

Constitution-Making and Peace Process Stagnation in Myanmar:

*Will a conditional clause help restore confidence
in the 21st Century Panglong Conference?*

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Introduction

The national peace negotiation process in Myanmar is not working, and it is currently facing stagnation. After a 14-month delay, a third “Union Peace Conference—21st Century Panglong” (UPC-21CP) took place in Nay Pyi Taw in mid-July this year in a bid to convey a positive momentum. But, even then, core issues like political dialogue, security reform, natural resource-sharing and the ethnic right of self-determination were not included. Rather, only 14 subsidiary issues that are already covered in the 2008 constitution were discussed and agreed upon. They have now been added to a “Union Accord” that was partially inked at the previous UPC-21CP meeting last year.

Like the 2008 constitution, the detail of the Union Accord remains a matter of deep controversy. Some of the longest-running ethnic conflicts in Asia are still continuing in several borderlands and, for the moment, it is very difficult to define in what direction Myanmar’s peace process is truly heading.

As this grave legacy reflects, the obstacles to achieving national peace and reconciliation are many. But chief among them is the failure to achieve a political dialogue that is genuine and nationwide during the bitter years of civil war since the country’s independence in 1948. Tragically, this failure is continuing again during the present political era. This time failure is being fuelled by an inability to stop conflict in the front-line, a lack of “all-inclusiveness” in peace talks, and the unsuccessful search for “common goals” that can bring the country together. Without such common goals, it will be impossible to empower the “political will” to strive for a “win-win” outcome that is based on “altruism”. Until the present, some very different concepts in political outlooks and goals still remain among different peoples and parties.

Myanmar, it should be stressed, is not alone among conflict-divided states in facing challenges in achieving peaceful resolutions. The dilemmas of conflict resolution have been frequently studied in other parts of the world in recent years. In particular, peace research theoreticians have increasingly been looking at the challenges of achieving national peace through the lens of the wedded function between “peace agreements” and “constitution-making”. In other words, the recent trend in conflict resolution is to use the process of “constitution-drafting” as a “peace-making tool” and the resultant constitution as a “peace treaty”. Examples of such strategies include Iraq, Afghanistan, and Nepal.

In this commentary, I argue that understanding of these experiences of “peace agreements” and “constitution-making”, including the use of a “conditional clause”, can prove beneficial to regenerating the peace process in Myanmar. It is in this light that many of the present obstacles should be addressed.

To do this, we first need to look at the background dynamics to the present peace initiative to understand why it has reached such a stagnation stage. Then, from this platform, we can look deeper into resolving the challenges of achieving nationwide peace in the country. The two goals of “peace treaties” and “constitution-making” are closely inter-linked.

Political Background

The ethnic peace process in Myanmar is one of the most complicated in the modern-day world. In contemporary terms, it is usually dated to the advent to office of a quasi-civilian government, headed by President Thein Sein, in March 2011. But it is important to note that ceasefires by ethnic armed organisations (EAOs) already existed in many parts of the country with the preceding military

government. Some of these agreements dated back as long ago as 1989 when the then State Law and Order Restoration Council (SLORC) initiated truces with Kokang, Wa, Shan and Kachin EAOs in Myanmar's northeast. Over subsequent years, the ceasefire EAOs joined a National Convention to draw up a new constitution. This process was started by the military SLORC government in 1993 and was only finished by the successor State Peace and Development Council (SPDC) 15 years later in 2008.

Crucially, however, many of the ceasefire EAOs were not satisfied with the new charter, and the situation worsened from April 2009 when the SPDC unilaterally demanded that all ceasefire groups transform into Border Guard Forces (BGFs) under the Tatmadaw's control. This would have had the effect of breaking up EAOs into smaller separate units, formally under Tatmadaw control, without addressing political grievances and aspirations. The stronger organisations therefore refused, and conflict resumed in Myanmar's northeast when the Tatmadaw attacked the ceasefire Myanmar National Democratic Alliance Army (MNDAA) in the Kokang region of northern Shan State.

These were not the only outstanding difficulties in ethnic politics. During the transition to the Thein Sein government, armed conflict still continued in several borderlands with Chin, Karen, Karenni, Rakhine, Shan and other EAOs that had not made ceasefires with the SLORC-SPDC government. A special cause of dispute, which is still resonant today, was the stipulation in the new constitution that the national armed forces, known as the Tatmadaw, would be preserved the "leading role" in national political life. Thus, in preparation for forthcoming regime change, an original eleven EAOs, including both ceasefire and non-ceasefire groups, came together in February 2011 to form a United Nationalities Federal Council (UNFC) in a bid to formulate a common strategy for relations with the new government.

