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Article


Jonathan Liljeblad†

In Human Rights Resolution 2005/74, the United Nations Commission on Human Rights recognized the importance of National Human Rights Institutions (NHRIs) in protecting human rights and called for further work to nurture their growth. In an effort to address critiques that it fell short of U.N. expectations for NHRIs, in March 2014 Myanmar’s government enacted the Myanmar National Human Rights Commission Law to reform the Myanmar National Human Rights Commission (MNHRC) in accord with the Paris Principles. Despite the new law, the MNHRC continues to be criticized for ineffectiveness and lack of progress. This Article argues that the MNHRC is challenged by issues tied to Myanmar’s political transition, and that as a result evaluations of the MNHRC need to be more cognizant of the context within which the MNHRC works. This Article takes the MNHRC as a case study in the development of NHRIs and sees the MNHRC’s struggles as exemplifying the challenges facing nascent NHRIs in transition states, with the implication that greater contextual understanding is needed to generate evaluations that are more constructive in nurturing the abilities of NHRIs to advance the international human rights system.

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## INTRODUCTION

National Human Rights Institutions (NHRIs) are independent, state-created entities tasked with promoting international human rights on a local level. In 2005, the Commission on Human Rights (replaced by the Human Rights Council in 2006) issued a resolution recognizing the importance of NHRIs in protecting human rights and calling for further work to nurture their growth.\(^1\) Then-Commissioner Louise Arbour affirmed the sentiments of the resolution in her March 2005 speech to the 61st Session of the Commission on Human Rights, noting the United Nations’ sustained support for NHRIs as a way of helping states meet international human rights standards.\(^2\) In order to fulfill such expectations, the United Nations (U.N.) maintains guidelines set forth in the 1993 Paris Principles that require NHRIs to maintain independence from their state, an inclusive and

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transparent selection process, adequate capacity, and an active commitment to advancing the U.N. system of human rights. Compliance with the Paris Principles is assessed via an accreditation system administered by the International Coordinating Committee of National Human Rights Institutions (now called the Global Alliance of National Human Rights Institutions) Sub-Committee on Accreditation (ICC Sub-Committee), which administers an accreditation system to assess NHRI compliance to the Paris Principles.

The Myanmar National Human Rights Commission (MNHRC) is the entity tasked with carrying out NHRI activities in Myanmar. In an effort to address U.N. concerns that the MNHRC did not meet the Paris Principles, in March 2014 Myanmar’s government enacted the Myanmar National Human Rights Commission Law (Enabling Law) to reform the MNHRC in accord with the Paris Principles. Following the Paris Principles, the law provided a statutory basis for the MNHRC and removed it from its previous status under presidential discretion. It also based the MNHRC’s mandate on universal human rights; explicitly described its powers of investigation, publication of reports, referrals and recommendations, and promotion of human rights; and granted it operational and financial independence. In essence, the Enabling Law institutionalized the MNHRC as an instrument of the international human rights system in Myanmar.

The ICC Sub-Committee, however, found these changes insufficient. In its November 2015 review of the MNHRC, the ICC Sub-Committee

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5. OHCHR TRAINING PUBLICATION ON NHRIS, supra note 3, at 44-53.
10. Id.
awarded it a “B” accreditation that fell short of the ideal “A” rank. The ICC Sub-Committee justified its rating by citing issues regarding membership, funding, independence, and activism that the committee saw as impediments to the mission of the MNHRC as an NHRI. In particular, the ICC Sub-Committee criticized the MNHRC for not being more rigorous in exercising its mandate to address human rights violations in Myanmar. The ICC Sub-Committee’s perspective echoes the arguments of critics who accuse the MNHRC of failing to respond to allegations of human rights violations and of being too circumspect in its interactions with the Myanmar government. For such voices, the MNHRC is an ineffective institution with little commitment to advancing human rights in Myanmar.

This Article takes the MNHRC as a case study on the difficulties of NHRI's, with the MNHRC's struggles exemplifying the challenges facing nascent NHRI's in transition contexts. Analysis of the MNHRC can provide insights for understanding NHRI's in other countries. Specifically, this Article argues that an evaluation of the MNHRC needs to be placed within the larger context of Myanmar's ongoing political transition, and that doing so shows that the MNHRC's apparent measured progress reflects an incrementalist strategy appropriate for the MNHRC's challenges. The analysis begins with a brief background introducing the MNHRC, the standards for NHRI's set by the U.N. Paris Principles, and the accreditation system that the ICC Sub-Committee exercises to monitor NHRI's. The analysis proceeds to discuss the context of Myanmar's democratization, identifying the risks to the MNHRC posed by the country's democratic transition. Following a review of contextual risks, the analysis continues with an explanation of why the MNHRC's behavior is consistent with scholarly arguments in favor of an incrementalist approach that ties the MNHRC's growth to the pace of political reform. The discussion then turns to a cautionary tale that shows how an aggressive agenda by another Myanmar institution, the Constitutional Tribunal, led to a self-defeating confrontation with Myanmar's Parliament. After this, the Article offers data.
that shows the MNHRC has exercised its powers in a manner consistent with an incrementalist strategy and has managed to further its mission of promoting human rights while doing so. The Article concludes by drawing implications from the case of the MNHRC for other NHRIIs and identifying further directions for research that can extend the findings of the analysis. The Article finishes with a call to contextualize evaluations of the MNHRC and other NHRIIs so as to better direct criticism towards more constructive approaches that facilitate their improvement.

**METHODOLOGY AND TERMINOLOGY**

Methodologically, the bulk of this Article is based on an ethnographic study conducted in Myanmar under a United States Fulbright Scholar grant from 2014-2015. It should be noted that while the Myanmar government and the MNHRC are working to make their documents publicly accessible, they have not made all their materials available online. Hence, the MNHRC materials for this study involve a mixture of documents posted on the MNHRC website along with documents—particularly an English-language translation of the 2014 Enabling Law—acquired in person from MNHRC members, supplemented with interviews and field notes made as an observer of the MNHRC offices in Yangon from 2015-2016. In contrast, materials from the United Nations and the news media regarding Myanmar and the MNHRC are readily available online, and are used as primary and secondary source materials.

To facilitate the discussion for readers not familiar with Myanmar, this Article uses English terminology to refer to Myanmar’s political institutions. While Myanmar’s national government uses a quasi-democratic model with identifiable executive, legislative, and judicial branches, the nomenclature differs somewhat from Western terminology. The words “President” and “Supreme Court” are used in the same way as in the West to refer to the heads of the executive and judicial branches. However, this Article substitutes the word “Parliament” in lieu of “Hluttaw” for Myanmar’s national bicameral legislature, with the terms “Upper House” and “Lower House” used instead of “Amyotha Hluttaw” and “Pyithu Hluttaw,” respectively. Beyond Myanmar source materials, this Article uses English-language versions of U.N. texts provided on their original U.N. websites.

**I. NHRI ACCREDITATION AND THE PARIS PRINCIPLES**

As defined by the United Nations, NHRIIs “promot[e] and monitor[] the effective implementation of international human rights standards at the national level”16 and help “bridge the implementation gap between the international human rights obligations and actual enjoyment of human

rights on the ground."17 Because they are formed by statutory or constitutional mandate, NHRIs are extensions of the state. However, under the guidelines of the Paris Principles, their mandates must be sufficient to allow them to function as neutral entities independent of both governments and non-governmental organizations (NGOs).18 The Paris Principles call upon NHRIs to promote and protect human rights by educating and training government and civil society on human rights, providing publicly available advice and reports on human rights, proactively identifying and investigating human rights violations, monitoring state enforcement of human rights, and encouraging the provision of remedies to victims of human rights abuses.19 NHRIs are, in essence, instruments of the U.N. human rights system that serve to oversee, critique, and assist their respective states and societies in meeting U.N. human rights standards.20

In doing so, NHRIs are also expected to function as coordinators between their respective states and international human rights bodies so that national human rights efforts are consistent with international human rights expectations.21 This includes maintaining engagement with the various components of the U.N. human rights system, including its human rights treaties, the Human Rights Council (HRC), and the Office of the United Nations High Commissioner for Human Rights (OHCHR).22 It also includes engagement with the International Coordinating Committee (ICC) for NHRIs, regional bodies for NHRIs, other national NHRIs, and international and national NGOs and civil society organizations (CSOs).23 Because of the role they play in harmonizing national and international human rights regimes, NHRIs occupy a critical position in the global human rights system that Louis Bickford has described as the "convergence towards the global middle" that marks the confluence of two complementary trends: international NGOs that seek proximity with human rights issues in local contexts often located in the Global South, and local NGOs that seek more direct engagement with the international human rights system.24


19. OHCHR TRAINING PUBLICATION ON NHRIS, supra note 3, at 21-26.


21. See OHCHR TRAINING PUBLICATION ON NHRIS, supra note 3, at 23-25.

22. See id. at 25.

23. See id. at 23-25.

The proliferation of NHRIs has accelerated over time, starting in the 1960s and 1970s with a small minority of U.N. member states located primarily in Europe and then multiplying after the 1993 Paris Principles at a rate of more than five NHRIs per year, such that by 2011 the United Nations counted NHRIs in more than 130 countries. The MNHRC thus reflects an emerging trend in the international human rights system and marks Myanmar’s attempt to be consistent with the international community. It also means that the MNHRC shares the same issues faced by other NHRIs: 1) The expectations of the Paris Principles for NHRIs, which articulate the criteria NHRIs must meet to gain accreditation within the U.N. human rights system; 2) a “justification deficit” in terms of justifying the need for human rights both for the state and society, particularly in Asia, where human rights have been associated with a Western worldview and challenged as being inconsistent with Asian values; and 3) the need to be independent from states and societies while still being engaged with both.

In order to monitor the status of NHRIs, the ICC Sub-Committee conducts a periodic review that evaluates each NHRI against the standards articulated by the Paris Principles. The Paris Principles set the criteria to deem an NHRI fully functional: autonomy and independence from the nation’s government, an inclusive and transparent selection process that provides a pluralist composition representative of the society, adequate legal power and physical resources to advance its mandate, and a mandate that commits to the promotion and protection of the U.N. system of human rights. According to the OHCHR, the Paris Principles constitute a globally recognized test of NHRI “legitimacy and credibility.” Hence, in applying the Paris Principles to evaluate NHRIs, the ICC Sub-Committee is making an authoritative determination of whether an NHRI is a member in good standing with the U.N. human rights system.

