

Dealing with Myanmar's Past: A Call for a Truth Commission

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In 2003, a seven-point roadmap for a “discipline-flourishing democratic state” was released by Prime Minister Khin Nyunt (Holliday, 2012). The election in 2011 of the first civilian government since 1962 reflected this turn towards democracy. Under the initiative of President Thein Sein several reforms have since been implemented as well as peace processes initiated, thus paving the way for a democratic transition. The landslide election of the National League for Democracy (NLD) in 2015, led by Aung San Suu Kyi (ASSK), raised even more of the population's hopes and expectations to speed up the transition towards democracy. Nonetheless, progress is always reversible and the limits of the nascent transition have already become visible. The peace process has not yet reached a meaningful outcome and its prospects are limited considering the ongoing conflicts. The reforms are incomplete and entangled in the government's contradictions. The relaxation of societal control resurfaces old grievances from all social groups. Importantly, Tomas Ojea Quintana, the fourth Myanmar's United Nations (UN) Special Rapporteur on human rights, denounced the thriving “culture of impunity” within the state in a 2013 report (para 47). The government's denial of past human rights abuses since the beginning of the transition created a general atmosphere of mistrust throughout the society.

Considering that, this paper will aim to answer the following question: *‘What has to be done to undertake a successful democratic transition in Myanmar?’* It will be argued that establishing a truth commission is necessary in order to deal with Myanmar's past and to overcome the current deadlock, while at the same time not jeopardising the progresses made so far. This proposal reflects the contemporary socio-legal norm suggesting that states in the midst of a transition have to reckon with transitional justice measures (Dukalskis, 2015). Former UN Secretary-General Kofi Annan declared: “If...people do not feel that their grievances have been dealt with, it is extremely difficult to get serious reconciliation ” (cited in Pierce and Reiger, 2014). In Myanmar, past human rights abuses remain unaddressed. Tensions between communities are deepening and the general mistrust towards the government disrupts reforms and peace efforts. It is now paramount to move from the government's organized forgetting of past violations to an official acknowledgment and general forgiveness.

This study is structured as follows. First, the contradictions of Myanmar's transition will be highlighted. The limited peace process and reforms arouse old animosities in a country where past human rights violations have never been addressed, thus depriving the democratic transition of a solid foundation. Subsequently, the paper will justify why a truth commission is the most appropriate transitional justice mechanism considering the current context. To that end, three factors have to be taken into consideration: the type of political transition, the strength of the civil society and the interest of the international community. Finally, the last section will aim to underline the potential benefits of a truth commission in Myanmar. Its mandate ranges from ethical imperatives to redress past injustices to the practical needs to make recommendations for future reforms in a bid to prevent further human rights violations and then to build a stable democracy.

CHAPTER ONE – THE CONTRADICTIONS OF MYANMAR'S TRANSITION

Limited peace process

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While the goals of reconciliation and internal peace have been put at the top of the NLD-led government's political agenda (Holliday, 2012), they are understood as achievable without addressing the past. Thus, the following section will show that the different attempts to build peace in the country have faced obstacles, including widespread mistrust thriving between groups.

The Myanmar National Human Rights Commission

The creation of the Myanmar National Human Rights Commission (MNHRC) in 2011 was seen as an opportunity to raise human rights violations issues and more generally to address the past (Thomson, 2016). However, only few complaints have been submitted due to its flawed system. Indeed, there is no provision granting the protection and confidentiality of witnesses and victims. The lack of confidence on part of the population in the institution is all the more reinforced as commissioners are often retired military officials who neglect transparency in the commission's investigations. Additionally, the *Brand Shawng Case* (2012) still acts as a deterrent. Brang Shawng complained about the alleged killing of his daughter by the military, asking for an investigation. Beyond the fact that nothing has been done, he was successfully taken to court and charged for defamation by the military who based the case on his complaint to MNHRC. The latter did not intervene to oppose this decision. As a result, the hopes linked with the creation of this institution have been rapidly dashed. The MNHRC is therefore not seen as a viable and secure solution to address past human rights abuses.

Partial Nationwide Ceasefire Agreement and Panglong Peace Process Conferences

In October 2015, a Nationwide Ceasefire Agreement (NCA) was signed between the government and non-state ethnic armed organizations (EAOs) after an 18-month negotiation period (Thomson, 2015). The deal struck includes the granting of federalism and Security Sector Reform demanded by EAOs in exchange for ethnic groups' Disarmament, Demobilization and Reintegration (Institute for Security and Development Policy, 2015). Nevertheless, this ceasefire was only partial as the government prevented six groups from signing and others decided to stand aloof. This reluctance can be explained by the ethnic groups' widespread skepticism in the good faith of reforms implemented on their territories, where the military still perpetrate abuses (Pierce and Reiger, 2014).

In the wake of the NCA which paved the way for further political dialogue, the first 21st Century Panglong Conference has been held in August 2016 in a bid to achieve a permanent ceasefire and peace accord (Thomson, 2016). Nonetheless, despite these efforts, the discussions have not led to a substantive outcome due to several obstacles. First, only the armed group leaders who have signed the NCA were invited (Mon, 2018). Secondly, the discrepancies between the military and armed groups' positions remain. Finally, past human rights violations were still excluded from the discussions. Despite these flaws, the government decided in the wake of this meeting to plan a Panglong Conference every six months (Thomson, 2016). Yet, this commitment has not been respected as the third session has been postponed four times (Mon, 2018). This inconsistency is due to the lack of compromise from the military on the issue of federalism as well as to the ongoing conflicts and abuses in several states.

