

This paper is an output of a dialogue session held by Syrians for Truth and Justice as part of its project "Bridging the Gap between Syrians and the Constitutional Committee", supported by the National Endowment for Democracy.

The project aims to build the capacity of a diverse group of Syrians in northern Syria, on several topics; social justice, transitional justice, diversity and inclusion of minorities, gender and the constitution, and political participation. A sixth topic will be chosen by the participants themselves.

The mentioned project seeks to enhance communication between representatives of local communities in Syria and members of the Syrian Constitutional Committee, in order to ensure inclusiveness and guarantee that broader views of Syrians are represented in the constitutional process.

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The notion of Transitional justice must be included in the Syrian constitution, which will be written with the facilitation of the United Nations, and all its components must be implemented

1. Background:

This paper discusses "transitional justice" as one of the most important mechanisms adopted by several post-conflict states to preserve human rights and freedoms. It aims to highlight the role of transitional justice in addressing violations and abuse committed in Syria by the various parties to the conflict. Moreover, this paper underlines the importance of establishing legal, political, and social measures with focus on truth-seeking, redressing victims, reforming institutions, and finding mechanisms to hold perpetrators accountable (particularly high ranked officials).

Working on transitional justice in Syria is essential due to the complexity of the Syrian case, the number of committed violations, and the multiplicity of perpetrators. Several perceptions of transitional justice are based on the assumption that the Syrian government is the only party that committed gross violations of human rights. Although this assumption was correct until the end of 2011, things have changed after the huge number of crimes committed by local and foreign parties (who are also participating in the peace negotiations). Therefore, a new approach that is comprehensive and compatible with the current reality of the Syrian conflict must be adopted.

This paper is based on a four-session workshop called by Syrians for Truth and Justice (STJ). The workshop addressed general concepts of transitional justice and discussed previous experiences of several countries, particularly South Africa, Morocco and Chile. During the sessions, new aspects and approaches that support transitional justice were presented, such as restorative and transformative justice. The need to include transitional justice in the agenda of the Syrian Constitutional Committee (SCC) was also addressed as a bridge and an essential path towards a secure future and a sustainable state of law.

2. What is Transitional Justice?

The notion of transitional justice is a modern legal concept. Its political, legal, human rights and humanitarian motives began to emerge slowly through international experiences, especially in Europe after World War II, and with the establishment of international military tribunals in Tokyo and Nuremberg. Moreover, the creation of the United Nations, the Universal Declaration of Human Rights and other various international covenants clearly helped in the development of this concept.¹

At the end of the sixties, the development of civil society in Europe had a clear impact on the transition of several countries from stratocracy to democracy, as in Greece and Spain. This also applies to the political transition from dictatorship to democracy in Eastern Europe. These countries have followed different paths of transitional justice according to their political, social

¹ Habib Issa, The Constitutional Establishment of Transitional Justice in Syria, Foundations and Starting Points in the Transitional Justice in Syria (Legal Study). Harmoon Center For Contemporary Studies. November 2017, pages 9-14.

and economic conditions. These different tracks contributed to strengthening the notion of transitional justice.²

As a result of civil wars in several countries (Latin American and African countries) and the increase of grave violations, the international community has supported criminal trials to prosecute perpetrators. Therefore, international and hybrid criminal courts and tribunals were established for the former Yugoslavia, Rwanda, Sierra Leone, etc.

Transitional justice is an ever-evolving field of academic research and practice. It relates to large-scale past human rights abuses in the aftermath of a political transition. Transitional justice was implemented in societies that emerged from tyrannical regimes and countries that suffered from internal or external conflicts, as well as countries that suffer from ongoing conflicts, limited democracy, or democratic transition.³

2.1 Definition of Transitional Justice:

The United Nations defines the notion of transitional justice as “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof”.⁴ In other words, transitional justice deals with a legacy of widespread, systematic violations rather than individual abuse.

On the other hand, the International Center for Transitional Justice (ICTJ) defines transitional justice as a notion that refers to judicial and nonjudicial processes applied by several countries to address a legacy of large-scale past abuses. These processes include prosecutions, commissions of inquiry, reparations programs, and various forms of institutional reform. Transitional justice refers to how societies respond to the legacies of massive and serious human rights violations. It asks some of the most difficult questions in law, politics, and the social sciences and grapples with innumerable dilemmas. Above all, transitional justice is about victims.⁵

2.2 Components of Transitional Justice:

Transitional justice is rooted in the International Human Rights Law (IHRL). States have an obligation to provide victims of gross violations with an effective remedy.⁶ The Secretary-General of the United Nations stated that transitional justice consists of judicial and non-

² Hassan al-Aswad, Transitional Justice in the New Syria, Harmoon Center For Contemporary Studies. 26 December 2021. Accessed on 10 May 2023.

<https://www.harmoon.org/reports/%D8%A7%D9%84%D8%B9%D8%AF%D8%A7%D9%84%D8%A9-%D8%A7%D9%84%D8%A7%D9%86%D8%AA%D9%82%D8%A7%D9%84%D9%8A%D8%A9-%D9%81%D9%8A-%D8%B3%D9%88%D8%B1%D9%8A%D8%A9-%D8%A7%D9%84%D8%AC%D8%AF%D9%8A%D8%AF%D8%A9/>

³ Introduction into Transitional Justice in the Middle East and North Africa. Center for International and Regional Studies. Georgetown University School in Qatar. Summary Report No.16. (2018). Accessed on 10 May 2023. <https://repository.library.georgetown.edu/handle/10822/1050477>

⁴ United Nations Security Council. Report of the Secretary-General S/2004/616 “The rule of law and transitional justice in conflict and post-conflict societies”. 23 August 2004. Page 6. Accessed on 10 May 2023.

