SYRIA Options for a Political Transition

July 2015

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SYRIA:

The suggestions in this report are premised on an understanding that the transitional period in Syria cannot and will not address all of the long-term questions regarding the nature of the future Syrian governance and society. Drafting and ratifying a new permanent Syrian constitution, long term transitional justice and reconstruction activities will play a role in formulating core questions about Syrian identity. Attempting to address too many of these issues in the early transitional period would overload the process. Instead, this document focuses on providing options for making the *necessary* changes to get through an agreed, time-bound transition to peace, while providing space to address, in a more conducive environment, the big picture questions of Syrian identity in the longer term.

Three options are suggested for the early transition period, allowing either the transition outlined in the Geneva Communiqué to move forward, or power-sharing arrangements agreed at an alternative peace negotiation or a national dialogue to be implemented effectively. Alternatively and at a minimum, some of the suggested reforms could be implemented unilaterally.

Option 1 centers around reforming the 2012 Syrian Constitution, and other relevant laws and decrees.

push for a wholesale break with the status quo. In the course of negotiations, ultimately a middle ground will have to be found. Such a compromise could well entail a combination of reforms to the current Syrian constitution and legislation, coupled with the creation of new transitional institutions, and perhaps also new interim constitutional arrangements. Negotiating such a hybrid of laws and institutions for the transitional period would entail potentially complex tradeoffs, in the effort to ensure that the transition successfully lays a long term foundation for a new Syria, while addressing the legitimate fears and needs of Syria's many communities.

II. Acknowledgments

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The genesis of this effort dates back to December 2011 when a Carter Center team met separately with opposition representatives and senior government officials in Damascus to explore possible ways in which credible political reforms could offer a pathway towards a political transition and an end to the conflict. The initiative was the brainchild of late Dr. Robert Pastor (1947-2014).

III. <u>Introduction</u>

The Geneva Communiqué of 30 June 2012 issued by the Action Group on Syria remains an important document on the Syrian conflict (see Appendix V for the full text). The Communiqué suggested a

Phase 1 of the transition is based on the key assumption that the relevant governance provisions would be agreed upon in an international peace conference or a Syrian driven national dialogue. A second key assumption is that there would be a cessation of hostilities, accompanied by sufficient governance, stabilization

self-enforcing), and secondly (assuming that inevitably there will be some attempts to avoid the agreed arrangements) the effectiveness of internal and external checks to correct breaches.

In all governance, but particularly in transitions, the second should be seen as a backstop, rather than a substitute for the first. Effective checks against determined non-compliers require major institutional resources, personnel commitments, and

To address these complexities, the transition outlined in the Geneva Comm1r starkly notes three key steps:

- 1. A <u>transitional governing body with full executive powers</u>, formed on the basis of <u>mutual consent</u> that will <u>establish a neutral environment</u>.
- 2. A <u>National Dialogue process</u>, and <u>constitutional and legislative review</u> subject to <u>popular</u> <u>approval</u>.
 - <u>Once</u> the new constitutional order is established, free and fair <u>multiparty elections</u> for the new institutions and offices that have been established.

A neutral political environment would of course require a great deal of change and time. As noted above, it is useful to see the constitutional and legislative review in two stages: first, immediate changes agreed at a peace conference and necessary to enable the formation of a transitional governing body with full executive powers, or a national unity/power sharing government, but also with effective checks and balances; and second, longer term changes to be adopted through a national dialogue process, including possibly a constituent assembly, and popular approval

legislative reforms that were enacted in 2011 and 2012 are associated with increasing repression and bloodshed. This has made promises of further reforms ring hollow for all but the government's most ardent supporters. In Carter Center (the Center) discussions with some opposition lawyers, even the suggestion that changing the 2012 Constitution could be one of the options to consider elicited a strong negative reaction.

