so that the commission, with authorization of the court, can inquire into matters pending before it. CSOs have noted how the MNHRC's hands are tied if there is a court case already in motion.

One of the main obstacles to the MNHRC's fulfilling its mandate to protect human rights is the background and current mindset of its commissioners. The MNHRC is keen to propagate the benefits of the human rights talks that it gives, extolling the benefits of its human rights promotion work. Yet, people who have attended such talks report of commissioners speaking out to defend and even promote the deeply illegitimate 2008 Constitution. This is a document, which entrenches the political power of the Myanmar military, an institution that has committed

war crimes, the crime of genocide, and crimes against humanity. It also ensures that the military is the ultimate arbiter of the abuses that it itself commits.¹⁸ The defense of the 2008 Constitution is not the perspective of an institution working to protect the rights of the people of Myanmar. This echoes civil society complaints that the MNHRC is unable and/or unwilling to protect human rights if the violator is the Myanmar military.

This was illustrated in the context of the conflict between the Arakan Army and the Myanmar military. In May 2019, six Arakanese men, who were part of a mass detention of 275 men from one village, were shot and killed by the Myanmar military.¹⁹ An initial statement by the MNHRC merely echoed the Myanmar military's narrative that the six men were shot in self-defense after they tried to grab the soldier's guns.²⁰ The CSO Working Group on MNHRC Reform decried the MNHRC's lack of effective action with a statement urging an independent investigation.²¹ This created public pressure and the MNHRC did respond by investigating the case. Ultimately, the MNHRC continued to unquestioningly follow the military's narrative, and absolved the soldiers of responsibility.²² This is

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- 17 The Myanmar National Human Rights Commission Law, 28 March 2014, Section 3.
- 18 UN Independent International Fact-Finding Mission on Myanmar, 'Myanmar – Tatmadaw Leaders Must be Investigated for Genocide, Crimes against Humanity, War Crimes – UN Report,' 27 August, 2018, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23475&LangID=E>.
- 19 Human Rights Watch, 'Myanmar : Deaths in Army Custody Need Independent Inquiry,' 6 May, 2019, available at: <https://www.hrw.org/news/2019/05/06/myanmar-deaths-army-custody-need-independent-inquiry?fbclid=IwAR039bllxpVrCbVBzuVqiY6s4Nizrssx6j2Dg6EcEiEfAeDnmQaFUTtK8i0>.
- 20 MNHRC, Statement of MNHRC, 3 May, 2019, available at: https://www.facebook.com/myanmarnhrc/?epa=SEARCH_BOX.
- 21 CSO Working Group on MNHRC Reform, 'MNHRC Must Take Stand on Extrajudicial Killings of Rakhine Villagers,' 14 May, 2019, available at: <https://progressivevoicemyanmar.org/2019/05/14/mnhrc-must-take-stand-on-extrajudicial-killings-of-rakhine-villagers/>.
- 22 Wai Mar Tun, Ye Tike, and Tin Aung Khine, 'Myanmar Human Rights Commission Backs Army's Story of Kyauktan Shootings,' Radio Free Asia, 13 June 2019, available at: <https://www.rfa.org/english/news/myanmar/story-06132019170639.html>.

despite statements from villagers and witnesses who say that the military fired upon the villagers without provocation.²³

The MNHRC issued a similar statement to Parliament in May 2018, when two Kachin men who, according to witnesses, were arrested while tending to buffalo in January 2018, were later found buried after being executed by the Myanmar military.²⁴ A Kachin Independence Army (KIA) uniform had been put on one of the men. Despite medical reports that said they could have been tortured, the MNHRC explained that they were in fact KIA soldiers, and had been killed in battle, contradicting all reports and testimony from the people on the ground that they were merely civilians and that the Myanmar military had taken them away while they were in the fields.²⁵

These cases are emblematic of why trust with civil society is eroded. In Karen State in April 2018, a local Karen community leader and defender and promoter of indigenous peoples' rights, Saw O Moo, was murdered by the Myanmar military while travelling by motorbike in a ceasefire area to attend a meeting regarding

humanitarian assistance to internally displaced persons (IDP).²⁶ Yet despite his murder, the violation of the ceasefire, and the impunity of the soldiers who committed the crime, the MNHRC has not made any statement or conducted any investigation. Karen CSOs did not file any complaint to the MNHRC, because they had little trust in the body to take substantive action.

