



Human Rights
Institute



The murder of U Ko Ni:

**IBAHRI trial observation highlights fair trial concerns
in Myanmar**

A report of the International Bar Association's Human Rights Institute

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Table of Contents

Executive Summary	4
I. Overview	8
II. Background	10
A. Introduction	10
B. Political and historical background of Myanmar	11
C. The criminal justice system in Myanmar	13
D. Myanmar’s relevant international and national legal obligations	15
III. The Trial Observation	18
A. Observation methodology	18
B. Charges against the accused	20
C. The case	21
IV. Findings – Fair Trial and Due Process Concerns	23
A. Rights to liberty and not to be arbitrarily detained – failure to bring the accused before a competent authority	23
B. Prohibition of cruel, inhuman and degrading treatment – alleged police abuse amounting to ill-treatment and failure to exclude statements obtained through such means	26
C. The presumption of innocence and the right to remain silent	28
D. The right to guarantees necessary for a defence – failure to provide equal access to evidence and concerns regarding effective representation	29
E. Competent, independent and impartial tribunal – lack of attention paid by judges and procedural inconsistencies	34
F. Use of the mandatory death sentence	37
V. Findings – Positive Aspects	39
A. Right to be tried without undue delay – length of court proceedings/undue delays	39
B. Right to a public hearing – public access to the courtroom	40
VI. Conclusion	42
VII. Recommendations	43

Annex 1: The Accused	46
Kyi Lin	46
Aung Win Zaw	46
Zeya Phyo	46
Aung Win Tun	46
Aung Win Khaing	46
Annex 2: Case Timeline Including Observation Dates	47
Annex 3: Requests and Dates of Meetings	51

Executive Summary

On 29 January 2017, U Ko Ni and U Nay Win were shot by a gunman at Yangon International Airport. U Ko Ni was 63, a constitutional lawyer and senior legal adviser to the ruling National League for Democracy (NLD) party, best known for his efforts to amend Myanmar's military-drafted constitution and for crafting the position of state counsellor for Daw Aung San Suu Kyi.¹ He was also a Muslim in a Buddhist-majority country who publicly spoke out against the NLD's failure to field Muslim candidates in the 2015 general election.²

He was assassinated by Kyi Lin at close range while holding his grandson after returning from a trip in Indonesia. U Nay Win, a taxi driver who was at the airport that day, attempted to stop Kyi Lin's escape by throwing a brick and chasing after him, and was shot and killed himself.³ He was the father of three young children.

Five men, Kyi Lin, Aung Win Zaw, Zeya Phyo, Aung Win Tun and Aung Win Khaing were charged for their alleged involvement in the murders. All except Aung Win Khaing, who was not apprehended and remains at large, were convicted by a special bench of the Northern District Court in Yangon region on 15 February 2019.

The International Bar Association's Human Rights Institute (IBAHRI), concerned about potential infringement of fair trial guarantees, supported an international trial observer to monitor the trial proceedings from 16 June 2017 to 15 February 2019. The right to trial observation is provided in Article 9(b) of the United Nations Declaration on the Rights and Responsibilities of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, adopted by the General Assembly in 1998. The practice of sending trial observers is well established and accepted within the international community. The IBAHRI, with other international, national and regional legal organisations, has established a practice of sending representatives to observe trials in certain cases. The presence of a trial observer helps to ensure that the court administers justice fairly, that the court processes function properly and that the right to a fair trial is guaranteed.

The tribunal convicted Kyi Lin of violating Penal Code section 302(1)(b)⁴ for the premeditated murder of U Ko Ni and section 302(2)⁵ for the murder of U Nay Win. He was sentenced to death, and 20 years with hard labour, for the murder of U Nay Win. He also received three years with hard labour for illegally possessing and transporting firearms without a licence, pursuant to sections 19(d) and (f) of the Arms Act. Aung Win Zaw, found to be the main conspirator of Kyi Lin, also received the death sentence for the

1 See Hannah Beech, 'The Murder of an Honorable Lawyer in Myanmar' *The New Yorker* (New York, 7 March 2017) www.newyorker.com/news/news-desk/the-murder-of-an-honorable-lawyer-in-myanmar accessed 13 May 2019; Bertil Lintner, 'No Justice for Slain Myanmar Lawyer U Ko Ni' (The Irrawaddy, 17 June 2017) www.irrawaddy.com/opinion/guest-column/no-justice-slain-myanmar-lawyer-ko-ni.html accessed 13 May 2019.

2 See Hanna Hindstrom, 'NLD Blocked Muslim Candidates to Appease Ma Ba Tha: Party Member' (The Irrawaddy, 31 August 2015) www.irrawaddy.com/election/news/nld-blocked-muslim-candidates-to-appease-ma-ba-tha-party-member accessed 13 May 2019.

3 See Htun Htun, 'Taxi Driver U Nay Win, a True Citizen' (The Irrawaddy, 31 January 2017) www.irrawaddy.com/features/taxi-driver-u-nay-win-a-true-citizen.html accessed 13 May 2019.

4 S 302(1)(b) renders it an offence to commit murder with premeditation with punishment of death. Penal Code [India Act XLV, 1860] (as amended 2016).

5 S 302(2) renders it an offence to commit murder.

murder of U Ko Ni, pursuant to section 302(1) (b). The tribunal convicted Zeya Phyo of causing evidence to disappear and falsifying evidence pursuant to section 201⁶ and sentenced him to five years in prison. Section 201 was not part of the original charge against Zeya Phyo. Aung Win Tun received three years for harbouring a criminal for his involvement in Aung Win Zaw's attempted escape to Hpa-An, pursuant to section 212.⁷ The Northern District Court determined that Aung Win Khaing, the alleged mastermind, was too difficult to find.⁸ The IBAHRI acknowledges that in some ways the trial appeared to be better than most in Myanmar. However, it did not meet international human rights standards for fair trials. Nor did it comply with Myanmar's domestic law, which affords in some respects similar rights to accused individuals as those enshrined under international human rights law. In particular, the IBAHRI finds that:

- the failure of the police to follow procedures set down by law for the detention of the accused and the continued detention of those accused of bailable offences violated their right to liberty;
- the alleged mistreatment of the accused in custody to encourage them to confess, alleged forced testimony obtained from some of the witnesses and failure to exclude testimony or evidence obtained through these means are substantial violations of the right to human dignity and to be free from torture, cruel, inhuman and degrading treatment;
- the failure to provide the full and complete warning required by Myanmar law to each accused before they testified may have affected their right to presumption of innocence, which includes the right to remain silent;
- the lack of access to legal representation during the first days of detention, unequal access to evidence for lawyers and threats to defence lawyers jeopardised the right to guarantees necessary for a defence;
- the special bench did not always present competence and on certain occasions failed to control the courtroom, manage witness testimony or exclude evidence obtained through alleged ill-treatment or coercion;
- the special bench also showed inappropriate deference towards testimony of Buddhist monks thus impinging on the right to a hearing by an independent, impartial and competent tribunal; and
- the mandatory imposition of the death penalty for Kyi Lin and Aung Win Zaw violated their right to life.

While this is only one trial, observation of this case has raised concerns about the general fairness of pre-trial and court proceedings in Myanmar. What is clear from this case is that the criminal justice system and all agents of the system – the police, prosecution, lawyers and judges – should ensure the protection of fair trial rights.

6 S 201 renders it an offence to, with knowledge or having reason to believe that an offence has been committed, cause evidence to disappear with the intention of screening the offender from legal punishment, or with the intention to give information the individual knows or believes is false. The offence is punishable by imprisonment, which may extend to seven years if the offence the individual knows or believes was committed is punishable by death.

7 S 212 renders it an offence to harbour or conceal a person whom the individual knows or has reason to believe committed an offence, with the intention to screen the offender from legal punishment. The individual shall be punished for a term of up to five years (if the offence is punishable by death).

8 See 23 June 2017 observation report on file with the IBAHRI.

To this end, the IBAHRI makes the following recommendations.

The Union Attorney-General's Office and Parliament (Myanmar Pyidaungsu Hluttaw) should:

- eliminate the death penalty from all laws, especially those that mandatorily impose capital punishment;
- amend the Constitution and the Code of Criminal Procedure to include a specific provision affirming the right to presumption of innocence and other fair trial rights; this should include the right to remain silent during trial and the prohibition of any adverse inferences being drawn from the defendant's silence;
- sign, ratify and implement effectively those core human rights treaties to which Myanmar is not yet a party, including the International Covenant on Civil and Political Rights and the Convention against Torture, and ensure that national legislation adheres to the rights and obligations set out in both; and
- ensure law officers are aware of their duty to 'perform their duties fairly, consistently and expeditiously', including to take into account views and concerns of victims when their personal interests are affected in accordance with international human rights standards.

The Ministry of Home Affairs, including the Myanmar Prisons Department and the Myanmar Police Force, should:

- end the use of indeterminate, coercive interrogations at Aung Tha Pyay interrogation centre in Yangon;
- ensure that every individual brought to court to make a confession is doing so voluntarily and with full knowledge of its consequences;
- ensure all police and prison authorities are knowledgeable about international and national human rights standards, and their obligation to respect and protect them;
- provide appropriate training on how to conduct non-coercive investigations; if sufficient and appropriate guidelines do not exist, the Ministry of Home Affairs should create or revise them with the assistance and advice of experts;
- allow accused individuals immediate, confidential access to lawyers and to their families at the first opportunity after their arrest and to continued confidential access thereafter, including to health services and other necessary services; and
- conduct investigations into alleged cases of human rights violations by police and prison officials and ensure those found responsible for violations are held accountable through disciplinary and criminal proceedings.

The Office of the Supreme Court of the Union should:

- pending appropriate and relevant legal reform geared towards protecting the right to not incriminate oneself, train judges on how to provide the full and appropriate warning to all accused who testify on their own behalf;
- ensure judges act in accordance with the Office of the Supreme Court of the Union's 2017 Judicial Code of Ethics;
- ensure sequential hearings are held on a regular basis so that trials are not unduly delayed;

- empower judges to engage in court management through training and dialogue, including on issues such as recognising involuntary confessions in court, challenging false testimony and excluding inadmissible or improperly obtained evidence;
- ensure judges are equipped to and do hold police accountable for torture or ill-treatment of an accused, witness or any other individual, through filing direct actions against the officers and raising the issue with their superiors when they come to light during court proceedings; and
- ensure judges and court staff provide equal access to counsel to the entire case file, including statements made to police officers and all potentially exculpatory evidence, within 24 hours after a request is made and with a receipt indicating the amount permitted under law.

The Bar Council, Independent Lawyers Association of Myanmar (ILAM) and other bar associations in the country should:

- ensure they support lawyers in the country, including through bringing cases of threats, intimidation, harassment or other improper interference with the functions of the legal profession before the relevant authority with a view to ensuring those responsible are brought to justice;
- ensure lawyers are empowered to identify and challenge violations of the rights of their clients during criminal proceedings and bring challenges to violations when they occur; and
- ensure lawyers are aware of the need to act in accordance with ethical standards for the profession. In this regard, the code of ethics developed by the ILAM in broad consultation with international and domestic lawyers and entities concerned with lawyers serves as a basis for understanding this ethical standard.

The Ministry of Home Affairs, the Office of the Supreme Court of the Union, the international community, local civil society organisations and technical experts should:

- train defence lawyers, law officers, judges and police officers on fair trial rights, with an emphasis on exploring practical solutions and empowering individuals in their appropriate roles; training that includes all justice sector actors would afford opportunities for honest discussion and ensure coordinated messaging;
- provide technical support and expertise to the police on the use of non-coercive methods of investigation; and
- provide technical and financial assistance necessary for the improvement of the criminal justice system in the country.

I. Overview

Kyi Lin and Aung Win Zaw were charged and convicted with conspiracy to commit the premeditated murder of U Ko Ni pursuant to Penal Code sections 302(1) (b) and 34.⁹ Zeya Phyo was initially charged under the same sections, but the High Court amended the charges against him on 18 June 2018 to abetting premeditated murder pursuant to sections 302(1) (b) and 109.¹⁰ He was convicted only of violating section 201 for perverting the course of justice.¹¹ Kyi Lin was also charged and convicted of the murder of U Nay Win pursuant to section 302(2), and with violating sections 19(d) and (f) of the Arms Act for illegally transporting and possessing firearms.¹² Aung Win Tun was charged and convicted of harbouring his brother, Aung Win Zaw, by driving him to Hpa-An to allegedly hide, pursuant to section 212.¹³

Date of murders	29 January 2017
Accused	Kyi Lin (also known as Pho Htoo) Aung Win Zaw Aung Win Tun Zeya Phyo Aung Win Khaing , who remains at large
Arrest dates	Kyi Lin on 29 January 2017 Aung Win Zaw on 30 January 2017 Aung Win Tun on 30 January 2017 Zeya Phyo on 3 February 2017 Aung Win Khaing – not yet arrested
Case numbers	Case No 45/2017 Police Captain Moe Naing and four defendants including against Kyi Lin (Pho Htoo) Case No 46/2017 against Kyi Lin and Aung Win Zaw pursuant to the Arms Act charges
Bail date	Only Aung Win Tun on 22 February 2018
Days in detention pending outcome	Kyi Lin: 747 Aung Win Zaw: 746 Zeya Phyo: 742 Aung Win Tun: 388 days before bail
Court	Northern District Court, Yangon Region, Myanmar (also known as Insein Court)
Charges	Arms Act sections 19(d) and (f) for illegally transporting and possessing firearms against Kyi Lin Penal Code sections 302(1)(b) and 34 for conspiracy to commit premeditated murder of U Ko Ni against Kyi Lin and Aung Win Zaw Penal Code sections 302(1)(b) and 109 for abetting premeditated murder against Zeya Phyo Penal Code section 302(2) for the murder of Nay Win against Kyi Lin Penal Code section 212 for harbouring a criminal (his brother, Aung Win Zaw) against Aung Win Tun

⁹ See s 302(1) (b), at n 4 above. S 34 states: ‘When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.’

¹⁰ S 109 states that if one abets an offence and the offence is committed, the person who abetted shall be punished with the punishment provided by the underlying offence (here, s 302(1) (b)).

¹¹ See s 201, at n 6 above.

¹² See s 302(2), at n 5 above. S 19(d) renders it illegal to ‘transport any arms, ammunition or military stores in contravention of a regulation or prohibition issued under section 10’ and (f) makes it an offence to possess or control any arms, ammunition or military stores in contravention of the provisions of s 14 or s 15. Both shall be punishable with up to three years in prison. Ss 14 and 15 concern the licensing of firearms.

¹³ See s 212, at n 7 above.

Charges (continued)	Kyi Lin also served one year in prison during trial for illegally crossing the Thailand–Myanmar border a few weeks before the murder and violating section 13(1) of the 1947 Burma Immigration Emergency Provisions Act. ¹⁴ Due to items found during the search of Zeya Phyo's company, he was charged with violating section 468 of the Penal Code ¹⁵ and section 67 of the Telecommunications Law. ¹⁶ Separate courts held proceedings to determine these charges.
Judges, including dates of transfer and retirement	Yangon Northern District Judge U Tin Htwe (Chairman) Yangon Eastern District Judge U Zaw Htoo (member) Northern Deputy District Judge U Ohn Khaing (member) As of 12 January 2018, Yangon Eastern District Judge U Khin Maung Maung replaced U Zaw Htoo, who was allegedly promoted to serve in Kayah State As of 8 March 2018, Yangon Northern District Court Judge U Myint Hand replaced U Tin Htwe, who reached the age of retirement
Law officer	Deputy District Law Officer U Aung Naing Oo, Assistant Law Officer U Kyi Maung and Assistant U Kaung Myat
Complainant lawyers	Family of U Ko Ni represented by U Nay La, U Khin Maung Htay and U Min Min Zaw Family of U Nay Win represented by Robert San Aung and Daw Khin Moe Moe
Defence lawyers	U Kyaw Kyaw Htike for Kyi Lin U Nyunt Shwe and Aung Khaing for Aung Win Zaw and Aung Win Tun Daw Pa Pa Win for Zeya Phyo
First day of inquiry stage	16 March 2017 concerning the whereabouts and extent of the investigation into apprehending Aung Win Khaing
First day of substantive proceedings	23 June 2017
First day of IBAHRI observation	16 June 2017
Date charges confirmed	9 February 2018
Date revision petitions filed	16 March 2018
Date of High Court decision on revision petitions	18 June 2018, dismissing the Arms Act charges against Aung Win Zaw and amending the charge against Zeya Phyo from conspiracy to commit murder (Penal Code sections 302(1)(b) and 34) to aiding and abetting an offender (Penal Code sections 302(1)(b) and 109)
Date by which all recall witnesses heard	15 March 2018, as announced at the 22 March 2018 hearing
Date final witness heard	18 January 2019
Date at which hearings twice a week began	19 January 2018
Number of testifying prosecution witnesses	72
Number of prosecution witnesses recalled who testified	27
Number of testifying defence witnesses	40
Number of hearings	104
Number of hearings observed by IBAHRI	68
Date of verdict	15 February 2019
Sentences	Kyi Lin received the death sentence pursuant to section 302(1)(b) and 20 years for murdering U Nay Win pursuant to section 302(2), with three years in prison plus hard labour for illegally possessing and transporting firearms pursuant to sections 19(d) and (f) of the Arms Act Aung Win Zaw received the death sentence for the murder of U Ko Ni pursuant to section 302(1)(b) Zeya Phyo received five years in prison plus hard labour pursuant to Penal Code section 201 Aung Win Tun received five years in prison plus hard labour pursuant to Penal Code section 212

14 S 13(1) makes it illegal to enter or attempt to enter Myanmar without following official procedures, with imprisonment of up to five years.