The significant gap between the government and the opposition on constitutional and legislative amendments makes the development of multiple models of change more useful for potential mediators and Syrian negotiators, should a political process resume. The government side will insist on the most limited possible reforms to the current order, while the opposition will start from a premise of a complete break with the old system and an entirely new order. As such, the three options outlined in this report, elaborate on

president and the Constitution does not specify its composition or the manner of its formation; it leaves it to legislation (Article 133). The appointment, disciplining, and dismissal of judges are also left to a law rather than the Constitution (Article 136). Given the powers that the president

Article 100 - the president signs laws passed by the parliament

Article 101 - the president issues decrees, decisions, and orders

Article 103 - the president declares state of emergency

Article 104 – the president appoints heads of diplomatic missions to foreign countries and international institutions

Articles 105-106 - as the commander-

and "reform" of the current Constitution (above) is that these interim constitutional arrangements follow comprehensive political agreements, rather than being done essentially unilaterally.

Comparative Examples

In some transitions, these arrangements spell out fundamental principles intended to be binding on all future constitutions. For example, in South Africa in 1994 the parties agreed on 32 fundamental principles that would apply throughout the transition and would be incorporated in the new constitution that would follow free elections. These were brought into force by interim amendments to the existing constitution. The arrangements included the requirement that a new Constitutional Court would examine any reformulated constitution for compliance with these principles. In effect, these basic principles of democratic, non-racial government under the rule of law could not be amended by any constitutional change process. Options for such a supraconstitutional principles are suggested in Appendix I of this report.

Somewhat similarly in Kenya, following the post-election violence in early 2008, negotiated peace agreements required the creation of transitional power-sharing arrangements (including the Office of the Prime Minister, and new processes for cabinet government) that specifically altered the powers of the president. It also required that a future constitution would address the flaws of the past. These agreements were passed unanimously in parliament, amending the previous constitution for the interim period, and requiring independent inquiries into violence and elections, constitution-making, electoral reform, judicial reform, and new mechanisms for controlling the police. All these reforms were eventually adopted in a new constitution and brought into force by referendum. The country then conducted peaceful general elections in March 2013.

The same formula was adopted for the transition in Sudan, with interim constitutional arrangements entrenching a comprehensive peace agreement to govern the transition. It was also used in the late 1990s and early 2000s in the Bougainville Peace Process, with political agreements being implemented in transitional constitutional arrangements.

In a more recent example, the Yemeni constitution was amended in 2012 following a political agreement to put in place interim arrangements. These allowed the serving president to step down (with legal immunities), fresh elections for an agreed candidate for president, continued (shared) executive governance, a substantial period for legal and other reforms, a national dialogue, and fresh constitution-making.

Potential Applications in Syria

Concerns about current constitutional arrangements in Syria suggest the potential utility of this sort of interim constitutional option, possibly accompanied by fundamental principles to which all future constitutions must comply (as in South Africa). Government and opposition representatives could negotiate such a document as part of a national pact to govern and guide the transition. In effect, such a document would elaborate the transitional arrangements cited very briefly in the Geneva Communiqué.

The founding document for any such arrangement is always the political agreement reached by the parties. To show how this might work, <u>Appendix II</u> of this report includes some language for

this sort of Interim Governing Constitution. As with South Africa, Kenya, Sudan, and Yemen, the arrangements would be negotiated in a political context and then adopted as an interim constitution, replacing the existing Constitution in its entirety. The interim arrangements would establish oversight mechanisms. Here the examples include a *Transitiona G[]TJ6.388*

revolutionaries are flying the flag of the 1950 Constitution⁴, indicating that a connection is already being made between that era and the on-going revolution.⁵

Further:

Some participants argued that more than 80 percent of the 1950 Constitution could be used unaltered, decreasing the time during which Syria will operate in a legal vacuum while a transitional legal framework is negotiated and drafted.⁶

If indeed there was agreement between the parties, theoretically it would be possible to start with the 1950 base, update its provisions to create an appropriate document, and bring the whole into force as an interim constitution along the lines of option 2. Several of our Syrian interlocutors,

they have suggested that a semi-presidential system with proper checks and balances could be more appropriate.