Each NHRI is scheduled to be evaluated once every five years, with the ICC Sub Committee reviewing an NHRI and issuing it an accreditation ranking of “A,” “B,” or “C.” These rankings reflect the normative status of an NHRI but also carry substantive consequences. An “A” ranking...
confirms that an NHRI is in full compliance with the criteria of the Paris Principles and is allowed to 1) vote in international and regional meetings of NHRRIs, and 2) participate in the sessions of the U.N. Human Rights Council. This includes participating in the Human Rights Council’s Universal Periodic Review mechanism, which publicly evaluates the human rights records of states.\textsuperscript{33} A “B” ranking indicates that an NHRI only partially complies with the Paris Principles or that it has not submitted sufficient documentation for ICC Sub-Committee review, and is hence restricted to observer status in international and regional NHRI meetings and HRC proceedings.\textsuperscript{34} A “C” ranking means that an NHRI does not comply with the Paris Principles and is not allowed to hold rights or privileges within any U.N. human rights fora.\textsuperscript{35}

\section*{II. THE MNHRC’S “B” ACCREDITATION RATING}

The MNHRC is the successor to a human rights committee that was initiated by Myanmar’s State Peace and Development Council in 2002 but that functionally ceased to exist in 2004.\textsuperscript{36} The current MNHRC was created by an order from President Thein Sein in September 2011\textsuperscript{37} in response to recommendations made during the peer review phase of the HRC Universal Periodic Review of Myanmar.\textsuperscript{38} The MNHRC quickly ran into difficulties with both international and domestic observers. The United Nations argued that it did not satisfy the Paris Principles, which require NHRRIs to have a statutory or constitutional basis,\textsuperscript{39} and the Myanmar Parliament denied the Commission’s request for budget appropriations in March 2012.\textsuperscript{40} The Parliament argued that the presidential order had violated the Constitution because it bypassed the Parliament and that the MNHRC could not be considered a Constitutionally legitimate body of the state in the absence of Parliamentary approval.\textsuperscript{41} In response, the MNHRC

\begin{itemize}
\item \textsuperscript{33} Id.
\item \textsuperscript{34} Id.
\item \textsuperscript{35} Id.
\item \textsuperscript{36} See David Kinley & Trevor Wilson, Engaging a Pariah: Human Rights Training in Burma/Myanmar, 29 HUM. RTS. Q. 368, 382-84, 394-95 (2007).
\item \textsuperscript{39} See 2012 Report of the Special Rapporteur, supra note 7, at 19.
\item \textsuperscript{40} See MNHRC Statement No. 2/2012, supra note 8.
\item \textsuperscript{41} Id.
\end{itemize}
drafted legislation that would allow the Parliament to enact the MNHRC as an autonomous and independent body eligible for funding.\textsuperscript{42} Parliament ultimately passed this legislation as the Enabling Law, reshaping the MNHRC into a government-funded national body tasked with promoting international human rights.\textsuperscript{43} As a result, whether measured by its reconstitution under the 2014 Enabling Law or its inception under the September 2011 presidential decree, the MNHRC is a fledgling institution formed at a nexus of tensions in two dimensions: 1) between the international human rights system versus Myanmar's domestic politics, and 2) between Myanmar's President and Myanmar's Parliament.

The newly reconstituted MNHRC is Myanmar's attempt to meet U.N. expectations for NHRIs as laid out in the Paris Principles.\textsuperscript{44} Unfortunately, despite the Parliament's attempt to bring the MNHRC into compliance with the Paris Principles, the MNHRC encountered several critiques from the ICC Sub-Committee during its inaugural accreditation review in November 2015. First, the ICC Sub-Committee found that the MNHRC fell short of the Paris Principles requirements for transparency in the selection of commissioners, observing that the selection process given by the Enabling Law was not public and afforded little participation for civil society organizations.\textsuperscript{45} Second, the ICC Sub-Committee saw the MNHRC as not meeting expectations in the Paris Principles for greater vigilance towards situations of internal unrest between ethnic groups, calling upon the MNHRC to exercise greater activism in addressing the rights of Rohingya and other minorities.\textsuperscript{46} Third, the ICC Sub-Committee charged the MNHRC with not meeting the Paris Principles in regards to pluralism, noting that nine out of eleven commissioners were men and hence did not reflect the gender diversity of Myanmar society.\textsuperscript{47} Fourth, the MNHRC did not meet the Paris Principles requirement for independence, in that the ICC Sub-Committee noted that the MNHRC's budget was controlled by the President's Office.\textsuperscript{48} Fifth, the MNHRC suffered from a limited mandate in that it was required by the Enabling Law to provide prior notification in conducting investigations into places of confinement. The ICC Sub-Committee commented that the MNHRC would need to engage in investigations without prior notification in order to satisfy the Paris Principles.\textsuperscript{49} Sixth, the ICC Sub-Committee advised the MNHRC that as


\textsuperscript{44} For a recounting of these principles, see generally sources cited supra note 3.

\textsuperscript{45} November 2015 ICC Sub-Committee Report, supra note 11, at 11.

\textsuperscript{46} Id. at 12.

\textsuperscript{47} Id.

\textsuperscript{48} Id. at 12-13.

\textsuperscript{49} Id. at 13.
much as it met the Paris Principles in issuing statements to the Myanmar
government, it also needed to engage with the international human rights
system.\textsuperscript{50} Last, the ICC Sub-Committee urged the MNHRC to issue its
statements not only to the President but also to the Parliament to better
satisfy Paris Principles standards regarding NHRI mandates.\textsuperscript{51} Because of
these issues, the MNHRC received a “B” accreditation in its November 2015
review by the ICC Sub-Committee.\textsuperscript{52}

The MNHRC’s “B” accreditation places it within the minority of NHRIs
in the U.N. human rights system. As of August 2016, the ICC Sub-
Committee has accredited 117 NHRIs, awarding “A” status to seventy-five，“B” to thirty-two, and “C” to ten.\textsuperscript{53} Even within the regional confines of the
six NHRIs that currently exist in Southeast Asia, the MNHRC’s “B” status is
matched only by Thailand’s National Human Rights Commission, with the
NHRIs for Indonesia, Malaysia, the Philippines, and Timor-Leste each
holding an “A” ranking.\textsuperscript{54} In addition, the MNHRC’s “B” accreditation is
also atypical relative to NHRIs undergoing inaugural review: historically,
seventy-nine countries received an “A” in their initial review while only
thirty-eight received a “B” and ten received a “C.”\textsuperscript{55} Within the U.N. human
rights system, a “B” ranking carries negative connotations in two ways: 1) it
incurs procedural restrictions that limit the MNHRC to observer status
within the HRC and international NHRI mechanisms, without power to
make comments or vote;\textsuperscript{56} and 2) it represents an ICC Sub-Committee
finding that the MNHRC is deficient with respect to global standards for
NHRIs set by the U.N.’s Paris Principles,\textsuperscript{57} and so poses a reputational cost
to the MNHRC.

Within the U.N. human rights system, the stigma of a “B” accreditation
is tempered by the general orientation of the ICC Sub-Committee
accreditation process, which follows a periodic cycle of five years that
allows underperforming NHRIs to repeat their reviews and potentially
improve their accreditation status.\textsuperscript{58} Since the ICC Sub-Committee initiated
accreditation reviews in 1999, there have been seventeen cases where
NHRIs improved from a “B” ranking to an “A” and one case where an
NHRI improved from a “C” to a “B” ranking.\textsuperscript{59} This is facilitated by the

\begin{itemize}
\item 50. Id. at 13-14.
\item 51. Id. at 14.
\item 52. Id. at 11.
\item 53. Chart of the Status of National Institutions, Accreditation Status as of 5 August 2016,
[https://perma.cc/2ELY-DW7D] [hereinafter Chart of the Accreditation Status of National
Institutions].
\item 54. Id.
\item 55. Id.
\item 56. GANHRI Sub-Committee on Accreditation (SCA), supra note 32.
\item 57. Paris Principles: 20 Years Guiding the Work of National Human Rights Institutions,
supra note 31.
\item 58. May 2013 ICC Sub-Committee Observations, supra note 17, at 58 & n. 4 (mentioning the
adoption of a re-accreditation process occurring every five years).
\item 59. Chart of the Accreditation Status of National Institutions, supra note 53.
\end{itemize}
nature of accreditation reviews, which feature outcome reports involving recommendations enumerating the ways NHRIs like the MNHRC can act to improve their rankings. \(^6\) With respect to the MNHRC, in issuing its critiques the ICC Sub-Committee report consistently uses language that "encourages" the MNHRC to adopt the report's recommendations and references these recommendations in relation to the Paris Principles, \(^6\) reflecting a tone directed less at coercing compliance and more towards helping the MNHRC identify steps towards an improved ranking. The constructive nature of the ICC Sub-Committee report is further demonstrated by its consideration of the endemic conditions within which the MNHRC operates, with the report explicitly stating that it commends the MNHRC "for its continuing efforts to promote human rights despite the challenging context in which it operates." \(^6\) In making this comment, the ICC Sub-Committee indicates the importance of context in evaluating NHRIs like the MNHRC.

