ICTJ Justice Truth Dignity

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Prospects for Justice in Myanmar

Does the New Political Reality Offer Opportunities for Addressing Human Rights Violations?

In the years immediately before the 2015 election, there was a palpable sense of waiting among those working in Burmese civil society. Many of their plans depended on one or two critical developments to take hold: the NLD coming to power and the signing of a nationwide ceasefire agreement. Now, both long-hoped-for events have happened,[1] and Myanmar's transition to democratic rule continues to move slowly forward.

But certain shortcomings in Myanmar's new political reality mean that activists, human rights defenders, and community workers are scrambling to understand current conditions and craft strategies to address the issues they care about in the delicate atmosphere of a nation coming to terms with the fact that an NLD-led government is not everything they had hoped for, though still better than those of past.

Transitional justice has always been one of the topics on reserve for later discussion—to be talked about once there was peace, once there was a new government, once there was constitutional reform. Many in civil society who have been seeking justice for past violations, often in the form of reparations for the most vulnerable victims, have been waiting for an NLD-led government in order to advocate for their proposals. The presence of former political prisoners in positions of government, including dozens in Parliament, has raised expectations that some sort of effort to address past violations, if only through official acknowledgments, would be possible at the national level. Unfortunately, the situation is not so clear-cut. Several factors stand in the way of pursuing a comprehensive justice response in the current context.

Factors Affecting the Pursuit of Justice for Ongoing and Past Violations

From all indications, the new government has prioritized peace and reconciliation (both narrowly defined) over broader social change.

The NLD-led government's priorities once in office have been a subject of much speculation, rumor, and theorizing since before its members were inaugurated on February 1, 2016. It has made few public statements of policy or plans beyond the announcement of five main priorities: 1) national reconciliation, 2) internal peace, 3) rule of law, 4) constitutional amendment, and 5) democratic development. Of those, the focus thus far has been on reconciliation between leaders of the NLD and the military, and continuing the peace process, with some steps toward addressing violence against Muslims in Rakhine State.

1 The Nationwide Ceasefire Agreement affects only part of the country.

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In the media and political rhetoric, *national reconciliation* appears to most often apply to relations between the NLD and the military, or between the NLD and officials or supporters of former governments. A recent International Crisis Group report posited that State Counsellor and NLD Leader Aung San Suu Kyi defines it as "healing past deep divisions, particularly between the military and the civilian population and between supporters and opponents of the NLD."[2]

There is little in-depth information available to the public about how Suu Kyi and others in the NLD view the conflict and peace process, including their understandings of its root causes and measures necessary to resolve it. Suu Kyi and other NLD leaders have not made any public statements on the subject or taken any known actions to suggest that their approach to the peace process differs significantly from the military's, which focuses on disarming nonstate armed groups in exchange for some form of federalism, based on the idea that the conflict can be solved by promoting economic development in conflict areas. In order to achieve peace and reconciliation, the common argument goes, anything that might upset the military is off-limits, in order to secure its full cooperation on the NLD's priority issues (listed above). Unfortunately, it is unclear whether this trade-off has actually increased the chances that the military will compromise with the NLD; to date, it has continued to stick to its prior positions on every key issue.

Armed conflicts in Kachin and Shan states continue at fairly constant rates, and serious fighting has also occurred in Karen State, including near the site of a new dam project opposed by the local community. All of this has led to more displacement, civilian deaths, and serious human rights violations, with very little public comment from Suu Kyi. Civil society and communities in conflict areas have grown increasingly frustrated with her silence on the conflict and its impacts on civilians.

The recent 21st Century Panglong Conference, held on August 31, 2016, aimed at promoting political dialogue and peacebuilding between the government and nonstate armed groups. While a milestone in getting most of the relevant actors in one room and airing speeches by nonstate armed group leaders on state television, it did not delve into substantive issues. The obstacles to moving forward with dialogue, including ongoing conflicts and the conference's non-inclusion of certain groups, remain. There were also a number of "protocol slights" that caused some representatives of ethnic groups to feel that they were purposefully treated unequally.[3]

Going forward, the government plans to hold a Panglong Conference every six months, which will likely continue to result in slow progress, while holding lower-profile meetings to come to agreement on certain key issues. These issues, aside from cessation of hostilities and other ceasefire-related issues, are: federalism/decentralization and disarmament of ethnic armed groups (with broad security sector reform still pushed by ethnic armed groups and rejected by the military). It will be a significant challenge to move from formal speeches to substantive discussion on these issues; from the speeches given at the August conference it appears that the positions of the military and armed groups remain as far apart as they have for the past few years. The speeches by NLD

