

THE INTERNATIONAL MECHANISM OF EVIDENCE COLLECTING CONCERNING THE CRIMES COMMITTED IN SYRIA

AN APPROACH BETWEEN EXPECTATIONS & REALITY

STUDY

This study includes a research discussing new mechanisms

Introduction: about Syrian circumstances and crimes committed in Syria

- 1- The conditions and motives behind passing the resolution and launching the mechanism
- 2- International resolution content
- 3- Structure, powers, and competence
- 4- Expected advantages of the new mechanism
- 5- Challenges related to mechanism
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1- Introduction

Six years have passed since Syrian public protests started, which have been faced down by Syrian regime by unjustified violence, and illegal arrests. Violations and crimes have developed into killing and devastation when the regime used heavy weaponry, explosive barrels, killing under torture, siege, forced starving and displacement. Moreover, the regime has used internationally-prohibited weapons such as chemical weapons. As events have developed without any serious interference by international community to stop such violations and crimes which are defined by the international criminal court as war crimes, crimes against humanity, forced displacement, genocide, and/or sexual-violence crimes; armed paramilitary groups have been formed from both battling parties to control certain parts in Syria. Similarly, such groups have perpetrated crimes and violations as well against the civilians.

Therefore, human rights council (HRC) has founded the independent international investigation committee on Syria during the its 17th special session. This committee has been formed to investigate all alleged violations by the international law of human rights starting from March 2011 in the Syrian Arab Republic.

The committee has been formed as well to study the facts and circumstances that might be listed under such violations, along with investigating the crimes that have been committed, whenever committee officials are allowed to define and spot such crimes, in order to make sure that such violations perpetrators, including the violations that might be considered as crimes against humanity, would be held accountable for such crimes.

The committee has collected confirmed evidence about horrible crimes committed in Syria, that might be listed under crimes against humanity. About such crimes; the committee has prepared seventeenth reports.

Unanimously, Security Council has adopted resolution No. 2235 about forming a joint investigation committee for one year, that might be renewed, in order to investigate the attacks in which chemical weapons have been used in Syria. The committee has been authorized to define individuals, commissions, groups, and/or governments that are suspected to be involved, being responsible for, have committed, and/or participated in using chemical weapons in Syria, including chlorine gas or whatsoever other poisonous chemical weapons. The committee has conducted an investigation about using chemical weaponry in Syria between 2014 and 2015. Reports have been delivered by the committee to UN security council. Joint reports between UN and organization for prohibition of chemical weapons have confirmed the fact that the Syrian army of the regime has been involved in waging a poisonous gas attack against Qamnis, a village near Idlib province in 2015. Another report mentioned that the Syrian regime forces are responsible for two chemical attacks at two spots, the first is in Idlib countryside (in the north of Syria), during April 2014, and March 2015. Additionally, ISIS is responsible for using chemical weapons in Aleppo countryside on 21st August 2016.

2- Circumstances and motives behind passing the resolution and launching the mechanism

After three failing attempts at Security Council to refer the file of the crimes committed in Syria to the international criminal court due to the veto used by Russia and China to prevent such a file to be referred to this court; the international community has reached a dead end considering establishing justice in Syria or prosecuting the criminals who are responsible of perpetrating such crimes and violations.

This resolution has been passed due to the grave crimes and violations of humanitarian international law, along with horrible encroachments of human rights law and impunity as far as these crimes are concerned. Most crimes have been committed during conflict period, and this creates a good environment for more crimes and violations to be committed. Such practices cannot be accepted by the international community as far as what happens in Syria is concerned.

Moreover, due to the recurrent pressures practiced on the security council by the secretary general and high commissioner for human rights of the security council to refer the Syrian file to the international criminal court, and with the security council failure to take any action to stop such crimes and violations and to hold the perpetrators as accountable for such crimes; UN general assembly has adopted on Thursday 12th December 2016 a significant resolution including creating an international neutral independent mechanism to investigate and prosecute the perpetrators of crimes committed in Syria since March 2011, in order to collect, support, save and analyze evidence about these crimes.

It's worth mentioning here that the resolution has been voted for by 105 member states, with 15 objections and 52 abstained.

