

# An Unlawful Killing

How Ko Par Gyi's Death Highlights  
Barriers to Justice in Myanmar

April 2020



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## An Unlawful Killing in Myanmar

The ICJ has had a continuous presence in Myanmar since early 2014, and first began monitoring the situation of the justice system more than 50 years ago. A selected catalogue of the ICJ's reporting and work on Myanmar can be accessed at: <https://www.icj.org/country/asia-pacific/southeast-asia/myanmar/>

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## An Unlawful Killing in Myanmar

*"We must show that the military's crimes continue because of impunity.  
As the years pass, we cannot forget Ko Par Gyi.  
Justice for his death remains important."*

*Ko Soe Ya, independent journalist, Yangon, October 2019*

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Mourners gather at Ko Par Gyi's funeral in Yangon (source: Hein Htet/Mizzima)

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*Daw Thandar, surrounded by photos of her late husband (source: The Irrawaddy)*

## **1 INTRODUCTION**

### **1.1 Ko Par Gyi**

Aung Kyaw Naing, born in 1965 and better known as Ko Par Gyi, was a freelance journalist and photographer whose byline appeared in news journals including *The Voice* and *Eleven Media*. He regularly covered conflict between Myanmar's military, the Tatmadaw, and non-State armed groups, particularly in the southeast.

Ko Par Gyi was an activist before becoming a journalist. A member of the "88 Generation," and part of the tri-color student group, he participated in the 1988 uprising in Myanmar. As a member of the National League for Democracy (NLD) party, he served for a period as a bodyguard to its leader Daw Aung San Suu Kyi.

His media career began around 2010 whilst covering the situation of Karen refugees from Myanmar in Thailand, where he himself had sought refuge after the pro-democracy uprising of 1988. In 1989 Ko Par Gyi married democracy activist Daw Thandar. She later spent more than four years as a political prisoner, and in November 2015 was elected as an NLD member of parliament. Together they had a daughter, Suu Pyi Naing, who was a university student when her father was killed on 4 October 2014.

Ko Par Gyi had been travelling to his daughter's graduation ceremony in Chiang Mai, Thailand when police arrested him in Myanmar's southeastern province of Mon State. He had been covering hostilities between Myanmar's military, the Tatmadaw, and the non-State armed group the Karen Democratic Benevolent Army (DKBA). Soon transferred into military custody, he was detained, interrogated, and possibly tortured. On the fifth day in custody he died, and soldiers unceremoniously buried his body in a shallow grave. For 20 days the killing was concealed from his family and the public. His body was ultimately exhumed and laid to rest in a proper burial in Yangon.

Before Ko Par Gyi's fate was revealed, pressure mounted on the Government to establish his whereabouts: Daw Thandar held a press conference highlighting the "disappearance"; while regional and world leaders made interventions prior to the Association of South East Asian Nations (ASEAN) summit, being held for the first time in Myanmar's capital Nay Pyi Taw. After several weeks, the Tatmadaw announced that Ko Par Gyi had been killed in a botched escape attempt, and that he was at fault for his own death. Its statement claimed that Ko Par Gyi was a member of the DKBA, implying that he was participating in hostilities, not covering them as a journalist.

This version of events was called into question by Myanmar's National Human Rights Commission (MNHRC): its inquiry report established that Ko Par Gyi was working as a journalist, yet it failed to satisfactorily explain the circumstances of his death, including apparent signs of torture and ill treatment. Its recommendation for a full police investigation, to enable a trial in a civilian court, was never implemented.

Several other inquiries also failed to provide accountability or redress, including the truth of what happened, and why there was an initial cover-up. Police inquiries continued for some time, and an inquest into the death was held in the township court in closest proximity to the initial arrest. During this inquest, but separate to it, the Tatmadaw revealed that the two soldiers involved had been secretly acquitted of wrongdoing six months earlier, during hearings in a military court. The inquest lost momentum and police formally ceased inquiries in March 2016. Efforts by Daw Thandar and her lawyer to have the case reopened have been unsuccessful.

More than five years after Ko Par Gyi's death, nobody has been held accountable for his apparently unlawful killing. Military units suspected of involvement in his death continue to be implicated in human rights violations throughout Myanmar, and the Government has not yet addressed the laws enabling soldiers to commit serious human rights violations with impunity.

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*Ko Par Gyi's body is exhumed from a shallow grave in Mon State (source unknown)*

### 1.2 Summary and key recommendations

Impunity for serious human rights violations remains commonplace in Myanmar, particularly when members of security forces are involved in unlawful killings or other serious human rights violations. This lack of accountability continues to severely undermine efforts to establish the rule of law and to protect human rights, throughout the country. Under international law, all States are duty-bound to respect and to protect the right to life, including through investigating and prosecuting cases of potentially unlawful deaths and providing remedies and reparations to victims. However, for decades, various systemic issues in Myanmar have prevented authorities from doing so in a manner consistent with these obligations.

In this report, the International Commission of Jurists (ICJ) assesses the State's response to the killing of Ko Par Gyi. It identifies issues that carry resonance beyond this individual case, and which are emblematic of the broader challenges to providing accountability and redress in Myanmar. The purpose and intention of this is two-fold: a) to identify options for authorities to provide a credible justice process for Ko Par Gyi and his family; and b) to highlight the reforms necessary for the Government of Myanmar to fulfill its international law obligations to achieve justice for violations by providing accountability and redress for unlawful killings.

In exploring the illustrative example of Ko Par Gyi's killing, the ICJ identified three core barriers to justice in Myanmar:

1. Several provisions of national laws facilitate impunity for serious human rights violations by soldiers against civilians, by shielding security forces from public criminal prosecutions, and denying victims and their families of the right to truth about violations. If not for certain provisions of the 1959 Defence Services Act, the Tatmadaw would struggle to assert its legal authority to exercise jurisdiction in cases such as Ko Par Gyi's killing.
2. Investigations into unlawful killings routinely lack the independence, impartiality and effectiveness necessary to establish the truth and to provide accountability and redress. Simultaneous, separate and uncoordinated investigations into the same case are commonplace, constituting an unsystematic, ineffective and unsatisfactory approach to investigating serious human rights violations.
3. The rights of victims and their families are rarely respected, including the right to access information concerning the violations and accountability processes, and the right to remedies and reparations.

Addressing these emblematic challenges is imperative to deter the cyclical repetition of human rights violations, to enable peace and the provision of justice, and to fulfill the State's international law obligations to respect and to protect human rights. The recommendations presented in this report provide a foundation for authorities to fulfill their international law obligations, to provide justice for the apparent unlawful killing of Ko Par Gyi and address broader challenges in the provision of accountability and redress.

Of these, the ICJ's key recommendations are:

- *To the Myanmar Police Force*: reopen Ko Par Gyi's case, in coordination with prosecutors, to follow lines of inquiry that have not been duly pursued, including by investigating indicia of torture or ill treatment, with a view to identifying and prosecuting the perpetrators of criminal conduct related to his death, as appropriate, consistent with international law and standards.
- *To the NLD-dominated legislature*: repeal or amend the 1959 Defence Services Act to bring it into line with international law and standards - including to ensure that serious human rights violations perpetrated by soldiers can only be prosecuted in civilian courts. The law should ensure that trials are independent and conducted by impartial and competent courts applying international fair trial standards.

- *To all investigating authorities:* reform procedures and practice to respect the right of victims and their family members to participate in and be informed of the progress of an investigation, including through protecting them from any harassment or other ill treatment.

### 1.3 Methodology

Over several months in 2018 and 2019, members of the ICJ’s Myanmar-based legal team, in collaboration with a consultant, reviewed available public records related to the killing of Ko Par Gyi, interviewed individuals in Myanmar who were associated with the case, and attempted to obtain previously unavailable information and documents. A limitation of this report is that the ICJ’s communications with authorities, to seek inputs and clarifications, generated little additional information. Although, the ICJ appreciated the opportunity to raise the case, including with senior officials of the Myanmar Police Force and the Union Attorney General’s Office. Insights shared by family members and friends of Ko Par Gyi were also greatly appreciated.

This report is limited to a description of events and a procedural assessment of the State’s response, based upon available facts. All factual assertions and allegations contained in the report are based upon sources considered credible by the ICJ.

In the interests of clarity and brevity, many details of this complicated case are not addressed in this report. The law and facts are stated as on 1 March 2020.

This report builds on the ICJ’s research and analysis, including a report entitled “Achieving Justice for Serious Human Rights Violations in Myanmar,” published in 2018 as part of a global series of reports to identify barriers and opportunities for States to satisfy international law obligations to protect the right to life.<sup>1</sup> This report was produced as part of the ICJ’s “Global Accountability Initiative.” Similar case studies have been published in other parts of the world, including in Lao PDR, Nepal and Thailand.

The ICJ first began monitoring the situation of the justice system in the country more than fifty years ago,<sup>2</sup> and has had a continuous physical presence in Myanmar since early 2014. As part of this work, the ICJ promotes international standards on the conduct of investigations, by highlighting gaps through reports such as these, and engaging with authorities to support them in aligning policies and practices with the State’s obligation to protect the right to life.

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<sup>1</sup> ICJ, “Achieving Justice for Serious Human Rights Violations in Myanmar,” January 2018 available at: <https://www.icj.org/myanmar-reverse-laws-and-practices-that-perpetuate-military-impunity-new-icj-report/> (Burmese: “မန္တန်နိုင်ငံတွင် ဆိုးရဲပြီးသော လူ့အခြေခံအရေးခိုးဖောက်မှုများအကြက် တရားဗွဲ့တမှု ရယူခင်း,” <https://www.icj.org/wp-content/uploads/2018/01/Myanmar-GRA-Baseline-Study-Publications-Reports-Thematic-reports-2018-BUR.pdf>). See also: ICJ, “Five years without justice for journalist Ko Par Gyi’s killing highlights need to reform 1959 law that facilitates military impunity,” 4 October 2019, available at: <https://www.icj.org/wp-content/uploads/2019/10/Myanmar-Ko-Par-Gyi-killing-Press-Releases-2019-ENG.pdf> (Burmese: “သတင်းသမားကိုပါကြီးအသတ်ခံရမှု ၅ နှစ်ကြာသည်အထိ တရားမျှတမှုမရရှိသေး ခြင်းသည် တပ်မတော်အား ပြစ်ဒဏ်ကင်းလွတ်ခွင့်ပေးထားသည့် ၁၉၅၉ ဥပဒေကိုပြင်ဆင်ဖို့ရန် လိုအပ်ကြောင်း မီးမောင်းထိုးပြလျက်ရှိ,” <https://www.icj.org/wp-content/uploads/2019/10/Myanmar-Ko-Par-Gyi-killing-Press-Releases-2019-BUR.pdf>).

<sup>2</sup> See : “Military Rule in Burma”, Bulletin of the International Commission of Jurists, No. 15 (1963), pp 4-10, available at: <https://www.icj.org/wp-content/uploads/2013/07/ICJ-Bulletin-15-1963-eng.pdf>.

#### **1.4 Abbreviations**

DKBA – Democratic Karen Benevolent Army  
FIR – First Information Report  
ICJ – International Commission of Jurists  
KKO - Klohtoobaw Karen Organization, the DKBA's political wing  
MNHRC – Myanmar National Human Rights Commission  
MPF – Myanmar Police Force  
NLD – National League of Democracy  
LIB – Light Infantry Battalion (subordinate to the LID)  
LID – Light Infantry Division

## 2 BACKGROUND: INVESTIGATING UNLAWFUL KILLINGS IN MYANMAR

### 2.1 International law and standards

Under international law, all States are duty-bound to respect and protect the right to life. These obligations flow from the United Nations Charter, treaties and customary international law. The rights to not be arbitrarily deprived of life, and to be free from torture and other ill treatment, constitute customary international law that is never subject to derogation, even during an armed conflict or declared public emergency. Investigations and prosecutions of potentially unlawful killings should be undertaken in accordance with international law and standards including the Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity,<sup>3</sup> the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions,<sup>4</sup> and the revised Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016).<sup>5</sup> While Myanmar has ratified a number of international treaties and conventions (see annex 6.2), it has yet to ratify key instruments such as the International Covenant on Civil and Political Rights, and the Convention Against Torture.

The State's obligations to investigate, prosecute and punish acts that constitute violations of these rights require that investigating authorities are independent of individuals or institutions suspected of being involved. Investigators must be impartial, acting without preconceptions, bias or discrimination. Under international standards concerning impunity and the administration of justice, military courts should not be used to try military personnel for serious human rights violations and crimes under international law.<sup>6</sup>

Any investigation must be prompt, effective and thorough, and transparent. To be effective, all reasonable steps must be taken to, at a minimum: identify the victim or victims; determine the cause, manner, place, and time of death, and all of the surrounding circumstances; and determine who was involved in the death and their associated individual and collective responsibility.<sup>7</sup> To the extent they are able to, investigators must collect and confirm all relevant witness, documentary, digital, and

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<sup>3</sup> Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, E/CN.4/2005/102/Add.1, (2005).

<sup>4</sup> Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary, and Summary Executions, Recommended by Economic and Social Council Resolution 1989/65 of 24 May 1989 ('UN Principles'), para 1 (in which the Economic and Social Council recommended that these principles should be taken into account and respected by governments within the framework of their legislation and practices).