15 Zeya Phyo was found in possession of more than one national identification card. S 468 states: 'Whoever commits forgery, intending that the document forged shall be used for the purpose of cheating, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.'

16 Zeya Phyo was found with communications equipment that was allegedly illegal. Whoever keeps in possession or uses any telecommunications equipment restricted as requiring a licence without having a licence shall, on conviction, be liable to imprisonment for a term not exceeding one year or to a fine or to both.

II. Background

A. Introduction

On 29 January 2017 at about 1700, U Ko Ni, a prominent constitutional lawyer and senior legal adviser to the National League for Democracy (NLD), was shot and killed outside Yangon International Airport's arrival terminal one. U Nay Win, a taxi driver present at the airport, was shot while attempting to apprehend the gunman and died several hours later from his injuries at North Okkalapa Hospital in Yangon. Due to the efforts of U Nay Win and other taxi drivers, along with members of the police force, Kyi Lin was identified as the gunman and arrested at the airport that day.

Kyi Lin allegedly confessed to coordinating the murder with Aung Win Zaw, his former cellmate in Obo prison in Mandalay and a former military officer. The Myanmar police force arrested Aung Win Zaw and his brother Aung Win Tun while they were travelling to Hpa-An on 30 January 2017. The investigation led the police to arrest Zeya Phyo, a former military captain and instructor at the military's Central Intelligence Unit, on 3 February 2017. Zeya Phyo knew Aung Win Khaing, the brother of Aung Win Zaw and Aung Win Tun, because they attended the Defence Services Academy at the same time and Zeya Phyo helped Aung Win Khaing to establish businesses. Aung Win Zaw allegedly confessed that his younger brother, Aung Win Khaing, presented him with the idea to kill U Ko Ni, but Aung Win Khaing was never apprehended. Many believe that this is due to insufficient will and a lack of appropriate investigation, including only sending arrest warrants to a few discreet places and failing to alert Interpol until several weeks after the murder.¹⁷ On 23 June 2017, the special bench of the Northern District Court declared that the proceedings must continue without him because he was too difficult to find.

The four accused were brought to Yangon's Northern District Court in early March 2017. Pursuant to Union Judiciary Law section 23(b), the Chief Justice of the Union Supreme Court authorised a special bench made up of three judges to preside over the proceedings.¹⁸ Only one judge remained at the end of the trial more than two years later. The original Chairman, U Tin Htwe, retired, and a second member was promoted to Kayah State in early 2018.

The inquiry stage began a week after the defendants were taken to the Northern District Court and involved 72 prosecution witnesses, including the lead investigating officers, witnesses at the airport, technical operators who were responsible for the airport's closed-circuit television (CCTV) footage, government officials involved in the search of all of the accused's homes and employees of Zeya Phyo. The court confirmed all of the charges against all defendants on 9 February 2018, nearly a year after the proceedings began. Only at that stage did Aung Win Tun's lawyer apply for bail – the only bail application submitted in the entire case, to the observer's knowledge. The Northern District Court approved it.

17 Eg, a witness who analysed the Smith/Wesson weapon did not send the serial number to Interpol because he said that was not his job. See 15 December 2017 and 19 January 2018 observation reports on file with the IBAHRI.

18 This provision states that the Supreme Court may direct to adjudicate the important cases of the district courts by a bench consisting of more than one judge. See Union Supreme Court Order 44/2017 dated 14 March 2017.

Both sides contested the confirmed charges in revision petitions filed at the Yangon High Court on 16 March 2018,¹⁹ but these were largely retained in a decision rendered on 18 June 2018. The High Court, in a decision by Judge Aung Naing, declined to add further charges against the accused and only made two significant revisions: it dismissed Arms Act sections 19(d) and (f) against Aung Win Zaw and amended the charges against Zeya Phyo from conspiracy to commit murder (Penal Code sections 302(1)(b) and 34) to aiding and abetting an offender (Penal Code sections 302(1)(b) and 109).

All of the defendants testified and were subject to cross-examination, with the exception of Kyi Lin, who testified solely as a defendant and was questioned only by the panel of judges. The defence recalled²⁰ 27 prosecution witnesses and named about 50 witnesses, many of whom failed to attend court.

After more than two years, the tribunal convicted all defendants, sentencing Kyi Lin and Aung Win Zaw to mandatory capital punishment for the pre-meditated murder of U Ko Ni,²¹ Zeya Phyo to five years in prison plus hard labour for falsifying and destroying evidence and Aung Win Tun to three years in prison plus hard labour for harbouring his brother, Aung Win Zaw. Time served was credited for all convicted.

B. Political and historical background of Myanmar

Successive kings ruled the area that constitutes Myanmar until a series of Anglo-Burmese wars in 1824, 1852 and 1885 resulted in British control, with Britain incorporating Burma, as it was then known, into the colonial administration of India. Britain imported the colonial codes used in India to govern Burma, including the Penal Code and Code of Criminal Procedure that remain largely unchanged today.²² Burma achieved independence on 4 January 1948 and the period that followed was a high-point for the judiciary, with judges exercising their independence and at times declaring certain executive acts illegal.²³

This lasted only 14 years before the military took control of the state in 1962, leading to a significant, purposeful decline in the independence of the judiciary and the quality of legal education. The military abolished the Supreme Court and other high courts and established the 'People's Judicial System', with party members assuming judicial-like positions without appropriate training or qualification.²⁴ The 1974 Constitution formalised the existing lack of judicial independence. From 1963 until 1996, Myanmar only

19 Three revision petitions were filed: two by defence counsel for Kyi Lin and Zeya Phyo seeking to reduce the charges against their clients, and one by the complainants seeking to add a charge against all of the accused under ss 3(b)(1)–(18) and 41, 49(e) and 54 of the Counter-Terrorism Law (Pyidaungsu Hluttaw No 23/2014, 7th Waxing of Nayone, 1376 ME, 4 June 2014) and to revoke the grant of bail for Aung Win Tun. Ss 3(b)(1)–(18) define various acts of terrorism. S 41 criminalises actions financing terrorism, s 49(e) renders it an offence to use violence at an airport that provides civil aviation with a minimum ten-year prison sentence up to maximum life imprisonment or the death penalty, and s 54 renders it an offence to commit murder or severe pain to a person or people while committing offences under s 49.

20 The accused has the right to recall prosecution witnesses for cross-examination if the accused refuses to plead or pleads not guilty. See Code of Criminal Procedure [India Act V, 1898] (as amended 2016), s 256(1).

21 As mentioned, Kyi Lin also received 20 years plus hard labour for the murder of U Nay Win and three years plus hard labour for violating the Arms Act.

22 See Code of Civil Procedure [India Act V, 1908] (as amended 2014); Penal Code [India Act XLV, 1860] (as amended 2016); Code of Criminal Procedure [India Act V, 1898] (as amended 2016); see also, eg, Code of Civil Procedure (Amendment) Act of 1956; Criminal Law Amending Law (1963); Code of Criminal Procedure Amending Law (1973); Law Amending the Code of Civil Procedure (Pyidaungsu Hluttaw Law No 29/2014); Law Amending the Penal Code (Pyidaungsu Hluttaw Law No 6/2016); Law Amending the Code of Criminal Procedure (Pyidaungsu Hluttaw Law No 16/2016).

23 Myint Zan, 'Judicial Independence in Burma: No March Backwards Towards the Past', (2000) 5(1) Asian Pacific Law & Policy Journal 16 ('Judicial Independence').

24 *Ibid*, 20.

had one university law department in the entire country.²⁵ After demonstrations in 1974–1975, universities provided distance education courses in an effort to prevent students from gathering, meaning that students could only meet once or twice a year for several days.²⁶ Rote memorisation of exam questions was encouraged over critical thinking skills.²⁷ While law courses were taught in the Burmese language during the 1970s, the government abruptly changed instruction to English in the 1990s, despite the courts continuing to practise completely in Burmese.²⁸ As noted in the IBAHRI’s 2012 report, *The Rule of Law in Myanmar: Challenges and Prospects*, ‘the legal profession in Myanmar is deficient, largely because it was deliberately undermined’ with lawyers facing harassment and penalties for trying to effectively represent their clients.²⁹

Following successive socialist and military regimes, a new Constitution was approved in May 2008 amid the destruction of Cyclone Nargis. It entrenched the military’s power in terms of key ministry control and a now-infamous 25 per cent control over the legislature, resulting in veto power.³⁰ However, the Constitution does provide for the separation of powers between all three branches of government, emphasises the independence of the judiciary and provides for a number of fundamental rights, including those associated with fair trials, as discussed in section IIC.

Ongoing issues in Myanmar’s judiciary are well-documented. The IBAHRI’s 2012 report identified concerns including lack of independence in prosecutions, the use of confessions to secure convictions and deficient legal education.³¹ Legal education remains poor and the use of English-language examinations and rote memorisation continues, undermining graduates’ ability to practise law.³² In a 2017 report, the local rule of law organisation Justice Base presented findings from a three-year monitoring project designed to assess Myanmar’s compliance with fair trial rights in Yangon Region’s courts. It noted that the judiciary faces ongoing challenges in achieving fair trials, including with respect to an independent judiciary and protecting the rights of the accused.³³ Individual perceptions of the justice sector contextualise these concerns, with people associating the role of law as a coercive form of control, having low confidence in lawyers and preferring to resolve disputes away from formal institutions.³⁴

25 Myint Zan, ‘Legal Education in Burma since the 1960s’ (2008) *The Journal of Burma Studies* 4, unedited electronic version (‘Legal Education’).

26 *Ibid.*, 14–18.

27 *Ibid.*

28 *Ibid.*, 20.

29 IBAHRI, *The Rule of Law in Myanmar: Challenges and Prospects*, December 2012, pp 8, 63–64 (‘2012 IBAHRI Report’).

30 *Ibid.*, 21.

31 *Ibid.*, 63–65.

32 International Commission of Jurists, ‘Myanmar: Legal education’, 20 March 2014 www.icj.org/cijlcountryprofiles/myanmar-introduction/legal-education accessed 13 May 2019.

33 Justice Base, ‘Monitoring in Myanmar: An Analysis of Myanmar’s Compliance with Fair Trial Rights’, October 2017 www.justicebase.org accessed 13 May 2019.

34 MyJustice, ‘Searching for justice in the law: Understanding access to justice in Myanmar’ British Council, London, 2018, pp 25, 39 and 46 www.justicebase.org accessed 13 May 2019.

C. The criminal justice system in Myanmar

There are various categories of criminal cases in Myanmar. These include:

- bailable cases: those where the potential punishment is three years or less and judges must permit bail;
- non-bailable cases: involve potential punishments of more than three years; in such cases the judge may set bail, except in capital cases where there are reasonable grounds for believing the accused is guilty of the offence;³⁵
- cognisable cases: those where a police officer may arrest an individual without a warrant; the police officer then refers the case to the court to be prosecuted by the law officer (ie, prosecution);³⁶
- non-cognisable cases: those requiring a warrant for police arrest; a complaint is sent to the court, after which the judge may refer the case back to the police to investigate;³⁷
- summons cases: concern potential sentences of six months or less and permit the accused to plead guilty before the prosecution presents any evidence; and
- warrant cases: require the prosecution to present sufficient evidence to frame the charge in the inquiry stage before the judge asks the accused to plead guilty or present a defence.³⁸

The U Ko Ni case was a cognisable, non-bailable, warrant case, with the exception of the charge against Aung Win Tun, which was bailable.

Prosecutions are under the control of the Office of the Union Attorney-General's Prosecution Department, which is responsible for appearing on behalf of the government in civil and criminal cases. There are 14 Advocate-General Offices at the state or regional level. These are then divided into district law offices and township law offices. Law officers in these offices conduct criminal prosecutions and the law officer controls the prosecution during the inquiry stage.³⁹

Judges are governed by the Union Judiciary Law and the new Code of Judicial Ethics. The Supreme Court or supervising district court is responsible for unlawful conduct by judges.⁴⁰ Each of the 14 states and regions in Myanmar has a high court, with lower courts consisting of district and township courts.⁴¹ Both district and township courts may hear civil and criminal cases, but township courts may only hear cases in which the potential punishment is up to seven years' imprisonment, whereas the district courts hear more serious cases.⁴² Parties may appeal to district or high courts and ultimately to the Supreme Court, the court of final

35 Code of Criminal Procedure ss 4(a), 496–497.

36 *Ibid*, ss 4(1) (f), 54.

37 *Ibid*, ss 4(1) (n), 155, 159, 173.

38 For summons cases, see *ibid*, ss 4(1) (v), 241–249. For warrant cases, see *ibid*, ss 4(1) (w), 251–259.

39 The Attorney-General of the Union Law No 22/2010 (28 October 2010) at ss 3, 36(c)–(d).

40 Union Judiciary Law No 20/2010 (28 October 2010); 2008 Constitution Art 314; The Office of the Supreme Court, Code of Judicial Ethics for Myanmar Judges, 2 August 2017, ch 1, Art 2 and ch 4, Art 1 www.unionsupremecourt.gov.mm/sites/default/files/supreme/judicial_ethics_english_version.pdf accessed 13 May 2019 ('Code of Judicial Ethics for Myanmar').

41 Constitution of the Republic of the Union of Myanmar (2008) ('2008 Constitution'), Arts 293(a) and 314 www.burmalibrary.org/docs5/Myanmar_Constitution-2008-en.pdf accessed 13 May 2019.

42 Code of Criminal Procedure s 32; see also 2008 Constitution Arts 315–316; The Supreme Court of the Union, 'Township Courts' www.unionsupremecourt.gov.mm/?q=content/township-courts accessed 13 May 2019; The Supreme Court of the Union, 'District Courts' www.unionsupremecourt.gov.mm/?q=content/district-courts accessed 13 May 2019.

appeal, which may pass any sentence authorised by law.⁴³ The U Ko Ni case was heard by the Northern District Court in Yangon Region.

A criminal case in Myanmar can begin with a police officer arresting an individual suspected of committing a crime if the officer has a warrant (known as non-cognisable cases) or in cases in which a warrant is not necessary (cognisable cases).⁴⁴ If a warrant is necessary, officers conduct an investigation after receiving an order to do so from a judge.⁴⁵ Among other powers, officers can: (1) summon witnesses and examine individuals who may be acquainted with the facts of the case;⁴⁶ (2) conduct searches;⁴⁷ and (3) compel the production of documents or items.⁴⁸ Police officers send the results of their investigation to law officers seven days before filing a case. Law officers are responsible for scrutinising the evidence and relevant law, and providing legal advice before prosecution.⁴⁹ They have seven days to provide advice and, if sufficient evidence exists after that time period, the police officer files the case with the court.⁵⁰ At the same time, the officer must provide the judge with a police report that includes the name of the parties and potential witnesses, the nature of the information and whether the accused is in custody.⁵¹

A party, such as U Ko Ni's family, can hire a private lawyer in criminal cases to represent their interests alongside the law officer, who is responsible for prosecuting the accused. This external private lawyer is known as the 'complainant lawyer' and is under the supervision of the law officer.⁵² An accused may hire a private defence lawyer, seek representation through a legal aid provider or a lawyer interested in taking on a case pro bono. Thus, there may be three main lawyers in a criminal case: the law officer prosecuting the case under the Union Attorney-General's Office; complainant lawyer(s) who represent the private interests of those allegedly harmed by the accused; and defence lawyer(s) representing the accused.

Court proceedings in warrant cases begin with the inquiry stage, when the judge first hears all evidence in support of the prosecution and the accused has the right to cross-examine all prosecution witnesses.⁵³ At the end of the law officer's case, with arguments by both sides as to whether to frame the charge, the judge may discharge the case or, if there is sufficient evidence, frame the charges in writing, reading and explaining the charges to the accused and asking them whether they wish to plead guilty or present a defence.⁵⁴ The judge may also discharge the case at any time if the judge believes the charge(s) is groundless.⁵⁵ If the

43 *Ibid*, 2008 Constitution Art 295(b); *ibid*, Code of Criminal Procedure s 31(1).

44 Code of Criminal Procedure ss 54, 77 and 80–81.

45 *Ibid* 155, 157 and 159.

46 *Ibid* 160–161.

47 *Ibid* 165–166.

48 *Ibid* 94.

49 Attorney-General of the Union Law, see n 39 above, ss 36(b), (g)–(i); Attorney-General of the Union Rules 2001 ss 48, 51 and 53.

50 *Ibid*, Attorney-General of the Union Rules, s 55; Code of Criminal Procedure s 170. Law officers have the authority to withdraw charges or an entire case. See *ibid*, Attorney-General of the Union Law, s 36(i).

51 Code of Criminal Procedure s 173(1) (a).

52 *Ibid* s 493. Pursuant to the Attorney-General of the Union Law, the law officer is responsible for 'supervising' the complainant's lawyer. See s 36(m). See also para 117 of the Courts Manual: 'The persons by whom appearances, applications and acts may be made or done as "recognized agents" of the parties to a suit are specified in Order III, Rule 2.' Order III, Rule 2 deems persons holding powers of attorney as recognised agents.

53 Code of Criminal Procedure s 252.

54 *Ibid* s 253–255. Courts Manual paras 434, 446 and 538.

