

COMPENDIUM ON POLITICAL REGRESSION & TRANSITIONAL JUSTICE PROCESSES

**Lessons Learned &
Strategies for Engagement**



GIJTR

Global Initiative for Justice,
Truth & Reconciliation

ACKNOWLEDGEMENTS

This compendium was edited and compiled by Ismene Zarifis, on behalf of the Global Initiative for Justice, Truth and Reconciliation (GIJTR), with input and contributions from, The Center for the Study of Violence and Reconciliation, Public International Policy Group (PILPG), and The International Coalition of Sites of Conscience. GIJTR wishes to thank all practitioners who provided information for this compendium through interviews.



ABOUT THE GLOBAL INITIATIVE FOR JUSTICE, TRUTH, AND RECONCILIATION

Around the world, there are increasing calls for justice, truth, and reconciliation in countries where legacies of gross human rights violations cast a shadow on transitions from repressive regimes to participatory and democratic forms of governance. To meet this need, the International Coalition of Sites of Conscience (ICSC or the Coalition) launched the Global Initiative for Justice, Truth, and Reconciliation (GIJTR) in August 2014. GIJTR seeks to address new challenges in countries in conflict or transition that are struggling with legacies of or ongoing gross human rights abuses.

The Coalition leads GIJTR, which includes eight other organizational partners: American Bar Association Rule of Law Initiative, United States; Asia Justice and Rights (AJAR), Indonesia; The Centre for the Study of Violence and Reconciliation (CSV), South Africa; Documentation Center of Cambodia, Cambodia; Due Process of Law Foundation, United States; Fundación de Antropología Forense de Guatemala, Guatemala; Humanitarian Law Center (HLC), Serbia; and Public International Law & Policy Group (PILPG), United States. In addition to leveraging the expertise of GIJTR members, the Coalition taps into the knowledge and longstanding community connections of its 300-plus members in 65 countries to strengthen and broaden GIJTR's work. GIJTR partners, along with members of the Coalition, develop and implement a range of rapid-response and high-impact program activities, using both restorative and retributive approaches to justice and accountability for gross human rights violations. The expertise of the organizations under GIJTR includes the following:

Truth-telling, reconciliation, memorialization, and other forms of historical memory

Documenting human rights abuses for transitional justice purposes

Forensic analysis and other efforts related to missing and disappeared persons

Victims' advocacy, such as improving access to justice, psychosocial support, and trauma mitigation activities

Providing technical assistance to and building the capacity of civil society activists and organizations to promote and engage in transitional justice processes

Reparative justice initiatives

Ensuring gender justice in all these processes

To date, GIJTR has led civil society actors in multiple countries in the development and implementation of documentation and truth-telling projects; undertaken assessments of the memorialization, documentation, and psychosocial support capacities of local organizations; and provided survivors in Asia, Africa, and the Middle East and North Africa regions with training, support, and opportunities to participate in the design and implementation of community-driven transitional justice approaches. Given the diversity of experience and skills among GIJTR partners and Coalition network members, the program offers post-conflict countries and countries emerging from repressive regimes a unique opportunity to address transitional justice needs in a timely manner, while promoting local participation and building the capacity of community partners. Since its founding, GIJTR has engaged with people from 78 countries, worked with 801 civil society organizations (CSOs), and has supported 588 community-driven projects and the collection of more than 8,800 testimonies of human rights violations.

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INTRODUCTION TO THE COMPENDIUM ON POLITICAL REGRESSION

Why Was the Compendium Developed?

Since 2014, the Global Initiative for Justice, Truth and Reconciliation (GIJTR) has worked with its local partners across 72 contexts to ensure civil society and local communities have a strong voice and influence within national transitional justice processes. Of late, GIJTR has identified a global trend wherein the human rights situation in several country contexts in which it operates have “regressed,” characterized by a rise in authoritarianism and decline in respect for human rights; increasing political instability; excessive controls and closing of civic space; and growing marginalization and intolerance that has resulted in a recurrence of grave human rights violations.

Based on their work in the field, GIJTR Consortium partners identified four key typologies characterizing this regressive trend: unconstitutional grabs of power; eruptions of violence; counterrevolutions; and a lack of political will to transitional justice commitments. This compendium was born from the belief that further inquiry and analysis of these typologies and country contexts is needed to ensure the continuity of these transitional justice processes while identifying lessons learned, potential mitigation strategies, and recommendations for countries facing similar challenges. On this basis, the International Coalition of Sites of Conscience (ICSC) led this initiative together with its partners, the Public International Policy Group (PILPG) and the Center for the Study of Violence and Reconciliation (CSVR), to specifically identify best practices and lessons learned from government and civil society-led initiatives in diverse contexts; to expand resources for transitional justice practitioners and policymakers by examining the experiences of political regression of transitional justice processes in a variety of contexts; and to generate learnings on how civil society organizations can intervene and promote best practices in contexts in which political regression of transitional justice processes are underway. Overall, the goal of the compendium is to identify the drivers of political backsliding, which affect transitional justice processes (the initiatives, mechanisms, and actors involved in these processes) in order to better appreciate the causes, consequences, and impact of the four typologies and the role of civil society in fulfilling its mission to promote truth, justice, accountability, and reconciliation within these contexts.

The compendium is divided into two parts. Part one consists of four chapters, with each chapter undertaking an in-depth analysis of each of these typologies and attempting to explain the linkages between the typologies and transitional justice processes in the respective countries under study. Across the chapters, up to eight transitional justice contexts in countries across Africa, Asia, Guinea, Latin America, and the Middle East are analyzed, including South Africa, Peru, Sri Lanka, Kenya, Syria, Iraq, Libya, and Tunisia. Part two seeks to illustrate the identified typologies and their effects on the

transitional justice processes in select country contexts. In-depth country case studies analyze the situation in Syria, Iraq, and Sri Lanka. The case of Iraq demonstrates three typologies: unconstitutional grabs of power, eruptions of violence, and lack of implementation of recommendations initially provided by transitional mechanisms. The case of Sri Lanka demonstrates the lack of political will to implement a transitional justice agenda or recommendations provided by transitional mechanisms typology, amidst recurring eruptions of violence, while the case of Syria exemplifies the unconstitutional grabs of power and eruptions of violence typologies.

Finally, GITJR partners hope that the analysis and findings will further empower practitioners and policymakers to intentionally and more systematically address and prevent political regression to ensure that transitional justice processes remain on track and meet their goals to enable sustainable peace after conflict.

Who Was The Compendium Developed For And How Should It Be Used?

The compendium was developed to expand resources for transitional justice practitioners and relevant policymakers and communities by examining the experiences and examples of political regression of transitional justice processes in diverse contexts in which GIJTR partners actively operate.

The chapters are drafted to be read either individually or together as one comprehensive analysis of the various typologies of political regression that can affect a post-conflict society. It is meant to serve practitioners, policymakers, and academics around the globe wherever such contexts/typologies present themselves. It is possible that more than one typology may apply to a particular country context; thus, practitioners may find it useful to read one or all the chapters depending on their area of interest. Academics may benefit from reading the entire compendium in order to gain a comprehensive understanding of the various typologies and how they can each affect fulfillment of transitional justice goals and commitments, as well as to better appreciate the multiple actors and interests involved, which further inform the various typologies.

Methodology

The compendium is divided into chapters, with each chapter dedicated to one of the key typologies that characterize political regression in post-conflict societies. Each chapter was prepared by one a GITJR partner and follows a common methodology, which includes desk research and literature review, complemented by personal interviews with transitional justice actors in the field. Each chapter features up to three country contexts that illustrate the typology and informs the findings, conclusions, and recommendations for each compendium chapter.

The desk research involved identifying the nature of the transitional justice processes in the selected country contexts and reviewing to what extent the transitional justice mechanisms and recommendations were implemented in practice, analyzing the typologies for the political regression of those processes and/or lack of implementation of those mechanisms and recommendations. Information collected through the literature review and enhanced through the personal interviews with transitional justice practitioners forms the basis of the analysis of existing trends or typologies of political regression of transitional justice processes, or existing analysis on driving factors for regression of transitional processes and their warning signs, and identifies potential mitigation strategies to ensure transitional justice mechanisms and recommendations are implemented.

Highlights from the chapters reflect how each typology impacts a transitional justice process either by preventing a process from taking off, delaying a process already underway, or halting a process altogether by a sudden change of events or waning political commitment. Each chapter seeks to illustrate how the various actors, civil society, communities, governments, and international community play a role in advancing or inhibiting progress toward the fulfillment of national transitional justice goals.

Absence of Political Will

This chapter lays out the different manifestations that reflect a lack of political will to follow through on transitional justice commitments, especially once a national process has taken place. For example, where a truth commission has been conducted and a report has been adopted, follow-through on truth commission recommendations becomes a challenge, especially where the government is expected to hold perpetrators accountable through criminal proceedings, issue reparations to scores of victims in waiting, or institute much needed institutional and legal reforms to prevent the recurrence of violence and abuse of power in the future. There are a variety of reasons why states become reluctant to pursue a transitional justice process, as, in most cases, competing political interests and priorities take over. One common factor is a state's discomfort with pursuing accountability of perpetrators in the interest of protecting individuals who still hold positions of power and influence. The lack of political will can manifest as rhetoric without action, slow progress, cosmetic justice that is not transformative, and/or a completely stalled process. Any one of these can lead to societal frustrations, disillusionment with the process, and a return to conflict in some cases. This is one of the more common characteristics that many post-conflict contexts experience. In this chapter, this typology is illustrated through the country

contexts of Sri Lanka, Kenya, and Peru. Such situations require close monitoring, mass mobilization, and sustained advocacy to maintain public engagement and pressure for the fulfillment of transitional justice commitments.

Eruptions of Violence

The term “eruptions of violence” is used to refer to instances of armed or non-armed violence that arise due to political and social marginalization—in particular, due to the exclusion of specific groups from political power or participation or access to their country’s resources. The most common examples of eruptions of violence are deadly protests, riots, coups d’état, terrorist acts, and other forms of violent rebellion and unrest. These physical forms of violence are often symptoms of deep-seated structural or institutional violence prevalent in a society. Prolonged marginalization, discrimination, and repression of fundamental rights of particular segments of society can lead to eruptions of violence even where a transitional justice process has occurred, as long as the root causes of the conflict have not been adequately addressed. Eruptions of violence can also be symptoms of what is to come, rooted in structural violence and leading to a more deadly or prolonged conflict. Thus, eruptions of violence may occur as part of or leading to a conflict situation in certain societies, but also as a symptom of unresolved marginalization, discrimination, and structural violence festering in a post-conflict society. This chapter illustrates this typology through the cases of Kenya, Iraq, and South Africa.

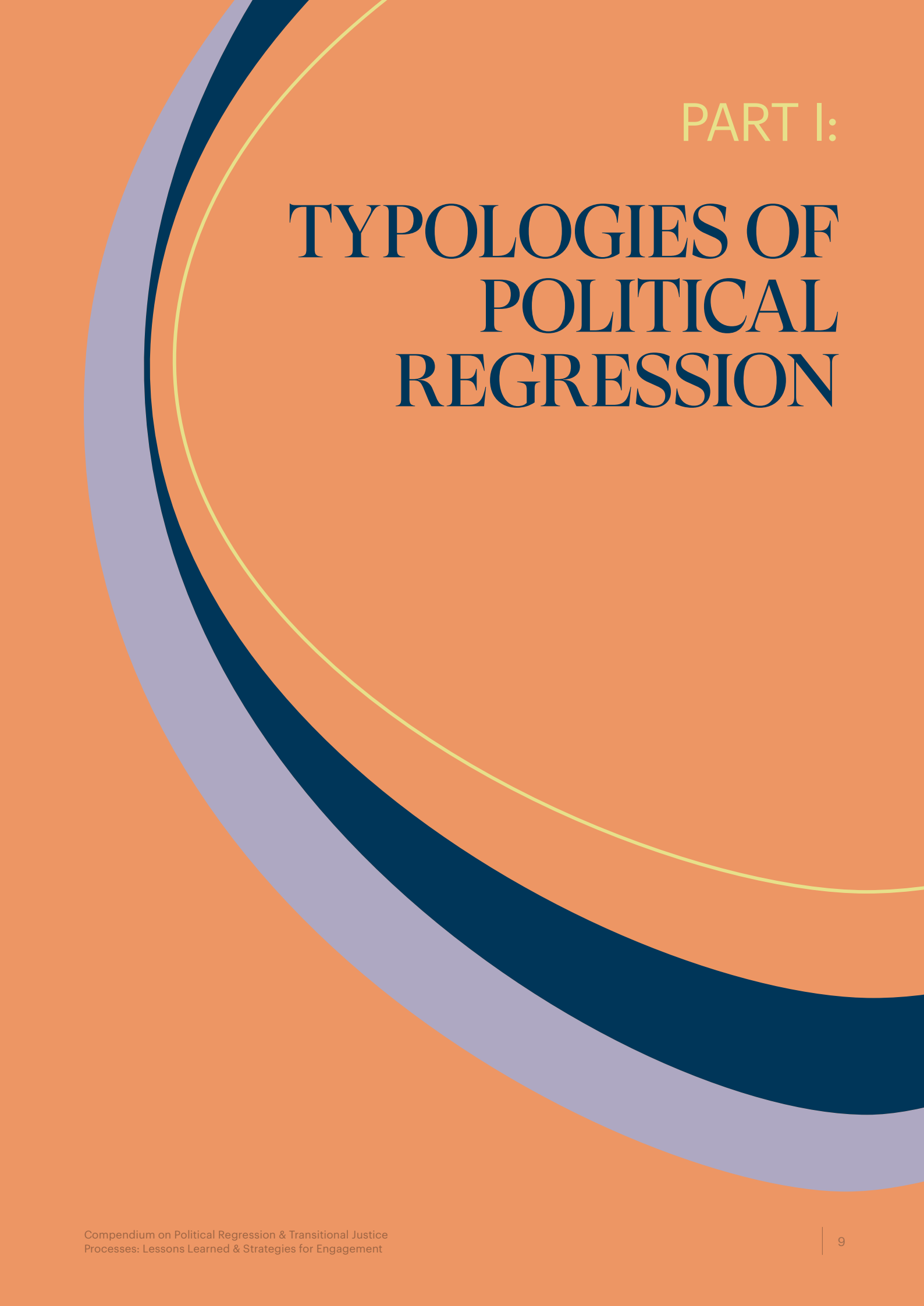
Unconstitutional Grabs of Power

Unconstitutional struggles are defined as attempts by a group of individuals to acquire or consolidate power in an unconstitutional manner. This is often done by seizing control of a sitting government or the political and military infrastructure—often, but not necessarily always, through force or deception—followed by its replacement with a new and unelected government. In most cases, the new government abolishes the old constitution and replaces it with a new one that gives sufficient discretion to the new leadership to maintain power for many years. Other scenarios are those in which individuals manipulate the political process or other political actors to obtain control of the government. There are different motivations for unconstitutional grabs of power; however, in most cases, they are motivated by the desire for personal or political gain. The consequences of unconstitutional grabs of power are multiple and multifaceted. In most cases, unconstitutional attempts lead to the establishment of authoritarian regimes that maintain power by force. This typically creates conditions of oppression that can directly impact a transitional justice process by preventing it from being established in the first place or can act to abruptly halt a process already underway. Such drastic changes in leadership are often accompanied by a reversal in rights protections, the rule of law, and a commitment to pursuing truth, justice, and accountability for massive violations. This typology is illustrated through the cases of Libya, Syria, and Tunisia.

Counterrevolutions

This chapter analyzes the makings of revolutions and counterrevolutions, with the understanding that revolutions change the balance of international order and impact the dynamics of regional stability and security. This reordering of the global political map elicits responses from stakeholders in the international community who feel threatened by the newcomers. Moreover, at the domestic level, counterrevolutions may be motivated by elites who seek to return to the status quo ante or who want to protect their power and privileges. Furthermore, it is thought that in the immediate aftermath of seizing power, revolutionary regimes are militarily weak and very susceptible to challenges, which provides an incentive for counterrevolutions from either domestic or international actors. This typology is illustrated through the cases of Sudan, Egypt, and Tunisia.

The compendium closes with a section on lessons learned and strategies for engagement derived from civil society's experiences of engaging in transitional justice processes despite the challenges presented through the typologies.



PART I:

TYPOLOGIES OF POLITICAL REGRESSION

CHAPTER 1: THE ABSENCE OF POLITICAL WILL AND ITS IMPACT ON THE REALIZATION OF TRANSITIONAL JUSTICE MECHANISMS

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Most transitional justice processes are born from demonstrated commitment by the state and other key stakeholders to pursue truth, justice, and national reconciliation after conflict or at the end of a repressive regime characterized by widespread violations. These processes are usually accompanied by the establishment of a variety of specialized transitional justice mechanisms to address the legacy of past violations,¹ and have unfolded with varying degrees of political commitment. Some processes have been more comprehensive and intentional, while others more piecemeal in their approach. In other contexts, processes get triggered but stall along the way, and in other cases, there may be mixed implementation with an emphasis on certain mechanisms over others (truth seeking over prosecutions).² The willingness to pursue a transitional justice process and the mechanisms chosen inevitably affect the integrity of the process. The failure to sustain this political commitment throughout the process has emerged as one of the key factors leading to the lack of implementation of transitional justice mechanisms after the initial enthusiasm has passed.³ As some parts of the world are witnessing a return to authoritarianism, accompanied by a backsliding of democratization, the rule of law, and respect for human rights, the lack of political commitment to pursuing justice, accountability, and victims' rights in the aftermath of conflict is a prevailing characteristic of this trend.

The *absence of political will* is defined as the lack of commitment on the part of the state toward implementing transitional justice mechanisms and decisions. This can take various forms, both passive and overt: from making public statements that transitional justice is no longer a priority to declaring public commitments with no follow-through to not committing sufficient funds to the establishment of specialized mechanisms to the adoption of policies that remain on paper only and are never executed.⁴ This is not an exhaustive list.

The lack of political will to implement transitional justice mechanisms can take many forms but often is characterized by a failure to act on recommendations by truth commissions, a failure to initiate criminal investigations or proceedings against human rights perpetrators, a failure to establish specialized bodies or follow-up mechanisms such as reparations commissions, a failure to adopt or reform laws to bring the state in line with its international obligations, and a failure to pursue institutional reforms, among others. In certain cases, the failure to publish findings from a truth commission, thereby sabotaging the process to pursue justice and accountability, is another telltale sign that political will is lacking.⁵ This lack of implementation is often caused by the state's failure to allocate adequate resources to allow for the full operationalization of transitional justice mechanisms. Another factor affecting implementation is the lack of independence of these bodies and in how they are structured and governed, thereby affecting their impartiality and integrity.⁶ This can lead to processes that are largely cosmetic (i.e., "cosmetic justice"). Another early warning sign that a failure to implement transitional justice is looming has to do with public statements made by government actors that are in fact just lip service and are not accompanied by corresponding government action or allocation of adequate resources.

This chapter highlights experiences in Sri Lanka, Kenya, and Peru to illustrate how initial commitments to transitional justice can be affected by a deterioration in the political environment and waning political will to see through these mechanisms and their recommendations. Based on the three country contexts, the lack of implementation of transitional justice mechanisms has everything to do with the fact that transitional justice strives to address impunity for past violations and war crimes, implicating persons who may and usually continue to hold positions of power and influence in the country and who wish to be shielded from punishment.⁷ Pursuing a justice and accountability agenda would therefore jeopardize their position and that of their associates. Related to this is the status transitional justice holds for certain governments, with a panoply of competing interests and priorities coupled with limited resources. This combination lends itself to the prevailing notion of "leaving the past in the past." In such cases, there is no genuine political interest to ensure that transitional justice measures succeed. Politicians can easily manipulate these processes to their benefit and pay lip service to a transitional justice agenda to appease the public and the international community.⁸ In such a context, the role of civil society actors and local communities to remain engaged and continuously push for a genuine transitional justice process becomes paramount, helping to create an environment wherein fundamental rights are respected and human rights defenders are protected; without these, transitional justice processes suffer.

This chapter also illustrates how a lack of political will can be a symptom of political regression appearing in the form of authoritarianism, or simply a state's interest in shielding itself from justice and accountability. Through a cursory country analysis, it outlines the transitional justice trajectory in Sri Lanka, Kenya, and Peru to illustrate how transitional justice processes have been shaped by political developments in each country. It then highlights the role of civil society and communities, in particular the challenges and the opportunities in sustaining the transitional justice agenda despite the prevailing context. Finally, the chapter identifies strategies employed by communities and civil society to maintain pressure to achieve their goals. Through this, lessons learned and best practices emerge.

Case of Sri Lanka

Transitional Justice Mechanisms and Processes to Date

Sri Lanka has struggled to achieve justice, accountability, and reconciliation in the aftermath of its brutal ethnic conflict that lasted nearly 30 years before finally ending in 2009.⁹ The conflict is known for widespread and egregious violations, and in particular, the thousands of enforced disappearances committed by both sides of the conflict.¹⁰ Today, the country remains divided, and a “victory narrative” together with ongoing structural inequalities in policy and practice continue to marginalize Tamils concentrated mainly in the north and east of the country, in favor of the majority Sinhalese living mainly in the south. The 2015 presidential election of Maithripala Sirisena brought with it hope for justice for the victims and reconciliation for the broader society. From that point, the new government made a number of commitments to pursue transitional justice, which were welcomed by the UN Human Rights Council (UNHRC) in its Resolution 30/1, which noted the government’s commitment to adopt a comprehensive approach to dealing with the past by calling for the creation of a truth commission, an office of missing persons, an office for reparations, and a judicial mechanism with a special counsel to investigate allegations of human rights and humanitarian law violations.¹¹

Despite initial intentions to rebuild Sri Lanka as a democracy based on the rule of law and human rights, the 2015 coalition government slowly dissolved due to disagreements between the president and the prime minister, causing the transitional justice process to stall.¹² In 2017, the UNHRC issued a report assessing progress on the 2015 commitments. The report highlighted areas of progress including the adoption of a law to establish the Office of Missing Persons and the ratification of various human rights treaties, including that which prohibited enforced disappearances.¹³ In terms of transitional justice, a notable achievement was the work done by the civil society-led Consultation Task Force on Reconciliation Mechanisms, which was praised for being an inclusive process that produced sound recommendations for the establishment of justice mechanisms.¹⁴ It also noted the adoption of the Death certificate Amendment Act, which allowed for the issuance of “certificates of absence” to benefit families of the disappeared. Despite these areas of progress, the UNHRC found the fulfillment of transitional justice commitments as “worryingly slow.”¹⁵ Meanwhile, on the issue of accountability, the UNHRC noted that most emblematic cases had not progressed or resulted in prosecutions. It also noted the human rights situation as a matter of concern with ongoing violations, the regular use of torture during investigations, reports of harassment against human rights defenders, and continued police abuse and excessive use of force.¹⁶ The commitments of 2015 had begun to wane with visible effects.

Signs of Lack of Political Will

Toward the end of 2019, elections led to the win of Gotabaya Rajapaksa. Following his victory and the appointment of former president Mahinda Rajapaksa as prime minister, the president announced that there was no need for a transitional justice process in Sri Lanka, and there was a complete denial of the thousands of enforced disappearances documented in the country.¹⁷ Ministries that were established to address questions of truth, justice, and reconciliation were quickly dissolved and in a January 2020 meeting with a United Nations official, the president announced that there were no missing persons in Sri Lanka and all those thought to be missing were dead. He also stated that reconciliation goals would be promoted through development projects and by educating children in both Sinhala and Tamil languages.

Since 2015, Sri Lanka has witnessed slow progress toward achieving initial transitional justice goals. All in all, despite some areas of progress, accountability for egregious violations remains elusive, no justice mechanisms have been set up, and the office of missing persons, established in 2016, was never able to go beyond the investigation stage due to lack of resources and funding.¹⁸ In a country that boasts one of the highest rates of enforced disappearances globally, this has caused extreme frustration among the families of the disappeared and triggered widespread protests. The mothers of the disappeared mobilized to hold daily protests for over the course of 2017, and later in 2022, families of the disappeared marked 1,900 days of continuous roadside protests calling for answers on the whereabouts of loved ones.¹⁹ Victims, families of victims, communities, and civil society have consistently demanded for justice and accountability for past atrocities and publicly vocalized their discontent about the government's failure to implement its commitments since 2015. This was manifested in mass demonstrations and public protests;²⁰ however, citizen voices have largely fallen on deaf ears as the government has become more repressive against public protests in recent years.²¹ This criticism was echoed in observations by the UNHRC in its subsequent reports.²²

Current Status of Implementation

Of late, Sri Lanka has had to battle with other factors, placing justice and accountability even further beyond reach. In 2019, a political and economic crisis erupted leading to a collapse in the economy and bringing nearly every sector of society to a standstill affecting livelihoods, health, education, and making even basic commodities and services scarce.²³ The population has experienced extensive power and fuel shortages, triggering an acute rise in food prices. These conditions led to popular protests around the country and a call for president Rajapaksa to step down.²⁴ The social unrest culminated in his ousting in July 2022.²⁵ Given this unconstitutional change of power, the current administration is in no position to pursue any of the previous transitional justice commitments. Further, managing the current economic crisis, introducing austerity measures, and seeking an International Monetary Fund bailout is the main priority.²⁶ According to one activist, the transitional justice process in Sri Lanka has effectively come to a standstill.²⁷

Civil Society Organizations (CSOs) and Community Responses

The challenges of achieving justice and accountability for past violations are many, and have political, social, ethnic, and economic dimensions. Activists underscore the failure of the government to acknowledge the fact that the country has experienced enforced disappearances.²⁸ Perpetrators on both sides of the conflict have not been tried in court. Vetting of the security sector has not taken place and the justice system has largely failed to deliver in handling the many emblematic cases identified by the

Lessons Learned and Reconciliation Commission.²⁹ With a current leadership that has been accused of human rights violations in the past; the closing of civic space; a range of perpetrators of human rights violations who continue to hold positions of power and influence; widespread impunity for even the most egregious violations; continued use of violence and oppressive practices against ethnic minorities; persistent intimidation, harassment, and attacks against human rights practitioners, together with ongoing incidences of hate speech³⁰ and communal violence; these constitute the persistent barriers to securing justice and reconciliation in the country. Nevertheless, following through on the transitional justice commitments made in 2015 remain just as, or even more, crucial now to curb the impunity and make a clean break with the past.

Confronted with this reality and a deeply fractured society, communities and civil society have taken a very active role in pushing the government to deliver on its transitional justice commitments.³¹ For years, communities have led mass campaigns to push for justice and accountability for enforced disappearances and other violations in a hostile environment; however, of late, these efforts have waned as communities and human rights defenders are continuously subjected to surveillance, harassment, and detention when vocalizing their demands.

Nevertheless, civil society's strength lies in its ability to mobilize communities and sustain active engagement by victims and families of the disappeared.³² The thirst for justice and reparations remains palpable despite the closing of civic spaces and continued intimidation of human rights defenders. In this context, activists who have been involved in the struggle for justice and reconciliation in Sri Lanka for the past decade have several recommendations as to what is needed at this juncture and what is possible—and remain realistic about what is achievable given the prevailing social, political, and economic factors at play.

Potential and Existing Mitigation Strategies

Continued engagement by communities is considered an important mitigating strategy. “There is need for continued engagement of the grassroots communities to push for justice, accountability, and reparations. CSOs have a role to play in mobilizing communities. Involving the youth is also critical as they are a powerful force. They are also more receptive to these issues.” This is the view of one activist who has been supporting victims especially families of missing persons for the past two decades.³³

Promoting and realizing national reconciliation is another important priority at this juncture, as is continuing to promote and advocate for reconciliation given the deep divisions that persist in society. More recognition, tolerance, and acceptance of minority groups is needed. “There is need to create awareness amongst the young religious community. We need a mechanism where religious leaders are sensitized on racism and become young activist leaders. Right now there is a lot of racism in the Buddhist institutions; we need to re-focus on real Buddhism. We also need to focus on the media and social media—there is need for sensitization and training on social tolerance, acceptance and inclusion of minority groups is needed,” remarked one civil society leader from Sri Lanka.

Despite the challenging political context, there is a strong commitment by civil society to join forces with communities to push for progress: “We’ve gotten used to taking two steps forward, five steps back. We need to keep visibility on the issues and keep the pressure on through popular mobilization, commemorations, fundamental rights petitions, and legal challenges,” commented another civil society actor in Sri Lanka.

