

**Myanmar: five years without justice for journalist Ko Par Gyi's killing highlights need to reform 1959 law that facilitates military impunity**

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*Reform of the 1959 Defence Services Act is a necessary step to address ongoing military impunity. The case of Ko Par Gyi's killing should be reopened to satisfy the State's international law obligations and deter repetition of serious crimes by soldiers.*

Five years after the death of journalist Ko Par Gyi, the International Commission of Jurists calls on the Government of Myanmar to reform the 1959 Defence Services Act, which was used to shield soldiers from accountability for involvement in his killing.

"The case is emblematic of the 1959 Defence Services Act being used to enable impunity for human rights violations by soldiers throughout Myanmar, by transferring to military courts the authority to investigate and prosecute serious crimes against civilians," said Frederick Rawski, Asia Pacific Region Director for the ICJ.

"Impunity for Ko Par Gyi's death is another example of this law being used to shield soldiers from accountability for serious crimes," added Rawski. "Legislators should reform the 1959 law to enable the public criminal prosecution of soldiers for serious crimes in all circumstances, and take other steps to address the accountability gap."

After being detained by police in Mon State and transferred into military detention on 30 September 2014, Ko Par Gyi died four days later in the custody of Tatmadaw soldiers. Unceremoniously buried in a shallow grave, Ko Par Gyi's death was hidden from his family and the public for weeks. Nobody has been held accountable for his death and his family lacks access to redress, including their right to know the truth.

A deeply flawed inquiry carried out secretly in military courts, pursuant to the 1959 Act, resulted in the acquittal of the soldiers allegedly involved. This effectively ended other efforts to hold the perpetrators accountable, including through an inquest at the Kyaikmaraw Township Court in Mon State. It also flouted the Myanmar National Human Rights Commission's recommendation for a police investigation and public criminal trial to be undertaken by civilian authorities.

"Five years on, Myanmar authorities must finally initiate a thorough, independent and impartial investigation into the killing of journalist Ko Par Gyi," said Sean Bain, legal adviser for the ICJ. "The truth must be established and recognized, and those responsible for his apparently unlawful killing need to be brought to justice in fair trials," he added.

Several provisions of the 1959 Act are used to facilitate a transfer of cases involving military personnel from civilian to military courts, including for serious crimes against civilians. This has been used as a tool to avoid accountability in cases throughout Myanmar, such as its use to justify the early release of soldiers who were convicted by a military court in the killing of ten Rohingya civilians in Rakhine State in 2017.

International legal standards prohibit the use of military courts to try military personnel for gross human rights violations and crimes under international law. The detention and prosecution of journalists, based solely on their lawful activities undertaken while doing their job, violates the right to freedom of expression, and the rights to seek, receive and impart information and to participate in public affairs.

Myanmar authorities have an obligation to reopen the case of Ko Par Gyi with a view to establishing the circumstances of his death, as with any potentially unlawful killing by either State or non-State actors.

"By empowering civilian courts to oversee such cases, the NLD Government would send a powerful message to all justice sector institutions, including police, prosecutors and judges, that they can and should review potential crimes involving the military with independence and impartiality, in line with the rule of law," added Bain.

The National League for Democracy (NLD)-led Government has the legislative authority to immediately reform the 1959 Act to align it with international standards. The ICJ has called for reform of this law, including by allowing the prosecution of soldiers for serious crimes to be undertaken under the jurisdiction of civilian courts.

## **Background**

### International Law

All States are required under international human rights law to promptly, thoroughly and impartially investigate all unlawful killings, which constitute a violation of the right to life. The obligation engages all parts of the State, including justice sector actors. Those responsible must be prosecuted in fair trials before competent, independent and impartial tribunals including through public criminal prosecutions in civilian courts in line with fair trial standards.

### 1959 Defence Services Act

Articles 293(b), 319 and 343(b) of the Constitution provide for the establishment of permanent military tribunals, over which the Commander-in-Chief exercises appellate power and ultimate authority, with no right of appeal to the Supreme Court or other civilian body. The 1959 Act provides jurisdictional foundation for cases to be referred to military courts: section 72 stipulates that military personnel on active service who commit serious crimes are to be tried by courts martial rather than by ordinary courts. Section 3(a) of the Act broadly defines "active service," with the effect that military personnel are typically considered to be on active service and thus subject to courts-martial rather than trial in ordinary courts, including for serious crimes. State institutions and individuals are restricted from appealing the decisions of these courts.

A provision of the original 1959 Act (section 130) authorized the President of the Union to request a retrial in an ordinary court, however this was repealed in amendments by the outgoing military junta in 2010 (section 8 of the 2010 Law Amending the Defence Services Act), as part of a series of immunities implanted in Myanmar's legislative frameworks prior to the transition to quasi-civilian rule.

### The death of Ko Par Gyi

Aung Kyaw Naing, born in 1965 and known as Ko Par Gyi, was a freelance journalist and photographer whose byline often appeared in news journals including *The Voice* and *Eleven Media*. Earlier in life for some time he had left Myanmar for Thailand, after participating in the 1988 democracy uprising. In 1989 he married Daw Thandar, a democracy activist, and together they had one daughter. A member of the NLD party, he served for a period as a bodyguard to its leader Daw Aung San Suu Kyi.

On 30 September 2014, police detained Ko Par Gyi in Mon State, where he was covering clashes between the Tatmadaw and the Karen Democratic Benevolent Army (DKBA). He died on 4 October, four days after being transferred to military custody.

Pressure then mounted on the Government to clarify Ko Par Gyi's whereabouts: Daw Thandar, his wife, held a press conference to highlight the "disappearance"; regional and world leaders made public and private interventions prior to the Association of South East Asian Nations (ASEAN) summit being held for the first time in the capital Nay Pyi Taw. In the third week of October the Tatmadaw released a statement that Ko Par Gyi had been killed while wrestling soldiers in a botched escape attempt, and was at fault for his own death. The statement also claimed Ko Pa Gyi had been in proximity to clashes in Mon State as member of the DKBA, not as a journalist. After the Tatmadaw had concealed the killing for 20 days, his body was later exhumed, and family and friends then gave Ko Par Gyi a proper burial in Yangon on 7 November.

The Tatmadaw's version of events has been called into question. The MNHRC established that Ko Par Gyi had been working as a journalist, yet its report failed to satisfactorily explain the circumstances of his death, including apparent signs of torture and ill treatment. Several other inquiries failed to facilitate accountability or redress, including the truth of what happened, and why there was an initial cover-up.

Following the MNHRC's final report of 2 December 2014, an inquest was initiated at the Kyaikmaraw Township Court. Yet in May it was revealed that six months earlier, in secret, the two soldiers involved had been acquitted of wrongdoing in the Tatmadaw's own process undertaken through a military court-martial, governed by the 1959 Act. The inquest in Kyaikmaraw lost momentum and police reportedly closed the case in March 2016. The MNHRC did not provide further comments or recommendations.

**See also:**

ICJ, "The investigation and prosecution of potentially unlawful death: ICJ Practitioners' Guide no. 14," 14 September 2019, available at: <https://www.icj.org/the-investigation-and-prosecution-of-potentially-unlawful-death-icj-practitioners-guide-no-14/>

ICJ, "Achieving Justice for Gross Human Rights Violations in Myanmar – a baseline study," 16 January 2018, available at: <https://www.icj.org/myanmar-reverse-laws-and-practices-that-perpetuate-military-impunity-new-icj-report/>

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