Another major problem relates to the rights of the Rohingya. The MNHRC simply does not recognize the identity of the Rohingya and has expressed this in various forums.²⁷ This means that the MNHRC has never addressed this issue despite the most serious crimes being committed against the Rohingya and has instead sought to deflect criticism of the violence. This delegitimizes the MNHRC as a national human rights institution. The UN-mandated Independent International Fact-Finding Mission on Myanmar, which in its final report found that the Myanmar military leaders should be investigated and prosecuted for the crime of genocide for the wave of violence in late 2017 against the Rohingya, condemned the role of the MNHRC:

"At no point during these six years, however, did the MNHRC call for or conduct a full, independent investigation of the alleged human rights violations committed by the security forces. Nor did it address the systemic discrimination against Rohingya, despite this falling within its mandate."²⁸

23 Ibid.

24 Lawi Weng, 'Govt Rights Body Says Two Kachin Men Found Dead were KIA Fighters,' The Irrawaddy, 4 June 2018, available at: <https://www.irrawaddy.com/news/burma/govt-rights-body-says-two-kachin-men-found-dead-were-kia-fighters.html>.

25 Ibid.

26 Karen Human Rights Group, 'A Karen Community Leader, Saw O Moo, Was Murdered by Tatmadaw forces in Hpapun District, April 2018,' 15 June 2018, available at: <https://khr.org/2018/06/18-3-nb1/karen-community-leader-saw-o-moo-was-murdered-tatmadaw-forces-hpapun-district-april>.

27 For example the APF Biennial Conference, Bangkok, 30 November 2017.

28 Report of the Independent International Fact-finding Mission on Myanmar, A/HRC/39/64, 27 August 2018, pp.408-409, available at: <https://www.ohchr.org/en/hrbodies/hrc/myanmarFFM/Pages/ReportoftheMyanmarFFM.aspx>.

It is difficult to reconcile the current MNHRC and its role to promote and protect human rights with its rejection to condemn the most horrific human rights violations committed against ethnic minorities and its refusal to even recognise the identity of the Rohingya. It is an issue that the international community must also consider

when it analyses its own engagement with the MNHRC. If the MNHRC is contributing to the state-sponsored persecution of the Rohingya by denying them their identity and downplaying abuses, is this an institution that the international community wants to continue providing 'technical assistance' to ?

4

Shrinking of Democratic Space in Myanmar

During 2018 and the first few months of 2019 democratic space in Myanmar has shrunk, threats to HRDs have increased, and respect for freedom of expression has declined.²⁹ Despite large prisoner amnesties in April and May 2019, which saw the release of over 23,000 prisoners, only 25 were political prisoners.³⁰ According to the Assistance Association for Political Prisoners, which documents and monitors the amount of arrests and imprisonment of people on political grounds, as of July 2019 there are 466 people who are either in prison or are facing charges and awaiting trial.³¹ This is despite the presence

of over 100 former political prisoners in the current National League for Democracy (NLD)-led government.

Freedom of expression is severely restricted, and criticism of not just the military, but also the NLD-led government, means people are vulnerable to being charged. Myanmar's ranking in the World Press Freedom Index fell seven places in 2018.³² Athan, a CSO that monitors freedom of expression has documented 47 cases of journalists facing trials since the NLD came to power.³³ One of the favorite tools the authorities use to

29 190 Myanmar Civil Society Organisations, Call from Myanmar Civil Society Organisations for World Press Freedom Day,' 30 April, 2019, available at: https://drive.google.com/file/d/1JXjnkM6sTTAjeKN5bVvbqBsaFhQB_2QU/view?fbclid=IwAR3tjo_TVAHt1loeymIS_nvfyXoEspTEeY4ayKUkx3uoqamBGpCqyChZBr4.

30 Assistance Association for Political Prisoners, President's Amnesty 16/2019 Released List on May 7, 2019, 7 May, 2019, available at: <https://aappb.org/2019/05/presidents-amnesty-16-2019-released-list-on-may-7-2019/>.

31 Assistance Association for Political Prisoners, President's Amnesty 16/2019 Released List on May 7, 2019, 7 May, 2019, available at: <https://aappb.org/2019/05/presidents-amnesty-16-2019-released-list-on-may-7-2019/>.

32 Athan, 'The Number of Journalists Charged Under the Current Constitution,' 23 April, 2019, available at : <https://www.facebook.com/athan.foe.myanmar/photos/a.215675215658218/428936997665371/?type=3&theater>.

