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A new path towards accountability?  
an Analysis of the IIIM for Syria

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## Summary

The conflict in the Syrian Arab Republic is ongoing since more than ten years, and there is no end in sight. The conflict is deemed to be the most documented conflict of all time. Despite the longevity of the conflict, there has been a lack of criminal accountability for the crimes committed. The international community has through the use of international criminal law attempted to refer the conflict to typical international criminal law entities such as the International Criminal Court. However, every attempt to do so have failed, mainly due to a blocking by the United Nations Security Council and the lack of consent from the Syrian Arab Republic. Out of desperation and because of limitations to pursue traditional forms of international criminal law methods, the United Nations General Assembly created *the International, Impartial 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* (IIIM). The IIIM is a fact-finding organ and its mandate is to collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights violations in accordance with international law standards. The IIIM shall assist in preparing material that can be used to facilitate and expediate fair and international criminal proceedings for entities that may have jurisdiction over the committed crimes.

This essay aims to shine a light on, how an organ such as the IIIM can pursue criminal accountability, especially when typical paths of international law fails to do so. The IIIM can work towards criminal accountability through the establishment of its archive, and its assistance to criminal judicial entities using universal jurisdictions. The IIIM has assisted criminal proceedings and states' use of universal jurisdiction in cases that have led to convictions of Syrian war criminals. Furthermore, it is not possible to determine to what extent the IIIM is able to pursue criminal accountability due to the confidential nature of the IIIM. However, this essay finds that the IIIM still can play an important role in bridging the accountability gap in the Syrian conflict.

## Sammanfattning

Konflikten i den Syrisk Arabiska Republiken började för mer än tio år sedan och ingen lösning är i sikte. Konflikten anses vara den mest dokumenterade konflikten någonsin. Trots att konflikten har pågått under en lång tid saknas det straffrättsligt ansvar för de begångna brotten. Det har gjorts försök, att genom användandet av internationell straffrätt hänvisa konflikten till den Internationella Brottmålsdomstolen. Detta har varje gång misslyckats, framför allt beroende på att Förenta Nationernas (FN) säkerhetsråd har blockerat förslagen eller på grund att den Syrisk Arabiska Republiken inte givit sitt samtycke. I desperation och på grund av brist på möjligheter att förlita sig på traditionella internationella straffrättsliga metoder skapade FN:s generalförsamling ”*the International, Impartial 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*” (IIIM). IIIM är ett organ som baserar sitt arbete på att söka fakta och dess uppgift är att samla, konsolidera, bevara, och analysera bevisning avseende brott mot internationell humanitär rätt och brott mot mänskliga rättigheter i enlighet med internationell rättslig standard. IIIMs uppgift är att förbereda material som kan användas för att förenkla och expediera rättvisa och hantera internationella straffrättsliga brottmål för organ som kan ha jurisdiktion över de begångna brotten.

Syftet med denna uppsats är att belysa hur ett organ såsom IIIM kan sträva mot straffrättsligt ansvar, även när det inte är möjligt via traditionell tillämpning av internationell rätt. IIIM kan arbeta för straffrättsligt ansvar genom att skapa arkiv och assistera organ som använder universell jurisdiktion. IIIM har assisterat i brottmålsutredningar och staters användande av universell jurisdiktion vilket har bidragit till att syriska krigsbrottslingar har kunnat dömas till straffansvar. Det är svårt att avgöra hur mycket IIIM har bidragit till detta på grund av den konfidentialitet som råder inom organisationen. Denna uppsats visar dock att IIIM ändå kan spela en viktig roll när det gäller att överbrygga ansvarsklyftan i konflikten i Syrien.

# Preface

The submission of this essay marks the end of my law degree. This essay could not have been completed without the support of my supervisor Alberto Rinaldi who was always there to answer any and all of my questions, provide valuable input and thoughtful discussions. I want give special thanks to my friends who made my time in Lund so special.

And lastly, to my family, thank you for everything.

Lovisa Kastensson

Stockholm, 24<sup>th</sup> of May 2023

# Abbreviations

CIJA	The Commission for International Justice and Accountability
CoI	United Nations International Commission of Inquiry on the Syrian Arab Republic
CSO	Civil Society Organisations
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
FFM	Fact-Finding Mission
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICL	International Criminal Law Myanmar
ICTR	International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994
ICTY	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
IIIM	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
IIM	Independent Investigative Mechanism for Myanmar
IT	Investigation and Identification Team
NGOs	Nongovernmental organisations
OPCW	The Organisation for the Prohibition of Chemical Weapons
R2P	Responsibility to Protect
R2R	Responsibility to Record
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN Charter	United Nations Charter
UNCHR	United Nations Commission for Human Rights

UNESCO	United Nations Educational, Scientific, and Cultural Organisation
UNHRC	United Nations Human Rights Council
UNITAD	Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
VSCA	Victim/Survivor Centred Approach



# 1 Introduction

## 1.1 Background

The conflict in Syria has overtime become the most documented conflict in human history. Already in the beginning of the Syrian uprising in the early 2010s the use of real time journalists, grass roots movements as well as citizen has with the use of smart phones manage to collect and spread videos and photos at a pace that has never been seen before.<sup>1</sup> Google has estimated that there are *“more hours of footage of the Syrian civil war on YouTube than there actually are hours of the war in real life.”*<sup>2</sup>

The armed conflict in the Syria Arab Republic has been ongoing since March 2011. The crisis has its root in the President Bashar al-Assad suppression of protests in 2011, that quickly became a country wide conflict that became characterized by various atrocities. There are mainly three campaigns that divides the conflict; violence between the Syrian government and opposition forces, coalition efforts to defeat the Islamic State, and military efforts against Syrian Kurds by Turkish forces.<sup>3</sup> The conflict has had large scale military hostilities as well as regional clashes between armed groups and Syrian government forces. It is believed that atrocities have been committed by the government, oppositions groups as well as third parties.<sup>4</sup>

In April 2011, the High Commissioner for United Nations Human Right Council (UNHRC) urged to *“dispatch urgently a mission to the Syrian Arab Republic to investigate all alleged violations of international human rights law and to establish the facts and circumstances of such violations and of the crimes perpetrated, with a view to avoiding impunity and ensuring full accountability”* and to later present their findings at the next session of the Council.<sup>5</sup> The Syrian authorities were encouraged to give the fifteen-member Fact-Finding Mission (FFM) assistance with witnesses, sources of information and freedom of movement throughout Syria. However, they received virtually no cooperation from the Syrian Arab Republic (worth noted that is not uncommon to receive no cooperation when bodies operate in a country without state consent). The regime did issue complaints regarding, in their view, made-up media reports, attested that through notes verbale that reforms were on their way, and responded in writing to questions asked by the FFM.<sup>6</sup>

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<sup>1</sup> Van Schaack, p. 340-345.

<sup>2</sup> Rosen (2018).

<sup>3</sup> Centre for Preventative Action (2023).

<sup>4</sup> Centre for Preventative Action (2023).

<sup>5</sup> Human Rights Council, Res S-17/1 (4 May 2011) U.N. Doc. A/HRC/S-16/1 para 7.

<sup>6</sup> Human Right Council, ‘Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in the Syrian Arab Republic’ (15 September

Almost twelve years later, the country remains divided, they have reached limited political progress, face massive economic hardships, and have the world's largest economic displacement and 70% of the population is in need of humanitarian aid.<sup>7</sup> The Office of the United Nations High Commissioner for Human Rights estimates that since the start of the conflict until 2021 that at minimum 580 000 people have been killed, among them over 305 000 are estimated to have been civilians.<sup>8</sup> Various independent bodies as well as UN organs and civil society have reported that human rights violations include the use of chemical weapons, arbitrary detention, torture, deaths in detention, forced disappearances, sexual and gender-based violations, deliberate or careless attacks against civilian and civilian structures such as hospital and schools.<sup>9</sup>

The global diffusion of new digital technologies, is changing human rights technology, documentation, methodologies, evidence generation and manipulations and its future impact on accountability efforts. The documentation efforts have so far catalogued almost every type of war crime and crimes against humanity that exist. The use of the collected data has a great potential of being transformed into admissible evidence, analytical information that can be used for lead and background purposes, transitional justice processes of truth-telling, vet/lustration, reparation, restitution, and institutional reform. The information gathered today can potentially be used years or decades into the future for justice and accountability purposes in the Syrian Arab Republic. The information that has been gathered have been used extraterritorially in domestic courts all over the world.

The possibilities of the usage of the collected information in the Syrian conflict have a great potential. The efforts to collect, gather and store information is led by nongovernmental organisations (NGOs), and ordinary citizens. Human right activists have been instrumental as it grew more and more difficult for United Nations (UN) representatives and foreign journalists to operate in the Syrian Arab Republic. As the information and the information environment tends and increases to be internet-based and digital it resulted in that human rights advocates have had to updated their authentication, analytical protocol assessing evidence, collection and storage. Additionally, NGOs are searching social media sites for open-sourced evidence and complete witness interview through online communications portals. This information is then typically processed through statistical analytical techniques, optical character recognition, software and securing its data in encrypted digital vaults. The collected evidence supports classic human right advocacy tools such as shaming and naming exercises, and the poignant testimonials from victims. While at the same time, the new ways of

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2011) UN Doc A(HRC/18/53 p. 3-4, 26-117.

<sup>7</sup> 'Security Council: 12 Years of War, Leaves 70 per Cent of Syrians Needing Aid' (2023).

<sup>8</sup> Global Centre for the Responsibility to Protect (2023).

<sup>9</sup> Varney and Zduńczyk (2020).

presenting evidence such as three-dimensional crime scene recreations, statistical analyses, detailed dossiers and proto-indictments on potential defendants for future prosecutions are being developed. Alongside NGOs efforts of mass collection of evidence are sovereign national security and foreign policy purposes. States may sometimes choose to declassify information for their own objectives, which ranges from the use of diplomatic pressure in order to ensure accountability, to enhance their own political strategies. In the middle, the multilateral sphere are multiple UN fact-finding efforts established such as United Nations International Commission of Inquiry on the Syrian Arab Republic (CoI). The UN fact-finding efforts are growing often with overlapping substantive mandates and the use of varying methodology.<sup>10</sup>

Every effort to create an international judicial body in the Syrian conflict was blocked. As a result, the United Nations General Assembly (UNGA) established the International, Impartial 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 (IIIM). The IIIM purpose is to document the Syrian conflict in order to pursue criminal accountability.

This essay will examine the IIIM ability to pursue criminal accountability in the light of the limits of international criminal law to engage in the Syrian conflict, through the establishment of an IIIM archive and investigate the possibilities of universal jurisdiction.

Throughout the essay *the International, Impartial 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* will be referred to as either the IIIM or the Mechanism.

## 1.2 Purpose and research question

In this thesis it will be discussed how a fact-finding organ can pursue paths for criminal accountability in a situation where international criminal law is unable to act. Thus, my research question for this thesis is:

*How can a fact-finding organ such as the IIIM work towards criminal accountability?*

To successfully answer my research question, it is necessary to 1) describe the IIIM and its function 2) describe why traditional international law have failed in the Syrian conflict, which resulted in the creation of the Mechanism and 3) discuss the Mechanism two paths towards accountability through - 4)

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<sup>10</sup> Van Schaack (2020) p. 340-346.

universal jurisdiction - 5) its archive 6) provide analysis of the Mechanism as whole 7) concluding thoughts.

### 1.3 Method, material, and limitations

This essay analyses the legal grounds, implementation and functions of the IIM for Syria. By doing so this paper will explore the field of international criminal law, archival studies, and transitional justice.

A legal dogmatic method provides a motivated description of established law by referencing established legal sources. This method, will in order to describe established law, interpret and systemise such law. The method will also account for the sources of law and its hierarchy. The legal dogmatic method will be complemented the legal analytical method, as it allows for the consideration of other sources than simply authoritative, sources that expand beyond traditional sources of law. A potential weakness with these methods is that the analysis has a subjective character.<sup>11</sup> Thus, these methods will allow for a legal analysis to legal justifications, objections, discussions and interpretation of various bodies of international law in relation to the IIM.

This essay will also apply an ethnographic lens. An ethnographic lens provides cross-cultural analysis, provides data and an interpretive analysis that provide an ‘insider perspective’. The examination of data in this analysis will consist of the interpretation of various actors. As Canfield argues ethnographers examine law in its social context.<sup>12</sup> The ethnographic lens, have been able to examine the archive in a social context and understand how the archival practices can be a tool or a hindrance in the IIM pursuit towards criminal accountability.

The essay will be characterised by an international perspective as it covers international law. Additionally, the international perspective also stems from the IIM mandate. The IIM mandate is limited geographically to the Syrian conflict, yet it tends to focus on the ‘international community’ by aiming to be bridge between countries and organisations.

This essay has relied on treaties, customary law, general principles of international law and legal doctrine. It has additionally used legal doctrine to interpret treaties, customary law, with the knowledge of its status as a secondary source.<sup>13</sup> Furthermore, this essay has used articles, books, essays, literature, and UN documents. This paper has referred to various journals discussing international criminal law, international law, the Syrian conflict, transitional justice and archive building. As there is a lack of public insight

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<sup>11</sup> Kleineman (2018) p. 21-46.

<sup>12</sup> Canfield (2021).

<sup>13</sup> Article 38 ICJ Statue.

into the IIIM, this essay has prioritised journals articles that have primary sources, such as interviews.

The fact that the IIIM was the first organ of its kind and was established recently (2016) has restricted this research. As a result, there is limited research on the IIIM, but also entities similar to the IIIM. For example, there is limited research on fact-finding organs created by the United Nations General Assembly, fact-finding organs that gather evidence to the highest evidentiary standard, entities that gather evidence to pursue criminal accountability without an impending trial and so on. At present there is little research done on the IIIM. The few articles that are discussing the IIIM; the majority of them are published before or just a year after the creation of the IIIM. Therefore, there is even less research that discusses the result of the creation of the IIIM. Furthermore, as result of this, this paper will at certain points compare and contrast similar mechanisms to the IIIM to stress a point. Specifically, the CIJA will be highlighted as they share many similarities.

This essay is also limited by the fact that the IIIM archive act under confidentiality and thus there is a secrecy regarding the IIIM archive and its assistance to the utilisation of universal jurisdiction (unless it is revealed by the receiving party, and so far, this has been done by very few).

## 1.4 Delimitations

This thesis strives to shine a light on the Mechanism. This paper purpose is to evaluate IIIM's opportunity to work towards criminal accountability through the establishment of an archive, and universal jurisdiction in the Syrian Conflict, despite the lack of support from international criminal law. It is not an essay that will discuss all potentials and limitations with international criminal law, international law, archive building or universal jurisdiction. This paper will not discuss nor provide 'solutions' the Syrian conflict. This essay has chosen to focus on the IIIM and not other fact-finding bodies due to paralysation of international criminal law in the Syrian conflict. The essay is centred on the Syrian conflict and the IIIM, however, it will sometimes compare and contrast other conflicts and other fact-finding missions in order to portray a larger picture.

Despite the wide application and interpretation of 'accountability'<sup>14</sup> in the interest of clarity. this essay will investigate criminal justice related accountability, such as individual and institutional criminal responsibility.

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<sup>14</sup> Devereux (2019) p. 393.