3- The Resolution :

Resolution adopted by the General Assembly on 21 December 2016

[without reference to a Main Committee ([A/71/L.48](#) and Add.1)]

71/248. 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

The General Assembly,

Guided by the Charter of the United Nations,

Reaffirming its commitment to the sovereignty of the Syrian Arab Republic,

Recalling the relevant resolutions of the General Assembly, the Security Council and the Human Rights Council, in particular Human Rights Council resolution S-17/1 of 23 August 2011 that established the Independent International Commission of Inquiry on the Syrian Arab Republic,

Welcoming the ongoing work carried out by the Commission of Inquiry, and recalling its reports and the recommendations contained therein,

Expressing its appreciation for the work carried out by the Organization for the Prohibition of Chemical Weapons-United Nations Joint Investigative Mechanism, and recalling its reports and the conclusions contained therein,

Recognizing the work of Syrian and international civil society actors in documenting violations of international humanitarian law and violations and abuses of human rights law in the Syrian Arab Republic during the conflict,

Noting with concern the impunity for serious violations of international humanitarian law and violations and abuses of human rights law committed during the conflict in the Syrian Arab Republic, which has provided a fertile ground for further violations and abuses,

Recalling the statements made by the Secretary-General, the United Nations High Commissioner for Human Rights and the special procedures of the Human Rights Council that crimes against

humanity and war crimes are likely to have been committed in the Syrian Arab Republic,

Noting the repeated encouragement by the Secretary-General and the High Commissioner for Human Rights for the Security Council to refer the situation in the Syrian Arab Republic to the International Criminal Court,

1. Emphasizes the need to ensure accountability for crimes involving violations of international law, in particular of international humanitarian law and international human rights law, some of which may constitute war crimes or crimes against humanity, committed in the Syrian Arab Republic since March 2011 through appropriate, fair and independent investigations and prosecutions at the domestic or international level, and stresses the need to pursue practical steps towards this goal to ensure justice for all victims and to contribute to the prevention of future violations;

2. Stresses the need for any political process aimed at resolving the crisis in the Syrian Arab Republic to ensure credible and comprehensive accountability for violations of international humanitarian law and human rights violations and abuses committed in the country in order to bring about reconciliation and sustainable peace;

3. Welcomes the efforts by States to investigate and prosecute crimes within their jurisdiction committed in the Syrian Arab Republic, in accordance with their national legislation and international law, and encourages other States to consider doing the same and to share relevant information to that end with other States;

4. Decides to establish 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 under the auspices of the United Nations to closely cooperate with the Independent International Commission of Inquiry on the Syrian Arab Republic to collect, consolidate, preserve and analyse 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;

5. Requests the Secretary-General, in this regard, to develop, within 20 working days of the adoption of the present resolution, the

terms of reference of the International, Impartial and Independent Mechanism, with the support of the Office of the United Nations High Commissioner for Human Rights, and also requests that the Secretary-General undertake, without delay, the steps, measures and arrangements necessary for the speedy establishment and full functioning of the Mechanism, initially funded by voluntary contributions, in coordination with the Commission of Inquiry and building on existing capacities, including recruiting or allocating impartial and experienced staff with relevant skills and expertise in accordance with the terms of reference;

6. Calls upon all States, all parties to the conflict as well as civil society to cooperate fully with the International, Impartial and Independent Mechanism and the Commission of Inquiry to effectively fulfil their respective mandates and, in particular, to provide them with any information and documentation they may possess, as well as any other forms of assistance pertaining to their respective mandates;

7. Requests the United Nations system as a whole to fully cooperate with the International, Impartial and Independent Mechanism and to promptly respond to any request, including access to all information and documentation, and decides that the Mechanism shall closely cooperate with the Commission of Inquiry in all aspects of its work;

8. Requests the Secretary-General to report on the implementation of the present resolution within 45 days of its adoption, and decides to revisit the question of funding of the International, Impartial and Independent Mechanism as soon as possible.

