

Transitional Justice in Syria

This publication has emphasised that transitional justice is essential to securing a sustainable transition following a period of conflict and serious human rights abuses. Transitional justice has not been presented as an end in itself or as a box Syria must tick as part of its reconstruction.

Transitional justice is the means through which Syria can confront its past and start the process of rebuilding a sustainable peace. It can help break cycles of impunity and violence that have destabilised society in the past; empower and restore the dignity of victims; provide a basis for reforming political structures and restoring the rule of law; and secure a foundation for reconciliation initiatives. Transitional justice is not the only approach Syria will need to overcome its past and achieve peace and stability, but it is an important tool to reach those goals.



Transitional Justice in Syria • Dawlaty

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Dawlaty

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Introduction and overview

As of May 2013, Syria finds itself in the middle of a violent and increasingly complex revolution. The death toll exceeds 70,000 with tens of thousands more injured, of unknown whereabouts and locked in detention centres where torture and abuse have become routine. This violence has driven millions of Syrians from their homes and communities with an estimated 1.3 million Syrians forced to take refuge in neighbouring countries and several million more displaced within Syria itself.

Syria's revolution started in February 2011 when protestors took to the streets demanding an end to the abuses of power and political oppression that had ruled their society for decades. State security forces responded with violence, intimidation and arrests. In the following months and years, thousands have continued to take to the streets in cities across Syria; the confrontations have grown increasingly violent and the risks to civilians continue to grow day by day.

Against that background, this publication addresses one issue that is inextricably linked to establishing sustainable peace: transitional justice. A stable and sustainable peace in Syria, governed by the rule of law, requires a comprehensive justice and accountability process to defeat the culture of impunity that has allowed violations to go unchallenged for decades.

Syrians are well aware of the cost of impunity: the memory and impact of massacres and violent political confrontations in the 1970s and 1980s are still being felt. There is now a growing determination to confront the country's history of impunity and ensure that it is not allowed to continue undermining Syria's prospective peace and stability. Justice, which is the antithesis of impunity, can only be achieved through a well-planned and coordinated national process that avoids "victors' justice" and further divisive acts of revenge and retaliation.

Transitional justice is a concept far broader than criminal justice. Individual criminal accountability plays a major role in a transitional justice process,

but other aspects of accountability are also crucial to reach the broader goals of the process. These might include fact-finding or truth-telling processes to shed light on a period of oppression and allow for an understanding of the broader political culture and the role of specific institutions, memorialisation to remember the victims, and official apologies, amongst other things.

No two societies are the same and therefore no two transitional justice processes can be the same. The overall process each society might ultimately use can consist of a number of mechanisms that should be designed to meet the unique objectives and context of a given transitional society. This may include accountability for those directly responsible for crimes; for those who ordered or encouraged crimes and the widespread abuse of human rights; and for the institutions that facilitated those practices.

Only Syrians themselves can design and implement a transitional justice process for Syria. Thousands of Syrian activists, journalists and individuals are already engaged in the preparations for that process. They are documenting human rights abuses, providing support to victims and planning for institutional and legislative reform. This publication aims to assist them in that important work.

The publication is divided into two parts, each of which can be read independently. Part one gives an overview of different aspects of transitional justice and its implementation. It makes a case for the importance of transitional justice, provides a brief definition and discussion of the concept, outlines its possible goals and discusses a number of the judicial and non-judicial mechanisms that typically form part of a transitional justice process. A number of examples drawn from the experiences of other transitional societies are used to illustrate key points. Given the nature of the current conflict in Syria, special attention is given to describing the major crimes under international law and to detailing the kind of documentation work that can most effectively be used to facilitate their successful prosecution.

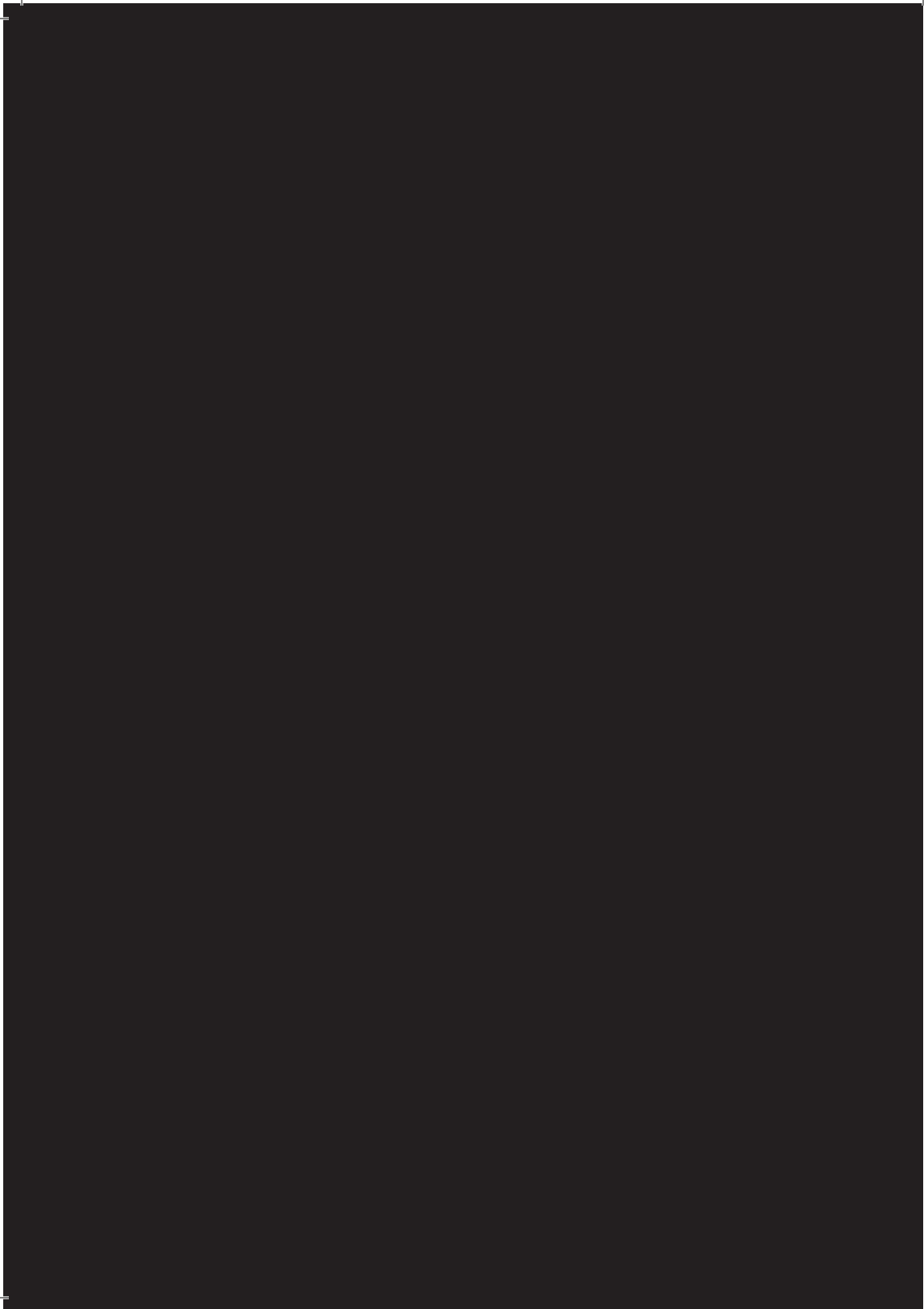
Although documentation is discussed primarily in the context of criminal prosecutions, this kind of work is also an essential underpinning for other mechanisms, including factfinding, truth-telling and vetting. This section specifically targets journalists, activists and individuals who are currently undertaking valuable documentation work in Syria. Part one does not make the case for a particular process, since Syria must decide for itself what its goals are and what transitional justice mechanisms are most likely to help achieve

those goals in the cultural, religious and historical context of Syria. As such, part one provides activists and policy makers with some of the information and resources that must be considered as part of this process.

Part two focuses on the details of the ongoing conflict in Syria and applies aspects of the more general framework outlined in part one. It is divided into four sections which can be read independently of each other. These cover the *context* in which transitional justice in Syria is taking place; a number of its possible *priorities*; an overview of some of the existing transitional justice *resources* Syrians can hope to draw on; and an overview of some of the major *challenges* to the process. None of these sections presents an exhaustive overview, rather they are meant to facilitate a discussion that can help when planning the process of transitional justice in Syria.

Part 1

A Brief Overview of
Transitional Justice



A Brief Overview of Transitional Justice

An inclusive concept

Syrians have lived with injustice for decades, encompassing human rights abuses, political oppression and growing economic inequalities fuelled by corruption and patronage. Such injustices have flourished in a culture of impunity where the law has been used selectively and arbitrarily and has provided no meaningful accountability or redress. The concept of transitional justice stresses that Syria's transition towards a more transparent, inclusive and peaceful future requires a comprehensive effort to confront this culture of impunity through justice and accountability. Transitional justice is an important means through which all Syrians can collectively prepare the ground for the sustainable and peaceful future they all want.

The question of how a society is to confront the injustices in its past has a long history dating back several thousand years. The concept of transitional justice as a discrete field has emerged more recently and can be traced to the events that shaped a number of Latin American countries in the 1980s and 1990s as they defeated their own dictators and authoritarian regimes. Of particular note are the experiences of Argentina (1980s), Chile (1990) and El Salvador (1992), which were aimed, in their own way, at uncovering the truth behind dark chapters in their histories. The concept was developed further during South Africa's landmark process in 1994 and again during later transitions in Sierra Leone, Rwanda, Timor Leste, Kenya, Afghanistan, Iraq and many others.

These cases also demonstrate that while the concept is becoming better understood, it remains difficult to implement successfully. Nevertheless, some form of transitional justice now follows most violent conflicts and periods of serious human rights violations. Transitional justice has emerged as a prominent feature in the revolutions collectively referred to as the Arab

Spring, including those in Tunisia, Egypt and Libya, again with differing degrees of success to date.

Despite this prevalence, the concept of transitional justice is not always well understood in the societies where it is implemented. It is often presented in abstract terms that can seem of little relevance to the lives of those it aims to help and is often conflated with other aspects of a society's transition.

The most widely accepted definition of transitional justice comes from a *2004 Report by the United Nations Secretary-General on the Rule of Law and Transitional Justice*. It defines transitional justice as:

“The full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.”

This definition makes it clear that transitional justice does not consist of a single mechanism or institution. Rather, transitional justice refers to a collection of different instruments and institutions united by the common purpose of securing a sustainable transition. Its application is thus only made determinate and concrete when placed in the context of a specific transitional society, such as Syria.

A range of possible objectives

Transitional justice is a means to an end, but securing a sustainable transition through justice and accountability is a very general goal. It can only be reached by successfully achieving a number of subsidiary goals. These goals and objectives will vary from society to society and will depend on factors such as the nature of the transition and on the cultural, economic, political, religious and historical context in which it is taking or has taken place. As a consequence, the objectives and mechanisms to meet them that have been successful in one case may not be suitable for another. There is no single model for transitional justice and Syria cannot simply hope to replicate a model that has succeeded in a different context elsewhere.

A crucial first step towards transitional justice in Syria is therefore that of determining its specific aims and objectives. These can vary a great deal but might include, in no particular order:

- Identifying those responsible for crimes and human rights violations, both during the revolution and prior to it
- Prosecuting those alleged to have committed serious crimes
- Breaking cycles of violence that have undermined stability in the past
- Reforming institutions and restoring society's confidence in them
- Removing violators from state institutions such as the security forces or from government
- Establishing an official record of a period of past abuses
- Identifying the fate and location of missing persons
- Preventing private acts of revenge
- Providing redress to victims
- Restoring the integrity and dignity of victims
- Promoting national reconciliation and national unity

This list is not exhaustive; not all of these objectives may be relevant to Syria and there may be other objectives that Syria has for its transitional justice process. The key element in reaching those objectives is that they are identified and shared by the affected population and are crafted to take into account the population's expectations for transitional justice.

Discussions of what Syria's transitional justice objectives are should therefore be transparent and genuinely inclusive. Those discussions need to engage communities on all sides of the current conflict and the full diversity of Syria's population, including religious and ethnic minorities; the vulnerable; marginalised communities such as women, children, young people; and the disabled. If efforts are not made to ensure that the voices of all Syrians are included from the very beginning, the process will lack the legitimacy and popular support needed to ensure its success. A "victors' justice" that focuses only on the crimes of the defeated and on the suffering of a select group of victims is no justice at all, but risks perpetuating the kind of injustice that has plagued society in the past. Transitional justice must, if it is to be successful, show equal concern for all Syrians and their experiences.

Outreach and consultation play an important role in establishing the legitimacy of a process and in ensuring that all communities feel included from the very beginning. The information gained from the population through outreach and consultation is also of great value to those charged with designing the process and its mechanisms. This can ensure that the right issues and priorities are addressed, that mechanisms are designed appropriately and helps highlight expectations that cannot be met due to the inevitable limitations on the process. The latter gives policy makers an early opportunity to communicate clearly the limitations and facilitate a discussion of how incompatible expectations might be prioritised and addressed.

Example: Outreach and consultation in Afghanistan¹

After more than three decades of violent conflict in Afghanistan, the Afghan Independent Human Rights Commission (AIHRC) was established with a mandate to undertake national consultations and propose a national strategy for transitional justice and for addressing the abuses of the past. The AIHRC decided to start this process with an extensive national consultation and outreach program. The consultation provided information about transitional justice and gave people an opportunity to share their experiences and expectations. The Commission designed a survey, which was completed by 4,151 respondents and convened more than 200 focus group discussions with 2,000 participants, to capture qualitative data and assess perceptions across the country. The consultation took eight months and covered 32 of Afghanistan's 34 provinces as well as refugee populations in Iran and Pakistan.

In addition to providing valuable information about perceptions and expectations, the Afghan experience showed that the consultation itself forms an important part of the transitional justice process. As Ahmad Nader Nadery describes it, "There seemed to be a sense of gratitude at the very concept of being consulted. A man in Salang district of Parwan became quite emotional while responding to the survey questions: 'Now I feel that I am a part of this society. Nobody ever asked our view on such important decisions.' A man in Kandahar said: 'So far, no one has asked us: what do you, victims, want? Do you desire revenge? Do you want housing? Food?' In one of the village focus groups, participants said they considered the consultation an extraordinary opportunity for the people of Afghanistan; they noted that no one since King Amanullah Khan has consulted with people on a national level." The process of consultation also enhanced the legitimacy of the process and began the process of rebuilding trust in public institutions.

¹ This case study is based on Ahmed Nader Nadery's "*Peace or Justice? Transitional Justice in Afghanistan*", *The International Journal of Transitional Justice*, Vol. 1, 2007. Mr Nadery is the former Transitional Justice Commissioner at the Afghanistan Independent Human Rights Commission.

Afghanistan's transitional justice process also provides another important lesson. Despite the success of its initial consultations, little has been achieved in the way of meeting the expectations it identified. The leadership and political will necessary to sustain the transitional justice process has been absent and a culture of impunity has survived, with many suspected violators continuing to enjoy positions of power in Afghanistan.

Example: Outreach in Sierra Leone

March 1991 marked the start of a brutal war in the West African country of Sierra Leone that was not declared over until January 2002. During the course of the war approximately 50,000 people were killed and more than two million - just over a third of the total population - were forcibly displaced, with many becoming refugees in neighbouring countries.

The scale of the conflict in Sierra Leone, coupled with the country's limited resources, led to it requesting international assistance for its transitional justice process. Together, the Republic of Sierra Leone and the United Nations established the Special Court for Sierra Leone, mandated to try those bearing the greatest responsibility for the most serious crimes. It started its work in 2002.

It was crucial to make sure that the work of this Court was well understood in Sierra Leone and that it was perceived as being legitimate and capable of providing justice for the victims of the conflict. A large outreach campaign was therefore started by civil society well before the Court began its work, with the aim of explaining its functions and objectives and of understanding people's expectations and perceptions.

Once the Court was established, both the Outreach Program (which is part of the Registry) and the Prosecutor and his team conducted a number of open meetings across the country, in which they explained the work of the Court and invited victims to share their experiences. A "Special Court at a Glance" booklet was created and distributed. It explained the key features of the Court in easy to understand text and pictures. The Special Court and its civil society partners continued to conduct outreach during the trials themselves, including through regular and simple updates on local radio and a special dedicated website.

Although every transitional justice process is different in respect of its immediate objectives, they are united in their common pursuit of a peaceful and sustainable transition. At the same time, whilst every transitional justice process faces a different set of specific challenges, some similar challenges are likely to emerge. These challenges share some common features that set a transitional justice process apart from the pursuit of justice more generally. Taking into account the challenging circumstances in which it inevitably operates can therefore also help to illuminate the concept of transitional justice.