55 Code of Criminal Procedure s 253(2).

accused pleads guilty, the judge may convict them.⁵⁶ If the accused denies the charges and wishes to present a defence, they may recall prosecution witnesses for further examination.⁵⁷ After recalling witnesses, the accused may either give evidence on their behalf subject to cross-examination. If they decline, they may still be called by the judges for questioning.⁵⁸ The accused must then identify the defence witnesses that they would like the court to summon on their behalf, whom the prosecution may cross-examine.⁵⁹ After hearing the evidence and final arguments, the judge acquits or convicts the accused, according to law.⁶⁰

D. Myanmar's relevant international and national legal obligations

International obligations

State obligations concerning fair trial rights derive from treaties, particularly the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment (CAT).⁶¹ Other international treaties provide fair trial rights with respect to particular groups of people.⁶² In addition, relevant principles and standards are contained in non-binding documents such as the United Nations Basic Principles on the Independence of the Judiciary, the Bangalore Principles of Judicial Accountability, the UN Basic Principles on the Role of Lawyers, the Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment, the Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems and the Standard Minimum Rules for Non-Custodial Measures.⁶³

While Myanmar is not a party to the ICCPR or CAT, the core fair trial rights are articulated in the Universal Declaration on Human Rights (UDHR), a document widely considered to have binding legal status under

56 *Ibid* 255(2).

57 *Ibid* 256(1).

58 *Ibid* 256(2) and 342(2).

59 *Ibid* 256–257 and 342.

60 *Ibid* 258.

61 The International Covenant on Civil and Political Rights, 23 March 1976, 999 UNTS 171 (hereinafter the ICCPR or the Covenant); Convention against Torture and Other Cruel, Inhuman or Degrading Punishment, 10 December 1984, UN Doc A/39/51 (CAT). Myanmar has not yet signed either.

62 The Convention on the Rights of the Child, 2 September 1990 (CRC); Convention on the Elimination of All Forms of Discrimination against Women, 3 September 1981 (CEDAW); International Convention on the Elimination of All Forms of Racial Discrimination, 4 January 1969, GA Res 2106 (ICERD); the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, 18 December 1990, GA Res 45/158 (CMW), 18 December 1990, GA Res 45/158; Convention of the Rights of all Persons with Disabilities, 3 May 2008, A/RES/61/106 (CRPD); and the International Convention on the Protection of all Persons from Enforced Disappearances, 23 December 2010 (CED).

63 See Basic Principles on the Independence of the Judiciary, 29 November 1985, GA Res 40/32, 13 December 1985, GA Res 40/146 ('Basic Principles'); Bangalore Principles of Judicial Conduct, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, 25–26 November 2002 ('Bangalore Principles'); Basic Principles on the Role of Lawyers, adopted by the 8th UN Congress on the Prevention of Crime and Treatment of Offenders, 27 August – 7 September 1990 ('Basic Principles on the Role of Lawyers'); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 9 December 1988, GA Res 43/173; UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, 2013, GA Res 67/187; UN Standard Minimum Rules for Non-Custodial Measures (the 'Tokyo Rules'), 14 December 1990, GA Res 45/110.

customary international law.⁶⁴ Provisions of the ICCPR, comments by the Human Rights Committee (the body responsible for monitoring the implementation and interpretation of the ICCPR) and other non-binding legal international human rights instruments remain relevant in the context of Myanmar because they provide clarity on how the rights in the UDHR should be broadly interpreted and applied.

Article 10 of the UDHR sets out the right to a fair trial: ‘Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.’

Further articles enumerate other rights related to the fair administration of justice, including:

- Article 3: the right to liberty;
- Article 5: prohibition against torture or cruel, inhuman or degrading treatment or punishment;
- Article 6: right to recognition everywhere as a person before the law;
- Article 7: equality before the law;
- Article 8: right to an effective remedy;
- Article 9: prohibition of arbitrary arrests; and
- Article 11: the right to presumption of innocence and no ex-post facto law.

Article 14 of the ICCPR elaborates on the fair trial rights in the UDHR and, in particular, obligates states to respect and protect the following:

‘All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.’

In addition, the ICCPR affirms other rights related to the fair administration of justice, including:

- Article 6: the right to life;
- Article 7: the right not to be tortured or subject to cruel, inhuman or degrading treatment or punishment;

64 UN General Assembly, Universal Declaration of Human Rights, United Nations, 217 (III) A, 1948, Paris (hereinafter the UDHR). ‘Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation. International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.’ Restat 3d of the Foreign Relations Law of the United States, s 102; see also Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds) *International Human Rights Law* (2nd edn, Oxford University Press 2014), p 271 (the ‘fundamental principles of fair trial form part of customary international law’, including Art10 of the UDHR).

- Articles 9 and 10: the rights to liberty and habeas corpus;
- Article 11: the right to not to be imprisoned due to a contractual obligation;
- Article 15: no ex-post facto laws;
- Article 16: the right to equal recognition before the law; and
- Article 26: the right to non-discrimination and equal protection of the law.

National/domestic legal obligations

Myanmar's domestic law is a combination of pre-colonial customary and Buddhist law, colonial law, precedent and other legislation. The 2008 Constitution, Code of Criminal Procedure, Evidence Act and its amended provisions and the Penal Code govern criminal matters. Guidance materials such as the Police, Jail and Courts Manuals afford further clarification.⁶⁵

Despite Myanmar's failure to ratify the ICCPR, domestic law does affirm certain key fair trial rights. The Constitution espouses basic principles of 'justice, liberty and equality' and specifies that judicial principles include the right to an independent judiciary, the right to a public hearing and, in all cases, the rights to a defence and appeal.⁶⁶

Other fair trial rights recognised in the Constitution include:

- Article 11: separation of powers among the three branches of government;
- Article 21(a): rights to equality, liberty and justice for citizens;
- Article 44: right to dignity;
- Article 347: right to equal rights and protection before the law;
- Article 348: right to non-discrimination;
- Articles 353 and 376: rights to life and liberty, including that a person shall not be held in detention for longer than 24 hours without the order of a judge (subject to exceptions for security, law and order and the public's interest);
- Articles 43 and 373: rights to no ex post facto laws and no excessive punishments;
- Article 374: right to be free from double jeopardy; and
- Articles 18(c), 296(a) and 378(a): right to file writs petitions, including habeas corpus.

65 See 2008 Constitution, at n 41 above; Code of Criminal Procedure, at n 22 above; The Evidence Act (India Act No 1-1872); Penal Code, see n 4 above; Burma Police Manual, Vol I, 1st edn (1985); Burma Police Manual Vol II, 5th edn (1940); Burma Police Manual, Vol IV, 5th edn (1953); Jails in Burma: Manual of Rules (1950); The Courts Manual, Vol I-IV, 4th edn (1999) ('Courts Manual').

66 See 2008 Constitution Arts 6(e), 19(a)–(c) and 375.

The recently enacted Legal Aid Law reiterates the right to a defence.⁶⁷ Every person accused of a capital offence shall have access to a lawyer.⁶⁸ Myanmar does not have an explicit provision confirming the presumption of innocence per se, but the law is clear that the burden of proof lies on the person bound to prove the existence of any fact,⁶⁹ in other words, on the state in criminal cases.

Finally, the Office of the Supreme Court of the Union recently published a code of ethics for the judiciary, which recognises the importance of judicial independence, impartiality, competence and integrity, and encourages judges to act in accordance with those key principles.⁷⁰

III. The Trial Observation

A. Observation methodology

Due to the high-profile nature of the case, which involved the killing of a well-known lawyer and legal adviser to the present government, the significant human rights implications of the trial and concerns about the general state of rule of law in Myanmar, the IBAHRI hired an independent international observer to monitor the proceedings. The trial observer was an accredited lawyer with experience monitoring cases in Myanmar's criminal justice system. She was assisted by an interpreter well versed in the Myanmar criminal justice system. The IBAHRI wrote to the authorities before the commencement of the observation to inform them of their intention to observe the trial. The observer and interpreter then presented a formal letter from the IBAHRI on the first day of monitoring, 16 June 2017, alerting the court to their presence and requesting that the court afford access. Due to the first observer's availability, the IBAHRI hired a new observer with similar experience to continue to monitor the proceedings from 8 September 2017. On that date, the new observer and interpreter followed the same process of presenting a formal letter from the IBAHRI, which noted the change and requested that the court afford access. The interpreter remained the same and the IBAHRI ensured that the second observer had information about the stage and substance of the proceedings when she began monitoring.

Hearings were initially scheduled for every Friday; however, on 19 January 2018, the court noted that hearings would be held every Thursday and Friday. The IBAHRI trial observer attended almost all the hearings once the court had decided to go ahead with the trial in the absence of the missing accused. Weekly observation reports were sent to the IBAHRI. In the event that the contracted observer was unable to attend, the IBAHRI approved temporary monitors. The observer monitored the proceedings for its compliance with fair trial rights as recognised and protected by the UDHR and expanded upon by the ICCPR, in particular Article 14, and domestic law.⁷¹ Both the observer and interpreter regularly sat on the first or second bench inside the courtroom in the public seating area, behind the bench for the accused.

67 Legal Aid Law, Pyidaungsu Hluttaw Law No 10/2016, (18 January 2017), at ss 3(b), 4(c), 25–26 ('Legal Aid Law').

68 Union Attorney-General Rules, Rule 110(a); Courts Manual para 457(1).

69 Evidence Act s 101; see also *Sein Hla v The Union of Burma* 1951 ('the burden of proving his guilt remains throughout the trial with the prosecution and... the prosecution must prove his guilt beyond all reasonable doubt').

70 Code of Judicial Ethics for Myanmar, see n 40 above.

71 ICCPR, see n 61 above.

The hearings typically lasted from 1030 to 1230. The longest hearing went on until 1600 and on many occasions, hearings were adjourned.

Apart from a few instances, the observer and interpreter were easily able to gain access to the court. On one occasion, a police officer blocked the observer's access to the courtroom door and asked for her name.⁷² He said that he was inquiring on behalf of the court, although the court had already allowed the observer and interpreter to obtain entrance passes and the officer knew the observer as she had been monitoring the case for months. On a separate occasion, a police officer sat next to the security station where the clerks wrote down observers' details and was seen copying everyone's name into a small book.⁷³ The observer also noticed that a police officer sitting in the courtroom carried a notebook that appeared to contain the names of all journalists present.⁷⁴ In a country in which the rule of law is still developing, the power of the executive and police looms large, and these types of actions were perceived to be attempts at intimidation.

The IBAHRI ensured that the observer did not intervene in the proceedings and remained neutral by establishing a strict code of conduct, including that the observer should not provide public commentary. The trial observer sent formal request letters in August 2017 in efforts to meet both sides, including the defence counsel Daw Pa Pa Win, U Kyaw Kyaw Htike and U Nyunt Shwe, the law officer U Aung Naing Oo and the complainant lawyers U Nay La and Robert San Aung on 1–3 August 2017. Meetings were held with the defence counsels U Kyaw Kyaw Htike and U Aung Khaing, the complainant lawyers U Nay La and Robert San Aung and the court's appointed media officer. In all meetings, the observer explained that the information would remain confidential within the IBAHRI and any public statements based on the information shared would not be made without first obtaining the interviewee's permission. No other conditions were imposed or requested by any party.

The court's appointed media officer met the IBAHRI in early July 2017 and explained the structure of the special bench, the formal procedure by which evidence is heard and the number of named prosecution witnesses. He otherwise directed the observer to counsel for the parties. Meetings with the defence counsel, U Kyaw Kyaw Htike and U Aung Khaing, and the complainant lawyers, U Nay La and Robert San Aung, were about their perspective on the case itself and any concerns they felt regarding the treatment of their client or the proceedings, and clarified questions posed by the observer about court procedure, such as the repetition of witness testimony in formal Myanmar language by the special bench. U Nay La and Robert San Aung were forthcoming with the observer, identifying concerns related to evidentiary gaps and explaining upcoming witness testimony.

The meeting with U Kyaw Kyaw Htike took place early in the proceedings during August 2017 and while he was cooperative and open with the observer, he declined to meet again despite requests to do so. The observer's meeting with the defence counsel U Aung Khaing took place nearly a year later in October 2018, after the observer requested to meet with him several times, and was exceptionally brief. The observer felt that he withheld information as he spoke only in vague terms about the case (he was 'defending his clients'; he would 'explain their innocence') and would not give further details when pressed (eg, it was 'too personal' to discuss the presumption of innocence). Daw Pa Pa Win, the third and remaining defence counsel, initially responded to requests for meetings by saying that she wished to wait until the charge

72 See 13 October 2017 observation report on file with the IBAHRI.

73 See 8 December 2017 observation report on file with the IBAHRI.

74 See 18 August 2017 observation report on file with the IBAHRI.

confirmation hearing and later that she wished to wait until she had the opportunity to present defence witnesses. She consistently evaded meeting requests, including those made by telephone and in person, by saying that she would revert back to the observer soon after checking with her client Zeya Phyo, but never did despite Zeya Phyo noting on one occasion that the observer could speak with his lawyer if she wished.⁷⁵ The law officer never responded to the observer's request for a meeting. The observer believes that this is likely due to the law officer's fear of being associated with external observers and the perception that he might be biased or a lack of permission from his superiors to do so. Annex 3 contains a list of meeting requests and notes when meetings were held with all actors associated with the case.

B. Charges against the accused

Conspiracy to commit murder in violation of Penal Code section 34: When a criminal act is committed by several people, in furtherance of the common intention of all, each person is liable for that act in the same manner as if it were done by him or her alone.

The court confirmed this charge against Kyi Lin, the gunman, and Aung Win Zaw, who allegedly helped to orchestrate the killing of U Ko Ni with his brother Aung Win Khaing. Both Kyi Lin and Aung Win Zaw were convicted of committing the offence.

Premeditated murder in violation of Penal Code section 302(1)(b): Whoever commits murder with premeditation shall be punished with death and shall also be liable to a fine.

Abetting a crime in violation of Penal Code section 109: Whoever abets any offence, if the act abetted is committed in consequence of the abetment and no express provision is made by this code of the punishment of such abetment, shall be punished with the punishment provided for the offence.

The court confirmed this charge against Zeya Phyo for his alleged involvement in financing the murder by providing funds to Aung Win Khaing, which were allegedly paid to Aung Win Zaw to hire Kyi Lin as the gunman, but did not convict him of committing the offence.

Perverting the course of justice in violation of Penal Code section 201: Whoever, knowing or having reason to believe that an offence has been committed, causes any evidence of the commission of that offence to disappear, causes any evidence of the commission of that offence to disappear, with the intention of screening the offender from legal punishment, or with that intention gives any information respecting the offence which he or she knows or believes to be false, if the offence he or she knows or believes to have been committed is punishable with death, shall be punished with imprisonment of either description for a term that may extend to seven years, and shall also be liable to a fine.

The court convicted Zeya Phyo of violating this section.

Harbouring a criminal in violation of Penal Code section 212: Whenever an offence has been committed, whoever harbours or conceals a person whom he or she knows or has reason to believe to be the offender, with the intention of screening him or her from legal punishment, shall, if the offence is punishable with death, be punished with imprisonment of either description for a term that may extend to five years, and shall also be liable to a fine.

⁷⁵ See 15 November 2018 observation report on file with the IBAHRI.

The court confirmed and convicted Aung Win Tun of this charge in relation to his alleged attempt to conceal his brother and help him to hide in Hpa-An in Karen State.

The court confirmed this charge against Kyi Lin, Aung Win Zaw and Zeya Phyto for the murder of U Ko Ni. Kyi Lin and Aung Win Zaw were convicted of violating this section.

Murder in violation of Penal Code section 302(2): Whoever commits murder in any other case shall be punished with transportation for life, or with rigorous imprisonment for a term that may extend to ten years, and shall also be liable to a fine.

The court confirmed and convicted Kyi Lin of this charge for the murder of the taxi driver U Nay Win.

Unlawful possession of firearms in contravention of Arms Act section 19(d): Whoever commits any of the following offences (namely): (d) transports any arms, ammunition or military stores in contravention of shall be punished with imprisonment for a term that may extend to three years, or with a fine, or both.

The court confirmed and convicted Kyi Lin of this charge.

Unlawful possession of ammunition in contravention of Arms Act section 19(f): Whoever commits any of the following offences (namely): (f) has in his or her possession or under his or her control any arms, ammunition or military stores in contravention of the provisions of section 14 or section 15,⁷⁶ shall be punished with imprisonment for a term that may extend to three years, or with a fine, or both.

The court confirmed and convicted Kyi Lin of this charge.

Aung Win Khaing, who is still at large, did not have the charges against him confirmed. Nor was there any conviction against him recorded in the verdict.

C. The case

Summary of prosecution evidence

The prosecution called 72 witnesses, introduced more than 70 images from Yangon International Airport's 196 CCTV cameras, presented and discussed items confiscated from the accused and focused on telephone records between and among the accused to present their case.⁷⁷

Testimonies given during the trial along with CCTV images from Yangon International Airport showed that Kyi Lin, Aung Win Zaw and Aung Win Khaing were present at the airport on 29 January 2017.⁷⁸ Telephone records show numerous text messages and calls between and among Aung Win Zaw, Aung Win Khaing and

⁷⁶ Ss 14 and 15 concern the possession of firearms that are unlicensed.

⁷⁷ The prosecution named 80 witnesses but only 72 testified.

⁷⁸ See, eg, 21 July 2017, 28 July 2017, 4 August 2017, 25 August 2017, 13 October 2017, 15 December 2017, 25 January 2018 and 22 September 2018 observation reports on file with the IBAHRI. See also 15 February 2019 verdict; The Republic of the Union of Myanmar, Office of the President, Press Release No 1/2017 regarding assassination of U Ko Ni, 31 January 2017, www.president-office.gov.mm/en/?q=briefing-room/statements-and-releases/2017/01/31/id-7210 accessed 13 May 2019 ('Press Release No 1/2017'); see also Phyto Thiha Cho, 'Suspected Plotter in Ko Ni murder drove assassin to the airport' originally reported in *Myanmar Now*, 28 September 2017 <https://defendlawyers.wordpress.com/2017/09/29/burma-suspected-plotter-in-ko-ni-murder-drove-assassin-to-the-airport-police> accessed 13 May 2019.