Case of Kenya

Transitional Justice Mechanisms and Processes to Date

Triggered by the post-election violence that erupted in 2007–2008, Kenya held a Truth Justice and Reconciliation Commission (TRJC) from 2009 to 2013. The TJRC was established to document the country's history of gross human rights violations, abuse of power, and misuse of public office since its independence.³⁴ It was tasked to make recommendations for prosecutions, reparations, and legal and institutional reforms, among others.³⁵ Its report contained comprehensive findings and recommendations on the violations and historical injustices sustained since 1963. It also included a plan to guide implementation of the recommendations.³⁶ Notably, it found that all three post-colonial regimes had been responsible for gross human rights violations and concluded that state security forces had been *“the main perpetrators of bodily integrity violations of human rights in Kenya including massacres, enforced disappearances, torture and ill-treatment, and sexual violence with northern Kenya most heavily affected by the violations.”*³⁷ In this connection, the commission also found a pervasiveness of socioeconomic violations across the country and concluded that the “government's exclusionary economic policies and practices in the distribution of public jobs and services inflicted suffering on huge sections of society.”³⁸

Importantly, the commission shed light on the emergence of “negative ethnicity”—first introduced by colonial powers and perpetuated by post-colonial regimes—as a concept and practice.³⁹ This took the form of structural discrimination, which pervaded all sectors of society but was most evident in land matters whereby large tracts of land were concentrated in the hands of the political elite and that of politically privileged ethnic communities. These groups favored members of their own ethnic groups in such areas as employment and appointment processes.⁴⁰ According to the commission, this sentiment permeated party politics,⁴¹ which led to a volatile combination of normalized violence along ethnic and party lines and became visible in the 2008 post-election violence.⁴² Finally, the commission found that the state had historically “covered up or downplayed violations committed against its own citizens, especially those committed by state security agencies” and had “demonstrated no genuine commitment to investigate and punish atrocities and violations committed by its agents.”⁴³ The underlying causes of violations were summed up by the commission to include a complex combination of centralized power, a culture of impunity, inter-ethnic divisions, uneven development, under-employment and patriarchy.⁴⁴

In sum, Kenya's transitional justice process and its aftermath has been intertwined with the politics of the day since the inception of the TJRC in 2009. The TJRC process itself, produced a largely comprehensive report⁴⁵, though it was marked by controversy over the former Chair, which ended up affecting the commission's credibility and casting doubt on its findings.⁴⁶ The failure to publish the report after the conclusion of the mandate, along with the altered TRJC Act to allow the National Assembly to dictate implementation and approve of it before its publication, caused more criticism and skepticism, thereby affecting the public's perception about the integrity of the process and accuracy of the findings. This was compounded by the

dissenting opinion of three commissioners challenging altered sections of the report on land matters.⁴⁷ An assessment by the International Center for Transitional Justice (ICTJ) sums up how the TJRC process and its report was affected by politics of the day and a perceived intent to obstruct the search for truth and justice. The assessment remarked that “the difficulties surrounding the TJRC process and its final report reflect the reluctance of the political leadership to account for the country’s dark past. Political neglect, the selfish and irresponsible behavior of its chairperson, and financial troubles compounded the challenge inherent in implementing an unwieldy and over-ambitious legal mandate.”⁴⁸

Signs of Lack of Political Will

In terms of implementation, the TJRC Act requires implementation of the report.⁴⁹ Despite this requirement, critics have stated that implementation has been a persistent challenge, especially with respect to justice and accountability for past crimes, but also the failure to deliver reparations.⁵⁰ Since the conclusion of its mandate, the TJRC report has not been formally adopted or discussed by the National Assembly and no formal commitment has been made to implement the recommendations.⁵¹ According to Kenya’s civil society, most of the recommendations from the TJRC report and Waki Commission report, especially with regard to prosecutions, have not been implemented.⁵² The pervasive culture of impunity for gross human rights violations and politically motivated violence has been noted as a key contributing factor for the lack of implementation of recommendations for prosecutions. In the minds of human rights advocates, the lack of implementation can be traced to a generalized lack of political will by the powers that be. It is a known fact that certain individuals allegedly responsible for human rights violations enjoy positions of power and influence in the country today and therefore calls to follow through on recommendations of criminal prosecutions have fallen on deaf ears.⁵³

Status of Implementation

With respect to other recommendations, there has been some noted progress, for example, certain security sector reforms have taken place, including the establishment of the Independent Policing Oversight Authority, an independent civilian policing oversight body, and police officers’ vetting by the National Police Service Commission. On the recommendation to create a reparations mechanism, former president Kenyatta eventually acknowledged the historical injustices and directed the Treasury to establish a Kshs. 10 billion (\$71.3 million)⁵⁴ Restorative Justice Fund to initiate restorative justice processes.⁵⁵ In 2017, the Public Finance Management (Reparations for Historical Injustices Fund) Regulations were drafted to facilitate the operationalization of the fund. However, to date, these regulations have yet to be adopted.⁵⁶

On the other hand, one of the major achievements since the TJRC has been the constitutional reform process in Kenya, which culminated in one of the most progressive constitutional frameworks on the continent. Much of the non-punitive recommendations of the TJRC were addressed in the text of the new constitution—issues such as devolution, economic marginalization, the attention to social and economic rights protections, as well as land reforms, such as introducing community land titles, among others.⁵⁷ Further, the constitution has provided advocates with a strong legal framework on which to anchor their advocacy and push for TJRC implementation. It has served as a basis for strategic litigation cases challenging arbitrary laws and practices in the aftermath of the truth commission.⁵⁸

CSO and Community Responses

In this context, the role of civil society to push for truth, justice, and reparations since the TJRC's establishment and the implementation of its recommendations has been crucial. Civil society convened a Transitional Justice Network to collectively engage with the TJRC. Since its conclusion, one of the few organizations still actively engaged in justice and accountability issues advocates for strategic litigation, policy advocacy, engagement at the regional level, and advocacy in favor of victims' rights to reparations.⁵⁹ The time lapse since the end of the TJRC is another feature to contend with regarding implementation of recommendations, so many CSOs have moved on to other priority issues or the funding that used be available for transitional justice has waned.⁶⁰ Despite this, some organizations such as the Kenyan Human Rights Commission (KHRC) continue to press for justice and accountability in their day-to-day work and highlights the importance of using the regional mechanisms in the present environment.⁶¹

Future Prospects for Meeting Transitional Justice Recommendations

While advocates have a sobering outlook on prospects for justice and accountability in the country now, they also highlight the importance of continued engagement and advocacy by civil society, as well as the need for greater public awareness of the contents of the TJRC report to gain more support for its implementation. At present, organizations are focusing their advocacy on the establishment of the reparations fund, given that it is one of the major outcomes of the TJRC for which victims are still waiting.⁶² Further, local organizations stress the role of regional and international mechanisms such as the Universal Periodic Review process and advocacy/litigation before the African Commission and African Court on Human and Peoples' Rights. Where political will remains weak at the national level, advocates make use of regional and international bodies to continuously push for transparency, justice, and accountability.⁶³ One such example is the recent "win" at the African Court on Human and Peoples' Rights of the Ogiek case against Kenya. KHRC was involved in the litigation of this "indigenous peoples" rights case that resulted in a landmark merits and reparations decision by the court only recently.⁶⁴ Despite the delay in receiving a judgment, the findings against the State of Kenya will require it to deliver reparations to the Ogiek community and adopt important reforms. The decision confirms the viability of the regional body to deliver justice where a member state has failed to do so. As such, advocates can seek redress at the regional level for unaddressed human rights cases at the national level.

Case of Peru

Peru's conflict began in the 1980s with violent insurgencies led by rebel group the Shining Path (Sendero Luminoso). The Peruvian State also unleashed systematic abuses during the armed conflict. Small, rural communities and indigenous peoples bore the brunt of the violence and endured a reign of terror and torture. In the 1990s, President Alberto Fujimori's repressive rule further eroded the rule of law, enacting amnesty laws and granting impunity for the members of government death squads.⁶⁵ In 1992, Fujimori dissolved the congress and assumed full legislative and judicial powers. He then served as president under Montesinos and the Peruvian Armed Forces and would reportedly adopt Plan Verde—a plan that involved the genocide of impoverished and indigenous Peruvians, censorship of the media, and control by the military.⁶⁶ He first faced charges of corruption and embezzlement in early 2000s, and later in 2009, Fujimori was convicted of human rights violations and sentenced to 25 years imprisonment for his role in kidnappings and murders by the Grupo Colina death squad during his government's battle against leftist guerrillas in the 1990s.⁶⁷ Specifically, he was found guilty of murder, bodily harm, and two cases of kidnapping. The verdict marked the first time an elected head of state had been extradited to his home country (Japan), tried, and convicted of human rights violations. Pedro Pablo Kuczynski later assumed the presidency.

Transitional Justice Mechanisms and Processes to Date

Peru's Truth and Reconciliation Commission (TRC), set up in 2001, had a mandate to "clarify the process, facts and responsibilities of terrorist violence and violations of human rights, between May 1980 to November 2000, imputable both to terrorist organizations and to State agents."⁶⁸ Its aim was to establish a historical memory of the conflict and to pursue truth, justice, and guarantees of non-repetition in the form of recommendations to the government for reparations and institutional reforms.⁶⁹ Key findings in its report established the following:

- Violence and human rights violations on a massive scale, with the majority of the violations recorded against members of indigenous communities in the Andean and Amazonian regions
- The culpability of both state agents/institutions and insurgent groups for violations
- A nexus between the violence against indigenous peoples and the historical and pervasive structural violence, discrimination, social exclusion, and marginalization of those groups
- Continuity of political elites and parties in positions of power/forces favoring the status quo

Signs of Lack of Political Will

The report became an immediate source of contention in a deeply polarized society characterized by the official government narrative (state denial of an armed conflict and of the structural violence and discrimination against indigenous populations) in conflict with the controversial findings in the report.⁷⁰ The fact that the report pointed to both the state security forces and the rebel groups as perpetrators of gross violations made both the government reject the findings and ensuing implementation slow.⁷¹ As a result, despite the comprehensive record that it produced, the commission's report was not embraced by the state and did not enjoy wide public support. It was then left to the human rights community to push for the recommendations without national support.

State of Implementation

In terms of implementation of truth commission recommendations,⁷² Peru has received overall positive reviews, with notable progress in multiple areas, despite some setbacks and areas that still require follow-up.⁷³ Some highlights⁷⁴ include steps taken toward reparations delivery and a comprehensive legislative and institutional framework being adopted in 2005 that has started to deliver individual and collective reparations.⁷⁵ In the area of memorialization, a Program of Symbolic Reparations and Memory was adopted and is responsible for the construction of the National Place of Memory, Tolerance and Social Inclusion Museum. Meanwhile, steps have been taken toward the elaboration of a national policy on memory, peace, and reconciliation.⁷⁶ On the issue of missing persons, a National Plan to Search for Disappeared Persons was adopted and a National Registry of Disappeared Persons and Sites of Burial was set up, with a mandate to identify, recover, and return remains to families.⁷⁷ On guarantees of non-repetition, a number of policies, laws, and reforms have been introduced that are a direct response to the findings and recommendations of the truth commission.⁷⁸ For example, certain violations contained in international treaties have been incorporated into domestic law, such as forced disappearance, torture, and genocide. At the same time, several security sector reform measures were adopted to reign in the military and professionalize the police force.⁷⁹ Notably, in the area of accountability, the state successfully prosecuted former president Fujimori and his associates for multiple serious violations, including extrajudicial killings, enforced disappearances, torture, and corruption, while the leader of the Shining Path, Abimael Guzmán, was also tried and convicted.⁸⁰

CSO and Community Responses

CSO engagement in the transitional justice process has been robust dating back to the TRC's establishment.⁸¹ At every major juncture in the transitional justice process in Peru, civil society has been vocal, organized, actively engaged, and networked. Their engagement was also pivotal in pushing for a comprehensive reparations plan that was adopted and has been in operation ever since.⁸² They have used community mobilization, public outreach and awareness, monitoring and reporting on the process, as well as advocacy and litigation at both national and regional levels to continuously push for justice and reparations. In particular, civil society was heavily involved in the creation of the truth body and also in informing the reparations law that came later, as well as shining a spotlight on the gender component of the conflict and ensuring reparations include a gender element.⁸³ Peru's civil society is also behind several emblematic cases at the Inter-American Commission on Human Rights (IACHR)—challenging the amnesty law and pushing for accountability of perpetrators of gross violations, including enforced disappearances, torture, and massacres.⁸⁴ Civil society was also instrumental in pushing for accountability of former president Fujimori and his

associates who were eventually tried and convicted.⁸⁵ It can be argued that the process in Peru would not have been as robust and comprehensive without the active engagement of civil society, victims, and the indigenous communities.

Current Crisis in Peru: Reversing the Gains?

Of late, Peru has experienced a political crisis⁸⁶ characterized by a series of traumatic events including a dissolved parliament and ousted president Pedro Castillo in December 2022 amidst popular protests. This led to President Boluarte stepping in as a temporary measure; however, mass protests continued calling for Boluarte's resignation, the holding of general elections, and a constitutional reform process.⁸⁷ During this time, Boluarte called for a state of emergency, suspending fundamental freedoms.⁸⁸ Police and army were deployed and ultimately responsible for multiple human rights violations, including the use of excessive force leading to an estimated 60 deaths, 600 injuries, and over 380 arrests as well as alleged massacres outside the capital city.⁸⁹ The use of torture against detainees was also reported. The UN has called for accountability and political reforms.⁹⁰ In response, the government denied its culpability and instead praised officers and troops for their actions.⁹¹

Currently, Peru is witnessing a rapid decline into authoritarianism that has been characterized by acute political polarization of society, severe intolerance to the exercise of basic human rights, and in particular, greater executive controls on freedom of speech, freedom of association, and freedom of assembly.⁹² Hate speech against human rights defenders is on the rise, whereby those advocating for human rights are subject to surveillance, harassment, and attacks. The old discourse of isolating Human Rights Development organizations (HRDs) by labeling them as "terrorists" is spreading a climate of fear and intimidation for speaking out against the government—a practice that dates back to the internal conflict in Peru and has been condemned by international experts in the past.⁹³ These are all symptoms of a new wave of political regression in Peru, creating a repressive environment that threatens to reverse the gains made since the truth commission.

Strategies for Harnessing Transitional Justice: Recommendations and Implementation

Given the recent trajectory in the country, there is an increasingly crucial role for civil society to play at this juncture. Building on the active engagement of communities and CSOs in the transitional justice process thus far, a researcher/activist formerly with the truth commission stressed the need for continuous monitoring and documentation of the transitional justice process, documenting ongoing violations, and countering newly emerging injustices.⁹⁴ She emphasized that to continue to harness the implementation of the TRC recommendations, there is also need to build and strengthen popular movements beyond the directly affected victims and victim communities in order to create a critical mass of persons to continue to push for justice and accountability at the national level. In taking these initiatives forward, it will be important to involve the youth in popular movements. Further, to counter the emerging wave of intolerance and hate speech in the country and to address the social stigma and harassment of HRDs, there is a critical need to raise awareness and disseminate accurate information to the population to counter the false narratives circulating in the public. Finally, there is a need to promote dialogue and tolerance within a deeply divided and polarized society.

Symptoms of a Breakdown in Political Will to Implement Transitional Justice Mechanisms

A common feature in post-conflict societies that have failed to see transitional justice processes comprehensively implemented is the absence of political will from the onset of a process despite political commitments having been made to adopt transitional justice mechanisms or policies. This frequently happens because the state wishes to meet expectations of the public or the international community to pursue truth, justice, and reparations in the absence of the state's own will to pursue a genuine process. As in the case in Sri Lanka, it appears that despite demonstrated verbal commitments, the process has been slow, ad hoc, and mixed largely due to a tick-the-box approach in the absence of genuine political interest in pursuing justice, accountability, and truth. This is evident in the fact that of the special mechanisms that were called for, only two (Office of Missing Persons, Reparations Body) were set up and neither managed to conclude its work. This is also true in the case of Kenya when it comes to pursuing justice and accountability for past crimes. The views by civil society members and those closely involved in the truth commission indicate that the interest to pursue justice and accountability was never genuine, which is confirmed by the number of alleged perpetrators enjoying positions of power in present-day Kenyan politics.

Another symptom of the lack of political will across contexts is the official narrative put forth by the state. The state may officially “deny” that a conflict occurred or gross violations were committed, as seen most clearly in Peru but also in Sri Lanka. This was also apparent in the Ugandan context. When an uncooperative government wants to avoid its responsibility to prosecute and punish violators, especially their own state agents, denial of what took place is a common theme. In Peru, the truth commission report was not embraced by the government, nor did the government admit that Peru experienced an armed conflict. The predominant narrative by the government was that it was *terrorism*, which automatically provided justification for the human rights abuses meted out by the military against civilians. On a related point, some governments have also sought to discredit human rights defenders to deflect criticism of their actions. In Peru, the state led a massive campaign against HRDs, accusing them of siding with the terrorists whenever they spoke out about human rights. HRDs were painted as leftists, and enemies of the state in a deeply polarized society. As a result, HRDs faced harassment and intimidation, became isolated from society, and had their agenda for justice discredited.

An official record of what took place during a conflict, in most cases reflected in a truth commission report findings and recommendations, is a critical component to establishing the truth about violations that took place during a conflict. It also serves as a key ingredient for subsequent justice and reparations processes. The comprehensiveness of a report, the objectivity with which it is written, and the fact that a report is actually published, circulated, and *owned* by the sitting government are all critical indications of whether the government has the political will to pursue a transitional justice process and follow through on the recommendations. As such, in societies where a truth commission has not been held despite there having been widespread, egregious violations—as with Sri Lanka and Uganda—this is a clear symptom that political will to pursue truth and justice is lacking. Where reports have been produced but have not been *owned* by the state or widely disseminated—as with Kenya and Peru—this is another sign that political will is lacking. This makes it much more challenging to implement the recommendations or pursue other transitional justice mechanisms.

Another observation about factors that impact implementation of transitional justice mechanisms has to do with understanding and addressing the root causes of conflict. It is apparent from these case examples and other transitional justice settings that societies that have experienced conflict

due to social or ethnic divisions and historical discrimination or exclusion of certain minority groups face additional hurdles in implementing transitional justice recommendations that are meaningful to the frequently fractured and socially divided societies. This is apparent in all three country examples. Activists in Sri Lanka and Peru in particular highlight the importance of reconciliation, social cohesion, and memorialization to render the transitional justice process meaningful to the victims and survivors on both sides of the social divide. In summary, the implementation of transitional justice mechanisms alone is rarely sufficient to address deep-seated discrimination and marginalization of certain ethnic groups. It will need to be accompanied by recognition of what took place and the role of all sides to the conflict, coupled with meaningful reconciliation efforts and structural reforms to avoid the recurrence of the same policies and practices that led to conflict in the first place.

Bureaucratization of a process can also be used as a dilatory tactic for states unwilling to fulfill their truth and justice mandates. The proliferation of policies, committees, task forces, and the like consume time and resources that are often limited in a post-conflict society. At times, these additional mechanisms are set up with little funding to fulfill their mandates, while others remain on paper as political commitments that are not taken forward. As time goes on, governments are faced with new competing priorities and challenges. Recently, Sri Lanka has been faced with an acute economic crisis followed by two years of COVID restrictions that dealt a blow to the national economy. This is similar to the situation in Peru where the country has fallen into political turmoil since the end of 2022, an influx of migrants from neighboring Venezuela putting strains on the socioeconomic situation and serious economic depression following austerity lock-down measures adopted by the government during the pandemic. With time, government priorities and commitments change, making it harder to implement transitional justice mechanisms and recommendations—especially several years later. This also puts a strain on civil society and communities whose energies and resources get diverted to other issues, and that struggle to sustain their advocacy within reduced funding sources to carry out their work. In the case of Kenya, it was noted that solidarity among civil society has weakened, where a competition for funds has prevented them from working in solidarity, thereby weakening their potential impact with respect to their advocacy.

This situation can sometimes contribute to a sense of futility by advocates/activists. This was apparent in discussions with Kenyan members of civil society and to some degree with activists from Sri Lanka. Opportunities to push for transitional justice mechanisms/recommendations are seen to have diminished. In such situations, there was an emphasis placed on engaging regional and international mechanisms for support. In Kenya and Sri Lanka, activists place hope and expectation in the UN structures and special procedures. In Peru, activists have resorted to using the Inter-American system of human rights on numerous occasions with a fair amount of success. As a result, the IACHR has issued numerous opinions on transitional justice related cases that have expanded protections and delivered remedies to the victims. It was agreed by activists in all three contexts that their advocacy should engage the regional and international mechanisms whenever the situation at the national level presents challenges.

Conclusion

In each of the three canvassed contexts, the task to secure justice, accountability, and reparations for past violations amidst severely restrictive political environments remains a looming and daunting challenge for civil society. Where states are reluctant or even hostile to addressing impunity for past crimes, specialized transitional justice mechanisms are designed to fill this gap. In some cases, these mechanisms have been set up and have delivered on their mandates, at least partially, as with the truth commissions in Kenya and Peru having produced rather comprehensive reports, while in Sri Lanka, the government's abandonment of its earlier commitments left most of the transitional justice mechanisms frozen at a nascent stage. Despite the challenges, there are critical lessons to be learned from these examples with respect to the role of communities and civil society actively holding their governments accountable.

From the illustrated country examples, strategies and best practices that civil society find to be particularly important in sustaining state engagement on transitional justice include the following:

- **Continuous engagement at the regional and international levels with targeted advocacy.** This includes the use of the state reporting mechanisms under the UN and African Union bodies. When national systems fail to deliver, regional and international mechanisms can call on states to follow through on their human rights obligations.
- **Community mobilization to guarantee a critical mass in support of transitional justice mechanisms and outcomes.** This was particularly evident in Sri Lanka by families of the disappeared calling for truth, justice, and reparations. When communities are mobilized, this becomes a powerful force to compel the state to act and comply with its commitments.
- **Working together through civil-society-coordinated mechanisms is very effective in achieving needed reforms.** This includes taking action through specialized networks/working groups to amplify voices, monitor transitional justice processes, take common stands on important national issues, and pursue collective actions to challenge government transgressions with respect to human rights obligations.
- **Strategic litigation as an effective tool to secure legal and institutional reforms and address structural and systemic issues.** Where national systems fail to deliver justice, regional bodies may be petitioned (IACHR ; African Commission and Court on Human and Peoples' Rights, etc.). In Latin America, the Inter-American system has a rich jurisprudence relating to transitional justice, including on the pronouncement of amnesty laws and prohibition of enforced disappearances, as well as landmark cases ordering collective reparations for indigenous communities.⁹⁵ The African system also has a growing jurisprudence on transitional-justice-related matters complementing and strengthening national transitional justice processes.⁹⁶

- **The role of women in pushing for transitional justice responses, justice, and reparations has proven to be an effective aspect of community mobilization.**

Women have used their powerful voice to articulate their specific needs and expectations for justice and reparations based on their unique experiences of violence and discrimination during conflict. Women have a strong unifying voice that may bring about change. The mass protest by the mothers of the disappeared victims in Sri Lanka is an illustrative example of mass mobilizing for justice and reparations that forced the government to take steps toward investigating enforced disappearances and creating a fund.

CHAPTER 2:

ERUPTIONS OF VIOLENCE

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Definition

In this Compendium, the term “eruptions of violence” is used to refer to instances of armed or non-armed violence that arise due to political and social marginalization, in particular due to the exclusion of specific groups from political power and participation and/or access to their country’s resources. The most common examples of eruptions of violence are deadly protests, riots, coups d’ état, terrorist acts, and other forms of violent rebellion and unrest.⁹⁷ These physical forms of violence are often symptoms of deep-seated structural or institutional violence prevalent in a society. Prolonged marginalization, discrimination, and repression of fundamental rights of particular segments of society can lead to eruptions of violence even where a transitional justice process has occurred, as long as the root causes of the conflict have not been adequately addressed. Eruptions of violence can also be symptoms of what is to come, rooted in structural violence and leading to a more deadly or prolonged conflict. Thus, eruptions of violence may occur as part of or leading to a conflict situation in some societies, but also as a symptom of unresolved marginalization, discrimination, and structural violence festering in a post-conflict society. Discussed in depth in their respective chapters in this compendium, unconstitutional changes of power and counterrevolutions they may also qualify as forms of eruption of violence.

Thus, eruptions of violence should not be understood as only the sudden revolt by those governed in a country against their government but also as all the conditions that trigger and allow for violence to erupt, often as the result of a systematic exclusion of persons based on their race, gender, national origin, ethnicity, religion, etc. from actively participating in political or civil life or enjoying social and economic rights. Marginalization can create feelings of frustration, anger, and hopelessness, which can lead to violent protests, riots, and other forms of unrest. Violence resulting from political marginalization can take many forms and can perpetuate marginalization, creating a cycle of violence and exclusion.

Structural violence can include the use of institutions, laws, policies, and practices that perpetuate social exclusion, inequality, or marginalization and foster unequal societies with limited access to basic services and enjoyment of rights. This form of violence arises from unjust, repressive, and oppressive political, economic, and social structures.⁹⁸ They may be intended to systematically exclude a specific group of people

from actively participating in a state's economy, which can lead to deep-seated poverty and inequality. It is the failure to address structural and/or institutional violence in a society emerging from conflict that can cause new cycles of violence—and which is the subject of this chapter.

Driving Factors

It is possible to identify multiple driving factors for eruptions of violence. However, most of them are connected with one main driving factor: marginalization or the exclusion of certain groups from political processes which in the long term prompts marginalized groups to resort to violence in order to achieve what is perceived by the group as “justice.” In their pursuit for justice, marginalized groups employ tactics such as violent protests, riots, and other forms of unrest. This is often driven by the feeling of having nothing to lose in an unequally structured society. In fact, in most cases, marginalization is reproduced by lack of economic opportunities, discrimination, structural racism, and, as of recently, the effects of climate change and damage to the environment.

Many consider the most extreme form of marginalization to be apartheid in South Africa, which led to multiple eruptions of violence, and whose legacy contributes to a system of racist marginalization, violence, and conflict to this day. The apartheid system, characterized by segregation laws and institutionalized racism, created a platform for violent crimes and political violence. The distinction between political and criminal conduct was often blurred during this period, with freedom fighters justifying their actions as a legitimate weapon against the racist regime. The violence reached unprecedented proportions, claiming the lives of thousands of South Africans in fighting between different political factions.

Deadly outbursts of violence continue to plague South Africa even after the end of apartheid, with xenophobic violence erupting in the “new” South Africa, attributed to the culture of violence originating from apartheid. The racist history of South Africa has laid fertile ground in which the use of violence was sewn, contributing to the expulsion of immigrants and the normalization of violence in communities.⁹⁹

Another driving factor for eruptions of violence can be foreign occupation or interventions. Especially in situations where the population or specific groups adopt an adverse position toward foreign occupying forces, there may be military, paramilitary, or civil groups that resort to violent acts to manipulate political processes. Afghanistan and Iraq are examples of this phenomenon. Also in this case, eruptions of violence triggered by foreign occupation can perpetuate the exclusion and marginalization of certain groups from the socio-political life of the country by the occupying forces. Similarly, violent policies to acquire full or partial political control over another country for the purpose of exploiting it, such as with colonialism and other forms of imperialism, are manifestations of violence that are often followed by further violent acts.

Another key driving factor of eruptions of violence is the failure to engage in mediation or negotiations to resolve a dispute or conflict. Where mediation and negotiations between warring factions, states, or groups are stalled for a long time, it is likely that the parties will eventually resort to violent means, such as acts of terrorism. This is especially true when there are systematic violations of human rights. In this context, this form of violence often aims to bring attention to the existing conflict, to change the political agenda of one or more countries, to bring instability in the region to the extent that it will coerce the international community to engage and solve the existing tensions or armed conflict. The case of the armed conflict between Palestine and Israel is another example of this phenomenon.¹⁰⁰

Eruptions of violence may also be triggered by a lack of trust in government institutions. For example, in post-conflict situations, when a country suffers from weak democratic institutions and political and economic instability and transitional justice processes fail to deliver justice for the crimes committed, victims are more likely to resort to vengeance and reprisals against those who committed those atrocities.

In conclusion, the consequences of eruptions of violence may vary greatly. At times, they may lead to protracted armed conflict; in other cases, they may lead to the establishment of dictatorial regimes, as in the case of unconstitutional changes in power. There are also instances of eruptions of violence in the form of revolutions and popular protests about governance issues that eventually lead to a political transition.

Applicable Contexts

Political Marginalization and Eruption of Violence in Kenya

Kenya has experienced multiple eruptions of violence resulting from years of political marginalization, particularly in the realms of class and ethnicity. The nation's historical trajectory was characterized by enduring discontent arising from economic disparities and ethnic tensions. Root causes of the ethnic tension include legacies of colonial influence, while disputes over land, water, and pasture resources have been a significant factor in triggering ethnic conflicts, especially in rural areas where these resources are essential for livelihoods, economic disparities, and increasing violent extremism.¹⁰¹

Such disparities along ethnic lines directly impact the political landscape of Kenya, and the overwhelming influence of ethnicity in Kenyan politics contributed to the sidelining of certain groups, thereby worsening social and economic inequalities. The outbreak of ethnic violence underscored unresolved problems stemming from prolonged political and social exclusion.¹⁰² The events of 2007 served as the culmination of these historical marginalization factors, laying bare the profound divisions and grievances embedded in Kenyan society. The eruption of violence starkly reflected the failure to address persistent issues of political and economic exclusion, ultimately resulting in a humanitarian and political crisis.

The 2007–2008 post-election violence in Kenya was largely characterized by ethnic tensions and violence, with the Kikuyu, Kalenjin, and Luo ethnic groups being prominently involved. The violence erupted following the disputed re-election of President Mwai Kibaki, which was widely perceived as rigged in favor of the incumbent. The Kikuyu, the ethnic group of President Kibaki, were targeted in the initial wave of violence. This was followed by retaliatory attacks on other ethnic groups, particularly the Kalenjin and Luo, in various parts of the country. The violence played out largely along ethnic lines, reflecting the deep-seated ethnic divisions and historical grievances within Kenyan society. The role of ethnicity in Kenyan politics and the historical marginalization of certain ethnic groups were significant factors that contributed to the eruption of violence during this period. The violence highlighted unresolved issues stemming from years of political and social exclusion, particularly along ethnic lines, which were exacerbated by the contentious election and its aftermath.¹⁰³

It can be said that the eruption of violence was the result of long-standing ethnic tensions and growing political grievances, sparked by allegations of electoral fraud.¹⁰⁴ These allegations arose from a dispute over who the legitimate winner was, when the national electoral commission proclaimed Mwai Kibaki, the incumbent, the winner and the opposition candidate, Raila Odinga, claimed that the election results were fraudulent and stated that he in fact had won the contest.¹⁰⁵

Leading up to this election cycle, political leaders had been implicated in exploiting existing grievances and fomenting violence following elections in 1992 (the first democratic multiparty elections following Kenya's independence) that pitted ethnic groups against one another along party lines, leaving over a thousand civilians dead. The 1997 elections led to similar violence in Kenya, albeit to a lesser extent, with 200 dead.¹⁰⁶ This thread of ethnic violence in Kenya, especially during election periods, has continued through to the present day.