The nature of the crimes requiring investigation may be especially serious and may include violations of international law. The investigation and prosecution of such crimes may be different from those that in-country judicial institutions have experience of investigating in the past. These difficulties may be compounded by the lack of resources and capacity that often follow a destructive conflict.

The alleged perpetrators of crimes may include political elites, powerful members of the society, institutions of state and foreign actors. The number of perpetrators might be very large and may well exceed the capacity of existing judicial institutions, such as domestic courts. As a consequence it may be impossible to bring all criminal cases and alleged perpetrators before the courts within a reasonable timeframe. Similarly, the number of victims may be very large and may exceed the capacity of existing institutions. Additional efforts may therefore be needed to engage victims in the process, to provide them with the recognition and compensation they expect and deserve and to avoid impunity for those perpetrators not dealt with by the courts.

A major political transition can uncover crimes from the past that were previously unknown, or make it possible to investigate and prosecute individuals that have lived beyond the reach of the law. Investigating and prosecuting crimes that are several decades old present their own unique challenges.

Syria's transition will almost certainly raise all these challenges and more. A transitional justice process acknowledges these challenges and responds by creating a collection of mechanisms and institutions especially designed to secure justice and accountability in this kind of challenging environment. For example, special courts may complement existing judicial institutions; efforts can be made to ensure those bearing the greatest responsibility for the most serious crimes are tried first and as a priority; and non-judicial mechanisms can be used to extend accountability to those alleged perpetrators and abusers who cannot be tried by the courts within a reasonable timeframe or for victims whose experiences are best dealt with outside a criminal justice process.

Making the case for transitional justice

One of the first challenges that transitional justice advocates in Syria will encounter is that of making the case for transitional justice. In the aftermath of Syria's conflict there are countless important objectives to be achieved. Those displaced by the conflict will wish to return home, those who have lost loved ones will want to grieve and those who have lost their livelihoods or property will be anxious to begin economic reconstruction. There will be an immediate need to rebuild the institutions of state to ensure security, to restore the ordinary services citizens expect from their government and to provide an outward and visible sign of the rule of law.

In this context, the need for transitional justice may well be questioned. What value is there in a potentially divisive and painful effort to examine or re-examine the past when there are so many other uses for scarce resources? There is no single answer to this question but it is important to consider a few lines of response. The central argument is that there can be no sustainable peace without justice. Building a peaceful and sustainable future requires a

commitment to confronting the crimes of the past so as to ensure that past injustices do not re-emerge to undermine future peace and stability.

One of the main reasons for this is the devastating long-term consequences of impunity. Impunity is the failure to hold individuals or institutions accountable for crimes, either intentionally through amnesties or in practice through inadequate accountability procedures. This failure can undermine efforts to secure a sustainable peace in a number of ways. Where there is impunity, the perpetrators of serious crimes are able to avoid punishment and keep the ill-gotten gains of their crimes. This can create the expectation of future impunity, both for victims and for perpetrators, perpetuating further cycles of violence and impunity.

Impunity also denies justice to victims, leaving them disappointed and disillusioned with the official mechanisms of justice and institutions of state. If they do not believe the state can be trusted to address their grievances, this can encourage private (and destabilising) acts of revenge and retaliation. This is particularly serious in societies where there are large numbers of weapons in the hands of the civilian population, as is the case in Syria.

A related concern is the effect impunity has on efforts to rebuild public trust and confidence in new state institutions. Public confidence in these institutions is typically very low following a period of corruption and political oppression. Rebuilding confidence and trust in these institutions is a crucial part of securing a stable society. If the public loses confidence in the institutions of justice, their lack of trust will eventually spread to the other institutions of state and undermine their legitimacy at the very time they are in the most need of public trust.

Countless historical examples testify to the destabilising effects of impunity, including Syria's own history. Some examples are well known, such as Iraq and Afghanistan, both caught in a cycle of violence and revenge. There are, however, examples of countries where impunity has prevailed that seem not to be suffering the same effects, such as Spain or Portugal, which did not pursue systematic accountability after their periods of authoritarian rule in the 20th century; Spain also experienced a devastating civil war. There are good reasons to assume that this will not work in the Syrian case: the experience of years of repression and unequal opportunities; the high level of violence currently

being experienced; and the level of devastation are all factors increasing the pressure for a transitional justice process in Syria.

Example: Failures of accountability in Lebanon

The war in Lebanon covered the period of 1975 to 1991 and engaged a number of domestic and international actors. An estimated 100,000 civilians were killed during the conflict whilst a further 17,000 disappeared. Hundreds of thousands were displaced by the war and estimates suggest tens of thousands remain so to this day. No serious efforts were made to secure accountability or justice for the crimes committed during this period of Lebanon's history. No one has ever been prosecuted for the crimes that were committed then, in large part due to a comprehensive amnesty law passed in 1991.

This amnesty law is now largely felt to have denied victims their right to justice, allowed many of those guilty of serious crimes to rise to positions of power in Lebanon and encouraged others to continue the pattern of crime and violations that were amnestied. As a consequence, Lebanon continued to suffer a great deal of instability and political upheaval in the years that followed its civil war and civilians continue to witness and suffer serious violations and human rights abuses.

When should it start and what should it cover?

Once the case for transitional justice has been made, one of the first questions to consider is that of timing. When should a transitional justice process start, what time period should it address and how long might it take?

Transitional justice does not address itself only to events during the period of transition. Rather, it is a process of justice designed to help a country through that period of transition. The objectives of a transitional justice process may therefore require it to look further back in history and seek accountability for crimes and abuses committed some time ago. Victims, and society as a whole, may still be experiencing the impact of crimes committed several decades ago. Addressing these injustices by identifying missing persons, prosecuting perpetrators, or returning property, for example, can all play an important role in securing a sustainable transition.

A transitional justice process does not have to wait until the end of hostilities. In a long conflict, like the one in Syria, there is much important work that can be done even while the violence is ongoing. The investigation and documentation of crimes and violations can start, even if their prosecution or inclusion in another process may have to wait. Similarly, the crucial work of outreach, education and consultation can begin long before a conflict has ended and can

go a long way towards preparing the ground for the success of a transitional justice process.

Transitional justice can take a long time and may consist of many phases. Different transitional societies have adopted radically different time frames, reflecting, in part, the different political climates and priorities of transitional societies, as well as the availability of resources and public expectations. Experiences from countries like Argentina show that even where initial accountability efforts fail, sustained public pressure, for example from victims' groups, can result in meaningful transitional justice initiatives at a later date.

Protests and civil society campaigns in Syria suggest that there is considerable public expectation for an accountability process that will start as soon as possible. Even then, it is important to make sure sufficient time is given to consultation and outreach, to designing a comprehensive and effective process that speaks to the expectations of all Syrians and to ensuring resources are available to guarantee that transitional processes are fair. While the costs of delays can be significant, the cost of making mistakes or failing to address certain important aspects of transitional justice can be equally damaging.

Example: Missed opportunities in Iraq

Saddam Hussein's Ba'ath party ruled Iraq for over 35 years. Torture, extrajudicial executions, arbitrary detentions and enforced disappearances were widespread, with an estimated 300,000 Iraqis still missing from this period. Several ethnic and religious groups were severely oppressed, including Shia Muslims in the south and Kurds in the north.

The trial of Saddam Hussein and senior figures in his regime could have provided an important opportunity for justice, and hopes were high for a special tribunal that was created in December 2003. However, the trials were widely criticised for appearing unfair, for falling short of the standards of due process and for failing to engage meaningfully with the victims of the crimes for which Saddam Hussein and others were tried. Many victims have complained that the trial did not address the crimes they had suffered. Furthermore, Saddam Hussein was executed before he could be tried for many of the other serious crimes his regime committed and many victims feel that the trial failed to provide them with the opportunity for justice and redress that they deserved.

Matching mechanisms to objectives

A number of different mechanisms are required to meet the variety of goals that characterise a transitional justice process. The question of what Syria's transitional justice process will look like is therefore one that can only be

answered by Syrians, based on a careful consideration of their goals and objectives.

It is important to note that independently of Syria's freedom to choose the most appropriate mechanisms for its goals, it is still bound by several international legal obligations. These obligations include:

- The obligation not to allow impunity
- The obligation to provide reparations to victims
- The prohibition against amnesties for war crimes, crimes against humanity and genocide.

Many successful transitional justice processes have shown a great deal of creativity and innovation in designing mechanisms suited to their own particular context and goals. Argentina's fact-finding commission spoke to a widely shared national concern for the fate of its 'disappeared'; South Africa's Truth and Reconciliation Commission provided a valuable forum in which victims could share their experiences and succeeded in engaging a number of low-level perpetrators in this conversation; and special ad hoc criminal tribunals in Sierra Leone and the Balkans succeeded in extending criminal accountability to many of those bearing the greatest responsibility for some of the most serious crimes committed during their conflicts.

Syria's policy makers and transitional justice activists will also have to think creatively, but it is useful to inform this process by outlining some of the mechanisms that can be considered. These might usefully be divided into those that are judicial and those that are non-judicial.

Judicial mechanisms

The principal judicial mechanisms focus on individual criminal liability and prosecutions. The criminal prosecution of those alleged to have committed serious crimes is typically one of the focal points of a transitional justice process.

Syria's own courts and penal code will provide an important starting point for criminal accountability. In many transitional societies, including Syria, securing comprehensive accountability through the domestic judicial system can however be extremely challenging. It is unclear whether there are sufficient

capacities and resources within the Syrian judicial system to accomplish this task at present or in the near future. At the domestic level the penal code may not criminalise those acts that may constitute crimes under international law (which are applicable in Syria whether they have been implemented domestically or not). Additional judicial resources may therefore be required, including those of international law. These might be utilised within Syria's existing judicial institutions, within new specially created domestic or "internationalised" courts or tribunals, or within an international court, such as the International Criminal Court (ICC), if jurisdiction is established.

Non-judicial mechanisms

A range of non-judicial mechanisms may be needed to complement and support the work of the judicial mechanisms as part of a transitional justice process. Criminal proceedings may not be able to address every reported crime, may not be able to involve every victim and may not be able to satisfy a desire for a broader overview or narrative of events, including investigations of institutional responsibility. There are many kinds of non-judicial mechanisms, each of which must be tailored to the circumstances of a transitional society such as Syria. Policy makers must think creatively in order to identify those mechanisms that serve their objectives most effectively.²

Investigative or fact-finding commissions

Fact-finding commissions have been established to investigate, document and report on periods of oppression and abuses. They are created either because the facts are not well known, have been hidden or distorted, or because they are contested. Fact-finding commissions can contribute to transitional justice by providing a complete picture of events during a period of abuses. This can help victims to better understand the context of their suffering and the crimes committed against them, as well as to help them understand what happened to their loved ones and make it clear to individuals and communities that there are others, perhaps on the "other side", who share their experiences and suffering.

² See *Closing the Gap, No Peace Without Justice*, for further discussion on the role of non-judicial mechanisms in closing the impunity gap, available from <http://www.npwj.org/node/1872> (accessed on 20 May 2013).

Commissions of this kind have proved helpful when there is a desire to understand the role that specific institutions played in a period of violations, perhaps as a basis for reform. Such institutions might include the army, the security services, government ministries or political parties. Investigating the role and responsibility of an entire institution is often beyond the scope of criminal trials that are focused on the role of specific individuals. Fact-finding commissions can therefore play a valuable role in bridging this gap by investigating entire institutions and the context in which they were allowed to operate.

Example: Fact-finding in Argentina

Argentina has a long history of military interference in democratic rule. On 24 March 1976, a military junta led by General Jorge Videla seized power and established the first in a series of military dictatorships. In an effort to protect its continued rule and claiming the justification of fighting left-wing terrorism, the military engaged in tactics that were to become known as the “Dirty War”. Enforced disappearances were endemic with the number of people seized estimated to be between 10,000 and 30,000. Those abducted suffered appalling violations ranging from extrajudicial killing to extended arbitrary detention, systematic torture and sexual abuse.

Despite a culture of impunity, one of President Alfonsín’s first acts upon coming to power in 1983 was to establish a National Commission on the Disappearance of Persons, known as CONADEP. The Commission was asked to: “clarify events relating to the disappearance of persons in Argentina and investigate their fate or whereabouts”³ and report its findings to the President. CONADEP was clear that it viewed its task as investigative, not judicial, although it was under an obligation to pass any information relevant to prosecution to the courts.

The Commission was tireless in its efforts to gather material during the nine months it had to complete its work. Commission representatives travelled to fifteen provinces and collected more than 1,400 depositions from witnesses inside and outside Argentina. The Commission conducted exhumations, inspected secret detention centres and, where feasible, checked prison and police records in order to build up as complete a picture as possible.

³ CONADEP’s report is titled “Nunca Mas” (“Never Again”). See: Part IV: *Creation and Organization of the National Commission on the Disappeared*.

The Commission compiled more than 50,000 pages of documentation and published a summary of its findings in 1984. These were later translated from Spanish into a number of other languages and were published in book form. The report sets out detailed findings on crimes committed under a number of subject headings, including: “Abduction”, “Torture”, “Secret Detention Centres” and “Extermination.” In a separate section, it presented an analysis of the victims who disappeared. It categorised them by age and sex, as well as by group, including children and pregnant women, adolescents, the sick and disabled, journalists, trade unionists and members of the clergy and religious orders. Further attention was devoted to “the family as a victim”. The report also addressed broader topics such as the coordination of repression in Latin America, the doctrine behind the repression and the attitudes of some members of the Church. It devoted an entire section to the role of the judiciary during the period of repression.

3 CONADEP’s report is titled “Nunca Mas” (“Never Again”). See: Part IV: *Creation and Organization of the National Commission on the Disappeared*.

Truth commissions

Similar to fact-finding commissions are truth commissions. The focus of a truth commission is to provide those affected by a conflict or period of oppression with an opportunity to share their experiences, articulate their concerns and communicate their needs and expectations. This typically focuses on the victims of conflict but may include an opportunity for perpetrators to share their experiences and tell their side of the story.

The testimony of victims and perpetrators can play an important role in documenting a period of violence and human rights abuses, but the benefit of truth commissions is often found in the value victims place on an opportunity to share their experiences and have a clear voice in the transitional justice process. Some may be given such an opportunity as witnesses in a criminal trial, but this will likely be limited to a small number of victims and may not afford them the latitude to share the full range of experiences they have suffered. Truth commissions can play a crucial role in preventing an impunity gap in situations where there are many more suspected of having committed crimes than the available judicial mechanisms can hope to prosecute.

Some transitional justice processes, notably those in South Africa, Sierra Leone and Timor Leste, have attempted to engage low-level perpetrators in the truth-telling process. This is often a difficult task - and even when low-level perpetrators have participated, the leaders and commanders usually do not - but where the right incentives are offered, it has helped with community reconciliation.

Compensation, reparation or restitution

In 2005, the UN General Assembly adopted the “UN Basic Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.”⁴ These guidelines outline the right that victims of serious abuses have to prompt, adequate and effective reparations. Recognising the importance of this right, the Rome Statute of the International Criminal Court included the establishment of a “Victims Trust Fund”, which is designed to provide appropriate forms of reparations and support to victims of crimes committed within the jurisdiction of the ICC.

Reparations are not capable of providing full restitution. Nothing, for example, can compensate for the loss of a loved one. These international guidelines stress, however, that despite their limitations, meaningful reparations can play an important role in speaking to the dignity of victims and to help guard against continued vulnerability and victimisation. This is particularly true of marginalised communities.

Compensation can take many forms, ranging from financial for individual victims to forms of collective compensation for entire communities, as well as symbolic reparations. Compensation can be provided directly by the state, or by perpetrators through community work, for example.

Compensation is one of the most challenging aspects of transitional justice. The resources available are often extremely limited and the number of victims extremely large. There is a danger that victims, and the families of victims, may find certain forms of compensation offensive as they may be viewed as trivialising their loss. There is also a very real danger that resentment and a sense of injustice will develop if compensation is not awarded fairly and transparently. Forms of collective and symbolic compensation can be especially valuable in confronting these challenges.

Institutional reforms

Where specific institutions are responsible for abuses, or are responsible for a climate of impunity, efforts can be made to reform these institutions

⁴ Adopted and proclaimed by General Assembly Resolution 60/147, 16 December 2005. Available at: <http://www2.ohchr.org/english/issues/remedy/principles.htm> (accessed 20 May 2013).

in order to prevent future abuses. This may be done by making their work more transparent, or by putting in place firmer accountability structures and procedures. Institutional reform might also consider the existing penal code. While it cannot be altered to facilitate the prosecution of crimes that have already been committed, its past role in facilitating a culture of impunity may suggest it requires amendment in order to serve as a more effective accountability tool in the future.

Vetting and lustration

Following a period of authoritarian rule, a large number of individuals may be complicit in corruption, criminal activity and abuses. Many will face criminal prosecution, but there may also be a desire to ensure that some of those who are not prosecuted are at least excluded from holding public office or positions in the government as new institutions are built. Vetting of candidates for public office and the lustration of existing government institutions is therefore often a central feature of transitional justice.

