BEYOND TRANSNATIONAL ADVOCACY: LESSONS FROM ENGAGEMENT OF MYANMAR INDIGENOUS PEOPLES WITH THE UN HUMAN RIGHTS COUNCIL UNIVERSAL PERIODIC REVIEW

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ABSTRACT

On July 21, 2015, the Coalition of Indigenous Peoples in Myanmar/Burma (CIPM), a group representing 24 indigenous rights organizations in Myanmar, announced they were submitting a report to the Universal Periodic Review (UPR) session on Myanmar. The use of the UPR represents an attempt by Myanmar's indigenous groups to address a variety of issues not traditionally associated with human rights, among them: environmental grievances associated with alleged government seizure of land, deforestation, pollution, and suppression of land-use rights. The use of the UPR also illustrates an indigenous strategy of reaching up to an international level in order to address problems at a local one: the CIPM resorted to the UPR in hopes of mobilizing pressure to change the behavior of the Myanmar government. This article explores the experiences of the CIPM with the UPR to draw lessons for other groups that seek to use the UPR to advance their interests.

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INTRODUCTION

On July 21, 2015, the Coalition of Indigenous Peoples in Myanmar/Burma (CIPM), a group representing 24 indigenous rights organizations in Myanmar, announced they were submitting a report to the Universal Periodic Review (UPR) session on Myanmar.[1] A mechanism of the United Nations (UN) Human Rights Council (HRC), the UPR is a procedure to periodically evaluate the human rights record of each UN member state once every four years.[2] Non-governmental organizations (NGOs) like the CIPM are allowed to submit arguments about alleged human rights violations for the UPR to consider.[3] With respect to the Myanmar government, the CIPM's submission joins an array of other reports detailing allegations of government behavior that violates the standards set by the UN human rights system.[4]

The use of the UPR represents an attempt by Myanmar's indigenous groups to address a variety of issues not traditionally associated with human rights, among them: environmental grievances associated with alleged government seizure of land, deforestation, pollution, and suppression of land-use rights.[5] As such, this attempt constitutes a strategy merging local environmental issues with international human rights mechanisms. Such an action is consistent with a trend to combine environmental and human rights issues.[6] Since its inception, the UPR has become an inclusive process

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1. Yen Saning, *Indigenous Rights Coalition in Burma Plans UPR Submission*, IRRAWADDY (July 21, 2015), http://www.irrawaddy.com/burma/indigenous-rights-coalition-in-burma-plans-upr-submission.html.

2. U.N. Office of the High Commissioner for Human Rights, Fact Sheet: Human Rights Council – Universal Periodic Review, 1 (Nov. 2008), https://www.ohchr.org/EN/HRBodies/UPR/Documents/UPRFactSheetFinal.pdf [hereinafter UPR Fact Sheet].

3. U.N. Office of the High Commissioner for Human Rights, Basic Facts About the UPR, http://www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx (last visited Dec. 4, 2018) [hereinafter Basic Facts About the UPR].

4. *See* Shwe Yee Saw Myint & Thomas Kean, *Govt, NGOs Prepare to Face Off at UN on Human Rights*, MYAN. TIMES (Jan. 30, 2015), https://www.mmtimes.com/national-news/12960-govt-ngos-gear-up-for-battle-at-human-rights-council.html (stating that numerous NGOs planned to submit reports describing Myanmar's failure to meet human rights commitments under the UPR).

5. *See generally* Coalition of Indigenous Peoples in Myanmar/Burma, Joint Submission to the U.N. Universal Periodic Review, Twenty-Third Session of the UPR Working Group of the Human Rights Council, 3–4, 6, 8–9, 11, 13–14 (Mar. 2015) [hereinafter CIPM 2015], https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=1996&file=CoverPage (submitting to the UPR various complaints pertaining to human rights and the environment).

6. *See* Ben Boer, *Environmental Law and Human Rights in the Asia-Pacific*, *in* ENVIRONMENTAL LAW DIMENSIONS OF HUMAN RIGHTS 69, 139 (Ben Boer ed. 2015) (noting the emergence of ties between environmental and human rights issues in the Asia-Pacific); Carmen G. Gonzalez, *Human Rights, Environmental Justice, and the North-South Divide*, *in* RESEARCH HANDBOOK ON HUMAN RIGHTS AND THE ENVIRONMENT 451 (Anna Grear & Louis Kotze eds., 2015)

accommodating human rights issues arising from a broad array of subjects, including environmental problems[7] and indigenous complaints.[8] The use of the UPR to address environmental issues is a valid exercise recognized by the UN Office of the High Commissioner for Human Rights (OHCHR).[9] With respect to Myanmar, some NGOs have raised environmental concerns within a human rights framework in their submissions to the UPR.[10] What is significant about the CIPM submission, however, is that it marks a formal attempt by indigenous people in Myanmar to exercise an

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("Many scholars and legal practitioners have framed the demands of the environmental justice movements nationally and globally in the language of human rights.").

7. *See, e.g.*, Republic of Haiti Submission to the U.N. Universal Periodic Review, Twelfth Session of the Working Group on the UPR Human Rights Council, (Oct. 2011), https://lib.ohchr.org/HRBodies/UPR/Documents/session12/HT/JS5-JointSubmission5-eng.pdf (chronicling Haiti's UPR, which included an environmental justice report); Lynda Collins, *The United Nations, Human Rights, and the Environment*, *in* RESEARCH HANDBOOK ON HUMAN RIGHTS AND THE ENVIRONMENT 235 (Anna Grear & Louis Kotze eds., 2015) (mentioning that many states have included environmental issues in their human rights discussions at the UPR).

8. *See* UNIV. OF ARIZ. INDIGENOUS PEOPLES LAW & POLICY PROGRAM, THE ROLE OF THE UN SPECIAL RAPPORTEUR ON THE RIGHTS OF INDIGENOUS PEOPLES WITHIN THE UNITED NATIONS HUMAN RIGHTS SYSTEM 29 (2012), http://unsr.jamesanaya.org/docs/data/UNSR-Handbook-USA.pdf (explaining that the UPR process is "relevant to indigenous peoples" and works in cooperation with the Special Rapporteur on the Rights of Indigenous Peoples); Joshua Cooper, *Universal Periodic Review: A Potent Process for the Realization of Human Rights in Indigenous Homelands*, CULTURAL SURVIVAL Q. MAG. (June 2014), http://www.culturalsurvival.org/publications/cultural-survival-quarterly/universal-periodic-review-potent-process-realization-human (explaining that the UPR process offers a chance for indigenous peoples to hold governments accountable to the community's input and preferences); *The Universal Periodic Review (UPR)*, INT'L WORK GRP. FOR INDIGENOUS AFF., http://www.iwgia.org/human-rights/un-mechanisms-and-processes/universal-periodic-review-upr [https://web.archive.org/web/20150916013139/http://www.iwgia.org/human-rights/un-mechanisms-and-processes/universal-periodic-review-upr] (noting that the UPR may be a useful process for indigenous peoples hoping to raise international awareness about domestic human rights issues) (last visited Dec. 4, 2018) [hereinafter IWGIA *Universal Periodic Review*].

9. *See generally* U.N. High Commissioner for Human Rights, *Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy, and Sustainable Environment: Individual Report on the UN General Assembly and the Human Rights Council, Including the Universal Periodic Review Process*, ¶¶ 2, 5, 14, 16–17, U.N. Doc. 6/HRC/UPR/25 (2013), [hereinafter *Mapping Human Rights Obligations*] http://www.ohchr.org/Documents/Issues/Environment/MappingReport/6.HRC-UPR-25-Feb.docx (highlighting the prevalence of environmental issues in the context of human rights amongst countries' UPR submissions).

10. *See, e.g.*, INT'L COMM'N OF JURISTS, INTERNATIONAL COMMISSION OF JURISTS' (ICJ) SUBMISSION TO THE UNIVERSAL PERIODIC REVIEW OF THE REPUBLIC OF THE UNION OF MYANMAR 2–3, 5–6 (2015), https://www.icj.org/wp-content/uploads/2015/03/Myanmar-UPR-Advocacy-2015-ENG.pdf (describing environmental considerations as components of human rights obligations); INST. FOR HUMAN RIGHTS AND BUS., SUBMISSION TO THE UNITED NATIONS HUMAN RIGHTS COUNCIL, UNIVERSAL PERIODIC REVIEW SESSION 23: MYANMAR 4 (2015), https://www.ihrb.org/pdf/submissions/2015-UPR-Myanmar.pdf (supporting environmental impact assessments as part of human rights protections).

international human rights mechanism, and so marks an escalation in their attempts to obtain redress for their local environmental grievances.[11]

As such, the use of the UPR illustrates an indigenous strategy of reaching up to an international level in order to address problems at a local one: the CIPM resorted to the UPR in hopes of mobilizing international pressure to change the behavior of the Myanmar government.[12] This is an approach advocated by indigenous supporters, such as the International Work Group on Indigenous Affairs (IWGIA), which observed an increasing trend of indigenous participation in the UPR since its inception—and which encourages indigenous groups to use the UPR as a tool to advance their interests.[13] This activity conforms to larger trends of non-state actors exercising more transnational activity[14] and expanding their roles at multiple levels of governance.[15] Typically, studies of environmental issues and human rights involve cases where the norms about appropriate behavior are conveyed from a universal or international level down to a domestic level.[16] Indigenous peoples tend to work in the converse, following a

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11. *See* Saning, *supra* note 1 (discussing the CIPM UPR submission, along with local sentiments that indigenous rights "remain up in the air" while the government fails to recognize the full spectrum of indigenous groups and their grievances); *see also* CIPM 2015, *supra* note 5, at 3–4, 6, 8–9, 11, 13–14 (formally submitting the CIPM's environmental concerns to the UPR).

12. *See* MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS 12 (1998) (stating that domestic actors who cannot engage their own government may find success through the persuasive power of the international community).

13. *See* IWGIA *Universal Periodic Review*, *supra* note 8 (describing the unique value of the UPR process to empower "indigenous peoples and other marginalized communities"); INT'L WORK GRP. FOR INDIGENOUS AFFAIRS, THE INDIGENOUS WORLD 2011 414, 416, 514, 516–17 (2011) [hereinafter THE INDIGENOUS WORLD] , https://www.iwgia.org/images/publications/0454_THE_INDIGENOUS_ORLD-2011_eb.pdf (highlighting recent examples of indigenous peoples' involvement in the UPR, and the benefits that come with their participation).

14. *See, e.g.*, ALISON BRYSK, FROM TRIBAL VILLAGE TO GLOBAL VILLAGE: INDIAN RIGHTS AND INTERNATIONAL RELATIONS IN LATIN AMERICA 29, 33 (2000) (using an indigenous rights movement in Latin America as an example of transnational activism); KECK & SIKKINK, *supra* note 12, at 10–11 (highlighting the increase in number of international social change NGOs between 1953 and 1993).

15. *See, e.g.*, John Guidry et al., *Globalizations and Social Movements*, *in* GLOBALIZATIONS AND SOCIAL MOVEMENTS: CULTURE, POWER, AND THE TRANSNATIONAL PUBLIC SPHERE 1, 1 (John A. Guidry et al. eds., 2000) (describing how social movements have become more globalized, relying on pressure at the international level to effect change in their home states). *See generally* Jan Aart Scholte, *Civil Society and Democracy in Global Governance*, 80 GLOBAL GOVERNANCE 281, 281, 286, 290, 293, 299–300 (2002) (discussing growth in activism at the global level of governance); DAVID HELD & ANTHONY MCGREW, GLOBALIZATION/ANTI-GLOBALIZATION 6–7 (2002) (providing background information on the trend toward globalization in "economic, social and political activities").