Political Marginalization and Eruption of Violence in Iraq

Iraq provides an example of how colonialism and foreign occupation can trigger multiple eruptions of violence in a country, of different forms and at different times in its history.¹⁰⁷ The Iraqi population witnessed the British colonization of their country from 1914 until 1932 and the occupation of the coalition forces led by the US in 2003.¹⁰⁸ In either case, the Iraqi population did not welcome the deployment and presence of foreign forces in its territory, resisted the invasion and foreign occupation, and resorted to violent tools of rebellion to regain control over their self-determination.¹⁰⁹ In both instances, foreign occupation fueled nationalist sentiments and prompted the formation of violent anti-occupation groups, which eventually yielded disturbing patterns of coups d'état, military revolts, civil unrest, ethnic cleansing, and political repression, which persist to this day.¹¹⁰ In addition to viewing the foreign occupation as an injustice, Iraqis significantly suffered from being completely excluded from the government's decisions over the fate of their country. Great Britain focused on shaping a country that would serve its long-term geopolitical regional interests, paying little attention, if any, to the aspirations and needs of the Iraqi population.¹¹¹ Great Britain's goal was primarily to establish a social, political, and economic system that was strong enough to keep Russian and German influence out of the region, ensuring the protection of Britain's strategic interests in Iranian oil fields and in Iraq.¹¹²

The US and coalition-led occupation of Iraq in 2003 resulted in a surge of violence in the country, leading to significant casualties and widespread instability. The power vacuum following the occupation's onset, coupled with the collapse of the Ba'athist government, sparked a lengthy insurgency and widespread civil war between different factions, contributing to the country's destabilization. The collapse of the Ba'athist regime resulted in widespread looting and outbreaks of violence that exacerbated ethnic and religious tensions, as well as an increase in criminal violence and acts of reprisal against the former regime. Restoring law and order was a significant challenge for the occupying forces, exacerbated by continued attacks against occupying troops that developed into full-scale guerrilla warfare. Iraqis met the occupation with resistance, and continued guerrilla assaults on occupying forces and leaders of the new Iraqi government compounded the difficulty of rebuilding Iraq. The occupation was widely perceived in the Middle East as a new form of anti-Arab and anti-Islamic imperialism, and many Arab leaders decried the presence of foreign troops in Iraq. The occupation and continued warfare led to significant casualties among Iraqi civilians and contributed to the fractious political situation in Iraq. The insurgency that followed the invasion not only targeted US-led forces but also Iraqi civilians, and ultimately gave rise to the Islamic State (ISIS), perpetrating war crimes and crimes against humanity. The occupation and its aftermath had a profound impact on Iraq, contributing to a cycle of violence, instability, and political regression.¹¹³

Structural Violence and Eruptions of Violence in South Africa

Though South Africa went through a robust transitional justice process following the end of the apartheid regime and subsequently adopted a new constitution in 1996, marking the beginning of a new democratic order in the country, structural issues pre-dating the transition persisted and continued to perpetuate deep social and economic inequalities, limiting enjoyment of basic rights by a large section of the population. This is owed to the country's apartheid history, the idea of "afrikanerism" that oiled the apartheid state machinery. Afrikanerism was the idea that Afrikaners (who are white) are superior than "the other" based on skin color, culture, language, and way of life. This meant that churches, schools, and other institutions of social and economic engagement had to function in accordance with that idea while also alienating the perceived racially and ethnically inferior groups.¹¹⁴ This became a period of mass murder, assassinations, and torture of the majority Blacks that were forced into the homelands and those who resisted the apartheid system.

Those classified as "black" were ethnically divided by the system in the homelands. As they were segregated across ethnic lines, there were trusted agents of the apartheid regime to preside over them in the homelands and townships. In communities where police would be deployed to enforce apartheid laws, police would demonstrate utmost disregard for human life in their operations.¹¹⁵ In response, protests took place in most parts of South Africa, from student movements to civil protests, with people demanding an end to the oppressive apartheid regime. On the battlefield, it was civilians versus the South African Police, which had become a potent tool used by the apartheid government in efforts to counter revolutionary attempts that sought to dismantle the apartheid system. This meant that the new democratically elected government would inherit violent institutions of the apartheid regime, further compromising transitional justice processes in South Africa—which is what the Truth and Reconciliation Commission (TRC) works toward to achieve—and seldom addressed issues related to structural violence that rears its ugly head in the new democratic order. Having inherited violent institutions, post-apartheid, democratic South Africa finds itself today in an entangled relationship with violence.

Structural violence in South Africa finds expression through lack of service delivery in the previously classified homelands, while the formerly classified "white" areas of the state enjoy access to public infrastructure and service delivery.¹¹⁶ This has created "othering" of certain people, with the disadvantaged resorting to protests and striking, which tends to assume a violent nature. The genuine issues and challenges of residents whose very realities require redress by the state either get hijacked or used by criminal elements and opportunists, eclipsing the genuine issues and concerns that people have.¹¹⁷

Even when South Africa is applauded for its comprehensive Truth and Reconciliation process, the impact of the TRC cannot be felt when it comes to the social and economic empowerment of the largely Black population. Despite civil and political freedoms, enjoyment of social and economic rights by the majority is a persistent problem in contemporary South Africa. Of late, the country is experiencing increasingly frequent and more widespread deficiencies in basic service delivery, causing frustration and leading to mass civil unrest, including xenophobic violence and community protests.¹¹⁸

Poor governance on migration in South Africa has resulted in a scramble for resources and competition for jobs, the suggestion being that migration has exacerbated its already existing dire socioeconomic conditions of poverty, inequality, and unemployment in the country.¹¹⁹ In the context of unemployment, poor governance in terms of labor migration has resulted in xenophobic violence in which South Africans fear the great influx of migrants, as it is understood to mean fewer job opportunities for South Africans first. As these protests are violent in nature, they signal a relationship between violence and collective resistance that has remained prevalent since the apartheid years.

Key Findings

Violence is almost always a symptom of deeper issues and problems in society such as long standing social, economic, racial, ethnic, or political marginalization. In Kenya, growing ethnic tensions fueled by political leaders has led to violence during elections, exacerbated by a lack of trust in security forces and institutions. In Iraq, the foreign occupation excluded local solutions and governance contributed to the escalation of violence. In South Africa, the apartheid system created deep divides in society along racial and ethnic lines that still exist today and deprive large sections of the population the enjoyment of basic services and their social and economic rights, leading to frustration and triggering violent responses. These findings underscore the importance of structural and institutional reforms to address root causes such as inequalities and marginalization that can trigger new cycles of violence and conflict if left unattended.

Status of Transitional Justice Processes

Kenya

Following post-election violence in 2007, Kenya has employed a range of transitional justice mechanisms, including prosecutions, both domestically and at the International Criminal Court (ICC), and the establishment of a truth commissions. The Truth, Justice and Reconciliation Commission (TJRC) was established in 2008 to investigate historical injustices and human rights violations.¹²⁰ Kenya's transitional justice process has faced a range of challenges, including political interference, lack of political will, and limited resources.¹²¹ Despite these challenges, Kenya has made some progress in its transitional justice process, including the establishment of the TJRC and the prosecution of individuals for their role in the post-election violence. However, there is still much work to be done to address the root causes of the violence and to ensure that victims receive justice and reparations.¹²²

The TJRC of Kenya, in particular, was established to address historical injustices, human rights abuses, and ethnic violence that occurred between December 12, 1963, and February 28, 2008. The commission was mandated to investigate, analyze, and report on gross violations of human rights, economic crimes, illegal acquisition of public land, marginalization of communities, and the context in which these crimes occurred. It aimed to promote healing, and reconciliation and address the causes and effects of historical injustices and human rights violations. The TJRC operated for two years, with public hearings beginning in January 2010. Its final report documented the commission's findings and detailed recommendations on addressing past violations and injustices through reparations and prosecutions. The commission's work was a part of the accountability component of Agenda Four, which sought to address the aftermath of the 2007 post-election violence and promote healing and reconciliation in Kenya.¹²³

While there have been efforts to prosecute those accused of atrocities during this period of violence, there have also been challenges in adequately investigating and prosecuting crimes related to the post-election violence. The ICC prosecutor presented cases against six individuals for crimes against humanity, and the court requested summonses to appear against these individuals.¹²⁴ However, the domestic judicial system in Kenya has faced criticisms for failing to adequately address the broader range of crimes and provide justice for the victims. There have been calls for Kenya to establish a special judicial mechanism within its justice system to address the post-election violence more comprehensively and provide compensation for the victims. The challenges in prosecuting those involved in the 2007 violence have underscored the need to address issues of accountability and justice in the aftermath of such conflicts.¹²⁵

Overall, the transitional justice process in Kenya has seen progress, but it still faces significant challenges. Prosecutions, truth-seeking, and reparations have been employed, but political interference, lack of political will, and limited resources have hindered progress. The prosecution of certain individuals for their role in the post-election violence has sent a message that there will be consequences for those who engage in electoral violence; however, most high-level offenders have not been charged or tried. In addition, the TJRC was established to investigate historical injustices and human rights violations, including those related to the post-election violence.¹²⁶ Moreover, reparations for the 2007 violence in Kenya have been issued, to some extent. In a landmark 2020 judgment, the High Court in Nairobi awarded 4 million KSH (approximately \$40,000) in reparations to each of the four petitioners who were survivors of post-election sexual and gender-based violence that took place in Kenya in 2007–2008. However, it is important to note that while some reparations have been awarded, there are survivors who are still awaiting compensation, and there have been calls for the Kenyan government to enforce the reparations awarded in the 2020 judgment without further delay.¹²⁷

Lastly, the Kenyans adopted a new constitution in 2010 in an attempt to fix or mitigate the structural issues plaguing Kenyan society. The new constitution introduced significant changes, including the establishment of a bicameral parliament consisting of the National Assembly and the Senate, the creation of 47 County Assemblies in each of the 47 counties, and the requirement for public participation in policymaking and legislation.¹²⁸ The constitution-making process in Kenya was marked by extensive public participation, legal and political challenges, and a commitment to address historical injustices and promote good governance. The process reflects the evolving nature of constitutional development in Kenya and the ongoing efforts to strengthen democratic institutions and promote the rule of law.¹²⁹

With this said, lingering challenges include political interference, lack of political will to pursue justice and accountability perpetuating widespread impunity for past crimes, as well as a lack of consensus on what form that transitional justice measures should take.¹³⁰

Iraq

The status of transitional justice in Iraq reflects a complex and challenging landscape. The country has grappled with a history of human rights abuses, including those committed during Saddam Hussein's regime, post-2003 violence, political instability, and the conflict with the Islamic State of Iraq and the Levant (ISIL). Efforts to address these legacies have faced significant obstacles, including the lack of capacity and expertise to address the widespread atrocities, the need for a secure environment and a legitimate authority to implement comprehensive transitional justice strategies, and the challenges of balancing prosecutions, reparations, vetting, truth-seeking mechanisms, and institutional reform.

The establishment of the Iraqi Supreme Court and the Iraqi High Tribunal, as well as the involvement of the United Nations Assistance Mission for Iraq (UNAMI) and the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD), have been part of the broader transitional justice efforts in Iraq aiming to address the past, promote stability, reconciliation, and development, and hold perpetrators of atrocities accountable. However, the process has been marked by challenges, including political pressure, security threats, and slow implementation of recommendations, underscoring the complexities and difficulties of achieving social cohesion and reconciliation in the aftermath of conflict and human rights abuses.¹³¹

South Africa

As part of the transitional justice process in South Africa, the state established a TRC that was mandated to investigate gross violations of human rights during the apartheid regime and make recommendations to assist the state in reconciling with society. The TRC was charged with three specific tasks: to identify the causes and nature of human rights violations in South Africa between 1960 and 1994, to identify victims eligible for reparations, and to grant amnesty in exchange for full disclosure of the truth to those who willingly came forward to relate facts about their involvement in the violations.¹³²

The TRC was established in South Africa in 1995 through the Promotion of National Unity and Reconciliation Act. Unlike traditional criminal prosecution, the TRC aimed to uncover the truth from both victims and perpetrators, fostering a healing conversation among all South Africans. Chaired by Archbishop Desmond Tutu and appointed by Nelson Mandela, the commission gathered information and testimony from thousands of victims, receiving over 22,000 statements.¹³³

Some of the key recommendations and outcomes of the TRC include the following:

- **Amnesty Hearings.** The TRC held amnesty hearings in which individuals could apply for amnesty in exchange for full disclosure of their involvement in politically motivated human rights violations.
- **Reparation and Rehabilitation.** The TRC recommended reparations for victims of human rights abuses, including financial compensation and other forms of rehabilitation and support.
- **Public Hearings and Testimonies.** The TRC conducted public hearings in which victims and perpetrators could give testimony about gross violations of human rights, thereby providing a platform for truth-telling and acknowledgment of past atrocities.
- **Official Report.** The TRC produced an official report documenting its findings and recommendations, providing a comprehensive account of the human rights abuses that occurred during the apartheid era.
- **Promotion of National Unity and Reconciliation.** The TRC aimed to promote national unity and reconciliation by uncovering the truth from victims and perpetrators, fostering a healing conversation among all South Africans.

These recommendations and decisions were aimed at addressing the injustices of the past, promoting reconciliation, and fostering a culture of democratic norms and tolerance in South Africa.¹³⁴

The TRC in South Africa faced several criticisms and limitations, which are considered failures by some observers. Some of the main criticisms include the following:

- **Lack of Economic and Social Transformation.** The TRC's failure to address social and economic transformation has been highlighted as a significant shortcoming. The commission's focus on truth-telling and reconciliation did not extend to addressing the broader structural inequalities and economic injustices that were deeply rooted in the apartheid system.¹³⁵
- **Inadequate Condemnation of Apartheid Law and Leaders.** Critics argue that the TRC failed to adequately condemn apartheid laws and its leaders. Some South Africans felt a sense of betrayal because politicians responsible for the atrocities were left unpunished, leading to a perception that the TRC did not hold apartheid leaders accountable for their actions.
- **Limited Focus on Policies and Political Economy of Apartheid.** The TRC did not sufficiently focus on the policies or political economy of apartheid, which resulted in a failure to examine the broader impact of apartheid's policies and the link between racialized power and privilege. This limited focus obscured the collective responsibility of those who benefited from apartheid.¹³⁶
- **Slow Implementation of Recommendations.** The post-Mandela government was slow to implement the TRC's recommendations, including the reparations program. By the end of the first decade of the 21st century, few of the commission's recommendations had been implemented, and there had been few prosecutions of individuals who failed to apply for amnesty or who were refused amnesty by the TRC.¹³⁷

These limitations and criticisms have led some to question the overall effectiveness and impact of the TRC in addressing the collective violence committed based on race and ethnicity during apartheid, the deep-seeded injustices of the apartheid era, and the promotion of genuine reconciliation in South Africa.

The negotiated settlement among the elite compromised how the TRC would function. Having stated that, its mandate, which was to investigate gross crimes against humanity, was limited to violations of human rights through the killing, abduction, torture, or severe ill treatment of any person or any attempt, conspiracy, incitement, instigation, command, or procurement to commit one of the acts during the period of March 1, 1960, to May 10, 1994. The commission was interested in matters related to politically motivated killings, abductions, torture and the like with minimal to no interest on the impact that apartheid as a system had on racial and ethnic groups, which constituted systematic violence of the apartheid regime through its policies.

Moreover, its analysis on the violations of human rights was related to conflicts of the past that were unrelated to the policies of apartheid, but what it framed as politically motivated killings. The commission's interpretation of "victim" was not inclusive of ethnic and racial communities that were oppressed by the apartheid system, victims for the most part, were those who were key members of organizations that emerged to challenge apartheid and perpetrators were ethnic rivalry groups such as Inkatha. This is to say that the TRC failed to adequately address the collective violence committed against South Africans based on race and ethnicity during apartheid. The TRC recognized apartheid as a crime against humanity but failed to acknowledge its victims who are the ethnically and racially marginalized groups. Being a victim became individualized, neglecting the collective violence based on race and ethnicity that was perpetuated by the apartheid government and its chosen system of governance.

Key Findings

In all three country examples, underlying structural violence, discrimination, and marginalization of particular minority groups have led to eruptions of violence even after transitional processes took place. This shows that transitional justice processes failing to address the root causes of conflict and adopt necessary reforms or issue meaningful reparations and hold perpetrators accountable can lead to deep-seated frustration in society that emerge as deadly violence and/or popular uprisings. In Kenya, the eruption of political violence during elections has been linked to growing ethnic tension fueled by political leaders to their advantage, alongside a lack of trust in security forces and institutions. The country has faced challenges in addressing historical marginalization and promoting inclusive governance to prevent political violence.

In Iraq, the occupation led to the denial of local solutions and governance, contributing to the perpetuation of violence. The challenges of national healing and recovery in Iraq have been underscored by the compromised institutions and squandered opportunities in implementing transitional justice mechanisms.¹³⁸ In South Africa, the legacy of apartheid has left a profound impact, with the TRC serving as a significant step toward addressing the injustices of the past

and promoting reconciliation and forgiveness among perpetrators and victims. However, challenges persist in addressing the structural and cultural barriers to achieving comprehensive transitional justice.¹³⁹ These findings highlight the complex and multifaceted nature of political violence, rooted in historical marginalization, and the challenges of implementing transitional justice mechanisms to address the legacies of conflict and human rights abuses.

Impacts and Relationship of Typology of “Eruptions of Violence” to Political Regression

The relationship between eruptions of violence and political regression is cyclical in that eruptions of violence can contribute to and characterize a society experiencing political regression, while a society experiencing political regression can also trigger violent outbursts due to built up frustration over prolonged or worsening conditions of social, economic, or political marginalization and discrimination, among others. Eruptions of violence and a subsequent state backlash can lead to human rights abuses, including extrajudicial killings, torture, political imprisonment, sexual violence, forced displacement, and other attacks against civilians.¹⁴⁰ In other words, violent uprisings fueled by political and economic marginalization are often met with violent state resistance, the closing of civic space, and further restrictions on rights and freedoms, contributing to political regression.

Once these cycles of violence occur, the resulting conditions lead to the weakening of state institutions entrusted with ensuring state security and the erosion of democratic norms, further allowing for authoritarians and authoritarian-leaning leaders to usurp power to benefit their own groups, supporters, and allies, furthering the spiral of marginalization and discontentment. Moreover, throughout these cycles of violence, in addition to acquiring power to benefit a leader and their supporters, there tends to be specific targeting of marginal groups and discrimination of “the other.” Lines between allies and political opponents are drawn along group identity, and those not in power tend to be increasingly disenfranchised. As previously discussed, it is this deep disenfranchisement and extreme marginalization that leads to mass and violent uprisings, sparking internal conflicts and further rights restrictions on a given population.

Potential and Existing Mitigation Strategies

Mitigation strategies for preventing political violence include a range of interventions that would need to be employed well before the prospect of violence occurs. First and foremost, the most effective strategies in avoiding recurring violence in a society, especially those that have experienced a transitional justice process, is the need to implement the recommendations from truth commissions or enforcement of court judgments in the case of criminal accountability of perpetrators. The development of an action plan or implementation plan for the recommendations of truth commissions emerges as one of the best practices that will more likely lead to expected results and allow stakeholders to monitor compliance with truth commission recommendations. In particular, the root causes of conflict that require institutional, legal, and related reforms are necessary to prevent society from succumbing

to new cycles of violence. Putting in place a monitoring and evaluation system for the follow-up of transitional justice mechanisms is another tool to avoid recommendations remaining on paper only. Preventative measures that are rooted in addressing the potential causes of a breakdown in society and eruption of violence must be put in place.

Strengthening the legal, policy, and institutional framework, including the rule of law, accountability, and transparency to combat impunity and create conditions discouraging violence is essential. To take this a step further, utilizing local and international *monitoring and observer missions* to oversee electoral or other peace processes and provide early warning of potential violence may mitigate major eruptions of such occurrences.¹⁴¹

Moreover, it is further recommended that states invest in early warning systems to detect any potential harm to their civilians and democratic state institutions. A strong risk analysis apparatus gives a forecast of potential political violence in order to prevent or mitigate conflict. These systems provide a forecast of potential political violence, allowing states to prevent or mitigate conflict. The Violence Early-Warning System (ViEWS) is a publicly available data-driven forecasting system that generates predictions for state-based violence.¹⁴² It aims to assist policymakers and practitioners in eliminating blind spots, justifying targeted action, providing an evidence-based means to allocate scarce resources, and serving as scenario analysis tools for policymaking. ViEWS produces forecasts for different types of violence at both country and subnational levels, and it is suitable for replication to other forecasting tasks, such as predicting impacts of armed conflict on human development.¹⁴³ Additionally, the ACLED Early Warning & Forecasting Hub offers interactive tools for tracking political violence and demonstrations, providing early warning signs and conflict prediction capabilities. These early warning systems play a crucial role in identifying important changes in political violence and providing insights to prevent or mitigate potential conflicts.¹⁴⁴

Lastly, promoting broad political participation and fostering civic engagement by all sectors of society promote inclusiveness and diminish the probability of violent outbreaks. Civic and political engagement empower individuals to participate in decision-making processes, ensuring that their voices are heard and their concerns are addressed.¹⁴⁵ Structural reforms are also key to promoting an inclusive democratic society that is responsive to a population's rights and needs. By promoting inclusive governance and democratization, these efforts enable citizens, particularly those previously marginalized, to actively participate in political representation and influence policy changes. Political efficacy, which reflects citizens' confidence in their ability to effect change through political action, is a key component of civic and political engagement.¹⁴⁶ To go one step further, promoting civic and political engagement among marginalized communities and improving the enjoyment of social and economic rights can help address structural and cultural barriers, ensuring that civic power is delivered to the community and decision-making processes are responsive and beneficial to all. These interventions are essential in building democratic resilience and fostering a culture of inclusive governance, ultimately reducing the risk of violent uprisings resulting from disenfranchisement and marginalization.¹⁴⁷

Conclusion and Recommendations

A recurring theme in the studied scenarios is the detrimental impact of excluding certain demographic groups from political processes and decision-making. This exclusion emerges as a primary factor in the escalation of violence, highlighting the critical need for inclusive governance. Such governance should not only be representative but also actively engage all segments of society to foster stability. This exclusion may disintegrate into conflict when protracted and combined with other social, economic, or political factors affecting the social, economic, political, and civil rights of particular groups. The chapter highlights the fact that eruptions of deadly violence are almost always a symptom of deeper structural violence, marginalization, or deep-seated discrimination against certain groups in society that can also fester after a transitional justice process has occurred but where the root causes of the conflict have not been addressed. Moreover, the research underscores the pivotal role of economic factors in the genesis of political violence, revealing a pattern in which economic marginalization, often rooted in the denial of access to resources and opportunities, results in civil unrest. This calls for important structural, institutional, and policy reforms to address root causes of the violent outbursts, especially in contexts where disenfranchisement is prevalent.

To prevent the recurrence of deadly violence in society, the chapter brings out the importance of adopting institutional, legal, and related reforms to address the root causes of conflict. Guarantees of non-repetition, which embody preventative measures, are frequently central to recommendations emerging from post-transitional justice processes and should be implemented by the state and monitored by key stakeholders, in particular civil society, survivor groups, and affected communities. International human rights bodies such as the African Commission on Human and Peoples' Rights, the Inter-American Commission on Human Rights, and the UN also have a role to play. The follow-up of transitional justice processes and mechanisms can be strengthened through more formal and rigorous monitoring frameworks to evaluate compliance with state commitments.

Moreover, the research suggests that states should equally adopt complementary measures to proactively promote social cohesion and reconciliation, especially in societies that have experienced protracted conflict and that also have damaging effects on the social fabric of affected populations. According to the African Union Transitional Justice Policy, "Reconciliation is both a goal and a process premised on building the trust necessary for a degree of cooperation between individuals and communities."¹⁴⁸ This suggests that for any form of reconciliation and social cohesion effort to be successful, there ought to be trust among historically warring parties and a shared desire for cooperation. Reconciliation entails addressing legacies that were inherited from the previous, violent regime, mending broken relationships, and seeking ways in which individuals and communities can co-exist despite dualisms or the differences among them. In examining the aftermath of historical injustices such as apartheid in South Africa and colonialism in Iraq and Afghanistan, it becomes evident that these deep-seated legacies continue to exert a profound influence on their respective political and social fabrics. This observation underscores the imperative for sustained and dedicated efforts toward reconciliation and justice, acknowledging the complex interplay between past and present.

CHAPTER 3:

UNCONSTITUTIONAL GRABS OF POWER

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Definition

“Unconstitutional struggles” are defined as attempts by individuals or groups of individuals to acquire or consolidate power in an unconstitutional manner—and thus be in violation of the constitutional norms in force. This is often done by seizing control of the sitting government or the political and military infrastructure—often, but not necessarily always, through force or deception—followed by its replacement with a new and unelected government. In most cases, the new government abolishes the old constitution and replaces it with a new one that gives sufficient discretion to the new leadership to maintain power for many years. The unconstitutional overthrow and replacement of a sitting government is widely known as a “coup d’état.” Other scenarios of unconstitutional grabs of power are those in which individuals manipulate the political process or other political actors to obtain control of a government. While such manipulations might not lead to a radical change, such as the overthrow of a government, they do have an impact on the political process by facilitating certain individuals’ political careers.

Depending on the specific context, there may be different driving factors for unconstitutional grabs of power; however, in most cases, as is discussed in this section, unconstitutional struggles are motivated by the desire for personal or political gain. In fact, most of those who lead these struggles are already in positions of power and aim to overthrow the sitting government in order to enrich themselves or a specific elite, or to advance a particular political agenda or ideology that has not been endorsed by the sitting government. Often, such attempts are facilitated by external interference, such as support from foreign countries for specific personalities that are attempting to obtain power, or by powerful actors who acquire leadership positions by taking advantage of the instability and discontent among a population at a given time.

The consequences of unconstitutional grabs of power are multiple and multifaceted. As these strategies are often employed by authoritarian leaders who seize power in a non-democratic manner, it is not surprising that in most cases such unconstitutional attempts lead to the establishment of authoritarian regimes and dictatorships that maintain power by force for decades. This typically takes a country into a system of oppression and repression wherein the population has limited opportunities to democratically

manifest its dissent for the government, necessarily leading the opposition to resort to more unlawful and often unconstitutional solutions.

This section looks into three examples of unconstitutional struggles and, based on these examples, identifies the main driving factors for unconstitutional struggles and how they contribute to political regression.

Driving Factors

It cannot be said for certain what exactly facilitates—or creates—the conditions suitable for an unconstitutional power grab, but there are factors seen in different contexts that appear to make such actions less challenging to those seeking to consolidate power in such a manner.

There are several historical root causes seen across states that can contribute to an unconstitutional power grab occurring, including the following:

- **Weak institutional checks and balances.** When the checks and balances within a political system are weak or compromised, or one unit of government becomes more powerful than others, it becomes easier for individuals or groups to exploit such weaknesses for their own gain. Weak balance of power may also include an existing oppressive regime that carries out unconstitutional reforms.
- **Political instability.** Periods of political instability, such as during transitions of power or times of crisis, can create opportunities for individuals or factions to exploit a situation and seize power unlawfully.
- **Authoritarian tendencies.** Leaders or groups with authoritarian inclinations may seek to consolidate power and undermine constitutional constraints in order to establish or maintain control over a government. For instance, one regime or ruler may maintain full control of all ministries and aspects of economic, political, and social life.
- **Erosion of democratic norms.** Over time, small erosions of democratic norms and the weakening of respect for constitutional principles (such as during times of crisis, namely, a war or pandemic) can create an environment in which power grabs become more likely.
- **Polarization and division.** High levels of political polarization and societal divisions can create a volatile environment in which individuals or groups are more willing to bypass constitutional processes in order to achieve their goals. Further, a stalemate or deadlock in parliament and between political parties rendering a government unable to provide for its people can be exacerbated by infighting within parties (even leading to perceptions of corruption).
- **Manipulation of legal loopholes.** Crafty manipulation of legal loopholes or ambiguities within a constitution or legal framework (along with a lack of a functioning constitutional court) can be used to justify an unconstitutional power grab.
- **External factors.** External interference, such as foreign influence or support, can sometimes play a role in enabling or encouraging an unconstitutional power grab.
- **Economic troubles.** States experiencing a sluggish economy in which citizens are unable to meet their basic needs are more likely to be susceptible to, and accepting of, authoritarian power grabs.

It's important to note that these factors are not exhaustive, and each situation may have its own unique combination of factors leading to an unconstitutional power grab. The following section discusses various contexts in order to provide a comparative analysis of the role unconstitutional struggles play in contributing to political regression.

Applicable Contexts

Libya

Libya is an example of a country that, after living through authoritarianism and dictatorship from 1969 until 2011 following an unconstitutional grab of power that was facilitated by foreign interference, attempted to embark on a transitional justice process without much success.

In September 1969, Muammar Gadhafi led a bloodless coup d'état organized by a group of approximately 70 armed officers against King Idris I. The coup ousted the old leaders and replaced them with the Revolutionary Command Council (RCC) which shortly afterward announced that Gadhafi would become commander in chief of the Army of Libya. The coup had been planned in Libya and Italy, strongly suggesting—and later being confirmed—that the involvement of Italian secret services in the overthrow of the monarchy and the unconstitutional rise of Gadhafi. With time, it became clear that the main interest behind Italy's support for Gadhafi was that of securing an agreement that would guarantee Italy's access to Libyan gas and dismantlement of British and American military bases.

After King Idris I was forced to flee the country, the RCC abolished the monarchy along with the constitution and established the Libyan Arab Republic. Under Gadhafi's rule, Libya became one of the richest countries in the African continent with a free education system and healthcare system for both men and women. However, Gadhafi's rule was accompanied by a controversial foreign policy and an increase of political repression with widespread human rights violations. As the Arab Spring started in 2011, the Libyan population saw an opportunity to overthrow the Gadhafi regime and promote a new agenda for the country; however, the protests were repressed with extreme violence to the extent the situation in Libya was brought to the UN Security Council. Invoking the Security Council's Resolution 1973, NATO, led by France, Germany, and the United States, invaded Libya in 2011, leading to the capture and killing of Gadhafi, thus signifying an end to his regime. Since then, the country has lived through chaos and instability with two competing governments administering the country and serious human rights violations being committed every day by both government forces and a multitude of rebel factions.

Syria

The history of Syria since 1970 is an example of human rights violations caused by the continuous return of authoritarianism through unconstitutional reforms and a lack of compliance with international agreements seeking to put an end to massive atrocity crimes.

The al-Assad family of Alawite minority has controlled the Syrian government and ruled the Ba'ath party since 1970, when Hafez al-Assad appointed himself leader of Syria after initiating a coup d'état that ousted then leader Salah Jadid. In 1971, Hafez al-Assad won the elections with 99.2 percent of the vote, and in 1973 adopted a constitution that allowed the family to institutionalize an authoritarian, repressive, and sectarian system that made the al-Assad family, as representative of the Socialist Arab Baath Party, the only political option in Syria. According to Art. 8 of the 1973 Constitution, the Socialist Arab Baath Party was "the leader of state and society," which translated into control over every ministry and aspects of economic, political, and social life.¹⁴⁹

Overall, the government monopoly exercised by the al-Assad family increased the Alawite dominance of the security and intelligence sectors, which since then have played a crucial role in systematically repressing the opposition through terror and violence. While the regime of Hafez al-Assad has been implicated in many human rights violations since its establishment, one of the most violent repressions took place in 1982 and came to be known as the Hama Massacre, when the regime reacted to uprisings with massive enforced disappearances, torture, and arbitrary detentions as well as the indiscriminate killing of thousands of people. The Hama Massacre made the regime of the al-Assad family even more established, repressive, and authoritarian.

