THE FUTURE OF IRAN: TRANSITIONAL JUSTICE

A South African Perspective on Iran

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I have been assigned a difficult a task: To respond to the papers of Prof. Ramin Jahanbegloo and Dr Hirad Abtahi by drawing on the South African experience of transitional justice as a basis for making three recommendations to Iranians and identifying three mistakes that should be avoided in their current situation.

The task is especially difficult because of the marked differences in the contextual realities of the two countries, and it would be presumptuous of me to suggest to any Iranian what to do in the crisis they face regarding judicial reform and transitional justice. I can only offer comment on the South African experience, hoping that this may generate some debate to the benefit of Iran.
I do so by suggesting five defining characteristics of the South African transition, relevant to the theme of this workshop:

1. **LEADERSHIP**

   Nelson Mandela was released from prison after 27 years of incarceration and spoke of reconciliation. F.W. de Klerk, president at the time, emerged as possibly the only head of an oppressive state in modern history to allow political sense to prevail over bloody-minded ideology, in voluntarily surrendering power to a democratically elected government. South Africa had remarkable leadership at the time of its transition, committed to an amicable settlement as possible within the context of human rights principles.

2. **ROME STATUTE**

   The South African transition of 1994 happened before the Rome Statute came into force in April, 2002. When international human rights organizations, Amnesty International among them, stated that the amnesty clause in the South African Truth and Reconciliation Act threatened the integrity of international human rights law, Dullah Omar, Minister of Justice in the newly elected South African democratic government, stated: "We are building a future for South Africans [and to the extent that] there is conflict between what the international community is saying and what is in the interests of the people of South Africa … we have to live with that kind of conflict."(1) South Africans claimed local ownership of their transition.

3. **LIMITED ARMED STRUGGLE**

   The African National Congress (ANC), South Africa’s major liberation movement, was committed to limited armed struggle. (2) In his autobiography, *A Long Walk to Freedom*, Mandela refers to ambits of the ANC’s guerrilla warfare at the time when liberation movements were banned in 1960: "Since the ANC had been reluctant to embrace violence at all, it made sense to start with the form of violence that inflicted the least harm against individuals… Our strategy was to make selective forays against military installations, power plants, telephone lines, and transportation links; targets that would not only hamper the military effectiveness of the state, but frighten National Party supporters, scare away foreign capital, and weaken the economy. This, we hoped, would bring the government to the bargaining table."(3) When the South African regime agreed to credible negotiations, the ANC agreed to end its armed struggle, which saved the nation from conflagration.

4. **TIMING OF THE TRANSITION**

   The South African transition happened within the kaleidoscope of global change at the end of the 1980s. This included the fall of communism and a change in US and the UK government policy towards South Africa, which cautiously turned in favour of democratic change.
Shortly after Mandela’s release from prison he met with General Constand Viljoen, then commander-in-chief of the South African army. “If you want to go to war,” Mandela told Viljoen, “I must be honest with you and admit that we cannot stand up to you on the battlefield. We don’t have the resources. It will be a long and bitter struggle, many people will die and the country may be reduced to ashes. But you must remember two things: you cannot win because of our numbers—you cannot kill us all; And, you cannot win because of the international community—they will rally to our support and they will stand with us.”

Viljoen was drawn into the settlement process and later played a crucial role in persuading conservative white Afrikaners to participate in the election process. Not all antagonists show the pragmatism of Viljoen. Some prefer ashes to survival.

5. SOUTH AFRICAN DNA

The South African opportunity for peace (which is sometimes referred to as a miracle) came as a result of years of struggle, and a carefully constructed, multi-faceted internal and global strategy. Exponents of constructive change slowly convinced the white community that it was in their interest to change. The moral and religious dynamic had shifted against the proponents of apartheid, including the white Dutch Reformed Church and Afrikaner cultural organizations that provided moral and theological justification for apartheid—their racist bigotry was exposed for what it was.

The South African change came not as a result of a miracle, but as a result of tough intellectual and moral arguments, coupled with strategic political work aimed at generating maximum global pressure on the apartheid regime. However, was there a DNA (an “X” factor) that enabled South Africans to succeed where other nations, who fought as hard as and harder than South Africans, failed? It’s a question worth pondering—to which I return.