Ongoing conflicts and gross human rights violations

The failed peace process is at the same time the cause and the consequence of the ongoing conflicts and abuses in several areas. The Rohingya crisis in Rakhine state which reached its peak in August 2017 is, according to Zeid Ra'ad Al Hussein, the United Nations High Commissioner for Human Rights (2017), a "textbook example of ethnic cleansing". Confrontations between the military and the Kachin Independence Army (KIA) increased since the resurgence of the conflict in 2011, breaking a long-standing ceasefire of 17 years (Progressive Voice, 2018). Similarly, clashes are still commonplace in Shan and Karen State. The military has recently deployed troops to the latter, despite the Karen National Union being the most significant signatory of the NCA. As such, these ongoing conflicts cast doubt upon the efficacy of the NCA and of peace conferences. All of this is reinforced by the thriving culture of impunity which has led to growing human rights violations perpetrated by the Tatmadaw (official name of Myanmar's armed forces) in these states, such as extrajudicial killings, torture and rape (Thomson, 2016). On top of that, ASSK kept silent on these issues, fueling the frustration of the communities at hand.

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Flawed reforms

Since 2011, several liberal reforms have been undertaken in order to democratize the country. Even though this constitutes significant progress, said reforms remain incomplete. For instance, the release of hundreds of political prisoners has been selective and those released are still restricted on their activities and civil rights (Thomson, 2015). These limitations have considerably diminished the population's trust towards the new democratically-elected government. More particularly, this section will focus on the freedom of expression and assembly which seems to become "worse and worse" despite the the election of the NLD-led government which initially raised hopes for improvements (Human Rights Watch, 2019, p.1). Those criticizing or protesting against the government, the military and speaking about conflicts issues are of primary concern.

Criminalization of peaceful expression and assembly

Regarding the freedom of expression, the government has made limited amendments and continues to repress peaceful speech made by journalists, activists or individuals by relying on existing laws. For instance, the parliament amended section 66(d) of the Telecommunications Law in 2017. Though some positive steps have been undertaken such as the removal of some causes of action, the provision regarding the criminal defamation remains and is most often used to prosecute journalists as well as individuals using a telecommunications network. The latter risks up to two years of prison. Similarly, sections 499-500 of the Penal Code provide up to two years in prison and/or a fine for criminal defamations which did not use a telecommunications network. By way of illustration, a defamation complaint was filed against nine students under section 500 in the wake of a satirical anti-war play performance in 2017.

Additionally, peaceful assemblies are still restricted despite the NLD amendment to the Peaceful Assembly and Peaceful Procession Law (PAPPL) in 2016 (Progressive Voice, 2018). A notification is now required in order to protest instead of a police permission. Nonetheless, the amendment has left a grey area in the law which is interpreted by local authorities as *de facto* requiring permission. Indeed, Article 10 states: "Those who participate in a peaceful assembly and a peaceful procession must obey the following rules: ... (k) They must not violate that predefined regulation and related agreement created by competent person and organization for the local need.". This broad formulation leads local authorities to make rules in a specific town. On top of that, criminal sanctions are provided by Article 20 if provisions of articles 8-10 are not respected. For example, in May 2017 a peaceful protest took place in Yangon in response to the successive postponements and failures of the peace process. The demonstrators' claims included stopping the conflict in Kachin state, holding dialogue in order to resolve it and allowing humanitarian aid for the victims. Notifications provided by the organizers were rejected by local authorities despite the amendment of the PAPPL. A justification given was the public inconvenience like traffic jam. Alongside the anti-war demonstration, a counter-protest was organised by ultra-nationalist groups including members of the Association for the Protection of Race and Religion (known as Ma Ba Tha). Rather than protecting the peaceful protesters, the police arrested some of them and even participated in beatings with the ultra-nationalists. Ultimately, several activists were charged, regardless of their degree of involvement in organizing the protest and of their responsibility in breaking the law.

Despite the repression, peaceful speech and assembly are likely to continue. Indeed, resentment and grievances are even more strengthened in a context where promises of liberalization have been dashed notably because of selective bans and ongoing impunity. The advocacy director of Action Committee for Democracy said: "When we talk in the media [about controversial topics], anything can happen, but we have to keep speaking" (Human Rights Watch, 2019, p.1).

Rise of Buddhist nationalism and hate speech

"A failed and violent transition may leave a legacy of nationalist ideology...that will hinder further democratic consolidation" (Mansfield and Snyder cited in Holliday, 2014, p.89). The rapid political and socio-economic changes since 2011 have caused anxiety amongst the Buddhist community and, at the same time, have created a political space permitting the expression of these concerns and of old communal grievances (Walton and Hayward, 2014). Indeed, the monk U Wirathu, the most prominent figure of anti-Muslim campaigns, was released in 2012 in the wake

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of amnesties provided to political prisoners by the new civilian government despite being detained for nine years for inciting anti-Muslim violence. Additionally, freedom of association increased with the enforcement of the new Association Registration Law in 2014 (Frydenlund, 2017). Taking advantage of the new political opportunities, the ultra-nationalist '969 movement' was created in 2012, followed by the more politically oriented Organization for the Protection of Race and Religion in 2013. Following the spread of virulent anti-Muslim hate speech, the members succeeded in introducing in parliament four 'race and religion laws'. Despite their huge negative impact on the freedom of religion, on the right to non-discrimination of minorities and women's rights, these bills were ultimately enforced in 2015. According to the UN Special envoy Yanghee Lee, these new legislations reflect a "backtracking in the political reform process" (OHCHR.org, 2015). The rise of Buddhist nationalism reveals the dark sides of the reforms which have created a political space for voicing anti-Muslim sentiments and initiating said legal proposals, while simultaneously criminalizing peaceful speech. This contradiction is at the heart of the Myanmar's nascent transition and exacerbates severe communal violence. As "inter-religious conflict could be the downfall of Myanmar's once-promising transition to democracy" (Walton and Hayward, 2014, p.51), it is urgent to resolve old grievances in order to achieve a national reconciliation and a mutual understanding through interfaith dialogue. In this respect, a monk claimed: "We need trust (...). We need to remove our suspicions on both sides." (p.32).