After Hafez al-Assad began to develop health issues, a succession crisis started that eventually brought his son, Bashar al-Assad, into power in 2000. Bashar's appointment as president of Syria was unconstitutional, as, according to the Syrian Constitution, the president must have turned age 40 at the time of appointment; however, the constitution was amended overnight by the Syrian Parliament to lower the minimum age to 34 in order to allow Bashar to take office.¹⁵⁰ A few days later, the Socialist Arab Baath Party unanimously elected Bashar as both its leader and the only candidate for Syria's presidency. He won the elections with 99.7 percent of the vote and started his first seven-year mandate, which was renewed in 2007 with 97.2 percent of the vote.

Despite the unconstitutionality of the elections, the change of leadership was initially welcomed by the Syrian people, who saw in Bashar al-Assad an opportunity to modernize, westernize, and liberalize the country. In his first years of power, Bashar al-Assad made democracy, transparency, and constructive criticism his political manifesto, providing hope for an era of democratic reforms and increased human rights protection. In fact, he loosened government restrictions, released hundreds of political prisoners, and allowed for the beginning of the so-called "Damascus Spring," during which political discussions and activism were tolerated. In 2011, following a wave of protests across the Middle East—the so-called "Arab Spring"—Bashar implemented a series of reforms focused on freedom of expression, local administration, and electoral procedures; on November 11, he appointed a committee to draft a new constitution to replace the one introduced in 1973, which was approved on February 27, 2012.¹⁵¹ While the 2012 Constitution, with the introduction of a multiparty system and multicandidate presidential elections, was intentionally adopted to make people believe that the regime was changing its oppressive nature, in all reality, it was used to keep the Assad family in power forever. The true brutal and oppressive nature of Bashar's regime was further revealed as the civil war unfolded in Syria.

Since 2011, systematic repressions of peaceful protests have led Syria into a brutal civil war that has killed or arbitrarily detained hundreds of thousands of people. Violations of human rights have largely been committed by the Syrian regime and its affiliates, which have intentionally targeted civilian buildings and systematically kidnapped and detained anyone suspected of opposition. Atrocity crimes, including genocide, also have been committed by the several non-state actors involved in the conflict, especially terrorist armed groups such as Daesh and Jabhat al-Nusra. Despite the involvement of the Syrian regime and its affiliates in massive atrocity crimes throughout the country for more than 10 years, Bashar al-Assad is still the Syrian president and has even gained back control over most of the territories that had been taken by the opposition. In May 2021, Bashar al-Assad secured his fourth term as president of the Syrian Arab Republic, once again through impartial and non-independent elections, as many have noted.

Tunisia

Tunisia is an example of a situation in which a state returns to authoritarianism during a time of crisis when its leader is able to exploit internal division and desire for stability in order to usurp democratic norms and consolidate power.

The Tunisian Revolution—as known as the “Jasmine Revolution”—was a popular uprising against President Zine El Abidine Ben Ali and his government, which had held power since 1987.¹⁵² On December 17, 2010, Mohamed Bouazizi, a produce vendor, self-immolated outside a municipal office in Sidi Bouzid after local officials confiscated his fruit cart and demanded bribes.¹⁵³ In the following days, protests spread across Tunisia, spurred by Bouazizi’s act of desperation and high levels of unemployment, lack of political freedoms, corruption, food inflation, poor living conditions, and poverty under Ben Ali’s rule.¹⁵⁴

Ben Ali’s government garnered international criticism and accusations of use of excessive force, as clashes between police and protesters resulted in dozens of civilian deaths.¹⁵⁵ Although Ben Ali responded by dismissing the minister of Interior and promising an investigation, as protests continued, deadly use of force by the police persisted and Ben Ali deployed the military in an attempt to quell demonstrations.¹⁵⁶ When assurance of reforms and political concessions similarly did not satisfy the surging protests, on January 14, 2011, Ben Ali officially resigned and fled Tunisia with his family to Saudi Arabia.¹⁵⁷ The Tunisian National Fact-Finding Commission concluded that 338 people were killed during the Tunisian Revolution and an additional 2,147 were injured.¹⁵⁸

In 2014, Tunisia adopted a new constitution in alignment with democratic principles and goals of the Arab Spring.¹⁵⁹ It also adopted a noteworthy transitional justice law that was lauded by many pro-democracy and pro-transitional justice activists.

Leading up to the 2019 power grab, a power struggle between the pillars of Tunisian government had been growing for months.¹⁶⁰ For years, Tunisia had faced political stalemate as the president Kais Saïed (elected 2019), prime minister Hichem Mechichi, and parliamentary speaker Rached Ghannouchi were at odds over how the constitution delegates powers among Tunisia’s leaders.¹⁶¹ This led to discontent among the public with their government, and voter turnout declined significantly between 2011 and 2018.¹⁶²

At the same time, Tunisia was experiencing a downturn in its economy, marked by high unemployment, a rising inflation rate, and tax increase, which led to protests throughout the country.¹⁶³ Unemployment increased from 12 to 18 percent after the 2011 revolution, and remains at approximately 15 percent.¹⁶⁴ The Tunisian dinar had depreciated significantly compared with other currencies, so when combined with the aforementioned factors, Tunisians' purchasing power was radically reduced, pressing citizens to cope with an increased cost of living.¹⁶⁵ In fact, the cost of living had increased by more than 30 percent between 2016 and 2019.¹⁶⁶

The origins of the crisis can be traced back to the 2019 parliamentary elections, which produced a highly fragmented legislature with no clear majority. Successive governments struggled to implement reforms and address the country's economic challenges, leading to growing frustration and anger among the population. In the spring and summer of 2021, this anger boiled over into mass protests and demonstrations, with many Tunisians taking to the streets to demand change. These protests were sparked by a series of crises, including a surge in COVID-19 cases and deaths, a looming economic crisis, and a political deadlock that had paralyzed the government.

In July 2021, Tunisia experienced a significant political upheaval as President Kais Saïed dismissed the government and assumed executive power. The move was seen as a response to widespread public discontent with the country's political class, which had been accused of corruption and mismanagement. Furthermore, it can be argued that Saïed took advantage of the COVID-19 crisis to usurp unconstitutional power under the guise of being a serious health emergency. During the pandemic, Tunisia was under a state of emergency that granted the president additional powers for a limited period to manage the crisis.¹⁶⁷

When this period was scheduled to end, Saïed utilized the military and other security officials to overtake the Syrian Parliament and "suspend Parliamentary immunity" that exists in Tunisia, threatening lawmakers with prosecution.¹⁶⁸ On July 25, President Saïed announced that he was invoking Article 80 of the Tunisian Constitution, which allows the president to take exceptional measures in the event of an imminent threat to national security or the normal functioning of state institutions. He dismissed the prime minister and other key officials, suspended parliament, and assumed executive power. He utilized the military to quell any dissension.¹⁶⁹ President Saïed also dismissed the head of the Dignity and Rehabilitation Fund for the Victims of Totalitarianism, a reparations mechanism to compensate victims of human rights abuses before the democratic revolution.¹⁷⁰ The police force supported President Saïed, cementing the stability of his power grab likely because there had been little security-sector reform, even as they continued to commit widespread abuses.¹⁷¹

Key Findings

Based on a review of the circumstances in which unconstitutional struggles took place in Syria, Libya, and Tunisia, it can be concluded that each had been a breeding ground for the unconstitutional grab of power:

- **Rise to power of autocratic leaders.** In order to gain power in an unconstitutional manner, an individual or a group of individuals necessitate leadership. Because of the challenging circumstances in which they operate, such leaders often propose radical solutions to the

problems of the country, excluding certain political ideas and leaders from the decision-making process and taking full control of the governance.

- **Internal support.** Unconstitutional grabs of power occur because of the existence of favorable dynamics for the rise to power of specific individuals. In most cases, the unconstitutional grab of power is facilitated by the support of specific leaders and individuals who have control over military or economic sectors and therefore play a fundamental role in shaping the future of the country.
- **Military apparatus.** Most often, unconstitutional grabs of powers are led by military leaders who enjoy the support of this apparatus, which, because of its very nature, has the power to silence the opposition.
- **External support.** Geopolitical dynamics play a fundamental role in facilitating or challenging the rise to power of specific leaders. Often, leaders enjoy the support of powerful countries that have specific interests in the agenda of that specific leader. Similarly, they are challenged or even overthrown when they do not pursue policies that are in the geopolitical interests of the powers in question.
- **Absent or weak democratic institutions.** In most, if not all, scenarios in which unconstitutional grabs of power take place, democratic institutions are absent or not well established and therefore the opposition cannot rely on effective resources to counter the unconstitutional rise to power of certain leaders.

Status of Transitional Justice Processes in Libya, Syria, and Tunisia

Libya

Muammar Gadhafi ruled over Libya as an authoritarian dictator for 42 years before the February Revolution of 2011 whereby he was overthrown, captured, and killed in October 2011. Gadhafi's tenure as Libya's head of state was characterized by factional warring, extreme violence, and indifference to human rights. He oversaw the "Green Terror," a term used to describe the campaigns of violence and intimidation used against Gadhafi's opponents.¹⁷² This gave rise to a surveillance state, similar to those operated by Saddam Hussein in Iraq and Kim Jong Il in North Korea.¹⁷³ These oppressive tactics fermented strong dissent to Gadhafi's rule, which eventually culminated in the 2011 February Revolution and his execution.

In 2011, following a NATO invasion, Gadhafi was arrested and killed. As a result, Libya is today politically, militarily, and territorially fragmented—and influenced by multiple foreign powers and armed groups. Since 2011, Libya has lacked a central government that is able to exercise authority over the whole country and effectively embark on a transitional justice process. Syria is currently governed by two governments, one of which, the General National Congress (GNC) was created to govern Libya

through democratic rule, and is recognized by the international community.¹⁷⁴

In this challenging context, Libya has attempted to embark on a transitional justice process to reconcile with its past and prevent future violence and instability. In 2013, the GNC passed Law No. 29 on Transitional Justice.¹⁷⁵ This law was criticized for being too narrow in scope and too weak in accountability because it did not provide for the wide range of crimes possible to prosecute under international law and it did not adequately include women's rights as part of the transitional justice process.¹⁷⁶ As a result, while women took a leading role in the 2011 revolution, there have only been a few women in the various governments through elections and appointments and women have generally been disadvantaged in the political process.¹⁷⁷ Efforts are ongoing by the few women that are presently in the Libyan government, but women continue to be challenged in their political participation, particularly in the more restrictive cultural and societal circumstances in the southern part of Libya.¹⁷⁸

As part of its accountability efforts, the GNC established a court of law that prosecuted other former high-ranking officials in Gadhafi's government in 2015. The trials were conducted in Tripoli, Libya's capital, against more than 30 Gadhafi-era officials who were charged with war crimes against the Libyan people during the 2011 revolution as well as other pre-revolution crimes. One of the officials charged was a son of Gadhafi, Saif al-Islam, who was widely considered to be the heir apparent to his father.¹⁷⁹ Al-Islam was also later indicted in the International Criminal Court (ICC) and tried in absentia.¹⁸⁰

The mass trial occurred within Libya under Libyan jurisdiction and law, which brought the GNC leaders in conflict with the ICC, as the ICC sought to extradite certain individuals for trial at the Hague and wanted access to those being held prisoner while awaiting trial due to concerns over the human rights circumstances of their incarceration. Many of the defendants in the trials were not present in the courtroom and those that were in the courtroom were held in cages.¹⁸¹ Ultimately, all the defendants in the mass trial were convicted in 2015.¹⁸² Nine of the defendants, including al-Islam, were sentenced to death in the court proceedings.¹⁸³ Human rights observers expressed concern over credible and persistent allegations of fair trial breaches.¹⁸⁴

Despite the human rights concerns regarding the conditions of the defendants in these post-revolution trials, the actual existence of these trials is one of the only successful measures to address the crimes of Gadhafi's rule. The trials, however, did not meet international standards of basic due process because of the treatment of the defendants.¹⁸⁵

The swift action in Libya to prosecute those who were responsible for human suffering during Gadhafi's rule was a positive sign that the new Libyan government would be able to provide victims with resolution and justice. It also demonstrated that Libya may be able to provide a cohesive government to help Libyans transition out of civil war and provide a stable, pro-democracy government moving forward. However, the GNC had a tenuous hold on stability in Libya in the post-revolutionary period. As such, the legitimacy of the trials remained in question due to treatment of the defendants. Ultimately, these trials did not help to legitimize the GNC or new Libyan government, as there was no coalescence of support for the government in the post-revolution and post-trial period.

In this challenging context, the international community has made efforts to bring Libyan stakeholders together in an attempt to unify the state. Discussions between the Libyan government and various international syndicates, including the US Support Mission in Libya, Berlin I and Berlin II Conference on Libya, and Paris International Conference for Libya have continued to support efforts at reconciliation, although such reconciliation efforts have turned toward a strategy of “national reconciliation” which, “in the Libyan mindset is generally understood as turning the page and enabling forgiveness.”¹⁸⁶

Despite this foundation and potential for a transitional justice process, a second civil war broke out in May 2014 after the GNC, with international support, failed to unite the state. In October 2020, a permanent ceasefire was signed to end the war. However, the state’s efforts to set a presidential election was delayed multiple times.¹⁸⁷ Protests continued, including when the GNC was burned down by protesters in July 2022.¹⁸⁸ Overall, due to uprisings between 2011 and 2020, many of the efforts of Law No. 29 were never fully implemented.

Syria

While there is no shared transitional justice strategy in Syria due to the fragmentation of the opposition into multiple groups and the reluctance of the regime to prosecute those responsible for international crimes, there have been sporadic efforts at the international level to seek accountability and reconciliation.¹⁸⁹

On August 22, 2011, the UN Human Rights Council formed the Independent International Commission of Inquiry on the Syrian Arab Republic (the “Commission”) to (i) investigate and document violations of international human rights in Syria since March 2011, (ii) establish facts that may amount to such violations and crimes, and (iii) identify culpable perpetrators.¹⁹⁰ The Commission succeeded in collecting key information to monitor the human rights situation in Syria, however limited, due to the Syrian government’s prohibition to enter the country.¹⁹¹

Common paths to justice, such as the ICC, were unavailable due to the opposition of Russia and China to the referral of the case to the ICC.¹⁹² Thus, many countries resorted to the principle of universal jurisdiction to prosecute perpetrators of crimes committed in Syria.¹⁹³

Pursuing redress through universal jurisdiction has achieved a number of victories, and cases filed in Germany, Austria, Sweden, and Norway targeted 60 high-level officials in military and security agencies, including Bashar al-Assad. These officials have been accused of crimes against humanity, including arbitrary arrest, forced disappearance, torture, death by torture, and the systematic and widespread hiding of bodies in unmarked mass graves.¹⁹⁴

In December 2016, the UN General Assembly established the International, Impartial and Independent Mechanism (IIIM), an independent panel to “assist in the investigation and prosecution of those responsible for the most serious crimes under international law committed in Syria.”¹⁹⁵ This panel was created to build and document investigative files for future prosecutions.¹⁹⁶ The IIIM was constructed as a catalyst for the Syrian community to regain faith in the ostensibly inactive international community and succeeded in collecting a substantial amount of evidence. However, as Syrian groups were not initially part of the discussions leading to the creation of the IIIM, the Syrian community did not trust the IIIM and lacked clarity with respect to how such a panel would differ from the Commission.

Tunisia

Since the president's power grab, Tunisia's transitional justice process has been halted, despite the country having experienced great progress in its democratization before 2019.

In 2013, Tunisia established the Truth and Dignity Commission (IVD) to investigate human rights violations that occurred between 1955 and 2013. The IVD was tasked with uncovering the truth about past abuses, providing reparations to victims, and proposing institutional reforms to prevent future violations. The commission received thousands of complaints and testimonies from victims and conducted investigations into cases of torture, political repression, and corruption.

The transitional justice process faced several challenges, including delays, resource constraints, and resistance from certain sectors. However, the IVD completed its mandate in 2018 and handed over its final report, which contained recommendations for further reforms, to the Tunisian government.

Following the completion of the IVD's work, the implementation of its recommendations and the broader transitional justice process remains ongoing. Tunisia has taken steps to address some of the recommendations, including the establishment of specialized chambers within the judicial system to prosecute cases of human rights abuses. Additionally, efforts have been made to promote truth-telling, reconciliation, and public awareness about the country's past.¹⁹⁷

The president's action in 2019 to assume power was widely praised by some Tunisians who had grown disillusioned with the country's political class, but it was also met with criticism from others who saw it as a power grab. The international community was also divided in its response, with certain countries expressing concern about the suspension of democratic institutions and others welcoming the move as a necessary step to address the country's deepening crisis.

The 2011 revolution demanded more than just freedom and democracy; social and economic justice were also core pillars of the struggle.¹⁹⁸ Therefore, any effective transitional justice process should include responses to those challenges. Since assuming power, President Saïed has promised to address corruption and implement reforms to address the country's economic and social challenges. He has also promised to restore democratic institutions once the crisis has been resolved. However, Tunisia's economy is still a major factor contributing to the lack of push for democracy in Tunisia.¹⁹⁹ Capitalizing on this disillusionment, those with political power have seized opportunities to tighten control and push Tunisia farther away from functioning as a true democracy.²⁰⁰ Lastly, since President Saïed's takeover, rifts between pro- and anti-Saïed factions have only widened, priming Tunisia for additional violence.²⁰¹

The situation in Tunisia remains highly fluid, and it is unclear what the future holds for the country. However, the events of 2021 have highlighted both the deep-seated problems facing Tunisia's political system and the need for meaningful reforms to address the country's economic, social, and political challenges.

Key Findings

Based on a review of the status of transitional justice in Syria, Libya, and Tunisia, the following factors stand out as critical in pursuing transitional justice effectively during conflict.

- **Government regime conducive to change.** Transitional justice cannot be implemented if the prevailing government is not committed to such principles, and is instead actively violating them and challenging any attempts to pursue an effective transitional justice process. For example, the Syrian government frustrated the Commission's reporting abilities by preventing entry into Syria. Further, implementation of the Chautauqua Blueprint was hampered due to its dependence on the unlikely fall of Assad's repressive regime at the time. Unless baseline levels of government commitment are demonstrated, detailed planning and implementation should be delayed until an amenable political environment can support transitional justice efforts. Another example is that of Libya, where the existence of two governments and different non-state political actors has brought more instability and chaos preventing the country from embarking on an effective transitional justice process.
- **Interference of foreign powers.** To be successful, a transitional justice process should not only aim to achieve accountability but also focus on reconciliation among warring parties to bring a certain level of stability that is required for the transitional justice system to work efficiently and effectively. Such reconciliation attempts may be significantly frustrated by external political interference, in particular by the geopolitical space surrounding the conflict. For example, Libya is administered by two competing governments that are respectively supported by different political powers and therefore driven by the interests of such external political actors. This political interference threatens international reconciliation, thereby increasing tensions and differences among internal political, religious, and military factions, which in turn significantly affects the efficiency of transitional justice mechanisms.
- **Sensitivity to broader political context.** Attempts at transitional justice are likely to be impeded by a target's political allies. If certain mechanisms require the approval of powerful allies whose incentives are incompatible with transitional justice objectives, other options should be explored. For example, Russia and China blocked a UN resolution that would have condemned the use of force against civilians by the Syrian authorities, and later vetoed a referral to the ICC. Such actions could create the perception that the powers of the UN (and similar institutions) are severely limited.
- **Cooperation between international and domestic groups.** Transitional justice mechanisms should take account of both international and domestic actors in its implementation. For example, only when Syrian organizations cooperated with the IIIM did it become more effective at gathering evidence for future prosecutions. Conversely, international institutions must actively support Syrian organizations such that victims clearly see that foreign actors are invested in pursuing accountability. In Libya, the lack of coordination between international and national authorities in investigations and prosecutions has severely affected the efficiency of the transitional justice process.

- **Increasing the efficiency and scope of documentation.** Documentation is a critical aspect of transitional justice, as it facilitates accountability and redress. Organizations face low victim participation due to perceived lack of impact on victims and their immediate circumstances, and some information gathered is deemed low-quality evidence inadequate for criminal prosecutions. To collect as much information as possible from a sizable sample of the population, organizations should focus not only on violations suffered by victims but also measures to create an environment that protects rights to property and civil status. The affected community could be consulted directly via surveys, interviews, town hall meetings, or debates.
- **Management of community expectations.** To foster a supportive environment for transitional justice, citizens must trust and actively participate in efforts by domestic organizations. As very few results have been realized since the beginning of conflict in Syria, many victims are frustrated with the international community and believe that culpable actors are not being held accountable. Victims are therefore unlikely to actively participate in any transitional justice initiative if they do not see any meaningful short- or mid-term impact—and creating realistic expectations for such impact is key. Therefore, organizations must reiterate to victims the realistic objectives and limitations of transitional justice mechanisms to manage expectations of victims who hope for imminent change. Organizations should implement clear communication channels, both locally and nationally, whether online or in-person, to provide regular updates to keep citizens engaged and informed.
- **Holistic approach to transitional justice.** Revolutions and armed conflicts are always driven by discontent with both the status quo and the ruling government's policies, as communities demand change after decades of repression and authoritarian rule. Authoritarian governments are often involved in crimes such as corruption and bribing, which severely affect the well-being of a country and have a serious impact on its economy. For this reason, a transitional justice process that is not accompanied by institutional reforms that address corruption, bribing, and impunity will hardly be successful and will be criticized and boycotted by the community. Therefore, a successful transitional justice should be implemented in tandem with reforms that aim to address the root causes of unrest. For example, in Tunisia, the population demanded that the transitional justice process address multiple problems that had led to the revolution, including financial hardships and social unrest.

Impacts and Relationship of Typology “Unconstitutional Grabs of Power” to Political Regression

As mentioned earlier, unconstitutional struggles are defined as attempts by individuals or groups of individuals to acquire or consolidate power in an unconstitutional manner and are thus in violation of the constitutional norms in force. By their nature, unconstitutional grabs of power are unlawful, and they often take place through violent actions. As explored in this section, unconstitutional grabs of power not only have short-term consequences such as violent acts against competing political powers and brutal repressions of civilians, but they are often the precursor to decades of authoritarian regimes and systematic repressions of liberal movements. As such, they contribute to political regression in several ways:

- **Weakening of legal protections.** A power grab often involves undermining or disregarding legal protections and safeguards put in place to ensure the protection of human rights. This can include disregarding constitutional rights, limiting freedom of expression, curbing freedom of assembly, and/or undermining the independence of the judiciary.
- **Suppression of dissent.** Unconstitutional power grabs often involve silencing opposition voices and suppressing dissent. This can lead to the persecution of human rights activists, journalists, political opponents, and members of marginalized communities who speak out against the illegitimate exercise of power.
- **Erosion of democratic or transitional justice-related institutions.** Power grabs typically involve the erosion or dismantling of democratic institutions, such as parliaments, independent media, and civil society organizations (CSOs) that play a vital role in upholding human rights, providing accountability, and safeguarding democratic principles.
- **Lack of accountability.** Illegitimate holders of power often face little to no accountability for their actions. This lack of accountability can lead to a culture of impunity, wherein human rights abuses go unchecked and perpetrators are not held responsible for their actions.
- **Discrimination and marginalization.** Unconstitutional power grabs may target specific groups based on their ethnicity, religion, political beliefs, or other characteristics. This can result in discrimination, marginalization, and violations of the rights of these groups, further exacerbating human rights regression.
- **Restricted access to justice.** With the erosion of independent judicial systems, the ability to seek justice and hold violators accountable can be severely restricted. This can leave individuals without recourse when their human rights are violated.
- **Undermining international human rights standards.** Unconstitutional power grabs can have ripple effects beyond national borders. They can begin trends to undermine international human rights standards, erode global norms, and weaken collective efforts to promote and protect human rights worldwide.

These consequences are not exclusive to unconstitutional power grabs, but they are often associated with such actions, especially in the aforementioned context countries.

Potential and Existing Mitigation Strategies

CSOs have a pivotal role in averting coups d'état and unconstitutional power seizures across different contexts. Most often, CSOs are crucial in establishing of human rights norms and ensuring representation of typically marginalized and excluded groups in governance and peace processes.²⁰² They can employ various strategies such as advocacy campaigns to educate the public on democratic principles, and monitoring and reporting on government actions, including possible preparations for a coup.²⁰³ CSOs can also engage in crisis mediation, foster international cooperation, pressure to oust authoritarians, and promote civil-military relations to ensure the armed forces uphold civilian authority and the rule of law. For instance, Ukrainian CSOs have been instrumental in garnering support from the international community to condemn Russia and establish an international tribunal to prosecute aggression.²⁰⁴

Mobilizing civil society, including marginalized groups, for peaceful resistance, taking legal action against coup perpetrators, and participating in election monitoring are additional tools in their arsenal.²⁰⁵ The effectiveness of these strategies may vary by context, but CSOs' persistence, adaptability, and collaboration with other stakeholders are essential in their efforts to safeguard democracy and prevent unconstitutional power grabs.

CSOs also play a particular role in preventing unconstitutional grabs of power through advocacy and information sharing. For instance, governments may often usurp power when citizens do not have access to public documents. In Burkina Faso, for example, a mobilization of civil society was able to prevent President Blaise Compaoré's attempted unconstitutional grab of power. Three factors were identified that contributed to the usurpation of power, including "a united coalition that brought together a diverse cast of opposition figures and former Compaoré allies, a new youth-based movement that drew upon the country's long legacy of social activism, and the catalyzing motivation of Compaoré's attempt to tighten his own grip on the country indefinitely, which made this perhaps the last realistic chance to end his rule."²⁰⁶

Also in 2000, a group of academics, journalists, and other civil society activists formed a commission called the Grupo Oaxaca to "explore the feasibility of a right to public information law" following the National Action Party's rise to power. The CSOs involved in the commission drafted a model law to ensure citizen access to information and also assisted the rest of the commission by offering guidelines to agencies and creating sanctions for government officials who deny a request for information without cause (exceptions included). To couple these efforts, the commission engaged in a public awareness-raising campaign, building pressure that eventually led to the Mexican government to draft and propose its own version of the bill, which became law in 2002.²⁰⁷

Conclusion and Recommendations

Mitigating an unconstitutional power grab requires concerted efforts from various stakeholders. Importantly, CSOs in particular can play a significant role in preventing power grabs and/or mitigating their effects. Civil society activists can bring attention to oppressive power structures and escalate conflicts nonviolently to bring about necessary changes through public education and advocacy campaigns.²⁰⁸ They can promote freedom of expression and access to information, especially for particularly or already marginalized groups. CSOs can protect freedom of expression by advocating for laws and policies that protect the right to free speech

and by monitoring and reporting on violations of this right. This can help to ensure that citizens are able to express their opinions and ideas without fear of retaliation or censorship.²⁰⁹ CSOs can support an independent media by advocating for laws and policies that protect the right to freedom of the press and by providing training and resources to journalists. This can help to ensure that citizens have access to accurate and unbiased information, which is essential for making informed decisions and holding those in power accountable.²¹⁰

Furthermore, CSOs can help to expose and counteract attempts to unlawfully seize power by monitoring and reporting on political developments and by mobilizing citizens to take action. An informed and engaged citizenry can help to prevent power grabs by exposing them and holding those responsible accountable.²¹¹

Moreover, what became especially clear during the COVID-19 pandemic was that CSOs have demonstrated their importance by providing relief and recovery efforts. The fundraising actions of local (opposition) governments and civilians were declared illegal by the central government, yet the viability of civil society was demonstrated by the witty and creative actions that have circumvented the central will and effectively helped those in need in local constituencies. The system's efforts to control civil activism tend to fail, and members of society, at least from time to time, show that they understand the importance of independent CSOs and their social responsibilities.²¹²

Encouraging active civic engagement, promoting political participation, and creating spaces for dialogue and debate can help prevent power grabs. Strong CSOs and citizen movements play a vital role in monitoring government actions and advocating for democratic principles. Overall, more collaboration between civil society groups and with those with international experience is encouraged to promote transitional justice and resist unconstitutional power grabs.²¹³

Lastly, strong institutions can halt an unconstitutional grab of power, as institutions such as state supreme courts can rule leaders' actions unconstitutional and restore a balance of power.²¹⁴

CHAPTER 4: COUNTERREVOLUTIONS

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Definition

Revolutions have been described as a global constant in the history of the 20th century,²¹⁵ and have been making headway in the 21st. They have birthed some of the most durable authoritarian regimes.²¹⁶ Armstrong describes this phenomenon as a “significant transformation of the social, political and economic structures of a given state in which change is violent, wrought by an uprising from below, occurs reasonably rapidly and projects a unifying aspirational ideology.”²¹⁷ This definition, however, fails to consider any attempts at transformation, and relies on significant change as the outcome.

Goldstone, on the other hand, defines it as “an effort to transform the political institutions and the justifications for political authority in a society, accompanied by formal or informal mass mobilization and noninstitutionalized actions that undermine existing authorities.”²¹⁸ Three main elements stand out: mass mobilization, regime change being the objective, and that regime change being reliant on extra-constitutional means.²¹⁹

The disruptive nature of a revolution unsettles regional and global politics, such that it is often followed by a counterrevolutionary civil war, international war, or even both.²²⁰ Thus, Bisley considers counterrevolutions to be the efforts to overthrow a revolutionary state.²²¹ However, Slater and Smith adopt a contrasting approach by defining it as “collective and reactive efforts to defend the status quo and its varied range of dominant elites against a credible threat to overturn them from below.”²²² The difference in these two conceptualizations indicates that the former denotes a consequence while the latter highlights a preemptive measure. Furthermore, according to the former, the main actor is the opposition, while for the latter, it is the incumbent regime. Halliday combines these two approaches to define counterrevolutions as “a policy of trying to reverse a revolution, and, by extension, to policies designed to prevent revolutionary movement that have already gained some momentum from coming to power.”²²³ To conceive counterrevolutions only as being preemptive in nature overlooks major events under this typology, such as the United States’ attempt to topple the Sandinistas from power in Nicaragua, while relying on only significant outcomes (in social, political, and economic structures) misses out on attempts of the US and its allies to prevent the Islamic State from toppling regimes in Iraq and Syria.²²⁴

Therefore, it can be deduced that there are two key elements of a counterrevolution. First, it must be in response to a revolutionary movement—targeting processes that are revolutionary. Second, the aim of the movement must be to maintain or revert to the previous status quo. As such, it seems to be an elite-driven process, either within or without the state. To this effect, Bisley contends that counterrevolutions, though also capable of possessing a domestic element, have a distinct international character and notes its four forms.²²⁵ The first is intervention, which is the deployment of military force by one state in another to remove the revolutionaries. The second is the support of proxies on the ground in military supplies, training, finance, and logistics. The third is harassment, and may comprise small-scale but persistent border incursions, other nuisance activities, and propaganda. Last are other actions intended to squash the revolutionary government by deprivation, the most obvious being by way of sanctions (by international institutions and diplomatic channels) designed to weaken the state.