As a result, it was clear that enormous challenges remained in military and political transition when Thein Sein took office in March 2011. A hybrid government between the Tatmadaw and the pro-military Union Solidarity and Development Party (USDP), there were elements of both continuity and change in his administration. Most ominously for future peace, the political climate continued to worsen in Myanmar's northeast, where the Tatmadaw's BGF order had badly misfired. In June 2011 the ceasefire of the Kachin Independence Organisation (KIO) also broke down after the Tatmadaw resumed military operations. As fighting spread, the Ta'ang National Liberation Army (TNLA) revived armed struggle, while the ceasefire of the Shan State Progress Party/Shan State Army (SSPP/SSA) only just survived. Little noticed, too, a new force, the Arakan Army (AA), also emerged in the northern borderlands that allied with the KIO, MNDAA and TNLA in seeking meaningful reform for the country's ethnic nationality peoples.

It was against this worsening backdrop that Thein Sein's peace initiative went ahead. In contrast to the peace breakdown in the north of the country, Thein Sein's main concentration was on the southeast of the country where a diversity of non-ceasefire EAOs and anti-government organisations had remained active throughout the SLORC-SPDC era. On 17 August 2011, Thein Sein initiated his peace process, pledging to "make the ethnic issue a national priority" by offering to open dialogue between the government and all EAOs without their having to yield to the BGF requirement. Supported by international aid, this offer met with a positive response in several borderlands during the following year, including ceasefires by the Karen National Union (KNU), Karenni National Progressive Party (KNPP) and Restoration Council of Shan State/Shan State Army (RCSS/SSA).

Three years later, the high-point for Thein Sein's peace initiative came on 15 October 2015 when eight EAOs signed a Nationwide Ceasefire Agreement (NCA). Critically, however, the majority of EAOs refused

to sign, including such ceasefire groups as the KNPP, SSPP/SSA and United Wa State Army (UWSA), and armed conflict continued in several borderland areas. It was a significant blow to the NCA's credibility.¹ Equally striking, President Thein Sein and his USDP party were decisively defeated by the National League for Democracy (NLD) in the general election that took place the following month. As a result, the countdown to Thein Sein's departure from office began with the peace process far from resolved.

NCA and UPC-21CP Confusion

From this impasse, it becomes very difficult to ascribe a coherent narrative to the peace process. Indeed, given the complexity of EAOs, BGFs and different militia forces in the country, it is hard to quantify which groups have, or should have, "EAO" status for participation in peace talks and political dialogue. Since 2011, for example, 21 "armed" organisations² have generally been mentioned or accepted as representative by the main actors to take part in peace negotiations. There is also the question as to what role should be played by electoral ethnic political parties (EPPs) that want to take part in peace politics. Until the present, however, there has not been a collective or inclusive process.

For their part, Aung San Suu Kyi and the NLD pledged to resolve the questions of representation and inclusion in their election campaign. But the situation has remained just as contentious after the party assumed office in March 2016. In consequence, the failure of successive governments to bring all parties into the national peace process continues to prove a major impediment. This failing now dates back through all eras of government since the first ceasefires by the MNDA and UWSA in 1989, and the peace and conflict landscape continues to be fragmentary in different parts of the country.

Inevitably, this confusion is undermining initiatives to promote national peace. Most recently, the differing processes of Thein Sein's NCA and Aung San Suu Kyi's "21st Century Panglong Conference" have become confusingly inter-linked. The first actual "Union Peace Conference", without the Panglong suffix "21CP", was conducted by the Thein Sein government in January 2016 shortly before he left office. Then, having promised a fresh start in national peace talks, Aung San Suu Kyi and the NLD made an apparent turn-around and followed in the NCA's path during their conduct of the three "UPC-21CP" meetings that have been held so far: in August 2016, May 2017 and July this year. The NLD's reasons for this change in policy have never been adequately explained, but the decision was presumed to be an effort by the party to maintain working relations with the Tatmadaw during government transition.

In what initially appeared a boost for the NCA, in February this year another two EAOs signed the NCA, including the New Mon State Party (NMSP), which brings the signatory count to ten. But the addition of two names has still not resolved the issue of inclusion nor addressed another major difficulty with the peace process: the NCA's weakness as a vehicle for initiating peace and reform.

In a process that is so critical for Myanmar's future, it cannot be ignored that, during the NCA's three-year existence, conflict, displacement and loss of life have been continuing in several border areas. In consequence, many parties and peoples feel excluded and still left outside in national politics. In addition to the increasing number of refugees and internally-displaced persons in the Kachin and Shan States, one of the major humanitarian emergencies in the modern-day world erupted in late 2017 along the Rakhine State frontiers after over 700,000 Rohingya Muslims fled into Bangladesh. This followed sweeping Tatmadaw clearance operations in response to attacks by a new force of militants, known as Arakan Rohingya Salvation Army, claiming support among the local people.³

Against this backdrop, many examples can be pointed out of failings in both the NCA and UPC-21CP processes. A most obvious flaw is that, despite the latest NCA signings, by far the strongest and most numerous of the EAOs in the country have not signed the NCA. After the political disappointments of the past, such organisations as the KIO, KNPP, SSPP/SSA and UWSA are continuing to demand clearer guarantees of meaningful dialogue. A peace treaty should be a gateway to reform, not a strait-jacket.