In short, both the failed peace process and contradictory reforms stir the population's deep resentment and grievances. The latter will remain unless a transitional justice mechanism is established to deal with Myanmar's past and break cycles of conflicts. This step is paramount to build trust and reconcile the different social and religious groups which will lay strong foundations for implementing effective reforms in a bid to prevent further human rights violations. To that end, a truth commission appears to be the most suitable option considering the current context.

CHAPTER TWO – THE CREATION OF A TRUTH COMMISSION IN MYANMAR'S CURRENT CONTEXT

"There is growing acceptance that legacies of violence that remain unaddressed, such as ongoing impunity for crimes committed or failure to establish a new truth about the nature and experience of violence and conflict, can be an ongoing source of grievance and fragility" (Domingo and Denney, 2012, p.6). A transitional justice initiative therefore seems to be necessary in the midst of Myanmar's turbulent transition. According to Hayner (2013), three main factors determine which transitional justice mechanism is more appropriate and more likely to be successful. The first factor is the nature of the political transition. The second one is the presence of a vocal and organized civil society. Finally, the interest of the international community in the country's transitional process is necessary.

Type of political transition

The distribution of political power and legal accountability

Since the end of World War II, the legalist paradigm has prevailed in the transitional justice literature, deriving from the Western perception of justice understood as reachable only through the courts (Suren, cited in Lubina, 2018). That is why that transitional justice often implies that "a legal response should be the primary measure by which progress toward rebuilding societies torn apart by communal violence should be judged" (Fletcher, Weinstein and Rowen, 2009). Non-judicial mechanisms were not recognised and considered in post-authoritarian transition. Yet, it is also the most difficult and many attempts in the past have had little success (Hayner, 2013). International courts or hybrid tribunals since the 1990s have failed to prosecute all the perpetrators and did not sufficiently involve the victims and local communities, whose many needs cannot be satisfied by the courts. As such, since the 1990s other mechanisms that avoid the "legal absolutism of retributive justice" have been developed (Suren, cited in Lubina, 2018, p.79). It was especially necessary to think about transitional justice in a more creative way when the post-conflict political reality made legal accountability impossible. Indeed, criminal trials can occur only if the regime responsible for human rights violations is discredited enough in such a way that it cannot oppose (Nobles, 2010). In Myanmar the transition has been the result of a political compromise between the old regime and the new political elites (Sarkin, 2009). The 2008 Constitution provides 25% of the parliamentary seats to unelected military officials and more than 75% of the votes are required to amend the Constitution (Dukalskis, 2015). Patrick Pierce (2013) claimed in the International Center for International Justice report on Myanmar: "I think there is a lot of ambivalence as well, and fear, that bringing up the past will provoke a coup by the military". In this context, it is necessary to avoid

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a confrontational transitional justice mechanism that could undermine the nascent transition: legal accountability is not a safe option.

It is noteworthy that the government does not seem to consider transitional justice as necessary or beneficial: the primary political goal of national reconciliation is thought to be achievable without addressing past human rights abuses. This reluctance can be explained by the politicians' narrow understanding of what is transitional justice (Thomson, 2015). They associate these terms only with criminal justice and ignore the different mechanisms available to tackle the past. The NLD is concerned about weakening the nascent transition by pushing too much for accountability (Dukalskis, 2015). For their part, the military fears retribution (Thomson, 2015). It is likely to be the reason why peaceful expression and speaking critically about the military is severely repressed; why past abuses are renounced since the beginning of the transition; why the military granted themselves amnesties in the 2008 Constitution; and more generally, why the Tatmadaw endeavours to maintain its power in the new government. As such, a truth commission could be an incentive for the military to address past injustices and to espouse change (Holliday, 2012).

The distribution of political power and Truth Commissions

The political reality does not empower the resort to retributive justice but allows for the creation of a truth commission. Past commissions were often created by presidential decree such as in Argentina, Chile or Uganda (Hayner, 2013). As the NLD is in office the implementation of a truth commission by decree in Myanmar is possible. On top of that, this scenario has several advantages. While some past truth commissions have revealed the difficulty to reach official documents necessary for the conduct of investigations, the authorization of the state could facilitate its access. The government may also provide reinforced security during the process. Moreover, the report and recommendations issued by the commission are more likely to be taken into consideration. Thus the establishment of a truth commission by presidential decree in Myanmar is not only possible but increases its chances of success.

A truth commission combined with selective amnesties

A truth commission has never jeopardized an ongoing peace process (Hayner, 2013). Nevertheless, in order to have an impact on human rights and democracy, cross-national research supposes that a truth commission has to be combined with trials and selective amnesties (Olsen et al., 2010). For instance, the South African Truth and Reconciliation Commission (TRC) granted amnesty to perpetrators in exchange of the truth about their past crimes if their applications met several criteria (e.g. political motive, complete truth revealed...) (Sarkin, 2009). Those who did not apply for amnesty were prosecuted. Though each context requires a unique solution, the South African 'carrot and stick approach' could be a model for Myanmar. Indeed, it faces the same type of political transition as South Africa: it is the result of a compromise between the old and new regimes (Sarkin, 2009). Dukalskis (2015) adds that the military self-amnesties granted in the 2008 Constitution, though not legitimate, show that this combination is relevant for Myanmar. Nevertheless, an objection to the amnesty programme is the increased acceptance in international law that the allowance of amnesties is prohibited for the gross violations of human rights (Scharf, 1997). Evidence of this alleged emerging customary international law is the amount of General Assembly Resolutions urging for prosecution of the most serious crimes, the writings of the most qualified publicists and the conclusions of international conferences. Yet, state practice is not general and consistent enough to suggest the existence of an international obligation to abstain from providing amnesty for crimes against humanity. Indeed, even though apartheid was considered as a crime against humanity, any international court has disputed the South African amnesty programme (Holliday, 2012). A global consensus emerged around its TRC and since then a lot of other commissions embraced the same model.

