

CONTINGENCY PLANNING FOR POST-CONFLICT SYRIA

Full Report





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Abstract

War is unilaterally destructive. Victories come at heavy costs and agreements force painful compromise. Moreover, for many civil conflicts, the end is inconclusive. Some two-thirds of countries devolve back into warfare within a decade. The civil conflict in Syria — sectarian, ideological, and internationalised — has proved particularly fractious. There is no party with the vision, power and support needed to unify the country under the pluralist ideal called for by the revolution’s thought leaders. But at some point Syria’s war will end, and eventually, refugees will return. This paper — a joint initiative by Mercy Corps and the West Asia-North Africa (WANA) Institute — aims to better Syria’s post-conflict odds. We map out the troubling scenarios that may comprise Syria’s future and plan how to best provide security and justice in these contexts. We then examine the institutional context of Syria’s security; civil registration; rule of law; and housing, land and property sectors, both prior to the war and as they stand today. Finally, we identify priorities, map out challenges and forge recommendations pertaining to contingency planning. It is an exercise in both realism and innovation, looking at good practices and adapting new and developing ideas to a post-war theatre. As a consequence of its timing, the project works with imperfect data. But the need for advance planning requires making do. In doing so, this paper considers interdisciplinary academic research, previous planning initiatives for Syria, Islamic theology, customary practices, and the insights of Syrians displaced by war and looking to return home.

Executive Summary

“It’s not about the war ending. It’s about dealing with the remnants of the war.”

— *Syrian male refugee, Za’atari camp*

A brief snapshot of Syria in 2016 gives little cause for hope. Over 250,000 people have officially lost their lives since the UN Office of the High Commissioner for Human Rights stopped counting in the summer of 2014. According to the UN Refugee Agency (UNHCR), there are currently more than four million Syrian refugees, while approximately 7.6 million have been internally displaced. Tens of thousands more are stranded on borders, in unregistered limbo, meaning that approximately half of Syria's population has been uprooted.¹ Criminality on all sides has fostered intractability, repeated international peace plans have failed, and foreign involvement escalated the conflict rather than ease a political solution.

Given these obstacles, thinking ahead to a period when Syria’s conflict is fully or partially resolved may appear premature. It is unclear whether Syria will survive as a single entity, let alone what factions will comprise its post-conflict leadership. These questions aside, if a settlement evolves, the risk that Syria will return to war is alarmingly high – especially if a post-settlement plan does not already exist at that point. The evidence is that 39 percent of states emerging from conflict return to war in the first five years and another 32 percent in the following five years.² Weapons availability, sectarianism and foreign interference may further add to this risk in the case of Syria.

With such potential for conflict recidivism, action must be taken to prepare for any Syrian calm. Such planning must thoroughly account for former missteps and set pragmatic, evidence-based goals to enable a better Syrian future. Two organisations have made some progress in this regard — The Day After Project and Syria Expert House.³ These efforts, however, are cemented around the expectation that President Bashar al-Assad will fall and that the Free Syrian Army (FSA) can lead reconstruction efforts. With Russian involvement, Assad’s departure looks far less likely. Moreover, the groups constituting the ‘mainstream’ opposition lack unity and are overshadowed by more hardline factions. Fundamentally, post-conflict planning cannot rely on any one particular future, as such recommendations will be much less robust and even counterproductive in alternative future scenarios.

Against these realities, this report builds off different potential reconstruction scenarios, to apply recommendations across several possible outcomes. Where still applicable, we incorporate insights and recommendations from The Day After Project and Syria Expert House. The paper furthermore integrates the perspectives of Syrians gleaned from four focus group discussions held in Za’atari refugee camp, Mafraq and

¹ D Al Rifai, “Syrian Refugees Near Four Million Amid Intense Fighting”, *Al Jazeera*, 6 June 2015 <<http://www.aljazeera.com/news/2015/06/syrian-refugees-million-intense-fighting-150606051731216.html>>

² P Collier, *Wars, Guns and Votes: Democracy in Dangerous Places* (2007), 57.

³ The Day After Project was a January to June 2012 initiative to plan for an inclusive, united Syrian civil State in the wake of the fall of President Bashar al-Assad. Their membership represents a self-described wide swath of the Syrian opposition: the Syrian National Council, Local Coordination Committees, the Syrian Muslim Brotherhood, and unaffiliated opposition members of all major political trends and religious groups in Syria. The Syrian Transition Roadmap was designed by Syria Expert House, a group of some 300 human rights activists, judges, academics, doctors, opposition leaders, defected government officials and military officers, local revolutionary council members and armed opposition commanders. They hope to improve on The Day After Project recommendations, by customising their suggestions more thoroughly to the unique Syrian context.

Jerash. Participants demonstrated grounded expectations for the future and offered several constructive suggestions for ways to ease a post-conflict transition. With such qualitative depth comes some caveats. To encourage open discussion, focus groups were largely homogenous, entirely Sunni and mostly from southern and central Syria. It is also important to note that this report does not address all of Syria's reconstruction needs, but instead focuses on unique challenges and opportunities in reforming the rule of law, security and civic registration sectors.

In particular, the need for subsequent economic development is reiterated throughout this report. Moreover, any progress will be gravely disadvantaged without central coordination for all involved parties' humanitarian, reconstruction and development efforts, ideally organised within a UN-Syria commission, to prevent overlap and maximise efficiency. Reconstruction will require massive, multi-year military and financial investment, and foreign nations prioritising their own interests over risk-minimisation will threaten Syria's post-conflict future. The considerable investment that is needed for reconstruction efforts to succeed further underscores why careful planning matters.

This report provides in-depth analyses on five thematic areas. First, security is displaced Syrians' foremost return prerequisite. Such an imperative needs to be understood against the likelihood of continuing instability over the medium term; wartime economies, sectarian narratives, and lingering frustrations of parties whose aspirations were not met mean that spoilers are likely to be active. The report offers recommendations for security sector reform (SSR) and for disarmament, demobilisation and reintegration (DDR).

Second, restoration of law and order is a pre-requisite for refugees' return, second only to security. A rule of law vacuum facilitates violence in the form of everyday criminality and organised crime. In such environments, relief supplies cannot be delivered, individuals are encouraged to take the law into their own hands, and high-risk groups become vulnerable to abuse and exploitation. Over the long term, systemic injustices accumulate, heightening vulnerability to conflict. Third, and mutually overlapping with access to justice, rule of law, and legal reform, is transitional justice. Syrians will most likely have to confront and deal with atrocities committed by all sides over the course of the conflict. These transitional justice processes employ various mechanisms and programs to promote accountability and reconciliation.

Fourth, conflict creates significant challenges in terms of maintaining records and producing new civil documentation. Where civil registration offices are not functioning and records are destroyed, replacement of such documents can be problematic or impossible. Prolonged armed conflicts also create an institutional and informational vacuum, widening the space for rights violations. Thus, it will be important to focus on and resolve civil registration issues. Fifth, in post-conflict contexts, housing, land, and property (HLP) rights are integral to maintaining peace and stability. Returnees have a right to recover homes and land left behind, while insecure environments enable property misappropriation that can reignite violence. Empowering state, and potentially also non-state mechanisms to ensure timely and just restitution is thus essential for peace consolidation and to prevent new or compounded rights violations.

Recommendations

General

- i. A special UN-led Syria commission – possibly sprung out of the International Syria Support Group (ISSG) – should be created to coordinate actors with a stake in reconstructing Syria, including the UN, post-conflict Syria leadership, neighbouring countries, the EU, the US, Russia, China, INGOs, NGOs, and private sector parties. This would make reconstruction and relief effective, meaningful and long-term sustainable.
- ii. Actors with a stake in the reconstruction efforts in Syria would need to make an extensive, multi-year military and financial commitment.
- iii. External actors must respect the independence of the reconstruction processes and commit to decisions made by future Syrian leadership.
- iv. Coinciding economic development, although beyond the scope of this report, constitutes a prerequisite to post-conflict Syria's stabilisation. This involves helping Syria transition from a wartime/relief economy to a peacetime/developing economy.

Security Sector Reform

- v. Peacekeeping forces are a well-evidenced insurance policy for promoting general security, and should be used during a transition period to local autonomy over law and order.
- vi. The Public Security Police and Syrian Armed Forces structures should be left as intact as possible to minimise disorder and disenfranchisement and to help secure the rule of law. However, renaming and rebranding may prove meaningful.
- vii. The benefits system that houses Syrian officers should be maintained to incentivise positive participation.
- viii. After careful vetting of officers by an experienced committee of Syrian experts, the Syrian Armed Forces should be mobilised in human security initiatives.
- ix. The intelligence apparatus should be significantly restructured and placed under civilian control, but while limiting the upheaval of lower level employees.
- x. Oversight committees should be established alongside with legal reforms ending security sector impunity for human rights abuses.

Disarmament, Demobilisation, and Reintegration

- xi. Disarmament should come after demobilisation and reintegration into regular armed forces under civilian control.
- xii. Fully disband only the most disreputable and sectarian military branches, in particular the Fourth Mechanised Division and the Republican Guard.
- xiii. Efforts should be made to incorporate irregular combatants into Syria's armed forces. While this may expand the army beyond its ideal size, this bureaucratic headache is worth the reduced spoiler action.
- xiv. Where disarmament is challenged, these forces can be redirected into a new National Guard structure. With national and external actors' commitment, Syrian militia organisations have the potential to moderate into constructive political forces.
- xv. Effort must be undertaken to locate and defend weapons arsenals, as well as to interrupt supply routes of primarily small arms. Extra attention should be paid to destroying IEDs and chemical weapons stockpiles.

Legal System and Access to Justice

- xvi. The existing legal framework, besides a general lack of protection for vulnerable groups, is on the whole not particularly problematic and should not be the focus for reforms. The Emergency Law

- and other specific legislation that carved out space for state-authorized exploitation with impunity should be significantly reformed.
- xvii. A small cadre of Syrian judges should be quickly but carefully vetted to undertake judicial review, resolve property cases, and ensure that criminal matters are dealt with swiftly and transparently. Military institutions should not be granted interim judicial functions.
 - xviii. Post-conflict environments are generally not the time to promote new and more liberalised values. Conceptualising interventions only within the rights structures recognised by Syrian society is the preferred solution in the immediate term. This would include *shari'a* law.
 - xix. Tribal justice was operative in Syria before the conflict, and its functions are likely to have increased in importance in the absence of nationwide rule of law. This influence should be consolidated and capitalised upon rather than suppressed.
 - xx. Legal reforms should provide for and protect the rights of Kurds, limit persecution of those considered Islamists, and end previous bans against specific religious sects (e.g. Jehovah's Witnesses).
 - xxi. Reform laws that currently disadvantage children by treating minors as adults in the Syrian criminal justice system, failing to combat child labour and trafficking, and discriminating against children born out of wedlock.

Civil Registration

- xxii. Even before the end of the crisis, agencies and host states should be working to promote identity issuance to all Syrians and protocols to make sure that all departing refugees have personal documentation, especially women and children.
- xxiii. Civil registration efforts should be decentralised in the short term, and digitised, backed up, and centralised in the medium to long-term. However, mechanisms to issue and collect documents can and should be put to practise immediately.
- xxiv. Peace negotiations should account for government control over civil registration data and should encourage shared access among post-conflict governing parties.
- xxv. Until Syrians have regained general trust in Syrian state authorities, a neutral arbitrator or mediating power may be necessary to obtain personal information. Nevertheless, state authority over records should be restored as soon as feasible.
- xxvi. The use of social media should not be underestimated in the process of re-issuing civil documentation. In the absence of official certificates, online information – such as pictures, posts, and emails – can assist in confirming identity and property ownership.
- xxvii. Customary sources, particularly tribal networks, should be allowed to play a key role in emergency registration processes, for claims verification and for resolving disputes.
- xxviii. Housing and property data should be compiled subsequently. Mechanisms to do this should be put to practise immediately.

Housing, Land and Property Issues

- xxix. While state land tenure systems may fray or lose legitimacy during a conflict, religious and traditional/customary institutions usually remain intact and should be used to provide reliable frameworks for rights transfer, records maintenance and dispute resolution.
- xxx. To stabilise a newly brokered Syrian peace, potential spoiler groups and situations where long-simmering bitterness may be a source of conflict, should take priority with regards to resolving HLP issues.
- xxxi. Over the medium-term, legitimate pre-exiting HLP grievances in Syria should be redressed. Progress can be made to e.g. reconstruct property in Hama and Quneitra; replace informal housing settlements with adequate official property; and compensate those who cannot access their claims.

Transitional Justice

- xxxii. Regional experience and data collected from Syrians themselves highlights the value placed on accountability as a justice mechanism. Specifically designed national tribunals are a leading option, but should be instituted with safeguards to manage their potential to increase instability.

- xxxiii. The possibility to grant amnesty for former combatants should be carefully examined as a way to avoid victor's justice.
- xxxiv. While truth commissions can provide a valuable source for information, the inevitable clash between a desire for knowledge and a desire for accountability must be carefully managed. Successful truth commissions requires public awareness of such trade-offs.
- xxxv. Islamic legal norms and tribal values will shape many individuals' perspectives towards the implementation of transitional justice in a post-conflict Syria; one path forward may involve encouraging religious and other community leaders to take a role in promoting justice efforts, particularly in terms of forgiveness and reconciliation.

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1. An overview of the Syrian Conflict and Potential Conflict Outcomes

“Syria was suffering from two types of conflict: sectarian conflict and conflict over authority and power. In addition, the country was suffering from poor infrastructure, and below poor living conditions.”

– Syrian male refugee, Mafraq, Jordan

Any sincere planning for a future, post-conflict Syria first requires an understanding of and commitment to the massive reconstruction effort that will be required. This chapter offers a foundation for that understanding. After introducing and contextualizing the conflict, it covers the demands of the Syrian uprising and details the pre-existing factors that triggered the country’s descent into violence. It then provides an overview of the parties to the fighting, the conflict’s progression, and an analysis on potential outcomes within which return of refugees might be possible and reconstruction initiated.

1.1 Outbreak of the Syrian Conflict

In the first months of 2011, experts saw little chance of a Syrian uprising emulating that of Egypt or Tunisia. There are several reasons to explain the population’s early reticence to press for change, ranging from popularity to fear. President Bashar al-Assad had distinguished himself as a reformer, at least compared to fellow Arab leaders, and particularly his father Hafez al-Assad. During Bashar’s early days in office, a period known as the ‘Damascus Spring’ heralded a temporary lightening of repressive policies. Moreover, the President’s long championing of the Palestinian cause and strong stance against the United States (US) granted him a degree of credibility with the Arab street not shared by his fellow autocrats.⁴ Fear also discouraged protests. Syria’s history of brutal repression had long dulled vocal dissent. Moreover, Syria’s numerous minority groups feared a Muslim Brotherhood power seizure in the event of a political disruption.⁵ When no significant protest movement had materialised by mid-March 2011, the subdued populace seemed to be falling in line with expectations. But the arrest and torture of a group of school children for anti-regime vandalism in rural Dara’a in March proved a tipping point. The escalation of families’ protests in the streets to a nation-wide movement may be attributed to a government miscalculation. From the outset, peaceful protesters met armed forces, spurring demonstrators by the thousand. The more disproportionately the government responded, the more anti-regime momentum grew. By mid-July, hundreds of thousands protested the Assad regime throughout Syria.⁶

1.2 What Did Syrians Want?

Syrians’ demands focused on the political, but additional evidence indicates economic and climate-related motivators for the revolution. Government-led economic reforms had fueled corruption and produced

⁴ J Gelvin, *The Arab Uprisings: What Everyone Needs to Know*, Oxford University Press (2012), 101.

⁵ *ibid.*

⁶ “Syrian President Bashar al-Assad: Facing down rebellion”, *BBC News*, 12 November 2014, <<http://www.bbc.com/news/10338256>>, at 16 July 2015.

inadequate job growth for the expanding population, particularly the rising numbers of young people. Leading up to the Arab Spring, a four-year drought destroyed Syria's formerly self-sufficient wheat production and forced 1.3-1.4 million people to abandon their rural lives for opportunities in nearby cities. This rural-based discontent helps explain why Syria's uprising emerged outside the urban hubs of Damascus and Aleppo.⁷

When the revolution began, few leaders expected Assad to step down as placidly as Tunisia's Ben Ali or even Egypt's Mubarak. Instead, hopes peaked at Assad bending to unprecedented pressure to reform. The intellectual leaders of the uprising hoped that amidst the pressure created by the wave of regional uprisings, changes long called for might finally be enacted. These included: an end to martial law; the pardoning of political prisoners; protections of freedom of assembly, press, and expression; and freedoms from constraint and surveillance.⁸

It is unlikely that Assad would have even been capable of implementing such reforms without sacrificing his hold on power. Thus, the protesting masses may have calculated more correctly; real reform required Assad's departure.⁹ By the time the original coalition of Syrian opposition groups, the Syrian National Council, consolidated their demands in September 2011, reform was no longer on the table. Instead, they called for a modern civil state with constitutional protections for human rights and freedoms.¹⁰

1.3 Incendiary Factors

1.3.1 Sectarian Division

The same factors that explain the regime's rigidity also made the Syrian context explosive. Syria is majority Sunni Muslim, but Alawite, Ismaili and Shi'a Muslims make up 13 percent of the population; Christians another 10; with Druze and a very small Jewish population constituting the remainder.¹¹ But religious heterogeneity alone does not explain the rise of sectarian violence. Instead, the Syrian conflict reflects the relationship between 'horizontal inequality' and incidence of civil war.¹² In Syria, that horizontal sectarian inequality advantaged the Alawites, the Assad family's minority religious sect, relative to Syria's Sunnis. This inequality left a rift exploitable on both sides. In fact, when the nature of violence is due to ethnic or religious conflict, this is particularly divisive, creating such deep societal fractures that the only solution is physical partition.¹³ Today, this sectarian divide has been further widened by external involvement of the region's Sunni and Shia powers.¹⁴

While Syria's sectarian divides certainly proved inflammatory, there are more layers to the fighting. The Kurdish independence movement stands separate from inter-religious issues. Moreover, many Sunnis still stand with Assad, while some Alawites and fellow minorities joined the uprising from its outset.

⁷ Gelvin above n 4, 108.

⁸ "Statement by 99 Syrian Intellectuals", *al-Hayat*, 27 September 2000, as cited in I Alvarez-Ossorio, "Syria's Struggling Civil Society: The Syrian Uprising", *Middle East Quarterly*, Spring 2012, 23-32.

⁹ *ibid.*

¹⁰ S Heydemann, "Syria's Opposition", *USIP*, 20 September 2011. <<http://www.usip.org/publications/syrias-opposition>>.

¹¹ "Syria", *The World Factbook*, 21 May 2015, <<https://www.cia.gov/library/publications/the-world-factbook/geos/sy.html>>.

¹² Horizontal inequality is a phenomenon where identity groups as a whole are advantaged or disadvantaged relative to one another compared to 'vertical inequalities' between individuals. G Østby, "Polarization, Horizontal Inequalities and Violent Civil Conflict," *Journal of Peace Research*, Vol. 45, No. 2, Special Issue on Polarization and Conflict (March 2008), 143-162.

¹³ C Kaufmann "Intervention in Ethnic and Ideological Civil Wars", in ed. R Art and K Waltz, *The Use of Force: Military Power and International Politics*, Rowman & Littlefield, 1999, 385- 405, 388.

¹⁴ P Roeder and D Rothchild, *Sustainable Peace*, Cornell University Press, 2005, 10–12, 320 as cited in R Licklider, "Civil War Outcomes," in M Midlarsky (ed), *Handbook of War Studies III: The Intrastate Dimension*, University of Michigan Press, 2009, 193, 212.

1.3.2 A Violent Legacy

A second incendiary factor is Bashar al-Assad himself and, more importantly, the merciless strategy he inherited from his father. When facing popular dissent, Hafez al-Assad silenced one rebellious area at a time at great human cost. Dozens of massacres are attributed to Assad's father, most infamously those at Tadmor Prison and Hama in 1980 and 1982. To ensure troops' commitment to these strategies, Assad selectively chose which units engaged in the initiatives and paired them with elite Alawite forces. Hafez also established the precedent of employing citizen militias of Ba'athist sympathisers, called *shabiha*.¹⁵ These measures prevented dissent and defection as he cleared major population centres by force.¹⁶

Bashar al-Assad has emulated his father's strategy; he selectively deploys his most loyal forces, grounding up to two-thirds of the army's combat power,¹⁷ and relies heavily on loyal Syrian paramilitaries (in addition to those of Hezbollah and Iran). This strategy has allowed him to consolidate his power in regime-controlled Syria but has fallen short of his father's success given the massive scale of the opposition. Instead, the displacement of Syria's people further dispersed sectarian conflict throughout the country.¹⁸ In its attempt to clear insurgents from population centres (often predominantly Sunni), the regime also forced civilians from insurgent-held areas, thus heightening geographic sectarian divisions. In general, Assad's military strategy, with its reliance on broadly cohesive, ultra-nationalist, and mostly Alawite pro-government forces, has exacerbated national divisions.¹⁹ These tensions have fed regime rhetoric, justifying its brutality by characterising the uprising as activism by rogue, foreign Sunni extremists.

1.3.3 Hardliners and Hard Solutions

Extremist groups like the so-called Islamic State (referred to here as Daesh) and Jabhat al-Nusra, Syria's al-Qaeda branch, have no interest in a negotiated solution. Moreover, strategic neglect by the Syrian regime has allowed the revolution's most rigid-minded actors to dominate the opposition. From the beginning of the conflict, Assad's forces have actively targeted moderate rebels while allowing extremists to gain influence. At times, the regime has directly enabled victories, evacuating troops at the first sign of extremist involvement. This strategy threatens any chance for a future united Syria, but it also fosters doubts within the international community about the viability of opposition partners.²⁰

1.3.4 Foreign Intervention

Assad's Syria has served as a channel for personnel, finances and weapons between Iran and Hezbollah. This strategic linkage motivates a deep commitment by the two Shi'a powers to maintaining Assad's power.²¹ Iran provides direct financial assistance to the Assad government and pro-government *shabiha*, in addition to sponsoring foreign Shia militia involvement in the conflict.²² For regional Sunni powers like Saudi Arabia and Qatar, that same linkage adds appeal to Assad's removal. Assistance to opposition forces by Turkey, Qatar and Saudi Arabia, and rival Iranian and Hezbollah assistance to the Syrian government, has helped to perpetuate and escalate fighting, prompting many analysts to consider Syria's violence a proxy war between Iran and Saudi Arabia.

¹⁵ J Holliday, "The Assad Regime: From Counterinsurgency to Civil War", *The Institute for the Study of War*, March 2013, 17, <<http://www.understandingwar.org/sites/default/files/TheAssadRegime-web.pdf>> at 8 June 2015.

¹⁶ Holliday, above n 15, 13.

¹⁷ *ibid* 15.

¹⁸ Holliday, above n 15, 20.

¹⁹ *ibid* 10.

²⁰ "Syria: Countrywide Conflict Report No. 5", *The Carter Center*, February 2015, 11.

²¹ Holliday, above n 15, 10.

²² M Eisenstadt, S Henderson and M Knights et al, "The Regional Impact of Additional Iranian Money", *The Washington Institute for Near East Policy*, 28 July 2015.

In another layer of external intervention, Russia and Syria have been allies since the Cold War, and Syria is one of Russia's key geopolitical ties to the region. Russian military intervention in Syria since September 2015, while ostensibly to defeat Daesh, defends regional authoritarianism while also demonstrating Russian commitment to its allies.²³ Russia's entry into the conflict has also spurred speculation of a second US-Russian proxy war in Syria. A 26 percent increase in the number of Syrian refugees between September and November evidences the humanitarian cost of such intensifications.²⁴ Syria is thus an important example of how foreign intervention influences violence patterns; assistance generally reduces the beneficiary's brutality, while the beneficiary's opponent often responds with greater violence against civilians in an attempt to level the playing field.²⁵

1.4 Belligerents and Actors in the Syrian Conflict

Before detailing the progression of the Syrian conflict, it is important to understand the different parties involved and their relationships to one another. The fighting can no longer be easily categorised as regime versus opposition; instead it has been pulled into an internationalised, dynamic, multi-belligerent conflict. The mainstream opposition now violently faces off with the Assad regime, Daesh, and sometimes Jabhat al-Nusra and the Kurds. Meanwhile, Syria's minorities find themselves struggling to pursue their own interests within a conflict that is increasingly painted in Sunni versus Shi'a terms. Kurds have executed a careful balancing act as they carve out their own autonomous territory, avoiding overtly targeting the Assad regime while defending their territory from Daesh. Even Syria's Kurds are ridden with divisions and infighting.

The complexity deepens within Syria's opposition; their network is vast, disparate, and constantly evolving. The internationally-recognised representative of the Syrian opposition is the Turkey-based National Coalition for Syrian Revolutionary and Opposition Forces. The Coalition headed the loose grouping of opposition forces referred to as the Free Syrian Army (FSA), now considered defunct. Instead, the two most powerful armed opposition groups in Syria are Jaysh al-Islam and Ahrar al-Sham. However, neither group represents the moderate, secular vision advocated by the revolution's early thought leaders. Both groups are opposed to Daesh and have made rhetorical steps towards moderation despite some contradictory statements and, in Ahrar-al-Sham's case, close links to al-Qaeda. The 'moderate' opposition that the US-coalition aims to empower is more fractured and less powerful. Brookings expert Charles Lister offers one of the more generous estimates, suggesting that moderate factions field some 75,000 fighters in total. Lister explains that, despite many ideological differences, these groups share an explicitly nationalist vision and are made up of local fighters. They advocate a multi-sectarian Syrian state with equality before the law. The two largest groups are the Southern Front and the Northern FSA.²⁶ Of these groupings, the Southern Front is broadly considered the most effective, genuinely moderate force on the ground.²⁷

Al-Qaeda affiliate Jabhat al-Nusra and Daesh are the most notorious Islamist extremist organisations in Syria. They have effectively diverted the attention of foreign powers away from deposing President Assad. Although both organisations emerged from al-Qaeda in Iraq (AQI), Jabhat al-Nusra, which was announced as an AQI offshoot in January 2012, is considered al-Qaeda's official Syria branch.²⁸ Despite this connection, al-Nusra is distinctly Syrian. The branch does not take direct orders from al-Qaeda leader Ayman al-Zawahiri, although he provides religious guidance and legitimacy for al-Nusra's foreign donors. The organisation has

²³ A Stent, "Putin's power play in Syria: how to respond to Russia's intervention", *Foreign Affairs*, 1 January 2016, Vol. 95, Issue: 1.

²⁴ *ibid.*

²⁵ R Wood, J Kathman, and S Gent, "Armed intervention and civilian victimization in intrastate conflicts", *Journal of Peace Research*, Vol. 49, No. 5, September 2012, 653.

²⁶ C Lister, "Yes, there are 70,000 moderate opposition fighters in Syria. Here's what we know about them", *The Telegraph; Brookings*, 27 November 2015.

²⁷ International Crisis Group, "New Approach in Southern Syria", *International Crisis Group*, Middle East Report No. 163, 2 September 2015.

²⁸ J Cafarella and C Cozak, "Likely Courses of Action in the Syrian Civil War June-December 2015", *The Institute for Study of War*, 4.

proven amenable to collaboration, working at times with Daesh and at others with the opposition. Al-Nusra's relations with the mainstream opposition have shifted over time and vary geographically.²⁹

Daesh cannot be classified as a standard rebel group in Syria; its leadership is foreign, its territorial holdings are transnational, and its ideological aspirations extend beyond Syria. The group's goals are distinct from those of al-Nusra, and al-Qaeda leader Ayman al-Zawahiri disavowed the group in 2014. In June 2014, Daesh proclaimed itself a Caliphate, marking the first step towards its goal of recreating the time of the Prophet Mohammad. A month later, massive territorial grabs in Iraq lent Daesh the gravitas to go with this title.³⁰ In contrast to al-Nusra's deft abilities to shift alliances, Daesh baits diverse enemies. It has conflicted with nearly every entity of the Syrian conflict, including al-Nusra. In general, the two groups manage a cautious détente that could shift in either direction.

1.5 Progression of the Syrian Conflict

- 2011

In 2011, Syrian demonstrations escalated quickly after the government, alongside superficial attempts to meet protesters' demands, cracked down by force.³¹ Not all of Syria's armed forces followed the crackdown; in July, a group of Syrian army defectors announced the FSA. By August, a violent uprising was materialising on the ground.³² That same month, sensing an opening for credible Syrian representation, the opposition established the Syrian National Council.

The international community began to get involved as early as May 2011. The US and European Union tightened sanctions against the Syrian government, while Iran stepped up its assistance. After a failed attempt to begin a national dialogue, some members of the international community demanded Assad's resignation. Russia and China vetoed the first attempted UN Security Council resolution on the subject, an October resolution condemning Assad's government. An Arab League peace plan looked to have more potential as Assad agreed to its terms, however, when the President failed to follow through, the Arab League joined the EU and US in sanctioning Syria.

- 2012

Over 2012, Syria's unrest shifted into a non-international armed conflict.³³ The precise timing of this transition is subject to debate, but the International Committee for the Red Cross cites 14 July 2012.³⁴

An attack on FSA-held Zabadani in February marked a significant strategic shift for the Assad government; although ground assaults had been common, this was the first instance of shelling its own population.³⁵ The regime's use of barrel bombs, improvised explosive devices (IEDs), cluster bombs, and surface-to-surface

²⁹ R Siegel, interview with L Khatib, director of Carnegie Middle East Center, "No Winner In Sight As Forces Fighting In Syria Weaken," *NPR*, 9 June 2015. <<http://www.npr.org/2015/06/09/413192414/no-winner-in-sight-as-forces-fighting-in-syria-weaken>>, at 30 June 2015.

³⁰ "Syria Countrywide Conflict Report No. 5", *The Carter Center*, February 2015, 20, <https://www.cartercenter.org/resources/pdfs/peace/conflict_resolution/syria-conflict/NationwideUpdate-Feb-28-2015.pdf> .

³¹ "Syrian President Bashar al-Assad: Facing down rebellion", above n 6.

³² L Arimatsu and M Choudhury, "The Legal Classification of the Armed Conflicts in Syria, Libya and Yemen", *Chatham House*, March 2014, 9.

³³ "An armed conflict exists when there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups, or between such groups within a State", "A/HRC/S-17/2/Add.1", *Independent International Commission of Inquiry of the Syrian Arab Republic (Col)* as cited in Arimatsu and Choudhury, above n 32.

³⁴ G Charron and E Arnaud, "A full scale displacement and humanitarian crisis with no end in sight", *Internal Displacement Monitoring Centre*, 31 July 2012, <<http://www.internal-displacement.org/middle-east-and-north-africa/syria/2012/a-full-scale-displacement-and-humanitarian-crisis-with-no-solutions-in-sight>>.

³⁵ Holliday , above n 15, 13.

missiles began in Aleppo that August.³⁶ Over the course of 2012, the armed opposition gained organisational structure and territory in restive governorates, seizing control of large segments of northern and eastern Syria and launching offensives in Damascus and Aleppo,³⁷ the latter becoming a focal point in the conflict.³⁸

As violence increased, the Arab League withdrew its observers from Syria, and former UN Secretary General Kofi Annan became the first appointed UN-Arab League Joint Special Envoy to Syria. By March 2012, even China and Russia had agreed to support a draft, non-binding Security Council peace plan. In August, UN High Commissioner for Human Rights Navi Pillay called on the UNSC to refer the Syrian situation to the ICC.³⁹ That same month, after disappointing dead ends at the Geneva I peace talks, Kofi Annan resigned to be replaced by Lakhdar Brahimi.⁴⁰ By the end of 2012, the UN reported that both sides had committed crimes against humanity.

- 2013

In 2013 Syria's fighting witnessed the beginnings of significant Daesh and Hezbollah involvement as well as the government's most notorious use of chemical weapons. In the first half of 2013, Daesh pressed Jabhat al-Nusra from Raqqah, the city that is now its Syrian powerbase. The government matched rebels' rising capacity with increased brutality. It began besieging the Yarmouk Palestinian refugee camp,⁴¹ and in August used chemical weapons on two rebel-held areas near Damascus.⁴² While this move overstepped the US-proclaimed 'red line',⁴³ with Russian assistance Syria managed to avoid punitive strikes through a deal to destroy remaining chemical stocks.⁴⁴ Although largely drowned out by the associated media flurry, the government massively increased its use of barrel bombs — by that time a mainstay of the conflict.⁴⁵

The latter half of 2013 saw the progress of moderate rebels falter. In September, some dozen groups left the Syrian National Coalition and renounce its call for a civil democratic state. Despite their vocal support for the

Syria's war being classified as a non-international armed conflict is important as it means that international humanitarian law (IHL) applies to the crisis and its participating parties. In particular, Geneva Convention Common Article III, to which Syria is a party, and Article 1 of Additional Protocol II, which Syria has not ratified, restrict Syrian actors' behavior as customary law, irrespective of status as state or non-state actors. Despite Syria's failure to ratify the Rome Statue of the International Criminal Court (ICC), the Syrian Government and non-state actors may technically be referred to ICC jurisdiction by the UN Security Council, as occurred for crimes in Darfur and Libya (although Russia and China are unlikely to permit such an option). As asymmetric warfare becomes the norm, standards for non-state actor behavior have become more defined; they are obligated to follow customary human rights law, especially when these actors possess territorial authority.