In troop terms, the 10 NCA “signatory” EAOs can only put into the field some 20% of the estimated 100,000 EAO combatants in the country. In contrast, the NCA “non-signatories” – spearheaded by the UWSA, SSPP/SSA and KIO – constitute around 80% of the total force, including both ceasefire and non-ceasefire groups. Most of these are allied in the Federal Political Negotiation and Consultative Committee (FPNCC) established last year in the country’s northeast. Equally anomalous, only the KNU and RCSS/SSA have armies of significant size among the NCA signatories. With the exception of the NMSP, the rest are generally small, sometimes breakaway groups and, in some cases, function more as non-government organisations, with few troops, whose NCA status has provided them elevated recognition.

Adding to the unease over political representation, the functioning as spokespersons for the signatory EAOs by individuals from such small groups as the Pa-O National Liberation Organisation and Chin National Front does not generally go down well in the broader nationalities spectrum. At this moment in Myanmar’s history, there is a great urge to be represented with the consent and inclusion of all groups. But not only do other EAOs – both NCA signatories and non-signatories – feel awkward about identifying with a select group of individuals in their presentation of the ethnic nationality cause, but many political parties and civil society organisations (CSOs) worry about the same lack of inclusion as well.

For this reason, many nationality organisations believe that the Tatmadaw is continuing to play a “divide and rule” game in the national peace process, as it has since 1989, by selecting “dialogue partners” when it suits its interests and excluding, or fighting, other EAOs at the same time. The negative consequences for the peace process have been profound. At the moment, for example, the Tatmadaw is in armed conflict with the KIO and has ruled out full participation in the NCA and peace negotiations for the KIO’s allies: the MNDAA, TNLA and AA. On this exclusionary basis, the NCA is already weakened and a source of uncertainty rather than confidence in many communities. Equally ominous, clashes have also broken out during the past year between the Tatmadaw and some of the NCA-signatory groups as well, most recently with the KNU and RCSS/SSA. During a time of pledged peace, the Tatmadaw has continued to promote “security-first” tactics in military operations in several ethnic borderlands.

As a result, the representation and status of EAOs in the NCA and UPC-21CP processes continue to be unequal and flawed. The exclusion and selection of “dialogue partners” by the Tatmadaw is an obstacle to all-inclusiveness and not conducive to the peace process as a whole. Different peoples and organisations have been represented in different ways at the meetings so far. Meanwhile the UNFC, which was set up in 2011 to be the main political platform among EAOs, has declined from 14 to an uncertain handful of groups today.

It needs to be stated, too, that these disparities do not only relate to the participation of EAOs but have also been echoed in the representation of the two other key clusters or groupings in the peace process: the “government-Tatmadaw-parliament” and “electoral political parties”.

The inconsistencies in this tri-partite structure between the chosen stakeholders then add further difficulties in moving political discussions forward. As Sai Kyaw Nyunt of the Shan Nationalities League for Democracy and Secretary of the Union Peace Dialogue Joint Committee recently explained, only 14 points could be discussed during the latest UPC-21CP meeting. These topics, however, excluded the core political issues needing reform, because the three negotiating clusters have an ad hoc veto-wielding power over what can be discussed. In other words, if one cluster is not happy with a topic, the issue will not go higher up the UPC-21CP agenda for debate or adoption in the Union Accord. Meanwhile community and civil society representatives, although invited to UPC-21CP meetings, are not allowed to take part in the formal discussions. It is little wonder, then, that the peace process has been faltering.

Nationwide Ceasefire Agreement

With this historically complex backdrop in mind, it is now appropriate to look at the NCA in more detail. It was charted among its supporters as a peace agreement to pave the way for a more comprehensive agreement through a Union Accord that will be the basis for constitutional reform and a final document that can lead to a lasting political settlement. At the moment, this may seem a tall order. But, in these footsteps, many conflict specialists still hope that a way to national peace might be found.

The NCA text, agreed on 6 August and signed on 31 October 2015, is ambitious in scope. After half a century of centralised military rule, it pledged to achieve a lasting peace through achieving a union “based on the principles of democracy and federalism”. In its present form, the NCA has a preamble and seven chapters, with 33 clauses and 86 sub-clauses containing 104 specific provisions that run to twelve pages in the English version. The key provisions are: Preamble, Basic Principles, Aims and Objectives, Ceasefire-Related Matters, Maintaining and Strengthening Ceasefires, Guarantees for Political Dialogue, Future Tasks, and Miscellaneous.

Those drafting the agreement were not naïve, and it was recognised at the NCA’s inception that this document could only mark a beginning. A report by the International Crisis Group in September 2015, a month before the NCA’s partial signing, correctly spelled out the challenges that the negotiators would face ahead:

“Finalization of a draft NCA text was a significant step but meant as only the first in the process, with long, difficult political dialogue needed before a comprehensive peace agreement – the ‘Union Accord’ – could be reached. Many of the most challenging issues, including what form of federalism might be envisaged, how revenue sharing would be done and the future status of the armed groups and their possible integration into the military were deferred to the political dialogue. So too were some technical military issues on ceasefire monitoring and code of conduct.”