## 2 The IIIM

### 2.1 Establishment of the IIIM

The failure traditional international criminal law to ensure accountability in the Syrian conflict led to the creation of a new UN organ. The International, Impartial 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 (IIIM) was created through the United Nations General Assembly's resolution A/71/248 on the 21<sup>st</sup> of December 2016.

The organ was created as a direct consequence of the paralysis at the Security Council and strived to take the work of the CoI even further as a new quasi-prosecutorial initiative. The concept was first proposed by Liechtenstein and Qatar, in consultation with civil society organizations.<sup>15</sup> In its introduction of its proposed measure Liechtenstein stated:

*“The situation in Syria is the defining crisis of our time, both with respect to human suffering and to the inability of the Security Council to take effective action to address the unfolding humanitarian tragedy. Nothing illustrates the political paralysis in the Council more starkly than the repeated use of the veto in connection with moderate resolutions that pursue the primary goal of alleviating the suffering of the civilian population in the country. Since the referral of the situation to the International Criminal Court was vetoed in the Council more than two years ago, there has been no serious effort in the Council to ensure accountability and end impunity. It is therefore imperative that the General Assembly steps in and enables the international community to at least take one decisive step forward in this respect: to prepare files that can serve as the basis for criminal proceedings in a court or tribunal that may in the future be able to exercise jurisdiction.”<sup>16</sup>*

The draft was later co-sponsored by several states.<sup>17</sup> The result of the proposal was 105 in favour, 15 against<sup>18</sup> and 52 abstentions. Additionally, the Human

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<sup>15</sup> Van Schaack (2020) p. 366-367.

<sup>16</sup> Permanent Mission of the Principality of Liechtenstein to the United Nation: Statement by H.E. Ambassador Christian Wenaweser (Dec. 9, 2016).

<sup>17</sup> The following states were co-sponsors of the later draft: Albania, Andorra, Austria, Bahrain, Belgium, Botswana, Bulgaria, Canada, Costa Rica, Czech Republic, Denmark, Djibouti, Estonia, Finland, Georgia, Germany, Iceland, Ireland, Kuwait, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Maldives, Montenegro, Netherlands, Palau, Poland, Qatar, Saudi Arabia, Slovenia, Somalia, Sweden, Switzerland, Turkey, Ukraine, United Arab Emirates and Yemen; Boeglin (2017).

<sup>18</sup> Votes against: Algeria, Belarus, Bolivia, Burundi, China, Cuba, Democratic People's Republic of Korea, Iran, Kyrgyzstan, Nicaragua, Russian Federation, South Sudan, Syrian Arab Republic, Venezuela, and Zimbabwe.

Rights Council saw the creation of IIIM positively and encouraged state cooperation.<sup>19</sup>

## 2.2 The IIIM mandate

The General Assembly established and mandated the IIIM under the auspices of the United Nations 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”*<sup>20</sup>

This organ strived to be a new form of an accountability model and was initiated as a way to address the growing evidence of human rights violations being committed since the start of the Syrian conflict. The organ was mandated 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”*.<sup>21</sup>

Thus, outlining three overall aims; 1. Collect, consolidate, and preserve - .2. Analyse - 3. Share – the evidence of violations of international humanitarian law and human rights law.

The establishment of the IIIM was ground-breaking in many ways. The IIIM was established without the consent of the Syrian Arab Republic, which was seen as a historic first for the UNGA. Additionally, this was the first time that such a body has been tasked with investigations that must meet the prosecution's evidentiary standards, and as well serve as an evidence repository and connecting hub in the Syrian conflict as justice facilitator between many different (international and national) justice actors.<sup>22</sup> A significant aspect of the IIIM mandate is that it allows for the prosecution of all potential and possible crimes committed by all parties of the conflict according to prosecution standards. This differ from the previous UN-system and international criminal law.<sup>23</sup> The IIIM is also partially intended to serve as a clearinghouse of information produced by other organ such as the CoI,

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<sup>19</sup> Van Schaack (2020) p. 366-367.

<sup>20</sup> UNGA Res A/71/248 (11 January 2017).

<sup>21</sup> UNGA Res A/71/248 (11 January 2017).

<sup>22</sup> Pues (2022) p. 1208-1212.

<sup>23</sup> Pues (2022) p. 561-652.

NGOs and governments. At the same time the IIIM is a ‘only’ a proto-investigative team that gathers information, to further fill gaps and prepare files for future prosecutions before international, regional, hybrid or domestic court.<sup>24</sup>

As such, the IIIM will limit itself to focus its efforts to ensure accountability for “*crimes involving violations of international law, in particular international humanitarian law and international human rights law, some of which may constitute war crimes or crimes against humanity*”<sup>25</sup>.

The IIIM does not have prosecutorial powers as it is intended to: “*supports law enforcement agencies, investigative authorities, prosecutorial authorities, and judges that investigate, prosecute or try core international crimes committed in the Syrian Arab Republic since March 2011.*”<sup>26</sup> Thus the IIIM is not a prosecutor office nor a court and thus cannot issue indictments or run trials.<sup>27</sup> This has resulted in the IIIM being referred to as a “*a prosecutor without a tribunal*”<sup>28</sup>. The IIIM mandate is limited to pursue criminal accountability and will therefore not assist intelligence or immigration agencies, or cases that are only related to immigration or terrorism offences. Similarly, the IIIM does not provide assistance when the defendant is in absentia when a case is based on the universal jurisdiction. The IIIM mandate is not limited in time, despite its status as a temporary organ.<sup>29</sup>

It is important to discuss the IIIM funding as it was not without controversy at the Mechanism creation. Initially the Mechanism was dependent on voluntary financial contributions (around 14 million USD per year), not UN funding, as result of Russia intentional blocking of UN funds. Therefore, the Mechanism staff was forced to fundraise. Most of its funds were allocated from western/European states. This, at first, raised concerns about the impartiality of the Mechanism. However, as of 2020 the IIIM was included as a part of the UN Secretary General’s budget.<sup>30</sup>

### 2.3 Collaboration with third actors

The IIIM is not allowed to operate or investigate independently within the Syrian state border. This is due to its lack of consent from the Syrian Arab Republic and that the enforcement powers as stated Chapter 7 in the United Nations Charter (UN Charter), that would allow the Mechanism to operate,

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<sup>24</sup> Van Schaack (2020) p. 367.

<sup>25</sup> UNGA Res A/71/248 (11 January 2017).

<sup>26</sup> “Support to Jurisdiction”.

<sup>27</sup> “Support to Jurisdiction”.

<sup>28</sup> Reil (2017).

<sup>29</sup> “Support to Jurisdiction”.

<sup>30</sup> Poes (2022) p. 561-652.



have not been employed.<sup>31</sup> Therefore, the IIM is reliant on third actors, such as NGOs, independent organs or other states to complete investigations within the Syrian border.<sup>32</sup> The IIM collaboration with third actors, in particular, Syrian Civil society has been extraordinary. Third actors have played a crucial role in the IIM act of documenting and gathering evidence of violations of international humanitarian law to support and build the IIM Central Repository of Information and Evidence (its archive)<sup>33,34</sup> The IIM has also entered into an agreement with Syrian Civil Society Organisations, the so-called Lausanne Protocol. This protocol emphasis the efforts of the Syrian Actors and sets up an outline with overarching principles that shall guide the relationship between the IIM and Syrian Civil Society Organisations. The protocol also contains provisions regarding data and witness protection, regulations regarding consent from the NGO who provided the information before sharing it with other actors, transparency witness and victim support. The protocol is also intended to safeguard their agency in the process.<sup>35</sup> The IIM can also set up additional memoranda of understanding with an individual Syrian Civil Society Organisation if required or desired.

The UNGA have requested that all UN actors shall cooperate with the IIM, and respond to its requests. The IIM shall also develop tailored cooperation agreements when engaging with other UN actors and agencies. This is due to that the IIM must considers its restrictions and requirements that each organization has for its material. For example, the IIM has entered into a memorandum of understanding with the Independent International Commission of Inquiry on the Syrian Arab Republic (CoI).<sup>36</sup>

## 2.4 The IIM collection, consolidation, preservation and analysis of information

The IIM receives information and evidence from various sources such as States, international and regional organisations, UN bodies, individuals, media, Syrian civil society organisations (CSOs), and open sources. The gathering of information and evidence have been partially prohibited because of the COVID-19 pandemic which has made it more difficult to engage in field mission work.<sup>37</sup>

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<sup>31</sup> The IIM is not allowed to individually operate within the Syrian border without Consent from the Syrian Republic the Security Council decides so.

<sup>32</sup> Poes (2022) p. 561.

<sup>33</sup> From here and hereon after referred to as “archive”.

<sup>34</sup> ‘Civil Society’.

<sup>35</sup> Poes (2022) p. 561; IIM, Protocol of Cooperation between the International, Independent and Impartial Mechanism and Syrian Civil Society Organisations participating in the Lausanne Platform (2018).

<sup>36</sup> ‘UN & International Organisations’.

<sup>37</sup> UNGA ‘Report of the 77th Session of the International, Impartial and Independent

The IIIM strives to conduct its collection of evidence in accordance to its 'Structural Investigation'. In this case the 'Structural Investigation' refers to the IIIM methodology of the mapping of structures of power wielded by the parties to the conflict, relevant actors, mapping of overarching crimes patterns and at the same time consider the broader context in which these relevant events took place (such as the geopolitical landscape, political, economic, social, cultural and religious context, and the legislative and constitutional frameworks).<sup>38</sup>

By 2022 the IIIM had initiated 111 collection activities and continues to expand and enhance their central repository of information and evidence.<sup>39</sup>

One of the IIIM mandate is to preserve the information of serious committed crimes committed in the Syrian Arab Republic since March 2011. In order to accomplish this the IIIM has preservation facilities for large quantities of evidence in multiple formats. The preservations facilities range from archive rooms, vaults, and digital preservation. The evidence and potential evidence is preserved to an evidentiary standard that is compliant with the highest of requirements of international law and the laws of evidence in the jurisdictions cooperating with the IIIM. In order to guarantee the safeguarding of the evidence, the IIIM has invested in information protection and cyber security. Its officers collaborate closely with their counterparts in the UN Office in Geneva and the Secretariat's Office of Information and Communications Technology, as well as industry-leading private sector service providers. Additionally, the IIIM claims to follow a holistic approach to information governance, which in this context means that the technical tools used along with the customized processes, procedures and workflows are in line with international information security standards.<sup>40</sup>

Once the evidence has been collected and preserved, the information in the archive will be available to IIIM legal officers, analysts and investigators. Thereafter, the evidence workers use various methods and tools to extract the information depending on the sources. The most common processes to work with digital information entails extracting layers of text from scanned documents or imagery in several languages and of various qualities. It also includes extracting additional information from digital materials for example non-text files, videos and images. The processing also includes searches for

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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 (16 February 2023) UN Doc A/77/751.

<sup>38</sup> 'Glossary'.

<sup>39</sup> UNGA 'Report of the 77th Session of 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 (16 February 2023) UN Doc A/77/751.

<sup>40</sup> 'Information & Evidence Management'.

duplication of evidence and information in the IIIM portal. These steps are taken to make it easier for legal officers, and analysts to find the material and, as a result, to make it easier for them to find the relevant information.<sup>41</sup>

Once the evidence has been processed it is contained within the IIIM Central Repository. Every piece of evidence is stored digitally in a centralized database. The database allows investigators, analysts and legal officers to search the Repository and annotate its contents. The material contains links and cross-referencing to other records in the Repository to both coordinate and establish patterns of recognition. Also, the Evidence officers strives to automate a big part of the triaging process such as using automatic machine translation, and then build a tool that examines the quality of those translations, and flag those documents that have inadequate translations. A process like this saves the IIIM time and resources, but can also create problems.<sup>42</sup> In order to further automatise the processes the IIIM is working together with the Connected Civil Society project of Benetech, a non-profit organization that develop software solution and other technology to use machine learning to analyse and organize open-source data from the Syrian conflict.<sup>43</sup>

According to their own report the IIIM “*represents one of the first uses of technology assisted review within international criminal law*”.<sup>44</sup>

## 2.5 The IIIM in comparison to traditional United Nations organs

The Mechanism changes the focus on accountability from the United Nations Security Council (UNSC) to the General Assembly. The IIIM was created by the UNGA, whereas previously accountability organs have been created by the UNSC.<sup>45</sup> Typically, the UNSC has served as the creator of international criminal justice bodies such as the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY), and the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December

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<sup>41</sup> ‘Information & Evidence Management’.

<sup>42</sup> ‘Information & Evidence Management’.

<sup>43</sup> Van Schaack (2020) p. 371.

<sup>44</sup> UNGA ‘Report of 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 (13 August 2020) UN Doc A/75/311, 13 August 2020 para 38; ‘Information & Evidence Management’.

<sup>45</sup> Pues (2022) p. 567-568.

1994 (ICTR). The UNSC was able to do so due to its Chapter VII UN Charter enforcement powers. These powers were awarded the UNSC at the establishment of the ICC through the Rome statute which allows the UNSC to confer jurisdiction even when there is a lack of state consent.<sup>46</sup> This happened in the Libya conflict in 2011. While the UNSC's involvement in Libya shows a responsiveness to human right challenges, the focus was on 'peace and security' rather than pursuing victims' rights.<sup>47</sup> At contrast, the UNGA has tended to focus on investigating criminal accountability by assisting UNSC mandates through, fact-finding missions. As a result of the UNSC paralysis in regards to the Syrian conflict the UNGA took however an active role in supporting international criminal justice initiatives, resulting in the creation of IIIM.<sup>48</sup>

It is not new that the UN system has established a fact-finding investigative mission. In fact, establishing fact-finding missions have been a repeated practice by the UNGA. The General Assembly established a fact-finding mission to South Vietnam 1963, an inquiry into the massacres in Mozambique 1973, appointed experts to consider the existing evidence and propose additional measures of strengthening democracy, individual accountability, and bring about national reconciliation in Cambodia 1998, and an investigative team for Afghanistan in 1999. By analysing the UN charter and UN practice together, the UNGA's establishment of such a body is not disputed by itself.<sup>49 50</sup>

What is different from traditional human rights fact-finding bodies created by UNGA and other subsidiary organs is that the Mechanism's mandate is closely tied to analysis and collection of materials as to invoke individual criminal responsibility in future criminal trials in both domestic and international courts.<sup>51</sup> Additionally, the work of the Mechanism is classified with the purpose of ensuring that its partners and staff and that the integrity of current and future criminal trials is safe, therefore differs from other fact-finding missions have prioritized transparency and openness. The Mechanism only produces two publicly available reports to the UNGA each year, which as in contrast the CoI shall report publicly, on all aspects of its work. Also, the degree to which NGOs and civil actors are recognized and utilized is never heard of in public international criminal justice institutions.<sup>52</sup>

## 2.6 The coordinating role of the IIIM

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<sup>46</sup> Burgis-Kasthala (2021) p. 1199.

<sup>47</sup> Burgis-Kasthala (2021) p. 1199-1120.

<sup>48</sup> Burgis-Kasthala (2021) p. 1199-1120.

<sup>49</sup> A further analysis of this will commence under the heading 'international law' in this paper.

<sup>50</sup> Poes (2022) p.567-568.

<sup>51</sup> Burgis-Kasthala (2021) p. 1199-1120.

<sup>52</sup> Burgis-Kasthala (2021) p 1199-1120.