<sup>5</sup> The "Minnesota Protocol," Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions. The Protocol is available in English and Burmese (unofficial translation) here: "ICJ co-hosts workshop on the investigation of potentially unlawful deaths," 30 October 2019, <https://www.icj.org/myanmar-icj-co-hosts-workshop-on-the-investigation-of-potentially-unlawful-deaths/> (Burmese: "ဥပဒေမဲ့သေဆုံးခြင်း ဖွံ့ဖြိုးစစ်ဆေးမှုဆိုင်ရာမင်နီဆိုတာပရိုတိုကော," <https://www.icj.org/wp-content/uploads/2019/10/Universal-Minnesota-Protocol-Advocacy-2017-BUR.pdf>).

<sup>6</sup> See Principle 29 of the Updated Set of Principles for the protection promotion of human rights through action to combat impunity, "The jurisdiction of military tribunals must be restricted solely to specifically military offences committed by military personnel, to the exclusion of human rights violations, which shall come under the jurisdiction of the ordinary domestic courts or, where appropriate, in the case of serious crimes under international law, of an international or internationalized criminal court." See also Principle 9 of the Draft Principles Governing the Administration of Justice Through Military Tribunals, U.N. Doc. E/CN.4/2006/58 at 4 (2006), ('Decaux Principles').

<sup>7</sup> The Minnesota Protocol, para 25. In determining the manner of death, the investigation should distinguish between natural death, accidental death, suicide, and homicide.

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physical evidence.<sup>8</sup> Almost always, meeting these aims will be materially assisted by the performance of an autopsy.<sup>9</sup>

In cases involving a potentially unlawful killing, the ultimate goal of an investigation must be to determine whether or not there was an arbitrary deprivation of the right to life, with a view to prosecuting perpetrators in instances where this is found. Investigations must therefore seek to identify direct perpetrators, as well as others who were responsible for the death.<sup>10</sup> An effective investigation and prosecution should result in the perpetrator of the violation being held criminally accountable in a fair trial, and subjected to a penalty commensurate with the gravity of the crime. It is also necessary, though not alone sufficient, to ensure access to an effective remedy and reparation for the victim and their family – taking the form of restitution, compensation, rehabilitation, satisfaction and/or guarantees of non-repetition.<sup>11</sup>

The right of victims and their families to play an active part in such investigation, and their right to know the truth about all the facts surrounding a serious violation of human rights are all critical elements of the right to a remedy.<sup>12</sup> Both investigation and prosecution processes must be aimed at: ensuring that those responsible are brought to justice; promoting accountability and preventing impunity; avoiding denial of justice; and drawing necessary lessons for the revision of practices and policies with a view to avoiding repeated violations.<sup>13</sup>

Investigations must be transparent, including by being open to scrutiny by victims' families and the public. At a minimum, states should acknowledge that an investigation has commenced, the procedures to be followed and any findings, including their legal and factual basis. Any limitations on transparency should be strictly necessary for a legitimate purpose. In no circumstances should any limitation be used to conceal the fate or whereabouts of any victim of an enforced disappearance or unlawful killing, or contribute towards impunity for those responsible.<sup>14</sup>

### 2.2 National laws

Several provisions of Myanmar's laws enable impunity for rights violations, including by shielding security forces from the proper investigations and public criminal prosecutions that are required under international law and standards.

The 2008 Constitution of the Republic of the Union of Myanmar confers upon the Tatmadaw significant autonomy to administer and adjudicate its affairs.<sup>15</sup> Despite a formal transfer of executive power from direct military rule to a quasi-civilian government in 2011, the military remains the most powerful institution in the country, largely outside the control of the civilian government.<sup>16</sup> Sections 293(b), 319 and

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<sup>8</sup> Ibid, para 24.

<sup>9</sup> Ibid, para 25.

<sup>10</sup> Ibid, para 26.

<sup>11</sup> The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation recall that adequate, effective and prompt reparation is intended to promote justice by redressing serious human rights violations, requiring reparation to be proportionate to the gravity of the violation(s) and the harm suffered. For an elaboration of these principles and concepts, see: ICJ, "Achieving Justice," citation above, pp. 24.

<sup>12</sup> ICJ Practitioners' Guide No 2, 'The Right to a Remedy and to Reparation for Serious Human Rights Violations', 2018 update p 57, available at: <https://www.icj.org/the-right-to-a-remedy-and-reparation-for-serious-human-rights-violations-2018-update-to-practitioners-guide-no-2/>.

<sup>13</sup> General Comment No. 36 on the right to life, para 27

<sup>14</sup> The Minnesota Protocol, paras 32-33

<sup>15</sup> ICJ, "Achieving Justice," citation above, pp. 10.

<sup>16</sup> The Union Solidarity and Development Party (USDP) led the government from March 2011, following five-odd decades of military rule. Following a national election in November 2015, in April 2016 a new government was formed led by the NLD party and its leader Daw Aung San Suu Kyi. At the time of writing, national elections were scheduled for late 2020. For further analysis of the military's legal powers, see: ICJ, "Questions and Answers on Human Rights Law in Rakhine State," November 2017, pp. 3-4, available at: <https://www.icj.org/myanmar-rule-of-law-must-drive-responses-to-rohingya-crisis/>

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343(b) of the Constitution provide for the establishment of permanent military courts, over which the Commander-in-Chief of the Tatmadaw exercises appellate power and ultimate authority, with no expressed right of appeal to the Supreme Court or other bodies. Immunity provisions in the Constitution, and in laws, also provide a legal basis for State actors to evade accountability for serious crimes. For instance, section 445 of the Constitution codifies impunity by prohibiting the prosecution of government and military officials for 'any act done in the execution of their respective duties' before March 2011. The Special Rapporteur on the situation of human rights in Myanmar has repeatedly recommended the amendment of these provisions.<sup>17</sup>

These arrangements are incompatible with the principle of separation of powers, and with the rule-of-law principle that security forces must be accountable to civilian authorities.<sup>18</sup> In February 2019, the NLD-led Government created a Constitutional Amendment Committee, which submitted a report to the Union Parliament in July. The NLD does not appear to have recommended substantive changes to provisions related to military justice, although several other political parties have done so.<sup>19</sup> In any case, the Tatmadaw wields an effective veto over amendments to the Constitution, which underpins military authority in governance and judicial affairs.

National laws, namely the 1959 Defence Services Act (to be read with the 1962 Defence Services Rules) and the 1995 Myanmar Police Force Maintenance of Discipline Law, provide rules for the jurisdictional transfer of cases from public criminal proceedings to special military or police courts, including when soldiers and polices are implicated in crimes against civilians. These special courts are typically characterized by undue interference, a lack of transparency, and little if any consideration of the rights of victims and their families, including the right to redress, let alone for their need of protection from reprisals and re-victimization.<sup>20</sup>

The 1959 Defence Services Act enables cases involving soldiers to be heard in military courts, even for serious human rights violations such as culpable homicide (section 304 of the Penal Code). Section 71 of the Act provides that soldiers who have committed an offence under non-military criminal law shall be liable and subject to the prescribed penalties, *but subject to* section 72 of the Act. Section 72 stipulates that personnel on "active service" who commit serious human rights violations can be tried by a military court rather than by ordinary courts. Section 3(a) broadly defines "active service," with the effect that military personnel are typically considered to be on active service and thus subject to courts-martial rather than trial in ordinary courts, including for serious human rights violations. State institutions and individuals are restricted from appealing the decisions of these courts.

In 2010, prior to the transfer of executive power from direct military rule to a quasi-civilian government in 2011, Senior General Than Shwe, chairperson of the State Peace and Development Council, instituted amendments to the 1959 Defence Services Act, including removal of a provision that had permitted the President to order that a case already heard in a military court be retried in a civilian court.<sup>21</sup> While the Chief of Staff

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(Burmese: "အမေး အဖြေများဆိုင်ရာရှင်းလင်းမှတ်ချက် မြန်မာနိုင်ငံရခိုင်ပြည်နယ်အတွင်း လူ့အခွင့်အရေးဆိုင်ရာဥပဒေ," <https://www.icj.org/wp-content/uploads/2017/11/Myanmar-QA-Rakhine-Advocacy-Briefing-Paper-2017-BUR.pdf>).

<sup>17</sup> See for instance: Report of the Special Rapporteur on the situation of human rights in Myanmar, UN Doc A/HRC/22/58 (2013), para 76.

<sup>18</sup> This principle is recognized although qualified in article 11 of Myanmar's Constitution.

<sup>19</sup> The Shan Nationalities League for Democracy (SNLD) for instance has proposed that section 319 be amended to include the text: "Courts-Martial has the power to adjudicate only in matters related to the military. Defence Services personnel who commits civil offences shall be adjudicated under civilian law." Pyidaungsu Hluttaw Constitutional Amendment Committee, "Report of the Joint Committee to Amend the Republic of the Union of Myanmar Constitution (2008): Findings and Observations," July 2019.

<sup>20</sup> ICJ, "Achieving Justice," citation above, pp. 11-12.

<sup>21</sup> 2010 Defence Services Amendments Act, section 8. Prior to this amendment, Section 130(1) of the 1959 Act had allowed for a retrial: "Notwithstanding anything contained in any other law for the time being in force a person convicted or acquitted by a court-martial

of the Tatmadaw or a “prescribed officer” is authorized to annul the finding of a military court, as per section 169, the President’s authority to annul a finding was also withdrawn as part of the 2010 amendments.<sup>22</sup> The Union Solidarity and Development Party, leading government from 2011 to 2016, also used its final months in power, following an election defeat, to undermine accountability, by introducing new immunities in the 2016 Presidential Security Act.<sup>23</sup>

Myanmar’s National Human Rights Commission also lacks independence, impartiality and effectiveness in investigating potential violations of the right to life. Its composition and legal foundations require an overhaul. For instance, section 37 of the 2014 MNHRC Law instructs Commissioners to refrain from inquiring into complaints that have come before courts.<sup>24</sup> Many significant human rights cases come before the courts in one way or another. The content of this provision, and its narrow interpretation by Commissioners, effectively precludes inquiries into potential human rights violations that are already the subject of a court proceeding, even if the proceeding itself involves human rights violations or fails to satisfy tests of justice.<sup>25</sup>

The Union Parliament has power to review and revise legislation that governs the conduct of investigations and the jurisdiction of special courts, with a view to repealing or amending laws that do not meet the State’s international law obligations.

### 2.3 The conduct of investigations

Unlawful killings are historically commonplace in Myanmar. Generally, they take place in areas affected by conflict or unrest; typically, although not exclusively, occurring in the context of military operations; and at times appear to constitute serious crimes under international law.<sup>26</sup>

Overall, in cases where a death may have been caused by or is otherwise attributable to the State, prosecutions are rare, convictions exceptional, and penalties relatively weak, and not commensurate to the gravity of the crime. Often the true circumstances of such cases are not satisfactorily explained.<sup>27</sup> Public courts rarely review acts carried

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may, with the previous sanction of the President, be tried again by a criminal court for the same offence, or on the same facts.”

<sup>22</sup> Previously, section 169 of the Act provided that, “The President, the Chief of Staff or any prescribed officer may annul the proceedings or set aside the conviction on the ground that they are illegal or unjust.” The 2010 Amendments Act, citation above, subsequently removed the President’s authority to annul the proceedings of a military court.

<sup>23</sup> ICJ, “Achieving Justice,” citation above, pp. 11.

<sup>24</sup> “The Commission shall not inquire into the complaint which violates any of the following: (a) cases under trial before any court, cases under appeal or revision on the decision of any court; (b) cases that have been finally determined by any court.”

<sup>25</sup> ICJ, “Four immediately implementable reforms to enhance Myanmar’s National Human Rights Commission,” 12 November 2019, page 5, available at: <https://www.icj.org/four-immediate-reforms-to-strengthen-the-myanmar-national-human-rights-commission/> (Burmese: “မြန်မာအမျိုးသားလူ့အခွင့်အရေးကော်မရှင်အား ပိုမိုအားကောင်းလာစေရန် ချက်ချင်းအကောင်အထည်ဖော်နိုင်သော ပြုပြင်ပြောင်းလဲရေး အစီအစဉ်လေးရပ်,” <https://www.icj.org/wp-content/uploads/2019/11/Myanmar-MNHRC-Advocacy-Briefing-Note-2019-BUR.pdf>).

<sup>26</sup> See this recent authoritative comprehensive example: Independent International Fact-Finding Mission on Myanmar, “Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar (2018 FFM Report),” UN Doc. A/HRC/39/CRP.2 (2018), pp. 37-41 (incidents in Kachin and Shan states) and 205-9 (incidents in Rakhine State).

<sup>27</sup> See for example: ICJ, “ICJ marks 2nd year anniversary of the killing of lawyer U Ko Ni,” 29 January 2019, available at: <https://www.icj.org/wp-content/uploads/2019/01/Myanmar-Ko-Ni-Statement-News-web-stories-2019-ENG.pdf> (Burmese: “ရွှေနေဦးကိုနီ လုပ်ကြံခံရမှု (၂) နှစ်ပြည့် အထိမ်းအမှတ် အကြွက် ICJ ကြေငြာခံကြွတ်,” <https://www.icj.org/wp-content/uploads/2019/01/Myanmar-Ko-Ni-Statement-News-web-stories-2019-BUR.pdf>).

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out by security personnel,<sup>28</sup> and inquests rarely if ever have the mandate and authority to provide or facilitate accountability or redress.

