

# **Burma: Curb Your Enthusiasm. Analysis of the Establishment of the New Myanmar National Human Rights Commission**

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## **I. General Human Rights Situation in Burma**

One year ago, on 5 September 2011, the Burma Government established the Myanmar National Human Rights Commission (MNHRC). The establishment of the Commission was announced in the state-run newspaper, *The New Light of Myanmar*, only a few days after the UN Special Rapporteur on the situation of human rights in [Burma], Tomás Ojea Quintana, ended his visit to the country and reiterated his call for the establishment of an international commission of inquiry. A month after the MNHRC's establishment, the United Nations General Assembly (UNGA) discussed its annual resolution on the situation of human rights in [Burma], and ASEAN made its decision regarding Burma's bid to chair the regional bloc in 2014. Thus, there is a widespread perception that the establishment of the MNHRC is merely an attempt by the regime to appease the international community and to rehabilitate its image on the international scene.

Notwithstanding this, the establishment of the MNHRC has often been cited as among the positive changes that have taken place over the past year, along with Daw Aung San Suu Kyi's election to the Parliament, the release of political prisoners and the easing of media censorship.

Despite these undeniable relative improvements, serious human rights abuses have been taking place over the past year. A closer inspection of the incidences of human rights violations and the subsequent responses by the MNHRC raise serious questions of its will to hold perpetrators of human rights violations accountable.

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Despite what appears to be a relatively free and competitive multi-party by election in April 2012 and the subsequent election of Daw Aung San Suu Kyi and other members from the opposition National League for Democracy (NLD) to Parliament, the opposition currently only holds 6.6% of the total seats, making it very difficult for them to effect any significant change within the Parliament. Furthermore, according to the Assistance Association for Political Prisoners – Burma an estimated 311 political prisoners remain behind bars throughout the country as of October 2012, with probably many more unverified. Activists are still subjected to threats, government surveillance and arrests. This year has seen an increase in the number of arbitrary arrests and detentions of activists: over 200 people have been arrested for politically motivated reasons since the start of 2012 without formal charges. There have been an increasing number of reported cases of land confiscation, while armed conflicts continue in many ethnic states despite ceasefire agreements. In Kachin State, human rights violations committed by Burma Army soldiers against civilians are commonplace. Villages are burnt, women raped, civilians tortured and killed. Civilians in Arakan State have been the victims of communal violence, while the Rohingyas continue to suffer from constant human rights violations and discrimination by the Government of Burma. Meanwhile, impunity for Government officials remains rampant and is enshrined in Article 445 the 2008 Constitution which grants amnesty for any regime official who has committed any crime as a result of its official duties.

While the establishment of the MNHRC appears as a positive step, it must nevertheless be welcomed with cautious optimism. As this analysis will further demonstrate, there are already strong reservations about the Commission’s independence, effectiveness, transparency and accessibility.

## **II. Independence**

### **The MNHRC: The President’s Tool?**

The MNHRC was established under Union Government's Notification No. 34/2011<sup>2</sup> dated 5 September 2011. The Government’s Notification announced that the “Myanmar National Human Rights Commission was formed [...] with a view to promoting and safeguarding the fundamental

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<sup>2</sup> Union Government’s Notification No. 34/2011, 5 September 2011, available at <http://bit.ly/QmEtWH>

rights of citizens described in the Constitution of the Republic of the Union of Myanmar”, and included the names of the 15 members of the MNHRC.

The only other source of information available to the public about the MNHRC is the letter the Commission sent to Burma Partnership in response to its inquiry about the Commission’s mandate. The letter, entitled “Replying on Myanmar National Human Rights Commission's Responsibilities and Entitlements,” is in Annex 1 to this report. The letter provides a list of the MNHRC’s fifteen members, as well as a list of the Commission’s responsibilities including receiving individual complaints, working with UN agencies and raising awareness on human rights issues. It also states that the MNHRC reports to the President’s Office and gives the term of office of the MNHRC members.

The MNHRC plans to exist on the sole basis of this list of “responsibilities and entitlements”. As Win Mra, Chairman of the Commission, stated in an interview with the *Myanmar Times*<sup>3</sup> the commissioners were already working on a set of rules and procedures.

However, on 16 March 2012, the Parliament refused to allocate to the MNHRC the budget requested (around 843, 028 USD<sup>4</sup>) by the Government as part of the 2012-13 National Planning Bill. The decision was based on the fact that the Parliament considered that the MNHRC’s establishment was not consistent with the Constitution which requires that the “Leading Bodies of the State” be formed with the approval of the Parliament.<sup>5</sup>

On 27 March 2012 the MNHRC released a statement<sup>6</sup> announcing that as a consequence of the Parliament’s decision it is drafting an Enabling National Human Rights Commission Act and will submit the draft to the President and, if approved, present it to the Parliament for adoption.

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<sup>3</sup> “We won’t be influenced by the govnt,” *The Myanmar Times*, 19 September 2011, available at <http://bit.ly/MaXJIP>

<sup>4</sup> The exchange rate used here is the 'unofficial' market rate (1 USD = 815 kyat) as opposed to the official exchange rate. For decades the authorities kept the official exchange rate extremely low as a method to hide away hundreds of millions of US dollars yet every transaction was made through the market rate.

