

The Syria Mechanism: Bridge to Prosecutions or Evidentiary Limbo?

Written by Beti Hohler and Elizabeth Pederson

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<https://www.e-ir.info/2017/05/26/the-syria-mechanism-bridge-to-prosecutions-or-evidentiary-limbo/>

BETI HOHLER AND ELIZABETH PEDERSON, MAY 26 2017

Since 2011, the conflict in Syria has killed more than 400,000 people, internally displaced an estimated 6.3 million, and created more than 5 million refugees. Documented crimes include chemical weapons attacks, a range of crimes against civilians from torture to the use of child soldiers, and sexual violence. Attempts by the UN Security Council to refer the situation in Syria to the International Criminal Court have failed, and only a handful of crimes have been investigated or prosecuted in national jurisdictions such as Germany, Sweden, Austria and Spain mostly on the basis of reports from Syrian refugees arriving into these countries. On the other hand, successful efforts to collect and preserve evidence of the war crimes and crimes against humanity committed in Syria have been instigated both by inter-governmental agencies and non-governmental organizations. These include, for example, the Joint Investigative Mechanism of the United Nations and the Organization for the Prohibition of Chemical Weapons (OPCW), tasked with identifying individuals and entities involved in the use of chemicals weapons in Syria, and the Syrian Accountability Project.

With a political impasse in the Security Council, the UN General Assembly stepped in on 21 December 2016 to pass Resolution 71/248, establishing 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 ("Mechanism").

The Terms of Reference for the Mechanism, published as an Annex to a Report of the UN Secretary General, were developed by the latter with the support of the Office of the United Nations High Commissioner for Human Rights, and published on 19 January 2017. They provide a general framework for the functioning of the Mechanism, but little more. Many questions remain unanswered and will hopefully be the subject of detailed regulation once the Mechanism becomes operational.

The purpose of this brief article is to describe the key characteristics of the Mechanism and how it will function. We also identify potential challenges arising out of the Mechanism's specific mandate.

The Mechanism Has No Authority To Prosecute

The Mechanism is not a tribunal. It does not have any authority to prosecute crimes. Rather, it is intended to collect and analyse available evidence, which will then be shared with national and international courts and tribunals. It will focus on the most serious crimes committed in Syria, namely genocide, crimes against humanity, and war crimes.

To fulfil its intermediary function between recent crimes and uncertain future prosecutions, the Mechanism's mandate is twofold. First, to collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights violations and abuses and, second, to prepare files in order to facilitate and expedite fair and independent criminal proceedings. It is this analysis of evidence and preparation of files according to criminal law standards that makes the Mechanism distinct from other fact-finding entities and unique in the international community. Moreover, it is purported to focus on evidence that establishes linkage, *mens rea*, and modes of criminal liability so that alleged crimes can be attributed to those responsible.

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The Mechanism is formally a subsidiary body established by the UN General Assembly and has the capacity to conclude agreements with States and other entities. It has a specific relationship with the Independent International Commission of Inquiry on the Syrian Arab Republic, which has already produced a number of reports on crimes committed in Syria. The mandates of the two are complementary. The Mechanism will focus on collection, preservation and analysis of evidence to be shared with national and international courts whereas the Commission publicly reports on its findings, focusing on recent incidents and broad patterns of violations and abuses. Unlike the Commission, which is a fact-finding body, the Mechanism will primarily build on information already collected by other entities, including the Commission.

The seat of the Mechanism will be in Geneva. It will be headed by a senior judge or prosecutor and staffed with experts in international criminal law, human rights law, forensic matters, witness and victim protection and a number of other relevant areas. It will initially rely on voluntary contributions, but the General Assembly has indicated it will revisit the funding scheme. Some Syrian organizations in a Memorandum following the establishment of the Mechanism, cautioned against the voluntary contributions system that could affect the impartiality and independence of the Mechanism if one or more sources provided disproportionate initial funding. To guard against improper influence, they proposed a 10% cap for individual donating states.