2 International Crisis Group, *Myanmar's New Government: Finding its Feet?,* Asia Report No. 282, July 29, 2016, 5.

3 For instance, ethnic armed group delegations were not picked up at the airport and their leaderships' nametags did not reflect their titles or ranks while the military's nametags did. The most consequential of these slights was that the United Wa State Army delegates were listed as observers when in fact intensive negotiations had finally settled on them being full participants; this led to a walk-out by the Wa delegates on the first day. This is important because the United Wa State Army is the largest and most heavily armed of the armed groups, it is politically close to the Chinese government, and it has been reluctant to participate in the peace process because it already feels it has a more favorable arrangement in the territory of its influence than appears to be on offer thus far from the government.

officials conspicuously did not mention constitutional reform, leading some to wonder whether a deal had been struck with the military on this topic. Justice for human rights violations is not likely to be included in these discussions either.

2. It appears that the NLD leadership does not believe transitional justice is necessary or desirable.

Suu Kyi, despite being subject to years of house arrest and a violent attack on her convoy in 2003, has frequently stated that she feels she has "nothing to forgive" her captors for.[4] From public comments and other reported discussions, it appears that Suu Kyi and other NLD leaders associate *justice* or *transitional justice* with criminal prosecutions motivated by revenge. As for other democracy activists who may have suffered worse violations, she has repeatedly told them essentially that they should not expect anything for their sacrifice and that if they genuinely care about the well-being of the country they should not demand reparation.[5] These comments have been directed at former political prisoners and members of the democratic movement in general. Suu Kyi has made few, if any, comments on allegations of human rights violations committed during ethnic conflict or even the suffering of civilians in conflict areas.

It is possible that Suu Kyi's more pointed comments about not addressing the past were based on political calculations and not on her true feelings.[6] However, the rationale of sacrifice and not expecting redress are also often expressed by Burmese human rights defenders and political activists in private conversation—even those supporting transitional justice, who say they want nothing for themselves because they have chosen to sacrifice for the cause of democracy. Instead, they focus on pursuing justice for those with more immediate needs, like disabled torture victims and families of political prisoners who died in prison. Instead of material reparations, many activists would want any future reparations program to recognize and honor their contributions to the democratization process.

3. Civil society has little space to voice an opinion that differs from the NLD leadership.

Civil society organizations who try to counter the belief that transitional justice is motivated by revenge or personal gain, or that it is dangerous and unnecessary, are having a hard time doing so in a way that communicates their perspective productively. This may be because there is a preference for privately negotiated compromise over public confrontation.[7] Overall most organizations have made a strategic decision not to be publically vocal about transitional justice at this point. This should not be misunderstood to mean that there is no desire for justice. Human rights defenders and others who work closely with victims continue to report a wide range of opinions on the appropriate government response to their experiences.[8]

One of the most influential factors preventing activists from speaking out about the need for transitional justice is the risk involved: people have been put in jail and events have been shut down for criticizing the military. To call for justice is necessarily to criticize the military, because it suggests that some military leaders or personnel have committed

4 See, for example, Richard Allen Greene, "Smiling Suu Kyi Lays Out 'Ambitious' Plan for Myanmar," *CNN*, June 14, 2012.
5 ICTJ Interviews of NLD members and members of civil society.
6 For instance, see Zarni Mann, "Forgive Those Who Wronged Us," *The Irrawaddy*, December 7, 2015, www.irrawaddy.com/election/news/forgive-those-who-wronged-us-suu-kyi-tells-nld; and Nyein Nyein, "State Counselor Tells Peace Process Participants not to Dwell in the Past," *The Irrawaddy*, September 3, 2016, www.irrawaddy.com/burma/state-counselor-tells-peace-conference-participants-not-to-dwell-on-the-past.html
7 Though opposition activities during military rule show that when strategically useful Burmese activists have no problem using public, confrontational tactics, they have shied away from criticizing the NLD publically.
8 ICTJ interviews.

human rights violations, which the military still publically denies.[9] Over the past year, people have been arrested and imprisoned for social media posts deemed critical of the military on far more trivial points than accusations of committing international crimes.[10] Criticism on social media still gets people into trouble in Myanmar under the new government. For instance, a politician in Karen State was convicted in September of defamation and sentenced to nine months' imprisonment after calling President Htin Kyaw an "idiot" and "crazy" on Facebook.[11]

Continued censorship of critical ideas extends beyond social media. A film screening at an annual film festival in Yangon was cancelled after the local government worried depictions of military abuses during conflict would upset ethnic relations. In June, the Yangon regional government allegedly prevented a human rights organization from carrying out a press conference on the launch of their report, *Trained to Torture: Systematic War Crimes by the Burma Army in Ta'ang Areas of Northern Shan State (March 2011–March 2016)*, documenting torture by the Myanmar military and calling for transitional justice remedies.[12] Under the previous government, similar report launches were common in Yangon, and some ethnic minority activists have taken this and other incidents as a sign that their freedom of speech has shrunk since the NLD took power. (Similar organizations have certainly taken note of where "the line" is for public criticism.)