Factors That Drive Counterrevolutions, and Their Warning Signs

Root Causes

To understand the historical and contemporary causes of counterrevolutions, it is important to first understand what drives revolutions. This is because counterrevolutions react to revolutionary activities, be it to maintain or preempt change in the status quo. Gottschalk outlined five causes of revolutions and divides them into two categories: contributory cause and immediate cause. The first cause is provocation, as people need a reason to rebel. The second is crystallized public opinion, as people need to be sure there is a general consensus. These two denote the “demand” for revolution. The third warrants a program for reform, and the fourth requires a leader capable of putting all the cogs together. These two comprise “hopefulness.” The fifth is the immediate cause, which is the weakening of the ruling elite. This might come through a split among the elites or a losing the support of the army.²²⁶ It is only from these causes that a counterrevolution may occur, either to orchestrate or prevent it. The paragraphs that follow examine the driving factors.

Driving Factors and Their Correlation With the Occurrence of a Counterrevolution

The predominant driver of a counterrevolution is the occurrence of a revolution. In contemporary times, all revolutions have experienced some form of international counterrevolution.²²⁷ Revolutions change the balance of international order and impact the dynamics of regional stability and security. This reordering of the global political map elicits responses from stakeholders in the international community who feel threatened by the newcomers. Moreover, at the domestic level, counterrevolutions may be motivated by elites who seek to return to the status quo ante or who want to protect their power. Furthermore, it is thought that in the immediate aftermath of seizing power, revolutionary regimes are militarily weak and very susceptible to challenges.²²⁸ This provides an incentive for counterrevolutions from either domestic or international actors.

Counterrevolutions are also driven by the paranoia and self-destructive sense of revolutionaries who fear betrayal from their allies.²²⁹ Conscious that revolutionary regimes are inherently weak at the beginning, the revolutionaries are filled with fear and begin to immediately counter revolutionary threats that may not even exist at the time. Beyond fear, counterrevolutions may likewise be driven by the need for regimes to intimidate their opponents, who may be displaying credible revolutionary

tendencies. Through what is known as “State Mobilized Movements,” regimes may sponsor mass movements to intimidate their opponents, and as a show of strength, demonstrate that they still enjoy the support of the citizenry.²³⁰

The aforementioned factors have been illustrated in numerous instances around the globe. For instance, the Iranian revolution of 1979, which occasioned the overthrow of the Shah, threatened the interests of both the regional elites and Western powers. This led to covert support for counterrevolutionary forces and culminated in the Iraq-Iran war, as regional forces sought to stem the spread of the revolutionary ideology.²³¹ In recent times, the Arab Spring of 2010–2011 is the most notable event to have spurred numerous counterrevolutions. In Tunisia, the praetorian guard of deposed President Ben Ali exchanged gunfire with the army in hopes of countering the revolution and reestablishing the status quo.²³² In the same trend, pro-democracy protests erupted in Syria, calling for the ousting of the regime of Bashar al-Assad. The regime countered this revolution by using deadly force to crush the movement. International actors such as Russia and Iran have supported al-Assad to this effect by providing training, financial support, and even their own soldiers.²³³

The Early Warning Signs

From an analysis of the root causes and driving factors of counterrevolutions, as seen above, it is easy to map out the early warning signs. The first is the occurrence of a revolution, given that, at inception, their regimes are generally weak, and on the assumption that there must be an international counterrevolution. Also, the occurrence of a revolution will almost invariably spark a counter from the elites of the incumbent regime to preserve their regime.

Another early warning sign of a counterrevolution is a growing involvement by external forces in the domestic affairs of the revolutionary state. This might be in the form of diplomatic pressure, international sanctions, statements of condemnation, covert operations, or even an increased military presence and activities along its borders. Such involvement may also come in the form of economic disruption and sabotage—efforts aimed at destabilizing the revolutionary government and eroding its credibility.

Lastly, the mobilization of troops, including the recruitment and training of fighters in preparation for conflict or the deployment of foreign fighters is one of the clearest warning signs that a counterrevolution is in motion against the revolutionary regime. At this point, the regime might also set up its own strategy to counter the counterrevolution.

Counterrevolutions In Context: Egypt and Sudan

Egypt

The Arab Spring, which began in Tunisia following the death of Mohammed Bouazizi, kick-started a wave of protests that grew into revolutions in the Middle East and North Africa. This reached the doorsteps of Egypt, a country of 89 million people at the time. Protests also escalated after the death of Khalid Saeed, a young activist who died under murky circumstances while in police custody.²³⁴ The subsequent January 25 protests of 2011 in Midan Tahrir called for the sacking of the interior minister, the suspension of the perpetual emergency law that hampers civil liberties, and the introduction of presidential term limits that would bring an end to the 30-year rule of Hosni Mubarak. After a failed police attempt to quell the protests, it gained traction across major cities, and throughout its 18-day life span, culminated in a revolution, with the slogan—“The people want the fall of the regime.”²³⁵ Every section of the Egyptian working class became involved in this movement. Finally, on February 11, 2011, Mubarak resigned as president, and the Supreme Council of the Armed Forces (SCAF) took power until new elections were held.

Following this revolution, a counterrevolution was instigated. At the onset of the revolution, the US openly supported the Mubarak regime and sought to ensure its survival until the last minute. This was because Mubarak had been a key ally in perpetuating US interests in the Middle East. However, in the face of defeat, the US changed strategy and sought to contain the revolution and ensure the preservation of its interests post-Mubarak. This entailed installing a regime that would weaken the political and social forces that drove the revolution, thereby blocking any potential revolutionary change.²³⁶ The revolutionaries who initiated the movement to topple the old guard did not play any role in dismantling the old structures and building a new one.²³⁷ It has been argued that a revolution did not even occur, as the SCAF and the Muslim Brotherhood (which won the post-revolution elections) countered the revolution by ensuring that the state apparatus remained intact as it was under the Mubarak regime.²³⁸ Essentially, the military, bureaucratic, and civil society elites from the previous era had reasserted their control and grip over the state architecture.²³⁹ This prompted a counterrevolution—the June 30 revolution (2013), which ousted the Muslim Brotherhood regime of Mohammed Morsi. This came after mass protests calling for the resignation of Morsi. His supporters countered this movement, but the military stepped in and removed him on July 3, 2013.²⁴⁰

Sudan

The December Revolution of 2018 brought an end to President Omar al-Bashir’s 30-year authoritarian regime. Protests had erupted by December 13, 2018, in Ed Damazin in the Blue Nile State due to dwindling subsidies and rising commodity prices and costs of living. In a few weeks, this had morphed into a nationwide uprising calling for the president’s resignation. Al-Bashir’s regime countered this revolution using several strategies. First, he vowed to introduce “real reforms” that will “provide citizens a decent life.” Second, the regime tried to stem the

revolution by resorting to repression tactics. Numerous protesters were killed or arrested by the police.²⁴¹ Regardless, the revolution continued to gather momentum until, April 11, 2019, when the army arrested al-Bashir, bringing an end to his rule. The key features of this revolution were mass participation, including women, religious leaders, security forces, and local officials and unity and leadership, exercised by the Sudanese Professionals Association (SPA), which enjoyed popular legitimacy and coordinated national protests. Lastly, the movement was largely committed to non-violence and, as such, the regime crackdown on peaceful protesters instead served to fuel backlash, motivating many other to join the movement.²⁴²

As soon as Bashir was deposed, seeds of counterrevolution were sown by the elites to maintain their positions and influence as it was under the al-Bashir regime. The Transitional Military Council (TMC), which carried the coup, was led by General Abdel Fattah al-Burhan after General Ahmed Awad ibn Auf resigned a day after the coup. It is worth noting that Burhan was appointed as al-Bashir's chief of staff and head of the ground forces in February 2019, a month before his toppling in April.²⁴³ Moreover his deputy, General Hammad Dagalo, was head of the Rapid Support Forces—a paramilitary group created by the old regime. The masses continued calling for full transfer of power to a civilian government, but the TMC resisted this move, and in four months, post-coup, it had canceled all agreements with the civilian coalition and scrapped talks over power sharing. By June 2019, protests had intensified, and the TMC regime responded with a heavy hand, leading to the deaths of 118 civilians.²⁴⁴ In response, the protest leaders called for a nationwide civil disobedience campaign, forcing the TMC to resume talks. At the end of these talks, another supreme body was created—the Transitional Sovereignty Council (TSC)—with General Burhan as head and General Dagalo as deputy, occupying similar positions as they did in the TMC. A civilian prime minister, Abdalla Hamdok, was appointed as head of the transitional government. Once more, the elites of the old guard continued to maintain their control over the revolutionary state. The agreement was for a full handover to a civilian administration in 21 months. However, in October 2021, Burhan and Dagalo led a second coup and disbanded the Sovereignty Council, breaking the agreement in a final move that completely countered the December 2018 revolution.²⁴⁵

The Status of Transitional Justice Processes Amid Counterrevolutions

A review of the counterrevolution in Egypt, for instance, within the context of transitional justice, reveals that the country did not undergo a formal peace process or engage in the signing of peace agreements. Rather, the revolution that ousted Mubarak and the subsequent counterrevolution that followed occurred through political maneuvering. To wit, there have been limited efforts to implement transitional justice processes. Despite civil society pressure on the state, the power shifts and political alliances have hindered any meaningful pathways toward justice and institutional reform. Three official fact-finding commissions were established in 2011, 2012, and December 2013 to investigate grave incidents that happened since the revolution, but none of the transitional rulers and subsequent regimes have taken credible steps to strengthen these institutions or make their findings public. The rationale has been to delay transitional justice processes for the sake of short-term national cohesion post-revolution.²⁴⁶

In Sudan, amid the counterrevolution by the military, the TSC and its transitional government was created following talks between civil society and the TMC. This was followed by the Juba Peace Agreement of October 2020, which established several transitional justice initiatives, such as justice and accountability mechanisms both under international and national institutions; reconciliation; and traditional justice mechanisms to resolve local feuds; and the Transitional Justice Commission and the Truth and Reconciliation Committee, among other committees.²⁴⁷ However, the military coup of 2021 hampered this process, further creating new issues that needed to be resolved. Furthermore, the conflict that erupted between the Sudanese Armed Forces of General Burhan and the RSF of Dagalo put these processes on a standstill, indicating that the transitional justice process in the country needs to be recalibrated.

Tunisia too adopted transitional justice processes in the aftermath of the 2011 revolution. A few days after the toppling of President Ben Ali, the transitional government created an inquiry commission, investigating crimes committed during the revolution. Consequently, Ali, his minister of interior, and other high-ranking officials were convicted of complicity in killing protesters. The courts, however, failed to identify the perpetrators of the killings and the investigations did not include events that preceded the 2011 revolution. Nonetheless, the adoption of the transitional justice law in December 2013 laid the groundwork for a comprehensive accountability process reviewing the time between 1955 and 2013. At the time, the prospects looked good, but optimism was tempered by the realization of the political forces still needed to broadly assent to key issues in the process.²⁴⁸ In this vein, the Truth and Dignity Commission was created, making it the first of its kind in the Middle East and North Africa after the Arab Spring. On March 26, 2016, it published an extensive report detailing the extensive network that facilitated human rights abuses for over five decades. It also highlighted the need for several institutional reforms to consolidate the revolution of 2011. However, by July 2021, Tunisia was facing three interrelated crises: the corona virus pandemic, a quickly deteriorating economy, and political polarization and paralysis. Relying on this, and drawing from the emergency provision in Article 80 of the Tunisian Constitution (2014), President Kais Saied issued an emergency decree, firing the prime minister, freezing the work of parliament for 30 days, and assuming all executive power, effectively initiating a self-coup.²⁴⁹ Since then, his increasingly authoritarian rule has countered all the gains made in the last decade post-revolution.

The Impact of Counterrevolutions and Nexus With Political Regression

How Counterrevolutions Occasion Political Regression

The typology of counterrevolutions determine the machinations that occur within the public realm and how they orchestrate political regression. In an instance when the regime is looking to preserve its position, in reaction to a credible revolutionary threat, there is greater possibility of increased levels of authoritarianism and restrictions on the civic space. The strategy is to stifle dissent, and this can be by way of brutally repressing protests, arbitrary arrests, and/or forced disappearances. This was widely seen in the Syrian counterrevolution following the Arab Spring, whereby the regime also carried out targeted air strikes on civilian buildings and widespread bombing of residential areas. There have been subsequent allegations of genocide and sexual enslavement of minorities such as Yezidis. Furthermore, this counterrevolution further radicalized opposition groups, forcing them to take up arms and now culminating in a civil war, which has lasted over a decade.²⁵⁰

Conversely, in Tunisia and Sudan, where revolutions took place, the subsequent counterrevolutions targeted the gains made during the revolutions. Concerted efforts have been made to return the state to the same status quo it was pre-revolution. In Tunisia, President Saied has been centralizing power, returning the country to the authoritarian dispensation seen under former president Ben Ali. In Sudan, the military coalition of the RSF and SAF masterminded a military-led regime post the Sudan revolution. Under such circumstances, the primary gain of the revolution, which was the overthrow of President al-Bashir's authoritarian government, was quickly countered by another authoritarian military government, whose key members were part of the previous regime. These are all circumstances that support the reversal of the political processes, thereby eroding democratic institutions and principles.

The Impact of Counterrevolutions on Transitional Justice Processes

Regardless of the category of counterrevolutions, there exists a negative impact on transitional justice processes, which are predominantly initiated post-revolutions. Relating to the attempts of bringing healing, reconciliation and transformation in societies have come out from a dispensation they felt needed to challenged. Once a revolution occurs, the *grundnorm* changes, which essentially is the abstract factor that denotes why the state and its legal order is sovereign and ought to compel obedience in the public realm.²⁵¹ Thus, revolutions introduce a new *grundnorm* (and legal order) from which new transitional justice processes emanate. Therefore, counterrevolutions come to challenge this *grundnorm*, invariably disrupting transitional justice processes. This was played out in Sudan when, in the aftermath of the 2019 revolution, transitional justice processes were initiated under the tutelage of the transitional government. However, the military-led coalition of the SAF and RSF overthrew this government in a coup, thereby limiting the implementation of the transitional justice processes and creating the need for recalibration.

Closely related is the issue of accountability stemming from the Darfur Conflict during which then president al-Bashir created a militia, the *Janjaweed*, to support the military in quelling the rebellion. They have been accused of widespread human rights violations, and were transformed into the RSF, which later participated in the coup that ousted al-Bahir, and in the subsequent counterrevolution that overthrew the transitional government. In such a context, Bobuin argues that it is not feasible to expect any effective accountability measures as regards holding the RSF accountable for its actions in Darfur, since it is at the head of the state architecture and this component of transitional justice is not in its best interest.²⁵² In contemporary Tunisia, the recommendations made by the Truth and Dignity Commission cannot be effectively implemented due to the increasing return toward authoritarianism under the Saied regime, particularly after he sacked the government and froze parliament, consolidating all state powers in his hands.²⁵³

Potential/Existing Mitigation Strategies and Associated Risks

Several strategies exist to tamper the effects of counterrevolutions. Particularly, civil society organizations can mount sustained pressure against a regime trying to preserve its continuity by resorting more toward authoritarianism or against the strategies intended to reverse the benefits gained post-revolution. In Tunisia, for instance, civil society organizations such as the Tunisian General Labour Union (UGTT, *Union*

Générale Tunisienne du Travail), the Tunisian Confederation of Industry, Trade and Handicrafts (UTICA, *Union Tunisienne de l'Industrie, du Commerce et de l'Artisanat*), the Tunisian Human Rights League (LTDH, *La Ligue Tunisienne pour la Défense des Droits de l'Homme*), and the Tunisian Order of Lawyers (*Ordre National des Avocats de Tunisie*) paved the way for continuous dialogue between the state and citizens.²⁵⁴ This enhanced the effectiveness of transitional justice initiatives by promoting reconciliation and healing while strengthening state accountability mechanisms. However, a key risk factor is the political will of the state, and this has come into play given the continued absolutism perpetrated by President Saïed. There has also been retaliation on members of civil society who have called for reforms, such as Sihem Bensedrine, former head of the Truth and Dignity Commission.²⁵⁵

Furthermore, international pressure from the international community can serve to mitigate the effects of counterrevolutions and ensure that transitional justice initiatives are implemented and adhered to. International non-governmental organizations (INGOs) and inter-governmental organizations (IGOs), be they at regional, global, or continental level, can amplify the voices of victims, drawing attention to their plight and the essence of engaging in reconciliation and accountability initiatives. Sudan, the US, and Saudi Arabia (states with considerable influence) have also sought to diminish the effects of the counterrevolution, and foster peace and reconciliation, by masterminding several peace agreements between the RSF and the SAF. However, these have quickly broken down due to the lack of political will, delaying the prospects of a just transition, reconciliation, and also accountability. Conversely, these foreign interventions can also pose threats to transitional justice processes amid counterrevolutions. For instance, in Syria, international actors such as the USA, UK, France, and Saudi Arabia have all supported the opposition, particular the Kurdish and Arab militias called the Syrian Democratic Forces (SDF). Turkey is also a supporter of the opposition, but its concern is on using rebel groups to contain the Kurdish YPG militia that populates the SDF.²⁵⁶

Conclusion and Recommendations

In this study, a thorough review of the phenomenon of counterrevolutions reveals that it is imminent post all revolutions, either by virtue of the fact that an incumbent regime is trying to maintain the status quo and therefore reacts to revolutionary threats, or a revolution has successfully taken place but the elites are trying to reverse its gains, returning to the status quo ante. Regardless of typology, the effects are often repressive on human rights, and lead to increased levels of authoritarianism. Beyond these immediate effects, secondary consequences can emerge, with demeaning impacts on the public realm, further enhancing political regression within the polity. In Sudan and Syria, counterrevolutions have been seen to culminate in civil war. Several early warning signs exist, with the obvious being the occurrence of a revolution, which is the clearest indicator of a counterrevolution. International pressure, most commonly through diplomatic means, public statements from foreign officials, the mobilization of troops along the borders, and/or outright deployment of troops to the revolutionary state, are other early signs of an impending counterrevolution. These work to frustrate transitional justice processes, delaying victims' and survivors' right to accountability, thus frustrating reconciliation and allowing seeds of division to effectively germinate and be consolidated. Therefore, linkages between revolutions, counterrevolutions, political regression, and transitional justice require a meticulous appreciation for effective management

in contexts where these dynamics are at play. To wit are the following recommendations:

- The international community (states, IGOs, and INGOs) must be agents of peace and reconciliation; states must particularly shun perpetrating the cycle of violence by orchestrating international counterrevolution wars.
- States must effectively look to address socioeconomic injustices, as these underlying inequalities contribute to political instability and revolutionary movements. These are the root causes of discontent, and in their absence, there is a reduced incidence of revolutions and counterrevolutions.
- States should promote inclusive governance, and civil society should serve as the watchdog to this effect. There must be avenues to accommodate diverse perspectives, including of marginalized groups (be it gender-based or ethnic-based). Inclusive governance serves as a deterrent to grievances that might fuel counterrevolutions.
- States must effectively build early warning systems of political instability and commit the political will to address these warning signs in strict adherence to democratic principles and the rule of law.
- States ought to prioritize the implementation of transitional justice processes post-revolution. This includes truth-telling, accountability, and reconciliation measures that address past grievances. Adequate political will is required to make this happen, and in its absence, social cohesion remains threatened, fueling a counterrevolution.



PART II: CASE STUDIES

CHAPTER 5: COUNTRY CASE STUDY— SRI LANKA

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Background

Sri Lanka has struggled to achieve justice, accountability, and reconciliation in the aftermath of its brutal ethnic conflict lasting nearly 30 years and which ended in 2009.²⁵⁷ The conflict is known for widespread and egregious violations, and in particular, thousands of enforced disappearances committed by both sides of the conflict.²⁵⁸ The civil war broke out as a result of simmering ethnic tensions between the mainly Buddhist Sinhalese and a largely Hindu Tamil minority. In May 2009, Sri Lankan military defeated the Tamil Tigers, bringing the civil war to an end. At the end of the conflict, the UN estimated a total of 80,000–100,000 deaths. Other violations documented by the UN include acts of torture, sexual and gender-based violence, abductions, forced recruitment, arbitrary detentions, recruitment of children for use in hostilities, and the denial of humanitarian assistance—not to mention indiscriminate attacks on innocent civilians and humanitarian installations in the final days of the war.²⁵⁹

The country has been at the center of a brutal ethnic armed conflict that has drawn international attention and condemnation, triggering the establishment of a UN panel of experts on accountability in Sri Lanka appointed by UN Secretary General to conduct investigations into the violations and which produced a ground-breaking, comprehensive report in 2011 that documented evidence of war crimes and crimes against humanity committed by both sides of the conflict with the recommendation for the need for further investigations.²⁶⁰ The panel found that as many as 40,000 civilians may have been killed in the final months of the civil war due to indiscriminate shelling by the military.²⁶¹ This and other reports resulted in the UN Human Rights Council (UNHRC) passing a resolution in 2013 that requested for the UN Office of the High Commissioner for Human Rights on the situation on human rights, accountability, and reconciliation in Sri Lanka. Subsequently, the UN Office of the High Commissioner for Human Rights reinforced the panel's findings, which led to the adoption of UN Resolution 30/1 in 2015 committing Sri Lanka to adopt a series of measures including the establishment of a hybrid court to try war crimes and the adoption of adequate legislation to criminalize enforced disappearances, war crimes, and crimes against humanity among other institutional and judicial reforms.²⁶² Notably, the government of Sri Lanka co-sponsored the resolution, demonstrating political will to fulfill its commitments, of which domestic legislation outlawing enforced disappearances was subsequently adopted in 2018. Domestic legislation on war crimes and crimes against humanity have yet to be adopted, however.

Today, Sri Lanka remains a divided country where a victory narrative together with ongoing structural inequalities in policy and practice continue to marginalize Tamil and Muslim communities concentrated mainly in the north and east of the country in favor of the majority Sinhalese living mainly in the south. The 2015 presidential election of Maithripala Sirisena brought with it hope for justice for the victims and reconciliation for the broader society. From that point, the new government made a number of commitments to pursue transitional justice, which were welcomed by the UNHRC in its Resolution 30/1. The resolution noted the government's commitment to adopt a comprehensive approach to dealing with the past by calling for the establishment of several transitional justice mechanisms including the creation of a truth commission, an office of missing persons, an office for reparations, and a judicial mechanism with a special counsel to investigate allegations of human rights and humanitarian law violations.²⁶³

Transitional Justice Measures

In 2010, Sri Lanka witnessed one of the first transitional justice initiatives introduced by the former Rajapaksa regime due to mass victim and community mobilization, triggering intense international pressure on the government to adopt accountability mechanisms to address the atrocities. This body was called the Lessons Learned and Reconciliation Commission (LLRC). Unfortunately, the LLRC was widely criticized by civil society and the international community for its lack of impartiality, independence, and transparency. Nevertheless, the international community encouraged implementation of the recommendations, which ultimately never came to fruition. This triggered stronger calls for accountability mechanisms by victim communities echoed by the international community, which were well received by the newly elected President Sirisena in 2015, leading to robust commitments to establishing accountability mechanisms in the UNHRC Resolution 30/1 and reiterated by Sirisena's government to the population thereafter. Excitement and high expectations accompanied Sirisena's new administration, as stated in the UN's 2015 report, "The election of a new President and Government on a platform centered on good governance, human rights and the rule of law have given Sri Lanka a historic opportunity to address the grave human rights violations that have wracked its past, to pursue accountability and institutional reform, to ensure truth, justice and redress to many thousands of victims, and to lay the basis for long-term reconciliation and peace."

The key commitments made in Resolution 30/1 were to establish a national truth commission, an office of missing persons, a reparations body, and a judicial mechanism (hybrid in nature, with international judges). Though the Sirisena government communicated an outward message of commitment to pursuing justice and accountability for wartime atrocities to satisfy the international community's expectations, its message domestically did not reflect this. In fact, on numerous occasions, the president and his ministers were quoted as saying that prosecutions would not be held, and consistently reassured his security forces of their protection.²⁶⁴ This lack of genuine commitment on the part of the new government explains the largely cosmetic actions the government took since the conclusion of the war. For example, in 2015, the government announced the establishment of the Consultation Taskforce (CTF), which was meant to take forward national consultations on the proposed transitional justice mechanisms. The CTF subsequently ran from 2016 to 2017. However, while the report did make meaningful findings, the government rejected the recommendations, such as the call for the setting up of a hybrid court to try perpetrators.²⁶⁵ Further, it was not used to inform the establishment of recommended accountability mechanisms for which it was intended. So despite political commitments, no government since the conclusion of the war has demonstrated a genuine commitment to pursuing an accountability agenda for past crimes in Sri Lanka.

The Office of Missing Persons (OMP) law was passed in May 2016 and set up two years later. After

the CTF concluded its work in 2017, establishment of the OMP did not take into consideration any of the CTF recommendations. Moreover, the government continued with the same anti-accountability rhetoric at the national level by confirming that the OMP's mandate was not prosecutorial in nature and limited to searching for missing persons and issuing certificates.²⁶⁶ To date, the OMP is arguably the only mechanism that has been able to partially fulfill its mandate by recording missing persons and issuing death certificates.²⁶⁷ The only other mechanism that was set up was the Office on Reparations, though progress toward operationalizing its mandate has been slow, and even stalled of late.²⁶⁸ Despite these efforts, victims have vocalized their dissatisfaction with both institutions due to a perceived lack of independence informed by the highly politicized process of appointments and processes undertaken.

Other initiatives by the government have included the establishment of various ad hoc bodies such as the Secretariat for Coordinating Reconciliation Mechanisms, the Office for National Unity and Reconciliation, as well as multiple working groups charged with designing potential justice and accountability mechanisms; however, the UN concluded that a clear and comprehensive transitional justice strategy has yet to be presented.²⁶⁹ Besides these initiatives, on the issue of accountability, a number of cases of serious violations including extrajudicial killings, murders, and assassinations have been pursued by the courts over the years. Although there have been a few victories, the majority have suffered numerous setbacks from excessive delays, evidence tampering, weak victim/witness protections, and political interference, which has led to cases languishing in the courts without a judgment, charges being dropped, acquittals, or in cases where a court judgment has been issued, instances of presidential pardons of the perpetrators.²⁷⁰ These practices have undermined the search for justice and accountability for serious conflict crimes in Sri Lanka and left victims frustrated and disappointed with the reluctance on the part of the state to fulfill its commitments. Despite efforts to introduce one commission after another, or pursue criminal prosecutions for serious violations, the results have not produced fruit in large part because there is an avoidance to tackle accountability for past violations.²⁷¹

Despite initial promises to rebuild Sri Lanka as a democracy based on the rule of law and human rights, the 2015 coalition government slowly dissolved due to disagreements between the president and the prime minister, causing the transitional justice process to stall.²⁷² This was marked by public statements suggesting that the previously made transitional justice commitments were no longer a priority and that focus should be on national reconciliation instead. In 2017, the UNHRC issued a report assessing progress on the 2015 commitments, which highlighted areas of progress including the adoption of a law to establish the OMP and the ratification of various human rights treaties, including that prohibiting enforced disappearances.²⁷³

In terms of transitional justice, the UN recognized the work done by the civil-society-led Consultation Task Force on Reconciliation Mechanisms, praising it for being an inclusive process that produced sound recommendations for the establishment of justice mechanisms.²⁷⁴ It also noted the adoption of the Death Certificate Amendment Act, allowing for the issuance of "certificates of absence" to benefit families of the disappeared. Despite these areas of progress, the HRC found the fulfillment of transitional justice commitments on the whole as "worryingly slow."²⁷⁵ Meanwhile, on the issue of accountability, the HRC noted that most emblematic cases had not progressed or resulted in prosecutions. It also noted the human rights situation as a matter of concern with ongoing violations, the regular use of torture during investigations, reports of harassment against human rights defenders, and continued police abuse and excessive use of force.²⁷⁶ The commitments of 2015 had begun to wane, with visible effects on victims and victim communities losing faith in the process.

Lack of Political Will and Its Impact on the Transitional Justice Process in Sri Lanka

By mid-2019, the context was deeply marked by an unprecedented attack on civilians: the Easter Sunday bombings that targeted several churches and three luxury hotels and resulted in 290 deaths.²⁷⁷ These attacks in April 2019 created widespread fear among society, setting the stage for the narrative that Sri Lanka needed a strong leader. To date, the authors of the attack have not been disclosed; however, several allegations have been made suggesting the attacks were orchestrated to influence the subsequent presidential elections in the country, which led to the win of Gotabaya Rajapaksa in late 2019. Following his victory, and the appointment of former president Mahinda Rajapaksa as prime minister, the president consolidated authoritarian rule through the adoption of a constitutional amendment in late 2020, thereby compromising independent institutions such as the Supreme Court and attorney general's office by way of making direct presidential appointments and in effect circumventing the checks and balances system previously in place.²⁷⁸ Similarly, the president announced that there was no need for a transitional justice process in Sri Lanka; this was accompanied by a complete denial of the thousands of enforced disappearances documented in the country.²⁷⁹ Ministries that were established to address questions of truth, justice, and reconciliation were quickly dissolved and in a January 2020 meeting with a United Nations official, the president announced that there were no missing persons in Sri Lanka and all those thought to be missing were dead. He also stated that reconciliation goals would be promoted through development projects and by educating children in both Sinhala and Tamil languages.