"Reasons for Displacement: Documenting Abuses Against Syrian Civilians", *American Bar Association: Rule of Law Initiative*, December 2013.

³⁶ "Death Everywhere: War Crimes and Human Rights Abuses in Aleppo, Syria, *Amnesty International*, 4 May 2015, Index number: MDE 24/1370/2015 5.9, 11; OHCHR, "Human Rights Council Twenty-seventh session Agenda item 4: Human rights situations that require the Council's attention Report of the Independent International Commission of Inquiry on the Syrian Arab Republic".

³⁷ "Syrian President Bashar al-Assad: Facing down rebellion", above n 6.

³⁸ "Death Everywhere", above n 36.

³⁹ "Press Release, Security Council Briefers Highlight 'Prevailing Disrespect for International Humanitarian Law as Security Council Considers Protection of Civilians in Armed Conflict, SC/11097. Rev. 1, 19 August 2013, as cited in "Reasons for Displacement: Documenting Abuses Against Syrian Civilians", *American Bar Association: Rule of Law Initiative*, December 2013, 3.

⁴⁰ *Ibid.*, 3.

⁴¹ "Syria: Squeezing the Life out of Yarmouk: War Crimes Against Besieged Civilians", *Amnesty International*, 10 March 2014, Index number: MDE 24/008/2014.

⁴² The Syrian government continues to deny responsibility but Human Rights Watch reports evidence strongly suggesting the government was to blame. Syria: Government Likely Culprit in Chemical Attack", *Human Rights Watch*, 10 September 2013, <<https://www.hrw.org/news/2013/09/10/syria-government-likely-culprit-chemical-attack>>.

⁴³

⁴⁴ *Ibid.*

⁴⁵ "Death Everywhere" above n 36, 11.

rebels, Western and Gulf allies officially rejected appeals for heavy weaponry⁴⁶ and their involvement in the conflict remained understated.

- 2014

Daesh's surge in power in 2014 dramatically changed the landscape of the conflict, spurring infighting and distracting the international community from the contest between rebels and regime. Early in 2014, Daesh consolidated its hold on Raqqah, expanded in Syria's northeast and made significant territorial gains in Iraq. However, it was the mass broadcasting of the group's beheading of American journalist James Foley in August that provoked international action and the formation of the US anti-ISIS coalition in Paris.⁴⁷ Daesh's extremism incited discord among the rebels, encouraging the breakdown of the first round of the Geneva I peace talks in January. A second round of talks collapsed in February, leading Joint Special Envoy Brahimi to step down.

With rebels riddled by factions, the Syrian regime won a major symbolic battle when it retook Homs in May. However, with Daesh's rise in Syria and Iraq, Iran's influence increased, the country taking a more direct role in command control and even recruitment efforts within Syria.⁴⁸

The Organisation for the Prohibition of Chemical Weapons (OPCW) reported a completed destruction of Syria's caches of chemical weapons in June. Chlorine and ammonia, however, were not targeted in the destruction and were used in attacks on rebel-held villages between April and July 2014.⁴⁹

- 2015-2016

In 2015, international involvement rose to unprecedented levels in response to Daesh's ascendance. The first half of 2015 saw successes for Syrian Kurds against Daesh and the opposition against the regime. While Kurdish gains have held, the oppositions' successes were met with a resurgence of foreign support for Assad.

The organisation of two coalitions in 2015 marked a transition for Syria's opposition. The first, the more moderate Levant Front, quickly dissolved, however the second proved more effective.⁵⁰ Called Jaysh al-Fatah (Army of Conquest), the coalition of mostly hardline extremist Islamist groups formed as a "military alliance of convenience."⁵¹ The group has led some of the opposition's greatest battlefield successes in coordination with Jabhat al-Nusra, including the seizure of Idlib in March, the second seizure of a provincial capital from the regime since the government lost Raqqah in 2014.⁵² The group has also partnered with the more moderate Southern Front.⁵³

Despite Western misgivings regarding its al-Qaeda ties, al-Fatah has broken barriers in terms of foreign support; unprecedented overt cooperation between rivals Turkey, Qatar, and Saudi Arabia has been integral

⁴⁶ "Syrian President Bashar al-Assad: Facing down rebellion", above n 6.

⁴⁷ Rather than falling into legal limbo, the more powerful and organised Daesh becomes, the greater its obligation to follow international customary law as it is classified as an armed group under Common Article 3. Its use of torture and summary execution against civilians and combatant hostages glaringly abrogates IHL. "Rule of Terror: Living under ISIS in Syria-- Report of the Independent International Commission of Inquiry on the Syrian Arab Republic", United Nations, 14 November 2014, <<http://www.refworld.org/pdfid/5469b2e14.pdf>>, 13.

⁴⁸ C Kozak, "An Army in All Corners: Assad's Campaign Strategy in Syria", *Institute for the Study of War*, Middle East Security Report, 26 April 2015, 4.

⁴⁹ "Syria: The story of the conflict", *BBC News*, 12 March 2015, <<http://www.bbc.com/news/world-middle-east-26116868>>.

⁵⁰ A Lund, "The Levant Front: Can Aleppo's Rebels Unite?", *Carnegie Endowment for International Peace*, 26 December 2014; A Lund, "The Revolutionary Command Council: Rebel Unity in Syria?" *Carnegie Endowment for International Peace*, 1 December 2014.

⁵¹ "New Islamist alliance seizes Idlib from Syrian troops", *France 24*, 30 March 2015, <<http://www.france24.com/en/20150330-islamists-syria-seize-idlib-nusra-jaish-fath>>.

⁵² *ibid.*

⁵³ E Banco, "Syrian Rebel Groups Merge to Take on Assad in Dera'a, but Deep Divisions Remain", *International Business Times*, 26 June 2015, <<http://www.ibtimes.com/syrian-rebel-groups-merge-take-assad-deraa-deep-divisions-remain-1984616#.VY1GuumrLBg.twitter>>.

to its success.⁵⁴ The US was behind the establishment of a third notable coalition, although one organised to fight ISIS rather than the Assad regime. This diverse grouping, the Syrian Democratic Forces (SDF), is made up of Kurdish, Sunni Arab, and Syriac Christians, but its well-organised Kurdish component dominates.⁵⁵

Three developments marked a change in tide for the opposition. First, the opposition's Southern Front, lauded as the bastion of Syria's moderate opposition, lost crucial backing. In September, the Amman-based Military Operations Centre (MOC) cut off support in reaction to severe organisational and coordination failures.⁵⁶ Without this support, the Southern Front may disintegrate. A second development was the advancement of the Iran nuclear deal, empowering one of Assad's key backers. Third, the introduction of Russian airstrikes, supposedly targeting Daesh forces, has allowed the Assad regime to regain its strength. The Syrian army broke a Daesh siege on the Kuwairis Airbase in early November, re-launched its offensive on rebel-held areas south of Aleppo, and retook Palmyra from Daesh in March 2016.⁵⁷ Moreover, the killing of Jaysh al-Islam leader Zahran Alloush and several other opposition leaders marked a major coup for the Syrian regime, demonstrating deft intelligence and damaging the structure of what was one of the opposition's best-organised factions.⁵⁸

Broad peace talks on the Syrian conflict began in Vienna in October 2015. Notably, the talks were held among members of the International Syria Support Group (ISSG) rather than the Syrian government and opposition factions, demonstrating how powerful foreign influence in Syria has become. In mid-December, the UN Security Council unanimously approved a road map for a political solution with ISSG assistance, beginning with UN mediated peace talks between government and opposition representatives in January.⁵⁹

The UN road map centres on cementing an enduring ceasefire between key belligerents to the conflict, partially as a path to peace and partially to free up fighters to focus on Daesh and Jabhat al-Nusra. One such effort, an incremental and less formal 'cessation of hostilities' started in late February 2016 and surpassed expectations by successfully limiting casualties and re-opening venues for peaceful protest in opposition areas. The calm deteriorated in the following months. While no party has willingly called an end to the agreement, by most practical measures it is no longer in effect, with significant fighting in Aleppo, Eastern Ghouta, and Dara'a. Nonetheless, international actors remain dedicated to efforts to reinvigorate the agreement alongside concurrent movement towards a political solution.

Even as the organisation pulled off dramatic terror attacks worldwide, Daesh has suffered significant territorial decline since its losses to the Kurds at the beginning of 2015. Statistics analysed by IHS Jane from before the Syrian government retook Palmyra, found that the group had lost 14 percent of its territory in 2015 and a further 8 percent in 2016.⁶⁰ The campaign for Raqqa is ongoing, and remains a test of the coalition's strategy against Daesh, particularly the SDF forces.⁶¹

⁵⁴ T Joscelyn, "Al Nusrah Front, allies launch new offensives against Syrian regime", *Long War Journal*, 23 April 2015, <<http://www.longwarjournal.org/archives/2015/04/al-nusrah-front-allies-launch-new-offensives-against-syrian-regime.php>>.

⁵⁵ A Lund, "Origins of the Syrian Democratic Forces: A Primer", *Syria Deeply*, 22 January 2016, <<https://www.newsdeeply.com/syria/articles/2016/01/22/origins-of-the-syrian-democratic-forces-a-primer/>>.

⁵⁶ B Al Badarin, "تجميد التعاون مع المعارضة السورية «العلمانية»... ومخاوف من اقتراب الحرس الثوري أو عناصر «حزب الله» ما سيجري في درعا قريبا", *Al Quds*, 27, September 2015, <<http://www.alquds.co.uk/?p=409648>>.

⁵⁷ "Syria conflict: Army 'breaks IS siege of Kuwairis airbase'", *BBC News*, 10 November 2015, <<http://www.bbc.com/news/world-middle-east-34781225>> .

⁵⁸ S Dagher, "Op-Ed: Killing of Syrian Rebel Faction Leader Imperils Planned Peace Talks", *The Wall Street Journal*, 25 December 2015.

⁵⁹ *ibid*.

⁶⁰ C Strack, "Islamic State loses 22 per cent of territory", *IHS Jane*, 16 March 2016, <<http://www.janes.com/article/58831/islamic-state-loses-22-per-cent-of-territory>>.

⁶¹ L Sly, "U.S.-Backed Offensive in Syria Targets Islamic State Capital", *The Washington Post*, 24 May 2016.

1.6 Potential Syrian Outcomes

“We do not care about the regime. We just want the bombing to end. Our children need education, need futures.”

– *Syrian female refugee, Jerash, Jordan*

Civil wars last an average of 7-12 years,⁶² but Syria is not an average civil war. In its sixth year, the conflict shows no sign of abating; it is plagued with too many actors and too many interests at odds with peace. Various ‘solutions’ recommended have been limited in nature, excluded vital parts of the Syrian state, or involved multi-step processes staggered over time. Here, we map out five potential scenarios under which a Syrian future might be considered.

1.6.1 A Stabilised Ceasefire in Syria

A diplomatic solution, either immediately following or concurrent to an enduring ceasefire agreement, would likely create contiguous or non-contiguous territories under opposition, Syrian government, and Kurdish purview (necessarily excluding territory under Daesh control).⁶³ As pockets of rival powers remain in these territories, a lasting ceasefire may require land swaps, and would certainly require peacekeeping forces. The war on Daesh would continue, and as territory is won back from the group it may fall under international administration⁶⁴ or perhaps that of one of the Syrian territories. Such an agreement could re-unify the Syrian state or allow for its Balkanisation into autonomous units; each option is elaborated below.

- **Negotiating the Re-Unification of Syria**

With the exception of Daesh, Syria’s Kurds, and potentially Jabhat al-Nusra, most parties to Syria’s conflict prefer for the Syrian state to regain its territorial integrity, an idea consistently endorsed by the UN Security Council. The Council further supports the establishment of “credible, inclusive and non-sectarian governance”, the drafting of a new constitution and free and fair elections.⁶⁵ Such an outcome is unlikely to come to pass. Instead, negotiations to reunite Syria are more likely to involve the token resignation of Bashar al-Assad or his replacement via elections, with little structural change. If the President has his way, Syria will be reconsolidated without his loss of seat. In this instance, the opposition would only agree with the imposition of a de-centralised federal or confederal system offering local control over governance and security.⁶⁶ A federal or confederal system implies an unstable peace with vulnerable minority groups and limited political pluralism; it also means complex internal organisation. Peacebuilders would face formidable bureaucratic hurdles. As with any potential outcome, a reunified Syria under a peace agreement would likely suffer violent surges. However, the limited viability of small independent states strengthens the case for unification as a long-term benefit.⁶⁷

⁶² Variance accounts for use of median or mean (simplified here as average) and different metrics for civil wars start and end dates; J Fearon, ‘Why Do Some Civil Wars Last So Much Longer Than Others?’ *Journal of Peace Research*, May 2004, 280.

⁶³ J Dobbins, P Gordon and J Martini, “A Peace Plan for Syria”, RAND Corporation, 2015, 2 <https://www.rand.org/content/dam/rand/pubs/perspectives/PE100/PE182/RAND_PE182.pdf>.

⁶⁴ *ibid* 4.

⁶⁵ “Security Council Unanimously Adopts Resolution 2254 (2015), Endorsing Road Map for Peace Process in Syria, Setting Timetable for Talks”, *UN Meetings Coverage and Press Releases*, 18 December 2015, <<http://www.un.org/press/en/2015/sc12171.doc.htm>>.

⁶⁶ Dobbins, above n 63, 5.

⁶⁷ C Solomon, “Why Syria Will Remain United”, *Global Risk Insights*, 26 February 2016 <<http://globalriskinsights.com/2016/02/why-syria-will-remain-united-2/>>.

- **Full Balkanisation**

Despite broad support for a unified Syria, some officials have their doubts about this option's viability.⁶⁸ As discussed above, Russian escalations in Syria and the Iran nuclear deal have extended Assad's lifeline. Against this backdrop, a ceasefire could also make way for a broader calm within a Balkanised Syrian state. This scenario would see a partitioning of government and opposition territories, with separate Kurdish and Daesh-held areas. A partitioned Syria risks consolidating sectarian identities and, as demonstrated in the 1990s, is unlikely to be conducive to lasting peace. The region with the best relative autonomy is Syria's non-contiguous Kurdish region. However, Kurdish independence would face fierce opposition from the Turkish government, concerned about its own Kurdish population's ambitions. Moreover, whether Balkanised or confederalised, partitioning Syria along ethno-sectarian demographics inhibits repatriation when returnees do not share the identity ascribed to their place of return.

1.6.2 Military options

In war, as long as one side is confident in its ability to expand, a ceasefire is unlikely. Significant military encroachment by any one party, however, may end the war throughout much of Syria. The following paragraphs examine the implications of military victory by the Assad government, Syria's opposition movement, and Daesh respectively.

- **Assad's reconsolidation of Syria by force**

When his future looked more tenuous, Assad mentioned a willingness to give up parts of the Syrian state. However, with the Syrian government now poised to seize Aleppo,⁶⁹ a reinvigorated Assad has vowed to retake all of Syria.⁷⁰ This option depends largely on Iran and Russia's respective capacities and preferences. Russia has sent mixed signals regarding Assad's expansion and Iran is stretched by its actions in Iraq, but both would stand to gain from a Syrian state reconsolidated under Assad. Even if the two backers committed themselves to this option, it would likely remain a long, drawn-out battle, and conquered territories would face an almost unavoidable risk of insurgency.

Although prolonging President Assad's legacy risks accelerating violent extremism within Syria and beyond, there are advantages to a future that includes Assad, at least in the short term. Principally, the state has functioning institutions. Moreover, the presence of high-level Sunnis in government ranks and relative pluralism in Damascus indicate a limit to sectarianism. For the secular and minority Syrians fearful of living under Islamist rule, Assad is their safest bet. That said, even if broader security were restored, refugees' fear of reprisal could limit large-scale repatriation. Given the enormous debt Assad would owe both Russia and Iran in this context, the two states would hold ultimate sway over steps taken to restabilise and reconstruct the country.

- **Rebel Military Victory**

In the context of a post-nuclear deal Iran, waning international support for the opposition, and Russia's intensified involvement on Assad's behalf, the opposition's impressive achievements last year via Jaysh al-Fatah appear short-lived. At this point, a rebel victory would require a drastic change on the ground — likely Russian disengagement. One potential route to Assad falling is if propping up the government becomes too expensive. In past years, Syrian inflation has skyrocketed; the Syrian currency has crashed from 47 pounds to

⁶⁸ D Sanger "The Legacy of a Secret Pact Haunts Efforts to End War in Syria", *The New York Times*, 16 May 2016.

⁶⁹ "Fresh strikes around Syria's Aleppo despite ceasefire", *Al Jazeera*, 5 May 2016, <<http://www.aljazeera.com/news/2016/05/fresh-strikes-syria-aleppo-ceasefire-160505073507489.html>>.

⁷⁰ S Ketz and C Chaise, "AFP EXCLUSIVE: Assad vows to retake Syria, amid new ceasefire push", AFP, 12 February 2016, <<https://www.yahoo.com/news/afp-exclusive-assad-vows-retake-whole-country-warns-150319669.html?ref=gs>>.

the US dollar to over 500 pounds to the dollar.⁷¹ If the state can no longer afford to function, sustaining the regime will become a much heavier investment. An alternate scenario might involve a NATO intervention on behalf of the opposition, potentially as part of a broader strategy to defeat Daesh and regional radicalisation.

Syrians interviewed spoke widely about the need to bring down not just Bashar al-Assad but the system supporting him. A military overthrow offers the most latitude for this step. However, unless the opposition undergoes a major transformation, a violent rebel victory worsens Syria's prospects for long-term peace. Efforts to empower the moderate opposition have not translated to efficacy, and the composition of more powerful coalitions is worrisome.⁷² An alliance of victors, near-certain to include Ahrar al-Sham and Jabhat al-Nusra, is unlikely to prioritise the protection, let alone inclusion, of Syria's non-Sunnis. This bodes poorly for hundreds of thousands in Damascus, Latakia and other Daesh-held territories.

- **An Expanded Daesh Territory**

An expansion of Daesh territory – or other ideologically similar groups – either militarily or from opposition groups shifting allegiances would see the imposition of harsh Islamist rule over civilian populations. Although the frequency of both coalition and Syrian government-led successes against the group have increased, the coalition has limited means to combat Daesh's easiest way to expand, i.e. a reinvigorated Assad government encouraging a calculation of relative evils. Currently, Daesh promotes itself as a defender of Sunnis in Iraq and Syria. If the Sunni opposition's only real alternative is the hand at which they have suffered barrel bombs, mass disappearances, and chemical weapons, the non-Assad option holds a certain appeal. Moreover, in light of its comprehensive vision for an Islamist caliphate, Daesh is the belligerent most committed to the labour-intensive elements of reconstruction. Such efforts are paying off. The group's capacity to implement a rule of law and provide services are attracting those weary of conflict. Displaced Sunnis can choose between uncertain reception in government territory, crime-ridden and corrupt opposition areas, or welcoming and predictable, if brutal, governance under Daesh. This calculus is not limited to internally displaced Syrians; as conditions in host states deteriorate, it may apply to returning refugees as well. Nevertheless, the policy recommendations that follow bear little significance in any Daesh territory, and emergency relief measures for trapped civilians and the displaced would remain the priority for international stakeholders.

1.6.3 Any Syrian Future

As the above analysis makes clear, the situation on the ground in Syria is fluid and dynamic; potential outcomes could look very different a month from now. Planning must reflect this reality. Moreover, rather than fixating on an ideal but illusory solution, actors should work to design broad ranging and adaptable contingency plans for the options available. From a risk minimisation perspective, outcomes that are structured around loose power-sharing arrangements are most likely to support a fledgling peace. Outright winners create outright losers, who then have little to lose (and much to gain) through actions geared towards destabilising a new state structure. The following chapters build off and are structured around this premise, as they relate to security sector, justice and civil registration planning.

⁷¹ A Lund, "Assad's Other War: Winning on the Ground, Defeated by the Pound?", *Carnegie Endowment for International Peace: Syria in Crisis*, 5 April 2016.

⁷² J Veldkamp, "How to Understand those 60 Trainees," *Syria Comment*, 14 August 2015, <<http://www.joshualandis.com/blog/how-to-understand-those-60-trainees/>>.

2. Security Sector Reform and Disarmament, Demobilisation, and Reintegration Guidance

“Punishment is not a priority; security is what matters. We just want fighting to end. God will take care of justice.”

– *Syrian male refugee, Za’atari camp*

There is little to none contention that a secure environment is a *sine qua non* for post-conflict return and reconstruction. In the absence of security, justice sector institutions cannot operate, political organs will remain dormant, and measures to jump-start the economy cannot be set in place.⁷³ Further, until perceptions of safety are restored refugees will not repatriate, civil society cannot reconvene, and businesses will remain closed. Concerns over security can also prevent humanitarian aid, reconstruction projects and private sector investment from commencing.⁷⁴ In both Afghanistan and Iraq, increasing threats to staff and cargo led to periodic scaling back in aid activity. A security vacuum also spawns violence in the form of everyday criminality (opportunistic assault and lootings as well as revenge attacks), organised crime (either in response to a non-functioning economy or as a means of perpetuating the conflict), and extremist activity.

Given its centrality to post-conflict return and recovery, security should be an essential element of any contingency planning. This strategy must reflect the specific risks, threats, assets, and opportunities of the Syria context. These include a large population of predominantly young male combatants now accustomed to violence, caches of chemical and conventional weapons, and the presence of Islamic extremist organisations. The tool-set traditionally employed is security sector reform (SSR) alongside a process of disarmament, demobilisation and reintegration (DDR).⁷⁵ Such implementation will be particularly challenging in the Syrian context given the numbers of disparate groups and the sectarian divisions that have come to define the conflict. Moreover, planning is severely restricted without an understanding of how a conflict will end. In this context, it is easy to understand why analysts and humanitarian agencies have distanced themselves from contingency planning and instead concentrated on humanitarian assistance. A review of past operations, however, reveals that the prioritising SSR and DDR in return scenarios is not enough. Without evidence-based strategic planning, the impact of SSR and DDR activities is limited. A common issue is that resource and personnel shortages at the beginning of an operation prevent proper evaluations from taking place. Without a clear understanding of the pre-existing security architecture, skillsets of personnel and their loyalties, institutional functionality and popular expectations, agencies risk setting in place plans that are unrealistic. Having no strategic plan also paves the way for multiple agencies working under independent mandates or at cross-purposes.

Obviously, there is no single model for security sector planning and reform, a fact further complicated by the range of outcomes that decision-makers must contend with. The following analysis therefore relies on reasonable assumptions (that Syria will remain fragmented and unstable) and information on the pre-existing

⁷³ J Stromseth, D Wippman, R Brooks, *Can Might Make Rights? Building the Rule of Law After Military Interventions* (2006) 53, 134.

⁷⁴ *ibid* 141-143.

⁷⁵ Disarmament covers the control and disposal of light and heavy weapons, small arms, ammunition, and explosives. Demobilisation is the official process for discharging active combatants from formal armed forces and other groups. Reintegration encompasses the path for some ex-combatants to regain civilian status and obtain durable employment and others to integrate into new or reformed military structures “Rule of Law.” United Nations Peacekeeping, <<http://www.un.org/en/peacekeeping/issues/ruleoflaw/>>.

state of affairs that should inform new information as it evolves to map out likely scenarios and loose tranches of recommended action. As a final scenario becomes clear, it should be further enriched by insights into the needs and aspirations of the Syrian people, the likely moves and motivations of vested interest groups, and the strength and legitimacy of those who finally take charge. Such analysis must begin with an examination of Syria's pre-existing security sector institutions and their methods.

2.1 An Overview of Syria's Armed Forces and Security Apparatuses

Before evaluating potential reforms, Syria's armed forces and security apparatuses must be understood as they now stand. The Assad presidents' policies of manipulating sectarianism, constructing loyalty-bound institutions, and employing irregular militias are conspicuous within the current conflict. One outcome of these policies is that Syria's armed forces and security apparatuses, unlike the Egyptian Armed Forces under Mubarak, are never likely to turn on the regime. The dynamics of such loyalties have significant implications for efforts to transform Syria's security sector.

The Assads' most obvious strategy has been a manipulation of religious sectarianism. Army and intelligence leadership appointment is biased towards Alawites who subsequently link their power (as well as their safety) to preserving the secular, semi-pluralist regime.⁷⁶ When popular movements rose up against Hafez al-Assad, for example, he implemented selective deployment, positioning trusted Alawite-dominated army units to quash the dissent.⁷⁷ Bashar al Assad continued this practice by joining Alawite-heavy units with elite Special Forces regiments and limiting the involvement of conventional troops.⁷⁸ Similarly, although Sunnis do occupy positions of power, it is common for a non-Sunni to be instated as an immediate subordinate in order to monitor loyalty.⁷⁹ This tactic bears an important repercussion for any restructuring scenario. In Syria, the framework revolves around people and patronage, meaning that officials' personal identity can be more important than their title or position. Reform must therefore be rooted in an understanding of the identities of Syrian power holders, and not merely the structure itself.⁸⁰

While these sectarian factors are important, Assad's Sunni supporters should not be underestimated. Well-placed Sunni elites have long shared their Alawite counterparts' association between government stability and their own status, explaining senior officers' continued loyalty five years into Syria's conflict.⁸¹ Powerful Chief of Staff and General Staff positions are held by Sunnis and Christians in addition to Alawites. This practice is reminiscent of Hafez al Assad's coup-proofing of his regime by intertwining Syria's security sector within the state. Described as a pyramid, Syria's governance system balances three powers: the administration, the Ba'ath Party, and the army and security apparatuses. Competition, both between the powers and within them, keeps the structure dependent on the President at the top, with agencies contending for presidential favour and prioritising Ba'athist loyalty over any religious sect. But this structure is fragile; rival sides risk descending into disorder without central leadership⁸² (as seen in the insecurity that followed Hafez al-Assad's death and in the early days of Bashar al-Assad's presidency).⁸³ Recognising this tenuous balance, Syria's military and intelligence have a great incentive to stand by Assad. One broader implication is that, over time, these loyalty-

⁷⁶ Syrian Center for Political and Strategic Studies, "Syria Transition Roadmap" (2013) *Syria Expert House*, 166.

⁷⁷ N van Dam, *The Struggle for Power in Syria*, 98, J Holliday, "The Assad Regime: From Counterinsurgency to Civil War", *The Institute for the Study of War*, March 2013, 10, <<http://www.understandingwar.org/sites/default/files/TheAssadRegime-web.pdf>> at 8 June 2015.

⁷⁸ *ibid* 15.

⁷⁹ E Hokayem, *Syria's Uprising and the Fracturing of the Levant*, Routledge for the International Institute for Strategic Studies, 2013, 34; G Achkar, "The Syrian army and its power pyramid", *Open Democracy*, 18 July 2014, <<https://www.opendemocracy.net/arab-awakening/gilbert-achkar/syrian-army-and-its-power-pyramid>>.

⁸⁰ Y Sayigh, "Syria Security Reform", Skype Interview, 18 March 2016.

⁸¹ *ibid*.

⁸² Syrian Center for Political and Strategic Studies, above n 76, 161.

⁸³ Yemen and Libya have experienced a similar disintegration of institutions after the fall of their respective strongmen leaders; Sayigh above n 80, 5.

promoting policies weighted military and security priorities away from the people and towards protection of the state. The following paragraphs describe these institutions in their current form in greater detail.

2.1.1 Syria's intelligence apparatuses

Syria's intelligence sector is enormous and its leadership (often friends and family of the two Assad presidents) is heavily integrated into state institutions. Syria's intelligence agencies have their own separate military branches, are more powerful than the armed forces, and unlike the armed forces, have been directly involved in the government's repression of the people. Their bond to the Syrian state is evidenced by the dearth of intelligence attrition, especially when compared to that of the armed forces.

While statistics are limited, the estimated pre-2011 number of intelligence personnel was 65,000 full-time and hundreds of thousands of part-time employees.⁸⁴ The system has numerous, somewhat entangled agencies, however four dominate: the General Intelligence Administration, the Political Security Division, Military Intelligence and Air Force Intelligence.⁸⁵ On paper, all four branches report to the National Security Bureau (or the Presidential Security Council), but in reality they report directly to Assad.⁸⁶

Alawites are most frequently selected to head the intelligence directorates, however both the General Intelligence Administration and the Political Security Division are currently headed by Sunnis. The Military and Air Force Intelligence branches are Alawite-run and are considered to be the most influential of the four. In the current conflict, they are also known for their ferocity; the Air Force Intelligence has expanded beyond its original mandate to rival Military Security in protecting the regime⁸⁷ and has employed ruthless tactics to prevent pilots' defection. The Military Intelligence was culpable for early crackdowns on peaceful protests (alongside divisions of the Armed Forces),⁸⁸ and the division known as the 'Palestine Branch' is renowned for its brutality against political dissidents.

2.1.2 The Syrian Army (Al Quwaat al Musallah al Arabiyya ah Suriyya)

Syria's armed forces are among the most powerful in the region; there is mandatory conscription for males over 18 and the government heavily invests in military spending. The armed forces, however, are not necessarily the bedrock of regime loyalty. The need for selective deployment — grounding around two-thirds of the forces' doctrinal combat power — highlights the forces' vulnerability to lower level disobedience and defection.⁸⁹ Mitigating this risk has considerably limited the government's combat capacity, encouraging its reliance on foreign forces and irregular militias. Years into the fighting, deaths, defection, desertion and draft avoidance have compounded such depletion. Personnel numbers decreased from around 300,000 persons⁹⁰ to current estimates of 80,000 -178,000.⁹¹

⁸⁴ Syrian Center for Political and Strategic Studies, above n 76, 161.

⁸⁵ *ibid.*

⁸⁶ A Ramthall, "Syria's Intelligence Services—Origins and Development", *The Journal of Conflict Studies*, Oct. 1996; "By All Means Necessary: Individual and Command Responsibility of Crimes Against Humanity in Syria", Human Rights Watch, Dec. 2011, 85 as cited in Holliday, above n 13, 54.

⁸⁷ *ibid.*

⁸⁸ A Al Hendi, "The Structure of Syria's Repression", *Foreign Affairs*, 3 May 2011; Syrian Center for Political and Strategic Studies above n 76, 161-2.

⁸⁹ Holliday, above n 15, 16.

⁹⁰ 'Reasons for Displacement', above n 39, 2.

⁹¹ I Black, "Wake-up call on Syrian army weakness prompted Russian intervention", *The Guardian*, 1 October 2015, <<http://www.theguardian.com/world/2015/oct/01/syrian-military-weakness-russian-intervention>> at 8 December 2015; "Syria Military Strength-Rated 42 of 126", *Global Fire Power*, 5 December 2015, http://www.globalfirepower.com/country-military-strength-detail.asp?country_id=syria; C Kozak, 4 "An Army in All Corners", *Institute for the Study of War*, Middle East Security Report No, 26 April 2015, <<http://understandingwar.org/sites/default/files/An%20Army%20in%20All%20Corners%20by%20Chris%20Kozak%201.pdf>>.

Syria's career forces are thought to be 70 percent Alawite, while conscripted forces are majority Sunni.⁹² This discrepancy supports theories that sectarian identity influences troop allegiance. Further, despite the loyalty of many Sunni officials, the most prominent defection was that of Sunni Republican Guard commander Manaf Tlass, whose family was closely tied to the Assads.⁹³ One factor contributing to officers' loyalty, regardless of sect, is a generous benefits system, which offers land ownership in Dahiet al-Assad, a military housing complex in northeast Damascus. As many officers come from poverty, land ownership presents an opportunity for social as well as economic advancement, and cements officers' interests to those of the regime.⁹⁴ Additionally, the presence of officers' families in the common location offers the government easy recourse in case of betrayal. Unsurprisingly, there has only been one recorded instance of a Dahiet-resident officer defecting to the opposition.⁹⁵

Syrians appreciate that conscripted armed forces cannot readily be categorized as Assad loyalists. Before 2011, many considered the army, unlike the intelligence sector, to be a legitimate national institution that stood for the entire nation. Opposition supporter Syria Expert House stood by this assessment as late as 2013. Interviewees refrained from classifying the armed forces as a legitimate institution, but broadly recognized that low level officers are merely following orders. Importantly, in contrast to the intelligence apparatus or regime, the armed forces were generally considered an entity that could be forgiven.