In a population long accustomed to strict curtailments of freedoms under military government with unpredictable periods of loosening restrictions, many have adopted automatic self-censorship and a complex way of evaluating what is and is not allowed. This has led activists and human rights defenders to self-censor on issues of justice for two related reasons, in addition to the risk of being arrested or sued for defamation. First, there is a hesitancy to publically criticize the new government, less out of fear of provoking some military response than of being ostracized and attacked by the rest of the pro-democracy community. The NLD, particularly Suu Kyi, has had such an exalted status for so long that criticizing her publically is almost unthinkable. This has not stopped private criticisms, but no one wants to be the first to be seen publically to be too critical. Second, many ethnic minority activists are feeling particularly exposed; they feel criticism of the conflict will be taken as criticism of the government, and they can no longer depend on support from pro-democracy forces when criticizing the government. Instead, they would be even more vulnerable to arrest, attacks (in person or on social media), or being ostracized from mainstream civil society.

This has had a measurable effect on anti-war activities. For instance, one prominent Kachin activist commented to ICTJ that the decision had been made to cancel an annual peace rally on the anniversary of the resumption of the Kachin conflict, in order to hold a lower-key briefing for diplomats in a hotel. She said they feared the reaction from all sides—NLD and its supporters, the military, former government officials, the private sector, and others—if they were too critical publically. However, this caution is wearing thin as conflict continues without comment from Suu Kyi or the president. Rallies

9 An exception is the narrow admission by Northeastern Commander Lt.-Gen Mya Tun Oo related to soldiers' responsibility for the deaths of five villagers in northern Shan State during interrogation. See below for more on the case and its implications.

10 For instance, Chaw Sandi Tun was arrested in October 2015 for a Facebook post comparing the color of the military's new uniforms to the clothing of Suu Kyi. While this insult carried the additional cultural layer that any association with women's clothing can reduce men's power and masculinity, this is still a much less serious insult than an accusation of serious human rights violations.

11 One problem is that the victim of the alleged defamation is not the only one who can file criminal charges. For instance, in this case the plaintiff was a member of the Karen State central committee for the NLD who also threatened to bring charges against anyone else who insulted NLD leadership. There have been no statements by NLD leadership repudiating the action or making any comment on the case.

12 Thu Thu Aung, 'Trained to Torture' Press Event Cancelled in Yangon," *Myanmar Times,* June 28, 2016.

in Kachin State in October saw thousands of demonstrators calling for a cessation of hostilities, while also calling on Suu Kyi to be more engaged.

Finally, even when civil society representatives decide to speak out on a given issue, they are increasingly convinced that their opinions will not be taken into consideration by the NLD. Nor can they give input privately. In recent months, Suu Kyi has made numerous public and private comments on the theme that civil society is useless, unnecessary, and selfish.[13] After an NLD MP made an unauthorized visit to the headquarters of the United Wa State Army, Suu Kyi reportedly instituted a new policy that all NLD MPs must get permission from the NLD's Central Executive Committee before participating in any non-NLD sponsored workshops, meetings, and events. Civil society activists have informed ICTJ that invitations to participate in such activities must be addressed to a committee or other relevant office, instead of to individual MPs, to allow the party to select a participant it deems appropriate. How much of this is formal and will last is unclear, but civil society has gotten the message—their contributions are not welcome.

Civil society representatives were allowed to attend the Panglong Conference but not as participants. It has been made clear that they will not participate directly in political dialogue. The idea for a "civil society forum" on economic and social issues has been floated, reportedly originating with Suu Kyi, but such a forum would not cover anything political or security-related. It is as yet unclear how it would be organized, who would be invited, and how the outcomes would be incorporated into formal peace negotiations, if at all.

4. The Myanmar National Human Rights Commission is not seen as a viable option for addressing violations.

The Myanmar National Human Rights Commission (MNHRC), created in 2011, is often raised by internationals interested in or working on Myanmar as a potential avenue for submitting complaints of human rights violations and as an institution that could push for addressing the past. However, most in civil society do not see MNHRC, which has reportedly received few complaints related to human rights violations, as a viable or safe option. There are a few reasons for this. First, though it happened years ago and the law creating the MNHRC has been amended since, the *Brang Shawng* case, in which a MNHRC complainant was successfully sued by the military for defamation and fined, continues to exert a chilling effect.

