International Coordinating Committee Sub-Committee on Accreditation (ICC-SCA) Accreditation of the National Human Rights Commission of Myamar (MNHRC)

Stakeholder submission by:
The Asian NGO Network on National Human Rights Institutions (ANNI)* and Burma Partnership**
Submitted on 16 July 2015

**The Asian NGOs Network on National Human Rights Institutions (ANNI) was established in December 2006. It is a network of Asian NGOs and human rights defenders working on issues relating to National Human Rights Institutions (NHRIs). ANNI is composed of members that are national organizations from all over Asia. ANNI currently has 30 member organizations from 17 countries or territories. The work of the ANNI members focus on strengthening the work and functioning of Asian NHRIs to better promote and protect human rights as well as to advocate for the improved compliance of Asian NHRIs with international standards, including the Paris Principles and General Observations of the Sub-Committee on Accreditation (SCA) of the International Coordinating Committee (ICC). The Asian Forum for Human Rights and Development (FORUM-ASIA) is the Secretariat of ANNI. FORUM-ASIA has consultative status with the ECOSOC (UN Social and Economic Council) since 2004.*

***Burma Partnership is a network of organizations throughout the Asia-Pacific region advocating for and mobilizing a movement for democracy and human rights in Burma. They draw our strength from the diversity of their partners, from the multi-ethnic leadership of political and civil society organizations both inside Burma and in exile, to our partners and broad-based solidarity organizations throughout the region. The organization was established at a regional conference titled "Democratic Change by the People: Asia Pacific Partnership on Burma" in Chiang Mai, Thailand in February 2006.*

Contact persons:
Mr. Joses Kuan
NHRI Advocacy Programme Officer, ANNI
Asian Forum for Human Rights and Development (FORUM-ASIA)
Tel: +66 2 6379126
66/2 Pan Road, Silom, Bang Rak
Bangkok, 10500 Thailand
Email: joses@forum-asia.org

Ms. Khin Ohmar
Coordinator
Burma Partnership
Tel: +66 55536357
PO Box 188
Mae Sot,
Changwat Tak, 63110 Thailand
Email: khinohmar@burmapartnership.org

1. Context and Establishment

The Myanmar National Human Rights Commission (MNHRC) was established in 2011 by Presidential Decree and feted as a showpiece of the government's reformist credentials. There was significant hype and promise surrounding the establishment of the MNHRC in 2011, as it signaled the possibility of genuine political reforms while the country embarked on nascent political and economic reforms.

It must however also be noted that efforts to establish the MNHRC by the government were largely prompted to deflect calls for an International Commission of Inquiry into suspected crimes against humanity and war crimes in Burma, made in 2010 by the international community as well as the former UN Special Rapporteur on the situation of human rights in Myanmar, Mr. Tomas Ojea Quintana.

While such political dynamics and maneuvers demonstrate the need for caution against over-optimism, civil society organizations were still willing to demonstrate patience and give the MNHRC a chance to prove itself.

However, the MNHRC as it is today suffers from severe legitimacy and public confidence deficits as it falls substantially short of the minimum international standards mandated in the Paris Principles and ICC-SCA's General Observations for an NHRI to be considered credible, legitimate, relevant and effective.

Indeed, the MNHRC is arguably in a stage of "crisis" barely four years since its inception, with allegations that it has become an "alibi" institution to legitimize the State.

As such, The Asian NGO Network on NHRIs (ANNI) and Burma Partnership strongly urge the ICC Bureau and the ICC-SCA to exercise the powers vested under Article 13 of the ICC Statute[1] to **decline the accreditation application** by the MNHRC until it has addressed the concerns highlighted below and proves itself as a discerning and vital actor in the national human rights governance and protection system.

2. National Situation[2]

The reforms in Burma/Myanmar have undoubtedly halted and in many instances displayed worrying signs of regression. Today, it is marked by shrinking democratic and civil society space, as increasing restrictions through problematic/repressive legislation and crackdowns against peaceful political activity escalate.

As Burma/Myanmar's democratic rollbacks intensifies, the inadequacies of the MNHRC are increasingly exposed. 2014-2015 saw the passage of problematic legislation, such as the controversial package of "Race and Religion" bills, the harsh clamping down on freedoms of peaceful assembly and expression, and the systematic denial of basic rights for Rohingya, an escalation of military offensives in ethnic minority areas, all of which undermine the minor positive changes achieved. The four core human rights elements articulated by former Special Rapporteur on the situation of human rights in Myanmar, Mr. Tomas Ojea Quintana,

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1 Article 13 of the ICC Statute states: *"Should the ICC Bureau decide to decline an application for accreditation of any NHRI by reason of its failure to comply with the Paris Principles, the ICC Bureau or its delegate may consult further with that institution concerning measures to address its compliance issues."*

2 See briefing papers on the country situation to the 25th and 28th sessions of the Human Rights Council for comprehensive country situation.

throughout his entire tenure to assess Burma/Myanmar's democratic transition remain unmet. These calls and observations have also been made by civil society organizations.[3][4][5]

3. Engagement with/on the MNHRC (2011-2015): Activities/Actions

Since the MNHRC's inception in 2011, ANNI and Burma Partnership have:

- Advocated for the disclosure/publication of draft founding law;
- Made inputs to the draft law when the announcement was made in national broadsheet to solicit feedback;
- Had interface/interaction at different fora, including at regional/international meetings (Turkey, Qatar)[6] and national level meetings/communications with Commission members;
- Shared the draft annual assessment reports for the MNHRC to clarify factual inconsistencies or to seek further information[7];
- Organized public events, including in Burma/Myanmar, such as media briefings and report launches on the MNHRC;

4.1 Paris Principles Compliance in Law

ANNI and Burma Partnership were consistently engaged in the drafting process, from advocating for the disclosure of the draft law[8] to submitting inputs and feedback to the bill.[9] However, these have simply amounted only to window-dressing measures as only nominal token changes were made.