<https://undocs.org/Home/Mobile?FinalSymbol=S%2F2004%2F616&Language=E&DeviceType=Desktop&LangReques=False>

⁵ What Is Transitional Justice? The International Center for Transitional Justice. Accessed on 10 May 2023.

<https://www.ictj.org/what-transitional-justice>

⁶ Office of the United Nations High Commissioner for Human Rights. About transitional justice and human rights. Accessed on 10 May 2023. <https://www.ohchr.org/en/transitional-justice/about-transitional-justice-and-human-rights>

judicial processes and mechanisms, including prosecution initiatives and facilitating initiatives in respect of the right to truth, delivering reparation, institutional reform, and national consultations. Whatever combination is chosen must be in conformity with international legal standards and obligations.⁷

Components of Transitional Justice		The legal foundation	Definition
Judicial/ Quasi-judicial processes	National/ International courts and special tribunals	Right to justice	Holding perpetrators accountable is a right of both victims and society. This includes judicial investigations of those responsible for committing human rights violations, or who are believed to bear the greatest responsibility for gross or systematic violations.
	Truth commissions	Right to truth	Truth commissions investigate and draw patterns of systematic violations, recommend amendments, and help understand the reasons behind serious human rights violations. They do not prosecute, but issue reports and unearth the causes and consequences of the destructive events. They give recommendations about amending or repealing laws that affect investigations or trials.
Non-judicial processes	Reparations programs	Right to reparations	Initiatives supported by the state and contributed to redressing material and moral damages resulting from past violations. Reparations can be material and symbolic. ⁸
	Institutional reform/Legislative reform	Guarantees of non-recurrence	Reforming public institutions in a way that protects human rights and fosters a culture of respect for the rule of law. Ensuring non-recurrence of violations and establishing democracy through constitutional, legal and public institutions reform (particularly in the security, justice and media sectors). Without reforms, institutions may repeat abuses.
	National consultations		National consultations are a critical component of a human rights-based approach to achieving transitional justice, including the participation of different marginalized groups, such as women, ethnic, religious, and linguistic groups.

⁷ Guidance note of the Secretary-General: United Nations approach to transitional justice. ST/SG(09)/A652. March 2010. Page 2. Accessed on 10 May 2023. <https://digitallibrary.un.org/record/682111?ln=en>

⁸ According to the United Nations General Assembly, A/RES/60/147 “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”, published on 21 March 2006, Reparations for victims or their families can be either material (compensation, free health, and scientific services), or symbolic (commemorations, museums and memorials that preserve the public memory). Accessed on 10 May 2023. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/496/42/PDF/N0549642.pdf?OpenElement>

Transitional justice is a project controlled by a complex set of reasons, terms, conditions, and forces. It does not adopt a single approach. Instead, it prioritizes the established local perceptions of justice, reconciliation, and peace. It learns from past experiences. Furthermore, transitional justice is an effective tool that promotes citizenship, human rights, community participation, and democracy. Transitional justice is a path to rebuild societies that were destroyed by dictatorship or torn apart by civil wars.

3. Forms and Approaches to Transitional Justice:

Transitional justice does not have one single form but a variable structure that evolves and changes from one country to another. Transitional justice is an engineering of multiple approaches and justice strategies, in specific conditions (a democratic transition or a conflict) when state institutions are weak, corrupted, or destroyed.⁹

Within this context, transitional justice is based on the need to understand the political, social, economic, and cultural context that characterizes a society. It aims to deal with the consequences of past violations. It is not possible to entirely apply the experience of one country to another, as priorities, challenges and obstacles might differ.

In Colombia, for example, the government proposed to apply restorative justice to face the atrocities committed by paramilitary groups. “The legislative proposal is oriented towards a restorative conception, which supersedes the assimilation of punishment with vengeance. This assimilation is typical of a discourse, which mainly reacts against the criminal with a similar pain to that which he/she inflicted on the victim and, only in a second place, seeks non recurrence (prevention) and victims’ reparations. It is important to consider that, when doing justice, law points towards reparations, and not towards revenge. In face of evidence regarding the frequent failure of prison, as the only answer to crime, to achieve resocialization of delinquents, contemporary criminal law has advanced in the issue of alternative sanctions”.¹⁰

As for the South African experience¹¹ (after the Reconciliation Law in 1995), the efforts of the transitional justice committees did not stop. Also, victims’ associations continued to seek a constitutional amendment. During 2008, the Pretoria High Court declared the Prosecution Policy’s amendments unconstitutional.¹² In 2010, the Constitutional Court upheld victims’ rights to be consulted before political pardons were granted, as well as in the legal appeals to the amendments to the National Prosecuting Authority’s Prosecution Policy which provided for a backdoor amnesty.¹³

In democratic transition, the issue of amnesty for serious crimes was one of the most important issues to negotiate. The two parties to the conflict agreed to grant amnesty in

⁹ Habib Nassar, the Director of Policy and Research at Immunity Watch. During a workshop on transitional justice in Syria, organized by STJ.