Active civil society

Additionally, the success of a truth commission depends on the strength of the civil society (Hayner, 2013). First, non-governmental organisations (NGOs) play a key role in galvanizing its creation by raising governmental awareness about the different transitional justice options in order to vanish their fear of being prosecuted. In this respect, they have started to engage in discussions with the government in which they tend to support the implementation of truth

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telling processes and reparations (Thomson, 2015). In other words, it is noticeable that an official acknowledgement of the past is generally demanded by the civil society rather than revenge. Thus transitional justice is more likely to have prospects.

Secondly, while the creation of a truth commission by presidential decree has numerous advantages, it cannot be done without relying on the input of grass-roots organizations. NGOs are a great source of information and expertise in human rights. In Myanmar, local initiatives documenting human rights violations are flourishing in a bid to provide them if national transitional justice occurs (Falvey, 2010). By way of illustration, the Network for Human Rights Documentation – Burma (more well-known as ND-Burma), created in 2004, gathers more than twelve human rights organizations (Dukalskis, 2015). Its activities go beyond the investigation of past abuses: local transitional justice trainings, including truth-telling, and workshops are organised. This local involvement is crucial for a truth commission to have prospect since it has to be “nationally rooted, unique to each place, and reflects a process of national ownership” (Hayner, 2013, p.211).

Interest of the international community

The international community has started standing against the military junta's human rights violations since the 1990s (Tan, 2012). In 1991, the first resolution on Myanmar was adopted by the UN General Assembly and two years later the first Special Rapporteur on human rights in Myanmar released a report (International Human Rights Clinic at Harvard Law School, 2009). This increased concern regarding human rights issues led Tom Ojea Quintana to appeal for the creation of a UN Commission of Inquiry in 2010 in a bid to prosecute the identified perpetrators (Tan, 2012). He repeated this claim the following year. However, given the lack of pressure put on the Security Council to implement it and since Myanmar has ultimately started a transition towards democracy, this idea has been replaced lately by a call for the creation of a truth commission. Indeed, Quintana appealed for the latter in 2012, emphasizing that “addressing grievances from decades of human rights violations is crucial for democratic transition and national reconciliation” (Radio Free Asia, 2012). Interestingly, he said that he had spoken with several ethnic groups and politicians about this possibility, as the local NGOs do. It means that discussions are engaged with the government by both the international community and local communities and could ultimately alleviate their fear of being prosecuted, thus paving the way to address past violations.

In sum, adopting a non-threatening transitional justice mechanism is more appropriate regarding Myanmar's political reality. In this respect, a truth commission combined with amnesties appears to be the best compromise in order to address the past and achieve a sustainable peace. Moreover, the civil society and the international community are standing in favour of this option. Even though a truth commission has less legal power than courts, it is endowed with a broader mandate and “may become the most prominent initiatives of a transition” (Hayner, 2013, p.14).

CHAPTER THREE – POTENTIAL BENEFITS OF A TRUTH COMMISSION IN MYANMAR

According to Mark Freeman, a truth commission is:

...an ad hoc, autonomous, and victim-centered commission of inquiry set up in and authorized by a state for the primary purposes of (i) investigating and reporting on the principal causes and consequences of broad and relatively recent patterns of severe violence or repression that occurred in the state during determinate periods of abusive rule or conflict, and (ii) making recommendations for their redress and future prevention (2006, p.18).

This broad mandate can therefore achieve wide goals including fighting against the legacy of impunity and reforming the country to prevent future human rights violations. Truth-telling processes could encourage reconciliation and help to build trust in Myanmar where scepticism between the government, the citizens and within the society runs deep. Indeed, a survey by The Asia Foundation (2014) found that an astounding 77% of the respondents believed that most people cannot be trusted and only 21% said the contrary.

Truth-seeking and truth-telling

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Truth telling involving victims and perpetrators

The creation of complete records of past wrongs by a truth commission prevents from a “collective amnesia”, standing against silence and denial (Sarkin, 1996, p.616). Importantly, a truth commission focuses on victims in order to respect and answer their needs (Hayner, 2013). In this regard, David Holliday claims that a “victim-centred approach is key” (2014, p.196). Beyond seeking truth particularly through official sources and NGOs’ work, hearings are held to collect witness testimonies and truths about past events. By relating their stories of endured violations, victims get their dignity back (Sarkin, 2000). Beyond this catharsis effect, a truth commission answers to the demand of victims to see their perpetrators socially sanctioned (Dukalskis, 2015). In Myanmar, many have said they were ready to forgive the wrongdoers in exchange of apology and recognition of past abuses. This, for example, is discernible in the case of monks who suffered repression during the Saffron Revolution (Radio Free Asia, 2013) and of parents whose daughters were killed during the 1998 protest (The Irrawaddy, 2013). Thus perpetrators have to tell and officially recognize the truth about past wrongs. ND-Burma (2012) justly writes: “Until the government of Burma is willing to admit that torture has been practiced – and is in fact ongoing in Burma – it will be difficult to develop mutual *trust*”. Obviously, this acknowledgment will have to encompass all human rights violations. The victim’s truths will be eventually honoured in a public report embodying the official acknowledgment of past atrocities and is necessary to ensure a long-lasting impact on the society (Hayner, 2013). This mechanism is also necessary to speed up the peace process between the government and the ethnic armed groups as the current deadlock is partly due to a high level of distrust and grievances. It would also be a signal by the new political elites of their will to break with the old regime’s legacy of impunity and then “facilitate a normative shift toward a new democratic order” (Holliday, 2012, p.100). In short, this “healing process” will help the society to recover the past (Sarkin, 2000) and may be beneficial in a midst of a difficult transition in order to reconcile and to build trust between social groups (Dukalskis, 2015).