This process can be challenging and disruptive. The importance of excluding those guilty of abusing their power must be balanced against the importance of securing stability and continuity, including ensuring valuable capacity is not lost unnecessarily at a time when it is urgently needed. Efforts must be made to ensure that there are clear and transparent criteria that are focused on individual conduct, rather than on mere affiliation. The process should also guarantee due process rights, including clear procedures for appeals and a fair process.

Example: De-Ba'athification in Iraq

Following the fall of Saddam Hussein and his Ba'ath Party's 35-year regime, there was strong public desire to ensure that those guilty of complicity in the regime's oppression were not permitted to continue serving in the government or in the institutions of state. The resulting de-Ba'athification law is, however, now widely regarded as an early and costly mistake.

Sweeping legislation removed large numbers of officials from government institutions, the military and the security services. Criteria lacking in clarity and precision focused on affiliation with the Ba'ath Party rather than on conduct while in office, with the consequence that many thousands of officials who had not been accused of any serious wrongdoing were removed from service and barred from all future public sector employment, without clear appeal processes or guarantees of due process. This deprived many government institutions of valuable resources and, most importantly, severely undermined the capacity of the army and security services at a time when this capacity was much needed.

Memorialisation

Victims, and societies as a whole, often value acknowledgement of their loss and suffering and some form of public remembrance of those they have lost. Official initiatives to commemorate victims can therefore be of tremendous value to victims. Museums, statues, renaming streets or squares, acts of remembrance and official acknowledgements can play an important role in providing victims with the sense of closure they may need to rebuild their lives.

Coordination

Some transitional justice mechanisms are appropriate for identifying individual guilt and responsibility, whereas others are better suited to investigating broader institutional roles or restoring the dignity of victims. Criminal accountability, for example, requires judicial mechanisms, whereas vetting and lustration require procedures for identifying individuals who are guilty of abusing their power. Non-judicial mechanisms may be needed to provide accountability where criminal courts cannot be expected to do so. A fact-finding or truth commission may be appropriate for understanding the role of specific institutions, such as the security forces, and may provide a basis for reform. A truth commission may be useful to address the grief of those who want to know about the fate of the disappeared or deceased. The specific mechanisms can therefore only be identified once a clear picture of Syria's transitional justice objectives has emerged from inclusive public discussions and consultations.

Once the objectives of transitional justice have been identified, and once mechanisms have been identified to meet these objectives, thought must be given to how their work is to be coordinated. This is crucial to avoid inefficient

duplication and unnecessary strain and trauma on victims; it is critical to ensure that confusion or uncertainty does not limit the willingness of victims and perpetrators to participate. This is particularly relevant in the context of a complex conflict like Syria's, where many people are perpetrators and victims at the same time. Those guilty only of very minor crimes, for example, may have information of value to courts or fact-finding commissions, but may be reluctant to share this information for fear of their own prosecution. Those designing and implementing the process should ensure that each mechanism has a clearly defined mandate and that both their independence and collaboration are clear and transparent.

International law

The provisions and requirements of international law are increasingly important features of judicial accountability mechanisms, particularly concerning crimes under international law and due process rights. There are two main sources of international law, firstly treaties, i.e. written agreements between two or more states; and secondly customary international law, i.e. the conduct of states together with their belief that such conduct is legally required.

The main treaty sources for crimes under international law are the Geneva Conventions of 1949 and their Additional Protocols of 1977, the Genocide Convention of 1948, the Rome Statute for the International Criminal Court of 1998 and other specialised treaties focusing on specific issues, such as the Second Optional Protocol to the Convention on the Rights of the Child. Due process rights are found in the International Covenant on Civil and Political Rights and in other treaties and declarations. Except where the treaty provisions can be said to represent customary international law, which is the case for many of the treaties just mentioned, treaty-based obligations are binding only on the parties to that treaty.

The Rome Statute for the International Criminal Court is widely considered to represent customary international law with respect to the crimes enumerated in its statute. As such, the crimes within the jurisdiction of the ICC, found in articles 6 to 8, are the best possible indication of customary international

law at the time of the adoption of the Rome Statute in 1998.⁵ These include: genocide (article 6), crimes against humanity (article 7) and war crimes (article 8).⁶ As will be discussed in more detail below, each of these complex crimes consists of multiple elements, often referred to as the “Elements of Crimes”, which are elaborated in a separate document adopted by the ICC Assembly of States Parties in 2002.⁷

It is important to note the distinction between the crimes contained in the Rome ICC Statute and the other Rome ICC Statute provisions, particularly those related to the jurisdiction of the ICC and cooperation with the ICC by its States Parties. Since the Rome ICC Statute is considered to represent customary international law at least as of 1998, if not earlier, the text of articles 6 to 8 on war crimes, crimes against humanity and genocide can be considered to contain the content of customary international law on those crimes. As such, the Rome ICC Statute can be considered as a source of the international law that is applicable to all states as well as non-state actors participating in an armed conflict and, for crimes against humanity and genocide, also during times of peace.

This does not however mean that the ICC itself will have jurisdiction over all states and non-state actors. The ICC will have jurisdiction and be able to investigate and prosecute individuals in three circumstances:

- Where the conduct takes place on the territory of a state that is a member of the ICC, or where the individual committing the conduct is a national of a state that is a member of the ICC;
- Where a state that is not a member of the ICC has voluntarily given the ICC jurisdiction (i.e. referred the situation to the ICC); or
- Where the United Nations Security Council has referred a situation to the ICC.

Since Syria is not a state party to the ICC, the ICC does not automatically have jurisdiction over crimes committed in Syria or by Syrian nationals. For

5 See Politi, M. and Nesi, G. (eds.), *The Rome Statute of the International Criminal Court: A Challenge to Impunity*, Dartmouth Publishing Co., 2001, p. 25 and Lee, RS (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, 2001, pp. 5, 8 and, generally, Chapter 6, “Reflections on the Elements of Crimes”.

6 A/CONF.183/9, available from http://icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Pages/rome%20statute.aspx (accessed on 20 May 2013).

7 ICC-ASP/1/3(part II-B), available from http://icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Pages/elements%20of%20crimes.aspx (accessed on 20 May 2013).

that to occur, either Syria or the UN Security Council would have to refer the situation in Syria to the ICC. Nonetheless, insofar as articles 6 to 8 on crimes under international law can be considered to represent customary international law, the content of articles 6 to 8 represents the law that is applicable to all actors involved in the conflict in Syria.

The categories of crime under international law

There are three main categories of crimes under international law: war crimes, crimes against humanity and genocide.

War Crimes

War crimes are those violations of international humanitarian law committed during an armed conflict that attract individual criminal responsibility. To constitute a war crime, there are two sets of elements that need to be proved. Firstly, there is a need to show the existence of an armed conflict, whether international or non-international in nature. Secondly, the act must be one of the prohibited acts, such as intentionally targeting civilians or civilian objects; the use of certain prohibited weapons; the conscription, enlistment or use of children to participate actively in hostilities and so on.

Once those two elements are established, in order to prove individual criminal responsibility there is then a need to show the individual concerned was aware of the facts constituting the armed conflict and that the act took place in the context of that armed conflict. The provisions relating to war crimes in international and non-international armed conflicts are found in article 8 of the Rome ICC Statute.

In considering whether war crimes have been committed in Syria, and in documenting events that may constitute war crimes, it is therefore important to bear all these elements in mind. As the following case study makes clear, it will be particularly important to determine at what point events demonstrate the existence of an armed conflict and what kind of armed conflict it is.

Example: The International Criminal Tribunal for the Former Yugoslavia's (ICTY) definition of an armed conflict

The ICTY considered the definition of an armed conflict early in its history and stated the following: “[A]n armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring states or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.”⁸

International humanitarian law draws a distinction between international armed conflicts and non-international armed conflicts. The majority of provisions in the Geneva Conventions and Additional Protocol I apply only to international armed conflicts. Nonetheless, article 3 common to the Geneva Conventions and Additional Protocol II lay down a set of basic minimum rules and basic protections applicable in any armed conflict.⁹ The conflict in Syria can be characterised at different points in time and these basic minimum rules and protections would therefore apply in Syria from the moment at which an armed conflict began.

Crimes against humanity

The Elements of Crimes of the International Criminal Court is the most definitive document defining crimes against humanity and their legal elements. The crimes were first defined in article 6(c) of the Nuremberg Charter following the end of World War II. The category of crimes against humanity has been included in the Statutes of the ICTY and ICTR, the Rome ICC Statute and the Statute of the Special Court for Sierra Leone, among others. The provisions relating to crimes against humanity are found in article 7 of the Rome ICC Statute.

⁸ *Prosecutor v Tadic*, Case No. IT-94-I, Appeals Chamber, Jurisdiction Decision, 2 October 1995 (Tadic Jurisdiction Decision), para.70.

⁹ *Prosecutor v Naletilic and Martinovic*, Case No. IT-98-34, ICTY Trial Chamber, Judgment, 31 March 2003, para. 228.

There are two sets of elements for crimes against humanity, one of which may be described as the “contextual” elements. These must be met in all cases for an act to constitute a crime against humanity. These elements are:

- (1) There is an attack against a civilian population;
- (2) The attack is widespread or systematic;
- (3) The act in question was committed as part of that attack; and
- (4) The accused knew of the broader context in which his or her act is committed.

If the contextual elements are met, the act must also constitute one of the prohibited acts that make up a crime against humanity, including murder, extermination, torture, deportation, imprisonment, rape and other forms of sexual violence, persecution and other inhumane acts. There is no requirement for the existence of an armed conflict: the law prohibiting crimes against humanity is applicable during times of peace as well as times of war.

Genocide

The elements of the crime of genocide were first elaborated in 1948 in the Genocide Convention. That convention is now considered not only to represent customary international law, but also to be a norm of international law from which no derogation is permissible. As such, the law setting out the crime of genocide is binding on all states everywhere at all times.

The essence of the crime of genocide is the special intent associated with the crime, namely certain acts committed “with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”. In the crime of genocide, “The group itself is the ultimate target or intended victim of this type of massive criminal conduct. The action taken against the individual members of the group is the means used to achieve the ultimate criminal objective with respect to the group.”¹⁰ While this mental element of the crime is therefore crucial in proving the crime as a whole, it is also often the most difficult element to prove.

¹⁰ International Law Commission Draft Code of Crimes Against the Peace and Security of Mankind, Commentary to Article 17. *Report of the International Law Commission on the work of its Forty-Eighth session*, 6 May-26 July 1996, General Assembly Official Records - Fifty-first session, Supplement No.10 (A/51/10).

As with the other crimes, once this specific intent element is established, there is also a need to prove the occurrence of certain prohibited acts, namely: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; and forcibly transferring children of the group to another group.

Kinds of individual criminal responsibility under international law

Direct responsibility

According to well-established principles of customary international law, any person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime under international law, i.e. war crimes, crimes against humanity and genocide, may be held individually responsible for the crime. The accused does not have to be a member of the armed forces to attract liability; civilians can also be held criminally responsible for violations of international criminal law.

The fact that the accused was acting under the orders of a government or superior does not relieve the individual of his or her criminal responsibility, although - according to general principles of law - it may be taken into account in mitigation of sentence. According to these principles of liability, if a commander orders that certain acts be committed, he or she would bear direct responsibility for those acts.

Command responsibility

International criminal law imposes what is known as “command responsibility”, referring to the principle by which a superior will be responsible for the acts of subordinates under his or her control.¹¹

Command responsibility is concerned with being in a position of command, namely that the commander is in a certain relationship towards his or her subordinates, rather than actually giving commands. Thus the commander

¹¹ See, in general, Bantekas, I., *The Contemporary Law of Superior Responsibility* (1999) 93(3) *American Journal of International Law* 573.

will be responsible for any such acts of his or her subordinate, irrespective of whether the commander actually issued an order to commit such acts. If a command or order is given, as noted, the commander will bear direct responsibility for acts carried out pursuant to that command.

The theory of command responsibility has been described by the ICTY as follows: “The distinct legal character of the two types of superior responsibility must be noted. While the criminal liability of a superior for positive acts follows from general principles of accomplice liability ... the criminal responsibility of superiors for failing to take measures to prevent or repress the unlawful conduct of their subordinates is best understood when seen against the principle that criminal responsibility for omissions is incurred only where there exists a legal obligation to act. As is most clearly evidenced in the case of military commanders ... international law imposes an affirmative duty on superiors to prevent persons under their control from committing violations of international humanitarian law, and it is ultimately this duty that provides the basis for, and defines the contours of, the imputed criminal responsibility”.¹²

This type of responsibility is applicable in two situations. Firstly, where the superior knew or ought to have known the acts were about to be committed or were being committed and did nothing to stop their commission; secondly, where the superior knew that such acts had been committed and failed to punish those responsible for them. As with direct responsibility, command responsibility is not limited to military personnel but extends to civilian commanders. It is worth emphasising that the principle of command responsibility does not limit or extinguish the individual criminal responsibility of the subordinates for the acts they have committed; both can be liable for the crimes at the same time.

Joint criminal enterprise

There is a third way of establishing individual criminal responsibility, namely the theory of “joint criminal enterprise”, also known as “JCE”. JCE refers to the participation of an individual in an “understanding or arrangement amounting to an agreement between two or more persons that they will commit a crime. The understanding or arrangement need not be express, and its existence may be inferred from all the circumstances ... The circumstances

¹² *Prosecutor v Delalic et al*, Case No. IT-96-21-T, ICTY Appeals Chamber, Judgement, 16 November 1998, para. 334.

in which two or more persons are participating together in the commission of a particular crime may themselves establish an unspoken understanding or arrangement amounting to an agreement formed between them then and there to commit that crime.”¹³

There are three forms of JCE. JCE 1 requires the participation of an individual in a common plan with the intent to commit a crime and that the crime actually takes place. JCE 2 requires that there be a system of ill-treatment (such as might be found in a detention facility), that the individual participates in that system with the intent to commit a crime and that the crime actually takes place. JCE 3 is similar to JCE 1 except that it does not require the commission of the actual crime, provided what takes place is another crime that is reasonably foreseeable as a result of the acts taken to commit the crime that had been intended. For example, someone may participate in a plan to bomb a village with the intent to terrorise the population but without intending the destruction of a mosque. Since it is reasonably foreseeable that the mosque would be destroyed, the person can also be held responsible for that crime, pursuant to JCE3.

Investigations and documentation

Many transitional justice mechanisms rely on the investigation and documentation of serious crimes and abuses. This is true of both judicial mechanisms and non-judicial mechanisms such as fact-finding, truthseeking, compensation and vetting. Syrian activists, journalists, civil society organisations and policy makers are currently undertaking a range of important documentation and investigation work. As the above discussion makes clear, however, the nature of many transitional justice mechanisms places important requirements on the way in which this work must be done in order for it to meet its full potential. It is therefore important to ensure that ongoing documentation work is done with a view to meeting these requirements, alongside any other objectives for the work.

¹³ *Krnjelac*, Case No: IT-97-25-T, Trial Chamber Judgment, para 80.

Investigating crimes under international law¹⁴

The categories of crimes under international law and the elements required to prove them demonstrates the importance of documenting events with a clear understanding of their eventual role in a potential criminal investigation. As noted, the documentation process is important for non-judicial accountability mechanisms to ensure the integrity of the process and its outcomes. This section focuses on criminal investigations, but many of the same principles and approaches also apply to non-judicial mechanisms.

As with domestic criminal law, there is a need to investigate crimes under international law before they can be prosecuted in a court of law. The processes of international criminal investigations are in many ways very similar to processes of national criminal investigations: there is a suspicion that a crime has been committed, investigators then carry out their investigations through speaking with witnesses, reviewing documentary evidence and by collecting various types of physical evidence. The results of these investigations are analysed according to the applicable law, specific crimes are linked with specific individuals and prosecutors bring evidence before a court with jurisdiction over that particular situation, if one has been established.

The main difference between national and international criminal investigations and prosecutions is the sheer amount of information available regarding the commission of particular crimes, especially when those crimes have been either widespread or systematic in nature. In international law, there can be thousands of witnesses who can provide a lot of information about crimes that were committed, including identifying specific individuals who carried out those individual crimes. However, there is less information available to link the person(s) with ultimate responsibility, often referred to as “those who bear the greatest responsibility”, to the individual acts that took place on the ground.

As such, there is a need for international criminal institutions to obtain an overall picture of what happened, to determine which individuals may be responsible for clusters of acts constituting crimes, or for plans or policies that included or resulted in the widespread or systematic commission of crimes. Frequently, the witnesses who will provide information on the “crime base”,

¹⁴ This advice is based on Glyn Morgan's paper titled “*Documentation: Filling the gap between events and victims.*” Glyn Morgan is an expert investigator with extensive experience of investigating crimes under international law in a number of transitional societies.

i.e. the multiplicity of crimes committed on the ground, will be different from those who can provide “linkage information”, i.e. information that ties those who bear the greatest responsibility to the crime base. It is important, however, not to miss opportunities for valuable intelligence by presuming that a certain witness will not be in a position to provide linkage evidence.