¹⁰ The Colombian Congress Gazette No. 436, 2003. See: Maria Paula Saffon and Rodrigo Uprimny, Transitional Justice, Restorative Justice and Reconciliation. Some Insights from the Colombian Case, National University of Columbia 2005, p.1. Accessed on 10 May 2023 <https://www.legal-tools.org/doc/e5caf8/pdf/>

¹¹ The experience of South Africa is one of the most prominent experiences of transitional justice, as South Africa suffered over thirty years (1960 to 1990) from racial segregation under the all-white government of South Africa and faced an armed conflict, led by the African National Congress (ANC), against the Apartheid that ended with a democratic transition in 1990. The ban on ANC was lifted and Nelson Mandela was released.

¹² South Africa, International Center for Transitional Justice. Accessed on 10 May 2023. <https://www.ictj.org/location/sud%C3%A1frica>

¹³ *ibid.*

respect of acts, omissions and offenses associated with political objectives committed during the conflicts of the past.¹⁴

With the outbreak of the Arab Spring, it was necessary to conduct a major revision of the concept of transitional justice to adapt with the particularity of the region and the crimes committed by governments and armed militias (like in Syria, for example).

4. Syria and Transitional Justice:

Before the conflict in Syria, only a few specialists were aware of the notion of transitional justice. However, after 2011, Syrians began to organize themselves in non-governmental organizations specialized in transitional justice. Transitional justice was addressed in the National Covenant document endorsed by the Syrian Opposition Conference held under the auspices of the League of Arab States in Cairo on 3 July 2012.¹⁵ It called for the establishment of a **public commission for accountability and national reconciliation**.

Several advocacy, documentation and training organizations participated in developing perceptions of achieving transitional justice in Syria.

Moreover, coordination groups were formed. They aimed to formulate a national vision of transitional justice in Syria and to initiate a broad consultation process. The latter seeks to involve the population on a larger scale and to encourage victims and their families to organize themselves in victims' associations.¹⁶ These groups continued to reflect on the concepts and mechanisms of transitional justice. The efforts focused on documenting violations and testimonies to shed light on the suffering of victims and on their claims for justice and accountability. Furthermore, criminal litigation efforts focused on fighting impunity, which helped multiple initiatives in the countries that hosted Syrian refugees to work on prosecuting crimes under the principle of Universal Jurisdiction (as well as other forms of extraterritorial jurisdiction). This encouraged international criminal justice efforts and motivated victims' groups and other civil society actors to focus on truth-seeking in order to address the issue of tens of thousands of forcibly disappeared and missing persons in Syria. All the above has contributed to new and innovative approaches to justice.¹⁷

The legacy of violations in Syria has varied, affecting most of the ethnic, religious, cultural, and social components of the Syrian people. This requires the Syrians to work on creating a special path and philosophy for transitional justice. The scale of the violations on the one hand, and the

¹⁴ In mid-1995 the South African Parliament ratified the Law of "Promotion of national unity and reconciliation ACT 34", which established a Truth and Reconciliation Commission (TRC) based in Cape Town. The TRC implemented its mandate through 3 committees: the Amnesty Committee, Reparation and Rehabilitation Committee and Human Rights Violations Committee. Official Truth and Reconciliation Commission Website. Accessed on 10 May 2023.
<https://www.justice.gov.za/trc/>.

¹⁵ Cairo Documents: Joint Political Vision. Malcolm H. Kerr Carnegie Middle East Center. Accessed on 10 May 2023.
<https://carnegie-mec.org/diwan/49938?lang=en>

¹⁶ Transitional justice in Syria, the path and the outcome (العدالة الانتقالية في سوريا المسار والمآل). Pro Justice. 24 August 2018. Accessed on 10 May 2023.
<https://pro-justice.org/ar/accountability/%D8%A7%D9%84%D8%B9%D8%B1%D8%A8%D9%8A%D8%A9-%D8%A7%D9%84%D8%B9%D8%AF%D8%A7%D9%84%D8%A9-%D8%A7%D9%84%D8%A7%D9%86%D8%AA%D9%82%D8%A7%D9%84%D9%8A%D8%A9-%D9%81%D9%8A-%D8%B3%D9%88%D8%B1%D9%8A%D8%A7-%D8%A7.html>

¹⁷ Unlocking the Road to Justice in Syria, Opinio Juris, 1 October 2022. Accessed on 10 May 2023.
<http://opiniojuris.org/2022/10/01/unlocking-the-road-to-justice-in-syria/>

challenges on the other, makes it necessary to design various programs with multiple mechanisms and different tools to reach the desired results.