Criminal proceedings in civilian courts, when they occur, tend to be characterized by undue interference, with little if any consideration of redress for victims and their families.<sup>29</sup> Prosecutors (also referred to in Myanmar as law officers) rarely effectively prosecute cases perceived to challenge military or special interests. Police often play a detrimental role in politically sensitive cases.<sup>30</sup> Lawyers experience significant challenges to their independence, and face additional pressures when litigating cases involving members of security forces, including the potential for various forms of retaliation.<sup>31</sup> Military courts too persistently fail to provide accountability for perpetrators or redress to victims.<sup>32</sup> None of the special military- or executive-led inquiries commissioned in Myanmar since 2011 are known to have led to the effective prosecution of security forces for human rights violations, or to the provision of redress to victims and their families.<sup>33</sup>

It is in this context that the UN Human Rights Council decided to establish an Independent Investigative Mechanism for Myanmar (IIMM) in September 2018, in response to the lack of accountability and redress for human rights violations constituting the most serious crimes under international law, as found by the

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<sup>28</sup> Limited exceptions to this rule have emerged in recent reporting. In November 2014, for example, a soldier was convicted and sentenced to 13 years imprisonment for the kidnapping and rape of a disabled ethnic Kachin girl. The soldier had been transferred to the regular court following trial for a lesser charge in military court. ICJ, "Achieving Justice," pp. 14, citation above. See also: Lawi Weng, "Army Officer Jailed for 10 Years for Killing Civilian Who Failed to Present ID Card," *The Irrawaddy*, 21 May 2019 (Burmese: လဝီဝမ်, "တပ်မေတ်အရာရှိကို မော်လမြိုင်တရားရုံးမှ ထောင် ၁၀ နှစ်ချမှတ်," *ဧရာဝတီ*); Lawi Weng, "Myanmar Soldiers Sentenced to 20 Years After Civilian Killings," *The Irrawaddy*, 6 September 2019. In another situation in Kachin State, relatives of three Internally Displaced Persons killed by soldiers were (unusually) able to attend hearings under military courts martial: Radio Free Asia, "Tatmadaw officials admit to killing Kachin villagers," 20 September 2017.

<sup>29</sup> ICJ, "Achieving Justice," citation above, pp. 32-25.

<sup>30</sup> Including by partaking in or allowing corruption, fabrication of evidence, courtroom delays, politically motivated investigations and prosecutions, denial of access to clients, and the undermining of the presumption of innocence. ICJ, "Right to Counsel: The Independence of Lawyers in Myanmar," 3 December 2013, available at: <https://www.icj.org/myanmar-lawyers-still-face-restrictions-despite-increased-independence-2/> (Burmese: "ငြိန်မာနိုင်ငံ ရှေ့နေများ၏ လွတ်လပ်ခွင့်" <https://www.icj.org/wp-content/uploads/2015/07/MYANMAR-Right-to-Counsel-Publications-Thematic-Report-2015-BUR.pdf>).

<sup>31</sup> *Ibid.* pp. 17-20.

<sup>32</sup> The early release of soldiers implicated in the massacre of ten Rohingya men in Inn Dinn Village Rakhine State, highlighting part of the reason why prosecutions for serious human rights violations should only ever take place within the civilian justice system. See: Shoon Naing and Simon Lewis, "Myanmar soldiers jailed for Rohingya killings freed after less than a year," *Reuters*, 27 May 2019.

<sup>33</sup> ICJ, "Achieving Justice," citation above, pp. 19-22. See also: ICJ, "New Commission of Inquiry Cannot Deliver Justice or Accountability," September 2018, available at: <https://www.icj.org/myanmar-governments-commission-of-inquiry-cannot-deliver-justice-or-accountability/> (Burmese: မန္တလေးနိုင်ငံ - စုံစမ်းစစ်ဆေးရေးကော်မရှင်သတ္တ တရားဥပဒေ သို့မဟုတ် တာဝန်ရှိမှုဖော်ဆောင်ပေးနိုင်ခင်းမရှိ၍ နိုင်ငံတကာ၏ တုံ့ပန္န လိုအပ်နေ," <https://www.icj.org/wp-content/uploads/2018/09/Myanmar-COI-cannot-deliver-justice-or-accountability-Advocacy-Analysis-brief-2018-BUR.pdf>). When properly constituted, a special inquiry can contribute to fulfilling the State's duty to investigate, prosecute and punish crimes. However, global experience shows that when inquiries fail to meet these standards they actually have the effect of promoting impunity, by diverting criminal investigation from domestic or international mechanisms. See: ICJ, "Commissions of Inquiry in Nepal: Denying Remedies, Entrenching Impunity," June 2012, available at: <https://www.icj.org/nepal-toothless-commissions-of-inquiry-do-not-address-urgent-need-for-accountability-icj-report/>.

Independent International Fact Finding Mission on Myanmar.<sup>34</sup> The State's failure to fulfil its international law obligations is also the basis for the International Criminal Court's prosecutors opening an investigation, in November 2019, into the situation Bangladesh/Myanmar (limited to acts where one element or part of a crime occurred within the territory of Bangladesh, which, unlike Myanmar, is a State Party to the Rome Statute of the ICC).<sup>35</sup> The persistent lack of domestic-level accountability, and ongoing serious human rights violations, rationalise initiating both these international responses.<sup>36</sup>

### 2.4 Detention and the right to legal counsel

The UN Basic Principles on the Role of Lawyers emphasize that, "Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than 48 hours from the time of arrest or detention." The detention of journalists based solely on their lawful activities undertaken while doing their job, violates the right to freedom of expression, and rights to seek, receive and impart information and to participate in public affairs.<sup>37</sup>

Sections 19 and 375 of the Myanmar Constitution also guarantee the right to a legal defense, as does Myanmar's Code of Criminal Procedure (section 340), Courts Manual (section 455(1)), the Police Manual (section 1198c) and the Prisons Act (section 40). Sections 21(c) and 376 of the Constitution and section 61 of the Code of Criminal Procedure state that persons cannot be detained for more than 24 hours without a judge's order. The constitutional right to legal defense implies the right to access legal counsel during this 24-hour period. Section 403 of the Courts Manual states that a detainee may be remanded only after having appeared before a judge. Further guidance on the fair trial rights in Myanmar law, including the right to counsel and protections in detention, has been published by the Union Attorney General's Office.<sup>38</sup>

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<sup>34</sup> See: Sean Bain, "A legal path to justice emerges for Myanmar," Asia Times, 4 October 2018, available at: <https://www.icj.org/a-legal-path-to-justice-emerges-for-myanmar/> (Burmese: "တရားမျှတမှုသို့ ဦးတည်သည့် ဥပဒေဆိုင်ရာ လမ်းကြောင်း ပေါ်ထွက်ခြင်း," ဧရာဝတီ).

<sup>35</sup> For further analysis of this jurisdictional basis, see: ICJ, "ICJ submits Amicus Curiae Brief to International Criminal Court," 19 June 2018, available at: <https://www.icj.org/icj-submits-amicus-curiae-brief-to-international-criminal-court/>. See also: ICJ, "ICJ senior legal adviser explains the International Criminal Court process in an interview for BBC Burmese," 12 November 2019, available in English and Burmese at: <https://www.icj.org/icj-senior-legal-adviser-kingsley-abbott-explains-the-international-criminal-court-process-in-an-interview-for-bbc-burmese/>.

<sup>36</sup> Sean Bain, "How International Initiatives Can Support Peace and Justice in Myanmar," The Irrawaddy, 21 November 2019, available at: <https://www.irrawaddy.com/opinion/international-initiatives-can-support-peace-justice-myanmar.html> (also available in Burmese at <https://burma.irrawaddy.com/>).

<sup>37</sup> For further elaboration, see "Global Principles on National Security and the Right to Information," ("The Tshwane Principles"), 12 June 2013.

<sup>38</sup> Union Attorney General's Office, "Fair Trial Guidebook for Myanmar," February 2018. In relation to arbitrary detention specifically, see: pp. 22-28

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*Ko Par Gyi with NLD leader Daw Aung San Suu Kyi (source: DVB)*

### **3 THE ARREST, DISAPPEARANCE AND DEATH OF KO PAR GYI**

#### **3.1 Arrest and disappearance**

On 26 September 2014, Ko Par Gyi travelled from Yangon to Mon State, to report on skirmishes between the Tatmadaw and the Democratic Karen Benevolence Army. In the days prior, he was present at a peace conference in Yangon where negotiations were taking place for the National Ceasefire Accord. Conference delegates from the DKBA's political wing, the KKO, returned to Mon State upon learning of fighting with the Tatmadaw.<sup>39</sup> Ko Par Gyi accompanied them and, in his capacity as a photojournalist, embedded with DKBA forces from 27 to 29 September during clashes around Shwe Wah Gyaung Village.<sup>40</sup> The Head Abbot of the village later confirmed to journalists that he saw Ko Par Gyi in the area at this time, easily identifiable as a civilian, wearing a journalist-style jacket and holding a camera in hand.<sup>41</sup> After three days covering clashes, Ko Par Gyi left the area, travelling by ferry to Kyaikmayaw Town.

Upon his arrival at Kyaikmayaw Town Jetty on the morning of 30 September, Ko Par Gyi asked around for assistance in arranging onward transport to attend his daughter's university graduation ceremony in Chiang Mai, Thailand. The circumstances of Ko Par Gyi's arrival in town could have been perceived as out of the ordinary: a relative stranger to the area, distinctively tall at more than six feet in height, dishevelled from more than four days of conflict reporting, and soliciting an uncommonly long motor taxi ride. The area was subject to heightened tensions given its proximity to the clashes between the Tatmadaw and DKBA.

Local informant networks, active throughout Myanmar, had been advised to identify and report unusual activity to authorities. Possibly suspecting Ko Par Gyi of being associated with the clashes, they apparently notified police of his arrival in town.<sup>42</sup> Around mid-morning, local police arrested Ko Par Gyi. The Tatmadaw had also learnt of his presence, and later that day, following an initial interrogation, soldiers seized him from police custody.<sup>43</sup> The township Chief of Police later stated, "It was not that we formally handed him over to the military, they just took him."<sup>44</sup>

Given that at no time was Ko Par Gyi afforded the right to legal counsel, as provided for under international law and in Myanmar's national laws and guidance (see part 2.4), his detention was unlawful and arbitrary. Furthermore, in the circumstances discernible in this case, no legitimate legal ground exists for the transfer of a journalist from police (nominally civilian) custody into military custody.

Whether or not Ko Par Gyi identified himself as a journalist upon his arrest is unclear. The Tatmadaw's version of events, accepted by the MNHRC, was that he did not; however, this account cannot be treated as authoritative, particularly in light of the Tatmadaw's initial cover-up of the death. A journalist with experience covering conflict, who knew Ko Par Gyi and was around the area at the time, believes that he would have immediately identified himself as a journalist. Another journalist who closely followed developments after the disappearance thinks it is possible that he did not identify his

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<sup>39</sup> See: Radio Free Asia, "Five Karen Rebels Killed in Fighting with Myanmar Troops," 9 September 2014.

<sup>40</sup> Note: the village name is also transliterated into English as "Shwe Ya Chaung."

<sup>41</sup> ICJ key informant interviews in Myanmar, July 2018 and September 2018.

<sup>42</sup> ICJ key informant interview in Myanmar, July 2018.

<sup>43</sup> See: Myanmar National Human Rights Commission, "The inquiry report of the Myanmar National Human Rights Commission into the death of Ko Aung Naing (a) Ko Aung Kyaw Naing (a) Ko Par Gyi – unofficial translation," 2 December 2014, paras. 20 and 21. Note that while the 22<sup>nd</sup> Light Infantry Division (LID) is headquartered in Hpaan Township, in neighboring Karen State, the MNHRC report indicates its "front line headquarters" were stationed at Shwe Wah Gyaung Monastery in Mon State. A government-aligned Border Guard Force is also understood to have been in the area. Saw Yan Naing, "More Clashes Between Govt and Karen Rebels in Mon State," *The Irrawaddy*, 29 September 2014.

<sup>44</sup> Democratic Voice of Burma, 'Journey to Justice: The Par Gyi Case,' January 2015. The filmed statement by the Township Police Chief was reportedly made on 4 November 2014.

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profession, for fear of punitive retaliation.<sup>45</sup>

Ko Par Gyi was initially taken into the custody of the Light Infantry Battalion (LIB) 208, then subsequently transferred into the custody of LIB 210.<sup>46</sup> Both LIBs were operational around Shwe Wah Gyaung Village, where Ko Par Gyi had been covering their clashes whilst embedded with the DKBA – a common journalistic practice. Ko Par Gyi is understood to have been taken to this area to assist in the recovery of arms taken from the Tatmadaw by the DKBA, which may explain the transfer of custody from LIB 208 to LIB 210, which at the time had its frontline base in the village.<sup>47</sup>

[Forming part of the Light Infantry Division (LID) 22, a combat division headquartered in Hpa'an Township, Karen State, at the time both LIBs came under the command of the Tatmadaw's Southeastern Command.<sup>48</sup> Nation-wide, the Tatmadaw has ten infantry divisions, each consisting of around ten light infantry battalions. LIBs have been implicated in serious human rights violations throughout Myanmar, including those constituting the most serious crimes under international law. The LID 22's LIB 208 was reportedly notorious in this area of Mon State for carrying out arrests, detentions and possibly extrajudicial killings. The LID 22 has been linked to alleged human rights violations elsewhere in the country, as recently has 2019.<sup>49</sup>]

For more than three weeks, Ko Par Gyi's whereabouts was unknown to his family and to the public. At first his disappearance was not viewed as unusual, as his work involved a lot of travel to remote areas. But family members became concerned when he did not arrive in Chiang Mai as planned, and as informal reports emerged on Facebook that he had been arrested in Kyaikmayaw Town and transferred to military custody. Around two weeks after his disappearance, Ko Par Gyi's wife, Daw Thandar, travelled to the area, accompanied by friends, seeking to establish his whereabouts.