South Africa is not Iran, in history, in religious ethos, within the context of the international judicial climate, or in leadership. I leave it to Iranian participants in this workshop to answer the question whether there is the level of intensity, or a political possibility, of achieving the level of non-violent change in Iran that Prof. Jahanbeghoo speaks about in his paper. In pondering this question, we will do well to remember that when a relatively peaceful change came to South Africa, it came as a surprise to most of us. We had anticipated a bloodbath.

OPTIONS FOR IRANIAN CHANGE

President Jimmy Carter, in 1979, famously referred to the 1953 overthrow of Muhammad Mossadegh’s democratically elected government in Iran, with the support of the CIA, as “ancient history”. This, he insisted, should not be allowed to influence the current political attitudes or decision-making of his administration. How wrong he was. The American hostage drama followed, the rescue attempt of American hostages failed, Carter lost the presidency to Ronald Reagan, the Shah (Reza Shah Pahlavi) fled into exile, and Ayatollah Ruhollah Khomeini returned from his exile in 1979 to institute a theocratic government in Iran. The country continues to face the fall out of both ancient and
current history. The memory of past history weighs heavily on developments in Iran, with events around the Arab Spring reminding us that the past is never quite past. It bears down on nations as both a body of death and a source of renewal.

In pondering the words of my fellow panellists within the context of the present global debate on Iran, three scenarios seem to emerge:

1. Conflagration and death. It is scenario fuelled by the unrelenting campaign of Western destabilization in Iran and the threat of war by the United States and/or Israel on the one hand. On the other hand, it is driven by fears concerning Iran’s possible nuclear capabilities and the suppression of progressive ideas by Supreme Leader Ayatollah Khamenei and incumbent President Mahmoud Ahmadinejad. This is a possibility for others, more informed than me, to consider.

2. A second scenario is presented in Ramin Jahanbegloo’s *Reflections on Forgiveness and Transitional Justice*. His paper is a reminder of the non-violent political energy embedded in Iranian history, which includes the complex Constitutional Revolution of 1906, the Mossadeq Movement in the 1950s, and the revolution of 1979. Considering the extent and persistence of violence, which is part of the Iranian collective memory, Jahanbegloo asks whether there is a realistic alternative to more violence and retribution, if not revenge, while seeking to hold those responsible for Iran’s gross violations of human rights accountable for their actions. His courageous appeal is for Iranians to harness the “moral”, “spiritual”, and “cultural” capital in their collective history, to enable Iran to find a possibility beyond future violence that could “dehumanise the perpetrators of past crime.” He draws on Karl Jasper’s notion of “metaphysical guilt” to remind us of the broader culpability facing all of humanity, not least those who watch developments in that country without appropriate resistance and response. Jahanbegloo’s question is whether there is a third way “between the extremes of vengeance and national amnesia” to enable Iran to redeem itself?

3. The third scenario is implicit to Hirad Abtahi’s paper on the relationship between supranational criminal courts, tribunals and transitional justice, although he does not relate this to the Iran situation. He focuses on international criminal justice, which he reminds us is “not the only form of justice envisaged by the term transitional justice”. In so doing he discusses the contribution of hybrid courts, the International Criminal Tribunal for Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC)—each of which provide possible ways of dealing with the question of impunity.

Presumably Iran could, with appropriate national and international pressure, opt for a supernatural court in one of the first two forms outlined in Abtahi’s paper. Short of this, the powers of the ICC, referred to as “a court of last resort” could be invoked.

This is the judicial “big stick” (if any is used at all) most likely to be employed in the Iranian saga. I therefore I focus my comments on the Rome Statute of 1998 that gave rise to the establishment of ICC on July 1, 2002. Its intent is to close down on impunity
and to strengthen the hand of new democracies in countering the indomitable influence of perpetrators. The Statute is careful to state that it is only those who are suspected of bearing most responsibility for the specific crimes of genocide, crimes against humanity, war crimes and the crime of aggression who are required to face trial before the ICC. The Statute also includes other conditions that limit the actions of the ICC. Among these is the provision that it can only intervene in a conflict where a state is itself either unwilling or unable to act against a perpetrator. Bluntly stated, the intent of the ICC is not to promote prosecutions to the point of the potential collapse of newly emerging democracies. In this respect the ICC constitutes a major step forward in the international struggle for human rights.