5. The International Community's Role in Strengthening the Path of Transitional Justice in Syria:

The notion of transitional justice and some of its components were mentioned in the 2012 Geneva Communiqué,¹⁸ in the context of addressing safety, stability, and calm. Article 10(D) states the following: "Commitment to accountability and national reconciliation. Accountability for acts committed during the present conflict must be addressed. There also needs to be a comprehensive package for transitional justice, including compensation or rehabilitation for victims of the present conflict, steps towards national reconciliation and forgiveness".¹⁹

Although the UN Security Council Resolution No. 2254 of 2015²⁰ (which calls for a cease-fire and a political settlement in Syria) does not explicitly mention the notion of transitional justice, it stresses that the only path out of the tragedy towards a solution, in line with resolution 2254, is through an inclusive and Syrian-led political process that meets the legitimate aspirations of all Syrians, with a view to full implementation of the Geneva Communiqué of 30 June 2012 as endorsed by Resolution No. 2118 of 2013.²¹

To represent all Syrians, the Civil Society Support Room (CSSR) was established in January 2016 by the Office of the Special Envoy for Syria (OSE-Syria) as a mechanism to consult with a broad and diverse range of civil society actors. Through the CSSR civil society actors could meet, interact, and provide their insights and ideas to the OSE-Syria, relevant UN actors and international stakeholders. After several rounds of the Syrian Constitutional Committee, participants had conflicting opinions. On the one hand, an opinion, represented by the delegation of the Syrian Negotiations Committee, states that "the state's commitment to addressing war crimes, crimes against humanity, and human rights violations should adopt a comprehensive approach to transitional justice, based on the following principles: no impunity, crimes are not subject to statute of limitations or a previous amnesty, the rights of victims and their families shall be preserved". Another opinion, represented by the Syrian Government Delegation, states that "transitional justice is not a constitutional principle, and therefore cannot be included in the constitution".²²

The Tunisian experience of transitional justice is considered one of the most recent and is a good example to look at. Article 148(9) of the Tunisian Constitution of 2014 states that "The state undertakes to apply the transitional justice system in all its domains and according to the deadlines prescribed by the relevant legislation. In this context the invocation of the non-retroactivity of laws, the existence of previous amnesties, the force of *res judicata*, and the

¹⁸ Final Communiqué of the Action Group for Syria (Geneva Communiqué). United Nations Peacemaker. 30 June 2012. Accessed on 10 May 2023. <https://peacemaker.un.org/node/1581>

¹⁹ *ibid.*

²⁰ Resolution 2254 (2015), S/RES/2254. United Nations Security Council. 18 December 2015. Accessed on 10 May 2023. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/443/34/PDF/N1544334.pdf?OpenElement>

²¹ Constitutional Committee. Office of the Special Envoy of the Secretary-General for Syria. Accessed on 10 May 2023 <https://specialenvoysyria.unmissions.org/constitutional-committee-0>

²² The minutes of the negotiating sessions of the Syrian Government Delegation and the Delegation of the Syrian Negotiations Committee at the Syrian Constitutional Committee.

prescription of a crime or a punishment are considered inadmissible”²³. Moreover, Article 241 of the Constitution of Egypt states that “In its first session after the enforcement of this Constitution, the House of Representatives commits to issuing a transitional justice law that ensures revealing the truth, accountability, proposing frameworks for national reconciliation, and compensating victims, in accordance with international standards”.²⁴

6. Challenges and Obstacles in Implementing Transitional Justice in Syria:

The first obstacle towards transitional justice in Syria is the presence of multiple international and regional parties to the conflict, who committed grave human rights violations against citizens. Beside the military forces and security services of the Syrian government, several parties were/are involved in various forms of violence against the Syrians, such as the Russian military forces,²⁵ the global coalition forces led by the United States of America,²⁶ the Turkish military and security forces,²⁷ the Iranian Revolutionary Guard forces and the Iraqi, Lebanese and Afghan militias associated with it,²⁸ as well as the armed groups mentioned in the list of designated terrorist groups, such as the Islamic State of Iraq and the Levant (ISIS),²⁹ al-Qaida and its affiliates (al Nusra Front/Hayat Tahrir al-Sham),³⁰ in addition to the Free/National Syrian Army factions³¹ and the Syrian Democratic Forces.³² Some of these factions no longer exist or have the same power, such as ISIS and other extremist armed groups.

²³ The Tunisia's Constitution of 27 January 2014. Accessed on 10 May 2023.

https://www.constituteproject.org/constitution/Tunisia_2014.pdf

²⁴ The Egyptian Constitution. Article No. 241. Accessed on 10 May 2023.

<https://www.presidency.eg/ar/%D9%85%D8%B5%D8%B1/%D8%A7%D9%84%D8%AF%D8%B3%D8%AA%D9%88%D8%B1/>

²⁵ Seventh Annual SNHR Report on Russian Forces' Violations since the Beginning of Russia's Military Intervention in Syria on September 30, 2015. Syrian Network for Human Rights. 30 September 2022. Accessed on 10 May 2023.

<https://snhr.org/blog/2022/09/30/seventh-annual-snhr-report-on-russian-forces-violations-since-the-beginning-of-russias-military-intervention-in-syria-on-september-30-2015/>

²⁶ The Twentieth Periodic Report and Sixth Annual Report on the US-led Coalition Forces against ISIS. Syrian Network for Human Rights. 23 September 2020. Accessed on 10 May 2023. <https://snhr.org/blog/2020/09/23/55476/>

²⁷ Syria: Damning evidence of war crimes and other violations by Turkish forces and their allies. Amnesty International. 18 October 2019. Accessed on 10 May 2023.

<https://www.amnesty.org/en/latest/press-release/2019/10/syria-damning-evidence-of-war-crimes-and-other-violations-by-turkish-forces-and-their-allies/>

²⁸ Two Syrian experts: Iranian groups helped the regime in its violations, (خبيران سوريان: مجموعات ايران ساعدت النظام في انتهاكاته). Anadolu Agency. 10 May 2022. Accessed on 10 May 2023.