It is worth noting that a big challenge lies in the variety of demands and interests of the population. Even though evidence shows that the majority calls for an official recognition of past abuses rather than revenge, some can be frustrated. As Thomas Brudholm put it, “after atrocity, forgiveness can be refused and resentment can be retained on genuinely moral ground” (2006, p.22). More data and surveys reflecting the public’s expectations and needs have to be collected (Dukalskis, 2015). In general, even when a truth commission is mostly accepted within the population, it can open old wounds and renew hostility against the perpetrators. That is why it is necessary to carefully plan and prepare the process (Sarkin, 2000).

Truth telling involving ethnic and religious groups

Additionally, a truth telling mechanism can take place between the different ethnic and religious groups (Thomson, 2015). This process seems to be more than necessary in Myanmar. Conflicting narratives regarding the causes and consequences of conflicts are constantly spread through the media and school programmes. Information has been controlled by the state over the past years and is still inaccessible in conflicts zones. As a result, many parts of the country are unaware of the other regions’ conflicts and gross human rights violations. By way of illustration, the International Center of Transitional Justice interviews conducted in 2014 revealed that people in the throes of conflicts always hold all Burmese responsible for their pain. Likewise, communities living outside conflict areas have limited knowledge about ethnic groups and atrocities ongoing in other parts of the country, except through biased media coverage. According to a survey by The Asia Foundation (2014), only 55% of respondents were conscious of the ongoing conflicts in Myanmar and 34% believed there are none. Additionally, people fail to appreciate the scope of religious discrimination, since 77% claimed that all religions are treated equally and only 18% consider non-Buddhists as facing discrimination despite the recent increased communal violence in the country (see above). This violence is often induced by the spread of rumors, stereotypes and misunderstanding between religions. This is notably a reason why anti-Muslim sentiments flourish across the country (Walton and Hayward, 2014). Also, hate speech hides concerns and needs that have to be voiced and understood by the government in order to address them. Thus a truth telling process could foster knowledge and understanding between ethnic and religious groups in a bid to build trust and reconcile the country. This mechanism cannot put an end to communal violence alone. It has to be combined with other measures such as increasing transparency in education and access to information. Additionally, recommendations made by a truth commission to reform several sectors may favour coexistence and prevent future human rights violations.

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Public Truth Commission

A significant part of the literature under consideration suggests that making the truth commission public amplifies its benefits and contributes to democratization (Hayner, 2013; Taylor and Dukalskis, 2012). The public South African TRC is often considered as having largely sped the democratic transition up (Gibson, 2006). First of all, holding public hearings is a means to provide a formal and public acknowledgment of the past (Hayner, 2013). Transmitted on the television or on the radio, for instance, victim's testimonies can enhance the population's understanding, avoid a further denial of the truth and ultimately support the commission's work. If the whole society feels engaged and the media coverage lasts during a long period of time, the truth commission will be more likely to be successful and achieve its objectives. It is noteworthy that some counter-arguments stand against holding public proceedings. Commissioners and witnesses' security is the primary concern. Nevertheless, the confidentiality of testimonies does not get rid of this risk. The truth commission process is naturally unsafe as it takes place at the very beginning of a transition towards a democracy, when perpetrators still seize power in the country. All in all, the insecurity issue should not undermine efforts to create a public truth commission since it exists even when sessions occur behind closed-doors. Rather, it is paramount to be aware of this challenge in order to take it into consideration when establishing a truth commission. As it may potentially be established by presidential decree in Myanmar, security during the whole process could be reinforced (see above). In the same vein, as in the case of the South African TRC, a strong protection programme could be set up for the witnesses as well as for the commissioners.

Recommendations made by the Truth Commission

After having investigated the causes of violence, the second purpose of a truth commission is to make recommendations to the new government to prevent future human rights violations (Freeman, 2006). To that end, an external engagement is crucial in supporting local efforts to meet international standards (Holliday, 2014). Several sectors have to be deeply reformed in Myanmar as the root causes of conflicts and of the current polarization of society are complex and inextricably entwined. Indeed, "without peace, there is no economic development; without economic prosperity, the logic follows, attaining peace is difficult; and without a viable political settlement, including democratic institutions, any such peace or prosperity cannot prove sustainable" (Farely and Win, 2016, p.39).