33 Athan, 'The Number of Journalists Charged Under the Current Constitution,' 23 April, 2019, available at <https://www.facebook.com/athan.foe.myanmar/photos/a.215675215658218/428538974371840/?type=3>

criminalize critics is Article 66(d) of the Telecommunications Act. The Act, which excessively restricts freedom of expression online is used to charge media workers and others for posting criticism of the military or the government on social media. Ultrationalists and the powerful Buddhist nationalist group, Ma Ba Tha, have also used this law. For example, Ko Swe Win, an award-winning journalist, faced charges under Article 66(d). The criminal charges were filed against him after he shared a Facebook story that criticized the leading ultranationalist monk, Wirathu. After the charges were filed, he had to appear in court over 50 times in a case that was dragged out for over two years before charges were finally dropped in July 2019.³⁴

Perhaps the most infamous case is that of Kyaw Soe Oo and Wa Lone, two Reuters journalists who were arrested under the Official Secrets Act for having in possession documents that were supposedly top secret. As the court case showed, it was a sting operation by the police in order to entrap the two journalists, whose real crimes in the eyes of the authorities was their fearless reporting on the situation of the Rohingya in Rakhine State, and in particular, a massacre of ten Rohingya villagers in Inn Din Village. Despite international and local outcry, the journalists were sentenced to seven years

imprisonment, and the Supreme Court rejected their appeal.³⁵ Both domestic and international pressure, including being awarded the Pulitzer Prize, eventually resulted in their release as part of the third Presidential prisoner's Amnesty on 7 May, 2019.³⁶

It is not just freedom of expression that has taken a battering in the past few months. Freedom of assembly, exercised especially by the youth of Myanmar protesting the war and the suppression of ethnic rights, is also under attack. In May 2018 two protests related to the civil war in Myanmar, one in Myitkyina, Kachin State, and one in Yangon were held. In Myitkyina, 5,000 people, including many youth, demanded the safe passage of IDPs trapped by armed conflict in Kachin State and the delivery of humanitarian aid. In Yangon, the youth demanded an end to the war more broadly and for peace dialogue to be held. The protesters in Yangon were met by pro-military counter-protesters who tried to provoke confrontations and verbally and physically attacked them. The police did nothing to stop the violence and even seemed to be working together with the counter-protesters to then make arrests. Consequently at least 47 youth activists were charged for their roles in the two protests, most under the deeply flawed Peaceful Assembly and Peaceful Procession Law (PAPPL).

&theater

34 77 Civil Society Organisations, 'Myanmar Authorities Must Drop the Case against Ko Swe Win and Decriminalise Defamation,' 7 March, 2019, available at: <https://progressivevoicemyanmar.org/2019/03/07/myanmar-authorities-must-drop-the-case-against-ko-swe-win-and-decriminalise-defamation/>.

35 Committee to Protect Journalists, 'Myanmar Court Rejects Appeal by Reuters' Wa Lone and Kyaw Soe Oo,' 22 April, 2019, available at: <https://cpj.org/2019/04/myanmar-court-rejects-reuters-journalists-appeal.php>.

36 Ye Mon, 'Wa Lone, Kyaw Soe Oo among 6,520 Prisoners freed in Presidential Pardon,' Frontier Myanmar, 7 May, 2019, available at: <https://frontiermyanmar.net/en/wa-lone-kyaw-soe-oo-among-6520-prisoners-freed-in-presidential-pardon?fbclid=IwAR294eaDnnCG6rZ6mkaxhxoJMLFckI1qVeWyCj7GYD2cFQUUU33MoK-n-Ml>.

Some of these activists continue to attend court hearings to this day, while three Kachin activists were sentenced to six months in jail.³⁷

In January 2019, youth gathered to peacefully protest against a statue of General Aung San that the local authorities wished to erect in the Karenni State capital, Loikaw.³⁸ General Aung San (Aung San Suu Kyi's father) was one of the independence leaders of Burma and founders of the first Burmese military. He was assassinated in 1947. He comes from the largest ethnic group known as the Bamar, who have long dominated political and civilian institutions in Myanmar. These protests were a symbol of ethnic identity and of resistance to the perceived Burmanisation policies of the NLD-led government. The protests, which began in mid-2018 and reignited in February 2019 resulted in dozens of arrests under Article 505(b) and 505(c) of the Penal Code and Articles 19 and 20 of PAPPL. The police also used force to disperse the peaceful protesters using rubber bullets.³⁹