While the selection committee was marginally expanded, the measures are still hollow as individuals from non-registered civil society organizations remain excluded while there are no formal safeguards against politicization of the appointment of MPs to the body. The MNHRC's lack of independence from the Executive have also been repeatedly asserted by Mr. Quintana and his successor, Ms. Yanghee Lee in their reports to the Human Rights Council.[10]

In a shocking turn of events, the MNHRC was re-constituted in secrecy 25 September 2014, in clear violation of the mandated standards. There are even allegations, as reported in the national press, that even several incumbent members were removed without their knowledge.[11]

- Founding Law (existing flaws and gaps)

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3 They are: the establishment of the rule of law and the institution of an impartial and independent judiciary; constitutional and legislative reform; reform of the armed forces; and the progressive release of political prisoners.

4 http://www.forum-asia.org/jpeg-pdf-link/FINAL%2029052014UNA%20Bulletin%20%28May2014%29.pdf

5 Oral Statements made under Item 4 Interactive Dialogue at the 25th and `http://www.forum-asia.org/?p=18572 sessions of the Human Rights Council.

6 A representative from Kachin women's group had interaction with the MNHRC on the case of Samut Roi Jar, while Burma Partnership coordinator Khin Ohmar also interfaced with Win Mra in Qatar on the assessment report.

7 It must be noted here that MNHRC Chairperson, U Win Mra, had gone on record to deny any knowledge or receipt of the report. This is untrue. ANNI had sent the 2014 Report draft, to which an elaborate 12-page response was given.

8 http://www.burmapartnership.org/2013/05/open-letter-civil-society-consultation-on-the-enabling-law-of-the-myanmar-national-human-rights-commission-ts/

9 http://www.burmapartnership.org/2013/08/civil-societys-concerns-on-draft-mnhrc-law-must-be-adequately-addressed/

10 A/HRC/25/64 (Paragraph 57) and A/69/398 (Paragraph 74)

11 http://www.mmtimes.com/index.php/national-news/11803-rights-body-shake-up-under-fire.html

Establishment of NHRI

Established by Law/Constitution/Presidential Decree	*Myanmar National Human Rights Commission Law, 2014 Notification No. (34/2011)*
Mandate	Taken from (http://www.mnhrc.org.mm/en/about/mandate/) (a) To promote and protect the fundamental rights of citizens enshrined in the Constitution of the Republic of the Union of Myanmar effectively; (b) To create a society where human rights are respected and protected in recognition of the Universal Declaration of Human Rights adopted by the United Nations; (c) To effectively promote and protect the human rights contained in the international conventions, decisions, regional agreements and declarations accepted by Myanmar; (d) To engage, coordinate, and cooperate with the international organizations, regional organizations, national statutory institutions, civil society and registered non-governmental organizations working in the field of human rights.
Selection and Appointment	
Is the selection formalized in a clear, transparent and participatory process in relevant legislation, regulations or binding administrative guidelines, and for its subsequent application in practice?	Chapter III of the Myanmar National Human Rights Law outlines the legislative basis for the selection of new MNHCR members. This includes how the Selection Board will be comprised, the criteria for the nomination of Commission members, the role of the Selection Board, along with the authority granted to the President to ultimately select and appoint nominations. In practice, the selection process has been substantially less transparent. On 25 September 2014, the previous 15-member commission was disbanded without prior public notice of the dismissal or subsequent nomination process and replaced with a new body of 11 commission members. In an article written by the Myanmar Times, it was pointed out that even key members of the Executive– along with one of the ousted Commission members, U Hla Myint – were unaware of who had been nominated for the commission[12].
Is the selection process under an independent	The President – as opposed to an independent

12 Bill O'Toole and Lun Min Maing, "Rights Body Shake-Up In Line with Law, Insists Government," *Myanmar Times*, October 3, 2014, http://www.mmtimes.com/index.php/national-news/11838-confusion-surrounds-reshuffle-of-new-human-rights-commission.html.

and credible body, which involves open and fair consultation with NGOs and civil society?	body – maintains authority over the final appointment and dismissal of MNHRC representatives. This point is especially salient in regards to the September 2014 presidential order to disband the Commission. During the disbandment, there was no communication with civil society over the dismissal of former Commission members of the appointment of the replacements[13]. The MNHRC enabling law is problematic in terms of how civil society is to be involved. It states that the Selection Board shall be comprised of two representatives from registered Non-Governmental Organizations (NGOs) though it fails to provide information as to how these organizations are selected. There is also concern in the eligibility of only "registered NGOs" to be considered for nomination to the Commission as the majority of civil society and human rights organizations in Burma operate without the government-approved registration[14].
Is the assessment of applicants based on pre-determined, objective and publicly available criteria?	Chapter III of the MNHRC Enabling Law outlines the criteria for the selection of Commission Members. This section – which has been made public – contains prerequisites involving citizenship, age, character, along with relevant experience in human rights and international law[15]. Unfortunately, the lack of transparency in the most recent September 2014 Member selection process prohibits civil society from determining whether the Selection Committee has followed the criterion. The failure of the MNHRC Enabling Law to guarantee the independence of the Selection Committee also calls into question whether correct procedures were followed when pursuing the hiring of new Commission members[16].
Is there a provision for broad consultation and/or participation, in the application, screening and selection process?	The September 2014 Commission reshuffle demonstrated that civil society and other stakeholders were not consulted in the application and selection process of the new Commission members. Furthermore, the singular involvement of the Executive in the selection process does not provide any room for

13 Kyaw Thu, "Myanmar Revamps Human Rights Panel Amid Criticism from Rights Groups," *Radio Free Asia*, September 9, 2014, http://www.rfa.org/english/news/myanmar/commission-09252014174739.html.

14 Nyein Kaw, Chester Toh, and Jainil Bhandari, "Setting Up an NGO in Myanmar," *Lexology, Globe Media Business Group*, July 29, 2013, http://www.lexology.com/library/detail.aspx?g=0272d66e-3a21-4097-9d81-b0e0f62ba266.

15 Pyidaungsu Hluttaw, *The Myanmar National Human Rights Commission Law, Pyidaungsu Hluttaw Law No. 21/2014*, March 28, 2014.