The report thus concluded:

“...the text is neither a classic ceasefire agreement – many of the military issues such as force separation, demarcation and verification are vague, or not included, or would require further agreement to come into force – nor is it a political agreement, as it references many political issues but defers detailed discussion. This hybrid status reflects the genesis of the document and the diverse set of actors and priorities around the peace table, as well as political constraints.”

These warnings remain valid today. The NCA was very weak as a ceasefire document and sought to cover a lot of bases. The treaty was not only concerned with the issues of ceasefire but also questions relating to the formation of a future political system. The text, however, provided no real answers as to how to go about achieving these ambitious goals. Rather, a step-by-step roadmap was agreed through which it was hoped that solutions would be found by negotiation along the way: i.e.

- Signing of the Nationwide Ceasefire Agreement
- Drafting and adopting the “Framework for Political Dialogue” by representatives of the government and EAOs
- Holding national political dialogue based on the adopted Framework for Political Dialogue, negotiating security reintegration matters, and undertaking other necessary tasks that both parties agree can be carried out in advance
- Holding the Union Peace Conference
- Signing the Union Accord
- Submitting the Union Accord to the Pyidaungsu Hluttaw (national parliament) for ratification
- Implementing all provisions contained in the Union Accord, and carrying out security reintegration matters.

Three years and a new government later, it is difficult to define what peace and reform progress has tangibly been made. Different organisations have different perspectives and, with the addition of the 21st Century Panglong process, Myanmar’s conflict landscape remains as complicated as ever.

Political Positions of Stakeholders

The attempted integration of the NCA and 21st Century Panglong processes brings us to the political positions of the key stakeholders in relation to constitution-making and a national peace agreement: the NLD, Tatmadaw and ethnic nationalities (both EAOs and EPPs) as a whole. Various social and political actors want to give voice during the present discussions. But it is the actions of these three groupings that will ultimately define the success or failure of the UPC-21CP initiative as it stands.

(a) The NLD

The NLD’s commitment to constitution-making in the national peace process is set out in its 7-point roadmap, which has been extensively reported in various news media.⁴ Like the NCA, the NLD’s plan suggests a step-by-step approach in achieving nationwide peace and supports the goals of a federal union:

1. To review the political dialogue framework (drafted by the previous government led by President Thein Sein)
2. To amend the political dialogue framework
3. To convene the Union Peace Conference—21st Century Panglong in accordance with the amended and approved political dialogue framework
4. To sign a Union Accord—21st Century Panglong Conference Agreement, based on the results of the 21st Century Panglong Conference

5. To amend the constitution in accordance with the union agreement and approve the amended constitution
6. To hold multi-party democracy general elections in accordance with the amended and approved constitution
7. To build a democratic federal union in accordance with the results of the multi-party democracy general elections.

(b) The Tatmadaw

In contrast to the NLD and most other participants in the peace process, the military Commander-in-Chief Snr-Gen. Min Aung Hlaing has repeatedly made it clear during the past few years that, whatever the reform direction, the Tatmadaw is committed to sticking to the 2008 constitution. In particular, Tatmadaw leaders are averse to amendment of any of the basic articles that might result in the national armed forces losing their national privileges and political edge.

In support of these objectives, the 6-point policy of the Tatmadaw has often been repeated:

1. To have a keen desire to reach eternal peace
2. To keep promises agreed to in peace deals
3. To avoid capitalizing on the peace agreement
4. To avoid placing a heavy burden on local people
5. To strictly abide by the existing laws
6. To march towards a democratic country in accord with the 2008 constitution.

In addition, the three major “national causes” from the previous SLORC-SPDC era of military government are often stated by Tatmadaw leaders and remain a staple in the media and official publications:

1. non-disintegration of the Union
2. non-disintegration of national solidarity
3. perpetuation of sovereignty.

These three causes, it is proclaimed, are the shared duty of every citizen that must be forever safeguarded by the Tatmadaw, and all the “national brethren” (meaning both Bamar and non-Bamar nationalities) have to perform this duty in unison as well.

(c) Ethnic Armed Organisations and Ethnic Political Parties

Given the different networks and alliances, it is often difficult to generalize about the position of all the nationality parties, both EAO and EPP, in the country. But in preparation for the inaugural Panglong 21st Century Conference in August 2016, an unprecedented meeting of EAOs and EPPs took place at Mai Ja Yang in KIO-controlled territory from 26 to 30 July. Here delegates spelled out a platform in support of ethnic political aspirations for the upcoming meeting. During four days of discussions, the gathering agreed on “8-point” principles in drafting a “federal union” constitution. Key policy areas included sovereignty, equality, genuine federalism, self-determination, protection for the rights of minorities, democratic rights, universal human rights, gender equality, and a multi-party system that is based on a secular form of governance.