Kyi Lin immediately before the murder took place while they were visible on the airport's CCTV cameras.⁷⁹ Telephone records also show numerous calls to and from Aung Win Khaing and Zeya Phyo, accused of financing the murder, throughout December 2016 and January 2017.⁸⁰ Witnesses alleged that Aung Win Tun drove Aung Win Zaw to Hpa-An two days after the murder in an attempt to escape prosecution.

The prosecution delved into the relationships between the accused, including relationships built while they served time in prison and as former members of the military. In a joint case in 2003, Kyi Lin and Aung Win Zaw were convicted of violating Penal Code section 380 for smuggling religious statues in Budalin Court and sentenced to 27 years in Mandalay's Obo Prison.⁸¹ Both were released in a presidential amnesty in 2014. While the accused testified that they had not been in contact for years, testimony from witnesses identified Aung Win Zaw and Kyi Lin together on previous occasions, and described alleged ongoing business connections between Aung Win Khaing and Zeya Phyo.⁸² A government employee tasked with monitoring social media after the murders testified that he found pictures of Aung Win Khaing and Aung Win Tun together, and pictures of the families of Aung Win Khaing, Aung Win Tun and Zeya Phyo together.⁸³

A key prosecution witness, who was also a former inmate of Kyi Lin and Aung Win Zaw and was approached to commit the murder before Kyi Lin, connected the accused to the murder plot. Aung Soe testified that Aung Win Zaw allegedly called him in June 2016 and asked him to kill a 'foreign diplomat' but he declined.⁸⁴ Confirmation that Aung Soe was approached first came from the Union Minister of Home Affairs at a press conference on 25 February 2017.⁸⁵

No motive for the murder was articulated by the prosecution, although part of the line of questioning appeared to indicate motivations of religious extremism.

EVIDENCE CONCERNING THE CHARGES UNDER SECTIONS 19(D) AND (F) OF THE ARMS ACT

For the charges pursuant to the Arms Act, a ballistics expert who was a police colonel in the Criminal Investigation Department testified that he analysed a nine-millimetre handgun, related bullets and a

79 See 15 December 2017 observation report on file with the IBAHRI.

80 See 23 August 2018 observation report on file with the IBAHRI.

81 Budalin Township Court Criminal Regular Cases 256/2003, 257/2003 and 258/2003. Penal Code s 380 renders it an offence to commit theft 'in any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or used for the custody of property' with a punishment of up to seven years and a fine. Budalin Township is in Monywa District, Sagaing Division and is relatively close to Mandalay. See also *The Global New Light of Myanmar*, 'Antagonism, extreme nationalism behind assassination of U Ko Ni: Police Chief', Vol III, No 316, 26 February 2017 www.burmalibrary.org/docs23/GNLM2017-02-26-red.pdf accessed 28 May 2019 ('Global New Light of Myanmar').

82 See 8 September 2017, 19 January 2018, 15 March 2018, 2 August 2018, 23 August 2018 and 17 January 2019 observation reports on file with the IBAHRI. See 30 November 2018 observation report on file with the IBAHRI (witness testimony that Zeya Phyo did own AIS company, including that Zeya Phyo and his wife were the company's directors). See 'Antagonism, extreme nationalism behind assassination of U Ko Ni: Police Chief' www.president-office.gov.mm/en/?q=issues/national-security/id-7337 accessed 13 May 2019 ('President's Office Release').

83 See 10 November 2017 observation report on file with the IBAHRI. See also 23 February 2018 report.

84 See 29 September 2017 observation report on file with the IBAHRI.

85 *The Global New Light of Myanmar*, see n 81 above. The Office of the President also reported the same information. See President's Office Release, see n 82 above. The defence did not dispute the existence of that meeting.

38-millimetre revolver.⁸⁶ He said that he matched the bullets found at the crime scene to the guns possessed by Kyi Lin and to the gun powder under his fingernails when he was apprehended.⁸⁷

Defence summary

The defence questioned the reliability of the prosecution's evidence, including the sources of pictures admitted into evidence showing the accused together⁸⁸ and the CCTV footage, challenged the legality of the searches conducted in the accused's homes and at their offices,⁸⁹ and emphasised that none of the accused personally knew U Ko Ni and thus had no motive to kill him.⁹⁰

Kyi Lin also expressed that he was blackmailed into killing U Ko Ni, and the defence team argued that he never meant to shoot U Nay Win and, alternatively, that he never shot U Nay Win.⁹¹ Zeya Phyto was not at the airport on the day of the murder and witnesses testified both that he fell ill in 2016 and could not engage in business dealings and that any money he offered was always paid back and used for the purposes of his companies.⁹²

Aung Win Zaw testified, along with other witnesses, that he was only at the airport to attempt to obtain a job for his son as a pilot with the assistance of Aung Win Khaing. The defence argued that while the accused were in contact immediately before the murder while they were on CCTV footage, no witness could describe the content of their conversations.⁹³ Finally, U Aung Khaing argued that there was no evidence connecting Aung Win Tun to the murder or to any specific events after the murder.⁹⁴

IV. Findings – Fair Trial and Due Process Concerns

A. Rights to liberty and not to be arbitrarily detained – failure to bring the accused before a competent authority

Testimonies provided by the defendants during the trial raised concerns about the potential violations of their rights to liberty and not to be arbitrarily detained. Aung Win Zaw testified that while he was

86 See 15 December 2017 observation report on file with the IBAHRI.

87 *Ibid.*

88 See 16 March 2018 observation report on file with the IBAHRI.

89 See 1 September 2017 and 20 October 2017 observation reports on file with the IBAHRI. Under Myanmar law, any person inside a place subject to search may permit entry on production of the warrant. See Code of Criminal Procedure s 102.

90 See 30 November 2018 observation report on file with the IBAHRI.

91 An Irrawaddy article released after the hearing on 2 February 2018 included an interview with U Kyaw Kyaw Htike, where he reiterated this point. See 'Gunman Was Blackmailed into Killing U Ko Ni, Lawyer Says' (The Irrawaddy, 2 February 2018) www.irrawaddy.com/news/gunman-blackmailed-killing-u-ko-ni-lawyer-says.html accessed 13 May 2019. See also 15 December 2017 and 23 February 2018 observation reports on file with the IBAHRI.

92 See 25 May 2018 and 17 January 2019 observation reports on file with the IBAHRI. See also Tin Htet Paing, 'Lawyer says Suspect's Wealth could prove key in Ko Ni murder trial' (The Irrawaddy, 22 December 2017) www.irrawaddy.com/news/lawyer-says-suspects-wealth-prove-key-ko-ni-murder-trial.html accessed 13 May 2019.

93 See 15 December 2017 observation report on file with the IBAHRI.

94 See 16 February 2018 observation report on file with the IBAHRI.

arrested on the night of 30 January 2017, the police wrote down the official date of his arrest as 3 February 2017 and only requested permission for his remand on 6 February 2017.⁹⁵ Aung Win Tun said that he first saw a judge a week after he arrived at Aung Tha Pyay, in violation of Myanmar law. Similarly, Zeya Phyo was taken to Aung Tha Pyay and remanded three days after his initial arrest, allegedly with a black bag over his head until the judge asked the officers to remove it.⁹⁶ All three men were therefore held without approval for their detention being longer than the legal period under national⁹⁷ and international law. The accused stated that they were regularly questioned during this time, which suggests that the unauthorised detention was used as a tactic to encourage the accused to confess.

Furthermore, despite provisions of national and international law requiring that detention be used only in exceptional circumstances, only Aung Win Tun was released on bail⁹⁸ during the proceedings and this was only after the charge against him was confirmed on 22 February 2018. To the best of the observer's knowledge, this was the only bail application made during the proceedings, despite the fact that Aung Win Tun always faced a bailable offence. The three other accused in the custody of the police were charged with non-bailable offences that carry mandatory capital punishment. However, bail applications may be made regardless of how an offence is categorised, with the exception of death penalty cases where 'reasonable grounds for believing' that the accused committed the offence exist.⁹⁹ They were detained in custody pending the outcome of the proceedings for more than two years. This time was ultimately credited to their prison sentences. Arbitrary, continuous detainment increases the likelihood of torture and thwarts an accused's right to be presumed innocent.

International law

Article 3 of the UDHR provides: 'Everyone has the right to life, liberty and security of person.' Article 9 prohibits arbitrary arrests and detentions.¹⁰⁰ In expounding on these rights, Article 9 of the ICCPR provides: 'No one shall be subject to arbitrary arrest or detention, or shall be deprived of his or her liberty except in accordance with procedures established by law.' In particular, under Article 9(3), detention *shall not be* the general rule for persons awaiting trial¹⁰¹ and anyone arrested or detained on criminal charges must be brought promptly before a judge or other officer with the ability to exercise judicial power and tried within

95 See 2 August 2018 observation report on file with the IBAHRI.

96 See 25 January 2018 observation report on file with the IBAHRI.

97 According to Art 21 (b) of the Constitution, no person shall be detained for longer than 24 hours without an order from a judge.

98 He paid MMK 50m (£24,450), had two guarantors and promised to attend all future hearings. See Ye Mon, 'Alleged coconspirator in Ko Ni assassination trial is granted bail' (DVB, 22 February 2018) <http://english.dvb.no/news/alleged-co-conspirator-ko-ni-assassination-granted-bail/79870> accessed 14 May 2019.

99 See Code of Criminal Procedure, Schedule II. While s 201 is a bailable offence, Zeya Phyo was never officially charged with violating this section and was only found guilty of violating it during the verdict hearing. S 497(1) of the Code provides that a person accused of a non-bailable offence may be released on bail.

100 No one shall be subjected to arbitrary arrest, detention or exile.

101 See *Cagas et al v Philippines*, UN Human Rights Committee, Communication No 788/1997, UN Doc CCPR/C/73/D/788/1997, at para 7.4 (2001); *Smanster v Belarus*, UN Human Rights Committee, Communication No 1178/2003, UN Doc CCPR/C/94/D/1178/2003, at para 10.3 (2008) (to justify exception to the general rule that persons awaiting trial are not to be detained, the state must sufficiently describe concerns that would justify continued detention and why these concerns could not be addressed by bail requirements or other strict conditions of release).

a reasonable time or released.¹⁰² Pre-trial detention should only be used in exceptional circumstances in which it is likely that the accused would ‘abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State party.’¹⁰³ In particular, courts must examine whether alternatives exist to pre-trial detention.¹⁰⁴ All persons so deprived of their right to liberty must be treated with humanity and respect for their inherent dignity.¹⁰⁵

Persistent, arbitrary deprivations of liberty can further violate the right ‘to be presumed innocent until proved guilty’,¹⁰⁶ as it exacerbates uncertainty for the accused.

Domestic law

Myanmar’s Constitution also recognises the right to liberty.¹⁰⁷ It makes clear that no person shall be detained for more than 24 hours without the permission of a judge.¹⁰⁸ The arrest itself and the grounds for the arrest must be lawful.¹⁰⁹ An accused may only be remanded in custody during the police investigation for 15 days at a time if he or she faces a potential punishment of less than seven years, or 30 days for those punishable by a term of seven or more years.¹¹⁰ An accused’s detention beyond these periods during the investigation phase must be reviewed and determined by a judge at the end of each 15 or 30-day period. Judges are not required to order the detention of an accused and should only do so when there is sufficient evidence ‘rais[ing] suspicion’ of the accused and further evidence is likely to be obtained by the detention.¹¹¹ Bail is a right.¹¹² Law officers have a duty to scrutinise requests for detention of accused.¹¹³ The Myanmar Police Force’s Maintenance of Discipline Law further renders it an offence to unnecessarily detain a person who should not be arrested or to fail to bring an individual before proper authorities.¹¹⁴

102 Prohibition of arbitrary detention violated when individual detained in excess of time legally provided without providing explanation as to necessity of prolonged detention. *Bolanos v Ecuador*, UN Human Rights Committee, Communication No 238/1987, UN Doc CCPR/C/36/D/238/1987, at paras 8.3 and 9 (1989).

103 *Hill and Hill v Spain*, UN Human Rights Committee, Communication No 526/1993, UN Doc CCPR/C/59/D/526/1993, at para 12.3 (1997); see also *Kulov v Kyrgyzstan*, UN Human Rights Committee, Communication No 1369/2005, UN Doc CCPR/C/99/D/1369/2005, at para 8.3 (2010) (the right to liberty requires that any remand in custody be lawful, reasonable, and necessary in all circumstances such as to prevent flight, interference with evidence, or recurrence of crime); UN Human Rights Committee, General Comment No 35: Article 9 – Right to liberty and security of person, UN Doc CCPR/C/GC/35, at para 38 (2014) (‘General Comment No 35’).

104 *Ibid*, at General Comment No 35.

105 ICCPR, Art 10(1). See also Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, GA Res 43/173, 9 December 1988.

106 ICCPR, Art 14(2); UDHR, at n 64 above, Art 11(1); UN Human Rights Committee, General Comment No 32: Article 14 – Right to equality before courts and tribunals and to a fair trial, UN Doc CCPR/C/GC/32, at para 39 (2007) (‘General Comment No 32’).

107 Arts 21(b), 353 and 376.

108 Arts 21(b), 376; Code of Criminal Procedure ss 61, 100 and 167. See also Police Manual, paras 1353 and 1361 (‘any corrupt or malicious detention of a person in custody is contrary to law’); Union Attorney-General’s Office, Fair Trial Guidebook for Law Officers, February 2018, p 22 (noting this is an ‘important safeguard’) www.oag.gov.mm accessed 28 May 2019 (‘Fair Trial Guidebook’).

109 *Bo San Lin v The Commissioner of Police and one* (1948) BLR (SC) 372.

110 Code of Criminal Procedure s 167(2); Courts Manual para 410 (noting that illegal detention is ‘far too frequent’).

111 *Ibid*, Code of Criminal Procedure ss 167(2) and 344.

112 Police Manual para 1785.

113 Attorney-General of the Union Law 2010, s 36(g).

114 Ss 17(a) and (g). See also Police Manual para 1380 (noting that an officer who causes unwarranted personal violence to a person in their custody is liable for imprisonment, but also that the ‘maltreatment of defenceless prisoners is a dishonourable act which cannot in any way be extenuated’).

B. Prohibition of cruel, inhuman and degrading treatment – alleged police abuse amounting to ill-treatment and failure to exclude statements obtained through such means

The police force took all the accused to Aung Tha Pyay, a notorious interrogation centre in Yangon, for questioning.¹¹⁵ All alleged ill-treatment in their own testimony but no further documentation was provided to the court.¹¹⁶ Aung Win Tun testified that he was blindfolded, questioned by men in civilian clothes and kept for three days without speaking to his family or a lawyer.¹¹⁷ Zeya Phyo was allegedly kept in foot chains, denied healthcare, denied food and medicine sent by his family and was forced to sign a prepared statement written by the police.¹¹⁸ He was also allegedly presented before the judge for the first time with a black bag over his head, which was only taken off when the judge asked the officers to remove it.¹¹⁹

The treatment of the accused during the proceedings also failed to protect their rights not to be ill-treated and to be treated with dignity. All were kept handcuffed.¹²⁰ On some occasions, the accused were also held together in a long ankle chain.¹²¹ While two of the lawyers, U Kyaw Kyaw Htike and Robert San Aung, protested the use of restraints, the judges deferred to the police, who asserted that the accused were dangerous criminals who must be chained or cuffed for security reasons.¹²² One member of the special bench then said that if it was not in accordance with regulations, the restraints should be removed.¹²³ During the final stages of the proceedings, the accused were only kept in linked handcuffs.

There were also allegations that police used coercive measures to obtain testimony from witnesses in Nay Pyi Taw to support the prosecution. This testimony may have been inaccurate because it was allegedly made under duress. Employees of Zeya Phyo who worked at his ‘compound’ in Nay Pyi Taw testified that the police forced them to give testimony in front of a judge about the actions of Aung Win Khaing, who allegedly burned evidence at Zeya Phyo’s ‘compound’ after the murder.¹²⁴ They testified that the police forced them to use a prepared statement that they did not write themselves to testify in front of a local judge during the investigation stage.¹²⁵ Another testified that the police interrogated him on five separate occasions.¹²⁶ The police asserted that they were told by the law officer to prepare documents to ensure that

115 See 25 January 2018, 9 August 2018 and 7 September 2018 observation reports on file with the IBAHRI. For Aung Tha Pyay, see also Shoon Naing, Thu Thu Aung, ‘Black hoods, kneeling, no sleep: Reuters reporter details Myanmar custody’, Reuters (London, 24 July 2018) www.reuters.com/article/us-myanmar-journalists/black-hoods-kneeling-no-sleep-reuters-reporter-details-myanmar-custody-idUSKBN1KE1PM accessed 14 May 2019; Amnesty International, ‘Myanmar Activist at Risk of Torture’, 16 September 2008 www.amnesty.org/en/latest/news/2008/09/myanmar-activist-risk-torture-20080916 accessed 14 May 2019 (noting an anti-government activist was arrested and taken to Aung Tha Pyay Detention Centre and is at risk of torture).

116 *Ibid.*, observation reports. See also 12 July 2018 observation report on file with the IBAHRI.

117 See 7 September 2018 observation report on file with the IBAHRI. Aung Win Tun later said that he was eventually treated well in the camp.