66th plenary meeting
21 December 2016

4- Structure, Authorities & competences

Creating this mechanism is a precedent, since UN general assembly has never taken such a procedure before. Despite the fact that security council and human rights council have already formed investigation committees, yet such a mechanism is totally different from other investigation committees' activities, because it has been formed by the highest international organization, and it has been formed not only to investigate, but also to thoroughly prepare files to facilitate things for the working team to achieve the mechanism goals, and how to deal with them, along with finding out the competences, roles and functions of this mechanism as far as the Syrian case in concerned as well as the prosecutions related to this mechanism. Therefore, we can describe such a mechanism as a legal process aiming to collect, support, save, analyze evidence so that they can serve as a means to condemn the perpetrators of documented crimes. This procedure can be done by preparing files and being ready to file lawsuits regarding war crimes in Syria, as well as human rights violations that have been committed during conflict time. This mechanism would be applied neutrally and independently to serve as a tool for investigating and prosecuting those who are responsible of the crimes committed in Syria.

1- Mechanism Process

The resolution has not been clear concerning how the mechanism should be applied, or what roles to be assumed by it. The resolution has asked all conflict countries and parties along with civil society groups to provide any information or documents to the team in order to facilitate such a task. It showed that the team would prepare files in order to facilitate and accelerate fair independent criminal procedures that go in line with international law standards at national, regional, and/or international courts or arbitration commissions that would or might be given a judicial power to consider such crimes in the future. Clearly, the mechanism shall be applied on two significant levels including:

- a- Collecting, saving, and analyzing evidence about human rights violations and transgressions to help save them from any loss.

- b- Preparing files to facilitate and accelerate fair independent criminal procedures that go in line with international law standards at national, regional and/or international courts, or special courts that should consider these crimes whether now or in the future.

However, the resolution has never defined whether the investigation committee would investigate such crimes to reach certain accusations against criminals or to only collect and save evidence. I think since evidence analysis and file preparation tasks have been added; this means that the committee should at least investigate the authenticity and correctness of evidence and make sure of them in order to reach certain results concerning the criminals, and this would help it to be able to prepare judicial files, and consequently, to carry out additional investigations.

2- Mechanism Competences

Article No. 5 mentions that the secretary general should assign the competences of the neutral independent international mechanism within 20 working days, starting from the date of passing this resolution. He must depend on UN high commissioner for human rights to do this. This action would help start with preparing mechanism process and activating it in coordination with the independent international investigation committee that has been formed for Syria, and to benefit from this committee's capabilities and experiences in order to take the following procedures:

- a- Providing finance for the mechanism through donations and by UN member states.
- b- Assigning qualified independent employees who enjoy good experiences and qualifications
- c- Organizing the processes of data collecting, saving, exchanging in a way that makes sure all of them are kept as confidential and top secret in order to protect various information sources.
- d- Asking all conflict states and parties, in addition to the international community to thoroughly cooperate with the mechanism, and to provide any information or documents they have about crimes committed in Syria.

- e- Preparing clear detailed files according to international standards in order to prosecute the perpetrators of these crimes
- f- Adopting the principle of transparency and neutrality in activating the mechanism and its fulfilling the duties and tasks, along with sending files to UN general assembly to make sure that a joint interaction at work has been created between organizations, civil society members and crime victims.

Because the mechanism is new and has been activated lately; the perceptions about starting the work have not been assumed their final shape, whether at the level of preparations or commencement. Therefore, the formation of this mechanism has been discussed, and the secretary general has assigned human rights council official to start creating the administrative structure of mechanism process, as well as creating rules for its activation. So far, many meetings and conferences have been held with concerned organizations and states, along with Syrian organizations to help formulate such a structure and process ways and methods, so we hope our study might make a difference as an additional effort to support such a process.

3- Expected advantages of the new mechanism

- Depending on neutrality, transparency and independence principles that are adopted for dealing with conflict parties in Syria; there is no need to resort for double standards pretext, and all war crimes perpetrators in Syria would be summoned to courts to be prosecuted in this case.
- This mechanism is seen as the milestone to carry out serious investigation depending on rigid international standards to help accelerate prosecution processes and to hold war crimes perpetrators as accountable for what happened during conflict period.
- The mechanism that relies on collecting evidence and documenting war crimes according to approved legal procedural laws is the only way to save victims' rights on one hand, and to be able to hold war crime perpetrators as accountable on the other hand, and this might be achieved when international circumstances allow to hold such prosecutions and trials.