The IIIM is attempting to position itself as bridge between various actors and act as a central repository for the collected material.<sup>53</sup> As stated in one of the IIIM reports:

*“The Mechanism has provided preservation and evidence-processing services to organizations that, in some cases, lack the resources, technology or capacity to preserve evidence to the required legal standards. These activities complement, rather than replace, the efforts of civil society and other stakeholders.”*<sup>54</sup>

In the Syrian conflict different international actors have been involved in documenting human rights violations with the purpose of supporting future transitional justice processes. Several important bodies have been created over the years, bodies that have become increasingly aligned and coordinated, with often overlapping mandates. These include the Independent International Commission of Inquiry on the Syrian Arab Republic (COI), The organization of Chemical Weapons (OPCW) that in turn set up a Fact-Finding Mission (FFM) and the Investigation and Identification Team (IT), the Commission for International Justice and Accountability (CIJA), and several Syrian Civil Society Organisations (CSOs). The different mentioned organs both have different and overlapping mandates, and they are both privately and publicly founded.

IIIM's potential to position itself in a coordinating role stems from its impressive resources, technological capabilities and support from the United Nations. One of the aims of an investigative mechanism is to be able to engage with a multitude of different actors who are documenting and prosecuting crimes committed in Syria. These actors may have biases and can loosely be described as connected in a web of interrelations. Having the IIIM as an institution at the core of networks can be free from political influence and biases. The IIIM independence from states can in an ideal world ensure that the investigations are impartial and free from political agendas.<sup>55</sup>

## 2.7 The IIIM Victim/Survivor centred approach

Already at the time of its founding, the IIIM adopted a Victim/Survivor Centred Approach (VSCA) whose aim is to ensure inclusive justice in its accountability processes. The VSCA is intended to act as a the IIIM thematic strategies for inclusive justice. The VSCA is acknowledged in the IIIM Terms of Reference. It states that IIIM shall pay attention to gender-based crimes, and crimes committed against children. This is due to that IIIM strives to

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<sup>53</sup> Burgis-Kasthala (2021) p. 1204.

<sup>54</sup> UNGA' Report of 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' (13 February 2019) UN Doc A/73/741 para. 19.

<sup>55</sup> Burgis-Kasthala (2021) p. 1204-1205.

investigate survivors/victims that are at a disadvantage due to causes such as gender constructions, and age.<sup>56</sup>

Thus, the IIIM has attempted to connect to its broader Syrian constituency.<sup>57</sup> In order to do so it has, as mentioned previously, the IIIM has entered into memoranda of understanding with CSOs. Additionally, it has in 2021 attempted to host a virtual meeting to spread information about the Mechanism's work in Syria and encourage engagement.<sup>58</sup> Despite, the attempt of the IIIM to include the Syrian public in its work, it is not clear how it can reach out and make ordinary Syrians participate in the Mechanism tasks.<sup>59</sup>

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<sup>56</sup> 'Victim/Survivor Centred Approach'.

<sup>57</sup> Those who arguably the archive is intended for.

<sup>58</sup> IIIM 'Bulletin No. 5, February 2021' (February 2021).

<sup>59</sup> Burgis-Kasthala (2021) p. 1214.

## 3 International criminal law

### 3.1 International criminal law fails Syria

In previous conflicts accountability has often been pursued through international criminal law (ICL). International criminal law has as a field developed after the end of World War II, specifically with the Nuremberg trials. The international community has been a cornerstone in the growth of international criminal law. International criminal law is dependent on the engagement of state, multilateral organisations (such as the UN) and state consent through ratifications of treaties.

Already at the start of the Syrian conflict, the international community attempted to be an active participant in the conflict. However, it has proved difficult for the international community to pursue traditional ICL mechanisms. Typical paths to justice such as ad hoc courts/prosecution entities, tribunals and referrals to the International Criminal Court (ICC) have all been blocked. This was due to the fact that the Syrian Arab Republic has not ratified the Rome Statute, the lack of consent from the Syrian state and by vetoes made by permanent members of the UN Security Council. In other words, the Syrian Conflict has highlighted the shortcomings of international criminal law.<sup>60</sup>

#### 3.1.1 Failure of referring the Syrian conflict to the International Criminal Court

There have been several attempts to refer the conflict to the ICC. There are four different ways the ICC can receive jurisdiction over a conflict.<sup>61</sup>

1. The state has ratified the jurisdiction of the ICC or the crime was committed in the territory of a state party or by a state party,
2. Voluntary ad hoc referral by a state (that is not a party to the Rome statute),
3. The ICC prosecutor may initiate an investigation proprio motu, or
4. Through a UN Security Council referral.<sup>62</sup>

Neither of these options have been possible in the Syrian conflict.<sup>63</sup> Firstly, Syria is not a state party to the ICC statute and thus the ICC has not been able to exercise jurisdiction *ratione loci* (jurisdiction on a territorial basis) and

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<sup>60</sup> Schantli (2021) p. 309-315.

<sup>61</sup> Schantli (2021) p. 309-315.

<sup>62</sup> Article 12 and 13 Rome statute; Schantli (2021) p. 309-315.

<sup>63</sup> Schantli (2021) p. 309-315.

jurisdiction *ratione personae* (the active nationality) has been rejected as many high-ranking Syrian officials have been accused of committing international crimes.<sup>64</sup> Secondly, Syrian authorities have chosen to decline to willingly accept the jurisdiction of the court (the *ad hoc* jurisdiction). Thirdly, the ICC Prosecutor has declined a request to initiate an investigation *proprio motu* of war and humanity crimes.<sup>65</sup> The prosecutor believed that the responsibility of bringing perpetrators to justice were the national authorities.<sup>66</sup>

Fourthly, it has not been possible to achieve a UN Security Council referral due to vetoes made by the permanent members of UNSC. There have been attempts to refer the conflict to the ICC through a UN Security Council referral. On 22<sup>nd</sup> of May 2014 China and Russia vetoed a draft of a UN Security Council resolution of referring the situation in Syria since March of 2011 to the ICC Prosecutor.<sup>67</sup> The states were then publicly and broadly condemned for enabling impunity.<sup>68</sup> The refusal of referral of the conflict to the ICC was not unexpected as Russia has throughout time been one of the Assad regime's strongest allies and China has consistently been opposed to any real and perceived erosion of sovereign equality and non-intervention principles.<sup>69</sup> This was later followed by additional UNSC vetoes, as by the end of December 2016 China had vetoed five and Russia six draft resolutions concerning the Syrian conflict.<sup>70</sup> It is important to note that previous referrals have only been possible when no permanent member of the UN Security Council has had any vital interest in the situation.

Moreover, even if the conflict were to be referred to the ICC, it would most likely include limitation clauses that would exclude citizens of non-state parties from the Court's jurisdiction and reiterate that non-state parties have no obligation to cooperate with the Court. Thus, if the Syrian conflict ever were to be referred to the ICC, the clause would exclude and exempt e.g., Americans and Russian nationals from being prosecuted before the court. Clearly, demonstrating the selective manner the ICC may bring about, and thus subsequently undermines the legitimacy of the ICC.<sup>71</sup>

### 3.1.2 Failure to pursue other paths of accountability

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<sup>64</sup> Sweeney (2019) p. 1083-1115.

<sup>65</sup> Sweeney (2019) p. 1084-1089.

<sup>66</sup> The Syrian Arab Republic have been unwilling to prosecute their national perpetrators for their alleged war crimes.

<sup>67</sup> Draft UNSC Res. 348 (22 May 2014).

<sup>68</sup> UNSC, Verbatim Record of the 7180th meeting of the UN Security Council, (22 May 2014) UN Doc. S/PV.7180.

<sup>69</sup> Sweeney (2019) p. 1088.

<sup>70</sup> Poes (2022) p. 564.

<sup>71</sup> Sweeney (2019) p. 1096-1090).



It has proven difficult to pursue other forms of typical accountability processes in the Syrian conflict. This is due to that in order to set up ad hoc, international criminal tribunals, hybrid courts, tribunal there is a need that the UNSC sets up such a court, or that the relevant country itself gives consent to the UN to do so.<sup>72</sup> The Security Council has at several times created subsidiary organs which have included international tribunals concerned with the criminal accountability for crimes under international humanitarian law or have assisted governments, when asked to do so, in investigations and prosecutions. The Security Council is through article 41 UN Charter granted the authority to create methods and procedures to enforce its decision. Examples of such organs is the ICTY, ICTR, and the International Residual Mechanism for Criminal Tribunals.<sup>73</sup> However, such suggestions have not been possible due to the lack of political will from the Security Council and the Syrian Arab Republic.<sup>74</sup>

There has been a debate if another organ, more specifically, the UNGA, could initiate an international criminal tribunal. However, at present the UNGA does not have the power to create an international tribunal. The UNGA can according to the article 22 of the UN Charter “*establish such subsidiary organs as it deems necessary for the performance of its functions*”.<sup>75</sup> The precise limits of the article are unclear; however, the general consensus tend to agree that the provision merely grant the General Assembly power to create subsidiary organ that have the same power as the General Assembly enjoys as well.<sup>76</sup> Furthermore, the UNGA does not have the power to create judicial organs, thus UNGA’s power to create subsidiary bodies does not include the creation of judicial bodies.<sup>77</sup>

### 3.1.3 One small but notable success of international collaboration

One notable exception to the inaction of international community in the Syrian conflict is the establishment of a Joint Investigative Mechanism between the Organisation for the Prohibition of Chemical Weapons (OPCW).<sup>78</sup> The UN Security Council stated: “*its determination to identify those responsible [...] and reiterates that those individuals, entities, groups, or governments responsible for any use of chemicals as weapons, including*

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<sup>72</sup> Compare, the International Criminal Tribunal for former Yugoslavia, the International Criminal Tribunal for Rwanda, ICC, the Extraordinary Chambers in the courts of Cambodia, the Special Tribunal for Lebanon, the Special Court and the Residual Special Court for Sierra Leone, the United Nations Mechanism for Criminal Tribunals; ‘International and Hybrid Criminal Courts and Tribunals’.

<sup>73</sup> ‘International and Hybrid Criminal Courts and Tribunals’.

<sup>74</sup> ‘International Tribunals’.

<sup>75</sup> Article 22 UN Charter.

<sup>76</sup> Jinks (2014).

<sup>77</sup> Jinks (2014).

<sup>78</sup> Pues (2022) p. 565.

*chlorine or any other toxic chemical, must be held accountable*".<sup>79</sup> Already by October 2016 the Joint Mechanism had been able to confirm rumours that chemical weapons had been used in the conflict. The Joint Mechanism was able to broadly identify the responsibility of chemical attacks to Syrian government forces, and ISIS, however, it struggled to identify individual perpetrators and their chain of command.<sup>80</sup> Furthermore, despite these findings the Security Council did not renew the Joint Mechanism mandate due to a blocking by Russia and Bolivia.<sup>81</sup> The OPCW demonstrates that when there is political incentives to engage in the Syrian conflict, international law and principles allows for international action.

## 3.2 Objections against the creation of the IIIM

### 3.2.1 Reflections on the United Nations General Assembly's ability to create the IIIM

Opponents of the establishment of the IIIM were critical of the General Assembly's power to establish such an organ. The Russian Federation argued that:

*"In deciding to create a "mechanism" with these functions, the General Assembly acted ultra vires — going beyond its powers as specified in Articles 10-12 and 22 of the Charter of the United Nations, and also in violation of the Charter provisions on the division of powers between the principal organs of the United Nations."*<sup>82</sup>

It is not clearly stated in the UNGA Res A/71/248 what the legal basis for the creation of the IIIM were. However, it is straightforward to infer that the UNGA does have the power to create a fact-finding body such as the IIIM.<sup>83</sup> The article 10 of the UN Charter allows the UNGA power to "*discuss*" and issue "*recommendation(s)*" regarding "*any questions or matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter*".<sup>84</sup> Additionally, article 22 of the UN Charter grants the UNGA to establish a subsidiary organ when it is needed for the UNGA to perform their obligations. It seems unproblematic to

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<sup>79</sup> UNSC Res 2235 'Establishment of an OPCW-UN Joint Investigative Mechanism to Identify the Use of Chemical Weapons in the Syrian Arab Republic' (7 August 2015) para 4.

<sup>80</sup> Poes (2022) p. 565.

<sup>81</sup> UNSC Meetings Coverage 'Security Council Fails to Renew Mandate of Joint Investigative Mechanism on Chemical Weapons Use in Syria, as Permanent Member Casts Veto' (24 October 2017) UN Doc SC/13040.

<sup>82</sup> UNGA 'Note Verbale dated 8 February 2017 from the Permanent Mission of the Russian Federation to the United Nations addressed to the Secretary-General' (14 February 2017) UN Doc. A/71/793 p. 1.

<sup>83</sup> Whiting (2017) p. 230-233.

<sup>84</sup> Article 10 UN Charter.

claim that the IIIM is a subsidiary organ that will assist the UNGA by collecting and presenting evidence of international crimes that will inform the UNGA to have and make informed discussions and recommendations.

Additionally, another argument for legality behind the establishment of the Mechanism can be inferred through the recognized authority of the Secretary General.<sup>85</sup> The Secretary General is according to article 99 UN Charter allowed to " ...bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security".<sup>86</sup> The practice to do so have been established by the General Assembly, in its 'Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security'.<sup>87</sup> At the time the Secretary General did in fact argue that the Resolution could be adopted by referencing the UNGA's residual right to maintain international peace and security. The votes had an 87.5% voting margin, which is within the two thirds (approximately 66.67%) voting margin that is needed in order to issue UNGA recommendations within the respect of international peace and security.

Another concern that was brought up by states such as Algeria, Iran, South Africa, Cuba, Venezuela, Russia, Iran and Syria was if the UNGA could issue recommendations in relation to a situation that the Security Council is actively working on.<sup>88</sup> This concern stemmed from article 12(1) UN Charter which states that when the Security Council is: "*exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.*"<sup>89</sup> The Secretary General of UNGA responded that:

*"Article 12 does not prevent the General Assembly from generally considering, discussing and making recommendation on items that are on the agenda of the Security Council, in particular when the item before the Council and the Assembly are not identical. I would also like to clarify that the words 'is exercising' in Article 12 have consistently been interpreted as meaning exercising at this moment, and consequently the Assembly has made recommendations on matters that the Security Council was also considering. The accepted practice of the General Assembly to consider, in parallel with the Security Council, the same matter concerning the maintenance of*

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<sup>85</sup> Whiting (2017) p. 230-233.

<sup>86</sup> Article 99 UN Charter.

<sup>87</sup> UNGA 'Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security' (9 December 1991) UN Doc. A/RES/46/59.

<sup>88</sup> Whiting (2017) p. 230-233.

<sup>89</sup> Article 12(1) UN Charter.