For ethnic nationality parties, the Mai Ja Yang meeting marked a historic moment. The political guidelines were based on a federal union constitution that was drafted in 2008 by an earlier Federal Constitution Drafting and Coordinating Committee, formed in 2005 by a network of EAOs and democracy exiles in the Myanmar borderlands. In addition, the “8-point” principles incorporated proposals agreed in 2015 by the United Nationalities Federal Council. The Mai Ja Yang meeting was also the most comprehensive conference to determine a common position among nationality forces and political parties since independence in 1948. In attendance were delegates from 17 EAOs⁵ and two alliance organisations of EPPs, the United Nationalities Alliance and Nationalities Brotherhood Federation, as well as civil society representatives who made their way to the Kachin State border. These included the Women’s League of Burma. Adding resonance to the occasion, there were a number of prominent international observers, notably the UN Secretary-General Special Advisor, Vijay Nambiar, and Sun Guoxiang, Special Envoy of Asian Affairs of China’s Foreign Ministry.

In general, the discussions at Mai Ja Yang marked a reiteration of many long-held positions. The most outstanding point of discussion in federal governance was the proposal for a new delineation of “national” or “nationalities” state formation, rather than continuing with the 14 “states and regions” configuration that existed under constitutions drawn up by previous military governments in 1974 and 2008. Both these constitutions appeared to divide the country into two political formations: seven “regions” (formerly called “divisions”) supposed to be primarily inhabited by Bamars (Burmans) and seven ethnic “states” where non-Bamar peoples are in the majority.

The new suggestions agreed at Mai Ja Yang did not clarify future territorial designations and, in some respects, echoed the earlier “federal seminar” proposals in 1961 by ethnic politicians shortly before Gen. Ne Win seized power the following year. The “federal seminar” proposal was for the creation of an ethnic Bamar state that would form an equal union with other nationality states. The present discussion is more open. Hypothetically, for example, a “Bamar” state in Myanmar today could be carved out from the present Mandalay, Magway and Bago Regions, while Yangon (Rangoon), Ayeyarwady (Irrawaddy), Tanintharyi (Tenasserim) and Sagaing Regions could become states representing “nationalities”, since they are populated by various ethnic groups besides Bamar who dominate most aspects of national and local governance.

In summary, following the Mai Ja Yang meeting, many challenges remained but hopes were generally high as the first Panglong 21st Century Conference approached. All three key stakeholders – the NLD, Tatmadaw and ethnic nationality organisations – had laid down their principles and guidelines as to how they wanted peace talks and political reform to go forward. For the first time in many decades, important cards appeared to be on the table.

Constitution-Making Process

From these platforms, we can now move on to the next stages in understanding why the peace process has stalled and what might be done to address this. It is at this point that the critical issue of “constitution-making” becomes involved.

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“National Dialogues and Constitution Making”, published by the Berghof Foundation. From her essential 9-point steps in the constitution-making process, the following five points are selected to compare and contrast with the peace process in Myanmar:

- Agreeing to undertake constitutional reform or to introduce an entirely new constitutional order after a revolution or when a new state is formed.
- Agreeing on basic values of the state in a peace process: for instance, that it will be democratic, adhere to the principle of equality, and respect freedom of religion. Such agreement may be reached in many different forums, including peace negotiations and national dialogues. These are all considered to be part of the constitution-making process because they have constitutional implications.
- Designing a process of constitutional reform, agreeing on its participants and how it will proceed, including the role of the public.
- Making decisions on substantive constitutional issues and preparing a draft constitution or constitutional amendments in a formally recognized process. This may include debate on nation-building and policy issues.
- Engaging with civil society organisations and the broader public on the proposed constitutional review and what the constitution should say, including educating the public on constitutional issues.

Now let us compare and contrast the different actors or stakeholders active in Myanmar’s political arena in relation to Prof. Murray’s starting-point of “agreeing to undertake constitutional reform”.

On this key issue, the NLD is keen to undertake constitutional reform or amendments, as are the EAOs and EPPs. They have all stated this time and again in their political positions. In contrast, the Tatmadaw is currently sending mixed signals. Previously, Tatmadaw officers expressed agreement with the formation of “federal union” form of government during the Thein Sein presidency, marking a clear change from the military eras that preceded. The mood, however, has changed since President Thein Sein stepped down and, although participating in the UPC-21CP, Tatmadaw representatives prefer to repeat their commitment to adherence to the 2008 constitution, which is neither federal nor democratic, and vowing to protect it at all costs. These positions are contrary to the amendment of the present constitution in any meaningful way.

In essence, many citizens believe that the Tatmadaw leadership is more interested to protect their institutional dominance, which was granted under the 2008 constitution, and are not keen to give up the political and economic advantages that they are now enjoying. Most obviously, the Tatmadaw administers the Home, Defence and Border Affairs ministries under the 2008 constitution; it is reserved an allotment of 25% of all seats, without election, in the national legislatures; and it controls the influential General Administration Department that manages Myanmar’s civil service and is responsible for everything from tax collection and land registration to local financial management and NGO regulations.

