

## NOTES & COMMENTS

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# The 2014 Enabling Law of the Myanmar National Human Rights Commission and the UN Paris Principles: A Critical Evaluation

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*In March 2014 the Myanmar Hluttaw, or Parliament, enacted the Myanmar National Human Rights Commission Law, which provided a statutory basis for a national human rights body in Myanmar. The Myanmar government declared to the United Nations Human Rights Council that the Enabling Law was compliant with the United Nations Paris Principles that set international standards for national human rights institutions. Despite the claims of the Myanmar government, however, critics charge the Enabling Law is insufficient, with detractors claiming the law leaves the MNHRC with anaemic powers incapable of advancing human rights. This paper responds to such issues by conducting an independent evaluation of the MNHRC Enabling Law under the Paris Principles. In doing so, the analysis treats the Enabling Law as a case study demonstrating how the Paris Principles can be exercised by third parties as the UN-supported international standards for national human rights institutions.*

### Keywords

Myanmar, Enabling Law, MNHRC, Paris Principles, OHCHR, NHRIs, ICC Subcommittee

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DOI: <http://dx.doi.org/10.14330/jeail.2016.9.2.06>

# 1. Introduction

In March 2014, the Myanmar Hluttaw, or Parliament, enacted the Myanmar National Human Rights Commission Law (hereinafter Enabling Law),<sup>1</sup> which provided a statutory basis for a national human rights body in Myanmar. The Enabling Law superseded a previous presidential order establishing the Myanmar National Human Rights Commission (“MNHRC”) and reconstituted the MNHRC with more explicit terms regarding its membership, powers, duties, support, and structure.<sup>2</sup> This served to institutionalize the MNHRC, moving the commission’s existence from an expression of presidential discretion via decree to a product of broader parliamentary deliberation and attendant legislation.

The Myanmar government declared to the United Nations Human Rights Council (“UNHRC”) that the Enabling Law was compliant with the UN Paris Principles that set international standards for national human rights institutions.<sup>3</sup> The declaration is supportive for the United Nations Human Rights Office of the High Commissioner (“OHCHR”) to help the MNHRC design and draft the Enabling Law,<sup>4</sup> and so presumably guide it towards compliance with the UN guidelines. As a result, the Enabling Law would represent a larger effort by Myanmar’s government to work with the UN human rights system, thereby reflecting an intent to meet international expectations regarding human rights.

Despite the claims of the Myanmar government, however, critics charge the Enabling Law is insufficient, with detractors claiming the law leaves the MNHRC with anaemic powers incapable of advancing human rights.<sup>5</sup> Such organizations

<sup>1</sup> Myanmar National Human Rights Commission Law, Document No. 24/2014 [hereinafter MNHRC 2014].

<sup>2</sup> *Id.* See also Statement by the Myanmar National Human Rights Commission on International Human Rights Day (Dec. 10, 2011), available at <http://mnhrc.org.mm/en/statements-2/statement-by-the-myanmar-national-human-rights-commission-on-international-human-rights-day-10-december-2011>; Republic of the Union of Myanmar President Office, Order No. 23/2014 (2014) [hereinafter Myanmar President 2014], available at <http://www.myanmarpresidentoffice.info/en/?q=briefing-room/2014/09/25/id-4232> (all last visited on Oct. 14, 2016).

<sup>3</sup> Statement by U Thant Kyaw, Deputy Minister for Foreign Affairs of the Republic of the Union of Myanmar, at the High-Level Segment of the Twenty-Eighth Session of the Human Rights Council (2015), available at <http://www.mofa.gov.mm/wp-content/uploads/2015/03/statement-by-DyFMU-Thant-Kyaw-28-HRC.pdf> (last visited on Oct. 14, 2016).

<sup>4</sup> Activities of the International Coordinating Committee of National Human Rights Institutions for the Promotion and Protection of Human Rights in Accrediting National Institutions in Compliance with the Paris Principles [hereinafter OHCHR 2014], U.N. Doc. A/HRC/27/40 (2014), available at <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Pages/ListReports.aspx> (last visited on Oct. 14, 2016).

<sup>5</sup> See generally All the President’s Men, Burma Partnership (2014) [hereinafter Burma Partnership 2014], available at <http://www.burmapartnership.org/2014/09/all-the-presidents-men>; B. O’Toole, *Rights Body Shake-up Under*

as Burma Partnership, Equality Myanmar, and FORUM-ASIA, in particular, assert that the Enabling Law falls short of the Paris Principles.<sup>6</sup> The disparity between the Myanmar government and its critics regarding the Enabling Law raises a question about its actual status, particularly with respect to its capacity to meet the requirements of international standards embodied by the Paris Principles.

This paper aims to respond to such issues by conducting an independent evaluation of the [MNHRC] Enabling Law under the Paris Principles. In doing so, the Enabling Law will be treated as a case study demonstrating how the Paris Principles can be exercised by the third parties as the UN-supported international standards for national human rights institutions (“NHRIs”). This paper is composed of five parts including Introduction and Conclusion. Part two will provide criteria for evaluating the Enable Law under the Paris Principles. In Part three, our discussion will extend to compare its findings with those made by the ICC Sub-Committee in its review of the MNHRC in November 2015. Considering that the ICC Sub-Committee review focused on the Enabling Law, Part four will seek to show how third parties can conduct independent evaluations of NHRIs using the Paris Principles. As the committee’s review went beyond the Enabling Law, the author will analyse how the Paris Principles can be used to address broader NHRI issues.

Some note should be made regarding methodological issues of research in Myanmar. While the MNHRC tries to be transparent, a lack of capacity in staff, infrastructure, and technology limits its ability to make documents available on-line. Hence, the MNHRC materials for this study involve a mixture of documents gathered from both the MNHRC website and its offices - particularly an English-language translation of the Enabling Law - supplemented with anonymous in-person interviews with the MNHRC members in Yangon. In contrast, primary materials related to the UN, including the Human Rights Council and the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (“ICC”)’s Sub-Committee on Accreditation (hereinafter ICC Sub-Committee), are readily available on-line. In assessing the Enabling Law against the

*Fire*, MYANMAR TIMES, Sept. 29, 2014, available at <http://www.mmtimes.com/index.php/national-news/11803-rights-body-shake-up-under-fire.html>; Kyaw Thu, *Myanmar Revamps Human Rights Panel amid Criticism from Rights Groups*, RADIO FREE ASIA, Sept. 25, 2014, available at <http://www.rfa.org/english/news/myanmar/commission-09252014174739.html> (all last visited on Oct. 14, 2016).

