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Towards a Transitional Justice Strategy for Syria

Introduction

Since the beginning of the uprising in Syria in spring 2011, the violence has become a full-fledged, brutal civil war, with the United Nations indicating over 100,000 dead; thousands more wounded, detained, and disappeared; massive destruction of property; and a refugee population that is now estimated at around 2 million, as well as at least 2.5 million internally displaced persons. The endgame to the present conflict is impossible to predict. The prospect of a clean victory with a more-or-less-obvious set of actors capable of taking power, according to some commentators, is becoming less likely by the day.

The evidence of systematic human rights violations during the conflict continues to be documented, and its incidences are mounting daily, including the use of chemical weapons against civilians. The crimes that are currently being committed follow decades of repression and state-sponsored violence that further dim the prospects of an easy or stable transition to a peaceful and more democratic state system in Syria, even in the face of a resolution to the current conflict.

At some point, the authorities of a new Syria—whatever configuration that might take—and members of Syrian civil society will have to consider how to deal with the crimes of the current conflict and the decades of repression that preceded it. Syrian and international commentators have begun proposing visions for a new Syria, including ways in which transitional justice, in particular, may support a different path for the country, one committed to human rights and the rule of law.

This briefing paper seeks to complement those discussions. **It urges five key considerations in the case of Syria:**

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1. The basic conditions on the ground should be assessed to determine whether they can support an accountability process, including but not limited to: adequate levels of security to allow for broad engagement and participation, sufficient social organization to enable meaningful national consultations, and a government recognized as legitimate by significant sectors of society.
2. Accountability processes should engender national ownership and incremental credibility; they should be appropriate to the political and social context and avoid preconceived models and be based on a well-founded understanding of people's sense of justice and demands for accountability, such as may be developed through a broad consultative process.
3. In-country independent assessments, if given adequate time to prepare and implement, are critical to the successful design and implementation of subsequent transitional justice measures.

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4. Transitional justice measures (including truth seeking, criminal justice, reparations, and institutional reform) are most effective at restoring civic trust and preventing future violence when implemented together. Criminal justice alone is not sufficient to confront such histories on a national scale. Experience from transitions around the world shows that the process by which those measures are developed and implemented is likely to be as important for restoring trust as the results of the processes themselves.
5. Expectations for quick results should be tempered from the outset, but a credible and consistent demonstration of political will should be publicly illustrated early on.

When the above guidance is ignored, the opportunities presented in moments of transition can be squandered or, worse, instrumentalized to perpetuate impunity. In Iraq, for example, we have seen how poorly planned interventions on reform and accountability, particularly around de-Baathification, proved disastrous in the medium term, polarizing Iraqi politics and unnecessarily depleting many state functions (see ICTJ's paper "A Bitter Legacy: Lessons of De-Baathification in Iraq" at www.ictj.org/publication/bitter-legacy-lessons-de-baathification-iraq). In Afghanistan, we saw how an initially promising approach by the Independent Human Rights Commission, which focused on consultation, building credibility, and national ownership, withered on the vine due to a lack of political traction and delayed implementation. In Tunisia, where we have perhaps the most stable of all the recent transitions in the MENA region, we can see clearly how difficult it is to make swift progress. Even in a relatively successful model of criminal accountability, one that followed an international peace process and agreement, the national Court of Bosnia and Herzegovina was delayed in starting proceedings due to the time required to conduct assessments and build broad political will. Indeed, credible, nationally owned processes that are perceived as fair will require planning, discussion, legislation, and integrated efforts for effective implementation.

Transitional justice is generally understood to refer to the application of a number of measures aimed at ensuring accountability for serious violations of human rights; they are particularly suited to a context in which a change in national leadership or governance structure opens an opportunity to account for crimes of the past. Faced with the massive scale of violations, the fragility of the state, and competing demands for urgent needs, transitional justice measures seek to restore belief in the idea of fundamental human rights as a basis for the social contract between citizens and the state. In the short- to medium-term, progress is measured in terms of a public sharing of the truth, a credible criminal justice process, a victim-centered reparations program, and reform measures that overhaul compromised public institutions (e.g., police, military, judiciary).

Preconditions for Substantive Transitional Justice Programming

A. Social and Political Preconditions

Transitional justice is premised on the idea of accountability for serious crimes as a necessary element in a rights-respecting democracy. The political minimum requirement for a credible approach to accountability and human rights has to be that the government of the day is committed to those principles and is not actively violating them. From a social perspective, there is little value in talking about accountability for past crimes if repression and political violence persist and existence from day to day is in the balance. Unless the minimum levels of political commitment and openness are demonstrated, along with sufficient degrees of security that allow people to focus on more than their immediate circumstances, detailed policy planning and implementation is perhaps best deferred.