<sup>5</sup> “Hluttaw Refuses Human Rights Body Budget” *The Myanmar Times*, 26 March 2012, available at <http://bit.ly/MaZENJ>

<sup>6</sup> “Statement of the Myanmar National Human Rights Commission on Its Establishment and Its Current Status of Functioning,” 27 March 2012, available at <http://bit.ly/Mb16iQ>

Despite calls by civil society members<sup>7</sup> for a transparent and participatory drafting process, neither the MNHRC nor the President have published the draft of the Enabling Act or conducted consultations with civil society groups. Burma Partnership also submitted recommendations to the Commission regarding its Enabling Act in March 2012 (See Annex 2), yet the letter remains unanswered.

Thus, no information regarding the content or the schedule of the Enabling Act has yet been made public.

As a consequence, to our knowledge at the time of writing, the only document publicly available to assess the MNHRC is the letter in Annex 1. The list of responsibilities and entitlements described in the letter is considered by the MNHRC to be its mandate.

### **The MNHRC's Relationship with the Executive and the Parliament**

To assess the MNHRC's independence it is crucial to examine its relationship to the Executive.

The letter in Annex 1 states that the MNHRC "shall report directly to the President on its conducts" while the Office of the High Commissioner for Human Rights (OHCHR)<sup>8</sup> considers that National Human Rights Institutions (NHRIs) should answer to an authority other than the Executive, most usually the legislature.

The letter also mentions that the MNHRC will "carry out tasks entrusted by the State President". When the MNHRC visited the Insein Prison and the Hlay-Hlaw-Inn Yebet Prison on 27 December 2011,<sup>9</sup> presidential authorization was required and interviews with prisoners were conducted in the presence of prison officials.<sup>10</sup>

This is in contradiction with OHCHR's recommendation that members and staff of NHRIs should not receive instructions or be required to seek authorization from Government ministers or other public officials.

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<sup>7</sup> "Statement Calling for a Transparent and Participatory Drafting Process of the Myanmar National Human Rights Commission's Enabling Law," 10 May 2012, available at <http://bit.ly/MivG09>

<sup>8</sup> "Assessing the Effectiveness of National Human Rights Institutions", page 12, Office of the High Commissioner for Human Rights, 2005, available at <http://bit.ly/Q7kS2V>

<sup>9</sup> "Statement by the Myanmar National Human Rights Commission on Its Visits to the Insein Prison and Hlay-Hlaw-Inn Yebet Prison Labour Camp," 30 December 2011, available at <http://bit.ly/NoTKi7>

<sup>10</sup> "Progress report of the Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana," paragraph 19, 7 March 2012, available at <http://bit.ly/NoOVkA>

Moreover, when Chairman Win Mra spoke about the drafting process of the MNHRC's terms of reference, he explained that it would need to be officially approved by the authorities.<sup>11</sup> As noted by the UN Special Rapporteur on the situation of human rights in [Burma] in his latest report: "This would seem to indicate that it is not fully independent of the Government."<sup>12</sup>

While the future Enabling Act of the Commission represents a possibility for further engagement with Parliament, at the moment the MNHRC needs presidential approval to carry out its duties and reports to the President only. This raises serious concerns regarding the independence of the MNHRC from the President.

### **The Selection Process of the MNHRC Members**

The appointment of the members of the MNHRC was made in the same Government notification that announced its creation with no explanation of the methods of appointment. Moreover, the only extra information provided in letter of the MNHRC were on the tenure of the commissioners (five years, which may be renewed for another term), and on their criminal and civil immunity for acts taken while executing the responsibilities and entitlements of the MNHRC.

In contravention of the Paris Principles that emphasise that NHRIs should be established by procedures that ensure pluralist representation, the current members of the MNHRC were appointed solely by the President.<sup>13</sup> The report of Tomás Ojea Quintana further explains:

"While the President appointed commissioners representing different ethnic minority groups, the vast majority are retired Government civil servants. Some informed the Special Rapporteur that they had been neither consulted nor informed in advance of their appointment."<sup>14</sup>

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<sup>11</sup> "We won't be influenced by the govnt," op.cit

<sup>12</sup> Tomás Ojea Quintana, op.cit

<sup>13</sup> "We won't be influenced by the govnt," op.cit

<sup>14</sup> Tomás Ojea Quintana, op.cit

Furthermore, Burma's 15-member body includes former military regime's ambassadors, as well as retired civil servants with little prior knowledge of human rights. There are no representatives of NGOs, trade unions or professional associations. Based on the composition of the MNHRC and the way they were appointed, there are serious concerns that the Commission might only serve as a tool for whitewashing Burma's appalling record of human rights abuses.

Win Mra, the Chairman of the MNHRC is a retired career diplomat. He served as the permanent representative of Burma to the UN from 1994 until 2001. In his capacity as the regime's former Ambassador to the UN in New York, Win Mra spent seven years routinely defending the regime against allegations of human rights violations.

For instance, in his statement to the 52<sup>nd</sup> Session of the UNGA in November 1997, he blatantly denied the occurrence of human rights violations and impunity in Burma.<sup>15</sup>

“I would like to reiterate here that, as a matter of policy, Myanmar does not condone human rights violations as it is committed to the principles enshrined in the Charter of the United Nations and the Universal Declaration of Human Rights.”

He continued, stating that there is no impunity in Burma:

“No perpetrators of offences punishable under law enjoy impunity in Myanmar. To suggest that such privilege exists in Myanmar for government agents is outrageous and is totally unacceptable.”

Impunity for army generals and regime officials who perpetrate human rights violations is a widely-known and well documented fact. The establishment of the MNHRC generated hopes that it could become an institution that would actually hold violators responsible for their abuses. However, the Chairman's previous public denials of the very existence of impunity in the country raise serious doubts on the ability of the Commission to carry out its mandates and responsibilities independently.