My concern about the interventions of the ICC to date (all of which have been against Africans) involves the apparent selective implementation of some of these prosecutions which often smacks of Western perspectives and high handedness. The question is whether the ICC would not accomplish more by putting more energy and money into empowering and, where necessary, sensitising, local judicial mechanisms to the demands of international justice, rather than the showy projects that catch the attention of international audiences. Abtahi’s reference to the capacity building of supranational criminal courts is an important corrective in this regard. The question is whether it is enough?

This aside, the question needs to be asked how best to deal with human atrocities in Iran today and maximise the possibility of eliminating similar atrocities in the future. Drawing on Hannah Arendt, Jahanbegloo, refers to the “predicament of irreversibility”, stressing the need to find a way of beyond such a predicament. Arendt famously stated that the hanging of Eichmann was “necessary but inadequate”. Colloquially stated: “Yes, hang him—but what more are you going to do?” In this regard, Gerry Simpson poses the tantalising question as to whether there is ultimately “an incongruity between legal language and unimaginable evil”.

The question facing Iran, Iraq, Afghanistan, Northern Ireland, Rwanda, South Africa, and other countries is not whether the Rome Statute, carefully applied, has a place in the toolbox of transitional justice. It does. The question is what more needs to be done to overcome the spiral of violence which has the capacity to mutate from within one situation to another. Abtahi suggests that consideration be given to criminal justice and a truth and reconciliation process being held in tandem to address such situations. This is an option that is increasingly injected into the transitional justice debate. The Sierra Leone experiment in this regard makes it clear, however, that this option has its own set of problems which need to be sorted out.

It is also important to note that the ICC recognises that transitional justice involves more than prosecutions. It has, for example, established the Trust Fund for Victims (TFV), with the aim of providing restorative services which include vocational training, counselling, reconciliation workshops, and reconstructive surgery. The TFV website indicates that there are an estimated 42,300 direct beneficiaries and an additional
182,000 families and community members who are recipients of funding (my figures are most probably outdated). (15) Spokespersons for the TFV, at the same time, indicate that funding in Uganda and the Democratic Republic of the Congo, resulting from decisions made within the Pre-Trial Chamber of the Court alone, cost an estimated €1.8 million. There are also restrictions imposed on the fund by the mandate of the ICC and the separate mandate of the TFV, and officials responsible for UN development funding seeking to ensure that development funds are used for self-sufficiency projects and economic growth rather than victim dependency.

Reparation is a complicated process, which deserves a workshop beyond the confines of this one. President Nelson Mandela, for example, on receiving the TRC report in 1998, suggested that the chapter on the “Causes, Motives and Perspectives of Perpetrators” might be among the most important in the entire report. He indicated that unless these factors are acknowledged and readressed, the conflict is likely to reoccur, in one form or another, in the future. He stressed that South Africans needed to engage in national dialogue and joint decision-making as a basis for giving birth to a new country”. (16) He argued that in addition to any monetary payment that may be part of reparations more (again that word!) is required. Legal reform, economic development and grievance awareness needs to top the list in post-conflict transformative interventions.

RECOMMENDATIONS AND MISTAKES TO AVOID

Now to the crux of my assigned task: I am asked to draw on the South African experience to make “Three recommendations for the Iranians and three mistakes that should be avoided”.

Recommendations:

1. LOCAL OWNERSHIP

The world has both good and wanton recommendations on how to solve situations of conflict in Iraq and elsewhere. The trauma of colonial and other past forms of international involvement in Iran bears witness to this.

