

# Transitional Justice in Syria

Practical Solutions



المركز السوري للإعلام وحرية التعبير  
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This booklet has been created by the  
**Syrian Center for Media and Freedom of  
Expression (SCM)**

with the support of the  
**Friedrich-Ebert-Stiftung**

P.O. Box 116107 Riad El Solh |

Beirut 1107 2210 | Lebanon

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# Contents

<b>Introduction</b>	2
<b>Recommendations</b>	4
<b>Forum Sessions</b>	9
<b>Transitional Justice: Concepts - Constitution – Reality and Challenges.</b>	11
Transitional Justice Mechanisms: Reparation and Truth Commissions	12
Truth Commissions	12
Compensation or Reparations Frameworks	15
Transitional Justice and the Constitutional Process	16
Syrian Constitutional Committee	18
<b>Transitional Justice and the Fate of Missing Persons</b>	20
Enforced Disappearance and the Fate of Missing Persons Within the Context of Transitional Justice	20
Detainees, Forcibly Disappeared Persons, and Transitional Justice Mechanisms	21
Political Transition	21
Independent Bodies in the Constitution	22
Institutional Reform	24
Guarantees of Non-Recurrence	25
Right to the Truth	25
Compensation and Reparation	26
Lawsuits and Accountability	26
<b>Documentation and Memorialization, Narrative Documentation and Victims Organization</b>	28
Documentation and Memorialization	28
Victims' Right to Privacy and Dignity: Between Exploitation and Redress	29
Civil Society Organizations and Documentation Mechanisms: Obstacles and Experiences	29
Survivor Groups and Families of Victims (Caesar Families Association)	30
The Truth and Justice Charter	33
<b>Accountability: Its Current and Potential Mechanisms</b>	33
Current Judicial Proceedings and Their Place in Transitional Justice	34
Possible Accountability Mechanisms in Syria	36
The Role of Civil Society in Strategic Accountability Processes	37
In the Course of Trials and Litigation: Notes on the Koblenz Trials	38
<b>Conclusion</b>	42
Findings	42
<b>Key Concepts and Terms</b>	47
<b>References</b>	51

# Introduction

In an effort to establish a sustainable framework for Syrians at home and abroad to promote dialogue among relevant stakeholders, find common ground and broaden communal support for undertaking the course on transitional justice, the Syrian Center for Media and Freedom of Expression, in collaboration with the Friedrich-Ebert-Stiftung (FES), launched the Transitional Justice Forum. The Forum is a safe space for free and open discussion, capacity-building and developing transitional justice mechanisms, and it aims to maximize the effectiveness of the Syrian movement within the framework of the Center's unwavering vision for how to challenge the discourse of defeat, resignation or evasion of failure. Often blaming the international community or the entire Syrian population, this discourse can only be confronted through civil and legal initiatives based on human rights principles, which are the best, and perhaps only, roadmap for overcoming the current national impasse and the broad sense of overwhelming futility. The Forum also stresses the need to take a peaceful and judicial path to retaining rights and holding perpetrators accountable, as well as the importance of restoring faith in the value of the law, renouncing violence, reviving society, raising awareness about common values and shared histories, and building a collective understanding and vision of Syrians' shared cultural, social and political roots, as well as the lives and fates they share.

The Syrian Center for Media and Freedom of Expression was the first to introduce the concept of transitional justice in practice in Syria. With power transferred to Assad Jr. in 2000, a climate of optimism, which may have spread to render his inheritance of power smoother, emerged in Syria. With it came calls for comprehensive national reconciliation, the country ridding itself of the legacy of tyranny, and the belief that change was possible,<sup>1</sup> as well as redrawing the relationship between the people and the government and between the authorities

and the opposition in its various forms. It was hoped that this would be seen in tangible steps, thereby opening the door to development and curbing penchants for hostility, fear, revenge and decline. These calls, which were ended by the perpetuation of governance through domination, returned and were reinvigorated after the withdrawal of the Syrian army from Lebanon, which inspired hope that the authorities would start reevaluating or changing their behavior. Transitional justice thus became broadly discussed among intellectuals and human rights advocates. Seen as a just framework for getting past the legacy of human rights violations that began in the 1970s and continued through to the massacres of Hama and beyond.<sup>2</sup> At the time, the director of the Syrian Center for Media and Freedom of Expression, the lawyer Mazen Darwish presented a transitional justice project to the political authorities who ignored it and insisted on dealing with the exacerbating national crisis by denying its existence. [The crisis] therefore deepened and extended, putting society as a whole at an impasse. We thus saw the revolution and paid its extremely high costs, which could have been avoided if the authorities had seized one of the historical opportunities for reconciliation they had been offered.

Reconciliation, which was needed at the start of the millennium, seems, after the bloodiest decade in the country's history, a necessary prerequisite for any agreement or solution to the conflict. Achieving it demands nothing less than a historical settlement that removes the contradictions we have seen since the Baath Party coup. Indeed, it requires a reconciliation process that adopts a long-term community project that creates a national consensus among the various components of society and paves the way for a new social contract and national charter that redefine the state and national identity, the relationship with the region, the governance framework and the nature of the relationship between the three branches of government, integrating all of these elements into the constitution and a series of laws that protect the country



from tyranny, or any form of violence, and imposing changes to the structure of state institutions that enable them to perform their security-related, social and political functions efficiently and to the benefit of the community. Among the requirements for reconciliation, accountability takes precedence over other requisites or elements. Without it, the concept of reconciliation is hollowed out entirely. It becomes an instrument of power in the face of the people that deprives them of their rights under the pretexts of forgiveness or general amnesty. Here, accountability does not imply punishing all the perpetrators, but rather determines the punishment they are due, which is a necessary prerequisite for forgiveness. Refraining from ensuring accountability would fuel violence, the desire for revenge as a means to retain rights and settle accounts, and the violation of human rights. It would entrench the culture of impunity, as those who see nothing to deter them from taking the actions they had taken in the past would not hesitate to repeat them if given the opportunity.

No reconciliation or settlement prosecution and conviction of criminals alone would achieve the justice demanded by the Syrian people. Criminal justice that does not view the crimes from the point of view of the victims, but focuses instead on the perpetrators who violated laws and must be punished, does not achieve justice in the broad sense, the minimum requirements of which must be integrated into the process of transitional justice. They include, in addition to holding the criminals accountable, guaranteeing the rights of victims and their families to effective redress, justice and reparations, as well as their right to know the truth, which all come together in transitional justice. The institutions working on the process of transitional justice must be given the tools needed to achieve its objectives, and this needs genuine political will. A segment of the elites must be aware that there is a need to agree on humanitarian principles, going beyond local differences and national division to establish shared trust among the parties to the transition process. This recognition must

also be based on broad recognition that the choices of the past taken at various levels have led the country to a state of complete stagnation, left the country behind on every metric, and that going back to the course is not an option.

In addition to the political will, which is the most prominent obstacle in its path, the transitional justice process is hindered by several impediments and subjective weaknesses, which must be addressed by presenting them to previous public debates or taking them into account when preparing and designing policies for their implementation. At the forefront of those obstacles is the lack of a historical experience of state-building and institutional memory in Syria, which has been ruled by the same family for almost half a century and left the country without experience in managing political pluralism, an issue plaguing the Syrian government and opposition alike. Another is the involvement of regional forces in the conflict and their efforts to build popular bases of support for their projects through groups that sell their decisions to whoever feeds, funds and arms them. A third obstacle is the country's legislature, which is structured to fortify the authorities' position and their immunity from the crimes that they commit. Total full impunity begins with the constitutionally immune President of the Republic and does not end with the direct perpetrators of the crime, and it has been built on a clear and applied legal text for decades.

The judicial cover provided over decades for violations presents those making any future attempt at transitional justice with a very delicate problem. How are they to deal with the judicial system that had been implicated in repression and human rights violations, granting those behind them with legal cover or taking part themselves. Nonetheless, it is supposed to play a crucial role during the first phase of democratic consolidation and institutional and social reform. The problem stems from the fact that it is impossible to completely replace or change the judiciary, while any reassessment of the past through truth commissions or other bodies

necessarily includes reconsidering the trials that had been held without respect for the most judicial standards. Thus, because it had been implicated in tyranny for decades, the judiciary will be among the staunchest opponents of change and the institutions most hostile to the idea of transitional justice.

These obstacles would not be the only ones on the path to transitional justice. Indeed, it is a path brimming with mines. Still, it is the only path that ensures a transition from the havoc of violence to the establishment of peace, upon which a national project could be built. This project would not emerge by chance or random progress. Rather, it is governed by a complex and intertwined set of causes, conditions and circumstances in which the subjective and objective, internal and external, economic and cultural are connected, and a complex set of forces and motivation of various forms and degrees of influence, which mature with the conditions of time and space, but they all begin with will.

## Recommendations

### Establishing a Community of Transitional Justice

- \* Through activities including workshops, conferences, and forums that provide opportunities to build the capacities of actual stakeholders and empower them through enhancing their understanding of the concepts of transitional justice so they can spread the word and highlight how they can be of benefit in the Syrian context, as well as dedicating particular activities to marginalized and vulnerable groups, such as the elderly, people with disabilities, adolescents and the diaspora.
- \* Conceptualize transitional justice and its application in national contexts. Emphasize that transitional justice

is not only based on justice, truth, reparations and guarantees of non-recurrence, but is also an open space that does not adopt the same single approach to all cases or parachute approaches from other places. Indeed, it is a process that prioritizes and inspires local conceptions of justice, reconciliation, peace and healing.

- \* Work to mitigate negative stereotypes about transitional justice and narrow conceptualizations of what it implies, focusing especially on the concepts of justice, reparations and peace. Work to manage and guide expectations regarding compensation in particular, and emphasize the fact that reparations are not limited to financial reparations. This is of particular significance given that any future government would have a limited budget that would not allow for the provision of generous monetary compensation and would not be able to meet the demands or needs of victims.
- \* Emphasize the centrality of the role of victims in the pursuit of transitional justice, and put victims at the center of policies aimed at achieving this, thereby ensuring that the visions, aspirations and needs of victims are met. Doing so also creates a strong bulwark against pressures and agendas that goes against the vision of victims for transitional justice, accountability, the negotiation processes and the political transition.
- \* Call on civil society organizations, especially those representing victims and marginalized groups, to work on building the capacities of their members and empowering them to play a central role in ongoing discussions. This can be achieved through programs aimed at building knowledge about and capacities that help ensure transitional justice, accountability and good governance,

as well as raising awareness about legal matters and familiarity with the options for pursuing accountability. Capacity-building programs may also include comparing approaches to truth-seeking and reparations, and mechanisms for promoting reconciliation.

- \* Launch cultural and media programs that pave the way for the transitional justice process in isolation of political developments. Open the door to national initiatives and projects at the grass-roots level aimed at reaching a national settlement that adopts a long-term community reconciliation project based on truth, accountability, reparations and guarantees that violations will not recur.
- \* Begin to draw the transitional justice framework and launch national-level dialogue among all those involved in transitional justice in order to formulate a tailored approach for future monitoring and evaluation that would allow for assessing progress, monitoring results and reviewing the course justice is taking annually or biannually, with a view to changing or amending policies and programs that have not made progress.
- \* Strengthen links between academics, policymakers and civil society organizations in order to establish a clear framework for the application of programs and mechanisms, balance theoretical or academic formulas with the facts on the ground, assess priorities based on the needs of Syrians, and assess contextual challenges and institutional capacities to develop realistic participatory transitional justice policies based on the principles of equality and non-discrimination and are effective and sustainable.
- \* Launch management capacity building and training programs for

Syrians within the framework of a national strategy to train cadres whose skills would allow them to fill future transitional justice institutions and state institutions, as achieving justice and institutional reform cannot be done by weak and politicized institutions.

- \* Start working on the development of comprehensive plans, policies and measures aimed at ensuring the right to reparations for victims of gross violations and human rights abuses. Ensure that all reparation programs are developed in cooperation with victims and are designed and implemented in a gender-sensitive manner.
- \* Start conducting comprehensive studies of Syrian legislation, identify legislation and laws that are inconsistent with international conventions and international human rights law, and identify laws that need to be amended or completely repealed.
- \* Adopt transitional justice curricula and mechanisms. Call on academies, universities and educational institutions to integrate transitional justice and national reconciliation into their curricula.

## **On Drafting the Constitution**

Emphasize, demand and lobby for the future constitution to include the following:

- \* A provision that defines transitional justice as foundational and necessary for the transition to a state of social harmony and political stability, as well as ending the relations that create violence by laying the groundwork for transitional justice without mentioning the measures that would be implemented. This is the case for the constitution of South Africa; Article 25 of its constitution

stipulates “redressing the results of racial discrimination” without setting limitation. Another option is obliging the legislature to adopt the transitional justice system as defined by a particular constitutional framework, as is the case with the Tunisian Constitution (art. 148, para. 9) or the Constitution of the Arab Republic of Egypt (art. 241).

- \* Stipulate the independence of the Constitutional Court plainly and unequivocally. The Constitutional Court is the umbrella institution that safeguards rights and freedoms by issuing rulings over the constitutionality of laws passed by the legislature and whether or not they violate the International Bill of Human Rights.
- \* Stipulate the establishment of independent constitutional bodies tasked with ensuring adherence to the constitution’s principles and compliance with its provisions, the democratization of institutions and the implementation of the rule of law. One example is human rights commissions, which operate totally independently from the executive branch and are keen on maintaining impartiality and avoiding political controversies, and are subject to parliamentary and judicial oversight in a manner that does not compromise their independence.
- \* Prohibit the establishment of special criminal courts and civilians being tried before military courts, whose jurisdiction must be clearly defined in the new constitution in order to ensure that they only hold trials for military personnel, who are to be tried there solely for crimes tied to the military, while ensuring a fair trial.
- \* Include effective constitutional oversight mechanisms for monitoring security services and ensuring they

are held accountable for violations of the law. Affirm the principle of the armed forces and the neutrality of security agencies and place legal limitations on their tasks and duties.

- \* Stipulate that the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, are the Syrian Constitution’s only reference documents. This ensures that no future ruler can undermine rights and freedoms in the name of cultural particularities, the resistance or any other slogan.
- \* Stipulate the establishment of a special body independent of the executive branch, or a parliamentary committee, to oversee prisons and detention centers. This should not substitute, but rather supplement judicial oversight in order to ensure dual oversight and that arbitrary detention and enforced disappearance do not recur.

## **On the Question of Detainees and Missing Persons**

- \* Affirm that the question of detainees and missing persons should be off the political negotiation circle and that any future amnesty exclude those guilty of kidnapping, arbitrary detention and torture, as no authority has the authority to grant amnesties for violations of international humanitarian law.
- \* Coordinate the efforts of Syrian civil society organizations working on documenting human rights violations in order to establish a national database at the national level. Work with international bodies, such as the International, Impartial and Independent Mechanism, that can support investigations and



prosecutions of the most serious crimes committed in Syria since March 2011 within an institutional framework that allows for the collection of as much information and evidence as possible on the grave crimes that were committed over that period, and it paves the way for holding perpetrators accountable.

- \* Stipulate that transitional justice programs must include reparations for human rights violations resulting from enforced disappearance. Stress that compensation should not be confused with social protection measures that any government is obliged to provide to families that have lost their main breadwinner, as well as ensuring the rights of victims and their families to resort to justice and compensation in the event that they can prove they have been psychologically or physically harmed.
- \* Prepare plans and assess the requirements for and potential outcomes of applying transitional justice to the missing persons' file. This includes holding recognition hearings, a basis for building trust and overcoming the horrors of the past, as well as working to ensure that reparations and compensation are handed out, thereby promoting social harmony, satisfying the collective desire for justice, and restoring the trust of victims in the state.
- \* Establish a national fund to support the families of missing and disappeared persons. Seek sustainable sources of funding to ensure that the victims and their families harmed by the crimes committed against them can receive the medical, psychological, social, economic, legal, and humanitarian assistance they need, regardless of whether the harm is physical, psychological, or material.
- \* Establish a map of mass graves in

Syria, identifying the graves where evidence of particular relevance to criminal proceedings can be found, preserving them so they can be used as evidence in trials, truth commissions, compensation procedures, historical testimonies, and other frameworks Syrians may develop in the future. Work with human rights organizations that have documented severe violations of international human rights law over the past decade to identify the largest number of mass graves possible.