The supportive nature of the ICC Sub-Committee's approach towards the MNHRC contrasts with the tenor of critics who use the "B" rating to criticize the MNHRC. For example, members of Burma Partnership, a coalition of human rights NGOs focused on Myanmar, argue that the MNHRC's "B" accreditation "is a damning indictment of its ineffectiveness and lack of impact." \(^6\) Similarly, the Asian NGO Network on National Human Rights Institutions questions the legitimacy of the MNHRC so long as it fails to respond to the recommendations of the outcome report from the ICC Sub-Committee's accreditation review. \(^6\) The positions represented by these critiques deviate from the ICC Sub-Committee's constructive approach and take a more negative posture that goes so far as to call for the ICC Sub-Committee to deny the MNHRC's accreditation altogether. \(^6\)

The harshness of the MNHRC's critics is not fully justified, since it overlooks the ICC Sub-Committee's appreciation for the context within which the MNHRC operates. While a "B" rating represents the ICC Sub-Committee's call for an NHRI to make further progress towards the Paris Principles, its rhetorical use by the MNHRC's critics as authoritative proof of ineffectiveness ignores the complexities of Myanmar's transition. It is important to recognize the contextual issues posed by Myanmar's transition, because they direct the strategic choices made by the MNHRC to pursue the stability and legitimacy necessary to assure its survival and

\(^6\) See, e.g., November 2015 ICC Sub-Committee Report, supra note 11, at 11-14.

\(^6\) Id.

\(^6\) November 2015 ICC Sub-Committee Report, supra note 11, at 11.


\(^6\) Id.
growth as an institution capable of promoting human rights within Myanmar. The following sections attempt to illuminate Myanmar’s political context and show that an incrementalist approach by the MNHRC, while not in line with the Paris Principles or expectations from civil society, is an appropriate strategy towards long-term goals of instilling an appreciation and observance for the U.N. system of human rights in Myanmar.

III. THE CONTEXT OF MYANMAR’S POLITICAL TRANSITION

This Article follows prior studies of the Commission performed by Melissa Crouch, Niki Esse de Lang, David Kinley, and Trevor Wilson, all of which responded in part to criticism of the MNHRC. These works, however, studied the Commission before the 2014 Enabling Law, whereas this Article undertakes an analysis of the current incarnation of the MNHRC in the wake of the 2014 Enabling Law. In doing so, this Article notes Anne Smith’s argument that each NHRI must create a space for itself as an agent for universal human rights within the particular context of its respective country. This involves a recognition that an NHRI is more effective when it is relevant to the circumstances unique to its country, which implies that an evaluation of the MNHRC should consider the contextual issues within Myanmar that pose risks for the MNHRC’s existence.

The consideration of context is an argument that precedes the ICC Sub-Committee’s 2015 accreditation review of the MNHRC. In 2011, then-High Commissioner for Human Rights Navi Pillay stated that “[i]t will inevitably require time and support” for the MNHRC “to be fully accepted on both the national and international stages.” Navi Pillay made her comments in reference to the complexities of Myanmar’s transition, and so tied her assessment of the Commission to the country’s democratization process. Hence, this Article works to counter civil society critiques of the MNHRC by affirming a perspective held by the ICC Sub-Committee and the OHCHR that holds that Myanmar’s path to democracy poses issues challenging the MNHRC. This Article argues that such contextual issues must be given consideration in making an accurate evaluation of the MNHRC.

There are several identifiable issues that threaten the aspirations of the MNHRC in the context of Myanmar’s transition: the country’s struggles to
engage with the international human rights system, the afflictions of underdevelopment and limited capacity, the uncertain complexities of the country's democratization, and the persistence of military influence. Each is analyzed individually below.

### A. Nascent Human Rights

The MNHRC must reckon with the status of Myanmar's relations with the U.N. international human rights system. The MNHRC operates within a country that was recognized by the United Nations for having a historical human rights record so poor that it required elevation to a status deserving of increased scrutiny from the OHCHR. Specifically, the then-existing Commission on Human Rights in 1992 assigned a dedicated Special Rapporteur on the Situation of Human Rights in Myanmar (Special Rapporteur) with a mandate to monitor the country. Despite this, the status of human rights in Myanmar continues to be fragile. Even though it was among the original signatories to the Universal Declaration of Human Rights, the country has not ratified or acceded to the vast majority of human rights treaties, with the exceptions being the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, acceded to in 1997), the Convention on the Rights of the Child (CRC, acceded to in 1991), and the Convention on the Rights of Persons with Disabilities (CRPD, acceded to in 2011). Myanmar is a signatory to the International Covenant on Economic, Social, and Cultural Rights, but has not ratified it. In addition, in separate statements to the U.N. General Assembly in 2015, the Special Rapporteur and the HRC expressed ongoing concerns about democratic reforms, electoral changes, discrimination against minorities and women, escalating conflicts, environmental degradation and development inequalities, and the weak rule of law. In both statements, the Special Rapporteur and the HRC called for Myanmar's government to improve its observation of the rights of free expression, association, assembly, and free and independent media. They also called for more efforts to halt arbitrary arrests and detentions, torture, sexual

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71. See id.
74. Id.
violence, and forced displacement.\textsuperscript{77} In order to address these concerns, they urged the Myanmar government to approve a country office for the Office of the United Nations High Commissioner for Human Rights\textsuperscript{79} and—of particular note for the MNHRC—to ensure “that the National Human Rights Commission is able to discharge its functions fully and in accordance with the [Paris] Principles.”\textsuperscript{79} As a result of the concerns raised by these statements, the United Nations decided to extend the mandate of the Special Rapporteur for another year.\textsuperscript{80} Even as the United Nations has recognized Myanmar’s recent progress on human rights, it is apparent that the United Nations maintains concerns that the recognition of human rights in Myanmar is not assured and that the government struggles to understand or incorporate the elements of universal human rights. The implication for the MNHRC is that it faces a significant task in advancing human rights in Myanmar. Phrased in Anne Smith’s terminology, the MNHRC has a large burden to create a space for itself as an institution and human rights as a practice within Myanmar’s political system.\textsuperscript{81}

\section*{B. Underdevelopment and Limited Capacity}

Concomitant with Myanmar’s difficulties with human rights is its challenges with underdevelopment and lack of capacity. Under British rule, Myanmar was among the wealthiest countries in Southeast Asia.\textsuperscript{82} Since that time, however, the country has descended to become one of the poorest countries in the Asia region. While the United Nations and the World Bank provide promising data that show Myanmar’s gross domestic product (GDP) in 2015 as being roughly $62.6 billion\textsuperscript{83} with an annual growth rate between 7.3\%\textsuperscript{84} and 8.7\%,\textsuperscript{85} the United Nations also reports an annual GDP per capita of US $1,244\textsuperscript{86} and a Human Development Index rank of 145\textsuperscript{th} out of 188 measured countries\textsuperscript{87} that make Myanmar the

\begin{footnotesize}
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\item[\textsuperscript{77}]H.R.C. Res. 28/23, supra note 75, ¶ 6; 2015 Report of the Special Rapporteur, supra note 72, ¶¶ 68-69.
\item[\textsuperscript{78}]H.R.C. Res. 28/23, supra note 75, ¶ 14.
\item[\textsuperscript{79}]Id. ¶ 5.
\item[\textsuperscript{80}]Id. ¶ 16.
\item[\textsuperscript{81}]Smith, supra note 18, at 905-907.
\item[\textsuperscript{82}]Sean Turnell, Least Free: The Economic Consequences of Fifty Years of Totalitarian Rule in Burma, in THE OPEN SOCIETY AND ITS ENEMIES IN EAST ASIA 78, 79 (Gregory Moore ed., 2014).
\item[\textsuperscript{84}]Id.
\item[\textsuperscript{86}]Id. The World Bank places this number lower, at $1,161.50. World Bank Group, GDP Per Capita (Current US$), http://data.worldbank.org/indicator/NY.GDP.PCAP.CD [https://perma.cc/E4VQ-WGH2].
\item[\textsuperscript{87}]UNDP, Human Development Report 2016: Human Development for Everyone,
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poorest country in the Association of Southeast Asian Nations.\(^8^8\) Much of this disparity is driven by the country’s allocation of spending. The government reported a 2015-2016 fiscal year budget with 6.8% spent on education and 3.7% on healthcare, which respectively represent the lowest education budget and the third lowest healthcare budget in ASEAN.\(^8^9\) Working to resolve such issues is a government recognized by international observers as lacking capacity in all areas and at all levels, with weak institutions, poor rule of law, opaque leadership, dysfunctional civil service, poor infrastructure, inadequate resources, and insufficient skills.\(^9^0\) While development and technical aid from the international community increased in the wake of Myanmar’s 2011 elections and initiation of political reforms, it continues to face extensive challenges in addressing its development issues.\(^9^1\)

Such problems pose two consequences for the MNHRC. First, the extent of underdevelopment makes the lack of recognition of human rights only one of multiple issues affecting Myanmar that include an anemic economy, poor human development, misallocated government spending, extensive corruption, and weak rule of law. The state of conditions in Myanmar gives each of these issues an urgency that vies with human rights for priority in government policy considerations, and hence threatens to distract government attention away from the work of the MNHRC. Second, whatever attention the government may be able to provide is be frustrated by the lack of government capacity to respond to any of the problems afflicting the country. Whatever capacities the Myanmar government may muster must be rationed among multiple demands, raising the possibility

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\(^9^1\) See generally Skidmore & Wilson, supra note 90, at 16-19; Harding, supra note 90, at 377-79; Nixon et al., supra note 90, at 76-84.
of assistance that is short of the specific aspirations of institutions like the MNHRC.

C. Uncertain Complexities of Transition

A further challenge to the work of the MNHRC is the nature of Myanmar's political environment, which features an array of diverse interests whose fissures run deep enough to fracture the country's political system into a complex, pluralist landscape of competing perspectives. Myanmar's transition involves a retreat of military control and a corresponding expansion of civil society actors, fomenting public politics pushing various agendas for reform. This takes Myanmar politics beyond a simple military-versus-civilian dichotomy, with a spectrum of factions with distinct interests which at various times converge or diverge in a transition discourse that Larry Diamond characterizes as involving questions about the path "from authoritarianism to democracy, from military to civilian rule, from a closed and monopolistic to an open and competitive economy, and from an ethnically fractured and fissiparous state to a more viable and coherent union." This is reflected in the national government, where despite the landslide win by Daw Aung San Suu Kyi's National League for Democracy party in the 2015 election, there are fifteen ethnic political parties and parliamentarians from twenty-nine ethnicities representing distinct constituencies. In addition to ethnic divisions, there are divergent views among ministers and parliamentarians about the form and reach of political and economic reforms. Exacerbating the political complexities are factions within political parties, within individual ministries, and between national and local levels of government vying to affect the country's political processes. Finally, compounding the dynamics of domestic forces are the activities of international efforts that seek to explore "third views" between the military and pro-democracy forces. Such factors create a pluralist terrain of diverse political actors that may be unified in a desire for transition but differ in the manner in which they think it should be done and the ultimate result it is supposed to produce.