The Mechanism As a Central Receptacle For Evidence

The Mechanism is mandated to collect evidence and relevant information in two ways: 1) by receiving it from states, international and regional organizations, UN entities, non-governmental organizations, foundations and individuals or 2) by conducting its own collection missions. Sources can volunteer information or the Mechanism may request it. Although Resolution 71/248 calls upon states and other entities to cooperate with the Mechanism, such cooperation remains entirely voluntary.

Aiming to build a legally sound bridge between the evidence collection that occurred contemporaneously or shortly after the alleged criminal conduct and an eventual criminal prosecution, the Mechanism's most important function is arguably its commitment to "systematically record and preserve" all evidence, including witness testimony and forensic material, "in accordance with international criminal law standards." Such preservation will ensure a chain of custody record that increases the likelihood of the evidence being admissible in criminal proceedings. In this sense, the Mechanism is a central receptacle for evidence from a variety of disparate sources. The sources are then relieved of the burden of safeguarding this evidence until an uncertain future time when prosecutions may occur.

Following the collection, the Mechanism will organize the evidence in its possession and conduct analysis that will include the use of "advanced, state-of-the-art criminal investigative and prosecutorial software." The objective of the preparation of files that will follow is to establish the criminal conduct of those responsible for the crimes committed in Syria, regardless of the person's "affiliation or official capacity" and under various modes of criminal liability recognized under international law. The files will include both inculpatory and exculpatory information in the possession of the Mechanism.

Analysis of Evidence May be A Slippery Slope for a Non-Prosecutorial Entity

The collection and preservation of evidence are relatively straightforward, although the Mechanism's commitment to adhere to "international criminal law standards" assumes that such standards exist in a universally accepted form, when in reality they vary. In defining "international criminal law standards," the Mechanism must—to be successful in its mission—anticipate admissibility standards in a variety of jurisdictions, including national courts.

The analysis of evidence and preparation of files outside the context of a specific jurisdiction and legal framework may also prove challenging for the Mechanism. For example, the Terms of Reference specify that the Mechanism will assess reliability and probative value of the information, documentation and evidence as well as identify potential gaps. However, legal analysis of evidence can only be meaningful when done in the context of a specific jurisdiction, since the elements of crimes and rules of evidence differ across jurisdictions. It is the jurisdiction—and criminal charges available therein—that determines whether individuals can be held responsible for a crime and what

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evidence is necessary to establish culpability.

Analysis of evidentiary gaps that leads the Mechanism to discover and safeguard important evidence that might otherwise be lost is an important part of its function. However, analysis of evidence and the development of charges is also a key component of prosecutorial work. It is unlikely that a prosecutor in any jurisdiction would—or ethically could—rely on the analysis of the Mechanism without conducting independent analysis and assessment.

Sharing Evidence Could Be Complicated by Duplicate Sources and Prosecutions

As a final step, the Mechanism will share the analysed information and evidence with national, regional and international courts or tribunals that have, or may in the future have, jurisdiction over the most serious crimes. The Mechanism will not share information with jurisdictions where the death penalty would apply or with jurisdictions that do not respect international human rights law and standards, including the right to a fair trial. In such instances, if a request came, the Mechanism would have to reject it, although it is currently unclear by whom and how such a determination would be made.

At this stage, it is also impossible to predict whether the Mechanism will be the sole depository of collected evidence or whether the source entities will keep either original or duplicate of the evidence provided to the Mechanism. In case of the latter, these providers could end up sharing such evidence with jurisdictions, organizations, or even individuals at will and could—in cases where they retain the original or have unique information about the circumstances under which the evidence was collected—be considered superior to the Mechanism as a source. Multiple sources of the same evidence—especially in cases where the duplicate source is not maintained securely—could create issues of authenticity if one source is altered through neglect or tampering and used to cast doubt on the other. To prevent such issues, the Mechanism should endeavour to reach agreements with source providers about duplicate evidence in order to avoid manipulation and misuse and to promote consistent standards of disclosure.