Turning to Prof. Murray’s second point in constitution-making, “agreeing on basic values”, there are presently major blocks. For their part, the EAOs and EPPs have consistently set out the position that they are seeking the achievement of a federal democratic system of government through a process of peace talks and political reform. The NLD has similarly said that it is committed to a federal democratic union

and is ready to implement the new system according to the outcome of the Union Accord. NLD leaders, however, have failed to spell out any real detail of their party position in a clear and transparent manner as to how this might be achieved. This has caused disappointment among voters who had expected public leadership from a party elected to government office on the promise of nationwide reform.

The Tatmadaw, in comparison, has been stating a much narrower approach to political change: that it will adhere to the 2008 constitution and is ready to amend only minor articles – not those that compromise on its “leading role” in national politics. As was intended in the transitional arrangements from the SPDC government, they have secured a fail-safe protection under the present political system by imposing a 75% vote ceiling needed for constitutional amendments. This means that no amendments are possible without Tatmadaw agreement, since they automatically hold 25% of seats in all legislatures. In the meantime, the Tatmadaw continues to defend a unitary system of “hybrid” civilian-military governance, while maintaining control of key sectors of the national administration. In effect, the Tatmadaw remains a “state within a state”, continuing its self-appointed role as the sole saviour of the country’s unity. As a result, the Tatmadaw’s political outlook and actions have little or nothing to do with the formation of a federal union in a true sense.

This leads to the third key issue in constitution-making: “designing a process of constitutional reform, agreeing on its participants, procedure and the role of the public”. As outlined in analysis of the peace process above, these are among the most vague and contentious areas of the UPC-21CP. A changing cast of actors and participants has taken part in different peace meetings so far, with the main discussions now largely confined to the government, Tatmadaw and NCA signatories. This imbalance in representation is objected to by the non-signatory EAOs, other political parties and representatives of the country’s vibrant civil society. Meaningful empowerment of public participation is simply not included or adequately planned for and described in the present UPC-21CP process.

Adding to these restrictions on national inclusion, the Tatmadaw is continuing to use its extensive powers to control the direction of the peace process. These practices include deciding who can be allowed as “dialogue partners” in the NCA and UPC-21CP meetings and what constitutional issues can be discussed when political questions arise. In effect, the Tatmadaw is assuming the double role of rule of law “enforcer” for the government and, at the same time, a lead “negotiator” in the peace process. As a result, negotiators in the peace process and invited attendees at meetings are far from on an equal footing. The atmosphere of a level playing-field is virtually absent, so it is not surprising that little trust-building and substantive progress have so far been made. The values of collaboration, equality and inclusion should be the basis for any serious peace negotiation process.

These omissions and failings in the peace process also impact on the fourth key area in constitution-making: “making decisions on substantive constitutional issues”. For the moment, the negotiation partners and adversaries are bogged down on the problem of conducting “public consultations” and discussing controversial topics such as “non-secession” and “security reform”. As each new UPC-21CP conference is scheduled, these delays and obstructions threaten to derail the holding of the meeting, and substantive political dialogue is yet to begin.

As may be expected, there are different perspectives on the different sides over decision-making. But, once again, it is the Tatmadaw that has proven the main obstacle to moving the discussions forward. Most obviously, the Tatmadaw has blocked a number of formally-recognised steps in the NCA process,

notably national dialogue or public consultations on sub-state or state-levels in such territories as the Rakhine and Shan States. Similarly, the Tatmadaw has demanded that the EAOs agree to a “non-secession” clause in the Union Accord before political dialogue can begin.

This “non-secession” demand, first raised at the second UPC-21CP conference last year, has caused considerable disquiet. Not only do ethnic leaders believe that the UPC-21CP is too early a stage in the negotiation process to make such a political decision, but many parties also see this condition as a violation of their birthright to self-determination that was guaranteed in the 1947 constitution at independence. In response, Tatmadaw officers have countered that ethnic representatives and politicians will not be given a go-ahead for the drafting of constitutions for the nationality states (one for each state), if they do not yield to a non-secession agreement in advance.

Equally disconcerting, Tatmadaw representatives have also rejected the proposal by EAOs and EPPs in security sector reform (SSR) and disarmament, demobilisation and reintegration (DDR) for a “federal union” army where all ethnic nationalities are proportionately involved in the structures and representation of the national armed forces. Rather, Tatmadaw leaders are insistent on maintaining the armed forces in their current form, which is dominated by officers and personnel from the ethnic Bamar-majority. As many nationality leaders complain, the Tatmadaw leadership only appear to see the key issues of SSR and DDR as matters for the EAO to comply with.

Finally, the fifth point in constitution-making, “engaging with civil society organisations”, is one of the most critical in trust-building and sustaining political reform. Often unacknowledged, a great deal of work has been carried out during the past few years by civil society organisations in public education on federalism. Compared to the SLORC-SPDC era, freedom of expression and the range of activities carried out by CSOs and independent media groups have significantly improved. Certainly, federalism is no longer a taboo word within the country. However, although CSO representatives are invited to the sidelines of peace meetings, active and meaningful participation at the UPC-21CP level still appears a long way off. Rather, according to the NCA, only the EAOs are considered on the first-rung category among non-governmental groups in stakeholder participation, followed by the political parties. As a result, although many CSOs continue to lobby for socio-political change, they are not allowed to make official input.