<sup>6</sup> See The Myanmar National Human Rights Commission Continues Failing to Deliver, Burma Partnership 2014 [hereinafter Burma Partnership 2014b], available at <http://www.burmapartnership.org/2014/09/the-myanmar-national-human-rights-commission-continues-failing-to-deliver>; 2014 ANNI Report on the Performance and Establishment of National Human Rights Institutions, Forum-Asia (2014) [hereinafter Forum-Asia 2014], available at <https://www.forum-asia.org/?p=17635> (all last visited on Oct. 14, 2016); Thu, *id.*

Paris Principles,<sup>7</sup> this study refers directly to the principles as well as the supporting commentaries provided by the OHCHR and the ICC Sub-Committee.<sup>8</sup>

## 2. Evaluation under the Paris Principles

In 1993, the UN declared the Paris Principles as setting the minimum standards for effective NHRIs.<sup>9</sup> The Paris Principles require that NHRIs satisfy several criteria to be considered fully functional.<sup>10</sup> While the OHCHR and ICC Sub-Committee list six criteria that treat autonomy as distinct from independence, their commentaries on both overlap and so, for purposes of organizing this analysis, these two categories are collapsed together to leave five criteria in this study:<sup>11</sup>

- A mandate to “promote and protect” universal human rights standards;
- Resources adequate to fulfil its mandate;
- Powers adequate to fulfil the mandate;
- Autonomy and independence from government; and
- A pluralist composition.

According to the OHCHR, the Paris Principles are “broadly accepted as the test of an institution’s legitimacy and credibility”<sup>12</sup> and thus perform a normative function

<sup>7</sup> National Institutions for the Promotion and Protection of Human Rights, G.A. Res. 48/134, U.N. Doc. A/RES/48/134 (Mar. 4, 1994) [hereinafter UNGA 1994], available at <http://www.un.org/documents/ga/res/48/a48r134.htm> (last visited on Oct. 14, 2016).

<sup>8</sup> See International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights Sub-Committee on Accreditation, General Observations (2013) [hereinafter ICC Sub-Committee 2013], available at <http://nhri.ohchr.org/EN/AboutUs/ICC/Accreditation/Documents/SCA%20GENERAL%20OBSERVATIONS%20ENGLISH.pdf>; Office of the High Commissioner for Human Rights, Training Series No. 4: National Human Rights Institutions: History, Principles, Roles and Responsibilities (2010) [hereinafter OHCHR 2010], available at [http://www.ohchr.org/Documents/Publications/PTS-4Rev1-NHRI\\_en.pdf](http://www.ohchr.org/Documents/Publications/PTS-4Rev1-NHRI_en.pdf) (all last visited on Oct. 14, 2016).

<sup>9</sup> C. Renshaw, A. Byrnes, & A. Durbach, *Testing the Mettle of National Human Rights Institutions: A Case Study of the Human Rights Commission of Malaysia*, 1 *ASIAN J. INT’L L.* 165 (2011), available at <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/S204425131000038X> (last visited on Oct. 7, 2016).

<sup>10</sup> B. BURDEKIN, NATIONAL HUMAN RIGHTS INSTITUTIONS IN THE ASIA PACIFIC REGION (2006). See also OHCHR 2010; UNGA 1994.

<sup>11</sup> International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights Sub-Committee on Accreditation, ICC Sub-Committee on Accreditation (2015) [hereinafter ICC Sub-Committee 2015a], available at <http://nhri.ohchr.org/EN/AboutUs/ICC/Accreditation/Pages/default.aspx> (last visited on Oct. 14, 2016). See also ICC Sub-Committee 2013; OHCHR 2010.

<sup>12</sup> OHCHR, Paris Principles: 20 Years Guiding the Work of National Human Rights Institutions, available at <http://www.ohchr.org/EN/NewsEvents/Pages/ParisPrinciples20yearsguidingtheworkofNHRI.aspx> (last visited on Oct. 6, 2016).

in evaluating a country's NHRI. It implies the State is a member in good standing of a larger global community tied to the UN's human rights protection system. In addition, the principles also serve a substantive function, with an NHRI's status under the Paris Principles being a component in an accreditation process conducted by the ICC Sub-Committee on Accreditation.<sup>13</sup>

Myanmar's position regarding the MNHRC's 2014 Enabling Law was summarized succinctly during the 28th Session of the Human Rights Council held in March 2015. Here, Deputy Foreign Minister U Thant Kyaw said that: "In order to be more compliant with the Paris Principles, the Myanmar National Human Rights Commission Law was enacted by the Parliament on 28 March 2014."<sup>14</sup> This indicates an intent to improve the MNHRC as it was originally formed via a presidential decree in 2011. Critics saw the incarnation of the MNHRC as being ineffective in dealing with the country's human rights problems.<sup>15</sup> However, aspirations for greater compliance with the Paris Principles call for an evaluation of the 2014 Enabling Law against each of the criteria of the principles.

### *A. Criterion 1: A mandate*

The Paris Principles provide that an NHRI "shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence."<sup>16</sup> The provision for a constitutional or legislative base is specified since it ensures "greater permanence, greater independence, and greater transparency" compared to an executive order.<sup>17</sup> The 2014 Enabling Law meets this requirement, explicitly stating that the MNHRC originally created by the presidential decree in 2011 under Presidential Order No. 34/2011 should continue under the new law. To emphasize this transition, Presidential Order No. 23/2014 officially revoked Presidential Order No. 34/2011, officially leaving the MNHRC solely under the Enabling Law.<sup>18</sup>

With respect to a mandate, the ICC Sub-Committee asserts that it "should be

<sup>13</sup> G. DE BECO & R. MURRAY, A COMMENTARY ON THE PARIS PRINCIPLES ON NATIONAL HUMAN RIGHTS INSTITUTIONS (2015). See also ICC Sub-Committee 2015a; OHCHR, Information Note for National Human Rights Institutions (2015) [hereinafter OHCHR 2015a], available at <http://www.ohchr.org/EN/HRBodies/HRC/Pages/NHRIParticipation.aspx> (last visited on Oct. 14, 2016); OHCHR 2014.