The Reagan administration in the US and the Thatcher government in the UK were long hostile to those fighting for democracy in South Africa. (It was not until July, 2008, that Nelson Mandela’s name was formally removed from the US terrorist list.) As negotiations between the apartheid regime and the ANC began to unfold, and sensing an opportunity to take advantage of his earlier involvement in peace initiatives in the Middle East, President George H.W. Bush wrote to de Klerk and Mandela, offering to assist in the negotiation process. Both Mandela and de Klerk declined the offer. Later on, when ex-US Secretary of State Henry Kissinger and former British Foreign Secretary Lord Carrington tried to draw Chief Mangosuthu Buthelezi’s Inkatha Freedom Party (IFP) into the elections in a last-ditch initiative, they went home empty-handed. It took a somewhat enigmatic initiative by a fellow African and Kenyan diplomat, Washington Okumu, to persuade Buthelezi to participate in the elections.
When South Africans finally went to the polls, de Klerk observed: “Nobody could say that it [the settlement] has been thrust upon us from outside.” The transition was not perfect and many mistakes have been made since. Had we not, however, had a messy and morally compromised settlement, crafted and implemented by South Africans who were enemies and adversaries one of the other, the nation would have, in all probability, imploded into chaos.

The question is whether, and how, Iran can, when its opportunity arises, learn from the wisdom of both the international human rights community and the experiences of countries that have undergone transition in recent years. The warning of those monitoring post-conflict situations around the world tell us that a typical country reaching the end of a civil war faces around 40 percent risk of returning to conflict within five years.

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This means that a compromise solution with local communities needs to be taken very seriously by the international community. The warnings which come from human rights purists around the world, as important as they may well be, should not necessarily be regarded as the last word in situations of extreme conflict. Above all they should not be allowed to degenerate into “legal violence” as opposed to authentic power derived from a collective, negotiated will.\(^{(17)}\) In the words of Kofi Annan, the former UN General Secretary, “Peace programmes that emerge from national consultations are … more likely than those imposed from outside to secure sustainable justice for the future in accordance with international standards, domestic legal traditions and national aspirations.”\(^{(18)}\) Even where such programmes are not perfect and require later changes (for example, regarding prosecutions Argentina and Cambodia), they can be the first step beyond the imposition of government through the barrel of a gun.

2. POLITICAL INCLUSIVITY

The Convention for a Democratic South Africa (CODESA), the name given to South Africa’s formal multi-party talks, included even the smallest of political groups, from right-wing white Afrikaners to radical black revolutionaries. It was a process that recommended proportional representation in the National Assembly, which resulted in some parties gaining representation in parliament on the basis of less than one percent of the national vote. The negotiations, inter alia, resulted in the formation of a secular state, with the support of all major religious groups.

The question is whether Iranians are willing (and desperate enough) to engage in these kind of negotiations and cobble together one or another kind of government of national unity? It will take deep commitment and tough decision-making by
Iranians to negotiate a settlement that produces sufficient acceptance among its ethnic, linguistic, and religious groups that range from Kurds, Baluchis, and Turkmen to Sunnis, Wahhabists, Salafists, and Jihadists. As a first step towards such inclusivity, there needs to be fearless and open debate, both within and between Islamic groups, and in the country as a whole. South African talks that led to a final settlement were preceded by informal, clandestine and semi-official talks, as well as talks about the possibility of talks that gradually enabled a break-through, resulting in open, transparent and unrestricted debate on topics that where hitherto neither countenanced nor allowed.

3. A COMMITMENT TO RECONCILIATION

The bedrock of the South African transitional justice process was (and is) political rapprochement. If the liberation movements had insisted on Nuremberg-style trials for the leaders of the apartheid government, there would have been no peaceful transition to democracy, and if the apartheid government had insisted on a blanket amnesty, the negotiations would have broken down. A bloody revolution would have been inevitable.

Reconciliation can be broadly interpreted in two different ways. One involves a sense of coming to peace with one’s past. G.F.W. Hegel, the German philosopher, spoke of reconciliation as “metaphysical solidarity”, which “leaves no scar behind”. The problem is that few of us are able to reach such heights.

A second notion of reconciliation is less demanding, but only slightly so. It involves moral compromise, common sense, and political realism—despite the scars that refuse to go away. It involves political savvy rather than religious magnanimity, clear-headedness rather than heroism, responsible living rather than monk-like self-denial.