118 See 25 January 2018 observation report on file with the IBAHRI.

119 *Ibid.*

120 Courts Manual para 477 asserts that handcuffs must be removed unless there is a reasonable expectation of violence or that an attempt will be made to rescue the accused.

121 See 24 November 2017 observation report on file with the IBAHRI.

122 See 1 December 2017 observation report on file with the IBAHRI.

123 *Ibid.*

124 *Ibid.* See also 27 October 2017, 8 December 2017 and 24 August 2018 observation reports on file with the IBAHRI

125 *Ibid.*, at 1 December 2017.

126 See 8 December 2017 observation report on file with the IBAHRI.

the witnesses provided smooth testimony so they wrote down the witnesses' main points for them.¹²⁷ The police further stated that the Criminal Investigation Department in Nay Pyi Taw recorded their original statements and the court could cross-reference those with the alleged forced statements. The observer did not see this happen. The observer does not have information on whether the statements given under duress were used because they should have been excluded from evidence under Myanmar law.

International law

Article 1 of the UDHR provides for the right to human dignity and Article 5 prohibits the use of torture or cruel, inhuman or degrading treatment or punishment. This prohibition is reiterated in other international human rights treaties.¹²⁸ Placing bags over heads, the presentation of individuals in court in restraints or otherwise in a manner that indicates they are criminals may constitute a violation of this prohibition.¹²⁹ International human rights standards provide that only the minimum force necessary be used on detainees or prisoners and force may only be used when strictly necessary, only if the use of non-violent means has proven ineffective and only as a last resort.¹³⁰

In addition, the Human Rights Committee has stated that respect for this right means that any statements obtained through torture or ill-treatment, including coercion, must be excluded from evidence in criminal proceedings.¹³¹ This applies to confessions by accused or witness testimonies.

Domestic law

Myanmar's Constitution also recognises the right to human dignity and implicitly prohibits torture, cruel, inhuman or degrading treatment by prohibiting anything 'detrimental to the life and personal freedom of any person'.¹³² It is an offence in Myanmar to voluntarily hurt another for the purpose of extorting information or a confession.¹³³ The Myanmar Police Force's Maintenance of Discipline Law renders it an offence to ill-treat a prisoner, person in custody or any person detained and imposes a potential sentence of imprisonment of up to three years for this offence.¹³⁴ While law enforcement may use reasonable force, it must be 'exceptional and to the minimum extent required'.¹³⁵ The police cannot threaten or otherwise seduce a witness to make false statements.¹³⁶

127 See 9 March 2018 observation report on file with the IBAHRI.

128 ICCPR, Art 7; CAT, see n 61 above.

129 UN Human Rights Committee (HRC), General Comment No 32, Art 14, Right to equality before courts and tribunals and to fair trial, para 30.

130 Standard Minimum Rules, see n 63 above, Rule 54; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 27 August – 7 September 1990, Principles 4, 5 and 15; Code of Conduct for Law Enforcement Officials, 17 December 1979, GA Res 34/169 at Art 3.

131 See General Comment No 32, at n 129, paras 6, 41, 60.

132 2008 Constitution Arts 44 and 353.

133 Penal Code ss 330–331.

134 S 17(g). See also Police Manual para 1380 (noting that an officer who causes unwarranted personal violence to a person in their custody is liable for imprisonment, but also that the 'maltreatment of defenceless prisoners is a dishonourable act which cannot in any way be extenuated').

135 Union Attorney-General's Office, Fair Trial Guidebook for Law Officers, February 2018, p 18.

136 Myanmar Police Force's Maintenance of Discipline Law, Law No 4/95, the 12th Waning of Oo Tagu, 1357ME, 26 April 1995, s 13.

Judges shall explain to any person that they are not bound to make a confession and shall only record such confession if the judge believes it is made voluntarily.¹³⁷ Involuntarily confessions by an accused are ‘irrelevant’ and inadmissible, and confessions made solely to a police officer, either by an accused or a witness, shall not be used as evidence against the accused.¹³⁸ Judges may further ‘inspect prisons, prisoner camps and police lock-ups within their jurisdictions for enabling convicted persons and those under detention to enjoy lawful rights to which they are entitled’.¹³⁹ This includes ensuring they are not subjected to torture, cruel, inhuman or degrading treatment.

Finally, no ‘characteristics of guilt’ may be associated with the accused, such as excessive restraints.¹⁴⁰

C. The presumption of innocence and the right to remain silent

Under Myanmar law, an accused may still be called to the witness stand to answer questions put to him or her by the judge as an ‘accused’ even if he or she states that he or she does not wish to give evidence on his or her behalf as a ‘witness’, which would subject an accused to cross-examination under oath.¹⁴¹ The right to remain silent includes the right to refuse to speak at all and this is not upheld under domestic law. Only Kyi Lin declined to testify as a witness subject to cross-examination; instead, he answered questions put to him by the special bench. The three other accused testified as witnesses, each over the course of several weeks. In all cases, the special bench failed to issue the complete warning as required pursuant to section 342(1) before their testimony, which could have affected Kyi Lin’s decision to testify as an accused or the other accused’s decisions to testify as witnesses. This warning includes that the court may draw negative inferences from an accused’s failure to testify as a witness, and that if an accused testifies as a witness, anything he or she says may be used against an accused or any others jointly accused.¹⁴²

International law

Every person charged with a criminal offence has the fundamental right ‘to be presumed innocent until proved guilty’.¹⁴³ Under Article 14(3)(g) of the ICCPR, every person accused of a criminal offence has the right ‘not to be compelled to testify against himself or to confess guilt’.¹⁴⁴ This right is fundamentally tied to the right to be presumed innocent and the right against torture. It includes the right not to be coerced into confessing and means that any confessions must be excluded from evidence.¹⁴⁵

137 Code of Criminal Procedure s 164(3); Courts Manual para 602.

138 Evidence Act ss 24–26. See also Code of Criminal Procedure s 163.

139 Union Judiciary Law 2010, s 68.

140 *Ibid.*, 15.

141 Code of Criminal Procedure ss 256(2) and 342.

142 Code of Criminal Procedure ss 256, 289(1) and 342.

143 ICCPR, Art 14(2); UDHR, Art 11(1); General Comment No 32, para 39.

144 *Ibid.*, General Comment No 32, para 41.

145 *Ibid.* *Berry v Jamaica*, UN Human Rights Committee, Communication No 330/1988, UN Doc CCPR/C/50/D/330/1988 (1994), para 11.7.

Domestic law

While Myanmar does not have an explicit provision affirming the presumption of innocence or the right to remain silent, the burden of proof for the existence of any fact lies on the party who wishes to prove its existence.¹⁴⁶ The recent Fair Trial Guidebook for Law Officers released by the Union Attorney-General's Office affirms that the presumption of innocence is an 'essential element of the right to a fair trial' and that the prosecution must prove guilt 'beyond a reasonable doubt'.¹⁴⁷

The same guidebook states that the accused's right to remain silent during the investigation period 'is an important right not to be compelled to incriminate oneself'.¹⁴⁸ Under section 256(2) of Myanmar's Code of Criminal Procedure, a judge must ask an accused whether he or she wishes to give evidence on his or her own behalf, and if an accused does he or she may be examined and cross-examined under oath ('as a witness') only on an accused's own volition.¹⁴⁹ If an accused does not wish to give evidence, he or she shall still be examined 'generally' by the court pursuant to section 342(2), but an accused is not under oath.¹⁵⁰ The accused's failure to give evidence must not be the subject of any comment by the law officer, but the court may draw negative inferences.¹⁵¹ Myanmar law mandates that judges inform the accused of the consequences of confessing during the investigation stage, and that judges inform the accused that if he or she testifies, any evidence an accused gives may be used against him or her or any jointly tried accused.¹⁵² Judges must also warn that if an accused remains silent, the court may make an adverse inference against him or her.¹⁵³

D. The right to guarantees necessary for a defence – failure to provide equal access to evidence and concerns regarding effective representation

Equal access to evidence

Another issue throughout the trial was the defence's access to evidence.¹⁵⁴ It was unclear exactly what the defence received and, at times, lawyers for the accused appeared surprised by materials presented by the prosecution. When the court played key CCTV footage, there were a number of issues. They initially did not turn the computer screens for the accused or their counsel to observe.¹⁵⁵ The judges instructed the clerks to skip through certain portions of the footage and close some of the images before, it appeared, everyone had a chance to see the footage. This was problematic because the lawyers were only allowed to have copies

146 Evidence Act ss 101–104. See also Code of Criminal Procedure ss 253(1) (discharge of the accused if no case has been made out); 245(1) (acquittal); 258 (acquittal).

147 Fair Trial Guidebook, see n 108, p 14.

148 *Ibid*, The Right to Remain Silent, p 29.

149 Code of Criminal Procedure s 342(1)(a); Courts Manual para 454(1).

150 Code of Criminal Procedure ss 289(2) and 342(2) (iii).

151 Code of Criminal Procedure s 342(1)(c); see also Evidence Act s 114 (courts may presume that an accused who does not answer would not have a favourable answer if they were to answer).

152 Code of Criminal Procedure ss 256 and 342.

153 Code of Criminal Procedure ss 289(1) and 342(1)(b)(c).

154 Example regarding images captured from Yangon International Airport's CCTV footage from 1 September 2017 hearing and images from evidence seized from Zeya Phyo's residence and business as discussed at the 20 October 2017 hearing.

155 See 25 August 2017 observation report on file with the IBAHRI.

of the images rather than full copies of the video footage itself.¹⁵⁶ The defence explicitly stated that they did not have sufficient time to refute the images from the airport's CCTV cameras.¹⁵⁷ Defence counsel frequently asked the bench to show them copies of exhibits that were already in evidence and the bench would produce giant paper books of bound exhibits and pass them to the defence. The observer does not know if the lawyers had access to the documents and failed to bring them to court or if they had to ask to see exhibits because they were not afforded access.

At times, the judges attempted to move the case along while sacrificing the defence's time to prepare, such as by permitting one week to prepare arguments before the charge confirmation hearing instead of the two requested by counsel.¹⁵⁸ The judges said that the public would disapprove of any delays.

Neither side showed physical evidence in court. When asking witnesses to confirm certain items identified in search forms, lawyers only showed witnesses the forms or pictures of the materials rather than the physical objects.¹⁵⁹ At times, they asked witnesses to verify lists of items without showing any document at all.¹⁶⁰ At one hearing, U Kyaw Kyaw Htike objected to the court's failure to bring the murder weapon and related bullets into court, noting that it was the defence's right to cross-examine witnesses as to those items and that to do so those items must be present in court.¹⁶¹ The judges stated the items were not present because they were dangerous and ruled that the witness's testimony was sufficient because the items were not 'vital' to the proceedings.¹⁶² At a separate hearing, a number of exhibits were admitted by the law officer – including Facebook photographs of the accused together and photographs allegedly depicting the burned evidence at Zeya Phyoo's compound – and none of these items were shown to the witness, judges or opposing counsel before the court admitted them into evidence.¹⁶³

Inability to access counsel

One critical issue was the length of time spent by the accused in detention before being brought before a judge to authorise the detention. Aung Win Tun testified that he was denied access to a lawyer during his first three days in police custody, a key point at which an accused may be under duress and coerced or encouraged to confess.¹⁶⁴ The other accused were similarly detained without proper authorisation and the observer understands that they also did not have access to counsel during that time.

156 *Ibid.*

157 See 25 May 2018 observation report on file with the IBAHRI.

158 See 2 February 2018 observation report on file with the IBAHRI.

159 See 11 August 2017 and 8 September 2017 observation reports on file with the IBAHRI.

160 See 22 September 2017 observation report on file with the IBAHRI.

161 See 15 December 2017 observation report on file with the IBAHRI.

162 *Ibid.*

163 See 19 January 2018 observation report on file with the IBAHRI.

164 See 7 September 2018 observation report on file with the IBAHRI.

Threats to the lawyers

In addition, there were reported cases of intimidation of defence lawyers during the trial to which the authorities did not appear to adequately respond. Lawyers expressed to the observer that they received regular death threats due to their involvement in the case.¹⁶⁵

In January 2018, Kyi Lin allegedly threatened the prosecuting lawyers and journalists present as police officers led him out of the courtroom, saying that they should eat now.¹⁶⁶ This is commonly understood in Myanmar as a threat to eat before one is killed. While complainant lawyers informally raised this directly to the tribunal in conversation, the judges failed to acknowledge that a threat had been made, saying only that the tribunal did not want to interfere in any disputes and that it was trying its best to preside fairly in accordance with law. The observer understands this to mean that the judges did not perceive this threat as relevant to the substantive proceedings and felt that it was an external issue to be resolved by the parties outside the courtroom.

At the same hearing, a group of nationalists stood outside the courtroom in the courtyard wearing shirts with the same threat – ‘*Htamin wa aung sa htar*’, roughly translated to ‘eat while you still can’ – allegedly first made by Kyi Lin.¹⁶⁷ The observer received information that one of the complainant lawyers sent a complaint letter to Yangon’s High Court, the State Counsellor’s Office, the Ministry of Home Affairs and others asking to change the location of the hearings to another district court or to Insein Prison to avoid additional protesters and issues of impartiality. He reportedly did not receive a response.

A number of lawyers’ associations denounced the nationalists’ actions as a violation of Article 19(b) of the 2008 Constitution as it ‘deliberately disturb[ed] the independence of justice’.¹⁶⁸ On 6 February 2018, U Aye Min, the Insein Township Administrator, filed a case against the four nationalists at Insein Township Court, alleging charges under Penal Code sections 505(b) and 189.¹⁶⁹

165 See 12 October 2017 and 15 January 2018 meeting reports on file with the IBAHRI.

166 See 19 January 2018 observation report on file with the IBAHRI. This allegedly occurred because the complainant lawyers had objected to Zeya Phyo signing documents inside the courtroom. See also Tun Tun, ‘Legal Action to be Taken Against Nationalist Supporters at U Ko Ni Trial’ (The Irrawaddy, 9 February 2018) www.irrawaddy.com/news/legal-action-taken-nationalist-supporters-u-ko-ni-trial.html accessed 14 May 2019; Zarni Mann ‘Legal Groups Fear Intimidation at U Ko Ni Trial’ (The Irrawaddy, 5 February 2018) www.irrawaddy.com/news/burma/lawyers-u-ko-ni-trial-demand-action-taken-nationalists-threatening-t-shirts.html accessed 14 May 2019.

167 See 2 February 2018 observation report on file with the IBAHRI.

168 The translated document is on file with the IBAHRI. See also ‘Legal Groups fear intimidation at U Ko Ni trial’, (The Irrawaddy, 5 February 2018) www.irrawaddy.com/news/burma/lawyers-u-ko-ni-trial-demand-action-taken-nationalists-threatening-t-shirts.html accessed 14 May 2019.

169 Ye Mon, ‘Trial against alleged assassin of lawyer Ko Ni and co-conspirators will continue’ (DVB, 10 February 2018) <http://english.dvb.no/news/trial-alleged-assassin-prominent-lawyer-ko-ni-co-conspirators-will-continue/79677> accessed 14 May 2019; Tun Tun, ‘Legal action to be taken against nationalist supporters at U Ko Ni trial’ (The Irrawaddy, 9 February 2018) www.irrawaddy.com/news/legal-action-taken-nationalist-supporters-u-ko-ni-trial.html accessed 14 May 2019. S 505(b) renders it an offence to make, publish or circulate any statement, rumour or report with intent to cause, or which is likely to cause, fear or alarm to the public or to any section of the public whereby any person may be induced to commit an offence against the state or against the public tranquility punishable with imprisonment which may extend to two years, or with fine, or with both. S 189 states: ‘Whoever holds out any threat of injury to any public servant, or to any person in whom he believes that public servant to be interested, for the purpose of inducing that public servant to do any act, or to forbear or delay to do any act, connected with the exercise of the public function of such public servant, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.’

Effective representation

Throughout the trial, Aung Win Zaw and Aung Win Tun were represented by the private lawyer U Aung Khaing, whom they hired. Aung Win Tun was accused solely of harbouring his brother and was not implicated in the murder plot. While witnesses were called on behalf of Aung Win Tun, it is important to note that a greater emphasis was placed on the defence of Aung Win Zaw (although, notably, he faced a death sentence if convicted). U Aung Khaing failed to apply for bail for Aung Win Tun until the charge against him was confirmed, nearly a year after the case began and more than a year after his initial detention in custody. To the observer's knowledge, U Aung Khaing also did not refer to Aung Win Tun in his final oral defence arguments or in his oral arguments against the confirmation of charges. The observer rarely saw U Aung Khaing interact with Aung Win Tun inside the courtroom; instead, he usually spoke directly to the three other accused.

The prosecution may also have suffered from a lack of capacity or will. According to Myanmar procedure, complainants, such as U Ko Ni's family, may hire a private lawyer to represent them in criminal cases under the law officer's supervision.¹⁷⁰ The observer was told that the complainant lawyers sought to add charges against other accused, name additional witnesses, follow the chain of possession concerning the murder weapon and ask questions to certain witnesses, but the law officer denied these requests.¹⁷¹ At several hearings, the observer saw the complainant lawyers pass notes to the law officer during his examination of witnesses. On others, when the complainant lawyers stood to ask questions or object, defence counsel objected or they were told to stop by the judges.¹⁷² These actions may have violated the equality of arms between the parties, in terms of both the critical examination and questioning of evidence presented and the potential evidence that was left out of the case.