16. *See, e.g.*, Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 893, 899 (1998) (noting that norms from the international community can descend to the domestic level in multiple ways, and indicating that environmental or human rights efforts often take shape at an international scale); Audie Klotz, *Norms Reconstituting*

pattern scholars like Sidney Tarrow describe as "scale shift,"[17] whereby domestic activists seek to take norms held at the grass-roots level upward to an international system that can then be mobilized to aid grass-roots efforts to promote those norms in a domestic context.[18]

This article evaluates the CIPM strategy to use the UPR to advance its environmental grievances against the Myanmar state. The analysis begins with a brief presentation of background information about the challenges of doing research in Myanmar and the opportunities for the CIPM to participate in the UPR.[19] The analysis then applies the concept of Transnational Advocacy Networks (TANs) to better understand the mechanics of the CIPM's participation in the UPR.[20] Following this, the analysis draws upon TANs to highlight concerns for the CIPM with respect to the UPR, and then comments on the motivations for the CIPM to continue engaging with the UPR.[21] Finally, the analysis draws out lessons for other groups that may seek to adopt the CIPM's strategy of using the UPR to advance their interests.[22]

I. BACKGROUND

The analysis is based on ethnographic field notes collected in Myanmar under a U.S. Fulbright Scholar grant from 2014–2015, supplemented with unpublished primary source documents obtained in person from CIPM representatives.[23] Additional interviews and documents were gathered

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Interests: Global Racial Equality and U.S. Sanctions Against South Africa, 49 INT'L ORG. 451, 451–52 (1995) (explaining that international sanctions against South Africa may be attributable to the global norm in favor of racial equality).

    17. *See* SIDNEY TARROW, THE NEW TRANSNATIONAL ACTIVISM 32 (2005) (defining "scale shift").

    18. *See* Pamela Martin & Frankie Wilmer, *Transnational Normative Struggles and Globalization: The Case of Indigenous People in Bolivia and Ecuador*, 5 GLOBALIZATIONS 583, 585 (2008) (discussing how advocates brought their concerns to the international level, which in turn created domestic change).

    19. *See infra* Part I (providing relevant background on research methods, Myanmar's multi-dimensional transition, and the UPR mechanism).

    20. *See infra* Part II (explaining how the CIPM fits into the TAN model and works to initiate a "Boomerang Pattern").

    21. *See infra* Parts III–IV (describing a number of issues inherent in the CIPM's use of the UPR, and how these limitations square with the CIPM's goals and expectations for the process).

    22. *See infra* Part V (highlighting various lessons that the CIPM experience provides, and how other groups can use these lessons when pursuing international assistance for human rights issues).

    23. *See Fulbright Scholarship Program: Jonathan Liljeblad*, COUNCIL FOR INT'L EXCH. OF SCHOLARS, https://www.cies.org/grantee/jonathan-liljeblad (last visited Dec. 4, 2018) (providing additional details on the author's Fulbright scholarship).

several months after the November 2015 UPR session for Myanmar,[24] while the Myanmar elections in that time period heralded the arrival of a government led by Daw Aung San Suu Kyi's National League for Democracy (NLD) political party.[25] Due to the continuing political sensitivity of Myanmar's ongoing democratization, this study does not use direct quotes, names, or attributing information unless they were given in publicly available documents.[26]

It should be noted that Myanmar's ongoing transition complicates efforts to study the country, which has seen political, economic, and social changes spurred by engagement with foreign technical assistance, foreign investment, foreign trade, and renewed diplomatic relations.[27] Examples of these changes include: an array of new laws passed or drafted across a range of areas, particularly in infrastructure, human development, education, energy, and foreign investment;[28] a continuing peace process to end domestic conflicts with various ethnic groups;[29] a reform process to promote rule of law, human rights, and independence of the legal and judicial professions;[30] a growing number of infrastructure and human

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24. Interviews and Materials Gathered from CIPM Representatives (Nov. 6, 2018) (on file with author).

25. *Myanmar's 2015 Landmark Elections Explained*, BBC NEWS (Dec. 3, 2015), https://www.bbc.com/news/world-asia-33547036.

26. *See The Current Situation in Burma: A USIP Fact Sheet*, U.S. INST. OF PEACE (June 4, 2018), https://www.usip.org/publications/2018/06/current-situation-burma (highlighting political unrest in Myanmar).

27. *See* Mary Callahan, *The Opening in Burma: The Generals Loosen Their Grip*, 23 J. DEMOCRACY, Oct. 2012, at 120, 122–24, 126 (exploring the ongoing political, economic, and social changes advocated by various leaders); Neil Englehart, *Two Cheers for Burma's Rigged Election*, 52 ASIAN SURV. 666, 682 (2012) (discussing changes to transparency and censorship but advising caution in drawing conclusions); Christina Fink, *How Real Are Myanmar's Reforms?*, 113 CURRENT HIST. 224, 224–25 (2014) (describing recent political and economic shifts, along with openness to foreign investment and aid); N. Ganesan, *Interpreting Recent Developments in Myanmar as an Attempt to Establish Political Legitimacy*, 1 ASIAN J. PEACEBUILDING 253, 257–63 (2013) (summarizing recent changes and detailing increased foreign support).

28. *See, e.g.*, Fink, *supra* note 27, at 225 (discussing then-president Thein Sein's efforts to bolster education and infrastructure spending, improve the financial system, and pass new investment laws); Viacheslav Backsheev & James Finch, *Myanmar's New Electricity Law*, MYAN. BUS. TODAY (Jan. 22, 2015), https://www.mmbiztoday.com/articles/myanmar-s-new-electricity-law (describing a new law, enacted in 2014, which sought to bring Myanmar's energy system in line with "international standards").

29. *See* Fink, *supra* note 27, at 229 (noting the military's efforts to confiscate weapons); *Myanmar's Suu Kyi Opens Fresh Round of Peace Talks*, ALJAZEERA (May 24, 2017), https://www.aljazeera.com/news/2017/05/myanmar-suu-kyi-opens-fresh-peace-talks-170524045940849.html (reporting on the government's continuing efforts to reach a lasting ceasefire between ethnic groups).

30. *See generally* Kyaw Yin Hlaing, *Understanding Recent Political Changes in Myanmar*, 34 CONTEMP. SOUTHEAST ASIA 197, 203–11 (2012) (describing aspects of liberalization and democratization, as well as the development of a constitutional mode of governance based on the rule of

development projects;[31] and efforts to promote improved governance, with technical aid to bolster capacity and reduce corruption.[32] Attendant with all this is a continuing process of democratization, with efforts to move the country away from military to civilian rule, even as it works to conduct democratic elections.[33] The sum of all these changes is a dynamic environment with fluid conditions that makes it difficult for analyses to stay timely.[34] To mitigate this, the analysis here focuses primarily on the nature of the UPR as a strategy employed by the CIPM to advance the environmental grievances of Myanmar's indigenous peoples. This analysis, to the extent it ties into the context of Myanmar's transition, draws upon conditions in the country as they existed at the time of the November 2015 UPR for Myanmar.

The UPR serves as an HRC mechanism directed at promoting human rights among UN member states.[35] The UPR operates by subjecting each state to a review of its human rights on a continuing periodic basis of roughly four years.[36] For each state, the UPR review process follows a sequence of four steps: (1) the submission of information in the form of reports about a state's human rights record from UN bodies, UN member states, national human rights institutions (NHRIs), and NGOs; (2) a

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law and countervailing powers); Englehart, *supra* note 27, at 681–82 (charting the ascendance of new military leadership with greater investment in upholding human rights and resisting corruption).

    31. *See* Fink, *supra* note 27, at 225 (listing recent efforts to support citizens and develop infrastructure, by increasing spending for public needs and reforming the central bank); Ganesan, *supra* note 27, at 266 (noting new foreign assistance available for infrastructure development).

    32. *See* Callahan, *supra* note 27, at 122, 124 (stating that then-president Thein Sein's administration appeared to be governing rather than ruling, and discussing a shared desire among leaders to create a new, legitimate government); Englehart, *supra* note 27, at 681 (emphasizing the transition from "rule by decree" to governing through a legislature); Ganesan, *supra* note 27, at 266 (detailing increased foreign assistance for personnel training and infrastructure); Hlaing, *supra* note 30, at 198 (noting then-President Thein Sein's stated goal to reduce corruption); *United Against Corruption in Myanmar 2017*, U.N. OFF. ON DRUGS AND CRIME (Dec. 8, 2017), https://www.unodc.org/southeastasiaandpacific/en/myanmar/2017/12/anti-corruption-day/story.html (summarizing remarks by officials from the UN and Myanmar, touting Myanmar's efforts to address corruption—which include passing new laws and adopting the UN Convention Against Corruption).

    33. *See* Callahan, *supra* note 27, at 126 (explaining that government officials are actively trying to transition in ways that "look more democratic"); Englehart, *supra* note 27, at 682 (noting a significant, albeit flawed, shift toward democracy); Fink, *supra* note 27, at 224 (describing the shift toward democracy that took place in 2012); Ganesan, *supra* note 27, at 268 (stating that military leaders have stepped back, and political reforms have begun).

    34*. See, e.g.*, Hlaing, *supra* note 30, at 208 (emphasizing the surprising pace of political reform after President Thein Sein—who apparently did not expect to win the election—came to power).

    35. Human Rights Council Res. 5/1, U.N. Doc. A/HRC/RES/5/1, annex ¶¶ 3(a)–(g) (June 18, 2007); G.A. Res. 60/251, ¶ 5(e) (Apr. 3, 2006).

    36. Basic Facts About the UPR, *supra* note 3; *see also* U.N. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, *UPR Sessions*, https://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRSessions.aspx (discussing the timing of UPR cycles) (last visited Dec. 4, 2018).

Working Group meeting involving discussions based on the submitted reports to evaluate the state's progress towards the standards of the UN human rights system; (3) the publication of an outcome report at the end of the Working Group meeting containing recommendations to improve the reviewed state's status on human rights; and (4) subsequent provision of capacity-building and technical aid, along with the exercise monitoring measures, directed at helping the reviewed state fulfill the outcome report recommendations.[37] In this process, NGOs like the CIPM can participate by submitting reports prior to the Working Group meeting, forwarding information to member states during the Working Group meeting, issuing comments during assembly of the outcome report, and monitoring the performance of a reviewed state in relation to outcome report recommendations.[38] Hence, in submitting a report to the UPR, the CIPM is only taking an initial step within a larger process that is itself part of a greater UN human rights system.[39]

The CIPM's claims to the 2015 UPR session on Myanmar comprise a range of issues encompassing themes of land, natural resources, development, and self-determination tied to human rights.[40] As presented in the CIPM submission to the UPR, much of this revolved around environmental damage resulting from dam building, road construction, plantation clearing, mining, and timber harvesting.[41] The CIPM asserted that these projects frequently involved confiscating or exploiting indigenous land without: compensation; legally required environmental impact assessments; or free, prior, informed consent (FPIC).[42] As a result, these projects violated indigenous collective rights to subsistence, cultural practices, and customary laws related to their land.[43] The projects also violated indigenous rights to self-determination, because the government did not negotiate with indigenous peoples—or notify them—before making decisions about the land.[44]

In addition, many of these projects involved replacing indigenous names with Burmese language terms and destroying sites of cultural significance to indigenous peoples, thereby violating indigenous rights

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37. *See* Basic Facts About the UPR, *supra* note 3 (describing the review process in detail).

38. *See id.* (noting opportunities for NGO participation within the process).

39. *See id.* (describing how the broader UPR process evolves after preliminary submissions).

40. CIPM 2015, *supra* note 5, at 2, 5, 9.

41. *Id.* at 6, 8–10, 12.

42. *Id.* at 5, 7.

43. *See id.* at 12–13 (stating that construction projects and other government initiatives have displaced communities, destroyed sites of cultural significance, and impinged on customary practices).