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<sup>15</sup> UNGA, 52<sup>nd</sup> session, Statement by H.E. U Win Mra to the UN, on the Draft Resolution “Situation on Human Rights in Burma,” 24 November 1997, available at <http://bit.ly/PoDFW6>

Win Mra has also denied the occurrence of forced labour at the International Labour Organization annual session<sup>16</sup> and stated that there was no religious discrimination and no racial group known as Rohingya in Burma.<sup>17</sup>

Kyaw Tint Swe, the Vice-Chairman of the MNHRC, is also a former career diplomat who succeeded Win Mra as the regime's Ambassador to the UN in New York from 2001 to 2010. While serving in this position, he claimed on several occasions that Burma was the victim of a "systematic disinformation campaign."<sup>18</sup> In a statement to the UNGA in November 2003, he refuted the allegations of rape and other abuses against civilians carried out by the Burma Army in Shan and other states, "I again reiterate that these allegations were maliciously fabricated by two well-funded NGOs."<sup>19</sup>

According to Article 3 of the Paris Principles, the range of responsibilities that should be within the operational mandate of an institution includes, "To contribute to the reports which States are required to submit to the United Nations bodies and committees [...]" As the Chairman and Vice-Chairman of the MNHRC have in the past consistently denied the occurrence of human rights violations in Burma and continuously defended the regime's human rights violations at the UN, there are valid scepticisms over the ability of the new MNHRC to provide accurate and independent reports on the human rights situation in the country.

Other members of the MNHRC include Hla Myint, a former Burma Army Brigadier General and Nyunt Swe, a former Burma Army General and State Law and Order Restoration Council (SLORC) Deputy Foreign Minister. From 2006-2007, Nyunt Swe served as the military regime's Deputy Ambassador to the UN in Geneva where in 2007 he said: "No forced recruitment is

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<sup>16</sup> "But Government Maintains No Abuses Exist: Burma Pledges to Help on Forced Labour Issue," *The New York Times*, 4 July 2001, available at <http://nyti.ms/PoDPwD>

<sup>17</sup> "36<sup>th</sup> session, Summary Record of the 960<sup>th</sup> Meeting: Myanmar," 06 June 2004, available at <http://bit.ly/PoDXfo>

<sup>18</sup> UNGA, 58<sup>th</sup> session, Statement by H.E. Kyaw Tint Swe on the Draft resolution "Situation on Human Rights in Burma," 23 November 2003, available at <http://bit.ly/PoE5LW>; UNGA, 62<sup>nd</sup> session, Memorandum on the Situation of Human Rights in the Union of Myanmar prepared by H.E. Kyaw Tint Swe, 5 November 2007, available at <http://bit.ly/PoEaiX>

<sup>19</sup> UNGA 58<sup>th</sup> Session, op.cit

carried out and all soldiers joined the armed force of their own accord” and “Myanmar is not a nation in a situation of armed conflict.”<sup>20</sup>

The appointment of the two former high-ranking officials in the Burma Army to the MNHRC, both of whom have explicitly made statements to defend blatant and gross human rights violations, raise serious doubts over their willingness to investigate allegations of human rights violations committed by their peers. Such appointments do nothing more than to strengthen the perception that the Commission is merely part of the regime’s campaign to whitewash human rights abuses, leaving well-founded scepticism over the ability of the MNHRC to carry out its duties with autonomy and independence.

### **Resourcing of the MNHRC**

In terms of financial independence, the Paris Principles require that funding be sufficient to allow the NHRI to have its own premises and staff in order to be independent of other Government bodies.

Moreover, the International Coordination Committee of NHRIs (ICC) in its General Observation<sup>21</sup> notes that “the classification of an NHRI as a public body has important implications for the regulation of its accountability, funding, and reporting arrangements. In cases where the administration and expenditure of public funds by an NHRI is regulated by the Government, such regulation must not compromise the NHRI’s ability to perform its role independently and effectively. For this reason, it is important that the relationship between the Government and the NHRI be clearly defined.”

However, no information has been made available thus far on the funding of the MNHRC. It is also unknown whether the MNHRC itself will be able to determine how to direct and use its resources and what transparency and accountability mechanisms will be established.

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<sup>20</sup> Statement by the Deputy Permanent Representative U Nyunt Swe at the Fourth Session of the Human Rights Council, 23 March 2007, available at <http://bit.ly/PoEnT6>

<sup>21</sup> “ICC Sub-committee on Accreditation, General Observations,” June 2009, available at <http://bit.ly/Q7ns99>



The MNHRC will soon present a new Enabling Act to the Parliament. Even though the content of the Enabling Act remains unknown, it represents a chance to further advocate for the Commission's independence. However, the above analysis leads to a conclusion that the Commission is not an independent body but rather a tool created by and for the President.

### **III. Effectiveness**

#### **The MNHRC: An Empty Gesture?**

To assess the MNHRC's effectiveness Burma Partnership looked at its mandate and the activities it carried out over the past year.

#### **The MNHRC's Mandate to Promote and Protect Fundamental Rights**

The mandate of the MNHRC is to promote and protect "the fundamental rights of citizens described in the Constitution of the Republic of the Union of Myanmar."<sup>22</sup> The 2008 Constitution violates the fundamental rights of the people of Burma and is an instrument used by the regime to maintain power and oppress the population.<sup>23</sup> Therefore, the MNHRC's core mandate is problematic in itself.