Various authorities confirmed to members of Daw Thandar's group that soldiers had seized Ko Par Gyi, and although nobody confirmed his location or condition, some implied that he may have been subjected to torture and ill treatment, and possibly killed.<sup>50</sup> For instance, during one of the earlier visits to Kyaikmayaw, a man approached Daw Thandar, identifying himself as an interlocutor for the Tatmadaw. Suggesting that soldiers holding Ko Par Gyi had "gone beyond the limit" – a Burmese expression generally used when an act is likely to cause death – he apparently told her that her husband would be handed over if she promised not to speak further about it to the media. Yet she wanted to see him alive, although expected the worst-case scenario, and after much consideration and negotiation, she decided not to make such a promise, and to instead pursue justice for whatever may have happened to Ko Par Gyi.<sup>51</sup>

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<sup>45</sup> ICJ correspondence, November 2019. ICJ key informant interview, Myanmar, July 2018.

<sup>46</sup> Note: in the English version of the MNHRC's report of December 2014, an LIB is referred to as a "Light Infantry Regiment."

<sup>47</sup> ICJ interview, Myanmar, July 2018. MNHRC Report, para 20.

<sup>48</sup> MNHRC Report, paras 14, 17, 20, 21. Global Security, "Light Infantry Divisions and Military Operations Commands," available at: <https://www.globalsecurity.org/military/world/myanmar/army-orbat-2.htm> (accessed 18 November 2019).

<sup>49</sup> See: Amnesty International, "'We will destroy everything' – Military Responsibility for Crimes Against Humanity in Rakhine State, Myanmar," 2018, pp. 7, 144-5; Independent International Fact-Finding Mission on Myanmar, "Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar (2018 FFM Report)," UN Doc. A/HRC/39/CRP.2 (2018), for instance pp. 309-10; Aung Zaw, "Death of an Activist-Reporter," *The Irrawaddy*, 28 October 2014; Amnesty International, "'No one can protect us' – War Crimes and Absues in Myanmar's Rakhine State," 2019, pp. 34.

<sup>50</sup> ICJ interviews with three key informants in Myanmar, in May and September 2018.

<sup>51</sup> ICJ Interview with Daw Thandar, Myanmar, September 2018; see also Aung Zaw, 'Death of an Activist-Reporter in Myanmar', *The Irrawaddy*, 28 October 2014 (Daw Thandar 'discovered that [Ko Par Gyi] had been badly tortured', and 'sources close to the local police and army claimed that his physical condition was in such bad shape that there was no way he could have tried to escape and seize a gun, as claimed in the army statement'.); Hanna Hindstrom, 'Slaying of journalist casts doubts on Myanmar's democratic reforms', *Al Jazeera*, 25 November 2014 ("I know what it feels like to be in the interrogation room because I

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Around 20 October, Daw Thandar filed a First Information Report (FIR) with the Kyaikmayaw Township Police.<sup>52</sup> She then returned to Yangon and participated in a press conference on 21 October in which she called attention to Ko Par Gyi's capture by soldiers, and demanded that authorities either immediately release her husband, or otherwise transfer him into police custody to be brought before a public court.

### 3.2 Revelation of the killing

On 24 October, just days after Daw Thandar's press conference, media reported that Ko Par Gyi had been killed in military custody on 4 October.<sup>53</sup> The reports were prompted by a communication sent by the Ministry of Defence to the Myanmar Press Council on 23 October. This gave the Tatmadaw's version of events: that Ko Par Gyi was captured due to his links to the DKBA as a "communications captain" for its political wing, and that he was at fault for his own death as he struggled with soldiers while trying to escape.<sup>54</sup> The DKBA's political wing, the KKO, promptly denied any such affiliation.<sup>55</sup> The Tatmadaw's statement, undated and not printed on official letterhead, added that his body was buried in Shwe War Chong Village, around 20 kilometres from Kyaikmayaw Town, and that his wife would be informed of this. No explanation was provided for the secret burial and apparent cover-up of the killing.<sup>56</sup>

On the evening of 24 October, while visiting Thailand to receive a human rights award, Daw Thandar received news of her husband's death via text message from a journalist.<sup>57</sup> Upon her return to Yangon, an unidentified individual from the Tatmadaw's Southeastern Command called Daw Thandar in an apparent attempt to negotiate a compensation payment; the offer was promptly refused.<sup>58</sup> Daw Thandar then travelled again to Kyaikmayaw with the intention of filing a murder case for her husband's death. Police there referred her to their District Office in Mawlamyine Town, where she travelled, only to be referred back to police in Kyaikmayaw, who eventually accepted the case.<sup>59</sup> She then returned again to her home in Yangon.

The announcement of Ko Par Gyi's death, and its initial cover-up, drew immediate and significant attention from both local and international actors, including media agencies, human rights groups and diplomatic missions to Myanmar.<sup>60</sup> Incidentally, the Government of Myanmar was about to host the Summit for the Association of South East Asian Nations (ASEAN) in November, in its first ever year as chair of the regional bloc. With the arrival of United States President Barrack Obama pending, on 29 October the US Embassy published a statement calling for a credible investigation with a view to accountability for Ko Par Gyi's death.<sup>61</sup> On 30 October, then-President U Thein Sein

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have experienced it," says Ma Thandar, a prominent activist and former political prisoner. "In 2007 they broke my ribs during police interrogation.")

<sup>52</sup> ICJ Interview with Ma Thandar, 30 September 2018; ICJ Interview with Naw Ohn La, 17 May 2018. The precise dates could not be established.

<sup>53</sup> The Irrawaddy, "Missing Reporter Killed in Custody of Burma Army," 24 October 2014.

<sup>54</sup> Ibid.

<sup>55</sup> The KKO's Secretary Saw Lont Lone told The Irrawaddy: "He is just a journalist and we helped him when he came to gather news, that's all." The Irrawaddy, 'Missing Reporter Killed in Custody of Myanmar Army', 24 October 2014.

<sup>56</sup> Ibid.

<sup>57</sup> ICJ Interviews with two key informants in Myanmar in May and September 2018.

<sup>58</sup> Ibid.

<sup>59</sup> ICJ interview with key informant in Myanmar in May 2018.

<sup>60</sup> See: Assistance Association for Political Prisoners, "Statement Regarding the Death of Freelance Journalist Aung Kyaw Naing, aka Par Gyi," 27 October 2014. Paul Mooney and Aye Win Myint, "Myanmar activists demand independent probe into journalist's killing," Reuters, 29 October 2014.

<sup>61</sup> Tim McLaughlin, "President orders investigation," The Myanmar Times, 31 October 2014. In an interview soon thereafter, Obama said Ko Par Gyi had been "tragically and senselessly murdered." The Irrawaddy, "Exclusive: The Irrawaddy Interviews US President Barack Obama," 12 November 2014.

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instructed the MNHRC to initiate an investigation.<sup>62</sup>

On 2 November police in Yangon's Ahlone Township relayed a fax to Daw Thandar from the Kyaikmayaw police, informing her of plans to exhume Ko Par Gyi's body on 5 November, and requesting her arrival in town the day before.<sup>63</sup> On the morning of 4 November, Daw Thandar again embarked on the day-long road trip from Yangon to Kyaikmayaw, accompanied by a group of friends including members of the "88 Generation" group and her lawyer U Robert San Aung.

### 3.3 Exhumation, autopsy and reburial

At around midday on 5 November, Ko Par Gyi's body was exhumed from an unmarked grave in Shwe War Chong Village. While forensic doctors and police surgeons were present, the Tatmadaw appeared in charge of the operation, including identification of the site.<sup>64</sup> The exhumation took place in a tense, militarized environment: Daw Thandar's entourage and media agencies were accompanied by more than 100 soldiers and police.<sup>65</sup> After the exhumation, the body was transferred to Mawlamyine where an initial examination was taken in the evening, followed by an autopsy the next day, on 6 November. Two doctors were involved in this process.<sup>66</sup>

There was much negotiation between Daw Thandar and her group with authorities and hospital staff regarding the autopsy process, which was apparently unclear, and in light of concerns among Ko Pa Gyi's friends and relatives that his body required necessary inspection for signs of torture and ill-treatment. The autopsy report, its findings summarized by MNHRC, had inconsistencies with the Tatmadaw's version of events. While the Tatmadaw had stated that Ko Par Gyi had been shot five times, the MNHRC's autopsy summary lists seven entrance gunshot wounds.<sup>67</sup> Daw Thandar, recalling a discussion with the doctors involved in the autopsy, suggested that the fatal wound may have been a gunshot to the chin, likely at point blank range.<sup>68</sup>

Persons independent of authorities who viewed the body, though not medical experts, reported what they believed to be knife wounds, as well as bruising, on the body.<sup>69</sup> Lawyer Robert San Aung was among those who observed what could be signs of torture.<sup>70</sup> Ultimately the autopsy report was not shared with Daw Thandar, and doctors involved in the autopsy could not be reached for comment on their findings.<sup>71</sup>

As with at the exhumation site, the situation and at the hospital was also highly tense and various actors including authorities sought to dissuade Daw Thandar from returning to Yangon with her husband's body, proposing to instead bury the body

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<sup>62</sup> The Irrawaddy, "President Orders Rights Commission to Investigate Killing of Journalist," 31 October 2014.

<sup>63</sup> Democratic Voice of Burma, "Journey to Justice – part one," 2014.

<sup>64</sup> ICJ interview with key informant in Myanmar in July and September 2018.

<sup>65</sup> ICJ interviews with key informants in Myanmar in May and September 2018. See also: Democratic Voice of Burma, "Journey to Justice – part one," 2014.

<sup>66</sup> Kyaw Hsu Mon, "'The Report Was Fabricated'," 3 December 2014. This was independently confirmed by the ICJ.

<sup>67</sup> Paragraph 32 of the MNHRC's autopsy summary lists the following entrance gunshot wounds: one underneath the chin; two over the left chest wall; one over the left thigh; one over the left heel; and two below the left shoulder.

<sup>68</sup> Kyaw Hsu Mon, "The Report was Fabricated," citation above.

<sup>69</sup> ICJ interviews, two key informants, Myanmar, May & September 2018. One person said they noticed bruises on both of the arms and the legs as well as two wounds on the chest: one slit (possibly a stab wound) and one hole (which looked like a bullet wound). When another person saw the body, they noticed 'two slits' on the left side of the chest, and did not see anything that looked like exit gunshot wounds. Both saw the body after it had been cleaned. See also: "A fellow activist and colleague of Par Gyi's, Naw Ohn La, who saw the corpse a day before the autopsy, claims the injuries looked more like stab wounds." Hanna Hindstrom, 'Slaying of journalist casts doubts on Myanmar's democratic reforms', Al Jazeera, 25 November 2014.

<sup>70</sup> BBC, "Exhumed Myanmar journalist Aung Naing 'beaten'," 5 November 2014.

<sup>71</sup> ICJ interview with Daw Thandar, Myanmar, 30 September 2018. The ICJ was unsuccessful in reaching out to persons involved in the autopsy.

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immediately in Mawlamyine.<sup>72</sup> Undercover military officers lingered around the hospital, as did other unidentified men.<sup>73</sup> A group of men dressed as monks, harassed members of Daw Thandar's entourage.<sup>74</sup> Some alluded to the chance of possible violence if an effort was made to return the body to Yangon.<sup>75</sup> Eventually, having initially withheld approval for the body to be returned to Yangon, local health authorities allowed Daw Thandar to return to Yangon with Ko Par Gyi's remains.<sup>76</sup> She travelled in a convoy with friends and her lawyer, and on 7 November Ko Par Gyi was laid to rest at Yay Way Cemetery in Yangon, where monks performed funeral rites.



*Crowds gather in Yangon in 2014 to demand full investigation (source: Irrawaddy)*

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<sup>72</sup> An interaction between media and undercover officers can be seen in the video, Democratic Voice of Burma, "Journey to Justice," 2014.

<sup>73</sup> ICJ interviews with three individuals who had direct knowledge of these discussions, Myanmar, 2018. See also: Democratic Voice of Burma, "Journey to Justice," 2014.

<sup>74</sup> ""They became rude and shouted, 'Why did this bastard have to come and die here?'" she recalls. "If you take the body, there will be trouble. There will be another Rakhine."" – as reported by: Hanna Hindstrom, "Slaying of journalist casts doubts on Myanmar's democratic reforms," Al Jazeera, 25 November 2014.

<sup>75</sup> ICJ interviews with three individuals who had direct knowledge of these discussions, Myanmar, 2018. The description of events here only touches lightly on some aspects of the situation as reported by persons who were at these scenes. It was deemed to be outside the scope and resources of this report to further examine what happened at this time to the degree necessary in order to confidently establish and verify the source and nature of this harassment. Nonetheless, the harassment of Daw Thandar and her group appears at face value to have been systematic, possibly intended to ensure the destruction of inculpatory evidence, and possibly also intended to detract the inevitable media attention that a burial in Yangon would bring. This merits further inquiry.

<sup>76</sup> Nyein Nyein, "Journalist's Body Moved to Rangoon Against Local Orders," The Irrawaddy, 7 November 2014.

#### 4 INVESTIGATIONS INTO KO PAR GYI'S KILLING

Several concurrent and overlapping investigations took place into Ko Par Gyi's death. All failed to facilitate accountability or redress, including the truth of what happened, and why there was an initial cover-up. Following the MNHRC inquiry, an inquest was initiated at the Kyaikmayaw Township Court. Yet in May it was revealed that almost six months earlier, the soldiers involved had been acquitted of wrongdoing in a secret military court. The inquest in Kyaikmayaw lost momentum and police formally closed the case in March 2016, upon the instruction of the provincial prosecution office. Court petitions lodged on behalf of Daw Thandar, who had since become a Member of Parliament, failed to generate further information.