44. *See id.* at 2, 5, 8, 13 (advocating for the right of self-determination and lamenting that indigenous rights, including the right to manage indigenous territories, are being violated).

regarding cultural heritage.[45] Further, the government violated rights of free speech, free assembly, equality under the law, and access to the law, by working to suppress indigenous efforts to organize public protests or access legal protections against such projects.[46] Last, because many of the large-scale extraction and agriculture projects produced toxic waste, they threatened the right to life.[47] Thus, for Myanmar's indigenous peoples, the environmental destruction brought by Myanmar government policies was tied to a slate of collective and individual human rights issues.

II. FORMULATING THE CIPM AS A TRANSNATIONAL ADVOCACY NETWORK

To a degree, the use of UPR by Myanmar's indigenous peoples conformed to the general features of what are called TANs.[48] In their most basic components, TANs are defined as "networks of activists, distinguishable largely by the centrality of principled ideas or values in motivating their formation."[49] The elements of TANs are "actors working internationally on an issue, who are bound together by shared values, a common discourse, and dense exchanges of information and services."[50] The actors in TANs operate to "mobilize information strategically to help create new issues and categories and to persuade, pressure, and gain leverage over much more powerful organizations and governments."[51] The prevailing understanding of transnational advocacy is tied to a "Boomerang Pattern" originally advanced by Margaret Keck and Kathryn Sikkink.[52] This model conceives of TANs as involving a recalcitrant state that is unresponsive to the efforts of domestic activists, who reach out to activists in other countries, who in turn push their own states or international organizations to pressure the recalcitrant state to satisfy domestic activists.[53]

Since their inception, the ideas of TANs and the Boomerang Pattern have been applied in various permutations to a broad array of topics,

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45. *See id.* at 12 (discussing efforts to suppress indigenous languages, and the destruction of culturally significant sites).

46*. See id.* at 7–8 (noting actions taken by the government to suppress protests, free speech, and access to legal venues).

47. *See id.* at 8 (highlighting extraction projects and their effects on the health and livelihoods of local communities).

48*. See* KECK & SIKKINK, *supra* note 12, at 1–2 (describing how transnational advocacy networks forge new connections between citizens, nations, and the international community).

49. *Id.* at 1.

50. *Id.* at 2.

51. *Id.*

52. *Id.* at 12.

53*. See id.* at 12 (explaining that advocacy groups may seek international assistance when domestic avenues for progress are closed).

including: labor,[54] children's rights,[55] climate change,[56] corporate conduct,[57] education,[58] environmental protection,[59] human rights,[60] indigenous rights,[61] independence movements,[62] public health,[63] sexual harassment,[64] and women's rights.[65] Indigenous concerns, alongside human rights and environmental problems, were among the original subjects of TANs, generating the central examples of Boomerang Patterns studied in the seminal work of Keck and Sikkink.[66] Boomerang Patterns can involve combinations of issues, and scholars like Kathryn Hochstetler, Margaret Keck, and Pamela Martin have observed permutations that involved indigenous activism over environmental grievances, with indigenous peoples reaching out to international actors in order to resolve local

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54. *See generally* David M. Trubek et al., *Transnationalism in the Regulation of Labor Relations: International Regimes and Transnational Advocacy Networks*, 25 L. & SOC. INQUIRY 1187, 1199, 1209 (2000) (analyzing transnational advocacy in relation to labor).

55. *See* R. Charli Carpenter, *Setting the Advocacy Agenda: Theorizing Issue Emergence and Nonemergence in Transnational Advocacy Networks*, 51 INT'L STUD. Q. 99, 101 (2007) (noting a TAN agenda involving children affected by war).

56. David Ciplet, *Contesting Climate Injustice: Transnational Advocacy Network Struggles for Rights in UN Climate Politics*, 14 GLOBAL ENVTL. POL., Nov. 2014, at 75, 76.

57. Emily McAteer & Simone Pulver, *The Corporate Boomerang: Shareholder Transnational Advocacy Networks Targeting Oil Companies in the Ecuadorian Amazon*, 9 GLOBAL ENVTL. POL., Feb. 2009, at 1, 2.

58. Karen Mundy & Lynn Murphy, *Transnational Advocacy, Global Civil Society? Emerging Evidence from the Field of Education*, 45 COMP. EDUC. REV. 85, 86 (2001).

59. Michael G. Huelshoff & Christina Kiel, *Swan Song: Transnational Advocacy Networks and Environmental Policy in Chile – The Case of the Cisnes de Cuello Negro*, 1 INT. GROUPS & ADVOC. 260, 261 (2012); *see also* Patricia Widener, *Global Links and Environmental Flows: Oil Disputes in Ecuador*, 9 GLOBAL ENVTL. POL., Feb. 2009, at 31, 33 (noting that "[e]nvironmental justice struggles are increasingly transnational in nature").

60. Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction*, *in* THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE 5 (Thomas Risse et al. eds., 1999).

61. *See* MARIA GUADALUPE MOOG RODRIGUES, GLOBAL ENVIRONMENTALISM AND LOCAL POLITICS: TRANSNATIONAL ADVOCACY NETWORKS IN BRAZIL, ECUADOR, AND INDIA 3 (2004) (indicating that TANs have empowered indigenous rights groups); Claire Wright, *Indigenous Mobilisation and the Law of Consultation in Peru: A Boomerang Pattern?*, 5 INT'L INDIGENOUS POL'Y J., no. 4, Oct. 2014, Art. 4, at 4 (explaining that indigenous rights movements have exemplified the transnational approach to advocacy).

62. Stephen Noakes, *Transnational Advocacy Networks and Moral Commitment: The Free Tibet Campaign Meets the Chinese State*, 67 INT'L J. 507, 516 (2012).

63. Fengshi Wu, Double-Mobilization: Transnational Advocacy Networks for China's Environment and Public Health, at 199 (2005) (unpublished Ph.D. dissertation, University of Maryland) (on file with the Digital Repository at the University of Maryland), https://drum.lib.umd.edu/handle/1903/2970.

64. Kathrin Zippel, *Transnational Advocacy Networks and Policy Cycles in the European Union: The Case of Sexual Harassment*, 11 SOC. POL. 57, 58 (2004).

65. Valerie Sperling et al., *Constructing Global Feminism: Transnational Advocacy Networks and Russian Women's Activism*, 26 SIGNS: J. WOMEN CULTURE & SOC'Y 1155, 1155 (2001).

66. KECK & SIKKINK, *supra* note 12, at 2.

environmental disputes.[67] Hence, TANs and the Boomerang Pattern provide a means of studying the efforts of Myanmar's indigenous peoples to use an international mechanism like the UPR to address their environmental concerns.

With respect to the initial components of the definition set by Keck and Sikkink, the CIPM's use of the UPR is consistent with the idea of TANs.[68] Specifically, a number of indigenous groups in Myanmar were frustrated by perceived inadequacy in the Myanmar government's response to environmental degradation, and the groups argued that the government was responsible, complicit, or negligent with respect to deforestation, pollution, and land seizures that restricted the resources of their habitats.[69] Dissatisfied with the lack of government action, these groups worked together as the CIPM to reach out to the HRC and its UPR mechanism as transnational instruments that ostensibly have powers to influence the behavior of the Myanmar state.[70] To the extent that the UPR involves UN member states, UN agencies, and NGOs or civil society organizations (CSOs), the CIPM's use of the UPR involved accessing a network of relationships to exchange information and services with respect to the conduct of the Myanmar government in relation to UN standards of human rights.[71] Thus, to the extent that the CIPM was able to frame its environmental grievances within the UN human rights system, it formed a Boomerang Pattern of transnational advocacy on its own behalf.[72] An illustration of the CIPM model of the Boomerang Pattern is given in Figure 2 below.

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67. *See* KATHRYN HOCHSTETLER & MARGARET E. KECK, GREENING BRAZIL: ENVIRONMENTAL ACTIVISM IN STATE AND SOCIETY 98–99 (2007) (explaining how Brazilian environmentalists began engaging with the international community in addressing deforestation); PAMELA L. MARTIN, GLOBALIZATION OF CONTENTIOUS POLITICS: THE AMAZONIAN INDIGENOUS RIGHTS MOVEMENT 121 (David Wilkins & Franke Wilmer eds., 2014) (describing ways indigenous peoples have engaged in transnational efforts and collaborated with international entities on domestic environmental issues).

68. *See* KECK & SIKKINK, *supra* note 12, at 4 ("The networks we describe . . . use [their] resources strategically to affect a world of states and international organizations constructed by states.").

69. *See* CIPM 2015, *supra* note 5, at 3, 6, 8 (assigning blame to the government for enabling these destructive practices through legislation, improper permitting, and military force).

70. *See id.* at 1 (showing the groups that joined together to address the UN); Mathew Davies, *Rhetorical Inaction? Compliance and the Human Rights Council of the United Nations*, 35 ALTERNATIVES 449, 455–456 (2010) (explaining the potential outcomes and persuasive effects of mechanisms like the HRC).

71. *See* Basic Facts about the UPR, *supra* note 3 (describing how the UPR process engages UN member states, NGOs, and the reviewed state in promoting human rights).

72. *See* KECK & SIKKINK, *supra* note 12, at 12, 17 (explaining that a "boomerang pattern" may form when advocacy groups "bypass their state and directly search out international allies").
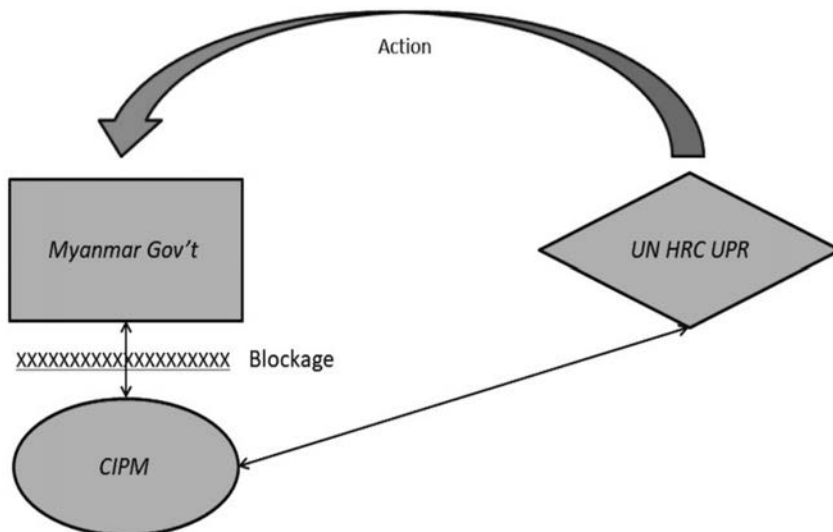
Figure 2. The Boomerang Pattern for the CIPM[73]

III. ISSUES FOR THE CIPM

Applying TANs to the CIPM's use of the UPR is useful not just in terms of clarifying the mechanics of the CIPM strategy, but also in terms of identifying issues that may threaten the expected outcomes. The CIPM has expectations that the UPR can aid its efforts to find redress for its grievances with the Myanmar government, and so their assessment of the UPR is tied to its ability to apply pressure upon the Myanmar government to respond to such grievances.[74] Specifically, the CIPM approach to TANs indicates there are two stages that pose potential advocacy issues: the nature of blockage in the context of Myanmar, and the nature of pressure expected from the HRC.[75] These two stages represent critical areas for the CIPM and its supporters: the stages relate to the CIPM's expectations for the UPR, and

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73. Jonathan Liljeblad, Diagram of the "Boomerang Pattern" for CIPM (2018) (on file with author).

74*. See* Saning, *supra* note 1 (discussing the CIPM's complaints to the UPR and their request to the UN Special Rapporteur on the Situation of Human Rights in Myanmar to help them create a country-wide dialogue).