This process may be represented broadly in the following way:

- Investigation phase: collect information to piece together the picture of what actually happened.
- Identify which crimes under international law may have been committed.
- Link the crime to a particular person suspected of being responsible for the crime through the various modes of liability.

There is clear evidence that serious violations of international law have taken place in Syria. As the process described above makes clear, however, the process of prosecuting those responsible for these crimes is complex. Ongoing efforts to document serious crimes under international law in Syria must therefore consider all the requirements of prosecuting such crimes, including linkage elements and evidence linking those who bear the greatest responsibility for the crimes to the events on the ground. It is important to incorporate these requirements into ongoing documentation work. There are a number of relatively simple ways in which this can be done.

Documenting the crime scene: practical considerations¹⁵

A great number of violent events continue to take place in Syria, including explosions and attacks from the air and attacks with heavy weapons. While it is important to document all casualties, the casualty list in itself does not hold an absolute legal value in terms of the prosecution of crimes under international law. It is an unfortunate fact that wars produce many civilian casualties, by no means all of whom are the victims of war crimes, crimes against humanity or genocide. Many lawful military operations nonetheless cause civilian deaths and injuries, which are not necessarily criminal acts in and of themselves.

¹⁵ This section is based on Glyn Morgan’s paper titled “*Documentation: Filling the gap between events and victims.*” Glyn Morgan is an expert investigator with extensive experience of investigating crimes under international law in a number of transitional societies.

This is particularly the case with indirect fire incidents (artillery, mortar and sometimes tank fire), which tend to be widespread, but also problematic and for this reason they also make a useful illustrative example.

At first glance an artillery shell exploding in a bustling civilian area in a Syrian city, causing multiple deaths and injuries and extensive damage, might seem like an obvious criminal act. The above description of crimes under international law makes it clear, however, that a number of criteria must be satisfied in order for this to be the case. It is therefore important that documentation efforts focus on documenting the presence of these additional criteria as well as to the underlying acts.

Documenting the crime scene helps to do this and like the other documentation efforts that are currently ongoing in Syria, this is an undertaking that certainly lies within the capacity of Syrian activists. There is, however, one important issue to remember: it is imperative that every effort is taken to ensure that these steps can be done safely and that they are not undertaken where safety cannot be guaranteed. Sites where explosives, including shells and mortars, have been used may contain unexploded ordnance, which can still be active and can injure or kill people who are later documenting a scene.

With that important caveat in mind, there are several steps that can be followed to document a crime scene so that it could be useful for later accountability processes. Firstly, documenting the wider physical context of the event: within a few hundred meters¹⁶ of the impact point are there any legitimate military targets of a static nature (either operational targets, e.g. military installations or strategic ones, e.g. critical infrastructure)? At the time of impact, were there any mobile targets passing through the area (so-called operational ‘opportunity’ targets)? These could have been what the shell was inaccurately aimed at. The proximity of any such targets could undermine claims that civilians were being deliberately or negligently targeted.

Secondly, documenting the impact site: is it possible to make a sketch of the immediate area around the impact point showing damage, shrapnel marks and where people were hit? Is it possible to include photographs or video in the documentation, taking care to ‘reference’ these by including in them clear

16 The reasoning of the ICTY Appeals Chamber judgement which acquitted the Croat Army General Gotovina for unlawfully targeting civilians during Operation Storm in the summer of 1995 shows that it is difficult to put a precise figure on how many metres this radius should be.

sight of street names, local landmarks, etc. If possible, document whether the shell was a 'single shot' or part of a broader salvo (of multiple shots); if the latter, map each of the other impact sites and apply the same documentation approach to each of them individually.

Thirdly, documenting the ammunition used by retrieving shell parts from the crater (i.e. the fuse-cone, tail fins and rotating band) and collecting shrapnel from the surrounding area which could later help experts to identify the ammunition type, which in turn can indicate the weapon that fired it. This can be useful in identifying whether injuries are consistent with the ballistic characteristics of the ammunition, remembering that corresponding shrapnel fragments may have been surgically removed from the victims. This cross-referencing clearly links the victims with the event. This step, together with the fourth step, requires particular attention: if unsure about whether ammunition is live or not, the best approach is to photograph the area from a safe distance and leave collection for someone specifically trained to do so safely.

Finally, documenting the shell crater¹⁷ itself, again taking care not to become a further casualty from any unexploded munitions, by documenting the position, size and shape of the impact crater. This will help determine the ammunition or weapon type, and more importantly it will indicate the direction from which the shell was fired and the angle at which it made impact. This can provide valuable information about the location from where it was fired, which can, in turn, help determine which unit and commander was responsible.

Several reports have suggested that chemical weapons may have been used in Syria. It is important to bear in mind that artillery shells are one means of delivering a chemical weapon, not least because residual contamination may still present a health hazard to anyone visiting the scene. In these instances, the physical damage around the point of impact will likely be much less because the shell is packed with the chemical agent rather than high explosive. The key 'evidence' in these situations is recording the physical effects experienced or suffered by persons in the immediate vicinity. How would they describe the smoke/mist they saw around the impact point? What smell and taste did it have? What physical sensations did they experience, such as runny eyes, burning throat, dizziness, skin blisters or burns and subsequent headaches or

17 Full and legal crater analysis is a professionally trained skill in the military, usually for artillerymen, but non-gunners do use a rudimentary form for tactical purposes. Useful guidance can be found at http://www.globalsecurity.org/military/library/policy/army/fm/6-121/fm612_9.htm (accessed on 20 May 2013).

vomiting? Soil samples, if subjected to proper laboratory analysis, can provide hard evidence of the use of chemical weapons. Again, care must be taken to avoid personal contamination as a matter of priority in such situations.

These documentation efforts can greatly facilitate the investigation, and eventual prosecution, of crimes under international law and assist nonjudicial mechanisms such as fact-finding or truth commissions.

Another important contribution to investigating and documenting crimes under international law comes from captured documents. These can be particularly important in proving the linkage elements that can establish direct or command responsibility for the crimes. The value of captured documents is, however, not always appreciated by documentation activists or those engaged in fighting. There are anecdotal stories of ‘under-cover’ regime officials in Egypt and elsewhere joining the mob and burning document collections as a means of covering their own tracks.

What is needed is a more deliberate approach to capturing, or securing, documents, with ‘the capture’ itself also being documented. This initially relies on raising awareness of the value of documents so that revolutionaries do not deliberately destroy them, but make efforts to safeguard them.

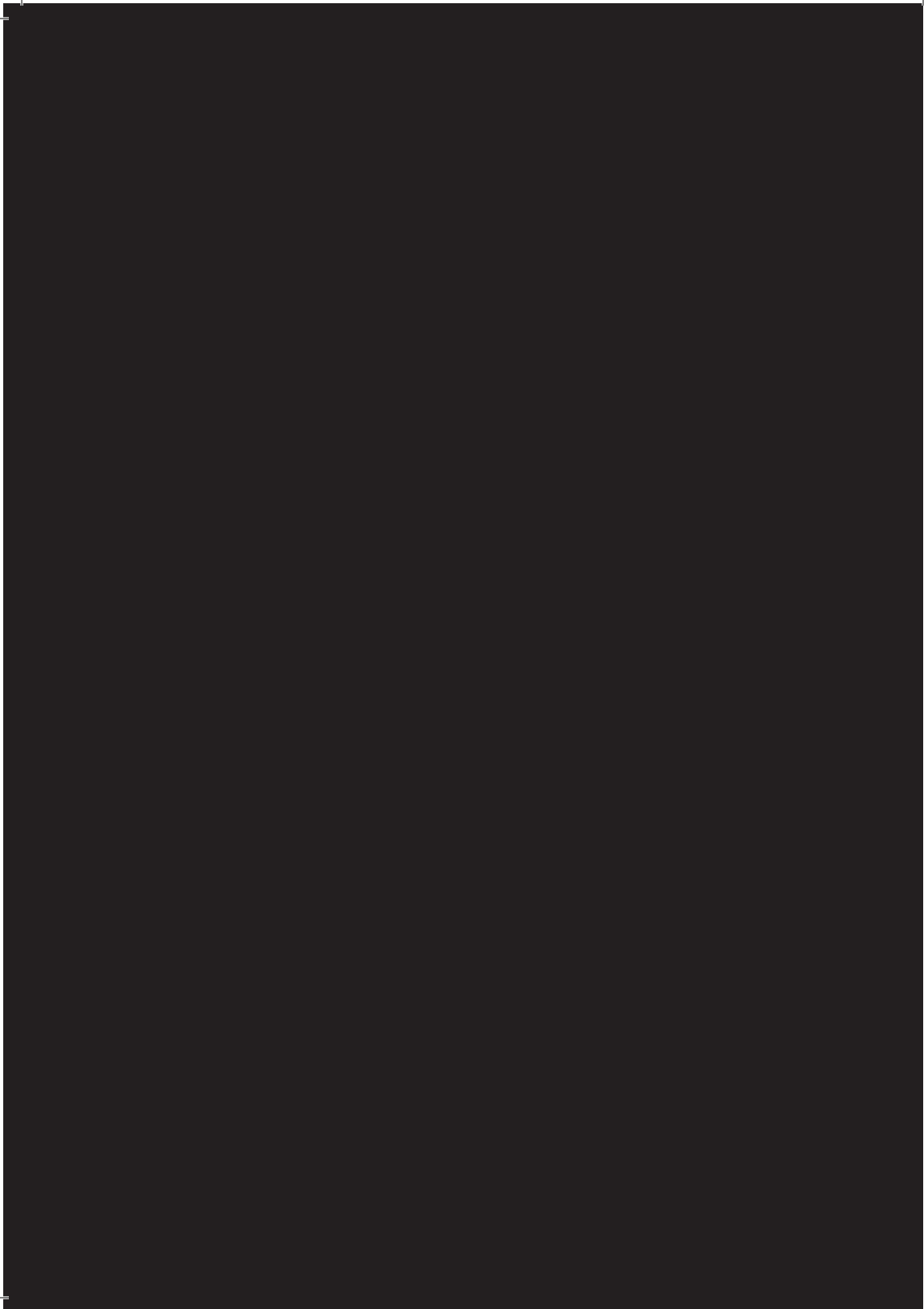
Knowing precisely where a document came from and keeping related documents together creates a synergy that tends to increase their collective value and strengthens the inferences that can be drawn during analysis. Consequently, the documentation should record not only which building documents came from, but which office, which cabinet and even which shelf. Annotated photographs or video taken during the capture action are a quick and simple way to do this.

Paper documents are very perishable, particularly if they are damp, so care should be taken to store them in dry, aired conditions free from mould, vermin, insects etc. There are certainly practical difficulties in processing large volumes of captured documents, but their potential value makes it worth the effort. It is unlikely that you will find a ‘smoking gun’ document, clearly identifying the commander and his murderous intent, but a careful review will reveal a myriad of details that can be re-assembled into an inferred, or even explicitly proven, whole.

One important obstacle to documentation efforts of this kind comes from the manipulation of crime scenes, documents, or testimony, whether intentional or not. Evidence and documents can be fabricated or inaccurately recorded, numbers can be inflated or diminished and witnesses may be tempted to fill in gaps in an effort to be helpful to investigators. Accuracy is the key to successful investigations and it is therefore crucial to ensure documentation work is done in accordance with these strict standards and that efforts are made to corroborate facts and build a detailed picture of events on the basis of a multitude of sources and evidence.

Part 2

Transitional Justice in Syria



The Syrian Context

The context in which a transitional justice process unfolds both determines the starting point for the process and influences expectations of where it should lead. Contexts also affect how mechanisms and institutions work and are perceived and how they interact with other aspects of a society. To deliver to all Syrians a justice they want and recognise as their own, as opposed to the justice envisioned by a different cultural and political context, it is important to consider how Syria's history, culture, religions and politics have influenced the nature of the ongoing conflict and how these factors might influence the process of transitional justice. Based on that, a process for the unique Syrian case can be designed. Both the length and intensity of fighting in Syria has set it apart from most other countries of the Arab Spring. This will have a profound impact on transitional justice.

Priorities for Syria

Syria's revolution is, at least in part, a consequence of demands for a more transparent and accountable society governed by the rule of law. Syria now finds itself in the middle of violent conflict characterised by a multitude of crimes and serious human rights violations that demand accountability and justice. There is therefore a clear need for a transitional justice process in Syria. Syria's transitional justice needs are, however, many and diverse. It is important to ensure that a process is designed to deliver the justice Syrians want in a way that is mindful of, and appropriate to, Syria's context.

A full picture of Syria's transitional justice priorities can only emerge from a comprehensive process of consultation and outreach that includes all of Syria's diverse communities on both sides of the conflict. Transitional justice is not a "victors' justice". This outreach has already started and is complimented by ongoing investigations and documentation efforts. The picture that is emerging identifies a number of distinct issues likely to play a central role in Syria's transitional justice process.

Mechanisms of authoritarianism

Syrian history of the past four decades has been characterised by a culture of impunity. Important elements of this had already come into being before Hafez al-Assad assumed power: in 1963, the state of emergency was declared and never lifted. Ever since, Syria has been governed under martial law which has sanctioned and protected abuses. It has allowed Syria's army and security forces to work outside the parameters of civil law. If at all, they have been held accountable only to their (secret) military tribunals.¹⁸ In addition, 1969 Legislative Decree 549 provided extensive immunities to employees of the state.

Following a period of instability, Hafez al-Assad seized power in Syria in 1970 through a series of military coups. The climate of military and political instability in which he had ascended to power focused his attention firmly on security. Hafez al-Assad immediately started the process of centralising power and reforming government institutions to secure his position. Foremost among these reforms was the creation of a vast security apparatus capable of operating independently of the national army and police, drawing on the intelligence of a vast network of informers.

Despite considerable efforts to secure his position of power, popular dissent towards increasing authoritarianism mounted in the late 1970s and early 1980s. Hafez al-Assad resolved to meet this dissent with violence by drawing on his extensive security apparatus. Operating under martial law that had been in place since the emergency decree of 1963, security forces were able to operate with effective immunity. Armed confrontations with the regime's main political opponents, particularly the Muslim Brotherhood, left thousands dead whilst thousands more disappeared into secret government detention centres. Political opponents from the left, including the Communist Party, were also targeted. Arbitrary arrest and detention, mistreatment and torture were all commonplace; thousands of the disappeared remain unaccounted for today. Perhaps most notable are the massacres that killed thousands of civilians in Hama in February 1982 and the hundreds of prisoners executed at Palmyra on 27 June 1980.

The reputation of the Assad Government's judicial, intelligence and security institutions has been tarnished by the impunity with which they have been

¹⁸ Dr Radwan Ziadeh, *"How to Build a Democratic Syria"*.

able to commit crimes, both before and during the ongoing conflict in Syria. This is particularly true of the four main intelligence branches, the army, the Ministries of Interior and Defence and, to some extent, the judiciary. These institutions have either actively committed, or encouraged and facilitated, serious crimes and human rights abuses and have failed entirely to hold perpetrators accountable. This has eroded public trust and the role these institutions have played in promoting a culture of impunity (and in themselves committing violations throughout the Assad regimes and the ongoing conflict) mean they will be an important focus for transitional justice. While there is undoubtedly valuable capacity within these institutions that must be identified and utilised, their complicity in serious crimes and limited legitimacy in the eyes of Syrians suggests an urgent need to reform both these institutions and the legal environment in which they were able to operate. In 2008, Legislative Decree 69 further limited the prosecution of members of the police, security services and customs officials.

In June 2000, Bashar al-Assad inherited from his father a state in dire need of reform. After some early overtures during the so-called “Damascus Spring”, there was a heavy crackdown on political and civil society activism. Political reforms were stalled and the economic reforms enacted were largely superficial and to the benefit of a small business elite able to enrich themselves in exchange for loyalty. It did not take long before corruption, rising poverty and a growing sense of economic injustice began to alienate large segments of the population.

Arbitrary detention, keeping prisoners at detention centres or in prison without trial or sentence and torture were intrinsic features of the Syrian regime under Hafez and Bashar al-Assad. Syrian Human Rights groups after 2000 established the number of political prisoners to be low in comparison with those in Jordan or Egypt, with between 500 and 1,000 prisoners of conscience. Blurred red lines, particularly in Syria’s form of “war against terrorism” depoliticised Syrian society.

Prior to the revolution, Syria’s economy suffered from low levels of growth and high levels of unemployment, particularly among the youth. These factors contributed to rising rates of poverty and crime in many Syrian communities. More damaging, however, was that political and economic inequalities were growing under the rule of Bashar al-Assad. While many Syrians grew poorer, increasingly visible elites were growing richer. The selective privatisation of

state resources was fuelling unemployment and enriching a select group of individuals perceived as being loyal to the regime. Transitional justice might include efforts to recover state assets and prosecute serious financial crimes. Syria's economic conditions place limitations on the resources available, which may even affect the possibilities of a transitional justice process.