##### 4.1 The Myanmar National Human Rights Commission's inquiry

With local and international criticism mounting, then-President U Thein Sein ordered an investigation into the death, reportedly by phoning the MNHRC and directly requesting them to initiate an investigation.<sup>77</sup> Ko Par Gyi's wife, Daw Thandar, as well as Min Thi Ha of *Education Digest*, had separately lodged complaints to the MNHRC. An investigation team of three Commissioners was formed, and deployed to Mawlamyine and Kyaikmayaw from 1 to 8 November and then again from 13 to 16 November.<sup>78</sup> The team reported that they interviewed 47 individuals (including military, police and other witnesses), gathered documents from eight government departments, and considered other information including media reports.<sup>79</sup> As part of its investigation, the MNHRC coordinated the exhumation and autopsy of Ko Par Gyi, and ultimately summarized the findings and conclusions in its inquiry report.

Head of the team, MNHRC Vice Chairperson U Sit Myaing (himself a former military judge), delivered a preliminary oral report on 21 November 2014, in which he said that persons interviewed confirmed Ko Par Gyi had indeed been working as a journalist at the time of his arrest (contrary to the Tatmadaw's version of events provided to the Myanmar Press Council, above).<sup>80</sup> While confirming receipt of the autopsy report from the Ministry for Health, he declined to publicly comment on claims that the body showed signs of having been tortured.<sup>81</sup>

Although not constituting a grave crime in Myanmar law, the Penal Code criminalizes certain acts that constitute torture, including their use by authorities during interrogations.<sup>82</sup>

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<sup>77</sup> Naw Say Phaw Waa, "Mounting fears of interference in Ko Par Gyi investigation", Myanmar Times, 11 June 2015; Myanmar Now, "Burma's human rights commission fights for government respect", 13 March 2016. Statement of the Myanmar National Human Rights Commission with Regard to the Case Involving the Death of Ko Aung Naing (a) Ko Aung Kyaw Naing (a) Ko Par Gyi, Statement No (5/2015), 8 May 2015, para 1; Lun Min Mang, 'Rights team contradicts government on journalists' death', Myanmar Times, 21 November 2014.

<sup>78</sup> U Sit Myaing (Vice Chairperson), U Zaw Win, and Dr Nyan Zaw were the members. At the time of this report being published, U Sit Myaing was the only member of this investigation team who still served as a Commissioner of the MNHRC. See: MNHRC Report, paras 2, 6–8. Lawyer U Robert San Aung's told media that one member of the team had previously been responsible for imprisoning Daw Thandar in relation to her political activities. Lun Min Mang, "Accusations fly over rights commission investigation," citation above.

<sup>79</sup> MNHRC, "The inquiry report of the Myanmar National Human Rights Commission into the death of Ko Aung Naing (a) Ko Aung Kyaw Naing (a) Ko Par Gyi," 2 December 2014, paras 3, 6.

<sup>80</sup> Lun Min Mang, 'Rights team contradicts government on journalists' death', Myanmar Times, 21 November 2014.

<sup>81</sup> U Sit Myaing was reported to say, "The most I can say is that he was shot dead and five bullet wounds were found on his body." Ibid.

<sup>82</sup> Myanmar Penal Code, sections 330 and 331. See: ICJ, "Achieving Justice," citation above, pp. 13.

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A 52-paragraph “inquiry report” was then published on 2 December 2019, detailing the MNHRC’s investigation, findings and recommendations.<sup>83</sup> This constitutes the only publicly available detailed written report in relation to Ko Par Gyi’s death, and it remains the most detailed and substantive output of its kind produced by the MNHRC.

After describing hostilities between the DKBA and the Tatmadaw in detail,<sup>84</sup> the MNHRC made a number of factual findings related to Ko Par Gyi’s arrest, detention, and death—notably, that he had been shot while attempting to escape<sup>85</sup> and that “no witness came to testify as to whether torture was applied.”<sup>86</sup> Based on its findings, the MNHRC concluded that soldiers had erroneously but not unreasonably determined that Ko Par Gyi was an enemy combatant and not a reporter at the time of his arrest.<sup>87</sup>

Nevertheless, the Commission made a number of criticisms with respect to the Tatmadaw’s handling of the matter.<sup>88</sup> Notably, the MNHRC reiterated its earlier determination that Ko Par Gyi was a freelance reporter and not a member of the KKO: yet while suggesting the military failed to take the adequate steps to establish this fact, some portion of blame was also attributed to Ko Par Gyi, for apparently not identifying himself as a journalist (this finding cannot be verified, see above).<sup>89</sup>

Regarding the police, the officers responsible for the arrest were found to have failed to duly file the necessary reports recording the case,<sup>90</sup> yet the MNHRC did not provide any recommendations for disciplinary or other action to be taken as a result. In terms of forensic evidence, the Commission revealed that the autopsy report (received by the MNHRC on 15 November) indicated that the main cause of death was bullet wounds to “the head, chest, thighs, and calf.”<sup>91</sup> However, the autopsy report itself was not attached;<sup>92</sup> and only a summary of the wounds was provided.<sup>93</sup>

While the Commissioners reviewed additional forensic evidence,<sup>94</sup> they did not attempt to reconcile this evidence with facts of the case presented in the report. They also did not address the apparent cover-up of the death, although the burial was found to have not been systematic, and lacking oversight.<sup>95</sup> The Commissioners recommend that such cases involving civilians should be handled with greater transparency.<sup>96</sup>

The key recommendation of the MNHRC’s report was for the Myanmar Police Force to carry out an investigation into Ko Par Gyi’s death with a view to facilitate a public criminal trial in a civilian court, with the Commissioners citing section 347 of the 2008 Constitution which guarantees to all persons equal protection before the law.<sup>97</sup>

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<sup>83</sup> Note the Burmese term for inquiry, (စုံစမ်းစစ်ဆေးခြင်း / *sone san sit sey chin*) is also commonly translated as “investigation.”

<sup>84</sup> MNHRC Report, paras 9–17.

<sup>85</sup> *Ibid*, para 21.

<sup>86</sup> *Ibid*, para 27.

<sup>87</sup> *Ibid*, paras 38, 43, 46, 47.

<sup>88</sup> *Ibid*, paras 25, 28, 29, 42, 45.

<sup>89</sup> *Ibid*, paras 41, 42, 44, 47.

<sup>90</sup> *Ibid*, para 41.

<sup>91</sup> *Ibid*, para 31.

<sup>92</sup> ICJ interview with Daw Thandar, Myanmar, 30 September 2018.

<sup>93</sup> MNHRC Report, para 32.

<sup>94</sup> See MNHRC Report, para 33.

<sup>95</sup> MNHRC Report, para 29.

<sup>96</sup> MNHRC Report, para 50.

<sup>97</sup> Note: section 347 of the 2008 Constitution is a particularly important provision because, unlike most “fundamental rights” in the Constitution which are restricted only to citizens, it guarantees rights for “all persons.” For further discussion see: ICJ, “Citizenship and Human Rights in Myanmar: Why Law Reform is Urgent and Possible,” June 2019, available at: <https://www.icj.org/myanmars-discriminatory-citizenship-laws-can-and-must-be-immediately-reformed/>. (Burmese: “မြန်မာနိုင်ငံတွင် နိုင်ငံသား ဖြစ်မှု နှင့် လူ့အခွင့်အရေး -

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Daw Thandar immediately responded to the report by saying she had questions and doubts about its findings.<sup>98</sup> She said that the MNHRC had not consulted her in the development of the report, and that given the inquiry team had not allowed her to attend a meeting with them in the presence of her legal counsel, she had declined to meet them. Three times the MNHRC had apparently refused Daw Thandar's requests to meet with the Commission accompanied by her lawyer, or by a female companion.<sup>99</sup>

Her lawyer U Robert San Aung pointed out that without Daw Thandar's testimony the inquiry is incomplete, and called for its review with the assistance of an international human rights specialist.<sup>100</sup> Another key focus of their criticism was that the report did not satisfactorily explain the circumstances of his death, including apparent signs of torture and ill treatment. In a public letter sent to then-President U Thein Sein on 10 December, UN Human Rights Day, Daw Thandar further derided the inquiry report, citing various inaccuracies and inconsistencies, its failure to ascribe fault for the death and for not duly consulting with and interviewing her.<sup>101</sup>

In response to Daw Thandar's assertion that "What the report calls weakness in obeying existing rules and laws was in fact a crime", head of the inquiry Commissioner U Sit Myaing declared that, "We had no authority to say whether a crime was committed or not. Our role was to point out the weaknesses. It's for the authorities and courts concerned to take steps to bring the case to justice."<sup>102</sup>

Five months later, on 8 May 2015, the MNHRC published a three-paragraph statement which recalled its December recommendation, remarked that the killing came under jurisdiction of military courts as per the 1959 Defence Services Act, and revealed that the two soldiers involved had been acquitted.<sup>103</sup> The acquittal was delivered on 27 November 2014, prior to publication of the MNHRC's inquiry report.<sup>104</sup> Commissioners were apparently unaware of this development at the time, and for months after, until its May 2015 statement, which remains their last public communication on the case.<sup>105</sup>

In spite of deficiencies in the inquiry, the MNHRC's report was the most substantive publicly available record of the circumstances of Ko Par Gyi's death – to date, the inquiry is also the first its kind since the MNHRC was first established in 2011. Its recommendations were designed to achieve accountability in this case, and to enable

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ဥပဒေဆိုင်ရာပြုပြင်ပြောင်းလဲရေးသည် ချက်ခြင်းလုပ်ဆောင်ရန် နှင့် လုပ်ဆောင်ရန် ဖြစ်နိုင်ခြေရှိခြင်း," <https://www.icj.org/wp-content/uploads/2019/06/Myanmar-Citizenship-law-reform-Advocacy-Analysis-Brief-2019-BUR.pdf>). The full recommendations of the MNHRC Report read as follows: "(49) The Myanmar Police Force should carry out the police investigation of the death of Ko Aung Naing (a) Ko Aung Kyaw Naing (a) Ko Par Gyi to the very end and prosecute the case in line with the judicial proceedings; (50) Except in matters of National Security news release of all other cases dealing with the public should be carried out in a transparent and timely manner; (51) Since so called Ko Aung Naing (a) Ko Aung Kyaw Naing (a) Ko Par Gyi (pseudonym- Aung Gyi) is a Citizen of Myanmar, he should be accorded equal status before the law and is also entitled to equal protection of the law; (52) Therefore the Commission would like to recommend that, in line with section 347 of the constitution of the Republic of the Union of Myanmar, for attainment of the fundamental rights of the citizens and also for transparency in the eyes of the public, this case should be tried in a civil court."

<sup>98</sup> Kyaw Hsu Mon, "The Report Was Fabricated": Widow of Slain Myanmar Journalist', The Irrawaddy, 3 December 2014.

<sup>99</sup> ICJ interview with Daw Thandar, Myanmar, September 2018.

<sup>100</sup> Aung Hla Tun and Paul Mooney, "Lawyer raps report on Myanmar journalist's death, demands new inquiry", Reuters, 2 December 2014. Lun Min Mang, 'Accusations fly over rights commission investigation', Myanmar Times, 15 December 2014.

<sup>101</sup> Lun Min Mang, "Accusations fly over rights commission investigation," Citation above.

<sup>102</sup> Ibid.

<sup>103</sup> MNHRC, "Statement of the Myanmar National Human Rights Commission with regard to the case involving the death of Ko Aung Naing (a) Ko Aung Kyaw Naing (a) Ko Par Gyi," Statement No 6/2015, 8 May 2015.

<sup>104</sup> Commissioner U Sit Myaing told The Myanmar Times that the case was decided on 27 November 2014. Yola Verbruggen, Naw Say Phaw Waa and Lun Min Mang, "Military acquittal raises fresh doubts about civilian inquest", Myanmar Times, 12 May 2015.

<sup>105</sup> ICJ meeting with MNHRC Commissioners, January 2019.

support access to the truth in this and similar cases in Myanmar. However, the inquiry alone did not provide accountability or redress, and the MNHRC itself lacked the powers necessary to compel authorities to comply with its recommendations.

### 4.2 Military Court proceedings

The circumstances and timing of the military court proceedings remains opaque, as does the release of information about it. As noted above, on 8 May 2015 — in the midst of the inquest and with no apparent justification for the peculiar timing — the MNHRC publicly announced the 27 November 2014 verdict of the military court. It remains unclear how or whether the two processes had interacted in any way. The MNHRC's brief statement of May 2015 remains the main source of publicly available information about this process and its outcome. That statement reads as follows:

"...As it was affirmed that the death of Ko Aung Naing (a) Ko Aung Kyaw Naing (a) Ko Par Gyi occurred during the period of active service, it came within the jurisdiction of the Court Martial under section (72) of the Defence Services Act. Accordingly the case was heard by a Summary General Court Martial as Case No (146/147) under the provisions of the Defence Services Act 1959, the Code of Criminal Procedures and the Rules and Procedures of the Court Martial and an order of acquittal was passed on two guard soldiers of (210) Light Infantry Regiment namely Lance Corporal Kyaw Kyaw Aung and Private Naing Lin Tun under section 71 of the Defence Services Act and section 304 of the Penal Code. The order was upheld by the Commander of the Southeast Command, it was learnt. From the information provided by the Ministry of Defence, it was also learnt that the trial of the Officers and other ranks with regard to the case involving the death of Ko Aung Naing (a) Ko Aung Kyaw Naing (a) Ko Par Gyi was held according to the 2008 Constitution, the Code of Criminal Procedures and the Defence Services Act."<sup>106</sup>

The MNHRC's inquiry reported that on 27 September 2014, the Tatmadaw's Southeastern Command had notified LID 22 that the area in which clashes with the DKBA were taking place was considered to be under "active duty status."<sup>107</sup> As highlighted in part 2.2 of this report, the definition of active duty (or, active service) is overly broad, and read with sections 71 and 72 of the Defence Services Act, can be used to transfer the investigation and prosecution of serious crimes perpetrated by soldiers to military, rather than civilian, courts, regardless of the victim's status.