The trend of arrests and filing charges against youth activists is continuing in 2019. During New Year celebrations, five members of the Peacock Generation who performed a Thangyat – a satirical poetry slam traditionally performed

during Myanmar's April New Year holiday – were arrested, denied bail and sent to the notorious Insein Prison. Cases were filed against the Thangyat troupe members under Section 505(a) of the Penal Code for their performance criticizing the military. They also face charges under Article 66(d) of the Telecommunications Act for live streaming the performance on Facebook.⁴⁰ In another case, ethnic Karen land rights activist, Naw Ohn Hla, was arrested under PAPPL after protesting the loss of villagers' land to a housing project.⁴¹ In a characteristic strategy used by the government to make life difficult for and deter activists, Naw Ohn Hla has been harassed by the police and called into court six times since her initial arrest.

While the above is not a comprehensive list of incidences where freedom of peaceful assembly or expression is being restricted, they point to a broader pattern of civic space shrinking. The authorities resort to numerous tactics to restrict civic space, including the adoption of restrictive laws, harassment and surveillance of HRDs. However, interviews with the HRDs reveal that criminalisation is the biggest threat they face.

The NLD-led government has shown that it simply cannot handle criticism, and shows authori-

37 Progressive Voice, 'Time to Hear Our Voices: Freedom of Assembly and the Youth Peace Movement in Myanmar,' July 2018, available at: <https://progressivevoicemyanmar.org/2018/07/12/time-to-hear-our-voices-freedom-of-assembly-and-the-youth-peace-movement-in-myanmar/>.

38 Progressive Voice, 'Ethnic Struggles Face Harsh Reality on Union Day, 13 February, 2019, available at: <https://progressivevoicemyanmar.org/2019/02/13/ethnic-struggles-face-harsh-reality-on-union-day/>.

39 Ibid.

40 The Irrawaddy, 'Five Members of Thangyat Troupe Jailed for Criticizing the Military'.22 April, 2019, available at: https://www.irrawaddy.com/news/burma/five-members-of-thangyat-troupe-jailed-for-criticizing-military.html?fbclid=IwAR2GtmIL9hk6xUO-KuwiF2utOf-amqIlgGSLDuvjq4EtjVSS4JzDm_N8xI0.

41 Karen News, 'Land Right Activist Naw Ohn Hla Arrested Over Housing Protest in Myawaddy,' 25 April, 2019, available at: <http://karennews.org/2019/04/land-right-activist-naw-ohn-hla-arrested-over-housing-protest-in-myawaddy/>.

tarian tendencies, especially towards HRDs and CSOs that stand up for the marginalised. The biggest risk, however, is reserved for those who criticise the military as the case of the two Reuters journalists shows. In this context, Myanmar

needs a strong NHRI, willing to publicly side with HRDs, and show that it too can be a defender of human rights.

5

The Role of MNHRC in Democratic Backsliding and Contraction of Civic Space

While the MNHRC has taken a proactive role in the promotion of human rights, in regards to the protection of HRDs, more needs to be done. This section will analyse the response of the MNHRC to two of the emblematic cases out-

lined above – the arrest and trial of the two Reuters journalists – Wa Lone and Kyaw Soe Oo – and the youth peace movement demonstrations in May 2018 that resulted in at least 47 arrests.

Reuters Journalists

After the arrest of Kyaw Soe Oo and Wa Lone in December 2017, the MNHRC released a statement urging “the authorities concerned to ensure that they enjoy human rights they are entitled to, including non-infliction of torture, provision of health care and allowing access to visits by family and lawyer during detention.”⁴²

Following the court case of the two journalists at Yangon Northern District Court, the MNHRC then released a second statement upon their seven year sentencing, stating “According to the Myanmar National Human Rights Commission Law, the Commission has no particular com-

ment on the sentencing of the two journalists.”⁴³ This reflects the problems outlined in Article 37 above. Given that the police set up the two journalists on orders from their superiors, and that this was a planned sting operation to stop them reporting on the atrocities against the Rohingya, the trial itself represents a grave miscarriage of justice. Any statement by the MNHRC should have, at the very least, pointed out the legitimacy of their work as journalists, and how the charges and subsequent trial and sentencing were a violation of their human rights including to freedom of expression and a fair trial. A stronger statement may have added it had the

42 MNHRC, ‘Statement by the Myanmar National Human Rights Commission on the arrest of two journalists,’ 21 December 2017, available at: <http://www.mnhrc.org.mm/st-146300-2/>.