96. Kyaw Yin Hlaing, Understanding Recent Political Changes in Myanmar, 34 CONTEMP. SOUTHEAST ASIA 197, 212-14 (2012); Zöllner, supra note 92, at 63-65.
97. Zöllner, supra note 92, at 69-70.
These complexities are not always benign and have historically generated tensions significant enough to threaten the country’s stability. In particular, while Myanmar grants official recognition to 135 ethnic nationalities, the country continues to face tensions with eleven armed groups seeking varying degrees of sovereignty. The most persistent tensions are tied to ethnic conflicts in Myanmar’s border areas, which have been fueled by a lucrative drug trade. There have been multiple attempts at cease-fires and peace talks, with the most recent iteration commencing in 2016, but there continue to be regions of the country subject to violence between armed groups struggling for power. Hence, the fractures in Myanmar’s politics pose a fluid environment with diverse interacting interests whose differences frustrate efforts to focus efforts at resolving the country’s challenges—including issues of human rights.

Compounding these divisions is the uncertainty arising from political reforms undertaken by the government. Such uncertainty is extensive because it involves not only democratic transition but also institutional change. Scholars like Arend Lijphart and Geoffrey Pridham believe democratic transitions transforming power relations alter political processes. Political processes fashion new political institutions whose rules delineate the political spaces within which various actors seek to advance their interests and thus shape the foundational directions of new democracies. Guillermo O’Donnell and Philippe Schmitter observe that it is characteristic of the transition that during it the rules of the political game are not defined. Not only are they in constant flux, but they are usually arduously contested; actors struggle not just to satisfy their immediate interests... but also to define rules and procedures whose configuration will determine likely winners and

losers in the future.105

Echoes of this are apparent in Myanmar, with the process of political reform unsettling historical power relations to fashion a form of democracy, with nascent institutions like the presidency, the bicameral legislature, and the MNHRC working to set new rules for the operation of Myanmar’s version of parliamentary democracy.106

Such events have consequences for the MNHRC’s work to create a space for itself in Myanmar’s political system. The experience of the MNHRC bears out predictions in the literature addressing the challenges of institutions within political transition environments. In particular, Josep Colomer, along with O’Donnell and Schmitter, observes that in the early stages of transition actors are unsure of their strength relative to each other and are hence unsure about the possible outcomes of their actions.107 Such confusion forces actors to make decisions based on perceived expectations and calculated threats.108 This means that the sense of risk is continually changing and actors are left in a state of constant adaptation.109 Under such conditions, any work done to fortify institutions is undertaken with an underlying focus on ensuring survival through pursuit of the most advantageous positions in government.110 Hence, as an actor within the political space of Myanmar’s transition, the MNHRC is working within an environment of uncertainties regarding its strength relative to other government actors and the outcomes that may result from advocating for human rights. Under such conditions, the MNHRC must manage its growth based on its understanding of the expectations, promises, and threats posed by different factions vying for power in the various offices of government. Given the flux of the political order during Myanmar’s democratization, the MNHRC has to constantly reassess its understanding of the political system and adapt to a changing set of risks. There are two resulting implications: 1) The MNHRC cannot fulfill its mission of advancing universal human rights without sometimes prioritizing its own institutional survival; and 2) whatever interests in the MNHRC other political actors may express, their true motives towards the MNHRC may be less about human rights and more about serving ulterior political agendas. Thus, the MNHRC is vulnerable to political forces that may dilute
D. Persistent Military Influence

Since its independence, Myanmar has experienced several decades of military rule. The post-military government that has recently emerged is defined by the 2008 Constitution, which creates a hybrid government with both civilian and military authority, with 25% of the seats in Parliament reserved for the military and the military controlling nominations of ministers for the Ministry of Defense, Ministry of Border Affairs, and Ministry of Home Affairs. The future of the military’s presence in Myanmar government is reflected by the public statements of military Commander-in-Chief General Min Aung Hlaing, who provided an interview to the Washington Post on November 23, 2015 that described the role of the military in Myanmar and the prospects for greater civilian control over government. In the interview, the Washington Post reporter asked General Hlaing if the military would cede power to civilian authority, and he responded: “If the country’s situation is stable, one day we will do what you [the reporter] are talking about.” He supplied three indicators of stability: resolution of the country’s ethnic conflicts, maturation of multiparty democracy, and improved relations between ethnic groups and the government. In connecting Myanmar’s lingering conflicts to the necessity of the military’s involvement in government, General Hlaing’s stance is consistent with the Myanmar military’s historical perception of itself as a defender of national unity and peace. If his statements are taken at face value, they indicate that a military presence in Myanmar government will continue so long as General Hlaing deems there are threats to the country’s stability.

O’Donnell and Schmitter see civilian-military relationships like the one in Myanmar as marking a democratic transition, in that they represent an interval between pure authoritarianism and functional democracy. O’Donnell and Schmitter note that “during the transition, to the extent that there are any effective rules and procedures, these tend to be in the hand of authoritarian rulers.” Sujian Guo and Gary Stradiotto argue that the balance of power between various actors in transitions is important in that...
the side “with the power advantage is inclined to design electoral rules to secure its place in the new democracy.”\textsuperscript{119} In the case of regime-led transitions, Guo and Stradiotto see change as being led by incumbents.\textsuperscript{120} Guo and Stradiotto are consistent with the case of Myanmar, with the military’s State Law and Order Restoration Council (SLORC)—later renamed the State Peace and Development Council (SPDC)—controlling a constitutional drafting process that lasted two decades before culminating in a 2008 Constitution that enshrined the military’s seats in the Parliament and granted it control over the ministries of Defense, Border Affairs, and Home Affairs.\textsuperscript{121} Gretchen Casper and Michelle Taylor see the persistence of authoritarian elements as a risk associated with negotiated transitions, since negotiations—and hence the likelihood of authoritarian or democratic outcomes—are a function of the relative bargaining positions of authoritarian and pro-democracy actors.\textsuperscript{122} Following Casper and Taylor, the military’s control over the constitutional drafting process reflected a power imbalance relative to pro-democracy voices that was sufficiently skewed to ensure the military a position in Myanmar’s government.

The role of the military in Myanmar’s path to democracy thus far fits with Larry Diamond’s description of a negotiated transition as an attempt to transfer power to civilian control in a way acceptable to the military.\textsuperscript{123} It should be noted, however, that a preference for a negotiated transition seems to be shared among Myanmar’s leaders. As Brian Joseph found, negotiated transitions are the most preferred and likely choice among various factions within Myanmar’s political system when they are given a choice between negotiated transition, regression to military rule, “Singapore” style economic reform at the expense of authoritarian government, or fragmentation into polarized conflicts.\textsuperscript{124} As a result, Myanmar’s political environment is one that maintains a place for the military in government. Since the military is largely resistant or hesitant to the promotion of human rights, the persistence of the military in Myanmar’s political transition challenges the mission of the MNHRC.\textsuperscript{125}

It is possible that the civilian members of Myanmar’s government can endeavor to limit the military’s actions, but the hybrid civilian-military nature of Myanmar’s political transition does not assure the complete elimination of military interests. In particular, Larry Diamond observes that negotiated transition in Myanmar will require pacts between incumbents

\textsuperscript{119}. SUJIAN GUO & GARY A. STRADIOTTO, DEMOCRATIC TRANSITIONS: MODES AND OUTCOMES 33 (2014).
\textsuperscript{120}. Id.
\textsuperscript{121}. Lidauer, supra note 111, at 72-75.
\textsuperscript{122}. See GRETCHEL CASPER & MICHELLE M. TAYLOR, NEGOTIATING DEMOCRACY: TRANSITIONS FROM AUTHORITARIAN RULE 225-244 (1996).
\textsuperscript{123}. See Larry Diamond et al., Reconsidering the Transition Paradigm, 25 J. DEMOCRACY 86, 91 (2014); see also Diamond, supra note 93, at 139-140 (noting Myanmar as a negotiated transition with a powerful military).
\textsuperscript{124}. Joseph, supra note 93, at 139-140.
\textsuperscript{125}. See Catherine Renshaw, Human Rights Under the New Regime, in CONSTITUTIONALISM AND LEGAL CHANGE IN MYANMAR 217 (Andrew Harding & Khin Khin Oo eds., 2017).
and opponents, where pacts are centered around a "compromise under which actors agree to forgo or underutilize their capacity to harm each other." Compromise, however, means that Myanmar may become a "diminished democracy" that suffers from concessions in political power to the military. With its hybrid civilian-military government, Myanmar's political system is susceptible to instability arising from the tensions between opposed civilian and military interests. Instability threatens breakdowns in the political system, exposing Myanmar to the fate of other negotiated transitions that have encountered a "democratic recession" in which democratic regimes increasingly limit freedom. Thus, while the military's presence in Myanmar's government may be contested by civilian politicians, the diminished and potentially unstable nature of Myanmar's hybrid system of government poses a political environment that calls upon the MNHRC to maintain concerns for its survival.

If the MNHRC chooses to avoid engaging pro-military interests altogether, it could still encounter risks in the form of marginalization. Academics have observed that the character of democratic transitions vary according to the forces driving them. When a transition is led by incumbents, institutions tend to have exclusionary tendencies; when a transition is led by opposition forces, institutions tend to have inclusionary tendencies. Exclusion involves a continuation of the dysfunctional behavior of authoritarian regimes by suppressing dissent, while inclusion means the engagement of both incumbent and opposition voices. Guo and Stradiotto argue that emergent regimes, and by extension their attendant institutions, are more likely to succeed if transitions are inclusive, which suggests that the MNHRC's growth would be more assured if Myanmar's democratization were an inclusive process. However, the nature of Myanmar's democratization as a negotiated transition dominated by the military makes Myanmar a case of an incumbent-led transition, and so implies an exclusionary environment with institutions less likely to tolerate dissent. This conflicts with the purpose of the MNHRC in that the goals of an NHRI under U.N. guidelines is to advance the ideals of universal human rights that involve the protection of dissenting voices. The contradiction between the MNHRC's mission and the character of Myanmar's incumbent-led transition makes the MNHRC a target for exclusion, and so it raises the risk of marginalization within Myanmar's transition if it forgoes engagement with the military.