<sup>14</sup> *Supra* note 3.

<sup>15</sup> See Burma's NHRC: An Empty Gesture, Burma Partnership (2012), available at <http://www.burmapartnership.org/2012/01/burmas-nhrc-an-empty-gesture/> (last visited on Oct. 14, 2016); Forum-Asia 2014.

<sup>16</sup> UNGA 1994, annex §A.2.

<sup>17</sup> OHCHR 2010, at ¶ 32.

<sup>18</sup> Myanmar President 2014.

interpreted in a broad, liberal and purposive manner to promote a progressive definition of human rights.<sup>19</sup> While the Paris Principles recognizes that there are variations in NHRIs, the ‘best model’ is one whose mandate covers all international treaties and covers all human rights.<sup>20</sup> The 2014 Enabling Law seems ambiguous in this regard, with language that offers potentially different interpretations. Some parts seem to take an expansive mandate, with Chapter 1 asserting that ‘human rights’ means all those contained in the Universal Declaration of Human Rights<sup>21</sup> and Chapter 2 charging the MNHRC “to create a society where human rights are respected and protected in recognition of the Universal Declaration of Human Rights.”<sup>22</sup> However, other parts seem to limit the mandate to those human rights accepted by the State, with Chapter 1 reading that ‘human rights’ means the rights contained in international instruments “applicable to the State”<sup>23</sup>; Chapter 2 declaring that the MNHRC will promote international and regional human rights instruments “accepted by the State”<sup>24</sup>; and Chapter 5 stating that the MNHRC can review laws for consistency with international human rights instruments “to which the State is a party.”<sup>25</sup>

Reading in light of the more restrictive passages, the Enabling Law seems to fall short of the ‘best model’ for NHRIs under the Paris Principles. This, however, does not render it entirely in contravention of the principles, since the OHCHR observes that “it is possible to have such a more limited mandate and still comply with the Paris Principles.”<sup>26</sup> The OHCHR further notes that it is possible for NHRIs to have limited mandates so long as they have “full authority to promote all rights.”<sup>27</sup> The 2014 Enabling Law seems to achieve this, allowing the MNHRC powers to recommend which international human rights instruments the government should join<sup>28</sup> and to raise public awareness of human rights.<sup>29</sup> Hence, while the Enabling Law does not rise to the ideal of a mandate under the Paris Principles, it still meets the minimum requirements maintained by the OHCHR.

<sup>19</sup> ICC Sub-Committee 2013, at 7.

<sup>20</sup> OHCHR 2010.

<sup>21</sup> MNHRC 2014, at ¶ 2.

<sup>22</sup> *Id.* at ¶ 3.

<sup>23</sup> *Id.* at ¶ 2.

<sup>24</sup> *Id.* at ¶ 3.

<sup>25</sup> *Id.* at ¶ 5.

<sup>26</sup> OHCHR 2010, at 32.

<sup>27</sup> *Id.*

<sup>28</sup> MNHRC 2014, at ¶ 22.

<sup>29</sup> *Id.* at ¶ 22.

## ***B. Criterion 2: Adequate resources to fulfil its mandate***

The Paris Principles require that a State provide an NHRI with adequate funding.<sup>30</sup> The ICC Sub-Committee explains this as including at minimum the funds sufficient to pay for “premises which are accessible to the wider community,” salaries to staff “comparable to civil servants performing similar tasks in other independent institutions of the State,” remuneration for NHRI members, a communications system including telephone and internet, and resources for mandated activities.<sup>31</sup> The budget and spending records of the MNHRC are not available to the public, so it is difficult to accurately assess the status of the MNHRC against this criterion. As for NHRI premises, the Enabling Law is not directly responsive, stating only that the MNHRC “shall establish its headquarters and may establish its branches as required to implement its mandate.”<sup>32</sup> It can be inferred, however, that the Myanmar government has in some ways met the ICC Sub-Committee requirement, with the MNHRC currently being housed at 27 Pyay Road in Yangon, a major street in Myanmar’s largest city, in a building open for visitors via appointment, and hence is accessible to the public.<sup>33</sup>

In terms of staff salaries, the Enabling Law is more explicit. It states that while the MNHRC members have the authority to determine the rank of their staff they do so “subject to the laws and regulations for civil service personnel.”<sup>34</sup> It means that the staff should be treated as civil servants. In regards to remuneration for NHRI members, the Enabling Law specifies that the Chairperson of the MNHRC holds the same rank as a Minister and that the members are equivalent to Deputy Ministers, such that they are “entitled to the honoraria, allowances and perquisites” appropriate to such ranks.<sup>35</sup>

With respect to resources, the Enabling Law says that the “State shall provide the Commission with adequate funding to enable it to effectively discharge the functions assigned to it” and so requires the Myanmar government to fund the MNHRC in its performance of its mandate.<sup>36</sup> There is an issue as to whether the Myanmar government has actually complied with its obligations under the Enabling Law,

<sup>30</sup> UNGA 1994, annex § B.2.

<sup>31</sup> ICC Sub-Committee 2013, at 26.

<sup>32</sup> MNHRC 2014, at ¶ 57.

<sup>33</sup> See Myanmar National Human Rights Commission (2015), available at <http://www.mnhrc.org.mm/en> (last visited on Oct. 14, 2016).

<sup>34</sup> MNHRC 2014, at ¶ 54.

<sup>35</sup> *Id.* at ¶ 12.