Second, there is still no system in place for witness or victim protection or for confidentiality for complainants. Other problems with the commission, including commissioners who are former military officials and a lack of transparency and robust investigations, leaves civil society with little trust. Meanwhile, MNHRC has

The Brang Shawng *Case*

Brang Shawng, of Kachin State, filed a criminal complaint at the local court after his daughter Ja Seng Ing was allegedly killed by the military in 2012. He also submitted a complaint to MNHRC, asking them to investigate her death. Neither process moved forward. However, the military promptly sued Brang Shawng for defamation, explicitly citing the complaint to MNHRC as the basis of the case. MNHRC made no statement on the case and no known effort to intervene. Brang Shawng's trial went on for two years, with inconvenient and costly hearings. He was ultimately found guilty and required to pay a $50 fine.

13 ICTJ interviews of individuals present for those statements, and with members of civil society who had heard of them through their networks.

undertaken few outreach activities to improve its image and relationships with those who have the information it claims to want to receive.

Recently the MNHRC has been even more widely discredited in the wake of a scandal relating to its handling of a case of child abuse and trafficking. A journalist helped two young girls who had been held as unpaid domestic workers and badly abused by a middle-class family in Yangon report their case to MNHRC. In response to the complaint, MNHRC decided to mediate between the victims' family and the employers, and allegedly pressured the victims to accept a small amount of compensation instead of pursuing legal action. After the journalist reported on this, there was a public outcry against the commission. The case has now been taken up by the police, and at the time of writing the Attorney General was considering pressing charges against MNHRC commissioners for facilitating child abuse and human trafficking. After the lower house of Parliament passed a resolution calling for the dismissal of all commissioners, four commissioners resigned. There is hope that this case will prompt necessary reforms of the commission.

What Opportunities Exist for Promoting Justice?

In this environment, it may seem unlikely that issues of the past will be addressed in Myanmar. However, there are ongoing efforts, including increased advocacy and coordination efforts on reparations by civil society, with some organizations seeking justice on a case-by-case basis for crimes committed during ethnic conflict. Furthermore, some developments should increase the chances that transitional justice will be on the agenda in the future.

In broader terms, at the national level, it will be very important for Parliament to become a more independent institution and a venue for debate and diverse political voices. Parliament has begun to build some autonomy, with the capacity to question the actions of the national executive. For example, in July there was a parliamentary debate on the MNHRC's annual report in which MPs criticized the commission, particularly how it handled complaints, some even urged it to do more to investigate alleged human rights violations on its own initiative. Vocal MPs included Ma Thandar, a former human rights activist whose husband, a journalist, was killed by the military in 2014. Another MP, Ye Htut, criticized the commission for failing to obtain justice in other cases of killings by soldiers and called for an end to impunity. Other NLD MPs also spoke about ending impunity, a sign that they may have a bit more room to manoeuvre now. Parliament has also recently been the site of numerous substantive debates on government policy, including calls to exclude the Rakhine Advisory Commission's international members and discussions about whether and how to amend controversial laws.

There is also a need to reframe the conversation on reconciliation to be more inclusive. Many civil society activists and others have discussed the need for a deeper kind of reconciliation, between different ethnic groups and between the government and the people. Dealing with the past has a role to play in that kind of reconciliation, as the impacts of past violations and conflict remain an obstacle to building civic trust in affected communities. If reconciliation is seen to require listening to and understanding the grievances of those who suffered in the past (and continue to suffer today) there may be a better chance of achieving justice.

What Is Civil Society Doing in Relation to Transitional Justice?

Civil society organizations working on transitional justice are employing a number of strategies to increase the chances of meaningful processes in the mid- to long-term. First, they are strengthening their movement by improving their coordination, building their own capacity and knowledge, and strengthening survivors' voices through teaching and supporting self-care and other mutual support groups. Second, they continue to document ongoing violations as well as past violations, and improve their reporting of violations. They are also working to spread basic knowledge of transitional justice to people who may be key supporters of future measures, including MPs (working through networks of former political prisoners) and other civil-society, religious, social, and community leaders. Some organizations cover the basics of transitional justice in human rights trainings they conduct around the country.

Finally, some organizations are working together to develop shared principles and proposals for what exactly they want in terms of transitional justice. This is the first step in a process that will include consulting other stakeholders, to get their opinions and buy-in on proposed reparations, and conducting a more rigorous needs assessment and consultation of victims in order to understand their priorities and current situation.