However, according to the letter in Annex 1 and the MNHRC's statement dated 6 October 2011,<sup>24</sup> the Commission can accept complaint letters. This is much welcomed as it is a core function to protect people's rights, yet more information is needed to assess the actual power this represents. There are already serious concerns as to the real effectiveness of the complaint mechanism. The MNHRC requires that complainant send a copy of their national registration card. This provision excludes an important number of victims of human rights violations especially people from ethnic and religious minority groups. Moreover, by filing complaints against state officials or Burma Army soldiers stationed in their area most victims are putting themselves at risk.

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<sup>22</sup> Union Government's Notification No. 34/2011, *op.cit*

<sup>23</sup> "List of the Most Problematic Provisions in the 2008 Constitution and Burmese Laws," Burma Lawyers Council, 29 June 2012, available at <http://bit.ly/QDDHrG>

<sup>24</sup> "Accepting of Complaint," 6 October 2011, available at <http://bit.ly/QDEFo0>

Therefore, the MNHRC should accept a mechanism of civil society organisations making complaints on behalf of victims. This would enable the Commission to receive complaints from a broad range of parties and curtail further risk on the part of the victim. The MNHRC should also put in place protection mechanisms for the victims and witnesses against danger of reprisal. Otherwise this would seriously restrict its capacity to receive complaints from victims of human rights abuses.

Another serious limitation to the MNHRC's mandate to receive complaints is the statement made by Win Mra at a press conference at Thailand's Ministry of Foreign Affairs on 14 February 2012.<sup>25</sup> In his statement he explained that the MNHRC would not investigate human rights abuses from ethnic conflict area. This seriously restricts the mandate of the MNHRC and the possibility of victims of human rights abuses to seek accountability, especially since the most egregious human rights violations take place in ethnic remote and conflict areas.

Another concern is that there is no information regarding what the MNHRC can do with its findings. For instance, it is unknown whether the MNHRC has the power to recommend reparations for victims, whether it can refer cases to the relevant court or authority and whether it can monitor the implementation of its recommendations.

Finally, the letter in Annex 1 states that, "when carrying out its functions, the Myanmar National Human Rights Commission can call upon relevant persons for questioning. It can call for viewing of relevant documents with the exception of those particularly prohibited under state requirements." The concern is that Burma's authorities have been interpreting the notion of state requirements and security very broadly. Those concepts have been used to restrict the freedom of expression, assembly and association of the people of Burma for decades. Therefore, this could represent an additional serious limitation to the MNHRC's capacity to investigate complaints.

Finally, Burma's statement at the UN Human Rights Council in March 2012 mentioned that the MNHRC has so far received a total of 1,250 complaints and that findings on 283 cases were transmitted to the relevant Government ministries. There is no way to corroborate such information as these reports were not sent to either an accountability body or the public as a

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<sup>25</sup> "Head of HR Commission Rules Out Conflict-Zone Inquiry," *The Irrawaddy*, 15 February 2012, available at <http://bit.ly/QDJdum>

whole. No information is available about complaints received, investigated and advice given to the Government. Moreover, some of Burma Partnership partners have filed a high number of complaints with the Commission but have received only a very limited number of answers.

It appears that serious limitations to the complaint mechanisms already exist. However, the Enabling Act could detail more precisely the MNHRC's mandate and abrogate these restrictions in order to give the Commission the necessary power to investigate cases of human rights abuses independently and effectively.

### **The MNHRC: Proponent of the Regime?**

To analyse the effectiveness of the MNHRC it is crucial to look at the activities it has been carrying out. In the case of Burma, it indicates that the MNHRC is a very effective proponent of the regime.

### **The MNHRC's Activities**

Since its establishment the MNHRC has released eight statements, two open letters, given several interviews and travelled overseas to visit Asian NHRIs.<sup>26</sup>

In three press statements released on 10 October, 12 November and 30 December 2011 respectively, the MNHRC called on the regime to release "what is referred to as prisoners of conscience by the international community."<sup>27</sup> However, the MNHRC continues to use the regime's number of political prisoners without having carried out an independent investigation, adopting the regime's discourse as its own. Furthermore, in a statement released on 30 December 2011,<sup>28</sup> the MNHRC refuted allegations by Amnesty International that authorities mistreated the prisoners who staged a hunger strike at Insein Prison. The Commission also did not mention any of the problems of health, food, hygiene, torture and other mistreatment of prisoners despite

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<sup>26</sup> A complete list of the MNHRC statements and activities is available at <http://bit.ly/NG01Eo>

<sup>27</sup> The Myanmar National Human Rights Commission submitted a request in open letter to President of the Republic of the Union of Myanmar, 10 October and 12 November 2011 available at <http://bit.ly/NFSfKx> and <http://bit.ly/NFSp40>

<sup>28</sup> "Statement by the Myanmar National Human Rights Commission on its visits to the Insein Prison and HlayHlaw-Inn Yebet Prison Labour Camp," *op.cit*

ample documentation on these issues.<sup>29</sup> The Commission did not call on the regime to take any concrete actions, but rather recommended that meditation classes be offered to prisoners.

On 27 November 2011, the MNHRC released a statement welcoming ASEAN's decision to grant Burma the Chairmanship in 2014. Again on 14 January 2012,<sup>30</sup> the Commission released a statement welcoming the President's "magnanimity" for releasing prisoners and on 2 July 2012<sup>31</sup> it released another statement to welcome the signing of the plan of action for prevention against recruitment of the under-aged children for military service between Burma Government and the UN. Instead of thoroughly investigating and monitoring the human rights situation, the MNHRC's statements that publicly welcomes and endorses the Government's assertion supports the perception of the MNHRC being a body set up merely to window dress the Government's human rights record.