- \* Develop an integrated national plan for the provision of funding and special training for information-gathering and storage programs for Syrian teams. Train Syrian experts on exhumation and the identification of bodies so that these tasks are carried out in accordance with international standards. Emphasize the need to standardize scientific protocols, enumeration and documentation systems, the evidence collection process, and the framework for identifying victims from their remains.
- \* Fund and train information collection and storage programs, expanding forensic capacities, procuring adequate equipment for the storage of bodies, and building facilities adequately equipped for the examination and identification of remains. Initiate an integrated national plan for obtaining DNA samples from families of missing persons at a national level and establish a missing persons database.

## Families of Victims

Manage the documentation of violations as a process that goes beyond individual rights and whose outcomes have repercussions for society and future generations:

- \* Share information and files about the disappeared and their conditions with a credible international or local body while prioritizing the personal safety and security of the missing persons.
- \* Preserve any photos of the victim, try to collect photos from their extended family or friends, and keep all their identification documents.
- \* Make a record of what the disappeared person had in their possession on the day they were forcibly disappeared. Keep a comprehensive list of their belongings and clothes, as well as any information that may help reveal their fate. Make a record of all the dates and information in the possession of the family and arrange them in chronological order.
- \* Maintain documents, including the medical history of the victim, especially dental radiographs, and any medical files, lab results, or reports if they had previously received medical treatment or had surgery.

## On the Accountability Effort

- \* Raise awareness among Syrian refugees in Europe about universal jurisdiction and the frameworks for investigating and prosecuting those who have broken international law. This helps manage expectations and gives them a realistic, grounded view of the potential outcomes and likelihood of prosecution. In concord, raise awareness among refugees about their right to raise lawsuits in the event that they had been directly violated; teach them about their

rights to and the role they can play in investigations or criminal justice proceedings if they have information relevant to the trials.

- \* Manage expectations regarding the limits and impact of litigation under universal jurisdiction or before European Courts- explaining that waiving the President of the Republic's immunity, for example, is not possible because it is tied to the question of sovereignty and that rulings issued in absentia have no punitive implications for the perpetrators. They only restrict victims' freedom of movement and their ability to travel to the European Union, and arrest warrants are issued by the courts.
- \* Coordinate efforts to establish a national access to justice strategy in order to formulate a multilayer approach in the medium and long term, which would include litigation under universal jurisdiction if the conditions are met and other judicial frameworks at the international and national levels. Make use of available United Nations procedures and mechanisms to maximize the number of victims who can participate, with a view to preventing the perpetrators from going unpunished for their crimes.
- \* Within the framework of the aforementioned strategy, work to establish a translation unit that prioritizes the employment of Syrians, employing foreigners only when this is necessary for translating important decisions, judgments, and press statements tied to trials of crimes committed in Syria. Translate forms requested by courts, law enforcement agencies, and digital forms, into Arabic first and then to Kurdish at a later stage.

## Forum Sessions

Over four sessions that could be described as foundational, the Forum hosted select Syrian and Arab experts and activists from human rights organizations, victims' associations, the Constitutional Committee, and civil society organizations working in transitional justice in Syria. They discussed ways to respond to the systematic and widespread human rights violations committed during the conflict and before it began, with the aim of shedding light on the crimes committed against victims and their suffering, to render peace, reconciliation, and democracy more achievable, adapt judicial procedures to suit the situation in Syria, and ensure two necessary requisites: the perpetrators being held accountable and redress for the victims and their families, thereby attaining the justice possible under current political circumstances.

In the sessions that were shared on social media, attendees shared their divergent visions on how to achieve equitable solutions and what mechanisms should be adopted to achieve transitional justice. That will not provide a magic solution that clears the rot that had accumulated over decades, nor will it compensate for the gross human rights violations committed during the conflict. However, it does lay the groundwork for long-term social and political struggles for justice, address the repressive and inhumane legacy of the regime, remove the traces of dictatorship, and establish a serious national strategy for reducing impunity, supporting and strengthening civil peace, and ensuring that the transition is made in a manner that is consistent with their ethical and legal standards rather simply being a means to an end, even if this end is legitimate, as means and ends are tied to one another.

The first of the outputs of the Forum was four papers that include the contributions of the speakers, which are all presented in this booklet. In order to achieve its goals of summing up transitional justice, proposing recommendations for developing transitional justice policies, and showing

those concerned and interested perceptions different to their own, only the segments on the contributions to practical issues were included. Historical narratives, repetition, and in-session deliberations were not shared. The contributions can be found on hyperlinks in this booklet. We do not claim that this booklet represents a guide or a program of action. Rather, it is a transcription of the presentations of the speakers, in which they explain their visions as representatives of civil society on how to deal with the national impasse left by the dictatorship and years of conflict. It also marks the beginning of an invigorated public debate on transitional justice, which had begun among elites at the turn of the millennium and expanded with the revolution. Because of the heightened awareness about human rights and the access to information provided by today's means of communication and technology, a public debate is ongoing among Syrians, whose collective satisfaction remains the basis for any processes or programs dealing with the past and charting the future of Syria.

### **Transitional Justice Forum Moderator:**

Former National Coalition for Syrian Revolutionary and Opposition Forces Vice President and former editor-in-chief of the government newspaper Tishreen, as well as Al-Watan, **Samira Al-Masalmeh.**

### **Session 1: Transitional Justice: Concepts - Constitution - Reality and Challenges:**

The session tackled the concept of transitional justice and its procedures, truth and reparation commissions, and a reading of transitional justice and the constitution, discussing how they affect one another. Constitutions encompass symbolic indications of a fundamental shift away from the preceding national trajectory and introduce new regimes that transform how power is exercised. Thus, this study could be considered a safe gateway to a political and social contract and a starting point for any future democratic transition.

- \* **Mr. Said Benarbiya:** international law consultant, senior legal adviser to the International Court of Justice.

- \* **Ms. Maryam Alhallak:** representing civil society, a founding member of the Caesar Families Association.
- \* **Judge Anwar Majanni:** legal adviser to the NGO The Day After, member of the Constitutional Committee, representing civil society.

### **Session 2: Transitional Justice and the Fate of Missing Persons:**

In this session, participants discussed the question of detainees, the forcibly disappeared, and the multifaceted violations involved in each individual case in which the perpetrators hadn't been held accountable, compensation and redress for the victims, the role of transitional justice, and the avenues for benefiting from its various programs. Participants of the session proceeded to discuss how to address this question and incorporate it into the constitution, the formation of independent bodies tasked with tackling the issue of missing persons and detainees within the framework of transitional justice, and the importance of focusing more on victims and society as bearers of peace than criminal accountability, though the latter is not to be neglected.

- \* **Dr. Nizar Ayoub** is a researcher and academic and human rights activist in the occupied Golan Heights- specialized in international human rights law.
- \* **Mr. Ahmad Helmi:** A Syrian activist who had been detained by the Syrian government for three years in nine different prisons, one of the founders of the "Ta'afi" initiative to support prison survivors and torture victims and achieve justice and ensure accountability in Syria.
- \* **Ms. Alice Mufarrej:** Syrian politician, member of the Supreme Negotiation Committee of the Syrian Revolutionary and Opposition Forces in charge of the file of detainees and forcibly disappeared persons.

### **Session 3: Documentation and Memory Preservation, Narrative and Documentation, and Organizing Victims:**

The session dealt with documenting violations, which is crucial for both traditional justice- that is, holding the perpetrators accountable and prosecuting the entire institution- and transitional justice, as the documentation process prevents tampering with or manipulating the historical narrative. It thus ensures collective recognition of human rights violations and that survivors and subsequent generations understand the historical context that led to their suffering, allowing them to turn the page on the past and reconcile with it without erasing or trying to forget it. This session also tackled survivors' associations, victims, and their families in Syria, as such played a central role in the fight against policies of impunity in other countries.

- \* **Ms. Yasmine Mashaan:** Caesar Families Association Internal Liaison and Coordination Officer.
- \* **Ms. Medya Dhir:** Director-General, Fraternity Foundation for Human Rights, working on documenting violations.

**Session 4: Accountability:** Accountability for gross and large-scale violations of human rights in Syria, which have become of unprecedented severity over the past decade, was undermined by the structural failings of the international judicial system, which allowed perpetrators to get away with their crimes and show them that there is nothing to deter them from perpetrating them again. The session also addressed the paths to accountability available to Syrians and provided a detailed review of the trial of an officer and a member of the Syrian security forces in Koblenz, Germany, under universal jurisdiction.

- \* **Mr. Tariq Hakan:** Human rights lawyer since 2000. Director of the Legal Office at the Syrian Center for Media and Freedom of Expression.
- \* **Ms. Joumana Seif:** Syrian lawyer, she

is currently a research fellow working with the International Crimes and Accountability Department at the European Center for Constitutional and Human Rights, and she heads The Day After, an NGO working toward a democratic transition in Syria. She is also a founding member of the Syrian Women's Network and the Syrian Women's Political Movement.

- \* **Mr. Ibrahim Olabi:** Lawyer based in the United Kingdom. He holds a Master of Laws degree from the University of Manchester. He is the founder and director of the Syrian Legal Development Program, which supports victims of human rights violations and civil society through international law. He is also a former adviser to the Office of the United Nations High Commissioner for Human Rights and the International Bar Association.

## Transitional Justice: Concepts - Constitution – Reality and Challenges.

What justice awaits me, the mother of a martyr.

Every person who was martyred after being tortured had been subjected to several human rights violations: arbitrary arrest, enforced disappearance, torture, and extrajudicial killings. My son was subjected to this twice. He survived the first time but not the second. After only five days in detention, he was martyred.

However, he was not tortured in prison, but at the University of Damascus, in an office room at the Faculty of Human Medicine, which members of the Student Union had turned into a detention center and filled with tools used to facilitate torture.

Thirteen vicious, regime-affiliated thugs (shabeeha) beat him, pulled his toenails, pierced his ears with needles until he bled, and Iyad Taleb struck him on the head with a large stick. My son Ayham fainted immediately, so Taleb poured hot water over my son's head to force him to regain consciousness. He and another torture victim with him were taken to Branch 215.

That's where his internal bleeding began. His skin turned blue because of the blows to the head. The detainees asked the warden to allow him at a hospital, but he replied: Leave him be, and when he dies, let me know. And that is what happened. When his cellmate realized that his body had gone cold, he summoned the warden, who brought a doctor who declared him dead and put a sticker with the number 320 on his forehead.

I am telling you the story of my son so that the perpetrator who should be held accountable is identified.

Is it the man who heads the regime that allowed his security apparatuses to commit all these violations?

Or was it Ashraf Saleh who had him detained in Damascus University?

Or is it the man who dealt the lethal blow to head, Iyad Taleb?

Or is it the warden who refused to allow him medical treatment?

As you can see, I have the names of the people who killed my son, and I have witnesses.

I await justice, the perpetrators being held accountable, finding his remains in one of the country's many mass graves, burying him in a tomb worthy of his humanity, and honoring him by having a hospital in his city named after him, one of the first doctors to become a martyr.

From the intervention of **Ms. Maryam AlHallak**



## Transitional Justice Mechanisms: Reparation and Truth Commissions

After the cessation of conflict, Syrians must adopt effective mechanisms to address the atrocities that have torn apart their society and devastated the country, causing them tragedies and hardships that cannot be imagined or easily forgotten. In light of this painful and complex reality, a Syrian political consensus on transitional justice is the necessary and most effective path to bridge schisms and alleviate severe divisions within Syrian society. Post-war Syrians must realize the right to the truth, to reform institutions, compensate the victims, and hold criminals accountable. These demands will inevitably be rejected by conflict parties all of which have been involved in serious violations of human rights, albeit to varying proportions, and whose opposition to the transitional justice process should not constitute an excuse for delaying it. The mechanisms of transitional justice must start to be implemented, in successive stages if necessary, while managing expectations and raising awareness that transitional justice does not lead to rapid or immediate results, especially with regard to accountability. Therefore, it is necessary to provide the opportunity and time to achieve the desired goals and results of transitional justice by enabling the people, national institutions, and civil society organizations to play a fundamental and effective role in the development and formulation of programs that consider the realities of Syria and ensure the participation of the largest possible number of Syrians. This could result in a national formula for transitional justice and its mechanisms, achieve comprehensive national reconciliation by stopping the persistent violations of human rights, investigating past crimes, identifying and punishing those responsible, compensating victims, and preventing the recurrence of violations. To achieve those goals, transitional justice adopts a range of judicial mechanisms to prosecute and try perpetrators of serious

crimes who bear personal/individual criminal responsibility for their criminal acts, and non-judicial mechanisms that support and complement judicial mechanisms such as truth commissions, fact-finding missions, reparation and/or compensation for victims, institutional reform, and victim remembrance and memorialization, among others.

### Truth Commissions

Truth commissions are bodies mandated to conduct formal investigations into past human rights violations in order to establish an accurate historical record, as has happened in many countries such as the Democratic Republic of the Congo, Guatemala, South Africa, and Morocco.<sup>3</sup> These commissions enjoy administrative and financial independence, and are established during periods of political transition, whether from war to peace or from tyranny to democracy. They give priority to the needs of victims and how to meet them. At the end of or during their work, they submit reports or recommendations on their findings. This may include reparations for victims, and proposing legal and institutional reforms necessary to promote reconciliation. However, these recommendations are not binding<sup>4</sup> and truth commissions are not a substitute for prosecutions, as they attempt to do something different from prosecutions by providing a much broader level of recognition and consequently reducing the culture of denial. In general, these commissions have requirements to complete their work, including:

#### **Ensuring the independence, impartiality, and competence of the commission:**

Inquiry commissions established as part of the transitional justice process must be independent, impartial and qualified. The basic criteria for ensuring this are laid out in Principle 7 of the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity. "Commissions of inquiry, including truth commissions, must be established through procedures that ensure their independence,

impartiality and competence. To this end, the terms of reference of commissions of inquiry, including commissions that are international in character, should respect the following guidelines: “

- \* They must be established in line with criteria that build public confidence in the qualifications and impartiality of its members by highlighting their experience working in human rights and, if necessary, experience working in humanitarian and human rights law. They must be established according to criteria that guarantee their independence.
- \* Their members must be granted the privileges and immunities needed to ensure their protection, even after completing their task, especially from any future defamation lawsuits or other civil or criminal proceedings brought against them on the basis of the facts or opinions contained in the reports of the commissions.
- \* Regarding the nomination of members, efforts should be made to ensure that women and groups vulnerable to human rights violations are adequately represented.
- \* The truth commission must be transparent, and it must have control over its budget, which is necessary for ensuring independence.<sup>5</sup>
- \* Commission members can only be dismissed in the event that they are no longer capable of fulfilling their duties or take actions that render them unfit for the position. They must also be granted protection from criminals in order to carry out their tasks.<sup>6</sup> That is particularly necessary for investigations of high-ranking Syrian military, security and intelligence officials.
- \* Commission members must carry out their duties without discrimination

or prejudice. The constitution should clearly guarantee neutrality in order to ensure the impartiality of the commission and that of its members, who should avoid engaging in any activity that could indicate- even implicitly- that their decisions could be influenced by external factors, which would undermine public confidence in the commission.