Legal reforms

Myanmar's current reform efforts are challenged by the lack of trust amongst the population towards the justice system (Pierce and Reiger, 2014). Addressing past crimes through the creation of a truth commission is a necessary step to "send powerful signals about the commitment of the new government to the rule of law...Early gathering of information on human rights violations and assisting victims can signal serious intent to overcome legacies of impunity and rights violations at both the community and national level" (World Development Report 2011, 2011, p.125). Thereafter, deep reforms are required to make the legal system transparent and independent from any executive interference (Pierce and Reiger, 2014). To that end, international actors have to support local lawyers through technical assistance, trainings and oversight mechanisms. Besides, many laws need to be amended in order to match international standards. Here are some examples of what has to be done concerning the freedom of speech and assembly. First, the government has to stop using criminal laws, even less so in a selective way (Human Rights Watch, 2019). On top of that, defamation has been the reason given almost exclusively to outlaw speeches under section 66(d) of the Penal Code and two-third of these cases concerned statements of opinion. Yet, international law precludes opinions to be criminally charged (United Nations Human Rights Committee, 2011). Additionally, Article 10(k) of the PAPPL has to be amended since its broad formulation permits the local authorities' interpretation of the notification requirement as being de facto a permission one (Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, 2012, para 30). The law should also include the government's positive duty "to actively protect peaceful assemblies" particularly against "counter-demonstrators, who aim at disrupting or dispersing such assemblies" (para 33).

Socio-economic reforms

One may argue that the catharsis effect of truth commissions is worthless when communities face dire poverty

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(Holliday, 2014). Yet, their task is to investigate the causes of violence and then recommend reforms to prevent its reoccurrence. The rapid economic reforms undertaken since 2011 have first increased structural inequalities which are drivers of conflicts in Myanmar and secondly did not solve the chronic underdevelopment (Walton and Hayward, 2014). Thus, economic assistance is fundamental in this context. Development programmes can be combined with victims reparations measures recommended by a truth commission (Sarkin, 2000). However, even if both socio-economic reforms and reparations answer the same need of alleviating poverty, it is necessary to differentiate them. Indeed, the "normative component" of reparations must not be diluted: it is a state's acknowledgment of its wrongs and a "reaffirmation of moral respect and dignity of victims" (Verdeja, 2006, p.126; p.115).

Institutional and constitutional reforms

The institutional structure that fostered the occurrence of violence has to be thoroughly transformed (Dukalskis, 2015). For this purpose, the 2008 Constitution which provides considerable powers to the military needs amendment. Assuming that the fear of retribution is probably the reason why the Tatmadaw refuses to give up its granted 25% of parliamentary seats (Thomson, 2015), the non-threatening strategy of a truth commission could reassure them and ultimately pave the way for their withdrawal. On top of that, some military officials themselves started acknowledging the problem concerning the presence of soldiers in the parliament (Egreteau, 2015). Former President Thein Sein contemplated this possible progressive disengagement already in 2012 in an interview given to *The New York Times*, drawing a parallel with the Indonesian case. In short, this constitutional reform is far from being the only requirement, however, it could mark a significant step towards democracy.

Promoting a culture of human rights

Finally, quantitative research evidences that a truth commission may help to advance the norms related to human rights (Kim and Sikkink, 2010). The call for a truth commission can be a common demand around which civil society mobilises. It is already noticeable in Myanmar that activism is gaining ground and local initiatives around transitional justice are emerging (see above). This mobilization is likely to continue after the commission's work (Dukalskis, 2015). Moreover, the recommendations suggested by the commission will lay the foundations to prevent future human rights violations (Sarkin, 2000). A truth commission is especially a local solution that "brings human rights home" thanks to the interactions between the active civil society and international experts (Tan, 2012). Obviously, the cultural shift towards a full respect of human rights will not be instantaneous but the result of a long process of norms' internalization. The latter is indispensable for a long-lasting peace because, as Diane Orentlicher claims, "Norms matter: they are the indispensable foundation of the whole enterprise of combating atrocious behavior" (2007, p.21). In sum, a truth commission will hopefully facilitate a normative shift towards an interiorised human rights' culture in Myanmar.

Conclusion

To conclude, it has been argued that the establishment of a truth commission in Myanmar could be a significant initiative to undertake a successful transition to democracy. The governments has up to now denied past human rights violation. Yet, as Sarkin claimed, "An unresolved past...inevitably return[s] to haunt [a society in transition]" (1996, p.616). Hayner furthermore illustrated this idea by writing: "Stuff skeletons in the closet, and they will fall back out of the closet at the most inauspicious times" (2013, p.23). The paper did not sustain that a truth commission would necessarily be successful, as some variables cannot be predicted, but rather that it embodies the best initiative in a divided society where mistrust is widespread. The choice of a truth commission mechanism is first and foremost based on the political reality of the country, which, in the case of Myanmar, makes impossible the resort to legal accountability as the military still retains power within the government. If past injustices are silent since the beginning of the transition and if, for instance, peaceful speech and assembly are criminalized while nationalist hate speech thrives, it is because of their fear of retribution. On their part, the NLD led-government is cautious about not pushing for accountability to avoid the risk of undermining the progresses made so far. In this regard, Myanmar is in the throes of the peace and justice dilemma. The former goal has been privileged in this paper considering the balance of political power. However, this choice was not through spite, but having in mind that a non-confrontational strategy could eventually lead to the withdrawal of the military whose presence in the government is the primary

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obstacle to a functioning democracy. Additionally, it is erroneous to assume that justice is achievable only through the courts. A truth-telling process provides a social sanction to perpetrators who officially recognize their crimes. It is noteworthy that this mechanism solely functions in combination with selective amnesties and prosecution. Thus the juxtaposition between peace and justice is not completely valid. Additionally, a truth-telling process could lay the strong foundations needed for a long-lasting peace. It embodies the most prominent initiative to build trust and reconcile a divided society. This mechanism has a broader mandate than courts that ranges from the establishment of a complete record of past abuses, primordial to stand up against the legacy of impunity, to the making of recommendations as a preventive action against further human rights violations. Importantly, a truth commission is the fruit of interactions between outsiders and insiders. Opting for this transitional justice option, it is being aware that "people throughout the land are determined to shape their own destinies" (Holliday, 2012, p.3). In order to fulfil their hopes for change, the international community has to assist and empower them.