International law

Article 11 of the UDHR requires that an accused has all the guarantees necessary for his or her defence. These guarantees include the right to legal representation, adequate time to prepare a defence and to communicate with a lawyer.¹⁷³ All accused must be able to exercise their right to legal representation from the beginning, including during questioning by the police. The right to equality of arms is a fundamental aspect of the right to a defence because it ensures that both parties have equal access to material evidence, sufficient time to prepare, and the right to call and present witnesses.¹⁷⁴ This may be violated in cases where an accused is not granted access to a lawyer from the time that he or she is first questioned, not

170 Code of Criminal Procedure s 493. Pursuant to the Attorney-General of the Union Law (2010), the law officer is responsible for 'supervising' the complainant's lawyer. See s 36(m). See also para 117 of the Courts Manual: 'The persons by whom appearances, applications and acts may be made or done as "recognized agents" of the parties to a suit are specified in Order III, Rule 2.' Order III, Rule 2 deems persons holding powers of attorney as recognised agents.

171 See 12 October 2017 meeting notes on file with the IBAHRI. Certain witnesses named by the complainants were heard on 28 July 2017. See also 25 August 2017 and 10 November 2017 observation reports on file with the IBAHRI.

172 See 23 June 2017 (by judges), 30 June 2017 (by judge), 25 August 2017 (by defence counsel) and 25 January 2018 (by judges) observation reports on file with the IBAHRI.

173 Arts 14(3)(a) and (d).

174 General Comment No 32, paras 13, 32–33 and 39.

granted a postponement when an accused's counsel is absent or where an accused does not have access to exculpatory evidence.¹⁷⁵

International human rights standards further require governments to:

‘ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference... [and that they] (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics’.¹⁷⁶

They further provide: ‘Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.’¹⁷⁷

Furthermore, international standards require prosecutors (law officers in this case) to ‘perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system’.¹⁷⁸

They must further:

‘(a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination; (b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;... and (d) Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.’¹⁷⁹

Lawyers in turn must loyally represent and advocate for their clients, including by advising clients as to their rights and obligations and by taking legal action to protect their interests.¹⁸⁰

Domestic law

Myanmar recognises a constitutional right to defence.¹⁸¹ An accused has the right to time to prepare his or her defence and the facilities to do so, including access to documents or evidence that may assist his or her defence. An accused may request and must be provided with written statements made to police officers during an investigation, subject to the court limiting access on the grounds of relevancy, expediency and the interests of justice.¹⁸² Under section 103(A) of the Courts Manual, parties are also entitled to obtain copies of police papers once admitted as exhibits and copies of confessions ‘at any stage’. For all cases

175 *Robinson v Jamaica*, UN Human Rights Committee, Communication No 233/1987, UN Doc CCPR/C/35/D/223/1987(1989) para 10.4. See also General Comment No 32, para 33.

176 Basic Principles on the Role of Lawyers, see n 63 above, Principle 16.

177 *Ibid*, Principle 17.

178 Guidelines on the Role of Prosecutors, Principle 12.

179 Guidelines on the Role of Prosecutors, Principle 13.

180 *Ibid*, Principles 12–15.

181 Art 19(c).

182 Code of Criminal Procedure s 162(2).

involving the death penalty, an accused must have a lawyer who is afforded ‘sufficient time’ to review material evidence.¹⁸³

Myanmar law prohibits lawyers from taking instructions from anyone other than the party on whose behalf they are retained.¹⁸⁴ Lawyers are required to zealously advocate for their client’s interests and may be prosecuted for negligence.¹⁸⁵ A legal aid body may be appointed if there is more than one accused.¹⁸⁶

E. Competent, independent and impartial tribunal – lack of attention paid by judges and procedural inconsistencies

Lack of attention paid by judges

While court was held on a weekly basis, the judges were not attentive at every hearing. During at least six hearings, the observer saw a member of the bench leave for several minutes without adjourning the proceedings.¹⁸⁷ The observer also saw the judges closing their eyes for portions of the hearings, although it was unclear if they were asleep.¹⁸⁸

Procedural inconsistencies

The observer identified troubling inconsistencies in procedure that could have resulted in substantive consequences, including the refusal to record arguments and the rephrasing of witness testimony by counsel and judges.¹⁸⁹ For example, at one hearing, the judges stated that they would determine whether certain questions should be considered part of the record at a later date after they stated that they would not record every single question.¹⁹⁰ They explained this in part by asserting that courts were based on ‘judicial reasoning’ and must be impartial in recording questions; thus, they would not include questions in the record that they considered ‘biased’.¹⁹¹ This means that no one other than the judges know exactly what questions were considered inadmissible and thus what portions of testimony were admitted as evidence for the court, unless counsel carefully reviewed the record each day. It also meant that the court heard answers to questions that otherwise would not be permitted and in fact were inadmissible. A common issue in Myanmar is the lack of accurate and complete transcripts from court hearings, further complicating the problem.¹⁹² In addition, in a weak judiciary, it thwarts the opportunities for lawyers to understand what types of questions lead to objections or rejections by the court.

183 Courts Manual para 457(2). See also Union Judiciary Law 2010 s 73 and Notification No 349/2015, 29 April 2015.

184 Legal Practitioners Act [India Act XVIII, 1879], section 13(a) (hereinafter “Legal Practitioners Act”).

185 Union of Myanmar Bar Council, *The Ethics of the Legal Practitioners Duties and Rights*, 7th edn, s 141; Legal Practitioners Act [India Act XVIII, 1879], s 44 (‘Legal Practitioners Act’).

186 Legal Aid Law, see n 67 above, s 32.

187 See 13 October 2017, 20 July 2018, 3 August 2018, 31 August 2018, 7 September 2018 and 2 November 2018 observation reports on file with the IBAHRI.

188 See 1 September 2017, 10 November 2017, 19 January 2018, 2 November 2018 and 30 November 2018 observation reports on file with the IBAHRI.

189 See 7 July 2017, 14 July 2017 and 9 March 2018 observation reports on file with the IBAHRI.

190 See 25 January 2018 and 9 March 2018 observation reports on file with the IBAHRI.

191 See 10 November 2017 observation report on file with the IBAHRI.

192 Justice Base, see n 33 above, p 16.

While individuals associated with the case explained to the observer that judges and counsel were rephrasing testimony because the record must only include ‘formal’ language, some also expressed concerns that the rephrasing led to inaccuracies. Complainant lawyers told the observer that they filed complaints about this practice to the High Court but did not receive a response. It was unclear how many times the rephrasing led merely to changes in language or to wholesale differences between the witness’s original testimony and what was later recorded as part of the official record. At one hearing, the rephrasing was blatant, with defence counsel inserting a number of facts during cross-examination that were not already testified to, without any objections.¹⁹³ Over the course of several hearings in 2017, the law officer read aloud the witness’s statement into evidence rather than asking the witness questions and having the witness respond under oath.¹⁹⁴ At times, the judges appeared to ask leading questions of the witness.¹⁹⁵

Failure to exclude information obtained unlawfully

Witness testimony disclosed that the police may not have adhered to proper procedures during the search of the accused’s homes and offices, but the judges failed to uphold their obligation to exclude evidence that was improperly obtained.¹⁹⁶ Several witnesses testified that they signed search forms but were not present when the police identified and confiscated the items, had no idea what items were contained in them and were not shown the items. This is in violation of Myanmar law, which states that an officer must have two witnesses attend the search and sign the search form listing the items seized in the course of the search.¹⁹⁷ Defence witnesses for Zeya Phyto contended that materials were added to the search form after it had been signed. During the search of Zeya Phyto’s house, some officials were allegedly not wearing uniforms and did not present a warrant for the search.¹⁹⁸ Similarly, the police did not present a warrant to search Aung Win Zaw’s home. The judges never made a clear statement that either the items seized or the search forms themselves would be excluded from evidence.

Judicial impartiality

The observer identified concerns regarding the lack of critical analysis of certain testimony given by monks who served as defence witnesses. Both international and domestic law assert that all persons are equal before the law and that the judiciary may not show bias or preference towards a person based on certain distinctions, including religion.¹⁹⁹ Myanmar’s new Fair Trial Guidebook for Law Officers reiterates that everyone is equal before the law and, in particular, that a person’s religion should not be

193 See 8 September 2017 observation report on file with the IBAHRI.

194 Under para 609 of the Courts Manual, witnesses are to be examined *viva voce* in open court. Under Evidence Act s 59, all facts must be proved by oral evidence except the contents of documents. Examination of witnesses, including examination in chief and cross-examination, is set out in Evidence Act ss 135 Union of Myanmar Bar Council 138.

195 See 7 July 2017 and 14 July 2017 observation reports on file with the IBAHRI.

196 Code of Criminal Procedure s 103 describing the proper procedures for a search. See also Courts Manual para 401 noting that the ‘provisions of section 103 must be strictly complied with’ and any ‘material irregularity in the conduct of a search’ must be brought to the attention of the judge.

197 Code of Criminal Procedure s 103.

198 See 1 September 2017 and 20 October 2017 observation reports on file with the IBAHRI. Under Myanmar law, any person inside a place subject to search may permit entry on production of the warrant. See Code of Criminal Procedure s 102.

199 UDHR, Art 7; ICCPR, Arts 14(1) and 26. See also General Comment No 32, para 9 (guarantee of equality prohibits any distinctions); Bangalore Principles, see n 63 above, Principle 5; and 2008 Constitution Arts 21(a), 347 and 348.

‘considered when deciding whether the accused testifies truthfully, and whether the accused deserves the protection of the law’.²⁰⁰ However, the 2008 Constitution recognises the ‘special position of Buddhism’, while acknowledging other religions’ existence.²⁰¹

The observer noted the near-complete lack of court management, cross-examination and critical engagement during testimonies given by monks. It is possible that due to the judges’ own religious beliefs or dominant cultural values in Myanmar, they permitted the hearing of evidence that was biased or false.²⁰² For example, monks who testified as character witnesses for Zeya Phyto testified that the accused was half-man, half-monk and that he could levitate.²⁰³

This deference is significant because religious sermons from extremist monks were found in Zeya Phyto’s company’s office. One potential motive for this crime, somewhat explored during the trial, was U Ko Ni’s religious identity as a Muslim in a predominantly Buddhist country. Witnesses stated that those sermons were given as gifts and that Zeya Phyto presented himself as a devotee Buddhist, and denied that he was an extremist.

In a country where legitimising forces, such as the rule of law and courts, are perceived as a form of control or as lacking sufficient independence, the moral authority that monks possess increases.²⁰⁴ It is noteworthy then that the Chief Judge did attempt to push those witnesses to hurry their testimony or to avoid repetitive testimony, although not nearly on enough occasions.

Failure to address perceived corruption by clerks and police officers

The observer heard allegations that bribes were a regular occurrence from both sides, but never saw money change hands. The observer did see Zeya Phyto’s wife, Thida Lwin, regularly buy water and snacks for defence counsel and the police officers sitting inside the courtroom. This could have encouraged the officers to treat the accused with more care than they would have treated other accused individuals, including in the manner in which the accused were held and their access to information, for example, the ability to read notes passed to them by their wives, and to write notes and sign documents unrelated to the proceedings in the courtroom.²⁰⁵ At times, the observer noticed paper bags being passed between family members of the accused and court clerks – on one occasion, the observer saw a clerk lock the paper bag up in a locker toward the front of the courtroom – but the contents remained a mystery.²⁰⁶ These actions could have garnered favour among the clerks towards the accused, resulting in increased access to documents, including witness examinations, which normally would be delayed and at times denied.

200 Fair Trial Guidebook, see n 108 above, p 9.

201 E Michael Mendelson, ‘Religion and Authority in Modern Burma’ (1960) 16(3) *The World Today* 110; 2008 Constitution ss 361–362.

202 See 30 November 2018 observation report on file with the IBAHRI.

203 *Ibid.*

204 Hiroko Kawanami, ‘Charisma, Power(s) and the Arahant Ideal in Burmese-Myanmar Buddhism’, (2009) 23(2) *Asian Ethnology: Power, Authority, and Contested Hegemony in Burmese-Myanmar Religion* 211.

205 See 22 September 2017 and 19 January 2018 observation reports on file with the IBAHRI.

206 See 1 November 2018 observation report on file with the IBAHRI.

International law

Under Article 10 of the UDHR, individuals are entitled to a ‘fair and public hearing by an independent and impartial tribunal’.²⁰⁷ This is an ‘absolute right’ that shall not be limited.²⁰⁸ It both ‘entitles and requires the judiciary’ to ensure that proceedings are fair and that all actors respect the rights of the parties.²⁰⁹ Indeed, all government and other institutions have a duty to ‘respect and observe the independence of the judiciary’.²¹⁰ Judges must be free from any external, ‘unwarranted’ interference, influence or pressure from any other branch of government and any individual to decide the issues before them based on the facts presented and in accordance with the law.²¹¹ Judges must be unbiased, meaning that they are truly impartial and that observers perceive them as being impartial, in that they have no personal interest in the case and do not promote one side over the other.²¹²

Finally, judges must have the legal knowledge and skills, including integrity and appropriate training, necessary to preside competently over the proceedings.²¹³

Domestic law

Myanmar affirms the independence of the judiciary as a key constitutional principle and asserts that the three branches of power, including the judiciary, ‘are separate... to the extent possible, and exert reciprocal control, check and balance among themselves’.²¹⁴ A code of ethics for judges also exists, affirming the requirement that judges act competently, including maintaining their knowledge and skills.²¹⁵ Judges are required to ensure inadmissible evidence shall not be used as in courts.²¹⁶ Judges are ultimately responsible for court management, including addressing inappropriate behaviour in the courtroom by clerks and police.²¹⁷

F. Use of the mandatory death sentence

The bench convicted Kyi Lin and Aung Win Zaw for the premeditated murder of U Ko Ni and sentenced them to the mandatory death penalty. A mandatory death sentence violates absolute, non-derogable rights under international law and is inherently incompatible with Myanmar’s constitutional guarantees of the right to life.²¹⁸

207 See also ICCPR, Art 14(1); General Comment No 32, para 19; UN Human Rights Committee, General Comment No 29: Art 4: Derogations during a State of Emergency, UN Doc CCPR/C/21/Rev1/Add11 (2001), para 16; and International Committee of the Red Cross, Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, Volume 1: Rules, Rule 100, pp 352–356 www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-icrc-eng.pdf accessed 14 May 2019.

208 *Ibid*, General Comment No 32 para 19.

209 Basic Principles, Principle 6.

210 *Ibid*, Principle 1.

211 Bangalore Principles, Principle 1; Basic Principles, Principles 2–4.

212 General Comment No 32, para 21; Bangalore Principles, Principle 2.

213 *Ibid*, Bangalore Principles, Principle 6 and Basic Principles, Principle 10.

214 See 2008 Constitution Arts 11(a) and 19(a) and (c). See also Union Judiciary Law 2010 s 3(a).

215 Code of Judicial Ethics for Myanmar, see n 42 above, ch 3, Art 4. See also Office of the Supreme Court of the Union, Judicial Strategic Plan, ‘Towards Improving Justice for All’ 2018–2022 www.unionsupremecourt.gov.mm/sites/default/files/supreme/stplan2018eng.pdf accessed 14 May 2019.

216 Evidence Act ss 24–26. See also Code of Criminal Procedure s 163.

217 Courts Manual para 13.

218 See 2008 Constitution Art 353.

However, it is unlikely Myanmar will execute them and also unlikely that they will serve full life sentences.²¹⁹ Myanmar has not officially executed a person since 1988; in 2014, former President Thein Sein commuted all death sentences to life imprisonment.²²⁰ However, recently enacted laws continue to include the death penalty as a potential punishment and the mere possibility that a mandatory death sentence could be imposed is a significant rights violation.

International law

Death sentences, whether mandatory or simply potential, violate individuals' inherent right to life.²²¹ Mandatory death sentences in particular are prohibited as they remove a court's ability to consider mitigating circumstances or degrees of reprehensibility.²²² All countries must work towards the abolition of the death penalty. In countries where the death penalty is in place, any death sentence must be considered an 'exceptional measure'.²²³ In every case involving the death penalty, the accused must be afforded a right of appeal.²²⁴

The IBAHRI Council Resolution on the abolition of the death penalty, adopted on 15 May 2008, and the 2016 IBAHRI report *Forced to Kill: The Mandatory Death Penalty and its Incompatibility with Fair Trial Standards* maintain that the mandatory death penalty is illegal under the justice system of international law. Further, any procedure under domestic law that obliges a court to impose the death penalty is inherently flawed.

Domestic law

In cases of premeditated murder, Myanmar imposes a mandatory death penalty.²²⁵ A convicted individual has the right to appeal within seven days.²²⁶

219 'U Ko Ni Assassination: The Prosecution Lawyer's View of the Trial' (The Irrawaddy, 2 February 2019) www.irrawaddy.com/datetime/u-ko-ni-assassination-prosecution-lawyers-view-trial.html accessed 14 May 2019 (noting that the state will likely commute their sentences to indefinite terms, then to 20 years in prison, then again through the parole process, resulting in ten to 15 years in prison).

220 'Myanmar Sentences 2 to Death in killing of Suu Kyi aide' *AP News* (New York, 15 February 2019) www.apnews.com/91fdde2dc6e5473f9eb033b187d9443c accessed 14 May 2019; Melissa Crouch, 'The death penalty paradox in Buddhist Myanmar' (The Interpreter, 18 March 2019) www.lowyinstitute.org/the-interpreter/death-penalty-paradox-buddhist-myanmar accessed 13 May 2019.

221 ICCPR, Art 6. See also *Weerawansa v Sri Lanka*, UN Human Rights Committee, Communication No 1406/2005, UN Doc CCPR/C/95/D/1406/2005 (2009).

222 See UN Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc A/HRC/4/20, 2007, paras 55–66; UN GA, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/67/279, 2012, para 59.