Since 2015, Sri Lanka has witnessed a glaring backslide in achieving its initial transitional justice goals. All in all, despite some areas of progress, accountability for egregious violations remains elusive, no special accountability mechanism has been set up as previously called for, and the office of missing persons, though established in 2016 and having initiated its work of documentation, was never able to go beyond the investigation stage due to lack of resources and funding.²⁸⁰ In a country that claims to have among the highest rates of enforced disappearances globally, this has caused extreme frustration among the families of the disappeared and triggered widespread popular protests. The mothers of the disappeared mobilized to hold daily protests over the course of an entire year (2017); and later in 2022, families of the disappeared marked 1,900 days of continuous roadside protests calling for the whereabouts of loved ones.²⁸¹ Victims, families of victims, communities, and civil society have consistently demanded for justice and accountability for past atrocities and publicly vocalized their discontent about the government's failure to implement its commitments since 2015. This was manifested in mass demonstrations and public protests;²⁸² however, citizen voices have largely fallen on deaf ears as the government has become more repressive against public protests in recent years.²⁸³ This criticism was echoed in observations by the UNHRC in its subsequent reports.²⁸⁴

Current Status of Implementation

Of late, Sri Lanka has had to battle with other factors placing justice and accountability even further beyond reach. In 2019, a political and economic crisis erupted leading to a collapse in the economy and bringing nearly every sector of society to a standstill, affecting livelihoods, health, and education and making even basic commodities and services scarce.²⁸⁵ The population experienced extensive power and fuel shortages triggering an acute rise in food prices. These conditions led to popular protests around the country and a call for former president Rajapaksa to step down.²⁸⁶ The social unrest culminated in his ousting in July 2022.²⁸⁷ Given this unconstitutional change of power, the current administration is not in a position to pursue any of the previous transitional justice commitments; further, managing the current economic crisis, introducing austerity measures, and seeking an IMF bailout are the main priorities.²⁸⁸

The situation has led to an overwhelming sentiment of anger and frustration among the population and civil society actors, though not without a degree of hope for positive change to come. According to one activist, the transitional justice process in Sri Lanka has effectively come to a standstill.²⁸⁹ In the words of another civil society actor, “Under the current context, none of the initiatives from before have been retained and ‘reconciliation’ is a prohibited word now. The government prefers to use ‘co-existence.’”²⁹⁰ Reconciliation efforts have thus stalled. Due to the economic crisis and political dynamics, communities have lost trust in their leaders, making the task of building reconciliation a “herculean” one.²⁹¹ As a result, society is becoming more polarized with a more public and official rhetoric of discrimination.

The current situation continues to be worrisome, though the rate of gross violations has decreased in comparison with earlier years. Cases of abduction, torture, and sexual violence by the army and police are still reported. On the other hand, reports document continued surveillance and harassment of HRDs/civil society, curtailing their freedom to advocate for justice and accountability.²⁹² On this point, the International Truth and Justice Project (ITJP) documented 76 cases of illegal detention and torture from 2015 to 2017.²⁹³ While a Right to Information Act was passed in 2015, enhancing civil society organization (CSO) campaigns on the right to truth, other developments are not as encouraging. Statistics on human rights violations remain a concern and the recent proposal of bills on anti-terrorism (Anti Terror Act) and social media controls (Online Safety Bill) are reported to contain repressive provisions.²⁹⁴

CSO and Community Responses

The challenges of achieving justice and accountability for past violations are many, and have political, social, ethnic, and economic dimensions. To date, activists underscore the failure of the government to acknowledge the fact that the country has experienced enforced disappearances.²⁹⁵ Perpetrators on both sides of the conflict have not been tried. Vetting of the security sector has not taken place and the justice system has largely failed to deliver in handling the many emblematic cases identified by the LLRC.²⁹⁶ With a current leadership that has been accused of human rights violations in the past; the closing down of civic spaces; a range of perpetrators of human rights violations who continue to hold positions of power and influence; widespread impunity for even the most egregious violations; continued use of violence and oppressive practices against ethnic minorities; persistent intimidation, harassment, and attacks against human rights practitioners; and ongoing incidences of hate speech²⁹⁷ and communal violence, these constitute the persistent barriers to securing justice and reconciliation in the country. Nevertheless, following through on the transitional justice commitments made in 2015 remain just as—or even more—crucial now to curb the impunity and make a clean break with the past.

Confronted with this reality and a deeply fractured society, communities and civil society have taken a very active role in pushing the government to deliver on its transitional justice commitments.²⁹⁸ For years, communities have led mass campaigns to push for justice and accountability for enforced disappearances and other violations in a hostile environment; however, of late, these efforts have waned, as communities and human rights defenders are continuously subjected to surveillance, harassment, and/or detention when vocalizing their demands.²⁹⁹

On the other hand, since the mass uprising against the former government over the economic collapse in 2021–2022, a glimmer of hope has emerged whereby citizens’ public outrage with government’s mismanagement of public funds and institutions, corruption, and lack of public accountability have triggered greater citizen engagement and renewed calls for accountability across all sectors.³⁰⁰ This

presents an opportunity for effective citizen engagement to push for much needed institutional reforms in much the same way the population mobilized to force former president Rajapaksa from office, thus opening new opportunities for advocacy and institutional change.³⁰¹

For years, Sri Lanka civil society's strength has lain in its ability to mobilize communities and sustain active engagement by victims and families of the disappeared to push for their justice demands.³⁰² The thirst for justice, truth, and reparations remains palpable despite the closing of civic space, the dysfunctional judiciary, and continued intimidation of human rights defenders. In the view of one CSO that has focused on the use of strategic litigation to push for justice for victims over the past 20 years, the recent economic crisis exposed the government to gross deficiencies and unethical practices, namely corruption and mismanagement of funds resulting in the total collapse of the economy in 2021–2022.³⁰³ This situation has pushed the younger generation in particular to demand accountability in the country. Similarly, following the release of a critical study on emblematic cases that highlighted a series of due process issues and weaknesses in the criminal justice system, a renewed public call for justice reform in Sri Lanka was triggered.³⁰⁴ In the view of one civil society actor, Sri Lanka's recent political history of public mobilization to successfully ouster its former president creates the potential for a similar campaign to secure much needed institutional change and reforms.³⁰⁵

In this context, activists involved in the struggle for justice and reconciliation in Sri Lanka for the past decade have several recommendations as to what is needed at this juncture—and remain realistic about what is achievable given the prevailing social, political, and economic factors at play. Mitigation strategies shared by activists center around the need for sustained citizen engagement, increased public awareness of, and continued participation in, the transitional justice process and mechanisms, as well as sustained advocacy at the international level to hold the government accountable to fulfilling its Resolution 30/1 commitments, regardless of the delays.

Conclusion and Recommendations

Continued engagement by communities is considered to be an important mitigating strategy to counter the reluctance of the state to pursue transitional justice commitments. “There is need for continued engagement of the grassroots communities to push for justice, accountability, and reparations. CSOs have a role to play in mobilizing communities. Involving the youth is also critical as they are a powerful force. They are also more receptive to these issues,” is the view of Father Nandana, an activist priest who has been supporting victims especially families of missing persons for the past two decades.³⁰⁶ Local community activism, while serving as the backbone of social change/justice, is not sufficient, however, given the hesitance of the government to take forward a justice and accountability agenda. Collective and sustained action by civil society activists and accompanying support by the international community will be key to fulfilling national commitments and monitoring their effective implementation. For example, maintaining attention and pressure from UN bodies charged with monitoring Sri Lanka's human rights situation will be crucial in the months and years to come.

Promoting and realizing national reconciliation is another important priority at this juncture given the deep divisions that persist in society. More recognition, tolerance, and acceptance of minority groups are needed, as are corresponding policy and legal reform to promote social inclusion. “There is need to create awareness amongst the young religious community. We need a mechanism where religious leaders are sensitized on racism and become young leaders. Right now there is a lot of racism within Buddhist institutions; we need to re-focus on real Buddhism. We also need to focus on the media and social media—there is need for sensitization and training on social tolerance, acceptance, and inclusion of minority groups is needed,” contends P. Muthulingam of Institute for Social Development. It will be equally important that community-based groups and civil society are sufficiently supported in undertaking such community reconciliation initiatives and that such initiatives are truly “national” in nature. Wherever the state is reluctant to take necessary measures, civil society is committed to continue pushing for community-led initiatives.

Despite the challenging political context, there is a strong commitment by civil society to join forces with communities to push for progress: “We’ve gotten used to take two steps forward, five steps back. We need to keep visibility on the issues and continue to keep the pressure on through popular mobilization, commemorations, fundamental rights petitions, and legal challenges,” commented Radhika Hettiarachchi. Similarly, in the words of another activist lawyer from the Centre for Policy Alternatives (CPA), the recent study on emblematic cases has not only exposed the egregious due process violations in the justice system, but also triggered a renewed call for justice reform and the pursuit of effective accountability measures in the country. The study has therefore brought to light endemic weaknesses the government is now forced to address. Thus, hope remains for the fight against impunity, and victims’ demands will ensure this happens.³⁰⁷ Equally, the rigorous monitoring, reporting, and attention by the international community to pursue justice and accountability has played an important role in pushing forward the transitional justice agenda. In spite of the challenges in fulfilling this agenda, there is need to sustain this international attention and monitoring of the process to ensure that the government meets its commitments and introduces broad reforms to promote peaceful co-existence and prevent the recurrence of the violence.

CHAPTER 6:

CASE STUDY—SYRIA

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I. Background

Syria has a long history of repression and violence. The Assad family, of the Alawite minority, has controlled the Syrian government and ruled the Ba'ath party since 1970, when Hafez al-Assad appointed himself leader of Syria after initiating a coup d'état that ousted the leader Salah Jadid.³⁰⁸ Since then, the Assad family has institutionalized an authoritarian, repressive, and sectarian system and increased the Alawite dominance of the security and intelligence sectors, which since then have played a crucial role in systematically repressing the opposition through terror and violence.³⁰⁹ One of the most dramatic examples of the regime's brutality is the Hama massacre perpetrated in 1982 to quell the Muslim Brotherhood opposition against the Ba'ath party, which killed thousands of people.³¹⁰ Similar strategies of repression have been implemented by the regime to repress the wave of protests initiated by the Arab Spring in 2011, which eventually led Syria into a brutal and long civil war in which war crimes, crimes against humanity, and genocide have been committed, with hundreds of thousands of people killed.³¹¹ While the regime and its affiliates have been found responsible for most of the systematic crimes, including intentionally targeting civilian buildings, enforced disappearances, and detentions, gross human rights violations have been committed by all the parties to the conflict.³¹² Human rights violations committed by non-state armed groups, especially terrorist groups, have significantly increased, as the Free Syrian Army, initially the main opposition group, fell apart into a multitude of non-state armed groups.³¹³

Given the complexity of the case, characterized by the involvement of numerous domestic and international political and military actors, and the widespread victimization, there is a pressing need for a comprehensive transitional justice process—a plan for transition toward peace, justice, and reconciliation that engages the whole country. However, efforts to adopt such a relevant framework have been hindered by various challenges,³¹⁴ including the lack of a unified political consensus and the impunity of the Assad family, which despite the most atrocious crimes committed by its members and affiliates, continues holding control over the government and the justice system.³¹⁵ In fact, recent developments suggest that the Syrian President Bashar al-Assad is restoring his diplomatic ties with key economic and political partners after they had been suspended for over a decade.³¹⁶ Furthermore, the lack of security, the displacement of populations, and the limited access to affected areas make it difficult to reach victims and witnesses, thereby hindering their participation in a transitional justice process.

Additionally, the involvement of external actors and geopolitical considerations further complicate the prospects for a robust and inclusive transitional justice process in Syria. Major global powers, regional states, and non-state actors, each driven by their own geopolitical motives, have vested interests in the Syrian conflict. For instance, Russia's support of the Assad regime stems from its strategic desire to maintain a foothold in the region of the Middle East.³¹⁷ Notably, Russia controls the Tartus naval facility in Syria, which is its only naval foothold in the Mediterranean, and has been in use since the days of the Soviet Union. The control of the Assad regime over this territory guarantees military protection for Russian military bases. In fact, President Bashar al-Assad invited Russia to establish more permanent Russian military bases in Syria.³¹⁸

On the other hand, Turkey has always supported the opposition to the Assad regime and has been using what remains of the opposition, nowadays known as the Syrian National Army, to keep control the territories close to the Turkish border amid concerns over the materialization of a Kurdish state there.³¹⁹ The Kurds have always been perceived as a significant threat to Turkey's national security and territorial integrity.³²⁰ Another important actor is Iran, which, due to sectarian and regional power dynamics,³²¹ has always supported the Assad regime, especially through the use of Hezbollah, a Shia militant group labeled by some states as a terrorist organization. Western nations, driven by concerns about terrorism, refugee flows, and regional stability, have taken various stances on intervention and support for different factions within Syria.³²² The involvement of Western states in the Syrian conflict is controversial. While overall the West has never supported Assad, it has at times provided military support to the more moderate Syrian opposition, but such support has not been firm and consistent. Surely, the greatest involvement from the West in the Syrian conflict relates to the anti-Daesh coalition formed in 2014 specifically to fight the terrorist group.³²³ All these competing interests and involvements intersect and sometimes conflict, making the establishment of a thorough and inclusive transitional justice mechanism in Syria a profoundly intricate endeavor.

Due to the complexity of this conflict and the many geopolitical interests standing in the way of transitional justice, to date, there has been no clear vision of what a transitional justice process in Syria should look like, although experts generally agree that it should include elements of accountability, remedy, and reconciliation and be structured in a way that such efforts do not fuel the existing divisions among communities.³²⁴ There is also general consensus among international organizations and local non-governmental organizations (NGOs) that Syrians should take ownership of the process, the process should be built around multiple mechanisms depending on their function and mandate, and the Syrian civil society should be adequately involved to ensure that it is a bottom-up process and different minorities and groups are adequately involved.³²⁵

A notable attempt to foster dialogue and consultative processes around transitional justice in Syria was seen during a Brookings Doha Center workshop held in March 2020. This event brought together Syrians in diaspora, victims, their representatives, and organizations concerned with transitional justice to share experiences and expertise, notably shedding light on the achievements made in initiating justice processes in Syria, largely through universal jurisdiction in European countries such as Germany, Austria, Sweden, and Norway. It highlighted the active role played by the Syrian diaspora, victims, and their representatives in driving justice initiatives forward despite the ongoing conflict.³²⁶

The main conclusions of this workshop were that the unique nature of the Syrian transitional justice process starting during, rather than after, the conflict has allowed for an abundant collection of evidence, thanks to a robust documentation movement, making it a distinctive case in the global history of transitional justice. Furthermore, the Syrian case stands out, as the transitional justice processes were initiated by the victims themselves rather than through other states' decisions, thus limiting political influence on the transitional

justice processes.³²⁷ These efforts have led to several cases being filed against high-ranking officials accused of crimes against humanity in various European countries, utilizing universal jurisdiction laws and initiating a historic public trial against two security officers in Germany.

While the path toward transitional justice in Syria is complex and ongoing, these instances depict some level of engagement and consultative processes aimed at addressing the demands of justice, accountability, and remedy for victims. However, much remains to be done to achieve comprehensive transitional justice in the Syrian context, as, for the moment, only isolated and uncoordinated initiatives mostly led by the UN, a few other states, and Syrian civil society exist. The following section explores the transitional justice initiatives that have been implemented so far, with a particular focus on the accountability processes.

II. Resulting Mechanisms and Recommendations Produced by the Transitional Justice Process

As previously mentioned, there is no well-defined or agreed upon transitional justice mechanism for Syria. What has been done so far in the transitional justice space is the result of the initiatives and efforts of the UN and those states and civil society organizations that have remained committed to fighting impunity in Syria and supporting the victims, despite the adverse circumstances. This section explores the transitional justice initiatives implemented to date. For the purpose of this case study, these efforts are divided into judicial and non-judicial initiatives.

Judicial Initiatives

The support of Russia and China for the Assad regime has been a key obstacle to the investigation and prosecution of the crimes committed in Syria before the International Criminal Court (ICC) or any international criminal tribunal that may be established for that specific purpose. Given that Syria has not signed the Rome Statute of the ICC, or submitted an ad hoc declaration, the ICC cannot investigate crimes against humanity, war crimes, and genocide committed by Syrian nationals in the Syrian territory without a referral from the UN Security Council. While there have been attempts to pass a UN Security Council resolution that would refer the situation to the ICC, such attempts have been blocked by a dual veto by Russia and China. Similarly, the establishment of an international criminal tribunal or court to investigate and prosecute crimes committed in Syria requires a UN Security Council Resolution that cannot be passed due to Russia's and China's veto. Thus, there is no international mechanism that has the judicial power to prosecute crimes committed in Syria. All the prosecutions that have been initiated so far are foreign domestic prosecutions.

State-Led Transitional Justice Efforts

States that have prosecuted international crimes related to the Syrian war have largely relied on the principle of universal jurisdiction to do so. Universal jurisdiction is a principle of international law that allows a state or international organization to prosecute individuals responsible for grave crimes such as genocide, crimes against humanity, and war crimes, even when the state or international organization bears no relationship with the crimes themselves. The jurisdiction arises on the basis of the nature of the crime, rather than on the basis of a connection with the concerned court.³²⁸ The idea of universal jurisdiction is rooted in the following principles: certain crimes are so grave that they harm the international community as a whole;³²⁹ the fight against impunity is borderless;³³⁰ and that international courts (e.g., the ICC) should only function as a last resort.³³¹ To the extent possible, all crimes—including international crimes—should be prosecuted domestically.³³²

According to a mapping of Syrian cases updated in April 2023, cases based on the principle of universal jurisdiction have been initiated in the United States, Netherlands, Germany, France, Austria, Hungary, and Sweden. Germany and Sweden have initiated 50 such cases each.³³³ For example, on February 24, 2021, the High Regional Court of Koblenz (Germany) sentenced Eyad al-Gharib, a former member of the Syrian intelligence services, to 4.5 years in prison for complicity in crimes against humanity.³³⁴ This became the first case in which a foreign court sentenced a member of the Syrian security apparatus (still operating) and found the Assad regime guilty of crimes against humanity. Importantly, not only was the sentence a condemnation of the crimes committed by that individual perpetrator, but it also condemned the whole system of violence set up by Syria's security apparatus.³³⁵ In May 2023, the French Court of Cassation ruled that France could try foreign suspects on the basis of the principle of universal jurisdiction, thereby allowing the cases concerning two Syrians accused of war crimes and crimes against humanity to go forward.³³⁶

Importantly, these efforts concern individual criminal accountability cases and therefore are focused on specific cases involving identified perpetrators and crimes. As such, they do not entirely capture the responsibility of the Syrian government for designing, building, or maintaining a governance structure aimed at repression of the opposition through the systematic perpetration of atrocities. In other words, they are not concerned with state responsibility. Yet, most crimes committed since 1970 in Syria have been the result of a systematic perpetration of violence institutionalized by the Assad family that is deeply rooted in the governance structure since Hafez al-Assad took power. Individual criminal accountability cases, being focused on specific cases involving identified perpetrators and crimes, hardly reflect the institutional nature of such crimes.³³⁷

To hold Syria accountable for such a policy of terror, Canada and the Netherlands instituted proceedings against Syria before the International Court of Justice (ICJ) in 2023.³³⁸ Such proceedings are in regard to violations of the prohibition of torture and other cruel, inhuman, and degrading treatment and punishment by Syria against its own population. The first round of hearings on request for provisional measures took place in October 2023 in the absence of the Syrian delegation.³³⁹ At present, this is the first and only state accountability case to hold the Syrian regime accountable for the crimes committed since 2011.

Recommendations by States

While the number of states that have initiated trials of suspects of international crimes committed in Syria is limited, and no international court is likely to be able to exercise jurisdiction on this situation any time soon, many states have stressed the importance of continuing funding and supporting the existing mechanisms, which may contribute to justice and accountability in the future. For example, in 2022, Turkey's representative urged the United Nations to continue funding the International, Impartial and Independent Mechanism (IIIM), as the work done by this mechanism may significantly contribute to the cause of justice for the many victims of the Syrian conflict.³⁴⁰ Additionally, many states have urged the international community to acknowledge the role of Russia in perpetuating impunity by actively hiding the horrors committed by the Assad regime through military and ideological assistance during the conflict and by challenging the legitimacy of the IIIM. For example, the United States constantly reminds the international community that the patterns of crimes committed in Ukraine are very similar to the ones committed in Syria because Russia has been using the same tactics.³⁴¹ On the other side, Syria's, Iran's, and Cuba's representatives have expressed concerns over the politicization of justice by certain Western states that, with their actions, are deliberately undermining Syria's judicial system, which bears primary responsibility for investigating and trying crimes committed in its territory.³⁴²

Non-judicial Initiatives

While judicial initiatives have met several challenges given the political implications that individual and state accountability present, non-judicial activities have been easier to implement. Various international and grassroots initiatives have been launched to document human rights abuses, support victims, and promote accountability as part of the larger goal of achieving justice and reconciliation in Syria.³⁴³

Transitional Justice Efforts Led by the Independent International Commission of Inquiry on the Syrian Arab Republic

In August 2011, the United Nations Human Rights Council established the Independent International Commission of Inquiry on the Syrian Arab Republic (the Commission) "to establish the facts and circumstances that may amount to such violations and of the crimes perpetrated and, where possible, to identify those responsible with a view to ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable."³⁴⁴ In recent years, the Commission has continued its mandate to investigate and report on the situation in Syria. In 2023, some key findings and statements were made to shed light on the ongoing crisis and how overall the instability of the country stands in the way of recovery in Syria. For instance, recently, Paulo Pinheiro, the chair of the Commission, urged for more decisive international action, stressing the need for clear peace and justice pathways to prevent further violence and radicalization, portraying a bleak picture of continuous suffering and loss amid political and humanitarian negligence.

Pinheiro stressed that various factions, including Syrian forces, foreign armies, and terrorist groups, are increasingly implicated in civilian casualties and other violations and the ongoing humanitarian disaster is fueling even more violence and crimes. He also emphasized that the deteriorating situation underscores the essential role of non-judicial mechanisms in monitoring and reporting on on-the-ground realities. Despite the dramatic situation, Pinheiro welcomed the ICJ hearings on Syria's human rights obligations and the efforts made to address the missing persons crisis.³⁴⁵

Additionally, a recent report by the Commission highlights severe infringements on human rights and breaches of humanitarian law persisted throughout Syria, encompassing both government-controlled territories and regions held by non-state entities, in the initial half of 2023. The humanitarian and economic conditions kept worsening, with upwards of 15 million Syrians requiring humanitarian aid. Even though there was a temporary cessation of hostilities following the calamities brought on by the earthquakes in February, confrontations among the conflicting factions recommenced shortly thereafter. The report also highlights that torture, ill-treatment, and arbitrary detention by government forces continued unabated, with recurring deaths in detention and scant information provided to the bereaved families. Moreover, systemic practices such as arbitrary arrests and detentions fueled an environment wherein personal grievances often led to arrest. Notably, individuals who had "reconciled" with the government were also not spared from arbitrary arrests. Incommunicado detention remained a grave concern, along with forced confessions and inadequate legal representation. This pattern of violations extended to returnees, further underscoring the perilous situation in Syria for returning migrants.³⁴⁶

Recommendations by the Independent International Commission of Inquiry on the Syrian Arab Republic

Since the beginning of its mandate, the Commission has always stressed the need to cease all violations of international law and take all feasible measures to locate missing persons. It has also urged all parties to the conflict to ensure that all credible reports of murders and killings of civilians, including custodial deaths, are promptly investigated and that parties to the conflict cease providing any kind of support to actors for which there is a reasonable ground to believe that they are committing violations of international law.³⁴⁷ While the Commission has always stressed the need to focus on those crimes related to enforced disappearances, more recently, the Commission recommended the establishment of a newly created independent institution with an international mandate to coordinate and consolidate claims regarding missing persons.³⁴⁸ This came as the Commission recognized the role that enforced disappearances have played in Syria to repress the opposition and the extent of victimization resulting therefrom.

Transitional Justice Efforts Led by the International, Impartial and Independent Mechanism

Largely due to the Security Council's persistent deadlock on the establishment or referral of the Syrian case to a judicial mechanism, in December 2016, the UN General Assembly established an investigative body, which, given the limited powers, did not require a Security Council Resolution and therefore Russia's and China's approval: the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011.³⁴⁹ The IIIM continued and expanded some of the work initiated by the Independent International Commission of Inquiry on the Syrian Arab Republic, which had been established in 2011.

The IIIM was established and tasked to “to closely cooperate with the Independent International Commission of Inquiry on the Syrian Arab Republic to collect, consolidate, preserve and analyze evidence of violations of international humanitarian law and human rights violations and abuses and to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law.”³⁵⁰

Despite being a non-judicial mechanism, with no judicial power for the prosecution of international crimes, the establishment of the IIIM was an important development in the practice of the UN and international criminal law as the evidence was collected in accordance with international criminal law standards, hence to be used specifically for international prosecutions. The IIIM successfully built a central repository for the evidentiary materials, some of which were collected by various UN agencies, governments, and civil society organizations to facilitate the work of courts and prosecutors that had started investigations into crimes committed in Syria under their jurisdiction.³⁵¹

It is important to stress that, given that the IIIM’s mandate is explicitly limited to facilitate criminal proceedings, evidence was collected in compliance with strict confidentiality rules and rigorous information security measures are governing access to the IIIM repository. Thus, it is unlikely that the information collected can be used for non-judicial initiatives, such as truth-seeking, reparations, and restorative justice. In fact, all these initiatives require opening up access of this information to the public which may jeopardize criminal investigations and prosecutions, in particular, violating the principle of confidentiality.³⁵²

Recommendations by the International, Impartial and Independent Mechanism

The IIIM has repeatedly stressed that the response to the Syrian crisis has been inadequate and that the IIIM alone, given that it does not have the judicial powers to prosecute, cannot impart justice because its role is limited to *provide assistance* to national, regional, and international courts or tribunals. To maximize its impact, the IIIM has recommended that the UN and other international organizations improve their coordination strategies to promote dialogue among different organizations engaged in this space and to ensure that the IIIM has full access to existing evidence possessed by documenting organizations.³⁵³ The IIIM has also recommended that all international organizations, guided by the UN, take a more victim-centered approach in their cooperation with IIIM and share information regarding effective humanitarian referral pathways to assist victims/survivors of international crimes in Syria, with a view toward facilitating access to support services as much as possible.³⁵⁴

Civil Society-Led Transitional Justice Efforts

Despite their limited resources, international and Syrian civil society organizations have played a critical role in collecting key information about the crimes committed since the revolution started in 2011.³⁵⁵ Especially with regard to missing persons and survivor and family associations, such as the Association of Detainees and Missing People at Saydnaya Prison,³⁵⁶ the Caesar Families Association,³⁵⁷ and the Coalition of Families of Persons Kidnapped by ISIS-Da’esh,³⁵⁸ as well as civil society organizations such as the Syrian Centre for Media and Freedom of Expression,³⁵⁹ the Syrian Network for Human Rights,³⁶⁰ and the Syria Justice and Accountability Centre,³⁶¹ information about more than 100,000 missing persons has been collected.³⁶² While the number of accountability cases is still very limited, such evidence is being used to substantiate claims that the regime’s repression was systematic and carried out in accordance with a well-established state policy in cases before national and international courts. It has also played a key role in advocacy activities and in making

sure that information about missing persons does not get lost as the war continues and that the truth about the fate and whereabouts of missing persons is established despite the regime's denials. Organizations such as Impunity Watch provide support to families to make their voice and demands heard.³⁶³ The International Center for Transitional Justice,³⁶⁴ together with civil society organizations such as the Syrian Legal Development Programme,³⁶⁵ also provide space to survivors and the families of missing persons to share their experiences.

Recommendations by Civil Society

The recommendations of civil society organizations in relation to a plan for a transitional justice process in Syria have changed over the past several years in light of the developments on the ground. In the beginning, the recommendations were formulated based on the assumption that President Bashar al-Assad would have stepped down in the near future. As this became less likely and the civil war intensified, civil society organizations started focusing their recommendations on what to do while President Bashar al-Assad remains in power. In fact, civil society itself has significantly changed. Originally, Syrian civil society privileged coordinated advocacy, support, and capacity-building with a new democratic state at the center of such initiatives; today, it champions independent action taken at the grassroots level and without the involvement of the state.³⁶⁶

Civil society organizations agree that criminal accountability will play a crucial role, but they also recommend that any justice process adequately respond to victims' needs. This does not seem feasible at the domestic level given that the regime of President Bashar al-Assad is still in power and many crimes were committed by its regime and its allies. In these circumstances, civil society organizations recommend that domestic prosecutions be delayed rather than proceed in a flawed way, as this will give more time to Syria to come to grips with its past.³⁶⁷

Civil society organizations welcome domestic prosecutions before foreign courts; however, they recommend that the international community view such efforts as only a part of the building blocks toward a more comprehensive transitional justice process. In this regard, civil society also recommends that domestic prosecutions continue in order to keep the cause for justice alive, but should increase and be just one of many initiatives aimed at providing justice for the victims of such a complex conflict.³⁶⁸ Similarly, Syrian civil society believes in the role of documentation of human rights violations in laying a foundation for accountability, truth-seeking, and the preservation of memory and history. However, civil society organizations recommend that the documentation of atrocities be integral to the pursuit of transitional justice in ongoing conflict and authoritarian contexts.³⁶⁹

In addition to the establishment of effective judicial processes, civil society organizations recommend that any transitional justice plan include public apologies, as it's an entire society and country that is victimized by the war. Public apologies will ensure that even those who do not obtain justice from prosecutions or from reparations mechanisms will perceive some form of address and will be able to move forward.³⁷⁰

Finally, civil society organizations recommend support for the development of this "new" type of civil society, which conducts its transitional interactions "as a set of discourses and form of politics" rather than through institutional mechanisms.³⁷¹ Such support should be ideological and humanitarian but also financial.³⁷² In particular, civil society recognizes the importance of documentation work and stresses that, without financial support, there cannot be any documentation that challenges the hijacking of narratives and the destruction of historical memory, and that it maintains a database containing evidence for eventual prosecutions and truth commissions.³⁷³

III. Assessment of the Level of Implementation (and Impact?) of the Agreed Upon Mechanisms and Recommendations and Their Ability to Meet the Needs of Victims and Survivors

As previously discussed, there is no agreed upon transitional justice plan in Syria, as the mechanisms that have been established are not part of a comprehensive transitional justice strategy. On the contrary, they are largely uncoordinated initiatives and processes implemented with the hope that a transitional justice plan may be designed and implemented in the future—and if not, that these mechanisms will provide some form of redress to victims and will help with peace and reconciliation. Therefore, it is not possible to assess the progress of the implementation of the transitional justice strategy as such, but it is possible to assess the progress and achievements of each mechanism on its own in light of their overall contributions to transitional justice and how they have successfully or unsuccessfully met the needs of victims and survivors.