Divisions and diversity

Syrian society is religiously, ethnically, culturally and politically diverse. Understanding this diversity is essential to understanding Syria's past and the dynamics of the current conflict. It is also imperative to understanding a number of the challenges to establishing a transitional justice process for Syria.

The majority of Syrians are Arab but Syria is also home to large communities of Kurds, Armenians, Assyrians, Circassians and Turkmen, as well as other communities, including Palestinians and Iraqis. Running across this cultural and ethnic diversity is a great deal of religious diversity. The majority of the population are Sunni Muslim, though there are also large Alawite, Druze, Ismaili and various Christian communities. This diversity is a consequence of numerous historical currents and of a society that has traditionally welcomed immigration and which has at times achieved the relatively harmonious integration of new communities.

A number of Syria's rulers have, however, attempted to manipulate this diversity to their advantage. Under the French Mandate, minorities were favoured in many respects, particularly within the country's military and political structures into which, for example, large numbers of Kurds were promoted. The Kurdish population was later largely removed from these positions of power and politically marginalised during the rule of Hafez al-Assad. Syria's Alawite community, by contrast, were previously marginalised, but has, at least in some cases, been privileged under successive Assad regimes. The mistrust and societal divisions that are the legacy of these policies provides essential context for understanding how different communities within Syria will perceive various transitional justice policies and priorities.

The diversity of Syria's population is also reflected in the diversity of groups currently engaged in fighting on both sides of the conflict. While the conflict can be divided into forces loyal to the regime of Bashar al-Assad and those

fighting to end his rule, this division hides a number of further subdivisions on both sides. Pro-Assad forces consist largely of surviving elements of Syria's army and security forces, as well as pro-Assad militia forces referred to collectively as the *Shabiha*. The opposition forces can be divided into those fighting as part of the Free Syrian Army, under the coordination of its Military Councils, and independent groups often fighting in their local communities (including Aleppo and Homs), such as the Al Farouk Brigade, Al Ansar Battalions and Jabhat Tahreer Suria. Others are more clearly driven by ideology, such as Jabhat al-Nusrah, as well as other Islamic, Salafi and Jihadi groups and networks.

While the Syrian opposition is growing increasingly organised, the diversity of groups fighting on the side of the revolution will have a significant impact on transitional justice in Syria. Perhaps most significant is the diversity of reasons for which the revolution is being fought, with some groups driven by Islamic or other political ideologies and others fighting mainly to protect their communities, with few ideological concerns. Increasingly, there are reports indicating that many combatants are fighting on behalf of groups based outside of Syria, including elsewhere in the Arab world.

While many of these diverse groups are fighting on the same side of the conflict, their motivations and vision for a post-conflict Syria differ dramatically. Although the common aim among the opposition of defeating pro-Assad forces is providing some grounds for cooperation, their competing ideologies and visions for Syria will inevitably create a difficult political context within which to shape and implement transitional justice in the long run.

Syria's history of ethnic and religious marginalisation and oppression is fuelling the current conflict in Syria and will also continue to influence events during the transitional period. Perhaps most notable is the perceived patronage that exists within Syria's army and security apparatus. Many Syrians view the security services, as well as the Ministry of Interior and the Ministry of Defence, as the clearest symbols of both the Assad regimes' oppressive past, considering them to be instruments created primarily to protect these regimes rather than Syria and its citizens. As a consequence, there is considerable public hostility towards these institutions and those they are perceived to have served. This context risks acts of revenge that target entire communities, regardless of the individual's actual role within these institutions. The same might be true, although perhaps to a lesser extent, of Syria's ruling Ba'ath Party, as

well as families that have come to embody decades of economic corruption. These include the Assad, Makhoul, Tlass, Khaddams and Akhras families, as well as members of the Sunna and Christian business communities, who are perceived to have acquired their wealth through patronage and loyalty to the Assad regime.

Syria's Kurdish population has suffered marginalisation since the era of popular Arab nationalism from the 1950s onwards. Their culture and language has been suppressed and their communities have been politically and economically marginalised. Their land has been confiscated and their culture and identity subjected to forced Arabisation. Their protests have been met with violence, for example the annual clashes when Kurds ask for their right to celebrate Kurdish New Year, Nawroz, or the al Qamishli riots of 2004, in which at least 30 people were killed following clashes between the police and Kurdish protestors. The Kurdish population's experiences of marginalisation and cultural oppression are likely to shape their vision of a post-conflict Syria.

Stages of the revolution

It is from this background that the Syrian revolution emerged. Understanding the context for transitional justice also requires an understanding of how the revolution itself started and evolved and an understanding of how it is viewed by different Syrian communities. There is no single narrative accepted by all, or even all those who are fighting on the side of the revolution. Understanding the significance with which some key events are viewed does, however, provide essential context. The conflict in Syria went through different stages. In the first phase, protests started and remained peaceful whilst being violently attacked by the Syrian regime (February 2011 – May 2011). In the second phase, between June and November 2011, the exclusive reliance of the government on military and security means led to the establishment of armed groups among the opposition who started to defend and protect the protests. After November 2011, the conflict reached a stage of significant militarisation.

Peaceful protests

On 18 February 2011, around one hundred Syrians gathered in downtown Damascus to protest against the assault of a young man who had been severely beaten by three policemen. Less than two weeks later, Syrian authorities arrested

dozens of teenagers in the southern city of Deraa for spray-painting several city walls. The Syrian uprising grew as protests mounted in Deraa and Damascus towards the middle of March 2011. The protests were triggered by the torture of several young students. On 25 March, mass protests spread nation-wide, as demonstrators emerged after Friday prayers. Syrian authorities responded by meeting peaceful demonstrations with violence, arresting and killing many civilians. As a consequence, demonstrators in Deraa turned from demanding reforms to calling for the fall of the regime. On 11 April 2011 Syrian security forces responded by attacking the city of Deraa, leaving hundreds dead or injured. The Syrian army and security forces used tanks and heavy weapons to attack other cities, such as Hama and Deir ez-Zor.

Defection and self-defence

As a result of the use of violence by Assad's regime against unarmed protesters, many soldiers and low ranking officers began to defect from the army. The first defections happened during the military operation in Deraa. Many soldiers who refused to open fire against peaceful protestors were immediately executed by the army. The number of defections increased during the following months as the level of violence used by the regime increased. As the uprising continued, opposition fighters became better equipped and senior military officers and government officials began to defect as well.

Protests continued as government forces expanded military operations, repeatedly firing at protesters, employing tanks against demonstrations and conducting arrests. Some besieged cities and towns were under critical conditions. On 29 July a group of defected officers announced the formation of the FSA. The main objective of the FSA was to protect civilians during demonstrations. The FSA is composed of a mixture of defected military personnel as well as civilian volunteers. This began a new era in the conflict with more armed resistance against the government's violent suppression. Since August 2011, Syrian forces systemically attacked different cities, towns and villages, and continued to use violence during protests. On 14 August the Syrian Navy became involved in military operations for the first time during the siege of Latakia.

Intensive armed conflict

After November 2011, armed oppositional groups did not limit their actions to defence but more often initiated offensives, for example on Syrian Army check points. Peaceful protests continued across the county, but they were often dispersed and disrupted by gunfire from security forces and pro-government militia. Clashes between the FSA and pro-Assad forces were taking place on a daily basis.

By early 2012 daily protests decreased in number and size due to the spread of armed conflict. This new phase of the revolution soon escalated into an intensive armed conflict, as the opposition grew more numerous, organised and well-armed. January 2012 saw intensified clashes, with the Syrian Army's use of tanks and artillery becoming common. In spring 2012, the first massacres committed by the Syrian military and regime's militias were reported. Most of them targeted Sunni inhabitants or villages in mixed areas, giving the conflict a sectarian note it had not had before.

A year after its formation, the FSA gained control of many towns close to the Turkish border. In July 2012, UN observers for the first time confirmed aerial attacks of Syrian cities by fighter jets, and by mid-July 2012, the International Committee of the Red Cross declared the existence of non-international conflict in Syria. During the second half of 2012, a significant and more rapid escalation of the conflict was detectable. In some aerial attacks, sea mines were dropped and in an increasing number of cases the use of improvised "barrel bombs" (dropping barrels filled with dynamite) was reported. In October and November 2012, Human Rights Watch released reports on the use of cluster bombs and incendiary weapons.

Through the regime's aerial attacks, the number of civil victims significantly increased, since most of the attacks were large scale operations killing indiscriminately. As reported by Human Rights Watch in August 2012, more and more of the attacks were however not only targeting citizens indiscriminately but deliberately, for example when people were queuing for bread in front of bakeries. Ever since December 2012, the regime has also used Scud ballistic missiles. Some clashes were reported between different groups within the rebel forces, as well as other clashes between Islamic groups and Kurdish groups. A military stalemate emerged, as both sides were able to hold territory

without being equipped to defeat the other decisively. A major problem for civilians is that no safe zones have been created. Even in areas over which the government has lost control on the ground, aerial bombardments have prevented a normalisation. Devastation of infrastructure, a lack of services and deliveries, power and fuel shortages among other issues make the re-organisation of daily life difficult.

Human rights violations during the conflict

First and foremost will be the judicial response required due to serious violations of Syrian and international law. This judicial response will require careful consideration of what crimes have been committed. The Syrian Penal Code provides a useful starting point for this evaluation. It will be important to consider, however, whether the code could provide a sufficient basis for comprehensive accountability in Syria. Could it, for example, provide adequate grounds for the prosecution of those not directly involved in the commission of a crime, but who nevertheless bear overall command responsibility? Have efforts to shield the security forces from prosecution under Syrian law been successful in the past and why? Are there sufficient resources within the Syrian judicial sector to investigate and prosecute serious and complex cases of this kind and can it operate with the impartiality required to consider allegations against persons on all sides of the conflict fairly?

The potential limitations of Syria's own penal code and Syria's international legal obligations will therefore require consideration of whether violations of international law have taken place in Syria. This in turn will require a further evaluation of the nature of events in Syria, since in order for a violation of international law to have occurred, a number of conditions must be satisfied.

Firstly, not all deaths will constitute a crime. It is a regrettable consequence of war that it can result in large numbers of fatalities, including both combatants and civilians. Civilian deaths must be distinguished from the deaths of combatants. The latter are often lawful but might constitute a crime under certain conditions, such as if they are being held prisoner. It is important to note that a combatant is not limited to someone wearing the uniform of the Syrian army. Those actively engaged in combat, on all sides, are regarded as combatants, including those fighting under the command of the FSA and as part of other independent brigades and militia.

It is also important to determine whether or not confirmed civilian victims were killed as an indirect consequence of a legitimate military operation. Crimes under international law will only have been committed where deaths are not the unintended consequence of a legitimate military operation, but are instead the result of intentional efforts to target the civilian population or insufficient efforts to protect them.

The prosecution of crimes under international law requires evidence of a number of additional elements, including evidence linking multiple individual crimes. In some cases, it will also be necessary to show that the crimes took place in the context of an armed conflict. Finally, evidence is required to identify those bearing both direct and command responsibility for crimes, as well as those who may be held responsible through the principles of joint criminal enterprise.

This raises a number of important questions about ongoing investigations and documentation work in Syria. Is there evidence that crimes under international law have been committed? Are ongoing documentation efforts sufficiently mindful of the requirements for the prosecution of such crimes? In particular, is sufficient attention being given to the importance of gathering information that establishes the context of the crime, that links it to other crimes and that provides the elements with which to build a case against those bearing the greatest responsibility higher up in the command chain?

Ongoing investigation and documentation efforts are making it clear that these conditions have been met in many cases. Not only have there been thousands of criminal acts perpetrated under Syrian law, but many of these acts also constitute serious breaches of international law. A number of Syrian rights-groups, activists and journalists have consistently drawn attention to these crimes and continue to document and publicise abuses.

There is also clear international agreement on the fact that crimes of the most serious kinds have been committed in Syria. United Nations UnderSecretary-General B. Lynn Pascoe has informed UN Security Council members that sources in Syria were “consistently reporting the use of artillery fire against unarmed civilians; door-to-door arrest campaigns; the shooting of medical personnel who attempt to aid the wounded; raids against hospitals, clinics

and mosques; and the purposeful destruction of medical supplies and arrest of medical personnel”.¹⁹

Interviews with defectors and seized documents make it clear that there is evidence of direct and command responsibility reaching to the very top of the Assad regime, including the Heads of Syria’s intelligence agencies and Bashar al-Assad himself. For example, Human Rights Watch has reported that since July 2012, the Syrian Government has systematically bombed cities, towns and villages in areas controlled by opposition forces from the air using helicopters and jets. They estimated that these attacks resulted in over 4,300 casualties and destroyed a great deal of private property and infrastructure.

Reports indicate that at least 59 attacks have either deliberately targeted the civilian population, or have been indiscriminate in the sense that they failed to distinguish civilians from enemy combatants. The case for these findings has been made by interviews with defectors, reference to the kinds of munitions used (including indiscriminate weapons such as cluster bombs), and the nature of the targets hit, most notably hospitals and bakeries with long queues and without legitimate military targets being close by.²⁰

Investigations are also increasingly suggesting that forms of ordnance, including cluster munitions and incendiary bombs, have been used in Syria in a way that may constitute a crime. Syria is not party to the Convention on Cluster Munitions, which banned the use of such munitions from 1 August 2010, or the 1980 Convention on Conventional Weapons, which includes a protocol on incendiary weapons. Nevertheless, such munitions may provide evidence for the case that an attack was indiscriminate or did not take sufficient measures to protect the civilian population.

Reports are also increasingly suggesting that chemical weapons may have been used in Syria in late 2012 or early 2013. Syria is not a party to the Chemical Weapons Convention, which outlawed the use of such weapons from 29 April 1997. However, a prohibition against the use of such weapons is in many cases thought to fall under customary international law, which is binding on Syria.

19 Briefing to the Security Council on the Situation in Syria, New York, 27 April 2011, UnderSecretary-General for Political Affairs, B. Lynn Pascoe. Available from <https://www.un.org/wcm/webdav/site/undpa/shared/undpa/pdf/USG%20Pascoe%20Syria%20Briefing%2027%20April%202011.pdf> (accessed 20 May 2013).

20 Human Rights Watch Report: *Death From the Skies*: <http://www.hrw.org/reports/2013/04/10/death-skies> (accessed on 20 May 2013).

Beyond the crimes certain deaths may represent, it is important to note that all killings - civilian and military - represent a loss to someone. The families of those killed illegally will undoubtedly demand that efforts are made to identify and hold accountable those guilty of these crimes, but the families of those killed in other ways will also expect a transitional justice process to acknowledge their loss. The sacrifices of those who died as combatants defending their communities must be remembered and there may be an expectation that these sacrifices will also be rewarded. This might take the form of monetary compensation, or perhaps more importantly through memorialisation and official acknowledgement.

It is important to note that while the killing of a civilian may be a crime in itself, it will also have a potentially serious impact on the lives of their families and loved ones. The emotional trauma exacted by this loss may require attention; where the deceased was the primary source of a family's income, poverty and financial insecurity might also result in victims becoming vulnerable to further crimes. Much the same is true of the thousands who are injured as a consequence of fighting. Their sacrifice is also in need of recognition, and where the injury is serious and permanent, assistance may be required to protect and compensate them.

A range of non-judicial transitional justice mechanisms is therefore important to confront the mounting human cost of Syria's conflict. This is particularly important with respect to closing the impunity gap that emerges where courts have insufficient resources to consider every alleged crime. Given the number of crimes committed in Syria, this situation is almost inevitable. In such a case, it will be important to articulate clearly which crimes will be prioritised and why and to ensure victims understand and are included in the articulation of this policy. It will then be important to consider how accountability can be extended for other crimes through complimentary nonjudicial processes.

Arbitrary detention, torture, mistreatment, and death in custody

Since the very first days of anti-government protests in Syria, the government has responded by arbitrarily detaining tens of thousands of civilians. Many have been released but thousands remain in custody without charge or trial. As of 9 May 2013, the Centre for Documentation of Violations in Syria²¹ had

²¹ <http://www.vdc-sy.info/index.php/en/home> (accessed on 20 May 2013).

documented 37,887 detentions, but there are certainly many more. It will be important to consider whether any of these detentions qualify as crimes under Syrian law and whether they contravene the international legal requirement that detainees are treated “promptly”. It is also clear, however, that detention in Syria is often accompanied by mistreatment, including beatings and torture, some of which have even resulted in death.