- \* Commission members must be appointed based on merit. Such merits include expertise in international law, in particular international human rights law and international human rights law, while highly skilled judicial, forensic, medical, and human rights experts, among others, can also contribute.<sup>7</sup>

## **Powers of Investigative Commissions**

Investigations launched by commissions should complement one another and be effective and comprehensive.<sup>8</sup> Investigators must be able to collect and verify biological and chemical evidence.<sup>9</sup> They must have the capacity to collect, analyze and store forensic evidence.<sup>10</sup> Human remains must be dug up and analyzed through exhumations and autopsies conducted by independent and impartial experts.<sup>11</sup> This is particularly crucial for enforced disappearance and extrajudicial killing cases prevalent in Syria. In order to carry out such investigations, the Commission must be granted the power to oblige others to cooperate. In addition, punitive measures should be taken against those who unlawfully impede (or attempt to impede) the investigations of the commission, whether by intimidating witnesses, tampering with evidence, or bribing witnesses or members of the commission. All those involved in the commission's work must be protected from any threats to their lives or safety. Members of a truth commission or any other commission should be adequately protected in order to safeguard their personal security, independence, and impartiality- without “intimidation, hindrance, harassment or

improper interference, and must be able to operate free from the threat of prosecution or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics, protection from intimidation, obstruction, harassment, as well as the threat of prosecution or other retaliation for any actions they take in compliance with their professional duties, standards, and ethics.”<sup>12</sup>

## **Parties Concerned with Commission proceedings**

### **1. Victims in the Commission’s proceedings:**

Under international law, victims and others who have suffered harm<sup>13</sup> must be granted rights that include and are not limited to: presenting and requesting evidence or testimony, being granted access to documents and evidence, and examining or challenging evidence and witnesses put forward by the accused.<sup>14</sup> Victims and witnesses should therefore be given the opportunity to participate in commission proceedings that concern them.

### **2. Alleged Perpetrators in the Commission’s Proceedings:**

According to the Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, those implicated “shall be afforded an opportunity to provide a statement setting forth their version of the facts either at a hearing convened by the commission while conducting its investigation or through submission of a document equivalent to a right of reply for inclusion in the commission’s file.”<sup>15</sup> The basic rights of the accused, like the right to a fair trial, must be upheld, as should their right to take part in the investigation phase to ensure that they are able to defend themselves, refute allegations and present counter-evidence<sup>16</sup>. They also have the right to be presumed innocent until proven guilty, as well as access to decent legal counsel, including during pre-trial proceedings. The proceedings must fully comply with these principles while attempting to identify those responsible for gross violations of international humanitarian law.

### **3. Public participation in the proceedings of the commission:**

To ensure effective participation in the proceedings of the commission, victims, witnesses and private individuals must be granted the right to testify either in public or private, be it orally or in writing. Public participation, including through public hearings, contributes to establishing the truth about gross violations of human rights and upholds the rights of both individuals and society as a whole. It is essential to achieve the broader objectives of the transitional justice process, including the identification of the state’s role in human rights violations and guaranteeing non-recurrence. Investigations of human rights violations should be conducted transparently to ensure that the public can assess their credibility and victims can participate in them.<sup>17</sup>

### **4. Sharing the findings and reports of the commission:**

Reports issued by truth commissions or similar bodies “shall be made public in full and shall be disseminated as widely as possible.”<sup>18</sup> The victims in particular, but also their families “have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims’ fate” regardless of any legal proceedings.<sup>19</sup>

### **5. Protection and access to archives:**

Governments and de facto authorities have an obligation to maintain governmental and local records regarding gross violations of human rights and to take measures to ensure they are not removed, destroyed, hidden or falsified.<sup>20</sup> Archives also include the records of the commission, including the evidence gathered, which should all be stored in a publicly accessible archive that can reasonably be restricted on security and/or privacy grounds. Preservation of and access to such records and evidence, including through technical measures, is essential for safeguarding the rights of victims and those of the accused,<sup>21</sup> as well as the right of the public to the truth.<sup>22</sup>

## Compensation or Reparations Frameworks

States are obliged to ensure that citizens have a right to reparations and compensation. It must grant the victims or their families fair compensation for the harm that had been done to them. This can be realized through the establishment of a capable body (commission) tasked with obtaining compensation commensurate with the severity of the violation<sup>23</sup> and the harm suffered by the victim, provided that it is commensurate with the needs of the victim<sup>24</sup> in terms of redress and reparations.<sup>25</sup> Among transitional justice steps, seeking reparations addresses victims most directly and individually and satisfies their needs. They are also the most accessible step, and if the process is well designed, it can cover several psychological and possibly material needs, allowing for collective acknowledgment of the suffering of victims and providing an opportunity for redress, as well as symbolic compensation or material compensation for victims or their relatives. Individuals can claim reparations through the judicial system or state-introduced policies. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law lays out five categories of reparations: restitution, compensation and rehabilitation, satisfaction and guarantees of non-recurrence.

**Compensation:** Compensation must be granted for “any economically assessable damage,” including physical, mental injury, moral harm, and “lost opportunities, including employment, education and social benefits”.<sup>26</sup> In deciding upon compensation, the question of what motivated those accused of committing human rights violations and abuses to perpetrate their actions are irrelevant.

**Restitution:** “Whenever possible, restore the victim to the original situation before the gross violations of international

human rights law or serious violations of international humanitarian law occurred.” This must include: restoring freedom, human rights guarantees, identification documents, family life, and citizenship, the right to return to one’s home, reinstatement in old jobs, and restitution of property,<sup>27</sup> with the restitution process undertaken by the reparations commission in cooperation with the relevant bodies.

**Restoration of personal liberties and disclosure of the fate and whereabouts of disappeared and missing persons:** The commission is obliged to spread the truth about these crimes by publishing comprehensive lists of the names of all detainees and the forcibly disappeared, freeing forcibly disappeared persons or disclosing their fate and whereabouts.

**Property law: The commission must establish the** truth about all cases in which property rights were violated and give the property back to its owners,

**The right to return to one’s place of residence:** The committee must be enabled to contribute to ensuring this return and the provision of other forms of reparations to the impacted parties.

**Rehabilitation:** The commission must provide victims of gross human rights violations with the tools they need while ensuring that they are compensated for the “costs required for legal or expert assistance, medicine and medical services, and psychological and social services.”<sup>28</sup>

**Satisfaction:** The committee must take measures to ensure satisfaction, including: (a) measures to halt ongoing violations, (b) public apologies, including acknowledgements of the facts and recognition of responsibility, (c) pay tribute to and hold memorials for victims and include “an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.”<sup>29</sup>

**Guarantee of non-recurrence:** In accordance with international standards, guaranteeing non-recurrence necessarily implies civilian control over the military and security forces, that all civilian and military actions comply with international due process standards, are fair and impartial, and fortify the independence of the judiciary, while reassessing and amending laws that lead to or facilitate gross human rights violations.<sup>30</sup>

## Transitional Justice and the Constitutional Process

Constitutional processes and transitional justice intersect at many points and share several objectives in states where there is an ongoing armed conflict. Neither precedes the other chronologically, and the success of both processes depends on the extent to which they are able to reconcile groups, address grievances that have accumulated over the years, establish the right social, legal and political environments, and enshrine principles that prevent recurrence. These principles can thus be reflected in a constitution which stipulates full and equal citizenship, recognizes that the people are the legitimate source of authority, emphasizes the rule of law, defines all aspects of national identity, defines the rights and freedoms of individuals, and establishes a separation of powers based on observation and balance. All of this is achieved through the participation of the various segments of society and is necessitated by the expansion of the concept of democratic rights and the fundamental right of all people to be recognized by international law. **Here, a distinction must be made between drafting the constitution, that is, completing the written text, and the set of practices taken on the basis of the constitutional text, rendering it sustainable, and ensuring the implementation of and compliance with its provisions, which is called “constitution building,” the most complex and pivotal transitional justice process.** The International Institute for Democracy and Electoral Assistance defines constitution-

building as the process by which “the political entity is committed to establishing the system of values and government... The process of constitution building extends over time to include governmental and non-governmental organizations. In this sense, constitution building is almost an evolutionary process to take care of the text and facilitate the disclosure of its logic and driving forces” within the framework of a long-term historical process that does not end once the constitution has been drafted. It starts with agreeing on the need for and scope of constitutional change, which often forms part of broader historical changes underway in the country. This step is followed by the establishment of institutions and procedures and setting the framework for how an inclusive and participatory constitution can be developed. After that the draft goes in legal effect after being ratified. Finally, we have the implementation phase, and the first few years are particularly crucial.

Drafting post-war constitutions requires an understanding of the legacy of the past. The new constitution should be seen as a tool for facilitating political transition, ending the era of tyranny, ensuring that authority stems from the will of the people, and conveying their aspirations. It also must stipulate that all the sole task of security apparatuses is to ensure social stability and protect citizens, not clamp down on them. Since transitional justice is a set of mechanisms and procedures, both must be referenced in the constitution, making the finalization of the constitution the first phase of the political transition. Therefore, in **order for the new constitution to be considered to be genuinely paving the way for the realization of transitional justice, it must include the following:**

1. A factual narrative about what caused the conflict and the reasons for which the new constitution is being written. Constitutions begin with an introduction or preamble that includes a narrative about why it had been adopted, presenting the real reasons for the conflict or gross violations of human rights. This is the case for Egypt’s 2012



Constitution. Its preamble reads: "This is our Constitution, the document of the January 25 Revolution, the Revolution which was initiated by our youth, which our people rallied around, and which the Armed Forces sided with. After we rejected, in Tahrir Square and across the country, all forms of injustice, oppression, tyranny, despotism, exclusion, plunder, corruption and monopoly." The same is true of Tunisia's 2014 constitution. Syria's 2012 constitution, which was issued after the revolution, ignored its causes, while its preamble celebrated the Syrian army while it was bombing civilians. Rather than contributing to ending the conflict, the constitution may have exacerbated the situation despite the few shifts incorporated into it, which fell short of the people's aspirations. The preamble to the Constitution must therefore provide the real reason for which it emerged, clearly laying out the reasons for the conflict and setting the contours of a new state built on respect for human rights.

**2. Fundamental principles:** Also known as guiding principles, they refer to the broad set of principles along which the constitution is drafted and the state is built. These principles guiding the constitution are limited to recognition of the importance of the rule of law and the independence of the judiciary, respect for and protection of human rights, and other principles that those drafting the constitution believe to be fundamental for good governance and needed to ensure the integrity and fairness of the government. This will help the people to adopt, respect and protect the constitution and respect the state.

In all the constitutions issued in Syria since 1963, the principles of citizenship and equality were disregarded in favor of Baath Party ideology and the consolidation of its authority, and the diversity of Syrian society was thus overlooked. Since creating an environment appropriate for transitional justice requires the establishment of the principles of citizenship and equality, these concepts must be enshrined as fundamental constitutional principles. This matter is

underscored by the Guidance Note of the Secretary General (United Nations Approach to Transitional Justice), which emphasizes the need to include provisions that safeguard economic, social, cultural rights, and non-discrimination in peace agreements and constitutions. It is also crucial that the constitution explicitly declare a position on international human rights conventions. The Syrian Constitution has completely ignored them, while the Tunisian Constitution, for example, states that they fall beneath the constitution and above the country's law. The Constitution of the Kingdom of Morocco states that international conventions that had been ratified must take precedence over all forms of national legislation.

**3. Rights and freedoms:** Transitional justice aims to address the legacy of gross violations of human rights. Accordingly, the appropriate constitution for the course of transitional justice is one that safeguards and protects rights and freedoms, and not only through the content of the text, which had been the case in previous constitutions. Constitutional guarantees must be clearly laid out, with the role of legislation in providing these guarantees limited to their implementation. Indeed, the constitution must guarantee the rights and freedoms of individuals and groups, explicitly allowing them to freely associate and form political parties and civil society organizations, as well as allowing those political and civil entities to undertake their activities without prior approval from the executive.

**4. Separation of powers and independence of the judiciary:** One of the reasons for the grave violations that have occurred in Syria is that there was no separation of powers. The executive had control over all branches of government. The President of the Republic, the head of the executive, has the power to legislate and dissolve the People's Assembly. He is also the commander-in-chief of all armed forces. His powers also include declaring a state of emergency and appointing Supreme Constitutional Court members. Moreover, the independence of the judiciary is not stipulated by the

constitution; the President of the Republic heads the High Judicial Council. Transitional justice requires the separation of powers, guarantees of the judiciary's independence, prohibitions on the establishment of special courts, and the inadmissibility of trying civilians before military courts, as well as assurances regarding the Supreme Constitutional Court's independence and its ability to fulfill its obligations and other safeguards that create a suitable environment for the realization of transitional justice.

**5. Constitutional bodies:** The establishment of these bodies is laid out in the constitution. Constitutions that are designed to launch the transitional justice track traditionally set up such bodies to provide added assurances that human rights will be respected and to prevent any political majority that may emerge in the future from diverging from or obstructing the course of transitional justice. For example, Title VI of the Tunisian Constitution, entitled Independent Constitutional Bodies, calls for the establishment of the Supreme Independent Elections Commission, the Audio-Visual Communication Commission, Human Rights Commission, the Commission for Sustainable Development and the Rights of Future Generations, and the Good Governance and Anti-Corruption Commission. It also obliges the state to realize all aspects of transitional justice. Accordingly, Syria's future constitution must stipulate the establishment of constitutional bodies, in particular a national transitional justice body and a national human rights body.

## Syrian Constitutional Committee

On 26 September 2019, the Secretary-General of the United Nations announced the formation of the Syrian Constitutional Committee, as well as its criteria, fundamentals, and internal regulations in a letter to the President of the United Nations Security Council. The Constitutional Committee consists of 150 members, with the Syrian government, Syrian Negotiations

Commission, United Nations (civil society or the middle third) each nominating a third of the members each.

- \* The Constitutional Committee has a Large Body and a Small Body. The Large Body has 150 members, and the Small Body has 45 members, also divided equally among the blocs. The Small Body is tasked with preparing and drafting constitutional proposals and the Large Body ratifies them.
- \* The Committee operates on consensus, and if it is not achieved, a 75% majority (i.e. 113 votes) suffices.
- \* The Committee has two Co-Chairs. One is nominated by the Syrian government and the other by the Syrian Negotiations Commission.
- \* The Constitutional Committee's Large Body has convened once, and the Small Body has convened five times subsequently. No constitutional agreement has been reached so far because of the overwhelming obstacles, the most prominent of which is that the Constitutional Committee was formed before a political agreement had been reached.

As for the challenges hindering the Constitutional Committee from initiating the transitional justice process, they are as follows:

### 1. Challenges linked with the lack of a political solution:

For several years, the conflict in Syria has been managed by other countries through their Syrian loyalists. Several foreign armies have troops on Syrian soil, which they have split into spheres of influence. Thus, any solution to the conflict in Syria hinges on the political solution that these countries will create, and taking the path of transitional justice in Syria therefore requires the approval of the countries involved in the Syrian conflict. On the other hand, the contours of the

proposed solution make it clear that the regime will survive or at least be involved in the next phase. Naturally, it would stand in the way of any solution that incorporates transitional justice, prompting complaints that emphasizing transitional justice would be an impediment to a political solution. Moreover, some foreign forces have been implicated in human rights violations on Syrian territory, so undermining transitional justice is also in their interest.

## **2. Challenges linked to the structure of the Constitutional Committee:**

- \* Establishing the Constitutional Committee before a political solution had been reached left disputes and divisions within the Committee, creating an impasse. Instead of focusing on its technical task, the Committee was formed as though finding a solution had been among its responsibilities, creating an unbreakable impasse.
- \* The high threshold for passing proposed articles of the constitution, as this requires the approval of 113 out of 150 members. Thus, any party can hinder its work, and the fact that setting the agenda, dates, and program of the Committee requires both Co-Chairs' signature poses another major problem.
- \* The implication of the parties to the conflict in violations compels them to seek to deviate from the transitional justice track. Indeed, it implies the prosecution of those responsible, first and foremost the Syrian government, which, given the number of reports clearly condemning it, opposes the incorporation of transitional justice into the constitution, as do some opposition parties (for example, the Syrian National Army, which has been accused of human rights violations, is part of the opposition bloc) and this represents the greatest challenge.