In terms of structure and armament, army ground forces are divided into three corps with different regions of operation. The Damascus and Zabadani headquarters are led by Alawites, while the Aleppo base is led by a Circassian Sunni.⁹⁶ Although Alawites predominate, nearly all force groups are made up of mixed religious sects. Two exceptions are the all-Alawite Republican Guard (also called the Presidential Guard) and the Fourth Mechanised Division.⁹⁷ Both are known for their brutality, specifically the 2011 killing of protesters in Dar'aa.⁹⁸ At that time the state arsenal was estimated to include large numbers of long-range Scud-C and Scud-D missiles with ranges of 500 kilometers and 700 kilometers respectively. The army was also known to possess T-80, T-72, T-64, and T-55 tanks and the Republican Guard T-90 tanks.⁹⁹

2.1.3 Public Security Police (PSP)

Although its power is often usurped by the security forces, enforcement of the law technically falls under the purview of Syria's Public Security Police within the Ministry of Interior. With the exception of its paramilitary units — the Gendarmerie and the Desert Guard — the PSP are limited in both authority and operational activity.¹⁰⁰ Syrians recognise this distinction and consider police the most trusted regime security entity; one interviewee called them “defenders of citizens.”¹⁰¹ They also recognise the limits imposed on police capacity: “The police are our friends they can be trusted they just had limited jurisdiction and power. They were forced to go along with the regime.”¹⁰²

⁹² Achkar, above n 79.

⁹³ G Abuhamad and A Tabler, “All the Tyrant's Men: Chipping Away at the Assad Regime's Core”, *Washington Institute for Near East Policy*, 23 August 2013, <<http://www.washingtoninstitute.org/policy-analysis/view/all-the-tyrants-men-chipping-away-at-the-assad-regimes-core>> at 15 October 2015.

⁹⁴ K Kheddour, “Assad's Officer Ghetto: Why the Syrian Army Remains Loyal”, *Carnegie Endowment for International Peace*, 4 November 2015, <<http://carnegie-mec.org/2015/09/30/assad-s-officer-ghetto-why-syrian-army-remains-loyal/iigr>>.

⁹⁵ Ibid; Syrian Center for Political and Strategic Studies, above n 76, 183.

⁹⁶ R Bhalla, “Making Sense of the Syrian Crisis”, *Stratfor*, 5 May 2011, <<https://www.stratfor.com/weekly/20110504-making-sense-syrian-crisis>>.

⁹⁷ Syrian Center for Political and Strategic Studies, above n 76, 183.

⁹⁸ Z Barany, “Why Most Syrian Officers Remain Loyal to Assad”, *Doha Institute*, 17 June 2013, <<http://english.dohainstitute.org/release/b8f4f88b-94d3-45a0-b78e-8adad3871daa>>.

⁹⁹ Syrian Center for Political and Strategic Studies, above n 76, 178-9.

¹⁰⁰ L Sullivan, M S Rosen, D M Schulz, M R Haberfeld, *Encyclopedia of Law Enforcement* 1327 (Vol 1, SAGE Publications, 2004).

¹⁰¹ Interview, Zaatari, April 2016.

¹⁰² Interview, Mafrq, April 2016.

2.2 Militias and Irregular Forces

The Syrian conflict can be distinguished from conventional warfare for its internationalisation and the participation of powerful, sometimes transnational, non-state actors. Such groups will have varying influence within post-conflict security sectors depending on the outcome, and their presence cannot be ignored in DDR and SSR planning. The next section provides an overview of pertinent armed groups.

2.2.1 Pro-government Militia Groups (Shabiha, Popular Committees and Foreign Fighters)

As discussed, Bashar al-Assad strategically under-utilised sectors of Syria's armed forces to continue his hold on power. To maximise numbers of loyal fighters, encourage the will to fight, and increase counter-insurgency capacity, Syrian armed forces transitioned away from conventional techniques to implement the so-called 'militia-fication' so prominent in Iraq.¹⁰³ Today, some 150,000 fighters in pro-government militias supplement the traditional armed forces¹⁰⁴ and are responsible for committing some of the most reprehensible violence of the conflict. They can be split into two categories.¹⁰⁵ One type is a newer phenomenon: the predominately-Alawite *Shabiha* criminal smuggling networks led by members of the Assad family. The other militia is reminiscent of Hafez al-Assad's time in power. They call themselves Popular Committees and are made up of minorities who armed themselves to protect their neighbourhoods but later transformed into broadly operating militias.¹⁰⁶ While they are less violent than the *Shabiha*, experts suspect they are more numerous. In addition to these, foreign militias, and security forces emerged on the scene after 2013. These include Lebanon's Hezbollah, Iraq's Badr Organisation and Asaib Ahl al-Haq, Iran's Islamic Revolutionary Guard Corps (IRGC) and Russian forces.¹⁰⁷

Syria's largest militia network is the National Defense Forces (NDF). This 90,000-strong force was formed in 2012 and is an Iran-assisted merging of Popular Committees from around Syria.¹⁰⁸ It is loosely organised and its lower branches operate with relative independence from the Damascus leadership. Operational capacity, levels of armament and professionalisation vary drastically across different NDF affiliates.¹⁰⁹ With the exception of the Ba'ath Party's armed branch, other militias are localised.¹¹⁰ They include the Aleppo-based and Palestinian-championed Jerusalem Brigade; the largely Alawite Latakia-based Syrian Resistance; the Christian-oriented Syrian Social Nationalist Party in Homs; and Damascus's Palestinian Marxist Group, the *Popular Front for the Liberation of Palestine-General Command (PFLP-GC)*. These groupings counter allegations that pro-government militias are solely Alawite products; indeed some, like the Qamishli-Hasaka-based Commandos, are Sunni Arab.¹¹¹

Assad's dependence on militias has disrupted the balance of power in Syria, adding a powerful influence that the government must court. In acknowledgment, at the end of 2014 Assad promised half of state jobs to family members of deceased pro-government fighters, military and militia alike, further complicating the relationship between state and pro-state forces.¹¹²

¹⁰³ K Ghattas, "Syria civil war: Is it too late for a peace deal?" *BBC News*, 17 March 2015, <<http://www.bbc.com/news/world-us-canada-31910544>>.

¹⁰⁴ "With Syria army in tatters, pro-Assad militias fill the gap", *Middle East Eye*, 25 September 2015 <<http://www.middleeasteye.net/news/syria-army-tatters-pro-assad-militias-fill-gap-1516906335#sthash.i13XBL3g.dpuf>>.

¹⁰⁵ Although the opposition lumps both types under the same *Shabiha* name.

¹⁰⁶ J Holliday, above n 15, 16.

¹⁰⁷ A Lund, "Who are the pro-Assad militias?", *Carnegie Endowment for International Peace*, 2 March 2015, <<http://carnegieendowment.org/syriaincrisis/?fa=59215>>.

¹⁰⁸ "With Syria army in tatters, pro-Assad militias fill the gap", *Middle East Eye*, 25 September 2015, <<http://www.middleeasteye.net/news/syria-army-tatters-pro-assad-militias-fill-gap-1516906335#sthash.i13XBL3g.dpuf>>.

¹⁰⁹ J Cafarella and C Cozak, "Likely Courses of Action in the Syrian Civil War June-December 2015", *The Institute for Study of War*, 4.

¹¹⁰ Lund, above n 55.

¹¹¹ *ibid*; عناصر حزب البعث بالحسكة من الوقوف ضد (PYD), *Orient News*, 2 December 2014, http://www.orient-news.net/ar/news_show/83110.

¹¹² *ibid*.

2.2.2 Syria's Armed Opposition

Depending on the conflict's outcome, Syria's armed opposition groups will need to be variously incorporated into a reformed or remade armed forces. Previous SSR and DDR planning efforts have emphasised the involvement and guidance of the Free Syrian Army. However, given the incoherence of any lingering FSA structure, more innovative solutions must be considered. The two most powerful armed opposition groups in Syria today are Jaysh al-Islam and Ahrar al-Sham. Neither represent the moderate, secular vision advocated by the Syrian revolution's early thought leaders. Both are opposed to Daesh and have made rhetorical steps towards moderation, but their rhetoric has been counterbalanced by contradictory statements and, in Ahrar-al-Sham's case, close links to al-Qaeda. The 'moderate' opposition that the US-coalition aims to empower is more fractured and less powerful. Brookings expert Charles Lister generously estimates that moderate factions total around 75,000 fighters. He explains that, despite many ideological differences, these groups share an explicitly nationalist vision and are made up of local fighters. They advocate a multi-sectarian Syrian state with equality before the law. The two largest groups are the Southern Front and the Northern FSA.¹¹³ The Southern Front is broadly considered the most effective, genuinely moderate force on the ground.¹¹⁴ While many secular groups are cooperating with moderate Islamist factions, efforts to create a unified umbrella force have thus far faltered. Against this context, the likelihood of Jabhat al-Nusra and Daesh acting as spoilers must be accounted for.

2.3 Responses and Recommendations

A principal recommendation of this policy brief is that the risk of conflict recidivism in Syria will be so high and the costs of this — in both financial and human terms — so great, that the strategy adopted must be one of risk avoidance. The high number of disparate parties accustomed to (and, frequently, benefiting from) violence means that the opportunity for spoiler groups to form and succeed is thus great. In this context, creating space for and incentivising potential spoilers to participate in the new governance framework should be prioritised.

If Assad remains in power, or even if he departs but the security apparatus remains intact under Russian and Iranian influence, any security sector reform is likely to be limited. Without substantial international pressure, Assad will have little incentive to change the security apparatuses that helped ensure his power. If anything, the authoritarianism of the Assad government will become more entrenched. While the international community can implement sanctions or incentives, without Iranian and Russian backing such reform efforts are likely to have little impact. If Assad does fall, one certainty is that Syria will be fragmented and unstable well into the medium-term future. The key priority for the power-holder(s) will be managing security risks and reducing opportunities for recidivism. This process will be complicated by the size, complexity and entrenched nature of Syria's security apparatus. Moreover, rivalries between and strict hierarchies within agencies, mean that reforms applied will need to be complementary and carefully sequenced.

A further challenge relates to confidence building. Two foundational mistakes that any future Syrian administration must learn from are Iraq's Coalition Provisional Authority (CPA) policies of 'de-Ba'athification' and disbanding of the military. De-Ba'athification barred Iraqis from the top four levels of the Ba'ath party and the top three levels within each ministry from government service, knocking some 85,000 people from their civil positions.¹¹⁵ Disbanding the military followed a 2002 psyops leaflet initiative offering Iraqi soldiers continued positions in a post-Saddam army if they refused to defend the regime. This promise

¹¹³ C Lister, "Yes, there are 70,000 moderate opposition fighters in Syria. Here's what we know about them", *The Telegraph*; *Brookings*, 27 November 2015.

¹¹⁴ International Crisis Group, "New Approach in Southern Syria", *International Crisis Group*, Middle East Report No. 163, 2 September 2015.

¹¹⁵ See generally P Bremer, *My Year in Iraq* (2007) p.39; Thomas Ricks, *Fiasco* (2006) 160 as cited in Pfiffner, above n 500, 80 as cited in J Pfiffner "US Blunders in Iraq: De-Baathification and Disbanding the Army," *Intelligence and National Security*, February 2010, Vol. 25, No. 1, 76.

led to many Iraqi soldiers avoiding fighting American troops in 2003.¹¹⁶ When the CPA demobilised the military, many of whom had no special loyalty to Saddam Hussein, soldiers felt humiliated and betrayed.¹¹⁷ Inadequate reintegration assistance compounded these young, disproportionately Sunni, men's frustrations.¹¹⁸ This legacy of deception is likely to impair the trust of all parties' in a post-conflict Syria. Similar sweeping lustration in Libya, although not as comprehensive, paralleled this mistake with "arbitrary, far-reaching, at times vague" criteria for dismissal that contributed to the country's devolution into civil war.¹¹⁹ But while complete overhaul should be avoided, entities such as Syria's Air and Military Intelligence divisions should be entirely restructured and re-staffed.¹²⁰

Arguably the biggest challenge will be inculcating a new culture in security provision: from controlling citizens to serving them. Training in human rights, social contracts, and international best practices, while laudable, will be inadequate. New and better solutions will be needed to respond to Syria's unique history and war-induced sectarianism.¹²¹ At the same time, quick technical reforms that yield broad results in functionality and perception should be prioritised. Relocating the Interior Ministry's non-security-related departments (i.e. passport administration and civil registries) to other ministries, for example, would restrain its bloated mandate.¹²² The legal framework also needs to be overhauled. In addition to numerous extraordinary courts, extensive legal loopholes create vulnerabilities in terms of civil liberties protection and government accountability. Addressing these deficits would be relatively simple and would provide evidence that power-holders are committed to a more peaceful future.

2.3.1 Intelligence Services

While inclusive integration is a key message of this analysis, the intelligence services require a more thorough overhaul. Their role was to maintain Assad's power and even Alawis support the disbandment of the Air Force Intelligence.¹²³ But while changes should be extensive, a gradual implementation may be the best way to balance their destabilising impacts.

One area of reform will be structural — teasing out an appropriate security apparatus from Syria's deliberately wide and interwoven network of personnel. A key effort will be to depoliticise and transfer intelligence to civilian authority. Mandates also need to be simplified and split between foreign intelligence and domestic,¹²⁴ with internal intelligence a civilian run agency within a newly constrained Ministry of the Interior.¹²⁵ Such steps would present an enormous check on the extensive military powers of current intelligence agencies. Downsizing should be considered a mid-long term aspiration. The Iraqi experience evidences the dangers of leaving thousands jobless without adequate support and assistance.¹²⁶

¹¹⁶ M Gordon, "Fateful choice on Iraq army bypassed debate", *The New York Times*, 17 March 2008, as cited in Pfiffner, above n 51, 81.

¹¹⁷ See generally G Tenet, *At the Center of the Storm: My Years at the CIA* (2007), 429, as cited in Pfiffner, above n 116, 80; "Iraq: Building a New Security Structure", *International Crisis Group*, 23 December 2003, Middle East Report No. 20.

¹¹⁸ Pfiffner, above n 116, 80.

¹¹⁹ Libyan Mission to the United Nations, "Briefing by Mr. Tarek Mitri SRSG for Libya—Meeting of the Security Council," June 19, 2013, <<http://www.libyanmission-un.org/en/2013/06/briefing-by-mr-tarek-mitri-srsg-for-libya-meeting-of-the-security-council>> as cited Sayigh above n 80, 13.

¹²⁰ When Yemen attempted security sector reform after 2011, insufficient overhaul restricted the fundamental changes needed in how the security sector operated, fueling opposition movements and Yemen's own plunge into conflicts; ayigh above n 80, 15.

¹²¹ Syrian Center for Political and Strategic Studies, above n 76, 168.

¹²² *ibid* 169.

¹²³ "Pilot Survey on Transitional Justice", The Day After Project, 11 January 2015, <http://tda-sy.org/pilot_survey_on_tj/?lang=en>, 23.

¹²⁴ Expert House has recommended completely overhauling the institutional structure with the exception of Syria's police forces, while the Arab Reform Initiative suggested establishing branches for air force, naval, and military intelligence under their respective armed service branches M Joujati, "Reforming Syria's Security Sector in the Post-Assad Era", *Arab Reform Initiative*, July 2014, 1. <http://www.arab-reform.net/sites/default/files/20140731_Joujati_SSR_EN.pdf>.

¹²⁵ *ibid*.

¹²⁶ Syrian Center for Political and Strategic Studies above n 76, 168.

The second area for reform should involve a comprehensive vetting of the Interior Ministry and intelligence agencies to identify members who committed serious crimes and who can be entrusted with leadership roles. If properly conducted, such a process can also contribute to transitional justice efforts.¹²⁷ Syrian interviewees frequently listed the intelligence forces as an entity that could not be forgiven. This suggests that gradual reform may be met with frustration; to mitigate this, the long-term intentions of any program and reasoning for maintaining some continuity should be widely and clearly communicated.

Finally, certain legal and administrative changes will be required, particularly closing loopholes and subjecting intelligence bodies to the rule of law. Effective systems of documentation and oversight must also be established to aid accountability.¹²⁸ Efforts should also be made to open up the sector to Syrians from diverse backgrounds and religious affiliations,¹²⁹ however this will be complicated in certain transitional contexts.

2.3.2 The Syrian Army

As noted, in an Assad outcome, there is little likelihood of comprehensive security sector reform. But even if the regime falls, a complete overhaul would be unwise. The army is institutionally strong, well trained and has the confidence of the population relative to other regime agencies. Many (mostly Sunni) soldiers have been relegated from the main areas of fighting, constituting a huge boon for any broader reconciliation and reintegration effort. Most importantly, any mass demobilise would unnecessarily add to the already large mix of potential spoilers. Such an approach is also consistent with the sentiments of interviewees who generally agreed on the notion of establishing a new unified Syrian army from those who did not commit war crimes. To help assuage this process for citizens, cosmetic measures, such as renaming (for example “the Unified Syrian Army”), might be considered. However forces that were exclusively Alawite, such as the Fourth Mechanised Division and Republican Guard, will likely need to be disbanded and a process of vetting administered. As recommended by Expert House, vetting might be managed by committees made up of human rights leaders, police and judiciary figures in good standing, specially approved lawyers and select reputable leaders from the old guard.¹³⁰

Advance planning is needed to determine an appropriate size for Syria’s reformed armed services and ideal proportions for representation of Syria’s demographic groupings. This strategy must be developed alongside and in complement with how Syria’s pro-government militias and armed opposition groups will be managed. The guiding principle of both should be to incorporate groups and limit spoiler risk.

In these processes, past mistakes cannot be repeated. New units must be properly trained and inevitable cohesion issues planned for. Expert House’s recommendation for training in civic spirit and tolerance¹³¹ is perhaps overly optimistic. While the ultimate goal is a representative armed forces under civilian authority,¹³² the required cohesion may be lacking for many years. New ideas for how to realise this transition in the Syrian context are needed. Moreover, until this time, security support and oversight will be critical and should not be dismissed for political correctness (or lingering post-colonial guilt). Abdulla Erfan suggests involving officers in broader human security tasks to encourage popular confidence in the armed forces while simultaneously supporting development efforts.¹³³ The importance of adequate remuneration must be integrated into planning. In Iraq, unpaid salaries (in addition to improper training and an unclear mandate), caused nearly half

¹²⁷ *ibid.*

¹²⁸ *ibid.*

¹²⁹ *ibid* 169.

¹³⁰ *ibid* 168.

¹³¹ *ibid* 185.

¹³² *ibid* 189; 183-184.

¹³³ A Erfan, “Building Peace in Syria: Drawing Lessons from Iraq”, *Al Jazeera Centre for Studies*, 24 February 2013, <<http://studies.aljazeera.net/en/reports/2013/02/20132209526299197.htm>>.

of the CPA's first battalion forces to resign.¹³⁴ While remunerations do come cheaply, averting the cost of military fragmentation is a strategic investment. Maintaining the benefits system that houses Syrian officers in Dahiet al Assad to incentivise positive participation should be prioritised.

2.3.3 Public Security Police

The limited operability of Syria's police force may be an advantage in any SSR process. Less culpable than other elements of Syria's security and enforcement apparatus for crimes and oppression, a quicker vetting process can be conducted before empowering the police to lead rule of law enforcement.

2.3.4 Militias

Perhaps the greatest obstacle for any post-conflict Syria will be the conflict's 100-plus rebel groups and pro-government militias. The conventional approach is that militia groups are disarmed, demobilised, and then reintegrated. Each of these steps requires careful and customised planning. Relevant data must be gathered on local security, infrastructure, labour market, educational opportunities and community sentiments towards combatants.¹³⁵

Typically, the first step is disarmament. In insecure post-conflict zones, because people are frequently resistant to giving up their means of defending themselves, propaganda, coercion, and reward are often used to limit individuals' ability to engage in armed conflict.¹³⁶ But rather than buying back arms, it is better that benefits received are less fungible e.g. job training/support or community-thrust compensation.¹³⁷ Demobilisation generally follows disarmament. Beyond deciding who to demobilise and the actual turning in of uniforms, demobilisation requires that resources be allocated for soldiers' initial severance as well as broader livelihood support and psychosocial assistance.¹³⁸ Implemented alongside demobilisation, reintegration concerns the social, economic and psychological needs of ex-combatants. This wide mandate involves direct assistance in terms of cash payments; job placement and skills training; and the provision of food and non-food items such as civilian attire, household ends, building materials and agricultural tools.¹³⁹ Ex-combatants can provide essential labour in public works projects such as construction and infrastructural repairs.¹⁴⁰ The immediate post-conflict period is ripe with economic need and peacebuilders can capitalise on this unique context to provide both employment opportunities and a fast-track escape from war-time economies.¹⁴¹

DDR efforts typically stir concern that combatants are being offered preferential treatment. While an important consideration, pragmatists must work past them. Discharged combatants are jobless, frequently homeless and may suffer debilitating physical or psychosocial conditions. Most importantly, if they are excluded they pose a security risk.¹⁴² A more valid criticism is that initiatives designed exclusively for soldiers and their families reinforce spatial and symbolic differences separating them from local communities.¹⁴³ Notably, this was not a concern raised during discussion groups, in fact, male participants insisted on the

¹³⁴ "Iraq: Building a New Security Structure", above n 118.

¹³⁵ Syrian Center for Political and Strategic Studies above n 76, 186-187.

¹³⁶ W Kuhne, "From Peacebuilding to Postconflict Peacebuilding", in L Reyhler and T Paffenholz (ed), *From Peacekeeping to Peacebuilding (2001)*, 376, 384.

¹³⁷ S Faltas, "Small Arms--Big Problems", in L Reyhler and T Paffenholz (ed), *From Peacekeeping to Peacebuilding (2001)*, 397, 403.

¹³⁸ K Kingma, "Demobilizing and Reintegrating Former Combatants", in L Reyhler and T Paffenholz (ed), *From Peacekeeping to Peacebuilding(2001)*, 405, 407.

¹³⁹ *ibid* 410.

¹⁴⁰ Syrian Center for Political and Strategic Studies above n 76, 190.

¹⁴¹ *ibid* 189.

¹⁴² Kingma, above n 139, 409.

¹⁴³ R Muggah and C O'Donnell, "Next Generation Disarmament, Demobilisation and Reintegration", *Stability Journal*, 21 May 2015, Vol. 4, Issue 1, <<http://www.stabilityjournal.org/articles/10.5334/sta.fs/>>.

importance of compensation for former combatants, although women focused more on the need for psychological rehabilitation.

But conventional DDR may not be the right strategy for a post-conflict Syria. These rebel groups are trained, weapons are rampant, and inroads for foreign support will likely remain open to exploitation. Syria will be fragmented and highly vulnerable to conflict relapse, thus if risk-minimisation is the priority, these groups should be included in the security apparatus and an adequate incentive structure set in place. Without a better option, they are likely to become spoilers and may be highly effective in interrupting any peace process.

As the conflict's resolution may involve phasing out the violence in stages, one useful (though unconventional) strategy is the 'stick-then-carrot' approach. This process implements DDR measures for willing participants while peacekeepers simultaneously neutralise active fighters. This strategy has been used in the Eastern Congo, Somalia, and, albeit in a very limited capacity, in Libya.¹⁴⁴ Another approach is abandoning the traditional order of DDR. There is increasing support that disarmament may be unrealistic or unwise in the immediate aftermath of certain conflicts. For example, if disarmament leads to only law abiding citizens surrendering their arms, while more likely spoilers maintain their firepower, disarmament can heighten risk. Even if it is just to offer time for building the necessary institutional confidence for weapons submission, in such circumstances, disarmament might follow demobilisation and reintegration.¹⁴⁵ However, while such an approach has significant scholarly support, interviewees widely considered disarmament a prerequisite for their return.

The following recommendations are drawn from parallel experiences in the region and account for unique factors in the Levant context.

2.3.5 A Syrian National Guard

Some of the most innovative thinking on militias is the idea of transforming militias into national guards. Wehrey and Ahran explain that militias can both interrupt peace, or, if properly leveraged, provide cheap, flexible support and local knowledge to governments.¹⁴⁶ Thus rather than aiming to demobilise them (likely a futile task), redirecting these forces into a National Guard structure may be the best path forward. In the right transitional context, and with national and external commitment, militia organisations have the potential to moderate into more constructive political forces.

This thinking is informed by U.S. military efforts in Iraq. There, miscalculated SSR and DDR efforts had left Iraq's Sunni minority disenfranchised and betrayed, fomenting the 2006 insurgency.¹⁴⁷ However, in a measure of militias' potential, the US temporarily quashed the violence via co-opted Sunni tribes who were recruited to turn against the insurgency with weapons, protection and promises of greater inclusion and autonomy within the Iraqi government. The strategy only half worked. While the arrangement crippled the insurgency, the government's reticence to integrate Sunni combatants into state forces meant that one side of the bargain was

¹⁴⁴ In the absence of a real state, rival armed militias have risen to squabble over Libyan territory. Without much scope for DDR, the international community is focused instead on damage control such as UN Mine Action Service efforts to regulate weapons stockpiling, with a view to limiting arms proliferation and the violence's escalation. Shaw and Mangan, 14 as cited in Muggah and O'Donnell, above n 144.

¹⁴⁵ There is greater consensus on recommendations for arms collection. Arms stolen from state sources can and should be returned to state storage if they can be kept securely. Otherwise, arms should be destroyed as rapidly as possible and in public to signify the conflict's end. Faltas, above n 138, 403.

¹⁴⁶ F Wehrey and A Ahran, "Taming the Militias: Building National Guards in Fractured Arab States", *The Carnegie Endowment for International Peace*, 7 May 2015.

¹⁴⁷ Gordon, above n 117, 81.

not fulfilled.¹⁴⁸ Frustrated tribes restored their Ba'athist and Islamist linkages, nourishing Daesh's early iterations as it transitioned from its identity as al-Qaeda in Iraq.

This experience reinforces the importance of national leaders' involvement in and support for any integration plan. Moreover, such an initiative depends on broader security reform, political reform, and power sharing. If well managed, a National Guard system could formalise linkages between militias and the state and allow the state to benefit from militias' local knowledge, legitimacy and representation.¹⁴⁹ But such a strategy is certainly not without risk, as Libya's 2013 flirtation with the idea showcases. There, the key groups — the Muslim Brotherhood militias and National Forces Alliance — stood to gain in vastly different measures.¹⁵⁰ This suggests that for a National Guard structure to work it must aim to rebalance a system in favour of a marginalised group, and not encourage one's dominance.

2.3.6 Counterbalancing Militias

Another option is non-disarmament, particularly given the likelihood that ex-fighters' will strongly resist turning over their weapons while instability persists. An examination of Hezbollah in Lebanon shows that, while preferable, total disarmament is not imperative. There has been some suggestion that a Sunni Hezbollah equivalent could be developed from the opposition's most powerful Sunni Islamist faction Ahrar al-Sham, channeling their organisational power into a more constructive force.¹⁵¹

The Lebanese security structure is far from ideal. Its most apparent shortcoming is that it lacks a monopoly over the use of force. Hezbollah was exempted from general disarmament efforts in the early 1990s and remains a powerful militant force, creating a de facto dual security structure. In December 2009, the government reconfirmed Hezbollah's permission to remain armed.¹⁵² As one of the world's most powerful militant groups, Hezbollah poses major obstacles to traditional security efforts, most evident in the May 2008 crisis when Hezbollah occupied half of Beirut. The group's influence makes it a prime spoiler of security reform efforts. All that said, Hezbollah's militancy has not triggered a return to civil conflict, and the forces tacitly cooperate with and support Lebanon's armed forces.¹⁵³

One crucial difference between Lebanon and Syria is that, leaving aside the 2008 occupation of Beirut,¹⁵⁴ Hezbollah's militancy is not targeted towards the Lebanese state. Instead, the organisation is externally focused: staunchly anti-Israel and now pro-Assad. While problematic, this focus mitigates Hezbollah's role as an internal spoiler. In Syria, domestic militias are very much internally-focused. Moreover, international assistance plays a major role in the Lebanon context; to counterbalance Hezbollah, Western and Arab states have extensively supported Lebanese forces with training and equipment, and the United Nations Interim Force in Lebanon (UNIFIL) has been operating in Southern Lebanon since 1978.¹⁵⁵¹⁵⁶¹⁵⁷

¹⁴⁸ Wehrey and Ahram, above n 147.

¹⁴⁹ Wehrey and Ahram, above n 147.

¹⁵⁰ Y Sayigh, above n 80, 11.

¹⁵¹ C Solomon, "Syria: Lessons from Lebanon's Civil War", *International Policy Digest*, 28 November 2015, <<http://www.internationalpolicydigest.org/2015/11/28/syria-lessons-from-lebanon-s-civil-war/>>.

¹⁵² S Simon and J Stevenson, "Disarming Hezbollah: Advancing Regional Stability", *Foreign Affairs*, 11 January 2010.

¹⁵³ Solomon, above n 152.

¹⁵⁴ B Saab, "Rethinking Hezbollah's Disarmament," *Middle East Policy Council*, Fall 2008, Vol. XV, No.3, 1.

¹⁵⁵ A Al-Shayyal and S Bakrania, "GFN-SSR Regional Guide: Security Sector Reform in the Arab Middle East", October 2010; *Global Facilitation Network for Security Sector Reform*, 13, <http://www.gsdc.org/docs/open/GFN-SSR_SSRinArabMiddleEast_Oct2010.pdf>.

¹⁵⁶ Even since UNIFIL's 2006 expansion, disarmament has failed and Hezbollah's rockets cache has expanded, from estimates of 6,000 after the Hezbollah-Israel war to some estimates of well over 60,000 in 2014Y J Bob, "Defining 'disarmament': Hezbollah-style or new model," *The Jerusalem Post*, 30 July 2014.

¹⁵⁷ A Mustafa, "Saudi, US Aid Boost Lebanese Firepower", *Defense News*, 11 July 2015,

<<http://www.defensenews.com/story/defense/land/weapons/2015/07/11/lebanon-firepower-saudi-us-increases/29913841/>>.

These shortcomings highlight the challenges that would face such an experiment in Syria. However, given the predominance and popularity of Ahrar al Sham, and the battlefield influence of pro-government militias, power sharing efforts, especially with peacekeeping back-up, must be taken seriously. In short, if militias will not disarm and cannot be integrated, the only option might be to counterbalance them and encourage slow steps towards political legitimacy.

2.3.7 What of Daesh and Jabhat al-Nusra?

While options are available to co-opt Syria's more moderate opposition groups into constructive forces or incorporate them into the security structure, certain groups, specifically Daesh and Jabhat al-Nusra, must necessarily be excluded. Contingency planning must prepare to press back their efforts to thwart peace, development and reconciliation. A contingent of peacekeepers might be designed to counter expansion efforts from remaining Daesh or Nusra territory and to defend internally from sleeper cell encroachment. As quickly as possible, reformed armed forces and intelligence agencies should take on this role.

2.3.8 Disarmament Essentials

Certain disarmament practices must be implemented in any scenario, as all will involve at least temporary security vacuums. The locations of weapons arsenals must be identified and arrangements made for their defense (or in the case of chemical weapons, their destruction).¹⁵⁸ Likewise, getting rid of small arms is unhelpful if supply routes are still functioning and profitable.¹⁵⁹ Consolidation and/or interruption of weapons' trades must immediately follow or precede weapons eradication.¹⁶⁰

2.3.9 The International Community

There will need to be diplomatic efforts to encourage foreign support, or at least acquiescence to SSR and DDR terms; the numerous countries plying different Syrian factions with arms and support must commit to DDR and SSR efforts for these initiatives to come to fruition. At the same time, foreign powers must be willing to limit their use of domestic militant groups in Syria as pawns for geopolitical power posturing. Support becomes meddling, however, when national actors are denied autonomy and once foreign interests are prioritised over reconstruction goals. In Iraq, the heavy involvement of private and foreign security management impaired the new government's security authority.¹⁶¹ Even more significant is foreign submission to Syria's resolved outcome. Thus far, foreign intervention has only intensified the conflict. In a post-conflict setting, attempts to steer reconstruction in one foreign state or faction's favour could easily derail the entire process, or at least hinder DDR efforts. External resistance, whether coming from Iran and Russia or Saudi and Sunni states, can be as great a spoiler as internal movements, and any foreign troop involvement should reflect this.