<https://www.aa.com.tr/ar/%D8%A7%D9%84%D8%AF%D9%88%D9%84-%D8%A7%D9%84%D8%B9%D8%B1%D8%A8%D9%8A%D8%A9/%D8%AE%D8%A8%D9%8A%D8%B1%D8%A7%D9%86-%D8%B3%D9%88%D8%B1%D9%8A%D8%A7%D9%86-%D9%85%D8%AC%D9%85%D9%88%D8%B9%D8%A7%D8%AA-%D8%A5%D9%8A%D8%B1%D8%A7%D9%86-%D8%B3%D8%A7%D8%B9%D8%AF%D8%AA-%D8%A7%D9%84%D9%86%D8%B8%D8%A7%D9%85-%D9%81%D9%8A-%D8%A7%D9%86%D8%AA%D9%87%D8%A7%D9%83%D8%A7%D8%AA%D9%87/2583809>

²⁹ The Most Notable ISIS Violations against Syrian Society and ISIS' Contribution to Distorting the Popular Uprising Calling for Freedom and Dignity. Syrian Network for Human Rights. 10 February 2022. Accessed on 10 May 2023.

<https://snhr.org/blog/2022/02/10/57313/>

³⁰ The Most Notable Hay'at Tahrir al Sham Violations Since the Establishment of Jabhat al Nusra to Date. Syrian Network for Human Rights. 31 January 2022. Accessed on 10 May 2023 <https://snhr.org/blog/2022/01/31/57274/>

³¹ Syria: Continued Violations and Opposition Intra-Factional Clashes in "Safe Areas". Syrians for Truth and Justice. 1 August 2022. Accessed on 10 May 2023.

<https://stj-sy.org/en/syria-continued-violations-and-opposition-intra-factional-clashes-in-safe-areas/>

Syria: Civilians Abused in 'Safe Zones'. Human Rights Watch. 27 November 2019. Accessed on 10 May 2023

<https://www.hrw.org/news/2019/11/27/syria-civilians-abused-safe-zones>

"You Can Still See Their Blood". Human Rights Watch. 10 October 2013. Accessed on 10 May 2023.

<https://www.hrw.org/report/2013/10/10/you-can-still-see-their-blood/executions-indiscriminate-shootings-and-hostage>

Moreover, there are parties that interfere in the constitutional process in Syria and set conditions and vetoes on the presence and participation of some parties. The planning for transitional justice in Syria is not controlled by the Syrians only, but also by the parties involved in the crisis in the first place. This threatens the ability to implement all components of transitional justice and hold various parties to the conflict accountable for the crimes they committed in Syria.

Certainly, the cornerstone of the transition process in Syria is the political will, which is achieved either through an internal national consensus and a national reconciliation process or imposed by the international community and through active and influential countries. In the Syrian context, there is an absence of this will, whether at the local level between the conflicting parties or among the influential international and regional parties, such as Russia, Turkey, and Iran.

Furthermore, the lack of confidence in the Syrian national institutions is an obstacle towards transitional justice and to reaching an inclusive social contract, which is _in a way or another_ supposed to represent the common will of the Syrians to live together. This should be reflected in the constitution because without clear constitutional provisions, transitional justice is not able to gain legitimacy and acceptance. Subsequently, governments cannot abide by it.

Therefore, the important step (at the beginning of the transitional period) is the constitutional establishment of the legislative, executive, and judicial institutions. The current Syrian constitution of 2012, as well as previous constitutions, violates the essential rights of citizens. For example, the preamble states that:

“The Syrian Arab Republic is proud of its Arab identity and the fact that its people are an integral part of the Arab nation. The Syrian Arab Republic embodies this belonging in its national and pan-Arab project and the work to support Arab cooperation in order to promote integration and achieve the unity of the Arab nation”.³³

Moreover, in the preamble, the terms “Arab/Arabic” are repeated more than ten times, which may give the impression that all Syrians are Arab, despite the fact that other ethnicities live in Syria such as the Kurds, Turkmen, Syriacs, Assyrians and others.

Moreover, Article 3 of the Syrian constitution stipulates that “Islamic jurisprudence shall be a major source of legislation”³⁴ which excludes other groups such as Christians, Yazidis, and Druze.

In addition, according to the Syrian constitution, the President of the Republic enjoys broad executive and legislative powers. He interferes in all aspects of political, economic, security and social life, whether through legislation, or administrative instructions. He lays down the general policy of the state and names the Prime Minister, his deputies, ministers, and their

³² Report of the Independent International Commission of Inquiry on the Syrian Arab Republic A/HRC/51/45. 17 August 2022. Accessed on 10 May 2023. <https://reliefweb.int/report/syrian-arab-republic/report-independent-international-commission-inquiry-syrian-arab-republic-ahrc5145-enarruzh>

³³ Constitution of the Syrian Arab Republic. 27 February 2012. Accessed on 10 May 2023. <https://egov.sy/page/en/137/0/Constitution.html>

³⁴ *ibid.*

deputies.³⁵ Moreover, the President passes the laws approved by the People's Assembly, as well as the decrees, decisions, and orders. He declares war, calls for general mobilization and concludes peace agreements after obtaining the approval of the People's Assembly.³⁶ Also, he declares the state of emergency and repeals it.³⁷ The President of the Republic sets up special bodies, councils and committees whose tasks and mandates are set out in the decisions taken to create them.³⁸ Furthermore, the Supreme Judicial Council is headed by the President of the Republic³⁹ and the Supreme Constitutional Court consists of at least seven members named by the President.⁴⁰

Under the current constitution, there is no actual separation or independence of powers. Moreover, there is neither equality between Syrians nor political life. All powers are granted to the President.