*international peace and security has also been noted by the International Court of Justice in its advisory opinion of 2004”.*<sup>90</sup>

It was also questioned if the UNGA would infringe on the Security Council’s primary responsibility for the maintenance of international peace and security.<sup>91</sup> However, to what extent and what authority this responsibility has is continuously contested and will consequently become a discussion regarding article 12 and 24 of the UN Charter. Article 24 appoint the primary responsibility to the UN Security Council for the maintenance of peace and security. The Syrian representative argued that the UNSC shall have the primary responsibility as according to article 12.<sup>92</sup> However, with the support of article 22 UN Charter the UNGA is equipped with powers to established any subsidiary organ necessary to perform its functions, and in addition can recommend measures for the peaceful adjustment of any situation as provided in article 14 UN Charter. By viewing UN practice and Charter together the UNGA ability of establishing an investigative body is not disputed.<sup>93</sup> It is therefore clear that the UNGA bears a responsibility for the maintenance of international peace and security. Furthermore, the ‘Uniting for Peace’ General Assembly Resolution 377A(v) of 3 November 1950, triggered a gradual normative development of the General Assembly position as a security actor. This development and evolution of the General Assembly’s role was acknowledged by the ICC during the advisory opinion “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory”:

*”[...] under Article 24 of the Charter, the Security Council has ‘primary responsibility for the maintenance of international peace and security’ and that both the Security Council and the General Assembly initially interpreted and applied Article 12 to the effect that the Assembly could not make a recommendation on a question concerning the maintenance of international peace and security while the matter remained on the Council’s agenda, but that this interpretation of Article 12 has evolved subsequently. The Court takes note of ... an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security. The Court considers that the accepted practice of the Assembly, as it has evolved, is consistent with Article 12, paragraph 1; it is accordingly of the view that the General Assembly,[...] seeking an advisory opinion from the Court, did not contravene the provisions of Article 12, paragraph 1, of the Charter. The*

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<sup>90</sup> UNGA, ‘66<sup>th</sup> Plenary Meeting’ (21 December 2016) UN Doc A/71/PV.66 p. 28-29.

<sup>91</sup> Article 1(1) UN Charter.

<sup>92</sup> Pues (2022) p. 563-565.

<sup>93</sup> Pues (2022) p 568.

*Court concludes that by submitting that request the General Assembly did not exceed its competence.*<sup>94</sup>

Thus, it seems plain to establish that UNGA did in fact have legal authority to create the IIIM.

**3.2.2 Concerns regarding prosecutorial character of the IIIM**  
Another objection that was made against the establishment of the IIIM was that the UNGA did not have the authority to establish a prosecutorial body. The leading opponent of Resolution A/71/278, Russia, argued that the UNGA does not have the power to establish a prosecutorial body, especially when an affected state did not consent to such. Russia submitted a note verbal to the UN Secretary General arguing that the UNGA could not assign powers to a mechanism that did not hold itself accountable arguing that:

*” A number of powers vested in the “mechanism” under resolution 71/248, including those of “analys[ing] evidence” and “prepar[ing] files”, are prosecutorial in nature. However, prosecutions, criminal investigations and support of criminal investigations are not among the functions of the General Assembly. It cannot create an organ that has more powers than the Assembly itself”<sup>95</sup>.*

The issue that arose was if the Mechanism’s new standard of investigations, that would allow the IIIM to compile individual cases and produce evidence and could be used in international as well as domestic cases, would be seen as a prosecutorial power of a prosecutorial body. As previously established, the UNGA is within their right to establish fact-findings bodies and it is correct to argue that UNGA cannot establish prosecutorial bodies. However, far from every investigative mechanism is a prosecutorial body. Although, one cannot neglect that the IIIM has not been endowed with prosecutorial power, *Stricto sensu*. The IIIM seek to gather evidence of prosecutorial standard and aim to facilitate prosecutions. The IIIM does not have a direct access to a forum for prosecution nor can it prosecute. The IIIM shall merely fulfil the prosecutorial standards when collecting and analysing evidence. The IIIM will make it easier to facilitate prosecutions but cannot provide justice as such. As Whiting said *“the Mechanism is a fact-finding body that will adhere to a criminal law standard when collecting and analysing evidence.”*<sup>96</sup> Simply, the IIIM is as close as to being a prosecutorial power,

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<sup>94</sup> ICJ ‘Advisory opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian ( 9 July 2004) paras. 13–42.

<sup>95</sup> UNGA ‘Note Verbale dated 8 February 2017 from the Permanent Mission of the Russian Federation to the United Nations addressed to the Secretary-General’ (14 February 2017) UN Doc. A/71/793.

<sup>96</sup> Whiting (2017) p. 231, 234.

as is allowed by the current international criminal system, and is intended to bridge the gap of impunity caused by UN Security council inaction.<sup>97</sup>

Therefore, the Russian argument in this case is incorrect as the powers of the Mechanism are not prosecutorial, it merely is a prosecutorial body in the sense that it shall respect the standards of a prosecutorial organ when it is collecting and gathering evidence.<sup>98</sup>

### 3.2.3 Evaluation of the relationship between documentation gathering and state sovereignty

Syria continues to question the legitimacy of the Mechanism. The Syrian representative to the UN stated during the International Mechanism Head's, Catherine Marchi-Uhel, address to the General Assembly seventy-seventh session April 25<sup>th</sup> 2023 that the Mechanism was simply an attempt by the western countries to “*target the Syrian State and nothing more*” and use international justice as a tool of political pressure.<sup>99</sup> The representative argued that the Syrian Arab Republic is and have proven to be “*more than capable*”<sup>100</sup> of exercising its own judicial and legal bodies and therefore able to deliver justice and supporting reconciliation. The representative also stressed that it would be better if the Organisation (referring to the UN) provided support to the national efforts, in particular the area of capacity building.<sup>101</sup> Additionally, at the General Assembly session the Democratic People's Republic of Korea, China, the Russian Federation, and Iran echoed the Syrian sentiments arguing that the Mechanism is illegitimate (a violation of the Charter, and international principles), infringement on the Syrian national legal system, and a Western political instrument. Thus, arguing that the Mechanism imposes on the Syrian Arab Republic and the concept of state sovereignty.

Intervention within another state's border is subject to legal constraint. Article 2(4) UN Charter states that “*All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations.*”<sup>102</sup> However, there are exceptions to this

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<sup>97</sup> Whiting (2017) p. 230-233.

<sup>98</sup> Whiting (2017) p. 230-233.

<sup>99</sup> UNGA, ‘Briefing General Assembly on Judicial Activities, International Mechanism Head Stresses Predictable Financing Needed in Bringing Justice to Syria's Victims’ (25 April 2023) UN Doc GA/12499.

<sup>100</sup> UNGA, ‘Briefing General Assembly on Judicial Activities, International Mechanism Head Stresses Predictable Financing Needed in Bringing Justice to Syria's Victims’ (25 April 2023) UN Doc GA/12499.

<sup>101</sup> UNGA, ‘Briefing General Assembly on Judicial Activities, International Mechanism Head Stresses Predictable Financing Needed in Bringing Justice to Syria's Victims’ (25 April 2023) UN Doc GA/12499.

<sup>102</sup> Article 2(4) UN Charter.

rule. The Responsibility to Protect (R2P) principle allows intervention and thus infringements on another state's sovereignty during certain circumstances. R2P is a "a political commitment to end the worst forms of violence and persecution. It seeks to narrow the gap between Member States' pre-existing obligations under international humanitarian and human rights law and the reality faced by populations at risk of genocide, war crimes, ethnic cleansing and crimes against humanity."<sup>103</sup> Specifically, R2P is intended to assist the international community into taking collective responsibility. The R2P have reconstructed the Westphalian understanding of sovereignty, arguing that sovereignty shall be seen as responsibility, rather than a power of people in a certain area. The R2P have three foci (pillars), 1) State has a responsibility to protect its own citizens against atrocity, 2) states have a responsibility to protect citizens outside their borders against atrocities, 3) when a host state fails to do so, the international community must intervene. It can be simplified as a responsibility to prevent atrocity, responsibility to react when an atrocity occurs, and a responsibility to rebuild after intervention takes place. R2P is a principle that shall be an avenue of soft power, and intervention shall be seen as a last resort.<sup>104</sup> Forceful intervention on the basis of R2P is only possible through a decision from the UNSC<sup>105</sup>, and must be in accordance of the Charter. However, there is a discussion in the international community if the third pillar of R2P allows for a humanitarian intervention, especially when a state commit human rights violations towards its own people. In those cases, should states work within the legal framework as it is today, or should actions outside it be explored<sup>106</sup>; international law and norms do not provide a definitive answer.

Therefore, one must question if the IIIM mandate to collect, consolidate, preserve, analyse and share information/evidence violates Syrian sovereignty. The IIIM is not allowed to engage within the Syrian Arab Republic due to the lack of consent from the state. The IIIM therefore has its seat in Geneva and rely on third actors to procure first hand evidence and documentation. The Mechanism does however, gather evidence and information that point out Syrian perpetrators and documents Syrian war crimes. It must be questioned if the Mechanism is allowed to perform these activities and is it allowed to store the information? Archivists and the act of archiving is not neutral. There has been a political ethos belief that archivist potentially disrupts the 'inalienability' which "*posit that records generated by the state or governmental institutions rightfully belong in the custody of state-operated*

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<sup>103</sup> 'Responsibility to Protect'.

<sup>104</sup> Sarkin and Capazorio (2022) p. 504 -506.

<sup>105</sup> As article 39 and 42 UN Charter allows the use of force under the authorization of UNSC.

<sup>106</sup> Sarkin and Capazorio (2022) p. 504.

*governmental archives*".<sup>107</sup> In an anonymized interview a CIJA senior lawyer working on Syria with several years' experience from the ICTY states that:

*"Now, the big million-dollar question is, well what about the sovereignty of the state involved? And my argument would be that where a government has so thoroughly and egregiously failed to fulfil its duty to its own citizens, i.e. where it committed crimes against humanity against its own citizens, then that government's claim to some kind of state sovereignty argument preventing those documents from being taken outside that country, in order to uncover the truth and accountability, that should be taken into account, that State sovereignty cannot act as some kind of trump. . . the governments of those states have lost the legitimacy to argue the state sovereignty argument."*<sup>108</sup>

This stance is known as a Responsibility to Record (R2R). The Responsibility to record is seen as to build on the Responsibility to Protect (R2P). The senior lawyer also argues that Syria has failed to protect their citizens against atrocities (thus pillar 1 of the R2P), and as a result the state shall lose its right to state sovereignty.<sup>109</sup> Similarly, the OHCHR submitted a report that argued for the need that states preserve all government records and set up mechanism to manage the information in conflicts.<sup>110</sup> This discussion brings up several difficult questions that do not have an answer.; when and how can state abuses can be challenged.

As the IIIM continues to gather and document systematic and violent abuses of power by the Syrian Arab Republic, it will inadvertently provide ways to present a legitimate challenge to the rule; does an outside organization have the right to help an opposition to then potentially overthrow/overtake the government by assisting in providing evidence of internal crimes. When a state does not or refuses to document their own abuses – it must be questioned if other actors such as international governmental organisations or other human rights advocacies have the right to do so.<sup>111</sup> According to Burgis-Kasthala, criminal accountability and human rights archiving scholars answers yes.<sup>112</sup> One also must consider the potential benefits of that in a future trial (potentially against the Syrian state actors) to have evidence and documents that are not tainted by the Syrian state. One also shall consider that it is not solely the principle of sovereignty that prohibits the UNSC from taking action in Syria. If the article 2(4) UN Charter were to disappear tomorrow, it would not make a difference to the Syrian conflict. Russia the

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<sup>107</sup> Caswell (2013) p. 113-114.

<sup>108</sup> Burgis-Kasthala (2021) p. 1212.

<sup>109</sup> Burgis-Kasthala (2021) p. 1212.

<sup>110</sup> The Office of the United Nations High Commissioner for Human Rights 'Study on the Right to the Truth' (2006) UN Doc E/CN.4/2006/91.

<sup>111</sup> Ciorciari (2012) p. 5-16.

<sup>112</sup> Burgis-Kasthala (2021) p. 1212.



most pertinent objector, would not stop vetoing UNSC resolutions regarding Syria.<sup>113</sup>

It is important to question whether the lack of Syrian consent undermines the legitimacy of the IIIM. Wolves argues that the legitimacy of any accountability mechanism is based on creating legitimacy through procedures, which can lead to fairness and judicial review.<sup>114</sup> When the Syrian Arab Republic first joined the UN, it hardly predicted the establishments of an investigative body that aim to collect evidence for criminal proceedings on matter that occurred on its territory and by its citizens. Pues, argues that even though it can be seen as a far-fetched argument, the Syrian Arab Republic did by joining the UN agree to a system that sees to protect human rights, peace and security. The IIIM task at hand is unquestionable to contribute to enforcement of international norms that reach the status of customary law and has a *jus cogens* character<sup>115,116</sup> Thus, Pues argues that when there is lack of consent-induced legitimacy, the best way forward to enhance pathways to accountability is through an impartial and independent UN-mandated body to ensure that there is no gap of impunity.<sup>117</sup>

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<sup>113</sup> Sarkin and Capazorio (2022) p. 509-510.

<sup>114</sup> Wolfrum and Röben (2008) p. 23.

<sup>115</sup> *Jus cogens* crimes is a peremptory norm of general international law that is recognized and accepted by the international community. It is a norm from which no derogation is permitted. Examples of *jus cogens* crimes are aggression, genocide, slavery, torture and murder. For further readings please refer to: Jørgensen (2000).

<sup>116</sup> Pues (2022) p. 575-576.

<sup>117</sup> Pues (2022) p 576.

## 4 Accountability – the Mechanism’s aim towards justice

The mission of the Mechanism is to bring *accountability* for international crimes committed in the Syrian Conflict. The Mechanism’s mandate ranges from march 2011 (the start of the conflict) and though it has been established as a temporary organ its end date has not been specified. As the term mandate is not firmly established, one can assume that the organ seeks to establish accountability for crimes committed in the past, present and future. The Mechanism shall record, collect and gather evidence in order to ensure and make it possible for criminal accountability on an individual and or societal level. However, as the conflict is still ongoing there are limited pathways to use the IIIM material to ensure criminal accountability in Syria. There are mainly two ways that the IIIM material is used at present time:

1. The creation of an archive,
2. The use of Universal Jurisdiction.

These two different paths all correlate to the IIIM mandate which is to collect, consolidate, preserve, analyse and share information/evidence. The IIIM has created an archive that stores information and evidence with the intention of (when it is possible to do so) being shared and used in future trials concerning human rights violations in the ongoing Syrian conflict. The IIIM archive knowledge is at present time shared to ‘competent jurisdictions’ in order to pursue criminal accountability through the use of universal jurisdiction.

Firstly, this thesis will discuss the implications of building, creating and safeguarding the IIIM archive in the chapter 5. Secondly, the possibilities of utilising universal jurisdiction with the assistance of the IIIM archive will be explored in chapter 6.

## 5 The role of the IIIM in building a criminal archive

The uncertainty of deterrence efforts and the paralysis of the international community have shifted the justice efforts towards processes of rigorous documentation. The IIIM mandate is to collect, consolidate, preserve, analyse, and share information in order to support (future) criminal proceedings. This has resulted in that the IIIM creation of an ‘archive’ of the Syrian conflict. The IIIM will govern the archive as they have complete control over the archive. They can decide which information that shall be included, how the information shall be stored, choose who is allowed to access it et cetera. As the archive is created with a very specific purpose in mind, that will too, influence building of the archive.

The following part will discuss the potential consequences of the IIIM creating an archive of the Syrian conflict with the intent that its archive shall be used to pursue criminal accountability. To do so this part will discuss, the imperative of documentation as an accountability model, why there is a need for archives, the potential biases in archive building, competing narratives of archives, the possibilities of using the archive in other accountability purpose and the confidential nature of the IIIM.

