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Burma's Democratic Transition: The Internationalization of Justice, the Challenge of Legitimacy, and the Necessity of Facing Past Political Violence

by Daniel Rothenberg*

Burma is a nation in crisis. The country faces severe economic stagnation, endemic poverty, and serious health and social welfare challenges, all within a context of significant international isolation. Burma's status as an international pariah represents a global response to a history of gross human rights violations as well as the refusal of the State Peace and Development Council (SPDC), the ruling military regime, to recognize the overwhelming victory of the National League of Democracy (NLD) in the 1990 elections. It is difficult to imagine how Burma can respond to its current crisis without addressing its global political isolation, a process that will almost certainly require a political transition from authoritarian rule to a constitutionally based electoral democracy. In this sense, the question facing Burma is not so much whether there needs to be a democratic transition, but rather how this transition will be managed, and when it will take place.

One of the most important and contentious issues of a possible Burmese political transition involves how the larger society should respond to the military regime's legacy of human rights violations. Attempts to face past political violence are often presented as a binary opposition of "prosecute and punish versus forgive and forget." This perspective creates an impasse with democracy and human rights activists claiming the first option, and the SPDC advocating the second.

Understanding Burma's future as a choice between criminal prosecutions or a general amnesty fundamentally misreads contemporary ideas on transitional justice as well as the current demands of a world increasingly committed to the

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internationalization of justice. Such a position is likely to increase tension between the negotiating parties, delay a possible transition, and ultimately produce results different from those intended by any of the parties. Conversely, a willingness on the part of the Burmese military to accept responsibility for past violations of basic human rights may well provide the parties with more long-term protection than a negotiated general amnesty. In order to move beyond this tension, strategies for enabling a political change in Burma should be evaluated in relation to their ability to confer legitimacy on the transitional process, particularly as regards a reckoning with the nation's legacy of violations of human rights.

Burma's Crisis and the Necessity of a Democratic Transition

Burma's current crisis involves profound and systematic dysfunction as a result of decades of governmental mismanagement. In this sense, Burma's crisis is a political prob-



Burmese working in a rice field near Inle Lake.

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lem expressing the negative impact of authoritarianism on every sector of society.

The SPDC is highly repressive. Gross violations of human rights are common, including disappearances, extrajudicial killings, torture, and rape, particularly in rural areas dominated by ethnic minorities. The military government engages in widespread forced labor as evidenced by recent International Labor Organization investigations. The regime detains and imprisons citizens at will, targeting virtually anyone whose activities are perceived to be even remotely expressive of political dissent. The SPDC also engages in widespread surveillance, censors all published material, and generally prevents citizens from gaining legal access to outside information. There is no independent judiciary in Burma and no meaningful rule of law.

Economically, Burma is in a very difficult situation. Despite its exceptional natural wealth, the nation's per capita income is only U.S.\$300 per year. The nation's infrastructure is crumbling, living standards are poor, and attempts to stimulate foreign investment have been largely unsuccessful.

Socially, Burma suffers from endemic poverty within a repressive system that offers residents precious few opportunities. The government's policies have severely impacted the educational system, leaving the country with a serious lack of trained professionals necessary for sustained development. In addition, Burma is deeply divided along ethnic lines and faces several armed ethnic resistance movements.

Burma's crisis is profoundly exacerbated by the nation's international isolation such that it is difficult to imagine how the nation can address its political, economic, and social crisis without reintegrating itself within the larger world system. By ending its isolation, Burma will be able to gain access to foreign investment and international aid, including loans, financial assistance, training, infrastructure projects, and other mechanisms designed to encourage national development. It is nonetheless highly unlikely that

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Burma can move beyond its current pariah status without engaging in a democratic transition.

Although it is probably too early to know whether the nation's transitional process has begun, important negotiations have taken place between the SPDC and Aung San Suu Kyi, the NLD General Secretary and recipient of the 1991 Nobel Peace Prize. The subject of these negotiations remains secret, yet the establishment of communication, understanding, and some level of trust between the military regime and the democracy movement is the first step toward a negotiated political transition. For this reason, it is an especially important time for those interested in Burma's future to learn from the transitional experiences of other nations with a keen sensitivity to the contemporary global political climate.