75*. See infra* Parts III.A–B (describing the nature of the blockage facing the CIPM, and the nature of the pressure applied by the UPR).

hence their sense of its effectiveness in meeting those expectations.[76] This suggests that prognostications regarding the possible outcomes for the CIPM's use of UPR are best served by looking to the blockages responsible for indigenous grievances and the manner in which the UPR generates pressure upon recalcitrant states.

A. Nature of Blockage

To a degree, the UPR can address the blockages facing the CIPM's efforts to engage the Myanmar government.[77] This capacity, however, is defined by the reach of the UPR as a mechanism of the HRC within the UN human rights system.[78] To the extent that the blockage involves issues that fall within this system, it is possible for the CIPM to use the UPR to advance its environmental grievances, but there is a risk that the CIPM's strategy of using the UPR may not adequately address issues lying outside the UN human rights system.[79] This suggests a need to identify the nature of blockages facing the CIPM, and assess whether the UPR is the appropriate mechanism to resolve the CIPM's complaints against the Myanmar government. At the time of the November 2015 UPR, the CIPM faced blockages caused by a number of factors, some of which fell under the purview of the UN human rights system and some which lay outside the focus of the UN human rights system.[80]

With respect to issues that fall under the purview of the UN human rights system, there are a number currently receiving attention from ongoing UN human rights programs. First is the treatment of the indigenous peoples in Myanmar. The concept of *indigenous* is a relatively recent introduction in Myanmar, with ongoing efforts involving various foreign NGOs and local CSOs to promote understanding of the term.[81] The UN

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76. *See infra* text accompanying notes 199–207 (relaying the CIPM's continued expectations for the UPR process, and the perceived values associated with participation).

77. *See infra* notes 81–100 and accompanying text (describing how the UPR can assist in promoting indigenous rights, human rights generally, an end to corruption, and the rule of law); UPR Fact Sheet, *supra* note 2 (indicating that primary responsibility for implementing the UPR recommendations lies with the state in question).

78. *See* UPR Fact Sheet, *supra* note 2 (providing that the UN General Assembly established the UPR as a subsidiary of the HRC).

79. *See infra* Part III.A (detailing issues facing the CIPM, as well as the scope and limits of the UPR as a mechanism for addressing those issues).

80. *See infra* Part III.A (describing recent developments and historical conditions that continued to frustrate the CIPM's efforts leading up to the 2015 UPR).

81. *See About Us*, Promotion of Indigenous and Nature Together, http://www.pointmyanmar.org/en/about-us (last visited Dec. 4, 2018) [hereinafter Indigenous and Nature Together] (describing efforts in Myanmar, beginning in 2012, to promote awareness of indigenous peoples and their rights).

applies various definitions of the term *indigenous*, which complicates efforts to reach a common understanding.[82] For its part, the Myanmar government seems to acknowledge the concept in principal: voting in favor of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).[83] In practice, however, the government eschews the idea, and instead employs the term "National races" articulated in its 2008 Constitution.[84] This choice is significant, in that it ignores the topics of collective indigenous rights—including self-determination and customary land use practices—recognized under the UNDRIP.[85]

Second, even though it was among the original signatories to the Universal Declaration of Human Rights, Myanmar suffers from a poor record on human rights.[86] It has not ratified or acceded to the vast majority of human rights treaties, with the exceptions of the Convention on the Elimination of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), and the Convention on the Rights of Persons with Disabilities (CRPD).[87] The UN General Assembly continues to express concerns over the status of a wide range of human rights in the country, including: democratic reforms, electoral changes, discrimination against minorities and women, escalating ethnic conflicts, environmental degradation, development inequality, arbitrary arrests and detentions, torture, sexual violence, forced displacement, and continuing restrictions on free expression, free association, and a free and independent media.[88]

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82. *See* Asia Pacific Forum and U. N. Office of the High Commissioner for Human Rights, The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions 7 (2013), https://www.ohchr.org/Documents/Issues/IPeoples/UNDRIPManualForNHRIs.pdf (noting there is no clear definition of indigenous peoples).

83. Press Release, General Assembly, General Assembly Adopts Declaration on Rights of Indigenous Peoples; 'Major Step Forward' Towards Human Rights for All, Says President, U.N. Press Release GA/10612 (Sept. 13, 2007), http://www.un.org/press/en/2007/ga10612.doc.htm.

84. CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR 2008, pmbl., http://www.moi.gov.mm/moi:eng/sites/default/files/Constitution_of_Myanmar_0.pdf.

85. G.A. Res. 61/295, annex, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

86. *See, e.g.*, Rep. of the Independent International Fact-finding Mission on Myanmar, ¶¶ 18, 20, 59, 70, 71–72, U.N. Doc. A/HRC/39/64 (2018), https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_64.pdf (describing ongoing human rights violations perpetrated or allowed by the government, including forced labor, institutional oppression of ethnic groups, violence toward civilians, denial of humanitarian aid, and suppression of free speech).

87. *Myanmar's NHRI Expands Education and Prison Monitoring Activities*, ASIAN PAC. F. (Aug. 5, 2015), http://www.asiapacificforum.net/news/myanmars-nhri-expands-education-and-prison-monitoring-activities/ (noting the three human rights treaties that Myanmar has ratified).

88. G.A. Res. 28/23, Situation of Human Rights in Myanmar, ¶¶ 1–12 (Apr. 2, 2015) [hereinafter Situation of Human Rights in Myanmar 2015], http://ap.ohchr.org/documents/dpage_e.aspx?m=89; *see also* Yanghee Lee (Special Rapporteur on the

Third, Myanmar suffers from extensive corruption and weak rule of law.[89] Transparency International's Corruptions Perceptions Index listed Myanmar 156 out of 175 countries in 2014.[90] Similarly, the World Justice Project, in its Open Government Index assessing the extent of publicized government data, right to information, civic participation, and complaint mechanisms, ranked Myanmar 100 out of 102 measured countries.[91] In its Rule of Law Index, the World Justice Project factored in variables including constraints on government powers, absence of corruption, security, observance of rights, and enforcement, and found Myanmar ranked 92 out of 102 countries.[92]

These issues frustrate the CIPM's engagement with the Myanmar government. Myanmar's corruption and weak rule of law subvert political and legal mechanisms that could provide solutions for CIPM complaints, the struggles with human rights indicate a political system unwilling to recognize the legal basis of CIPM concerns, and the avoidance of the concept of indigenous peoples effectively denies the CIPM identity.[93] However, the UPR can address these issues as an extension of a UN human rights system that already has mechanisms in place focused specifically on mitigating the violations within Myanmar.[94] For example, the OHCHR assigned a Special Rapporteur on the Situation of Human Rights in Myanmar (Special Rapporteur) with a mandate to monitor and engage the

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Situation of Human Rights in Myanmar), *Rep. of the Special Rapporteur on the Situation of Human Rights in Myanmar*, ¶¶ 1, 12, 27–29, 32–35, U.N. Doc. A/HRC/28/72 (Mar. 23, 2015) [hereinafter *Special Rapporteur* 2015], http://ap.ohchr.org/documents/dpage_e.aspx?m=89 (highlighting concerns regarding electoral reform, freedom of assembly, gender and minority discrimination of various types, torture, land use, violence, and environmental issues).

89*. See generally Overview of Corruption In Burma (Myanmar)*, U4 ANTI-CORRUPTION RESOURCE CTR.: CHR. MICHELSEN INST., https://www.u4.no/publications/overview-of-corruption-in-burma-myanmar/ (providing an account of the corruption and instability in Myanmar) (last visited Dec. 4, 2018).

90. *Corruption Perceptions Index 2014: Results*, TRANSPARENCY INT'L, https://www.transparency.org/cpi2014/results (last visited Dec. 4, 2018).

91. *WJP Open Government Index 2015: Myanmar*, WORLD JUST. PROJECT, http://data.worldjusticeproject.org/opengov/#/groups/MMR (last visited Dec. 4, 2018).

92. WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2015, at 119 (2015), https://worldjusticeproject.org/sites/default/files/roli_2015_0.pdf.

93. *See supra* notes 81–92 and accompanying text (discussing systemic issues which create obstacles to productive interaction with the government).

94*. See* Yanghee Lee (Special Rapporteur on the Situation of Human Rights in Myanmar), *Rep. of the Special Rapporteur on the Situation of Human Rights in Myanmar*, ¶¶ 1–2, 7–10, U.N. Doc. A/72/382 (Sept. 8, 2017) [hereinafter *Special Rapporteur* 2017], https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/279/73/pdf/N1727973.pdf?OpenElement (noting the Special Rapporteur's efforts and observations with regard to human rights and the rule of law in Myanmar).

Myanmar government.[95] The Special Rapporteur has conducted annual visits and reports covering questions of indigenous rights, human rights, corruption, and the rule of law.[96] The OHCHR continues to seek the establishment of an office in Myanmar to advance UN concerns with the Myanmar government.[97] The HRC has also supported and monitored the development of the Myanmar National Human Rights Commission (MNHRC), which is a national human rights institution under the HRC International Coordinating Committee of National Institutions for the Pormotion and Protection of Human Rights (ICC) Sub-committee and so has the mission of advancing the UN human rights system within Myanmar.[98] Thus, the UPR is tied to a concurrent set of UN mechanisms that focus specifically on the subject of human rights in Myanmar and recognize a need to promote indigenous and environmental rights.[99] Hence, the UPR functions as a useful strategy for the CIPM in terms of advancing indigenous and environmental rights past the blockages represented by the Myanmar government's reluctance to accept the concept of indigeneity, advance human rights, remove corruption, or strengthen the rule of law.[100]

Beyond these issues, however, there are factors that lie outside the purview of the UN human rights system but still serve as blockages

95. *See* U.N. Office of the High Commissioner, Myanmar Refuses Access to UN Special Rapporteur (Dec. 20, 2017), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22553 (providing background information about the Special Rapporteur, and her mandate).

96. *See Special Rapporteur* 2017, *supra* note 94, ¶¶ 1–2, 7–9, 34, 37 (highlighting the Special Rapporteur's engagement with the government, and thoughts regarding ongoing issues of human rights, the rule of law, corruption, and ethnic conflict).

97. *See generally* Human Rights Council, Rep. of the Working Group on the Universal Periodic Review: Myanmar, ¶¶ 79, 94, U.N. Doc. A/HRC/31/13 (Dec. 23, 2015), https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/_layouts/15/WopiFrame.aspx?s ourcedoc=/EN/HRBodies/HRC/RegularSessions/Session31/Documents/A_HRC_31_13_E.doc&action= default&DefaultItemOpen=1 (noting several countries' concerns about the ongoing efforts to open an office in Myanmar).

98. *See* Human Rights Council, Rep. of the Working Group on the Universal Periodic Review: Myanmar, ¶ 106, U.N. Doc. A/HRC/17/9 (Mar. 24, 2011), http://undocs.org/A/HRC/17/9 (recommending the formation of a national human rights commission in Myanmar); U.N. Office of the High Commissioner, OHCHR and NHRIs, https://www.ohchr.org/en/countries/nhri/pages/nhrimain.aspx (last visited Dec. 4, 2018) (stating that the ICC became the Global Alliance of National Human Rights Institutions (GANHRI) in 2016; *Directory of National Human Rights Institutions*, GLOBAL ALLIANCE OF NAT'L HUM. RTS. INSTITUTIONS, https://nhri.ohchr.org/EN/Contact/NHRIs/Pages/default.aspx (last visited Dec. 4, 2018) (showing that the Myanmar National Human Rights Commission is an NHRI under the GANHRI).

99. *See generally Mapping Human Rights Obligations*, *supra* note 9, ¶¶ 1–5, 11–13 (discussing human rights concerns in relation to the environment and how the UN has expanded human rights to also include those directly in relation to the environment).