126. Diamond et al., supra note 123, at 91; see also Diamond, supra note 93, at 139, 144-45.
127. O'DONNELL & SCHMITTER, supra note 103, at 38.
128. Diamond et al., supra note 123, at 91.
129. Id. at 141.
130. See Larry Diamond, Democracy's Third Wave, 110 CURRENT HISTORY 299, 303-04 (2011) (explaining breakdowns in third-wave democracies and noting that "[a] significant correlation exists between the quality of a countries' democracy and their governments' stability and legitimacy.").
131. See Guo & Stradiotto, supra note 119, at 48.
132. Id.
133. Id. at 36.
IV. MNHRC STRATEGY AGAINST THE CHALLENGES OF MYANMAR’S TRANSITION

As an NHRI under the U.N. Paris Principles, the MNHRC has a responsibility to represent and promote the U.N. international human rights system within Myanmar.134 The United Nations, however, recognizes that an NHRI is constrained by its context, commenting that “[i]t is rare that an NHRI can be more effective or stronger than the governance structure or environment in which it operates.”135 The preceding sections identified Myanmar’s political context as an environment marked by nascent human rights, underdevelopment, complex transition dynamics, and persistent military influence. For its part, the MNHRC has made efforts to stress the challenges posed by Myanmar’s political context, with the Chairperson of the MNHRC, U Win Mra, responding to criticism that the MNHRC is ineffective and slow with repeated public statements about the difficulties facing the MNHRC. For example, in September 2011 he stated that “[w]e don’t even know what the benefits of human rights are” and hence that the task of introducing human rights was great enough that “it can’t be done only with the commission and we need cooperation from the government, non-government organizations, civil society, and activist groups.”136 He made similar comments in a March 2012 interview, stating that “this is a country that has just emerged out of an authoritarian regime” and that human rights are an alien concept for most of the population.137 In a September 2014 interview he defended the MNHRC from accusations of poor progress by asserting that the MNHRC is following a longer-term strategy to advance universal human rights in the country.138

U Win Mra’s statements are supported by the findings of scholars like Andrew Harding, who in his analysis of Myanmar’s legal reform argues that the country’s transition should be a “considered, careful process that respects existing laws and institutions and is carefully calibrated to a country’s capacity to absorb and implement new legislation.”139 Harding’s concern is that any change within Myanmar’s legal system should be “consistent and coherent, otherwise it will lack legitimacy and be ineffective or misunderstood.”140

134. See G.A. Res. 48/134, supra note 3, at 2, 4-6.
138. O’Toole, supra note 14.
139. Harding, supra note 90, at 394.
140. Id.
Harding’s comments relate to laws rather than institutions, but they indicate the margins of the political space within which the MNHRC exercises its mandate. As much as the MNHRC may seek to aggressively pursue the powers granted in its 2014 Enabling Law, the MNHRC is working within a Myanmar context that Harding asserts would respond best to a gradual process of change. The resulting implication is that while the MNHRC can try to exert itself as an institution, attempts to induce rapid change in the Myanmar government are likely to fail. As a result, expectations for what the MNHRC can achieve should take greater consideration of the deliberate pace of change that Harding sees as appropriate for Myanmar’s transition.

The work of international entities like the OHCHR with the MNHRC also seems cognizant of the need for a careful approach. The OHCHR aided the MNHRC in the drafting of its Enabling Law141 and continues to schedule periodic visits by the Special Rapporteur to monitor and advise on the progress of the MNHRC.142 In addition, the OHCHR has supported a progressive periodic series of training sessions for the MNHRC designed to increase the MNHRC’s understanding and skills regarding the various treaties comprising the U.N. international human rights system, including individual workshops respectively dedicated to the International Covenant on Civil and Political Rights (ICCPR),143 International Convention on Economic, Social, and Cultural Rights (ICESCR),144 and CRC.145 The OHCHR, along with other organizations, is also helping the MNHRC develop a schedule of publications and workshops to educate the public146 and government officials147 about the U.N. system of human rights. The OHCHR’s engagement with the MNHRC contrasts with the ICC Sub-

144. U.N. Secretary-General, supra note 141, at 7.
145. Id.
147. See, e.g., MNHRC 2014 International Human Rights Day Statement, supra note 43.
Committee’s accreditation review of the MNHRC in that the OHCHR is exercising a progressive approach to help improve the MNHRC, even as the ICC Sub-Committee awarded it a “B” that effectively admonished the MNHRC for its shortcomings in relation to the Paris Principles. The difference between the OHCHR and the ICC Sub-Committee approaches towards the MNHRC constitutes an incongruity within the U.N. human rights system. Given the differences between the two, as much as the ICC Sub-Committee took care to note the relevance of context and offer encouragement to the MNHRC, the OHCHR’s actions do more to fulfill Harding’s call for a “considered, careful process” that provides the MNHRC with means to connect with, and hence engage, Myanmar’s government.

With respect to the MNHRC’s capacities for engagement, Anne Sa’adah describes the capabilities of new institutions in terms of power versus authority. She sees power as tied to coercion that induces “people to do something they would not otherwise do.” Authority, in contrast, involves legitimacy wherein “leadership is recognized as rightfully possessed.” She sees a difference in the consequences for institutions in that “the use of coercion . . . sets up escalating costs” that can exhaust an institution’s power while legitimacy allows authority to continue despite changing circumstances. The MNHRC’s Enabling Law provides for no coercive mechanisms and instead grants the MNHRC the ability to educate the public about human rights, make recommendations to the government to promote compliance to human rights, conduct inquiries regarding human rights violations, engage CSOs, work with other international human rights mechanisms, respond to government questions regarding human rights, and write reports about the MNHRC. The MNHRC keeps within U.N. guidelines for NHRI, which limit NHRI powers to educating the public, conducting investigations, advising governments, aiding in the execution of human rights programmes in all professional circles, and cooperating with the international human rights

149. Id.
150. See Harding, supra note 90, at 394.
152. Id.
153. Id.
155. Id. ch. V(22)(b).
156. Id. ch. V(22)(c-e).
157. Id. ch. V(22)(f).
158. Id. ch. V(22)(g).
159. Id. ch. V(22)(h-i).
160. Id. ch. V(22)(j-l).
162. Id. at 8.
163. Id.
164. Id. at 9.
Following Sa'adah's distinction between power and authority, the MNHRC is deficient in power because it lacks coercive force and thus is left to rely on developing authority through legitimacy.

Sa'adah argues that an institution's legitimacy is bolstered when an institution is consistent with local expectations and an institution's legitimacy is undermined when it is inconsistent with local expectations. It is because of this that she sees institutional change as being durable when it follows a strategy of incrementalism, since incrementalism allows an institution to maintain continuity with local sensibilities such that they change in tandem. Such a perspective echoes scholars like Michael Hayes and Charles Lindblom, who see incrementalism as advancing change through small steps under the reasoning that smaller change receives less resistance from opponents relative to large change. Changes made in small steps may require time to accrue in order to produce larger-scale transformations, but James Mahoney and Kathleen Thelen see strategies based on gradual processes as capable of eventually yielding substantive institutional change. The perspectives of Sa'adah, Hayes, Lindblom, and Mahoney and Thelen support U Win Mra's preference for a cautious, tentative approach in the growth of the MNHRC. An incremental strategy by the MNHRC maintains continuity with Myanmar's ongoing political transition and thereby avoids confrontation with the government that might threaten the survival of the MNHRC. In doing so, an incrementalist strategy allows the MNHRC to build legitimacy while accumulating small changes that in time can lead to substantial improvements in human rights.

V. A CAUTIONARY CASE ON BEHALF OF INCREMENTALISM

The existential concern driving adoption of an incrementalist strategy is not mere speculation, since Myanmar's transition has already yielded a cautionary example of an institution that pursued an activist agenda: the Constitutional Tribunal. In his study of Myanmar's Constitutional Tribunal, Dominic Nardi finds that the tribunal's efforts to assert its power actually contributed to its own demise. The Myanmar Constitutional Tribunal was created by the 2008 Constitution and implemented by a 2010 Constitutional Tribunal Law. The Constitutional Tribunal is comprised of nine justices appointed for five year terms. The President and the Speakers of both chambers of Parliament each nominate three justices, and all must

165. Id. at 8-9.
166. Sa'adah, supra note 150, at 309-10.
167. Id. at 310.
171. Id. at 654-55.
be approved by the entire Parliament.\textsuperscript{172} The 2008 Constitution gives the Constitutional Tribunal the power to evaluate legislation in accordance with the Constitution.\textsuperscript{173} Nardi notes that the drafters of the 2008 Constitution likely did not intend for the Constitutional Tribunal to check the powers of the government but rather expected it to focus on resolving intra-governmental disputes over jurisdiction.\textsuperscript{174}