People do not have to forgive one another, love one another or hug and kiss one another in order to live together in peaceful co-existence. We do, however, have to respect one another and establish certain social and political ground rules to coexist in a peaceful manner. It involves balancing the demands for justice and the requirements for peace. This balance was possible in South Africa because sworn enemies, under strong leadership, were prepared to talk peace, without one side dictating (or having the muscle to dictate) the terms of that peace to the other. The question is whether Iranians have the capacity to do the same.

These recommendations, of course, presuppose the possibility of certain exploratory steps regarding an agreement to investigate the possibility of a peace accord, the suspension of violence and the terms on which these possibilities can be achieved.

MISTAKES TO AVOID

- War: A military intervention by the US, Israel or a UN–NATO coalition, which is likely to have the support of some Arab states, not least Saudi Arabia who aggressively seeks to impose its version and interpretation of Islamic law through funding of
mosques and madressas in several Arab countries. What President Carter saw as “ancient history” in the overthrow of the Mossadeq government in 1953 is enough to show that it is easier to tear down than to build in a volatile situation. The Iraq and Afghanistan wars, in turn, show the importance of having a viable post-war strategy in place before a campaign of destruction begins. The jus ad bellum theory of war indicates, for example, that force may be used only where there is a truly just cause and solely for that purpose. This is an injunction that the world would do well to remember. There ought to be a probability of success or a likelihood of peace, and it should only be resorted to as a last resort.

- The exclusion of those capable of destroying a future peace: A lasting agreement is impossible to attain if it fails to include those who have the power to undermine it. Negotiations must include militants and minority groups, including those resistant to the settlement. Peacemaking is more often than not about conflict management, policies of inclusion and process maintenance rather than about getting everyone to agree on all the outcomes.

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The South African settlement prioritized inclusivity, without allowing any minority group to scupper the negotiations, by creating what the CODESA talks called “sufficient consensus” as a basis for promoting both unity and diversity in a country torn apart by decades of ideological difference and war. It is tempting for the dominant group in any situation to exclude troublesome minority groups, and it takes courage for minorities, welded together by entrenched ideological belief, not to walk away from talks with a dominant opposition group.

An important ingredient of post-conflict legal and political restoration is what to do with “low level” perpetrators (those who are judged to be primarily responsible for past atrocities who can, where appropriate, be dealt with through the courts). East European countries sought to do so through different lustration processes. The US, in turn, had a process of de-Baathification in Iraq. It is worth reflecting on the limitations and failures, of these processes. But, this too, is beyond the confines of this workshop.

- Moral consciousness: Do not ignore the moral ingredients embedded in Persian civilization and recent Iranian history. Reference has earlier been made to the “moral”, “spiritual”, and “cultural” capital in Iranian collective history—the so-called soft ingredients of political struggle. The history of the South African transition reveals a strong spiritual and religious ingredient, involving Christians, Muslims and Jews. The role of Archbishop Tutu and other religious leaders have contributed significantly to the moral conscience of the country. The African
notion of ubuntu, captured in the proverb, umuntu ngumuntu ngabantu (a person is a person through other people), suggests that the realization of one’s human potential can only be achieved in interaction with other people. Dag Hammarskjöld once observed: “The longest journey is the journey inward, for he who has chosen his destiny has started upon his quest for the source of his being.” To rephrase his wisdom: It is perhaps only as Iranians inclusively decide who they are that the possibility of shaping their future can begin.

At the height of the struggle there were conflicting theologies in all religions in South Africa. The Christian theology of apartheid was condemned as a heresy by local and international groups. The Kairos Document, published in 1985, thrust churches into direct conversation with liberation movements at an institutional and formal level. Jews for Justice and other dissident Jewish groups, challenged the conservative stance of most South African Jews. The Call of Islam, the Muslim Youth Movement, the Muslim Judicial Council, and other Islamic groups grappled with the question concerning a post-apartheid South Africa. In 1991, a National Muslim Conference addressed the need for a democratic South Africa to be a Dar-al-Amanwa-Salaam (Abode of Security and Peace) for Muslims. This was followed by a National Interfaith Conference that brought together representatives of all the major religions in South Africa. Its aim was to conceptualise the nature of a post-apartheid secular state, within which the freedom of religion and the common values of the country’s diverse religious values could be included in the South African Constitution and Bill of Rights. This created a democratic space for the promotion of Islamic values found, for example, in Muslim personal law.