Some limits inherent to this study are worth noting. First, the question of timing is always a sensitive issue; determining when is the right moment to create a truth commission has to be carefully thought out. This paper suggested that the current context seems favourable to the establishment of a truth commission. The NLD is in office, making possible its creation through a presidential decree, human rights NGOs' work is flourishing and the UN Myanmar's Special Rapporteur on human rights Quintana championed this mechanism. Yet, considering the ongoing conflicts, it could be wise to wait a little more. Above all, the creation of a truth commission relies on an ungraspable political will. This will could at the maximum be influenced by the local NGOs and by the international community. Secondly, more data and surveys will have to be collected to comprehend the deepest expectations of the population regarding transitional justice issues. Even though some evidence suggests that an official acknowledgment of the past is preferred than revenge, some victims could anyway be frustrated not to see their perpetrators prosecuted. Thirdly, security issues have to be taken into account to ensure protection of witnesses and commissioners. Fourthly, it cannot be assured that the recommendations made by the truth commission will be successfully implemented by the government. Last but not least, funding may be lacking, preventing a commission to lead its work until the end. In sum, many challenges and technical questions need to be carefully addressed before the creation of a truth commission. This task, though not within the scope of this paper, will have to be fulfilled when the time comes; in fact, "sooner or later, then, the transitional justice agenda must be confronted" (Holliday, 2014, p.199).

Bibliography

- Al Hussein, Z. (2017). Darker and more dangerous: High Commissioner updates the Human Rights Council on human rights issues in 40 countries. In: *Human Rights Council 36th session*. [online] Available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22041&LangID=E> [Accessed 22 Apr. 2019].
- Brudholm, T. (2006). Revisiting Resentments: Jean Améry and the Dark Side of Forgiveness and Reconciliation. *Journal of Human Rights*, 5(1), pp.7-26.
- Domingo, P. and Denney, L. (2012). *The Politics of Practice: security and justice programming in Fragile and Conflict Affected States*. [online] London: ODI Expert Meeting on Security and Justice. Available at: <https://issat.dcaf.ch/download/15631/182888/Politics%20of%20Practice.pdf> [Accessed 22 Apr. 2019].
- Egreteau, R. (2015). Soldiers as Lawmakers?: Assessing the New Legislative Role of the Burmese Armed Forces (2010–15). In: R. Egreteau and F. Robinne, ed., *Metamorphosis: studies in social and political change in Myanmar*. Singapore: Nuss Press.
- Falvey, P. (2010). Local transitional justice practice in pretransition Burma. In: R. Shaw, P. Hazan and L. Waldorf, ed., *Localizing transitional justice: interventions and priorities after mass violence*. Stanford: Stanford University Press.
- Farrelly, N. and Win, C. (2016). Inside Myanmar's Turbulent Transformation. *Asia & the Pacific Policy Studies*, 3(1), pp.38-47.

Dealing with Myanmar's Past: A Call for a Truth Commission

Written by Laura Huchet

- Fletcher, L., Weinstein, H. and Rowen, J. (2009). Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective. *Human Rights Quarterly*, 31(1), pp.163-220.
- Freeman, M. (2006). *Truth commissions and procedural fairness*. Cambridge: Cambridge University Press.
- Frydenlund, I. (2017). Religious Liberty for Whom? The Buddhist Politics of Religious Freedom during Myanmar's Transition to Democracy. *Nordic Journal of Human Rights*, 35(1), pp.55-73.
- Gibson, J. (2006). The Contributions of Truth to Reconciliation. *Journal of Conflict Resolution*, 50(3), pp.409-432.
- Hayner, P. (2013). *Unspeakable truths*. Brantford, Ont.: W. Ross MacDonald School Resource Services Library.
- Holliday, I. (2012). *Burma redux*. New York: Columbia University Press.
- Human Rights Watch (2019). *Dashed Hopes: The Criminalization of Peaceful Expression in Myanmar*. [online] Human Rights Watch. Available at: <https://www.hrw.org/report/2019/01/31/dashed-hopes/criminalization-peaceful-expression-myanmar> [Accessed 4 Mar. 2019].
- International Human Rights Clinic at Harvard Law School (2009). *Crimes in Burma*. [online] International Human Rights Clinic at Harvard Law School. Available at: <http://hrp.law.harvard.edu/wp-content/uploads/2009/05/Crimes-in-Burma.pdf> [Accessed 18 Apr. 2019].
- Institute for Security and Development Policy (2015). *Myanmar's Nationwide Ceasefire Agreement*. [online] Stockholm: Institute for Security and Development Policy. Available at: <http://isdp.eu/content/uploads/publications/2015-isdp-backgrounder-myanmar-nca.pdf> [Accessed 14 Apr. 2019].
- Kim, H. and Sikkink, K. (2010). Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries¹. *International Studies Quarterly*, 54(4), pp.939-963.
- Lubina, M. (2018). Set the Torturers Free: Transitional Justice and Peace vs Justice Dilemma in Burma/Myanmar. *Polish Political Science Yearbook*, 47(1), pp.77-96.
- Mon, Y. (2018). *Controversy, progress at the third Panglong conference*. [online] Frontier Myanmar. Available at: <https://frontiermyanmar.net/en/controversy-progress-at-the-third-panglong-conference> [Accessed 14 Apr. 2019].
- Network for Human Rights Documentation – Burma (2012). *Extreme Measures: Torture and Ill Treatment in Burma since the 2010 General Elections*. [online] Thailand: Network for Human Rights Documentation – Burma. Available at: <https://burmacampaign.org.uk/media/extreme-measures.pdf> [Accessed 19 Apr. 2019].
- Nobles, M. (2010). The Prosecution of Human Rights Violations. *Annual Review of Political Science*, [online] 13(1), pp.165-182. Available at: <https://ssrn.com/abstract=1691297> [Accessed 15 Apr. 2019].
- Ohchr.org. (2015). *OHCHR | UN Myanmar rights expert: Backtracking on democratic space gains momentum in election year*. [online] Available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=%2015494&LangID=E> [Accessed 21 Apr. 2019].
- Olsen, T., Payne, L., Reiter, A. and Wiebelhaus-Brahm, E. (2010). When Truth Commissions Improve Human Rights. *International Journal of Transitional Justice*, 4(3), pp.457-476.
- Orentlicher, D. (2007). 'Settling Accounts' Revisited: Reconciling Global Norms with Local Agency. *International Journal of Transitional Justice*, 1(1), pp.10-22.