<sup>36</sup> *Id.* at ¶ 46.

even when the MNHRC continues to operate with a shortage of staff and inadequate technical resources.<sup>37</sup> Such an issue, however, is one with the state rather than with the Enabling Law itself. Hence, on the criterion of funding, the Enabling Law seems to be in accordance with the ICC Sub-Committee guidelines and hence in keeping with the Paris Principles.

### *C. Criterion 3: Powers adequate to fulfil the mandate*

The Paris Principles specify that an NHRI “shall be vested with competence to promote and protect human rights.”<sup>38</sup> The OHCHR interprets this to mean that an NHRI should have the minimum capacity to perform the following responsibilities:<sup>39</sup>

- monitor and investigate human rights issues without approval of a higher authority;
- encourage ratification and implementation of international human rights instruments;
- provide recommendations to the government and publish them on its own initiative;
- contribute to national human rights reports;
- cooperate with international and regional human rights institutions and other NHRIs;
- conduct human rights education and research;
- raise public awareness of human rights; and
- encourage harmonization and implementation of national practices with international human rights instruments.

The Enabling Law meets this criterion in varying degrees. Under the Enabling Law, the MNHRC’s ability to monitor and investigate seems to exceed the Paris Principles, with the commission having the powers to conduct inquiries either on its own initiative or in response to requests.<sup>40</sup> This covers inquiries in response to individual complaints,<sup>41</sup> which goes beyond the OHCHR’s observation that NHRI powers “may not include the specific power to receive individual human rights complaints.”<sup>42</sup> The MNHRC meets most of the other requirements, with the Enabling Law specifying powers to encourage government ratification and implementation of international human rights instruments. The Commission issues recommendations to the government, publishes reports, effects liaison with international and regional human rights institutions and NHRIs, provides education and research to the public, receives

<sup>37</sup> Interview 1 (2015); Interview 2 (2015); Interview 3 (2015).

<sup>38</sup> UNGA 1994, annex § A.1.

<sup>39</sup> *Id.* annex § A.3. See also OHCHR 2010, at ¶¶ 34-35.

<sup>40</sup> MNHRC 2014, at ¶¶ 22, 28, & 33.

<sup>41</sup> *Id.* at ¶¶ 30 & 32.

<sup>42</sup> OHCHR 2010, at ¶ 35.



assistance from experts, and promotes public awareness of human rights.<sup>43</sup> The MNHRC, however, does suffer in that it is limited to encouraging and harmonizing with only the international human rights instruments and institutions to which the State is a party.<sup>44</sup> Hence, the Enabling Law meets or exceeds the majority of the OHCHR's expectations, with the only apparent shortfall being the limitations on harmonization with the full ensemble of the international human rights system.

The extent of the MNHRC's powers under the Enabling Law with respect to government also seems to largely meet the Paris Principles. The Enabling Law makes no restrictions on the MNHRC's powers to investigate, comment on, or issue reports and recommendations to the president, government agencies, or parliament. If such an omission is interpreted as a sign of freedom to exercise such powers, then the Enabling Law grants the MNHRC powers beyond the expectation of the OHCHR. The High Commissioner cautions that NHRIs "generally do not have authority over parliament, nor can they in any way affect the traditional immunities and privileges" held by the members of the legislature so as to protect freedom of political discourse.<sup>45</sup> With respect to the judiciary, the Enabling Law does set limits, requiring that the MNHRC avoid cases either in trial or already decided by the courts.<sup>46</sup> This is, however, consistent with the OHCHR's position that NHRIs do not have oversight of courts and the judiciary and "should not sit in appeal or review of the courts," so as to respect the rule of law.<sup>47</sup>

One area where the Enabling Law seems to contravene the Paris Principles is the national security cases where the law denies the MNHRC access to documents "which would affect the security and defence of the State" or "which are classified by the departments and organizations of the Government."<sup>48</sup> The OHCHR concedes that NHRIs can be limited "into matters concerning the armed forces, the security services and/or Government decisions on international relations" for national security reasons.<sup>49</sup> However, it specifies that such limitations should be "not unreasonably or arbitrarily applied and should only be exercised under due process."<sup>50</sup> The Enabling Law neither provides conditions about unreasonable or arbitrary declarations of national security, nor mentions a need for due process. In

<sup>43</sup> MNHRC 2014, at ¶¶ 22 & 38-40.

<sup>44</sup> *Id.* at ¶ 22.

<sup>45</sup> OHCHR 2010, at ¶ 33.

<sup>46</sup> MNHRC 2014, at ¶ 37.

<sup>47</sup> OHCHR 2010, at ¶ 193.

<sup>48</sup> *Id.* at ¶ 36.

<sup>49</sup> *Id.* at ¶ 33.

<sup>50</sup> ICC Sub-Committee 2013, at 42.

this context, it deviates from the OHCHR's interpretation of the Paris Principles in this regard.

#### ***D. Criterion 4: Autonomy and independence from government***

The Paris Principles require that an NHRI "have its own staff and premises, in order to be independent of the Government."<sup>51</sup> The OHCHR interprets this to involve operational autonomy in terms of control over daily affairs independent of external influence, financial autonomy in terms of control over finances, and legal autonomy through a statutory or constitutional declaration of legal personality and both appointment and dismissal procedures.<sup>52</sup> The ICC Sub-Committee phrases such requirements with the comment that an NHRI should "be independent from the government in its structure, composition, and method of operation."<sup>53</sup>

The Enabling Law seems to satisfy most of these expectations. In regards to operational autonomy, critics argue that it led to a reconstitution of the MNHRC that reduced the members from fifteen down to eleven, out of whom ten were retired civil servants, and thus left the commission dominated by members who were susceptible to government influence.<sup>54</sup> The ICC Sub-Committee, however, only requires a prohibition against "members of a ruling political party or coalition, and representatives of government agencies,"<sup>55</sup> and suggests that the membership prohibition applies only against current rather than former government employees. In addition, the Enabling Law seems to provide operational autonomy by omitting any government approval for the MNHRC's exercise of its powers. This indicates that the commission has discretion over its own activities in order to meet the OHCHR and the ICC Sub-Committee expectations for NHRI self-control over daily affairs. Further, the Enabling Law places powers over staff appointments, functions, benefits, and organization under the commission,<sup>56</sup> and appears to infuse the MNHRC with the independence in structure and composition expected by the ICC Sub-Committee.