In conclusion, by comparing the present landscape with Prof. Murray's model, there are inhibitions and obstacles at every stage in constitution-making and the peace process that are preventing resolution of the challenges in achieving nationwide peace and reform. If Myanmar is ever to find sustainable peace, these deficiencies urgently need to be addressed.

International Perspectives

As the political situation currently stands, international actors have also been unable to help the peoples of Myanmar usher in a political settlement through the empowerment of a nationally-owned peace process. Both Western countries and China have sought to play behind-the-scenes roles. For their part, a Joint Peace Fund financed by Western governments has funded peace meetings as well as supported a training and awareness-building role of CSOs in peace-making, democracy and federalism in the country. However, after several years of peace initiatives, Western “capacity-building” is not functioning to transpose the Tatmadaw into reforming along the lines of democratic norms and principles.

Equally unsettling, in the wake of the Rohingya crisis, doubts have set in as to whether Western strategies of engagement will be enough to build awareness among the general public of universal human rights values and anti-racism principles. This will be vital to help the country become mainstream within the international community again. For Western governments, national peace and reconciliation, including the sustainable return of Rohingya communities, have become a political minimum. A leading role in human rights investigation and humanitarian relief is being played by UN agencies and Western NGOs that is likely to continue in the coming years. In particular, following the mass exodus of Rohingya Muslim refugees into Bangladesh, there have been widespread allegations of “ethnic cleansing”, and even “genocide”, and calls for the International Criminal Court to take actions against the perpetrators.

In contrast, China is more interested in security and pursuing its own national interest linked to economic goals. In particular, to realise its ambitious Belt and Road Initiative, China needs Myanmar to be peaceful, which is why it is pushing the non-signatory EAOs, particularly the Federal Political Negotiation and Consultative Committee, to join the UPC-21CP process. For this reason, some critics have argued that the FPNCC is China’s proxy, but this is not really the case. As a close neighbour, China understands very well the depth of Myanmar’s political crisis, and it is also urging the Tatmadaw to be more flexible and accommodating in making the NCA and UPC-21CP all-inclusive. To date, however, China has not had obvious success and, as the 2011 suspension of the controversial Myitsone dam project in Kachin State warned, popular opinion in Myanmar will never simply follow China’s sway, despite its ever-greater dominance in the region.

It needs to be recognised therefore that, up until the present, no international action has achieved an inclusive and sustainable breakthrough in supporting peaceful change. Both Asian and Western governments, as well as international organisations such as the United Nations, European Union and World Bank, are continuing to advocate support for the peaceful resolution of Myanmar’s conflict crises. But it is clearly time for different approaches to be tried.

A Possible Solution?

Given such a situation off impasse, it will be a waste of time continuing with the UPC-21CP just as it is. The Tatmadaw is not on the same wavelength as the other stakeholders. Equally concerning, the NCA upon which the peace process is based has not proven nationwide, nor is it a ceasefire, nor has there been a defining agreement that has led to political dialogue on the meaningful scale that is needed. The question, then, is whether there are other ways to break the current deadlock.

Debra Eisenman is Managing Director of the Asia Society Policy Institute, who focuses on development, governance and security challenges in peace-building. In a recent policy paper, “Reconciling expectations with reality in transitioning Myanmar”, she highlighted a number of inter-connected and critical challenges in state transformation. I pick out two of these for their relevance to the country’s reform impasse. The two issues link the failures of Myanmar’s peace process and constitution, both of which need to be reformed:

- Multifaceted and violent ethnic conflict, largely created or exacerbated by Myanmar’s military, which is undermining the peace process and causing the tragic plight of the Rohingya.

- A flawed constitution, unchecked military power, and the conflation of the rule of law and law and order.

For the time being, a major political crisis continues within the country. While seeking to maintain relations with Tatmadaw leaders, the NLD government claims that it is trying to be accommodating to the United Nations and international pressure regarding the Tatmadaw's mishandling of the Rohingya Muslim population. No immediate answers, however, appear to be in sight, and concerns are continuing to grow about the ongoing conflicts and displacement of local peoples in the Kachin and northern Shan States. Meanwhile the government's peace process does not appear to be heading in any conclusive direction.

As a result, with the latest UPC-21CP conference again failing to provide a political breakthrough, it has to be asked whether the present stagnation in the peace process might be salvaged by turning away from the technicalities of the NCA in future UPC-21CP meetings, where progress has stalled, and instead concentrate on the constitution-making aspects of achieving peace and reform. Even if in a small way, such a refocusing of priorities and discussions could help break the ice and restore trust-building which, for the moment, is practically depleted.

Here, as a suggestion, making use of a "conditional clause" approach might be the last hope to save the UPC-21CP as a peace agreement platform. Christina Murray has demonstrated the potential constitution-making steps that are needed above, while Debra Eisenman has aptly described the impasse realities that currently exist. It is a highly worrying situation, warning of negative outcomes and the possibility that the peace process, as a whole, is not only losing its way but programmed to be doomed.