Dealing with Myanmar's Past: A Call for a Truth Commission

Written by Laura Huchet

- Pierce, P. (2013). *ICTJ program report: Myanmar*. [online] New York: International Center for Transitional Justice. Available at: <http://ictj.org/news/ictj-program-report-burma-myanmar> [Accessed 18 Apr. 2019].
- Pierce, P. and Reiger, C. (2014). *Navigating Paths to Justice in Myanmar's Transition*. [online] New York: International Center for Transitional Justice. Available at: <https://www.ictj.org/sites/default/files/ICTJ-Myanmar-Development-Report-2014.pdf> [Accessed 7 Mar. 2019].
- Progressive Voice (2018). *Time to hear our voices: Freedom of Assembly and the Youth Peace Movement in Myanmar*. [online] Progressive Voice. Available at: https://progressivevoicemyanmar.org/wp-content/uploads/2018/07/PV_Briefing_Final_Web.pdf [Accessed 29 Feb. 2019].
- Radio Free Asia. (2012). *'Truth Commission' Proposed*. [online] Available at: <https://www.rfa.org/english/news/myanmar/un-08052012161004.html> [Accessed 18 Apr. 2019].
- Radio Free Asia. (2013). *Myanmar Students' Group Demands Apology for Brutal 1988 Crackdown*. [online] Available at: <https://www.rfa.org/english/news/myanmar/students-08072013215834.html> [Accessed 19 Apr. 2019].
- Sarkin, J. (1996). The Trials and Tribulations of South Africa's Truth and Reconciliation Commission. *South African Journal on Human Rights*, 12(4), pp.617-640.
- Sarkin, J. (2000). Dealing With Past Human Rights Abuses: Promoting Reconciliation in a Future Democratic Burma. *Legal Issues on Burma Journal*, [online] 7. Available at: <http://www.ibiblio.org/obl/docs/Legal%20Issues%20on%20Burma%20Journal%207.pdf> [Accessed 11 Mar. 2019].
- Scharf, M. (1997). The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes. *Law and Contemporary Problems*, 59(4), p.41.
- Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association (2012). *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*. [online] Human Rights Council. Available at: <https://undocs.org/A/HRC/20/27> [Accessed 14 Apr. 2019].
- Special Rapporteur on the situation of human rights in Myanmar (2013). *Situation of human rights in Myanmar*. [online] United Nations General Assembly. Available at: <https://undocs.org/A/68/397> [Accessed 15 Mar. 2019].
- Taylor, L. and Dukalskis, A. (2012). Old truths and new politics. *Journal of Peace Research*, 49(5), pp.671-684.
- Tan, A. (2012). Audrey Tan, Myanmar's Transitional Justice: Addressing a Country's Past in a Time of Change. *Southern California Law Review*, 85(6), pp.1643-1696.
- The Asia Foundation (2014). *Myanmar 2014: Civic Knowledge and Values in a Changing Society*. [online] San Francisco: The Asia Foundation. Available at: <https://asiafoundation.org/resources/pdfs/MyanmarSurvey20141.pdf> [Accessed 20 Apr. 2019].
- The Irrawaddy. (2013). *Thein Sein Makes Rare Comments on 1988 Uprising*. [online] Available at: <https://www.irrawaddy.com/news/burma/thein-sein-makes-rare-comments-on-1988-uprising.html> [Accessed 19 Apr. 2019].
- Thomson, A. (2015). *Opening up remedies in Myanmar: Understanding the Range of Options for Dealing with Myanmar's Past*. [online] New York: International Center for Transitional Justice. Available at: <https://www.ictj.org/sites/default/files/ICTJ-Briefing-Myanmar-TJ-2015.pdf> [Accessed 8 Mar. 2019].
- Thomson, A. (2016). *Prospects for Justice in Myanmar*. [online] New York: The International Center for Transitional Justice. Available at: <https://www.ictj.org/publication/myanmar-justice-prospects-nld> [Accessed 14 Apr. 2019].

Dealing with Myanmar's Past: A Call for a Truth Commission

Written by Laura Huchet

United Nations Human Rights Committee (2011). *General Comment No. 34, Article 19: Freedoms of Opinion and Expression*. [online] Available at: <https://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf> [Accessed 12 Apr. 2019].

Verdeja, E. (2006). Reparations in Democratic Transitions. *Res Publica*, 12(2), pp.115-136.

Walton, M. and Hayward, S. (2014). *Contesting Buddhist narratives: democratization, nationalism, and communal violence in Myanmar*. Honolulu: East-West Center.

World Development Report 2011: Conflict, Security and Development (2011). [online] Washington: World Bank. Available at: <https://openknowledge.worldbank.org/handle/10986/4389> [Accessed 20 Apr. 2019].

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