- The resolution of forming this mechanism has restored the hopes of war crime victims that justice would be applied at the end of the day.
- We should note here that the significance of this mechanism lies in the fact that it would protect evidence from any loss caused by any reason with the passage of time, especially when it adopts strict rigid confirmation and proof standards at international criminal court.
- This mechanism creates a precedent, because for the first time in history a mechanism has been created to collect evidence, and prepare records while crimes are still going on. Normally, judicial records are usually collected when these crimes come to an end.
- One of the positive points is the joint work under the patronage of United Nations between fact-finding committee about Syria and the mechanism team on one hand, and the civil organizations and communities on the other hand, in addition to the cooperation between variety of international organizations. This cooperation and coordination would join the efforts of these organizations and help collect unified databases, in addition to lessening the tension created by the bad effects of competitiveness that has prevailed between such organizations, so that a reliable unified database for all former evidence and documentations would be created.

4- Challenges that would be faced by the New Mechanism

- 1- Finance: the first challenge that might be faced by the mechanism is to find a finance, and it is the first challenge faced by it throughout seven months starting from the date of its formation, since it was unable to collect the budget of the first year of activation. Recently, interested human rights organizations and Syrian organizations have launched a campaign to collect money to finance the mechanism activation, because the finances that would create justice must occupy the first priority in the world that claims to be interested in the Syrian case. Moreover, if the mechanism depends only on governmental finance this would make it fluctuate according to any changes that might occur to political situations. Therefore, it's better for this mechanism to continue to depend on other open resources of finance in order not to be under the pressures practiced by other countries and states.

2- Tasks & Authorities

Many find that the resolution of creating such a mechanism is impractical and it is just an emotional way to settle things down, which means it is useless, because the processes and activities of former investigation committees created by human rights council or security council are still pending without any hope to leave an impact on the situation, whether on the level of stopping the violations or on the level on resorting to courts to hold the perpetrators as accountable and to prosecute them.

However, we can just discuss that such a resolution has not been applied yet, and this mechanism has not been activated in reality to decide whether it is a success or failure. Nevertheless, whether the mechanism is capable of resisting all political circumstances that bet on the impossibility of creating international courts, condemning war criminals and holding them accountable, yet such a mechanism would prepare the files that go in line with international standards and according to international legal procedures, so that they would be ready to be settled instead of procrastination caused by long years of prolonged procedures between conflicting parties before courts, as this mechanism would struggle to reach decisive judgments as quickly as possible regarding how criminals should be punished. As we have already said, we think that this step makes a precedent that creates a better environment for justice and transparency with other lawsuits that would be filed later.

3- Mechanism goals and Cooperation with International Organizations

Many debate that the goal of this mechanism is still unclear, and they keep asking about the aim of creating a new mechanism to collect files, information and documents about crimes committed in Syria; since there is an independent international investigation committee that was formed in 2012 which has collected many evidence, as the investigation committee about using chemical weapons. However, nothing has been filed to an international court to pass judgments against the criminals. This means that creating a UN committee would never add anything to the case, since court competence has never been defined, nor a court or a thorough mechanism has been formed to establish justice. As fact-finding committee has truly presented files about violations and crimes committed in Syria, in addition to files

prepared by high-tech international techniques; this means that circumstances have been prepared to prosecute criminals and file lawsuits against them and to enable such a committee to go on. However, the committee could not present such evidence to any judicial commission, because no special courts for the Syrian crisis have been formed up till now.

To pass this challenge; according to article 4 of the resolution; the mechanism has been established under UN patronage in order to cooperate with international investigation committee, not to cancel its role. This means that it is not an independent committee that can practice its duties away from the new mechanism. Evidently, the most important thing is that this resolution has been passed to confirm the fact that it is necessary to cooperation with investigation committees that have already worked on the Syrian case. Such a cooperation would help commence in working from the point that has been reached by other efforts exerted by the investigation committee. The importance of this cooperation between investigation committees and mechanism team would be clear at two significant points:

- 1- Work shall start at significant levels of the Syrian case through investigation committees, not from scratch.
- 2- There would be ready files, documents and evidence to facilitate the mechanism process in building up its new files according to the standards required internationally, along with archiving them to help achieve mechanism goals more easily and quickly.

Challenge here lies in how cooperation with international organizations and commissions that have already worked in this field could be achieved, and in depending on what they have reached to, along with participating with them in this regard.

