

A memorandum to the Secretary General of the United Nations regarding the new United Nations mechanism for investigation and prosecution

19 January 2017

His Excellency the Secretary General of the United Nations, Antonio Guterres,

We, Syrian organizations working in the areas of human rights violations, documentation, accountability, and transitional justice, signed this memorandum in regards to the United Nations General Assembly Resolution A/71/ L.48 on the establishment of the International, Impartial and Independent Mechanism (IIIM) 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. We would like to thank the United Nations General Assembly for the initiative aimed to ensure reliable and comprehensive accountability for violations of international humanitarian law and violations of human rights abuses committed in Syria. However, we also would like to express our disappointment that we were not involved in drafting the terms of reference for the IIIM as it was assigned to the United Nations Office of High Commissioner for Human Rights, despite the fact we have continuously engaged with various UN entities, often contributing directly to reports and statements related to the human rights situation in Syria. Below are recommendations from the undersigned Syrian organizations that we hope you will take into account during the drafting and subsequent implementation of the IIIM's terms of reference:

- 1. Jurisdiction and the process of preparing files:** The General Assembly resolution confers upon the IIIM powers of prosecuting perpetrators of violations without also conferring or describing clear jurisdiction for the prosecutions.

While the resolution refers to prosecution in national, regional or international courts, there are currently no international courts that have jurisdiction over war crimes and crimes against humanity committed in Syria. Thus, the ability of the IIIM to pursue prosecutions is limited to the jurisdiction of European and North American courts, which often only extends to low level perpetrators found among asylum seekers located in those countries. Thus, the terms of reference should explain a) whether and how the IIIM will seek to open up new jurisdictions for prosecutions and b) how it plans to engage with jurisdictions currently available when the prosecutorial offices of those countries typically lead the investigation and trials process.

Similarly, the resolution calls for the IIIM to prepare files in order to facilitate and expedite fair and independent criminal proceedings in national, regional and international courts that have or may in the future have jurisdiction over these crimes. Without clear

jurisdiction, the preparation of criminal files will happen in a vacuum and will not have any direct use in the near term. Therefore, the United Nations should prioritize clarification of the process for preparing such files in regards to whether the IIM will prioritize file preparation only for those cases where jurisdiction is currently available or, if it is preparing cases regardless of jurisdiction, how the IIM will prioritize types of violations as well the anticipated outcomes of the case files in the near term. The relationship between file preparation and the availability of jurisdictions is vital to the efficacy of the IIM.

2. Partnership with Syrian civil society: The General Assembly resolution calls on civil society to cooperate fully with the IIM and provide the mechanism with any information and documentation the groups may possess. As written, the IIM will adopt the United Nations' approach of viewing Syrian civil society organizations merely as sources of information and not as partners in achieving justice; this "one-way" relationship has been used by the United Nations Commission of Inquiry of the Human Rights Council and was not perceived favorably by Syrian civil society groups.

The IIM's terms of references should be clear about the relationship between the IIM and Syrian civil society. For example, Syrian civil society involvement in the process of drafting the terms of references of the IIM is essential in establishing a relationship of trust between the parties. We believe that the inclusion of representatives of Syrian civil society, particularly those human rights organizations that have proven their credibility in documenting violations, in an advisory role (such as an advisory board) will strengthen trust between the parties and increase the chances of cooperation. It is also necessary to develop a clear policy on sharing data and exchanging information to ensure that the mechanism maintains the highest level of confidentiality, while also allowing Syrian civil society to access information under certain circumstances. The IIM can also be a vital tool in communicating to Syrian civil society and Syrian society in general the progress of file preparation and steps towards accountability. Involving Syrians in these processes to the extent possible without violating high standards of confidentiality, due process, and victim protection increases local buy in and ensures that accountability is meaningful to the community it seeks to serve.

3. Expand stated goal to use the results of investigations and files: The General Assembly resolution focuses on criminal prosecutions, which is only one element of a comprehensive transitional justice process. While it may not be possible to expand the focus of the IIM now, the information collected by the mechanism and the results of its investigations should be made available for future truth-telling mechanisms, reparations programs, the identification of missing-persons, and efforts to resolve the dilemma of detainees. The terms of reference can and should make this aim explicit from the outset.

4. Victim-centered approach: It is clear that the United Nations resolution seeks justice for all victims of the conflict. However, victims in Syria have not received much-needed attention or visibility to demand meaningful justice. Thus, it is important for the IIM to focus on victims by engaging them whenever possible and being attentive to their needs beyond merely collecting information. Such an approach has an added benefit of

encouraging victims to supply information. The IIIM must also prioritize the safety and demands of victims in all matters and procedures. To do so, a IIIM should build partnerships with victims' groups and engage with them on a regular basis. It must also work with medical and mental health service providers to make sure that the investigations follow proper ethical standards and can increase victims' access to any needed psychosocial or medical support.

5. Relations with the political track of the United Nations: The resolution stresses that any political process must ensure “credible and comprehensive accountability . . . in order to bring about reconciliation and sustainable peace.” To ensure the political process is properly informed of investigations and the most prominent violations committed by negotiating parties, the terms of reference should provide clear language requiring the IIIM to provide periodic consultations, hearings, and briefings to the United Nations, specifically the Office of the Special Envoy to Syria in such a way that does not violate high standards of confidentiality, due process, and victim protection. Briefings should aim to mitigate the apparent disconnect the political track has from the human rights/justice tracks of the United Nations. This must be done while preserving the political independence of the IIIM, meaning the political track must be barred from attempting to influence the work of the IIIM based on the course of negotiations.

6. Funding and staffing: The General Assembly resolution states that the initial funding for the IIIM will be secured through voluntary contributions. Voluntary contributions could lead to one or more sources providing a disproportionate amount of the initial funding, thereby potentially affecting the impartiality and independence of the IIIM. Thus, we suggest that the terms of reference determine that the ceiling of voluntary contributions each country can provide to be a maximum of 10% of the initial funding allocation, with a preference to shift the funding from a voluntary contribution system to funding through the UN system as a whole. The same considerations of independence and impartiality should also apply to the senior leadership of the IIIM. We believe strongly that the leadership of the IIIM should not come from countries that are either direct or indirect parties to the conflict in Syria (i.e. fighting directly in Syria or even supporting parties to the conflict militarily, politically, financially, etc.)

The organizations signing this memorandum welcome the IIIM, and calls for the Secretary-General of the United Nations to take the recommendations and concerns of the Syrian human rights community into consideration, particularly in regards to allowing Syrians to participate in an advisory role to aid in the work of the IIIM.

We will be happy to meet with you through our representatives at any time, and we invite you to discuss these points and others in more detail.

The undersigned organizations, in alphabetical order:

1. Assyrian Network for Human Rights
2. Fraternity for Human Rights
3. Free Syrian Lawyers Association (FLSA)

4. Human Rights Guardians
5. Hurras Network
6. International Supporting Women Association (ISWA)
7. Justice for Life – Syria
8. Kawakibi Organization for Human Rights
9. Rule of Law Support Center
10. Syria Justice and Accountability Center (SJAC)
11. Syrian Center for Media and Freedom of Expression (CME)
12. Syrian Center for Statistics and Research (csr-sy)
13. Syrian Institute for Justice
14. Syrian League for Citizenship
15. Syrian Network For Human Rights
16. Syrians for Truth and Justice
17. The Day After (TDA)
18. The Syrian Committee for Detainees
19. Ur Nammu
20. Violations Documentation Center (VDC)
21. Women Now for Development