B. Consultation and Assessment

Various national and international interests have a stake in the outcome of the current conflict in Syria, and some may have considerable interest in shaping transitional justice agendas. There will be demands for immediate progress and complaints that things are going too slowly, or that the opportunity for change is being missed and that vested interests are being entrenched. The challenge is how to meet these often legitimate concerns effectively.

The first important challenge to recognize is the scale of the destruction of both infrastructure and the social and moral fabric of the country. Syria will continue to face a monumental humanitarian crisis where the first order of business will be ensuring food, shelter, medicine, and the return of millions of displaced persons. In this challenging context, creating unrealistic expectations for the timeliness of accountability measures will only exacerbate disappointment when they are not met. Much work has been done by numerous parties in collating information about alleged violations, and various parties will push strongly to have that information used. Many will likely advance arguments that there is no need to wait, with pressure for immediate prosecutions, even if there is insufficient information to justify some convictions. This would be a serious mistake. All of the efforts to obtain information are associated with different factions and support networks, both nationally and internationally, and cannot be divorced easily from their origin. While the information gathered may be of immense value, it will have to go through a process of neutralization and analysis by objective and credible parties with national legitimacy.

Rather than rushing to a particular set of procedures or mechanisms, what is likely to be of more value in Syria is a comprehensive process of planned assessment and consultation that will provide recommendations for specific measures. That process should have three key aims:

1. To capture as much information as possible from a broad spectrum of the Syrian population, both on the issue of violations suffered and on what measures they feel would be necessary to help create a rights-respecting state for all. That process could include multiple forms of interviews, debates, town hall meetings, and roundtable discussions throughout the country.
2. To allow the national institution (e.g., Human Rights Commission) charged with carrying out assessment and consultation the opportunity to develop legitimacy and credibility and essentially play a vanguard role in re-establishing the trust of citizens in their state. This will be a challenge in any event, but it will be easier to develop trust and credibility in a needs assessment and consultation exercise than by rushing to create immediate delivery mechanisms that will face unrealistic expectations.
3. To allow time for genuine ownership of the process to develop in Syrian society, rather than imposing it at speed and creating suspicion that efforts are being manipulated behind the scenes.

While any effort towards accountability risks raising expectations, perhaps the greatest risk with the proposed approach is that political actors will feel that opportunities and time are being wasted, and that one has to strike at the moment of opportunity. All efforts have to try to find a balance that both takes advantage of the opportunities that exist and manages expectations. Experience in other transitions suggests that stressing the importance of building a credible process should take precedence over pushing for quick results. The most immediate objective should be to establish a nationally owned and respected process that embraces and promotes the possibility of engendering a rights-respecting society through truth,

justice, reparations, and reform. While political actors may find it difficult to accept that speed is not of the essence, examples abound where the rush for results has been rootless and unsustainable. Speed is not unimportant, but, rather, the choice of what is done quickly is what matters. In the case of Syria, the most important thing will be conveying a message of credible national ownership of a legitimate process and moving to make that happen in a concrete way. Above all, this means mapping, assessing, and consulting. The biggest mistake for the international community in the short term would be to impose or be seen as imposing a model that does not have the backing of a legitimate, nationally owned process.

C. The Consultation and Assessment Process

It is highly likely that a UN-integrated mission will be placed in Syria after the end of the war or in a conflict-management situation. If that happens, the mission's human rights section will be responsible for the support of transitional justice. That section should first support the creation of a national human rights body, as happened, for example, in Afghanistan with the creation of the Afghan Independent Human Right Commission (AIHRC). The AIHRC and the work of the UN mission to help create it was one of the success stories in the early years of the post-Taliban era. The ultimate lack of political will to implement much of what was recommended was regrettable, but not due to the good work of the UN and the AIHRC. At the same time, lessons from Afghanistan show that if the international community is serious about accountability, they have to be prepared to support the technical work carried out at the political level. In Afghanistan the issue was left too late and was continually deprioritized as former and current warlords continued to exercise more and more power.

The initial work of an independent human rights commission on accountability should be to devise a programme of extensive mapping of violations as part of a broader process of consultation and assessment, not to carry out a truth commission or a commission of inquiry. One of the lessons learned in recent times is that the proliferation of immediate and overlapping commissions of inquiry can increase fatigue, scepticism, and confusion on the part of the public. Initial efforts should be directed at mapping of violations and attitudes as well as identifying capacities and possibilities for dealing with them. Individuals, academics, civil society organizations, victims' groups, and political and religious actors should all be consulted.