Beyond this, the key recommendation is that decision-makers should heed the evidence on the value of peacekeeping. Even with a carefully preplanned and evidence-based approach, the risk factors are still numerous. Combined with the inevitability that some players will necessarily be excluded, peacekeeping — although expensive and unpopular — is probably the most likely context in which a steady peace can evolve. Research by Collier found that an annual expenditure of USD100 million on peacekeeping reduces the cumulative 10-year risk of conflict recurrence from 38 percent to 17 percent; at USD200 million, the risk reduces to 13 percent and at USD 500 million, it reduces to 9 percent. Against the evidence, peacekeeping is usually value for money. An average civil war reduces a country's growth by 2.3 percent per year over a

Syrian Center for Political and Strategic Studies, above n 76, 184.

¹⁵⁹ Faltas, above n 138, 398.

¹⁶⁰ *ibid* 401.

¹⁶¹ *ibid*.

typical 7-year war, leaving a country 15 percent poorer than it would have been without the conflict.¹⁶² These figures do not take into account the additional costs associated with conflict contagion and global spillovers such as refugee movements, disease, organised crime and terrorism. Some studies have linked the effectiveness of peacekeeping to troop quality,¹⁶³ the scale and duration of deployment and depth of mandate.¹⁶⁴¹⁶⁵ Taken together what this suggests is that, vis-à-vis the cost of conflict, peacekeeping should be taken seriously and the international community should ready itself for a long-term commitment together with requisite resources. Such an approach may not sit comfortably with current trends away from Western interference in Arab conflicts and ‘no boots on the ground’ strategies. But decisions on peacekeeping, its duration and scope, should be made based upon the evidence.¹⁶⁶ Certainly in Libya, the failure to deploy an international force to stabilise the country after NATO intervention in the country’s revolution stunted efforts to implement SSR and promote stability.¹⁶⁷

2.3.10 Summary of Interviews with Syrian Refugees

Syrian interviewees reiterated the primacy of security in their return assessment and as listing it as a post-conflict priority. Some cited security itself as a sufficient condition for return, although there was wide acknowledgment that sustaining security would depend on a consolidation of the rule of law and economic opportunity. There was widespread understanding that armed spoilers on either side could destroy a fragile security situation. Many, although they opposed the regime, were willing to return to an Assad-led Syria if security were restored (although some feared for their personal security if the regime stayed in power). Female interviewees did not expect an imminent resolution of the ideological elements of the conflict, but foresaw a situation where the ‘political conflict’ could continue to be played out but in a peaceful context. They cited Tunisia and Egypt where, despite heated political tensions, people could live without having to flee violence. There was a general concern that those who had sought refuge in Jordan, Lebanon and Turkey were characterized as opposition-sympathizers and what this would mean in an Assad future. Female interviewees were more concerned about the need for protection from Jabhat al Nusra, Daesh and sectarian groups.

¹⁶² Conflict costs also spill over on to neighbours. A country making development advances loses an estimated 0.7 percent of GDP every year each neighbour is in conflict, bringing the average cost of war to one country and its neighbours to 64 billion. Collier, above n 2, 95-100.

¹⁶³ *ibid.*

¹⁶⁴ A Laporte-Oshiro, “From Militants to Policemen: Three Lessons from U.S. Experience with DDR and SSR.” 17 November 2011. *United States Institute of Peace*, 3.

¹⁶⁵ *ibid.*

¹⁶⁶ Syrian Center for Political and Strategic Studies, above n 76.

¹⁶⁷ Sayigh, above n 80, 7.

3. Syria's Legal System and Access to Justice

"To return, there has to be a government that can protect us, a government that we can go to when our rights are violated."

– Syrian female refugee, Za'atari camp

Reinstating rule of law plays a key role in consolidating a post-conflict peace. This is because justice stressors, including weak access to justice, corruption, inequality and exploitative governance, each increase a state's vulnerability to conflict. While it is not a complete explanation, the country's history of unrest seems to correspond to a history of social injustice at a cost that vastly outweighs the price of providing well-functioning rule of law institutions. Many identified such injustice and weak of rule of law as key drivers of the initial protests, and there is some evidence that injustice has motivated radicalisation. At the same time, well-functioning justice institutions strengthen resilience against conflict recidivism. Indeed, a central conclusion of the World Bank Development Report (2011) was that peace processes can rarely be sustained in the absence of legitimate institutions to absorb the shocks that accompany necessary reforms. A priority action for any post-conflict Syria is thus the development of institutions — including justice institutions — that can deliver necessary services and generate a level of trust and confidence in state and society. A fast restoration of the rule of law also complements the stated needs of Syrians. The consensus of interviewees was that, following security, their immediate priority was to return to “a country of law”. Likewise, that corruption and ‘wasta’ as the principal paths to a justice outcome be replaced with systems for fair and transparent case resolution.

While it is possible to identify specific areas of necessary reform, what will be possible is contingent on how the conflict plays out. If Assad remains, he is likely to maintain and strengthen existing institutions. In a non-Assad future, justice sector reform — particularly ones aimed at interrupting legacies of rights abuses, impunity and corruption — have strong potential to restore confidence in the state's capacity and willingness to fairly administer justice. The immediate priority, however, will be to restore law and order and the rule of law. Fortunately, Syria's overall legal framework works. As a general structure, it may even inform reconstruction scenarios within potential opposition-governed statelets. A first step will be to identify capacity to prevent crime and spoiler actions and set in place a process of judicial review. The least risky and most pragmatic option might be to utilise a vetted group of PSD and armed forces (for law and order) and former justice sector employees (for judicial administration). To ensure access to justice, tribal justice systems — which are broadly trusted, fair and respected — should be utilised, and special processes set in place to ensure that vulnerable groups are not exploited or further marginalised. Immediate action should be taken to dismantle the Assad regime's exceptional courts and curb opportunities for state authorities (and particularly security forces) to encroach on citizens rights and effect violence. Longer-term goals will include reforms to promote judicial independence, curb executive control, interference, impunity and rights violations, strengthen the protection framework for vulnerable groups (particularly women, minors and minorities) and simplify the complex court structure.

3.1 The Syrian Legal System (Pre-2011 and Today)

Courts architecture: Syria's courts are divided into regular, administrative, and constitutional branches. The regular jurisdiction comprises Civil, Criminal, Military, and Religious courts. Civil and Criminal Courts are

then subdivided into Courts of Peace, Courts of First Instance, Courts of Appeal and a Court of Cassation. The Court of Cassation, the highest court in the judicial structure, is made up of civil, criminal, religious, and military branches, each presided over by three judges. The State Judicial Council has jurisdiction over administrative law matters, while the Supreme Constitutional Court resolves constitutional disputes.¹⁶⁸ Since 2008, civil and commercial disputes could be resolved using alternative dispute resolution.¹⁶⁹ The Minister of Justice presides over the judiciary's main branches: the public prosecution; public defence; an audit department overseeing judges, prosecutors, and other judicial departments; and a Supreme Judicial Council with jurisdiction over appointments, promotions, disciplinary actions and recommending draft laws pertaining to the judiciary.¹⁷⁰

Exceptional courts: Syria's Exceptional Courts include a military jurisdiction,¹⁷¹ military field courts,¹⁷² military tribunals¹⁷³ and the State Security Court.¹⁷⁴ These courts were established by the executive in breach of Constitution article 135 (which vests the judicial authority with sole responsibility for establishing justice).¹⁷⁵ They dispense justice harshly and offer few procedural guarantees. The Supreme State Security Court - which was broadly perceived as a forum to prosecute government opponents and activists - was abolished by the President in April 2011 in an attempt to quiet public discontent.

Enforcement authority: Enforcement authority rests with the Public Security Police (PSP), which falls under the Ministry of Interior. The PSP is divided in four branches: Administration, Criminal Investigation, Public Order, and Traffic, supplemented by two paramilitary units: the Gendarmerie (concentrated in rural areas) and the Desert Guard (a border protection force). Apart from the paramilitary units, the PSP is largely non-operational and lacking in authority. It is the national security agencies (the Political Security Directorate, the General Intelligence Directorate, Syrian Military Intelligence and Syrian Air Force Intelligence) that wield power and exercise law and order functions.¹⁷⁶

Prisons: Authority over prisons – which have been broadly criticised for failing to meet international standards - rests with the Ministry of Interior, and consequently, the security forces. As of 2012, an estimated 2,500–3,000 political prisoners were being held in detention.¹⁷⁷

Constitutional provisions: The 1973 Constitution established a judicial architecture structured upon accepted legal principles, including governance based on the rule of law and *nulla poena sine lege* (no crime or punishment except by law).¹⁷⁸ Article 25 establishes freedom as a sacred right and vests the state with responsibility for ensuring citizens' personal freedom and preserving their dignity and security. Other provisions grant equality in rights, duties, and opportunity (art 25.3.4); the right to participate in the political, economic, social, and cultural life (art 26); the right to privacy (arts 31-32), freedom of belief, and expression (art 35); freedom of the press (art 38); and a right of peaceful assembly and demonstration (art 39). The

¹⁶⁸ Arts 131-148 Constitution (1973); Judicial Authority Law No. 98 (1961).

¹⁶⁹ Syrian Arbitration Act Law No. 4 of 2008.

¹⁷⁰ Arts 65-67 Judicial Authority Law"; .Arts 51(3) Constitution (1973).

¹⁷¹ Military jurisdiction was established by the Penal Code and fundamentals of military courts, issued by Legislative Decree No. 61.10 of 1950.

¹⁷² Military field courts were established by Legislative Decree No. 109 in 1968, Art 1. These courts have jurisdiction over offenses pertaining to the military committed during war, military operations, or in affiliation with the enemy. The court's jurisdiction has been in effect since June 1967. Article 5 allows for this court to bypass standing laws, and, according to Article 6, its decisions are final and not subject to challenge or appeal. Death sentences must be approved by the President of the Republic, while other sentences are approved by the Minister of Defence. Syrian Center for Political and Strategic Studies, above n 76, 124.

¹⁷³ Legislative Decree No. 87, 1 October 1972.

¹⁷⁴ The Supreme State Security Court was established by legislative Decree No. 47 on 28 March 1968. Its formation was based on the provisions of Decree No. 2 by the transient national command of the Ba'ath Party of 25 February 1966, and on cabinet decree No. 47, dated 20 March 1968. Other exceptional courts, included the Economic Security Courts. They were abolished by Legislative Decree No. 16 of 14 February 2004.

¹⁷⁵ Syrian Center for Political and Strategic Studies, above n 76, 127.

¹⁷⁶ Sullivan, Rosen, Schulz, Haberfeld, above n 101.

¹⁷⁷ Global Security, "Syria Intelligence & Security Agencies" <<http://www.globalsecurity.org/intell/world/syria/intro.htm>>.

¹⁷⁸ Article 135 of the 1973 Constitution provides that "the law regulates the different branches, categories and degrees of the judicial system. It also states the rules for the mandates of different courts". See also articles 28 and 25

Constitution was amended in 2012; the main changes reduced Ba'athist dominance¹⁷⁹ and restricted the presidential term, suggesting more room for political competition. Loopholes, however, remain and the President maintains his authority as decision-maker with respect to state policy and the judiciary.

International agreements: Syria is party to the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, although with reservations). It is not a signatory to the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment and certain offences (including offences against public property and state security) are punishable by death.

Administration of justice today: As is common during conflicts, the capacity of the justice sector in Syria has been severely compromised. Judicial infrastructure, including court buildings, case records, and equipment has been damaged or destroyed. Justice sector actors, including judges, lawyers, prosecutors, police, and correctional facility staff have fled, been killed, or relocated to other states. Notwithstanding such losses, dispute resolution and justice administration continues. Several regime courts continue to function, even operating alongside rebel-established tribunals in seized territories staffed by defected judges. These tribunals include the United Courts — a self-appointed council of judges, lawyers and clerics and the House of Justice in Gharz — an alliance of judges selected by moderate rebel and Islamist factions. In Aleppo, two rival legal systems operate; one implements a strict interpretation of *shari'a* while the other applies regime-like law.

3.2 Key Constraints and Deficits in Syria's Judicial Architecture

“If we have a problem with the electricity company for example, we hire a lawyer, not for the sake of justice, but to know who to bribe to sort the matter.”

– Syrian female refugee, Jerash, Jordan

Weak judicial independence and partiality: Despite constitutionally guaranteed judicial independence, the justice system is prone to executive control and interference. The President appoints: the Minister of Justice, the seven-member Supreme Constitutional Court and the seven-member Supreme Justice Council (four of which are part of the executive i.e. the Minister of Justice, the deputy Minister of Justice, the Attorney General and head of the Judicial Audit District).¹⁸⁰ All judges are appointed from the Ba'ath party, and it is generally understood that their role is to serve the interests of the President.

Freedoms of press and association: Despite legislated freedom of speech, journalists and activists are regularly intimidated and brought before the State Security Court. The Penal Code and a 2001 Publications Law criminalise the publication of material that harms national unity, tarnishes the state's image, or threatens the 'goals of the revolution'. Freedom of assembly and association are curbed on the grounds of state security. Public demonstrations require official permission and since 2006, any group of five or more has been forbidden from discussing political and economic topics.

¹⁷⁹ According to article 8 of the 1973 Constitution, the leading party was the Socialist Arab Ba'ath Party, whereas the amended article in the 2012 Constitution reads “The political system of the State shall be based on the principle of political pluralism, and exercising power democratically through the ballot box”.

¹⁸⁰ Constitution of the Syrian Arab Republic (1973), Art 131, 132, 133 (1).

State rights abuses: Regime-perpetrated rights violations, including arbitrary arrest, prolonged detention without charge and targeted political killings, are well documented. Torture is a widely used tool to suppress dissent and coerce confessions, despite Constitutional protections.¹⁸¹ Such practices were facilitated by the state of emergency imposed through decrees issued between 1962-2012, which empowered executive authorities to the diminution of other state apparatus.¹⁸² State security agencies, particularly the Military Intelligence and Air Force Intelligence, operate independently and outside the rule of law; they are widely known for repressing internal dissent and targeting suspected regime opponents with impunity. A 2008 law provides that only the Command of the Army and Armed Forces can issue an arrest warrant for crimes committed by a military, security force or a customs-police officer in pursuit of their normal duties, and that such cases must be tried in military courts. No known prosecutions or convictions of police and security force personnel have taken place under this law.

Poor Access to Justice: Interviewees cited delays, complexity, high costs, the authoritarian nature of the system, and corruption as dissuading them from referring disputes to the justice system. One driver seems to have been inadequate staffing; in 2010, there were around 1,300 judges in Syria, while the national Bar Association estimated that at least 3,000 judges were needed for fast and effective dispute resolution.¹⁸³ This, coupled with a complex legal architecture, slowed case turnover with anecdotal reports suggesting a 5-10 year processing period.¹⁸⁴ Judges were also under-remunerated, which reduced their productivity and incentivised corruption. This is consistent with Syrian interviewees who consistently described money and *wasta* as the easiest paths to a favourable judicial outcome.

3.3 Groups Vulnerable to Rights Violations

3.3.1 Women

Discriminatory legislation remains a principal obstacle for Syrian women accessing their rights:

- Women are prevented from passing their nationality to their children.¹⁸⁵
- Muslim never-married women must obtain their guardian's consent prior to marriage.¹⁸⁶
- Polygamy is permitted by law.¹⁸⁷
- Muslim women are not permitted to marry non-Muslim men¹⁸⁸
- Husbands enjoy unilateral divorce rights whereas wives can petition for divorce only under certain conditions).¹⁸⁹
- In personal status matters the testimony of one man is equal to that of two women.¹⁹⁰

Other laws, while not explicitly discriminatory, fail to provide women sufficient protection:

- Under the Penal Code, the perpetrator of a rape can avoid punishment by marrying his victim.¹⁹¹
- Marital rape is not criminalised.¹⁹²

¹⁸¹ Art 28.3 1973 Constitution; "Syria: Torture, despair and dehumanization in Tadmur Military Prison" 2 (2001) *Amnesty International*.

¹⁸² Legislative Decree No. 51 of 22 December, 1962; Emergency Law of the National Council of the Revolutionary Command No.2 (1963).

¹⁸³ A Bacci, "The System of Justice in Syria: Current Organization and Future Challenges" (2010).

¹⁸⁴ Syrian Center for Political and Strategic Studies, above n 76, 133; see also UN ICCPR Human Rights Committee, Examen Des Rapports Soumis Par Les États Parties Conformément À L'Article 40 Du Pacte Et De La Situation Dans Des Pays (suite), p. 7, para. 25, UN Doc. CCPR/C/SR.2291, Jul. 26, 2005.

¹⁸⁵ Nationality Law No. 276 of 1969.

¹⁸⁶ Art 21 Law of Personal Status 1953 Law No. 59/1953, as amended by Law no. 34/1975.

¹⁸⁷ Ibid Art 17.

¹⁸⁸ Ibid Art 48(2).

¹⁸⁹ Ibid, Art 91 and Art 105-115.

¹⁹⁰ Note that in civil, criminal and commercial cases, the testimony of men and woman is considered equal.

¹⁹¹ Law of Personal Status 1953 Art 508.

- Perpetrators of so-called honour crimes can benefit from mitigating provisions that allow a reduced penalty.¹⁹³
- There is no specific legislation addressing domestic violence.¹⁹⁴
- Mothers must obtain the consent of their child's *wali* to take them outside of the country.¹⁹⁵

This weak legal protection framework is reinforced by traditional attitudes towards the roles and responsibilities of women and men in Syrian society. Violence against women is widespread and broadly considered a matter to be kept within the private sphere, because of its direct connection to a woman and her family's reputation. Moreover, cultural norms that support subservience and patriarchy normalise rights violations and place strong cultural disincentives upon women to refer the resolution of disputes outside of their immediate families.¹⁹⁶ In some locations, it is considered inappropriate for women to attend court, police stations, or government offices unaccompanied by a man, and justice sector employees lack understanding of gender issues, rights and responsibilities.

3.3.2 Children

Although according to Syrian law, 'child', 'minor', and 'juvenile' are legal terms pertaining to a person below 18 years of age, the age of criminal responsibility is 10 years, and the Juveniles Act only applies to children under 15 years.¹⁹⁷ In 2004 7,134 juveniles were brought into formal contact with the police and/or criminal justice system (2,000 more than in 2003). Convictions also escalated considerably, from 3,803 in 2007 to 6,261 in 2009.¹⁹⁸ The judicial infrastructure, however, lacks independent and effective complaints mechanisms for children, and police stations and rehabilitation institutions have been linked to cases of ill-treatment and sexual abuse.¹⁹⁹ The following constitute key areas of rights violation for minors:

- Despite the Education Ministry's prohibition on verbal and physical violence, corporal punishment (which is not criminalised) is widespread in schools. The law permits parents to exercise disciplinary authority, as sanctioned by custom.²⁰⁰ A particularly serious issue is state sanctioned or instigated violence; such violence has escalated since 2011, with children being subjected to detention, torture, rape, arbitrary execution and being used as human shields.
- Child rape is criminalised with aggravated penalties for children less than 15 years,²⁰¹ however the legal framework has been criticised for providing insufficient protection to boys as well as mitigating provisions that allow perpetrators to escape prosecution or face reduced penalties.
- Although the minimum marriage age is 18 and 17 for men and women respectively, child marriage is widespread.²⁰²
- Persons under 18 cannot lodge complaints for rights violations without parental or guardian assistance.²⁰³ This prevents reporting in cases where a family member is involved (e.g. in cases of abuse) or the family does not object to the violation (e.g. in the case of child marriage).

¹⁹² Article 489 of the Penal Code specifies that a rape victim is any woman *other* than the perpetrator's wife.

¹⁹³ *Ibid* 470.

¹⁹⁴ *Ibid* 469.

¹⁹⁵ Articles 148-150 of the Personal Status Law.

¹⁹⁶ *Ibid* 486.

¹⁹⁷ Legislative Decree No. 52 of 2003; art 1 Syrian Juvenile Delinquents Act No. 18 of 1974 as amended 2003. See also UNICEF "State Party Reports: Syria Arab Republic" <http://www.unicef-irc.org/portfolios/documents/444_syrian-rep.htm>

¹⁹⁸ UNODC Statistics, "Juveniles Brought into Formal Contact with the police and/or criminal justice system, All Crimes: Syria" <<https://data.unodc.org/>>.

¹⁹⁹ UN Committee on the Rights of the Child, above n 74, 20.

²⁰⁰ Syria Personal Status Law of 1953, Art 150.

²⁰¹ Penal Code of Syria 1949, Law No. 148, 1949, Art 489.

²⁰² If a male claims to have reached puberty after completing his fifteenth year, or a female after her thirteenth, and they petition to be married, the judge should permit the marriage if their claim is deemed apparent; Syria Personal Status Law of 1953 arts 16-18.

²⁰³ Art 46 Legislative Decree No. 84 of 5/18/1949.

- Syria is a destination and transit country for child labour and sex trafficking, with ‘temporary marriage’ being particularly prevalent. The law does not clearly define trafficking, lacks procedures for identifying, interviewing and referring child trafficking victims, and there are no provisions criminalising the sale of children and child pornography.
- Child labour is common in rural areas and the wholesale, retail and agriculture sectors. Children working in family businesses and agricultural are not protected by labour legislation.²⁰⁴
- Children born out of wedlock cannot be affiliated to their father, and a mother who wants to register a child born from rape or outside a legal marriage, must request a police report investigating the child’s conception. Even if paternity is established, a mother cannot pass on her surname or nationality, preventing the child from accessing an identity card, education, travelling abroad or owning property.
- The law prevents women from passing their Syrian citizenship to their children.²⁰⁵ Such children face limitations claiming inheritance and accessing education, health services and other benefits.

3.3.3 Religious Minorities

Syria has a large Sunni majority (87 percent) and minority groups including Alawite, Shi’a, and Ismaili Muslims (13 percent), Christians (10 percent), Druze (3 percent), Yazidis and Jews (0.1 percent). Citizens must be nominally affiliated with a recognised Muslim, Christian or Jewish group for personal status issues. Ethnic minorities (10 percent of the population) include Kurds, Armenians, Circassians, and Assyrians.

Despite the 2012 Constitution requiring that the President be a Muslim and Islamic jurisprudence be a principal source of legislation, the state is legally committed to respecting and protecting all religions.²⁰⁶ There is no official state religion and the Constitution states that: “Citizens shall be equal in rights and duties without discrimination among them on grounds of sex, origin, language, religion or creed”.²⁰⁷ Government policies allow most groups to worship freely, with the exception of Jehovah’s Witnesses, whose activities are banned. There have been numerous arrests and convictions of individuals promulgating Wahabist and Takfiri ideologies, and affiliation with the Syrian Muslim Brotherhood is illegal and punishable by death (although the sentence is typically commuted to 12 years imprisonment).²⁰⁸

Religious Courts have jurisdiction over personal status matters and are subdivided into Sunni or Shi’a *shari’a* courts for Muslims, *madhhabi* courts for Druze and *rubi* courts for Christians and Jews. Cases involving guardianship, capacity, missing persons and matrimony fall under *shari’a* court jurisdiction for all Syrians, regardless of their religion, and for non-Syrians from countries where Islamic personal status laws are applied. The law applied, however, has exemptions for Druze, Christians and Jews.²⁰⁹ All citizens are subject to *shari’a* with respect to inheritance, except for Catholics, who have their own inheritance law (2006) under which men and women inherit equally.

The key minority issue is the status of Syria’s Kurds, who represent 10-15 percent of the population. In 1962, up to 120,000 Kurds were stripped of their nationality²¹⁰ and it is estimated that there are around 300,000 stateless Kurds living in Syria today.²¹¹ They are prevented from obtaining a passport or official identification

²⁰⁴ Art 5 and 118 Syrian Labour Law No. 17 of 2010.

²⁰⁵ “Nationality Law No. 276 of 1969, Art 3. Although Article 3(d) states that nationality will be given to “anyone born in the country and was not, at the time of his birth, entitled to acquire a foreign nationality by virtue of his parentage”, this provision is not applied effectively nor efficiently.

²⁰⁶ Constitution of the Syrian Arab Republic (2012), Art. 3.

²⁰⁷ *ibid* Art 33.

²⁰⁸ US Department of State, “International Religious Freedom Report 2010”, 17 November 2010.

²⁰⁹ K Mechantaf, “Constitutional Law and Courts’ System in the Syrian Arab Republic” <<http://www.nyulawglobal.org/globalex/Syria.htm>>.

²¹⁰ The 1962 census stripped around 120,000 Kurds of citizenship, amid state allegations that they had entered the country, settled and registered illegally.

²¹¹ Human Rights Watch (2009) Minority Rights Group.

documents which leaves them unable to travel, own property, attend school or gain employment in the public sector.

3.4 Syria's Tribal System

Tribal law was abolished in 1958 after Syria's union with Egypt,²¹² and by the time Ba'ath Party took power in 1963, large tribal groupings had left.²¹³ Their influence resurged in the 1970s under the presidency of Hafez al-Assad who understood the importance of tribal support to his rule. Tribal leaders continued to be politically influential and generally held 8-10 percent of parliamentary seats until Bashar al-Assad – who preferred to rely on Alawites – came to power.

Today's tribal strongholds are concentrated in three regions: Al-Jazirah (Raqqah, Deir Ezzor and Hassakeh), Al-Badiya (Homs, Palmyra and Hama) and Hauran (the surrounding areas of Dara'a). Since the onset of the conflict, they have been courted by several opposition groups,²¹⁴ and over time have become split between the regime and its opponents. Some established the opposition tribal council of Syria while others formed councils asserting loyalty to the government.²¹⁵ Armed groups, such as Jabhat al-Nusra and Daesh, have increased these divisions, with tribes pledging their allegiance often according the more advantageous offer.

Table 1: Tribes in Syria by Geographical Region²¹⁶

Southern Region		Central Region		Northern & Eastern Region	
Tribe	Allegiance	Tribe	Allegiance	Tribe	Allegiance
Fadl	Split	Hasanah ¹	Split	Fad'an ¹	Regime
al-Zoubi	Split	Sba'ah ¹	Silent	Al-Jabbur	Regime
al-Hariri	Opposition	Turki	Opposition	Al-Mashahdeh	Silent
al-Masalmeh	Opposition	Bani Khaled	Split	Busha'ban	Split
Nu'im	Opposition	Fawa'ira	Opposition	Tay	Regime
		Aqaydat	Split	Al-Khursah ²	Opposition
		Hadidiyn	Regime	Al-Aslam ²	Opposition
		Mawali	Silent		
		Nu'im	Opposition		
		Bushakim	Silent		

¹ Part of the Aneza tribe confederation.

² Part of the Shammar tribe confederation.

3.4.1 Tribal Law and Dispute Resolution

Until the end of the Ottoman Empire in 1918, Bedouins lived largely autonomously and with little interference from government or empire authorities.²¹⁷ They developed a system of law to ensure their security and survival, informed by Islamic principles. Importantly, this tribal law was personal rather than

²¹² D Chatty, "The Bedouin in Contemporary Syria: The Persistence of Tribal Authority and Control" 64/1 *Middle East Journal* (2010) 29-49, 37.

²¹³ *ibid.*

²¹⁴ W Abdallah, "Tribal Disputes Heat Up in Syrian Desert" *Al-Monitor* (8 July 2015) <<http://www.al-monitor.com/pulse/politics/2015/07/syria-desert-tribes-division-oil-geography.html#>>.

²¹⁵ *ibid.*

²¹⁶ Table: H Dukhan, "Tribes and Tribalism in the Syrian Uprising", *University of St Andrews*, 2014, 15.

²¹⁷ B Clinton, *Bedouin Law from Sinai and Negev: Justice without government*, (2009), 9.

territorial. Strangers or visitors did not enjoy its protection by virtue of having entered a tribal area; security required that they enter a relationship with someone authorised to extend legal protection.²¹⁸

Syrian tribal law is based around customs and practices passed down through generations. Laws are usually approved and modified by a consensus of the tribe's dominant males, however conservative norms and existing legal obligations limit the extent to which laws can be modified.²¹⁹

Dispute resolution usually follows a process of informal arbitration led by male authority figures or tribal elders, with enforcement based on mutual agreement and social sanctions. 'Hearings' usually takes place at one of the adjudicators' homes and parties can be represented by an advocate. The process is often open to the public and all interested parties are able to present their arguments. Once a decision is reached, both parties must formally accept the outcome, or request a re-trial by the second adjudicator. Punishments can include restitution, compensation, or symbolic reparations, such as an apology. Physical punishments are possible, however are usually commuted to a monetary payment.²²⁰ Outcomes do carry a precedential value, however decisions by jurists or members of a descent group considered specialists in particular type of dispute carry a stronger value.

Islamic law is administered as a separate system or is used to fill gaps in tribal law. Women generally receive stronger protection under Islamic law. In some tribal areas women have no legal personality; they cannot bring actions or provide evidence and rely wholly on their guardian to represent their interests.²²¹

Interviewees highlighted the authority of customary institutions and fairness of tribal justice processes, noting that working through them was often preferable to the corruption of the formal legal system. Some criticised the regime for actively marginalizing tribal identity to encourage nationalism, an action that weakened tribal law in the years preceding the conflict.

“Tribal law was the only judicial entity that was not corrupt, but its significance was overshadowed by the corrupt judicial system.”

– Syrian female refugee, Jerash, Jordan

The settlement of violent conflict under tribal law requires specific explanation. Tribes are made up of groups that have legal personality, meaning groups that claim rights and assume duties and that are represented by one or more of their members in their dealings with other groups or individuals. The main groups are territorial groups and blood-money groups. A territorial group has an allotted district, *dira*, within which no other group has superior rights, including to resources within the *dira*. A blood-money group (*khamsah*) exists as a type of insurance in the event that one member is responsible for an act of criminal violence and needs to pay compensation.²²² Generally those belonging to a *khamsah* are descended from common ancestors five generations back.²²³ Members of the group must participate in any payment for which one of

²¹⁸ F Stewart, "Customary Law Among the Bedouin of the Middle East and North Africa" in Dawn Chatty (ed), *Nomadic Societies in the Middle East and North Africa* (2006) 239-279, 240.

²¹⁹ *ibid* 243-4.

²²⁰ *ibid*.

²²¹ *ibid* 245-247.

²²² *ibid* 247-253.

²²³ S Khalaf, "Settlement of Violence in Bedouin Society" *Ethnology* 29/3 (1990) 225-242, 226.

their number becomes liable as a consequence of a crime. A blood-money pact or contract between the members determines the division of payments and receipts.²²⁴

If a violent conflict takes place, the perpetrator and *kbamsab* group must leave their *dira* and seek refuge with another (preferably distant) tribe until a settlement is reached.²²⁵ The act of seeking another tribe's protection is called *dakhala* (literally entering protection). Once an agreement is entered into, the protector must ensure the *kbamsab* group's safety and welcome them into his house for three days.²²⁶ On the first day the protector must inform the victim's group of the protection arrangement to prevent the *dakhala* from being violated.

Among some tribes the custom of *rita'a* (literally the right of pasture) is practiced. *Rita'a* is a payment among tribes that permits the perpetrator's household, descending six generations, to stay in the *dira* where the killing occurred. Another custom is *jali*, or exile.²²⁷ The *jali* serves a double function: to afford offers perpetrator immediate protection and to preserve the victim's family honour. During *jail*, which may last for several years, the perpetrator's family is marginalised in socio-political life.

After the exile period, the perpetrator's *kbamsab* contacts the dominant men of their own and neighbouring tribes to start a mediation process. Respected tribal sheikhs then request to visit the victim's tribe to explore mediation (*zoura*). If the *zoura* is accepted, the hosts (bound by the laws of hospitality) offer food to the sheikhs. The sheikhs refuse to eat until the victim's family agree to a peaceful settlement and the payment of the *diya* (blood money). The mediation process is composed of ritual acts, such as slaughtering animals, sharing food and invoking proverbial wisdom. Once the *diya* is determined, the two families enter a *dakhala* relationship; a man from the victim's family guarantees protection to the perpetrator's group until the *diya* is paid. Disagreements regarding *diya* usually need to be resolved by a mediator (*arifa*, or a legal expert in Arab tribal society).²²⁸

3.5 Recommendations

“We – the people who left Syria – are considered traitors by those who have stayed. So if we go back, we still will be viewed as less nationalist; as people who love their home country less. People who stayed there have to understand we left because our lives were directly threatened. If we go back, I want to know I will not be dealt with as a traitor.”