The public re-emergence of moral incentives by South Africa’s major religions, often forgotten and frequently compromised, made an important contribution to the South African transition. It demanded that the apartheid regime and the liberation movements make moral decisions, in applying their minds to peaceful co-existence.

The debate on tendencies within Islam, accelerated in response to the Arab Spring, sees Muslims in debate and confrontation (reminiscent of the South Africa in the 1980s and 90s) in a manner that suggests those Iranians working for democratic change will do well to take this debate seriously. There are others who are infinitely more competent than me to speak of the religious and political control that the Supreme Leader Ayatollah Ali Khamenei and others have in Iran. My historical and religious intuition, together with an awareness of debate that reaches back to the 1979 revolution on the character and place of Islam in the Iranian political structures suggests, however, that no religious or political monolith is devoid of internal debate and latent institutional fissures. These should not be ignored in the struggle for a “new” Iran.

The question is whether Iran has a DNA or “X” factor hidden within its history and structure that warrants uncovering in the current Iranian situation? My guess is, it does.
IN SUMMATION

No one size fits all in transitional justice and conflict resolution. This workshop includes a session on transitional justice before transition. Three South Africanisms on this:

1. The South African breakthrough came at the height of what has earlier been referred to as the “predicament of irreversibility”. We predicted Armageddon and got peace.

2. We got peace because liberation initiatives, including armed struggle and international sanctions were shaped and geared to deliver negotiations. They were not an end in themselves. The carrot dangled before apartheid ideologue was “come to the table of negotiation with good intent” and we will call off the pressure. When that moment came, the forces of opposition to the regime honoured its commitments and negotiated a deal that saved the nation from the predicted bloodbath. Many of the ideologically committed hard-liners in the ANC disagreed with the terms of the settlement, but the voice of moderation and reason prevailed.

3. The opposition to apartheid, both at home and abroad, that led to negotiations was organized, sustained, and relentless. At home, there was a call “to make the country ungovernable” for which thousands of South African paid a significant price and some were killed. Abroad, the anti-apartheid movement penetrated the structures of government, business and academia around the world. It was led by South Africans in exile and at home who engaged the international community without ever allowing them to dictate the South African agenda.

2. This is reflected in the first (1994) election results: ANC 62.6%; NP 20.39%; IFP 10.5%; DA 1.7%; PAC 1.2%; Other 3.61%


4. Allister Sparks, Tomorrow is Another Country (Sandton: Struik Book Distributors, 1994), 204.


9. The “crime of aggression” remains undefined, with the implementation of this crime being postponed until the ICC’s 2017 review committee.

10. Article 16 of the Rome Statute allows the UN Security Council to prevent or suspend ICC investigations or prosecutions for a renewable period of one-year if those investigations or prosecutions relate to situations where the UN Security Council has adopted a resolution under its Chapter VII powers which relate to maintenance or restoration of peace and security in a particular situation. Article 17 indicates that ICC jurisdiction applies only in such instances where “the State is unwilling or unable genuinely to carry out [an] investigation or prosecution.” Article 53 indicates further that a stay of investigations or prosecutions can be triggered by a request from a State that has made a referral to the Pre-Trial Chamber of the ICC or where the UN Security Council has done so. The Pre-Trial Chamber is required to take into account all the circumstances, including the seriousness of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime. These circumstances are to be evaluated “in the interest of justice” – which presumably includes situations where prosecutions might interfere with negotiations in pursuit of the cessation of killing and a possible peace settlement.

11. See my “ICC in Africa: Judicial Imperialism or Legal Complementarity” in The Thinker, … 2011


14. Ibid.


16. See C. Villa-Vicencio, Walk with Us and Listen, 89.