223 UN Human Rights Council, General Comment No 6: Art (right to life) (1982), para 7.

224 ICCPR, Art 14(5) and General Comment No 32, paras 45 and 51.

225 Penal Code s 302(1)(b).

226 Under para 584 of the Courts Manual, the accused must file an appeal within seven days if he or she is convicted of a capital sentence. Under the Limitation Act ss 153–155, the time to submit an appeal from a district court to a high court is 60 days.

V. Findings – Positive Aspects

A. Right to be tried without undue delay – length of court proceedings/undue delays

While the proceedings lasted for more than two years, attempts were made to expedite the proceedings. The tribunal held weekly (and after January 2018, twice-weekly) hearings, and often hearings in the country are not that regular. After 2 February 2018, the judges explained that they were required to submit weekly court reports because the case had lasted for more than a year, demonstrating that the judiciary was diligently following and encouraging the bench to reach a conviction or acquittal. The IBAHRI attributes the majority of delays to four main reasons.

First, the defence named 50 witnesses, many of whom were character witnesses who gave irrelevant and unreliable testimony or were witnesses who had previously testified twice (both as prosecution witnesses and then again on recall).²²⁷ Second, many witnesses failed to attend court when scheduled or were told to come on another day so they were not present when it could have been possible to hear their testimony.²²⁸ Most hearings ran from 1030 until 1200, with the court only hearing the testimony of two to three witnesses. This appeared to be the result of how the lawyers called witnesses; for example, the judges asked to continue the proceedings on multiple occasions and stressed the importance of keeping the case moving, but defence counsel would state that witnesses were not present because they had scheduled them for the following hearing.²²⁹ At one hearing, the judges asked the prosecution to identify important witnesses and remove those who would only provide redundant testimony.²³⁰ It is unclear if those witnesses were ever removed. Third, at times defence counsel could not attend due to other commitments; however, counsel never informed the court in advance.²³¹ Towards the end of the case, the counsel for Aung Win Zaw and Aung Win Tun was absent but the court did not adjourn the proceedings.²³² No one addressed the counsel's absence. Fourth, both sides filed revision petitions challenging the confirmed charges in early March 2018 to the High Court. The High Court took four months to render a decision. During that period, the Northern District Court adjourned all proceedings as the paper case files were with the High Court.

International law

International law affords all those charged with a criminal offence the right to be tried without undue delay.²³³ This helps to ensure the fairness of the proceedings because it makes it less likely that an accused's right to liberty will be violated and more likely that evidence, including the memories of witnesses, will be

227 See 10 November 2017 observation report on file with the IBAHRI (judges asking the defence to lead witnesses rather than simply permit them to state whatever they wanted).

228 Eg, the final witness was summoned by defence counsel on three separate occasions before the prosecution sought to remove that witness from the defence's witness list.

229 See 10 November 2017 and 2 February 2018 observation reports on file with the IBAHRI.

230 See 28 July 2017 observation report on file with the IBAHRI.

231 See 15 September 2017 observation report on file with the IBAHRI.

232 See, eg, observation reports on file with the IBAHRI dated 30 November 2018, 10 January 2019 and 11 January 2019. This was vastly different from earlier hearings. See, eg, 15 September 2017 observation report where Kyi Lin requested an adjournment because his counsel was not present.

233 ICCPR, Art 14(3)(c).

preserved.²³⁴ Delays of more than two years between the date of arrest and the beginning of a trial amount to violations of that right.²³⁵

Domestic law

While Myanmar law contains provisions for the accused to be tried as soon as possible,²³⁶ and for administrative arrangements to ensure this, such as sequential hearings,²³⁷ it does not happen in practice. Most cases face frequent adjournments and rarely have proceedings on a weekly basis, despite powers afforded to judges to move cases along. Judges can issue summons to compel witnesses to attend and warrants in cases in which the witness fails to appear without a reasonable excuse despite proof of service or where the court believes the witness will not obey.²³⁸ A recent Supreme Court notification reminds judges of their power to dismiss stalled cases, including by summoning witnesses who fail to appear on three separate occasions and dismissing those who fail to appear a fourth time.²³⁹ Judges are also under a duty to avoid delays and must make reports to their superiors if an adjournment is set to last longer than 15 days.²⁴⁰ A 2018 notification on case management further pushes the judiciary to ‘reduce delayed cases’ by delineating cases into categories by complexity and setting standard timeframes for completing those cases, such as 270 days for complicated criminal cases.²⁴¹ The same notification makes clear that it is the responsibility of all judicial actors to try and complete cases ‘regularly and effectively’.²⁴² Along the same lines, law officers must complete criminal cases within six months or report reasons for the delay to their superior.²⁴³ The 2017 Judicial Code of Ethics emphasises that it is ‘essential’ for judges to avoid delays²⁴⁴ and the Fair Trial Guidebook for law officers asserts that delays may violate the right to presumption of innocence and to defend oneself.²⁴⁵

B. Right to a public hearing – public access to the courtroom

With respect to the observer’s own access, the observer and interpreter met with the Chairman U Tin Htwe on the first day of monitoring, who explained that while the court was open, he was concerned about security in the courtroom if an international observer attended the proceedings.²⁴⁶ He said that his primary worry

234 See General Comment No 32, para 35.

235 *Henry and Douglas v Jamaica*, UN Human Rights Committee, Communication No 571/1994, UN Doc CCPR/C/57/D/571/1994 (1996).

236 Courts Manual para 466. See also paras 13 and 22 (forbidding unjustifiable delay); Union Judiciary Law 2010 ss 67–68 (judges may inspect prisons, prisoner camps and police lock-ups to prevent undue delays); *Maung Tin Ngue v Union of Burma* (1966) BR 639 (adjudication should be speedy).

237 Courts Manual para 24. See also paras 468 and 608 (if a case is adjourned even once without examining all witnesses in attendance, it has priority over others to be heard on the following day).

238 Code of Criminal Procedure ss 69; 4(w) (defining warrant cases), 252(2) and 257(1). See also Courts Manual para 451. For warrants, see Code of Criminal Procedure ss 90(a)–(b).

239 Supreme Court Notification 114/424 PTC (2855/2015).

240 Courts Manual para 466.

241 Supreme Court of the Union, Notification No 649/2018 (1 August 2018).

242 *Ibid.*

243 Union Attorney-General Rules, rule 109(e).

244 Code of Judicial Ethics for Myanmar, see n 42 above, ch 3, Art 2.

245 Fair Trial Guidebook, p 51.

246 See 16 June 2017 observation report on file with the IBAHRI.

was about secret recordings and any negative reports deriving from the observation, and asked them not to interfere in the proceedings.²⁴⁷ The court readily accepted the change in observer in September 2017 and never refused access to the IBAHRI's observer and interpreter.

At times, the public's ability to access the proceedings changed depending on the political context and other cases occurring at the court, but as mentioned, the observer and interpreter were always able to monitor the proceedings. While the now-infamous Official Secrets Act case against two Reuters' journalists, Wa Lone and Kyaw Soe Oo, was ongoing in the same courtroom from April to October 2018, the clerks instituted a procedure requiring all observers to provide a paper copy of their passport or identification card and state their home address. This may have resulted from a perceived need to organise the many observers attending the Reuters' hearings, but at most ten observers attended the U Ko Ni hearings, with the majority of those individuals being the accused's family members.

Once the Reuters' case ended, the clerks stopped requiring paper copies, with the exception of the verdict hearing in this case. The observer and interpreter never provided their home addresses even when asked; instead, they gave a vague business address. Notwithstanding the hard-copy issue, the clerks always required all observers to sign in at the security station, with the court clerks writing their name and passport or identification number in a notebook. After two years of hearings, many of the clerks recognised the observer and interpreter and did not need to ask for any information.

During the revision petition hearings at the High Court in mid-2018, the observer and interpreter faced significant difficulties gaining access.²⁴⁸ The front entrance to the High Court consists of a security station, which immediately blocks access to the courthouse grounds. A clerk asked the observer and interpreter to complete a form, which sought their acknowledgment that they were media and could not interview anyone or take any pictures. They explained that they were not members of the media but the clerk persisted and they provided their names, identification, signatures and the IBAHRI's contact information. Another individual took the completed forms inside the court compound and a second clerk came outside with the forms and signed them. The observer and interpreter were led inside by a male clerk, who escorted them through the High Court, waited for them outside the courtroom and walked them out to the exit when the proceedings ended. While the observers were permitted to access the proceedings, members of the public may have felt intimidated and thus discouraged to attend court if they were subjected to the same level of scrutiny.

International law

Every individual is entitled to a 'fair and public hearing' in the 'determination of his rights and obligations and of any criminal charges against him'.²⁴⁹ A tribunal may only exclude members of the public in exceptional circumstances and only to the extent strictly necessary by making specific findings

²⁴⁷ *Ibid.*

²⁴⁸ See 16 March 2018 observation report on file with the IBAHRI.

²⁴⁹ UDHR, Art 10; see also ICCPR, Art 14(1).

based on law, such as for reasons of national security or to protect the private lives of individuals.²⁵⁰ As long as they do not deter or prohibit the public, reasonable security checks are permissible.

Domestic law

Myanmar's Constitution recognises the right to a public hearing and other laws reiterate that right, with the only exceptions concerning cases involving juveniles and the Official Secrets Act.²⁵¹ Notably, the law affords judges sole discretion to exclude the public generally and to 'maintain order and prevent disturbances', in addition to the exceptions identified.²⁵² The Courts Manual, which offers guidance on Myanmar law, states that judges must hear all evidence, including confessions, in open court and must publicly pronounce final judgments.²⁵³ Myanmar's recent Fair Trial Guidebook, while not law, recognises that a public hearing affords the parties and the public transparency, and lends credibility to the judges' ultimate verdict, including the notion that the decision was independent.²⁵⁴

VI. Conclusion

The IBAHRI finds, in part, that the proceedings and conviction of all four accused violated their rights:

- to a fair trial, including their rights to liberty;
- not to be subjected to torture, cruel, inhuman or degrading treatment or punishment;
- to an adequate defence;
- to be tried by a competent, independent and impartial tribunal; and
- their right to life.

The special bench did not always present competence and on certain occasions failed to control the courtroom, manage witness testimony or exclude evidence obtained through alleged ill-treatment or coercion. The failure to provide the full and complete warning to each of the accused before they testified is significant because it may have affected their right to remain silent. Also important is the mandatory imposition of the death penalty for Kyi Lin and Aung Win Zaw. Concerns about the pre-trial investigation, including the alleged mistreatment of the accused in custody to encourage them to confess, and to the alleged forced testimony obtained from some of Zeya Phyo's employees are substantial violations of fair trial rights.

250 ICCPR, Art 14(1); see also UN Commission on Human Rights, 'The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights', 28 September 1984, E/CN.4/1985/4, para 38(a); and General Comment No 32, para 29.

251 See 2008 Constitution Art 19(b); Code of Criminal Procedure s 352; Union Judiciary Law 2010 s 3(b); *Maung Kyaw Aye v Union of Burma* (1953) BLR 114; and Courts Manual para 48(1). Exceptions: Child Law 1993 s 42(b), Official Secrets Act 1923 s 14 (upon the prosecution's request).

252 Courts Manual para 48(1).

253 Courts Manual paras 616, 602(1) and 652.

254 Fair Trial Guidebook, Standards Applicable to the Trial Stage, IIIB.

However, it is also worth noting that the special bench held twice-weekly hearings, which is typically unheard of in Myanmar's court system. This reflects the significance of the case and the judges' attention to it. In addition, some of the challenges faced during the proceedings were due to the defence and not the state. At times, the accused appeared to delay the proceedings through their own testimony and their failure to secure witness attendance. The consistent level of legal argument, frequent citations to precedent, and objections and challenges to evidence submissions observed in this case is also noteworthy and may be considered a useful, empowering example to others in Myanmar's legal field.

The observation, however, has uncovered evidence for grave concern about the administration of justice in general in Myanmar. Police in this case were allowed to obtain and submit evidence obtained through questionable means and to unlawfully detain the accused with impunity. Lawyers and judges were unable or unwilling to apply international and even domestic human rights standards for fair trial in the proceedings. In a proceeding with so much international scrutiny, where attempts were made to at least appear fair, failures are significant. What is clear is that there is a need for steps to be taken to ensure agents of the criminal justice system, including lawyers and the judiciary, apply and protect fair trial rights throughout the criminal justice process.

VII. Recommendations

In light of these findings, the IBAHRI makes the following recommendations.

The Union Attorney-General's Office and Parliament (Myanmar Pyidaungsu Hluttaw) should:

- eliminate the death penalty from all laws, especially those that mandatorily impose capital punishment;
- amend the Constitution and the Code of Criminal Procedure to include a specific provision affirming the right to presumption of innocence and other fair trial rights; this should include the right to remain silent during trial and the prohibition of any adverse inferences being drawn from the defendant's silence;
- sign, ratify and implement effectively those core human rights treaties to which Myanmar is not yet a party, including the ICCPR and the CAT, and ensure that national legislation adheres to the rights and obligations set out in both; and
- ensure law officers are aware of their duty to 'perform their duties fairly, consistently and expeditiously', including to take into account views and concerns of victims when their personal interests are affected in accordance with international human rights standards.

The Ministry of Home Affairs, including the Myanmar Prisons Department and the Myanmar Police Force, should:

- end the use of indeterminate, coercive interrogations at Aung Tha Pyay interrogation centre in Yangon;
- ensure that every individual brought to court to make a confession does so voluntarily and with full knowledge of the consequences;
- ensure all police and prison authorities are knowledgeable about international and national human rights standards and their obligation to respect and protect them;

- provide appropriate training on how to conduct non-coercive investigations; if sufficient and appropriate guidelines do not exist, the Ministry of Home Affairs should create or revise them with the assistance and advice of experts;
- allow accused individuals immediate, confidential access to lawyers and to their families at the first opportunity after their arrest and to continued confidential access thereafter, including to health services and other necessary services; and
- conduct investigations into alleged cases of human rights violations by police and prison officials, and ensure those found responsible for violations are held accountable through disciplinary and criminal proceedings.

The Office of the Supreme Court of the Union should:

- pending appropriate and relevant legal reform geared towards protecting the right not to incriminate oneself, train judges on how to provide a full and appropriate warning to all accused who testify on their own behalf;
- ensure judges act in accordance with the Office of the Supreme Court of the Union’s 2017 Judicial Code of Ethics;
- ensure sequential hearings are held on a regular basis so that trials are not unduly delayed;
- empower judges to engage in court management through trainings and dialogues, including on issues such as recognising involuntary confessions in courts, challenging false testimony, excluding inadmissible or improperly obtained evidence;
- ensure judges are equipped to and do hold police accountable for torture or ill-treatment of an accused, witness or any other individual, through filing direct actions against the officers and raising the issues with their superiors when they come to light during court proceedings; and
- ensure judges and court staff provide equal access to counsel to the entire case file, including statements made to police officers and all potentially exculpatory evidence, within 24 hours after a request is made and with a receipt indicating the amount permitted under law.

The Bar Council, ILAM and other Bar Associations in the country should:

- ensure they support lawyers in the country, including through bringing cases of threats, intimidation, harassment or other improper interference with the functions of the legal profession before the relevant authority with a view to ensuring those responsible are brought to justice;
- ensure lawyers are empowered to identify and challenge violations of the rights of their clients during criminal proceedings and actually bring challenges to violations when they occur; and
- ensure lawyers are aware of the need to act in accordance with ethical standards for the profession; in this regard, the code of ethics developed by the ILAM with broad consultation of international and domestic lawyers and entities concerned with lawyers serves as a basis for understanding this ethical standard.

The Ministry of Home Affairs, the Office of the Supreme Court of the Union, the international community, local civil society organisations and technical experts should:

- train defence lawyers, law officers, judges and police officers on fair trial rights, with an emphasis on exploring practical solutions and empowering individuals in their appropriate roles; training that includes all justice sector actors would afford opportunities for honest discussion and ensure coordinated messaging;
- provide technical support and expertise to the police on the use of non-coercive methods of investigation; and
- provide technical and financial assistance necessary for the improvement of the criminal justice system in the country.

Annex 1: The Accused

Kyi Lin

Convicted gunman. Formerly convicted of stealing Buddha statues and sentenced to seven years in prison in 1985.²⁵⁵ In 2003, he was convicted of stealing Buddha statues and antiques with Aung Win Zaw and sentenced to 27 years in Obo Prison in Mandalay. He was released in 2014 after receiving a presidential pardon. Kyi Lin and Aung Win Zaw were cellmates in prison.

Aung Win Zaw

Brother of Aung Win Khaing and Aung Win Tun. Former cadet in the 34th intake of the Defence Services Academy from 1989–1993 and later captain, but received a jail sentence while serving in the military in 1996. He was sentenced to 27 years in prison for stealing Buddha statues with Kyi Lin and was similarly released in 2014 after a presidential pardon. He testified that he met Kyi Lin in Monywa in about 2002.²⁵⁶ He spent six years with Kyi Lin in Obo Prison in Mandalay from 2003–2009 and was Kyi Lin's cellmate for a certain period of time.²⁵⁷ He allegedly confessed that his brother Aung Win Khaing was behind the plot to assassinate U Ko Ni.

Zeya Phyo

Former cadet of the 38th intake of the Defence Services Academy, military captain and instructor at the Central Intelligence Unit until he resigned in 2004. He established a number of companies, including AIS Company, 38-Group, Shwe War Phyo Company and his main company, Zeya Phyo Company, which competed for government tenders in construction. He met Aung Win Khaing while they attended the Defence Services Academy and testified that he helped Aung Win Khaing to establish a business called Young Wa Phyo, which was allegedly unrelated to Zeya Phyo's businesses. According to a 23 February 2017 press release by the President's Office, Zeya Phyo established a company with Aung Win Khaing in 2016, with Aung Win Khaing as Managing Director.