This leads to another obstacle, which is the structure and power of different institutions involved in killing and displacing Syrians, such as the security institutions (police and army). Moreover, the judiciary's involvement in the perpetration is very problematic in terms of how to deal with a judicial system that has been complicit in repression and human rights violations.

Decree 64 of 2008, for example, prevented the judiciary from looking into crimes committed by police officers, the Political Security Division, and the customs police, and granted them immunity against the crimes they commit by prosecuting them before military courts. A prosecution is only possible by a decision of the General Command of the Army and Armed force.

Moreover, Article 53 of the Military Penal Code does not allow the prosecution of military personnel (or those working in military departments) who fall within the jurisdiction of the military judiciary, unless there is a persecution order issued by the competent authorities.

Furthermore, Law No. 14 of 1969 states that prosecuting any member of the (intelligence) department for crimes committed during the execution of specific tasks entrusted to them, or when initiating them, is only possible upon a prosecution order issued by the Director.⁴¹

The establishment of both the constitution and the law must be based on the repeal of exceptional laws and judiciary, and on amending legislation in line with the changes of social and legal reality (Penal Code, Civil Code, Civil and Criminal Procedure Code, Personal Status Law, etc.). Tight laws must be put in place to respect and implement judicial rulings.⁴² The transitional phase begins with the establishment of a constitution that provides for an independent and impartial judicial system that can carry out the role assigned to it. The judicial system must be given full power to reject laws that are inconsistent with the constitution and treaties ratified by Syria, especially those related to human rights. The law of the Supreme

³⁵ Articles 97,98,99,124

³⁶ Articles 100,101,102

³⁷ Article 103

³⁸ Article 115

³⁹ Article 133

⁴⁰ Article 141

⁴¹ The law establishing the State Security Department and the law of the internal regulations of the State Security Department (قانون إحداث إدارة أمن الدولة وقانون التنظيمات الداخلية لإدارة أمن الدولة). The Syrian Human Rights Committee. 6 February 2004. Accessed on 10 May 2023. <https://www.shrc.org/?p=7451>

⁴² Syria: The Power of the Executive Branch and its Security Organs Make Judicial Immunity Ineffective. Syrians for Truth and Justice. 28 July 2022. Accessed on 10 May 2023. <https://stj-sy.org/en/syria-the-power-of-the-executive-branch-and-its-security-organs-make-judicial-immunity-ineffective/>

Constitutional Court should be reconsidered to limit the powers granted to the executive authority on appointing judges.⁴³

On the other hand, the formation of truth commissions is usually a challenge, as well as ensuring their ability to reveal the fate of thousands of dead, detainees, and forcibly disappeared people, especially when multiple parties control different regions of a country. Moreover, the absence of evidence, documents, and witnesses is an obstacle. Further, because of displacement, many victims and their families leave the country. For example, addressing the issue of missing persons was an essential element in the process of social reconciliation in democratic Chile.⁴⁴

In the Syrian context, there are several difficulties in this aspect. One of them is the reparations, especially that defining victims⁴⁵ and determining the period of reparations might be challenging (for example, will reparations cover the crimes committed since the beginning of the conflict?) particularly regarding political detainees and the deprivation of nationality (as in the case of the Kurds in Syria).⁴⁶

Several reports of human rights organizations and the Independent International Commission of Inquiry indicate a wide range of violations of human rights law and international humanitarian law.⁴⁷ The implementation of effective transitional justice measures and securing financial resources will be challenging⁴⁸ as a result of the large number of victims and crimes, the presence of around 6.2 million internally displaced persons (IDPs) and the same number of refugees, and the ongoing economic crisis. Securing financial resources will be one of the challenges that will face the Syrians, depending on the extent of the destruction of the economy and infrastructure, the unemployment and poverty, and the shortage of resources.⁴⁹

Moreover, reparations programs and the allocated financial resources can be challenging. The acknowledgment of responsibility is an essential element of reparation, and its absence is a result of a misunderstanding that compensation is enough to provide reparation. There are cases where governments give money to victims without taking responsibility for the state's failure to prevent abuses and without committing to non-repetition.⁵⁰ Therefore, compensation must be accompanied by acknowledgment of responsibility.

⁴³ The Supreme Constitutional Court in Syria: A Formal Independent Tool in the Hands of the President. Syrians for Truth and Justice. 15 August 2022. Accessed on 10 May 2023.

<https://stj-sy.org/en/the-supreme-constitutional-court-in-syria-a-formal-independent-tool-in-the-hands-of-the-president/>

⁴⁴ International Commission on Missing Persons. Chile. Accessed on 10 May 2023.