100. *See supra* notes 81–99 and accompanying text (describing how these blockages manifest in Myanmar, and how they are addressed through the UN human rights framework).

impeding the CIPM's efforts.[101] These factors are reflective of the larger context of Myanmar's current transition, and call the attention of entities distinct from human rights organizations. First among these factors is the scale of underdevelopment, and resulting lack of capacity, throughout Myanmar's state and society. Under the British, Myanmar was among the wealthiest countries in Southeast Asia.[102] Since that time, however, the country has become one of the poorest in the region.[103] While the World Bank provides promising data showing Myanmar's 2016 Gross Domestic Product (GDP) as roughly $63.3 billion with an annual growth rate of approximately 6%,[104] the World Bank also reports that the annual per capita Gross National Income in 2015 was $1,190.[105] The UN Human Development Report for 2016 gives Myanmar a Human Development Index score of 0.556, ranking it 145 out of 188 measured countries.[106] Within the region, Myanmar is the poorest country in the Association of Southeast Asian Nations (ASEAN).[107] This is driven in part by the country's allocation of spending: the government reported a fiscal year budget with 6% spent on education and 3% on healthcare at the time of the 2015 UPR, which respectively represented the lowest education budget and the third lowest healthcare budget in ASEAN.[108] By contrast, Myanmar devoted 12% to military spending,[109] which was above an OECD-measured ASEAN average under 10% and second only to Singapore in the ASEAN

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101. *See Human Rights,* UNITED NATIONS, http://www.un.org/en/sections/issues-depth/human-rights/ (last visited Dec. 4, 2018) (indicating that human rights are "cross-cutting," but that rights involving development, food, labor, gender, and other broad themes may be more directly addressed by other UN organizations); *infra* notes 102–46 (discussing three significant factors that frustrate the CIPM's efforts, yet largely exist outside the scope of the UN human rights system).

102. *See* Michael Schuman, *Will Burma Become Asia's Next Economic Tiger?*, TIME (Aug. 22, 2012), http://business.time.com/2012/08/22/will-burma-become-asias-next-economic-tiger/ (stating that Myanmar was among the richest countries in the region after World War II).

103. PETER CHALK, ON THE PATH OF CHANGE: POLITICAL, ECONOMIC AND SOCIAL CHALLENGES FOR MYANMAR 4 (2013), https://www.aspi.org.au/report/path-change-political-economic-and-social-challenges-myanmar.

104. *GDP (Current US$)*, WORLD BANK, https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?end=2017&locations=MM&start=2015&view=chart (last visited Dec. 4, 2018); *GDP Growth (Annual %)*, WORLD BANK, https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?end=2017&locations=MM&start=2015&view=chart (last visited Dec. 4, 2018).

105. *GNI per Capita, Atlas Method (Current US$)*, WORLD BANK, https://data.worldbank.org/indicator/NY.GNP.PCAP.CD?locations=MM (last visited Dec. 4, 2018).

106. U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2016 200 (2016), http://hdr.undp.org/sites/default/files/2016_human_development_report.pdf.

107. CHALK, *supra* note 103, at 4.

108. Ei Ei Toe Lwin, *Military Spending Still Dwarfs Education and Health*, MYAN. TIMES (Mar. 30, 2014), http://www.mmtimes.com/index.php/national-news/10000-military-spending-still-dwarfs-education-and-health.html.

109. *Id.*

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region.[110] To make matters worse, the Myanmar government has been consistently recognized by both academics and aid agencies as lacking capacity in all areas and at all levels—with weak institutions,[111] opaque leadership,[112] dysfunctional civil service,[113] poor infrastructure,[114] inadequate resources,[115] and insufficient skills.[116] Though development aid and technical assistance from the international community increased in the wake of the country's 2011 elections and the initiation of political reforms, Myanmar continues to struggle against the scale of development issues.[117]

Second is the unstable 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.[118] The political landscape in Myanmar goes beyond a simple military-versus-civilian dichotomy, encompassing a spectrum of factions with distinct interests converging or diverging at various times in the ongoing transition discourse.[119] Larry Diamond

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110. *See* ORG. FOR ECON. CO-OPERATION AND DEV., OECD DEVELOPMENT PATHWAYS: MULTI-DIMENSIONAL REVIEW OF MYANMAR 182 (2014) (indicating that military spending was, on average, below 10% of total spending); Zachary Abuza, *Analyzing Southeast Asia's Military Expenditures*, COGITASIA (May 7, 2015), https://www.cogitasia.com/analyzing-southeast-asias-military-expenditures/ (showing that Myanmar was second to Singapore in 2014 military spending, measured as a percentage of total government spending).

111. HAMISH NIXON ET AL., STATE AND REGION GOVERNMENTS IN MYANMAR 7 (2013), https://asiafoundation.org/resources/pdfs/StateandRegionGovernmentsinMyanmarCESDTAF.PDF.

112. *See id.* at 62 (noting perceptions of opacity in government).

113. *See id.* at vi (describing dysfunctional, ineffective civil services and ministries).

114. *See* CHALK, *supra* note 103, at 8 (explaining that poor infrastructure hampers Myanmar's economy).

115. *See id.* at 7 (discussing Myanmar's low GDP and difficulty funding key services like public health).

116. *See id.* at 9 (identifying lack of skill as one factor reducing Myanmar's capacity to govern); Richard Horsey, *Myanmar's Political Landscape Following the 2010 Elections, in* MYANMAR'S TRANSITION: OPENINGS, OBSTACLES AND OPPORTUNITIES 39, 47 (Nick Cheesman et al. eds., 2012) [hereinafter MYANMAR'S TRANSITION] (noting a lack of competency in Myanmar's government); NIXON ET AL., *supra* note 111, at 38 (quoting a regional leader who noted a lack of technical skills as an impediment to effective governance).

117. *See* CHALK, *supra* note 103, at 7–8 (describing aspects of Myanmar's development challenges and the struggle for economic reform); Morten B. Pendersen, *Rethinking International Assistance to Myanmar in a Time of Transition in* MYANMAR'S TRANSITION, *supra* note 116, at 271, 271–72 (indicating that some international aid is forthcoming, but much more is needed); NIXON ET AL., *supra* note 111, at 35 (summarizing the inadequacy of resources and organization for the scale of the problem).

118. *See generally* Lex Rieffel, *Peace in Myanmar Depends on Settling Centuries-Old Ethnic Conflicts*, BROOKINGS INST. (Mar. 20, 2017), https://www.brookings.edu/blog/up-front/2017/03/20/peace-in-myanmar-depends-on-settling-centuries-old-ethnic-conflicts/ (providing an overview of long-running conflicts, diversity in ethnicity and religion, and deep divides among Myanmar's people).

119. *See* Callahan, *supra* note 27, at 120 (discussing the "new political fluidity" arising in the transition from military to civilian rule); Brian Joseph, *Political Transition in Burma: Four Scenarios in*

characterizes this discussion as one that involves 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 state to a more viable and coherent union."[120] Compounding such complexity is the involvement of international interests that seek to explore "third views" between the military and pro-democracy forces.[121] Such factors create a pluralist terrain of diverse political actors, who may be unified in their desire for transition, but differ on the manner in which to accomplish it and the ultimate result it is supposed to produce.[122] These complexities are not always benign, and have at times generated tensions significant enough to threaten the country's stability.[123] In particular, Myanmar has experienced sustained civil war since its independence in 1948: fomented by diverse nationalist movements tied to at least 135 ethnic nationalities seeking various degrees of sovereignty,[124] and fueled by a lucrative drug trade.[125] The government has made multiple attempts at cease-fires and peace talks, with the most recent iteration commencing after the 2011 elections,[126] but regions of the country are still subjected to violence between armed groups struggling for power.[127]

the Run-Up to the 2015 Elections, 32 SAIS REV. INT'L AFF., Summer–Fall 2012, at 137, 138–40, 142–44, 147 (2012) (exploring four possible scenarios for political change to highlight the relationship between a range of factors and individuals). *See generally* Renaud Egreteau, *Legislators in Myanmar's First "Post-Junta" National Parliament (2010-2015): A Sociological Analysis*, 33 J. CURRENT SOUTHEAST ASIAN AFF., no. 2, 2014, at 91, 94, 119 (examining the political backgrounds of Myanmar's "emerging national parliamentary elite" and their potential impact on the transition to civilian rule).

120. Larry Diamond, *The Need for a Political Pact*, 23 J. DEMOCRACY, Oct. 2012, at 138, 140 [hereinafter *Political Pact*].

121. *See* Hans-Bernd Zöllner, *After an Election and a Symbolic Re-election in Myanmar – What Next?* 42 INTERNATIONALES ASIENFORUM 47, 70 (2011) (noting the emergence of "third forces" in the political landscape, and discussing how international interests may affect Myanmar's transition).

122. *See id.* at 70 (indicating that new political interests, situated between the military and opposition leaders, may change the way the transition unfolds).

123. *See* Rieffel, *supra* note 118 (describing the complex ethnic conflicts and corresponding interests which destabilize the country—particularly the plight of the Rohingya community).

124. *See* Derek J. Mitchell, *Burma's Challenge*, 37 FLETCHER F. WORLD AFF., no. 3, special edition 2013, at 13, 14–15 (2013) (indicating that Myanmar has at least 135 ethnic nationalities, most of which have been involved in civil conflict).

125. *See* Patrick Meehan, *Drugs, Insurgency and State-Building in Burma: Why the Drugs Trade is Central to Burma's Changing Political Order*, 42 J. SOUTHEAST ASIAN STUD. 376, 396 (2011) (discussing how the government's approach to the drug trade keeps tensions high and allows them to consolidate power).

126. *See* *Peace Process Overview*, MYAN. PEACE MONITOR, http://www.mmpeacemonitor.org/mpm/peace-process-overview (last visited Dec. 4, 2018) (showing that the latest round of peace talks was initiated during the Thein Sein administration in 2011).

127. *See* Aung Naing Oo, *Armed Conflict: The Beginning of the End*, MYAN. TIMES (Aug. 25, 2015), https://www.mmtimes.com/opinion/16137-armed-conflict-the-beginning-of-the-end.html (describing difficulties during negotiations and ongoing violence in the north of the country).

Prominent conflicts have continued near the country's borders with China and India, including the Kokang and Rhakine regions.[128] Hence, the fractures in Myanmar's politics create a fluid environment of diverse, interacting interests whose differences frustrate efforts to resolve the country's other challenges—including issues of indigenous rights or environmental protection.[129]

Third is the issue of democratization under continued military control. In a January 2015 interview with Channel News Asia, military leader General Min Aung Hlaing stated that the military was reluctant to reduce its role in government so long as it continues to perceive threats to the country's nascent democracy.[130] In the interview, he cited stability as a necessary prerequisite to allow democracy to develop, and he did not rule out the resumption of military control over the country.[131] In reference to the political terrain of the country's democratic transition, he stated a disinclination to reform the country's laws and argued that too much change threatens the stability that the military seeks to impose on the

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128.   *Id.*; *see also* THE ASIA FOUND., THE STATE OF CONFLICT AND VIOLENCE IN ASIA 102, 108, 110 (2017), https://asiafoundation.org/wp-content/uploads/2017/10/The_State_of_Conflict_and_Violence_in_Asia-12.29.17.pdf (noting conflict near Myanmar's borders to the north and east, as well as violence in the Rakhine region).

129.   *See* KRISTIAN STOKKE ET AL., MYANMAR: A POLITICAL ECONOMY ANALYSIS 2, 10 (2018), https://brage.bibsys.no/xmlui/bitstream/handle/11250/2483349/NUPI_rapport_Myanmar_Stokke_Vakul chuk_%25C3%2598verland.pdf (describing fractures in Myanmar's government and society, and the difficulties that arise as a result).