### 5.1 Legal justifications for the creation of an archive

The legal justification for an establishment of an archive documenting a conflict is mostly based on the concept of a “right to know” and a “duty to record”. Regulations related to archiving atrocities are most often expressed in national law. However, UN bodies such as UN Educational, Scientific and Cultural Organization (UNESCO), UN Commission for Human Rights (UNCHR) have commissioned reports focusing on the efforts to archive state abuses.<sup>118</sup> The Universal Declaration on Human Rights (UDHR), and the International Covenant on Civil and Political Rights (ICCPR) does not specifically name public archives or archives, yet they include a mention of a right to seek and receive information.<sup>119</sup> Some bodies of laws, such as the ICCPR, include a restriction of a right to know if deemed necessary.<sup>120</sup> Similar sentiments have been echoed by states, the European Union, UN, and other courts (e.g., Inter-American Court for Human Rights).<sup>121</sup> Closely connected to the right of truth is duty to record. In a report to the UNCHR, the Office of the United Nations High Commissioner for Human Rights,

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<sup>118</sup> Ciorciari (2012) p. 3.

<sup>119</sup> Article 19 UDHR, and article 19 ICCPR.

<sup>120</sup> Article 19(3) ICCPR.

<sup>121</sup> Ciorciari (2012) p. 3-10.

established and emphasised that archive have a crucial role in order to implement the right to truth.<sup>122</sup>

## 5.2 Imperative of documentation for accountability purposes

It is important to establish the imperative of documentation for accountability purposes in a conflict, such as in the Syrian Arab Republic. There are different reasons to why it is important to gather information in a conflict. These can be summarized as deterrence, naming and shaming, mobilization of action, systematic reforms, educational material and history writing.<sup>123</sup>

Documentation efforts are pursued with the purpose of preventing the repetition of crimes, both at the particular location or elsewhere. The idea is that reporting criminal acts and follow-up through accountability will induce potential perpetrators not to commit atrocities in the future. This theory has of course its limitations, given that atrocities continue to occur and there is no impending justice response e.g., to some extent, the same can be argued with regards to domestic criminal systems however.<sup>124</sup>

Documentation can allow for multilateral bodies, individual governments and NGOs to partake in ‘naming and shaming exercises’. The naming and shaming have proved to be a successful tool used by many human rights organizations but also in a transitional justice context such as in Truth Commissions in El Salvador and Liberia.<sup>125</sup> This is a human rights tool that can be used mid-conflict as derivative of a human rights documentation program. Publicly announcing and associating individuals with crimes denies them anonymity, creates individual responsibility, shows that the world is watching, and that the world/organization has knowledge regarding the accused individual. Recognizing perpetrators can also bring a form of accountability when other venues of accountability are closed. It can as an added benefit give comfort to victims as their experience become a public accepted truth and a form of symbolic justice. At a minimum, Schaak argues that it “*signal a commitment to document abuses and eventually hold perpetrators responsible*” and further pushes international norms and laws when there are transgressions. This proved to be a success when the newspaper Al Jazeera with help by Jigsaw (former Google Ideas) published a tracking system of Syrian defectors from members of parliament, colonels,

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<sup>122</sup> UNGA, Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General (21 August 2009) Un Doc. A/HRC/12/19.

<sup>123</sup> Van Schaack (2020) p. 343.

<sup>124</sup> Van Schaack (2020) p. 343.

<sup>125</sup> ‘Republic of Liberia Truth & Reconciliation Commission, II Consolidated Final Report 349–52’ (June 30, 2009); ‘From Madness to Hope: The 12-Year War in El Salvador: Report of the Commission on Truth for El Salvador’ (Apr. 1, 1993). U.N. Doc. S/25500.

general and cabinet members in June 2013. Also naming and shaming allows for multilateral collaboration as organisations have multiple vectors to provide information including but not limited to other states, NGOs, grass roots movements. Furthermore, an organization can simply vouch for other information that already been published or share additional information that could be of use. For example, very early in the conflicts Human Rights Watch reported on custodial abuses in Syrian Prisons and identified the leaders. Governments that had relevant information was able to verify the conclusions of the Human Rights Watch. It allows for collaboration without the difficult process of declassifying materials. Despite naming and shaming can be an effective tool it also has some limits. Naming individuals as perpetrators without proper judicial procedures can violate the presumption of innocence and/or due process rights by unfairly prejudging the guilt of those identified. However, this tool is not being fully utilized in the Syrian conflict, as it would jeopardize the possibility of engaging in any kind of peace negotiations.<sup>126</sup>

Documenting in real-time can help international actors (who are capable and willing) to intervene and mobilise. Having documentation and evidence that is impregnable, can potentially increase the willingness to ‘do something’ as international awareness has increased. This was demonstrated in 2014 as the defector with the code name ‘Caesar’ managed to smuggle more than 50 000 images of roughly 11 000 victims on a thumb drive and on his phone out of Syria. Caesar was instructed to photograph the victims after their deaths to prevent the guards from extorting the families of the deceased victims and to secure their release. Many of the victims' death certificates were falsified, and many stated that their hearts and breathing had stopped, which meant that death had occurred from natural causes, such as heart failure.<sup>127</sup> The photos revealed death as caused by mutilation, systematic starvation, and torture on an unprecedented scale. These photos were leaked to many media outlets, and as a result the ‘Caesar photos’ became cited as to one of the reasons why France and Australia chose to vote for referral of the Syrian conflict to the ICC.<sup>128</sup>

Systematic documentation can show how a regime has used violence to institutionalize repressions and target marginalized members of the population. By understanding how governments have institutionalized repression it can also lay the groundwork for systemic structural reforms by dissolving repressive security forces, repealing discriminatory legislation, redistribute land/resources. Such documentation of systematic abuses could motivate the activation of R2P.<sup>129</sup>

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<sup>126</sup> Van Schaack (2020) p. 344.

<sup>127</sup> Van Schaack (2020) p. 348.

<sup>128</sup> Van Schaack (2020) p. 349.

<sup>129</sup> Sarkin and Capazorio (2022) p. 504-506.

Documentation can also serve as educational material and history writing. By transforming documentation to educational resources, memorial to promote reconciliation, media campaigns, social cohesion, conflict prevention. Similar projects have already started in Syria. For example, the quasi-governmental USHMM have displayed pieces of fabric where Syrian prisoners wrote their names on with a mixture of rust and blood. The value of preserving historical record is important as it can one day be used by scholar that can write accurate and detailed accounts of the conflict that will exist long after the conflict itself.<sup>130</sup>

### 5.3 The importance of an archive in a conflict

An archive has a very important role in conflicts as they not only collect information, they organise it. Typically, the gathering of evidence tends to be one of the greatest difficulties that an international court face. However, as Syria is considered to be the most documented conflict of all time, this will not be an issue. In an anonymized interview with a CIJA employee, the respondent states that:

*“challenge for the Mechanism will not be a paucity of available material, but rather effectively handling the overwhelming volume of material produced on the Syrian situation. In particular, the volume of videos and other images — as well as the role played by social media — is unprecedented in any other accountability process with respect to international crimes to date. The standard tasks of classifying relevant material, demonstrating authenticity, presenting the complexity of collected material in innovative visual ways and managing the association of evidence with other corroborating material become amplified by volume and by the diversity of the collection methods and organizations involved. This means that the Mechanism must devise creative new strategies for handling that reality, which makes its IT systems and expertise crucial, as reflected by the heavy early focus on this aspect of its operations.”<sup>131</sup>*

Therefore, it is crucial to have an archive in the Syrian conflict that can not only collect the information but organise it. An archive can coordinate its evidence to get a broader picture of the situation, contextualize it and avoid over-documentation of the same event. It has been recognised that some witnesses have been interviewed several times by different organisations, which has led to inconsistencies and unnecessary trauma for the witnesses themselves.<sup>132</sup> With modern technologies, archives are better at facing the challenges of volume and the complexity of the data gathered than before.

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<sup>130</sup> Van Schaack (2020) p. 349-353.

<sup>131</sup> IIM Report of 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 (28 February 2018) UN Doc A/72/764 para. 12.

<sup>132</sup> Elliott (2017) p. 1204.

The Mechanism use of various algorithms, allows for more precise, fast and reliable review and analysis of text with difficult text legibility.<sup>133</sup> Although, the automated processes of the archive can “*In no way can [...] fully substitute human analytical efforts[...]*”<sup>134</sup>, the archive technological developments look promising.<sup>135</sup> Therefore, there is a great advantage to establish archives that can coordinate, and make information more easily accessible when needed.

## 5.4 The building of an archive

In order to create an archive, it has to rely on a conversation between archival studies and transitional justice/international criminal law. International criminal trials/lawyers will rely on archivists to amass and catalogue material that can be used in future trials. There are typical four key themes in archive building, as identified by Geraci and Casswell and quoted by Burgis-Kasthala: “(i) *the role that archivists can play in realizing legal redress, justice, and reconciliation; (ii) the complicity of archivists in human rights abuses and forms of structural violence; (iii) the political nature of archival work; and (iv) the ethical responsibility of archivists’ work.*”<sup>136</sup>

The different approaches of archive building may result in very different archives, despite that the archives might cover the same conflict and use the same information/evidence and sources. This is due to that depending on the archives purpose, it might gather or interpret evidence differently. For example, Human Rights Archives tend to include advocacy, awareness raising, and various forms of transitional justice efforts (see e.g., truth and reconciliation commissions). Whereas an archive such as the IIIM only collects information that must comply to the highest standard of international law with the intention of that information to be used in a future criminal proceeding. Therefore, a Human Rights Archive and the IIIM archive will look different from each other, and store different knowledge, and thus they will tell a different (or possible complementary) narrative of the same conflict. They will however, not tell the exact same narrative.<sup>137</sup>

The archives’ purpose will influence how the archive process its evidence. The IIIM purpose is to pursue criminal accountability. However, international nor national criminal process cannot use information in its purest form, as “*Raw material never present the whole picture*”.<sup>138</sup> The information needs to be transformed into evidence that can be used in a court of law. Furthermore, the evidence must correspond with the legal requirements that needs to be met in

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<sup>133</sup> Radeva (2021) p. 139.

<sup>134</sup> Radeva (2021) p. 146.

<sup>135</sup> Radeva (2021) p. 146.

<sup>136</sup> Burgis-Kasthala (2021) p. 1211.

<sup>137</sup> Burgis-Kasthala (2022) p.1209.

<sup>138</sup> Ciorciari (2012) p. 32.

order to convict a suspect<sup>139</sup>, and the evidence must fit within the legal process.<sup>140</sup> Therefore the information needs to be processed, and tailored in order to become evidence that can be presented in court. In addition, the evidence must tell a compelling narrative/story in order to inspire a conviction. As the founder of the CIJA Bill Wiley stated “... *there is a difference between information and evidence ... [I]nformation becomes (no matter how exciting it is) . . . evidence only after it’s been analyzed in the context of the legal requirements of the offences and modes of liability.*”<sup>141</sup> Therefore, the information that IIIM receives will change form in order to suit the Mechanism’s purpose. The facts might remain the same, but the facts will most likely be interpreted to fit a certain narrative (for example court process).

The purpose of archive will also affect what information that deemed to be ‘archivable’ and ‘unarchivable’. For example, the IIIM only stores evidence that fulfil the highest standard of international law, and will therefore exclude information that does not fulfil those standards. Thus, the IIIM might exclude information that a Human Rights Archive does not. Ultimately the archivists of an archive will deliver a *judgement* of what knowledge is archivable or unarchivable. Annihilation of certain knowledge and information in archive building can have profound effects of in the constitution of status, political possibilities, and identity.<sup>142</sup> This is particular concern for the IIIM as most its archive is intended for future use.

## 5.5 Narrative warfare

The IIIM is far from the only mechanism that gathers evidence and information regarding the Syrian conflict. NGOs, CIJA, CoI, other states and local actors are all active participants on the scene. As argued above depending on the archive’s purpose; archives will most likely differ from each other. It is possible that archives have conflicting evidence (potentially regarding the same event), or have interpreted the same evidence differently.<sup>143</sup> This can potentially lead to a ‘narrative warfare’ as the archives can be pushing and or telling a different story from each other. A worst-case scenario is, for example, that one archive condemns a person to be a perpetrator, whereas another archive deems the same person to be victim. The extent of the issue of archives telling two contradicting narratives will depend

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<sup>139</sup> For example, in order to convict a suspect for genocide (in accordance to genocide convention) there must be evidence that demonstrates that the suspect have committed genocide as stated in article II in the convention (definition of genocide). If the evidence does not demonstrate that the requirements of article II is fulfilled, a genocide have not been committed. Therefore, the evidence must, in order to inspire a conviction, be transformed in order to fit the legal definitions of crime.

<sup>140</sup> Not all information can be used as evidence, and for example some courts do not allow illegally obtained information.

<sup>141</sup> Bill Wiley interview (2017) by Burgis-Kasthala (2021).

<sup>142</sup> Burgis-Kasthala (2022) p. 1209.

<sup>143</sup> Burgis-Kasthala (2021) p. 1210-1212.



on the situation. Modern historical archives tend to strive to create a ‘full picture’ of the conflict, and thus it is possible to portray two different version of an event to receive a greater understanding of several sides of the conflict. Whereas in international criminal justice process, this has proven to be more difficult, for example, as a suspect (typically) must be deemed to be either guilty or innocent. This issue has, for example, been explored in transitional justice discussing the issue of a ‘complex victim’, a person who is both a victim and perpetrator in the same conflict.<sup>144</sup> The outcome of a complex victim trial will, despite its status as both, push a narrative of the complex victim being a perpetrator or victim and the complex victims will suffer consequences due to the outcome. It has and continues to be difficult in international criminal processes to recognize the complexity of a conflict, as Burgis-Kasthala argues that there is: “...an impulse of the international criminal trial advancing its finding of a (a single, fixed) ‘truth’...”<sup>145</sup> Furthermore, international criminal law processes are not only sites of legal judgements, they are producers of a narratives, as Zammit argues, they “... systematically and inevitably produce knowledge or find truths about the conflicts that come before them”.<sup>146</sup>

Archivist scholars such as Stoler argues that an archive shall not produce one truth, she emphasizes the importance of researchers to ‘track the production and consumption of ‘the facts’ as an archive is a ‘site of epistemic and political struggle’.<sup>147</sup> She argues this, due to that her belief is that an archive cannot produce an indisputable truth or knowledge claim, as archive and the archive building is dynamic and will continue to be incomplete. However, it seems unlikely that criminal archive can achieve complexity of such an archive.

Thus, archival building is not neutral. The archival practices and the archive’s purpose will influence the collection, omission and interpretation of evidence. The archive and the building of an archive can therefore push a certain narrative of a conflict. The awareness of this is of great importance as Campbell argues, an (legal) archive, as well as (future) trials have the power to reshape the memories of an atrocity.<sup>148</sup> The IIIM archive building is at its establishment concerned with building an archive that has information and evidence that is compliant with the highest of international law in order to be

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<sup>144</sup> The most famous is the case ‘Prosecutor v. Ongwen’. Ongwen was one of the highest-ranking officials in the Lords Resistance Army. He was charged and later convicted of over 60 crimes against humanity. His defense argued that he was a victim due to being abducted as a child and forced to become a child soldier, and due to his victimization could not be hold accountable. The Court ruled that previous victimization could not excuse a justification for committing international crimes. For future readings please refer to: Moffet (2016); Herremans and Destrooper (2021) p. 576-595.