43 MNHRC, ‘Statement on the sentencing of journalists Ko Wa Lone and Ko Kyaw Soe Oo of Reuters News Agency,’ 4 September, 2018, available at: <http://www.mnhrc.org.mm/en/statement-on-the-sentencing-of-journalists-ko-wa-lone-and-ko-kyaw-soe-oo-of-reuters-news-agency-statement-no-92018/>.

appearance of a politically targeted case against two people uncovering grave violations by the military. It was, however, simply a weak statement to a gross miscarriage of justice. This case reflects deeper problems within the MNHRC

that it is still beholden to the all-powerful military, and that it lacks the political will and/or ability to publicly defend people such as Kyaw Soe Oo and Wa Lone.

Youth Peace Movement Protests

The youth peace movement, as outlined above, consisted of two main demonstrations in May 2018 – in Myitkyina, Kachin State, and Yangon – after which dozens of young activists were charged. Some of the activists filed a complaint with the MNHRC because of the violence they faced by counter-protesters and (in)action of the police. They wanted action taken against the pro-military thugs who tried to disrupt their peaceful demonstration. The activists met with the MNHRC several times and submitted evidence regarding the violence used by counter-protesters, including video footage. At one of the early meetings, one of the commissioners asked accusatory questions at the young activists, including why would they protest against the military. After several meetings, the MNHRC did make a statement on its Facebook page, stating how they had received a complaint and investigated it. Eventually, the police opened a case against the counter protesters, eight months after the fact, but at the time of writing, this has not been concluded. Despite this, the HRDs involved in the complaint do not perceive that throughout the process, the MNHRC has been an effective actor in protecting their rights.

HRDs being under attack and civil society space shrinking, the MNHRC will not publicly criticise or take substantive action against the security services. CSOs and HRDs that contributed to this report urged the MNHRC to do more than simply issue statements. Human rights talks and statements are not enough for them to feel like they have an ally they can trust in the MNHRC. This also reflects the mindset and background of the commissioners, who lack human rights expertise or understanding of the role of an HRD or rights-based civil society, and what they need.

The Marrakech Declaration, which was adopted by GANHRI in 2018, lays out concrete steps that the MNHRC could be doing to better promote and protect HRDs in Myanmar.⁴⁴ The MNHRC could publicly advance the narrative of the protection of HRDs, identify clearly – through a process of documentation and research – instances where policy and legislation is having an impact on HRDs and civic space and advocate for reform of problematic laws, report cases of reprisals against HRDs to relevant authorities, and promote avenues for justice for victims of human rights violations, including international accountability mechanisms. The MNHRC would do well to follow these steps.

The above demonstrates that in key cases of

44 The Global Alliance for National Human Rights Institutions, 'The Marrakech Declaration: Expanding the civic space and promoting and protecting human rights defenders, with a specific focus on women: The role of national human rights institutions,' The International Conference of National Human Rights Institutions, October 2018, available at: https://nhri.ohchr.org/EN/ICC/InternationalConference/13IC/Background%20Information/Marrakech%20Declaration_EN_%2012102018%20-%20FINAL.pdf.

6

Conclusion

The MNHRC's work to promote and protect human rights is hampered by two interlinked problems – commissioners who apparently lack the relevant human rights mindset and expertise, and the structural issues at the heart of the enabling law that means that the commissioner's selection process is not independent but aligned to the military and the government. Together these factors contribute to an institution that is still beholden to the most powerful actor in Myanmar: the military. The selection process means that commissioners are not independent, human rights minded, critical individuals that understand the real threats that HRDs face and

who would publicly criticize and denounce the main perpetrators of human rights violations. Thus, it is vital that reform of the commission, both structurally and in terms of personnel, go hand in hand. Otherwise, the MNHRC will continue to release statements and give human rights talks, but won't tackle the fundamental problems that Myanmar faces. An independent and critical MNHRC will not be able to magically make Myanmar's human rights violations disappear, but it would be at least a stronger and much needed ally to the brave HRDs who risk their liberty to fight for the rights of all people in Myanmar.