With regard to the many recommendations issued to establish an international mechanism with the power to investigate and prosecute serious crimes committed in Syria since 2011, the international community has consistently failed to establish an international criminal tribunal to hold individuals accountable for the crimes committed. Similarly, it has failed to refer the case to the ICC.³⁷⁴ Only a few states, on their own initiatives, have shown interest and the political willingness to prosecute such crimes under their own jurisdictions, relying on the principles of universal jurisdiction.

However, the impact of these prosecutions on the victims is rather limited. As many have noted, victims regard such prosecutions as an effort to keep the cause of justice alive and prevent the world from forgetting about the brutality of the conflict in Syria, but they do not view them as impactful from a justice perspective. According to many, including Syrian lawyers, these trials should take place in Damascus “in front of Syrian judges and victims with Syrian lawyers defending the accused and Syrian prosecutors presenting the evidence that Syrian investigators collected.”³⁷⁵ While many cherish such initiatives, they find it disappointing that these trials are not taking place at the international court, a special tribunal, or in Damascus, but rather in a German regional court.³⁷⁶

If judicial mechanisms have achieved limited results given the many challenges and obstacles experienced, non-judicial mechanisms have also been able to achieve most of their objectives, although it remains arguable whether such accomplishments have adequately met the expectations and needs of victims. Non-judicial mechanisms have been able to gather a substantive amount of evidence that is being used in domestic and international court cases as well as in advocacy initiatives. With regard to the IIIM, the latter has achieved many of its initial objectives including the following:

- By the end of 2022, the IIIM has processed some 2.3 million records.³⁷⁷
- The IIIM has concluded 83 cooperation frameworks with a range of stakeholders.³⁷⁸
- The IIIM has received 242 requests for assistance from 15 different jurisdictions and has assisted 130 distinct national investigations.
- The IIIM has proactively shared information, data sets, evidentiary modules, and analytical products with national war crimes units to support their investigations and prosecutions.

- As part of the Lausanne platform process,³⁷⁹ which aims to intensify cooperation between the IIIM and the civil society network, the Mechanism has deepened trust and cooperation with victims and survivors.
- In gathering evidence, the IIIM has continued to engage with states, international organizations, NGOs, and individuals, especially victims and survivors.³⁸⁰
- The IIIM continues to benefit from its cooperation with the Independent International Commission of Inquiry on the Syrian Arab Republic, which has provided assistance in contacting and liaising with sources and potential witnesses in support of criminal investigations in national jurisdictions.³⁸¹
- Despite numerous attempts, the IIIM has struggled to establish cooperation with the Syrian Arab Republic, challenging the IIIM's access to key evidence, especially concerning torture and enforced disappearances.³⁸²

The work of the Commission and the IIIM has surely contributed to transitional justice efforts, in particular accountability. The Commission and the IIIM have played a key role in collecting a remarkable amount of evidence that is being used for prosecutions or may be used for that purpose in the future. However, without further action from the international community to push for further prosecutions, such evidence may remain in a database and be used for more transitional justice efforts. In fact, the database contains very confidential information that poses security risks to the victims and witnesses and therefore cannot be shared with the public unless redacted. Due to the confidentiality of such evidence, it is unlikely that it will be used for purposes other than criminal accountability, for example, for truth-seeking. Additionally, it is important to remember that the IIIM was specifically established to contribute to prosecutions. Using the evidence collected for purposes other than prosecution may give rise to issues of legitimacy, as well as credibility.

While all stakeholders engaged in the transitional justice space in Syria recommend that the international community initiate more accountability efforts and build a comprehensive transitional justice process to maximize the impact of the existing transitional justice mechanisms, the recent geopolitical events do not indicate that there is a unified position on this. On the contrary, recent events signal that the regime of Bashar al-Assad is restoring its legitimacy in the international arena despite the sheer amount of evidence demonstrating that the regime is responsible for war crimes and crimes against humanity. Thus, from a political perspective, the international dynamics surrounding the Syrian crisis indicate a paradoxical stance.

Despite the abundant documentation and reports on the atrocities committed by the Assad regime, major powers, including members of the United Nations Security Council, have been reticent to take decisive action. The reluctance to enforce strict sanctions,³⁸³ initiate peacekeeping missions, or demand accountability reflects a geopolitical hesitancy, possibly rooted in regional alliances, economic interests, or the complexities of the Syrian conflict itself. As a testament to this, nations began resuming or maintaining diplomatic ties with Syria,³⁸⁴ and invitations have been extended to Syrian officials for international summits,³⁸⁵ all indicating a gradual normalization of relations with the Assad regime. Furthermore, the number of victims who have not obtained redress for the harm endured has only increased in the past years as impunity reigns and parties to the war continue committing crimes. This suggests that, despite the commitment and the various measures the mechanisms have implemented so far, they have not been able to implement key recommendations such as overthrowing the regime of Assad and bringing it to justice and obtaining redress for the victims.

The case brought before the ICJ by Canada and the Netherlands may be an interesting development in the fight against impunity and in the search for transitional justice as it relates to Syria's accountability for its systematic practice of torture in violations of its treaty obligations under the Convention against Torture. An ICJ finding that Syria violated the convention would convey an important political message, which is much needed now that many states are restoring relations that were once frozen with the regime of Bashar al-Assad. It would also have an impact on the reparation of victims. While the Netherlands and Canada are the applicants in this case, if found in breach of the convention, Syria may be ordered to pay reparations to Canada and the Netherlands. Yet, there are arguments that the latter may be able to decide to use that compensation to set up mechanisms of reparations for victims of torture. As is often stressed, the acknowledgment of the facts, including the responsibility of a regime for carrying out policies of repression, and effective reparation mechanisms play a key role in promoting peace and reconciliation in war-torn countries. A finding of responsibility for the breach of the convention against torture would therefore be perceived as an important achievement in the search for justice and accountability in Syria.

A recent positive development is the establishment of an investigative body specifically for enforced disappearances, upon the recommendation of the Commission of Inquiry, the IIIM, and the UN General Assembly.³⁸⁶ A new mechanism focused specifically on this matter will be mandated to clarify the fate and whereabouts of missing and forcibly disappeared persons and provide support to their families. Therefore, contrary to the IIIM, this mechanism will specifically focus on truth-seeking and, where applicable, reparations. According to experts, the new body must be guided by a victim- and survivor-centered approach that allows families to be consulted and able to participate in all stages of the process. This includes its establishment, design, implementation, evaluation, and decision-making.³⁸⁷

Also, civil society organizations have been able to collect a great amount of evidence, especially with regard to systematic and widespread crimes such as enforced disappearances. Survivor and family associations, such as the Association of Detainees and Missing People at Saydnaya Prison, the Caesar Families Association, and the Coalition of Families of Persons Kidnapped by Daesh, as well as civil society organizations such as the Syrian Centre for Media and Freedom of Expression, the Syrian Network for Human Rights, and the Syria Justice and Accountability Centre have been able to collect more than 100,000 missing persons.³⁸⁸

With regard to the recommendations to expand the formal transitional justice work with victims, this field has remained underdeveloped, although civil society organizations have tried to give more agency to victims. In particular, The Day After organization has taken the lead in providing space to former detainees of Saydnaya, current female detainees, and family members to discuss their experiences and thereby understand what is the most efficient way to make their voices heard.³⁸⁹

IV. Assessment of the Factors Contributing to the Political Backsliding of the Transitional Justice Processes (Drawing from Compendium)

Different factors have contributed to the political backsliding of the transitional justice process in Syria. Perhaps the main factor is the lack of political will of the international community and the Syrian regime to push for serious and effective plans for transition aimed at promoting justice, peace, and reconciliation.

Between 2011 and 2013, the Syrian revolution had momentum and was widely supported by the international community, but not by the allies of the Assad regime, including Iran, Russia, and China, which have always supported the regime given their common strategic geopolitical interests. The support for the opposition was such that the international community even provided political, diplomatic, and military support to the Syrian opposition to overthrow the regime of Assad and establish a more liberal state. However, the increasing role of extremist and terrorist groups, such as Daesh, especially in light of their terrorist activities in and outside Syria, drew the attention of the international community away from the crimes committed by the Syrian regime. It shed light on the long-existing fractures within Syrian society exploited by extremist political groups that took advantage of the situation to push their agenda, especially al-Qaeda and Daesh.³⁹⁰ As a result, the priority of many states became the fight against terrorists rather than for a transition in Syria. The international community, increasingly distracted by new security emergencies, gradually accepted that the Syrian regime would remain in power, abandoning the hope that Syria will be able to transition from an oppressive dictatorship to a more just society in the near future.

However, as Syrian civil society organizations and numerous states have highlighted, as long as Bashar al-Assad remains president, the chances that Syria will embark on a transparent and effective transitional justice process are very few.³⁹¹ In fact, to be effective, transitional justice requires the state's cooperation in investigating and prosecuting those responsible and establishing the truth—all requests that the Syrian regime has consistently not complied with. As a consequence, all credible transitional justice efforts have stalled.

Another important factor contributing to the political backsliding of transitional justice processes in Syria is the complexity of the crimes committed, the sheer number of people affected, which continues to grow as the war unfolds, and the ethnic and religious fragmentation of Syrian society. In fact, a credible and efficient transitional justice mechanism must capture measures aimed at redressing the harm endured by all the victims of war. However, civil society organizations and international mechanisms have limited resources and limited access to certain areas, such as those controlled by the regime. Especially now that there are no moderate opposition groups and the majority of the country is controlled by the regime or terrorist groups, civil society organizations are barely able to document human rights violations in certain areas. As a consequence, certain crimes are significantly underreported.

An additional factor contributing to political backsliding is the increasing tensions among different ethnic groups, which led to a highly divided society that finds it difficult to cooperate in an effort to embark on a transitional justice process. While, in the beginning, different ethnic groups were rather united against the regime, such cohesion gradually disappeared as the civil war intensified and the revolution against the regime collapsed into multiple armed conflicts between different armed groups representing the agenda and aspirations of different groups.

In this regard, it is important to stress that the Syrian society is characterized by a rich ethnic-sectarian mosaic consisting of a majority of Sunni (74%) and a few other minorities, such as Alawis (11%), Kurds (10–15%), Christians (10%).³⁹² It is representative of different cultures and religions that have lived together for a long time in relative peace promoted by the informal divide-and-rule measures adopted by the Syrian regime.³⁹³ While all these groups have been affected by the war and all of them have suffered loss and destruction, the types of crimes and the motives behind them differ and are often linked to ethnic origins. For example, the Yazidi, an ethnic group living in Iraq and Eastern Syria, have been persecuted by Daesh, an extremist Sunni Islamic group that eventually committed a genocide against the Yazidi in August 2014, leaving an extremely deep wound in the relationship between Sunnis and Yazidis. In fact, while Daesh was the criminal mind behind the genocide, the testimonies of the Yazidi reveal that there were cases of ordinary Sunnis who actively aided Daesh combatants in rounding up Yazidi in Sinjar, Iraq, with the knowledge that men would be killed and women would be sexually enslaved. The fact that Daesh is a Sunni terrorist group and that Sunni citizens aided it in executing the genocide deepened the divisions and hatred between Yazidi and Sunnis, as currently the Yazidi tend to view the perpetrators of the genocide as the Sunnis themselves. Similarly, the relationship between the Yazidi and the Kurds has deteriorated since the 2014 genocide, further complicating the process of reconciliation. The Kurds are currently present in the north of Syria, in the so-called Rojava region. While some consider the Yazidis as a completely separate minority, they are generally considered part of the Kurdish community—and for that reason, generally, there have been good relations between the two. However, as Daesh approached Sinjar on August 3 with the intention to commit a genocide, the Kurdish troops withdrew, leaving many behind who were then killed or enslaved. The Kurds' withdrawal has seriously damaged the relationship between them and the Yazidi.³⁹⁴

Another interesting example is the tension between the Alawis and the Sunnis, which runs very deep and has historical roots. The regime is predominantly Alawi, whereas the majority of the population is Sunni. While initially the Syrian revolution was an opportunity for all ethnic and religious groups to protest against an oppressive and tyrannical regime, it became perceived as a Sunni-led revolution for the following reasons. First, the Sunnis were the majority of the population. Second, they were the most affected by the repression of the regime for many decades, since the regime of Hafez al-Assad and therefore they played a key role in the protests against the regime.³⁹⁵ Third, as the revolution turned into war and more extremist elements groups engaged, other ethnic and religious groups felt threatened and took distance from the opposition against Assad, which, on the contrary, vowed to be “the protector of minorities,” with the result that it became a Sunni-led opposition. After all that happened, 11 years of war later, thousands of people killed under the barrel bombs indiscriminately launched by the regime's airplanes on civilian buildings, and thousands of people forcibly disappeared, detained, tortured to death in the regime's prisons, it is hard to imagine that it will be easy for the Sunnis and the Alawi to work together toward the development of a transitional justice process if the Alawi remain in power.

The increasing fragmentation of the Syrian society, divided along ethnic and religious groups as well as political ideas, has significantly contributed to the political backsliding of transitional justice processes, as there is no comprehensive transitional justice process that engages every ethnic and religious group, and the initiatives aimed at reconciliation are very limited.

V. Recommendations from Civil Society-Led Initiatives and Interventions to Ensure Transitional Justice Mechanisms and Recommendations Are Implemented.

While there exist different types of interventions and actors in the transitional justice space in Syria, some of the recommendations they have produced are common and can be summarized as follows.

First, both civil society organizations and the UN mechanisms have recommended increasing the Syrian ownership of the transitional justice process in order to maximize its credibility. This could be done, for example, by fostering opportunities for Syrian practitioners to engage in the transitional justice mechanisms. Civil society has stressed that it is important that the international community support initiatives that aim to bring Syrian policymakers to table new policies and alternative plans to the regime. They should not be engaged merely as “consultants” or “beneficiaries,” but rather they should be put in the position to lead and shape these efforts.³⁹⁶ The Syrian opposition has lost its credibility due to the rise of extremist groups, and with that, it has also lost support from many states. Ensuring that Syrian policymakers can shape new policies and alternative plans to the regime keeps the opposition to the Assad regime alive and gives a moderate Syrian opposition the tools to lead a successful transitional justice process in the country.

Another way to increase the Syrian ownership of the transitional justice process is to intensify the work with victims and survivors to ensure that they have a safe space to express their emotions and are given agency to decide how they want to use their stories and experiences to contribute to transitional justice.³⁹⁷ Additionally, civil society organizations have stressed the need for ideas and projects for a transitional justice process to remain flexible, as the establishment of a transitional justice process very much depends on political developments—and to be credible, a transitional justice plan must be realistic.³⁹⁸

Second, it is recommended that different initiatives continue being implemented, but such efforts should be better coordinated to maximize the impact and ensure that all victims receive sufficient support. Relatedly, it is recommended that a more comprehensive and well-structured transitional justice plan be designed to guide the different actors in their efforts to contribute to accountability and avoid a waste of resources and duplication. This is especially important for organizations that work in the documentation space and that therefore run the risk of subjecting victims to retraumatization. Better coordination among different initiatives will ensure that more crimes, victims, and geographical areas are reported and represented in the evidence collected. This will also foster reconciliation among different ethnic groups that struggle to cooperate due to ethnic tensions.

Related to this, civil society organizations acknowledge that there is little prospect that there will be a transition to a more liberal and democratic governance in the near future and, therefore, that the Syrian government will seriously engage in an effective transitional justice process. However, they reiterate that it is necessary that civil society and UN institutions continue with their pre-transition work, such as collecting evidence and establishing facts, to be able to engage as soon as the opportunity presents itself.

Third, all actors agree that the international community should continue discussing the situation in Syria, continue demanding accountability and justice, and all perpetrators are promptly investigated and prosecuted. When asked what the priority is in Syria with regard to addressing the past, most civil society representatives claim that there would be no peace without justice. Too little has been done in the accountability space to make Syrians feel like they can move on. The regime is holding on to power

and even normalizing relations with other countries. Emergencies such as the recent earthquake have dramatically shifted the attention and resources committed by the international community away from addressing impunity for the crimes committed by the regime and its culpability. Very little has been done in terms of accountability, and it all comes from countries that have expressed their interest and commitment to prosecuting those responsible. It is important that the international community continue pushing for accountability for the crimes committed by the Assad regime and does not restore the regime's credibility in the international arena. As previously mentioned, the fact that the regime has remained in power is one of the main factors contributing to political backsliding in Syria and is preventing the country from moving on and embarking on a transitional justice process.

Fourth, all actors agree that more efforts should be focused on reconciliation, as this is another dimension of transitional justice in need of more attention and work. Because of the humanitarian crisis and economic instability, victims of crimes driven by ethnic hatred such as genocide have felt particularly isolated. There is still too much hatred among different ethnicities that prevents them from establishing dialogue and cooperating for a peaceful future. The international community should allocate funding for activities aimed at reconciliation, especially in areas where different ethnic groups live together and therefore there is more likelihood of violence. Providing support to all communities and groups will help ease the existing tensions and increase the chances that different communities will embark on a transitional justice process.

Fifth, civil society organizations in particular have stressed the need to increase security across the country. The lack of security, especially the potential for being harassed, threatened, or kidnapped, has severely limited the work of civil society organizations. Both the regime and non-state armed groups have attacked civil society to prevent it from investigating crimes. Documentation and advocacy activities are especially targeted. The lack of security limits not only the material scope of work done by civil society but also the geographical areas they manage to cover with the result that both some areas are left without coverage and evidence may eventually disappear. Clearly, the problem of security is linked to the current situation of war. As long as the Syrian territory is controlled by armed groups hostile to transitional justice, there is little chance that civil society will be able to efficiently work in the justice and accountability space, as it will be consistently targeted. Additionally, security risks affect coordination among different civil society organizations, which often cannot meet in person, resulting in duplication of work.

CHAPTER 7:

CASE STUDY—IRAQ

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Background

The past decade of Iraq's history has been marked by recurring cycles of violence. Most significantly, the rise of the Islamic State (ISIS) or Islamic State of Iraq and the Levant (ISIL), the military operations confronting it, and violent crackdowns on peaceful protesters by government forces and militias have led to the perpetration of unspeakable human rights offenses against the civilian population. A vast number of conflict-affected Iraqis, including returnees, are extremely vulnerable, recovering from trauma, and struggling to maintain or reestablish their livelihoods. Many who stayed in ISIL-controlled areas face risks of retaliation from returnees who may perceive them as sympathetic to ISIL. While the government of Iraq (GoI) has taken steps toward addressing these violations, these efforts have been slow evolving and often criticized by Iraqis and members of the international community. The UN Investigative Team for Accountability of Da'esh (UNITAD) established through UN Security Council Resolution 2379 at the request of the GoI, began its work in late 2018 but is still in the early stages of its investigations. While criminal trials are being conducted under Iraq's criminal and counterterrorism laws, these laws do not address the specific nature of many of the crimes committed by ISIL fighters. Proceedings in domestic criminal courts are fraught with false allegations, confessions extracted through torture, and significant risks of retribution to victims. And while Iraqi officials have pledged to investigate and hold to account those responsible for the brutal suppression of peaceful protesters in recent months, public confidence in their commitment to those words is low. Most Iraqis remain skeptical of the government's ability and/or willingness to deliver accountability to victims.

Overall, the conflict in Iraq has been characterized by a complex web of historical, political, ethnic, and sectarian tensions. Rooted in decades of authoritarian rule under Saddam Hussein's Ba'athist regime, Iraq witnessed ethnic and sectarian divisions intensify over this period. The United States Department of State's annual report Country Reports Human Rights Practices outlines regime practices, including executions, use of torture and chemical weapons on political opponents, and other abuses toward women, children, and minority ethnic groups.³⁹⁹ The 2003 US-led invasion and subsequent collapse of the regime further destabilized the country, leading to a power vacuum, sectarian violence, and the rise

of extremist groups, most notably ISIL. These factors, combined with a struggle for control over Iraq's vast oil resources, have fueled a protracted conflict marked by clashes between various ethnic and religious groups, including Sunni Arabs, Shia Arabs, and Kurds, each with its own regional and international allies. The conflict has resulted in significant humanitarian suffering, displacement, and profound challenges to governance and security in Iraq, making it a central focus of international concern and efforts to restore stability and peace. A Congressional Research Service Report from 2003 notes that:

*About 60 mass graves, containing numbers of remains varying between single digits and the several hundreds, have been uncovered since the 2003 war began. Some estimates are that there might have been as many as 300,000 victims of the regime. Most are believed to contain the bodies of Shiite Muslims killed in the post-1991 war uprisings against Saddam Hussein.*⁴⁰⁰

Iraq's more recent history has been marked by recurring cycles of violence. Most significantly, the early 2000s rise of ISIS, the military operations confronting it, and violent crackdowns on peaceful protesters by government forces and militias have led to the perpetration of unspeakable human rights offenses against the civilian population. Sectarian divide has also led to violent uprisings and protests, met with harsh, often state-backed response.⁴⁰¹

As Iraq now looks ahead toward a political transition, millions of its citizens are in need of justice and accountability, humanitarian aid, and medical and psychosocial support. A vast number of conflict-affected Iraqis, including returnees, are extremely vulnerable, recovering from trauma, and struggling to maintain or reestablish their livelihoods. Many who stayed in ISIL-controlled areas face risks of retaliation from returnees who may perceive them as sympathetic to ISIL.

While the GoI has taken steps toward addressing human rights violations, these efforts have been slow-evolving and often criticized by Iraqis and members of the international community due to poor planning and, whether real or perceived, a lack of legitimacy.⁴⁰² While criminal trials are being conducted under Iraq's criminal and counterterrorism laws, these laws do not address the specific nature of many of the crimes committed by ISIL fighters. Proceedings in domestic criminal courts are fraught with due process violations such as false allegations, confessions extracted through torture, and significant risks of retribution to victims.⁴⁰³ And while Iraqi officials have pledged to compensate families of those killed in the uprisings and investigate, prosecute, and punish those responsible for the brutal suppression of peaceful protesters in recent months, public confidence in the government's commitment remains low, as no dedicated mechanism to manage this effort has yet been established.⁴⁰⁴ Without demonstrative measures to achieve justice and accountability, most Iraqis remain skeptical of the government's ability and/or willingness to deliver accountability to victims.

Ongoing human rights violations against civilians include the following:

- Targeted killings
- Abductions⁴⁰⁵
- Property violations, including arson, demolition, relocation, and confiscation
- Ethnic and sectarian targeting against Sunnis, Shiites, Kurds, Turkmen, Yezidi, Sabaeans, Shabaks, Christians, and more⁴⁰⁶
- Attacks of civilians, which disproportionately affect the elderly, the disabled, pregnant women, and children⁴⁰⁷
- Forced conscription of young men and children⁴⁰⁸

- Forced marriage⁴⁰⁹
- Mass murders, both judicially and extra-judicially⁴¹⁰
- Bombings of schools, hospitals, and civilian infrastructure⁴¹¹

It is worth noting that, to bolster these domestic efforts, UNITAD began its work in late 2018 but is still in the early stages of its investigations.⁴¹²

Resulting Mechanisms and Recommendations Produced by the Transitional Justice Process

The Iraqi Supreme Court is the highest judicial authority in Iraq and plays a crucial role in interpreting and upholding the country's constitution. Established in 2005 after the fall of Saddam Hussein's regime, the court is composed of nine judges who are appointed by the Council of Representatives. The Supreme Court's primary responsibilities include reviewing the constitutionality of laws and regulations, settling disputes between federal and regional authorities, and adjudicating electoral matters. The court's decisions carry significant weight and influence in shaping Iraq's legal framework and ensuring the rule of law. Over the years, the Iraqi Supreme Court has faced numerous challenges, including political pressures and security threats. However, it continues to be a vital institution in safeguarding constitutional principles and providing legal guidance for the country's governance and stability.

The Iraqi High Tribunal (IHT) was established in 2003 to prosecute individuals for international crimes committed during the rule of Saddam Hussein, with jurisdiction extending to all crimes committed by any Iraqi nationals or residents between July 17, 1968, and May 1, 2003, the period of the Baath party rule.⁴¹³ It was created to be a transitional court in a transitional period with the duty to examine "the crimes of the defunct dictatorial regime."⁴¹⁴ The IHT is a hybrid criminal court consisting of both Iraqi and international judges.⁴¹⁵

There is also the United Nations Assistance Mission for Iraq (UNAMI) whose mandate is primarily focused on providing support and assistance to the government and people of Iraq in various areas to promote stability, reconciliation, and development in the country.⁴¹⁶ To support such reconciliation, UNAMI was tasked with facilitating dialogue and cooperation among Iraq's diverse political and ethnic groups, supporting the electoral process, and helping the government strengthen its institutions and democratic governance. UNAMI has also worked with other UN bodies and Iraqi stakeholders to provide humanitarian assistance and promote human rights, mainly working to promote and protect human rights in Iraq, including efforts to strengthen the rule of law, improve the justice sector, and address issues related to accountability and reconciliation.⁴¹⁷

Lastly, the United Nation Security Council created UNITAD for the specific purpose of promoting accountability for the crimes committed by the terrorist group known as the ISIL or Da'esh in Iraq.⁴¹⁸ The Security Council established UNITAD in September 2017 through Resolution 2379 to hold ISIS members accountable for their crimes through evidence-based investigations and domestic proceedings.⁴¹⁹ UNITAD has its own investigation team that conducts interviews, collects witness testimony, and receives information and documentation as well as acquiring forensic material for use as evidence. It also has an analytical team that assesses the probative value of the evidence collected and identifies areas where more documentation is needed to build a case for prosecution. Its efforts are intended to support the Iraqi government in its prosecution of ISIS members for atrocities committed in the state.⁴²⁰

Assessment of the Level of Implementation of the Agreed Upon Mechanisms and Recommendations and Their Ability to Meet the Needs of Victims and Survivors

Since the fall of Saddam Hussein in 2003, Iraq has sought to reckon with its troubled past and establish mechanisms for truth, accountability, and reconciliation. The country has pursued various initiatives, including truth commissions, trials, reparations, and memorialization efforts, to ensure justice for victims, promote national healing, and prevent the recurrence of past injustices. For instance, the first trial commenced in October 2005 and resulted in the conviction of Saddam Hussein and two other defendants for crimes against humanity.⁴²¹ The IHT also prosecuted other high-profile officials, including Ali Hassan al-Majid, known as “Chemical Ali,” who was convicted of genocide and crimes against humanity for his role in the Anfal campaign.⁴²²

While the IHT achieved some significant convictions of high-profile officials for war crimes, crimes against humanity, and genocide committed during Saddam Hussein’s regime, it also faced criticism for its handling of certain cases and perceived lack of independence from the Iraqi government.⁴²³ Moreover, the transitional process as a whole has been complex and faced numerous challenges, including sectarian tensions, political interference, and security concerns. Civil society organizations largely contribute to accountability efforts through documentation, but rely on courts to proceed with the information offered.⁴²⁴

Iraq’s transitional justice process faces significant obstacles that hinder its effectiveness and progress. Those on the ground assert that Iraq is going through a very slow transitional justice process, emphasizing that reconstruction has stalled and the infrastructure is the same as it was in 2003.⁴²⁵ One of the primary challenges is the deep-seated sectarian divisions and political rivalries that permeate the country’s social and political landscape. For instance, most post-conflict state-building efforts have been significantly hindered following the fall of Sadaam Hussein, as the rivalry between the Shia majority and the Sunni minority in Iraq has been so intense.⁴²⁶ Moreover, these divisions often impede efforts to establish a unified approach to justice, as different factions may prioritize their own interests over the broader goal of accountability and reconciliation. US intervention has exacerbated the existing divisions.⁴²⁷

Additionally, the persistent threat of violence and insecurity poses a serious challenge to the transitional justice process, making it difficult to conduct investigations, protect witnesses, and ensure the safety of those involved in the proceedings.⁴²⁸ Threats come mainly from political groups rather than ISIS, as the group has been significantly weakened in recent years.⁴²⁹ Moreover, a lack of institutional capacity and resources, including trained personnel, infrastructure, and funding, further impedes the implementation and effectiveness of transitional justice mechanisms. Threats toward activists continue, especially in light of the lack of accountability for state actors who intimidate and attack such protesters.⁴³⁰

Lastly, there is a need for widespread public awareness and trust-building to encourage victims and witnesses to come forward and participate in the process, which is hindered by skepticism, fear, and a lack of confidence in the justice system, as well as with a lack of general knowledge around accountability and transitional concepts more broadly.⁴³¹ Addressing these obstacles is crucial to overcome the challenges and move toward a more comprehensive and inclusive transitional justice process in Iraq. Prosecutions that have proceeded for crimes committed against civilians are often rife with legitimacy concerns.⁴³²

While the ICTI played a significant role in addressing some of the most egregious human rights abuses in Iraq’s recent history, it also raised questions about the challenges of conducting such trials in a post-conflict environment and the broader issues of transitional justice in Iraq.

Despite these obstacles, Iraq’s transitional justice efforts continue to evolve, reflecting the commitment of the government and civil society to address past wrongs and build a more inclusive and just society.

Assessment of the Factors Contributing to the Political Backsliding of the Transitional Justice Processes

Despite the aforementioned transitional justice mechanisms' impact on Iraqi society following the fall of Sadaam Hussein, the political backsliding of the transitional justice processes in Iraq can be attributed to several factors.