Similarly, the Enabling Law seems to satisfy the financial autonomy. The OHCHR requires that the government should provide an NHRI sufficient funds to

<sup>51</sup> UNGA 1994, annex § B.2.

<sup>52</sup> OHCHR 2010, at ¶¶ 39-41.

<sup>53</sup> ICC Sub-Committee 2013, at 24.

<sup>54</sup> O'Toole, *supra* note 5.

<sup>55</sup> ICC Sub-Committee 2013, at 24.

<sup>56</sup> MNHRC 2014, at ¶¶ 51-56.

cover accommodations, staff, commissioners, and communications.<sup>57</sup> In addition, the NHRI should, and thus does not need to, have total control over its own budget.<sup>58</sup> The Enabling Law seems to meet the first condition, by declaring that “[T]he State shall provide the Commission with adequate funding”<sup>59</sup> to fulfil its responsibilities, which presumably translates into the accommodations, staff, commissioners, and communications tied to those responsibilities. The Enabling Law, however, fails the second condition, omitting the subject of budgetary control altogether. This is not a necessity, however. While it renders the Enabling Law less than ideal, it still allows conformity to the Paris Principles.

The Enabling Law struggles against the legal autonomy. In regards to the legal personality component of legal autonomy, the Enabling Law satisfies the OHCHR’s expectation for a statutory declaration in that the law makes the MNHRC a unique entity with powers against the government. Legal personality is further emphasized by the provisions for immunity of commission members, staff, witnesses, or associates from obstruction or harassment; separate headquarters; distinct name, logo, and succession; and inviolability of premises, communications, materials from censorship, seizure, or interference,<sup>60</sup> all of which serve to further highlight the MNHRC as a distinct legal entity. In regards to the appointments and dismissal component of legal autonomy, however, the Enabling Law runs into problems. According to the ICC Sub-Committee, legal autonomy requires that an appointment process involve transparency and open consultation with civil society organizations (“CSOs”)<sup>61</sup> and that a dismissal mechanism be independent of the executive and limited to serious wrongdoing or incapacity.<sup>62</sup> Unfortunately, the Enabling Law specifies that an appointment procedure involving nomination and selection of candidates should be carried out by a Selection Board and the President, acting in coordination with the Speakers of both chambers of the Parliament, respectively.<sup>63</sup>

Because there is no explicit provision for this mechanism to be public, transparency is at the discretion of the Selection Board, President, and Speakers of the Parliament. This is against the Paris Principles for a transparent procedure. In addition, consultation with CSOs also seems restricted as these organizations are only allowed

<sup>57</sup> OHCHR 2010, at ¶ 40.

<sup>58</sup> *Id.* at ¶ 41.

<sup>59</sup> MNHRC 2014, at ¶ 46.

<sup>60</sup> *Id.* at ¶¶ 41, 42, 57, 60, 63 & 64.

<sup>61</sup> OHCHR 2010, at ¶ 38; ICC Sub-Committee 2013, at 22.

<sup>62</sup> OHCHR 2010, at ¶¶ 42.

<sup>63</sup> MNHRC 2014, at ¶¶ 5-9.

to participate in the Selection Board. Here, only two out of ten seats are available for non-governmental organizations (“NGOs”) which must be registered with the government. This also falls short of the Paris Principles’ expectation for consultation with CSOs. With respect to the dismissal procedure, meanwhile, the Enabling Law allows the President, in coordination with both Speakers of the Parliament, to terminate MNHRC members for reasons including insolvency. The MNHRC members may be dismissed at the discretion of the President and Speakers of Parliament with the reasons even below a threshold that the ICC Sub-Committee set. Eventually, the Enabling Law’s procedures for appointments and dismissals fail to satisfy the requirements for legal autonomy in the Paris Principles.

### *E. Criterion 5: A pluralist composition*

The Enabling Law would have some problem with the Paris Principles in relation to pluralism. The Principles provides that the “composition of the national institution and the appointment of its members ... shall be established in accordance with a procedure that affords all necessary guarantees to ensure the pluralist representation of social forces...”<sup>64</sup> The principles offer direction as to what this means, pointing to representation that involves NGOs, CSOs, philosophical or religious thought, universities, parliament, or government.<sup>65</sup> The ICC Sub-Committee further observes that pluralism involves “broader representation of national society ... in the context of gender, ethnicity or minority status.”<sup>66</sup> The ICC Sub-Committee recognizes that there are different models to achieve pluralism, as, but not limited, to have not only an NHRI whose members and staff represent different segments of society, but also appointment or operation procedures involving diverse societal groups in its operation.<sup>67</sup>

The Enabling Law differs from such models. Under the Enabling Law, the Selection Board has ten members, consisting of the Chief Justice, the Attorney General, a representative of the Bar Council, a government body under the Attorney General’s Office, the respective Ministers of Home Affairs and Social Welfare, two representatives from the Parliament, a representative of the Myanmar Women’s Federation, and two representatives from NGOs registered with the government.<sup>68</sup>

<sup>64</sup> UNGA 1994, annex § B.1.

<sup>65</sup> *Id.*

<sup>66</sup> ICC Sub-Committee 2013, at 20.

<sup>67</sup> *Id.*

<sup>68</sup> MNHRC 2014, at ¶ 5.