Given that any information about Ko Par Gyi's death was withheld from the public and his family until 23 October, and the apparent acquittal date of 27 November, it appears that the military court process went on for approximately one month. Separate to the soldiers directly involved in the killing, the MNHRC statement indicates that the actions of "officers of other ranks" were also reviewed. While this may have led to disciplinary action, details of this could not be established or verified, and such information is not publicly available.<sup>108</sup>

After learning of the acquittal, Daw Thandar sent a letter of complaint to various authorities, including the Office of the President, the Commander-in-Chief, and the parliament's Rule of Law and Tranquility Committee led by Daw Aung San Suu Kyi.<sup>109</sup>

### 4.3 Inquest at the Kyaikmayaw Township Court

Almost six months after Ko Par Gyi's death, the Kyaikmayaw Township Court initiated an inquest on 30 March 2015. Several public hearings were held over ten weeks, from

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<sup>106</sup> MNHRC Statement, 8 May 2015 (citation above).

<sup>107</sup> MNHRC Report, para 16. For further analysis on the Tatmadaw's various rules of engagement issued to soldiers, including the practice of assigning different color designations for geographical areas, see: ICJ, "Achieving Justice," citation above, pp. 15.

<sup>108</sup> ICJ interview with informant, Yangon, January 2019.

<sup>109</sup> Naw Noreen, 'Fifth civilian court hearing in Par Gyi case', DVB, 25 May 2015.

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10 April and 23 June.<sup>110</sup> The District Prosecutor's witness list included over thirty individuals, including persons from the local administration, locals with knowledge of the case, the two soldiers involved in the killing, and Daw Thandar, Ko Par Gyi's wife.<sup>111</sup> The Court ultimately concluded that Ko Par Gyi died in military custody from gunshot wounds but made no determination as to who was responsible for his death.

Authorities administering the inquest apparently failed to inform Daw Thandar or her legal counsel that proceedings were taking place, and it was only after hearings had started that she learnt of them from a local contact.<sup>112</sup> Upon appearing at the inquest for the first time on 30 April, the District Prosecutor reportedly told her that there had been no requirement to inform her.<sup>113</sup> Later that day the Township Judge reportedly suggested that letters had been sent to her but that these may have gone missing in the post.<sup>114</sup> Following that day's proceedings, and upon her request to the Court, a formal letter was issued inviting her to testify at a subsequent hearing.<sup>115</sup> Speaking with reporters soon thereafter, Daw Thandar expressed optimism that these proceedings could facilitate justice for the death of her husband.<sup>116</sup>

Yet broad skepticism of the proceedings developed as further irregularities came into view, alongside an emerging awareness that the inquest was unlikely to lead to a determination of responsibility. Toward the end of proceedings, District Prosecutor U Nyi Nyi Lwin, the lead for witness examinations, was switched out, apparently due to a promotion.<sup>117</sup> Records of Ko Par Gyi's detention, promised to the Court by police, apparently were not submitted or followed up on.<sup>118</sup> At the same time, testimonies conflicted and diverged from official versions of events, further revealing discrepancies between information released by the Ministry of Defence and the MNHRC.<sup>119</sup> The inquest appeared to be subject to monitoring by military officials.<sup>120</sup>

On 23 June 2015, the inquest culminated in an appearance by the two soldiers directly involved in the killing, who had earlier been acquitted by a military court. Lance Corporal Kyaw Kyaw Aung and Private Naing Lin Tun testified that after an attempted escape and scuffle, the Corporal shot Ko Par Gyi.<sup>121</sup> That same day the Court concluded that Ko Par Gyi had died from unnatural causes while in military custody, but made no determination as to criminal culpability for his death.<sup>122</sup> Given this finding, and in light

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<sup>110</sup> Yola Verbruggen and Naw Say Phaw Waa, 'Murky investigation into journalist's death continues', *The Myanmar Times*, 1 May 2015.

<sup>111</sup> Naw Say Phaw Waa, "Mounting fears of interference in Ko Par Gyi investigation," *The Myanmar Times*, 11 June 2015.

<sup>112</sup> Yola Verbruggen and Naw Say Phaw Waa, 'Murky investigation into journalist's death continues', *The Myanmar Times*, 1 May 2015 ('Only in recent days did she learn that the court had begun hearing the case.');

<sup>113</sup> 'Court martial exonerates soldiers of murder of journalist while death inquest in civilian court still underway', Asian Human Rights Commission, 13 May 2015.

<sup>114</sup> Yola Verbruggen and Naw Say Phaw Waa, 'Murky investigation into journalist's death continues', *The Myanmar Times*, 1 May 2015.

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*

<sup>117</sup> Hnin Yadana Zaw, "Wife of Myanmar journalist killed by army puts hope in civilian court", *Reuters*, 12 May 2015.

<sup>118</sup> U Nyi Nyi Lwin was reportedly transferred to Maungdaw in Rakhine State, apparently as an long awaited promotion. Naw Say Phaw Waa, "Mounting fears of interference in Ko Par Gyi investigation," *The Myanmar Times*, 11 June 2015.

<sup>119</sup> A journalist who monitored the proceedings said that while the police told the court they would submit interrogation records for review, it was unclear if they did so and if this was factored into the considerations of the court (note that the MNHRC inquiry found that police had failed to duly file records of Ko Par Gyi's detention). ICJ interview. ICJ interview with journalist, Myanmar, September 2018.

<sup>120</sup> Lun Min Mang, "Soldiers tell how they killed journalist, as hearing ends," Citation above.

<sup>121</sup> ICJ Interview with journalist, Myanmar, 30 September 2018.

<sup>122</sup> Lun Min Mang, "Soldiers tell how they killed journalist, as hearing ends," Citation above.

<sup>123</sup> Zarni Mann, 'Par Gyi Murder Case Closed, Widow Vows Appeal', *The Irrawaddy*, 23 June 2015; Lun Min Mang, 'Soldiers tell how they killed journalist, as hearing ends', *The Myanmar Times*, 25 June 2015.

of the soldiers' acquittal in a military court, revealed during but apparently separate to the inquest, no recommendation appears to have been made to authorities on next steps, such as the prospect of a criminal investigation by police.

Some legal experts remarked that despite the Court's unsatisfactory finding with regard to accountability and redress, the inquest into a civilian's death in military custody had been a rare feat, and the appearance of military personnel as witnesses in a civilian court was unprecedented.<sup>123</sup> Other observers remarked that the process seemed designed to shield the government from criticism rather than establish the truth.<sup>124</sup> Daw Thandar's response to the findings was dissatisfaction with the absence of any accountability for her husband's death. She indicated that with her lawyer U Robert San Aung they would continue to seek remedy through higher courts.<sup>125</sup>

#### 4.4 Investigations by the Myanmar Police Force

Around 20 October, with Ko Par Gyi's disappearance so far unexplained, Daw Thandar travelled to Mon State to make inquiries about his whereabouts. As noted above, it was at this time she filed a First Information Report (FIR) with the Kyaikmayaw Township Police, requesting that they open a case file. After learning of her husband's fate, Daw Thandar returned to Kyaikmyaw, withdrew the FIR for disappearance and filed an FIR for his death.<sup>126</sup> On both occasions the police, who likely had knowledge of the case all along, initially refused to receive the FIR, in one instance referring Daw Thandar to police in the provincial capital Mawlamyine.<sup>127</sup> At the time, she was skeptical of whether the police would investigate the disappearance and death. Police officers apparently told her that higher authorities prevented them from opening an investigation.<sup>128</sup>

While police played a role in making arrangements for the exhumation, including through the provision of some information and transport arrangements for Daw Thandar, the exhumation itself seems to have been prompted by the MNHRC, with members of the Tatmadaw retaining control.<sup>129</sup> While the MNHRC's report of 2014 noted that the MPF's Criminal Investigation Department (CID) had conducted an "examination" of Ko Par Gyi's body, any further role of the CID in police inquiries could not be established.<sup>130</sup> In a February 2015 article, local media reported that police had interviewed more than 20 witnesses.<sup>131</sup> Yet the links, if any, between police inquiries and the inquest held at Kyaikmayaw Township Court was and remains unclear. And while police took part in the MNHRC inquest it is not clear if they were aware at the time, at any level, that a military court had concluded its proceedings. Following the inquest held in the Kyaikmayaw Township Court, which ended in June 2015, police did not comment on whether the case would be further pursued.<sup>132</sup>

A police case file on Ko Par Gyi stayed open from around the time of the police's receipt

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<sup>123</sup> See for example comments by lawyer U Kyi Myint. Lun Min Mang, 'Soldiers tell how they killed journalist, as hearing ends', The Myanmar Times, Citation above.

<sup>124</sup> ICJ Interview with journalist, Myanmar, 30 September 2018.

<sup>125</sup> Zarni Mann, 'Par Gyi Murder Case Closed, Widow Vows Appeal', The Irrawaddy, 23 June 2015.

<sup>126</sup> ICJ Interview with Ma Thandar, 30 September 2018; ICJ Interview with Naw Ohn La, 17 May 2018; see also Paul Mooney, 'Myanmar journalist killed by army was former bodyguard of Suu Kyi', Reuters, 28 October 2014.

<sup>127</sup> ICJ Interview with Naw Ohn La, 17 May 2018; ICJ Interview with Ma Thandar, 30 September 2018; see also Paul Mooney, 'Myanmar journalist killed by army was former bodyguard of Suu Kyi', Reuters, 28 October 2014.

<sup>128</sup> Paul Mooney, 'Myanmar journalist killed by army was former bodyguard of Suu Kyi', Reuters, 28 October 2014. Hanna Hindstrom, 'Slaying of journalist casts doubts on Myanmar's democratic reforms', Al Jazeera, 25 November 2014.

<sup>129</sup> Kyaikmayaw Township Police relayed the news of an impending exhumation to Daw Thandar via Yangon-based police in her neighborhood.

<sup>130</sup> MNHRC Report, para 34. It is unclear if the CID directly examined the body or not.

<sup>131</sup> Daw Thandar provided this information; at times she inadvertently seems to have acted as a communication channel between media and authorities. San Yamin Aung, "Army Blamed for Delay in Court Case of Slain Journalist," The Irrawaddy, 11 February 2015.

<sup>132</sup> Lun Min Mang, "Soldiers tell how they killed journalist, as hearing ends," citation above.

of an FIR in October/November 2014 through to March 2016. For around nine months following the conclusion of the Kyaikmayaw Township Court inquest in June 2015, police took no discernable action, and the case status remained unclear. This ambiguity was ultimately addressed in a letter dated 21 March 2016 from the Kyaikmayaw Township Police to Daw Thandar – around the same time that she entered Myanmar’s Union Parliament as a Member of Parliament for the NLD party, following the election of November 2015.<sup>133</sup> In the letter, Daw Thandar was informed that the police had closed the case on the instruction of law officers (prosecutors) in the District of Mawlamyine and in the Office of the Mon State Advocate General.<sup>134</sup> The letter noted that, after receiving this legal advice, township police also sought the advice of their provincial headquarters for Mon State, who reaffirmed the prosecutors’ advice. The communication to Daw Thandar did not outline a clear legal rationale for this decision.<sup>135</sup>

On reaching the public, this news prompted reactions from a range of actors, including Myanmar’s new information minister, U Pe Myint, who condemned the outcome as unacceptable and pledged to help facilitate justice.<sup>136</sup> U Robert San Aung, lawyer for Daw Thandar, labeled the decision as a mistake, and indicated that the decision would be appealed in the courts.<sup>137</sup>

#### 4.5 Supreme Court petition

Eighteen months after the death of Ko Par Gyi and following the conclusion of four concurrent procedures undertaken by State actors and the country’s national human rights institution, the true circumstances of his death were still not yet established, and no accountability or redress had been provided. Daw Thandar and her lawyer, U Robert San Aung, thus sought to have the case reviewed or reopened by a higher court. Their comments to media at the time suggested an intention to file a constitutional writ.<sup>138</sup> In Myanmar, writs are a key mechanism to compel a judicial review of decisions by lower courts.<sup>139</sup> It is understood that a constitutional writ was filed at the Supreme Court in Nay Pyi Taw in August 2016, then rejected or quashed

<sup>133</sup> Representing the Einme constituency of Ayeyarwaddy Region.

<sup>134</sup> Letter from Kyaikmayaw Township Police to Daw Thandar, on file with the ICJ.

<sup>135</sup> The Kyaikmayaw Township Police closed the case on 19 March 2016.

<sup>136</sup> Mizzima, “Myanmar shelves investigation into journalist killing,” 6 April 2016. DVB, “Police in Mon State close Par Gyi case,” 1 April 2016.

<sup>137</sup> DVB, “Police in Mon State close Par Gyi case,” citation above. Mizzima, “Myanmar shelves investigation into journalist killing,” citation above.

<sup>138</sup> Ibid.