16 International Service for Human Rights, "The Situation of Human Rights Defenders: Myanmar, UPR Briefing Paper – March 2015," *ISHR Global,* March 2015, http://www.ishr.ch/sites/default/files/article/files/ishr_-_upr_briefing_paper_on_myanmar.pdf.

	participation. This has prompted a number of civil society organizations, including the Alternative ASEAN Network on Burma and the International Federation for Human Rights to highlight this point as a major cause for concern[17].
Is there a requirement to advertise vacancies? How is it usually done/describe the process?	Chapter IV of the MNHRC Enabling Law, which contains provisions related to the filing of vacancies within the Commission, does not specify how these positions will be advertised to the general public. Moreover, it reinforces the idea of the Executive holding appointment and termination authority in the event of any vacancy, with only limited input from the two House Speakers representing parliament.[18].
Divergences between Paris Principles compliance in law and practice	According to the Paris Principles, the composition and appointment of members of a national human rights institution must be "in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human rights…[19]" The representation of Burma's "social forces" within the MNHRC falls short of the recommendations in the Paris Principles. In practice, the MNHRC has afforded a significant degree of authority to the President in forming and dismissing both the MNHRC along with the Selection Board[20]. Commission members must be free to criticize human rights concerns that are related to the government without fear of retribution in the form of dismissal or otherwise. Civil society is vastly underrepresented especially in comparison to the overwhelming representation of former government officials. Of the current 11 Commission members, nine have previously held positions as civil servants[21]. This includes officials with strong connections to the previous military regime such as Win Mra, the former Ambassador to the UN in New York, and Nyunt Swe, a former Tatmadaw Colonel and

17 Alternative ASEAN Network on Burma and the International Federation for Human Rights, "Myanmar: 23rd Session of the Working Group on the Universal Periodic Review," November 9, 2015, https://www.fidh.org/IMG/pdf/20150322_burma_upr_joint_en.pdf.

18 Pyidaungsu Hluttaw, *The Myanmar National Human Rights Commission Law, Pyidaungsu Hluttaw Law No. 21/2014*, March 28, 2014.

19 Office of the High Commissioner for Human Rights, *Principles Relating to the Status of National Institutions (Paris Principles), Adopted by General Assembly Resolution 48/134 of 20 December 1993,* OHCHR, http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx.

20 Pyidaungsu Hluttaw, *The Myanmar National Human Rights Commission Law, Pyidaungsu Hluttaw Law No. 21/2014*, March 28, 2014.

21 Myanmar National Human Rights Commission, *Commissioners*, Last Modified May 9, 2015, http://www.mnhrc.org.mm/en/about/commissioners/.

	Deputy Ambassador to the UN in Geneva[22]. Win Mra had previously stated that ethnic representation among MNHRC members included delegates from Chin, Karen, Kachin, Shan, and Arakan, however there is no publicly-available information as to how this representation was determined and whether this representation has been maintained after the September 2014 dismantling of the Commission[23]. According to a former high-level staff member of the MNHRC, ethnic representation has been limited to Mon and Shan[24]. Furthermore, while there is one current Member acting as a representative for Muslim Burmese, there is concern that the largely abused Rohingya population will not be represented, due in large part to systemic discrimination in the Burma Government[25]. The representation of women amongst MNHRC Commissioners is also shockingly low. The September 2014 Commissioner shakeup resulted in one female Commissioner being removed from her position, leaving only two women in the 11-Member body[26].
Functional Immunity	
Are members of the NHRI granted immunity/protection from prosecution or legal liability for actions taken in good faith in the course of their official duties?	The MNHRC Enabling Law indicates, in Chapter IV, that Members of the Commission are eligible for termination in the event that they are convicted for a criminal offence, determined by a court to be insolvent, or if they violate the regulations of the Commission[27]. While a "court of competent jurisdiction" is required to determine whether a Member is fit or unfit for participation in the MNHRC, the Executive holds ultimate authority. This is especially relevant to the 2014 reshuffle in which 9 Members of the Commission were dismissed. Among those dismissed were U Lahpai Zau Goone and U Hla Myint,, who in an interview with the Myanmar Times, expressed that they were both unaware of the grounds for their dismissal[28]. This prompts significant doubt as to

22 Alternative ASEAN Network on Burma and the International Federation for Human Rights, "Myanmar: 23rd Session of the Working Group on the Universal Periodic Review," November 9, 2015, https://www.fidh.org/IMG/pdf/20150322_burma_upr_joint_en.pdf.

23 Yadana Htun, "We Won't Be Influenced by the Gov't," *Myanmar Times*, September 19, 2011, http://www.mmtimes.com/index.php/national-news/2090-we-won-t-be-influenced-by-the-govt.html.

24 Former Staff Member of the MNHRC in discussion with Burma Partnership, June 2015.

25 Former Staff Member of the MNHRC in discussion with Burma Partnership, June 2015.

26 Myanmar National Human Rights Commission, "Commissioners", Last Modified May 9, 2015, http://www.mnhrc.org.mm/en/about/commissioners/.

27 Pyidaungsu Hluttaw, *The Myanmar National Human Rights Commission Law, Pyidaungsu Hluttaw Law No. 21/2014*, March 28, 2014.

	whether these individuals were dismissed in accordance with MNHRC Enabling Law.
Does the NHRI founding law include provisions that promote: - Security of tenure - The NHRIs ability to engage in critical analysis and commentary on human rights issues free from interference; - The independence of the senior leadership; and - Public confidence in national human rights institution.	Chapter VI of the MNHRC Enabling Law includes a clause indicating the protection that Commission Members or staff should receive from anyone attempting to interfere in the undertaking of MNHRC functions. In addition, Chapter IX outlines the additional immunity from interference in the form of censorship, the search and confiscation of assets, and how the MNHRC can authorize the protection of identity for any civilian currently involved with an investigation[29]. The independence of senior leadership, public confidence in the NHRI, or provisions surrounding a security failure are not explored in the MNHRC Enabling Law.
Are there provisions that protect situation of a coup d'etat or a state of emergency where NHRIs are further expected to conduct themselves with heightened levels of vigilance and independence?	There is no information within the MNHRC Enabling Law surrounding the role of the NHRI during states of emergency or in a coup d'etat.
Divergences between Paris Principles compliance in law and practice	Under the *Composition of Guarantees of Independence and Pluralism* subsection of the Paris Principles, the third point states, "In order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured." Under the current MNHRC Enabling Law, the process in which Members of the Commission are dismissed is in violation of this component of the Paris Principles. The MNHRC does not outline, by an official act, the establishment of a specific duration of the mandate but rather allows Presidential authority to ultimately dismiss Members arbitrarily. This prevents Members of the Commission from fulfilling their duties and obligations for fear of reprisal from the Executive, thus severely impacting their supposed independence[30]. For this stipulation to be upheld in practice, the dismissal of Commission Members must be made transparent and substantiated with evidence. While the MNHRC Enabling Law

28 Bill O'Toole, "Rights Body Shake-Up Under Fire," *Myanmar Times,* September 29, 2014, http://www.mmtimes.com/index.php/national-news/11803-rights-body-shake-up-under-fire.html.