The Selection nominates a pool of 30 candidates on the criteria as follows: (1) citizens; (2) 35 years or older; (3) known for good character and impartiality; (4) knowledgeable in human rights and good governance; and (5) demonstrate commitment to the objectives of the MNHRC.<sup>69</sup> From this pool of candidates, the President appoints the members of the MNHRC under the auspices of Speakers of the Lower and Upper Houses of the Parliament.<sup>70</sup> The Commission can have members between seven and fifteen,<sup>71</sup> with the inaugural body of appointees under the Enabling Law numbering eleven. In some respects, this appointment model would satisfy the Paris Principles, in that the use of a Selection Board is allowed under the OHCHR's recognition. The MNHRC provides 2014 the "responsibility for conducting the nomination and selection process can be delegated to a representative committee of experts" which can "develop the shortlist from which either the parliament or the executive would make the final selections."<sup>72</sup>

The Enabling Law, however, diverges from the Paris Principles regarding the manner in which it responds to the requirement for pluralism. In the transition from the 2011 Presidential Order to the 2014 Enabling Law, the MNHRC was criticized for an apparent retreat away from pluralism, as the reconstitution of the commission's membership led to the dismissal of members who came from the prominent Chin, Kachin, Karen, and Shan minorities - a notable development unifying a multitude of ethnic nationalities in Myanmar.<sup>73</sup> This damages the MNHRC in terms of OHCHR expectations to represent different segments of society. In this course, however, the OHCHR offered a concession that "while pluralism is best demonstrated when an institution's membership visibly reflects the social forces at play ... it does not mean that all groups must be represented at one time."<sup>74</sup> This suggests that while the loss in ethnic diversity of the MNHRC is not ideal under the Paris Principles, it can be mitigated via other means aimed at encouraging pluralism.

Unfortunately, the Enabling Law commented 'pluralism' as meaning that "groups feel that they are included" in the appointment procedures.<sup>75</sup> The Enabling Law provides that the Selection Board should seek to consider nominees not only relative to the selection criteria but also in relation to their expertise on national

<sup>69</sup> *Id.* at ¶ 6.

<sup>70</sup> *Id.* at ¶¶ 8-9.

<sup>71</sup> *Id.* at ¶ 4.

<sup>72</sup> OHCHR 2010, at ¶ 38.

<sup>73</sup> O'Toole, *supra* note 5.

<sup>74</sup> OHCHR 2010, at ¶ 39.

<sup>75</sup> *Id.* at ¶ 39. *See also* ICC Sub-Committee 2013, at 20.

economic, social, cultural issues and their value in ensuring “equitable representation of men and women, and of national races.”<sup>76</sup> The ICC Sub-Committee, however, might prefer a different approach. It asked that appointment procedures pursue pluralism by being transparent and open to broad consultation with NGOs and CSOs.<sup>77</sup> The Enabling Law does not guarantee transparency or consultation with the President’s selection of the MNHRC members, leaving the participation of NGOs limited to two seats on the Selection Board reserved for government-registered NGOs. This makes appointments a government-dominated procedure with no assurance of transparency and little opportunity for consultation with NGOs and CSOs, rendering it short of ICC Sub-Committee directives.

Similarly, the Enabling Law is inconsistent with the ICC Sub-Committee’s view that group inclusion can occur in an NHRI’s operations via “effective cooperation with diverse societal groups.”<sup>78</sup> The OHCHR would interpret this expansively. It maintains that: “In all circumstances, NHRIs should collaborate and cooperate with other stakeholders, and doing so is itself a test of their commitment to pluralism.”<sup>79</sup> In contrast, the Enabling Law reads that the duty of the MNHRC is to consult and engage “relevant civil society organizations, business organizations, labour organizations, national races organizations, minorities and academic institutions, as appropriate.”<sup>80</sup> The inclusion of ‘relevancy’ and ‘appropriateness’ implies that the MNHRC holds some discretion in selecting who, what, and how it works with stakeholders.

This shows that the Enabling Law is even less assertive than the OHCHR’s broad interpretation, so that it does not meet the OHCHR ideal. It might be possible, however, to allow such a discrepancy, since the OHCHR’s call for ‘all circumstances’ does not address the meaning of ‘effective cooperation’ and hence leaves some uncertainty on the latter term. But, the ICC Sub-Committee then asked further clarification on what constitutes “effective cooperation with diverse societal groups.”<sup>81</sup> The MNHRC can be more accurately evaluated against this requirement.

<sup>76</sup> MNHRC 2014, at ¶ 7.

<sup>77</sup> ICC Sub-Committee 2013, at 20-3.

<sup>78</sup> *Id.* at 20.

<sup>79</sup> OHCHR 2010, at ¶ 39.

<sup>80</sup> MNHRC 2014, at ¶ 22.

<sup>81</sup> ICC Sub-Committee 2013, at 20.

### 3. Overall Status under the Paris Principles

In summary, the status of the Enabling Law under the Paris Principles can be organized into a list that succinctly compares the law against each of the criteria in the Paris Principles. It further identifies whether the Enabling Law is compliant with the Paris Principles, what parts of it are problematic under the principles, and what parts of it are uncertain. Table 1 shows the results.

Table 1: Status of the Enabling Law under the Paris Principles

Paris Principles Criteria	Status of Enabling Law
A mandate to “promote and protect” universal human rights standards	Not ideal, but compliant with Paris Principles
Adequate resources to fulfil its mandate	Compliant with Paris Principles, issue with state fulfilment of obligations under Enabling Law to provide resources to the MNHRC
Powers adequate to fulfil the mandate	Problematic: Does not satisfy OHCHR-specified conditions <ol style="list-style-type: none"> <li>1) to harmonize and liaison with international human rights instruments &amp; institutions</li> <li>2) to have national security restrictions follow due process and not be unreasonably or arbitrarily applied</li> </ol>
Autonomy and independence from government	Problematic: Does not meet OHCHR-specified expectations of legal autonomy <ol style="list-style-type: none"> <li>1) Appointment procedures dominated by government with no requirement for transparency, and the procedures are not open to consultation with NGOs and CSOs</li> <li>2) Dismissal procedures allows for dismissal at the discretion of the President and Speakers of Parliament, and dismissal can be based on insolvency</li> </ol>
A pluralist composition	Uncertain: Problems with composition representing different groups in society and appointments involving diverse societal groups, but uncertainty if these issues can be mitigated by MNHRC engaging diverse societal groups – contingent on <ol style="list-style-type: none"> <li>1) ICC Sub-Committee conception of “effective cooperation” with diverse societal groups</li> <li>2) MNHRC’s performance relative to conception of “effective cooperation”</li> </ol>

Source: Compiled by the author.