<sup>145</sup> Burgis-Kasthala (2021) p. 1207.

<sup>146</sup> Zammit Borda(2020) p. 543-544.

<sup>147</sup> Mawani (2012) p. 337-340.

<sup>148</sup> Campbell (2013) p. 247- 248.

used at current and future trials. Thus, the IIM archive have a primarily international criminal law focus, not a transitional justice or history focus. The IIM archive will be able to tell a narrative of the Syrian conflict through court processes. Therefore, the IIM archive and the future use of IIM's archive, can tend to push one singular narrative.<sup>149</sup>

## 5.6 The IIM supporting 'broader justice objectives'

Lately the IIM have expanded beyond the scope of criminal accountability. As they state on their webpage "*While the IIM's mandate is focused on criminal accountability, it recognizes that many broader justice objectives are also important for victims/survivors of the Syrian situation*".<sup>150</sup> The IIM broader justice objectives will include a victim/survivor approach, thematic strategies on gender, children and youth, and clarifying the fate of missing persons. Another example of the IIM attempt to support broader justice objectives is "*the determination by the Head of the IIM that the IIM can and will support non-criminal justice processes that are sufficiently linked to core international crimes in Syria and offer a meaningful justice opportunity for victims/survivors*".<sup>151</sup> Thus, indicating that the archives established by IIM will expand their mandate beyond criminal liability scope, focusing on other transitional justice processes such as stated in the quotes in this paragraph "*non-criminal justice processes*". In the Mechanism's new strategic plan for 2023-2025 the Mechanism enforced that 'inclusive justice' will remain as one of their key objectives. The IIM will complete this "*through supporting and promoting current and future accountability efforts in the eyes of victims/survivors of core international crimes*".<sup>152</sup>

Thus, the IIM is moving away from solely focusing on criminal accountability by adapting many transitional justice approaches. However, as the Mechanism have developed an atrocity archive that is very much tailored to pursue criminal accountability, it is not unproblematic that the information from the Mechanism that is not intended to be, is used for different purposes.

It must be questioned if the IIM archive can assist in other purposes than achieving criminal accountability. As previously discussed, an archive is closely tailored to its archive purposes, it must be questioned if it is possible that the information can be used in other situations. One concern is if the IIM archive can cause misinformation. Is it possible that when the information has been processed by the IIM it has been adjusted to the Mechanism purpose to the extent that it no longer can be seen as evidence (without the IIM's influence) and therefore cannot be used in other situations. There are no definitive answers to these questions. Another concern is simply that the IIM

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<sup>149</sup> Such legitimacy is often given to courts system in democratic states.

<sup>150</sup> 'Victim/Survivor Centred Approach'.

<sup>151</sup> 'Victim/Survivor Centred Approach'.

<sup>152</sup> 'Victim/Survivor Centred Approach'.

does not have the information. It is possible that the information the IIM has deemed to be ‘unarchivable’ is essential for other situations. For example, it has recently been revealed that the IIM will assist in the search for missing persons in Syria. In such a scenario, the IIM might have information that can prove that person X kidnapped person Y, however, that does not mean that the Mechanism have information that may lead to that person Y is found.

So far in regards to the search of missing persons, the IIM have started “*Developing witness interview protocols that integrate attention to missing person issues alongside issues relevant to criminal accountability*”.<sup>153</sup> This is an example where the information gathering procedures have changed in order to accommodate the IIM’s new mission. If the Mechanism mandate continues to expand, the Mechanism shall change their approach to evidence gathering. It is important if the Mechanism does so, that it is considered *when* the Mechanism information is gathered, and thus consider the purpose of the IIM at the time.

There is not sufficient amount of information to determine to what extent the IIM archive can be used for other purposes. Firstly, this is unknown due to that it is confidential what specific information the IIM have or how the information is transformed into evidence. Perhaps, it is possible that the archive can be used in multiple and different causes simultaneously. Secondly, this is also difficult to determine as there is no complete knowledge regarding which organisations the IIM shares information with. In the case that the IIM only shares its information to other criminal justice entities, there might not be a cause for a concern as the information, as the archive is built with that cause in mind. However, if the Mechanism shares the information with any other organisations, there is a need for caution and consideration. There is a demand for a careful application of the IIM archive in other purposes than criminal accountability and international criminal law purposes. It is possible that the archive’s narrow focus on criminal accountability severely limits the archive’s usefulness in other processes.

## 5.7 The IIM role as a custodian of its archive

The IIM is intended to be a ‘central repository’ and as its archive continues to expand so does its responsibilities. As the IIM evidence archive grows, the IIM will take on a safeguarding role. The Mechanism controls the archive’s content, structure, and who should be allowed to access it. This is a great responsibility as the archive can be used to rewrite narratives of the Syrian conflict as a whole and imprison people who committed a serious human right violation. Safeguarding the archive is thus a great responsibility and there is a need to question whether the IIM is the most appropriate entity to do. It must be questioned who is the actual owner of the archive and who is it for. The answer to this varies. Some employees at entities such as the

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<sup>153</sup> ‘Victim/Survivor Centred Approach’.

CIJA and the IIM believe that their organisation's constituency is the Syrian people, international community, survivor communities, the UN, or national jurisdictions (that pursue universal jurisdictions).

The responsibility of safeguarding the evidence that the Mechanism stores is demonstrated as the CIJA director, the head of an organisation that has an archive and archive practices similar to the IIM, states:

*"The source of data that we hold [...] and the amount of personal information we hold is, if I put on my civil libertarian hat, then yes, it is fucking shocking and you know what are the checks, on CIJA, not in terms of the quality of its case building . . . but I mean the broader checks, and what are the prior checks on this organization holding these kind of files ... these are questions that I think need to be discussed and debated, definitely, because I think they are really important ..."*<sup>154</sup>

The Mechanism Deputy Head, Michelle Jarvis holds similar concerns discussing *"where you have got something like government documents, which CIJA has extracted, who manages those? Is it legitimate for [...] an international NGO to claim ownership of those documents?"*<sup>155</sup>

Furthermore, an anonymized CIJA worker points out:

*"We did not steal these documents, they were given to us by Syrians, we are the custodians, we safeguard them until such time that they can be handed back to a free and democratic Syria and it is important to spread that word as well, because you know we are not just your common spies and thieves, these are what Syrians have given to us, in the hope that they can be used in prosecution and not to blackmail other people or extort other people."*<sup>156</sup>

Thus, the anonymised CIJA worker, argues that the role of custodian is given to an archive on a voluntary basis. However, information can be given to various of organisations, and there are several different forms of fact-finding missions that can be in charge of an archive. Within the study of archive building the foundational approach discusses on how to best establish a legitimate, secure, well-organised, accessible archive regarding past abuses which in turn must be seen to according to the public as an impartial and fair. According to Ciorciari, *"the ideal outcome is to hand documents to well-funded, secure functioning national archive."*<sup>157</sup> However, Ciorciari also acknowledges that establishing a functioning archive in a society emerging from mass atrocities might not be possible. This is certainly the case in Syria.

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<sup>154</sup> Bill Wiley interview 10 November 2017 as cited in Burgis-Kasthala (2021) p. 1213.

<sup>155</sup> Michelle Jarvis interview 13 June 2019 as cited in Burgis-Kasthala (2021) p. 1213.

<sup>156</sup> CIJA anonymized interview #3 7 June 2017 as cited in Burgis-Kasthala (2021) p. 1215.

<sup>157</sup> Ciorciari (2012) p. 10.

With the emergence of social media platforms during the Syrian Conflict, there is another form of archive, which consists of publicly capturing and publicizing videos and photos (typically online).<sup>158</sup> Even though such information is publicly available on various site, one cannot neglect that private companies will exercise control over these repositories. When information is published on sites such as Facebook and YouTube, the company will be able to determine which material will be available or removed from their server. In 2017 Facebook, Microsoft, Twitter and YouTube created the Global Internet Forum to Counter Terrorism, which resulted in the removal of a large number of images of violent footage documenting the atrocities in Syria.<sup>159</sup> This development took many practitioners by surprise as they: *” did not initially anticipate the disappearance of human rights–related content on sites like YouTube and Facebook, only learning to distrust such platforms as reliable repositories after repeatedly losing access to valuable media and posts. Practitioners sought alternative means to safeguard content, but the safe storage of backups, particularly for videos, required time, expertise, and resources that human rights practitioners unevenly possessed.”*<sup>160</sup> This, demonstrates the danger of merely relying on the internet to keep information safe as the internet platforms have no or have taken any responsibility to do so. Also, this shows the need for an organ that scourges the internet for such evidence and collect it, as otherwise the information is at risk to disappear from internet due to censorship from private organization, but also state censorship.<sup>161</sup>

There are many advantages of NGOs fact-finding missions as it is often completed by the same people that have experienced the atrocities first hand, have cultural understanding, understand the language and often reliant on first-hand information. For example, in Cambodia documents were transferred to an NGO, as at the time the Cambodian National Archives were underfunded, did not have the capacity and was in a serious despair.<sup>162</sup> The Cambodian archive was able to assist the UN-backed Khmer Rouge tribunal, and be a source for research and various education projects. This example demonstrates that NGOs archiving can have legitimacy, especially, when there is a lack of state initiative to documents human rights abuses. Nevertheless, it must be pointed out that the Cambodian archive was only possible due to state consent. Without it, NGOs archive remain vulnerable to national legal challenges, and security threats.<sup>163</sup>

Having an organization such as the IIIM that fulfil the foundational approach (as it is perceived as legitimate, secure and well organized), can be an

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<sup>158</sup> Ciorciari (2012) p. 32.

<sup>159</sup> Burgis-Kasthala (2021) p. 1216.

<sup>160</sup> Banchik (2020).

<sup>161</sup> Burgis-Kasthala (2021) p. 1216.

<sup>162</sup> Ciorciari (2012) p. 8-12.

<sup>163</sup> Ciorciari (2012) p. 8-12.

advantage. In addition, in a situation where neither the nation-state nor websites can be trusted, it can be beneficial to have an external organisation which guards the archive and can mitigate resources from NGOs, other states, and organisations. Despite the above, storing the archive with the Mechanism is not without its risks. There are legitimate concerns of the UN being bias towards Western countries interests. As the future possibility of international criminal processes (e.g., tribunal) is years away, there is also a risk of the archive and its contents being forgotten, similarly to the United Nations War Commission archive which contents was buried for years.<sup>164</sup>

There is a great responsibility in being the custodian of an atrocity archive, a responsibility its bearers shall not bear lightly. There are several actors that can successfully bear such a responsibility with various advantages and disadvantages. It is even possible that several actors can do such at the same time (compare the IIM and CIJA two organization very similar to each other). However, one cannot disregard the advantages of the IIM as it is collaborating with states, NGO, and other various actors, its economic and technical resources, its international recognition and recognized legitimacy.

## 5.8 The confidential nature of the Mechanism

The IIM will carry additional responsibility as an archive due to confidentiality of the Mechanism.<sup>165</sup> The Mechanism archive is confidential to guarantee the safety of its partners and not threaten the integrity of future and current criminal trials. This differs from, traditional accounts of archival work as they tend to strive toward having an ‘open access archives’ that shall be available to the public. This is partially influenced by the fact that most archivists have worked within liberal democratic states and share the belief that archivists serve as ‘public memory builder’. This sentiment was echoed by the Society of American Archivists that argues “*Archivists promote and provide the widest possible accessibility of materials, consistent with any mandatory access restrictions, such as public statute, donor contract, business/institutional privacy, or personal privacy. Although access may be limited in some instances, archivists seek to promote open access and use when possible*”.<sup>166</sup> A similar belief is also pursued by the ICC as they see “*transparency of its archives is put forward as a means to bringing truth to the general public and to victims in particular, and is implemented, for example, by public access to trials (physically or through web-streaming) and online publication of transcripts*”.<sup>167</sup>

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<sup>164</sup> Burgis-Kasthala (2021) p. 1215.

<sup>165</sup> UNGA ‘Report of the 77th Session of 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 (16 February 2023) UN Doc A/77/751 p. 3-5.

<sup>166</sup> Society of American Archivists (2020).

<sup>167</sup> Stolk (2015).

The confidential nature of the Mechanism grants the IIIM a great power, as it can decide to who, what, and when it want to share information. A critic would argue that the Mechanism could misuse its archive; sharing or withholding information when it is in their best interests. An issue with the lack of openness and transparency to the IIIM intelligence gathering is that there is no one/nothing that can oversee the IIIM. The IIIM themselves have processes to ensure the quality of the documentation they gather in their archive.<sup>168</sup> However, there is no organisation overseeing the IIIM own processes.

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<sup>168</sup> By, for example, conferring with several third-party sources.

## 6 Universal Jurisdiction

The failure of international law in the Syrian conflict has led to a very narrow path of criminal accountability through the application of universal jurisdiction. The IIM archive will be able to provide states and other organization that are deemed to be ‘competent jurisdictions’ with information that can be utilized in criminal processes.

The following part will discuss the possibilities of using universal jurisdiction in order to pursue criminal accountability through the support of the IIM.

### 6.1 Universal jurisdiction

Over the last decade, universal jurisdiction has been on the rise. In 2018 the NGO Trial International reported a 106% increase use of universal jurisdiction from the year before.<sup>169</sup> Universal jurisdiction allows for state enforcements beyond the states owns border. Typically, under the classical Westphalian notion of state sovereignty a state exercises their sovereign power over their own territory, and thus can only prosecute criminal offenses that occurred within their borders. In theory, this principle also limits state’s power to exercise jurisdiction beyond their territory unless they argue for jurisdiction based on principles such as the passive personality principle, principle of nationality, or the principle of universal jurisdictions.<sup>170</sup> In international law there are some crimes which are seen as so heinous that even when these have been committed with no connection to a state (e.g., the perpetrator nor the victim is a citizen of the relevant state), a third state can regardless initiate a proceeding towards the perpetrator. Thus, universal jurisdiction extends to the so-called jus cogens crimes. This is due to that it is argued that states have a legitimate interest in that such crimes do not go unpunished.<sup>171</sup> All countries in the world are parties to the 1949 Geneva conventions. This gives states the mandate to exercise jurisdiction over ‘grave breaches’ thus allowing all countries to exercise universal jurisdiction.<sup>172</sup> However, the precise parameters of universal jurisdiction for human rights-related international crimes under customary international law is still a subject for debate, as there is limited international jurisprudence regarding the scope of universal jurisdiction. In *the Arrest Warrant Case* it was concluded that there is no customary international law that prohibits the exercise of universal jurisdiction in relation to crimes that are considered as most heinous by the international community.<sup>173</sup> The court case also specified a set of safeguard rules that must apply when states exercise universal criminal jurisdiction in

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<sup>169</sup> Devereux (2019) p. 400-402.

<sup>170</sup> Schantli (2021) p. 303-308.

<sup>171</sup> Devereux (2019) p. 400-402.

<sup>172</sup> Schantli (2021) p. 303-308.

<sup>173</sup> *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, International Court of Justice (ICJ), 14 February 2002.



absentia.<sup>174</sup> Many states require that the non-national is within their territory for prosecution to take place, however, the most expansive form of universal jurisdiction does not require this link.