4-Other Countries Stances

Some would say that such a mechanism would affect the sovereignty of the Syrian state, and create a gap between the methodology and application regarding how much UN charter is respected, and the same applies to the member state' sovereignty. Those might discuss that this mechanism would represent a blatant

interference in the internal affairs of a certain UN member state; as Al-Jafari, the Syria's delegate to UN, has put it.

As a response about these claims, we could say first that Syrian laws do not originally include any articles about crimes against humanity or war crimes. Syrian jurisdiction structure itself is not independent and subject to other powers, so it cannot assume such a role at all. Additionally, transgression against Syrian state's sovereignty has become quite clear through the interference of all countries that are present on the Syrian territories. Any interference in the Syrian internal affairs must be done to document war crimes rather than circumventing international laws to prevent any attempt to prosecuting the criminals. This documentation process would protect the sovereignty of the transgressed state, as it absolutely helps find out those who are affecting its sovereignty in reality. This mechanism would work in a neutral way, so the sovereignty of Syria would be preserved as a state, regardless of those who have committed war crimes.

5-Cooperation with Syrian Human Rights Organizations

Syrian human rights organizations issue creates a critical point a little bit, as it makes us inquire about the international investigation committee that has been formed five years ago with which Syrian organizations have cooperated and presented to all documented files. This means that it has reports about crimes committed in Syria, and ready files including evidence and proofs. However, no appropriate milieu has been created to form a court that would consider the Syrian case or pass judgments to condemn, accuse or confront war crimes perpetrators at least, so would such new mechanism be reliable? and can Syrian organizations and investigation committees monitoring and documenting human rights violations throughout conflict period under all sorts of pressures and risks cooperate with the team working on this field to achieve the goals of this mechanism?

We can discuss here that rousing any suspicions around trusting this procedure does not mean that it is not trustworthy. However, this flaw might become a positive point through finding solutions to support trust between these commissions. To support this kind of trust between the parties cooperating in the process of the mechanism; we

suggest to enable Syrian organizations to directly take a part in this mechanism, as the mechanism process depends primarily on collecting evidence, rather than investigation. Absolutely, this fact contradicts the claims that the presence of Syrian members would kill the neutrality, or at least, a consulting committee created by members from Syrian organizations must be added to work with mechanism team, so that they would be responsible of keeping the secrets of committee's work, along with supporting Syrian organizations self-confidence by showing that they are not neglected or they don't know anything about such documents, evidence or the general course of actions taken by the mechanism while it is doing its tasks. The committee that would be created to assume the role of the mechanism would support the fact-finding committee, and it would intensify the efforts exerted by the organizations that have worked on documentation, as the end is quite clear, which is to make use of the time that precedes lawsuit procedural process to reach fair judgments which ensure that all victims would be compensated, and all criminals would be held accountable.

6-Conclusions

Some think that the committee's authorities are limited to collecting evidence, and documenting crimes, so that it is not allowed to form international, regional, and/or national courts to hold war criminals as accountable.

To refute such a negative point; as I have already mentioned, this mechanism is brand new, it is a precedent, and the team that would prepare the files would facilitate and accelerate impartial independent criminal procedures according to international law standards adopted in national, regional, international courts, and/or arbitration commissions that might be given a judicial authority to consider such crimes in the future. This means that such a mechanism might be the cornerstone for this project in the future. Moreover, the mechanism team might be able to ask UN to form special international courts to hold war criminals in Syria accountable later, as long as the conflict in Syria is still in progress between the regime and opposition parties.

5-Finally:

What is new in this mechanism? What is the legal humanitarian message that might serve human community as a whole and Syrian case in particular?

Depending on this study; we can tell that there is a kind of advance in UN response to open new windows for justice to be established. The message of hope regarding establishing justice and condemnations would not be subject to the political interests of other countries. Actually, this mechanism is a precedent that is, when it is activated seriously and bravely, especially in confronting war crimes perpetrators, would absolutely affect the development of international law, because laws would develop depending on the progress of considered precedents, and would affect international community efforts to find solutions and tools other than those already utilized and previously formed or available which weren't used due to political complexities.

Therefore, we can discuss that creating this mechanism is a new victory in the process of establishing justice, not only in Syria, but also as far as international laws are concerned. We hope that this step would address a clear message to prevent other crimes in other places to happen in order to preserve people's lives away from criminals. In fact, it would create a milestone, since it would show everyone in this world that the policy of impunity is about to be terminated once and for all.

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