The commission should have adequate staff and resources from the beginning to allow it to carry out its mission, which would require not only a headquarters in Damascus, but also a number of regional offices throughout the country.

There will be a strong demand for such a commission to carry out its work and report within a short period. There are a number of complex tasks involved in such an endeavour, all of them frequently taking more time in practice than planned for. Commission members would have to be vetted and recruited—a very complex process in itself; a work plan owned by the commission would have to be developed, which would have to follow some degree of training and orientation; only then could field work begin and the nature of that will depend very much on issues of both outreach and security. A meaningful process would rely significantly on a well-planned outreach operation. Again, this process is not a truth commission, but a mapping, assessment, and consultation process to inform subsequent measures. Finally, an authoritative and credible report would have to be written—a process in itself that will almost certainly take several months. Even with strong cooperation from a new national government and other relevant actors, an aggressive timeline indicates that the overall process could take a bare minimum of twelve months.

This does not need to take several years, but if the initial process does not allow the time necessary to encourage trust and confidence, the rest will be built on sand. Ensuring transparency, setting expectations, and providing for a well-planned and robust outreach program that reaches affected communities and the general public can contribute to countering the pressure for immediate results based on victor's justice.

Considering Transitional Justice Approaches for Syria

The particular ways in which Syria chooses to address past violations of human rights should come out of the consultation process. It is, therefore, not the aim of this paper to offer prescriptive ideas on the details of truth commissions, national prosecutions initiatives, reparations programs, or institutional reform measures. Based on its experience, ICTJ believes firmly that all of these measures, taken together, offer more than the sum of their parts and that a combination of these four measures makes the most sense for societies in establishing a strong bulwark for the prevention of future abuses; transitional justice is not justice à la carte. This does not mean that each mechanism has to be applied simultaneously. Indeed, there are generally important reasons for sequencing different measures depending on the political situation, needs, capacity, and resources. But it does mean that consultation should be informed by an understanding of the complexities and opportunities offered by the range of measures and that planning for these should be based on an understanding of the relationship between them.

Some will suggest that accountability refers solely to criminal justice, and that transitional justice relates to other measures of justice; some may frame the debate around a “choice” between criminal justice and the other measures of transitional justice. It is hard to think of a more damaging misconception. Criminal justice is a central part of transitional justice, not a separate concept. Transitional justice is about vindicating rights that have been massively abused and restoring trust in institutions that have failed citizens. The justice sector, above all, bears the responsibility of protecting fundamental rights, but it cannot bear the weight alone. Truth commissions, reparations, and reform measures should not, however, be understood as alternatives to or replacements for criminal justice measures in cases when not all perpetrators can be prosecuted, in part due to their sheer numbers. This misunderstands the role of different measures working together to help restore the broken mosaic of the social contract. Each measure in transitional justice deals with a particular problem, but taken together, if effective, they can contribute to the following: re-establishing a critical mass of trust in the new institutions of the state, restoring the belief that the fundamental rights of citizens are taken seriously, and diminishing the prospects of a repetition of atrocities. Establishing any of these measures is immensely complex, requiring legislation, training, and years of detailed technical work. All of these will be needed, but in the short term, the aim should be to ensure that Syrians identify these needs for themselves, albeit encouraged and mentored wherever possible.

Finally, it is well understood that a significant amount of work has been done and large collections of data and documents already exist with regard to systematic human rights violations in Syria. One question is what should happen with this information. If such collections are handed over to a specially created department of a UN Mission, when established, the department should work with a national commission to ensure that information is properly controlled, does not get into the wrong hands, or risk the safety or due process rights of any individuals. Similarly, efforts to obtain and preserve documentation should, as far as possible, be coordinated through the UN mission and the national commission to ensure both good practice and maximum efficiency. A UN mission department dealing with

such matters should include experienced staff with expertise on archiving, consultation, and transitional justice mechanisms.

Conclusion

This paper focuses on establishing the architecture for mapping, assessment, and consultation in Syria, as opposed to focusing on the creation and establishment of specific transitional justice measures themselves (e.g., hybrid courts, truth commissions, reparations programs). ICTJ's comparative global experience shows that if the process of adopting measures is anchored in the society itself, the chances of effectively addressing abuses of the past are much greater and, thus, accountability and restored trust much more likely to be the result.

Further Reading

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