<https://www.icmp.int/where-we-work/the-americas/latin-america-and-the-caribbean/chile/>

⁴⁵ "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". Resolution adopted by the General Assembly on 16 December 2005. A/RES/60/147. 21 March 2006. Accessed on 10 May 2023.

<https://undocs.org/Home/Mobile?FinalSymbol=A%2FRES%2F60%2F147&Language=E&DeviceType=Desktop&LangRequested=False>

⁴⁶ Statelessness in Syria: An Enduring Dilemma. Syrians for Truth and Justice. 11 October 2022. Accessed on 10 May 2023.

<https://stj-sy.org/en/statelessness-in-syria-an-enduring-dilemma/>

⁴⁷ Report of the Independent International Commission of Inquiry on the Syrian Arab Republic. A/HRC/37/72. 1 February 2018. Accessed on 10 May 2023.

<https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F37%2F72&Language=E&DeviceType=Desktop&LangRequested=False>

⁴⁸ Report of the Independent International Commission of Inquiry on the Syrian Arab Republic. A/HRC/40/70. 31 January 2019. Accessed on 10 May 2023.

<https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F40%2F70&Language=E&DeviceType=Desktop&LangRequested=False>

⁴⁹ Syria Economic Monitor - Spring 2022: Lost Generation of Syrians. World Bank Group. Accessed on 09 November 2022

<https://openknowledge.worldbank.org/handle/10986/37617>

⁵⁰ Rule 150, IHL Databases, Volume II, Chapter 42, Section B. Accessed on 10 May 2023.

In the case of Chile, the government provided reparations to a wide variety of victims, and addressed the consequences of violations through comprehensive measures. It paid for the compensation from pensions, which allowed it to spread the costs over several years, and ensure that the victims did not fall into poverty when they were old. Compensation programs also included the establishment of a specialized health care system that took into account the needs of victims, and a program that provided university scholarships to victims and their children. Reparations programs were implemented in Chile and Argentina in parallel with major efforts to establish the truth, to recognize state responsibility, to investigate and prosecute perpetrators of serious crimes, and to reform institutions.⁵¹

In the future, the Syrians and the conflicting parties shall reach a political settlement that creates a balance in the interests of all parties. However, as the transitional phase begins, the limitation of awareness of transitional justice will be an obstacle in reaching a sustainable solution. The notion of transitional justice is confused with other notions, such as the notion of restorative justice, retributive/criminal justice and other approaches to justice.

Example: in Iraq, after the fall of Saddam Hussein's regime in 2003, and even after the victory over ISIS, whether in the trial of state officials or in dealing with the Baath Party and ISIS members, the desire for vengeance prevailed. The standards of a fair trial were not considered, and the trials did not provide the opportunity to achieve justice or equity for the victims who did not have the opportunity to participate in the process. No reparations were provided and the truth was not revealed.⁵²

The notion of this process should be clarified. Retributive justice and criminal justice are not far from the context of transitional justice, but one of the approaches that transitional justice needs to implement its vision, while ensuring a sustainable peace based on achieving justice. The South African experience in transitional justice is a prominent example of the democratization process that took a middle position between retributive and restorative justice:

The Truth and Reconciliation Commission (TRC) took a middle position between retributive justice and amnesty, avoided the approach of vengeance, and worked to re-establish an ethical system based on understanding and replacing criminal punishment with social stigma. The commission authorized "A pardon in exchange for truth" for perpetrators of human rights abuses who wished to confess. Presidential pardons were issued in secret trials, in the absence of the victims and their representatives. The commission enabled the perpetrators of grave crimes, who did not apply for the pardon, to escape punishment.⁵³

<https://ihl-databases.icrc.org/en/customary-ihl/v1/rule150>

⁵¹ ICTJ Program Report: Reparative Justice. The International Center for Transitional Justice. 13 May 2013. Accessed on 10 May 2023. <https://www.ictj.org/news/ictj-program-report-reparative-justice>

⁵² Transitional Justice in Syria. Dawlaty and No Peace Without Justice. 4 August 2014. Accessed on 10 May 2023. <https://dawlaty.org/publications/transitional-justice-in-syria/>

⁵³ Such as the former apartheid State President Pieter Willem Botha defied a subpoena to appear before the commission, calling it a "circus". Accessed on 10 May 2023.

[https://en.wikipedia.org/wiki/Truth_and_Reconciliation_Commission_\(South_Africa\)](https://en.wikipedia.org/wiki/Truth_and_Reconciliation_Commission_(South_Africa))

Moreover, justice can take a form of victorious justice, or the new authority may follow the transitional justice approach under international pressure. This can be seen in Morocco's experience in transitional justice (which was presented in STJ's workshop) and the formation of the Equity and Reconciliation Commission (ERC).⁵⁴

The ERC was established within the political system. Therefore, it remained in harmony with the latter and could not contradict it. The ERC was equivalent to a political body and that was clearly reflected in its work, as it was limited to restorative justice and non-judicial jurisdiction. ERC's tasks were limited to leading independent investigations, restoring rights, providing moral compensation, and giving reparations to the families of the victims, without granting them the right to participate in the litigation process. Officials were not held accountable for their crimes. The ERC focused on research, investigation, evaluation, arbitration and submitting proposals. It did not raise individual responsibility for violations.⁵⁵

Chile chose another approach to transitional justice.⁵⁶ The military authorities implicated in the violations became an effective partner in the new government. Augusto Pinochet, the former Chilean President whose regime was accused of committing violations and crimes against human rights in Chile, became a commander-in-chief of the army.⁵⁷ This prevented the truth commissions from researching and investigating the violations that involved leaders of the Chilean army.