Furthermore, whilst the current set-up limits the sharing of information and evidence to courts and tribunals, calls have been made for the sharing to be extended to truth-telling mechanisms, reparations programmes and missing-persons identification projects.

Another matter currently unregulated is whether the Mechanism will share the evidence and information contained in one case file with multiple jurisdictions, especially if several jurisdictions seek to contemporaneously try the same individual for the same conduct. In instances where evidence is subject to testing, the preservation of such evidence in quantity and quality to allow for future court-ordered testing—potentially in cases against multiple offenders in different jurisdictions—must also be considered.

Informed Consent and Witness Protection Are Laudable Goals with Pragmatic Difficulties

The Mechanism will seek to obtain what is termed “informed consent” from witnesses and other sources for it to share the information, documentation and evidence in its possession with courts and tribunals. Lack of consent does not appear to prevent the information from being shared; the Terms of Reference merely refer to such consent or lack thereof being “duly recorded”.

There are good reasons for latitude in requiring informed consent before sharing information. Such a requirement could severely impede the Mechanism, which is neither the first nor the last stop for the evidence. For one, the Mechanism will, in most cases, not be the original evidence collector. The evidence may have been obtained from the witness in question years ago and under adverse circumstances. Given the landscape of displacement in Syria, it may prove extremely difficult and in some cases impossible for the Mechanism to now contact these witnesses and obtain informed consent. Second, different evidence collectors who interacted with the witnesses likely engaged in diverse practices that range from no consent to consent policies that differ from the policy envisioned by the Mechanism, which may further complicate matters.

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We argue that the question of consent should rest with the parties that collected the evidence. If the evidence collector determines that the lack of consent is not an impediment to sharing the information with the Mechanism, then consent (or lack thereof) should not be an obstacle for the Mechanism sharing it with courts and tribunals conducting prosecutions. Individual courts or tribunals can then evaluate the importance of consent on their treatment of the evidence in accordance with their own rules of procedure and evidence. It seems an unnecessary step for the Mechanism itself to seek informed consent from witnesses when it cannot actually provide information about when and with what jurisdiction that information will be shared. If, however, the Mechanism itself makes contact with witnesses to address gaps in the evidence or attribute liability, then the consent by the Mechanism sought should be broad enough to include all scenarios under which the evidence could eventually be shared.

As a final point, we turn to the Mechanism purporting to have its own witness and victim protection unit. This is unusual for a fact-finding entity; witness protection units are generally attached to a prosecutorial or judicial body. The Terms of Reference do not elaborate on the scope of protection this unit will provide. General support and counselling services are not problematic, albeit they may require significant financial resources. More extensive protective measures, such as witness protection, are arguably more problematic and premature. Such protective measures would also necessarily rely on extensive cooperation from States for an uncertain time that would likely span years if not decades. In addition, such efforts could put witnesses in danger simply by singling them out. Like the concepts of case analysis and informed consent, witness protection evokes the function of a court or tribunal, and the practicality of their fulfilment may evoke an identity crisis that the Mechanism must seek to avoid.

Conclusion

The Mechanism is an important addition to the international justice landscape. If successful, it will provide a bridge between the contemporaneous collection of evidence and its use in trials that may take place years or even decades later. If unsuccessful, the Mechanism will be a limbo in which such evidence sits unused, providing the international community with excuses for continued procrastination in ensuring accountability for crimes committed in Syria.

In this brief overview, we identified three challenges ahead of the Mechanism, all arising out of its specific identity as a non-prosecutorial body. First, the Mechanism cannot predict where eventual prosecutions will occur and should therefore limit any analysis of evidence that extends beyond its non-prosecutorial mandate. Second, the Mechanism should endeavour to work with evidence providers to ensure the evidence duplication will not create issues for future prosecutions in terms of authenticity and disclosure. Finally, we suggest that the informed consent and witness protection aspects of the Mechanism arguably venture outside its mandate and should be implemented cautiously.

Disclaimer

The views expressed in this article are solely the authors' and do not necessarily reflect those of the Office of the Prosecutor or the International Criminal Court.

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