Also, a considerable number of states have enacted domestic legislation that allows them to prosecute non-nationals for genocide, crimes against humanity, and war crimes committed elsewhere. However, not all countries have done so. The reason differs from each other and will most likely boil down to a difference in politics. Some argue that universal jurisdiction is impracticable and intrusive, and others that it infringes on state's sovereignty.<sup>175</sup> Syria has stated that "*the suspicious tendencies of some Governments to broaden the scope of universal jurisdiction in ways that would impair the sovereignty of States*".<sup>176</sup> Others argue that the application of universal jurisdiction shall be seen as a last resort or a reserve tool.<sup>177</sup> States such as Kenya have been fearful of that "*universal jurisdiction must not be allowed to become a wildfire, uncontrolled in its spread and destructive of orderly legal processes*".<sup>178</sup>

There are some national legal challenges regarding universal jurisdiction. Countries that claim adherence to universal jurisdiction, for example by ratifying treaties defining international crimes, must introduce definitions of international crimes into their own national laws. However, if states have failed to introduce domestic definition of international crimes in a sufficient matter; if so, legal practitioners might have to turn to consult domestic definitions for e.g., murder and assault. This can cause several issues as domestic laws typically have less severe punishment and shorter statutes of limitations than international crimes.<sup>179</sup>

## 6.2 Universal jurisdiction in Syria

Criminal justice is and continues to be one of the cornerstones of transitional justice and in the Syrian conflict. As a way to bypass the deadlock in the UNSC, ICC and other international organs, universal jurisdiction has become an important avenue for Syrian victims' access to justice.

With the current limitation of criminal accountability in the Syrian conflict (nationally and internationally); universal jurisdiction is another viable path. In the conflict of Syria universal jurisdiction can and have persecuted individuals for war crimes in the Syrian Arab regime from all sides in the

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<sup>174</sup> Devereux (2019) p. 400-402.

<sup>175</sup> Schantli, (2021) p. 305-310.

<sup>176</sup> UNGA, 'Without Clear Definition, Universal Jurisdiction Principle Risks Misuse, Abuse, Sixth Committee Speakers Warn' (10 October 2018) UN Doc GA/L/3571.

<sup>177</sup> Schantli (2021) p. 308-312.

<sup>178</sup> UNGA, 'Without Clear Definition, Universal Jurisdiction Principle Risks Misuse, Abuse, Sixth Committee Speakers Warn' (10 October 2018) UN Doc GA/L/3571.

<sup>179</sup> Schantli, (2021) p. 310-311.

conflict. Thus, making it possible for criminal convictions, accountability, and justice for victims.<sup>180</sup> After having interviewed several victims of the Syrian conflict, Herremans and Destrooper state that:

*“...court cases under Universal jurisdiction do not necessarily reflect the justice that Syrians aspire to, as a) domestic or international justice mechanisms are preferred options, b) justice efforts cannot be limited to punitive and retributive mechanisms and c) the central focus on torture can contribute to the omission of other types of violations”*.<sup>181</sup>

As demonstrated in this quote universal jurisdiction is far from perfect. The countries legal frameworks vary from state to state. Despite the wide application of its use (*compare Arrest Warrant of 11 April 2002*), the opening of cases will to a large extent depend on the political will of the country. As purely political obstacles can arise at any time during the investigation, such as the defendants right to immunity. The investigation can be challenging as the crime was committed thousands of kilometres from the prosecuting court. Thus, the crime scene can become geographically difficult to access especially when there is an ongoing conflict. As consequence, the prosecuting authorities will either rely on local NGOs or commit their investigation from a distance (without support of e.g., local law enforcement). Also, the court exercising universal jurisdiction will lack familiarity with the historical, cultural and political context.<sup>182</sup> Additionally, it is expensive, and typically difficult to receive funding for the investigation and prosecution of these crimes. These logistical problems might even threaten the principle of fair trial.<sup>183</sup> This principle, outlined in article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) includes inter alia the equality in evidence and witness, which can be difficult when the witnesses and evidence are located in state outside the court exercising universal jurisdiction.<sup>184</sup>

The Mechanism will make it easier for the countries to utilise their universal jurisdiction by removing the majority of the ‘logistical problems’. By already, analysing, compiling, gathering the evidence, it removes many obstacles for the prosecuting countries. Hohler and Pederson states that IIIM can *“provide a bridge between the contemporaneous collection of evidence and its use in trials that may take place years or even decades later.”*<sup>185</sup> The Mechanism is able to both provide historical, political, and culture context and can bridge language barriers.

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<sup>180</sup> Devereux (2019) p. 400-402.

<sup>181</sup> Herremans and Destrooper (2021) p. 586.

<sup>182</sup> Schantli p. 308-313 (2021).

<sup>183</sup> As outlined in for example in article 5 of the ECHR.

<sup>184</sup> Triscone (2021).

<sup>185</sup> Hohler and Pederson (2017).

### 6.3 The IIIM support to jurisdictions

As a part of the Mechanism’s mandate the IIIM shall provide support to jurisdictions. However, the ability is limited, as stated in their Terms of Reference: *“The Mechanism shall share its information only with those jurisdictions that respect international human rights law and standards, including the right to a fair trial, and where the application of the death penalty would not apply for the offences under consideration.”*<sup>186</sup> Such jurisdictions are known as ‘competent jurisdictions’. Competent jurisdictions refer to tribunals and courts that can be seen as encompassing law enforcement agencies, investigative authorities, prosecutorial authorities and can conduct civil law proceedings that concern liability for crimes in Syria that fall under the IIIM’s mandate.

The IIIM can provide support to competent jurisdictions in two ways, it can provide information upon request, so called ‘Request for Assistance’ or by its own initiative, proactively. The cases when the IIIM proactively shares information with a competent jurisdiction is, most likely according to them, is to assist an ongoing prosecution or investigation in an already identified competent jurisdiction.<sup>187</sup> The extent of the proactive sharing by the IIIM will depend on the amount of information of ongoing prosecutions, and investigations the national jurisdiction shares. Most common is that the IIIM receives a request of assistance. The scope of the IIIM assistance includes:

- Multi-lingual open-source research
- Geolocating crime scenes and other locations of interest
- Identifying and locating witnesses for interviews by competent jurisdictions
- Introducing sources to competent jurisdictions
- Translation of high-value data
- Conducting high-value interviews for competent jurisdictions.<sup>188</sup>

The number of requests for assistance continues to rise, as by last year (2022) the IIIM received 242 requests for assistance from 15 competent jurisdictions. Out of these requests three were rejected as the mechanism deemed, they did not have the appropriate mandate, and 168 were processed and closed.<sup>189</sup> 53 requests are currently being processed and 18 are pending assistance. Out of

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<sup>186</sup> Report of the Secretary-General, Implementation of the resolution 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 (January 19 2017) UN Doc. No. A/71/755 p. 9.

<sup>187</sup> ‘Support to Jurisdictions’.

<sup>188</sup> ‘Support to Jurisdictions’.

<sup>189</sup> UNGA ‘Report of the 77th Session of 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 (16 February 2023) UN Doc A/77/751.

the 242 requests, 195 were closely related to distinct prosecutions or investigations. 130 request out of the total amount had already been assisted by the mechanism through sharing information, evidence or similar analytical products.<sup>190</sup>

## 6.4 Potential difficulties accepting illegally obtained evidence

The IIIM strives to only gather evidence that are admissible in court and serves the UN's purpose of bringing justice and accountability for crimes in the Syrian Arab Republic. However, as the IIIM have no right to collect primary sources, it is dependent on third party sources to gather material and evidence. It is unclear to what insight the Mechanism has to the evidence collecting methods used by their sources. It is possible that Mechanism accepts evidence that is obtained illegally.

For example, it is possible that the IIIM receives information that has been gathered without a valid court order, lack of permission from the Syrian government officials or that the evidence is stolen. The IIIM admission of potentially illegal evidence obtained can prove problematic, as many states apply an exclusionary rule prohibiting the use of illegally obtained information. At a modest estimation at least sixteen other countries do not allow improperly obtained evidence in court. In addition, countries might still reject the evidence based on that this was obtained in violation of the defendant's human rights. Also, even if the European states domestic laws might not decline illegally obtained information, they could be forced to reject the evidence based on ECHR, most probable article 8, as it prohibits public authorities from interfering with people's right to family and private life, home, and correspondence.<sup>191</sup>

States such as France, Germany and the Netherlands and Sweden will accept illegal obtained evidence, if the evidence is obtained purely by private parties. Additionally, some states such as Sweden have a broad discretion in admitting evidence, and will even allow evidence obtained by state authorities. Therefore, in some states it will have little legal implication no matter if the IIIM accepts illegal evidence or not.<sup>192</sup>

It is difficult to determine to what extent this might affect the Mechanism's usefulness to other states (that have exclusionary rules regarding illegally obtained information) wanting to use the Mechanism's evidence in their

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<sup>190</sup> 'Support to Jurisdictions'.

<sup>191</sup> Exceptions to this rule is if such interference is done according to the law and is deemed necessary in a democratic society in the interests of public safety, national security, economic health of a country, protection of morals, health or prevention of crime or the right and freedoms of others; Krapiva (2019) p. 1114.

<sup>192</sup> Krapiva (2019) p.1110-1119.

national courts. There is no public insight if or if so to what extent the Mechanism collect and or stores illegally obtained evidence. Also, there is no knowledge if a court have rejected evidence from the Mechanism on the basis that it is illegally obtained information. There is at the time of writing only evidence that the IIIM have assisted criminal proceedings in Sweden and Germany, countries that are known to admit a broad discretion of evidence. If this a coincidence, or causality it is not possible to deter.

## 6.5 Support to specific cases

Despite the organ is still quite young it has already contributed to domestic court cases. War crimes units such as the European Union Judicial Cooperation Unit have also taken advantage of the IIIM's work.<sup>193</sup> States such as Austria, France, Germany, Norway, the Netherlands, Spain, Sweden and Switzerland have already investigated and prosecuted individuals that are believed to have committed war crimes in Syria. Convicted individuals include members of the Syrian army, non-state armed groups, ISIL fighters, Jabhat al-Nusra fighter. Charges have also been filed against Syria's Head of Air Force Intelligence.<sup>194</sup>

The mass influx of Syrian asylum seeker into Europe, has provided the European investigators and courts more victims, material, evidence, and suspects, and as result some European countries have had a better opportunity than other states to receive first-hand information and prosecute.<sup>195</sup>

It is not known what information the IIIM have provided to national courts, unless it is specified by the courts themselves. At the time of writing, only a few court cases have publicly stated that they received material from the IIIM, and they have not specified what information they received. There is at best knowledge regarding what topics the courts received assistance with and if the material was testimonial or written material. For this reason, it is difficult to infer with certainty the extent to which the IIIM was an integral part of the prosecution.

### 6.5.1 Sweden - B2853-22, Solna District Court

9<sup>th</sup> of January 2023 the Districts Court of Solna in Sweden sentenced Camilla Olofsson and Abdirahman Shukri Mohamed for their war crimes in Syria which included taking children to a war zone, forced the children to get married, and child rape in Syria 2013-2014. The preliminary investigation report in the trial is confidential. It is stated in the judgment that the prosecutor relied and presented various written reports and interviews with witness supplied by the IIIM.<sup>196</sup> It is explicitly stated that two of the witness have

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<sup>193</sup> Van Schaack (2020) p. 368.

<sup>194</sup> Krapiva (2019) p. 1107-1115.

<sup>195</sup> Devereux (2019) p. 404.

<sup>196</sup> B2853-22 p. 19.

primarily supported the prosecutions by detailing facts that already had been established by the Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD) and IIM reports.<sup>197</sup> However, in the IIM yearly report submitted to the General Assembly it is stated that the case “*relied upon the Mechanism’s analytical work relating to the situation of girls in areas controlled by ISIL*”.<sup>198</sup>

## 6.5.2 Germany – Koblenz Federal Court Judgement – Eyad A. case

In the beginning of 2021 Eyad A. was sentenced for war crimes in the Syrian Arab Republic that included aided and abetting torture, and deprivation of liberty as crimes against humanity (crimes were considered to be at least 30 cases in violations of the German Code of Crimes against International Law).<sup>199</sup> Significant about this conviction is that Eyad was a former low ranking official of the Syrian Regime, and his crimes was committed as a part of the Syrian government’s widespread and systematic attacks against the Syrian public.<sup>200</sup> The German court relied on reports from that detailed the political situation, the Syrian government’s use of (excessive) force, torture (including beatings deprivation of water, food and sleep) abductions, disappearances, rape, and shootings. The information was used to cross-reference witnesses and additional facts.<sup>201</sup> Yet, it is not known if the IIM provided any of stated information<sup>202</sup> there is only knowledge that the German Federation Prosecution Office has publicly announced that the Mechanism has provided effective support by sharing evidence.<sup>203</sup> Also, one can infer that the IIM have assisted the conviction as this court case has been translated into Arabic and English by the IIM, and is published on the IIM webpage.<sup>204</sup>

## 6.5.3 Conclusion

Unfortunately, there are not enough cases available nor do these cases provide enough insight to draw any viable conclusion regarding the IIM’s contributions to these convictions. What has been demonstrated in these two

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<sup>197</sup> B2853-22 p. 98.

<sup>198</sup> UNGA ‘Report of the 77th Session of 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 (16 February 2023) UN Doc A/77/751 p. 7.

<sup>199</sup> The Higher Regional Court of Koblenz – Eyad A. case; ‘Koblenz Court Issues Verdict in Eyad A. Case’.

<sup>200</sup> ‘Koblenz Court Issues Verdict in Eyad A. Case’.

<sup>201</sup> The Higher Regional Court of Koblenz – Eyad A. case p. 58,61, 80-82.

<sup>202</sup> It is, however, established that CIJA contributed to information.

<sup>203</sup> UNGA ‘Report of the 76th Session of 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’(11 February 2022) UN Doc A/76/690 p. 4.

<sup>204</sup> ‘Court Judgements’.

cases is that organizations have relied on the IIM's cultural and historical research, cross-references of information and its analytical work. However, the impact of the IIM is formulated very broadly, and it is not possible to know the extent to which the information contributed to a conviction. The fact remains that the Mechanism contributed to the evidence in these two cases, and this must be taken as a positive development in terms of universal jurisdiction.

## 7 Analysis

### 7.1 International criminal law

International law has failed in the Syrian conflict. The last decade international law has accomplished extraordinary feats, creating institutions such as ad hoc tribunals, hybrid tribunals and the ICC pursuing accountability for international crimes. In the Syrian conflict, neither international law nor the international community have managed to halt violations or even succeeded in reducing such violations.<sup>205</sup> As Sarkin and Capazorio argues “*The Syrian conflict represents a test case for the limits of international law and the international community*“.<sup>206</sup> As demonstrated in this thesis, none of typical ICL pathways can be pursued unless there is a political will to do so, either through state consent or ratifications of treaties/agreements. The situation in Syria demonstrates the current gaps and weaknesses in the system, especially where the jurisdictional boundaries leave gaps of impunity. It is clearly demonstrated that international law, as structured today, is inadequate to deal with the Syrian conflict.