On 10 December 2011, in its statement for international human rights day,<sup>32</sup> the MNHRC referred to the importance of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights but did not call on the regime to ratify these two fundamental international instruments.

In that same statement, the MNHRC further stated, "The Constitution adopted on 29 May, 2008 overwhelmingly by the people of the Republic of the Union of Myanmar also enshrines these fundamental human rights." This statement is problematic in at least two aspects: First, the 2008 Constitution is an undemocratic military-drafted document adopted by a deeply flawed referendum held days after Cyclone Nargis hit Burma, killing at least 138,000 people and leaving 2.4 million people struggling to survive. Second, as stated above the 2008 Constitution does not guarantee people's fundamental rights as it includes very broad limitations to fundamental freedoms such as of association, expression and assembly.<sup>33</sup>

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<sup>29</sup> "Extreme Measures: Torture and Ill Treatment in Burma since the 2010 Elections," Network for Human Rights Documentation – Burma, May 2012, available at <http://bit.ly/R93IRu>

<sup>30</sup> "Statement by the Myanmar National Human Rights Commission," 14 January 2012, available at <http://bit.ly/NG1qKY>

<sup>31</sup> "Statement of the Myanmar National Human Rights Commission on the Plan of Action for Prevention Against Recruitment of the Under-Aged Children for Military Service," 2 July 2012, available at <http://bit.ly/NG1CtL>

<sup>32</sup> "Statement by the Myanmar National Human Rights Commission on International Human Rights Day," 10 December 2011, available at <http://bit.ly/NFUHAL>

<sup>33</sup> Burma Lawyers Council, op.cit

On 13 December 2011, the Commission released a statement after four of its members visited Kachin State.<sup>34</sup> It stated, “Under coordination by the Kachin State Government, humanitarian assistance [...] were systematically distributed to the population in the camps and their basic necessities were provided for.” This directly contradicts numerous reports on the need for humanitarian assistance in Kachin State, where, at the time of writing and for many months before, Internally Displaced Persons (IDPs) are in urgent need for food, clothes and health care<sup>35</sup> while the Government still denies access to UN relief agencies.

The MNHRC returned to Kachin State in July 2012, and released a statement dated 14 August 2012,<sup>36</sup> reiterating that only the Kachin Independence Army is recruiting child soldiers. It does not mention any crime committed by the Burma Army despite it being well-known that it continues to recruit child soldiers and commit war crimes.<sup>37</sup> With this statement, the Commission, conveniently for the regime, makes ethnic armed groups appear solely responsible for the violence and once again remains silent about human rights abuses committed by the Burma Army.

Similarly in its statement following its visit to Arakan State in July 2012<sup>38</sup> the MNHRC states that “the basic needs of food, clothing, shelter and health of the victims [...] are being met” while numerous reports<sup>39</sup> alarmed the international community about the ongoing humanitarian crisis. Once again the MNHRC’s statement appears to legitimize the Government actions rather than pointing out serious human rights violations such as discrimination against Rohingya, excessive use of force by soldiers and the police, and scattered access to humanitarian help.

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<sup>34</sup> “Statement by the Myanmar National Human Rights Commission,” 13 December 2011, available at <http://bit.ly/NFUPjG>

<sup>35</sup> Human Rights Watch “Ensure Aid Access to Kachin State,” 21 December 2011, available at <http://bit.ly/NFUVYT>

<sup>36</sup> “Statement of the Myanmar National Human Rights Commission on its trip to the Kachin State,” 14 August 2012, available at <http://bit.ly/PG6yND>

<sup>37</sup> « Untold Miseries : Wartime Abuses and Forced Displacement in Burma’s Kachin State,” Human Rights Watch, 20 March 2012, available at <http://bit.ly/NFZouu>

<sup>38</sup> “Statement of Myanmar National Human Rights Commission Concerning Incidents in Rakhine State in June 2012,” 11 July 2012, available at <http://bit.ly/NG45V6>

<sup>39</sup> “The Government Could Have Stopped This: Sectarian Violence and Ensuing Abuses in Burma’s Arakan State,” Human Rights Watch, 1 August 2012, available at <http://bit.ly/NG4mrh>

Win Mra, Chairman of the Commission also refused to back an investigation into alleged abuses in Arakan State on 8 August 2012, stating that:

“Truth commissions are established by new governments in countries that have transformed after violence, unrest and human rights abuses so they can be rediscovered and revealed. That is why it is a different condition here: the transition in Myanmar was peacefully attained by the election.”<sup>40</sup>

While the MNHRC commissioners’ travels to conflict areas appear to be a positive step at first sight, the outcomes of these field missions seem to suggest that they are nothing more than a public relations exercise. The MNHRC’s statements clearly reveal that it does not have the free space to report about human rights violations committed by the regime and the Burma Army.

The MNHRC’s activities over the past year give the very strong impression that it is nothing more than an institution created to “window dress” Burma’s human rights record in the eyes of the international community and to legitimize the regime’s.