Detention centres are mainly run by Syria’s four main intelligence services: the Department of Military Intelligence; the Political Security Directorate; the General Intelligence Directorate; and the Air Force Intelligence Directorate. Collectively they are known as the *mukhabarat*. Syrian journalists and human rights groups continue to document and report abuses in these detention centres based on their interviews with former prisoners, their families, witnesses and defectors. Human Rights Watch has identified 27 detention facilities to which it can link abuses, but there are thought to be many more.²²

Based on testimony from former detainees and defectors, numerous Syrian and international organisations have noted that the overcrowding and conditions of certain detention centres may themselves amount to ill-treatment and, in some cases, torture. Cells are reported as severely overcrowded, medical assistance is often withheld and meals and water are inadequate, as are sanitary facilities. The use of torture appears to be widespread based on the testimony of former detainees and defectors and has included sexual abuse and the threat of sexual abuse. In a report from July 2012, Human Rights Watch describes a “Torture Archipelago” of detention centres in which the use of torture is routine and systematic and clearly points towards a state policy of torture and ill-treatment, constituting a crime against humanity.²³

The extent and severity of these practices suggests they will form an important focus of Syria’s transitional justice process. As in the case of unlawful killings, there is emerging evidence of a multitude of individual crimes under both Syrian law and international law. Illegal detention and torture were features of the rule of Hafez and Bashar al-Assad prior to the conflict. As many abuses have been linked specifically to Syria’s four intelligence agencies, there will be a demand to examine the role of these institutions in major injustices of this

22 Human Rights Watch Report: *Syria’s Torture Archipelago* <http://www.hrw.org/reports/2012/07/03/torture-archipelago-0> (accessed on 20 May 2013).

23 *Ibid.*

kind, with a view to reforming them in an effort to prevent similar injustices happening again in the future.

The victims of detention, especially those that have been mistreated and tortured, may suffer from the consequences of their detention long after release. They may suffer from psychological trauma and from physical disabilities affecting them for the rest of their lives. These wounds will have an impact on their families and dependents. Many victims will therefore expect not only that the perpetrators of abuse are held accountable, but that there is some redress for victims.

Enforced disappearances

The history of major enforced disappearances in Syria goes back to the late 1970s during the rule of Hafez Al Assad. The government used armed forces to stop the political armed resistance that was led by the Muslim Brotherhood party between 1979 and 1982. Many civilians were drawn into the conflict. Field execution and executions without fair trials were happening systemically. There is no accurate number of the civilians who are still missing since then, but the number reported by activists is approximately 7,000. The status of many of them is still unknown to their families.

Enforced disappearance is still one of the ongoing violations carried out by the Syrian regime, especially after the beginning of the uprising. As of 27 May 2013, the Centre for Documentation of Violations in Syria²⁴ had documented over 1,408 cases. The arbitrary arrests have become a significant tool of the security branches, which usually keeps the location and the reason for the detainment of the arrestees unknown. Many families still do not know whether their disappeared loved ones are alive or dead. The identification and return of missing persons, whether alive or dead, will be an important goal for the families of many victims.

Sexual and gender-based violence

Sexual and gender-based violence, perpetrated against both men and women, is one of the most neglected categories of crimes committed during conflicts.

²⁴ <http://www.vdc-sy.info/index.php/en/home> (accessed on 27 May 2013).

In addition to being serious crimes and human rights violations, they can also constitute war crimes, crimes against humanity and genocide when the relevant contextual elements are also present.

Sexual assault and violence, including rape, has become widespread in Syria. The International Refugee Committee had identified the fear of sexual violence as one of the main reasons Syrians feel forced to flee Syria.²⁵ Reports indicate that sexual violence against women as young as 12 has become a common occurrence during government ‘sweeps’ of residential areas and when passing through checkpoints. In expanding refugee camps, women remain vulnerable to sexual abuse and exploitation.

There is clear evidence of rape and violence being used systematically by government forces and *shabiha* (local name for pro-Assad militia) as an instrument to collect information and/or to negotiate for the release/capture of a prisoner. A recent report by Human Rights Watch has particularly stressed the widespread practice of sexual assault in detention facilities, targeting both men and women.²⁶

These crimes are all too easily overlooked as part of a transitional justice process. Victims disproportionately belong to marginalised communities and parts of society (including women and young people) and, as in common with many cultures, there are serious social stigmas attached to sexual crimes. This means that victims and their families are often reluctant to report these crimes, which makes it extremely difficult to document the extent of such crimes. Sometimes families forcibly marry women who have been raped in order to save their honour and hide the crime.

Efforts to address sexual and gender-based violence as part of transitional justice must therefore be proactive and mindful of the cultural and religious context. Efforts must be made to engage communities that have suffered these crimes and to investigate and document incidents. Efforts are also required to address the social stigma and shame associated with crimes of this nature so as to encourage more victims to come forward, report crimes and participate in transitional justice processes.

25 International Rescue Committee <http://www.rescue.org/press-releases/syria-displacement-crisis-worsens-protracted-humanitarian-emergency-looms-15091> (accessed on 20 May 2013).

26 Human Rights Watch Report: *Syria: Sexual Assault in Detention* <http://www.hrw.org/news/2012/06/15/syria-sexual-assault-detention> (accessed on 20 May 2013).

The fighting parties involved in the conflict

The Syrian conflict has now lasted far longer than most other Arab Spring conflicts. In Syria, unlike in Egypt and Tunisia, a considerable section of the national army has actively sided with the regime and has continued to fight for its survival with considerable military resources at its disposal. The Assad regime has also actively recruited militia organisations to fight on its side, albeit without formal integration into the structures of the army. An armed opposition consisting of civilians, defecting soldiers and officers, as well as some combatants from other countries, is fighting on the side of the revolution. This has led to a military stalemate in which neither side has been able to command a decisive military advantage over any significant period of time. As a consequence, the human and material cost of Syria's conflict has continued to grow and an increasing number of civilians have been displaced from their communities.

Groups involved in the fighting are becoming increasingly well armed and organised as the conflict continues. The front-line is marking an increasingly permanent division in Syria as opposition forces are required to offer de facto governance in the territory they have captured and now control. The multitude of actors engaged in the conflict also makes it challenging to identify formal command structures and to determine when, for example, an armed group has acted on behalf of the state and when it has acted independently.

Consequences of the conflict

The impact on children

One important, and too often neglected, group of victims are children and young people. The nature of the conflict in Syria has affected the country's children in numerous ways and a transitional justice process must ensure it provides justice to Syria's youngest citizens.

Lois Whitman, the Children's Rights Director at Human Rights Watch, has stated that: "Children have not been spared the horror of Syria's crackdown. Syrian security forces have killed, arrested, and tortured children in their homes, their schools or on the streets. In many cases, security forces have

targeted children just as they have targeted adults.”²⁷ The United Nations has stated that it believes children have been killed and tortured, adding that it believes children have been used as human shields by government forces, for example by being forced to sit on top of military vehicles such as tanks.²⁸ There are also disturbing reports suggesting children have themselves been enlisted into the conflict.

In a recent report, Save the Children estimated that two million Syrian children are in need of urgent assistance as a consequence of the conflict and the destruction of their communities and homes.²⁹ Many are now displaced and are living either as refugees abroad or as internally displaced persons in Syria. Beyond the immediate physical effects of the conflict, high rates of trauma have also been recorded, with three in every four children interviewed by Save the Children having experienced the death of a loved one during the course of the conflict.

The future of Syria’s children is in danger, with attacks on hospitals and medical centres denying them important medical treatment. According to UNICEF’s education assessment (conducted in December 2012) at least one fifth of the country’s schools have suffered direct physical damage and 2,000 schools have been damaged or destroyed. Over 1,500 schools are being used as shelters for displaced persons. Some schools have been used by conflict parties. Some children have already missed out on almost two years of schooling; in Aleppo the attendance rate at school has dropped to 6%. Parents are reluctant to send their children to school, fearing for their safety. In areas hosting high numbers of displaced families, classes are overcrowded, sometimes hosting up to 100 students.³⁰ Schooling is also a serious problem in the many refugee communities established abroad.

Engaging children in a transitional justice process can be challenging. Like other vulnerable groups, their suffering is easily overlooked, as they are less able or likely to be forthcoming with information and testimony. Young children may not even understand or be able to give words to what they have experienced. Special efforts will be needed to engage children and young people;

27 Human Rights Watch: *Syria: Stop Torture of Children* <http://www.hrw.org/news/2012/02/03/syria-stop-torture-children> (accessed on 20 May 2013).

28 <http://www.bbc.co.uk/news/world-middle-east-18405800> (accessed on 20 May 2013)

29 Save the Children, *Childhood Under Fire*, March 2013, available from <http://www.savethechildren.org/site/apps/nlnet/content2.aspx?c=8rKLXMGlpI4E&b=8486803&ct=13020737> (accessed on 20 May 2013).

30 UNICEF MENA <http://unicefmena.tumblr.com/post/44608428766/syria-conflict-depriving-hundreds-of-thousands-of>

this focus needs to be built into the fabric of transitional justice processes from the beginning to ensure that their voices can be heard.³¹

Example: Engaging children in Sierra Leone

One of the signature horrors of the violent conflict in Sierra Leone was the kidnapping, forceful conscription and enlistment of young children, many of whom were forced to fight and were subjected to sexual violence. The trauma and psychological impact of the widespread use of child soldiers on thousands of young children in Sierra Leone necessitated a special effort to engage and include them in the transitional justice processes.

Dedicated efforts were taken to include them in discussions through carefully trained personnel in schools. Sierra Leone's truth commission, with the help of UNICEF, produced a special version of its final report that was specifically designed for children, using pictures and language they could understand. The Special Court for Sierra Leone also recognised the importance of including children in its work. This was achieved through special outreach programs that aimed to engage children, including former child soldiers, and special mechanisms were put in place to allow children to appear as witnesses during the Court's proceedings.

Internal displacement and refugees

As fighting has intensified and spread across Syria, hundreds of thousands of Syrians have been forced to flee their homes and communities in search of safety. They consist of both internally displaced persons, who have sought refuge elsewhere in Syria, and refugees, who have sought safety outside of Syria's borders. The United Nations and international aid agencies estimate that there are now more than 1.3 million Syrian refugees worldwide, with the majority settling in Jordan, Turkey, Lebanon and Iraq. The conflict has displaced an estimated further four million within Syria itself.³²

Syria's large IDP and refugee communities represent a major humanitarian emergency characterised by poverty, desperation and inadequate resources to provide for basic needs. The lives of many refugees are characterised by limited access to food, water and essential services such as medical care and education. These desperate conditions have in turn made refugee populations increasingly vulnerable to further crimes and violence and have created the conditions for their serious exploitation. Reports from Syrian rights groups

³¹ See, for example, Alison Smith, "Basic Assumptions of Transitional Justice and Children", March 2010, in *Children and Transitional Justice*, Harvard University Press, March 2010, available from <http://www.npwj.org/ICC/International-Justice-and-Children.html> (accessed on 20 May 2013).

³² Oxfam, Syria Info-Graphic <http://www.oxfam.org.uk/blogs/2013/04/syria-infographic> (accessed on 20 May 2013).

have documented the growth of prostitution, sexual assault and abuse in refugee camps and in communities of displaced Syrians. Anecdotal reports suggest an increasing number of young Syrian women are finding themselves forced or compelled to marry much older men from elsewhere in the region in a desperate attempt to escape poverty and violence.

The transitional justice implications of a forceful population transfer of this order are significant. In addition to being a crime in and of itself, it is essential to engage both IDP and refugee communities in the transitional justice process from the very beginning. These communities have typically suffered a great deal and as such they represent an important group of victims. They may have suffered in their home communities, forcing them to flee in search of safety; they might then have suffered further crimes or violations as IDPs or refugees; finally they might find that upon attempting to return to their homes and property that these have been destroyed or seized in their absence.

These communities can play an important role in investigation and documentation efforts. Most IDPs and refugees will have fled their homes because they witnessed or suffered a major event. Within IDP and refugee communities, there are therefore likely to be many people who have witnessed or have knowledge of serious events under investigation by transitional justice mechanisms such as the courts or fact-finding bodies. Identifying and collecting this knowledge can be challenging, but can make a major contribution to transitional justice.

One of the principal challenges is the dynamics of refugee flows. Multiple witnesses to a single event in a single town may end up in completely different refugee communities and it will be almost impossible to predict where displaced people will end up. Making use of the testimony and information provided by IDPs and refugees therefore requires a great deal of coordination. Information must be shared securely and effectively across multiple investigative units and protocols must be similar enough to ensure information can be combined to yield a comprehensive picture that can help investigators uncover patterns in crimes and abuses.

Facilitating the return of these communities will represent another major challenge to transitional justice. They may no longer have homes, property and livelihoods to which to return. Where this is the case, it must be an urgent

priority to assist them in the reconstruction of these communities. As resources will be limited, however, it is important to ensure this process is managed fairly and transparently. If some communities are given support that is not given to others in a similar position, this perceived injustice might threaten the credibility of the transitional justice process as a whole. This is especially true where a community might regard limited support, or support prioritised to another community, as punishment or revenge for its role in the conflict.

Alternatively, returning refugees or IDPs might discover that someone else has claimed their property in their absence, perhaps because they believed it to be abandoned, or because they believe themselves to have a claim to the property. The contested ownership of housing and private property can become especially problematic where there is poor public record keeping, or where public records have been destroyed during the conflict. If confidence is not quickly established via official mechanisms to resolve such disputes, instability might emerge as accusations of false claims are made and as individuals are tempted to take matters into their own hand to protect or retrieve what they believe to be theirs.

Finally, some IDPs and refugees might find the social fabric of their communities altered in such a way that makes their return difficult or impossible. Previously diverse communities might have become ethnically or religiously homogenous during the course of the conflict, or those who have fled may fear returning to communities in which they believe they are no longer welcome or safe.

Regional influences

Unlike the revolution in Libya, events in Syria have not prompted international intervention on humanitarian or other grounds. However this is not to say that other states are not playing an important role in shaping the conflict and its aftermath. Syria's revolution is of great significance to a number of states in the region and this significance is being felt in international forums and in the flow of arms, material support and even combatants.

Iran's historic ties and friendship with the Assad regimes have made it an unflinching ally both in terms of material and international support; this support has been echoed more recently by Hezbollah in Lebanon. Russia has made its material and international support clear, not least because of important strategic interests in Syria. Governments in Yemen, Algeria and Iraq have also expressed various degrees of support for Bashar al-Assad.

The revolution has many international supporters, although these have proved reluctant to intervene even in the face of a growing humanitarian emergency. Turkey has made its support clear and several Gulf States, including Saudi Arabia and Qatar, are reported to be providing material support to revolutionaries. This international involvement has the potential to complicate the transitional justice process in Syria in a number of ways. International actors may, for example, have different visions for a post-conflict Syria and may have inconsistent or contradictory expectations of the transitional justice process. This could cause complications with respect to political, financial and material support for transitional justice in Syria.

Resources for Transitional Justice in Syria

There are already a number of valuable resources in place to support Syria's transitional justice process and the planning and preparation for transitional justice is already underway. It is therefore crucial that further preparation for transitional justice in Syria takes these existing resources into account and does not proceed as though they are starting with a blank canvas. Efforts must be made to identify existing transitional resources, to identify gaps and weaknesses, and to fill these in order to provide as comprehensive and unified a transitional justice framework as possible. This is important, both to avoid the costly and unnecessary duplication of work and resources, as well as to ensure the overarching transitional justice framework is not fragmented and divided in ways that can confuse or frustrate its stakeholders, thereby undermining its legitimacy and effectiveness.

In considering the resources presently available to a Syrian process, it is important to look beyond judicial resources and to consider the role community and civil society groups might play in promoting and implementing transitional justice. It is therefore helpful to consider examples of a range of resources, which can be divided roughly into firstly community and civil society initiatives and, secondly, into more formal institutional resources, both within the old government structure and within the new institutions of the opposition.

Civil Society

Under both Assad regimes, Syrian civil society has been kept weak and under the control of the state's security forces. The state banned and persecuted civil society activism and attempted to "drown it out" by establishing its own "civil society organisations" and religious foundations. Since the revolution, however, there has been a tremendous growth in the number of communitybased and civil society organisations. Many of these emerging organisations now operate

in areas of relevance to transitional justice. This growth will continue and will be likely to increase even more dramatically still when Syria becomes stable and free.

Example: Micro-mapping in Uganda

Civil society initiatives do not have to be big and ambitious in their scope to have an important impact on the transitional justice process. A small group, or even an individual, can make an important contribution by sharing their own story, or that of their community. When Victor Ochen returned to his small village in northern Uganda, he noticed that almost no-one had remained unaffected by the violence caused by the Lord's Resistance Army's (LRA) rebellion against the government. He decided to record this impact by mapping the conflict's impact on each of the households in his small village. He sketched a map of his village and recorded a wide range of information including the deaths of family members, those missing, those injured and those suffering trauma as a consequence of the conflict. His map paints a vivid picture of a violent period of Uganda's history that few escaped and clearly shows how the consequences are still being felt today. The power of this simple picture attracted international attention and remains a powerful way of giving Ugandan victims a clear voice.³³

Civil society documentation initiatives

Some of the most valuable transitional justice work currently being carried out both inside and outside Syria is the vast process of documenting the conflict, serious crimes and human rights violations and the individual stories of victims. Inside Syria, journalists, individuals and civil society organisations are documenting the scenes of alleged crimes, seizing documents and other physical information, talking to victims and witnesses and recording events through video and photographs.³⁴ Outside Syria, individuals and organisations are collecting information and evidence from refugees and defectors and undertaking the daunting task of cataloguing, organising and preserving this wealth of information.