29 Pyidaungsu Hluttaw, *The Myanmar National Human Rights Commission Law, Pyidaungsu Hluttaw Law No. 21/2014*, March 28, 2014.

30 International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, *General Observations of the Sub-Committee on Accreditation,* Office of the High Commissioner for Human Rights, May 2013, http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20GENERAL%20OBSERVATIONS%20ENGLISH.pdf.

	attempts to provide a framework for dismissal – as discussed earlier – authority vested in the Executive overrides these principles in practice. The September 2014 dismissal of nine Commission Members, in which there was no public available information relating to the grounds for dismissal, provides evidence for the lack of independence available to Commission Members. The Paris Principles detail the importance of establishing "as broad a mandate as possible" for the protection and promotion of human rights[31]. Unfortunately, the MNHRC often falls victim to significant interference and deference to the military in Burma, which compromises the ability of the NHRI to conduct independent investigations within a broad mandate of human rights protection[32]. This is evident in the killing of journalist Ko Par Gyi, in which a military tribunal acquitted two soldiers involved in the death of the journalist despite suggestions from the MNHRC that a civilian court should handle the inquiry. The case – which will be explored in-depth later on in this report – demonstrates how the authority of the military compromises the mandate of the MNHRC to promote and protect human rights.
Capacity and Operations	
Adequate Funding	Within Chapter VII of the MNHRC enabling law, it is specifically stated that the Government is responsible for the provision of adequate funding to the Commission. It also allows for the receipt of contributions from external sources, so long as the independence of the Commission is not compromised as a result[33]. Currently, the MNHRC receives funding from the Government, the Raoul Wallenberg Institute of Human Rights, and the Swedish International Development Cooperation Agency[34].

31 Office of the High Commissioner for Human Rights, *Principles Relating to the Status of National Institutions (Paris Principles), Adopted by General Assembly Resolution 48/134 of 20 December 1993,* OHCHR, http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx.

32 Burma Lawyer's Council, "Revealing Burma's System of Impunity: A Briefer for the Commission of Inquiry Campaign," *Burma Campaign UK,* http://burmacampaign.org.uk/images/uploads/Revealing_Burmas_System_of_Impunity_-_BLC_Briefer.pdf.

33 Pyidaungsu Hluttaw, *The Myanmar National Human Rights Commission Law, Pyidaungsu Hluttaw Law No. 21/2014*, March 28, 2014.

34 Former Staff Member of the MNHRC in discussion with Burma Partnership, June 2015.

Government representatives on National Human Rights Institutions:	Member nominees are required to have retired from public service if they are to be considered for a position within the Commission, according to MNHRC Enabling Law[35]. Considering how there are nine former civil servants currently operating as Members of the Commission, there is reasonable concern that government representation is overwhelming.

4.2 Paris Principles Compliance in Practice:

The MNHRC's compliance with the Paris Principles must also be assessed through the activities and actions in relation to systematic, widespread and critical human rights issues in the country. It is paramount that the interventions and responses made by the MNHRC must be proportionate to the gravity and magnitude of violations in the country, particularly as other protection and accountability mechanisms remain weak.The responses and actions must also be comprehensive and timely, in a manner that can address human rights violations at an institutional level and is undergirded by a long-term follow up plan, which includes advocating for and monitoring the implementation of its recommendations.

Case Study #1: Brang Shawng

In October 2012 Brang Shawng, an ethnic Kachin from Sut Ngai Yang village, Kachin State, wrote a letter to the Myanmar National Human Rights Commission, calling for an independent investigation into the death of his 14 year old daughter, Ja Seng Ing, allegedly at the hands of the Burma Army. However, the complaint resulted in criminal proceedings initiated by the Burma Army against Brang Shawng on the basis of "false charges" submitted[36]. Not only did the MNHRC fail to investigate this human rights complaint, they failed to protect the complainant and the integrity of its complaints-handling mechanism appear to be severely compromised, which resulted in criminal prosecution.

Brang Shawng provided a detailed description of the death of his daughter Ja Seng Ing in the letter he wrote to the President of Burma and later the MNHRC. Amidst intense fighting between the Burma Army and the Kachin Independence Army (KIA) in Sut Ngai Yang village, a group of soldiers belonging to the Burma Army encountered a landmine previously laid by the KIA. According to Brang Shawng, Ja Seng Ing was fatally wounded after soldiers from the Burma Army began firing indiscriminately throughout the village after the landmine exploded[37]. The military investigation, however, has claimed that Brang Shanwg's daughter was killed due to injuries sustained from the KIA landmine itself[38].

Independent investigations conducted after the military investigation support Brang Shawng's account of the events leading to the death of his daughter. The Ja Seng Ing Truth Finding Commission, comprised of 10 Kachin community-based organizations, interviewed a number of eyewitnesses that confirmed it was the Burma Army who was responsible for the death of

35 Pyidaungsu Hluttaw, *The Myanmar National Human Rights Commission Law, Pyidaungsu Hluttaw Law No. 21/2014*, March 28, 2014.

36 Fortify Rights, "Myanmar: Overturn Wrongful Conviction of Brang Shawng," *Press Release,* February 18, 2015, http://www.fortifyrights.org/publication-20150218.html.

37 Matthew Thiman, Courtney Svoboda, and Tyler Giannini, "How One Father's Letters to the Government Got Him Convicted," *The Irrawaddy,* April 7, 2015, http://www.irrawaddy.org/contributor/how-one-fathers-letters-to-the-government-got-him-convicted.html.