#### **IV. Consultation and Cooperation with NGOs**

The MNHRC seems keen to engage with international actors. The Asia Pacific Forum (APF) has been involved in the drafting process of the MNHRC’s Enabling Act.<sup>41</sup> The Office of the High Commissioner for Human Rights (OHCHR) also started engaging with the Commission as well as the Swedish International Development Cooperation Agency (SIDA), the Raoul Wallenberg Institute of Human Rights and Humanitarian Law (RWI) and the University of Lund of Sweden.<sup>42</sup>

However, the engagement of the MNHRC with local stakeholders including civil society remains limited. The MNHRC claims it has been organizing monthly meetings with NGOs in Rangoon, we haven’t been able to verify this information as none of Burma Partnership’s partners based inside the country have been informed on any of these meetings. Moreover, some of the partners

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<sup>40</sup> “Human Rights Body Cool on Truth Commission Proposal,” 8 August 2012, available at <http://bit.ly/PG8uWf>

<sup>41</sup> “APF Discusses Myanmar NHRI’s founding legislation,” 21 May 2012, available at <http://bit.ly/MivYUJ>

<sup>42</sup> “Human Rights Workshop Kicks Off,” *The New Light of Myanmar*, 16 March 2012, available at <http://bit.ly/NoKbLE>

have invited the Commission to participate in various events that they organize and Burma Partnership has been sending letters inviting the MNHRC to organize consultations on the Enabling Act, but all these requests remain unanswered. As far as Burma Partnership is aware, no consultation with civil society actors has been organized on the drafting of the MNHRC's Enabling Act.

The Commission has been very reticent about meeting with some civil society groups and very selective in its engagement with NGOs. In a meeting with the Human Rights Education Institute of Burma in July 2012, the MNHRC explained that to engage with the Commission groups had to be officially registered. This poses a serious problem in that the current 1988 Registration Law is overly restrictive and prohibits NGOs to be involved in politics and to advocate for good governance. Any association that is not registered under this law is considered unlawful, and the law provides for NGOs to pay an unrealistic amount up to 500, 000 kyat (around 550 USD) for registration fees.

The Commission's current position implies that it will most likely only engage with Government affiliated or registered groups rather than independent community and grassroots organizations. The commissioners need to understand that engaging on a regular basis with a broad range of the civil society actors can only strengthen its independence and legitimacy. Currently the MNHRC seems to be more accountable to the President than to the public or the Parliament.

## **V. Conclusion and Recommendations**

At this point in time, there are significant reasons to doubt the independence and autonomy of the MNHRC. There are clear indications to support the perception that this body may serve to legitimize or cover up human rights violations committed by the regime rather than fulfil an NHRI's supposed mandate of protecting and promoting the rights of the people of Burma.

As the Special Rapporteur summarized in its latest report:

“Despite such developments, many questions remain about the composition, role and functioning of the commission and, to date, there are no indications that it is fully independent and compliant with the Paris Principles.”<sup>43</sup>

The forthcoming Enabling Act of the MNHRC may address some of the main concerns raised in this report regarding its effectiveness and independence. For the MNHRC to be in compliance with the Paris Principles, it would require a complete reconstitution of the Commission, including by ensuring an inclusive and transparent selection process, clearly defining its relationship with the Government to guarantee independence, and strengthening its mandates and functions. Furthermore, based on the concerns over the track record of the current Commissioners, the MNHRC’s members need to be restructured to ensure the credibility and legitimacy of the Commission.

Thus, with the goal of an independent, effective, transparent and accessible human rights Commission in Burma that best serves the victims of human rights abuses, we recommend the following:

#### **To the MNHRC, the President and the Parliament**

- Ensure that the Enabling Act clearly sets out the MNHRC's role and powers in order to guarantee the institution’s permanence and independence.
- Ensure that the Enabling Act fully reflects all the Paris Principles’ requirements including a broad mandate based on universal human rights principles, pluralism of members, adequate financial resources and power of investigation, as well as representation of civil society.
- Ensure that the drafting process of the MNHRC's Enabling Act is transparent and participatory.

In order to guarantee transparency and meaningful participation from the public and civil society we recommend implementing the following steps to ensure that the drafting process of the

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<sup>43</sup> Tomás Ojea Quintana, op.cit



MNHRC's Enabling Act is credible, inclusive, transparent and consistent with the Paris Principles:

- To widely publicize and disseminate the draft of the Enabling Act in Burmese and other ethnic nationalities languages, especially through the media, and to allow adequate time for meaningful public participation in the drafting process, including recommendations by the public on its content.
- To publicly identify a focal person within the Government and within the MNHRC to oversee the drafting process as well as to appoint a parliamentary committee to facilitate broad based consultation and communication with the public.
- To enable input at all stages of the drafting process, including the initial draft of the law and its subsequent discussion in the Parliament.
- To ensure pluralism through an inclusive consultation process with all relevant stakeholders, including both registered and non-registered civil society, community-based organizations inside the country and on the border, as well as grassroots people and communities throughout the country, especially those from ethnic areas, women's groups, and the media.
- To ensure that enough resources are allocated to the consultation process to enable it to be effective, inclusive and comprehensive.
- To ensure a conducive and secure atmosphere for people to take part in the consultation process, especially in ethnic areas.
- To seek technical assistance from international experts and the regional network of National Human Rights Institutions on the consultation process and the draft Enabling Act.

### **To the Myanmar National Human Rights Commission**

- Engage on a regular basis with civil society groups including both registered and non-registered civil society, community-based organizations inside the country and on the border, as well as grassroots people and communities throughout the country, especially those from ethnic areas, women's groups and media.