There are plenty of documentation efforts being conducted by the Syrian Human Rights Information Link (SHRIL),³⁵ the Centre for Documentation of Violations in Syria,³⁶ the Syrian Justice and Accountability Centre,³⁷ the

33 For more detail, see: http://news.bbc.co.uk/1/hi/in_depth/629/629/6499065.stm (accessed on 20 May 2013).

34 See, for example, *Lens Young Homs*: https://www.facebook.com/LensYoungHoms/photos_stream (accessed on 20 May 2013).

35 http://www.peacewomen.org/portal_initiative_initiative.php?id=1346

36 <https://www.vdc-sy.info/index.php/en/> (accessed on 20 May 2013).

37 <http://syriaaccountability.org/> (accessed on 20 May 2013).

Syrian Centre for Documentation,³⁸ the Syrian Observatory for Human Rights³⁹ and Insaan Rights Watch,⁴⁰ to name just a few. Women Under Siege (النساء تحت الحصار) is focusing specifically on documenting sexual and gender-based violence perpetrated against Syrian women.⁴¹ In addition, documentation work is being conducted by a number of large international organisations, such as Human Rights Watch and Amnesty International.

The Syrian Accountability Project (مركز العدالة والمحاسبة السوري), in collaboration with No Peace Without Justice, is compiling a comprehensive crime matrix detailing and linking individual events and identifying violations of both Syrian and international law. Sample indictments are provided to demonstrate how the matrix can be used to build complex cases against those bearing the greatest responsibility for the most serious crimes.

Building criminal cases against those directly responsible for crimes requires a great deal of evidence. More demanding still is the process of building a criminal case against those who bear the greatest responsibility for these crimes, as this requires a case that clearly establishes the link between commanders and crimes perpetrated on the ground alongside context elements to establish that multiple events form part of a systematic policy or plan of attack.

Local media can be a valuable tool for promoting awareness of transitional justice and for engaging ordinary Syrians in the process, both during the revolution and after. During the revolution a number of new magazines were founded: a local magazine called “Sham’s Pledge” (عهد الشام) provides one example. It is a new local magazine published fortnightly that focuses on the events and challenges of the revolution. Each issue devotes several pages to sharing the individual stories of those caught up in the revolution, including martyrs and prisoners. It has also aimed to raise awareness of key concepts in transitional justice, such as key international covenants and rights, and has encouraged its readers to use this information to hold both the FSA and the Assad regime accountable for their actions. Other similar publications include Enab Baladi (عنب بلدي),⁴² Hurriyat (حريات),⁴³ and Syria Untold (حكايه).⁴⁴ Documentation efforts can play a crucial role in other aspects

38 <http://www.documents.sy/index.php?lang=en> (accessed on 20 May 2013).

39 <http://syriaahr.com/en/> (accessed on 20 May 2013).

40 <http://www.insaan-rights-watch.org/default.aspx> (accessed on 20 May 2013).

41 <https://womenundersiegesyria.crowdmap.com/> (accessed on 20 May 2013).

42 <http://enab-baladi.com/> (accessed on 20 May 2013).

43 <http://www.syrian-hurriyat.com/> (accessed on 20 May 2013).

44 <http://www.syriauntold.com/ar> (accessed on 20 May 2013).

of transitional justice, such as fact-finding and truth-telling mechanisms, identifying missing persons, vetting and lustration and a fair and transparent compensation procedure.

Civil society campaigns within Syria

Community-based groups that have built trust by delivering essential humanitarian aid when it was needed the most are in a unique position to engage some of Syria's most vulnerable and marginalised communities, including minorities, women, young people, children and the disabled. Engaging their voices in the transitional justice is crucial, but often challenging. Some campaigns have encouraged humanitarian solidarity. A campaign called "We Are All Your Children," (كلنا ولادك) organised by a group calling itself "Grass Revival" (غراس النهضة) have encouraged Syrians themselves as well as an international audience to donate small sums of money to Syrian mothers who have lost their sons and daughters to prisoners or martyrdom.

Beyond the provision of humanitarian assistance, there are an increasing number of civil society campaigns engaged in other crucial aspects of transitional justice, such as documentation, memorialisation and remembrance. A number of these campaigns have specifically addressed victims and the importance of acknowledging and remembering their sacrifice. "Our Martyr is not Dead" (شهيدينا لا مات) was a campaign organised by The Damascus Girls Gathering (تجمع بنات الشام). Their campaign decorated streets with red ribbons, each bearing the name of a victim.⁴⁵ The same organisation has taken steps to ensure that the contribution of all communities to the revolution is remembered and have done so through an online documentation campaign titled "Great Women of the Syrian Revolution" (نساء عظيمات في الثورة السورية).⁴⁶ Similarly, the Coordination Group and Students of Damascus University organised a campaign they called "Elect the Martyr" (انتخبوا الشهيد). Their campaign centred on parliamentary elections held in May 2012 and consisted of a media campaign that promoted martyrs as candidates for election in place of the actual candidates.⁴⁷

45 See <https://www.facebook.com/media/set/?set=a.495091077221479.1073741843.481656721898248&type=3> (accessed on 20 May 2013).

46 *Great Women of the Syrian Revolution* <https://www.facebook.com/media/set/?set=a.490977100966210.1073741826.481656721898248&type=3> (accessed on 20 May 2013).

47 *Elect the Martyr*: <http://www.youtube.com/watch?v=nXpk6wVrLc> (accessed on 20 May 2013).

A number of public gatherings and acts of remembrance have been organised on special occasions like Eid (the highest Muslim religious holidays) or on the anniversary of massacres such as those committed in Darya. These formal campaigns are further supported by local or even individual initiatives. Streets and squares are being renamed in the name of victims, who are also remembered in statues and in graffiti. In institutionalized memorization efforts it is important to raise awareness not to include controversial figures in memorialisation campaigns.

For schools and educational institutions to play a role, it is of course crucial that any such work is done sensitively and that every effort is made to make sure that children are not subjected to further trauma. Important points include: developing curricula that deals with recent Syrian history in a balanced way; to professionally train teachers to use them and in how to handle controversial discussions among the students. As with any aspect of the transitional process, it is necessary to direct the efforts at conflict solution and reconciliation, and for this it is important not to deepen societal divides and foster stereotypes - particularly when dealing with children. Other campaigns have focused on the plight of prisoners. “Behind Bars but Free”⁴⁸ (أحرار خلف القضبان) and “I am not Just a Number” (لست مجرد رقم)⁴⁹ both of which draw attention to the plight of prisoners in Syria and provide support for their families. Other communities have reported ongoing local reconciliation initiatives, such as between Alawite and Sunni Sheikhs in Homs in 2011 and 2012 and between Kurds and the FSA in Ein Al-Arab (Sirikaneh).

It is clear that local community initiatives are becoming more organised and are beginning to incorporate further aspects of transitional justice into their work. The Union of Homs Neighbourhoods (اتحاد أحياء مدينة حمص), for example, has undertaken recent organisational changes that include the creation of a formal Civil Rights team that includes transitional justice issues within its mandate, as well as a Judicial Office and an Office of Civil Peace. While they stress that the ongoing humanitarian emergency commands the majority of their resources and attention, they are planning for a time when conditions on the ground also make transitional justice work possible, with the support and help of international experts.

48 *Behind Bars but Free*: <https://www.facebook.com/BehindBarsButFree> (accessed on 20 May 2013).

49 *I am not Just a Number*: <https://www.facebook.com/Syrian.Detainees.not.Numbers?ref=ts&fref=ts> (accessed on 20 May 2013).

Civil society research and policy recommendations

Civil society organisations and think tanks are providing valuable research and policy recommendations to the transitional justice process in Syria. The Syrian Centre for Political and Strategic Studies⁵⁰ has recently announced the creation of a National Preparatory Committee for Transitional Justice. This committee aims explicitly to create programs and plans for transitional justice in Syria. Its National Plan for the Future of Syria makes reference to a number of key transitional justice priorities.⁵¹ The first meeting of the Committee was held on 27-29 March 2013. It has so far focused on mapping existing transitional justice work in Syria and creating a formal and transparent structure for its work. It is presently engaged in a number of research projects and is working on formalising its relationship with the Syrian National Council. It has already produced a number of reports detailing proposed military reform; constitutional and legal reform; changes to the electoral law and regulations governing political parties; as well as broader political and administrative reforms.

Other research organisations are also producing valuable research of relevance to transitional justice in Syria. The Strategic Research and Communication Centre⁵² has produced research on electoral reforms and processes in Syria, its judicial system and the role and independence of judges, the Syrian constitution, including minorities and marginalised groups in Syria's institutions, and reforming the Syrian penal system. Valuable research and recommendations are also being produced by The Day After⁵³ and the Damascus Centre for Human Rights Studies in Syria.⁵⁴

50 <http://www.scpss.org/index.php> (accessed on 20 May 2013).

51 <http://www.scpss.org/index.php?pid=552&lng=en> (accessed on 20 May 2013).

52 <http://www.strescom.org/> (accessed on 20 May 2013).

53 <http://www.usip.org/the-day-after-project> (accessed on 20 May 2013).

54 <http://www.dchrs.org/english/news.php> (accessed on 20 May 2013).

Formal institutions

Institutions established by the opposition

Valuable transitional justice resources exist within the work already undertaken by the Syrian National Council. Members suggest the issue of transitional justice is on their agenda and that efforts are being made to put detailed plans in place for Syria's transitional justice process. Reports have, for example, already investigated the necessity of reforming Syria's penal system.⁵⁵ Members also suggest that they are communicating with the FSA in an attempt to formalise an awareness of transitional justice within their structures. Within the Syrian National Council, there is a Bureau for Human Rights and Civil Society that aspires to provide regular updates on violations and to play a role in ongoing documentation efforts.⁵⁶

Judicial structures are being developed with the territory under the control of opposition forces. The Free Syrian Judicial Council and the Unified Judicial Council were both formed in Aleppo and have recently merged to form a single more coherent judicial authority. Their present work is focused primarily on providing stability during the transitional period, rather than broader accountability, and is largely dominated by Sharia'a courts.

Institutions from the old Syrian State structure

It is important to acknowledge that there is a great deal of capacity and resource available within Syria's pre-existing state institutions. While many require reform and restructuring in order to re-establish credibility, it will be crucial to make use of existing resources where possible.

Syria benefits from a large and educated class of professional investigators, lawyers, judges, scientists, teachers, academics and bureaucrats. These

55 <http://www.syriancouncil.org/en/special-reports/item/639-reform-policies-of-the-syrian-penal-system.html> (accessed on 20 May 2013).

56 http://www.syriancouncil.org/ar/index.php?option=com_k2&view=itemlist&layout=category&task=category&id=27&Itemid=130 (accessed on 20 May 2013).

professionals, and many others, will play a critical role in rebuilding the Syrian State, its economy, its society and in designing and implementing its transitional justice process. A number of individuals may be guilty or seriously complicit in the crimes and corruption that have characterised both the Assad years and previous regimes, but many are not.

One of the first challenges for transitional justice will be to identify the many individuals who were not part of the problem and can instead form part of the solution by lending their expertise and capacity to the transitional justice process. This can be done by identifying clear and transparent criteria based on conduct rather than affiliation, and by ensuring that those accused of serious wrongdoing have an opportunity to defend themselves.

Syria also has a developed penal code that can form the backbone of many criminal prosecutions and which may be utilised as part of the judicial component of transitional justice. While the code may require reform for the future, efforts must also be made to identify its existing components that can serve as an important foundation for criminal accountability.

Many of Syria's institutions are however in need of urgent reform. This is perhaps most evident in the case of the Office of the President, the Intelligence agencies, the army, the security services and the Ministries of Defence and Interior. Amid this much needed reform, however, efforts must be made to ensure that those institutions that do function are preserved in a way that enables them to play a role in transitional justice. This may include components of the police and judiciary, as well as other government ministries.

Victims will be likely to demand that key figures are tried for their crimes; they may indeed wish for a broader investigation into the role that certain institutions played in crimes and violence. Society may want to ensure that individuals guilty of major or minor crimes are removed from their institutions and from other government institutions as and when they are created. It is important to ensure that such efforts are undertaken with requirements of due process in mind and that clear criteria are applied fairly to all parties.

Given their long history of serious abuses, Syrians may hope for major structural and legislative reforms designed to break the power of certain security institutions and to prevent a similar pattern of abuses and impunity in the future. Such objectives will likely require a range of transitional justice

mechanisms. Individual criminal accountability will be important, but further non-judicial fact-finding efforts might be needed to support vetting and lustration. A broader fact-finding effort focused on the role and structure of institutions as a whole, rather than on specific individuals, may be required to support institutional reform.

Reforming major government institutions is a difficult task. Institutions such as the judiciary will need to play an important role in holding people accountable for their crimes during the transitional period. Similarly, the security forces will need to play a crucial role in providing the security necessary for communities to return and rebuild and for economic and political reconstruction to begin. While it is crucial to ensure institutions are reformed in order to rebuild public confidence and trust, it is important to ensure that crucial capacity and expertise is not lost unnecessarily, leaving Syria without the institutions and expertise necessary for them to make the transition to a peaceful and stable society.

Challenges to Transitional Justice in Syria

While many challenges will make themselves known as events unfold and the transitional justice process develops, others can to some extent be anticipated. Where this is the case, the transitional justice process can be designed with these challenges in mind and with plans in place to meet and address them as they arise.

Limited awareness of transitional justice

A common initial challenge to transitional justice is limited awareness of transitional justice as a concept, alongside limited awareness of its value and importance. Transitional justice may be entirely unknown, or it may be confused with other concepts, such as the narrower conception of criminal justice. Some communities might even perceive it as an attempt at victors' justice or as unwelcome international interference with Syria's transition.

The value of transitional justice may be questioned, particularly in the context of the humanitarian emergency that has followed the armed conflict in Syria. With millions displaced, homeless and trapped by poverty, there will be an understandable wish to dedicate all available resources to rebuilding property, reviving the economy and creating new institutions able to provide security and improve people's lives in the most concrete sense. These concerns may in turn make it difficult to engage Syrians in the transitional justice process and may lead to misconceptions about its role and intentions. Both can ultimately undermine the legitimacy and effectiveness of the process as a whole.

How well understood is the concept of transitional justice in Syria at present? Where are the gaps or limitations in understanding? What can be done to engage with communities where the concept is not understood?

Societal divisions

The revolution in Syria has undoubtedly exacerbated existing ethnic and sectarian tensions, deepening already entrenched social divisions and mistrust. These societal divisions will represent a serious challenge to a national process of transitional justice. Different communities may have competing and contradictory expectations of the process and some may view it as an attempt to exact further revenge and punishment. Lessons from other transitional societies suggest this will be one of the most serious challenges to transitional justice in Syria.

Some are already advocating a division of the country in order to establish separate Alawite, Sunni Arab, Druze and Kurdish States. These divisions can strain political and security institutions at a time when they will already be weakened and lacking in legitimacy. The greatest challenge will, however, inevitably be that of designing a process that is perceived as fair, even-handed and neutral by all Syrians, on both sides of the revolution. First and foremost this will require consistency and a commitment to seeking accountability for crimes committed by and against all sides.

The United Nations, the international community as well as international and Syrian rights groups have all made it clear that the evidence shows forces loyal to Bashar al-Assad have perpetrated the majority of crimes and abuses in Syria. At the same time, reports also make it clear that revolutionaries have committed serious crimes. These include unlawful killing and torture; the illegal seizure of property; deliberate attempts to target civilians; attempts to use civilian populations to protect potential military targets; the mistreatment of prisoners of war; and forced conscription, including of children. As the revolution continues to unfold, there is an increasing risk of acts of revenge and retaliation that target entire communities as perceived “perpetrators”, with little regard for the conduct of individuals within those communities.

It is important to note, however, that a neutral process that avoids victors’ justice does not require the prosecution of equal numbers from both sides of the conflict. A neutral process requires both sides to be held to the same standard and subject to the same laws. This is consistent with prosecuting more members from the side responsible for the majority of crimes, provided the evidence supports this.

