

FIDH and SCM Open Letter to the Leadership of the UN International, Impartial and Independent Mechanism for Syria

FIDH and its member organisation, the Syrian Center for Media and Freedom of Expression (“SCM”) welcome the initiative taken by the United Nations General Assembly in adopting Resolution A/71/248¹ (the “Resolution”), establishing an International, Impartial and Independent Mechanism (the “Mechanism”) mandated to assist in the investigation and prosecution of those responsible for the most serious crimes under international law committed in the Syrian Arab Republic since March 2011 through the collection, consolidation, preservation and analysis of evidence and the preparation of files designed to facilitate and expedite criminal proceedings before competent national, regional and international courts.

FIDH and SCM also welcome the timely report of the United Nations Secretary-General on the implementation of the Resolution² (the “Report”), establishing the terms of reference of the Mechanism.

Both the Resolution and the Report rightly emphasise the need to ensure accountability in any future solution for Syria and will, we hope, contribute to the fight against impunity for grave violations of international law committed during the Syrian conflict.

In order to achieve this objective, a clear and specific roadmap for obtaining justice is needed. The Report is a welcome first step in this respect. To help carve out the way forward, FIDH and SCM set out a series of comments and recommendations aimed at assisting the Mechanism’s future leadership in implementing the Resolution and determining its *modus operandi*, with a view to ensuring that its contribution to ongoing and future accountability processes is effective, comprehensive and credible.

In addition, and in accordance with the Resolution and the Report, FIDH and SCM urge all UN Member States to actively promote the Mechanism, ensuring it has the operational support and means to function effectively.

1. The search for accountability must be an inclusive process

The inclusion of Syrian actors in any accountability process is critical to achieving meaningful justice. While both the Resolution and the Report acknowledge a role for Syrian civil society actors in such processes, FIDH and SCM note that this is limited to co-operating with the Mechanism to provide relevant information, documentation and assistance. Syrian civil society actors should be engaged much more concretely, in a two-way dialogue aimed at ensuring the Mechanism is not only effective in responding to the needs of those most affected by the Syrian conflict, but is also a legitimate and credible contributor in the design and operation of relevant accountability initiatives.

In this respect, FIDH and SCM endorse the recommendations submitted to you on 19 January 2017 by SCM, together with several Syrian civil society organisations in a joint statement (the “Joint Statement”)³ to the effect that they be included in the process of determining the Mechanism’s information exchange, sharing and communication policies as well as victim and witness protection and support systems.

Also critical to meaningful and sustainable justice are the interests of victims, whether direct or indirect, individuals or entire communities. FIDH and SCM echo the Joint Statement recommendation that the Mechanism focus on engaging victims, supporting them appropriately (in terms of security as well as physical, psychological and material needs) and also on engaging and building partnerships with victims’ groups beyond the framework of collecting information. Including Syrian actors in this process will be key to success.

1 · Adopted on 21 December 2016.

2 · A/71/755, 19 January 2017.

3 · Joint Statement by Syrian civil society organisations: *A memorandum to the Secretary General of the United Nations regarding the new United Nations mechanism for investigation and prosecution*, 19 January 2017.

2. Devising appropriate methodology for evidence collection and analysis and file preparation

FIDH and SCM welcome the Mechanism's evidence collection, consolidation, preservation and analysis as well as file preparation mandate, and recommends in this regard that the Mechanism leadership promptly devise appropriate methodology for effecting these tasks.

In this respect, we are encouraged by the Report's repeated references to adherence with international legal standards to maximise the possibility of admissibility in existing and future criminal justice proceedings, and by the recognition that such proceedings may occur in a range of forums. FIDH and SCM encourage the Mechanism leadership to consult with judicial and prosecutorial authorities engaged in domestic prosecution for international crimes across a range of jurisdictions in order to devise this methodology.

We further recommend that the Mechanism leadership consult with civil society organisations and other actors involved in documenting international law violations perpetrated in Syria in order to establish appropriate and effective processes regarding the consolidation and use of shared information and evidence, with respect for the highest standards of confidentiality.