Most of the problems identified in the above mentioned would be easily correctable because they involve issues in text that can be rectified through amendments to the Enabling Law like either changes in wording or the addition of language. *E.g.*, the problem regarding mandate can be addressed through the modification of the Enabling Law's Paragraph 36. It notes that the national security restrictions on the MNHRC's powers of investigation should not be unreasonable or arbitrary and follow due process. Similarly, the problem regarding transparency can be resolved by the addition of language to the Law's Paragraph 7 that make the appointments and dismissal procedures transparent to the public. The issue of insolvency as grounds for dismissal can be rectified simply by removing the sentence from Paragraph 18.

More difficult amendments would be those relating to consultation with NGOs and CSOs and dismissal at the discretion of the President and Speakers of Parliament. The Paris Principles call for appointments and dismissals to be done via open and independent consultation with the executive branch of government. Changing the Enabling Law to meet these requirements would not be so simple because they entail structural adjustments in terms of how both appointments and dismissals are conducted.

As for appointments, the Paris Principles require any number of potential changes, including, but not limited to, a reconstitution of the Selection Board to allow more NGO and CSO participation, an expansion in the appointment process to facilitate more engagement with NGOs and CSOs, or a complete elimination of the Selection Board altogether and replacement with an entirely new process that more fully integrates NGO and CSO involvement in MNHRC appointments. As for dismissals, meanwhile, the Paris Principles adhere the excision of the President and other elements of the executive branch from the dismissal procedure. In this case, the power to dismiss the MNHRC members would be placed in either the legislative or judicial branches of the Myanmar government, or alternatively an independent body not tied to the government at all.

The most difficult problem may be the pluralist composition, since any amendment to address this issue must await an antecedent clarification from the ICC Sub-Committee as to its conception of what constitutes 'effective cooperation.' Such amendment would potentially entail a closer relationship between the Myanmar government and the ICC Sub-Committee with respect to the MNHRC. Such an outcome, however, may not be entirely undesirable in a larger context. The closer the Myanmar government and the ICC Sub-Committee engage with each other, the more their communication will be constructive, potentially developing into the cooperation with the comprehensive UN human rights protection system. This



could be mutually positive for both parties, because the Myanmar government could achieve legitimacy as a member of the international human rights community. Such a scenario could be also positive for the UN human rights bodies to inspect the Myanmar government and the MNHRC more closely.

## 4. Accreditation under the Paris Principles

The above analysis will be also useful to compare the Enabling Law to the findings of the ICC Sub-Committee accreditation review of the MNHRC conducted in November 2015. The ICC Sub-Committee typically treats the implementation law of an NHRI as the central element in a determination that ostensibly turns on the criteria in the Paris Principles. The ICC Sub-Committee suggests that its review provides a means of comparison with the findings made above.<sup>82</sup> To the degree that the accreditation review matches the present analysis, it affirms the significance of the textual issues identified. To the degree that it differs, then, it marks issues that lie beyond the text of the Enabling Law.

The ICC Sub-Committee's accreditation review has consequences for NHRIs. An 'A' accreditation confirms that a State has complied with the Paris Principles and so holds rights to (1) have a NHRI to vote in international and regional meetings of NHRIs, and (2) participate as a voting member in the UN Human Rights Council ("HRC"), particularly the Universal Periodic Review ("UPR") process, which publicly evaluates national human rights record and publishes the subsequent findings in UN records.<sup>83</sup>

In the meantime, a 'B' accreditation indicates that a State partially complies with the Paris Principles or has not submitted sufficient documentation to allow evaluation under the Paris Principles. In this case, the State is limited to observer status in the UN human rights forums, including international and regional NHRI meetings and HRC activities.<sup>84</sup> If States do not comply with the Paris Principles they are given a 'C' accreditation, which means they hold no rights or privileges within

<sup>82</sup> DE BECO & MURRAY, *supra* note 13; ICC Sub-Committee 2015a; OHCHR 2015a; OHCHR 2014. *See also* International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights Sub-Committee on Accreditation, Reports and Recommendations of the Sessions of the Sub-Committee on Accreditation (2015), available at <http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Pages/SCA-Reports.aspx> (last visited on Oct. 16, 2016).

<sup>83</sup> ICC Sub-Committee 2015a; OHCHR 2015a.

<sup>84</sup> *Id.*

the UN human rights forums.<sup>85</sup>

In addition, accreditation carries further consequences for countries within the Asia-Pacific region. An 'A' accreditation is determined if an NHRI is a 'full' member holding voting rights in the Asia-Pacific Forum, which is responsible for guiding and supporting the national NHRIs in the Asia-Pacific region.<sup>86</sup> States with a 'B' or 'C' accreditation by the ICC are treated as 'associate' members without voting rights. They have no ability to influence regional decisions regarding NHRIs and their associated human rights policies.<sup>87</sup>

Considering the criteria of adequacy of powers, autonomy and independence, and pluralist composition, the Enabling Law would not get an 'A' rating. As the Enabling Law is not fully in compliance with the Paris Principles, it would take the MNHRC out of contention for an 'A' status. Just involving three out of the five criteria in the Paris Principles, it is, however, not complete failure to be a 'C' status. This MNHRC, based on a reading of the Enabling Law, would most likely deserve a 'B' accreditation.

Such a determination is consistent with the findings of the ICC Sub-Committee accreditation review for the MNHRC in November 2015. While it used a slightly different criteria from those of the Paris Principles, the committee review largely matched the observations to reach an identical awarding of a 'B' rating. Similar to this analysis, the ICC Sub-Committee report expresses the concerns about the powers of the MNHRC, its autonomy and independence, and the nature of pluralism and composition of its members. In particular, the committee agrees that the Enabling Law does not empower the MNHRC to meet the OHCHR's expectations regarding comprehensive interactions with the international human rights system, but instead limits it to ratified instruments and institutions.<sup>88</sup> Similar to findings in this paper, the committee sees the MNHRC as requiring more adequate funding.<sup>89</sup> The committee also shares the following concerns under the Enabling Law: (1) there is little transparency in the appointment and dismissal of the MNHRC members;

<sup>85</sup> *Id.*

<sup>86</sup> Asia-Pacific Forum, About the Asia-Pacific Forum (2015), available at <http://www.asiapacificforum.net/about> (last visited on Oct. 14, 2016).