Rather than updating the 1950 document as noted above, other commentators urge instead "a constitutional declaration of limited power and duration... [clarifying] the government's powers, tasks, administrative nature, time frame, and mechanisms and method for organizing the election of the constitutional assembly charged with drafting a permanent constitution that will be later put to a referendum." ⁸ In effect, this suggestion is adopted in option2 proposed above, though the details are not elaborated as done in this report. For these reasons, this report does not review the 1950 Constitution for possible amendments.

VI. Sequencing of Agreed Steps in a Transition

Once transitional constitutional options and overarching principles have been considered and decided in an international negotiation or a national dialogue, the stakeholders might then con

The length of a transition can vary (in other conflicts they have lasted anywhere from 18 months to 6.5 years), but this duration will need to be agreed upon early in the process. Further, throughout the transition there will need to be clear benchmarks established to hold transitional governing officials accountable. Finally, mechanisms should be put in place to ensure access to information and transparency at each step.

Appendix I Guiding Principles for a Transition

Consultations and discussions with Syrians suggest that any transition might be done in

Appendix II Aspects of the Interim Governing Constitution

The following is illustrative of a possible framework for and contents of an Interim Governing Constitution (IGC). Under current conditions, something like these basic arrangements is likely to be discussed at a revived peace conference. The resulting agreement in the form of the IGC would be endorsed by a U.N. Security Council resolution or a genuine national dialogue. Once the Interim Governing Constitution is in force, some authorities would relinquish power to relevant transitional institutions and some would continue in office.

Preamble

Recognize the deep pain and suffering of the Syrian people and the material damage wrought by the conflict and understand this will require <u>special national and regional measures</u> to restore and reconstruct the Syrian community.

Acknowledge that the 2012 <u>Constitution and existing laws require annulment or amendment</u> to support a genuine political transition and hasten an end to conflict in Syria.

Recognize the importance of <u>oversight mechanisms</u> to instill trust in the transition period including a role for civil society and possibly a neutral third party.

The restoration of constitutional government (Step 5 in Section X below) constitutes the formal "end of transition".

Understand there are long term reform and reconstruction issues for various sectors, including the return of refugees and internally displaced persons (IDPs) to their homes and the just payment of compensation where it is not possible for the refugees and IDPs to return, that might not be completed during the formal transition period.

Acknowledge the importance of regional and international support to any transition in Syria, meaning an unambiguous commitment to:

- Syria's territorial integrity and inviolability;
- The withdrawal of all foreign forces;
- 3. The cessation of military support;
- 4. Assistance to refugees/IDPs and their return/compensation; and
- 5. Reconstruction and restoration.

Establish that the transitional arrangements would reflect overarching principles based on healing, respect, peace, participation, gender equality, freedom, change, accountability, and effectiveness [further developed in Appendix I above].

I. The Nature and Aims of the Transitional Phase

Agree on the following aims of the *Transition Phase*:

- 1. End the conflict within Syria.
- 2. End foreign interference in Syria. [territorial integrity and inviolability]
- 3. Establish a Transitional Governing Body [with Full Executive Powers].
- 4. Establish checks and balances and oversight mechanisms, including
 - The Transitional National Assembly.
 - ii. The Supreme Transitional Constitutional Court/Council.
 - iii. An independent Judiciary.
- 5. Establish a neutral political environment.
- 6. A national dialogue process and constitutional and legislative review subject to popular approval.
 - Recognition of the trust deficit and the importance of oversight mechanisms for the transition, including a role for civil society and possibly a third party will be critical.
 - ii. Recognition of the need for broad participation of women in peace-building and post-conflict reconstruction.
- Commence restoration and reconstruction of the Syrian community including the return of all refugees and IDPs to their place of residence or just compensation if this is not possible.
- 8. Multiparty Elections.