The Constitutional Tribunal formally began in 2011 when the Parliament confirmed the initial cohort of nine justices.\textsuperscript{175} Over the course of the subsequent eighteen months, the Constitutional Tribunal heard five cases.\textsuperscript{176} In the first three cases, the Constitutional Tribunal declared a series of laws to be unconstitutional, generating criticism from the President's Office and Parliament but avoiding any lasting institutional controversy.\textsuperscript{177} It was with the fourth case, however, that the Constitutional Tribunal produced an existential crisis. The fourth case required the Constitutional Tribunal to render a decision in a dispute between the President and the Parliament over whether legislative committees were empowered to introduce legislation, maintain oversight of the executive branch, and subpoena ministers.\textsuperscript{178} The Constitutional Tribunal ruled against the Parliament, denying the legislative committees had the aforementioned powers under the 2008 Constitution.\textsuperscript{179} The ruling was perceived as an attempt to constrain the power of the Parliament, and generated criticism from inside and outside government against both the ruling and the members of the Constitutional Tribunal.\textsuperscript{180} In August 2012, members of Parliament circulated a petition to impeach the tribunal, and when rebuffed by the President, proceeded to pass resolutions for impeachment and formed a fifteen-member committee to investigate whether the Constitutional Tribunal had itself violated the 2008 Constitution by reaching an incorrect decision.\textsuperscript{181} When faced with the subsequent formal impeachment proceedings in September 2012, all nine members of the Constitutional Tribunal resigned.\textsuperscript{182} New members were appointed in February 2013, but only after the Parliament had amended the 2010 Constitutional Tribunal Law to 1) firmly place the justices of the Constitutional Tribunal under the authority of the President and the Speakers of both chambers of Parliament and 2) remove the authority of Constitutional Tribunal rulings as final judgements.\textsuperscript{183}

Nardi claims that the Parliament's actions were a defensive action to

\textsuperscript{172} Id. at 655.
\textsuperscript{173} Id. at 654.
\textsuperscript{174} Id. at 657.
\textsuperscript{175} Id.
\textsuperscript{176} See id. at 658.
\textsuperscript{177} Id. at 667.
\textsuperscript{178} Id. at 663-65.
\textsuperscript{179} Id.
\textsuperscript{180} Id. at 667-68.
\textsuperscript{181} Id.
\textsuperscript{182} Id.
\textsuperscript{183} Id. at 670.
protect itself from what it perceived to be a threat.\textsuperscript{184} Nardi asserts that, by striking down national legislation in a string of four cases, the Constitutional Tribunal had engendered an antagonistic relationship with the Parliament.\textsuperscript{185} In pursuing an activist agenda, Nardi argues that the Constitutional Tribunal raised fears among legislators that it was usurping the powers of the Parliament.\textsuperscript{186} Nardi states that the tribunal would have avoided calls for impeachment and thereby survived to advance its institutional growth if it had adopted a less aggressive approach\textsuperscript{187} and made greater effort to recognize the legislature’s priorities for political reform\textsuperscript{188} – in essence, if the tribunal had been more sensitive to Myanmar’s political context.

The connection between courts and context is a sentiment shared with Yonatan Lupu, who finds that courts “operate in a space that is both motivated and constrained by politics.”\textsuperscript{189} Lupu notes that because of contextual politics, courts focus on building institutional legitimacy and so “attempt to prevent confrontations that threaten this legitimacy.”\textsuperscript{190} Following the observations of Sa’adah, an incrementalist strategy can avoid the confrontations foreseen by Lupu because it maintains continuity with the preferences of actors in the surrounding political space.\textsuperscript{191} Incrementalism takes time to accrue legitimacy, but this is because it builds legitimacy through measured, deliberate steps that are unlikely to arouse resistance from other political actors.\textsuperscript{192} Hence, the implication of the Constitutional Tribunal’s experience for the MNHRC is that institutional survival is better served by forgoing activism in favor of nurturing institutional legitimacy through gradual processes that are calibrated with

\textsuperscript{184}. Id. at 669.
\textsuperscript{185}. Id. at 663-65, 667-69.
\textsuperscript{186}. Id. at 669.
\textsuperscript{187}. Nardi argues that the Constitutional Tribunal’s early textualist/originalist approach was laudably bold and unyielding, but failed to acclimate political elites to the new reality of constitutional review—especially so soon after a guarded political transition from military rule. Perhaps more importantly, the Tribunal’s approach was risky given its uniquely precarious independence. Political elites had not demonstrated a marked hostility towards judicial independence since the transition. \textsuperscript{Id. at 673.}
\textsuperscript{188}. Nardi believes that the political situation in Myanmar demanded pragmatism. \textsuperscript{Id. at 674.} Nardi further analogizes to Indonesia, where pragmatism “enabled [Indonesian justices] to make important policy decisions without triggering calls for impeachment.” Nardi notes that any attempt for the Tribunal to shift toward pragmatism was delayed past the opportunity for it to be useful, \textsuperscript{id. at 675, and that} that Myanmar’s Constitutional Tribunal did little to assuage legislators’ fears that it would act as an unaccountable check on the legislature, \textsuperscript{id. at 676.}
\textsuperscript{190}. Id.
\textsuperscript{191}. See Sa’adah, \textit{supra} note 151, at 310.
the pace of change in local sensibilities. The MNHRC is not a court nor a part of Myanmar’s judiciary, but the MNHRC is similar to the Constitutional Tribunal in terms of being a nascent institution in the dynamic environment of Myanmar’s political transition. In the context of Myanmar’s politics, the case of the Constitutional Tribunal points to the wisdom of an incrementalist approach for the MNHRC.

A caveat with an incrementalist strategy is that in maintaining continuity with endemic conditions an institution risks surrendering its potential to be an agent for change. That is, the more an institution curtails its activism in order to avoid confrontation with other political actors, the more an institution subsumes itself to the status quo of its surrounding environment. The logical extension is that an institution focused on matching local conditions is no longer focused on changing local conditions. Andrew Wolman observes that NHRIs in Asia have at times fallen into such a scenario, deviating from international standards to instead support local sensibilities. Similarly, Amitav Acharya finds that with respect to the countries of ASEAN there is a similar proclivity for locals to reconstruct foreign norms to match their own worldviews.

Surrendering international human rights standards for the sake of local preferences or sensibilities is contrary to the mission of NHRIs, whose responsibilities include promoting international human rights standards at national levels. Moreover, acceding to such local preferences may actually harm NHRIs. For example, the International Council on Human Rights Policy (ICHRP) found that the engagement over time of NHRIs in Mexico and Indonesia with local political interests led them to become less effective at advancing the international human rights system within those countries. In the case of Indonesia, Irene Hadiprayitno concludes that the weakening of the Indonesian NHRI frustrates future prospects for human rights in the country. The ICHRP further noted that NHRIs operating in politically restrictive contexts and lacking support by “a reasonably vibrant civil society and at least latent human rights activism” are at risk of becoming “mere mouthpieces of government.” Given Myanmar’s fragile political context, the ICHRP specifically warned that Myanmar’s initial proposals for an NHRI risked such an outcome.

195. See OHCHR and NHRIs, supra note 4; May 2013 ICC Sub-Committee Observations, supra note 17, at 2-3.
196. See INT’L COUNCIL ON HUMAN RIGHTS POL’Y, PERFORMANCE & LEGITIMACY: NATIONAL HUMAN RIGHTS INSTITUTIONS 57 (2004); see also id. at 54 (discussing factors that have weakened the performance of Mexico’s NHRI, including overdependence on the executive branch of government); id. at 35 (discussing the difficulty of political independence for Indonesia’s NHRI).
197. See Irene Hadiprayitno, Defensive Enforcement: Human Rights in Indonesia, 11 HUM. RTS. REV. 373, 396-397 (2010) (detailing how the impact of the Indonesian NHRI has been limited due to interference and inadequate support from the Indonesian government).
198. INT’L COUNCIL ON HUMAN RIGHTS POL’Y, supra note 196, at 64.
199. Id.
Another issue with an incrementalist strategy is that it is potentially limited in what it can achieve. Hayes and Lindblom note that incrementalism is about what is politically feasible, since they see it as a result of efforts between pluralist forces to find common ways to address concrete problems rather than a product of efforts to advance abstract ideals.\(^{200}\) As Andrew Cortell and Susan Peterson observe, the capacity of actors to make change is dependent on the structure of constraints on their power.\(^{201}\) In the case of the MNHRC, the structure of constraints is defined by its mandate under the Enabling Law, which limits the MNHRC to engagement via monitoring, investigating, reporting, advising, and educating Myanmar's government and people about human rights.\(^{202}\)

Within the space of activities circumscribed by the Enabling Law, the MNHRC is otherwise bereft of the power to force change. Hence, the MNHRC is dependent on the willingness of the actors it is engaging to accept and adjust their conduct in accord with the MNHRC's recommendations. In essence, the effectiveness of the MNHRC is a function of how well it can convince other actors in Myanmar's political system to forego their political interests and follow the international human rights system. Unfortunately, the ongoing observations of the U.N. Special Rapporteur on the Situation of Human Rights in Myanmar describe a government that continues to struggle to achieve U.N. expectations for human rights,\(^{203}\) and so pose some uncertainty as to how willing or able the various actors within Myanmar's political system are to heed the calls of the MNHRC.

VI. MNHRC ACCOMPLISHMENTS IN MYANMAR'S CONTEXT

Despite the aforementioned risks, the MNHRC's work to date has demonstrated that an incrementalist strategy does not necessarily equate to a lack of activism or lack of change. The MNHRC has encountered difficulties and calling for improvement is justified, but in the short time that the MNHRC has existed it has generated cause for optimism regarding its growth as an NHRI. Viewed as a whole, the MNHRC's accomplishments indicate an institution that is working through struggles to come closer to the expectations of the international human rights system.

Admittedly, the period of time since the MNHRC's 2011 inception provides a narrow basis to extrapolate trends regarding performance. Drawing data from this short period makes it difficult to make longitudinal extrapolations about the longer-term progress of the MNHRC, and it can generate misleading conclusions. For example, the MNHRC's Annual

\(^{200}\) See HAYES, supra note 168, at 40-46; see also Lindblom, supra note 168, at 83-87.

\(^{201}\) See Andrew Cortell & Susan Peterson, Altered States: Domestic Institutional Change, 29 BRIT. J. POL. SCI. 177, 190 (1999).

\(^{202}\) See Myanmar National Human Rights Commission Law, supra note 9, ch. V(22)(a-l).