## **3. Challenges linked to the civil society bloc:**

- \* Initially, because of its conviction that neither the government nor the opposition represented more than a fraction of the Syrian people, the UN was supposed to nominate 50 members of both genders representing Syrian civil society. However, the interference of states and the feeble determination to embark on a constitutional track left most states able to interfere in the nomination of members representing civil society, and those members are thus largely unrepresentative of civil society.
- \* On the other hand, the Committee's insistence granted the co-chairs broad powers left the civil society bloc unrepresented in the presidency and the weakest among the three. It is not involved in setting the agenda, dates, or making other procedural decisions. Moreover, the division within it has rendered it more like two blocs than one.
- \* Despite these challenges, some members (not nominated by the Syrian government) tried to coordinate their efforts and meet periodically, which helped them to form a small but influential group.
- \* Perhaps supporting this small sub-bloc within the Syrian civil society bloc could be the gateway to incorporating transitional justice into the constitution.

# Transitional Justice and the Fate of Missing Persons

## Enforced Disappearance and the Fate of Missing Persons Within the Context of Transitional Justice

Since March 2011, the warring parties in Syria, the Syrian government in particular, have been implicated in arbitrary arrest and detention, abduction, torture, extrajudicial killing, and enforced disappearances, which have become a hallmark of the ongoing armed conflict in Syria. These acts and the practices associated with them amount to war crimes and crimes against humanity when committed as part of a broad or systematic assault on the civilian population. While the exact number of enforced disappearances in Syria is unknown, we know that tens of thousands of Syrian men, women and children have been forcibly disappeared, detained, abducted or reported missing by the government, armed opposition groups, and militias designated as terrorist groups operating in Syria since the outbreak of the conflict in 2011. Reports by Syrian and international human rights organizations indicate that the number of forcibly disappeared persons exceeds 100,000 and that the vast majority had been abducted by government forces. Despite the severity of the crimes and their unprecedented scale, criminal accountability for enforced disappearances remains elusive, as those who bear the primary responsibility are high-ranking security and military officials, and they usually wipe any evidence incriminating them or documenting their crimes.

With regard to the fate of persons who have been forcibly disappeared, the International Center for Transitional Justice emphasizes that the concerted efforts and endeavors that have crystallized the field of transitional justice emerged from the quest for the truth about and justice for the disappeared.<sup>31</sup> It is

worth noting that the determination of the families and kin of missing persons in many Latin American countries to know the fate of their loved ones contributed significantly to laying the foundations for the realization of transitional justice after the dictatorships in Latin American countries fell. While authoritarian governments have sought to withhold records of all kinds from the public for decades, they have not been able to ignore voices determined to reveal the truth. Truth commissions were set up to establish a historical record of conflicts and document the testimonies of families torn apart by forcible disappearances and other violations. These fact-finding procedures have become models for countless other countries.<sup>32</sup> Transitional justice experts believe that transitional justice mechanisms should be designed and applied in accordance with the local conditions of each country and nation. Despite the compelling reasons to support this conviction, what has come to be known as “best practices” often guide the administration of transitional justice, ensuring the protection of victims and their families through accountability and the restoration of citizens’ confidence in their state. Best practices for ensuring justice for the forcibly disappeared may include giving truth commissions the powers needed to allow them to carry out investigations, such as the authority to issue subpoenas, so they can obtain the information necessary for determining the fate and whereabouts of missing persons. Establishing a framework for coordinating between the judicial investigations and fact-finding missions to determine the location of the victims is another best practice, as it ensures that no evidence or information that could contribute to revealing the fate of victims is lost.<sup>33</sup>

Despite the actual orientation to grant amnesty based on the premise that justice and peace can be mutually reinforcing, it the position of the UN is that amnesty should not be granted in cases where it would prevent the prosecution of individuals responsible for war crimes, genocide, crimes against humanity, and severity of the violations of

humanitarian law and serious violations of international human rights. The policy of the United Nations is based on international laws stipulating the right of victims to forms of redress, such as reparations or finding out the truth about violations as justice takes its course and peace settles.<sup>34</sup> The UN reiterated its opposition to amnesty for perpetrators of grave violations, war crimes, and crimes against humanity through its explicit reservations about the various peace agreements between the parties to the conflict in Sierra Leone, Angola, Sudan and Uganda, where UN representatives initially attempted to limit the scope of the amnesty. After failing to do so, they made their reservations on the documents they signed.<sup>35</sup>

## Detainees, Forcibly Disappeared Persons, and Transitional Justice Mechanisms

With its various mechanisms, transitional justice seems to be the most comprehensive path for addressing detainees and missing persons, within the framework of an integrated process of realizing rights and regranting them to those who have legitimate rights, and to uncover the truth, provide reparation and compensate the victims. It is based on a set of principles: Prosecution of perpetrators, recognition of the special status of victims, respect for the right to truth, adoption of a policy of isolation for those involved in crimes, memorialization of victims, as well as processes of institutional reform aimed at upholding the rule of law, fundamental rights, and good governance. Before delving into these mechanisms, it is necessary to point to the intrinsic link between political transition and transitional justice, and the measures and decisions that these impose and that should be adopted in addressing the issue of the detained and forcibly disappeared.

## Political Transition

UN Security Council Resolution 2254 of 2015 included a pledge by the international community to ensure a “Syrian-led and Syrian-owned political transition process based on the Geneva Communiqué in its entirety.” The 2012 Geneva Communiqué provided the primary steps to be taken during the transition process, the first of which is the establishment of a transitional governing body that can provide a neutral environment in which to move the transition process forward. This governing body exercises full executive powers, and could include members of the current government, the opposition, and other groups, and must be formed on the basis of mutual consent. With regard to safety and stability: While no transitional process can take place without political change, it remains essential to ensure that the transition can be implemented in a manner that ensures the safety of all amid an atmosphere of stability and calm. In this sense, this environment requires the presence of conditions and procedures, both before and after the conclusion of a political settlement, at the constitutional, legal, security, and economic level. A starting point to achieve it is the transfer of power to a transitional governing body with a nationally agreed-upon mandate, one that assumes a single distance from all Syrian men and women, without discrimination on the basis of political, ethnic, religious, sectarian, or gender identity or affiliation. In our Syrian reality today, it is one of the most important starting points for reaching stability to overcome dependence on regional and international agendas.

Procedures that must be included in the political settlement and put into effect as power is transferred to the transitional governing body, in order to meet some standards of a safe and impartial environment with regard to detainees:

- \* Abolishing and suspending all exceptional laws and courts that violate human rights, including those that threaten the properties of Syrian citizens and hinder democratic transition.



- \* Releasing the men and women detained on non-criminal charges; uncovering the fate of missing persons and all those held in secret detention centers; ensuring access to all such centers by the International Committee of the Red Cross and the United Nations, and revealing the conditions of prisoners held there.
- \* Forming a transitional judicial council and a supreme constitutional court composed of judges of recognized competence, impartiality and neutrality, subject to the full authority of the judiciary during the early implementation of the political settlement. Agreement would be reached regarding the powers, members, functions, and terms of reference of these two institutions during the drafting stage of the political settlement and the constitution. These bodies will be entrusted to lead judicial work and conduct judicial reform during the transitional period, including the role of an impartial Syrian judicial institution in transitional justice processes.
- \* Working on transitional justice, early recovery, and even reconstruction programs, and anything that assists released detainees, and their displaced and refugee families, to return to their original places of domicile and restore normal life in the country. This primarily contributes to providing a calm and stable environment for political transition. It is also necessary to ensure that the most affected groups benefit from reconstruction funds, and that warlords and symbols of corruption in Syria do not profit, and that basic infrastructure is rehabilitated such that it is a mainstay of Syrian economic and political development, and serve the path of transitional justice.

## Independent Bodies in the Constitution

The constitution-building process<sup>36</sup> can provide the main pillars for a transitional justice process in Syria, as it can provide for transitional justice concepts and mechanisms with constitutional text in order to prevent its circumvention in the political settlement, blocking the path of any future negotiations that confine the solution to military and political issues and exclude the victims/survivors and their families. The constitution is also among the vital guarantees for introducing the rule of law, particularly by ending the practice of enforced disappearance, addressing missing persons and the legacy of systematic human rights violations, and providing safeguards to protect all Syrians from enforced disappearance going forward. A future Syrian constitution must also include provisions for the formation of independent bodies as a tool to uphold the principles of the constitution and ensure the application of its provisions, and for the larger goal of democratizing institutions and promoting rule of law.<sup>37</sup> Of those bodies, some can be permanent agencies such as the Human Rights Commission, and other temporary independent bodies such as the Commission for the Affairs of Detainees, Forced Disappeared and Missing Persons and the Transitional Justice Commission. These are administrative entities that enjoy a legal personality founded in pursuance to legislation, and are structurally and functionally independent from the various organs of the state – political or administrative. By independence, we mean that they are not subject to supervision or oversight by the executive, and are governed according to the principle of neutrality and non-alignment with any party – as well as abstaining from engagement in any political controversy. However, these conditions do not achieve absolute independence and are rather relative, as these commissions are subject in their work to parliamentary and judicial controls and oversight, but not to any form of ratification or approval by the executive.

Members of these commissions are selected by parliament with the participation of relevant civil society organizations that are competent, experienced, and impartial. Of course, all of this is provided that independent commissions do not combine their work with any other function of an executive or legislative nature, a rule affirmed by the general principles of most constitutions in the world. These commissions must also adhere to the principle of women's representation by at least 30%, as well as representation for the families of victims, while their functions and jurisdiction are regulated via a detailed legislation.

Functions of the Transitional Justice Commission in regards to detainees and missing persons:

- \* The immediate release of detainees, cessation of arrests, and suspension of all decisions related to arrests and raids.
- \* A moratorium on executions and all other sentences handed down by exceptional courts.
- \* Facilitating access by competent international committees to all official and secret detention centers, and cooperating by providing all available data and documents, revealing the fates of detainees who died under torture or in field or summary executions, locating their remains, and delivering them over to their families.

**In the medium and long term, a program of institutional and security sector reform (SSR) must be developed.**

**Commission on the Affairs of Detainees and Forcibly Disappeared Persons:** This is a temporary agency with the purpose of implementing transitional justice measures as relates to its specific area of competence. The work, functions, time limitations, and membership criteria of the Commission must all be specified via a detailed legislation.

This official agency monitors the release of detainees and uncovers the fate of those who have been forcibly disappeared, relying on the participation of victims and their families and considering their perspectives to be central. The Commission investigates cases of missing and forcibly disappeared persons, one of its tasks being to visit prisons and detention centers. State institutions and civil society organizations must be committed to full cooperation with this agency by providing support, information, and documentation to enable it to carry out necessary investigations into cases of enforced disappearance, search for disappeared and missing persons, determine their whereabouts, identify the dead, and hand over the remains to their families.<sup>38</sup>

- \* The work of the Commission requires contracting independent international bodies such as the International, Impartial and Independent Mechanism (IIIM) and the International Commission for Missing Persons (ICMP).
- \* The Commission has a role in drafting laws related to detention and enforced disappearance, submitting periodic reports to parliament and making recommendations to the concerned government agencies.
- \* The Commission cooperates with international governmental and nongovernmental agencies concerned with forcibly disappeared persons.
- \* The Commission builds a central data bank at the national level containing all known information on missing and forcibly disappeared persons.

The Commission issues biannual reports that it shares and discusses with parliament about its work mechanisms, outputs, and results. It also makes recommendations to all international bodies in this regard.

## Institutional Reform

- \* An independent and impartial judiciary is a supreme authority, as no person or entity is above the law. Therefore, any laws or decrees that grant immunity to security officials for violations or crimes, such as Decrees 14/1969 and 69/2008, must be repealed. Additionally, such texts must be voided retroactively, and the criminal responsibility of those who benefited from these laws and decrees must be reaffirmed.
- \* Prohibition of the trial of civilians by military courts, and the abolition of special courts.
- \* Dissolving all security branches, and restructuring the security sector on a national and professional basis, taking into account international standards especially in terms of regulation and oversight of forces entrusted with maintaining public order.
- \* Disclosing secret and public prisons and detention centers and the complete cessation of establishing any secret facilities for the detention of individuals.
- \* Criminalizing torture and all forms of cruel, inhuman, and degrading treatment or punishment –in law and in practice.
- \* Accession to and ratification of the Rome Statute through the incorporation of its provisions into national laws, without voiding criminal responsibility for acts committed prior to the date of ratification and accession to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT); [the International Convention for the Protection of All Persons from Enforced Disappearance \(ICPPED\)](#); and Additional Protocol II (1977) to

the Geneva Conventions of 1949 to ensure maximum protection for victims of non-international armed conflict.

- \* Considering international treaties, human rights principles, and standards to have supremacy over national legal regimes, foremost among which the Constitution.

**Institutional framework for security sector reform: The Transitional Justice Commission is concerned with the program of reforming institutions, as its work includes** a comprehensive restructuring of these institutions; the issuance of new laws regulating their work; a comprehensive restructuring of their bodies and administrations; the abolition of laws granting immunity and exceptional powers to these institutions which have enabled them to commit violations with impunity; and developing detailed texts at the core of the constitution that defines the security apparatus and clearly delineate its functions and powers.<sup>39</sup> As such, the role of these institutions would be transformed into one of protecting the interests of society and promoting safety and security, as organizing principles for work in the security sector, and would enable moving beyond the security as an embodiment of naked and absolute power to exclude and isolate society from political life and suppress freedom of expression and opinion, through its organic association with the authoritarian political system.

In this context of institutional reform, United Nations Security Council Resolution 2151<sup>40</sup> of 2014 stressed the importance of women's active and equitable participation and full involvement in all stages of the security sector reform process. This would reinforce any measures taken to protect civilians, and achieve women's quotas in decision-making positions in all crucial state institutions and in all processes related to security sector reform –from planning, implementation, to monitoring the work of these apparatuses. Women must also be represented in all relevant committees,

participate in drafting legislations, designing monitoring committees, and participating in various court proceedings. Moreover, special programs must be developed for women victims/survivors of sexual violence, and hold the perpetrators of these crimes, from all parties to the conflict, accountable.

When striving towards women's participation, our aim can be reduced to a change in terms of respect for participatory decision-making, overcome authoritarianism and bloody violence which have instantiated a flagrant masculinity based on domination, vendettas, and the enslavement of Syrian society. Because in post-conflict scenarios, state institutions are often built without the participation or consultation of women on the structure and mechanisms of their work, institutions and authorities are then built upon the notion of male domination over women, and control of women is then rooted in subjugation through different means of violence. It is difficult in such cases for women to access these institutions, and the army/armed forces and security services in totalitarian regimes such as Syria are considered an appropriate example in this regard.<sup>41</sup>

**Judicial reform must cover** the most serious source of systemic violation of the right to a fair trial. This starts with the abolition of the exceptional penal court, as these jurisdictions breach international standards for the functioning of the judiciary. Courts of special jurisdiction are repressive organs that target political opposition, with the aim of terrorizing Syrian society in general as well as protecting the repressive regime that created them, in order to cover up violations of the regime's security apparatus under the pretext of combating terrorism.<sup>42</sup> Military courts must also be reformed and brought in line with the highest fair trial standards – by which civilians cannot be tried by military courts. It is impossible to build sustainable peace or achieve comprehensive national reconciliation without justice for victims, which depends primarily on the existence of an impartial, independent, and professional judiciary that upholds fair trial standards, in

order to uncover the fates of missing persons and prosecute the perpetrators of violations and atrocities.