On the other hand, post-conflict and post-dictatorship countries that attempt to implement the recommendations of their own truth commissions or develop programs to provide victims with reparative justice, face difficulties due to the urgent needs of their populations.

The decision to establish the ERC in Morocco stipulates that the mandate of the commission extends from independence to the date of royal ratification of the establishment of the Independent Arbitration Commission (IAC) which aimed to compensate victims.

⁵⁴ The experience of transitional justice in the Kingdom of Morocco is one of the first experiences in the Arab countries. In 1990, King Hasan II established the Consultative Council for Human Rights as a result of internal and international pressure. The Independent Arbitration Commission was established in 1999 to compensate victims of arbitrary detention and enforced disappearance. The council recommended the establishment of a truth commission. King Mohammed VI approved the establishment of the Equity and Reconciliation Commission (ERC) in 2003, which had non-judicial jurisdiction to settle gross human rights violations. Its mission was to research, investigate, evaluate, and suggest. This committee investigated violations from the date of independence in 1956 until the date of its formation in 2004. The commission adopted the methodology of field investigations, documentary research, and the study of records and documents.

⁵⁵ Nabil Zegaoui. *Faltering Steps of Transitional Justice and the Fragility of Democratic Transition in Morocco*. Arab Center for Research and Policy studies. *Siyasat Arabiya Journal*, Issue 47, November 2020. pp. 57-72. Accessed on 10 May 2023. <https://siyasatarabiya.dohainstitute.org/en/issue047/Pages/IssueHome.aspx>

⁵⁶ In 1990, former President Patricio Aylwin established (by presidential decree) the National Commission on Truth and Reconciliation (Retting Commission). The mandate of the commission was to investigate the situation of persons who had disappeared or had been executed during the military dictatorship. In February 1991, the Chilean National Commission for Truth and Reconciliation released a report detailing human rights abuses resulting in deaths and disappearances during the years of military rule. According to the report, 2296 people were murdered during the 17-year period. Subsequent estimates have put the number of missing as high as 3400. Addressing the issue of the missing has been recognized as a key element in the process of social reconciliation following the return to democracy. International Commission on Missing Persons. Chile. Accessed on 10 May 2023. <https://www.icmp.int/where-we-work/the-americas/latin-america-and-the-caribbean/chile/>

⁵⁷ Lubab Magazine. Issue 5 - February 2020. Al Jazeera Center for Studies. Accessed on 09 November 2022. <https://online.flippingbook.com/view/267413/26/#zoom=true>

7. Recommendations:

Based on the sessions held by STJ as part of the “Bridging the gap between Syrians and the constitutional committee” project funded by the National Endowment for Democracy, the following recommendations are proposed:

1. To include the notion of transitional justice in a special chapter in the new Syrian constitution which will be composed with the facilitation of the United Nations, whether it is written by the Syrian Constitutional Committee or another party.
 2. To increase pressure on the government to address the consequences of crimes and gross human rights violations that occurred in the past, to ensure that they are not repeated, and to build social peace.
 3. To adopt a comprehensive approach to transitional justice based on the principle of no impunity. Moreover, to take judicial and non-judicial measures based on national consultations that aim to know the truth, reveal the fate of the missing and disappeared, and stress the need for accountability.
 4. To establish a Syrian national commission for transitional justice/human rights. This commission shall acquire its authority from the constitution and shall prepare proposals on the components of transitional justice. The commission shall also have the power to establish specialized committees that focus on reparations and institutional reform (especially the institutions involved in violations, such as the army, security forces, and the judiciary), and submit these proposals to the government (that will be formed by consensus) to implement them.
 5. To establish committees specialized in investigating human rights violations committed during the Syrian conflict. The decisions of these committees shall be subject to appeal before the competent judiciary, provided that the latter is not controlled by the executive authority.
 6. The international community to provide support (especially material and technical support) regarding the paths of transitional justice that must be followed. Moreover, to seek help from the expertise of qualified technicians in international bodies concerned with transitional justice.
 7. To review laws and decrees that contradict the new constitution and international agreements, particularly when Syria is a State party. Repeal or amend such legislation to avoid any delay in the implementation of transitional justice programs.
 8. To effectively involve victims from various Syrian regions in all different phases of the process, especially women, children, and families of the victims.
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► About Us:

Syrians for Truth and Justice (STJ) is a nonprofit, nongovernmental organization monitoring human rights violations in Syria. Founded in 2015, STJ has been based in France since 2019.

STJ is an impartial and independent Syrian human rights organization operating across Syria. Our network of field researchers monitor and report human rights violations occurring on the ground in Syria, while our international team of human rights experts, lawyers, and journalists gather evidence, examine emerging patterns of violations, and analyze how violations break domestic Syrian and international law.

We are committed to documenting violations of human rights committed by all parties in the Syrian conflict and elevating the voices of all Syrians victimized by human rights violations, regardless of their ethnicity, religion, political affiliation, class, and/or gender. Our commitment to human rights monitoring is founded on the idea that professional human rights documentation meeting international standards is the first step to uncovering the truth and achieving justice in Syria.

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