38 Matthew Thiman, Courtney Svoboda, and Tyler Giannini, "How One Father's Letters to the Government Got Him Convicted," *The Irrawaddy,* April 7, 2015, http://www.irrawaddy.org/contributor/how-one-fathers-letters-to-the-government-got-him-convicted.html.

Ja Seng Ing[39]. Fortify Rights, a human rights organization, supported this investigation and claimed that Brang Shawng's prosecution was in fact retaliation for implicating the military in his daughter's murder[40].

In February 2015, Brang Shawng was convicted of the charges laid against him after spending more than 45 sessions in court over a period of 12 months[41]. The defendant was provided with the option of serving six months in prison or paying a fine of 50,000 kyats, ultimately choosing the latter.

The MNHRC proved to be an ineffective NHRI by allowing the confidentiality of a complainant to be breached and for failing to overcome interference from an external actor, the Burma Army. In a letter written to President Thein Sein, Fortify Rights stated, "The United Nations Paris Principles outline international standards for the operations of national human rights institutions and emphasize the importance of ensuring they are independent, autonomous, and able to operate free from government interference. Moreover, according to the MNHRC Law in Myanmar, third parties "should not victimize, intimidate, harass or otherwise interfere with" an individual because he or she provides information to the MNHRC[42]. In the case of Brang Shawng, the MNHRC has both failed to act independently and to safeguard a human rights defender from retaliation demonstrating a severe lack of commitment to the Paris Principles.

In addition, this case study highlights a disturbing trend– the impunity of the military- that continues to characterize and undermine Burma/Myanmar's democratic transition. Unfortunately, the Chair of the MNHRC has also previously stated in public that the Commission will not investigate human rights abuses in conflict areas (despite no such restriction curtailing its mandate), demonstrating significant deference to the military in these matters[43]. In the Brang Shawng case, the MNHRC clearly disregarded – or was otherwise incapable of – protecting the human rights defender from the interference of the military.

Case Study #2: Protection of Human Rights Defenders (HRDs)

Brang Shawng is one of many human rights defenders that have been prosecuted, oppressed, or silenced in the last year. Unfortunately, the MNHRC has failed to fully actualize its role as an interlocutor with the government (advocating for legal, policy and administrative framework changes) and key partner in the national human rights protection and governance system.

The second objective of the MNHRC, as stated in the Enabling Law, states that it will, "… create a society where human rights are respected and protected in recognition of the Universal Declaration of Human Rights adopted by the United Nations[44]." The MNHRC has attempted to fulfill this obligation by conducting regular workshops and training sessions,

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39 Ja Seng Ing Truth Finding Committee, "Who Killed Ja Seng Ing?" *Taken from the website of Burma Partnership,* http://www.burmapartnership.org/wp-content/uploads/2014/12/REPORT_Who-Killed-JSI_6.Dec_.14.pdf.

40 Fortify Rights, "Re: Prosecution of Shayam Brang Shawng," December 8, 2014, http://www.fortifyrights.org/downloads/Brang_Shawng_Letter_20141208.pdf.

41 Saw Yan Naing and Andrew D. Kaspar, "Kachin Man Accusing Army of Killing Daughter Found Guilty of Defamation," *The Irrawaddy,* February 17, 2015, http://www.irrawaddy.org/burma/kachin-man-accusing-army-killing-daughter-found-guilty-defamation.html.

42 Fortify Rights, "Re: Prosecution of Shayam Brang Shawng," December 8, 2014, http://www.fortifyrights.org/downloads/Brang_Shawng_Letter_20141208.pdf.

43 Kyaw Thu, "Myanmar Revamps Human Rights Panel Amid Criticism from Rights Groups," *Radio Free Asia*, September 9, 2014, http://www.rfa.org/english/news/myanmar/commission-09252014174739.html.

44 Pyidaungsu Hluttaw, *The Myanmar National Human Rights Commission Law, Pyidaungsu Hluttaw Law No. 21/2014*, March 28, 2014.

designed to promote a culture of human rights amongst senior officials and other stakeholders within the government. This responsibility was also undertaken with the creation of the Political Prisoners Scrutiny Committee (PPSC), which would support Thein Sein's declaration of releasing all political prisoners by the end of 2013.

In reality, the MNHRC has consistently failed to publicly support, investigate, or identify human rights defenders that have been targeted by the Burma Government. According to the Assistance Association for Political Prisoners, there are currently 170 activists still imprisoned and an additional 437 awaiting trial[45]. Most disconcerting is the fact that this figure has actually increased substantially from the previous year's total of 40.

Such concerns are amplified by sentiments conveyed by the Chairperson of the MNHRC, Win Mra, indicating that the release of political prisoners is not a priority of the government.[46] This creates a bigger legitimacy and public confidence crisis as the positions taken by the MNHRC seem to largely echo the government.

Over the past year, the Burma Government has detained, charged, and imprisoned a high number of political prisoners. On 27 May, nine farmers were arrested for conducting a peaceful protest on land confiscation, bringing the total number of land rights activists awaiting trial to 944 (not included in the 437 political prisoners awaiting trial)[47]. In addition, the land reform activist Sein Than was notably arrested and sentenced to two years in prison for leading peaceful protests in his Rangoon community[48]. San Tun, another land rights leader, was killed last June and the case remains unsolved as result of the Burma Police having shot and killed a key suspect[49]. While Win Mra has previously acknowledged that the majority of complaints received by the MNHRC are related to farmers claiming a lack of compensation for land seized by the Burma Army, the Commission has failed to protect the human rights defenders that step forward[50].

Political activists all over Burma have been targeted on baseless or trumped up charges during the past year. In June 2015, Htin Lin Oo, a columnist and former member of the National League for Democracy, was convicted for promoting religious tolerance in an October speech. The activist received two years in prison, with hard labour, on the basis that he had wounded "religious feelings[51]." In July, eight Chin activists were arrested for staging a demonstration in protest of a Burma Army soldier who had beaten and attempted to rape a 55-year-old woman in Matupi Township, Chin State[52]. Human rights defenders Naw Ohn Hla, Nay Myo Zin, and Sein Htwe were also arrested in response to their peaceful protest against the death of Khin Win in the Letpadaung Copper Mine incident.