The arrangements herein will guide the transition. The transition will commence upon the establishment of a Transitional Governing Body (TGB) and will be complete after the election of a permanent constitutional authority and supporting political institutions.

These arrangements will bind all organs of state at all levels of government, and supersede any incompatible provisions in the Constitution and legislation of the Syrian Arab Republic currently in force.

Government will be structured at national, provincial and local levels.

- At each level of government there must be democratic representation national, provincial and local executive officeholders and members of the legislature must be subject to periodic elections.
- The powers, boundaries and functions of the national and provincial governments must be defined in legislation. Provision must be made for obtaining the views of a provincial legislature, concerning all legislative amendments regarding its powers, boundaries and functions.
- 3. Each level of government must have legislative and executive powers and functions thati159(fui Tm1E

- The TGB will establish a Constitutional Commission within XX [possibly 6-12] months of coming into being, to be approved by the Transitional National Assembly.
- vi. The TGB will establish an Independent Elections Commission within [X] months of coming into being, to be approved by the Transitional National Assembly.
- vii. The TGB will establish an Independent Commission of Human Rights within [X] months of coming into being, to be approved by the Transitional National Assembly
- viii. The TGB will establish a Special Commission for the Restoration and the

- IV. Oversight Mechanism Supreme Transitional Constitutional Court/Council
 - 1. Composition

The current Constitutional institution of the Supreme Judicial Council is hereby abolished and its functions are assumed by the Supreme Transitional Constitutional Court/Council.

[Note: while this document tries to minimize the changes necessary for the first stage of the transition, the independence of the judiciary in Syria is so compromised by executive power and security apparatus meddling that a radical departure from current practices necessitates fundamental changes. Other oversight mechanisms could also be established.]

VII. Establish a Neutral Political Environment

Every member of the security forces (police, military and intelligence), and the security forces as a whole, is required to perform their functions and exercise their powers in the national interest and is prohibited from furthering or prejudicing political interests.

The establishment of effective administration, civilian oversight, and accountability systems for the security forces must be a high priority for the Transitional Governing Body.

[Provisions must be included here for disarmament, demobilization and reintegration (DDR) of paramilitary forces, giving due consideration to confidence building measures during the early stages of the transition before attempting to disarm those forces.]

VIII. National Dialogue Process, Constitutional and Legislative Review

Within XX months after assuming office, the Transitional Governing Body would nominate a Constituent Assembly consisting of XX members to be approved by the Transitional National Assembly and the Supreme Transitional Constitutional Court/Council.

Members of the Constituent Assembly must reflect the diversity of Syrian society and have the competencies necessary to draft a new Constitution.

The Constituent Assembly is to elect its own President and present its budget and work plan to the Transitional National Assembly within 30 days.

The Constituent Assembly will undertake broad national consultations and submit recommendations for constitutional review to the Transitional National Assembly and the Supreme Constitutional Council/Court within 12 months of commencing its work. Based on the approval of a two thirds majority in both, the recommendations will be subject to an act of "popular approval" within 3 months.

The new draft Constitution must comply with these arrangements.

[Note: The election of a Constituent Assembly was also considered. However prevailing conditions in the country would necessitate delaying the election for perhaps 24 months, thus delaying the drafting of the constitution and the transitional process. As such, this option is not included in this report]

Appendix III Electoral Principles

Because there will always be limits to how long an interim government should stay in office without a democratic mandate, it might be necessary to establish as early as possible, agreement on basic principles (and perhaps even on details) that should apply to the institutional and legal arrangements to conduct elections. Based on the comment, this report noted two possible stages in the transition, with the first ending with elections. In the second stage, an elected parliament and government would govern while continuing the national dialogue and implementing the new constitutional framework. Discussants also suggested that early elections at local government might be a key part of building legitimacy in the transition.