**To the Office of the High Commissioner for Human Rights (OHCHR), the Asia Pacific Forum (APF) and international organizations engaging with the MNHRC:**

The engagement with the MNHRC must concentrate on:

- Securing a solid legal framework for the MNHRC that fully complies with the Paris Principles.
- Encouraging an inclusive consultation process with all relevant stakeholders, including both registered and non-registered civil society, community-based organizations inside the country and on the border, as well as grassroots people and communities throughout the country especially those from ethnic areas, women's groups, and the media.
- Increasing transparency of the MNHRC's activities and its functions.
- Increasing accessibility of the MNHRC to victims of human rights violations.
- Starting outreach programs about the MNHRC for victims of human rights violations to increase public awareness of Commission's existence, functions and mandate.
- Starting capacity building activities for civil society and community-based organizations, including on the Paris Principles.





- f) To assist on subject matter regarding human rights capacity building programs and research programs;
- g) To initiate and assist in raising public awareness on human rights promotion and protection;
- h) To carry out tasks entrusted occasionally by the state President with regard to human rights promotion and protection.

3. The Myanmar National Human Rights Commission shall report directly to the President on its conducts and human rights developments in annual reports.
4. When carrying out its functions, the Myanmar National Human Rights Commission can call upon relevant persons for questioning. It can call for viewing of relevant documents with the exception of those particularly prohibited under state requirements.
5. No one can sue the Myanmar National Human Rights Commission, Commission members or those assigned tasks by the Commission, whether in criminal proceedings or in civil proceedings, for executing in sincerity responsibilities and entitlements ascribed in this notification.
6. The tenure of the Commission Chairperson and members shall be the same as that of the state President, and they can serve for two terms.

(Signed) (for) Chairman, (Sit Myaing, Secretary)

## **Annex 2: Answer from Burma Partnership to the MNHRC**

### **Myanmar National Human Rights Commission**

No. 27, Pyay Road

Hline Township, Yangon

Republic of the Union of Myanmar

### **Burma Partnership**

P.O. Box 188

Mae Sot, Tak

63110, Thailand

15 March 2012,

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### **Myanmar National Human Rights Commission**

No. 27, Pyay Road

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Republic of the Union of Myanmar

### **Burma Partnership**

P.O. Box 188

Mae Sot, Tak

63110, Thailand

15 March 2012,

Dear Chairman U Win Mra,

I would like to thank you for the Myanmar National Human Rights Commission's reply dated 12 January 2012. We appreciate your answer and your engagement with civil society groups like Burma Partnership. We hope that we can continue communicating and sharing information in the future as the Paris Principles recognise that relationships with civil society can help National Human Rights Institutions (NHRIs) to protect their independence and pluralism, and enhance their effectiveness by deepening their public legitimacy. The Paris Principles also encourage full and regular consultation at every stage from planning to implementation and evaluation, as a way to ensure that civil society organisations support the work of NHRIs.

In this regard and in order to work together towards an independent and effective Myanmar National Human Rights Commission (MNHRC) that can best serve the people of Burma, we would like to share with you our analysis and recommendations for the Commission to comply with the Paris Principles and hope you would be able to provide us with additional information.

We believe that independence is the key attribute for an NHRI's legitimacy, credibility and effectiveness. As you may know, the Paris Principles provide that a national institution should be established in the country's constitution or by a law that clearly sets out its role and powers in order to guarantee the institution's permanence and independence. However, as stated in your letter, the MNHRC was established by the Union Government's Notification No. 34/2011. Therefore, we believe that the MNHRC should point out this inadequacy and advocate the relevant authorities to adopt organic laws regarding the commission. In addition, the MNHRC should advocate for the law to include and detail, among other things, some of the following issues.

- **Appointment procedures of the MNHRC's members**

Your letter states that "the tenure of the Commission Chairperson and members shall be the same as that of the State President, and they can serve for two terms." We also take note that the MNHRC members were appointed by President U Thein Sein, but that information about the method and criteria of appointment and the dismissal process remain unknown.

The Paris Principles and other relevant documents explain that direct appointment by the executive branch of Government is undesirable and that the appointment process should be open, transparent and inclusive. Therefore, we recommend that the terms and conditions that govern appointment and dismissal of members is transparent, set out in a law and that the appointment process of the MNHRC's members involves the Parliament and representatives of civil society.

- **Lines of accountability and operational independence**

We would like to express deep concerns about the fact that, according to your letter, the MNHRC “shall report directly to the President on its conducts.” According to the Paris Principles, the MNHRC should not answer to the Government but to an authority other than the executive, most usually the legislature.

You also mention that the MNHRC will “carry out tasks entrusted by the State President”. According to the Paris Principles, it should be clearly stated that members and staff of NHRIs should not receive instructions or be required to seek authorization from Government ministers or other public officials. Moreover, it has been reported that the Commission's draft rules of procedure were being examined by the judiciary and were awaiting approval by the council of ministers. All these issues seem to indicate that the MNHRC is not fully independent of the Government. Therefore we would appreciate if you could clarify these issues. We recommend that the MNHRC advocate the relevant authorities in order to make the necessary changes and guarantee its independence.

- **Mandate and powers of the MNHRC**

We take due note of the responsibilities and entitlements of the MNHRC that are listed in your letter. However, as mentioned above, we would recommend that those be set out in a law. Moreover, the various functions of NHRIs that are described in the Paris Principles as “responsibilities” suggest that there are things that institutions are obliged to do. Therefore we would further recommend, to ensure that the MNHRC enjoys a broad mandate, that it includes the following competences regarding civil and political rights, but also economic, social, and cultural rights.