130.   *See* May Wong, *Myanmar Not Ready for Reduced Military Role in Parliament: Army Chief*, CHANNEL NEWS ASIA (Jan. 20, 2015) [hereinafter *Myanmar Not Ready*], http://www.channelnewsasia.com/news/aasiapacifi/myanmar-not-ready-for/1603394.html [https://web.archive.org/web/20150123000054/http://www.channelnewsasia.com/news/asiapacific/myan mar-not-ready-for/1603394.html] (relaying comments from General Min Aung Hlaing, who took the position that Myanmar's reforms are still too new and fragile to accommodate major structural changes); May Wong, *Myanmar to "Wait and See" on Constitutional Change: Army Chief*, CHANNEL NEWS ASIA (Jan. 28, 2015) [hereinafter *Constitutional Change*], http://www.channelnewsasia.com/news/asiapacific/myanmar-to-wait-and-see/1612338.html [http://www.burmapartnership.org/wp-content/uploads/2015/07/20150100-CNA-Interviews-with-MAH.pdf] (transcribing an interview with General Min Aung Hlaing, where he indicated that amending the constitution to change military control of parliament was not possible until Myanmar was more stable and unified); *see also* May Wong, *Myanmar's Military Says Will Not Unilaterally Stage a Coup*, CHANNEL NEWS ASIA (Jan. 21, 2015) [hereinafter *Military Coup*], http://www.channelnewsasia.com/news/asiapacific/myanmar-s-military-says/1606338.html [https://web.archive.org/web/20150123221238/http://www.channelnewsasia.com:80/news/asiapacific/m yanmar-s-military-says/1606338.html] (highlighting the General's reluctance to rule out a military coup, and political analysis indicating that the military did not think the people were ready for a full shift to democracy).

131.   *Constitutional Change*, *supra* note 130; *Military Coup*, *supra* note 130.

country.[132] His comments reflect an intention to maintain a dominant role for the military in the process of Myanmar's democratization, with the military exercising the legislative and executive seats set under the 2008 Constitution to control the pace and direction of reform.[133]

Scholars like Guillermo O'Donnell and Phillippe Schmitter see such a situation as marking a democratic transition, in that it represents an interval between pure authoritarianism and functional democracy.[134] In cases like Myanmar, where a democratic transition is led by a pre-existing regime, Sujian Guo and Gary Stradiotto observe that reforms tend to favor the interests of the incumbents.[135] As a result, Myanmar's path to democracy is what scholars like Larry Diamond and Francis Fukuyama describe as a negotiated transition: the transfer of power to civilian control in a way acceptable to incumbent military elites.[136]

Myanmar's form of democratization is not favored purely by the military alone, but also seems to be shared among its people.[137] Brian Joseph finds that a negotiated transition is the preferred strategy 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.[138] Both Myanmar's military-led state and its society seem to desire a negotiated transition to democracy, which

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132. *See Constitutional Change*, *supra* note 130 ("It will depend a lot on the country's unity, its peace and stability. To specify an exact time is difficult. [The military is] still trying to resolve conflicts with armed groups. Currently the process is still ongoing. We are not sure of the results.").

133. *See id.* ("The constitution is the main or mother law of a country . . . . It is not suitable to change a law often. A law needs to be strong."); *Myanmar Not Ready*, *supra* note 130 ("We are still a young democracy. When we are moving towards a multi-party democratic system it needs to be a strong system. The military representatives in Parliament only give advice in the legislative process. They can never make decisions.").

134. *See* GUILLERMO O'DONNELL & PHILIPPE C. SCHMITTER, TRANSITIONS FROM AUTHORITARIAN RULE: TENTATIVE CONCLUSIONS ABOUT UNCERTAIN DEMOCRACIES 36 (1986) (describing difficulties around the "transition" from military authoritarianism to democracy, including the need for "interim agreements" acceptable to incumbent and civilian leaders).

135. SUJIAN GUO & GARY A. STRADIOTTO, DEMOCRATIC TRANSITIONS: MODES AND OUTCOMES 40–41 (2014).

136. Fink, *supra* note 27, at 230; Larry Diamond et al., *Reconsidering the Transition Paradigm* 25 J. DEMOCRACY, Jan. 2014, at 91 (2014) [hereinafter *Transition Paradigm*]; *see also* Hlaing, *supra* note 30, at 203–04 (describing how military leaders crafted early political reforms to their advantage); GRETCHEN CASPER & MICHELLE M. TAYLOR, NEGOTIATING DEMOCRACY: TRANSITIONS FROM AUTHORITARIAN RULE 3, 8–9 (1996) (noting that authoritarian regimes, including Myanmar's, can be resistant to a true democratic transition); *Political Pact*, *supra* note 120, at 139 (arguing that a transition cannot be forced, but needs to be negotiated with authoritarian rulers); Joseph, *supra* note 119, at 137 (explaining that a negotiated transition to democracy now has support from military leaders).

137. *See* Joseph, *supra* note 119, at 139–40, 142–44, 147 (exploring four scenarios for political change, and noting that leaders from diverse backgrounds preferred a negotiated transition).

138. *Id.*

suggests an environment disposed toward a gradual process of reform dictated by a military.[139] Diamond and Fukuyama, however, warn that a negotiated transition may be effective in bringing civilian government in a gradual, deliberate manner but it comes at a potential cost: it risks incurring a bargained exchange of conditions in which power is transferred to civilian authority in return for an enshrinement of corruption and dysfunction that benefits the departing military elite.[140] This means that Myanmar is vulnerable to the fate of other negotiated transitions: a democratic regression in which democratic regimes slide into dysfunction and freedom decreases as a result of continued, ingrained corruption within their political systems.[141]

Endemic factors such as underdevelopment, political instability, and democratization function as blockages because they restrict the capacity of the Myanmar government to hear or respond to complaints from various factions of Myanmar society—including NGOs like the CIPM.[142] Underdevelopment means that there are limited government resources to apply to a competing array of social problems, political instability means that it is difficult to focus government will, and a continued military presence means there is a continuing legacy of government inimical to the concerns of indigenous groups seeking to assert their rights.[143] These issues largely fall outside the UN human rights system.[144] To the degree that the HRC deals with them, it does so in conjunction with organizations holding more direct mandates—like the United Nations Development Programme (UNDP)—or foreign state entities engaged in bilateral arrangements of assistance, like the United States Agency for International Development (USAID).[145] As a result, the UPR cannot resolve these problems alone. It

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139. *See id.* at 137, 139–40 (noting that military leaders and members of the opposition now support Myanmar's reforms, and that a negotiated transition is the most probable outcome).

140. *See Transition Paradigm*, *supra* note 136, at 89, 91 (stating that incremental reforms can allow regimes to stay largely intact, and raising concerns that the transition in Myanmar could yield similar results); *see also Political Pact*, *supra* note 120, at 144 (explaining that political transition may require promises to turn a blind eye to past and future corruption in the military regime).

141. *See, e.g.*, Larry Diamond, *Democracy's Third Wave Today*, 110 CURRENT HIST. 299, 299, 302–03, 306 (2011) (highlighting Afghanistan, South Asia, and Pakistan as places that have fallen into democratic backslides due to corruption and dysfunction).

142. *See* CHALK, *supra* note 103, at 7–9 (highlighting difficulties with Myanmar's economic development, political landscape, and institutional capacity, which leave reform efforts handicapped).

143. *See id.* at 8–9 (discussing the government's struggle to address infrastructure and healthcare, while the military remains largely in control).

144. *See generally* G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 4 (Dec. 10, 1948) (declining to take up issues of development, political stability, and democratization, with the exception of Article 21 which describes a universal right to democratic government).

145. *See generally Who We Are: Mandate*, U.N. OFF. OF THE HIGH COMM'R FOR HUMAN RIGHTS, https://www.ohchr.org/EN/ABOUTUS/Pages/Mandate.aspx (last visited Dec. 4, 2018)

must address them by coordinating outside the UN human rights system, with an array of ongoing aid projects in Myanmar. These projects are not necessarily focused on the environmental grievances of indigenous peoples. Hence, it appears that the UPR is not, by itself, an entirely effective strategy for the CIPM with respect to advancing its concerns past the blockages posed by underdevelopment, political instability, and democratization.[146]

B. Nature of Pressure

For the CIPM, the value of the UPR depends on not only whether it is the appropriate mechanism to address the blockages facing Myanmar's indigenous peoples, but also whether the UPR recommendations are effective in meeting expectations. The CIPM's participation in the UPR is predicated on a belief that it offers an alternative to state mechanisms of resolving indigenous problems.[147] This implies an assumption that the UPR is able to impose pressure upon the Myanmar government to change its behavior.

Unfortunately, there is a risk that the assumption is flawed; outcomes from the UPR process may disappoint those hoping for prescriptions directing a recalcitrant state to address indigenous grievances.[148] The UPR Working Group meetings are conducted by the 47 member states that comprise the HRC, and are led by a troika selected by drawing lots from among the HRC member states.[149] Each Working Group meeting involves an interactive discussion based on submitted reports about a reviewed

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(discussing that the OHCHR carries out its mandate in cooperation with other UN agencies, and in accordance with the Universal Declaration of Human Rights); *Looking to the Future*, U.N. DEV. PROGRAMME, http://www.undp.org/content/undp/en/home/about-us.html (last visited Dec. 4, 2018) (providing that the UNDP focuses specifically on development and democratization); *Mission, Vision and Values*, U.S. AGENCY FOR INT'L DEV., https://www.usaid.gov/who-we-are/mission-vision-values (last visited Dec. 4, 2018) (stating that USAID focuses on international development and strengthening democratic governance until countries can support themselves without aid).

146. *See supra* notes 101–44 and accompanying text (detailing blockages related to underdevelopment, political instability, and democratization, and explaining that these are largely outside the scope of the UN human rights system).

147. *See* Micah F. Morton, *Indigenous Peoples Work to Raise Their Status in a Reforming Myanmar*, 2017 ISEAS PERSP., no. 33, at 1–2, https://www.iseas.edu.sg/images/pdf/ISEAS_Perspective_2017_33.pdf (indicating that the CIPM engaged with the UPR hoping to galvanize the international community around domestic issues in Myanmar).

148. *See* Theodor Rathgeber, *The HRC Universal Periodic Review: A Preliminary Assessment*, 2008 FES BRIEFING PAPER 6, at 6 http://www.fes-globalization.org/geneva/documents/HumanRights/13June08_UPR_English.pdf (stating that the UPR struggles to provide "a genuine and immediate improvement for the situation on the ground").

149. Basic Facts About the UPR, *supra* note 3.

state's compliance with its human rights obligations.[150] All UN member states are allowed to submit reports and participate in the discussion, while NGOs may only observe the meeting and submit material that is then included in an "other stakeholders" report or referred to a participating state.[151] At the end of the Working Group meeting, the troika works with the OHCHR and the state under review to generate an "outcome report" that presents the questions, comments, and recommendations made by the states present at the meeting.[152] The report also includes the responses of the reviewed state, including its decision to either accept or note the recommendation.[153] The report is then sent to a plenary session of the HRC where all UN member states, their affiliated NHRIs, and NGOs are allowed to make additional questions and comments and the reviewed state is once again allowed to reply.[154] Once the report is adopted by the HRC, the reviewed state is responsible for implementing the accepted recommendations in time for the next review.[155] At that time, the state is expected to explain how and why it has satisfied or failed to carry out the recommendations.[156]

A number of observations should be noted about the UPR process. First, it is a form of peer-review, where each state submits itself to evaluation by the international community.[157] This means that there is no overarching entity rendering decisions and enforcing remedies upon states.[158] It also means that the proceedings, and hence the outcomes, of the Working Group meeting are a function of the diligence and attitudes of participating states regarding the behavior of the reviewed state in relation to the UN human rights system.[159] Second, the outcome of the Working Group meeting is essentially a report of the proceedings, which is less a prescription of judgements or sanctions and more a transcription of findings and recommendations.[160] Third, to the extent that there is a prescription, the

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150. UPR Fact Sheet, *supra* note 2.