With this in mind, it may be useful to the parties to consider key areas that would be critical components for the rebuilding of electoral machinery. The three areas noted below are only meant to be illustrative. Highlighting them does not suggest that other provisions of election laws do not impact the democratic character of an election. Rather, these three would be amongst some of the critical determinants of whether genuine, transparent, multi-party elections could be possible.

The three areas are outlined briefly here:

- 1. Establishing an independent election management authority
- 2. Ensuring transparency
- 3. Providing for proxies/agents, observers, and representatives of media

Election Management Bodies

- Electoral commissions must be independent from state and local government bodies in exercising their mandates. Electoral commission members at all levels must exercise their mandate with independence, impartiality, integrity, transparency, efficiency, collegiality and professionalism.
- There will be a Central Election Commission responsible for all types of election and referenda for the Syrian Arab Republic, subsidiary Provincial Election Commissions for each Province of the Syrian Arab Republic, and Precinct Election Commissions for each precinct.
- 3. The funding of expenditures for organizing and holding elections as well as expenditures necessary for the activities of electoral commissions must be made at the expense of the state budget. Such expenditures must be envisaged by a separate budget line in the state budget. Subsidiary electoral commissions must be funded and their members

- b. In the case of early termination of an election commission member, vacancies must be filled upon the nomination of the person or entity that nominated the vacating member.
- 8. Members of the Central Electoral Commission must be appointed for an initial transition period of two years, and thereafter for four years.
- 9. Members of the Provincial Election Commissions must be appointed by the Central Election Commission for a period to be determined by the Ced s

- a. to participate in commission sessions without the right to vote, and be present in the voting room during the voting;
- b. to examine electoral documents, including the relevant court verdicts and the respective statement issued by the authorized body;
- c. to examine freely all documents under the authority of the relevant commission, the electoral commission's decisions and protocols in the presence of the electoral commission's chairman, deputy chairman, secretary or any other commission member designated by the commission chairman, to receive copies of the aforementioned documents, take excerpts from them, as well as to examine voted ballots in accordance with the same procedures. Copies of or excerpts from decisions, protocols and other records must be stamped and signed by the chairman and the secretary of the commission. Documents received from Precinct Electoral Commissions must be stamped on voting day only;
- **d.** to appeal commissions' decisions, actions or inaction;
- e. to observe the process of printing, transporting, storing and counting the ballots in accordance with procedures defined by the Central Electoral Commission;
- f. without interfering with the work of a commission member, to be physically present next to the commission members performing the voter registration, allocation of ballots and voting envelopes, the stamping of voting envelopes, and the supervision of the ballot box, and to observe their work;
- g. on the voting day, to observe the commission work and make comments and suggestions to the commission chairman regarding such work, in respect of which the commission chairman must undertake necessary measures; and
- h. to examine freely the voted ballots and marks made on them in the presence of the electoral commission's chairman, deputy chairman, secretary or any other commission member designated by the commission chairman, and to be present during the counting of ballots and summarization of voting results.
- 2. Proxies must exercise their rights in accordance with procedures defined in this Code.
- 3. One proxy for each candidate and each party running in the National Assembly elections may be present during an electoral commission's session and during the voting.
- 5. No limitation of the rights of the proxies is allowed. No one, including electoral commissions, has the right to ask the proxies to leave the voting room or to isolate them in any other way from being present at the commission's activities, except in the case of their arrest or detention.

Appendix IV Decrees and Laws Relating to Emergency, Counterterrorism, and Special Tribunals to be Addressed

Background note: Some of these decrees and laws are cited inconsistently in various sources. On April 21, 2011, the State of Emergency Law (Military Act No 2/1963) was repealed and the Supreme State Security Court abolished. At the same time, Legislative Decree No 161 abolished the Supreme State Security Court (SSSC), an exceptional court with almost no procedural guarantees. However, the security apparatuses have continued to detain individuals without arrest warrants even before the enactment of Legislative Decree No 19 (July 2, 2012), dubbed the Counterterrorism Law. Also, Law No. 20 (July 2, 2012) was enacted, targeting state employees "convicted" of any act of terrorism. Finally, Law No. 22 (July 26, 2012) was enacted, establishing the Counterterrorism Court to apply the Counterterrorism Law.