Aung Win Tun

Brother of Aung Win Khaing and Aung Win Zaw. He is alleged to have attempted to harbour Aung Win Zaw and help him to escape to Hpa-An by driving him in his car.

Aung Win Khaing

Brother of Aung Win Zaw and Aung Win Tun. He graduated from the 36th intake of the Defence Service Academy and retired as a lieutenant-colonel. He attended the Defence Services Academy with Zeya Phyo and was his alleged business partner.

²⁵⁵ President's Office Release, see n 82 above.

²⁵⁶ See 2 August 2018 observation report on file with the IBAHRI.

²⁵⁷ See 12 July 2018 observation report on file with the IBAHRI.

Annex 2: Case Timeline Including Observation Dates

Date	Event
29 January 2017	U Ko Ni shot and killed by Kyi Lin at Yangon International Airport. Taxi driver U Nay Win shot and killed. Kyi Lin arrested. Complaint by Police Captain Moe Naing against Kyi Lin for the murder of U Ko Ni and U Nay Win.
2 February 2017	Reports that police arrested Myint Swe.
10 February 2017	Claim that Aung Win Khaing was last seen in Nay Pyi Taw at the Zeya Phyto Company compound.
15 February 2017	Police order calls for arrest of Aung Win Khaing but is only sent to six police stations in Yangon.
25 February 2017	Press briefing on conclusion of military investigation by Minister for Home Affairs Lieutenant-General Kyaw Swe. Accused motivated by 'extreme nationalism' and 'personal grudges'.
1 March 2017	Military press conference (General Mya Tun Oo) denying any army involvement in shooting.
3 March 2017	Arrest warrant issued by Yangon Northern District Court for Aung Win Khaing solely covering his home address in Dawbon Township.
3 March 2017	Case filed received at the Northern District Court. Pre-trial proceedings begin. The four accused are brought to court, with the judges explaining the charges against them and issuing remand orders.
7 March 2017	Original Order No 39/2017 from the Chief Justice of the Union Supreme Court instructing the Northern District Court to form a special tribunal to hear the case with District Judge U Tin Htwe as Chairman, Deputy District Judge U Tin Maung Myint (member) and Deputy District Judge U Ohn Khaing (member) presiding.
14 March 2017	Order No 39/2017 replaced with Order 44/2017 instructing Northern District Court to form a special tribunal with District Judge U Tin Htwe (Chairman), Yangon Eastern District Co-Judge U Zaw Htoo (member) and Northern Deputy District Judge U Ohn Khaing (member).
16 March 2017	Inquiry begins in Northern District Court with accused arriving for registration.
17 March 2017	Complainant requests Northern District Court issue arrest warrants in Naypyidaw.
18 March 2017	Counsel submit power of attorney for Aung Win Zaw and Zeya Phyto. U Nay La, U Khing Maung Htay and U Min Min Zaw submit power of attorney to represent the family of U Ko Ni.
24 March 2017	U Kyaw Kyaw Htike and U Thant Zin Oo submit power of attorney for Kyi Lin. U Aung Khaing submits power of attorney to represent Aung Win Tun along with Aung Win Zaw.
24 March 2017	Examination of illegal arms possession and transportation charges through the police official My Tun Kyaw, who initially submitted Case No 46.
31 March 2017	Examination of Police Captain Moe Naing, who initially submitted Case No 45.
Early April 2017	Major General Zaw Win holds press conference in Naypyidaw and says police have searched all townships and villages in Naypyidaw for Aung Win Khaing.
28 April 2017	Complainant lawyers present criminal revision petitions to the Yangon Division High Court requesting that the court issue an arrest warrant in Naypyidaw for Aung Win Khaing.
22 May 2017	High Court orders Northern District Court to issue further directions regarding search for Aung Win Khaing.
26 May 2017	Northern District Court orders more thorough searching for Aung Win Khaing.
9 June 2017	Police tell court no new leads to find Aung Win Khaing.
16 June 2017	IBAHRI trial observation begins.
23 June 2017	Northern District Court rules that the police have done everything they can to find Aung Win Khaing, and they must continue to search for him. As they cannot find him, the proceedings must continue without him.
30 June 2017	Substantive proceedings begin. Evidence heard from a police officer about the CCTV footage at Yangon International Airport.
7 July 2017	Evidence heard from two police officers who were on duty at Yangon International Airport.
14 July 2017	Evidence heard from two police officers who were on duty at Yangon International Airport.
21 July 2017	Evidence heard from two lay witnesses who work at Yangon International Airport and a police officer who was on duty at Yangon International Airport.
28 July 2017	Evidence heard from three lay witnesses who work at Yangon International Airport.
4 August 2017	Evidence heard from three lay witnesses who are taxi drivers and were at Yangon International Airport.

11 August 2017	Evidence heard from one police officer involved in seizing evidence, two lay witnesses involved in seizing evidence, one lay witness who is a taxi driver and was at Yangon International Airport and one lay witness who works at Yangon International Airport and was there at the time of the incident.
18 August 2017	Evidence heard from U Ko Ni's daughter, Dr Yin New Kaing, a monk, a police officer and a ward administrator about the events at Yangon International Airport, Kyi Lin's living situation and what was seized from the monastery where he was living.
25 August 2017	Evidence heard from three lay witnesses, a police officer and a security guard. Airport CCTV footage played.
1 September 2017	Continued cross-examination of a member of Yangon Aerodrome Company security personnel and evidence heard from a police officer and a ward administrator.
8 September 2017	Evidence heard from three lay witnesses.
15 September 2017	Adjourned due to absence of Kyi Lin's lawyer.
22 September 2017	Testimony from three police officer witnesses and two lay witnesses.
29 September 2017	Testimony from one police officer witness and three lay witnesses.
13 October 2017	Testimony from one police officer witness and four lay witnesses.
20 October 2017	Testimony from one police officer witness and two lay witnesses, all regarding the search of Zeya Phyto's home.
27 October 2017	Testimony from two lay witnesses regarding the search of a house allegedly used for Zeya Phyto's business.
10 November 2017	Testimony from two doctors who examined the bodies and one lay witness regarding photographs obtained from a Facebook account.
17 November 2017	No IBAHRI observation.
24 November 2017	Testimony from two lay witnesses who are both 100-household leaders from Insein Township who served as witnesses to police searches related to Zeya Phyto.
1 December 2017	Testimony from two township judges in Naypyidaw who presided over the confessions of individuals concerning the burning of alleged evidence.
8 December 2017	Testimony from three staff members of Zeya Phyto's business compound in Nay Pyi Taw who submitted prior statements to township judges from last week's hearing concerning the destroyed evidence.
15 December 2017	Testimony from members of the Criminal Investigation Department (CID) concerning ballistic evidence; the CCTV images and telephone records of Aung Win Khaing, Aung Win Zaw and Kyi Lin from 29 January 2017; and items obtained from Zeya Phyto and Kyi Lin that were examined by the technology department of the CID.
	No further IBAHRI observations in 2017.
2018	
12 January 2018	Testimony from a police officer stationed at the airport concerning the charges under sections 19(d) and (f) of the Arms Act against Kyi Lin and Aung Win Zaw.
19 January 2018	Testimony from the investigating officer concerning all charges against the accused.
25 January 2018	Cross-examination of the investigating officer by all defence counsel.
2 February 2018	Closing arguments on prosecution's evidence by law officer and all defence counsel before next week's charge confirmation hearing.
9 February 2018	Charges against the accused are confirmed. Kyi Lin is charged under sections 302(1)(b) and 302(2) of the Penal Code and sections 19(d) and (f) of the Arms Act. Aung Win Zaw is charged under section 302(1)(b) of the Penal Code and sections 19(d) and (f) of the Arms Act. Zeya Phyto is charged under section 302(1)(b) of the Penal Code. Aung Win Tun is charged under section 212 of Penal Code. Aung Win Khaing is charged in his absence under section 302(1)(b) of the Penal Code.
16 February 2018	The defence recall their first prosecution witnesses, all police officers who previously testified as to events on the day of the crime at Yangon International Airport. U Aung Khaing requests bail for Aung Win Tun.
22 February 2018	The court grants Aung Win Tun bail. Two guarantors pay MMK 50m (the equivalent of £28,400) and guarantee his presence at all future hearings.
23 February 2018	The defence recall five prosecution witnesses, including taxi drivers present at Yangon International Airport on the day of the incident and investigating police officers.
8 March 2018	A new judge presides over the hearing as a result of the Chief Judge retiring on 6 March 2018. The judge who presided as of January 2018 is now the Chief Judge. The defence recall five prosecution witnesses, including CCTV camera operators from Yangon International Airport.
9 March 2018	The defence recall five prosecution witnesses, including U Ko Ni's daughter, a monk from the monastery where Kyi Lin stayed during January 2017 and police officers who investigated the case.
15 March 2018	The defence recall seven prosecution witnesses, including the investigating officer and those involved in the search of Zeya Phyto's company and house.
16 March 2018	The High Court hears argument concerning the admission of the revision petitions submitted by U Kyaw Kyaw Htike and Daw Pa Pa Win's assistant.

22 March 2018	The Chief Judge adjourns until 5 April 2018, confirming that the revision petitions before the High Court are under consideration. Testimony from the accused and their named witnesses cannot continue until those have been decided. It is also understood that a petition was filed by Robert San Aung at the High Court alleging that the accused all violated the Anti-Terrorism Act.
5 April 2018	The Chief Judge adjourns the proceedings until 19 April 2018 as the High Court has not decided on the revision petitions.
19 April 2018	The Chief Judge adjourns the proceedings.
25 May 2018	The High Court hears arguments concerning the revision petitions.
18 June 2018	The High Court renders a decision on the revision petitions and declines to add the counterterrorism charges; dismisses the Arms Act charges relating to the import, export and possession of firearms against Aung Win Zaw; and amends the charges against Zeya Phyo from conspiracy to commit murder to aiding and abetting an offender (sections 302(1) (b) and 109 of the Penal Code).
28 June 2018	The accused plead to all amended charges and submit witness lists.
5 July 2018	The accused provide the court with addresses for their witnesses. Kyi Lin agrees to testify as an accused.
12 July 2018	Kyi Lin testifies as an accused.
13 July 2018	Aung Win Zaw testifies as a witness.
20 July 2018	Aung Win Zaw continues his testimony.
26 July 2018	No IBAHRI observation. Aung Win Zaw continues testifying.
27 July 2018	No IBAHRI observation. U Nay La cross-examines Aung Win Zaw.
2 August 2018	No IBAHRI observation. U Nay La cross-examines Aung Win Zaw.
3 August 2018	No IBAHRI observation. U Nay La cross-examines Aung Win Zaw.
9 August 2018	U Kyaw Kyaw Htike and Daw Pa Pa Win examine Aung Win Zaw. U Aung Khaing redirects Aung Win Zaw.
10 August 2018	Zeya Phyo testifies as a witness.
16 August 2018	No IBAHRI observation. Zeya Phyo testifies as a witness.
17 August 2018	No IBAHRI observation. Zeya Phyo testifies as a witness.
23 August 2018	U Nay La cross-examines Zeya Phyo.
24 August 2018	U Nay La cross-examines Zeya Phyo
30 August 2018	Court adjourns due to non-attendance of counsel for Kyi Lin, Aung Win Zaw and Aung Win Tun.
31 August 2018	U Nay La cross-examines Zeya Phyo. U Aung Khaing and U Kyaw Kyaw Htike cross-examine Zeya Phyo.
6 September 2018	No IBAHRI observation. First day of Aung Win Tun's testimony.
7 September 2018	Aung Win Tun testifies.
13 September 2018	No IBAHRI observation. Aung Win Tun testifies.
14 September 2018	No IBAHRI observation. Aung Win Tun testifies.
20 September 2018	Kyi Lin calls his first defence witnesses.
21 September 2018	Aung Win Zaw calls his first defence witnesses.
27 September 2018.	Three defence witnesses testify on behalf of Aung Win Tun.
4 October 2018	Defence witnesses testify on behalf of Aung Win Zaw and Aung Win Tun.
5 October 2018	Three defence witnesses testify on behalf of Aung Win Tun.
11 October 2018	Aung Win Zaw's wife Daw Min Min Htike testifies.
12 October 2018	No IBAHRI observation.
18 October 2018	Two defence witnesses testify on behalf of Aung Win Tun.
19 October 2018	No IBAHRI observation.
1 November 2018	Defence witnesses testify on behalf of Zeya Phyo.
2 November 2018	Defence witnesses testify on behalf of Zeya Phyo.
15 November 2018	Two defence witnesses testify on behalf of Aung Win Tun.
16 November 2018	Two defence witnesses are removed from the witness list and three new defence witnesses are added to it. No substantive hearing.
29 November 2018	No IBAHRI observation. Testimony of an employee who worked for Zeya Phyo's company.
30 November 2018	Two defence witnesses testify on behalf of Zeya Phyo.
December 2018	No hearings were observed in December 2018 due to the absence of the IBAHRI observer in Myanmar.

2019

10 January 2019	The defence state they have five remaining witnesses to call. None are present and the court adjourns.
11 January 2019	The defence state they will waive the three witnesses scheduled to come to court and have two remaining witnesses to call. None are present and the court adjourns.
17 January 2019	Thida Lwin, wife of Zeya Phyto, testifies.
18 January 2019	A defence witness testifies on behalf of Zeya Phyto.
1 February 2019	Final defence arguments. U Aung Khaing is not present.
15 February 2019	All guilty verdict.

Annex 3: Requests and Dates of Meetings

Date	Meeting Details
23 June 2017	The observer and interpreter meet with U Nay La.
7 July 2017	The observer approaches all counsel to obtain their contact details. The law officer declines but suggests that she speak with the court's media officer.
7 July 2017	The observer and interpreter meet the court's media officer, who is the Deputy District Judge of the Northern District Court and head of the court's Information Branch.
21 July 2017	The observer and interpreter approach U Kyaw Kyaw Htike to invite him to a meeting.
28 July 2017	The observer and interpreter approach U Aung Khaing to invite him to a meeting.
11 August 2017	U Kyaw Kyaw Htike approaches the observer and says that he has received a letter from her and would like to schedule a meeting.
17 August 2017	The observer and interpreter call all counsel. Robert San Aung agrees to a meeting on 23 August.
18 August 2017	The observer and interpreter speak to defence counsel in court. U Nyunt Shwe states that he would prefer to wait until there is some evidence presented about the other accused. Daw Pa Pa Win says that she will contact them to schedule a meeting. U Kyaw Kyaw Htike agrees to a meeting on 23 August.
23 August 2017	Meetings with U Kyaw Kyaw Htike and Robert San Aung.
25 August 2017	The observer speaks to U Nay La and arranges to call him to schedule a meeting.
12 October 2017	Meeting with U Nay La.
15 December 2017	The interpreter approaches Daw Pa Pa Win to request a meeting and she states that she would happy to meet and to arrange by calling her. The observer and interpreter have tea with U Nay La during the court's lunch break. Robert San Aung approaches the observer and says he would like to schedule a meeting.
12 January 2018	The interpreter approaches Robert San Aung for a meeting and one is scheduled for 15 January.
15 January 2018	Meeting with Robert San Aung.
19 January 2018	U Nay La asks to have coffee with the observer and interpreter around the corner from the courthouse at a tea shop before the hearing.
20–21 January 2018	The interpreter calls all defence counsel to request meetings. They all reply that they will schedule meetings at a later date.
25 January 2018	During the court's lunch break, the observer and interpreter ask U Nyunt Shwe's assistant lawyer for a meeting. He says that they want to wait until after the charge confirmation hearing.
8 March 2018	The observer asks U Nay La for a meeting.
21 September 2018	The observer and interpreter speak with U Aung Khaing and Daw Pa Pa Win to arrange interviews. U Aung Khaing says he can speak after next week's hearing on 27 September 2018. Daw Pa Pa Win says that she will let them know as she first needs to speak to her client, Zeya Phyo.
27 September 2018	The observer and interpreter speak with U Aung Khaing, who says that he mixed up the dates and he can meet with them next week on 4 October 2018.
4 October 2018	Meeting with U Aung Khaing in the court's tea shop.
15 November 2018	While sitting inside the courtroom, Zeya Phyo, through his wife, Thida Lwin, asks the observer and interpreter if they can help him to face the truth and asks for justice to prevail. He says that he would be happy to talk to them because he lost many things waiting for this trial to end. He says that he noticed they have been attending for more than a year. The observer explained that they were not journalists and were instead neutral observers for the IBAHRI who monitored the proceedings for any fair trial rights violations. Thida Lwin and Zeya Phyo say that they are happy people are monitoring the trial as they think the judges are acting more fairly than they might normally act. Zeya Phyo says that the observer can speak to his lawyer, and the observer says she will arrange a meeting.
30 November 2018	Robert San Aung sits down with the observer at the court's tea shop before the proceeding.
10 January 2019	Sitting on the accused bench, Zeya Phyo turns around to face the observer and states that he would like to see the case move quickly and, in that vein, was trying to remove witnesses from the witness list. He says that his family encouraged him to call more witnesses but that he did not want to call any further witnesses because he was not a criminal.
11 March 2019	Meeting with Robert San Aung.



**Human Rights
Institute**

International Bar Association

4th Floor, 10 St Bride Street
London EC4A 4AD, United Kingdom

Tel: +44 (0)20 7842 0090

Fax: +44 (0)20 7842 0091

www.ibanet.org