7

Recommendations

To the Myanmar Government:

- I. Propose amendments on reform of the MNHRC Law to:
 - a. Explicitly mandate the MNHRC to investigate human rights violations in conflict zones and to allow it unrestricted access to active conflict and ceasefire areas;
 - b. Expand the composition of the Selection Board to include civil society representatives from non-registered NGOs;
 - c. Establish a quota for different criteria to ensure pluralism, such as by specifying that at least a third of both the body's membership and staff are women and are

- from ethnic and religious minorities respectively, as well as from civil society with human rights experience;
- d. Establish an independent mechanism for dismissal of Commissioners with clear procedural rules and criteria to determine if commissioners are unable to fulfill their mandate;
 - e. Ensure the selection process is transparent, follows due process, with a requirement to publicize the members of the Selection Board;
 - f. Remove executive influence from the formation of the Selection Board including ensuring that the two parliament representatives of the Selection Board are selected by the Parliament itself rather than the President;
 - g. Set out procedures for nominating potential members of the MNHRC, which should include broad consultations with civil society;
 - h. Ensure staff recruitment procedures are open, transparent, and positions are advertised publicly;
 - i. Remove all clauses requiring prior notification to allow for unannounced visits to prisons, jails, detention centres and places of confinement;
 - j. Allow the MNHRC to initiate an investigation into a case if a case is under trial before any court or if a Myanmar court has “finally determined on a case;”
 - k. Give the MNHRC authority to take concrete action if the response provided by relevant ministries is not satisfactory or if there is no response at all;
 - l. Specifically stipulate that the funds for the MNHRC should be allocated through parliamentary vote;
 - m. Ensure that the budget is transparent and publicly available, for instance by adding a line in the national budget for the MNHRC budget; and
 - n. Ensure regular, wide and systematic publication of the MNHRC’s reports and findings;
2. Refrain from interfering in the MNHRC’s investigations and demonstrate the political will to respect and undertake recommendations from the Commission; and
 3. Amend the 2008 Constitution to bring the military under civilian control, end impunity and include the MNHRC as a constitutional body to enshrine its mandate of independence and impartiality to protect human rights.

To the Parliament:

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

To the MNHRC:

1. Interpret the MNHRC Law in a “broad, liberal, purposive”⁴⁵ manner that is more consistent with the Paris Principles;
2. Be more proactive in pressuring the Government and Parliament to reform the enabling MNHRC Law in accordance with the Paris Principles;
3. Actively encourage the Parliament to sign and ratify international conventions, especially the core international human rights treaties which Myanmar is still not a party to, and cooperate with international mechanisms and treaty bodies;
4. Review and implement the recommendations made by the GANHRI-SCA;
5. Ensure that the work of the MNHRC adheres to international agreements relevant to NHRIs such as the Paris Principles, the Merida Declaration, Marrakech Declaration and the Belgrade Principles;⁴⁶
6. Take the initiative to seek out and act upon information about human rights abuse, rather than waiting for a complaint to be filed to the Commission;
7. Ensure discretion and confidentiality when sharing information between the Executive, Parliament, the Myanmar military and branches of law enforcement to ensure that complainants and relevant witnesses are protected from reprisal;
8. Accompany human rights investigations and recommendations with public pressure to ensure that relevant parties, especially government ministries, respect and implement them;
9. Support programs that provide long-term, systematic support and rehabilitation for the victims of human rights violations;
10. Solicit assistance from civil society on how to deal with some aspects of human rights protection, including receiving complaints and carrying out investigations;
11. Open more branch offices in the rural areas with sufficient resources to educate marginalized, vulnerable, ethnic and religious minority communities about the MNHRC’s mandates to protect and promote human rights;
12. Ensure all materials produced are translated into as many non-Myanmar ethnic languages as possible and are distributed widely to respective communities; and
13. Engage in more outreach activities with smaller CSOs and grassroots community based organisations.

45 GANHRI-SCA, Section 2.3.

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

To the International Donor Community:

1. Encourage the Parliament and the government to reform the MNHRC Law in consultation with civil society;
2. Take into consideration the potential for the MNHRC as a screen for the Myanmar military's abuses when providing support and technical assistance; and
3. Support civil society's human rights work and their efforts to ensure the MNHRC becomes fully effective and in compliance with the Paris Principles, and all other declarations and principles relevant to NHRIs, including the Belgrade Principles, the Merida Declaration, and the Edinburgh Declaration.



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