## Guarantees of Non-Recurrence

Defined in the United Nations Set of Principles for the Protection and Promotion of Human Rights, through Action to Combat Impunity (1997 – updated 2005), as Principle 35 on non-recurrence states: “States must undertake institutional reforms and other measures necessary to ensure respect for the rule of law, foster and sustain a culture of respect for human rights, and restore or establish public trust in government institutions.” 2005 (17). In 2019, the International Center for Transitional Justice<sup>43</sup> suggested that by integrating a transitional justice component, institutional reform efforts can ensure the accountability of individual perpetrators and neutralize the structures that enabled the occurrence of violations. Another crucial guarantee of non-recurrence is adherence to the principle of the rule of law, which requires that not only legal text is introduced but its application ensured through controls over the work of security apparatuses.

## Right to the Truth

The right to the truth for victims of enforced disappearance and their relatives, to know the events that occurred and to identify the perpetrators of the acts that led to the violations, is an inherent right that is not subject to a statute of limitations, waivers, or bargaining, as the right to the truth is inexorably linked to the right to access to justice for all. The right to the truth is recognized by treaty committees, regional courts, and international tribunals.<sup>44</sup>

Among the prominent mechanisms to achieve the right to the truth is forming truth commissions, which collect provisional data and information on victims, as well as special commissions of inquiry into specific issues such as enforced disappearances, political arrests, and extrajudicial executions. Truth

commissions conduct official investigations into the forms of violation that have taken place, in order to establish an accurate historical record, uncover facts about violence perpetrated by state actors and other conflict parties, and contribute to judicial proceedings thereby strengthening the justice system and local courts. Like other transitional justice mechanisms, truth commissions are founded as per a political agreement or settlement, and result from the political will to disclose the fates of tens of thousands of detainees and missing persons. These commissions provide a platform for victims and give them a voice, while stimulating public debate on transitional justice and reconciliation, thus promoting social reconciliation. A truth commission operates at various levels, most importantly the grass-roots and local levels, and may help promote democratization and recommend necessary legal and institutional reforms.<sup>45</sup>

In the Syrian context, such a mechanism must be pursued on two distinct levels. The first is time-bound and must take place prior to the conclusion of the political settlement, with the support of all Syrian and international organizations working to monitor and document human rights violations. The second is the long-term political level, by striving to ensure that truth-finding and reconciliation missions are never excluded from proceedings linked to transitional justice or political transition in Syria.

## **Compensation and Reparation**

The state, as well as international bodies, must prioritize the right to reparation and compensation for victims and involve them in the formulation of programs to address this issue. These measures include the material, moral, and health restitution and rehabilitation of victims, taking into account compensation for serious and permanent damages caused by crimes and violations. These programs must emphasize the restoration of material and civil rights as a principle binding to any new government, and stress that reparation is a right for

victims which does not replace their right to truth and accountability. They must also be inclusive of all victims, ensuring non-discrimination.

United Nations General Assembly resolution 60/247 of 2006 contains a wide range of reparation measures such as restitution, compensation, rehabilitation, satisfaction, and guarantees of non-recurrence. In the context of detainees, restitution includes the restoration of freedom, which includes the release of tens of thousands of detainees and restoring their civil rights. It also involves guarantees of their enjoyment of human rights, such as the right to travel within and outside of their country; the lifting of all restrictions on the exercise of these rights; and the right to return to work in cases of arbitrary dismissal from the public sector as a result of their arrest.

Another key component of reparation restitution is rehabilitation, which includes psychological care for former detainees, as well as legal and social services. Reparations may be individual or collective, and are meant to cover all forms of physical and mental harm incurred, as well as opportunities lost as a result of detention. They may include financial compensation; psychological and medical services or programs; education grants and scholarships; curriculum reform incorporating human rights, gender and commemoration; land or property redistribution; and public apologies. More importantly, international law recognizes the rights of victims to reparation (United Nations, 2006), meaning that the state has a positive obligation to design and implement reparation programs that meet the needs of victims as identified by the victims themselves or their families.

## **Lawsuits and Accountability**

Trials under the universal jurisdiction are an institutional step for accountability towards the regime in Syria and all parties involved in the conflict as a mechanism to support the negotiating position. By employing



it politically, these trials can enhance the effectiveness of accountability through their international recognition, and be used to apply persistent pressure in the political settlement and besiege the regime with legal and judicial cases by continuing the concerted efforts by organizations working on accountability.

Criminal justice is indeed a means of directly confronting the perpetrators of large-scale violations and atrocities. A necessary condition to this is that such trials are selective or retaliatory, but rather aim to conduct prosecutions, investigations, and trials against perpetrators of war crimes and crimes against humanity –including individual leaders from all conflict parties who perpetrated violations.

**Prosecuting and holding perpetrators accountable is a fundamental requirement for victims and their families to obtain justice, and is a general requirement towards sustainable peace in Syria.**

This represents the demand by Syrians to refer the situation to the International Criminal Court. However, this demand was obstructed by the Russian veto, and was impossible to achieve because Syria is not a member of the Rome Statute. In its report of February 2013, the Independent International Commission of Inquiry on the Syrian Arab Republic also stated the reasons for, and obstacles to, the establishment of a special tribunal for Syria. The report argued that a tribunal is not a practical option to ensure accountability for crimes committed in Syria, due to practical and major impediments that require time and cost to address.<sup>47</sup> The best option for the Syrian case may be a hybrid court –assuming there is political will for such a measure. After the political transition, and with the partnership and support of international experts, national courts are to be formed on Syrian soil –in cooperation with the United Nations. Regardless of the nature or form of the trials to be held, or the courts mandated to address human rights violations, the following rules must be observed:

- \* Work on drafting special procedural rules and safe, gender-sensitive reporting mechanisms for victims of sexual violence, especially women, to enable them to access justice and overcome societal stigma which is a further injustice resulting from the violations targeting them.
- \* Not to grant amnesty for these crimes, and to apply the principle of non-applicability of statutory limitations to these crimes, similarly to war crimes and crimes against humanity.
- \* Application of a code of procedures that protects witnesses from any abuse to which they may be subjected.
- \* Strategic planning for the development of special training programs for judges, lawyers, and prosecutors on protection, investigation, prosecution, and defense mechanisms in trials and sexual violence cases.<sup>48</sup>

# Documentation and Memorialization, Narrative Documentation and Victims Organization

## Documentation and Memorialization

Many conflate the concepts of monitoring and documentation, in terms of the mechanisms adopted in each, the extent of integration between them, and the absence of the bridge separating them, that is, the investigation. This could easily subject the results of such a process to questioning or refutation by the perpetrators of human rights violations, which undermines their importance and thus, automatically, the impact of this process of redress for victims and later restitution and reparation. Monitoring, according to the methodology of the Fraternity Foundation for Human Rights, is defined as “a broad concept that includes all forms and methods of monitoring the field to reveal human rights conditions, whether negative or positive, in order to identify violations and forms of abuse that may occur on the ground.” As such, monitoring is an early warning measure aimed at launching a systematic process towards investigation and then documentation, which the same methodology defines as “the process of monitoring parallel to investigations and building a record or file on a specific pattern of violation, one that includes all documents and evidence that prove that an act has been committed which is in violation to the provisions of international and domestic law.”

Monitoring and documentation are also important in ensuring the improvement of human rights conditions and promoting responsibility among the dominant forces of different affiliations, in order to ensure protection of rights and non-recurrence violations. These mechanisms also preserve the rights of victims, and protect the generations that undergo political transition

and those that follow. This is a primary and fundamental basis for collective or social memory, as memory that is preserved serves as the legal basis to enable and achieve transitional justice in countries of conflict thus ensuring redress for victims, consolidating community peace, and providing an example of stability of international justice to the entire world.

**Collective Memory:** The concept of collective memory emerged in the aftermath of World War II, and the grave atrocities and crimes against humanity that were committed on a large scale by both sides of the war – not only the Axis powers.

Memorialization is fundamentally linked to monitoring and documentation, as these are the primary sources of information and the main weapon or tool for human rights defenders that enables them to uncover the truth that perpetrators of violations seek to conceal, and whose traces and evidence they try to erase. Through available information, it can be established whether violations are systematic and a matter of policy, or if they are merely individual abuses. Here, the importance of information lies in its introduction of a collective memory, which will later be the basis for the formulation of transitional justice in its legal sense. As such, we can then redress the damage, and prevent the recurrence of violations whether in the country concerned or in other countries, by serving as an experiment for the future of human rights in the world. Collective memory is not restricted to monitoring, documentation, or transitional justice, but can take many forms of humanitarian action through other means such as the use of documentaries or literary novels, through legal and human rights research, prison literature, or arts related to the suffering of families, the production of dramatic films on the issue, holding public hearings, and others.

## **Victims' Right to Privacy and Dignity: Between Exploitation and Redress**

One of the most important principles of monitoring and documentation, one that is agreed upon by all agencies working in the field, is that the goal of monitoring and documentation is to improve human rights conditions and protect rights. This goal must not cause harm to either workers or victims, confirming the need to commit to protecting the privacy of victims and witnesses, especially in times of conflict with widespread chaos that exposes workers in various fields to a lack of recommended standards –even if it is in good faith. In the course of monitoring human rights violations, we often see actors publicizing violations by a party without regard for the privacy of the victim and their family. This exposes them to additional risks and further obstructs investigations and documentation efforts, as it is accompanied with attempts by perpetrators to hide the impacts of violations or conceal the truth. At other times, and with the aim of gaining support for a cause, a party may take the initiative of using violations by other parties for political, social or even propaganda aims. This includes the publication of photographs of victims of military bombardment without respect for the privacy of victims, causing additional pain to their relatives and constituting an affront to their human dignity on par with the brutality of the perpetrators.

All of this highlights the need to spread awareness on the importance of the victims' right to privacy and the protection of their dignity, which requires training workers on matters related to this issue, on binding mechanisms that prevent the occurrence of abuses. It also highlights the need to establish a strict code of conduct for human rights workers, one which protects them as well as the rights of victims, blocks the path to political exploitation, and prevents the perpetrators of violations from successfully undermining the truth, thus protecting the right to fair redress for victims and their families, and enhancing the protection of document archiving.

## **Civil Society Organizations and Documentation Mechanisms: Obstacles and Experiences**

The Syrian conflict, and the gravity of the violations committed by all its parties, has imposed a broad need for human rights organizations, researchers, and investigators to cover and monitor violations in Syria. Despite the availability of civil society workers and organizations during the pre-conflict era, the nature of armed conflict and violations that accompany it have imposed an even greater need for expertise, skills, and knowledge of human rights, as well as a larger number of human rights workers than was expected or available. As the years passed and the conflict continued, and a set of uniquely poor human rights conditions and grave violations emerged, Syrian civil society managed to build some human rights experience and expertise. What was absent, however, was specialization in a specific area or form of human rights violation, adding to the burden of CSOs and their workers. From the outset, it would have been far more effective for each group or organization to specialize in a specific sector, or form or pattern of human rights violations, which in turn would have averted the later state of disarray of documentation work in Syria. Specialization would have also produced coordinated efforts to build human rights databases where information handling is easy and accurate, while ensuring access to this information by all parties concerned with the Syrian crisis.

This process has evolved over the last two years, with Syrian human rights organizations working in a more professional and specialized manner. For example, after five years of operation, the Fraternity Foundation for Human Rights has opted to focus on one area and one aspect of human rights violations, namely, the right to freedom of association and peaceful assembly, enabling Fraternity to become an essential source of information and initiative on this right. However, there is a need for more work and development, and this organization is not the only one focusing

on one specific sector. Fellow organizations have seen much development, and made great achievements at the international level especially in the area of justice and litigation through universal jurisdiction. These include the Syrian Center for Media (SCM), the Syrian Center for Legal Studies and Research, and other Syrian organizations that are well-established and effective in this field.

Syrian organizations have also made a qualitative leap in the context of cooperation and sharing of data and databases, as these mechanisms of cooperation were on clear display in advocacy campaigns to defend Syrian human rights issues. They have also moved towards further cooperation and coordination instead of the negative competition that has affected many organizations for many reasons, the most prominent of which is the pursuit of sustainability. However, there is a continuing need to unite efforts to serve the cause of human rights in Syria, and organizations still need work, integration, equality, and parity, and remain dependent on Syrians' awareness of the importance of participation and the unity of Syrian attitudes towards the perpetrators of human rights violations.

The most prominent obstacles that emerge inside Syria are those related to the nature of the ongoing documentation of human rights violations. Conflict parties encourage and support the documentation processes and the rights of victims only when the perpetrator is another party to the conflict, while obstructing the processes of documenting violations that they commit themselves, which imposes selectivity of cases on human rights organizations and voids human rights work of its substance.

## **Survivor Groups and Families of Victims (Caesar Families Association)**

In the face of impunity, and after years for widespread human rights violations persisting in Syria, the issue of detainees and forcibly disappeared persons was generally

sidelined. Later, the leaked Caesar photos served as clear and damning evidence of widespread grave violations in the regime's detention centers, and the families of those who identified their loved ones in the Caesar photos mobilized to affirm their rights and the rights of their missing relatives, and took initiative. These efforts received support from the Syrian Center for Media and Freedom of Expression, as the Association organized its first meeting in February 2018. It launched consultations and organized efforts and to set the foundations, structure, and objectives of the Caesar Families Association which stressed the need to hold the perpetrators of grave violations accountable, recover the remains of victims, push for the release of detainees, and reveal the fate of the missing, as an essential condition to achieving community peace and for sustainable peace-building, goals which can only be achieved by placing the victims and their families at the center of any transitional justice process. As people with a claim to rights, and who experience the impacts of violations on a daily basis, these families are in an insuperable position when assessing needs and developing programs around justice. Victims associations, thanks to empowerment efforts and trainings on the concepts of governance and human rights, have contributed through their membership to spreading a culture of human rights, raising awareness of justice, and warning of the dangers of being drawn into retaliation and revenge. This is where the importance of attracting new members to the Association emerges, which can further its ability to achieve its objectives of:

- \* Accountability by involving victims in initiating accountability efforts, according to their distribution in asylum countries and what avenues are available in the judicial systems of those countries. Later, their role would progress towards comprehensive accountability, by creating a special Syrian accountability mechanism or referring the Syrian file to the International Criminal Court.

- \* Inquiry by sharing their information, after their consent, with authorities concerned with litigation and accountability measures the most important of which being the International, Impartial and Independent Mechanism (IIIM).
- \* Search for mass graves as the families can contribute to uncovering the fates of their loved ones and the whereabouts of their remains and mass graves, contributing to DNA sample collection through competent organizations.
- \* Advocacy: The increased number of Caesar Family Association members gives greater impetus to the claim of their rights, and promotes collective participation by victims in international forums. The larger the membership of the Association, the stronger the voice of the families of victims and the more effective they will be in achieving their goals. The Association also serves as a bridge between victims and international and local decision makers, and their involvement enhances access to decision-making and influence over the transitional justice track.
- \* Making use of the expertise that members of the Association possess in the course of their work, and empowering them to achieve the Association's objectives.
- \* Community peace: Strengthening civic and community peace through the promotion of a culture of human rights.

Since March 2011, many activists have documented violations perpetrated by the Syrian government, and later the remaining conflict parties. As the conflict persisted, documentation became more methodical and adherent to international standards. This is a cornerstone of the Association's work, through which it follows up with

partners in order to achieve its goals of ensuring that perpetrators do not enjoy impunity, establishing a special court for war crimes and crimes against humanity, and supporting a path of transitional justice based on truth, accountability, and fairness. Documentation and record-keeping are of great importance in the course of justice. For instance, since the arrest of General Augusto Pinochet in 1998, an unprecedented number of human rights trials and tribunals have been held throughout Latin America, and the main source of evidence used in these proceedings were the testimonies of victims. In fact, records of documented human rights violations were generally unavailable, as the materials were destroyed or concealed. Even where such archives exist, they typically do not identify the perpetrators or the victim, nor do they directly establish criminal responsibility. Moreover, to the Caesar Families Association, documentation is an act of breaking the Syrian government's monopoly over the narrative in the country, as it is preserving the history of this period for future generations and preventing future attempts to manipulate this history and exonerate the perpetrators.