Transitional Justice and State Legitimacy

From the 1970s through the 1990s, dozens of countries around the world shifted from authoritarian to democratic rule, defining such political change as a key element of late 20th century politics. Because authoritarian regimes are characterized by systematic violations of fundamental human rights, democratic transitions often involve the special challenge of responding to past political violence. The theoretical and practical considerations of these issues define the emerging interdisciplinary field of transitional justice.

The justice issues raised in transitional societies are of a special nature because they are directly linked to larger societal processes of political change that define the character of the new regime. Authoritarian states' reliance on systemic political violence often calls into question the legitimacy of such regimes, providing important intellectual and political support for political change. Similarly, new democratic regimes have an obligation to address the moral, political, and legal demands of victims as a means of distinguishing themselves from the past government and grounding their vision of democracy in a fundamental respect for basic rights and rule of law.

Nevertheless, most transitions are negotiated processes involving parties advocating democratic rule as well as representatives of the authoritarian regime, who are often the same individuals (or members of the same organizations) responsible for past political violence. As such, determining the most appropriate response to past violence is a complex challenge, particularly when authoritarian leaders retain significant power during the transitional process. On the one hand, the new regime is compelled to respect the claims of victims of political violence by adhering to basic rule of law principles and as an expression of a commitment to protecting fundamental human rights. On the other hand, the new regime must ensure that the transitional process is stable, peaceful, and long-lasting, which may involve an agreement to limit legal responsibility for past political violence. A successfully negotiated transition typically involves balancing the demand for justice with the practical need to placate powerful representatives of the departing authoritarian regime.

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When the literature on democratic transitions first emerged, discussions of these issues were often presented as a choice between "prosecute and punish versus forgive and forget." It quickly became clear that this binary distinction was inadequate for documenting the complex experiences of different countries or accounting for the multiplicity of distinct strategies for dealing with the challenges of facing past political violence. To a large degree, the emergence of the transitional justice field is the result of a growing recognition of the inherent complexity of responding to political violence while simultaneously developing subtle, engaged, and context-specific responses to these issues. It is now common to consider political transitions as involving an array of possible strategies and policy options, including: truth commissions, monetary reparations, apologies, mechanisms of restorative justice, economic investment, monuments and memorialization, psycho-social healing, the opening of security archives, and other means of facing past violence in order to build the foundations of a new democratic order.

Although not always understood in this manner, democratic transitions and the related field of transitional justice are fundamentally concerned with the issue of state legitimacy. For a transition to be successful, both the process and the resulting democratic state must be understood to be legitimate in both domestic and international spheres. As the ideas and mechanism of transitional justice become more widespread, they become increasingly institutionalized as mechanisms of legitimizing a shift from authoritarian to democratic rule. In this way, transitional societies are obligated to use the language and policies of transitional justice as a means of ensuring that their nations' transitions are accepted, particularly within the international community.

The Internationalization of Justice—Two Perspectives

Developing alongside the institutionalization of transitional justice strategies for legitimizing democratic transitions is a growing interest in the internationalization of criminal justice for perpetrators of human rights violations. This interest has grown considerably over the last decade. This trend is evidenced by the movement to establish an International Criminal Court, the creation of ad hoc international criminal tribunals for Rwanda and the former Yugoslavia, and the increasing use of domestic courts to bring criminal and civil cases against individuals accused of gross violations of human rights. All of these activities are linked to one of the most basic principles of international law: the idea that one cannot engage in an international criminal case without first exhausting domestic remedies. Both the widespread use of transitional justice strategies and the recent increase in international prosecutions are expressions of a general global consensus to deny states the possibility of failing to face their legacies of gross violations of human rights. As such, the international cases arising out of democratic transitions typically express the measured determination of an essential failure within the transitional process.

To help make sense of the interrelationship between these two global trends and their link to a future Burmese

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transition, it is useful to compare the arrest and detention of General Augusto Pinochet, the former autocratic leader of Chile's military dictatorship, with the international community's response to South Africa's transitional experience.

The "Pinochet Precedent"

From late 1998 through early 2000, General Pinochet was detained in London pending possible extradition to Spain to face charges of terrorism, genocide, and other gross violations of human rights. The case became one of the most widely discussed legal issues of the century's end, representing the first time that a nation's domestic court was used successfully to enforce internationally recognized human rights principles against a former head of state for crimes committed in a different country. Although Pinochet was eventually released for medical reasons, the Spanish high court affirmed the legality of the case and the British high court ruled that the ex-dictator could be extradited, defining what is sometimes referred to as the "Pinochet precedent." The case is of great legal significance because it affirmed the principle of universal jurisdiction for prosecuting alleged perpetrators of human rights violations, negated the legal protection of general amnesties provided to former perpetrators in the Spanish cases, and denied the protection of sovereign and head of state immunity for former leaders in the British cases.