*Receiving complaints from individuals or groups*

We welcome the statement made by the MNHRC dated 6 October 2011 on its ability to receive complaints from individuals. In order for us to better understand the procedure we would appreciate if you could provide us with detailed information on the issues listed below.

Can civil society organisations make complaints on behalf of victims? We believe that the MNHRC should be able to receive complaints from a broad range of parties. It is important to recognize that some people may find it difficult to lodge complaints with an official body, therefore it appears that civil society organisations should be permitted to make complaints on their behalf.

Has the MNHRC put in place protection mechanisms for the victims and witnesses? Victims and witnesses should be protected if the circumstances indicate that there is a danger of reprisal. Therefore, we believe that the MNHRC should develop structures and procedures that support confidentiality and should also be able to recommend suspension from duty of officials under investigation for human rights violations.

Does the MNHC have the power to recommend reparation for victims? We believe that the right to remedy following a violation of rights is in itself a fundamental right.

What is the time jurisdiction of the MNHRC? That is to say, can the MNHRC investigate past human rights violations?

Finally, Burma's statement at the UN Human Rights Council mentioned that the MNHRC has so far received a total of 1,250 complaints and that findings on 283 cases were transmitted to the relevant Government ministries. We would thank you for providing us with this information. However, we would like to remind the MNHRC that these reports should be sent not only to an accountability body but to the public as a whole and should include complaints received and investigated, monitoring and advice given to the Government.

### *Commenting on existing and draft laws*

The Paris Principles provide that NHRIs should have the power to monitor laws on their own initiative. That is to say, it should review any law that is relevant to human rights and recommend amendments where appropriate. In Burma's actual context, it is of particular importance that the MNHRC ensure that old or existing laws are consistent with international standards. New draft laws could be in compliance with international human rights standards, however they would remain ineffective as long as old or existing oppressive laws remain on the books.

Therefore, we recommend that the MNHRC advocates for its list of responsibilities and entitlements to include the mandate to comment on existing and draft laws and that the MNHRC starts with the review of the laws previously identified as not in full compliance with international human rights standards, such as the State Protection Act (1975), the Unlawful Association Act (1908), sections 143, 145, 152, 505, 505 (b), and 295 (A) of the penal code, the Television and Video Law (1985) the Motion Picture Law (1996), the Computer Science and Development Law (1996), and the Printers and Publishers Registration Act (1962) and accordingly recommend appropriate amendments.

### *Monitor domestic human rights situation*

The Paris Principles state that monitoring the national human rights situation is an essential function of NHRIs. In this regard we welcome the fact that the MNHRC has the power to gather information and evidence in that purpose. We also welcome the visit by the MNHRC to Kachin State and to Insein and Hlay-Hlaw-Inn Yebet Prison. However, we are concerned by reports stating that presidential authorization is required for prison visits and that interviews with prisoners were conducted in the presence of prison officials. Therefore, we recommend that the MNHRC advocates to ensure it has the authority to make regular visits to all places of detention without prior authorization and in absence of prison authorities.

We also would like to have further information about whether the MNHRC has an all-encompassing jurisdiction. That is to say, can the MNHRC monitor the performance of

private and public bodies including relevant authorities, such as the police and the Burma Army?

Finally, we would like to encourage the MNHRC to take a more proactive role in the investigation of violations in conflict areas, contrary to the statement made at a press conference at Thailand's Ministry of Foreign Affairs on 14 February 2011.

*Monitoring and advising on compliance with international standards and co-operating with regional international bodies*

We welcome that according to your letter, the MNHRC can “assess whether rights defined in international human rights conventions to which Myanmar is a party are fully enjoyed [...]” and make recommendations on Burma joining the international human rights conventions to which it is not a party yet. This is a core responsibility for an NHRI and therefore we would like to enquire about what actions the MNHRC has taken in this regard. We also take due note that the MNHRC is engaging with United Nations agencies and other partner organizations. We do encourage you to further co-operate with these agencies and in particular with the Office of the High Commissioner for Human Rights and with international mechanisms, including treaty bodies and the special procedures of the UN Human Rights Council.

However, we are concerned by the mention in your letter that the MNHRC has the responsibility to “advise on Myanmar’s reports to be submitted to international human rights organisations.” We would like to emphasize that, according to the Paris Principles, NHRIs should not submit reports to international bodies on behalf of a Government but rather on their own behalf. Therefore we would welcome a clarification from you on this issue.

*Educating and informing the public, authorities and relevant agencies in the field of human rights*

We are glad to read that the MNHRC has among its responsibilities to raise awareness on human rights and assist in capacity building programs. Therefore, we would like to know whether you could share with us what actions the MNHRC has taken to date in this regard.

- **Funding**

The Paris Principles provide that NHRIs' funds should be efficient and granted through a mechanism that is not under direct Government control, such as a vote in Parliament. We know the Parliament rejected the MNHRC's budget bill on the basis that it was not formed as a national level institution since it was established by a Union Government Notification. Therefore, we would like to know how the MNHRC will now proceed. We would also like for the MNHRC to share information about its available funds and the number of its staff with the public, including Burma Partnership.

We hope that you will find these recommendations useful and will take them into consideration. We remain at your disposal should you need further information.

Thank you for your consideration of the issues and questions raised in this letter and we look forward to hearing from you again soon.

Sincerely,

Khin Ohmar

Coordinator of Burma Partnership