It is crucial, therefore, that as part of Syria's preparation for transitional justice, efforts are made to end crimes and abuses within revolutionary forces and that efforts are also made to document and identify such abuses when they do happen. It will then be important to ensure that the perpetrators of such crimes do not escape accountability, be it criminal prosecution or otherwise, and that the victims of these crimes are included in any compensation or redress mechanisms. The prosecution of those who may be regarded by many as protectors and heroes will present a major challenge to a transitional justice process and the transitional government.

What can be done to bridge these societal divisions? In other transitional societies, such as in South America, South Africa and the Balkans, victims' groups have played a major role in this undertaking. By emphasising a shared experience as victims, such groups have been able to find valuable common ground on which to build further discussions and initiatives. What can be done to ensure that there is public support for and understanding of the need to prosecute persons on all sides of the conflict when they are responsible for serious crimes?

Disarmament and demobilisation

The current conflict in Syria has had a dramatic effect on the number of weapons in Syrian society. Weapons are now freely available to civilians in many parts of the country; citizens are understandably concerned about their safety and that of their families. New weapons are arriving daily from abroad and are being offered to potential fighters. Weapons that used to be under the control of the official state security apparatus are making their way into the hands of civilians and revolutionaries as government bases and buildings are defeated or captured. The government has itself distributed arms to civilians across the country and established its own militias.

The proliferation of arms is not limited to light arms. Heavy weapons are now in use by both sides of the conflict. It is clear from reporting that both sides now possess large quantities of surface-to-air missiles, rocket-propelled grenades, machine guns and armoured vehicles, including tanks. Disturbingly, reports now suggest there are large stockpiles of chemical weapons in Syria, some of which may be in use.

In addition, the various fighting parties are becoming increasingly organised and developed as armed organisations. They are establishing clear command and communications structures and are amassing a great deal of experience and capacity. In many cases they are building a strong local following, given their role in providing security and other basic goods and services. While this greater degree of organisation might assist with establishing clear chains of command (which is important for accountability processes), reversing this level of arms proliferation and mobilisation is very difficult. At the end of hostilities, many will be reluctant to surrender their arms and return to civilian life. This may be because of a continued sense of uncertainty and insecurity, or because of the purpose fighting has given them.

As a consequence, it may be very difficult for the government to recover the levels of control necessary to implement transitional justice. Local armed groups may, for example, wish to protect those accused of serious crimes, or they might wish to retaliate or seek revenge without waiting for official responses to crimes. In countries like Libya, armed groups have intervened to settle property and land disputes in their communities. This is often done in an ad hoc manner and outside official channels, creating a sense of uncertainty and ultimately undermining the legitimacy of official processes.

Other transitional societies, most notably in the Balkans, have witnessed armed groups making the transition into organised crime following the end of hostilities. This represents a major challenge to law and order following a major period of transition. Revolutionary groups are often well-armed, wellorganised and skilled at operating independently and evading government controls. They may also find themselves with few legitimate forms of employment during the reconstruction phase immediately after a conflict has ended and consequently may be tempted by the potential proceeds of organised crime.

What are the major obstacles to demobilisation and disarmament in Syria? What can be done to address these obstacles? In Northern Ireland, where members of the Irish Republican Army (IRA) were reluctant to surrender their arms and positions of influence following a peace agreement, efforts were made to find them other positions of influence and belonging within, for example, sporting and civil society institutions.

Weak transitional government

The transitional government charged with coordinating Syria's transitional justice process will likely be weak and under-resourced. Societal divisions may undermine its legitimacy in the eyes of some who feel that they are not adequately represented. Differing political and ideological visions and expectations may undermine its unity and ability to act decisively and effectively. The fractured nature of the forces fighting both for and against the revolution, as well as the proliferation of weapons, may also undermine its ability to guarantee security and stability, as well as to protect members of the judiciary and those charged with implementing key components of the transitional justice process.

Syrian confidence in public institutions is very low and there will certainly be a great deal of political and popular pressure to reform and vet major government institutions, particularly the security forces. Reforming major government institutions is, however, a complex task requiring a great deal of authority and legitimacy. It is unlikely a weak and divided transitional government will be able to do so independently of the political and ideological agendas of the various factions involved in the revolution. The need and desire for reform must also be undertaken with a view to preserving security and stability.

Perhaps most importantly, however, a successful transitional justice process requires careful planning and coordination, as well as sustained political will. This is particularly crucial with respect to securing more challenging aspects of the transitional justice process, such as the prosecution of those guilty of serious crimes on all sides. It is also crucial to convince victims and their families to trust the official process and resist the temptation to resort to private revenge or attempts to recover their property themselves.

What role can civil society play in supporting the transitional government during this difficult phase? Civil society can, for example, help to educate the population and communicate the process to a range of affected communities. This will require both government and civil society to build trust in each other. This may be difficult in a country where there is little experience of a civil society working independently of the government.

Inexperienced civil society

With the exception of a few religious charities, the civil society culture in Syria has been severely oppressed by both Assad regimes. As a consequence, there is relatively little experience of organised civil society work within Syria, although this experience has increased since the start of the revolution in 2011.

The limited experience of organised civil society activism and campaigning may limit the impact civil society can have on Syria's transitional justice process, at least initially. With limited experience, there is a risk that civil society's contribution may be inefficient and poorly coordinated, resulting in conflicting messages and wasteful duplication of effort. With limited international and domestic resources available, there is also the danger of competition between emerging organisations, thus limiting their ability to cooperate and coordinate their work in pursuit of a joint cause. Such competition could be observed following the revolutions in both Libya and Tunisia, limiting civil society's ability to influence the transitional justice process at crucial stages early in the process.

Building capacity and knowledge within Syria's nascent civil society organisations will therefore be a critical challenge to the successful implementation of transitional justice. This will undoubtedly require a change in Syria's political culture, as government, civil society and individuals all rethink their traditional relationships with each other and begin the process of building trust and confidence.

Limitations to existing work

Whilst there is a great deal of valuable transitional justice work currently ongoing, this work has its limitations. This may be a consequence of limited awareness of transitional justice and its component parts, as well as limited knowledge of the way in which it can be integrated into current efforts to defeat the Assad regime. To what extent does the current documentation work meet these requirements? Whilst much of the current documentation work is excellent, some of it is not sufficiently aware of the requirements of complex criminal prosecutions, including prosecutions under international law.

Of particular importance for the latter are improved efforts to capture information and intelligence about the command structure of the Assad

regime and its armed forces. Documents seized from captured buildings or military units can, when considered collectively, paint a vivid picture of the command and control structure that can prove invaluable to investigators and prosecutors. At present, many such documents are burned, discarded or left behind. Many buildings known to contain valuable documentation are reportedly being destroyed and little thought is being given to their evidentiary value by those engaged in the fighting. This represents a major missed opportunity to secure accountability.

The same is true of prisoners who are mistreated or killed, whether they are civilians or combatants. Such acts represent crimes in their own right and should for this reason alone be stopped. At the same time, they represent another missed opportunity to gather information and intelligence about the pattern of crimes and violations.

Managing expectations with limited resources

Syria's economy was faltering before the revolution. The human and material cost of the conflict has exacerbated this problem further and the cost of rebuilding Syria will demand most of the remaining resources. This leaves very few resources for transitional justice, which places serious limitations on the process.

Most importantly, however, it may be that the process has insufficient resources to meet the expectations of its stakeholders. Those who have fought for the revolution may feel they are owed payment. Victims, and the families of victims, may feel they are owed compensation, as might those who have lost property and their livelihoods. If unrealistic expectations are allowed to develop and grow, this can eventually represent a threat to the process as a whole. Despite any other successes, victims will be left disappointed and may suspect others have benefited in their place.

Where resources are limited, efforts must therefore be made to ensure that expectations are kept in line with available resources. This may require policy makers to explore a range of creative alternatives, such as community based or symbolic reparations.

Ad hoc initiatives

A coherent national transitional justice process is crucial to its success, as the inconsistent or uneven application of transitional justice can result in new grievances and injustices that can undermine the process as a whole.

In the current situation, local justice initiatives are already evolving. These are often established without planning and coordination with other initiatives. Given the limited resources and effective control of a new government, local communities or armed groups may also decide to establish their own local justice mechanisms in the post-conflict situation. While such local initiatives can be of great value to transitional justice, it is important that they are integrated into a coherent national process. Where this is not the case, it may result in inconsistencies or contradictions that will be perceived by many as unjust. The simplest form of such ad hoc initiatives is individual or collective acts of revenge or retaliation and individual or collective efforts to recover property or compensation by force.

More organised structures are beginning to emerge in Syria. Local Sharia and mixed courts based in cities such as Aleppo and Raqqa are, for example, ruling on a number of important issues based on their own beliefs and principles of justice. Reports suggest that such courts are increasingly intervening in civilian life and with regard to crimes related to the revolution. There is, however, little oversight and accountability and disagreements are already emerging between these courts and other judicial institutions established by the opposition. Lawyers have established lawyer committees in rebel-held areas to systematically work on keeping a justice system running and discussing legal principles and their applicability in times of conflict.⁵⁷

⁵⁷ For these initiatives, see for example <https://www.facebook.com/free.lawyers.sy?ref=ts&fref=ts> and <https://www.facebook.com/Lawyers.Aleppo>

Conclusion

This publication has emphasised that transitional justice is essential to securing a sustainable transition following a period of conflict and serious human rights abuses. Transitional justice has not been presented as an end in itself or as a box Syria must tick as part of its reconstruction.

Transitional justice is the means through which Syria can confront its past and start the process of rebuilding a sustainable peace. It can help break cycles of impunity and violence that have destabilised society in the past; empower and restore the dignity of victims; provide a basis for reforming political structures and restoring the rule of law; and secure a foundation for reconciliation initiatives. Transitional justice is not the only approach Syria will need to overcome its past and achieve peace and stability, but it is an important tool to reach those goals.

The concept of transitional justice has been presented as multifaceted and flexible. No single model for transitional justice has been presented. Rather, each process must be carefully designed and implemented in a way that is sensitive to the unique local context of a country like Syria. This includes identifying local expectations and objectives, understanding how the process will be shaped by the prevailing culture and history and making full use of existing and available resources. The question of what form Syria's transitional justice process should take is therefore one that only Syrians themselves can answer, drawing where appropriate on the experiences of other transitional societies to guide them. This publication has therefore not sought to advocate a particular model, but to provide some of the information and raise some questions that Syrians will confront in making this difficult determination.

The starting point for Syrians is to understand their own expectations and objectives for transitional justice. What crimes demand accountability? What time periods or institutions need to be brought into the light of day and examined or reformed? Who needs help and protection and what form do they want

this to take? What can transitional justice contribute to the reconstruction of a new and legitimate state not tainted by crimes and abuses of the past?

Some countries have tried to address these questions through a process of national consultation and outreach that aims both to inform the public about transitional justice and to invite them to share their needs and expectations. Surveys, local discussions, prosecutors and investigators, teachers and civil society activists have all contributed to these kinds of initiatives. What is important above all, however, is that these discussions are inclusive and make a genuine effort to reach and engage all Syrians from the very beginning. Syria is a diverse society with a history of government policies that have aimed to divide and rule. The current conflict has exacerbated many of these pre-existing tensions and divisions; one of the greatest challenges to transitional justice will undoubtedly be that of establishing it, both in reality and perception, as a justice that is for all Syrians. If some communities are excluded, or even just feel excluded, from the initial stages of consultation, the process will lack legitimacy from the very beginning and may come to be viewed as a partial or victors' justice.

How can this period of outreach and consultation be organised systematically and effectively to ensure that all of Syria's many different communities are reached? How can outreach be included in the mandate of all Syria's transitional justice mechanisms? How can those mechanisms ensure their messages are consistent and do not confuse the public? What resources are available, both within the government and civil society, to facilitate this process? How can the gap between different sides in the current conflict be bridged, to ensure that all sides are included in the conversation and who is best positioned to lead this process? In transitional societies such as South Africa and the Balkans, victims' groups and women's groups have emerged as effective leaders of such initiatives.

It is this understanding of what Syrians want and expect from their transitional justice process that must drive the design of its mechanisms. Syrian policy makers may consider adapting institutions from processes implemented elsewhere or they may create entirely new institutions designed to meet Syria's own unique requirements. The criminal courts will undoubtedly be one of the most important accountability mechanisms in Syria, but important questions must be asked about their strengths and limitations. What capacity

is there within the Syrian judicial system to conduct timely and fair trials that can investigate potentially complex cases and hold perpetrators on all sides accountable to the same standard? What role should international law play in the accountability process? Is there a need for international assistance to ensure that accountability is secured for those responsible for the most serious crimes?

There is a great deal of valuable documentation work currently being done in Syria, some of it with a view to supporting criminal prosecutions. To what extent, however, does it meet the standards required by domestic or international criminal courts? Is evidence being handled, organised and systematised in the most helpful way to lead to eventual prosecutions? Is sufficient attention being given to investigating crimes committed by all sides of the conflict and against marginalised or vulnerable communities? Is there sufficient knowledge of the nature of the crimes that are being committed in Syria? For example, is current documentation mindful of the evidence requirements for the most serious crimes under international law? Is evidence being collected that can establish command responsibility and therefore form part of successful cases against the most senior figures?

Transitional justice is a concept far broader than criminal justice. Following four decades of authoritarian rule and a long and violent revolution, there are countless victims and suspected perpetrators in Syria. There are individuals suspected of serious crimes dating back as far as the 1970s and 1980s, including misappropriating large amounts of Syria's wealth through patronage and corruption, and individuals accused of perpetrating crimes ranging from theft to war crimes and crimes against humanity during the revolution.

There is no realistic prospect of Syria's judicial institutions dealing with every suspected crime or of engaging every perpetrator or victim in a timely fashion. The range of non-judicial accountability mechanisms that can form part of a transitional justice process may be all that stands between individuals who cannot be dealt with by the courts and de facto immunity. In that situation, clarity on their respective roles and mandates is of critical importance. Which crimes should the courts deal with as a matter of priority? How can clear prosecutorial guidelines be drawn up and communicated to ensure that priorities are understood and reflect the justice Syrians want? How might Syria then employ non-judicial mechanisms to extend the reach of accountability whilst

still respecting basic principles of due process? What role should victims and their communities play in these mechanisms and in developing their policies?

Non-judicial mechanisms are well suited to addressing questions broader than individual guilt. Little is known about the fate of the thousands who disappeared in the four decades of authoritarian rule prior to the revolution and Syria's secretive security services have operated beyond the reach of the law to protect successive Assad regimes throughout this period. What role is there for a fact-finding or truth commission to investigate and report on the work of the security services and to discover the fate of the thousands who disappeared? Could such an investigation facilitate institutional and legislative reforms designed to ensure the rule of law is restored and patterns of unaccountable abuses are not repeated in the future? To what extent can such an investigation contribute to individualising responsibility and avoiding placing blame on entire communities?

As old institutions are dismantled or reformed, new ones must be created in their place. In order to establish public trust in these new institutions, it will be imperative that their legitimacy is not undermined by affiliation with the corruption and abuses of the past. Many Syrians will undoubtedly be eager to ensure those guilty of abusing their past powers are removed from state institutions. A common way to ensure this is through vetting anyone wishing to run for or apply for public office. How can this process be administered in a way that is fair and systematic and ensures that prejudice and rumours do not unfairly target those who are not themselves guilty of misconduct? How can such a process be balanced against the need for security and stability? Can the vetting process effectively be extended to include revolutionaries who may wish to transition from military to political life? What are the potential pitfalls when such a transition is desired and how can they be avoided? Are there positive aspects to such situations that can be exploited to strengthen the future Syria, and how can this be done?

The variety of mechanisms that will form part of Syria's transitional justice process present a major coordination challenge to those charged with its design and implementation. What can be done to ensure that messages are consistent across multiple independent mechanisms? How can costly and unnecessary duplication of work be avoided and victims spared the pain of reliving their experiences more than is necessary? How can the mandate of

different mechanisms be made clear to victims and perpetrators in a way that facilitates their participation, rather than discouraging it through fear and uncertainty?

Some transitional societies, such as Tunisia, have attempted to meet these challenges by establishing a dedicated transitional justice office or ministry as part of the transitional government. Such a body can serve as a point of contact and information and act as a coordinator for all transitional justice initiatives. Would such a body be beneficial to the Syrian process? If so, how could its independence and neutrality be secured, both in practice and perception? How will it be funded? Is there a role for international assistance? Syria's growing civil society is already emerging as a valuable resource for transitional justice. What can be done to build the trust necessary to facilitate cooperation between civil society and a government body of this kind?

These are just some of the questions that Syria will have to answer on the road to transitional justice. There will undoubtedly be numerous challenges, some of which can be anticipated through the careful study of similar processes elsewhere, whilst others cannot. The first and most important step towards securing success is to ensure broad public support and understanding of the process from the very beginning. It is the Syrian public who will be the ultimate judges of the process and the ultimate beneficiaries of its achievements. They, more than anyone else, have to be engaged and relied upon to ensure that accountability stays on the political agenda and that impunity is not allowed to reestablish itself.