\(^{203}\) See 2015 Report of the Special Rapporteur, supra note 72, at 17-18 (summarizing concerns about backtracking by the Myanmar government, rising violence, and inequitable development).
Report from 2014 shows that it received a total of 1,855 complaints but only referred 543 to the government with requests for response and left fully 229 unaddressed at the end of the year.²⁰⁴ On cursory review, the ratio of referrals to total complaints provides cause to question the performance of the MNHRC, particularly in terms of whether the MNHRC is meeting the ICC Sub-Committee’s expectation that the MNHRC pursue its mandate “in a broad, liberal and purposive manner, and to promote and protect human rights of all.”²⁰⁵ The apparent shortfall in processing complaints, however, becomes less egregious when considered in light of several extenuating factors. First, the majority of complaints referenced issues that lay outside the international human rights system, and so were outside the mandate of the MNHRC.²⁰⁶ Second, the MNHRC processed these complaints during a year in which the commission’s time was consumed by its reconstitution, and so the rate of referrals was therefore not reflective of its true capacity.²⁰⁷ Lastly, it bears noting that the commission’s functionality during 2014 suffered in part from staffing issues; during this time the commission operated with only a staff of 44,²⁰⁸ despite being authorized for a total of 167.²⁰⁹ Hence, assessments based on data regarding moments in time can be under-informed in the absence of supporting facts.

Despite the shortness of time since 2011, there are identifiable longitudinal trends indicating that the MNHRC has managed to sustain some meaningful growth in its powers. For example, in terms of issuing statements on human rights issues in Myanmar, the MNHRC began with four official statements in 2011, eight in 2012, four in 2013, three in 2014, but then sixteen in 2015.²¹⁰ In addition, in cooperation with the OHCHR and the RWI, the MNHRC conducted workshops to educate Myanmar government personnel on human rights, with sessions in 2013 covering Business and Human Rights; Human Rights and the Media; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; and Universal Periodic Review.²¹¹ In 2014, the MNHRC worked with these same partners to cover the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of Persons with Disabilities; the Convention on the Elimination of All Forms of Racial Discrimination; Human Rights and Agribusiness; and the U.N. human rights system.²¹² In 2015, the

²⁰⁷. Id.
²⁰⁹. Id. at 6.
²¹¹. MNHRC Statement No. 4/2013, supra note 143.
MNHRC held workshops on U.N. Security Council Resolution 1325 on Women, Peace, and Security, as well as workshops on principles of human rights at the Central Institute of Civil Services and the National Defence College.213 The MNHRC’s provision of workshops should not be understated, as they serve the goals of education and promotion of human rights set forth by the OHCHR for NHRLs—with respect to education the OHCHR states that “human rights education is the key to developing a culture of human rights”214 and with respect to promotion the OHCHR states that NHRLs “should promote a wide understanding and acceptance of human rights principles.”215 Education and promotion are important because they serve what Harold Hongju Koh labels as the process of “internalization” whereby locals come to accept international human rights norms.216 In particular, by focusing on government officials and CSO leaders, the workshops conducted by the MNHRC provide opportunities for “political internalization” that Koh describes as the process of conveying human rights to political elites who are in positions to advance them within, in this instance, Myanmar’s political system.217

The issuance of statements on human rights and the provision of human rights workshops have been accompanied by an escalation of the MNHRC’s activities in other areas. According to the Asia Pacific Forum, the MNHRC has gone beyond engagement with Myanmar’s national government and increased its outreach through workshops directed at state-level government officials and CSOs. Focused on delivering overviews of human rights law, the human rights conventions ratified by Myanmar, and the fundamentals of the MNHRC,218 the workshops began with two sessions in 2012 near Yangon, grew to twenty-four sessions in 2013 located primarily in the Bago and Mandalay regions and Rakhine state and then to twenty-eight sessions in 2014 conducted in all seven states of Myanmar: Kachin, Chin, Mon, Kayin, Shan, Karen, and Rakhine.219 In 2015, the MNHRC further expanded its workshops to reach local-level government, holding sessions in thirty-one townships in addition to workshops at the national government offices including the President, both Houses of Parliament, the Supreme Court, government ministries, and the


214. OHCHR TRAINING PUBLICATION ON NHRLS, supra note 3, at 61.

215. Id. at 68.


217. Id. at 1413.


219. Id.
National Defense College.

The MNHRC’s domestic outreach between 2011 and 2015 accompanied its increased engagement with the international community. Following its inception in September 2011, the MNHRC received training courses in human rights from the Raoul Wallenberg Institute, sponsorship from UNICEF for a fact-finding visit to the Philippines Commission on Human Rights, and the support of the OHCHR in launching MNHRC-organized workshops on human rights for the Myanmar government. In 2012, the MNHRC became a member of the South East Asia NHRI’s Forum (SEANF), which includes the six NHRI’s that currently exist within Southeast Asia, and an associate member holding observer status in the Asia Pacific Forum (APF). Progress continued in 2013 with visits from the Bangladesh NHRI, a delegation of European NHRI’s, and a formal training schedule on human rights with the RWI. In 2015, the MNHRC continued its engagement with APF and SEANF and rose to assume the Chairmanship for SEANF at the end of the year.

The trends in the MNHRC’s issuance of statements, offering of workshops to government and civil society, and coordination with international and regional human rights institutions are indicators of its growth as an institution. They point to a progression of efforts to promote capacity and an attendant increase in activities, both in terms of engaging domestic political actors and foreign human rights bodies. As markers of the MNHRC’s work, they demonstrate that the MNHRC is working to fulfill UN expectations for NHRI’s in terms of “promoting and monitoring the effective implementation of international human rights standards at the national level.” Thus, as much as the ICC Sub-Committee’s awarding of a

220. MNHRC Statement No. 16/2015, supra note 213.
221. See Next Stop Myanmar, RAOUl WALLEnBerg INSt. (Dec. 5, 2012), http://rwi.lu.se/2012/12/next-stop-myanmar [https://perma.cc/6AC5-VKAJ].
222. MNHRC 2011 International Human Rights Day Statement, supra note 38.
225. See MNHRC Statement No. 8/2012, supra note 223.
228. MNHRC Statement No. 15/2016, supra note 146.
229. See OHCHR and NHRI’s, supra note 4.
“B” accreditation to the MNHRC may indicate a need for improvement, the above trends also provide grounds to view the MNHRC as maturing into its role as an NHRI advancing the international human rights system within Myanmar. In this case, the MNHRC’s strategy of incrementalism may indeed be enabling progress both for itself as an institution and for human rights as internalized norms within Myanmar’s political context.

Viewed in total, the trends in the MNHRC’s activities reflect growth and thus imply that whatever reversal or resistance to human rights might be occurring in Myanmar is not originating from the MNHRC itself but instead from other political actors in the country. The ICC Sub-Committee and some civil society actors have accused the MNHRC of being anemic in the pursuit of its mandate, with some critics going so far as to call the MNHRC a “cheerleader” for the Myanmar government. These charges are dissonant with the work of the MNHRC with the MNHRC’s progression in statements, workshops, and coordination with other bodies indicating a gradual increase in engagement at both domestic and international levels. The disconnect lies in the methodology of the ICC Sub-Committee evaluation and the interpretation of the evaluation by CSOs, both of which compare the MNHRC to the Paris Principles. For its part, the ICC Sub-Committee follows a supportive approach and notes the relevance of context in evaluating the MNHRC against the Paris Principles. The issue, however, is that the ICC Sub-Committee’s accreditation rating is being used by the MNHRC’s critics in ways that overlook the growth the MNHRC has made despite the constraints posed by the context of Myanmar’s political transition. Moreover, in focusing on the MNHRC itself, both the ICC Sub-Committee and civil society actors are misdirecting attention away from potential alternative factors working to impede human rights within Myanmar’s political system.

VII. CONCLUSION AND DIRECTIONS FOR FURTHER RESEARCH

This Article takes the MNHRC as a case study illustrating the utility of incrementalist strategies for NRHIs. The experiences of the MNHRC pose a number of implications for the efforts of other NRHIs working to promote the international human rights system within their respective countries. First is the base issue of institutional survival, with the operation of NRHIs dependent on an antecedent requirement that they exist. The conditions for existence are defined by the Paris Principles, which set the criteria characterizing an entity as meeting the minimum standards necessary to

231. *Id.* at 11-14; O’Toole, supra note 14; Thu, supra note 14.
233. See sources cited supra notes 5 & 63.
234. See sources cited supra note 62.
qualify as an NHRI within the U.N. human rights system. NHRIs are monitored by the ICC Sub-Committee, which reviews NHRIs to assess their compliance to the criteria set forth by the Paris Principles. Positive reviews from the ICC Sub-Committee leading to an “A” accreditation accords an NHRI with procedural privileges to comment and vote in U.N. Human Rights Council bodies and reputational benefits as a body in accord with U.N.-sanctioned international human rights standards. Negative reviews from the ICC Sub-Committee resulting in a “B” or “C” accreditation restrict an NHRI’s engagement with the U.N. Human Rights Council and incur reputational costs as a body that is short of U.N. expectations. In the case of the MNHRC, the stigma of a “B” rating was also used by civil society actors to criticize the MNHRC. As a result, NHRIs like the MNHRC face incentives and pressures to monitor their own compliance to the Paris Principles to ensure their status as NHRIs.

Second, the challenge of institutional survival is a function of political context—an NHRI exists as but one entity among many vying to advance their respective agendas within the conditions of a country’s political space. Thus, the capacities of an NHRI to operate are proscribed by the complexities within which it must work. For NHRIs like the MNHRC, the complexities are those tied to an ongoing political transition. Transitions are difficult, as O’Donnell and Schmitter observe: “It is characteristic of the transition that during it the rules of the political game are not defined. Not only are they in constant flux, but they are usually arduously contested.” The uncertainties posed by transition call upon NHRIs to exercise vigilance about their own institutional survival by being aware of their political environment and constantly adapting to evolving risks. For NHRIs in transition contexts like Myanmar, the political environment and associated risks involve factors that include a state and society struggling to adopt human rights, burdened by underdevelopment, afflicted with fluid political dynamics, and haunted by a lingering military legacy.

Third, to improve its prospects for survival, an NHRI must pace its activities in relation to its political context. Following Andrew Harding, an NHRI is wise to employ a “considered, careful process that respects existing laws and institutions and is carefully calibrated to a country’s capacity to absorb and implement new legislation.” The need to connect with existing laws and capacity calls upon NHRIs to pursue change via a strategy of incrementalism, in which NHRIs progress through small steps.