<sup>139</sup> Despite efforts to contact lawyer U Rober San Aung, the ICJ could not establish which writ was filed, if any. The most likely avenues pursued would have been the filing of the writ of mandamus (to direct an official to perform their duties or correct an illegal action) or the writ of certiorari (to cancel an unlawful decision). Yet significant barriers exist for filing constitutional writs in Myanmar. For applicants, these challenges include costs associated with the preparation and processing of documentation for submission and acceptance by the Supreme Court, which is located in the capital Nay Pyi Taw. See: 2011 Procedural Rules and Regulations for the Application of Writs. See also: Melissa Crouch, “The Common Law and Constitutional Writs: Prospects for Accountability in Myanmar” in *Law, Society and Transition in Myanmar*, Hart Publishing, 2014, pp. 155. For a list of the five constitutional writs in Myanmar, see: ICJ, “Special Economic Zones in Myanmar and the State Duty to Protect Human Rights,” February 2017, pp. 30, available at: <https://www.icj.org/myanmar-amend-special-economic-zones-law-to-protect-human-rights-new-icj-report/> (Burmese: “မြန်မာနိုင်ငံရှိ အထူးစီးပွားရေးဇုန်များနှင့် လူ့အခွင့်အရေးများကို ကာကွယ်ပေးရမည့် နိုင်ငံတော်၏ တာဝန်ဝတ္တရားများ,” <https://www.icj.org/wp-content/uploads/2017/05/Myanmar-SEZ-assessment-full-Publications-Reports-Thematic-reports-2017-BUR.pdf>). For further analysis, see: ICJ, “Handbook on Habeas Corpus in Myanmar,” May 2016, available at: <https://www.icj.org/myanmar-writ-of-habeas-corpus-can-help-protect-human-rights/> (Burmese: “တရားရုံးရှေ့တော်သွင်းစာရွက်တော် အမိန့်ဆိုင်ရာ လက်စွဲစာအုပ်,” <https://www.icj.org/wp-content/uploads/2016/06/Myanmar-Handbook-on-Habeas-Corpus-Publications-Reports-thematic-reports-2016-BUR.pdf>).

in 2017.<sup>140</sup> Daw Thandar, now a serving Member of Parliament, does not appear to have further pursued this legal route. The ultimately unsuccessful filing of a writ appears to have been the last formal step taken so far in pursuing a more satisfactory judicial conclusion with regards to the death of Ko Par Gyi.

၁၉၅၉ ခုနှစ်၊ တပ်မတော် အက်ဥပဒေ၊  
THE DEFENCE SERVICES ACT, 1959.

(၂) ပုဒ်မခွဲ (၁)၊ အပိုဒ် (က)၊ (ခ)၊ သို့တည်းမဟုတ် (ဂ) အရ ဤအက်ဥပဒေကို လိုက်နာသူထိုင်းသည်၊ မိမိ၏ စစ်မှုထမ်းခြင်း ရပ်စဲလိုက်သည်အထိ၊ နည်းလမ်းတကျ အငြိမ်းစားပေးလိုက်သည်အထိ၊ ထွက်ခွင့်ပေးလိုက်သည်အထိ၊ နုတ်ပယ်လိုက်သည်အထိ၊ အမြဲတန်း ထုတ်ပစ်လိုက်သည်အထိ၊ သို့တည်းမဟုတ် ရှုတ်ချ၍ အမြဲတန်း ထုတ်ပစ်လိုက်သည်အထိ၊ ဤအက်ဥပဒေကို လိုက်နာလျက်ရှိသည်။

၃။ ။ ဤအက်ဥပဒေတွင် အကြောင်းအရာနှင့်ဖြစ်စေ၊ ရွေ့နောက်စကားတို့၏ အဓိပ္ပါယ် အဓိပ္ပါယ်ပေါ်ပြချက်များ။ နှင့်ဖြစ်စေ၊ မဆန့်ကျင်လျှင်—



- (က) “တန်းပြည့်စစ်မှုထမ်းချိန်” ဆိုသည်မှာ၊ ဤအက်ဥပဒေကို လိုက်နာသူ တဦးနှင့် သက်ဆိုင်စေရာ၌၊ အောက်ပါအတိုင်း၊ ထိုသူပါဝင်ဆောင်ရွက်နေ သည့်အချိန်ကို ဆိုလိုသည်။
- (၁) ရန်သူနှင့်ပြိုင်ဆိုင် တိုက်ပွဲဆင်နွှဲနေသော တပ်ဖွဲ့တဖွဲ့တွင်၊ တွဲဘက်ထားသည့် အချိန်၊ သို့တည်းမဟုတ် ပါဝင်သည့်အချိန်၊ သို့တည်းမဟုတ်
- (၂) ရန်သူက လုံးဝသော်၎င်း၊ တစ်စိတ်တစ်ဒေသသော်၎င်း၊ သိမ်းပိုက်ထားသော တိုင်းပြည်တပြည်ဖြစ်စေ၊ နေရာတခုဖြစ်စေ၊ တိုက်ပွဲဆင်နွှဲနေသည့် အချိန်၊ သို့တည်းမဟုတ် ယင်းထဲသို့သော တိုင်းပြည် တပြည်သို့ဖြစ်စေ၊ နေရာတခုသို့ဖြစ်စေ၊ စစ်ချီတက်ရာ၌ ပါဝင်သည့်အချိန်၊ သို့တည်းမဟုတ်
- (၃) နိုင်ငံခြား နိုင်ငံတခုကို သိမ်းပိုက်ထားသော တပ်ဖွဲ့တဖွဲ့တွင် တွဲဘက်ထား သည့်အချိန်၊ သို့တည်းမဟုတ် ပါဝင်သည့်အချိန်။
- (ခ) “လေယာဉ်” ဆိုသည်မှာ၊ ရပ်ဘက် လေယာဉ်ပျံများ၊ ဓါတ်ပုံးပျံများ၊ လေတံ၊ ခွန် ဓါတ်ပုံးပျံများ၊ လေသင်္ဘောများ၊ စက်မဲ့လေယာဉ်များ၊ သို့တည်းမဟုတ်၊

"Active service" is defined broadly in the 1959 Defence Services Act

<sup>140</sup> Within its resource limitations, and given the lack of access to the lawyer, the ICJ could not establish further information about the details of this process.

## 5 FINDINGS AND RECOMMENDATIONS

The killing of Ko Par Gyi, its initial cover-up by the military, the investigations into his death and ultimately the lack of accountability and redress are all illustrative of broader challenges in achieving justice for serious human rights violations in Myanmar, and which calls for deterring their repetition in the future. As highlighted in this report, the division of the Tatmadaw whose members were responsible for Ko Par Gyi's death have since been implicated in further alleged human rights violations. Ongoing impunity enables and may encourage further crimes.

This case illustrates at least three core barriers to justice in cases of unlawful killings and recommends steps to meaningfully address them.

### 5.1 National laws enable impunity for serious human rights violations

Each of the four civilian-initiated processes undertaken to review Ko Par Gyi's killing were essentially rendered ineffective in light of the finding by a military court that absolved the soldiers involved of any criminal culpability in his death – in proceedings conducted in secret and for months hidden from his family, the public and apparently also from other State actors. Prosecutors, police, the MNHRC, and the judiciary at both the district and supreme court levels all ceased their inquiries on the basis that the acquittal in a military court of the soldiers involved in Ko Par Gyi's killing was final and conclusive.

#### *The 2008 Constitution*

Under the 2008 Constitution, the Tatmadaw's Commander-in-Chief is empowered to exercise ultimate authority over military courts, and any appeals from their rulings (see part 2.2). There is no expressed constitutional provision enabling such decisions to be appealed or reviewed in civilian courts, including the Supreme Court. This arrangement is patently incompatible with the bedrock rule-of-law principle that security forces must be accountable to civilian authorities, including an independent judiciary. The absolute autonomy enjoyed by military courts – particularly the section 343(b) provision allowing exclusion from review – further undermines the rule of law by flouting the equal legal protection to which all persons are guaranteed under section 347 of the Constitution.

The Constitutional Tribunal is the sole body with authority to assess this apparent conflict of constitutional provisions, and to issue a binding legal interpretation in accordance with its powers under sections 46, 322(a) and 324 of the Constitution. A range of actors may request the Tribunal to make such an interpretation, including the Union President.<sup>141</sup> [Note: while sections 295(c) and 343(b) of the Constitution establish the final and conclusive authority of the Supreme Court and of the Commander-in-Chief, in matters within their respective jurisdiction, the Constitutional Tribunal is the highest authority in constitutional matters, as per section 324.]

#### *The 1959 Defence Services Act*

These problematic provisions of the Constitution show why civilian-led processes effectively concluded in light of the decision of a military court. However, these constitutional arrangements themselves do not explain why the killing of Ko Par Gyi –

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<sup>141</sup> See: Constitution of Myanmar, section 325: "The following persons and organizations shall have the right to submit matters directly to obtain the interpretation, resolution and opinion of the Constitutional Tribunal of the Union: (a) the President; (b) the Speaker of the Pyidaungsu Hluttaw; (c) the Speaker of the Pyithu Hluttaw; (d) the Speaker of the Amyotha Hluttaw; (e) the Chief Justice of the Union; (f) the Chairperson of the Union Election Commission," and section 326: "The following persons and organizations shall have the right to submit matters to obtain the interpretation, resolution and opinion of the Constitutional Tribunal of the Union in accord with the prescribed procedures: (a) the Chief Minister of the Region or State; (b) the Speaker of the Region or State Hluttaw; (c) the Chairperson of the Self-Administered Division Leading Body or the Self-Administered Zone Leading Body; (d) Representatives numbering at least ten percent of all the representatives of the Pyithu Hluttaw or the Amyotha Hluttaw." Note: formed in 2011, the Constitutional Tribunal has never acted *suo moto* (of its own accord), and its authority to do so is untested.

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a civilian whose initial arrest was undertaken by nominally civilian authorities<sup>142</sup> – came under military jurisdiction instead of being subject to public criminal proceedings in the civilian courts. The military’s exercise of jurisdiction over the investigation and prosecution of Ko Par Gyi’s killing was performed presumably in reference to the 1959 Defence Services Act. Certain provisions of this Act allow for acts by soldiers, including serious crimes against civilians, to be heard in a military court (as detailed in part 4.2).

The effects of these provisions in the Defence Services Act is that military personnel are shielded from public criminal prosecution, victims and their families generally cannot access or participate in proceedings, or enjoy access to an effective remedy and other reparation. It also prevents the victims and families, and indeed the broader public, from gaining access to the truth. The possibility of achieving justice in civilian-led courts is severely limited, if not futile, given that police, prosecutors and courts typically consider the conclusions of military courts to be final. A provision of the original 1959 Act, which allowed the Union President to order for the review of a case heard in a military court, was repealed in amendments signed off by Senior General Than Shwe in 2010, closing the potential for any civilian-led review (see part 2.2).

Even in cases where a military court finds an individual culpable of serious human rights violations, the punishment is rarely commensurate to the crime, and the Tatmadaw’s Commander-in-Chief can and does exercise the prerogative to grant leniency – as in the case of soldiers found culpable for a massacre in Rakhine State.<sup>143</sup> Outcomes of these arrangements result in impunity and thereby reinforce the reasons investigations must always be conducted by independent and impartial authorities, and why prosecutions for serious human rights violations should only ever take place within the civilian justice system.

If not for the broad definition of “active service” in section 3(a) of the Defence Services Act, and the basis for the jurisdictional transfer to military courts of even the most serious crimes (sections 71 and 72), the Tatmadaw would struggle to assert its legal authority to exercise jurisdiction in cases such as Ko Par Gyi’ killing. Independent or supplementary to constitutional reform, removing or radically modifying these fatally flawed provisions is necessary to enable and embolden civilian authorities effectively investigate, prosecute and punish serious crimes involving soldiers.

### *The 2014 Myanmar National Human Rights Commission Law*

An inquiry by the MNHRC contributed to establishing the truth in relation to Ko Par Gyi’s death, despite its weaknesses, and illustrates that it can play a positive role. The ability of Commissioners to undertake inquiries and follow up on their recommendations would be further enhanced by reform of the 2014 MNHRC Law, particularly section 37, which effectively precludes the MNHRC from inquiring into potential human rights violations that are already the subject of a court proceeding.<sup>144</sup>

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<sup>142</sup> Of all State institutions in Myanmar, the police force is particularly close to the military, coming formally under its command structure and comprised of many individuals who formerly served in and may close links with the Tatmadaw. However, it is prudent to note that police themselves are civilians, regardless of the Constitutional arrangements under which they operate. For a discussion of Border Guard Divisions, part of the MPF but at times operating particularly close to the military, see: ICJ, “Questions and Answers on Human Rights Law in Rakhine State,” November 2017, pp. 9, citation above.

<sup>143</sup> Shoon Naing and Simon Lewis, “Myanmar soldiers jailed for Rohingya killings freed after less than a year,” citation above.

<sup>144</sup> Sean Bain and Jenny Domino, “Time for long overdue reforms to the human rights commission,” Frontier Myanmar, 13 November 2019.

## **5.2 Investigations fail to meet international law and standards**

The different, ultimately ineffective, investigations into the death of Ko Par Gyi is illustrative of a broader pattern in Myanmar, particularly since changes to legal and governance arrangements in 2011: simultaneous but separate investigations are undertaken with respect to the same case of alleged human rights violations and crimes, usually with a lack of clarity on their interactions. This typically takes place in response to significant attention and scrutiny from media, civil society and other actors. The outcome is an uncoordinated and unsystematic approach to investigating human rights violations which does not shed light on the facts, provide access to effective remedies and reparation, or result in the successful prosecution of perpetrators. As a result, investigations typically fail to meet the requirements under international law and standards of promptness, effectiveness and thoroughness, independence and impartiality, and transparency.