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45 Assistance Association for Political Prisoners (Burma), "Political Prisoner Data," June 15, 2015, *retrieved from:* http://aappb.org/political-prisoner-data/.

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48 Alternative ASEAN Network on Burma and the International Federation for Human Rights, "Myanmar: 23rd Session of the Working Group on the Universal Periodic Review," November 9, 2015, https://www.fidh.org/IMG/pdf/20150322_burma_upr_joint_en.pdf.

49 Alternative ASEAN Network on Burma and the International Federation for Human Rights, "Myanmar: 23rd Session of the Working Group on the Universal Periodic Review," November 9, 2015, https://www.fidh.org/IMG/pdf/20150322_burma_upr_joint_en.pdf.

50 APF Secretariat, "Myanmar: Land Grabbing Tops List of Rights Violations," *Asia Pacific Forum*, September 6, 2014, http://www.asiapacificforum.net/news/myanmar-land-grabbing-tops-list-of-rights-violations.

51 Zarni Mann, "2 Years Hard Labor for Htin Lin Oo in Religious Offense Case," *The Irrawaddy,* June 2, 2015, http://www.irrawaddy.org/burma/2-years-hard-labor-for-htin-lin-oo-in-religious-offense-case.html.

52 Network for Human Rights Documentation – Burma, "Report on the Human Rights Situation in Burma (July – December 2014)," *Periodic Report*, March 10, 2015, http://reliefweb.int/report/myanmar/report-human-rights-situation-burma- july-december-2014.

Case Study #3: Ko Par Gyi

In October 2014, Ko Par Gyi, a journalist covering conflict between the Democratic Karen Benevolent Army (DKBA) and the Burma Army and who was detained the month earlier had been killed while in the custody of the Army[53]. Public outcry over the mysterious circumstances around the death of the journalist prompted President Thein Sein to order the MNHRC to examine this case. The subsequent investigation contained numerous inaccuracies and failed to include key issues such as whether Ko Par Gyi was tortured. While the MNHRC subsequently recommended that the case be tried in a civilian court,[54] the two soldiers implicated in the death of Ko Par Gyi were acquitted of any charges in a privately held military tribunal in November, prior to the beginning of the civilian trial[55].

The details of the case shed light on a number of concerning shortcomings within both the MNHRC and the Burma Government. Firstly, the Burma Army's Light Infantry Battalion, publicly claiming that Ko Par Gyi was a member of the rival DKBA, detained the journalist on 30 September 2014[56]. It wasn't until 24 October, twenty days after Ko Par Gyi had been murdered, that the family of the journalist learned of his fate through a statement released by the Burma Army. In fact, the lack of transparency in the Ko Par Gyi case became a disturbing trend; both the military acquittal of the two soldiers involved and the beginning of the civilian court trial in April 2015 were kept secret from the media and the family of the slain journalist until much later[57].

The widow of Ko Par Gyi and well-known human rights activist, Ma Thandar, denied that her husband ever had any involvement with the DKBA[58]. While the resulting MNHRC investigation could not find conclusive evidence of Ko Par Gyi's involvement with any Ethnic Armed Organizations (EAOs), it also did not adequately clarify that Ko Par Gyi was in fact a journalist. Testimony from a number of journalists, including members of the Myanmar Journalist Association should have been sufficient for clearing Ko Par Gyi's role in Burma[59]. It is clear that the Burma Army failed to properly identify and was responsible for the death of the journalist, however the MNHRC investigation nonetheless failed to hold the military accountable for this mistake.

Ma Thandar, along with the family's lawyer and two forensic experts, question the validity of the MNHRC report into whether Ko Par Gyi was tortured while in custody, citing numerous consistencies between statements given by military officials and the MNHRC[60].

The impunity of the military from prosecution also presents a serious obstacle to the

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53 The Irrawaddy, "Missing Reporter Killed in Custody of Burma Army: Report," *The Irrawaddy,* October 24, 2014, http://www.irrawaddy.org/burma/missing-reporter-killed-custody-burma-army-report.html.

54 Lun Min Mang, "Commission Suggests Civil Court for Journalist's Death Case," *Myanmar Times,* December 8, 2014,http://www.mmtimes.com/index.php/national-news/12464-commission-suggests-civil-court-for-journalist-s-death-case.html.

55 Yola Verbruggen, Naw Say Phaw Waa and Lun Min Mang, "Military Acquittal Raises Fresh Doubts About Civilian Inquest," *Myanmar Times*, May 12, 2015, http://www.mmtimes.com/index.php/national-news/14402-military-acquittal-raises-fresh-doubts-about-civilian-inquest.html.

56 Aung Zaw, "Death of an Activist Reporter," *The Irrawaddy*, May 4, 2015, http://www.irrawaddy.org/from-the-irrawaddy-archive-burma/death-of-an-activist-reporter.html.

57 Artan Mustafa, "Cases Proceed Silently in Myanmar Journalist's 2014 Killing," *International Press Institute,* May 28, 2015, http://www.freemedia.at/newssview/article/cases-proceed-silently-in-myanmar-journalists-2014-killing.html.

58 Paul Mooney and Aye Win Myint, "Myanmar Activists Demand Independent Probe into Journalist's Killing," *Reuters,* October 29, 2014, http://uk.reuters.com/article/2014/10/29/uk-myanmar-journalist-idUKKBN0II1O120141029.

59 Lun Min Mang, "Rights Team Contradicts Government on Journalist's Death," *Myanmar Times*, November 21, 2014, http://www.mmtimes.com/index.php/national-news/12326-investigation-confirms-ko-par-gyi-was-a-freelance-journalist.html.

60 Kyaw Hsu Mon, "The Report was Fabricated," *The Irrawaddy,* December 3, 2014, http://www.irrawaddy.org/interview/report-fabricated.html.

independent and effective work and functioning of the MNHRC. This impunity is entrenched in the 2008 Constitution, which allows members of the military to override civilian court judgments during the prosecution of their own members[61]. Ma Thandar believes that this impunity explains why the military conducted their own trial in secrecy to ensure that an early acquittal would prevent further inquiry during any subsequent civilian court case[62].