– Syrian female refugee, Jerash, Jordan

Looking at the possible scenarios and the immediate legal initiatives that Syria needs, it should be obvious that Syria is not going to emerge from the conflict some bastion of pluralist civil democracy. Syria's immediate priority is peace. Justice is needed, at the pace it can be implemented, to make that peace sustainable. How post-conflict rule of law and reform might be approached will be heavily contingent on the war's outcome. If Assad remains in power, justice administration will likely remain in the hands of pre-2011 institutions and actors. Opposition and rebel actors will be dealt with harshly, the ability for vulnerable

²²⁴ Stewart, above n 119, 256.

²²⁵ Khalaf, above n 124, 227.

²²⁶ *ibid* 228.

²²⁷ *ibid* 227-230.

²²⁸ *ibid* 233-235.

groups to uphold their rights will be limited, and the scope for increased violations — particularly against ethnic and religious minorities — is broad. In the case of a transition there is stronger potential for reform. The following considerations, risks and priorities should be at the forefront of planning.

3.5.1 Restoring the rule of law

- **Fast Resumption of Law and Order**

Regardless of who emerges as the governing party (or parties), an immediate priority will be to reinstate law and order. The post-conflict literature is replete with evidence that security vacuums facilitate violence in the form of everyday criminality (opportunistic assault, lootings and revenge attacks) and organised crime (either in response to a non-functioning economy or as a means of perpetuating the conflict). In such environments, individuals are encouraged to take the law into their own hands and high-risk groups become vulnerable to abuse and exploitation. Given Syria's legacy of retributive violence and victor impunity, without adequate checks, the risk of practices such as arbitrary detention and extrajudicial killings is high.²²⁹ A key challenge in any post-conflict Syria will be fragmentation: armed opposition factions, split tribal allegiances, and militant extremists groups all vying to establish a place in the new governance architecture. Where groups are excluded, there is potential for spoilers to interrupt the transition process (as occurred in Iraq, Afghanistan and Libya). Fragility coupled with the high risk of spoiler action, means that the scope for crime and civic disobedience should be minimised. There will be a strong and mutually constituting relationship between the new authority's ability to maintain security and the effectiveness of a justice framework. A comprehensive and broadly mandated peacekeeping force may be the tool with the greatest effectiveness in realising this goal.

- **Engaging the PSP and Armed Forces**

In past situations, peacekeeping forces or domestic militaries have often taken over interim judicial functions. The results are rarely optimal; military are not experienced in judicial administration and its involvement can complicate transition to civilian authority. While the findings of this research encourage power holders to seriously consider the value of international peacekeeping, the legacy of US administration in Iraq is such that any group acceding to power is unlikely to agree to international forces assuming governance or administration functions. Different strategies to raise functional institutions while the security environment remains unstable must be identified. The best scenario (while far from ideal) might rest with the Public Security Police and armed forces. While the PSP were largely perfunctory, they were not engaged in systematic violence or exploitation and were largely trusted by civilians. Likewise, the armed forces are largely regarded as representative and less of a tool of the Assad regime than other security apparatuses. A process of rapid vetting coupled with close supervision by a peacekeeping force might be the most feasible means of quickly re-establishing law and order and resuming policing and detention functionality.

- **Detention Facilities**

Given the legacies associated with existing prisons, the construction of new detention facilities should be prioritised. Such facilities would ideally operate under civilian control (potentially with armed forces or peacekeepers providing security), and with high standards of accessibility and transparency.

- **Vetting**

Although all judges were selected from the Ba'ath Party, not all were sympathetic to the regime, and the engagement of civilian judges will be an important tool to offset military involvement in law and order

²²⁹ See generally, T McKormack 'Preface' in J Howard and B Oswald (eds) *The Rule of Law on Peace Operations: A "Challenges of Peace Operations" Project Conference* (Asia Pacific Centre for Military Law 2002) ix; UNSC 'Justice and the Rule of Law: The United Nations Role' 4835th Meeting of the Security Council (30 September 2003) UN Doc S/PV.4835 3.

administration. A small cadre of judges could be quickly vetted to undertake judicial review, resolve property cases, and ensure that criminal matters are dealt with swiftly and transparently.²³⁰

- **Transitional Justice**

How law and order activates might complement a future transitional justice mechanism should be kept in mind. Judges and police can play key roles in incarcerating alleged perpetrators of serious crimes, evidence collection, and evidence preservation.

3.5.2 Applicable Law

- **Constitution**

The weight of experience suggests that interim or emergency laws should be avoided, and this is particularly the case given the abuses perpetrated under al-Assad's emergency decrees. Some groups have proposed a reinstatement of the 1950 Syrian Constitution as the most appropriate foundation upon which to base a new government.²³¹ This document is probably insufficient to manage the complex reforms that will accompany the transitional period, however it could provide a symbolic separation from the al-Assad legacy.

- **Law Reform**

It should be acknowledged that the existing legal framework, despite a general lack of protection for vulnerable groups, is not particularly problematic. The principal issues were the Emergency Law and specific legislation that carved out space for state-authorized exploitation with impunity. Such spaces should be immediately closed, both to enhance protection and for the new power structure to gain credibility and trust. In particular, exceptional courts should be abolished and military courts should be prevented from trying civilians. New legislation should be limited to critical law and order-related functions such as arrest, detention, judicial review and evidence collection; laws should be clear, well disseminated, and pragmatic vis-à-vis the post-conflict setting.

3.5.3 Key Vulnerable Groups

- **Women**

Priority attention should be given to women lacking documentation and their capacity to claim rights, particularly inheritance, and prove the legitimacy of their children. Post-conflict situations are also hotbeds for sexual and gender based violence, 'survival sex', and general exploitation. Families may be pressured to marrying off their young daughters, while male disenfranchisement and unemployment is associated with increased domestic violence. Some studies link gender inequality and intrastate violence, making this subject a security as much as a rights concern.²³² While interim legal frameworks should be geared to detect and respond to these types of violations, it is important to remain within normative frameworks as far as possible. Women, children and minorities were vulnerable well before the onset of hostilities in 2011; the norms that gave rise to this will not have significantly changed post-war. Although it sits uncomfortably with right-based approaches, post-conflict environments are generally not the time to promote new and more liberalised values. Interventions that sit within the rights structures recognised by Syrian society – both men and women

²³⁰ *ibid* 4.

²³¹ Syrian Center for Political and Strategic Studies, above n 76, 34. This constitution was drafted by an elected Constituent Assembly, as opposed to committees appointed by President Hafez al-Assad (in the case of the 1973 Constitution) and President Bashar al-Assad (in the case of the 2012 amendments)

²³² M Caprioli, "Primed for Violence: The Role of Gender Inequality in Predicting Internal Conflict", *International Studies Quarterly*, Vol. 49, No. 2 (Jun., 2005), 161-178.

– are preferable in the immediate term. Supporting women’s movements for peace (particularly multi-ethnic and cross-sectarian) may prove more useful.²³³

- **Alawites and Kurds**

The risks faced by ethnic and religious minorities will be closely related to the outcome of the conflict, particularly for Alawites and Kurds. Given the prominent role of Kurdish troupes during the conflict, and the support they have garnered, it is plausible to suppose that they will gain some sort of independence if the conflict ends to their advantage. The group has gained recognition and power among the international community, and their repression at the hands of a new regime may be the cause of another war.²³⁴ In the case of autonomy, institutional capacity must be considered. While Syrian courts and legal institutions continue to run in parts of Kurdish territory, the self-declared autonomous Kurdish government has established people’s courts and the *Asayish*, a local volunteer police force. These courts suffer from a dearth of experienced prosecutors and judges (these jobs were unavailable to Kurds), and its many defence attorneys will need thorough training. Peace councils have long operated to settle civil disputes in Kurdish zones of Syria and these should be strengthened with appropriate safeguards.²³⁵

3.5.4 The Role of Tribal Authorities

Tribal justice was operative in Syria before the conflict, and its functions have increased in importance since 2011, especially where insecurity and lack of trust are high. As a new judicial infrastructure evolves and gains strength, tribal leaders will continue to resolve disputes, stem violence and promote law and order. Where structures and influence is strong, such functions should be consolidated and capitalised upon rather than suppressed. This is also consistent with interviewees who reinforced the idea that tribal protection frameworks and dispute resolution should supplement law and order capacity and relieve pressure on justice sector institutions. The protection deficits within such systems should be acknowledged; again however, managing fissures and maintaining security needs to be prioritised over agendas of rights liberalisation.

One model for a hybrid of customary institutions and inclusive peacebuilding is Iraq’s 22-member Kirkuk Council of Notables. This body is made up of respected and influential leaders from tribes, different faith groups and the general community of Kirkuk. By engaging in both dispute resolution and reconciliation, the group build cohesion and systematised a fragmented dispute resolution process.²³⁶

3.5.5 Justice Sector Reform

Two immediate priorities will be to remove actors who were involved in the perpetration of serious crimes and adopt measures to enhance accountability and tackle corruption. Examples include legislation criminalizing corruption and bribery, safeguards to protect against the misuse of public funds, and measures to promote transparency in relation to spending, public officials’ assets and procurement. Such steps should be complemented by complaints and disciplinary procedures, oversight bodies such as judicial councils and ombudspersons, and whistle-blower protections.

Medium term priorities should include promoting judicial independence, tapering opportunities for executive influence and simplifying the labyrinth court structure. Justice institutions should evolve towards merit-based

²³³ T Senaratha, “Women in peace processes – real inclusivity or ‘just add women?’” *Development Dialogue*, Dag Hammarskjöld Foundation, December 2015, 81.

²³⁴ C Drott, “Syrian Kurdish Areas Under the Rule of Law?” Carnegie Endowment for International Peace, 7 May 2014, <<http://carnegieendowment.org/syriaincrisis/?fa=55526>>.

²³⁵ Kurdish systems are not without fault themselves. Human Rights Watch documents a series of injustices in their report “Under Kurdish Rule: Abuses in PYD-Run Enclaves of Syria”, including child labour in the armed services, politicised arrests, detention abuse, and mysterious abductions and murders “Under Kurdish Rule: Abuses in PYD-run Enclaves of Syria”, *Human Rights Watch*, 19 June 2014, ISBN: 978-1-62313-1432, <<http://www.refworld.org/docid/53a983fd4.html>>.

²³⁶ S Abdulla, “The Council of Notables – relying on local structures and traditions for genuinely inclusive peacebuilding”, *Development Dialogue*, Dag Hammarskjöld Foundation, December 2015, 79-80.

appointment and be inclusive in terms of ethnic and political balance. Since legislation is unlikely to be sufficient to combat cultures of discrimination and impunity, reforms should be complemented by capacity building, particularly in rule of law norms and values, accountability, protection responsibility²³⁷ and effective linkages between police, judicial and corrections workers.

²³⁷ A key example is post-invasion Iraq where de-Ba'athification drained the government of its qualified and experienced employees. 'De-Ba'athification' barred all members of the ruling Ba'ath Party from office, but because Ba'ath membership was a requisite for professional success – often even appointment in Iraq, their disqualification drained the government of its qualified and experienced employees. See E Stover et al, *Justice on hold: accountability and social reconstruction in Iraq*, International Review of the Red Cross, 90 (869) (March 2008) 14 <https://www.icrc.org/eng/assets/files/other/irrc-869_stover.pdf>

4. The Civil Registration System

Civil registration pertains to the recording of the occurrence and characteristics of people's vital events, such as birth, death, marriage and divorce. A principal aim is to establish the basis for citizens' legal identity and documentation.²³⁸ Civil registration is also crucial for governments; authorities rely on population statistics for policy formulation, planning and implementation, and registration systems are tools that enable taxation and voting.

When states collapse, their functions and institutions also fail. Conflict thus creates significant challenges in terms of maintaining records and producing new civil documentation. Document loss is also common; documents may be destroyed (by accident, as a tool of war or by the owner for reasons of personal protection), left behind during flight, or taken by authorities in countries of asylum. Where civil registration offices are not functioning and records are destroyed, replacement can be problematic or impossible.²³⁹ Prolonged armed conflicts can therefore create an institutional and informational vacuum.²⁴⁰

The key message of the policy brief is that civic registration information – as a critical enabler of return and preventing post-return rights violations – should be prioritised in contingency planning and to the extent possible remedial action should commence immediately. The absence of personal documentation can impede an individual's ability to access aid, participate in court proceedings such as inheritance or guardianship determinations, access bank accounts, enroll in education or benefit from healthcare or social benefits. In serious cases, lack of documentation can limit freedom of movement and result in arbitrary detention. Civil documentation is also critical for family reunification, reinstating property rights and resolving property disputes, and undertaking vetting and criminal prosecutions. Demographic data also serves an important role in post-conflict reconstruction and planning; with this, authorities can track refugee returns and differentials such as gender, social, economic or geographic disparities, allowing for more targeted development and poverty alleviation policies.

Processes to issue, replace and recognise alternate forms of civil documentation will be particularly important for the protection of vulnerable groups. In Islamic contexts where adultery is a criminal offense, civil documentation is critical for protecting widows and women who have become separated from their husbands from detention and prosecution, and their children from being removed or discriminated against. Moreover, without documents to prove identity, children may be unable to access health care, education and other social services such as immunisation at the correct age. Orphaned children may not be able to access social benefits and entitlements such as pensions or inherit property. Registration is also crucial for preventing child labor, underage marriage, trafficking, premature enlistment into armed forces, and for protecting children in conflict with the law from being treated as adults. In later life, children whose births were not registered may have difficulty applying for a passport or driver's license, opening a bank account, obtaining credit and registering to vote.

4.1 Organisation of the Civil Registration System in Pre-Conflict Syria

A legally recognised civil registration system has operated in Syria since 1914 when Ottoman law established civil records regulations to build on a 1904 census.²⁴¹ After the Ottoman Empire collapsed, a house-to-house census was conducted in 1918. Three copies of each record was produced; two were retained by the state, and

²³⁸ Art 6 of the Universal Declaration of Human Rights and art 16 of the International Covenant on Civil and Political Rights state that "everyone has the right to recognition everywhere as a person before the law".

²³⁹ S Bah, "The Iraqi civil registration system and the test of political upheaval" (2014) 41/1-2 *Canadian Studies in Population* 111–119.

²⁴⁰ Unicef Innocenti Research Centre, *Birth Registration and Armed Conflict*, Unicef (Siena, 2007).

²⁴¹ United Nations Statistics Division, "Technical Report on the Status of Civil Registration and Vital Statistics in ESCWA Region" (2009) United Nations, ESA/STAT/2009/9.

one was provided to family elders for private use. The Civil Status Code No. 376 (1957, as amended) regulates civil status today, and provides the basis for the legal and administrative framework of the present civil registration system.²⁴²

The Ministry of the Interior authorises the Civil Registration Authority to collect and document civil information on births, deaths, marriages, divorces and naturalisations; it is also charged with authority over records corrections, identity card issuance, maintaining the civil registration database, and producing vital statistics and population statistics. Civil registration offices exist throughout Syria, which supply the central Ministry with data from towns and villages in each jurisdiction. In 2009, there were 14 offices in Governorate capitals, 48 *mintaqā* (district) offices, 166 *nabhiya* (township) offices and 34 new *nabhiya* offices. All registration offices follow a common set of procedures and protocols. Syrian citizens located abroad provide relevant information to Syrian embassies and consulates; a copy is then sent to the Civil Registration Authority in Damascus, and finally to the relevant local registrar (although this last step rarely occurs in practice). The civil registration office is required to pass information on the vital events of non-Syrians to the Ministry of Foreign Affairs, the records of which are held by the Ministries of Foreign Affairs and Interior.²⁴³

4.1.1 Technical Aspects of the Civil Registration System

Syrian citizens above the age of 14 are required to carry identity cards at all times. Such cards are available to individuals over the age of 14, and are issued by the civil registrar within the Civil Affairs Department of the Ministry of the Interior. Citizens must obtain the cards in person, but the cards are free of charge and they do not show the holder's religion (although oftentimes this is able to be discerned by the holder's name). For personal dealings with governmental departments, citizens must have a passport.

Responsibility for vital events registration rests with the family unit; fathers are responsible for registering births, the family elder (*mukhtar*) is responsible for registering deaths, and husbands are responsible for registering marriages and divorces. Vital family events must be registered within 30 days where these take place in-country, and within 60 days where they take place abroad.²⁴⁴

Birth registration in Syria records the child's date of birth, religion and parental information. Late registration is penalised. For births registered after 30 days but before one year the penalty is 500 Syrian pounds, for registration taking place within one-four years the penalty is 2000 pounds, and where registration takes place after four years, the penalty is 4000 pounds (18 USD at December 2015 exchange rate). Before 2011, birth registration stood at 98 percent and death registration at 75 percent.²⁴⁵

The Government acknowledges and observes data confidentiality. There is a mutual agreement over data sharing between the Civil Registration Office and Department of Statistics; for any other agency to access civil registration data special approval from the Civil Registration Office is required.

The Civil Registration Authority produces statistics on the population structure disaggregated for sex, age and administrative division. Syria's most recent population census took place in 2004. It collected data including on duration of first marriage, children ever born (lifetime fertility) to ever-married women (women married at some point in time), and births and deaths that had occurred in the previous 12 months. A Family Health Survey and Multiple Indicator Cluster Survey were conducted in 2001 and 2006 respectively; they collected data on employment, unemployment, education, child labour, health, immunisation and maternal mortality.²⁴⁶ Gender disaggregated data on birth, death, marriage and divorce is made available to the United Nations

²⁴² *ibid.*

²⁴³ *ibid.*

²⁴⁴ *ibid.*

²⁴⁵ *ibid.*

²⁴⁶ Two surveys were single-round surveys using random sampling; *ibid.*

Statistics Division, but not all of the required fields are submitted, including those relating to infant deaths, foetal deaths, children ever born and children living.²⁴⁷

4.2 Current State of Civil Registration

Civil registration in Syria has long been conducted manually. A project in partnership with UNFPA to computerise the system was underway in 2009. A network was created between all civil registry departments via the computerisation project, allowing citizens to update their records and produce documents from departments near where they lived rather than having to visit the departments where they were registered (usually the area of their birth). However, even prior the conflict, data collection suffered from major flaws and the need for wide-scale correction was broadly acknowledged.²⁴⁸

After 2011, many civil registration offices were looted and computers compromised. According to a worker at the Jarablus civil registration office, following the defeat of regime forces, the office was looted of all computers.²⁴⁹ Registration of births and marriages continued manually, and paper identity cards were issued. However, when Daesh entered the city, all the governmental offices, including the registration office, was taken over and most employees fled to Turkey. There have been broad reports that Daesh has led a massive campaign to destroy passports and legal records in Syria, although the extent of this destruction is difficult to verify.²⁵⁰ In 2012 the Ministry of Interior began work on restoring the civil registration offices that were damaged by vandals in a number of areas. According to Assistant Interior Minister for Civil Affairs Brig-Gen Hasan Jalali, the Civil Registration Authority has backup copies of all destroyed paperwork.²⁵¹

Currently, passport applications must be completed in person and their current cost is 1,850 Syrian Pounds (USD9.80 as at December 2015). Prior to the conflict the procedure took a few days, but now takes up to six months.²⁵² There have been reports that applicants from Damascus must also submit an official military document for which fees are required.²⁵³ Among broader reports of bribes being necessary to obtain a passport, residents from Homs, Hama and Daar'a seeking to obtain passports from Damascus need to pay "additional fees for not completing this procedure in their home provinces", despite there being no functioning government in these areas.²⁵⁴ Moreover, males over the age of 18 are screened in order to verify that they have completed their mandatory military service and are thus not required for active duty.²⁵⁵ Outside Syria, nationals must obtain passports from semi-functioning embassies; in Jordan, a passport costs USD400.²⁵⁶ Passport applications by Syrians wanted by the regime are usually denied.

²⁴⁷ Syria provided data for 9 out of 41 vital statistics tables requested by the United Nations *Demographic Yearbook* for the 10-year period of 1997-2006; *ibid*.

²⁴⁸ For instance, after the 1994 census, after a decline in population growth was observed but incorrectly recorded by the registration office, it was concluded that the registration records had major flaws and to improve the accuracy of data collected, the government needed to change its data evaluation techniques and to increase the frequency of data collection.

²⁴⁹ A Khalil and K Leigh, "Syrian Babies, Born Refugees, Left Without a State" *Syria Deeply*, 11 April 2014, <<http://www.syriadeeply.org/articles/2014/04/5100/syrian-babies-born-refugees-left-state/>>.

²⁵⁰ *ibid*.

²⁵¹ Syrian Arab News Agency (SANA), "SYRIA: Syrian interior ministry begins restoration of vandalized registry offices", *Wiki Leaks*, 17 July 2011, <https://wikileaks.org/gifiles/docs/67/678437_syria-syrian-interior-ministry-begins-restoration-of.html>.

²⁵² P Sands, "Syrians Face Six-Month Wait for Passport to Freedom" *The National*, 25 October 2012, <<http://www.thenational.ae/news/world/middle-east/syrians-face-six-month-wait-for-passport-to-freedom>>.

²⁵³ J Bahaa, Syrians applying for passports face blackmail and abuse, *Al Arabiya*, 11 October 2012, <<http://www.alarabiya.net/articles/2012/10/11/243028.html>>.

²⁵⁴ *ibid*.

²⁵⁵ P Sands, above n 253.

²⁵⁶ "The loss of a nation: Thousands of Syrians could become stateless", *The Economist*, 23 October 2014, <<http://www.economist.com/news/middle-east-and-africa/21627729-thousands-syrian-refugees-are-risk-having-no-recognised-nationality-loss-nation>>.

4.3 Risks and Difficulties

The loss of civic registration records is likely to pose a significant protection and rehabilitation challenge in a post-conflict scenario. There will be a mix of people with documents issued by the Assad regime, people whose records have been lost and returning refugees who have been issued with documentation from other jurisdictions.²⁵⁷ In this context, falsified documentation is a risk and new disputes are likely to arise. In all likelihood, a significant amount of permanent records held by the Government will have been lost, and even if this is not the case, given that the crisis is now in its fifth year many vital events will remain unaccounted for. Of Syria's four million refugees, a 150,000 have been born outside the country²⁵⁸ and as at December 2015 there have been an estimated 220,000 deaths.

The protection of vulnerable groups will be an immediate concern. As discussed, women who lack identity documents, because they have been lost, taken or never existed, are particularly vulnerable. The extent of this problem has been accumulating since the inception of the crisis. For example, female refugees in Jordan who do not have their original civil documents cannot officially register their marriage abroad. This has driven the practice of informal marriage, either because the parties to the marriage lack identity documents, desire to marry under the legal age, or because the parties regard registering the marriage as unnecessary.²⁵⁹ Without proof of marriage, upon their return to Syria such women will be at risk of prosecution or detention, especially if they have children and even more so if they are unaccompanied. They may also have difficulty accessing inheritance and reclaiming property.

These problems carry over onto the children born from unregistered marriages. For refugees to register a birth, at least in Jordan, marriage certificates and birth notifications from hospitals or doctors are required. This obstructs those without marriage certificates, or those who married customarily, from registering their children, largely accounting for the low birth registration of Syrian refugees. Out of all refugee babies born in Lebanon, 72 percent are unregistered.²⁶⁰ The most vulnerable group are those children born to Syrian mothers whose father is either deceased, missing (and whose identity cannot be proven) or non-Syrian. This is due to laws preventing mothers from passing their nationality to their child.²⁶¹ Children born to non-Syrian fathers may be able to take up alternate nationality, but returning to Syria may be problematic, and in the event of marital dissolution or the death of the father, such children come under extreme risk. For children who cannot prove their Syrian paternity, because their father is missing or dead and documentation has been lost, statelessness is a possible outcome. Stateless children are usually unable to obtain a passport, own property, attend school, access health and financial services, or engage in legal employment.

²⁵⁷ At the beginning of the Syrian crisis, on arrival in Jordan, authorities took personal documents from refugees and a receipt was issued. When exiting Jordan, refugees could reclaim such documentation. Today, iris scanning has replaced the need for document retention by authorities. Urban refugees are more likely to lack an identity document. They may have entered Jordan irregularly without any documentation, have left the refugee camp irregularly (after having had their documents taken upon arrival), or they may have had their documents confiscated by a landlord or employer. There are two systems for such persons to obtain an identity document. First, refugees can register with UNHCR. This process usually takes three-four months, after which time a family registration certificate is issued that is valid for six months. Second, refugees can (and in fact are required to) register with the Jordanian authorities through the police. This, however, requires the presentation of an identity document (which refugees may not possess), and refugees may be fearful to approach the police. Refugees housed in a camp can obtain proof of identity through UNHCR. In 2014 the government established both a Personal Status Department and Shari'a court in Zaatari camp, which facilitates the registration of marriages, deaths and issuance of birth certificates.

²⁵⁸ According to an April 2015 study by Refugees International, more than 60,000 babies have been born to refugees in Turkey alone. Murat Erdogan, a professor at Hacettepe University in Turkey, estimates the total could be closer to 150,000. Alia Dharssi, "From the 150,000 babies born to the strong education: Eight things you don't know about Syrian refugees" *National Post*, 23 October 2015, <<http://news.nationalpost.com/news/from-the-150000-babies-born-to-the-strong-education-eight-things-you-dont-know-about-syrian-refugees>>.

²⁵⁹ According to Save the Children, one in four Syrian marriages in Jordan is illegal because the female party is underage.

²⁶⁰ "Statelessness Update" (August 2014) UNHCR Lebanon. Without a family book or marriage certificate, a woman who gives birth in a Jordanian hospital is issued with a status report or discharge statement, but not a birth certification (if, at a later date, such documents are obtained, she can return and receive a birth certification).

²⁶¹ According not only to Syrian law, but also Jordanian and Lebanese laws.

A final area of concern is housing, land and property rights. In the absence of documentation, the risks of illegal land appropriation and property disputes are high. The absence of marriage contracts means that women (and children) may not be able to claim their rights to inheritance and property. Moreover, cultural practices and traditions that discourage women from accessing their rights emanating from marriage (particularly to inheritance) often become more entrenched in post-conflict situations.

A further risk is that in conflict and post-conflict contexts, groups often take advantage of the disorder to engage in looting. In Syria, widespread physical destruction coupled with compromised law and order capacity means that police are rarely able to collect evidence or conduct investigations. In a return situation, police or military patrols can offer some protection against looting and such actions should be prioritised. Returnees should be encouraged to locate evidence of ownership or other tenancy rights over their homes and lands and make an inventory of household possessions. Such documentation can be useful in resolving property disputes and if a restitution policy is introduced, in addition to restoring public records.

Given the mix of identity documents that a post-conflict Syrian administration will need to deal with and the likelihood of disputes and rights abuses, steps should be taken during the emergency repatriation phase to locate and protect remaining government records and establish systems to verify and replace missing documentation. Given the strength of tribes, systems that rely on elder and community verification, with suitable checks and balances, should be evaluated, as well as a similar system to verify land holdings (ownership as well as rental interests). Over time such a system should be extended not only to cover birth, marriage and death certificates, but also insurance, education and health certificates.

Even before the end of the crisis, agencies and host states should be working to promote identity issuance to all Syrians and protocols to make sure that all departing refugees have personal documentation, especially in the cases of women and children. Compiling housing and property data in databases is another valuable activity that could take place immediately. If a post-conflict settlement is reached, a priority action might be to negotiate that identification records issued by host country jurisdictions be recognised, and likewise for education and training certification.

4.4 Key Actions and Recommendations

Although the conflict in Syria is ongoing, documentation of land and property claims and assistance in obtaining identity documentation or filing records for new vital events must move forward, and efforts to centrally compile this information should be considered. Once reconstruction begins, innovative sources can help fill vacuums left in standard resources. The role of social media should not be underestimated in the process of re-issuing civil documentation. In the absence of official certificates, online information, such as pictures, posts and emails can assist in confirming identity and property ownership. Likewise, customary sources, particularly, tribal networks might play a key role in emergency registration processes, particularly for claims verification and resolving disputes.

Over the medium-term, vital events data must be updated. In this context, the most pragmatic approach will be to decentralise civil registration, making it more accessible in terms of direct and indirect costs. Any new system should be digitized.

Under any leadership, Syrians may be reluctant to submit their personal information to authorities, for fear of retribution and political instability. As such, a well-communicated system of checks and balances should be set in place. Further, collecting of personal information may be best executed by a neutral arbitrator or mediating power while confidence-building initiatives are ongoing. Alongside these efforts, awareness campaigns on the communal and individual value of civil registration can enable future registration efficacy.

5. Housing, Land and Property Issues in Post-Conflict Syria

“I don’t care about the infrastructure; I am willing to live in a tent as long as I go back to Syria.”

– Syrian male refugee, Za’atari camp

While some interviewees mentioned the destruction of their homes and the need for compensation, when compared to security and rule of law, Syrians vested less importance in housing, land and property as a requirement for their return to Syria. This said, in post-conflict contexts, housing, land, and property (HLP) rights are not only issues of justice; they are integral to maintaining peace and stability. Returnees have a right to recover homes and land left behind, and at the same time, fragile environments create ripe conditions for property misappropriation and disputes that can reignite violence. Empowering state and, potentially non-state, mechanisms to ensure timely and just restitution is thus essential for peace consolidation and to prevent new or compounded rights violations.

Implementing HLP protections involves the intersection of multiple sectors and disciplines, including reconstruction and urban planning; land and property interest mapping; protections for vulnerable populations; dispute resolution; and reinstating documentation.²⁶² All such actions must be rooted in the cultural and political context and, in the case of Syria, Islamic jurisprudence, which influences the rights of all religious groups under the current legal framework. Even as the conflict persists, registration of land and property interests, and assistance in obtaining identity documentation, should be ongoing.

Syria’s urban housing crisis — considered a main driver of the 2011 uprising — in addition to more than half of the population being uprooted in the ensuing violence, will pose enormous HLP challenges under a return scenario. This chapter provides a foundational understanding of HLP protections, specific statutory regulations and *shari’a* provisions on HLP. It discusses Syria’s pre-existing HLP framework, the challenges mounted by the widespread destruction, and recommendations for how they might be overcome. These recommendations highlight that while states hold ultimate responsibility for securing their citizens’ HLP rights, international organisations can make pivotal contributions, including by encouraging the inclusion of HLP provisions in peace agreements and contributing to an enabling environment for inclusive HLP policies and programmes.²⁶³

5.1 General Principles of Housing, Land and Property Rights

Recognition of the importance of housing, land, and property rights has increased in recent decades, culminating in the 2005 guidelines on HLP protections issued by the Special Rapporteur on Housing and Property Restitution: the Pinheiro Principles. While the principles do not constitute binding international law, the UN and other state and non-state organisations have incorporated them into international and intra-state law and policy.

²⁶² S Leckie, “Legal and Protection Policy Research Series - Housing, Land and Property Rights in Post-Conflict Societies: Proposals for a New United Nations Institutional and Policy Framework”, UNHCR (2005) PPLA/2005/01, <<http://www.unhcr.org/425683e02a5.pdf>>.

²⁶³ “The Pinheiro Principles: United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons, Centre on Housing Rights and Evictions”, Principle 22 <<http://2001-2009.state.gov/documents/organization/99774.pdf>>.

The principles can be broadly categorised into two groups. Principles 2-10 apply existing human rights protections to housing, land, and property. Principles 11-22 directly address return scenarios; they outline how states should approach and operationalise national housing and property restitution in accordance with international and humanitarian law.²⁶⁴ Key provisions include principle 5 — protection from displacement — whether this is due to unlawful acquisition, expropriation, or destruction of homes and property or whether caused by war, human rights’ violations, disaster or even development projects.²⁶⁵ Principle 3 bans discrimination “on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, disability, birth or other status” in HLP matters; and principle 4 ensures gender equality in housing and property ownership, inheritance, use and restitution. States should enshrine HLP and inheritance rights, specifically those of refugees and displaced persons, in national legislation,²⁶⁶ and implement formal and informal procedures to address returnee HLP issues in an “equitable, timely, independent, transparent and non-discriminatory” manner.²⁶⁷ States should also have suitable mechanisms to enforce HLP protections and process claims, including preventing interim looting.²⁶⁸ To make enforcement possible, the technical side of claims procedures should be regulated, including by protecting documentation and reestablishing land registries.²⁶⁹

Resolving claims should focus on restitution; compensation is limited to instances when an impartial tribunal has declared restitution “factually impossible,” when the “injured party knowingly and voluntarily accepts” such compensation, or in instances when a peace agreement’s terms accept the practice.²⁷⁰ Restitution should, whenever possible, restore the victim to the original situation before the gross violations of human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship; return to one’s place of residence, restoration of employment and return of property.²⁷¹

Principles 16 and 17 articulate targeted protections for tenants, non-owners, and secondary occupants, including modalities to restore occupied property to its rightful owners without committing new rights violations. The principles proscribe arbitrary and discriminatory returnee laws,²⁷² and reiterate the importance of protecting women’s equal rights and children’s best interests. Broader recommendations include awareness raising among claim holders, ensuring accessibility to claims processes, and including affected persons in decision making.²⁷³ Importantly, rights holders do not lose any of the abovementioned rights regardless of the protracted nature of their displacement; moreover, those unable to return do not relinquish their ownership or restitution/compensation claims.²⁷⁴

5.2 Pre-Conflict Land Tenure, Administration and Governance in Syria

Syria finds its land tenure protections encased in both formalised state and informal customary (often tribal or religious) systems.²⁷⁵ Syria’s land is broadly split into state land (62 percent) and private land (38 percent);²⁷⁶

²⁶⁴ *ibid* 4-5.