For Myanmar's peoples, this is a very depressing prospect where "an unjust peace is better than a just war" may be the best we can hope for in the present UPC-21PC process. The challenges of restoring trust and empowering a meaningful reform process still remain. But, after decades of unresolved conflict, using a "conditional clause" strategy can at least mark a starting point that all parties can engage around.

To illustrate the "conditional clause" idea, here are some nuts and bolts in this line of thinking for a new approach:

- As a starting point, an **unjust peace** could be viewed by the non-Bamar ethnic nationalities as having to give up some of their aspirations: for example, by agreeing to the **non-secession** clause of the Tatmadaw's demand.
- From the Tatmadaw point of view, an **unjust peace** could be taken as having to agree to the proposal by the EAOs for a **federal army** formation under a process guided by security sector reform. This position is in contrast to the disarmament, demobilization and reintegration priority confirmed time and again by Snr-Gen. Min Aung Hlaing that entails the maintenance of a Bamar-dominated **standard army**.
- On waging a **just war**, the EAOs would argue that they are defending the homelands of their families and ancestors and thus it is a justified war of resistance.
- On waging a **just war**, the Tatmadaw leadership is convinced, rightly or wrongly, that all the ethnic nationality territories have been part and parcel of a "Myanmar" empire from time immemorial and they are thus entitled to crush all resistance groups that rebel against its domination.

- Both camps thus argue that they are waging a **just war**.
- If this is the case, would it not be better if the adversaries at least agree on maintaining an **unjust peace** by compromising together, making use of a **conditional clause** approach so that they are able to reach a starting agreement?
- By **conditional**, for example, it is meant that, in the case of the **non-secession** issue, the ethnic nationalities would agree not to secede if acceptable objectives for a **federal democracy** are agreed and adhered to in words and deeds. If such agreement is not achieved, they would continue to have the historical right to secede.
- The same condition goes for the establishment of a **federal army**. This would mean that the territorial integrity of each ethnic state is guaranteed, along with the right to take care of internal security. This objective could be achieved by the local peoples employing their own state police forces and enjoying proportionate participation in the national federal army for the purposes of protecting the country from external enemies – not to encroach on other ethnic states and territories in the Union. If this can be agreed in political reform, the non-Bamar ethnic nationalities will abide by the structures of a federal union. If not, they would maintain the right to opt out of it.

In making these suggestions, the crucial point for all stakeholders is to grasp that the present deadlock in negotiation can only be overcome by making use of a **conditional clause** approach in the endeavours of achieving peace and constitution-making that are based upon mutual compromise. If such new approaches are not tried, the historic failures and present obstacles in conflict resolution are only likely to continue.

Conclusion

All those who truly want peace in Myanmar – whether domestic stakeholders, international actors or well-meaning sympathizers – should come to realise that the present peace process is not working and that fresh approaches are needed. Third party mediation may indeed be one way to go, but it is also one that is difficult in a peace process where local actors in Myanmar are keen to maintain national control. Nevertheless, the injection of fresh ideas is urgent, and ways must be supported to keep the momentum for peaceful change moving.

In this context, it is vital to breathe more life into the peace process, which many parties have felt is on the verge of collapse. Four steps should now be taken that could make a vital difference: first, closer scrutiny and understanding of why the peace process is failing; second, a complete halt to military operations; third, the initiation of whole-country participation and inclusion; and, fourth, the introduction of a “conditional clause” approach. In these troubled times, a glimmer of hope needs to be kept alive.

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¹ There were also differences of opinion as to whether the eight “EAO” groups should sign. In the end, the debacle was resolved by agreeing that only the group representative of the eight EAOs at the meeting, Saw Kwe Htoo Win of the KNU, would sign and not representatives of all eight organisations. Likewise, U Thu Wai, representative for political parties, inked the first part of the Union Accord. But still the produced document lacks a solid consensus in legal terms. Source: <https://english.panglong.org/2017/06/03/aftermath-of-second-21st-century-panglong-opinion-on-union-accord-and-linking-non-session-clause-to-ethnic-rights-of-self-determination/>

² The 21 EAOs are now reduced to 20, as the Wa National Organisation has apparently been absorbed into the UWSA. Source: <https://www.irrawaddy.com/news/burma/wa-national-organization-draft-resignation-unfc-leaked.html>

³ Initially known as the Harakah al-Yaqin, the new force presently calls itself the Arakan Rohingya Solidarity Army (ARSA). There is a long history of armed groups with different ideologies among the Buddhist Rakhine and minority Muslim communities in Rakhine State. But, for the moment, ARSA is too recent and little-known to fit into analysis of the present context.

⁴ For the English language media, see e.g., Nyein Nyein, "News Analysis: The NCA, One Year On", The Irrawaddy, 17 October 2016; Lun Min Maung, "Charter change lies at the heart of the peace process stalemate", Myanmar Times, 21 October 2016.

⁵ There were four absentees: the UWSA, MNDAA, TNLA in Shan State and the National Socialist Council of Nagaland– Khaplang on the India border.

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