The MNHRC has failed to continually pressure the Burma Army and the Government into adhering to their initial recommendation to have the Ko Par Gyi case tried in a civilian court. During the most recent hearing of the case in Kyaikmayaw Township, two key witnesses from the Burma Army failed to appear before the court[63]. Despite these shortcomings, the MNHRC has not yet made a public statement urging the Burma Government and Army to cooperate. This solidifies their inability to provide a long-term and systematic plan for human rights investigations. The outcome of the Ko Par Gyi case is disturbingly similar to that of last year's Du Chee Yar Tan incident, in which the MNHRC failed to conduct a credible investigation into the massacre of at least 48 Rohingya[64]. The ineffective and reactionary actions of the MNHRC call into question whether the institution is merely a smokescreen for human rights violations.

Case Study 4: Communal Violence (Duu Chee Yar Tan Massacre)

One of the most pressing human rights issues in Burma today is the anti-Rohingya violence and persecution by authorities. As Tomas Quintana, former United Nations Special Rapporteur on the situation of human rights on Myanmar stated in his final statement to the UN Human Rights Council in March 2014, "tackling the impunity and systematic discrimination in Rakhine (Arakan) State represents a particular challenge which, if left unaddressed, could jeopardise the entire reform process." One case study of significance is that of an alleged massacre at Duu Chee Yar Tan village in Arakan State in January 2014, committed by an Arakanese mob, and local police. The following is a summary based on an account put together by the Burmese Rohingya Organisation UK:

Duu Chee Yar Tan is a collection of seven small villages in northern Arakan State, a remote area. Three of these villages are home to mostly Arakanese and four to Rohingya. On the 9th of January, eight Rohingya men passing through the area were summoned to see the town administrator. Four days later, the dead bodies of eight Rohingya men were found and this information began to spread throughout the villages causing confusion and anger. In the middle of that night, a group of police officers went to one of the Rohingya villagers, allegedly to prevent the future spread of the news of eight dead Rohingya men, raping and killing a woman. After local villagers heard about these events, protests and altercations occurred, including gunshots. A police officer who went missing is thought to have been shot at this time. The police returned with more officers as well as a mob of around 30-40 Arakanese and the raping, beating and killing began, carried out by both police and Arakanese villagers. Most of the villagers then fled the scene.[65]

The UN High Commissioner for Human Rights, Navi Pillay, stated that the UN had received "credible information" that "at least 40 Rohingya Muslim men, women and children were

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61 International Centre for Transitional Justice, "Impunity Prolonged: Myanmar and its 2008 Constitution," *ICTJ New York,* September 2009, https://www.ictj.org/sites/default/files/ICTJ-Myanmar-Impunity-Constitution-2009-English.pdf.

62 Ma Thandar in discussion with Burma Partnership, June 2015.

63 Lawi Weng, "Army Witnesses Spurn Court Summons Over Journalists' Killing," *The Irrawaddy*, June 12, 2015, http://www.irrawaddy.org/burma/army-witnesses-spurn-court-summons-over-journalists-killing.html.

64 Khin Khin Ei, "UN Envoy Calls for "Trust Building" Between Myanmar Government, Ethnic Rebels," *Radio Free Asia*, February 19, 2014, http://www.rfa.org/english/news/myanmar/special-rapporteur-02192014165927.html.

65 Du CheeYar Tan Massacre Timeline, Burma Rohingya Organisation UK, available at: http://brouk.org.uk/?p=85

killed in Duu Chee Yar Tan village by police and local Rakhine (Arakan)".[66] This information was corroborated by MSF who claimed they had treated 22 Rohingya at that time, in that area, due to violence-inflicted injuries. Calls for an international investigation were not heeded, but the MNHRC did conduct an investigation.

Yet after their three day investigation, in a statement released on February 14, the MNHRC claimed that such an incident did not take place and recommended more security measures. According to the Burmese Rohingya Organisation UK, however, before Arakan State Government officials visited the area on the 22nd of January, villagers in the area were warned by police and security services of arrest if they told of seeing killings or dead bodies. If this is true, the same fear applies to the investigation conducted by the MNRHC a week later.

A worrying aspect of the MNHRC statement is the reference to Rohingya as 'Bengali' (Arakan state borders Bangladesh, formerly East Bengal). For many Arakanese Buddhists, and indeed, many people throughout Burma, they perceive the term Rohingya as an artificially created identity by illegal immigrants from Bangladesh to gain more status within Burma. This is a highly discriminatory term that furthers the idea that they are not from Burma and violates the human rights principle of self-identification. It is obvious from this investigation that the MNHRC is not impartial. The language used reflects a discriminatory attitude and one that does not respect international human rights standards, including the Universal Declaration of Human Rights. The MNHRC's investigation was used as a counter effort to placate the calls from the international community for an independent and international investigation.

Furthermore, as a result of MSF's statements that they had treated 22 Rohingya, the government did not renew their terms of reference in Arakan State, effectively banning them from delivering lifesaving treatment to vulnerable communities, most of whom are Rohingya. Members of the press were also blamed for stirring tensions by the government and reporters trying to access the area were denied, and briefly detained.[67] The MNHRC's investigation, whose findings contradict those from the UN and statements from MSF serve to de-legitimise the Commission in the eyes of the international community. An independent NHRI should not be used as a tool to cover human rights atrocities committed by a state institution, in this case, the police force.

Case Study 5: Sexual Violence in Armed Conflict Zones

One of the other major human rights issues facing Burma today is the pattern of gender based sexual violence by the Burma Army in conflict zones. While ceasefires have been signed with most major armed groups, and peace talks continue haltingly, the Burma Army itself continues its offensive against the Kachin Independence Organisation in northern Burma as well as more recently against ethnic armed groups in Shan State in northern Burma, Arakan State in western Burma, and Karen State in eastern Burma. Over 220,000 people have been displaced in the past four years and the rights groups have documented a plethora of human rights violations committed mainly by the Burma Army.