²⁶⁵ OHCHR, “The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law”, *Handbook on Housing and Property Restitution for Refugees and Displaced Persons Implementing the ‘Pinheiro Principles’* (2007), 16.

²⁶⁶ “The Pinheiro Principles”, above n 265, Principle 18.

²⁶⁷ *ibid*, Principle 12.

²⁶⁸ *ibid* Principle 20.

²⁶⁹ *ibid* Principles 13, 15.

²⁷⁰ *ibid* Principle 21.

²⁷¹ OHCHR, above n 267, 10.

²⁷² “The Pinheiro Principles”, above n 265, Principles 13, 15.

²⁷³ *ibid* Principle 14.

²⁷⁴ OHCHR, above n 267, 10.

²⁷⁵ *Syria Land Ownership and Agricultural Laws Handbook Volume 1 Strategic Information and Basic Regulations*. IBP, Inc (2013) 75.

private land can be held by individuals or companies. Land is divided into 14 governorates, *muhafazat*, which further divide among 60 districts, *manatiq*, and even further into subdistricts, *nawahi*. *Nawahi* are made up of villages, the smallest units of administration.²⁷⁷ Within governorates, official arbitration committees and courts for resolving territorial claims are well established and enjoy a sound reputation.²⁷⁸ Each governorate keeps a land registry of formally transacted property, but these were never consolidated into a national register;²⁷⁹ only an estimated 20 percent of state land is registered.²⁸⁰

The 1958 land reforms, which redistributed large land holdings to benefit poor farmers, gave beneficiaries rights that were similar in nature to private landowners, with the exception of being able to alienate property, whether by sale or transfer.²⁸¹ In fact, the predominance of state land in Syria can be explained by the importance of traditional land use rights.²⁸² Even today, an unquantified but significant portion of Syria's agricultural activities derive from customary-communal tenures on both public and private land. The extent of these usage-based tenure arrangements will make redressing returnees land claims more challenging. Informal tenure has allowed the evolution of customary institutions, *'urf*, to resolve land disputes,²⁸³ as demonstrated in Syrian traditional communal farms, *musha*. *Musha* are technically classified as private land, but are better defined as a long-standing customary system.²⁸⁴

5.3 HLP Provisions in Islamic Jurisprudence

While state land tenure systems may fray or lose legitimacy during a conflict, religious and traditional/customary institutions usually remain intact and can provide reliable frameworks for rights transfer, records maintenance and dispute resolution. Moreover, Syria's pre-existing legal system and the Islamism-charged rhetoric of some of the conflict's most powerful actors makes working within this framework a practical necessity. While Islam is generally seen as prescriptive and rigid, and although the Quran heavily references land and property rights, its regulations are generally not matters of strict religious observance, *ibadat*, but more frequently categorised as social transactions, *mu'amalat*.²⁸⁵

There are four main types of land tenure: *miri*, state land; *milke*, full private ownership; *waqf*, endowments explicitly owned by God; and *metruke*, common land. *Metruke* land is either converted into *matruk mahmiyya*, property for general use such as roads, or *matruk murfaqa*, property for use by a particular community, such as marketplaces.²⁸⁶ In *miri* land, the state represents God through its ownership, allowing for a range of citizen access and usufruct rights in the territory.²⁸⁷

Property ownership in Islam hinges on a critical element of the Islamic viewpoint: that property and land belong to God but are temporarily enjoyed by individuals in a type of stewardship arrangement.²⁸⁸ Provisions proscribing willful destruction or neglect of property further differentiate Islamic HLP jurisprudence from

²⁷⁶ "Emergency response to Housing, Land and Property issues in Syria", Global Protection Cluster, *UN Habitat*, 30 January 2013, <<http://reliefweb.int/sites/reliefweb.int/files/resources/Emergency%20response%20to%20Housing%20Land%20and%20Property%20issues%20in%20Syria.pdf>>.

²⁷⁷ *Syria Country Study Guide Volume 1 Strategic Information and Developments*, International Business Publications 2013, 12.

²⁷⁸ "Emergency response to Housing, Land and Property issues in Syria", above n 278.

²⁷⁹ *ibid.*

²⁸⁰ *ibid.*

²⁸¹ *Syria Land Ownership and Agricultural Laws Handbook Volume 1 Strategic Information and Basic Regulations*, above n 15.

²⁸² *ibid.*

²⁸³ *ibid.*

²⁸⁴ *ibid.*

²⁸⁵ Land tenure is not extensively discussed in the Quran; most regulation developed after the time of the Prophet. Qur'an 2:205, 2:220, 4:2, 4:5-6, 4:10, 4:29, 16:71, 38:24, 59:8. S Sait, H Lim in *Land, Law and Islam: Property and Human Rights in the Muslim World* (2006) 10; 16.

²⁸⁶ *ibid* 13.

²⁸⁷ *ibid* 12.

²⁸⁸ *ibid* 9.

secular notions of private ownership.²⁸⁹ Consistent with the notion of stewardship, land use is a critical element within Islamic land tenure. Private use can lead to the ownership of state and public land, while neglect may cause land ownership to transfer back to the state.²⁹⁰ Moreover, Islamic property rights are conditional; they are contingent upon the property not being wasted, exploited, or used to unjustly deprive others of property, including through unethical business practices.²⁹¹ Unworked land cannot actually be owned nor, according to theorists, rented.²⁹² Technically, Islamic jurisprudence could permit the disintegration of land rights over time.

5.3.1 Minority Protections HLP under Islamic Law

Religious pluralism has been an accepted concept since the first Islamic state in Medina. Here, a covenant extended Christians and Jews the right to acquire, enjoy, manage and alienate land in the same way as Muslims. Non-Muslims were, however, required to pay a special tax, *jizya*, to compensate for their exemption from religiously-required *zakat* donations and military duty.²⁹³ The Quran also establishes the notion of legal pluralism, giving Christians the right to live according to their own laws.²⁹⁴ In Syria, while Article 306 permits non-Muslims to apply their own religious law in certain family matters including marriage and divorce,²⁹⁵ matters of guardianship (*wilaya*) and inheritance (which can impact HLP determinations) fall under *shari'a* regulation.²⁹⁶

5.3.2 Islamic Inheritance Law

Inheritance law in Islam is based on explicit Quranic direction regarding how and to whom property of a deceased is allocated.²⁹⁷ After addressing funeral expenses, debts and formal bequeathals made by the deceased, all inheritance is transferred to members of the immediate and extended family²⁹⁸ who receive shares on the basis of three levels of priority. The first level includes the deceased's parents, spouse, children and grandchildren; the second the deceased's grandparents, siblings, nieces and nephews; and the third the deceased's uncles and aunts and their children. At each level, with the exception of the deceased's immediate children, children of potential heirs do not inherit if their parents are still alive.

5.3.3 Inheritance Law for Women

Formalised inheritance rights are women's main source of access to land in WANA.²⁹⁹ Such rights are limited to half that of an equivalent male share within the first levels of inheritance (although this discrepancy reverses at more removed inheritance levels). The explanation for this disparity lies in women's entitlement to 'maintenance' from their husbands or *wali* in the form of shelter, clothing, food and medical care.³⁰⁰ Understanding inheritance in terms of these lifetime transfers and transactions somewhat balances their

²⁸⁹ Qur'an 2:30, 36:54. Sait and Lim, above n 287, 10.

²⁹⁰ *ibid* 12

²⁹¹ Qur'an 2:188. Sait and Lim, above n 287, 11.

²⁹² *ibid* 12.

²⁹³ *ibid* 97.

²⁹⁴ Qur'an 5:47.

²⁹⁵ *Constitution of the Syrian Arab Republic* 1973 art. 3061 ; S Kelly and J Breslin (eds) "Women's Rights in the Middle East and North Africa" (2010), 471.

²⁹⁶ M S Berger, "The Legal System of Family Law in Syria" *Bulletin D'études Orientales* 49 (1997) 115–127, 119.

²⁹⁷ Qur'an 2:180, 2:240, 4:7-9, 4:11, 4:12, 4:19–33, 4:176, 5:105–8.

²⁹⁸ "A surviving parent will receive one-sixth of the estate, the surviving spouse either one-eighth (a wife) or one quarter (a husband), with the balance shared between the surviving children and the sons receiving twice the share of the daughters. Where the deceased has no sons and only one daughter, she will receive one-half of the estate. If there are no sons but two or more daughters, they will share two-thirds of the estate. The residue of the estate in this case will pass to the closest surviving male agnate (*asaba*), the deceased's father, brothers, uncles, cousins or more distant male relative (Nasir 2002: 207–17). If the deceased has no children, a wife will receive one-quarter of her husband's estate, while a husband will receive one-half of his wife's estate." Sait and Lim, above n 287, 110.

²⁹⁹ *ibid* 112.

³⁰⁰ Qur'an 4: 34. Sait and Lim, above n 287, "Inheritance, Laws and Systems" 115.

perceived inequity,³⁰¹ however they remain significant departures from international legal norms.³⁰² In Syria, Islamic inheritance is inextricable from the institution of marriage; illegitimate children do not share the claims of legitimate offspring. Legitimate marriage requires court and civil registration, as well as religious validation. Under Islam, validity requires two witnesses, whereas for Christian marriages, a priest must be present.³⁰³ The impact of the conflict in terms of lost or destroyed documentation and the sharp rise in informal marriage will create significant barriers for these heirs.

Importantly, Muslims can take steps to somewhat equalise inheritance or include officially overlooked parties (such as adopted or illegitimate children) through bequests and estate planning. Muslims can will gifts of up to one-third of their estate,³⁰⁴ either through a *hiba*, a simple gift or lifetime transfer, or by establishing a *waqf ahli*, or family endowment. A *hiba* can be granted to those outside the standard inheritance hierarchy or be used to increase a pre-designated heir's share.³⁰⁵ In practice, however, this mechanism is more often used to limit female heirs' inheritance than expand it.³⁰⁶ A final way families avoid women's inheritance rights is through renunciation. This relatively common practice involves a woman offering her inheritance share to sons or brothers in an informal exchange for care and security. Social pressure and notions of familial honour inhibit women's ability to make this choice freely.³⁰⁷ These practices highlight the value of widely communicating women's firmly delineated inheritance rights in a return situation. Indeed, studies have shown found that more religiously educated families are less likely to encourage renunciation.³⁰⁸

5.3.4 Inheritance Law and Orphans

While the Quran makes specific reference to orphans' property rights, orphaned grandchildren cannot benefit from their deceased parent's share of grandparents' inheritance.³⁰⁹ In these and other vulnerable cases, the Quranic verse recommending bequeaths to relatives in need might be drawn upon in programming.³¹⁰ Legal innovation may also play a role; in Egypt a legal trend emerged following the Egyptian Will Act (1946) which benefits orphaned grandchildren through a mandatory bequeath of their deceased parent's share up to the one-third of the estate allotted by Islam. This obligatory will has since been adopted by many nations, including Syria in 1953.³¹¹

5.4 Syria Housing, Land and Property Issues Pre-Conflict

Well before 2011, Syria had been suffering from an acute housing crisis, forcing millions into substandard housing without proper documentation. Moreover, the region's history of conflict had left Syria with its own populations of refugees, mainly from Palestine and Iraq.

5.4.1 Syria's Pre-2011 Housing Crisis

By 2010, Syria was experiencing the impacts of rapid rural-to-urban migration. 12.5 million people, over half of the population, resided in urban areas, a rate that was increasing by four percent each year. This emigration, at least to some extent, can be attributed to a drought that had been ongoing since 2006 and has impacted nearly 60 percent of the country, causing the most severe crop failures in recent history.³¹² Huge

³⁰¹ *ibid* 135.

³⁰² Particularly Principle 4's provision for equality between men and women.

³⁰³ Art. 38 Civil Status Code 1957.

³⁰⁴ Sait and Lim, above n 287, "Inheritance, Laws and Systems", 108.

³⁰⁵ *ibid* 115.

³⁰⁶ *ibid*; Kelly and Breslin, above n 297, 471.

³⁰⁷ Sait and Lim, above n 287, 127.

³⁰⁸ *ibid* 125-126.

³⁰⁹ Qur'an 6:152.

³¹⁰ *ibid* 114.

³¹¹ *ibid* 124.

³¹² "Emergency response to Housing, Land and Property issues in Syria", above n 287.

demand vis-à-vis supply led to a massive price surge,³¹³ which disproportionately affected those Syrians already struggling. This combination of a price surge and a real deficit in the formal urban housing supply left at least 30 percent (and perhaps up to 50 percent)³¹⁴ of Syria's total population residing in informal settlements. The resulting, very visible, inequality no doubt fuelled popular frustrations in the lead up to 2011.

Informal settlements generally took one of two forms: illegal squatting on land (private or, more often, state-owned) or informal purchase of land plots without contracts or planning permission.³¹⁵ By international standards Syria's informal housing residents were relatively well off;³¹⁶ many comprised carefully planned infrastructure, well-built homes and access to basic government services.³¹⁷ Others failed to meet basic safety regulations or national building codes. The ever-increasing population meant that new floors were haphazardly added, driving a deadly rise in collapsing buildings.³¹⁸ Within these informal settlements evolved community-based administration structures, with local experts acting as real estate agents and dispute arbitrators.³¹⁹

Residents of informal housing units who have been displaced by the conflict will face multiple challenges in a return scenario. A general lack of documentation combined with the informal and unregulated legal status of this population's urban dwellings is likely to complicate claims and fuel disputes. A further concern is the number of Syrians likely to return to unsafe and unsanitary housing, particularly if reconstruction efforts are limited to repairing and rebuilding housing destroyed by the conflict. In addition to the obvious safety issues, this may drive contestation between communities in terms of parity in international and government assistance.

It is noteworthy that the relative quality of informal housing in Syria stemmed directly from government policy. Local authorities are required to provide informal areas the same level of services provided in formal areas until alternate accommodation is established.³²⁰ Laws also ban forced eviction from these unregulated areas until formal housing is arranged.³²¹ Although such protections have largely fallen to the wayside in the context of the conflict, they may prove a useful framework in a return scenario.

5.4.2 Syria's Pre-2011 Displaced Populations

In addition to Syria's acute housing crisis, externally and regime-driven displacement over the past decades has left at least half a million people in a situation of protracted displacement. The first wave occurred after Israel's seizure of the Golan Heights during the 1967 war.³²² The number of Golanese IDPs is disputed, with Syria estimating 130,000³²³ but Israel estimating only 70,000.³²⁴ The current, expanded population could be as

³¹³ The Syrian Economic Center estimated the differential at 1.5 million formal homes. R Goulden. *Housing, Inequality, and Economic Change in Syria*. *British Journal of Middle Eastern Studies* 38 (2) (August 2011) 187-202.

³¹⁴ "Arqam Rasmiiyya Lafita 50% Sakan 'Ashwa'i'," *al-Thawra*, 17 April 2007, as cited in Goulden, above n 315.

³¹⁵ *ibid.*

³¹⁶ "For a conurbation to be classified as a slum requires it be overcrowded, have poor building quality, poor water supply, poor sanitation facilities, and/or insecure tenure." UN Human Settlements Programme, 2003, as cited in Goulden, above n 315.

³¹⁷ "Emergency response to Housing, Land and Property issues in Syria", above n 287.

³¹⁸ "Abniya Sakaniyya fi Harat Tansab minha Ra'ihat al-Mawt", *al-Nour*, 6 June 2007, as cited in Goulden, above n 315.

³¹⁹ "Emergency response to Housing, Land and Property issues in Syria", above n 287.

³²⁰ Goulden, above n 315.

³²¹ *ibid.*

³²² G Charron and E Arnaud, "A full-scale displacement and humanitarian crisis with no solutions in sight", Internal Displacement Monitoring Centre, 31 July 2012, <<http://www.internal-displacement.org/middle-east-and-north-africa/syria/2012/a-full-scale-displacement-and-humanitarian-crisis-with-no-solutions-in-sight>>.

³²³ Permanent Mission of the Syrian Arab Republic to the UN in Geneva, September 2007; [jawlan.org](http://www.jawlan.org) as cited in Charron, above n 324.

³²⁴ (USCR 2002) as cited in Charron, above n 324.

low as 236,000 or as high as 500,000.³²⁵ Quneitra, the region's former capital, was returned to Syria in a 1974 agreement but only after being bulldozed. Government reconstruction efforts have been largely symbolic.

The second wave occurred in the 1970s as part of the regime's campaign against the Kurds. A census was held on 5 October 1962, in the region now known as Hasakah, which required Kurds to prove their Syrian residency since 1945 or assume the status of *ajanib* (foreigners). As a result, around 120,000 Kurds lost their citizenship. Those who protested or were unable to participate are now known as *maktoum*, hidden, and are for all intents and purposes stateless. The situation worsened in 1965 when the government established an 'Arab belt' by resettling tens of thousands of Kurds³²⁶ and Arab farmers along a 280km strip of borderland. The program, which continued under al-Assad until 1976, theoretically aimed to establish state farms, but in practice was instigated to separate the Kurds from their restless Turkish brethren.³²⁷ In April 2011, Assad reinstated the citizenship of 220,000 *ajanib* but not the *maktoum*.³²⁸ By 2011, this population numbered 300,000; they are unable to own property and have no status in terms of property claims.³²⁹

A third wave of displacement took place during the 1982 Hama massacre, when the government brutally retook the city from the Muslim Brotherhood,³³⁰ leaving 10 percent of the city's 250,000 inhabitants dead³³¹ and entire residential neighborhoods destroyed. While accurate figures on displacement are disputed, the level of government rebuilding has been piecemeal and destruction has prevented return in many areas.³³² No compensation or restitution was provided.³³³

Unlike the occupation of the Golan Heights, the regime-orchestrated ejection of Kurds from al-Hasakah and the assault on Hama were stark violations of the government's responsibilities towards its citizens.³³⁴ These land and property claims remain valid and will persist in any post-conflict scenario. Besides adding another layer to claims considerations, the situation calls into question the regime's willingness to act to redress certain classes of HLP violations.³³⁵ Moreover, these issues helped inflame the current conflict, demonstrating the potential for HLP grievances to threaten future security. Finally, it is important to bear in mind that Syria was, and remains, home to refugees from Iraq, Palestine, Afghanistan, Iran, Sudan and Somalia.³³⁶ Specific contingency planning for those uprooted more than once must be incorporated into HLP mechanisms.

5.5 The Extent of Conflict Destruction

The combination of mass and protracted displacement; documentation and records loss; and heavy damage across Syria, brings the importance of planning to the fore. A key challenge is information. While there is extensive data on localised damage, efforts to map broader housing and reconstruction needs have been limited. Satellite data, first hand reports, and photo and drone footage are all tools that can be used to forge a better understanding of the destruction.

³²⁵ Israel annexed the territory in December 1981. UN Security Council Resolution 497 declared such annexation invalid under international law; Charron, above n 324.

³²⁶ A lack of government documentation and the general trend of urban to rural migration hinders efforts to estimate the number of Kurdish IDPs from this strip of land. HRW and Minority Rights Group place the number at some figure approaching 60,000 whereas the authority on the Kurds, Ismet Cherif Vanly, reports their number reached 140,000. (HRW, 2009; Minority Rights Group, 2009; Vanly, 1992) as cited in Charron, above n 324.

³²⁷ *ibid.*

³²⁸ *ibid.*

³²⁹ *ibid.*

³³⁰ *ibid.*

³³¹ *ibid.*

³³² *ibid.*

³³³ *ibid.*

³³⁴ *ibid.*

³³⁵ *ibid.*

³³⁶ "Emergency response to Housing, Land and Property issues in Syria", above n 278.

The United Nations Institute for Training and Research (UNITAR) Operational Satellite Applications Programme (UNOSAT) offers high-quality images of war-ravaged Syria that classifies building structures as destroyed, severely damaged or moderately damaged.³³⁷ The conservative estimate is that over 3 million buildings have been impacted with 1.2 million homes, 9,000 industrial facilities and some 4,000 schools destroyed.³³⁸ Syria has lost over a third of its hospitals; over half are at least moderately damaged. Hundreds of mosques and churches, as well as 290 cultural and heritage sites have been damaged, including Syria's six world heritage sites.³³⁹ The country's loss of population and infrastructure is also reflected in its night skies; the country is 83 percent darker than when the conflict began.³⁴⁰

Heavily Alawite zones in Latakia and Tartous have been spared the same level of damage, as the opposition does not share the regime's airpower capacity.³⁴¹ The focal points of destruction are territories that are hotly contested between the regime and opposition, or areas with a significant Daesh presence; late images show 13,778 affected structures in Homs; 8,510 in Aleppo; 5,233 in Hama; 351 in Dara'a³⁴²; and 544 in Idlib³⁴³ as well as 3,112 in Deir Ezzor and 467 in Raqqah. Yarmouk, the Palestinian refugee camp, has also faced extensive damage.³⁴⁴ Aleppo, a center of much of Syria's fighting, has 1,543 structures completely destroyed and nearly 5,000 severely damaged.³⁴⁵ Hama has experienced targeted destruction; all of opposition district Masaa al-Arbacen's 3,256 buildings were razed to the ground by 2012.³⁴⁶ In government-conquered areas, battle destruction is often followed by a second wave of demolition.³⁴⁷ This *en masse* destruction, generally affecting Sunni communities, has been labeled a sectarian cleansing and will almost certainly compound HLP challenges and complicate reconciliation efforts.³⁴⁸

Damage to infrastructure also cannot be overlooked; it is integral to reconstruction and broader development goals. Priority areas include roads,³⁴⁹ electricity and sanitation infrastructure,³⁵⁰ and natural gas and oil pipelines. Such reconstruction is pivotal to peacebuilding; in Iraq, widespread electricity system failures have created wide grievances and are a pressure point for intra-community conflict.³⁵¹ By contrast, infrastructure reconstruction can provide quick and visible evidence of progress, thereby building confidence.

5.6 Post-Conflict Challenges and Recommendations

Recurrent challenges in the management of post-conflict HLP issues include lack of available and safe housing, overlapping claims, squatting in abandoned homes, lost documentation, counterfeit documents and

³³⁷ 1. Building Destroyed: all or most of the building structure is collapsed (75% - 100% of structure destroyed). 2. Building Severely Damaged: a significant part of the building structure is collapsed (30%-75% of structure destroyed). 3. Building Moderately Damaged: Limited damage observed to the building structure (5%-30% of structure damaged), "Four Years of Human Suffering The Syria conflict as observed through satellite imagery", UNITAR, March 2015, 4 <http://unosat.web.cern.ch/unosat/unitar/downloads/SyriaFourYearsOfHumanSuffering/UNITAR-UNOSAT_SyriaFourYearsOfHumanSuffering.pdf>.

³³⁸ D Al Rifai and M Haddad, "What's left of Syria?", *Al Jazeera*, 17 March 2015, <<http://www.aljazeera.com/indepth/interactive/2015/03/left-syria-150317133753354.html>>.

³³⁹ "Ancient History, Modern Destruction: Assessing the Current Status of Syria's World Heritage Sites Using High-Resolution Satellite Imagery" <<http://www.aaas.org/page/ancient-history-modern-destruction-assessing-current-status-syria-s-world-heritage-sites-using>>. While the devastation to Syria's cultural heritage is an important matter for Syrian reconstruction at large, it is out of the scope of this chapter on housing, land and property rights; <http://www.voanews.com/content/unesco-chief-says-destruction-at-palmyra-is-war-crime/2930215.html>.

³⁴⁰ D Al Rifai and M Haddad, above n 340.

³⁴¹ Charron, above n 324.

³⁴² "Four Years of Human Suffering The Syria conflict as observed through satellite imagery", above n 339.

³⁴³ REACH initiative for the U.S. Office of Foreign Disaster Assistance as cited by "Damage Assessment of Idlib, Idlib Governorate, Syria", UNITAR, 21 July 2015, <http://unosatmaps.web.cern.ch/unosatmaps/SY/CE20130604SYR/UNOSAT_A3_Idlib_Damage_Points_20150406.pdf>

³⁴⁴ 'Reasons for Displacement', above n 39, 96.

³⁴⁵ "Four Years of Human Suffering The Syria conflict as observed through satellite imagery", above n 339.

³⁴⁶ *ibid.*

³⁴⁷ "Silent Sectarian Cleansing: Iranian Role in Mass Demolitions and Population Transfers in Syria", Naame Shaam Reports, 1st ed, May 2015, <<http://online.wsj.com/public/resources/documents/NaameShaamReport05182015.pdf>> at 15 December 2015.

³⁴⁸ *ibid.*

³⁴⁹ "Four Years of Human Suffering The Syria conflict as observed through satellite imagery", above n 339.

³⁵⁰ R Noack and L Gamio, A bird's-eye view of war-torn Syria (20 March 2015) <<https://www.washingtonpost.com/graphics/world/destruction-in-syria/>>.

³⁵¹ Z Al Ali, *The Struggle For Iraq's Future*, (2014), 182.

restitution.³⁵² These issues must be resolved swiftly and with a sense of fairness to avoid tensions spilling over into new conflicts.³⁵³ These pressures will be further burdened by nuances specific to the conflict. Most significantly, the Assad government not only fomented sectarian tensions ideologically, it created physical inroads for them. The destruction of specific neighborhoods supports concerns that the government is making a concerted effort to ‘cleanse’ areas of future resistance members.³⁵⁴ In Damascus, ostensibly to make way for two new housing developments, demolitions were organised for housing zones known as opposition hotbeds.³⁵⁵ The government justified the destruction by labeling the housing unauthorised, but residents — who claim to possess permits and ownership documents — contest this. None were compensated.³⁵⁶ Allegations that the government is planning to supplant such communities by opening citizenship to foreign Shias has further fueled concerns over sectarian cleansing.³⁵⁷ A May 2014 Ministry of Justice policy permitting abandoned houses to be rented has drawn related criticism. While the policy may provide safe accommodation for displaced Syrians,³⁵⁸ the opposition warns that the government is aiming to disrupt claims and, therefore, the return of (mostly Sunni) property owners.³⁵⁹ Regardless of whether the policy is sectarian-charged, these separate waves of occupation present an obstacle for restoring HLP rights post- return.

These sectarian elements also make planning deeply contingent on the conflict’s outcome. The Assad government’s tactics indicate that Sunnis will have difficulty both returning to their properties and claiming their HLP rights. On the other hand, Syria’s minorities are likely to encounter challenges following an Assad fall. Also under this scenario, the predominance of Islamists on the opposition side is likely to promote outcomes based on *shari’a* understandings of HLP rights, potentially causing contestations with international norms and protection-centric approaches.

The other possibility — that Syria will fragment into statelets — does not favour the redress of HLP rights. The logistics alone will create formidable challenges; for example, transporting reconstruction materials and equipment to different territories across the unfriendly internal borders. Properties along newly drawn borders will remain highly vulnerable. This outcome would also cement sectarian divisions, disincentivising returns to territories where one’s religious sect does not hold a political advantage.

5.6.1 Data Collection and Awareness-raising

Whether due to criminality, multiple waves of occupants, inheritance battles or human error, any post-conflict authority will have to deal with competing HLP claims. A strategy for managing these must focus on documentation, records recovery and records verification. Claims holders need to be assisted to acquire or replace documentation and be made aware of their rights and how to enforce them. A McGill University initiative is making significant progress in this regard. The project enables claim holders to use various forms of non-traditional documentation (frequently photos and social media evidence) to identify their land and property holdings and maps out claims across Syria. Such innovative responses should be mobilised to fast-track claims in the post-conflict period.³⁶⁰

³⁵² J Unruh “Use of Upgraded Evidence in Cadaster Approaches for Syrian Refugee Return”, The World Cadaster Summit, Congress & Exhibition Istanbul, Turkey, 20–25 April 2015, <<http://wcadastre.org/files/fulltexts/fulltext70.pdf>>.

³⁵³ *ibid.*

³⁵⁴ “Reasons for Displacement: Documenting Abuses Against Syrian Civilian”, above n 39, 96.

³⁵⁵ Silent Sectarian Cleansing: Iranian Role in Mass Demolitions and Population Transfers in Syria”, above n 89.

³⁵⁶ *ibid.*

³⁵⁷ *ibid.* 36.

³⁵⁸ *ibid.*; “Opening safe and closed houses and renting them for sums that will be preserved for their owners” (in Arabic), Al-Ba’th newspaper /22 May 2014) <<http://ncro.sy/baathonline/?p=6300>>.

³⁵⁹ See, for example, <http://www.orient-news.net/?page=news_show&id=79227> and <<http://goo.gl/9kv8yw>> (Arabic) as cited in “Silent Sectarian Cleansing: Iranian Role in Mass Demolitions and Population Transfers in Syria”, above n 89.

³⁶⁰ J Unruh, above n 354.

5.6.2 Build Confidence with Quick Wins

Given the importance of tangible transformations, broadly visible and wide-reaching HLP initiatives should be prioritised. Infrastructure, including public roads, electricity and sanitation services, as a pre-requisite to other reconstruction, is of primary importance. Such development should take into account future needs, particularly projections that water availability will decrease by half within the decade.³⁶¹

Cities that have been undergone considerable destruction like Aleppo, Homs and Hama will require special assistance. Reconstruction planning, however, should pay attention to equitability so as not to exacerbate divides between rural and urban, rich and poor, or different religious sects. Likewise, Syria's previously uprooted communities, particularly its IDPs from the Hama massacre and Golan Heights, have legitimate unaddressed grievances with the government that should not be overlooked. As this said, prioritisation should be guided by a risk assessment pertaining to conflict recidivism. Potential spoiler groups and situations where long-simmering bitterness may be a source of conflict may need to take priority. Another area that has the potential to fuel tensions is secondary occupation; selecting temporary shelters to house returning IDPs should proceed so as to avoid compounding to pre-existing tenure disputes.³⁶²

Another area for confidence building is explosive ordinance clearance,³⁶³ which is necessary both to encourage return and facilitate reconstruction.³⁶⁴

5.6.3 Enable Restitution

There is much guidance in the literature about verifying and facilitating restitution claims. While these will not be elaborated here, it is important to highlight that some are more time sensitive than others. For example, rubble should remain in residential areas for as long as possible while evidence of ownership is being established. This not only provides proof of property claims but also material for future construction. Technically, rubble should only be cleared when the owner or proper authorities (when no owner is found) provides written consent.³⁶⁵ Planning should aim to provide shelter to all displaced people, not merely those displaced due to the conflict, again to limit any sense of injustice felt by those without documentation. To the extent possible, populations should be temporarily housed close to the homes they left behind, to enable familiar social networks and access to livelihoods, and to limit the likelihood of secondary occupation.³⁶⁶

5.6.4 Protect Vulnerable Populations

In most conflicts, key vulnerable groups will include minorities, women and children, particularly those without documentation and where cultural norms discriminate against those who cannot prove their marriages or discourage women from claiming their property rights.³⁶⁷ Nationality laws, under which children derive their Syrian citizenship from their father and not their mother, pose additional barriers to both return and HLP restitution.³⁶⁸ Addressing documentation needs and promoting rights awareness will be of critical importance, but are unlikely to be sufficient on their own. Neutral and trusted representatives should be appointed to help counter biased or fraudulent decisions. The three courts administering and adjudicating

³⁶¹ "Emergency response to Housing, Land and Property issues in Syria", above n 278.

³⁶² *ibid.*

³⁶³ *ibid.*

³⁶⁴ *ibid.*

³⁶⁵ *ibid.*

³⁶⁶ The "Pilot Survey on Transitional Justice" conducted by the Day After Project (see p.15) found that in terms of property loss and damage, Syrians prioritised financial compensation over judicial prosecution.

³⁶⁷ "Emergency response to Housing, Land and Property issues in Syria", above n 278.

³⁶⁸ "2010 Country Reports on Human Rights Practices", U.S. Department of State (2010), as cited in Unicef, "Syria: MENA Gender Equality Profile Status of Girls and Women in the Middle East and North Africa" (2006) <<http://www.unicef.org/gender/files/Syria-Gender-Equality-Profile-2011.pdf>>.