Despite the many objections against the establishment and continuation of the IIIM it is clear that it is not Mechanism’s mandate or its functions that is an issue. It is due to national and international politics, and the lack of political will of states allowing the Mechanism to have a role in the *Syrian conflict*. Just a year after the creation of the IIIM the Security Council established UNITAD, and a year after that the Human Right Council created the Independent Investigative Mechanism for Myanmar (IIM). Two bodies whose mandate mirrors that of the IIIM, in that they strive to assist national efforts to hold parties accountable by assisting in the collection, preservation and storage of evidence, and to cooperate with national courts to promote accountability for crimes committed.<sup>207</sup> The biggest difference is that their mandate is tied to different regions.<sup>208</sup> The similarities in their mandate is contrasted by the difference of the organisation’s ability to operate within their defined region. UNITAD was created at the request of the state in which it operates (Iraq), therefore it can operate within Iraq, have open access to possible crimes sites, and employ the benefits of having the support from the Iraq governance structures. The Myanmar Mechanism on the other hand, as a part of their mandate includes cooperation conducted at the ICC, is related to state responsibility<sup>209</sup> under the Genocide Convention before the ICJ.<sup>210</sup> Therefore, the UNITAD and the Myanmar Mechanism

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<sup>205</sup> Pues (2022) p. 495.

<sup>206</sup> Sarkin and Capazorio (2022) p. 512.

<sup>207</sup> Pues (2022) p. 570-572.

<sup>208</sup> Pues (2022) p. 570-572.

<sup>209</sup> See the Case of the Gambia vs. Myanmar.

<sup>210</sup> Pues (2022) p. 572-573.



demonstrate that it is not the Mechanism's mandate itself, it is due to objections of the Mechanism being active in Syria.<sup>211</sup>

The creation of the IIIM shows an attempt to bridge the inability of the international law and community to act. It demonstrates a creative way that the UNGA utilised its position as a security actor and its ability to create subsidiary organs as way to bypass the UNSC paralysis and the lack of consent from country in question (in this case Syria). It allowed when there is majority consensus of the UN members states to act, it will not be blocked by a select few (the UNSC).<sup>212</sup>

The creation of the IIIM allowed for a greater expansion and multidimensional approach of ICL. Typically, criminal accountability has only been possible through a few centralised institutions. The consequence of the ICC being one of the few centralised criminal accountability actors is that the ICC has been vulnerable to political pressure. The ICC has as a result of their investigations into a specific country been exposed to sanctions against the ICC Prosecutor, and withdrawals of state parties. However, due to the uniqueness of the IIIM, similar political pressure would be very difficult to apply. The IIIM can operate without state consent or the UNSC approval. The lack of consent from Syria prohibits that the IIIM itself can act within its borders. However, due to the organisation's close relations to CSOs, NGOs and other states present in Syria, the IIIM can still exercise its mandate. Thus, the IIIM solves one of the biggest issues in international criminal law.<sup>213</sup>

The IIIM cannot 'solve' the Syrian conflict nor can it replace institutions such as the ICC. The Mechanism cannot provide criminal accountability, only assist the procedure to do so. Nevertheless, the IIIM can play an important part by complementing already existing ICL structures and efforts in national jurisdictions.<sup>214</sup> It can create a wider net of the pursuit of criminal accountability, and does so by assisting states to utilise universal jurisdiction and when the time comes assist future international judicial proceedings/courts. Thus, the Mechanism can be seen to provide an additional dimension of international criminal justice, and thus, is hopefully able to increase the chances of holding perpetrators in the Syrian conflict responsible. Even if the Syrian conflict were to end tomorrow, the pre-existing weakness of international law would still take several years to solve. Until then, the Mechanism can bridge a part of the current accountability gap in the Syrian conflict.<sup>215</sup>

## 7.2 Accountability

The Mechanism purpose is to bring criminal accountability for crimes committed in the Syrian Arab Republic. The Mechanism demonstrates that

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<sup>211</sup> Pues (2022) p. 572-573.

<sup>212</sup> Pues (2022) p. 572-577.

<sup>213</sup> Pues (2022) p. 577.

<sup>214</sup> Pues (2022) p. 576.

<sup>215</sup> Devereux (2019) p. 394.

future accountability can be pursued through the establishment of an archive, and the use of universal jurisdiction.

### 7.2.1 Archive

Documentation can allow for various paths towards accountability. The Mechanism has and continues to gather, analyse, and process evidence in the Syrian conflict with the purpose of that it shall be used in (future) criminal proceedings. Thus, IIM can be a tool in pursuing criminal accountability by providing information that assists judicial processes. However, this would be an all too simplified conclusion, as achieving accountability goes beyond a conviction, it must be characterised by a fairness and justice and it must fulfil international judicial standards.<sup>216</sup> As the act of archive building is not neutral, it matters how the IIM archive is built, organised and utilised. The archive can, intentionally and unintentionally, be affected by various biases from technological solutions, its staff and the archives' purpose itself. The IIM archive and its practices must be trusted, in order for it to be used in future criminal process.

The Mechanism archive is tailored to pursue criminal accountability and gathers evidence that uphold the highest standard of international law. This will influence the IIM archive in its entirety. It is possible that different archives will have different narratives of the Syrian conflict, contradicting evidence and different interpretations of the same evidence. Contradicting narratives can exist within for example historical archives. However, within criminal archives, it tends to be difficult as they typically strive towards either an innocent or guilty verdict. When there are contradicting archives (and there must realistically be)<sup>217</sup> there are no established procedures on how to proceed. However, one must consider how often this can occur, and if so to what extent archives may differ from each other. Is it a rare occurrence or does it happen so frequently, that every time the IIM would supply evidence to a domestic court, the court would be forced to fact-check the information. It is not clear how such a situation can be resolved. The archives strive to avoid such situations through rigorous fact checking. In order to avoid such scenarios, the archives could for example fact check with each other, share archives etc. This also creates some issues as there are multiple archives active in Syria that all store a significant amount of evidence. Fact-checking all archives and all their evidence against each other does not seem realistically possible. Also, the confidential nature of the IIM archive would prohibit such a possibility.

As the Mechanism is established with a very specific purpose in mind, there is a need to be careful when using its information in different situations. The

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<sup>216</sup> Devereux (2019) p. 393.

<sup>217</sup> Consider the large amount of information in the conflict and the knowledge that archives have in the past over documented by interviewing the same witness several times.

archive's information has been transformed to be information that is held to the highest international evidentiary standard. An archive as such, will differ from human rights or historical archives. Due to the confidential nature of the Mechanism, it is not possible to determine exactly how its information is transformed. It is possible that the Mechanism archive cannot be used in other situations as the information cannot be separated from the Mechanism's influence. Perhaps, the transformation is subtle, and thus it is possible to use the Mechanism's information in other situations without it potentially being damaging. However, due to the lack of insight into the organisation, it is not possible to give a definitive answer. Additionally, if this were to be a concern, there is nothing prohibiting the archive of changing its information collection methods. As seen in the IIM's expanded mandate in regards to assisting in the search of missing people, the IIM changed its methods in order to accommodate its new purposes.<sup>218</sup>

The IIM must consider the consequences of sharing information to judicial entities. International criminal justice archive tends to push one singular truth, in order to inspire a conviction. This is among other things due to the limits of international law in telling complex narratives. Furthermore, the IIM and the countries being assisted by the IIM, must consider that the use of the archive will not only lead to potential conviction of suspects, it will also enforce a narrative of the Syrian conflict. This is partially due to the legitimacy a court process has, as the process should allow an evaluation of evidence, allow defendants as well as the prosecution to motivate their position and so on. This is by itself not necessarily a bad thing, however, there is a need for an awareness regarding this.

The IIM as UN-organ is a very well-suited entity to be a custodian, as it has financial, and technological resources, and a large collaboration network. It is preferable, in a conflict with several fact-finding organs, to have one entity that prioritises being a 'bridge' between many organisations. However, with that in mind, the IIM is not the only suitable option as demonstrated previously; other NGOs have done very well in other past conflict.<sup>219</sup>

The IIM bears a great responsibility as a custodian and a creator of one of Syrian's atrocity archives. The information that the IIM collects, processes, and analyses have the potential of rewriting Syrian history (as archival building is not neutral).<sup>220</sup> Through its role as custodian, the IIM will have complete control of its archive, deciding what information to accept or reject, when and who it wants to give information to. It must be questioned if the number of a select few (the workers of the IIM) should have this power and if they are qualified to do so. Especially, as the archive intended use is for the Syrian population; one must question if the IIM can determine the will of the

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<sup>218</sup> Burgis-Kasthala (2022).

<sup>219</sup> Ciorciari (2012) p. 8-12.

<sup>220</sup> Campbell (2013) p. 247-248.

Syrian public. The IIM have attempted to combat this by striving to encourage the Syrian population to contribute towards its work and establishing various memorandums of understanding with CSOs and NGOs. In addition, the Mechanism has also created VSCA strategies to further account for the victims' perspectives. It is, however, unclear what success the IIM have had so far. Literature tends to question the Mechanism's ability in this regard.<sup>221</sup>

Furthermore, the IIM has an even greater responsibility safeguarding the archive due to its confidential nature. There is no insight into the Mechanism archive, due to that the IIM strives to guarantee the safety of its parties and not threaten the integrity of current nor future trials. However, the secrecy of the Mechanism makes it impossible to fully review the entity. As previously discussed in this heading, there is no public knowledge of exactly what information it stores, how it decides what information shall be shared or to whom et cetera. Without a possibility to review the IIM operation, it must be questioned if that partly diminishes trust for the IIM, especially as democratic archive building tends to rely on openness and transparency.<sup>222</sup>

The IIM archive possibilities to assist criminal accountability has great potential. However, when IIM archive is utilised, no matter the scenario, there is a need for a careful consideration and an ethical reflection. The IIM archive can create and destroy multiple potential uses of the archive; it can push a narrative and it bears a great responsibility as a custodian of the archives, especially due to its confidential nature.

### 7.2.2 Universal jurisdiction

Another path the IIM pursues accountability is by providing information from its archive to competent jurisdictions so that they can utilise universal jurisdictions.

The Mechanism has assisted criminal entities with cultural and historical research, cross-references of information, analytical work and witnesses. Judicial bodies (in Germany and Sweden) that have received support from the IIM have prosecuted and convicted Syrian war criminals. The Mechanism assistance has proven to be helpful as they already have information stored, provided cultural and historical insights as well as translations which lessens the (financial as well as time consuming) burden for the countries exercising universal jurisdiction.

Universal jurisdiction allows for criminal accountability to be achieved in the present time. To the public knowledge, there has not been many perpetrators that have been sentenced with the help of information from the assistance

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<sup>221</sup> Burgis-Kasthala (2021) p. 1214.

<sup>222</sup> Devereux (2019) p. 399.

from the IIIM. This could question the usefulness of universal jurisdiction. However, one should not underestimate the importance of seeing justice done, not only accomplishing it. Universal jurisdiction can be used as a ‘naming and shaming’, a tool that can be used mid-conflict, by publicly convicting, and associating an individual with criminal responsibility can show that the world is watching.<sup>223</sup> As the Syrian conflict has continued for more than a decade and most likely there are several years until any form of larger version of accountability can be accomplished, seeing any form of accountability can be of the utmost importance.

The use of the Mechanism archive in universal jurisdiction will still, as in general international criminal law, be dependent on the political will of states. Far from all states will willingly employ the Mechanism’s information and universal jurisdiction. As discussed, many countries might even be unable to do so due to the uncertain origin of the Mechanism’s evidence. However, it does allow countries, such as Germany and Sweden, that want and can use universal jurisdiction to do so. Perhaps, one state’s use of universal jurisdiction, is better than no state at all.

The secrecy of the Mechanism also limits the opportunity to examine to what extent the IIIM has been able to contribute to the application of universal jurisdictions. It has up until March 2023 concluded 83 cooperation networks with “*a range of stakeholders*”<sup>224</sup>, received Requests for Assistance from 15 jurisdictions and has assisted 130 distinct national investigations. However, due to the secrecy of the Mechanism’s contribution to other entities’ use of universal jurisdiction, it is not possible to know how many convictions the IIIM has assisted nor determine to what extent the Mechanism has inspired a conviction. Perhaps, the domestic courts would have been able to convict the war criminals without the support of the Mechanism.

Furthermore, there is no insights as to why nor into the reasoning behind that some jurisdictions are deemed to be competent and others not.<sup>225</sup> The Mechanism, when it has received a Request for Assistance can either assist or reject the request. Also, it is unclear when an entity receives a rejection of

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<sup>223</sup> ‘Republic of Liberia Truth & Reconciliation Commission, II Consolidated Final Report 349–52’ (June 30, 2009); ‘From Madness to Hope: The 12-Year War in El Salvador: Report of the Commission on Truth for El Salvador’ (Apr. 1, 1993). U.N. Doc. S/25500.

<sup>224</sup> UNGA ‘Report of the 77th Session of 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 (16 February 2023) UN Doc A/77/751 p. 3.

<sup>225</sup> Except that the IIIM shall share its information to jurisdiction that respect international human rights law and standards.

a Request for Assistance if it receives a motivation for the rejection and if there is a possibility to appeal such a request.<sup>226</sup>

Furthermore, the confidential nature of the IIIM is motivated by that IIIM wants to protect its partners and witnesses. However, when information is shared to competent jurisdictions, one must question if there are sufficient methods to safeguard the IIIM partners and witness.<sup>227</sup>

There are many uncertainties regarding the IIIM assistance to competent jurisdictions exercising universal jurisdiction. However, one must consider the current accountability gap in the Syrian conflict. The IIIM and the use of universal jurisdiction might not be a preferable nor the most efficient path towards accountability. Furthermore, it cannot be neglected that the IIIM and its support to competent jurisdictions can partially bridge the accountability gap.<sup>228</sup>

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<sup>226</sup> Devereux (2019) p. 399.

<sup>227</sup> Devereux (2019) p. 399.

<sup>228</sup> Devereux (2019) p. 405.

## 8 Concluding remarks

In the current international system, it is difficult to reach a form of accountability for victims, societies, groups and world order without invoking some sort of international criminal law. In order to invoke international criminal law no matter what form (such as tribunals, jurisdictions and ICC) there has to be documentation. As Mohammed Al Abdallah of Syria Justice and Accountability Centre states: “*To do institutional reform, you need good quality documentation.*”.<sup>229</sup> Documentation that the IIIM can supply.

The answer to this thesis research question, “How can a fact-finding organ such as the IIIM work towards criminal accountability” is that the IIIM can work towards criminal accountability through the establishment of an archive and by supporting competent jurisdictions in utilising universal jurisdiction.

The General Assembly’s creation of the IIIM has led to a subtle expansion of ICL and the ability to pursue criminal accountability in the Syrian conflict. The IIIM archive will be able to supply evidence to future criminal proceedings. It possible for the IIIM to provide assistance to states that exercises universal jurisdiction. The IIIM can be seen as having established a future foundation for international prosecution response, and thus a path forward towards criminal accountability in the Syrian conflict.<sup>230</sup> However, there is a need for a constant ethical reflection of lawyers to constantly question the gathering and presentation of evidence for both archival processes and for criminal trials as it is a process that never can remain neutral. Furthermore, there are many questions regarding the operation of the IIIM and thus, the examination of to what extent the IIIM can provide accountability is severely limited due to the lack of transparency of the IIIM.

With this said, the IIIM as an organisation can provide paths towards criminal accountability.

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<sup>229</sup> Mohammed Al Abdallah interview 10 May 2017 as cited in Abdoueldahab (2018) p. 12

<sup>230</sup> Pues (2022) p. 583.

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