What Are the Implications of the Recent Acknowledgment of Unlawful Killing of Civilians by Military Personnel, and Court Martial?

In August, Lt.-Gen Mya Tun Oo, the deputy commander of the Army's North Eastern Command, publically admitted that soldiers under his command had killed five local men during interrogation in Mong Yaw village in northern Shan State.[14] The soldiers had initially buried the bodies in a nearby forest, where they were discovered by locals searching for the missing men. Mya Tun Oo promised a court martial for the case, which was shortly convened and, in the first session, all but one of the accused soldiers confessed to the killings. The hearing was attended by 12 family members of the deceased, which is rare and possibly unprecedented for a military court proceeding. Local police also reportedly opened their own investigation into the case after exhuming the bodies.

This case is the most recent and high-profile of a slowly growing number of cases in which communities and local organizations have successfully advocated to the military to press charges against its own soldiers for crimes against civilians. Over the past few years, with the gradual democratization of Myanmar and the signing of initial ceasefire agreements, some victims of violations committed in the context of ethnic conflict and their advocates have taken advantage of newfound, yet limited, freedoms to seek judicial remedies. Some have filed police complaints seeking a criminal case to be brought in a civilian court; others have lobbied the military to use its jurisdiction over its own personnel to investigate, prosecute, and punish perpetrators. Still others have negotiated with military or armed groups for compensation or other assistance. Some have appealed to state leaders or the MNHRC to intervene on their behalf.

Although in the first few years of the Thein Sein administration most such efforts were unsuccessful, some progress has been made in individual cases in recent years. With the opening of traditional media and the growing influence of social media, the general public is more aware of certain high-profile cases, such as the "two teachers' murder" in

14 Wa Lone, "Myanmar Soldiers Admit at Court Martial to Killing Villagers: Witnesses," *Reuters*, August 11, 2016.

northern Shan State[15] and the *Ko Par Gyi* case,[16] increasing the pressure on authorities to take action. In limited cases this has led to low-ranking military officials being tried and convicted in civilian courts for serious crimes.

It remains to be seen whether the case in Mong Yaw represents an improved dynamic, where at least direct perpetrators may be tried, or whether it was a unique occurrence. Tensions remain high in conflict areas, and there is likely little appetite at the top levels of military or government to address serious crimes in a systematic manner.

However, there may be opportunities for civil society to keep pushing for more accountability on a case-by-case basis at the level of local or regional military command. Encouragingly, Mya Tun Oo, who ordered the court martial in the case in Mong Yaw, has recently been promoted to Chief of General Staff, one of the highest-ranking positions in the military, which means at the least that his actions were not sufficiently controversial to derail his rise.

Conclusions

After decades of military rule and internal conflict, Myanmar has a long way to go on the path to a full democracy. There are many urgent concerns that rightly occupy government officials and those working in civil society, including finding a peaceful settlement to the armed conflict and ensuring that ordinary citizens see the benefits of economic reforms. In confronting these challenges, Myanmar's leaders have urged all citizens to move forward in a spirit of reconciliation and not to dwell on the past.

However, ignoring the past is not a stable foundation for the future. Throughout the democratization process, the deep wounds caused by the country's difficult past have become apparent, in the distrust that permeates relationships throughout the country and in the continued physical and mental suffering of individual victims. Some actors in Myanmar's civil society have started to develop proposals that would address the past without jeopardizing peace and stability. The government should engage with them and others in an open conversation, instead of continuing in the manner of past governments to shut down any attempt to discuss the country's true history and current realities.

15 Two young women teachers volunteering with the Kachin Baptist Convention (KBC) in an IDP camp in northern Shan State were found raped and murdered in 2015. Local villagers and the KBC accused soldiers who had been camped nearby (on their way to the frontline) of committing the crimes, while the military blamed two villagers who later fled to armed-group-controlled territory after being accused. The case became well-known throughout the country due to graphic photos circulated on social media.

16 Ko Aung Kyaw Naing (also known as Ko Par Gyi), a journalist, activist, and former bodyguard of Suu Kyi, was taken into custody by the military in a conflict-affected area of Karen State. After he went missing for approximately one month, the military revealed that he had died in an attempt to escape custody. His widow, Ma Thandar, an influential political activist and now an MP, lobbied for and was granted an exhumation of his body, which had been buried in an unmarked grave in a field. According to the reports of those present at the exhumation, his body showed obvious signs of torture and close-range gunshot wounds. The MNHRC accepted Ma Thandar's complaint and made a rare statement recommending a police investigation and civilian trial. The investigation faced lack of cooperation from the military, and a civilian court eventually acquitted the two soldiers accused of killing him.

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