Syria's Law on Personal Status (the law most relevant to housing, land, and property issues) — the *shari'a*, *madhabi* and *ruh*³⁶⁹ — should be rehabilitated and staffed as a priority measure.

Islamic Law, while often considered an obstacle to women's rights, has been shown in practice to aid women's outcomes in terms of HLP rights, particularly when compared to customary law.³⁷⁰ Given the history of Islamic influence in HLP matters and the potential for Islamist rule over at least parts of Syria, it is unrealistic to expect and plan for a purely secular framework. Understanding Islamic HLP regulations and examining ways to apply them in keeping with international standards is thus not only pragmatic but provides a legitimate framework to counter discriminatory customary practices. Importantly, Islam accords the state responsibility in enforcing HLP protections and recognises the value of these rights in maintaining a just society.³⁷¹ Besides general protection of property and enforcing order to maintain property's value, Islamic law beholds the state to proactively enable adequate standards of living, including housing and reconstruction.³⁷² International community programmes should craft policies and programmatic interventions that leverage such duties.

5.6.5 Capitalise on Customary Institutions

Syria's non-state systems dealing with HLP issues, particularly use-based claims to *musha*, demonstrate the scope and possibility for local-level dispute resolution. With the involvement of external, non-vested arbiters and adequate checks and balances, these informal cooperatives might assist reconfigure land usage rights, relieving pressure on the state and allowing it to focus on broader HLP initiatives.³⁷³

5.6.6 Secure Needed Investment from the International Community

Syria has incurred billions in economic losses over its five-year war with reconstruction costs estimated at up to USD 180 billion.³⁷⁴ In addition, fiscal planning must also take into account the extent to which compensation may be due (either via claim holder acceptance, peace treaty terms, or an impartial tribunal declaring restitution impossible).

³⁶⁹ Law of Judicial Procedure, Law No. 84/1953, art 535-547 with amendments, sets out the jurisdiction of the shar'iyya courts. Erasmus, 206.

³⁷⁰ Sait and Lim, above n 287, 145.

³⁷¹ *ibid* 14.

³⁷² *ibid* 105.

³⁷³ *Syria Land Ownership and Agricultural Laws Handbook Volume 1 Strategic Information and Basic Regulations*, above n 15.

³⁷⁴ "Report: 140 Billion Dollars Cost of Syria Reconstruction", Syrian Economic Forum, 26 June 2014, 31, <<http://www.syrianef.org/En/?p=3615>>; "The Syrian Humanitarian Crisis What Is to Be Done?", *Middle East Policy Center*, 2016, <<http://www.mepc.org/hill-forums/syrian-humanitarian-crisis&print>>.

6. Transitional Justice in Syria

Countries emerging from periods of severe conflict, political repression, or gross human rights violations often find it necessary to take action against those atrocities in order for a conflict-free future to be envisaged. In doing so, states employ legal mechanisms or formal programs intended to promote the reconciliatory process, interrupt cycles of violence, and establish a sustainable social order. These responses are often called transitional justice.³⁷⁵

While responses will vary across conflict and country, certain mechanisms and programs arise repeatedly. They include amnesties, trials, truth commissions, lustration policies, reparations, and memorialisation — each described in further detail below. These mechanisms are often introduced to achieve specific goals, most common of which include: creating a reliable record and an accurate narrative; establishing a functioning state; helping victims cope with atrocities and rebuild their lives; ending violence and contributing to stability; establishing accountability; and reinforcing the rule of law.³⁷⁶ Due to potential conflicts between goals, the decision to adopt one or more mechanisms is a delicate process that must receive careful consideration.

This briefing note identifies key considerations that should inform a meaningful discussion on transitional justice in a post-conflict Syrian context. It outlines the role and recent history of transitional justice in the West Asia-North Africa (WANA) region, analyses the specifics of the Syrian context and preferences of the Syrian people, and presents a picture of what a transitional justice model might look like.

6.1 Transitional Justice in the WANA Region

For an area rife with conflict, the WANA region, historically, has not been significantly influenced by trends in transitional justice. Although this has been gradually changing since the Arab Spring, there are few recurring mechanisms, and little weight is typically given to new or innovative mechanisms.

6.1.1 Iraq

In 2003, following the defeat of the Hussein regime, the US occupation was left administrating a country writhing, not only from violent overthrow, but from decades of severe authoritarian oppression. In this context, US powers established a series of mechanisms intended to facilitate Iraq's transition to a democratic state. These mechanisms, in turn, shaped how Iraq would confront its history of oppression and conflict. The two most prominent mechanisms were the Iraqi de-Ba'athification program and the Special Tribunal for Crimes Against Humanity. Both mechanisms were highly controversial and faced harsh criticism from within and outside the country.³⁷⁷

On May 16, 2003, the Coalition Provisional Authority — the US-established transitional government of Iraq — issued the first of a series of orders that collectively established Iraq's de-Ba'athification program.³⁷⁸ The Ba'ath party had ruled Iraq for decades, first under Ahmad Hassan al-Bakr from 1968 and subsequently Saddam Hussein from 1979.³⁷⁹ De-Ba'athification was used to refer to the lustration program employed to

³⁷⁵ Other common names include “restorative justice” and “post-conflict justice.”

³⁷⁶ “Transitional Justice”, *Stanford Encyclopedia of Philosophy*, 4 April 2014, <<http://plato.stanford.edu/entries/justice-transitional/#ConTraJus>>.

³⁷⁷ Stover et al, above n 238. M Sissons and A Al-Saiedi, “A Bitter Legacy: Lessons of De-Ba'athification in Iraq”, *International Center for Transitional Justice*, March 2013, <<https://www.ictj.org/sites/default/files/ICTJ-Report-Iraq-De-Baathification-2013-ENG.pdf>>.

³⁷⁸ See Coalition Provision Authority Order No. 1, “De-Baathification of Iraqi Society”, CPA/ORD/16 May 2003/01; See also Coalition Provision Authority Order No. 2, “Dissolution of Entities”, CPA/ ORD/23 May 2003/02; Coalition Provision Authority Order No. 7, “Penal Code”, CPA/ORD/10 June 2003/07; Coalition Provision Authority Order No. 13 (Revised) available at <http://www.cpa-iraq.org/government/>.

³⁷⁹ Sissons and Al-Saiedi, above n 379.

remove Iraqi Ba'athist party members from positions of state authority.³⁸⁰ The concern motivating the program's enactment was that Ba'ath party members holding prominent positions in the Iraqi Government greatly increased the likelihood that the party might regain power and establish a regime equally as repressive as Saddam's.³⁸¹

In addition to disbanding the Ba'ath party, the program removed Ba'ath party members holding positions in the three highest management levels in the country.³⁸² These individuals, as well as all senior party officials, were banned from ever holding public administration positions.³⁸³ There was little way appeal other than writing to the CPA who conducted reviews on a case-by-case basis.³⁸⁴ In a separate directive, the CPA disbanded the armed forces, the secret intelligence service and the Ministry of Defence.³⁸⁵ All personnel ranked colonel and above were assumed to be senior party members, unless contrary evidence could be offered.³⁸⁶ The result of the lustration program was the dismissal of somewhere between 85,000-100,000 people, not including the entire military, intelligence services and Ministry of Defence, which discharged approximately 400,000 people.³⁸⁷ The civil service ministry most severely affected was the education ministry, which had 18,064 party members.³⁸⁸ In many cases, however, party membership was required for educators to keep their jobs, which lead to a significant proportion holding Ba'athist membership.³⁸⁹

The implementation and results of de-Ba'athification drew harsh criticism. The International Centre for Transitional Justice described the program as a purge.³⁹⁰ De-Ba'athification was also accused of violating basic due process standards by presuming that party members were guilty and requiring that they prove their innocence on appeal.³⁹¹ Moreover, the program was inherently overbroad and under inclusive, removing higher officials that may have not been involved in human rights violations, while leaving in place lower level ones that may have had direct involvement.³⁹² Such widespread removals also depleted the state of its most qualified administrators, leaving a political vacuum and non-functioning agencies. Public schools, for example, were left barely able to operate,³⁹³ and the CPA was forced to reinstatement many employees.³⁹⁴

In the case of the security forces, while disbandment of the secret service force was likely necessary, many argue that wholesale dissolution was a key contributor to future instability and the later insurgency.³⁹⁵ Disbanding the armed forces, formerly a prestigious institution, left many Iraqis armed and unemployed, with feelings of indignation towards their US occupiers.³⁹⁶

The de-Ba'athification program was also criticised over the impartiality and transparency of the dismissals.³⁹⁷ When a lustration program appears to be politically motivated, there is a risk of the enforcing authority losing credibility. Many feel that the de-Ba'athification program should have created a process of vetting

³⁸⁰ The term was derived from Coalition Order 1. See Coalition Provision Authority, above n 553.

³⁸¹ *ibid.*

³⁸² *ibid.*

³⁸³ *ibid.*

³⁸⁴ *ibid.*

³⁸⁵ *ibid.*

³⁸⁶ Stover et al, above n 238.

³⁸⁷ Bremer, above n 116; Sissons and Al-Saiedi, above n 379.

³⁸⁸ Sissons and Al-Saiedi, above n 379.

³⁸⁹ Pfiffner, above n 116, 79; G Tenet, *At the Center of the Storm: My Years at the CIA* (New York: HarperCollins 2007), 427.

³⁹⁰ Sissons and Al-Saiedi, above n 379.

³⁹¹ *Ibid.*

³⁹² Highlighted by Sissons and Al-Saiedi, above n 379.

³⁹³ *ibid.*

³⁹⁴ *ibid.*

³⁹⁵ Sissons and Al-Saiedi, above n 279; Pfiffner above n 116, 79.

³⁹⁶ *ibid.*

³⁹⁷ Stover et al, above n 238; Sissons and Al-Saiedi, above n 279.

individuals for evidence of wrongdoing to determine their qualification to hold office.³⁹⁸ A more targeted approach with clear criteria for dismissal would certainly have strengthened the program's legitimacy.

Not long after the creation of the de-Ba'athification program, the CPA established a tribunal to try former regime leaders accused of crimes against humanity and genocide.³⁹⁹ The tribunal was an arm of the Iraqi domestic court system, but its jurisdiction covered international crimes which were not enumerated in the Iraqi Penal Code.⁴⁰⁰ The tribunal leaders have estimated that there will be a total of 14 trials, although only a few have taken place. The first, which began in 2005, was the trial of Saddam Hussein (the Dujail trial).

The Iraqi citizenry strongly supported a means of accountability for those responsible for grave human rights violations,⁴⁰¹ and accountability for them meant a court of law.⁴⁰² It was hoped that a trial would strengthen the rule of law and support the development of a legitimate judiciary.⁴⁰³ However, the tribunal was largely unsuccessful in the eyes of the international community. Observers declared it partial and politically influenced.⁴⁰⁴ Human Rights Watch claimed that basic fair trial and due process standards were violated,⁴⁰⁵ and other commentators emphasised political interference.⁴⁰⁶ The public sentiment was that the court provided defence counsel with too much leeway and that the trials became protracted,⁴⁰⁷ suggesting that for the people, the most important thing was justice being dealt swiftly.

There had been earlier discussion about employing different transitional justice mechanisms. Human rights organisations had attempted to initiate discussion in the US about an international tribunal to prosecute Saddam Hussein.⁴⁰⁸ The US insisted on an Iraqi-led court, notwithstanding that the judiciary had no experience in trying complex international crimes cases.⁴⁰⁹ While this may have cut in favour of a court with international influence, the balance of consideration favoured local sentiment for Iraqi control.⁴¹⁰

6.1.2 Lebanon

Each of Lebanon's conflicts has received a unique response. In 1990, after 15 years of conflict, the Lebanese Civil War drew to a close and the Parliament passed a general amnesty law.⁴¹¹ The law pardoned all political crimes committed prior to 28 March 1991.⁴¹² The decision rested on the pretence that a clean slate was necessary for peace.⁴¹³

Amnesties have unique advantages among the various transitional justice mechanisms. They require significantly less time and money compared to trials or truth commissions that can cost millions of dollars and take years to conclude. As was purported in Lebanon, they may also be more effective at promoting peacebuilding; for example, an amnesty may be the only means to draw warring parties into negotiations.

³⁹⁸ *ibid.*

³⁹⁹ CPA Order No. 48, "Delegation of Authority Regarding an Iraqi Special Tribunal", (2003) <http://www.loc.gov/law/help/hussein/docs/20031210_CPAORD_48_IST_and_Appendix_A.pdf>.

⁴⁰⁰ Stover et al, above n 238.

⁴⁰¹ "Iraqi Voices: Attitudes toward Transitional Justice and Social Reconstruction", *Human Rights Center, University of California, Berkeley, and ICTJ*, 25 May 2004, May 2004, <http://www.hrcberkeley.org/download/Iraqi_voices.pdf>.

⁴⁰² *ibid.*

⁴⁰³ Stover et al, above n 238.

⁴⁰⁴ *ibid.*

⁴⁰⁵ "Judging Dujail: The First Trial before the Iraqi High Tribunal", *Human Rights Watch*, November 2006, Volume 18, No. 9 (e), 88, <<http://www.hrw.org/sites/default/files/reports/iraq1106webwcover.pdf>>.

⁴⁰⁶ Stover et al, above n 238.

⁴⁰⁷ *ibid.*

⁴⁰⁸ *ibid.*

⁴⁰⁹ *ibid.*

⁴¹⁰ See "Iraqi Voices: Iraqi Attitudes Towards Transitional Justice and Social Reconstruction", above n 403.

⁴¹¹ Law No. 84 of August 26, 1991, Granting General Amnesty to Crimes Committed before March 28, 1991 (Beirut: Dar al-Manshourat al-Houquouquiya-Matbaat Sader, Vol. 3), 3532.

⁴¹² *ibid.*

⁴¹³ A Kanafani-Zahar, *Liban*, (2011), 90.

Lebanon's amnesty was not met with great approval by the international community. To some, it served as a barrier to accountability and undermined the justice process.⁴¹⁴ Moreover, by failing to take action to deal with past wrongs, the regime compromised its legitimacy with respect to prosecuting present and future crimes. The law, it appeared, was not the supreme authority of the land, but rather a tool to be employed by political elites when it suited them. But in Lebanon, warring parties needed incentive to lay down arms; and after 15 years of conflict, achieving peace trumped the need for accountability.

It is debatable whether the amnesties were successful in promoting peace. In 2005, political tensions again came to a head with the assassination of Prime Minister Rafiq Hariri. Then Prime Minister Siniora requested that the UN create a tribunal of 'international character'.⁴¹⁵ The Security Council obliged, using its Chapter VII power to authorise the creation of a hybrid court in 2007 called the Special Tribunal for Lebanon (STL).⁴¹⁶ The STL, headquartered in the Netherlands, has jurisdiction only over persons connected with the 2005 assassination attempt.⁴¹⁷ Moreover, the STL may only try individuals under the Lebanese criminal code — primarily for counts of "terrorism [and] crimes and offences against life and personal integrity."⁴¹⁸

The STL was a point of political controversy in Lebanon. Initially, the Tribunal was to be created through an act of the Lebanese legislature.⁴¹⁹ However, after political deadlock within the Parliament, the Security Council acted unilaterally using its Chapter VII powers.⁴²⁰ On the one hand, this demonstrates that domestic and international actors were not on the same page; on the other hand, the Security Council's intervention may have been necessary to ease the tensions building around the deadlock.

Another area of contention is whether the STL is able to promote its goal of strengthening rule of law through accountability and judicial strength.⁴²¹ Critics have identified self-imposed challenges that jeopardise these goals. Principally, that UN involvement, including the act of circumventing the Lebanese Parliament, has sharpened political divisions within the country.⁴²² Other criticisms have focused on the Tribunal's narrow mandate and limited source-law.⁴²³ The Tribunal may only consider crimes connected to the assassination; since these do not violate international criminal law, it must apply the sections of the Lebanese Penal Code pertaining to terrorism and related offenses.⁴²⁴ Rather than having the full body of jurisprudence

⁴¹⁴ See, e.g., "Failing to Deal with the Past: What Cost to Lebanon?" *International Center for Transitional Justice*, January 2014.

⁴¹⁵ "Creation of the STL", *Special Tribunal for Lebanon*, 14 February 2005, <<http://www.stl-tsl.org/en/about-the-stl/creation-of-the-stl>>; see also 15 December 2005 in Resolution 1644.

⁴¹⁶ Security Council Resolution 1757.

⁴¹⁷ The full scope of the Tribunal's jurisdiction reads as follows: "The Special Tribunal shall have jurisdiction over persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons. If the Tribunal finds that other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date decided by the Parties and with the consent of the Security Council, are connected in accordance with the principles of criminal justice and are of a nature and gravity similar to the attack of 14 February 2005, it shall also have jurisdiction over persons responsible for such attacks. This connection includes but is not limited to a combination of the following elements: criminal intent (motive), the purpose behind the attacks, the nature of the victims targeted, the pattern of the attacks (modus operandi) and the perpetrators." Statute of the Special Tribunal for Lebanon, Section 1, art 1.

⁴¹⁸ The full text for governing legislation reads: The following shall be applicable to the prosecution and punishment of the crimes referred to in Article 1, subject to the provisions of this Statute: (a) The provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy; and (b) Articles 6 and 7 of the Lebanese law of 11 January 1958 on 'Increasing the penalties for sedition, civil war and interfaith struggle'." Statute of the Special Tribunal For Lebanon, Section 1, art 2.

⁴¹⁹ See Addendum, Report of the Secretary-General on the establishment of a special tribunal for Lebanon, S/2006/893/Add.1.

⁴²⁰ Security Council Resolution 1757.

⁴²¹ See https://www.youtube.com/watch?v=6b6LDbmqsbU&feature=share&list=UUV30kCf1LRRwKfgY8QYCe_g.

Addendum, Report of the Secretary-General on the establishment of a special tribunal for Lebanon, S/2006/893/Add.1, 4.

⁴²² M Bouhabib, *Power and Perception: The Special Tribunal for Lebanon*, Berkeley Journal of Middle Eastern & Islamic Law, Vol. 3 art 4, 204; see also "Failing to Deal with the Past: What Cost to Lebanon?", above n 591.

⁴²³ See Bouhabib above n 424.

⁴²⁴ See Security Council Resolution 1757 attachment Statute of the Special Tribunal for Lebanon.

supporting international criminal law, STL magistrates rely on Lebanese jurisprudence, which has been described as “scattered and lacking consistency,”⁴²⁵ limiting their power to administer justice effectively.

6.1.3 Egypt

The 2011 protests in Egypt led to the ousting of Hosni Mubarak, Egypt’s authoritarian ruler of three decades. The Mubarak regime was known for its suppression of dissenters, failure to respect civil and political rights, and its engagement in torture and police brutality.⁴²⁶ His democratically elected successor, President Mohamad Morsi, was also overthrown and arrested by the military after widespread protests in 2013. In both instances, Egypt’s court system has developed into the focal point for justice efforts.

In the euphoria after Mubarak’s removal from power, there was strong public support for accountability,⁴²⁷ and within three months of his deposition, Mubarak and six other members of his regime were brought to trial on charges of corruption and use of excessive force towards the 2011 protestors.⁴²⁸ Unlike the trials in Iraq or Lebanon, Mubarak was tried in a civilian criminal court under domestic law and revolutionary decree.⁴²⁹ While the judiciary was confident in this undertaking,⁴³⁰ the process progressed in fits and starts made up of several trials and retrials, issuing both guilty and innocent verdicts.⁴³¹ He has since been acquitted on most other charges, including the murder of 800 anti-regime protesters in 2011 and is now solely fighting a three-year embezzlement sentence.⁴³² This final trial was postponed from November 2015 to February 2016, and legal experts expect the verdict to be innocence.⁴³³

The court system has been less lenient with former President Morsi who received the death sentence in June 2015. Human Rights Watch considered the ruling politically motivated, saying it had compromised due process and failed to establish criminal guilt.⁴³⁴

By only adopting trials, Egypt has focused on the accountability of former regimes, while doing little to address the need for reconciliation surrounding the crimes committed during both presidencies.⁴³⁵ Given the judiciary’s capacity, charging political actors for three decades of crimes may not have been the answer.⁴³⁶ But considering the apparent influence of Egypt’s security state on rulings, judiciary capacity is unlikely to be the most significant limitation.

Early in the Morsi regime, authorities recognised the importance of uncovering the truth regarding the Government’s violence towards Egyptian protestors and attempted to establish a commission of inquiry.⁴³⁷

⁴²⁵ See Bouhabib, above n 424, 192 (quoting N Jurdi, “The Subject-Matter Jurisdiction of the Special Tribunal for Lebanon”, 5 J. INT’L CRIM. JUST. 1125, 1128 (2007)).

⁴²⁶ “Egypt Country Summary”, *Human Rights Watch*, January 2010, <http://www.hrw.org/sites/default/files/related_material/egypt_0.pdf>.

⁴²⁷ C Stanton, “Pressure builds to charge Hosni Mubarak over violence and corruption”, *The National*, 9 April 2011, <<http://www.thenational.ae/news/world/middle-east/pressure-builds-to-charge-hosni-mubarak-over-violence-and-corruption>>.

⁴²⁸ N Brown, “The Trial of the Century”, *Foreign Policy*, 3 August 2011, <<http://carnegieendowment.org/2011/08/03/trial-of-century/8kqy>>.

⁴²⁹ *ibid.*

⁴³⁰ *ibid.*

⁴³¹ D Kirkpatrick, “Mubarak Gets 3 Years for Embezzlement, and His Sons get 4”, *New York Times*, 21 May 2014, <<http://www.nytimes.com/2014/05/22/world/middleeast/hosni-mubarak-trial.html?ref=topics>>; D Kirkpatrick and M Thomas, “Egyptian Judges Drop All Charges Against Mubarak”, *New York Times*, 29 November 2014, <<http://www.nytimes.com/2014/11/30/world/hosni-mubarak-charges-dismissed-by-egyptian-court.html?ref=topics>>.

⁴³² APA, “Egypt Court Rejects Mubarak Appeal”, *Star Africa*, 12 December 2015, <<http://en.starafrica.com/news/egypt-court-rejects-mubarak-appeal.html>>.

⁴³³ M Thomas and K Fahim, “Third Trial Is Set for Mubarak in Killing of Egyptian Protestors”, *New York Times*, 4 June 2015, <<http://www.nytimes.com/2015/06/05/world/middleeast/third-trial-is-set-for-mubarak-in-killing-of-egyptian-protesters.html>>.

⁴³⁴ “Egypt: Morsy Death Sentence Follows Flawed Trials”, *Human Rights Watch*, 16 June 2015, <<https://www.hrw.org/news/2015/06/16/egypt-morsy-death-sentence-follows-flawed-trials>> at 15 December 2015.

⁴³⁵ E Wiebelhaus-Brahm, “All Retributive Justice, No Restorative Justice in the Post-Arab Spring Middle East”, *Middle East Institute*, 1, 4 March 2014.

⁴³⁶ Brown, above n 430.

⁴³⁷ M El-Shewy, “Going Grassroots: Transitional Justice in Egypt”, *Middle East Institute*, 27 January 2014,

Such fact-finding mechanisms can be instrumental in aiding victim's psychological rehabilitation,⁴³⁸ and might have offered some prospect that the state would recognise the wrongs done to the victims of the Arab Spring crackdowns. Egypt did not, however, authorise the Report's release to the public.⁴³⁹ Whether this constituted a missed opportunity or an escape from re-escalating violence will never be known.

6.1.4 Libya

Following Libya's violent crackdown on Arab Spring protestors, the International Criminal Court (ICC) began an investigation into alleged international crimes committed by the Gaddafi regime.⁴⁴⁰ The ICC investigation led to indictments against Muammar Gaddafi, Saif Al-Islam Gaddafi, and Abdulla Al-Senussi in June 2011.

The ICC, being a treaty-based court, generally only has jurisdiction over conduct occurring within the territory of a state that is party to the Rome Statute, or accused parties that are nationals of a state that is party to the Statute.⁴⁴¹ The only exception is where a situation that has been referred to it by the UN Security Council.⁴⁴² By way of Resolution 1970, the Security Council did just this.⁴⁴³ Some have described the Gaddafi indictment as an instance of Arab states being 'bullied' by more powerful states.⁴⁴⁴ Moreover, like in Egypt, the indictments only relate to the situation surrounding the 2011 crackdown and thus do not fully address Libya's violent past.⁴⁴⁵ Notwithstanding these geopolitics, the ICC can provide a venue for the administration of justice in situations where the domestic judiciary cannot. In states such as Libya, that are undergoing or emerging from violent conflict, the domestic judiciary may lack the stability, independence or qualifications to address cases involving international crime, and the ICC provides a qualified and well-funded alternative.

6.1.5 Tunisia

Of all the WANA states, Tunisia has employed the most diverse transitional justice scheme. Since the protests that led to former President Zine el-Abidine Ben Ali's abdication, Tunisia has taken several measures to address the country's history of violence and repression, including amnesties for political prisoners, domestic trials, investigatory commissions, lustration policies, a truth commission, reparations and memorialisation. Although these mechanisms have faced individual criticism, Tunisia's overall progress in promoting democracy and protecting human rights is unparalleled among the Arab Spring countries.⁴⁴⁶

Soon after the revolution, Tunisia was quick to enact restorative measures. It granted amnesties to political prisoners, and offered them compensation for their imprisonment.⁴⁴⁷ It also established two commissions, one to investigate human rights violations during the uprising, and another to investigate state corruption.⁴⁴⁸ Tunisia also took to memorialising some individuals who died during the revolution, renaming streets in their honour.⁴⁴⁹

⁴³⁸ B Hamber, "Dealing with the Past and the Psychology of Reconciliation. The Truth and Reconciliation Commission: A Psychological Perspective", *The Centre for Study of Violence and Reconciliation*, (1995) <<http://www.csvr.org.za/index.p2hp/publications/1779--dealing-with-the-past-and-the-psychology-of-reconciliation-the-truth-and-reconciliation-commission-a-psychological-perspective.html>>.

⁴³⁹ El-Shewy, above n 439.

⁴⁴⁰ E Wiebelhaus-Brahm, above n, 437, 1.

⁴⁴¹ Rome Statute of the International Criminal Court, art. 12, U.N. Doc. A/CONF.183/9 (1998) [hereinafter Rome Statute].

⁴⁴² Rome Statute, art. 13(b).

⁴⁴³ See UN Security Council resolution 1970 on 26 February 2011.

⁴⁴⁴ K Fisher, "Libya, the ICC, and Securing Post-Conflict Justice", *Middle East Institute*, 16 December 2013.

⁴⁴⁵ See UN Security Council Resolution 1970; see also Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi, International Criminal Court, ICC-01/11, June 27, 2011.

⁴⁴⁶ For an estimation of Tunisia's democratic progress, see Polity IV Country Regime Trends 2013, <<http://www.systemicpeace.org/polity/tun2.htm>>.

⁴⁴⁷ "World Report 2012: Tunisia, Human Rights Watch", available at <<http://www.hrw.org/world-report-2012/world-report-2012-tunisia>>.

⁴⁴⁸ M Voorhoeve, "Transitional Justice in Tunisia", *Middle East Institute*, 27 February 2014, <<http://www.mei.edu/content/transitional-justice-tunisia>>.

⁴⁴⁹ E Wiebelhaus-Brahm, above n 437,4.

Early in the transition, Tunisia also held domestic trials, in absentia, for Ali and some of his comrades who had fled the country. A Tunisian court found them guilty of crimes committed in connection to the Arab Spring protests, leaving them open to criticism for failing to address crimes committed during the regime's entire tenure. Such failings were addressed with the enactment of the Organic Law on Establishing and Organizing Transitional Justice (Transitional Justice Law), which among other things established specialised chambers to hear cases of human rights abuses committed during Ben Ali's presidency.⁴⁵⁰ The model has been praised for its independence and fair trial standards.⁴⁵¹ The Transitional Justice Law also established a Truth and Dignity Commission, a reparation program, and modalities for memorialisation.⁴⁵²

The Commission has significant investigatory powers. It can access relevant judicial filings; has the power to summon individuals to testify and punish those who fail to comply; can refer cases to the judiciary for human rights violations; and can take measures to protect witnesses.⁴⁵³ Most importantly, the Commission has jurisdiction to review events back to 1955.⁴⁵⁴

Although there have been back steps, Tunisia remains the most stable and democratic of the region's countries that underwent revolutions this decade. Although this distinction cannot be attributed wholly to its transitional justice program, it can be said that the program has not caused significant instability.⁴⁵⁵ There is empirical support for the proposition that countries enacting multiple mechanisms — including truth commissions, trials and amnesties — are more likely to experience improvements in human rights as well as democratisation.⁴⁵⁶ Although Tunisia's transition is not complete, it seems to be following this trend.

6.2 Considering Transitional Justice in Syria

How the Syrian conflict ends will be the principal determinant of whether and how transitional justice mechanisms will be employed. It is, however, possible to discern some of the feasibility issues and challenges that may be faced.

6.2.1 Trials

Every conflict or uprising discussed above, barring the Lebanese Civil War, was followed by a form of trial, and historically, domestic trials are the most common regional response to conflict and oppression. Other post-conflict mechanisms like truth commissions, amnesties, and lustration policies — and even hybrid and international courts — are adopted infrequently, and before Tunisia, were never employed in a holistic fashion. The recurrence and proportionality of trials may suggest that the region strongly values accountability over the other goals of transitional justice. While fair and competent trials are generally the best means to ensure accountability, they are commonly thought to run the risk of promoting political instability. Perpetrators of gross human rights violations often possess political capital and thus maintain the potential to 'spoil' a country's transition, compromising political stability and long-term peace. Trials can also face difficulty establishing an accurate national narrative, as evidentiary standards bar the inclusion of important events and aspects of the conflict.

⁴⁵⁰ See "Organic Law on Establishing and Organizing Transitional Justice English" translation at <<http://www.ohchr.org/Documents/Countries/TN/TransitionalJusticeTunisia.pdf>>.

⁴⁵¹ "Tunisia: Hope for Justice on Past Abuses", *Human Rights Watch*, 22 May 2014, <<http://www.hrw.org/news/2014/05/22/tunisia-hope-justice-past-abuses>>.

⁴⁵² See "Organic Law on Establishing and Organizing Transitional Justice" above n 452.

⁴⁵³ *ibid*; see also "Tunisia: Hope for Justice on Past Abuses", above n 628, for a summary of the Tribunal.

⁴⁵⁴ See "Organic Law on Establishing and Organizing Transitional Justice" above n 452.

⁴⁵⁵ See E Wiebelhaus-Brahm, above n 437, 3.

⁴⁵⁶ T Olsen et al, "When Truth Commissions Improve Human Rights", *International Journal of Transitional Justice*, Volume 4, Issue 3, 457-476; See also *Transitional Justice in Balance*.

- Domestic Courts

A series of well-executed domestic trials afford the opportunity, not only to hold perpetrators accountable, but also to build the Syrian public's faith in the court system and the rule of law. Moreover, bringing offenders to justice in a court setting provides recognition to victims and, in some cases, provides the only accurate narrative, which can be crucial for reconciliation.⁴⁵⁷

For domestic trials to produce such benefits, the Syrian judiciary must possess the capacity to function with independence, impartiality, stability, and be able to provide minimum fair trial protections, including the competence to deal with complex international crimes. Without this, trials may appear politically motivated, leading to instability, loss of credibility, and jeopardising any reconciliatory benefits that might have otherwise accrued. Currently, this is unlikely. The UN independent investigatory commission on Syria found that the Syrian judiciary is unwilling to initiate proceedings and does not seem capable.⁴⁵⁸ Following a cessation of hostilities, Syria will likely find itself in a similar position as Iraq, paying the price of both conflict and decades of autocratic rule.⁴⁵⁹ In Iraq, the courts were unqualified and incapable of providing fair trials;⁴⁶⁰ moreover, many legal professionals had fled into exile, and those that were available did not have the experience to prosecute international crimes.⁴⁶¹ But while domestic trials may lack feasibility in the short term, they could be pursued as a mid- to long-term objective. With sufficient reform in areas to strengthen the qualification, independence, impartiality, and thoroughness of the judiciary, holding domestic trials might be a realisable aim. Victims may, however, call for justice earlier than the Syrian judiciary can provide it. In this case, other forums for accountability need to be considered.