235. See G.A. Res. 48/134, supra note 3.
236. See GANHRI Sub-Committee on Accreditation (SCA), supra note 32.
237. Id.
238. Id.
239. See, e.g., Min & Kaun, supra note 63; Time for a Paris-Principles Compliant National Human Rights Commission in Myanmar, supra note 64.
240. See O’DONNELL & SCHMITTER, supra note 103, at 6.
241. See COLOMER, supra note 107, at 30; O’DONNELL & SCHMITTER, supra note 103, at 61-72.
242. See Alexander, supra note 109, at 252-266.
243. See Harding, supra note 90, at 394.
that maintain continuity with local sensibilities\(^{244}\) and so are less likely to arouse resistance from surrounding political actors.\(^{245}\) An incrementalist strategy involves gradual processes, but over time small steps can accrue to produce larger substantive change.\(^{246}\) For NHRIs in situations similar to the MNHRC, the implication is that an incrementalist strategy offers a way for NHRIs to promote the international human rights system while still protecting their prospects for institutional survival in challenging local contexts.

In conclusion, it is important to note that, because NHRIs are tasked with “promoting and monitoring the effective implementation of international human rights standards at the national level,”\(^{247}\) they are placed in middle positions that lie between the external expectations of the U.N. human rights system and the internal realities of domestic politics. For NHRIs like the MNHRC, the middle position can be a vulnerable one, with demands from international human rights bodies conflicting with apathy or resistance from local actors. The case of the MNHRC shows that there needs to be greater recognition about the vulnerability of nascent NHRIs operating in transition contexts. Assessments of NHRIs, while made in good faith to standards like the Paris Principles, can generate misleading observations if they overlook the extenuating realities lived by NHRIs. For cases like Myanmar, the reality involves complexity and uncertainty that can frustrate the MNHRC’s efforts to advance human rights. Misinterpretations of the performance of NHRIs are significant, as they can misdirect the responses of critics in ways that do not directly address the specific issues impeding NHRI efforts. If the ultimate goal is to promote human rights through NHRIs, then it is more constructive to devote greater consideration to the challenges of context in evaluating and addressing the performance of NHRIs. Doing so would facilitate solutions that are more responsive to the issues facing NHRIs and thereby do more to nurture NHRI growth.

Criticism of the MNHRC came from both the ICC Sub-Committee and civil society actors. The above findings suggest some need for critics to temper their treatment of the MNHRC. For its part, the ICC Sub-Committee takes a more supportive approach towards the MNHRC, with the accreditation report making note of context and issuing outcomes in the form of recommendations to be undertaken by the MNHRC.\(^{248}\) But the ICC Sub-Committee process would still benefit from reform. Its report only mentions context but does not explain the specific factors confronting the MNHRC and the ways they challenge the MNHRC’s activities. Greater discussion of these elements would have served to clarify the reasons for the MNHRC’s failure to meet the Paris Principles and would have also provided justification for the MNHRC’s incrementalism. Both items of

\(^{244}\) See Sa’adah, supra note 151, at 309-310.

\(^{245}\) See id. at 310.

\(^{246}\) See HAYES, supra note 168, at 40-46.

\(^{247}\) See OHCHR and NHRIs, supra note 4.

\(^{248}\) See November 2015 ICC Sub-Committee Report, supra note 11, at 11-14.
information are relevant in determining how the ICC Sub-Committee responds to the MNHRC, in that they can help to 1) direct its accreditation report recommendations in ways more responsive to the underlying causes of the MNHRC’s struggles and 2) direct international aid efforts based on the accreditation report recommendations towards more comprehensive solutions that appropriately address both the MNHRC’s capacity issues and the problems impeding the MNHRC’s work. In contrast to the ICC Sub-Committee, the MNHRC’s civil society critics took a harsher tone that understated the contextual issues facing the MNHRC and took the ICC Sub-Committee’s “B” accreditation rating as an indictment of the MNHRC’s institutional effectiveness. The tenor and substance of these attacks are dissonant not only with the ICC Sub-Committee but also with the realities posed by Myanmar’s political transition. As much as critical perspectives may contribute to a full discourse, civil society observers could provide more constructive commentary if they formulated criticism that connects the MNHRC and findings of human rights bodies like the ICC Sub-Committee to the endemic conditions surrounding the MNHRC. Doing so would be more consistent not only with the findings of this Article but also with the more constructive approach of the ICC Sub-Committee itself.

The findings of this Article provide direction for further research. To begin, the implications drawn from the analysis could be strengthened by study of other NHRIIs in contexts similar to the MNHRC. Specifically, identification of additional cases demonstrating the utility of incrementalist approaches for NHRIIs in other complex, dynamic political environments would affirm the insights provided by the MNHRC. These additional cases would not necessarily need to exactly match the context of Myanmar in order to support the conclusions presented here, but they could provide comparative value in terms of illustrating how incrementalism can succeed despite varying combinations and degrees of the factors encountered by the MNHRC.

Alternatively, it would also be useful to identify cases where NHRIIs in situations similar to the MNHRC pursued approaches more aggressive than incrementalism, since comparison between them and the MNHRC would indicate the value of incrementalism relative to other potential strategies for NHRIIs facing scenarios similar to Myanmar’s. There are potential cases suitable for these lines of reasoning within geographic proximity to Myanmar. Thailand, for example, hosts a NHRI holding a “B” ICC Sub-Committee accreditation matching the MNHRC and is experiencing its own political transition under the leadership of a military regime. Another example within the Southeast Asian region is Timor-Leste, whose NHRI enjoys an “A” accreditation despite operating within a context of underdevelopment and transition.

In addition to comparing the performance of the MNHRC to NHRIIs operating in similar contexts, it could also be useful to compare the

249. See Min & Kaun, supra note 63; Time for a Paris-Principles Compliant National Human Rights Commission in Myanmar, supra note 64.
MNHRC to NHRIs operating in very different contexts. This would demonstrate the generalizability of the implications drawn from the MNHRC in that diverse cases could indicate the broader value of incrementalism for situations that are unlike Myanmar. In contrast, if different cases indicate varying experiences with incrementalism, they would help to identify what conditions are more responsive to incrementalist approaches and what conditions are not, hence clarifying the circumstances in which NHRIs should deem them appropriate. Such reasoning opens up analysis to the full sweep of NHRIs, allowing for a comprehensive assessment of factors that might influence the relevancy of incrementalism for NHRIs. This would entail study of a wider array of NHRIs, going beyond the individual depth provided by comparative studies with the MNHRC to involve the breadth associated with an expansive review of NHRIs as a whole. While it might be unfortunate to overlook the nuances of individual comparative case studies, it would nevertheless provide value in highlighting larger trends regarding incrementalist approaches for NHRIs.

This Article approached the MNHRC as a case study with insights regarding challenges facing a nascent NHRI in a country undergoing political transition, such that it can aid understanding of other NHRIs situated in similar contexts. The analysis finds that the MNHRC struggles to advance its survival and growth within an environment still learning about human rights, working with limited capacity, hosting a complex political landscape, and dealing with a lingering military influence. Such an environment has driven the MNHRC to adopt an incrementalist strategy in promoting the commission—and human rights—within Myanmar.

The sentiments of critics towards the MNHRC’s approach echo the concerns raised by scholars like Steven Solnick, who, in his study of Russia’s post-Soviet transition in the 1990s, queried if democracy delayed is democracy denied?250 Analogized to the case of the MNHRC, Solnick’s proposition can be rephrased as a question of whether the incremental introduction of human rights constitutes an attempt to suppress human rights. The argument in this Article, however, is to the contrary and follows the arguments of scholars like Emily Beaulieu, James Mahoney, and Kathleen Thelen who observe that, while an incrementalist approach may contradict the interests of revolution or regime change, it provides value in terms of allowing closer continuity with changes in the immediate political context and thereby reduces the risks of resistance from surrounding political actors.251 Thus, the MNHRC is following a strategy that is appropriate for the context of transition in Myanmar in that it allows the commission to advance its mission of universal human rights while protecting its prospects for survival in the uncertainty of Myanmar’s


251. See EMILY BEAULIEU, ELECTORAL PROTEST AND DEMOCRACY IN THE DEVELOPING WORLD 9-12 (2014); MAHONEY & THELEN, supra note 169, at 1-37.
changing political landscape.

As a result, criticism of the MNHRC should do more to consider its progress in light of the issues in its surrounding political environment. The MNHRC’s incrementalist strategy has generated positive trends showing growth in institutional capacity and an attendant increase in activities to promote human rights, and it has done so despite the impediments of countervailing factors in Myanmar’s political system. The MNHRC should not be absolved from the ongoing human rights problems that continue to afflict Myanmar, but contextual considerations should be taken to mitigate accusations of anaemia that have been directed at the MNHRC. It is possible that critics are disincentivized from constraining the tenor of their accusations in that critics who qualify their commentary with observations about context may expose themselves to charges of complicity with the MNHRC. If, however, the purpose of criticism is to drive improvement in terms of furthering the MNHRC’s fulfilment of its role as an NHRI, then commentary would be more constructive in achieving such a purpose by accounting for a broader range of factors that can provide a more comprehensive, and hence accurate, understanding of the problems responsible for an NHRI’s struggles. Consideration of context serves to identify potentially relevant factors and thereby facilitates more comprehensive analysis.

The case of the MNHRC has implications for other NHRIs, particularly those placed in political transitions similar to Myanmar. Following the findings about the MNHRC, other NHRIs faced with existential risks posed by challenging contexts are advised to adopt an incrementalist strategy in fulfilling their goals, since an incrementalist approach is more likely to enable an NHRI to balance the immediate concerns of institutional survival with the larger mission of furthering human rights. If the goal is to use NHRIs as a vehicle to promote international human rights at national levels, especially within transition conditions, then incrementalism must be viewed as a viable strategy for NHRIs. Accommodating incrementalism, however, requires greater consideration of context in terms of the pressures that impede and threaten the work of an individual NHRI. Recognizing and addressing the issues of context will do more to nurture the growth of NHRIs as agents of an international human rights system and thereby do more to advance human rights in the political environments they are needed most.