First, Iraq's political landscape is still deeply divided along sectarian and ethnic lines. Political factions often prioritize their interests and influence over the pursuit of justice and reconciliation. This division can lead to a lack of consensus on the design and implementation of transitional justice mechanisms.⁴³³ Moreover, the tribalism that is prevalent throughout Iraq instills great fear in people, and during the al-Maliki presidency, would sometimes oppose government action through direct confrontation, as many were armed. Today, tribes still maintain significant power, as unemployment is rampant among young people in Iraq who therefore seek tribal affiliations for support.⁴³⁴

Ongoing violence and insecurity in Iraq pose significant challenges to conducting transitional justice efforts. Threats from armed groups, including ISIS, can deter witnesses and victims from coming forward, as well as disrupt proceedings and investigations.⁴³⁵

Iraq's institutions, including the judiciary and law enforcement, may lack the capacity and resources needed to effectively handle complex transitional justice cases. This can result in delays, inefficiencies, and an inability to meet international standards of justice.⁴³⁶ Moreover, it is noted that Iraq's institutional bodies are able to pass laws under the guise of transitional justice, but the real challenge lies in their effective implementation, sometimes due to Iraqi bureaucracy. This is exemplified by the lethargic management of the promises of reparations, which, for some, took up to four years.⁴³⁷

In some cases globally, the political will to pursue transitional justice may be weak. Certain political actors view addressing past atrocities as a threat to their own power or stability, leading to a reluctance to engage in meaningful justice initiatives, as has been the case in Iraq.⁴³⁸

A lack of public awareness and understanding of transitional justice processes can contribute to a lack of public pressure and support for accountability measures. This, in turn, can reduce the incentive for political leaders to prioritize such efforts.⁴³⁹

External actors and international powers may also play a role in shaping Iraq's transitional justice process. Geopolitical interests, foreign policy considerations, and economic concerns may impact the support and pressure for justice initiatives.

Lastly, addressing these contributing factors and strengthening the rule of law and accountability mechanisms are essential to overcoming the political backsliding of the transitional justice processes in Iraq. Doing so requires a comprehensive approach that involves the commitment of the Iraqi government, the engagement of civil society, and the support of the international community.

Recommendations from Civil Society-Led Initiatives and Interventions to Ensure Transitional Justice Mechanisms and Recommendations Are Implemented.

There is a significant opportunity for civil society organizations to promote human rights in Iraq and prevent such a backsliding as citizens place greater trust in those working for NGOs or other civil society organizations more than government or politically affiliated groups. This is because those working for these organizations do not have other incentives or personal agendas in the state. Civil society organizations may therefore be the best place to collect information, provide psychosocial support, and/or conduct awareness raising campaigns.⁴⁴⁰

Civil society advocates care just as much about memorialization, reparations, and institutional reform as they do about accountability and prosecutions. Some are most concerned with the laws that are intended to support victims and their families financially, and the fact that many families have still not received support of any kind.⁴⁴¹ It is worth noting that the Iraqi population is very young, and the needs of the youth, specifically labor and financial ones, are often overlooked by the state. Members of civil society recommend focusing on promoting youth opportunities to facilitate the state's progress.⁴⁴² Moreover, when it comes to the financial support of civil society organizations promoting transitional justice, many Iraqi NGOs are supported by international organizations that do not provide continuity in their work, leaving NGOs, many of which face challenges of limited capacity and funding sources, to carry on alone following a short period of implementation from the international community. More long-term support to NGOs would be impactful to promote human rights and prevent a return to authoritarianism.⁴⁴³

Civil society actors also note that a critical issue in Iraq pertains to the lack of awareness and understanding of transitional justice among local communities and specialized academic entities and NGOs. These stakeholders remain largely unfamiliar with the concept of transitional justice. Consequently, even when they partake in programs or meet with potential donors expressing interest in supporting transitional justice initiatives aligned with their principles, these opportunities are not adequately seized. To address this knowledge gap effectively, a comprehensive educational project or program encompassing workshops, meetings, and similar endeavors emerges as an imperative.⁴⁴⁴ Such an initiative would serve to promote an in-depth understanding of transitional justice, fostering greater cohesion and awareness between the disparate regions of South and North Iraq, thereby facilitating informed discussions and implementation efforts related to transitional justice principles.⁴⁴⁵ With this said, because of the greater trust placed in NGOs, awareness-raising projects and workshops are an excellent place to get involved, and may offer an opportunity to bring together activists and tribal leaders. Some have begun exploring this collaboration, which has led to positive outcomes thus far.⁴⁴⁶

It is noteworthy that Iraq comprises a diverse geographical landscape, encompassing regions to the north, south, east, and west. Specifically, the northern and western regions have grappled with the challenges posed by ISIS governance, leading to the emergence of fledgling transitional justice efforts. On the other hand, the southern and central areas of Iraq continue to struggle with collecting sufficient and accurate documentation of atrocity crimes and other human rights violations, coupled with a lack of awareness of how to use such information to seek accountability and pursue transitional justice. The lack of documentation stems from both limited access to conflict zones as well as the destruction and loss of vital records amid the instability. This has hindered efforts to fully grasp the extent of human rights violations and war crimes committed during the conflict in the country.

Finally, the 2021 Accountability Report by UNAMI/OHCHR offers additional recommendations. The report suggests to the GoI thorough, unbiased, and transparent investigations, conducted promptly and independently, into all reported human rights violations and abuses against protesters, activists, journalists, and critics. Efforts to ensure that victims are afforded access to effective remedies should be revitalized. This entails ensuring that both the judicial and administrative procedures are attuned to the needs of victims and that victims are kept well-informed regarding their roles, the progress, timing, and outcomes of proceedings, as well as the resolution of their cases. The international community can continue to fund programs aimed at bolstering the police and judiciary by incorporating robust oversight mechanisms to ascertain compliance with international human rights law standards, especially in cases involving crimes against protesters, activists, and critics—and extend assistance wherever necessary to meet these objectives.⁴⁴⁷

CHAPTER 8:

CASE STUDY—GUINEA

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I. Country Background

Guinea was the first sub-Saharan African nation to gain independence from France in October 1958. It is known for its rich bauxite deposits, making it the second-largest producing country globally. Despite its mineral wealth, Guinea ranks among the poorest countries.⁴⁴⁸ Since gaining independence, the country has had a history of autocratic and military-political leadership coupled with serious human rights abuses and violence, often committed along ethnic lines. Guinea has also been marked by frequent unconstitutional transitions of power, endemic corruption, bad governance, increasing poverty, authoritarianism, hostility to political dissent, and an increasingly militarized society. It is against this backdrop that successive regimes have cultivated a heavy reliance on ruling party militias and security forces to intimidate and repress opposition, which is now the norm in the country.⁴⁴⁹

To date, Guinea has experienced ongoing cycles of violence characterized by wide-scale human rights violations and ethnic and political tensions that have been further exacerbated by authoritarian rulers who failed to hold perpetrators accountable and allowed a culture of impunity to flourish. The armed forces have always played a crucial role in the country's domestic politics. They first guaranteed their support to Ahmed Sékou Touré, a nationalist leader and the first president of independent Guinea (1958–1984). Subsequently, the military staged a coup that installed career soldier Lansana Conté at the helm of the country for a quarter century (1984–2008).

From 1990 to 2008, Guineans experienced yet another wave of human rights violations and restrictions on civil liberties. During this time, Conté was accused of rigging the elections to ensure his victory and stifling any political dissent and press freedom. Immediately after Conté's death in 2008, a group of military officers under the leadership of Captain Moussa Dadis Camara seized power. Camara promised that he would lead a two-year transitional period ending in 2010, following which he would organize elections in which he would not run for office. However, On September 28, 2009, at a peaceful protest of opposition parties and civil society organizations (CSOs) requesting Camara to step down, several hundred members of Guinea's security forces burst into Guinea's capital, Conakry, and opened fire on tens of thousands gathered there. As a result, at least 157 people were killed, 109 women were raped, 82 persons were recorded missing, hundreds were detained, and more than 4,000 wounded.⁴⁵⁰

In January 2010, Blaise Compaoré, president of Burkina Faso, facilitated a political agreement in which Camara accepted the appointment of Vice President General Sékouba Konaté to lead the transitional government for one year. Alpha Condé was subsequently elected president in 2010 in presidential elections marked by spates of violence between the opposition and security forces, but that brought tremendous hope for greater protection of democracy and respect for human rights, especially considering the ongoing cycle of violence and wide-scale human rights violations which had persisted since independence. In his inaugural speech, Condé declared his commitment to fight impunity, and subsequently took concrete steps to break the cycle of violence and human rights abuses by initiating specific measures with regard to national reconciliation and securing justice for the victims of past atrocities. Particular focus was on the victims of the September 28, 2009, stadium massacre.⁴⁵¹

By 2020, tensions between civil society and President Condé's government had exacerbated. This came after a highly controversial constitutional referendum in March 2020 that resulted in the approval of changes to the 2010 constitution, permitting Condé to run for a previously unallowed third term and potentially serve as president for up to 12 more years. The presidential election was subsequently held on October 18, 2020, and on October 24, 2020, the National Electoral Commission announced that Condé had won with 59.5 percent of the vote. The main opposition leader rejected these results. Meanwhile, it is worth noting that both the constitutional referendum and presidential elections were marked by acts of violence throughout the country. This was between pro-government and opposition supporters—who were often divided along ethnic lines—and often accompanied by human rights violations committed by security forces, including the use of lethal force against protesters. In the wake of the post-electoral violence, 325 people were arrested, with the majority appearing to have been targeted due to their political affiliation.⁴⁵² The government also disrupted internet and cellular networks between October 23 and 27 2020, making it difficult for individuals to communicate and journalists to report on the election results and accompanying violence.⁴⁵³

Unconstitutional Change in Government

On September 5, 2021, Guineans woke up to the news of a military coup against President Alpha Condé led by the head of the country's military special forces, Colonel Mamady Doumbouya. What started as a rumor was confirmed when footage of Condé in the hands of military officers circulated on social media. Subsequently, the government and constitution were dissolved. This was the third military intrusion in Guinea's national politics since independence in 1958. The first came following the death of the first president Ahmed Sékou Touré in 1984. Colonel Lansana Conté staged a coup and then held onto power for 24 years until his death in 2008, after which he was quickly replaced by another military leader, Captain Moïse Dadis Camara, in an putsch that plunged Guinea into several years of violent political repression. After months of exhausting negotiations with political and social forces, and under constant pressure from the international community, the current junta finally announced the roadmap toward a return to the polls: presidential elections will be held in early 2025.⁴⁵⁴ Within this context, the country's unresolved political and ethnic tensions, coupled with a pervasive culture of violence and signs of increasing authoritarianism within the government, threaten any expectations of reconciliation, peace, or security for Guineans.

II. Resulting Mechanisms and Recommendations Produced by the Transitional Justice Process

Various African countries have established or are attempting to establish transitional justice processes to come to terms with the legacies of past abuses and gross human rights violations. These processes and attempts seek to pursue justice against those responsible for violations, uncover the truth about what violations occurred, nurture reconciliation between communities, redress harm suffered through reparations, commemorate and preserve the memories of victims, and promote institutional reforms.⁴⁵⁵

While transitional justice is an established field, it is also fairly new and still evolving in the African context. This has given rise to lively debates concerning its goals and definition. For the purposes of this case study, reference is made to the 2019 African Union Transitional Justice Policy (AUTJP), which defines transitional justice as “the formal and traditional or non-formal policy measures and institutional mechanisms that societies adopt in order to overcome past violations, divisions and inequalities and to create conditions for both security and democratic and socio-economic transformation.”⁴⁵⁶ Several mechanisms, which usually have limited time frames and specific mandates, have come to dominate the field of transitional justice and contribute in different ways to promoting rights to justice, truth, and reparations. In addition, local, community-based, traditional, and indigenous types of justice form a significant and growing area in this field.

In the case of Guinea, the September 28, 2009, massacre caused a major backlash within the international community, which, under pressure from Guinean and international NGOs, tasked the UN Independent Commission of Inquiry with shedding light on the massacre and the identities of those responsible. Following the commission’s report, Condé appointed three judges to investigate the members of the military involved in the massacre.⁴⁵⁷ Parallel to judicial proceedings concerning the 2009 stadium massacre, in 2011, President Condé also initiated a national reconciliation process by mandating the Provisional National Commission on Reconciliation (CPRN) develop and recommend mechanisms for reconciliation. After conducting national consultations, the CPRN submitted its report in June 2016. The CPRN made several recommendations related to truth, justice, reparations, memorialization, and institutional reforms to promote peace and reconciliation in Guinea. With regard to past atrocities, the report recommended establishing a Truth, Justice, and Reconciliation Commission to investigate human rights violations committed since 1958. The issue of reparations—individual, collective, material, as well as symbolic—was also highlighted in the report. Specifically, urgent measures of reparations were recommended to support victims with pressing needs that resulted from their victimization. These urgent reparations were recommended as an interim measure while formal national reparations mechanisms were being established.

However, since the submission of the CPRN report, for years, the country made little progress in engaging with transitional justice processes. In April 2017, in a national workshop in the capital—Conakry, consisting of representatives of government and civil society—it was agreed that there would be a Truth, Justice, and Reconciliation Commission. This was in line with the recommendations of the CPRN. Nonetheless, after the bill was approved, there were no further developments until 2022, when the trial for the September 28, 2009, massacre at the Conakry stadium began. In the interim, victims’ hopes for any kind of redress and justice continued to dwindle, while many victims—such as those from the notorious Camp Boiro, a concentration camp within Conakry city where thousands of political opponents were imprisoned during the regime of Ahmed Sékou Touré.⁴⁵⁸

“We have lost all hope for any kind of justice.”

—**Mr. Mohammed Lamine Sow**, who was accused of conspiring in the 1985 coup and tortured and imprisoned by the government of Lansana Conte.

The lack of reconciliation in Guinea and the delay in transitional justice processes following the atrocities committed during former regimes remain staggering. Commenting on the African context, Dersso stresses that the nature and historical context of violations on the continent demand a comprehensive and more substantive conception of transitional justice that goes beyond juridical and legal forms of justice.⁴⁵⁹ To date, not one individual implicated in the atrocious violations that characterized the 26-year regime of Sékou Touré has been held accountable in a credible judicial proceeding.⁴⁶⁰ This impunity set the stage for further abuses, for which Guineans have not yet seen justice. Throughout Guinea’s recent history, the security services have appeared to benefit from total protection.⁴⁶¹ Those who committed abuses have not been held accountable.

The Long-awaited Trial

Although, based on the interviews conducted, there is still a long way to go before the Guinean justice system can fully meet the needs of the Guinean people, in February 2010, legal proceedings were opened in Guinea into the massacre of September 28, 2009. Consequently, CSOs such as the International Federation for Human Rights (FIDH), the Guinean Organization for Human Rights (OGDH), and the Association of Victims, Relatives, and Friends of the September 28, 2009 Events (AVIPA) brought civil action and, along with their lawyers from the Judicial Action Group (JAG), supported victims in legal proceedings. The trial began on September 28, 2022, exactly 13 years to the day after the massacre in Conakry. Though long overdue, the trial was a major step in bringing justice to the victims and their families, who had waited more than a decade for accountability. While the country’s past is marked by widescale human rights violations, this trial was the first of its kind.

Victims had repeatedly called for holding the attackers to account and revealing the truth about the events. The lessons from this trial can inform other countries yet to initiate accountability mechanisms for widespread human rights violations. International law mandates prosecution of suspects against whom there is evidence suggesting responsibility for serious crimes that violate international law, including crimes against humanity. The duty to prosecute lies first and foremost with domestic authorities. At the same time, domestic prosecutions of atrocity crimes face many challenges, particularly around securing adequate political support and capacity to try them.

The second—and ongoing—phase of the trial started in February 2023. During this phase, the judges began hearing from victims who were civil parties in the case. Survivors of rape and sexual violence are among those who have testified. Most victims of sexual violence have testified in closed sessions, agreed to by the judges. Victims of other abuses, including shooting, torture, beating, assaults, and mistreatment, have testified publicly.

Despite the ongoing challenges and controversies canvassed above, the ongoing trial is seen somewhat positively, or very positively, by a large majority of the interviewees. For some, this moment is historic: they never imagined seeing a former head of state brought to justice, like a common criminal, in a country where the rich and powerful have always enjoyed impunity for their wrongdoing. However, it is clear to all that a guilty verdict would have immediate social and political repercussions. The priority, therefore, remains that of balancing the needs of justice with social peace among the ethnolinguistic communities of Guinea.

Parallel to the trial, the victims association has also been called for, among other things, a formal apology by the Guinean state, the judicial rehabilitation of those unfairly accused of anti-government crimes, the restitution of property seized from the families of detainees, and the construction of a memorial at Camp Boiro.

III. Factors Contributing to the Political Backsliding of the Transitional Justice Processes (Drawing From Compendium)

Guinea has experienced a recurring political crisis, with violence and massive human rights violations—and the political and security situation remains precarious. Guinean officials and international observers consistently emphasize that the situation is uncertain and fragile. The key challenges are the polarization along ethnic lines encouraged by political parties, the general lack of trust in the governance system, widespread poverty, and a weak civil society. From the interviews conducted, factors contributing to the delay in the implementation of a transitional justice process in the country include lack of judicial independence that is particularly concerning, lack of accountability being a major problem holding back Guinea's transition to democracy, and, finally, lack of framework for protection and support for witnesses and victims.

The country's past experiences are rich in lessons on the use of political violence to acquire and maintain power. The African Union and regional economic communities should prioritize determining how to deal with the unconstitutional grabs of power among their member states.

IV. Recommendations From Civil Society-Led Initiatives and Interventions to Ensure Transitional Justice Mechanisms and Recommendations Are Implemented

The discourse around transitional justice places great faith in the potential of localized and/or grassroots forms of justice to anchor the transformation of economic injustice at both the community and national levels. While bottom-up justice is highly beneficial in the immediate community, it may have follow-on effects for the wider national community due to local politics and traditions. We therefore make the following recommendations:

1. A Truth, Justice, and Reconciliation Commission should be established in line with the recommendations made by the national consultations led by the CPRN.
2. Violence against women should also be penalized within a renewed and more protective legislative framework.
3. Guinean investigating judges and other judicial personnel tasked with adjudicating the September 2009 crimes should be adequately resourced, protected, and supported by the Ministry of Justice.
4. A truth-telling mechanism should be established to expose less well-known atrocities, explore the dynamics that gave rise to and sustained successive authoritarian and abusive regimes, and make recommendations aimed at ensuring better governance and preventing repetition of past violations.

CONCLUSION

The chapters in this compendium highlight the present-day reality and worrisome trend in many countries around the globe of democratic backsliding characterized by a rise in authoritarianism and militarism that is having a direct and negative impact on the pursuit of justice and accountability and the consolidation of the rule of law and human rights in fragile states.

The compendium sheds light on the four typologies of political regression, highlighting their causes, manifestations, and consequences along with the challenges they present in pursuing a transitional justice agenda. The case studies illustrate how more than one typology can and often does present itself in any one given country context, creating additional complexities. One common factor identified across all the typologies is the pivotal role civil society plays in pushing forward the transitional justice agenda despite regressive political forces. Experiences from across the various country contexts analyzed in this compendium provide lessons learned for application in the future and other similar contexts. Some of these lessons are derived from the mitigation strategies employed by activists to counter these regressive trends while others are recommendations for additional measures that seek to maintain attention, engagement, and pressure on states to fulfill their transitional justice commitments and/or to generate the necessary political will to follow through on implementation of an ongoing or stalled transitional justice process.

Lived experiences from the country contexts profiled in this compendium point to important lessons and effective strategies employed by civil society actors that can serve as useful lessons in other relevant contexts. These stem from one overarching finding cited in the chapter on unconstitutional grabs of power: that inclusive governance constitutes a key building block for sustainable peace after conflict; and that, therefore, governance structures should be representative and actively include all segments of society to avoid a fractured society characterized by social exclusion and inequality—key factors that fuel conflict. Equally, the chapter that discusses eruptions of violence highlights the fact that violent outbreaks are almost always a symptom of deeper issues, such as structural discrimination, inequality, and exclusion, in a divided society. With time, these elements contribute to growing frustrations with the status quo and lead to open conflict. The case studies illustrate how unresolved issues that originally lead to conflict can persist, resurface, and frustrate peace-building when not adequately addressed through institutional and structural reforms. Finally, though political regression can take different forms, the compendium seeks to shed light on the role of civil society as a pivotal player in promoting and sustaining transitional justice processes despite the loss of political will of states to respect their international obligations and/or follow through on their commitments. Indeed, many of the transitional justice gains observed in the countries studied are thanks to the concerted and sustained efforts by civil society and citizen and survivor mobilization. This becomes a key lesson and an important opportunity to build on the gains achieved thus far with renewed focus, energy, and resources. Other lessons and strategies flowing from these findings include the following:

- Success of a transitional justice process will depend on the effective implementation of recommendations, including institutional, legal, and related reforms to address root causes of conflict, including structural discrimination as well as social, economic, and political exclusion; the alternative can lead to deep frustration and new conflicts due to unresolved underlying conflict triggers.
- Legal and policy frameworks, strategies, or national action plans should clearly stipulate transitional justice objectives, outputs, and outcomes to enable effective implementation and monitoring.
- Transitional justice policies/strategies should include a clear and meaningful role for civil society and local communities for these policies to reflect national ownership and sustainability.
- Despite difficult socio-political contexts, sustained engagement and advocacy by civil society and local communities is key.
- Transparency and public dissemination of information on a transitional justice process and decision-making is key for citizen engagement and national ownership of a process.
- Engagement at the regional and international levels, in particular advocacy and litigation with specialized, independent, and supranational human rights bodies, is an important strategy to continue to shed light and pressure states, especially where political commitment to transitional justice processes at the national level has stalled.
- Engaging youth and placing victims and other vulnerable groups at the center of advocacy efforts is important for victim agency, national ownership, and sustainability and contributes to the relevance of the proposed measures to the individual context.
- Societies that have experienced protracted conflict and/or authoritarianism suffer from a fractured society with vulnerable communities excluded—and if not addressed, can lead to new conflict; consequently, measures to achieve national reconciliation are just as important as efforts to secure justice and accountability after conflict or periods of massive violations.
- When key stakeholders complement and reinforce each other on the basis of their priorities and strategies for achieving justice and peace, transitional justice commitments are more readily attainable; particularly, where local communities are heard, supported, and placed at the center of an advocacy/reform agenda and when local civil society is simultaneously heard and supported by the international community.

In confronting the increasingly challenging environment of political regression globally, sustained commitment by the international community through public pressure and funding support remains just as critical as the need for sustained efforts by a concerted civil society, which echoes and amplifies local communities' call for truth, justice, and accountability as well as restoring peace and reconciliation. While pushing for a transitional justice agenda, societies grappling with political regression must not overlook the important task of addressing root causes or drivers of conflict, the potential of civil society to push for justice and accountability, and the need to adopt structural, institutional, and legal reforms that seek to prevent the recurrence of violations and address lingering impunity.

Endnotes

CHAPTER 1:

- 1 Truth commissions, national prosecutions, reparations bodies, commission of missing persons/disappeared persons.
- 2 Transitional justice processes in South Africa, Sierra Leone, Liberia, and Rwanda are just some examples of how processes have been approached differently with varying degrees of political commitment and mixed degrees of implementation.
- 3 Chapter IV, Kenya TJRC report; Sri Lanka is an example where political commitment to launch a transitional justice process reached its peak in 2015 only for these commitments to fade in subsequent years, leaving the process hollow and piecemeal.
- 4 Examples of lack of political will to implement transitional justice commitments/mechanisms is evident in the cases of Sri Lanka, Kenya, and Peru and takes different forms depending on the individual contexts.
- 5 Chapter IV, Kenya TJRC report, p. iv.
- 6 Referring to the Presidential Commission to Investigate complaints of Missing Persons in Report of the United Nations High Commissioner for Human Rights in Sri Lanka, A/HRC/34/20, para 21.
- 7 Sri Lanka, Kenya, and Peru are good examples; Sri Lanka's and Peru's "victory narratives" turn a blind eye to abuses committed by state forces against minority groups.
- 8 Interview with Fr Nandana, June 2, 2023; "Delayed or Denied? Sri Lanka's Failing Transitional Justice Process" People for Equality and Relief in Sri Lanka, May 2018; "Long Read: Why has Sri Lanka's transitional justice process failed to deliver?" Christopher Finnigan, <https://blogs.lse.ac.uk/southasia/2019/02/06/long-read-why-has-sri-lankas-transitional-justice-process-failed-to-deliver/>.
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- 10 Cases of torture, rape, sexual and gender-based violence, arbitrary detention, killing, and enforced disappearances.
- 11 UNHRC Resolution 30/1: Promoting Reconciliation, Accountability and Human Rights in Sri Lanka, Oct 2015.
- 12 "Long Read: Why has Sri Lanka's transitional justice process failed to deliver?" Christopher Finnigan, <https://blogs.lse.ac.uk/southasia/2019/02/06/long-read-why-has-sri-lankas-transitional-justice-process-failed-to-deliver/>.
- 13 Report of the United Nations High Commissioner for Human Rights on Sri Lanka" Feb 2017, para 16–18.
- 14 Report of the United Nations High Commissioner for Human Rights on Sri Lanka" Feb 2017, para 14.
- 15 Report of the United Nations High Commissioner for Human Rights on Sri Lanka" Feb 2017, para 59 and 61.
- 16 Report of the United Nations High Commissioner for Human Rights on Sri Lanka" Feb 2017, para 31, 40, and 41.
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- 18 "Report of the United Nations High Commissioner for Human Rights on Sri Lanka," Feb 2017, para 16.
- 19 *Delayed or Denied? Sri Lanka's Failing Transitional Justice*, PEARL, May 2018, p. 7 and 44, see also: [Vavuniya families of the disappeared mark 1,900 days of continuous protest | Tamil Guardian](https://www.vavuniya.com/news/2018/05/07/continuous-protest-tamil-guardian); As of September 2023, this group has protested over 2000 days.
- 20 *Delayed or Denied? Sri Lanka's Failing Transitional Justice*, PEARL, May 2018, p. 44.
- 21 *Delayed or Denied? Sri Lanka's Failing Transitional Justice*, PEARL, May 2018, p. 44.
- 22 Report of the United Nations High Commissioner for Human Rights on Sri Lanka" Feb 2017.
- 23 "Sri Lanka: Why is the country in an economic crisis?" BBC, <https://www.bbc.com/news/world-61028138>; see also: "Situation of Human Rights: Comprehensive Report of the United Nations High Commissioner for Human Rights", A/HRC/51/5, September 2022.
- 24 "Sri Lanka: Why is the country in an economic crisis?" BBC, <https://www.bbc.com/news/world-61028138>.
- 25 "Five Things to Know about Sri Lanka's Crisis," USIP, <https://www.usip.org/publications/2022/07/five-things-know-about-sri-lankas-crisis>.
- 26 Situation of Human Rights: Comprehensive Report of the United Nations High Commissioner for Human Rights, A/HRC/51/5, September 2022, para 4–7; Notwithstanding the current crisis, the defense budget is still the largest percentage of the national budget reflecting government's emphasis on militarization even in peace times.
- 27 Interview with civil society actor, June 1, 2023.
- 28 Interview with civil society leader, May 30, 2023.
- 29 Situation of Human Rights: Comprehensive Report of the United Nations High Commissioner for Human Rights, A/HRC/51/5, September 2022, para 48–50.
- 30 "Sri Lankan Officials Stoke Covid-19 Communal Hate," Human Rights Watch, <https://www.hrw.org/news/2020/05/19/sri-lankan-officials-stoke-covid-19-communal-hate>.
- 31 Interview with civil society actor, June 1, 2023.
- 32 Interview with civil society actor, June 2023.
- 33 Interview with Fr Nandana, June 1, 2023.
- 34 TJRC Act of Kenya.
- 35 Section 48 (1 & 2) TJRC Act of Kenya.
- 36 Vol IV, TJRC Report. A complete summary of the TJRC findings is beyond the scope of this chapter, so only key highlights from the findings are included here. The chapter focuses on an analysis of the TJRC's implementation and its challenges.
- 37 TJRC Report vol. 1 2013: p. vii; "An Injustice in Kenya's History: The TJRC Report Six Years," G. Lynche, May 2019.
- 38 TJRC Report vol. 1 2013: p. xv; "An Injustice in Kenya's History: The TJRC Report Six Years" G. Lynche, May 2019.
- 39 "An Injustice in Kenya's History: The TJRC Report Six Years," G. Lynche, May 2019.
- 40 TJRC vol. 1 2013: xiv; "An Injustice in Kenya's History: The TJRC Report Six Years," G. Lynche, May 2019.
- 41 TJRC vol. 1 2013: p. ix–x.
- 42 TJRC vol. 2A 2013: 29 "An Injustice in Kenya's History: The TJRC Report Six Years," G. Lynche, May 2019.
- 43 TJRC vol. 4 2013: 10.
- 44 TJRC report; "An Injustice in Kenya's History: The TJRC Report Six Years," G. Lynche, May 2019.
- 45 TJRC report.
- 46 "Lessons to be learned: An analysis of the Final Report of the Kenya's Truth, Justice and Reconciliation," ICTJ Briefing, May 2014. Former TJRC Chair Amb. Kiplagat was the subject of criminal investigations for his involvement in gross human rights violations during a previous administration and was forced to step down in 2012; ICTJ press release on Kiplagat.
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- 48 "Lessons to be learned: An analysis of the Final Report of the Kenya's Truth, Justice and Reconciliation," ICTJ Briefing, May 2014.
- 49 Section 50 (2) TJRC Act.
- 50 Interview with KHRC, 22 May 2023.
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- 53 Interview with KHRC, May 22, 2023.

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- 59 KHRC interview, May 22, 2023.
- 60 ICTJ interview, May 2023.
- 61 KHRC interview, May 22, 2023.
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- 63 Interview with KHRC, May 22, 2023 and Interview with ICTJ-Kenya, May 2023.
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- 68 “Alive in the Demand for Change: Transitional Justice and Prevention in Peru,” ICTJ report, June 2021, p. 8.
- 69 “Alive in the Demand for Change: Transitional Justice and Prevention in Peru,” ICTJ report, June 2021, p. 21.
- 70 Interview with Iris Jave, Pontifical Catholic University of Peru, June 2023.
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- 77 “Alive in the Demand for Change: Transitional Justice and Prevention in Peru,” ICTJ report, June 2021, p. 29–30. The framework is noteworthy for its humanitarian approach, providing psychosocial counseling and emotional support to families of the disappeared as well as logistical support with the process of the return of remains.
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- 80 “Alive in the Demand for Change: Transitional Justice and Prevention in Peru,” ICTJ report, June 2021, p. 28.
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