The list of laws that might be repealed, or subject to appropriate prompt amendment, would include (but not be limited to) the following:

Legislative Act No 51 (Law of Emergency) of 22 December 1962

Military Act No 2 (Law of Emergency) of 8 March 1963

Legislative Decree No 6 (The establishment of military tribunals in Damascus and in other cities when needed) of 7 January. 1965.

Legislative Decree No 40 (no immunity for judges) of 21 May 1966

Legislative Decree No 109 (establishing the Military Field Tribunal) of 17 August 1967

Legislative Decree No 47 (Supreme State Security Court) of 28 March 1968

Legislative Decree No 14 (establishing the General Intelligence Administration, and guaranteeing immunity to intelligence personnel for crimes committed in the course of duty) of 15 January 1969

Legislative Decree No 549 (regarding the regulations of the Internal Structure of the General Intelligence Administration (Article 74 guarantees immunity to intelligence personnel for crimes committed in the course of duty) of 25 May 1969

Law No 53 (on the Security of Arab Socialist Baath Party) of 8 April, 1979

Law No 49 (on the Muslim Brotherhood) of 7 July 1980

Legislative Decree No 64 (immunities of police, customs police and political security by requiring a decree from the General Command of the Army and Armed Forces to prosecute any member of the internal security forces, Political Security (one of Syria's security services), and customs police) of 30 September 2008

Legislative Decree No 55 (allowing the detention of suspects for up to 60 days) of 21 April 2011

Law No 19 (on counterterrorism) of 2 July 2012

Law No 20 (targeting state employees "convicted" of any act of terrorism) of 2 July 2012 Law No 22 (on counterterrorism courts) of 26 July 2012

Appendix V The Geneva Communiqué

Action Group for Syria

Final Communiqué

30.06.2012

1. On 30 June 2012, the Secretaries-General of the United Nations and the League of Arab States, the Ministers for Foreign Affairs of China, France, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland, the United States of America, Turkey, Iraq (Chair of the Summit of the League of Arab States), Kuwait (Chair of the Council of Foreign Ministers of the League of Arab States) and Qatar (Chair of the Arab Follow-up Committee on Syria of the League of Arab States) and the High Representative of the European Union for Foreign Affairs and Security Policy met at the United Nations Office at Geneva as the Action Group for Syria, chaired by the Joint Special Envoy of the United Nations and the League of Arab States to Syria.

2.

- 5. The parties must fully implement the six-point plan and Security Council resolutions 2042 (2012) and 2043 (2012). To that end:
 - a. All parties must recommit to a sustained cessation of armed violence in all its forms and to the implementation of the six-point plan immediately and without waiting for the

On that basis, there can be a review of the constitutional order and the legal system. The result of constitutional drafting would be subject to popular approval;

Upon establishment of the new constitutional order, it will be necessary to prepare for and conduct free and fair multiparty elections for the new institutions and offices that have been established.

Women must be fully represented in all aspects of the transition.

III. Safety, stability and calm

The conflict must be resolved through peaceful dialogue and negotiation alone. Conditions conducive to a political settlement must now be put in place;

There must be an end to the bloodshed. All parties must recommit themselves credibly to the six-point plan. This must include a cessation of armed violence in all its forms and immediate, credible and visible actions to implement points 2 to 6 of the six-point plan;

All parties must now engage genuinely with the Joint Special Envoy. The parties must be prepared to put forward effective interlocutors to work expeditiously towards a Syrian-led settlement that meets the legitimate aspirations of the