<sup>87</sup> Asia-Pacific Forum, Members (2015), available at <http://www.asiapacificforum.net/members> (last visited on Oct. 14, 2016).

<sup>88</sup> International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights Sub-Committee on Accreditation, Report and Recommendations of the Sessions of the Sub-Committee on Accreditation, Geneva (2015), available at <http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20FINAL%20REPORT%20-%20NOVEMBER%202015-English.pdf> (last visited on Oct 14, 2016).

<sup>89</sup> *Id.* at 12.

(2) the body of commissioners is dominated with government appointees with little CSO representation or participation; and (3) the composition of commissioners does not match the diversity of Myanmar society.<sup>90</sup>

The ICC Sub-Committee report, however, is different from this analysis. It raises the points that go beyond the text of the Enabling Law or the MNHRC as a body. In particular, the committee requires the MNHRC to increase its activities with respect to monitoring internal unrest or armed conflict and to visit the places where liberty is deprived.<sup>91</sup> The committee further recommends that the MNHRC directly submit annual reports to the Parliament rather than to the Presidential Office.<sup>92</sup> In addition, the committee can criticize the Myanmar state for treating MNHRC funding as part of the Presidential Office's. It should be a separate line-item in the Parliamentary budget.<sup>93</sup>

The author has a different opinion from that of the ICC Sub-Committee report on these latter aspects. It can be explained that such aspects are critiques aimed not at the Enabling Law itself, but rather with the actions of the MNHRC under the scope of the powers given by the text of the law. He seeks to provide a textual analysis of the Enabling Law, while the committee's accreditation review is going beyond its typical focus on performing textual evaluations of NHRI implementation laws against the Paris Principles. Instead, in the case of Myanmar, the ICC Sub-Committee is reaching out to criticize both the commitment of the MNHRC and the Myanmar state as expressed by their activity levels towards the cause of human rights in their country. Such behaviour would indicate a motive to send a message to both the MNHRC and the Myanmar government to become more active in their support of human rights. It also shows that the ICC Sub-Committee is vigilant in seeing that the powers granted by the Enabling Law are not just perfunctory text but substantive tools exercised with the force of political and legal authority. The ICC Sub-Committee, in essence, may be seeking to ensure that the MNHRC and the Myanmar government are fulfilling roles as active promoters of the international system of human rights protection.

It should be noted that a 'B' accreditation is not entirely undesirable. The ICC Sub-Committee may grant a 'B' status to indicate either that: (1) while the Enabling Law is not fully compliant with the Paris Principles, the law is a good-faith effort to meet requirements of NHRIs to a degree that its problematic sections can be rectified

<sup>90</sup> *Id.* at 11-12.

<sup>91</sup> *Id.* at 12-13.

<sup>92</sup> *Id.* at 14.

<sup>93</sup> *Id.* at 12-13.

via additional amendments for full compliance; or (2) the MNHRC did not supply enough information to allow determination of compliance with the Paris Principles. Under either scenario, a 'B' rating not only proffers a manageable outcome for the MNHRC to maintain a presence in international human rights forums as an observer, but also continues to resolve its compliance issues with the Paris Principles. In addition, a 'B' rating functions as a 'compromise' between supporters and detractors of the MNHRC, since it allows the ICC Sub-Committee to publicly note the issues in the Enabling Law as being problematic but still let the MNHRC continue its growth within the international human rights protection system.

Furthermore, in all cases where the ICC Sub-Committee has concerns about accreditation, it can specify the changes that need to be made for future review. Concerns that are raised in ICC Sub-Committee reports must be addressed by the offending NHRI in any subsequent review, with the committee expecting either some proof of efforts to rectify the concerns, or a reasonable explanation as to why efforts have not been made.<sup>94</sup> This means that despite a 'B' rating, the MNHRC would have an opportunity to seek reaccreditation in a future session of the ICC Sub-Committee.

## 5. Conclusion

This research would have implications extending to other NHRIs. In response to critics and supporters of the MNHRC, the author sought to demonstrate how third parties could use the Paris Principles to conduct an independent evaluation of the MNHRC. Current debates over the MNHRC pose competing arguments regarding its conformity to international standards for NHRIs articulated by the Paris Principles. He also presented a way to perform an independent assessment of the Enabling Law using the Paris Principles as marking criteria. Here, the Enabling Law was invoked as a case study demonstrating how the third parties could use the Paris Principles to conduct independent evaluations of NHRIs.

In addition, this paper has shown how such evaluations can provide a means of

<sup>94</sup> International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights Sub-Committee on Accreditation, *Compilation of the SCA Rules, Working Methods and Template for Statement of Compliance* (2016), available at [http://nhri.ohchr.org/EN/AboutUs/ICC/Accreditation/Documents/Compilation%20of%20the%20Rules%20and%20Working%20Methods%20of%20the%20SCA\\_Eng\\_February\\_2014.doc](http://nhri.ohchr.org/EN/AboutUs/ICC/Accreditation/Documents/Compilation%20of%20the%20Rules%20and%20Working%20Methods%20of%20the%20SCA_Eng_February_2014.doc) (last visited on Oct. 14, 2016).

identifying issues outside of NHRIs. The Enabling Law struggles in several aspects which bring it to the rating between 'A' and 'C.' Such issues prevent it from achieving an 'A' rating, but are not so extensive as to warrant a 'C' rating. As a result, the law would achieve a 'B' rating under the Paris Principles. The discussion compared this analysis with that of the ICC Sub-Committee accreditation review of the MNHRC from November 2015. Extensive parts of the ICC Sub-Committee accreditation report have matched this study in terms of identifying the same issues and the same accreditation rating in the Enabling Law. Some parts of the report, however, have not matched this research. It involves the issues lying outside the Enabling Law, particularly the energy of the MNHRC and the Myanmar government in advancing the international human rights protection system in Myanmar. This reveals how the ICC Sub-Committee process and the Paris Principles can be used to address human rights issues beyond the texts of laws implementing NHRIs.