The widespread international support for the case defines an emerging international commitment to taking legal action against the institutionalized impunity that has long protected former leaders of brutal regimes. To a large degree, the broad international support for the case expresses a general criticism of the Chilean transition as illegitimate because it provided a broad amnesty to General Pinochet and the military government he controlled. In this respect, the "Pinochet precedent" is a warning for authoritarian leaders, both in and out of power, who have engineered similar mechanisms of domestic legal protection.

The Amnesty Process of the South African Truth and Reconciliation Commission

The South African case presents a different situation in which the international community has largely supported a negotiated transition that provided perpetrators with a limited amnesty for their legal responsibility for gross violations of human rights. This approach is especially significant considering South Africa's status as an international pariah during the apartheid era.

The transition from a racially based minority rule to a democratically elected government was a complex process involving lengthy negotiations, the drafting of a new constitution, the first free and fair general elections in the nation's history, massive investment to address basic social needs, and significant legislative changes. The negotiations also involved the decision to form the Truth and Reconciliation

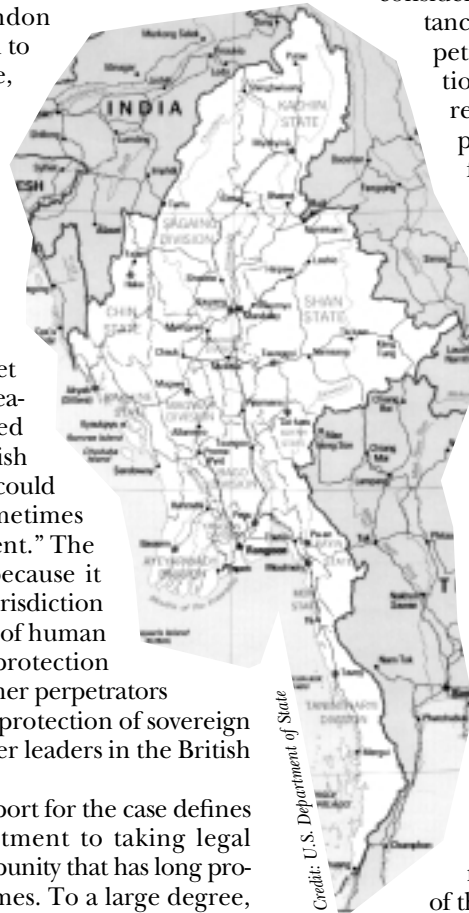
Commission (TRC) to deal with key elements of transitional justice.

The mission of the TRC was to assist the nation in facing its legacy of gross violations of human rights. To accomplish its mandate, the Commission was divided into three committees: a human rights committee that gathered and analyzed data and testimony on political violence and held numerous public hearings; a reparations committee that considered how to provide victims with financial assistance; and an amnesty committee that allowed perpetrators to receive full civil and criminal protection for particular crimes. Perpetrators could receive amnesty only if their crimes were of a political nature and they were willing to tell the full truth about the events in question. For some, the idea of providing amnesty to perpetrators who confessed was highly immoral, while for others the strategy represented an important means of revealing the shadow violence that defined the apartheid state as part of a larger process of national reconciliation.

The international community generally views the TRC positively and considers South Africa to be a prime example of a legitimate political transition. It is thus highly unlikely that a foreign nation would be willing or capable of prosecuting those South African perpetrators granted amnesty through the TRC process. First, a careful review of the legality of the domestic process would probably show that the nation adequately engaged in reasonable rule of law procedures regarding the crimes for which particular perpetrators received amnesty. Almost every aspect of the policies enacted was carefully designed with broad domestic and international consultations, and premised upon a basic commitment to rule of law with an understanding of the special challenges of a democratic transition.

Second, criminally prosecuting an individual provided with amnesty through the TRC would represent a basic challenge to the legality of South Africa's transitional policies. If a court of one nation questioned the validity of a South African amnesty (as numerous European courts were willing to do in the Pinochet case), the act would stand as a political judgment that the TRC and the larger transitional process was fundamentally illegitimate. Because the transitional process generally has been understood to have been highly legitimate, South African perpetrators whose amnesty petitions were approved by the TRC (though not those denied amnesty or those who never sought amnesty) are likely to benefit from a general protection against international prosecution.