151. *Id.*; Basic Facts About the UPR, *supra* note 3.

152. UPR Fact Sheet, *supra* note 2.

153. Basic Facts About the UPR, *supra* note 3.

154. UPR Fact Sheet, *supra* note 2.

155. Basic Facts About the UPR, *supra* note 3.

156. *See id.* (explaining that the reviewed state is expected to give a status update at the next review).

157. *See id.* (noting that a reviewed state submits information for UN member states to evaluate).

158. *See id.* (indicating that there is no authority above the UN member states conducting the review).

159. *See id.* (detailing the rigorous and time-sensitive process carried out by states in the UPR Working Group to ensure that the outcome improves human rights conditions).

160. *See id.* (describing the report prepared by the troika states after review, which provides a summary with questions, recommendations, and other comments).

focus is not on coercion but instead on cooperation: UN member states will provide capacity-building and technical assistance to help a reviewed state meet UN human rights standards.[161] The underlying philosophy, in short, seems to emphasize positive approaches like constructive measures to improve future state performance in terms of human rights, as opposed to negative approaches like punitive measures that punish states for past violations.

The underlying philosophy implies a mechanism that does not apply pressure capable of forcing a resistant state to change its behavior.[162] What pressure does exist in the UPR arises from its transparent nature: all submissions are available to the public, whether from states or NGOs, and the outcome report is available as well.[163] This facilitates the exercise of *naming and shaming* strategies that seek to mobilize international public outrage and drive governments to take action against a recalcitrant state[164]—in essence, an extended iteration of the Boomerang Pattern.[165] Such strategies, however, are not goals of the UPR itself, since an ulterior motive for the HRC is that it operates to depoliticize UN human rights processes by eschewing approaches that may antagonize states: the HRC applies constructivist international relations philosophies that favor norm-building through persuasion over coercive confrontation.[166] This is reflected in the alignment of the UPR with what Matthew Davies identifies as mechanisms involving "free and open discussion between participants, who make recourse to the 'better' argument" wherein "actors are ideally arranged horizontally . . . and all are empowered to contribute and shape discussion."[167]

Even where states consistently violate human rights standards, fail to meet the recommendations of the UPR Working Group, or refuse to submit to its review, the HRC procedure continues to adhere to such a

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161. *See id.* (highlighting how the UPR uses technical assistance and capacity-building to support states and promote human rights).

162. *Id.*

163. *See, e.g.*, U.N. OFF. OF THE HIGH COMM'R FOR HUMAN RIGHTS, *Documentation by Country*, https://www.ohchr.org/en/hrbodies/upr/pages/documentation.aspx (last visited Dec. 4, 2018) (providing access to existing UPR reports).

164. *See* Kenneth Roth, *Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization*, 26 HUM. RTS. Q. 63, 63–67 (2004) (explaining that many international organizations use a shaming method to reveal rights violations to the public and pressure governments to respond).

165. KECK & SIKKINK, *supra* note 12, at 12.

166. *See* Davies, *supra* note 70 (describing the constructivist approach and emphasizing the UN's focus on depoliticization and non-coercive methods).

167. *Id.* at 455.

philosophy.[168] The HRC responds to these states sequentially by: (1) urging the state in question to fulfil its obligations, (2) discussing the impact of the violations in relation to the UPR during HRC sessions, and (3) recording the state's behavior as a precedent to be considered in the event of further non-cooperation in the future.[169] In short, the UPR is a constructivist experiment based on persuasion.[170] Its goal is to guide states toward a peer-generated normative sensibility that marks a change in identity and understanding about the appropriateness of altering behavior to meet UN human rights standards.[171] Such persuasion comes with no coercive threat of sanctions, but rather the enticement of capacity-building and technical aid.[172]

This poses a potential problem for Myanmar's indigenous people, in that an approach based on norm-building through persuasion is not an inherently expeditious process.[173] In particular, for recalcitrant states lacking political will to address indigenous complaints, the process of sustaining discussions to change identity and behavior suggests time frames that may exceed the exigent circumstances of indigenous grievances.[174] Even where states accede to UPR recommendations, the levels of capacity-building and technical aid needed to fulfil them may be on a scale that requires time extending beyond the impending harms alleged by indigenous complaints.[175]

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168. *See* Human Rights Council, Rep. of the Human Rights Council on Its Seventh Organizational Meeting, U.N. Doc. A/HRC/OM/7/1, at 2 (2013) (noting that Israel decided not to cooperate with the UPR, urging the state to reconsider, and keeping a record for future proceedings).

169. *See id.* (responding to Israel by following these steps).

170. *See* Davies, *supra* note 70 (noting characteristics of the constructivist approach, which revolve around persuasion as opposed to coercion).

171. *See id.* (explaining the goals and presumed effects of a non-coercive system like the HRC).

172. *See id.* (noting a lack of sanctions); *see also* Basic Facts about the UPR, *supra* note 3 (indicating that the UPR uses the promise of technical assistance and capacity-building to persuade states).

173. *See, e.g.*, The Danish Inst. for Human Rights, Universal Periodic Review–First Cycle: Reporting Methodologies from the Position of the State, Civil Society and National Human Rights Institutions 66 (2011) [hereinafter Danish Inst.] (highlighting that the UPR process is quite time-consuming).

174. *See* CIPM 2015, *supra* note 5, at 3–5, 7 (discussing the serious and time sensitive nature of the human rights violations against indigenous peoples of Myanmar); Danish Inst., *supra* note 173, at 66 (showing that the UPR process can take years).

175. This problem is illustrated by the fact that, as of 2015, Myanmar had not successfully implemented the majority of its commitments under the 2011 UPR. *Burma: UPR Commitments Remain Largely Unaddressed*, Int'l Fed'n for Human Rights (Mar. 23, 2015), https://www.fidh.org/en/region/asia/burma/burma-upr-commitments-remain-largely-unaddressed [hereinafter *Commitments Remain Unaddressed*]. The issues raised by the CIPM are pressing, and delay will only create more harm. *See* CIPM 2015, *supra* note 5, at 3–5, 7 (discussing the serious and time sensitive nature of the human rights violations against indigenous peoples of Myanmar).

In a case like Myanmar, where the blockage against indigenous grievances involves a government suffering from both lack of political will and lack of capacity, the risk arises that the indigenous peoples of Myanmar will suffer irreversible damage to their environmental resources by the time the government alters its behavior.[176] The reluctant pace of Myanmar's government is not mere speculation: the International Federation for Human Rights (FIDH) found that during its 2011 UPR, the Myanmar government accepted only 74 out of the 190 recommendations raised during the Working Group meeting.[177] Further, the FIDH found that as of 2015 the Myanmar government still had not achieved the majority of the accepted recommendations from the 2011 UPR, even though it had received assistance from the international community to do so.[178] This, then, is the conundrum for the CIPM: the grievances of Myanmar's indigenous people are immediate, but the work of the UPR is not.[179] As such, the UPR may fall short of the CIPM's expectations for an alternative international strategy capable of bypassing the Myanmar state to address indigenous concerns.

IV. ISSUES AND MOTIVATIONS FOR THE CIPM'S ENGAGEMENT WITH THE UPR

The limitations of the UPR suggest that the indigenous peoples of Myanmar need to temper their hopes for its ability to change the Myanmar government's behavior. Specifically, these limitations point toward a need to consider the UPR against other potential strategies and reflect on ways to apply the process in service of the larger goal: advancing indigenous interests. While it is possible to argue that all strategies involve the goal of changing state identity through a normative transformation, where the state adopts new sensibilities regarding the treatment of indigenous peoples,[180]

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176. If Myanmar continues to struggle in implementing its UPR commitments, the consequences for indigenous peoples may be significant. *Commitments Remain Unaddressed*, *supra* note 175; CIPM 2015, supra note 5, at 3–5, 7.

177. *Commitments Remain Unaddressed*, supra note 175.

178. *See id.* (stating that Myanmar did not fulfil its obligations under the 2011 UPR). *See generally* THOMAS CARR, SUPPORTING THE TRANSITION: UNDERSTANDING AID TO MYANMAR SINCE 2011 1 (Feb. 2018), https://reliefweb.int/sites/reliefweb.int/files/resources/Understanding_Aid_to_ Myanmar_Since_2011_-_Asia_Foundation_2018.pdf (highlighting the international aid that Myanmar has received for its reform efforts).

179. *See, e.g.*, CIPM 2015, *supra* note 5, at 6–7, 11–13 (discussing the urgent environmental and human rights issues facing the indigenous peoples of Myanmar); *see also* Danish Inst., *supra* note 173, at 66 (outlining the lengthy UPR).

180. *See* Martin & Wilmer, *supra* note 18, at 584 (arguing that indigenous movements tend to expose and address normative issues standing in the way of indigenous rights).

the issue with the UPR is one of urgency.[181]The question is whether the time scale required for such a transformation can fit within the time pressures of ongoing environmental degradation to indigenous lands.[182]

The past record of indigenous movements utilizing the UPR provides some insight into alternative strategies. The International Work Group for Indigenous Affairs (IWGIA), in its review of the UPR, finds that there has been some success for indigenous groups with the UPR in terms of drawing international attention to their concerns.[183] However, with respect to actually mobilizing action from the international community, the IWGIA also finds that indigenous groups tend to be more successful if they join wider coalitions tied to the NHRIs in their countries of origin and NGOs involved in more well-known civil and political issues.[184] This is because such coalitions raise indigenous environmental issues to parity with more popular civil and political concerns, allow advocacy by more established NHRIs and NGOs, enable greater consultation with states prior to review, and thereby increase exposure to a wider array of opportunities for public appeal and advocacy throughout the UPR process.[185]

Beyond the UPR in particular, there is also the issue of TANs in general. Pamela Martin, in her overview of Amazonian indigenous attempts to engage the global community, finds that TANs do serve to drive procedural change to a larger degree than alternative international strategies.[186] This is promising for Myanmar's indigenous peoples, since the ulterior purpose in removing the blockages they face—facilitating greater engagement with the Myanmar government—constitutes an effort at procedural change.[187] Martin, however, states that while TANs are effective in carrying discussions on issues forward they suffer in cases where such discussion needs to be created.[188] This does not bode well for the CIPM, because the nascent state of indigeneity as a concept in Myanmar indicates

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181. *See supra* Part III.B (finding that systems like the UPR are slow-moving, while the issues requiring attention may be urgent).

182*. See* CIPM 2015, *supra* note 5, at 3, 5, 7–8 (raising issues related to confiscation of land, interference with agriculture and customary land use, and pollution).

183. THE INDIGENOUS WORLD, *supra* note 13, at 516.

184*. See id.* at 517 (recommending that indigenous groups find creative ways to broaden their reach, including collaborations with their NHRI).

185. *See id.* at 16, 22, 47–48, 96, 536 (demonstrating how coalitions of indigenous peoples and NGOs effectively worked with UN organizations and states on issues of climate change and the environment).

186. *See* MARTIN, *supra* note 67, at 129 (indicating that TANs drive procedural change to a greater degree than "transnational social movement organizations").

187*. See id.* (providing an example of how discussions between parties, including governments, can help broker change).