The documentation team at the Caesar Families Association has worked to help the families of victims identify their loved ones among the leaked Caesar photographs. This was done through modern technologies developed, evaluated, and improved in cooperation with the Syrian Center for Media and Freedom of Expression (which provided facial recognition technology), as well as information provided by the families themselves (date of arrest, responsible agency). However, it is exclusively the family's prerogative to identify the photo, as some families expressed some suspicion, for instance, and later denied that the person in the photo was in fact their family member. Therefore, the Association respects such decisions made by the families, and adopts a legal methodology that relies on documenting the victim's experience through their close relatives. After the Association had confirmed kinship, using identification documents and comparing pre-arrest



photographs to those in the Caesar photos, the family's representative is encouraged to join the and become a member of the Caesar Families Association –with the rights and responsibilities that this entails.

- \* The Association submits verified information to UN special procedures. 14 such complaints have so far been submitted to the special procedures (Working Group on Enforced or Involuntary Disappearances), 8 of which have received a response. The responses indicate a lack of cooperation on part of the Syrian government, as well as explanations of the cases mentioned.
- \* The Association also encouraged member and affiliate families to report cases of enforced disappearances through the tracing service launched by the International Committee of the Red Cross.
- \* The Association has signed a partnership agreement with the IIM, and can therefore provide and share documentation information. In doing so, it is working to ensure that human rights conditions in Syria are monitored by these mechanisms, and to make these efforts more effective in the future through continuous follow-up. Moreover, through its active involvement in legal cases against perpetrators of violations in Syria, the Association works to ensure that perpetrators do not go unpunished and that such violations do not recur.

The Caesar photos are living proof of the systematic practice of torture in Syrian government prisons, with the international community unable to make a genuine decision to hold accountable those responsible for grave and massive violations, which amount to crimes against humanity. This is the reason for the Caesar families' determination in seeking other solutions and using all available accountability measures, despite

the challenges and difficulties they face. Maryam Al Hallak, a mother and member of the Association, managed to file a criminal complaint based on universal jurisdiction before the German Federal Public Prosecutor in 2017, which resulted in the issuance of an arrest warrant against Jamil Hassan, Director of the Air Force Intelligence, which later prompted many survivors and families of victims to follow suit.

Here, documentation is particularly important, both in preparing criminal cases within domestic and international jurisdictions; preserving memory and history; and in initiatives seeking to disclose facts for the purpose of reconciliation. Speaking about the importance of documentation, Ali Hassani, a member of the Caesar Families Association, said: "Memorializing the martyrs is necessary at several levels, including advocating for the cause and pushing it into the public, as well as the psychological level in two ways; one positive that consolidates the status of the martyr in this world and the Hereafter and a source of pride for his family and relatives, and a negative one as wounds are opened and the longing for the loved one is rekindled. However, there is a long-term effect which is to communicate the idea to future generations that they have a right and a cause, and that justice must be achieved so that the tragedy does not recur in the future, and to emphasize the greatness of the human spirit."

To this end, the Association has, since its inception, provided detailed information that depicts the victims as persons. They are sons, daughters, brothers and sisters, relatives, friends, companions and life partners. This is the source of the stories that their families tell today, as they share photos of their loved one's while they were alive, as well as some videos that the Association produced. This is also what prompts members of the Association to go on media platforms and tell the stories of those they lost.

## The Truth and Justice Charter

The Caesar Families Association participated in a meeting between five organizations of victims and victims' families to launch the Truth and Justice Charter, a joint working document that reflects their shared vision on how to advocate for the rights of victims and the cause of truth and justice in Syria. The Charter sets out to uncover the truth, ensure justice for detainees and forcibly disappeared persons and their families, and hold violators accountable, as the building blocks for achieving lasting peace in Syria. The organizations put the voices and demands of survivors, victims, detainees, forcibly disappeared persons and their families at the forefront of any lasting political solution in Syria. The Charter aims to be a common road map for victims' organizations and their families. It is also intended to serve as a reference and strategic vision available to all stakeholders, human rights organizations, policymakers and decision makers. The charter issued by the Linkages Group was well received by the actors working on the Syrian issue, whether they are countries or institutions, and emphasized the central role of victims' associations in working on their cases. The Charter produced a report by the five associations on the possibility of creating a mechanism to search for the fate of disappeared and missing persons, and raised the importance and necessity of establishing a new truth-seeking mechanism as a starting point to determine the modalities for the release of detainees and disappeared persons.

## Accountability: Its Current and Potential Mechanisms

One of the most important mechanisms of transitional justice is criminal justice, which is the trial of those responsible for serious violations by all parties, in Syrian national trials that may be special tribunals established for this purpose. The accused are judged in accordance with Syrian law, while making use of international criminal law. Local and international human rights organizations, and the United Nations, can also be sought to prevent these trials from turning into retaliatory or show trials. The first phase should focus largely on criminal proceedings seeking the conviction of perpetrators of gross human rights violations and holding them accountable through the courts. This is the first and foremost manifestation of transitional justice, as past experiences in other countries have shown that to abandon or overlook this aspect of transitional justice leads to failure. What gives priority to criminal justice, over other transitional justice mechanisms, is that if the Syrian conflict were to end today, hundreds of thousands of victims would need to seek justice and redress through judicial investigations and prosecutions, and without meeting this need there can be no sustainable peace in Syria. As such, and at least in the early post-conflict stages, criminal justice remains the most effective method of restoring public trust in the institutions and preventing future outbreaks of violence. Moreover, in order to achieve reconciliation and restitution, the large number of gross human rights violations committed in Syria must be addressed through the courts.

The Ohio State University conducted a study,<sup>49</sup> published in 2020, about the prospects for transitional justice in Syria, which polled the opinions of Syrians on both sides of the political conflict, in order to determine which mechanisms of transitional justice must receive priority during a post-conflict period. The overwhelming majority of respondents were on the side of punitive

transitional justice and called for strict trials and sentencing. The research sample conceived of three categories of Syrians, or Opinion Clusters, in each of the two sides of the conflict:

- \* Extreme: Those with radical or extremist views in support of one conflict party, and from both sides, supported holding trials in the post-conflict period. However, they denied that their side had committed any violations that would warrant such trials, and believed criminal trials should be restricted to the other conflict party.
- \* Solid: Ideologues, partisans, and those with vested interests supported trials of the perpetrators of serious crimes from all parties –while protecting their political interests.
- \* Leaning: Ordinary citizens supported holding violators from all sides accountable, and accepted other transitional justice mechanisms as well. The greatest concern of this group was to end violence and the occurrence of violations. This study reached several conclusions:
  - \* Trials and criminal justice are the preferred transitional justice mechanism by Syrians on all sides, as they are necessary to ensure that crimes do not recur in the future, and that no reprisals take place.
  - \* Punitive justice is essential to prevent similar crimes occurring in the future.
  - \* Trials are a necessary measure to mitigate hatred and strife, and the potential for retaliation.
  - \* Amnesty is unacceptable, and many believe it would serve as a means to protect perpetrators from accountability.

One should bear in mind that concern for political agreement and peace-building are

often invoked in order to sidestep criminal justice in favor of other transitional justice mechanisms. However, we firmly believe that concern for peace and political agreement must drive us to prioritize criminal justice, especially when faced with the widespread violations committed in Syria. Therefore, trials or criminal justice will continue to take precedence over other measures such as general amnesty or pardons, as the courts are the entry point and the lever to activate these mechanisms.

It is easy to circumvent accountability and justice, or even ignore gross violations of human rights. However, this would place hinder Syrians from establishing the values upon which they want to build their state, and peace cannot be reached until those responsible for war crimes and other grave violations, on all sides, are held accountable and until the fates of all detainees, abductees, and forcibly disappeared persons are revealed.

## Current Judicial Proceedings and Their Place in Transitional Justice

The transitional justice process cannot commence with the current obstruction of conventional paths to justice such as the International Criminal Court or the establishment of an international tribunal for crimes committed in Syria. This is also the case for obstructions to reaching political consensus on the issue of accountability or any political solution that ensures that victims receive the justice they seek . Transitional justice requires all parties to agree that each stands to lose from the continuation of the conflict, and that none of them can emerge victorious. Only from this consensus can a national project for transitional justice be built. These obstructions to justice and the emergence of a political consensus are what prompted some victims and their representatives to resort to universal jurisdiction cases in several European countries in order to initiate justice processes.”

## Options for Accountability in the Pre-Transition Period

- \* Prosecution before foreign national courts under universal jurisdiction, an option that can be used against current or former Assad regime officials who visit or reside in Europe. This could also be a viable option if senior regime officials flee to Europe during the transitional period.
- \* Prosecuting Syrians, or other nationals, for war crimes committed in Syria. Sweden, Germany, Austria and other European states that adopt the principle of universal jurisdiction have already begun to prosecute Syrians suspected of war crimes.
- \* Extended jurisdiction *ratione personae*: This refers to the prosecution of war criminals through domestic jurisdictions on the basis of dual nationality, through which individuals can be prosecuted by their own state. Both Germany and France use domestic jurisdiction against dual nationals who returned from Syria after fighting with ISIS/HTS. Local jurisdiction criminal and civil suits can be filed against government officials, and the families of dual nationals who have been killed or tortured by the Syrian government can also claim damages from the Syrian government through local courts.

It should be noted that the process of prosecuting those responsible for violations in Syria currently doesn't fall within the framework of transitional justice.

- \* Transitional justice, as its name indicates, requires an end to the conflict and the introduction of a transitional phase based on consensus over a national project for transitional justice, which has yet to be achieved in Syria. Furthermore, it requires a national consensus that considers a

set of psychological, social, cultural, economic, and even religious givens and conditions when determining the mechanisms and tools to be adopted, in order to ensure the involvement of the broadest possible segment of Syrians in such a process.

- \* As important as it may be to the victims themselves, we believe that current court cases fall within the context of strategic litigation rather than transitional justice. These are cases that can be built upon and utilized. However, in order for accountability to be achieved in the context of transitional justice, the Syrian national judiciary must play the primary role. If other judicial mechanisms, such as the International Criminal Court, special tribunals, or universal jurisdiction are to be adopted, their role must be complementary to that of national courts.
- \* The main objective of transitional justice is not only to condemn criminals and apply the law, but also to restore civil and community peace, achieve national reconciliation, and wipe the impacts of the earlier conflict stage that could enable further devastation unless the conflict is fully overcome. This is an additional difference between transitional justice and the current judicial processes taking place in regards to Syria.

Moreover, no conception of "transitional justice" can be imposed on Syrians. Instead, it requires developing a comprehensive and integrated approach to transitional justice established through dialogue, in contrast to trials currently conducted under national laws based on universal jurisdiction and dual nationality.

## Possible Accountability Mechanisms in Syria

Before the transitional phase, the most viable option remains invoking the principles of universal jurisdiction and dual nationality; this may be the case even after the beginning of the transitional justice process to prosecute the perpetrators of serious crimes in Syria. There is also the option of forming a judicial alliance between a number of states that are now involved in the accountability process. This is a topic that is under discussion within the human rights community in these countries, and such an alliance would unite investigation and prosecution efforts, save costs, and establish a basis that can be built upon when the transitional justice process commences.

After agreeing to launch a transitional justice process, criminal justice will require a considerable period of time to take off. It will first require judicial and security reform, the identification of those suspected of serious violations and their removal from government and security posts, as well as radical reforms to the judiciary, the police force, and the prison system. Effective and fair criminal prosecutions for major crimes under international law may also be contingent on the general capacity of the Syrian criminal justice system, which must be addressed through reform, along with support from personnel capable of carrying out this task. In this period of great concern, the role of trials taking place outside Syria would be crucial for reassuring victims and their families that accountability is underway, thus containing the desire for retaliation and reprisal, and some security officials and perpetrators of serious crimes may also flee to Europe. As a transitional justice mechanism, this anticipated criminal justice process could take several approaches:

- \* Regular national courts conduct trials overseen by Syrian judges. First, it is necessary to form national courts that comply with international law and for the judges presiding over

proceedings of crimes and violations that amount to war crimes or crimes against humanity to have a proven track record of integrity, impartiality, and independence, while civil society organizations' engagement should be as broad as possible.

- \* The addition of specialized and special judicial mechanisms within the national judiciary, with the support of international judicial experts, which should mitigate the existing impunity gap. If properly structured, this could enhance the capacity of the national justice system to address serious violations of international law.
- \* A hybrid model between the national and international judiciary, such as the Special Court for Sierra Leone which was established outside the national judiciary or the Specialist Chambers in the Hague.

Finally, we believe that another mechanism will assert itself as an important tool for criminal justice in Syria, and those are community or tribal courts. This mechanism was adopted in Rwanda and played a significant role in the criminal justice process there. Due to the prevalent tribal nature of most regions of Syria, this mechanism can play a positive role, especially in areas that witnessed serious violations during the period of ISIS control, and the cracks in social cohesion brought about by this period.



## The Role of Civil Society in Strategic Accountability Processes

- \* Accountability is defined as an act that produces negative consequences for perpetrators of violations in matters of concern to them, and deprives them of what they seek to achieve. These may be deprivation of liberty (incarceration) and may also take the form of loss of legitimacy or reputation, financial loss, loss of local support, loss of control over the narrative, breaking of influence, or being confronted by the victims. Accountability is not an absolute process, but a battle of points scored. Whenever we can score such points, and achieve negative consequences for violators, the more they are held accountable, and the tools of accountability cannot be restricted to litigation only.
- \* Within the above definition, there may be mechanisms currently available to hold certain perpetrators to account in real time, resulting in their loss of legitimacy, reputation, or financial means, or making it difficult for them to achieve their aims. Other mechanisms that operate in the long term seek, for example, deprivation of liberty for perpetrators.
- \* Thus, when discussing accountability, we should always identify and examine matters of concern to the perpetrators, and build an action plan according to priorities, ability to influence, and possibilities. Thus, numerous accountability methods and tools are available, and they intersect and build upon each other.
- \* Some persons or entities demand accountability, while others actively pursue it. Work on the study of the latter is as important as the former.
- \* When discussing the judiciary, what

we specifically address is strategic litigation, not litigation as it is generally understood. The main difference is that, litigation as generally understood is the mobilization of legal efforts focused mainly on the result of each case, while strategic litigation is the selection of specific cases with a dimension greater than the case itself and its direct outcomes. As such, strategic litigation cases serve other purposes related to victims, deterrence, the issuance of case law, the mobilization of public opinion, the development of laws, opening other legal cases, and the bringing in new evidence. It may also be based on a few other determinants, including the ability to mobilize quickly, avenues for restitution, and the ability and ease to convict the perpetrator, etc.

There are several roles for civil society in the different stages of any accountability process, but it is important at the outset to:

1. Study the Syrian context on an ongoing basis.
  - \* Define the strategy and goal of accountability, i.e. who will be held accountable (individual, entity, etc.) and for what purpose. This requires analysis of the negative consequences to be avoided, as well as the things that the perpetrators are in pursuit of.
  - \* What type of accountability to choose, and which entity will undertake this effort (differentiating between executive, political, and judicial processes)
    - Analysis of the interests and impetus of each entity
    - Identifying the tools available to them
    - Determining the capacities available to them
2. Building a common space between civil society groups (specialization, integration, constructive criticism)

## The Role of Civil Society in Non-Judicial, Judicial, and Quasi-Judicial Accountability

- \* Non-judicial and quasi-judicial mechanisms (UN mechanisms, convention committees, sanctions, international forums§ etc.) need to be identified, validated, and their use determined technically and strategically to support accountability efforts.
- \* Judicial accountability: It is necessary to understand and work on local laws, understand and work on local policies, open lines of communication with politicians, police, judiciary, etc., identify criminals and victims, provide evidence and context, and advocate with judicial, executive, and legislative bodies.