For democratic transitions to be considered legitimate, they must appear to be genuinely engaged in a serious reckoning with past human rights violations. This is particularly true for nations such as Burma, which are isolated and display a relatively weak international status. To avoid the global consensus of illegitimacy regarding Chile's general amnesty (that led to subsequent international prosecutions) and to achieve the



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legitimacy of South Africa's partial amnesty (that will likely protect perpetrators from international prosecution), Burma's future democratic transition will require a formal reckoning with responsibility for past human rights violations.

Conclusion

Burma has much to gain from formally engaging with the ideas and policy options of transitional justice as a means of ensuring the legitimacy of future political change. To grasp the significance of these issues, it is important to consider that transitional justice in both theory and practice is structured by two basic principles: first, a recognition that each nation's transitional experience is unique and molded by distinct social, cultural, and historical factors; and second, that there are basic moral understandings, legal principles, and logistical issues common to all democratic transitions. By formally acknowledging the second principle—evoking the language

of transitional justice, seeking to learn from the experiences of other nations, and openly accepting basic international human rights standards—Burma may well increase the international community's willingness to respect the first principle—Burma's need to find its own solutions to its problems.

By addressing its violent past, Burma can ensure that a future transition is accepted at an international level while retaining a relatively high degree of autonomy regarding specific policy decisions. In negotiating its future political transition, Burma need not engage in full-scale prosecutions and may or may not choose to grant some form of amnesty to past perpetrators. To achieve the international legitimacy necessary for a successful transition, however, Burma must formally reckon with its legacy of gross violations of human rights and the related questions of responsibility. ☉

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to serve all of the community equally. The nationalist political parties retaliated to the weakening of Patten's proposals by refusing to take their seats on the new Policing Board. In their August 2001 package of proposals for the implementation of the Good Friday Agreement, the British and Irish governments undertook to publish a revised Implementation Plan for policing reform, which has persuaded one of the nationalist parties, the Social Democratic and Labor Party, to take up its seats on the Policing Board.

Among others, the U.S. Congress is concerned about the failure to implement properly the Patten recommendations. Other groups, such as British Irish RIGHTS WATCH, view the greatest concern about policing in Northern Ireland as Patten's refusal to address the question of how to root out those who were serial human rights abusers under the old system. Policing will change in Northern Ireland only if Catholic nationalists are sufficiently confident to join and remain in the new police service in numbers. This is unlikely to happen while RUC officers who used violence, lies, and collusion as their daily working methods are allowed to remain in place, without ever being brought to justice and without having to take the new oath. Unless Catholics can be persuaded to join and remain in the new police service, the rule of law will continue to be problematic in Northern Ireland.

Conclusion

Many argue that Northern Ireland needs a truth and reconciliation commission to deal with its past human rights abuses, but the possibility of Northern Ireland's establishing a truth commission is highly unlikely. Truth commissions have tended to be established in states in which regimes have changed and the incoming governments have been prepared to allow investigators to subject the former government's activities to scrutiny. Such conditions do not exist in Northern Ireland, and resistance to any development on the part of the "securocrats," *i.e.*, intelligence services and others who are responsible for state security, is likely to ensure that a truth commission never develops. Without a truth

commission, there will be continued domestic and international pressure for costly public inquiries that may go on for years and possibly hinder the peace process itself.

In hindsight, the human rights provisions of the Good Friday Agreement have been more well-intentioned than well-implemented. The Agreement offers a unique opportunity to consider the human rights deficit in Northern Ireland holistically. British Irish RIGHTS WATCH and other NGOs advocated for the wholesale reform of the system of criminal justice, looking at the issues of policing, emergency laws and the system itself as arms of a single entity. Instead, the government has allowed the criminal justice system to be reviewed piecemeal, resulting in an incoherent strategy that will not ensure the integrated and radical reforms that are essential to the development of stability and peace in Northern Ireland. The conflict is by no means over. According to British Irish RIGHTS WATCH's calculations, over 170 people have died since the 1994 cease-fires. The fear for most is that missing the opportunity for more coherent human rights reforms in Northern Ireland, together with the absence of any effective mechanism for dealing with past abuses, may one day be seen as having been a fatal error. ☉

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