In cases of potentially unlawful killings, police and military investigating authorities in particular appear to lack the capacity or will to apply basic investigation principles at the crime-scene, in interviews and in other procedures, including the autopsy.

The investigation of Ko Par Gyi's death highlights the Myanmar Police Force's lack of institutional independence from the Tatmadaw – particularly in areas of conflict or unrest, where police tend to be more deferential to soldiers. Their reluctance to undertake an effective investigation was expressly linked to instructions issued "from above," likely emanating from military officers.

While an autopsy was performed by credentialed forensic surgeons, a fundamental omission was its lack of reasonable conclusions regarding the cause of death and other factors surrounding it—including any information that would verify or refute the allegations of torture and ill treatment. It appears that no attempt was made by the forensic doctors to situate their findings within any of the various factual narratives advanced with respect to Ko Par Gyi's death.

The State's prosecutors and judges, as well as human rights Commissioners, were also evidently reluctant, unable or otherwise impaired in fulfilling their respective mandates – linked to their lack of independence, legally and structurally, from the Tatmadaw (see part 2.3). The outcome is that serious crimes by soldiers largely go unredressed and unpunished by any State agents, thereby entrenching military impunity.

In regard to the MNHRC's role, the legal and structural constraints set out above prevented the MNHRC from fully and vigorously exercising its investigative mandate. In addition, the report features noteworthy gaps, including a failure to properly engage with and gather contributions from the victim's family, a lack of critical analysis and an absence of any attempt to reconcile the evidence with the facts – particularly in relation to potential signs of torture, ill treatment and disproportionate use of force while Ko Par Gyi was under police and military custody.

The trial in a military court of soldiers implicated in Ko Par Gyi's killing manifestly failed to pass basic tests of independence and impartiality. Not only did the acquittal fail to provide accountability or redress, its outcome was to deter these elements from being addressed in other forums. This constitutes the greatest barrier to achieving justice for serious human rights violations, in this case and in many others throughout the country – rationalised in law in reference to the 1959 Defence Services Act.

The employment of multiple processes has been an obvious impediment to an acceptable resolution. As set out above, the various and at times overlapping proceedings regarding the death of Ko Par Gyi— the inconclusive and incomplete MNHRC investigation, the secret and summary military court proceedings, the superficial and ultimately toothless inquest, and the non-existent subsequent police investigation—have collectively resulted in an overall process that was neither prompt, effective and thorough, independent and impartial, nor transparent. Notably, these various mechanisms were carried out by different actors without any apparent coordination or attempt to harmonize their activity. Worse still, it appears that the military only initiated court-martial proceedings once the MNHRC—prompted by the

president in response to international pressure—announced its intention to conduct an investigation. Given Myanmar’s constitutional posture with respect to the military and the MNHRC’s limited mandate, a reasonable observer could conclude that hastily arranged court-martial proceedings may have been used as a shield to preempt any further civilian prosecution of the perpetrators.

### **5.3 The rights of victims and their families are rarely considered**

Authorities excluded Daw Thandar, the wife of the deceased, from the investigation processes. The Tatmadaw initially covered-up the killing, burying him in an unmarked grave without informing the family; then when the killing was revealed, the admission was made directly to the media, leaving Daw Thandar to learn of her husband’s death through news reports and word of mouth. Like the broader public, and apparently many State authorities, Daw Thandar was not informed about the convening or outcome of the military court trial that considered Ko Par Gyi’s death.

The Kyaikmayaw Police Force disingenuously withheld from Daw Thandar information its officers would have known about the circumstances of Ko Par Gyi’s enforced disappearance, and of his death. Instead of assisting her quest to establish the whereabouts of her husband, police officers in Kyaikmayaw seemingly actively obstructed her from doing so, referring her to a different police station, and making her wait for hours before accepting her submission of a First Information Report. On three occasions, according to Daw Thandar, the MNHRC’s inquiry team refused her reasonable requests to be interviewed in the company of her female companion for emotional support – her voice is entirely absent from the MNHRC’s reporting.<sup>145</sup> When an inquest was initiated at Kyaikmayaw Township Court, authorities again failed to take steps to inform her of this development, and she instead learnt of the proceedings belatedly and through word of mouth. Furthermore, key documentation, including the autopsy report, was not made available to her.

In addition to the systemic failures to respect the right to information of Daw Thandar, the victim’s family, her treatment during this traumatic time constituted an independent harm to her and in some instances constituted harassment (see part 3.3). Where serious human rights violations have occurred, the harassment of victims and their families is not uncommon, at times even taking the form of spurious prosecutions.<sup>146</sup>

None of the elements of reparation – restitution, compensation, rehabilitation, satisfaction and or guarantees of non-repetition – have been fulfilled in the case of Ko Par Gyi’s killing. This lack of access to justice is present even in this high-profile case of an unlawful killing, yet the lack of redress (as well as accountability) reflects experiences of families throughout the country who have been affected by serious human rights violations involving soldiers.

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<sup>145</sup> According to Daw Thandar, on three separate occasions, she asked to appear before the Commission accompanied by a female companion (Naw Ohn La) for emotional support. Each request was denied, and she never appeared in person. ICJ Interview with Daw Thandar, Myanmar, September 2018.

<sup>146</sup> In some instances victims, families and their representatives have been prosecuted for publically highlighting alleged human rights violations. See: ICJ, “Achieving Justice,” citation above, pp. 16-18, 31-32.

#### 5.4 Summary of recommendations

- A. **The Myanmar Police Force should reopen Ko Par Gyi's case**, in coordination with prosecutors, to follow lines of inquiry that have not been duly pursued, including by investigating indicia of torture or ill treatment, with a view to identifying and prosecuting the perpetrators of criminal conduct related to his death, as appropriate, consistent with international law and standards.
- B. **Myanmar authorities, in Mon State and at Union level, should commission a comprehensive review** by an independent, competent authority or expert(s) of the scope, methodology and results of the investigations, to identify specific measures required to provide accountability and redress for the killing of Ko Par Gyi as well as for similar cases throughout the country, and commit to implementing these recommendations.
- C. **The NLD-dominated legislature should repeal or amend the 1959 Defence Services Act to bring it into line with international law and standards** - including to ensure that serious human rights violations perpetrated by soldiers can only be prosecuted in civilian courts. The law should ensure that trials are independent and conducted by impartial and competent courts applying international fair trial standards. The definition of "active service" in section 3(a) should be narrowed, the legal basis in sections 71 and 72 to transfer jurisdiction over serious crimes involving soldiers to military courts should be removed, and military courts should be explicitly precluded from exercising jurisdiction over serious crimes, particularly serious crimes under international law. Such reforms constitute an essential step toward empowering police, prosecutors, judges and other relevant authorities to effectively fulfill their duties to facilitate the investigations, prosecutions and punishments necessary to combat military impunity and deter the repetition of serious human rights violations.
- D. **Constitutional amendments should be pursued that would make the Tatmadaw legally accountable to civilian authorities** - including by repealing section 343(b), which impedes the country's judicial and civilian bodies from reviewing the decisions of military courts. These reforms could be initiated by the executive or in the Union legislature, including through the constitutional amendment process.
- E. **The Union Parliament should consider other legislative measures to enable accountability and redress for serious human rights violations**, including by enhancing the independence and mandate of the Myanmar National Human Rights Commission, by enabling it to follow-up on the implementation of its recommendations.
- F. **All investigating authorities must reform procedures and practice to respect the right of victims and their family members** to participate in and be informed of the progress of an investigation, including through protecting them from any harassment or other ill treatment. Where feasible, a competent family liaison expert should be appointed to share information.
- G. **The Constitutional Tribunal should be invited to resolve the conflict of laws between section 343(b) and section 347 of the Constitution, with a view to enable civilian judges or officials to review the decisions of military courts**. Where serious crimes are perpetrated by soldiers and adjudicated in a military court, section 343(b) prevents victims and their families from pursuing a remedy in the public criminal justice system, in violation of the section 347 guarantee for "any person to enjoy equal rights before the law and shall equally provide legal protection." A positive determination that the Commander-in-Chief's section 343(b) power is subordinate and subject to section 347 could provide a basis for reforms to

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procedures and laws, including the Defence Services Act. It could also provide a basis upon which civilian courts could review the decisions of military courts.

- H. **The Government should act expeditiously to accede to** the International Covenant on Civil and Political rights, the Convention Against Torture and other principal human rights treaties to which they are not yet party.
- I. **United Nations Member States, UN agencies, Non-Government Organizations and other development parties should center justice sector assistance on the State's implementation of their international human rights legal obligations and human rights standards** - this would support authorities in implementing the duties to effectively investigate, prosecute and punish crimes in particular those constituting violations of human rights in a manner consistent with international law and standards; technical assistance in this area that does not place human rights at its core risks entrenching and strengthening systems of injustice, potentially undermining broader democratic and rule-of-law reforms.

## 6 ANNEXES

### 6.1 Chronology of key events

- ❖ 27 September 2014: in his capacity as a journalist, Ko Par Gyi embeds with DKBA forces to cover clashes in the Kyaikmaraw area;
- ❖ 30 September 2014: Police arrest Ko Par Gyi in Kyaikmaraw and, after interrogation, transfer him to military custody;
- ❖ 1–October: in military custody, Ko Par Gyi is made to assist in the recovery of arms missing from a recent firefight in the area, and possibly tortured;
- ❖ 4 October 2014: Ko Par Gyi is shot dead by two Tatmadaw soldiers. Ko Par Gyi's wife, Daw Thandar, is not informed;
- ❖ 20 October 2014 (approximate date): Daw Thandar files a complaint regarding her husband's disappearance with the Kyaikmaraw Township Police;
- ❖ 23 October 2014: the Tatmadaw announces Ko Par Gyi's death via a statement to Myanmar Press Council;
- ❖ [25] October 2014 (approximate date): Daw Thandar files a complaint for murder with the Kyaikmaraw Township Police;
- ❖ 30 October 2014: then-President U Thein Sein instructs the Myanmar National Human Rights Commission to conduct an investigation into the killing;
- ❖ 2 November 2014: Daw Thandar is notified by the Kyaikmaraw Township Police of a planned exhumation. Police in Yangon passed on the fax message saying the exhumation planned for 5 November;
- ❖ 4 November 2014: Daw Thandar travels back to Kyaikmayaw;
- ❖ 5 November 2014 Ko Par Gyi's body is exhumed from a shallow grave near Shwe Ya Chaung Village;
- ❖ 6 November 2014: An autopsy is performed at Mawlamyine General Hospital;
- ❖ 7 November 2014: Ko Par Gyi's body is returned to Yangon and buried;
- ❖ 21 November 2014: The MNHRC announces preliminary findings.
- ❖ 27 November 2014: a court-martial secretly acquits two soldiers for Ko Par Gyi's killing (announced publicly months later, see below);
- ❖ 2 December 2014: The MNHRC releases its full report;
- ❖ 10 December 2014: Daw Thandar writes to President U Thein Sein requesting justice;
- ❖ 30 March 2015: Inquest proceedings are initiated at the Kyaikmaraw Township Court;
- ❖ 10 April 2015: The first inquest hearing is held without notification to Daw Thandar;
- ❖ 30 April 2015: Daw Thandar appears at the inquest for the first time;
- ❖ 8 May 2015: The MNHRC publicly notes the decision of the court-martial in November 2014;
- ❖ 23 June 2015: The two acquitted soldiers testify at the final inquest hearing that Ko Par Gyi was shot while attempting to escape. The inquest is closed with the court concluding that Ko Par Gyi died from unnatural causes;
- ❖ 21 March 2016: The Kyaikmaraw Township police close the case without further inquiry;
- ❖ August 2016: Daw Thandar files an application for a writ of [MT?] to the Union Supreme Court. The writ application is later rejected;
- ❖ 4 October 2019: Five years on, no one has been found culpable for the unlawful death of Ko Par Gyi.

**6.2 International Human Rights Treaties and Labour Conventions ratified or acceded to by Myanmar (as of October 2019)**

<b>Treaty</b>	<b>Adoption</b>	<b>Entry into force</b>	<b>Ratification or Accession</b>
Convention on the Prevention and Punishment of the Crime of Genocide	9 December 1948	12 January 1951	14 March 1956
International Covenant on Economic, Social and Cultural Rights (ICESCR)	16 December 1966	3 January 1976	6 October 2017
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)	18 December 1979	3 September 1981	22 July 1997
Convention on the Rights of the Child (CRC)	20 November 1989	2 September 1990	15 July 1991
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict	25 May 2000	28 September 2015	27 September 2019 <sup>147</sup>
Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography	25 May 2000	18 January 2002	16 January 2012
Convention on the Rights of Persons with Disabilities (CRPD)	12 December 2006	3 May 2008	7 December 2011
International Labour Organization (ILO) Convention on Forced Labour (n°29)	28 June 1930	1 May 1932	4 March 1955
International Labour Organization (ILO) Convention on Freedom of Association and Protection of the Right to Organize (n°87)	9 July 1948	4 July 1950	4 March 1955
ILO Convention on Worst Forms of Child Labour (n°182)	17 June 1999	19 November 2000	18 December 2013

<sup>147</sup> Note: an ICJ report published in February 2017, entitled "Special Economic Zones in Myanmar and the State Duty to Protect Human Rights," incorrectly stated that Myanmar had ratified this Optional Protocol in 2015. In fact, ratification was only to happen in 2019.



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March 2020 (for an updated list, please visit [www.icj.org/commission](http://www.icj.org/commission))

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