3. Establishing clear modalities for information sharing and co-operation with competent authorities

In the current international landscape, national criminal jurisdictions represent the principal avenue for pursuing perpetrators of grave international law violations committed in Syria, implicating to a considerable degree national prosecutorial and judicial authorities. These authorities rely on information and documentation held currently by the Independent International Commission of Inquiry on the Syrian Arab Republic (the "Commission of Inquiry") and, in future, also by the Mechanism as well as other actors.

The elucidation of clear and effective policies on the practical modalities for information sharing and co-operation between the Mechanism, competent prosecutorial authorities and/or competent courts is essential.

In particular, and given FIDH's experience of litigation before domestic courts applying extra-territorial jurisdiction in pursuit of accountability for crimes perpetrated in Syria, the methodology established must include the possibility for collected evidence and witness and victim testimony to be comprehensively transferred to competent domestic courts or tribunals, so that it can be effectively used in the course of national level investigations and prosecutions. This includes, for instance, witness testimony that can be readily used in national proceedings, with prior consent being sought from the relevant witness regarding the use of their testimony and its presentation in a format that meets relevant evidence admissibility requirements.

Other issues to be addressed include the following: at what stage of national criminal proceedings can such requests be initiated, by whom (judicial and prosecutorial authorities only, or also third parties, victims etc.), under what circumstances can information be shared or, if relevant, withheld? If information held by the Mechanism is shared on its own initiative, what form will it take, to whom will it be addressed, and will a particular response or action be imposed?

In determining these policies, FIDH and SCM call on the Mechanism leadership to again ensure that sufficient consideration is made of the various types of legal system in which accountability processes are and may in the future be conducted, to ensure that the potential for fruitful co-operation is maximised. This includes retaining flexibility on the issue of co-operation with proceedings in legal systems where *in absentia* trials can be an important component of accountability as well as on the issue of who is targeted by the Mechanism's work. While FIDH and SCM agree that the most responsible perpetrators should be prioritised, regardless of their affiliation or official capacity, the Mechanism needs to adopt a holistic approach taking into account low-level as well as high-level perpetrators from all sides to the conflict.

4. Guaranteeing independence and impartiality

Complete independence and impartiality is of paramount importance for the Mechanism and any contribution it may have to ongoing and future accountability processes. This consideration must be central in determining the Mechanism's operational rules as well as the processes for decision-making and for appointing staff. In this respect, we endorse the recommendations put forward in the Joint Statement that

senior Mechanism staff be designated from neutral countries, and that a ceiling of voluntary contributions from a particular country be set at a maximum of 10% of the initial funding allocation, with a preference for funding through the United Nations system as a whole. FIDH and SCM reiterate the Secretary-General's call to the General Assembly to revisit the question of the Mechanism's funding as soon as possible.

In addition, we strongly believe that appropriate safeguards aimed at ensuring independence should be established, particularly regarding the role of Member States in establishing the witness and victim protection unit, recommending entities to assist with the preservation of evidence held by the Mechanism, and in concluding any agreements with the Mechanism.

5. Placing the Mechanism within the broader context of transitional justice for Syria

Avenues for accountability extend beyond national criminal prosecutions and may include a special international court and/or transitional justice mechanisms such as truth commissions and reparations programmes. FIDH and SCM welcome the Mechanism's potential contribution to achieving effective and credible criminal accountability. However, criminal accountability is but one element of a comprehensive transitional justice approach; a fact which is itself acknowledged in the Report.

The Mechanism may have a role to play beyond criminal accountability and this possibility should be explicitly recognised from the outset, as called for in the Joint Statement.

6. Clarifying the interaction between accountability and peace processes

FIDH and SCM reiterate the need to ensure that credible and comprehensive accountability processes form an integral part of any political settlement reached in respect of Syria, the pressing need for which is clearly expressed in both the Resolution and the Report.

A better understanding of the interaction between United Nations-led accountability activities (through both the Mechanism and the Commission of Inquiry) and parallel political peace processes is critical to any viable future solution for Syria. We note that neither the Resolution nor the Report explain the interaction between these two tracks. In this respect, FIDH and SCM endorse the Joint Statement recommendation that UN bodies engaged in the political process be properly informed of investigations and violations relevant to or committed by negotiating parties, with appropriate safeguards for ensuring respect for confidentiality and due process, as well as victim protection.

Signatures:

International Federation for Human Rights (FIDH)

Syrian Center for Media and Freedom of Expression (SCM)