188. *Id.*

that the discussion is still forming, and so suggests conditions unsuitable for the work of TANs.[189] In addition, Martin cautions that TANs tend to be episodic and issue-specific by nature, with shifting alliances and evolving targets, and that such inconsistency frequently causes breakdowns in indigenous movements.[190] This is problematic for the CIPM, particularly in association with international mechanisms like the UPR that convene every few years, since it indicates an unstable future with an uncertain outcome for a newly formed coalition of indigenous groups still learning how to navigate international avenues of appeal.[191]

Martin observes that additional use of transnational social movements can mitigate these challenges, since transnational social movements are more suited to creating discussions on indigenous issues[192] and provide sustained efforts based on a common agenda over extended periods of time.[193] Thus, the CIPM might find more success in mobilizing international response by using a combination of TANs and transnational social movements to advance its interests.[194] Martin, however, notes that both TANs and transnational social movements are dependent upon a well-organized domestic base.[195] This calls on the CIPM to focus on organizing and expanding a constituency in Myanmar.[196] A strong constituency is important not just for ensuring the effectiveness of TANs or transnational social movements, but also because the process of mobilizing toward the transnational level invariably incurs deterioration at the local level as organizations direct more of their attention outside the country.[197] In addition, transnational outreach can be divisive at domestic and international levels: members of a coalition can become demarcated along various lines, leading to conflict between (1) those that are transnational

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189. *Id.*; *see* INDIGENOUS AND NATURE TOGETHER, *supra* note 81 (noting that advocacy for indigenous peoples is a recent phenomenon in Myanmar).

190. MARTIN, *supra* note 67, at 122.

191. *See* UPR Fact Sheet, *supra* note 2 (stating that the UPR convenes at four-year intervals); MARTIN, *supra* note 67, at 122 (noting the unpredictable nature of TANs); Morton, *supra* note 147, at 2 (discussing the CIPM's first engagement with the international community in 2015).

192. *See* MARTIN, *supra* note 67, at 129 (mentioning that transnational social movements are well-suited to starting conversations among groups). *See also* PAUL WAPNER, ENVIRONMENTAL ACTIVISM AND WORLD CIVIC POLITICS 160 (1996) (discussing how modern social movements use creative approaches to garner attention).

193. *See* MARTIN, *supra* note 67, at 122 (explaining that transnational social movements may be more stable than TANs).

194. *See id.* at 129 (indicating that a combination of tactics may be the best approach for creating change).

195. *Id.* at 132.

196. *See id.* (indicating the need for a solid foundation before any initiatives will yield success).

197. *See id.* (describing how transnational engagement can lead to competition for resources and create divisions domestically).

and those that are not, or (2) several who go transnational but feel the need to compete amongst themselves for international assistance.[198] This places a charge upon the CIPM to be mindful of disunity and to promote among its members a shared understanding of coordination under a common agenda.

Despite the issues associated with the CIPM's experiences with the UPR, the CIPM maintains a number of motivations to continue engaging with the process. Following their return from the November 2015 UPR Working Group meeting, CIPM representatives noted in anonymous interviews with the author that they continued to hold hopes that the UPR could influence the behavior of the Myanmar government.[199] They also viewed the UPR as valuable in terms of providing a space to meet with a diverse multinational assembly of actors committed to human rights.[200] CIPM representatives observed that by traveling to the UPR Working Group meeting site in Geneva, Switzerland, they were able to directly interact with an international array of state and non-state actors who were not available in Myanmar.[201] Moreover, because the large majority of attendees at the meeting were supporters of human rights, the UPR provided an immediately accessible pool of potential international voices sympathetic to the CIPM's concerns regarding the Myanmar government.[202] For CIPM representatives, the value of the UPR was not just its directed purpose of influencing state conduct on human rights but also the prospect of building a social network spanning an international audience of sympathetic actors who could serve as agents for the CIPM's interests.[203]

The expansion of the CIPM's transnational social network serves the ulterior purpose of facilitating larger aims: CIPM representatives stated that they maintained ongoing goals to improve organizational capacity and promote organizational messages.[204] They saw networking as an important way to build relationships with actors who were willing and able to (1) help the CIPM grow its capacity, whether via technical training, provision of information, or investment of financial and material resources, and (2) advocate for CIPM concerns and relay them to a larger public audience.[205] The UPR, as a vehicle for building a transnational social network, served as a means of furthering both goals. Thus, while it may suffer in its ability to

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198. *See id.* (noting the possibility of division, and competition for international aid, between domestic groups or organizations).
199. Interview with CIPM representatives (Nov. 6, 2018) (on file with author).
200*. Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*

directly influence the Myanmar government, the UPR still offers an opportunity to advance the CIPM's interests.[206] CIPM representatives saw that the 2015 UPR on Myanmar held the potential for networking and garnering support for their goals—building CIPM capacity and promoting CIPM messages—to a degree that was sufficient to justify travel from Myanmar to Geneva to engage the UPR process.[207]

CONCLUSIONS AND LESSONS FROM MYANMAR INDIGENOUS USE OF THE UPR

The CIPM's use of the November 2015 UPR represented an attempt by Myanmar's indigenous peoples to advance their environmental grievances through a UN human rights mechanism.[208] The CIPM's experience offers a number of lessons for other groups seeking to further local environmental interests through international human rights mechanisms. The first lesson is that the nature of the UPR is based not on immediate, coercive punishment but instead upon the long-term cooperative persuasion of states.[209] As a result, any group—indigenous or otherwise—that seeks to use the UPR must be cognizant of the philosophy and methods the UPR employs in its mission of promoting the UN human rights system. Hence, in order to avoid disappointment, it would be wise for the CIPM to temper its expectations for the outcomes of the UPR in regard to the Myanmar government.[210] In particular, the orientation of the UPR as a persuasion-based mechanism to promote human rights norms may not match the exigencies of environmental destruction facing the CIPM.[211] Similarly, other groups who seek to follow the CIPM's strategy should weigh the nature of the UPR proceedings against the urgencies of their environmental concerns before deciding to engage.

Second, the UPR is only one form of TAN which is in turn only one type of strategy among a slate of options to advance CIPM interests, and should be seen as one component of a broader comprehensive approach

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206. *See* Basic Facts About the UPR, *supra* note 3 (indicating that the UPR can yield technical assistance and capacity-building); THE INDIGENOUS WORLD, *supra* note 13, at 516 (noting that the UPR can bring indigenous concerns to a wider audience).

207. Interview with CIPM representatives, *supra* note 199.

208. *See* CIPM 2015, *supra* note 5, at 5–9 (submitting detailed environmental complaints to the UPR in 2015).

209. *See supra* notes 162–75 and accompanying text (explaining that the UPR is deliberate and non-coercive, which can leave imminent problems unresolved).

210. *See* Rathgeber, *supra* note 148, at 6 (emphasizing that the UPR is not well-equipped to address pressing concerns).

211. *See* Davies, *supra* note 70 (discussing the persuasive, non-coercive nature of the UN human rights system).

integrating a suite of strategies to advance CIPM concerns.[212] Other approaches available to the CIPM might include coalitions with state and non-state actors across multiple countries and multiple issues, so long as these coalitions can accommodate and support the CIPM's local environmental grievances as a subset within the larger contexts of domestic and transnational movements to further political and legal reforms.[213] While CIPM representatives did not explicitly express an awareness of broad comprehensive approaches, their presence at the UPR proceedings in Geneva and attendant efforts at networking do reflect an implicit motivation to reach an international audience of actors that might not have been focused on environmental issues but which were sympathetic to indigenous concerns in Myanmar.[214] Likewise, other groups who seek to address environmental issues must recognize that the UPR is ostensibly focused on human rights and outreach to actors in other countries with diverse concerns that may bolster efforts to address environmental grievances.

Third, the UPR has value beyond the outcomes of its proceedings in that it is a multinational forum for state and non-state actors to congregate on the topic of human rights.[215] As a result, in addition to encouraging changes in state conduct, it also provides a space for network formation.[216] CIPM representatives stated that, as much as they maintained hopes that the UPR could support their efforts to resolve their environmental grievances against the Myanmar government, they also thought the UPR worthwhile as a means of building relationships that could help the CIPM build capacity and promote its message to a global audience.[217] The CIPM's approach applies to other groups, particularly those who—like the CIPM—started from local environmental concerns but now seek assistance from an international human rights system.[218] This escalation in scale is across multiple dimensions: going from local concerns to global institutions,

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212. *See supra* notes 48–68 and accompanying text (defining TANs, describing how the CIPM's engagement with the UPR is consistent with that definition, and listing other examples of TANs in action).

213. *See* MARTIN, *supra* note 67, at 122, 129 (discussing the advantages and drawbacks of transnational social movements, as opposed to TANs).

214. *See supra* notes 199–207 and accompanying text (relaying thoughts from CIPM representatives following the 2015 UPR, particularly the value they found in networking and public outreach opportunities).

215. *See generally* Basic Facts About the UPR, *supra* note 3 (indicating that the UPR allows UN member states, national institutions, and NGOs to engage on human rights issues).

216. *See id.* (explaining that the UPR allows the opportunity for all member states to participate and is designed to "expand the promotion and protection of human rights on the ground").

217. Interview with CIPM representatives, *supra* note 199.

218. *See, e.g.*, Saning, *supra* note 1 (reporting that the CIPM in Myanmar turned to the UPR and the UN Special Rapporteur on the Rights of Indigenous Peoples in the hopes of a remedy for local concerns).

reaching both state and non-state actors, and bridging environmental and human rights issues.[219] The UPR is an avenue for groups seeking a similar escalation to increase capacity and broaden public outreach, and such groups should consider the ways in which the UPR can be used to support both goals.

The analysis from preceding sections provides directions for further research. In particular, lessons from the CIPM's experiences with the UPR may have great utility, and additional case studies are warranted to verify the transferability of the above findings.[220] Suitable case studies would involve other situations where non-state actors are using the international human rights system to address local environmental problems. Indigenous organizations comparable to the CIPM but located in other countries would provide a means of direct comparison, but it would also be insightful to study non-indigenous organizations with local environmental concerns seeking recourse through international human rights bodies. Another direction for future research is longitudinal, because the persuasion-based orientation of the UPR suggests the possibility of state change occurring over multiple years.[221] It would be useful to follow the actions of the CIPM and the Myanmar government in the wake of the November 2015 UPR, conceivably through the next UPR for Myanmar scheduled for 2019. The 2019 UPR would allow comparison against the 2015 UPR, as the 2019 UPR provides another opportunity for the CIPM to participate and constitutes the next opportunity for the HRC to assess whether the Myanmar government altered its conduct in keeping with the 2015 recommendations.

CONCLUSION

In conclusion, the CIPM sought to use the UPR to build pressure upon the Myanmar government to respond to Myanmar indigenous peoples' grievances.[222] In so doing, the CIPM effectively attempted to improve their chances of resolving local environmental issues facing Myanmar's indigenous peoples by using an international human rights mechanism.[223]

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219. *See supra* notes 5–18 and accompanying text (describing how the CIPM resorted to the UPR as a means of increasing the scale of their advocacy in many directions).

220. *See supra* notes 209–18 and accompanying text (listing findings from the CIPM's engagement in the UPR).

221. *See supra* notes 162–79 and accompanying text (explaining that the UPR is deliberate and non-coercive, and the people of Myanmar may suffer further harm while the process is ongoing).

222. *See generally* CIPM 2015, *supra* note 5 (describing the CIPM's complaints to the UPR).

223. *See supra* notes 35–47 and accompanying text (introducing the UPR mechanism and discussing the CIPM's grievances through the lens of human rights).

The analysis in preceding sections used the theory of TANs to identify challenges that threaten the CIPM's aspirations and strategy.[224] Such challenges, however, should not be interpreted as grounds for the CIPM—or other groups seeking to employ the same strategy—to avoid participation in the UPR. When the UPR is understood in light of its nature, its existence as one strategy in a suite of potentially concurrent approaches, and its value beyond proceeding outcomes as a forum for networking and outreach, it remains a useful tool enabling non-state actors to pursue the resolution of local environmental issues through the international human rights system.

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224. *See supra* Parts II–IV (analyzing the efficacy of TANs and the UPR to show that the nature of the blockage between CIPM and the Myanmar government may require a multi-faceted advocacy approach).