## The Role of Civil Society According to Specialization

- \* Humanitarian organizations working on the ground as these have the most access, are an eyewitness to crimes, and must coordinate human rights efforts with other organizations.
- \* Media organizations that shed light and sound the alarm on violations, set expectations, and facilitate discussions among Syrians on accountability mechanisms.
- \* Human rights organizations involved in documentation, advocacy, filing police reports, briefing other organizations, and managing the expectations of Syrians in this regard.
- \* Victim, survivor, and survivor associations involved in advocacy and mobilization, combating disinformation as witnesses and survivors.
- \* Diaspora communities can create local political will by advocating with voters, media, local organizations, and

steering local public interest towards pursuing war criminals in Syria.

## In the Course of Trials and Litigation: Notes on the Koblenz Trials

Since 2011, tens of thousands of pages have been published by Syrian and international human rights organizations that document human rights violations, as well as international bodies established for the purpose of this investigation and documentation such as the IIIM. However, the perpetrators of these crimes have not been held accountable nor were tried by a court. With the impossibility of referring Syria to the International Criminal Court, under repeated exercise of Russian-Chinese veto power in the UN, it was necessary to focus on the only available legal option which is to make use of the principle of universal jurisdiction. This notion allows the establishment of jurisdiction for a third country to investigate and prosecute serious international crimes, as long as they are of such gravity that they can be considered crimes against humanity. In Germany, whose laws have open and unrestricted on universal jurisdiction, the first ever trial was held that addressed violations, torture, murder, and inhuman treatment, committed in Al-Khatib Branch (Branch 251) of Syrian intelligence in the capital Damascus, took place in Koblenz, Germany after years of investigation and accumulation of evidence, as in 2012 the German public prosecutor launched comprehensive investigations under their mandate.

The Al-Khatib trial began on 20 April 2020, as the court held 103 hearings to collect evidence, during which many facts were revealed. A ruling was issued on 13 January 2022. Therefore, it is necessary to highlight some of the details of the trial, and some of its shortcomings, due to their impact on subsequent trials as they established a precedent that will be built upon for criminal accountability and future justice efforts for Syria.

## **The absence of crimes of sexual violence as a crime against humanity from the indictment, and its subsequent addition:**

Anwar R. was indicted and deemed complicit in crimes against humanity between 29 April 2011 and 7 September 2012, and at least 4,000 cases of torture were attributed to him, including brutal violence with beatings, kicks, electric shocks, 58 murders, and 2 cases of sexual assault and rape. The indictment considered two individual cases of sexual assault and rape to be addressed in accordance with German law. As such, crimes of sexual and gender-based violence were not recognized as crimes against humanity committed as part of a systematic policy, or as a tool to further humiliate Syrian detainees and punish them for their political stance or expression.

On 19 November 2020, attorneys Patrick Crocker and Sebastian Scharmer, representing the plaintiffs at the trial, filed a legal brief requesting on behalf of their clients to amend the indictment and add crimes of sexual violence as a crime against humanity. They did this on the basis that the evidence mentioned in the facts of the case, as well as the information and evidence gathered during the hearings, required a different legal assessment of the charges filed. In addition to listing the sexual crimes committed, the attorneys presented dozens of pieces of evidence in the course of the investigations and testimonies as well as international and human rights reports relevant to the trial. The prosecution's brief also noted that, "by filing this application, the plaintiffs/civil plaintiffs are not primarily concerned with the question of the possible legal consequences for the defendant Anwar. However, this will be of utmost importance to those affected, and for the issue of the scope of the crime and the classification of systematic persecution of the civilian population in Syria, especially if the court registers findings on sexual violence as a systematic instrument of the government's power of persecution and repression."

On December 16, 2020, the court read a statement by the Federal Public Prosecutor's Office regarding the aforementioned request. The Federal Attorney General did not object to the request not to treat cases of sexual violence as individual cases, but rather as crimes against humanity, and agreed that sexual violence has been and continues to be used in a systematic and flagrant manner in Syria. At the trial hearing held on 17 March 2021, the bench issued a legal notice which stated that: "On the basis of the evidence gathered so far, the accused, Anwar R., can be convicted regarding sexual assaults that took place in Al-Khatib's branch as well."

## **Language of the Trial, and Denial of Access to Available Arabic Interpretation:**

With the beginning of the first session of the trial, the Arabic interpretation, originally available in the courtroom for defendants, plaintiffs, and civil claimants and broadcast through speakers, was not available to the attendees in the courtroom. Thus, Syrians who cannot speak German were unable to accurately follow the courtroom proceedings, especially since the legal language and terminology require a high level of specialized language proficiency. Accordingly, a request was submitted to the court to provide access to Arabic translation for journalists and all those who need it in the courtroom, but the court rejected the request on 9 July 2020 which prompted the European Center for Constitutional and Human Rights (ECCHR) and other European and Syrian organizations and journalists to file a complaint with the Federal Constitutional Court.

On 18 August 2020, the Federal Constitutional Court decided to allow "accredited" media representatives, who have a special relationship with the Syrian conflict, the possibility to follow the trial proceedings in German or Arabic. However, the court rejected the request to provide access to interpretation for attendees by using transmitter/receivers that the organizations can procure themselves, or by

allowing the presence of another translator in the public space whose interpretation can be transmitted through a separate broadcasting system. According to the reasoning of the rejection, the language of the court was German, which applied to trials in accordance with international criminal law, and the complainants were responsible for lack of proficiency in the German language. Allowing the use of the Court's translation system also requires the use of substantial additional government resources in order to provide, maintain, sterilize, and monitor the use of such a system and its components. This decision deprived many of those interested from following the course of the trial accurately, and also led to errors in understanding the content of some of the statements of the court and the prosecution, which was read in German by some of the attendees and those who report the news from inside the courtroom.

### **Trial Documents Released in German Only**

It is understandable that court documents issued by German courts would be in the German language. However, it was not sensible that German be considered a sufficient language for the case of the Al-Khatib trials, or that no translations of court documents were released in Arabic – the language spoken by the stakeholders in this trial and both its parties. It was also remarkable that the German judiciary did not translate the press statement of the Higher Regional Court in which it announced the commencement of the trial. This placed additional burdens on civil society organizations, that do not specialize in translation, to translate and save all court documents, in addition to following up all trial proceedings, writing reports documenting them, and working towards a later analysis of the entire judicial process.

### **Refusal to document the trial via audio: A missed opportunity that we have not managed to compensate**

The Koblenz trial was considered a major historical trial in the world, as it dealt with cases of torture practiced by the Syrian government. Despite this, the court did not allow the hearings to be documented via audio recording. Numerous attempts by human rights organizations and personalities have failed to convince the Court of the importance of recording and preserving the hearings for future generations, or the importance of benefiting from them in transitional justice in Syria and their contribution to addressing the past and in healing and preserving the collective memory of Syrians. A petition, submitted by a group of academics and international and Syrian human rights organizations working on scientific research, was also met with the same rejection. The latter petition asked for the closing sessions to be recorded, highlighting the prominent historical importance of this trial for scientific and research purposes and considering the trial of Koblenz as a milestone in the history of international criminal law. It should be noted here that German law requires major historical importance for Germany in order for a trial to be recorded by the German court, an importance which the Court of Cassation did not find in the Koblenz trials. The court further justified its refusal by citing the impact of audio recording on witness testimonies.

### **Refusal to add the charge of forced disappearance to the indictment due to a narrow interpretation of the law:**

On 22 July 2021, the attorneys partnered with the European Center for Constitutional and Human Rights (ECCHR) submitted a legal memorandum on behalf of 13 plaintiffs and joint plaintiffs, through which they demanded the addition of the crime of enforced disappearance to the indictment. Lawyers have provided numerous pieces of

evidence indicating that, during the period covered by the indictment, the accused deprived persons of their liberty under dangerous conditions and in collusion with other perpetrators, without subsequently providing truthful information about their fates or whereabouts when requested to do so. Some 100,000 to 150,000 people in Syria have been forcibly disappeared over the course of the conflict, and witnesses in the case have repeatedly spoken out about this issue.

On 18 August 2021, the court read the statement of the prosecution regarding this request, as the prosecution refused to add this crime to the indictment and explained its decision with the fact that, according to German law, there must be a “formal request for information” about the fate of the missing person and that the defendant must be positively aware of it. According to this reasoning, it would not be possible to prove the facts in situations where crimes occur on a daily basis, such as the crimes of enforced disappearance in Syria, thus nullifying this requisition for information.

In its explanation, the Public Prosecutor’s Office continued that the aim of arrests in Al-Khatib branch was not enforced disappearance, but its goal was primarily to gather information. As such, cases of enforced disappearance of detainees would be considered a collateral consequence of the arrest, but not its main objective. On 8 September 2021, the attorneys working on the case issued a statement in response to the Public Prosecutor in which they highlighted several things. It refuted the Public Prosecutor’s statement that enforced disappearance was not the intention of the Syrian government, as this view contradicts many statements of witnesses in Koblenz and many reports on the situation in Syria.

## Social media reports of the court hearings

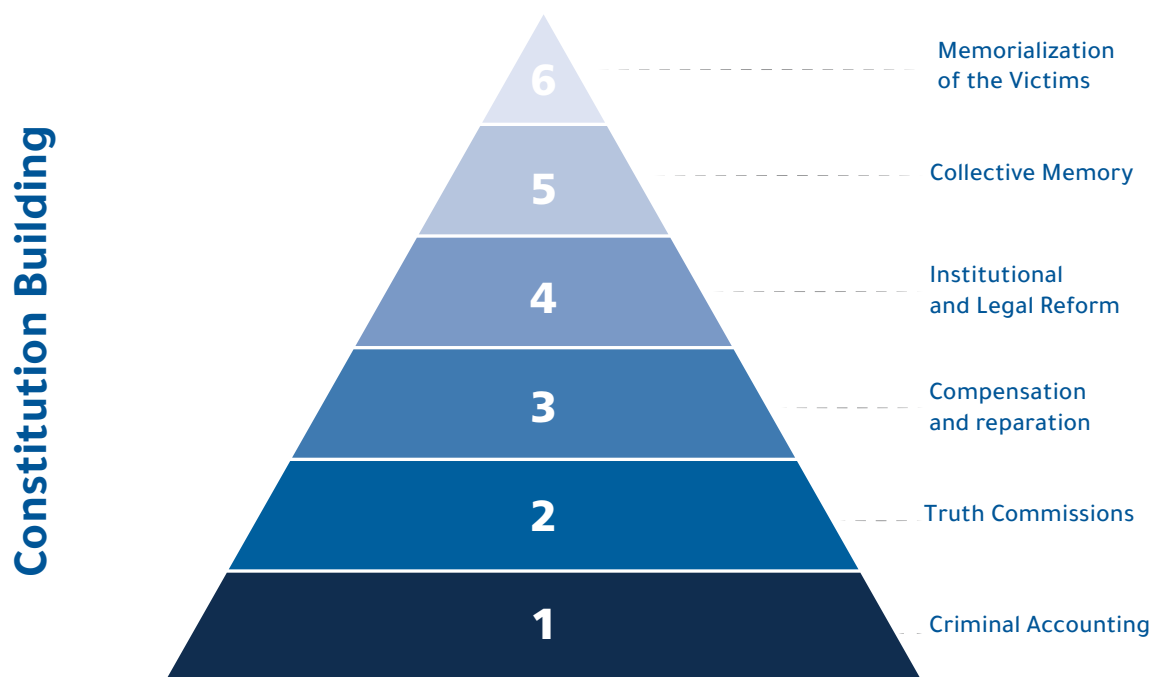
It is undeniable that efforts have been made by individuals and organizations to document the court hearings, and post periodic reports and updates to social media. This is undoubtedly a laudable effort, but some observations must be made and addressed in the future:

- \* Some reports mentioned the full names of witnesses without their informed consent, or the full names of people mentioned in the testimonies, displaying deplorable negligence. The witnesses must be dealt with the utmost responsibility and care, especially since the regime in Syria is known for its tendency for retaliation which will not spare the parents, relatives, and perhaps friends and acquaintances of the witnesses in its areas of control.
- \* Some reports have described the psychological and health condition of witnesses as they testified in court, which we consider to be in violation of their right to privacy. Additionally, this style of reporting has created real trepidation among some witnesses about what would be written about them, exacerbating their distress and the pressures that the trial has placed upon them.
- \* The last observation regards the absence of gender sensitivity in understanding the unwillingness of some female witnesses to write about their testimonies and statements. This displayed a lack of sensitivity towards the differences in individual choices made by survivors, both women and men, in dealing with the press and media in general.



# Conclusion

There is no definitive prearrangement or sequence by which a transitional justice process must take place. The facts, possibilities, and political factors determine the priorities in each transitional justice experience – as it is unrealistic to pursue all available avenues for justice at once. The pyramid below was designed according to the contributions made by the participants in four sessions. While some believe that accountability, compensation, and reparation are not feasible in light of institutions currently in place in Syria, and therefore, institutional reform would be located at the base of the pyramid. Another group approached justice as a matter of research, placing truth commissions at the base of the pyramid such that the initial reports of the commissions would be used to determine or amend priorities. Meanwhile, constitution building is a long process that may take many years, and it is one that accompanies transitional justice and intersects with it in terms of goals.



## Findings

- The participants focused on institutional reform in terms of the judiciary and the security sector. However, institutional reform also focuses on educational, media, cultural and other institutions which directly affect the lives of individuals, in order to bring about a change in the patterns of individual and personal behavior and the values that govern society. This, together with the culture and generalized personal traits, determine the culture and behavior of the group that constitutes the pivotal stabilizing factor and guarantees optimal handling of the ramifications of conflict and human rights violations.
- No sessions were entirely devoted to women's issues or the integration of a gender perspective, or specifically aimed to benefit from women's experiences and diversify views and proposed solutions, which would generally contribute to progress in the various transitional justice processes. However, there was a remarkable consensus among the participants about the mandatory

nature of women's participation, as many cited gender equality concepts in their interventions. This is a very important indicator, given that issues of women's rights and their political and equitable participation are often secondary or non-essential concerns during political transitions, peace negotiations, and when drawing transitional justice policies.

- The participants had a limited view of women as only victims or those concerned with truth-seeking, accountability, institutional reform, memorialization, etc. This overlooked women on the other side, i.e. those covered by accountability in the course of institutional reform as perpetrators of grave human rights violations. This raises questions as to the extent to which the institution of positive discrimination includes all women, whether they are victims or perpetrators.
- Transitional justice offers guarantees to all, so as to pave the way for redress and restitution for victims to compensate them for the rights they had lost, or reparation for the material or moral damage inflicted on them. This is aimed at alleviating part of their suffering, and what is most important is ensuring non-recurrence. It also provides legal guarantees to the perpetrators of crimes, as it seeks justice for the victim without abusing the perpetrator or abusing the victim's rights, and while preventing retaliation or the emergence of a culture of reprisals, slipping into another violent conflict, or the emergence of further ramifications from the current conflict.
- National reconciliation is the ultimate goal of any transitional justice process, and it invariably involves holding perpetrators accountable and reforming state institutions. Especially those implicated in human rights violations or those that have failed to prevent their perpetration.

With the conclusion of accountability and reform processes, national reconciliation begins as the inevitable result of the transitional justice approach, and it consolidates civil and community peace by moving beyond the past –by holding perpetrators accountable or pardoning them after redress for victims. Reconciliation then progresses cumulatively across all stages of transitional justice, and as a process it has no time limitation and is derived from societal indicators.