- International Courts

The ICC is the primary forum for international criminal accountability.⁴⁶² It is a court of special jurisdiction, meaning it is limited in the claims that it can hear.⁴⁶³ The ICC can only review situations concerning the most serious international crimes: genocide, crimes against humanity, war crimes, and the crime of aggression.⁴⁶⁴ Moreover, such review can only extend to events occurring after the Rome Statute's entry into force on 1 July 2002.⁴⁶⁵ It can take up a case only if the alleged crime occurred on the territory of a member-state, where the accused is a citizen of a member-state, or where the situation is referred by the Security Council.⁴⁶⁶

Given this limited purview, it is unlikely that the Court will be able to secure jurisdiction over the Syrian situation, notwithstanding the substantial evidence of international crimes.⁴⁶⁷ Syria is not party to the Rome Statute,⁴⁶⁸ and in May 2014, China and Russia vetoed a draft resolution to refer the conflict to the ICC.⁴⁶⁹

⁴⁵⁷ The reconciliatory benefits of establishing an accurate narrative is typically employed as a key justification for truth commissions, but the same reasoning applies, to an extent, to trials. Hamber, above n 440.

⁴⁵⁸ United Nations Human Rights Council, Report of the independent international commission of inquiry on the Syrian Arab Republic, *OHCHR*, Annex XIV, A/HRC/22/59, February 5, 2013, <<http://www.ohchr.org/EN/HRBodies/HRC/IIICISyria/Pages/IndependentInternationalCommission.aspx>>; For international fair trial standards, see art 14 and 15 of the International Covenant on Civil and Political Rights.

⁴⁵⁹ "Iraq: Justice needs international role", *Human Rights Watch*, 14 July 2003, <<https://www.hrw.org/news/2003/07/14/iraq-justice-needs-international-role>>.

⁴⁶⁰ *ibid.*

⁴⁶¹ *ibid.*

⁴⁶² The creation of the ICC was facilitated by the UN to alleviate the need for ad hoc criminal tribunals, such as the International Criminal Tribunals for the Former Yugoslavia or Rwanda. Seated in The Hague, the ICC was the first permanent treaty-based court, receiving its authority from the Rome Statute.

⁴⁶³ The ICC's jurisdiction can be contrasted with domestic courts, which are typically courts of general jurisdiction—that is to say domestic courts are typically without restrictions on the types of claims they can review.

⁴⁶⁴ Rome Statute of the International Criminal Court, art 5 (1), available at http://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

⁴⁶⁵ Rome Statute of the International Criminal Court, art 11.

⁴⁶⁶ *ibid* art 12 & 13.

⁴⁶⁷ For most recent UN investigatory report on international crimes in Syria, see Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G15/019/37/PDF/G1501937.pdf?OpenElement>>.

⁴⁶⁸ See ICC Website: "Asian Parties to ICC".

This leaves the door to the ICC open only a narrow margin; it could exercise jurisdiction over the foreign nationals involved in the conflict who are citizens of state-members. However, it is unlikely that these individuals occupy high-level positions, leaving the ICC unable to administer justice against those most culpable.

- **Hybrid Courts**

Although *ad hoc*, hybrid courts incorporate national and international elements to address the specific needs of a situation. These tribunals may be implanted within the pre-existing judicial establishment or housed external to the state. They can administer justice under either international or national legal norms, or in some instances try cases under both. A hybrid court may be able to overcome certain deficiencies that hinder effective domestic prosecutions. Hybrid courts are supported by the international community, and are typically staffed with qualified international professionals in addition to nationals, potentially overcoming issues related to independence, impartiality, qualification and experience.

Establishing a hybrid court in Syria faces difficulties similar to those associated with an ICC referral. Since most parties engaged in the Syrian conflict have been accused of international crimes, it is unlikely that a future authority will feel confident to not be implicated, making Syrian authorisation of a tribunal unlikely. Without state authorisation, the only possibility is Security Council approval, and as discussed above, a vote in favour of a tribunal is unlikely.

The wholesale building of a judicial institution also poses logistical difficulties. For domestic or ICC trials, there is an existing framework, whereas in the case of a hybrid tribunal, everything from the legal foundation to personnel recruitment and facilities acquisition must be conceived, funded and implemented anew.⁴⁷⁰

6.2.2 Amnesties

On the spectrum of transitional justice mechanisms, amnesties stand opposite trials: while trials provide accountability and retribution potentially at the expense of peace and political stability, amnesties sacrifice accountability to ensure peace and political stability, at least in the short term. A state might grant an amnesty for past atrocities to entice armed militant groups to lay down arms or to suppress spoilers who are in a position to disrupt the transition or post-conflict stability.⁴⁷¹ Thus, while amnesties grant perpetrators impunity, they can offer an afflicted society peace, and even (albeit limited) recognition of perpetrators' wrongdoings.

The obvious trade-off in granting amnesties is that it forecloses the option of holding trials.⁴⁷² This trade-off reflects a persistent debate in transitional justice over the role of peace versus justice.⁴⁷³ Some claim that justice should be the primary aim, and that accountability is necessary to discourage vengeance, deter future offenders, and marginalise the elites who perpetuate conflict.⁴⁷⁴ Others claim that this overlooks political realities on the ground⁴⁷⁵ and that peace must take precedence over justice.⁴⁷⁶ Moreover, that justice can only be administered on the back of successful peace and democracy, because trials are effective in deterring

⁴⁶⁹ Security Council Resolution S/2014/348, 22 May 2014.

⁴⁷⁰ See the "Report of the independent international commission of inquiry on the Syrian Arab Republic", above n 635.

⁴⁷¹ A Reiter, "Amnesty for Peace? Analyzing the Impact of Amnesties in Civil Wars", *Mount Holyoke College*, November 2011, <http://law.huji.ac.il/upload/11_ReiterAndrew.pdf>.

⁴⁷² This is true short-term, but there are cases where amnesties have been overturned to hold trials, notably in South America, see Argentina and Chile. See P Hayner, "Negotiating Justice: Guidance for Mediators", *Geneva: Humanitarian Dialogue Centre*, 2009, 9, www.hdcentre.org/files/negotiating%20justice%20report.pdf.

⁴⁷³ There are many arguments for prioritizing justice regardless in all political climates, and these arguments range from qualitative arguments to quantitative to moral. For a general overview of this debate, see O Thoms, J Ron, and R Paris, "The Effects of Transitional Justice Mechanisms", April 2008, <http://aix1.uottawa.ca/~rparis/CIPS_Transitional_Justice_April2008.pdf>.

⁴⁷⁴ *ibid.*

⁴⁷⁵ *ibid.*

⁴⁷⁶ *ibid.*

violence only if spoilers do not pose a threat.⁴⁷⁷ In other words, if the country deteriorates into violence, there will not be sufficient stability for just and fair trials to take effect. Regardless of the position held, most agree that an effective transitional justice program must be crafted in response to contextual realities. An extremely precarious political climate may necessitate amnesties, whereas in other instances, political stability may be strong enough for a country to accrue the benefits, in terms of peace and democracy, of trials.

In Syria, the decision to adopt amnesties should reflect, perhaps more than in the case of other mechanisms, the outcome of the conflict. It is possible that amnesties will be offered as a package in future peace negotiations. For warring parties, if the alternative to fighting is facing the death penalty under the opposing party's regime, then neither party will have a great incentive to lay down arms. Since both the Assad regime and several opposition groups have been accused of war crimes,⁴⁷⁸ there is the added risk of prosecution if either party loses. Amnesty may thus prove to be the most potent negotiation asset.

It must also be highlighted that although amnesties will make domestic trials difficult in the future, they do not wholly foreclose the possibility. Amnesties granted to former regime members in both Chile and Argentina have been overturned. In Argentina, they were struck down by the country's high court, while in Chile courts refused to enforce the amnesty legislation.⁴⁷⁹ Amnesties may thus be a temporary instalment to promote stability during judicial reforms that are then set aside to make way for greater accountability.

As a final point on amnesties, some argue that states have an obligation under international law to prosecute certain international crimes.⁴⁸⁰ The scope of crimes for which this duty ostensibly exists is narrow.⁴⁸¹ Given the information that has emerged from the conflict,⁴⁸² Syria's duty to prosecute will most likely come into play only with respect to cases of torture. The Convention Against Torture, to which Syria is a party, requires that states make acts punishable by "appropriate penalties which take into account their grave nature."⁴⁸³ Syria's international obligations might thus limit the scope of an amnesty, but certainly not for the majority of crimes.

⁴⁷⁷ *ibid.*

⁴⁷⁸ N Cummin-Bruce, "U.N. Condemns Both Sides in Syria for Attacking Civilians", *New York Times*, 23 June 2015, <http://www.nytimes.com/2015/06/24/world/middleeast/un-condemns-both-sides-in-syria-for-attacking-civilians.html?ref=middleeast&_r=1>.

⁴⁷⁹ "Argentina: Amnesty Laws Struck Down", *Human Rights Watch*, 14 June 2005, <<http://www.hrw.org/news/2005/06/14/argentina-amnesty-laws-struck-down>>; B Lee, "Chile Moves To Overturn Pinochet-Era Amnesty Law", *International Business Times*, 12 September 2014, <<http://www.ibtimes.com/chile-moves-overturn-pinochet-era-amnesty-law-1687092>>.

⁴⁸⁰ See Hayner, above n 486.

⁴⁸¹ Often cited sources of this obligation are the 1949 Geneva Conventions, the Genocide Convention of 1948, the Convention Against Torture, and Customary International Law. See M Scharf, "The Letter of the Law: The Scope of the International Legal Obligation to Prosecute", *Law & Contemp Problems*, 1996, 41, 59. In the case of Syria, several of these sources do not apply. The Geneva Conventions only address international conflicts, and although Syria is a signatory to the Conventions, the conflict has thus far been internal. *Ibid.*; I Hurd, "Saving Syria: International law is not the answer", *Al Jazeera*, <<http://www.aljazeera.com/indepth/opinion/2013/08/2013827123244943321.html>>. Thus any duty to prosecute crimes under the Geneva Conventions would not apply to Syria. Additionally, the Convention on Genocide only applies to national, ethnical, racial, or religious group, and it specifically excludes actions towards political groups. Since the Syrian conflict has begun, strong evidence of genocide has not emerged outside of the actions of the Islamic State and similar radicalized groups. Moreover, it does not appear that there is a customary international law duty to prosecute. Customary international law comes to exist through widespread and consistent state practice that arises from a sense of legal obligation. M Scharf, "The Letter of the Law: The Scope of the International Legal Obligation to Prosecute", *Law & Contemp Problems*, 1996, 41, 59. However, with the prevalence of amnesties offered in response to past conflict, the "practice" of prosecuting international crimes is not sufficiently widespread or consistent among states to qualify as international law. Where Syria will likely have the strongest obligation to prosecute are in cases of torture, which is discussed outside this footnote in the body of the text above.

⁴⁸² "Monitor: Nearly 13,000 tortured to death in Syria", *Syrian Observatory for Human Rights*, 14 March 2015, <<http://www.syriahr.com/en/2015/03/monitor-nearly-13000-tortured-to-death-in-syria/>>.

⁴⁸³ Art 4, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Assembly Resolution 39/46, 10 December 1984, <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>>.

6.2.3 Truth Commissions

Comparatively, truth commissions take a different approach to the goals of transitional justice than trials and amnesties by prioritising the reconciliatory benefits of truth and a common narrative.⁴⁸⁴ They subscribe to the philosophy that understanding the past will help achieve a more stable and peaceful future,⁴⁸⁵ and that victims gain psychological benefits from retelling their story⁴⁸⁶ (although many psychologists strongly dispute this).⁴⁸⁷

They are also introduced to address situations where information about an atrocity is difficult to obtain, either intentionally or incidentally. While trials also uncover facts, they rarely provide a comprehensive picture of a situation as they typically create a narrative only sufficient to validate the guilt or innocence of a particular party. Moreover, trials are bound by evidentiary rules and the scope of the case at hand. Truth commissions do not face such restrictions, and although they often lack the compulsory powers of trials, they are not limited to specific cases and can approach a situation holistically. Truth commissions can thus identify systemic issues and patterns of wrongful conduct. Taking advantage of this thoroughness, commissions often make recommendations for state improvements and reform.⁴⁸⁸

A truth commission may be a feasible mechanism for Syria to achieve important reconciliatory goals. The conflict has already created a situation of undeniable atrocity. The Assad regime has been accused of torture, inhumane prisoner treatment and disappearing persons.⁴⁸⁹ Putting together a commission may shed light on the nature and extent of these acts. Moreover, if trials are not possible, a commission may be a means to recognise fault without risking instability.

6.2.4 Lustration Programmes

Lustration is the systematic vetting and removal of individuals in government positions who are implicated in the wrongdoings of a former regime. These programs are most common following authoritarian rule where large numbers of government officials are complicit in atrocities or corruption. The rationale is that in such situations every responsible individual cannot be tried. Thus to ensure that history does not repeat, these officials are barred from holding office in the new regime.

The need to remove individuals from public office must be balanced against the importance of qualified and experienced individuals to successfully run the new state. In this respect, there are several important parallels between pre-conflict Iraq and the Syria situation. The most obvious is that the Ba'ath party, led by Assad, occupies a similar position in Syria to that in Iraq under Saddam.⁴⁹⁰ Many government positions in Syria are only available to those with Ba'ath party membership.⁴⁹¹ Accordingly, party members, both culpable and non-culpable for the atrocities of the Assad regime, pervade the ranks of the Syrian Government. Removing all government officers with party affiliation will not only devastate what is left of current government operations in Syria but will do injustice to those members not involved in atrocities. To avoid this course, Syria would have to adopt open and well-defined criteria for disqualification from public service, rather than

⁴⁸⁴ A truth commission, as defined by transitional justice expert Pricilla Hayner, is any "official bod[y] set up to investigate a past period of human rights abuses or violations of humanitarian law P Hayner, "Fifteen Truth Commissions - 1974 to 1994: A Comparative Study", *Human Rights Quarterly*, (1994), 16(4), 597, 598.

⁴⁸⁵ See, e.g., J Gibson, "Overcoming Apartheid: Can Truth Reconcile a Divided Nation?", *Politikon*, (November 2004), 31(2), 129–155, at 1.

⁴⁸⁶ See, e.g. Hamber, above n 440.

⁴⁸⁷ For evidence that testifying does not lead to reconciliation see D Stein et al "The Impact of the Truth and Reconciliation Commission on Psychological Distress and Forgiveness in South Africa", *Social Psychiatry Psychiatric Epidemiology*, June 2008; 43(6): 462–468, <<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3222912/>>.

⁴⁸⁸ For example, see the mandate of the Tunisian Truth and Dignity Commission. Organic Law on Establishing and Organizing Transitional Justice; See also, e.g., Final Report of the South African Truth and Reconciliation Commission, <<http://www.justice.gov.za/trc/report/>>.

⁴⁸⁹ I Plis, "Evil Faces Evil As ISIS Uncovers Assad's Torture Prison", *The Daily Caller*, 28 May 2015, <<http://dailycaller.com/2015/05/28/evil-faces-evil-as-isis-uncovers-assads-torture-prison/>>; "28,000 Syrians disappeared since start of anti-Assad protests, rights groups say", *Haaretz*, 18 October 2012, <<http://www.haaretz.com/news/middle-east/28-000-syrians-disappeared-since-start-of-anti-assad-protests-rights-groups-say-1.470764>>.

⁴⁹⁰ "Profile: Syria's ruling Baath Party", *BBC*, 9 July 2012, <<http://www.bbc.com/news/world-middle-east-18582755>>.

⁴⁹¹ *ibid.*

focusing on party affiliation. Ultimately, the possibility of lustration in Syria will rely heavily on the outcome of the conflict. In Iraq, the de-Ba'athification program followed the collapse of the Hussein regime, but if the Assad regime retains political influence at the end of the Syrian conflict, such a program will be unlikely.

6.2.5 Reparation Programmes

In large part, the transitional justice mechanisms considered above take a perpetrator-centred approach — even truth commissions focus on detailing the wrongs committed by the former regime. Conversely, reparations programs focus solely on victims by compensating them or their families for wrongs committed by a former regime. The payment of reparations, even if only symbolic, acknowledge that a wrong was committed as well as the status of the victim as the result of that wrong. However, with the devastation to infrastructure and public holdings, the capacity of a future Syrian government to pay reparations will likely be severely limited.⁴⁹² Moreover, the cost of reparations payments must be weighed against other uses of funds such as health and education provisions, job creation and re-housing — all actions that can reinforce a fledgling peace.

6.2.6 Memorialisation

Memorialising victims is another way for a new regime to overcome the past. Memorialisation helps engrain the victims of atrocity in the public consciousness and is a way to recognise a society's gratitude to those who gave their lives to ensure a more just and peaceful future. Memorialisation on its own is generally not sufficient to address the needs of afflicted communities,⁴⁹³ but when coupled with other programs can demonstrate a new regime's commitment to righting the wrongs of the past.

6.3 Features of a Meaningful Transitional Justice Discussion

From the forgoing, certain topics arise that should inform future discussions on transitional justice in Syria: the importance of a domestic approach; the influence of Islamic legal norms and tribal justice; mechanism viability; and the advantages of a holistic approach.

6.3.1 A Domestic Approach

Domestic sentiment should lay the foundation for any transitional justice program. Ceding to, or appearing to cede to, the interests of donors or international actors will diminish legitimacy. Equally, if the new regime is disinterested in transitional justice, it will be difficult for the program to operate effectively. It is thus important to gauge public opinion through consultation and by incorporating local actors into decision making from the first possible opportunity. It is important to note that transitional justice is often a polarising topic and that various groups may demand different or conflicting programs. This also raises the importance of managing expectations about the goals and intended results of any transitional justice mechanism.

6.3.2 Islamic Legal Norms

As a cornerstone of Muslim identity,⁴⁹⁴ Islamic legal norms will shape many individuals' perspectives towards the implementation of transitional justice in a post-conflict Syria. *Shari'a* principles significantly coincide with international notions of the rule of law, most notably the supremacy of law, equality before the law, no immunity from mandatory legal principles, prohibition on illegal use of force, and equitable dispute resolution.⁴⁹⁵ Moreover, Islamic law promotes the rights of victims, providing them the right to truth,

⁴⁹² D Arnold, "UN Experts Estimate Syrian Reconstruction at \$80 Billion - So Far", *Voice of America*, 1 July 2013, <<http://www.voanews.com/content/un-experts-estimate-syria-reconstruction-at-80-billion-dollars-so-far/1693004.html>>.

⁴⁹³ See the case of Tunisia; id.

⁴⁹⁴ S Azar et al, "Analyzing Post-Conflict Justice and Islamic Law", *United States Institute of Peace*, 23 March 2011, 2.

⁴⁹⁵ "Islamic Law, The Rule of Law, and International Peace Operations", *ZIF Conference Report*, 3 March 2012.

accountability, and compensation,⁴⁹⁶ thereby providing a strong foundation in support of transitional justice and its goals. Given these commonalities it might seem surprising that — outside of the recent Arab uprisings — transitional justice has been relatively absent in the region (however this may be attributed more to weak governance and the rule of law than incompatibility with Islamic norms).⁴⁹⁷ A more significant barrier is that transitional justice efforts are often perceived as ‘Western’ and hence un-Islamic.⁴⁹⁸ If these challenges can be overcome, however, Islamic legal norms have the potential to become a normative foundation for transitional justice in the WANA region.

6.3.3 Tribal Justice Norms

Historically, tribal values have had a strong influence on the political culture of the Middle East.⁴⁹⁹ Tribal values encourage accountability and refuse impunity, and these may be seen as playing out in recent conflicts.⁵⁰⁰ In many of the uprisings, attacks on military and intelligence forces were justified on the basis that members were committing abuses with impunity. There are also tribal overtones; a Syrian tribal leader was reported saying, “If one of the tribe is shot by a member of the security services and the killer is not properly punished by the government, then another security man will be killed to settle the score. It’s simple: an eye-for-an-eye.”⁵⁰¹ Given the close relationship between Arab culture and tribal norms, and the importance of incorporating domestic perspectives into post-conflict justice discussions, steps taken in response to past atrocity will probably be better received if the focus is placed on accountability.

6.3.4 Assessing the Limits of Mechanism Viability

A crucial element of transitional justice planning is the identification of broad contextual factors that will limit the adoption of various mechanisms. In addition to shortcomings specific to individual justice apparatus, the availability of funding can restrict the adoption or efficacy of mechanisms from domestic trials to truth commissions and reparations. Additionally, the scope of the past atrocity brings capacity issues to the fore. In post-2011 Egypt, the extent of corruption was so severe that one judge remarked that if all of the corruption cases were pursued at once, half of the county would be trying the other.⁵⁰² Although read hyperbolically, this statement reflects a task no judiciary could comprehensively tackle. If the scope of the project is unattainable, more realistic goals must be considered in its stead.

The conflict outcome will also have a substantial impact on the feasibility of different transitional justice mechanisms. In the case of a negotiated ceasefire, the leaders of all parties involved will have a significant interest in securing amnesties and some form of political power, making prosecutions difficult. Similarly, if one party that has committed atrocity emerges with control of the country, impunity will likely follow — although they may prosecute the losing parties. Only in the case of a third-party intervention is there a higher chance that accountability will be pursued universally across all culpable parties.

⁴⁹⁶ S Azar, above n 496, 2; “Islamic Law, The Rule of Law, and International Peace Operations”, above n 230.

⁴⁹⁷ S Azar, above n 496, 2.

⁴⁹⁸ id.

⁴⁹⁹ K Fattah, “Tribes and Tribalism in the Arab Spring”, *Yemen Times*, 26 April 2012, <<http://www.yementimes.com/en/1567/variety/760/Tribes-and-tribalism-in-the-Arab-Spring.htm>>; C O’Leary and N Heras, “Syrian Tribal Networks and their Implications for the Syrian Uprising”, *Terrorism Monitor Volume: 10 Issue: 11*, 1 June 2012,

<http://www.jamestown.org/single/?no_cache=1&tx_ttnews%5Btt_news%5D=39452#.VYqPCc5drGo>.

⁵⁰⁰ P Sands, “Tribal justice blamed for deaths of 120 Syrian police and soldiers”, *The National*, 17 May 2011,

<<http://www.thenational.ae/news/world/middle-east/tribal-justice-blamed-for-deaths-of-120-syrian-police-and-soldiers>>; See also a case in Iran where a man was sentenced to being blinded after blinding a fellow citizen with acid, literally a manifestation of the adage “an eye-for-an-eye.” “Iran: Man forcibly blinded in one eye in ‘unspeakably cruel’ retribution punishment”, *Amnesty International*, 5 March 2015, <<https://www.amnesty.org/en/latest/news/2015/03/iran-eye-for-an-eye-acid-retribution/>>.

⁵⁰¹ Sands, above n 502.

⁵⁰² Brown, above n 430.

6.3.5 Holistic Approach

Many experts consider transitional justice mechanisms most effective when employed concurrently. Thus a set of mechanisms, often including trials, a truth commission, lustration and reparations, is thought to be preferable to any single mechanism.⁵⁰³ This holistic approach is advocated by both the International Center for Transitional Justice⁵⁰⁴ and the United Nations.⁵⁰⁵ As mentioned, certain mechanisms can obstruct one another. In the case of trials and amnesties, those who are granted pardon cannot be immediately prosecuted. But this does not mean that the two mechanisms cannot be employed together systematically. For example, a state may choose to prosecute high-level offenders, while offering amnesties to low-level offenders — either to prevent court crowding or to encourage them to act as informants. A holistic approach to transitional justice in Syria would involve considering, first which mechanisms are feasible, and then which set in combination, is most likely to achieve the desired goals.

6.4 A Syrian Approach to Transitional Justice

“As long as the regime falls, that is their punishment. That is justice.”

– *Syrian male refugee, Za’atari camp*

The following points are based on a series of focus group discussions with Syrian refugees in Jordan. Albeit not perfectly representative, they paint a Syrian picture of a meaningful transitional justice process in a post-conflict Syria.

- **Justice as a prerequisite for return:** For many Syrians, return hinges on security and the rule of law, but for others it depends on justice. For interviewees holding this latter view, such justice minimally requires the fall of the Assad regime.⁵⁰⁶ This position could be interpreted as a rule of law and security concern, i.e. respondents doubting the regime’s ability to govern and offer security in the aftermath of fighting. However, given the limited faith Syrians voiced in any governance alternative,⁵⁰⁷ accountability is a likely principal motivation. Male interviewees were significantly more likely to consider regime change a prerequisite for return, and males in urban settings were more dogmatic in their insistence than those in camps.⁵⁰⁸
- **Trials:** Whether or not it was their first priority, most interviewees considered justice an important step to reforming the Syrian state,⁵⁰⁹ and trials as a key component of such justice.⁵¹⁰ It should be

⁵⁰³ See P. Seils, “Towards a Transitional Justice Strategy for Syria, International Center for Transitional Justice”, September 2013, <https://www.ictj.org/sites/default/files/ICTJ-Syria-Analysis-2013_0.pdf>; Annex XIV, 4th Report of Commission of Inquiry on Syria, A/HRC/22/59, <<http://www.ohchr.org/EN/HRBodies/HRC/IIICISyria/Pages/IndependentInternationalCommission.aspx>>.

⁵⁰⁴ Ibid.

⁵⁰⁵ “Report of the Secretary-General, The rule of law and transitional justice in conflict and post-conflict societies”, *United Nations Security Council, S/2004/616*, 23 August 2004.

⁵⁰⁶ Focus groups included only Sunni Arab Syrians, mostly from Dara’a, Homs, and Riif Damashq. The groups comprised of two all-male sections and two all-female sections in Jarash, Mafraq and Zaatari Refugee Camp and were conducted 10-11 April 2016.

⁵⁰⁷ Less than a fifth Syrians surveyed viewed the opposition coalition as representing their interests and over a quarter said no party represents them. “TDA Survey: Negotiating a Political Solution in Syria”, The Day After Project, “15 July 2016, <http://tda-sy.org/negotiating_survey/?lang=en>, 15.

⁵⁰⁸ Interviewees from Zaatari were generally more reactionary and passive than those living outside of camps, perhaps suggesting that lack of autonomy characteristic of life in a restricted camp setting has constrained their hopes and expectations.

⁵⁰⁹ “Pilot Survey on Transitional Justice”, The Day After Project, 11 January 2015, <http://tda-sy.org/pilot_survey_on_tj/?lang=en>, 14.

⁵¹⁰ For Syria’s Arab Sunnis, trials for war criminals and ending criminal impunity are the top priorities whereas Kurdish and Alawi Syrians specified human rights as their first concern; *ibid* 13.

kept in mind, however, that familiarity with trials might belie their popularity, as opposed to a reasoned preference.⁵¹¹

- **Hybrid verses domestic trials:** Interviewees voiced near-unanimous approval of trials for regime decision-makers and suspects of war crimes on all sides. Consistent with other studies, trials in specifically designed national tribunals administered by Syrians were preferred over state courts.⁵¹² Respondents referenced the judiciary's legacy of corruption and bias as well as the history of regime impunity. In terms of a national tribunal's legal standards, a plurality preferred *shari'a* with some supporting either direct implementation of international standards or a combination of Syrian national and international codes.⁵¹³ A specific point of departure between respondents' preference and international standards was execution; capital punishment was greatly favoured.⁵¹⁴
- **Objects of accountability:** Interviewees widely acknowledged that standard acts of war (i.e. killing of combatants) were not the root of injustice; instead, it was torture and the killing of civilians that demands reckoning: "I served in the army, so I know war. It is kill or be killed. This is how it goes. And so I can forgive the man who killed my son. My son was a soldier. This is war. But I could not forgive someone who violated my wife or daughter". Male interviewees were largely focused on crimes of the regime compared to Daesh and the 'fourteen' (referring to the violent sectarian groups in general). Women articulated greater interest in punishing Daesh, Jabhat al-Nusra and their ilk.
- **Amnesty:** Consistent with their broad insistence on accountability, interviewees reported an inability to forgive the Assad regime, the intelligence and members of the *shabiha*. As one female interviewee stated: "Snipers are killers they are not soldiers. They cannot be forgiven." There was a coinciding belief that low level fighters and conscripts on both sides should not be considered for amnesty. There was still, however, broad consensus that forgiveness was a necessary step in any future Syria.
- **Truth commissions:** The value of truth committees was widely recognized,⁵¹⁵ however less for their psychological benefits than fact-finding function. In particular, interviewees wanted to learn the fate of disappeared family members. Several noted a willingness to accept truth even if this meant forgoing revenge. Female interviewees placed less importance on dealing with past wrongdoings and more emphasis on moving forward. While they hoped for criminal prosecutions and accountability, concern for their children's futures was more important. As one woman stated: "We must forgive. Otherwise one hand strikes and the other hand strikes back."
- **Lustration:** Interviewees were conspicuously aware of the distinction between those orchestrating the war and those following orders. As one female stated: "We need to punish those in control, Daesh, Russia, the regime, but those low level in the army were just doing their job. Their job is war." Thus while desire for accountability may create pressure for broad lustration, this understanding shows a logical foundation from which to encourage a more limited, customised vetting initiative conducive with maintaining security sector functionality.
- **Reparations:** Except in regards to loss of property and ability of work, interviewees broadly considered financial compensation an inadequate justice alternative. For human loss, accountability was critical.⁵¹⁶ Memorialisation was not a priority for interviewees.

⁵¹¹ To help mitigate this factor, we encouraged focus group participants to carefully reflect upon types of transitional justice mechanisms (first explained to the group) before sharing their opinions.

⁵¹² The Day After project gathered more thorough data on preferred trial type. Trials in traditional state courts received very little support, with zero support from Kurdish respondents (Kurds favoured special or permanent international tribunals); *ibid* 14-15.

⁵¹³ The Day After Project notes that this latter option is not "strongly opposed" by Arab Sunnis, but 17.6 percent rejected it outright; *ibid* 16.

⁵¹⁴ The Day After Project encountered opposition to justice programs without capital punishment; *ibid*.

⁵¹⁵ Alawis expressed wariness regarding public hearings. "Pilot Survey on Transitional Justice", above n 124, 26.

⁵¹⁶ *ibid* 15.

7. Conclusion

Contingency planning for post-conflict Syria is constrained by a limited understanding of how the post-conflict environment will take form. Nonetheless, given the fragility of any post-conflict period, planning must pre-empt the calm. Any reconstruction context needs rapid and well-thought out measures to re-establish rule of law; account for vacuums in civil registration; handle HLP issues; conduct SSR and DDR; and implement appropriate transitional justice mechanisms. The preceding chapters underscored the general importance of quick wins, custom responses to local contexts, inclusivity, and evidence-based decisions. Here, we reiterate the need to integrate planning across sectors.

While this report is broken down into thematic chapters as an organisational tool, siloed thinking and actions in post-conflict Syria will cripple efforts to rebuild Syria. When reconstruction moves forward, it should remain centrally coordinated, even if delegated amongst diverse reconstruction actors. To limit overlapping mandates or efforts at cross purposes and ensure complementary implementation, centralised monitoring and evaluation for all areas of reconstruction is necessary. Moreover, within each area, responsibility should be turned over to national or local leadership in full or in partnership at the earliest possible time to encourage and ensure government legitimacy, functionality, and accountability. This will be vital for future Syrian resilience and sustained peace.

These specific recommendations are to be implemented alongside well-understood best practices for post-conflict reconstruction. Collecting information on claims and identity documentation, community sentiments regarding specific initiatives, and damage inflicted by conflict, will all be a preliminary foundation to well-structured planning. This information can help international efforts to determine the level of funding needed and commit to the protracted, open-ended investment required for reconstruction assistance to be effective. Meanwhile, efforts to empower Syrians, both in Syria and displaced beyond its borders, with knowledge of their rights, responsibilities, and the general reconstruction developments can protect vulnerable groups and inform expectations.

While good governance is requisite for Syria's long term stability, short term demands are rule of law, security, and basic infrastructure and services. In addition to immediate deployment of peacekeepers, standard police activities must continue and basic justice mechanisms resumed as soon as possible. Immediate physical reconstruction must prioritise public services, infrastructure, and explosive ordinance clearance, in addition to providing reintegration for former combatants, and shelter for returnees and IDPs (whether displaced by conflict or not). Even if full disarmament must probably be delayed, weapons arsenals must be secured and supply routes interrupted and consolidated.

Albeit not as immediately urgent, Syria's long term conflict resilience will require systemised governance, liberalised institutions and greater protection of human rights. Broader justice sector reform can promote judicial independence within a system of checks and balances. Furthermore, legal reforms must be substantiated via broader coinciding social initiatives that encourage pluralism, tolerance, and reconciliation.

This report presents a plan for a post-conflict Syria in five thematic areas, and its recommendations should be implemented when peace has finally been brokered. However, laying the groundwork for a sustained Syrian peace must precede peace itself; this work must start now.



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