One particular issue is that of sexual violence. The Women's League of Burma, an umbrella alliance comprising of 13 women's organizations from Burma released a report in January 2014 titled, "Same Impunity, Same Patterns."[68] The report presents how over 100 women

66 Pillay Calls for Killings in Northern Rakhine State to be Investigated, UN Office of the High Commissioner for Human Rights, January, 2014, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14194&LangID=E

67 Rise in Bigotry Fuels Massacre in Myanmar, Jane Perlez, The New York Times, 1, March, 2014, http://www.nytimes.com/2014/03/02/world/asia/rise-in-bigotry-fuels-massacre-inside-myanmar.html

68 *Same Impunity, Same Patterns,* Women's League of Burma, January, 2014, http://womenofburma.org/wp-content/uploads/2014/01/SameImpunitySamePattern_English-final.pdf

have been raped by the Burma Army since reforms began in 2010. Many of these cases occurred in Kachin State, which has experienced the majority of the fighting and the most activity by the Burma Army. In Shan State too, where there is a ceasefire but the Burma Army continues to manoeuvre and launch offensives, thirty cases of sexual violence were recorded. The report states that forty-eight of the documented cases involved gang rape by Burma Army soldiers, and twenty eight of the victims died. Some girls were as young as eight years old. Given the difficulties of recording these cases, both due to fear of repercussions as well as social stigma, WLB believe that these numbers are just the tip of the iceberg. A follow-up report from November 2014 presented further cases of rape and sexual assault by the Burma Army, demonstrating that these violations continue unabated.[69]

The incidence of sexual violence and rape by the Burma Army is systematic and deliberate. Thus, according to WLB, "sexual violence is used as a tool by the Burmese military to demoralise and destroy ethnic communities. Army officers are not only passively complicit in these sexual crimes but often perpetrators themselves." Yet these horrific abuses are committed with impunity. Under the 2008 Constitution, a courts-martial system was established which, under its mandate, according to the Burma Lawyers Council, "members of the military never have to appear before civilian courts, regardless of their crime."[70] While courts-martial systems are common in other countries, the military justice system in Burma is practically non-existent. While in Indonesia, for example, decisions made in the military courts can be appealed at the civilian Supreme Court, but the highest power in the military justice system in Burma is the Commander-in-Chief of the Armed Forces, Senior General Min Aung Hlaing, who can overturn any decision made.[71]

Thus it becomes all the more important for the MNHRC to conduct an independent and effective investigation into abusive policies that are not accountable under the current legal framework. Yet the MNHRC has done very little to address sexual violence and rape committed by the Burma Army, nor the judicial and legal framework that places the Burma Army above the law. When WLB released their report in January, an invitation was sent to the MNHRC to attend the event but there was no response. Similarly, when the Kachin Women's Association – Thailand (KWAT), a member organisation of WLB, have tried to engage the MNHRC on this issue, and sent reports, there has been no response.

Quite clearly, the above case studies highlight the MNHRC's lack of effectiveness in addressing known and chronic rights violations and abuses in the country. As the Burmese government intensifies the application of legal and administrative restrictions or the misuse of the judicial system and new human rights challenges relating to corporate accountability (among others) emerge, the MNHRC has clearly not actualized its mandate. The MNHRC has largely been silent on the communal violence in Arakan State, and when action was actually taken, findings proved problematic.

The culture of impunity is further perpetuated by the MNHRC's own reluctance to investigating complaints and abuses in the conflict-ridden border regions, despite no restrictions to the MNHRC's mandate and powers. [72] This is further weakened as internal military mechanisms/processes (e.g. court martial) usually prevent access to justice as well as ensure oversight and accountability.

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69 *"If they had hope, they would speak" The ongoing use of state-sponsored sexual violence in Burma's ethnic communities,* Women's League of Burma, November, 2014, http://womenofburma.org/wp-content/uploads/2014/11/VAW_Iftheyhadhope_TheywouldSpeak_English.pdf

70 *Revealing Burma's System of Impunity,* Burma Lawyer's Council, 9 September 2011, http://www.burmapartnership.org/wp-content/uploads/2011/09/Revealing-Burmas-System-of-Impunity-BLC-Briefer.pdf

71 *Myanmar: Civil-military Relations and Constitutional Reform,"* Melissa Crouch, East Asia Forum, 21 June 2013, http://www.eastasiaforum.org/2013/06/21/myanmar-civil-military-relations-and-constitutional-reform/

72 http://www.rfa.org/english/news/myanmar/commission-09252014174739.html

5. Conclusion and Recommendations

To the ICC Bureau and ICC-SCA:

I. To flatly reject the application for accreditation by the MNHRC, as conferring international recognition on the body would overlook/legitimize its shortcomings in the face of contrary evidence from the ground;

II. To urge the MNHRC to provide the documentary evidence and actions necessary to establish its continued conformity with the Paris Principles;

To the Government of Burma/Myanmar:

III. Amend existing provisions in the MNHRC enabling law to allow for public participation in the nomination and appointment process of Commissioners and to grant the Commission full autonomy in selecting its own staff;

IV. Take actionable and measurable steps to refrain from unduly interfering with the independence and autonomy of national human rights institutions;

V. Popularize, mainstream and implement the Belgrade Principles on the relationship between NHRIs and Parliaments such that the functioning, independence and accountability of the MNHRC can be secured, in particular those relating to independence, financial autonomy, appointment/dismissal processes;

VI. Ensure, through an appropriate and relevant mechanism that the annual reports of the MNHRC which are submitted to the President are subsequently tabled and robustly debated in Parliament to address and take action on both substantial human rights situation/issues in the country as well as the administrative, legal and financial constraints that inhibit the effective work and functioning of the MNHRC;

To the MNHRC:

VII. Advocate for formal legislative oversight and forms of cooperation between Parliament and MNHRC, such that the independence and accountability of the MNHRC can be secured;

VIII. Pro-actively engage in legislative processes, including providing inputs and recommendations for amendments to the MNHRC's founding law as well as inputs to draft legislation; in particular those that restrict, suppress or criminalize the work of HRDs

IX. Establish a HRD focal point within the Commission and ensure that the views of civil society organizations (registered and non-registered) are taken into account in the planning, design and implementation of its programs and activities;

X. Make timely investigations and pronouncements on systemic human rights violations and ensure that such responses and actions are informed by a long-term plan that addresses violations at an institutional level; including submitting recommendations to the government and Parliament to resolve pressing human rights issues;

XI. Publicize and widely disseminate the annual (and special/thematic) reports as well as investigations/inquiries with civil society to ensure public engagement, scrutiny and accountability.