- Transitional justice is not a substitute for criminal justice. Rather, it is an integrated path imposed by the nature of criminal justice that focuses solely on the perpetrators and does not consider the violation from the perspectives of victims, remaining insufficient to achieve justice in its general sense. The Iraqi experience is perhaps the clearest example of resorting only to criminal justice, which was rigorously applied against members of the government, ruling party, and military establishment that had existed before 2003. The result were tens of thousands who lost their jobs, and consequently became enemies of the new state and significant contributors to later armed insurrections.
- Criminal or conventional justice fails to address the gross human rights violations committed in Syria, as convictions do not in themselves constitute redress for victims, even if they are issued by an independent and impartial judiciary. According to the Inter-American Court, in cases of gross violations of human rights, the judgment alone is not an appropriate remedy, and such violations require compensation. Moreover, in cases of gross human rights violations, the victim does not obtain justice merely through a court ruling.<sup>50</sup>
- Transitional justice is inexorably linked to political transition, as it accompanies, proceeds, and marks

the beginning of political transition –or comes soon after it. Any justice achieved under authoritarianism or civil war is incomplete, not only failing to achieve justice for the victims, but also provides legitimacy to the perpetrators who have agreed to be included in the transitional justice track already knowing the outcome. In order to achieve its goals, transitional justice must link the concepts of justice and political transition, that is, achieving justice during the transition that the state is undergoing.

- Since transitional justice relates to political transition, or transitioning to a new political reality, it necessitates resorting to some exceptional procedures to address extraordinary situations that conventional justice may not be sufficient to address. Democratic transition is achieved when people are able to choose their representatives democratically and break with their history of authoritarianism. Although transitional justice is not inherently linked to the democratization of society, nor does it guarantee the introduction of a democratic system, there can be no talk of democratic transition without transitional justice. Similarly, the failure of transitional justice is an inevitable indicator of the failure of democratic transition.
- Transitional justice is not an alternative to international criminal justice. Even if the jurisdiction of international criminal justice is held in Syria, prosecutions will only include a handful of war criminals and leaders, and there will still be a need for parallel paths for fair national solutions and means to overcome the years of conflict and their effects by holding those actually responsible to account. Only then can truth and justice commissions arrive to uncover violations, document the victims, and provide a means towards reparations. Meanwhile, the mechanisms of public apology can play a complementary role to accountability, community rebuilding, and bridging the division between various social groups.
- It is among the priorities of civil society and media to raise awareness of transitional justice, mainstream the concept and explain it, in order to create a conviction among the public about transitional justice as an option that can free society and future generations from the cycle of violence, revenge, and grievance. This would pave the way for national reconciliation that could end the state of schism and estrangement between various social groups in Syria, and work to enshrine the broad concept of justice and privilege it over a legacy that sees justice either as conventional form, blind, decisive, and achieved only through retribution from perpetrators, or as revolutionary justice that uses broad strokes, and perhaps even revenge and persecution.
- Determining the parameters of transitional justice in Syria depends on the nature and form of its political resolution, the stability and security there, and the existence of adequate funding to this process. These are givens that must be available for the implementation of any justice programs that can make an impact. This is in addition to the availability of qualified and trained staff in all fields, a package of regulatory and deterrent legislation, and the availability of infrastructure such as halls, means of transportation, courts and banks, as well as technical infrastructure of no less importance than others. It also requires the availability of real channels to involve Syrian citizens in addressing their past and determining the future of their country.
- Social will and acceptance are no less essential than political will in concluding a successful transitional justice process. Therefore, work must

be done to lay the foundations for and raise awareness on the concepts of transitional justice at the local level, regardless of the continuation of the conflict or the current lack of political will. This is because the introduction of a culture of transitional justice, and mechanisms such as public apologies and discussions, can contribute to alleviating negative sentiments among the victims and their families, establishing standards and values of tolerance and openness towards the other, and rejecting prejudices and hostile perceptions of other groups. Additionally, transitional justice plays a role in raising awareness of collective responsibility for the past, and emphasizes that dealing with national collective memory and decades of authoritarianism is not achieved through collective amnesia or indifference, but with tolerance and accountability-based amnesty.

- In terms of procedures, there are various approaches to transitional justice according to the experiences of each society. There are no detailed and exhaustive guidelines to arrive at transitional justice, perhaps even within the same country. Here, we should mention the United Nations Expert Mechanism on the Rights of Indigenous Peoples which, in its Comment on the Human Rights Council's Guiding Principles on Business and Human Rights as related to Indigenous Peoples and the Right to Participate in Decision-Making, demands that indigenous peoples can "access conflict resolutions procedures to resolve conflicts and disputes with States or other parties, which include business enterprises where their rights are infringed upon. Such procedures must take into account the customs, traditions, rules and legal systems of Indigenous peoples concerned," as well as "consideration of traditional mechanisms like justice circles and restorative justice models where indigenous elders and other

traditional knowledge keepers may be helpful." Thus, the recognition of the rights of indigenous peoples to apply their customs for commerce and trade, as well as traditional knowledge, has played a significant role in reconciliation efforts. However, in that case, such integration was specific to reconciliation in the event that indigenous peoples are violated, and it may differ in other contexts where transitional justice is sought.

- Transitional justice cannot be addressed by a ministry, because the government and its executive are a direct subject to transitional justice in the context of institutional and legislative reform. The executive branch should therefore not be responsible for the implementation of transitional justice programs. However, it is possible that an auxiliary ministry for the future transitional justice body could assist –albeit with logistical arrangements only.
- ◆ Transitional justice goes hand in hand with constitution building and, despite the independence of their respective functions, the objectives of the two overlap. However, the more integrated and complementary these two processes, the more feasible it becomes to introduce national reconciliation and sustainable peace and development, at an accelerated and stable pace, through interaction and mutual reinforcement between the two tracks of transitional justice and constitution building.
- ◆ By understanding the nature of the relationship between these two processes, actors are enabled to make the most of both through careful design of both the constitutional process and transitional justice mechanisms. Along with the possibility of coordination between them, this can better achieve the stated objectives of both processes

and maximize their impact, in order to better achieve common overall objectives –including reconciliation and institutional reform.

- ◆ The processes of transitional justice and constitution building mutually provide the legal and political underpinnings for the other. They can provide protection and impetus to each other, as the identification of past violations through fact-finding, for example, is part of the transitional justice process, but one that identifies flaws and priorities for institutional and constitutional reform.
- ◆ Although all the participants agreed that it should be included in constitutional text, transitional justice can be excluded from the constitution, or only some of its mechanisms may be included such as restitution, or it may be included in detail and its mechanisms defined which, according to some, is not in line with the nature of the constitution, the supreme national document, which is incompatible with temporary or time-bound provisions.
- ◆ In the context of reorientation towards the rule of law, constitution building not only provides guarantees for victims of past violations, but also important safeguards for outgoing regimes and political actors. In the case of Syria, future constitution building can overcome the culture of retaliation and ensure that those not directly involved in human rights violations participate in transitional justice processes.
- ◆ In conflict and immediate post-conflict scenarios, both transitional justice and constitutional building can consolidate conflict realities into new political and legal institutions which, in turn, aims to create a non-violent environment in which the underlying political conflict can be managed. Even if the political conflict cannot itself be resolved, this can transform conflict into less violent forms and provide future opportunities to overcome the conflict once and for all.
- ◆ Truth commissions and constitution-drafting bodies share research on past errors and remedies to prevent future recurrences, and they can shape or redraw the narrative about a country's past and future in the preamble to the constitution and through transitional justice mechanisms. Here, it is important to coordinate between the two prevailing narratives to achieve desired outcomes.
- ◆ It is imperative to recognize and consider the interaction between transitional justice and constitution building, and to formulate both processes so as to ensure that neither is prioritized over the other according to political objectives. Furthermore, the two processes may not be assumed to be amalgamable due to their intersecting and overlapping objectives, or that one can serve the purpose of the other or function in the same way. There is also the risk of overestimating expectations, which may lead to the expansion of one of the two processes at the expense of the other, which must be avoided as it undermines the goals of both of these mechanisms.
- ◆ The politically-negotiated solution will determine the course of transitional justice in Syria, and it is possible that the price of accepting a political solution is legal immunity and impunity for perpetrators of past violations and atrocities. This will enable war criminals to take the lead in the future political scene in Syria, and therefore pressure and awareness efforts must stress that accountability may not be subject to political negotiations, and that there is no authority with the power to pardon or exculpate those in violation of international human rights law.



## Key Concepts and Terms

**National Reconciliation:** The process by which a national consensus is reached among the country's political parties and social forces. Founded on tolerance, justice, and overcoming the repercussions of previous conflicts, this national consensus is reached through particular mechanisms and in line with a set of procedures- to ensure peaceful coexistence among all segments of society and their right democratic transition. Some form of national reconciliation is inevitable in states that are deeply polarized and embroiled in civil conflict. It is among the most important terms in any political settlement. To the extent that the context allows, mechanisms adopted to achieve comprehensive national reconciliation, specifically truth-telling, accountability and institutional reform, should be put in place.<sup>51</sup>

**Criminal justice:** A social tool for enforcing the standards of conduct needed to safeguard the freedom and safety of individuals and maintain public order more generally. Overall, criminal justice aims to achieve two main objectives: to protect the private interests of individuals by guaranteeing their freedoms and rights and protecting the broader interests of society by ensuring security and stability through the application of a broad set of rules within a normal environment where there is social stability, there is a functional state that encompasses bodies that are impartial towards individuals and groups, with justice applied on the bases of legal code's legitimacy and the independence and impartiality of the judiciary, thereby ensuring respect for basic human rights.<sup>52</sup>

**Restorative justice:** Restorative criminal justice refers to any process in which the victim and the offender and, when appropriate, any other individuals or community members harmed by a crime actively and collectively engage in resolving matters arising from the crime, generally with the assistance of a facilitator. The restorative processes may include mediation, reconciliation, and sentencing negotiated between judges and lawyers.<sup>53</sup> It is also defined as an approach to dealing to a crime that contributes to bringing things back to normal and ensures everyone harmed the crime receives justice.<sup>54</sup>

We also know that it is a quasi-judicial approach, and bringing together perpetrators and victims, sometimes in the presence of representatives of the community, is among its elements. The aim of these meetings is to allow them to share their experience of what happened, discuss who was hurt by the crime and how, and reach a consensus on what the aggressor should do to compensate the victim for the suffering from the attack. Monetary compensation being paid by the perpetrator to the victim, an apology, or other forms of compensation, are usually agreed to so that aggressor is deterred from harming anyone in the future.<sup>55</sup> Given the ongoing "development of restorative justice processes", it is impossible, according to the United Nations, to provide a single comprehensive definition of the term, which countries like Canada and Sweden have incorporated it into their criminal justice systems rather than adopting it as an alternative to criminal justice. That is, restorative justice has been integrated into the broader legal system framework of stable states with institutions where the constitution has supreme authority.<sup>56</sup>

Within the context of dealing with gross violations of human rights, restorative justice has been adopted to address the harm that had been done to indigenous peoples by states in the past. Its application at the national level is not entirely different from its application at the level of criminal acts committed by individuals, and it therefore cannot be considered a pathway or framework for dealing with gross violations of human rights. According to the Basic Principles on the Use of Restorative Justice Programs in Criminal Matters,<sup>57</sup> "Restorative processes should be used only [...] with the free and voluntary consent of

the victim and the offender. The victim and the offender should be able to withdraw such consent at any time during the process,” and that, “Participation of the offender shall not be used as evidence of admission of guilt in subsequent legal proceedings,” implying lack of commitment and unreliable results.

**Compensatory justice** is a broad form of justice. It regards the extent to which the compensation granted to harmed individuals is proportional to the harm they suffered. However, it does not encompass the accountability and prosecution of the perpetrators. In other words, it pertains solely to reparations given after the crime against the victims are acknowledged. It is a civic concept and is not necessarily associated with a criminal offense or intentional harm. It applies whenever there is compensable harm. It completely disregards prosecuting the perpetrators of violations. It does not involve transitional phases but is limited to a single phase. Adopting “compensatory justice” means abandoning transitional justice and the transitional phase of the political solution. Thus, its adoption leaves the status quo maintained, demands for transition are abandoned, and the Assad regime is rehabilitated and exonerated from the crimes it committed<sup>58</sup>.

**Gender Equity:** refers to the extent to which men and women are treated equally within and their needs are respected, as well as the degree to which the process aligns with the principles of equal rights, civil and political freedoms, and opportunities. In order to ensure justice, a number of measures can be adopted to overcome obstacles, whether social or historical, that hinder men or women from working effectively in society, such as the women’s quota.

**Integrating a gender perspective into the justice system:** means ensuring that gender equity is incorporated into all aspects of the justice system. The United Nations describes a gendered perspective, as a conceptual or analytical approach for assessing how an individual’s gender shapes their opportunities, roles and social interactions. It is an angle that enables one to conduct a gender analysis and then mainstream a gender perspective in any program, policy, or project.

**Gender mainstreaming:** This is a process of assessing the potential consequences of any future measure or action on men, women, girls, boys and persons of different sexual orientations or gender identities or expressions, either in drafting policy, legislative reform, restructuring of an institution, or the establishment of a training course or any program. The United Nations Economic and Social Council defines gender mainstreaming as “the process of assessing the implications for women and men of any planned action, including legislation, policies or programs, in all areas and at all levels. It is a strategy for making women’s as well as men’s concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programs in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality.”

**Transitional justice:** A 2004 Report of the United Nations Secretary-General to the Security Council defined transitional justice as comprising “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.”<sup>59</sup>

## Transitional justice is founded primarily on truth-seeking, criminal prosecution, compensation and reparations, memorialization, and institutional reform. As for criminal cases, they are resolved along two tracks:

- \* **Criminal justice:** This type of transitional justice is founded on the possibility of arresting, investigating, and fairly prosecuting human rights offenders. In this context, leniency in sentencing perpetrators, and granting them pardons, are not available options. During the transitional period, trials are held in accordance with the national laws in effect, which carry harsh sentences, and victims must be compensated for the material and moral loss they had suffered. This type of justice has been applied in countries where the human rights violators lost power such as cases of regime changes, or if the perpetrators fell into the hands of international law agencies.<sup>60</sup>
- \* **Restorative justice:** This type of transitional justice is based on compensation and satisfaction for all those whose rights have been violated, as well as forgiveness and tolerance. The process of seeking this type of justice is initiated in cases where it is impossible to apply criminal justice which requires the arrest and trial of perpetrators, or when the application of criminal justice is risky due to general fragility in the country in question.<sup>61</sup>

## International Standards for Transitional Justice

Transitional justice has gained significant ground in judicial systems and international law beginning with the decision of the Inter-American Court of Human Rights Case of Velásquez Rodríguez v. Honduras of 29 July 1988. The court concluded that all states have four core human rights obligations “to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.” The European Court of Human Rights and the Human Rights Committee have affirmed these principles, as has the Rome Statute mandating the International Criminal Court which imposes significant burdens on states, obligating them to remove impunity for perpetrators and strengthen respect for the rights of victims.<sup>62</sup>

## Features of Transitional Justice

- \* **Comprehensive:** Transitional justice adopts a comprehensive, integrated approach to addressing the legacy of gross human rights violations. It is not limited to investigating crimes and identifying and punishing those responsible, but also works to ensure restitution and dignity for victims, as well as justice and the consolidation of civil peace and democracy.
- \* **Victim-centered:** Since transitional justice is an approach to obtaining justice, reinstating victims’ dignity is among its most important objectives. Thus, all transitional justice mechanisms and processes provide support for victims, promote their involvement and participation, and maximize their benefits from its outcomes.
- \* **Vision and future guarantees:** Transitional justice addresses what occurred during earlier periods in a country’s history, while addressing in parallel current challenges and providing guarantees of non-recurrence.

**Victims:** Principle 8 of the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation states that “victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.” Principle 9 states that, “A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.”

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#### Acknowledgements:

We thank the lead researcher and legal expert, **Aiman Menem** – PhD. in Constitutional Law. We also extend our gratitude to the speakers and contributors to the Transitional Justice Forum sessions for their valuable input. We are also grateful to the colleagues who contributed to the booklet at the **Syrian Center for Media and Freedom of Expression** and **the Friedrich-Ebert-Stiftung**.

