



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



Introduction from the Syrian Center for Media and Freedom of Expression and the Syrian Legal Development Programme to the Syrian civil society organizations convened in Lausanne 4 meeting and represented by the Transitional Justice Coordination Group.

This paper aims to help Syrian organizations understand the criteria of case selection and prioritisation adopted by different international courts to prosecute war criminals in all international and non-international conflicts, and benefit from it in matters related to the most dangerous international crimes committed during the armed conflicts in the Syrian Arab Republic.

The international community has previously witnessed dangerous international crimes like the ones committed during the Syrian conflict, and different international courts like the International Criminal Court, the International Criminal Tribunal for former Yugoslavia and the International Criminal Tribunal for Rwanda were formed to prosecute the perpetrators of such offenses.

But it is not realistic to expect from a court to look into all dangerous international crimes committed in the Syrian context since 2011 or to expect that it will prosecute all criminals in Syria. It is also probable that some crimes will not be prosecuted due to the lack of financial resources or any other reason.

Despite the fact that all cases labelled as major international crimes are highly important, some cases should be prioritized over others as they require immediate attention. For this reason, it is important to set defined and non-aligned principles and criteria to select and prioritise cases and crimes with defined properties. The selection and prioritisation process should be clear and transparent to avoid unrealistic hopes from the public and accusations of succumbing to political pressure.

This paper will define and explain the various criteria established by international courts, through which the process of selecting cases and setting prosecution priorities was outlined. The main

objective of this paper is to explain these criteria, allowing Syrian organizations to make well-evidenced recommendations based on knowledge in the international criminal law for cases and crimes they prefer they become the point of focus for the International Impartial and Independent Mechanism when collecting, consolidating, preserving and analysing evidences of violating the humanitarian international law and human rights abuses in Syria, and also when preparing files to facilitate and expedite the independent and fair criminal proceedings for international crimes committed during the Syrian armed conflict.

In this paper, we are going to explain the "Strategic Litigation" clause, sometimes named "Effective Litigation", and how to select cases and file suits in order to make broad changes in the society. Usually, the objective of applying the "Strategic Litigation" clause is to refer to the law to make a permanent impact and not only to win the case. That means "Strategic Litigation" looks after the impact of the cases on societies and governments and their final results.

It is important to take the "Strategic Litigation" concept into consideration when selecting cases and crimes the Syrian organizations prefer they become the point of focus for the International Impartial and Independent Mechanism when collecting, consolidating, preserving and analysing evidences and preparing files related to international law violations.

This paper will be divided into four parts:

Part 1: defining the International Impartial and Independent Mechanism framework.

Part 2: Methodology to set criteria of selecting cases and priorities of prosecution.

Part 3: setting criteria to select war crimes cases adopted by different international courts which could be of benefit when trying to select cases the International Impartial and Independent Mechanism should focus on when preparing files and evidences of crimes committed in the Syrian Arab Republic.

Part 4: explain the implications of these criteria and mention how different international courts made use of them in the process of selecting cases and setting priorities for prosecuting international crimes.

Part 1: the IIIM framework should be defined before setting priorities for prosecution of international crimes committed in Syria, in order to help prosecuting the perpetrators of the most serious crimes committed in the Syrian Arab Republic since March 2011. It is also necessary to define the IIIM framework, in other words “scope of competence” of the IIIM.

General Assembly Resolution 71/248:

“The General Assembly emphasizes the need to ensure accountability for crimes involving violations of international law, in particular of international humanitarian law and international human rights law, some of which may constitute war crimes or crimes against humanity, committed in the Syrian Arab Republic since March 2011”.

http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/248

“The General Assembly Decides to establish the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 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”.



It could be understood from the language used in the General Assembly resolution to establish the International, Impartial and Independent Mechanism (IIIM) that the scope of the mechanism is not limited to war crimes or crimes against humanity, but encompasses any violation of the international humanitarian law and the international human rights law (not every violation of the international humanitarian law/ international human rights law is necessarily a war crime or a crime against humanity).

The only international court that might have jurisdiction over Syria is the International Criminal Court. It is only concerned in war crimes, crimes against humanity and genocides as stipulated in the Rome Statute of the International Criminal Court. According to international law, national courts might exercise what is called the universal jurisdiction. In the meantime, this is the only basis for non-Syrian courts to prosecute non-Syrian citizens who committed crimes in Syria, given that these crimes (i.e. war crimes, crimes against humanity, genocide) are considered international crimes in accordance with customary international law. This list also includes crimes

stipulated by the Rome Statute of the International Criminal Court in addition to (maybe) a limited number of additional war crimes that were not stipulate in the Rome Statute. ([check customary war crimes list issued by the International Committee of the Red Cross](#), especially those related to international armed conflicts). In this context, the only case to justify the classification of other violations to the international humanitarian law or the international human rights law different than the violations that are war crimes and crimes against humanity in the scope of the International Impartial and Independent Mechanism (IIIM), is to establish an international criminal court for Syria with jurisdiction over any act that violate the international humanitarian law or the international human rights law.

Part 2: Methodology to set criteria of selecting cases and priorities of prosecution

This paper studied the criteria of selecting cases established by the International Criminal Court, and presented in the Public Policy Paper of the Office of the Prosecutor published in September 2016 ("[Policy Paper on case selection and Prioritisation](#)"). The Court has three criteria: the seriousness of the crimes, the degree of responsibility of the accused and the charges against them. Under each of these criteria, an explanation and other elements to be observed.¹

This paper also reviewed a book entitled "[Criteria for Prioritizing and Selecting Core International Crimes Cases](#)" by Morten Bergsmo. This book examined and analysed the criteria for selecting cases and defining the priorities of prosecution established by the International Criminal Court, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Khmer Rouge Court and the Special Court of Sierra Leone.

It also studied and analysed criteria for the selection of cases of war crimes, crimes against humanity and human rights violations that have been adopted in countries like Bosnia and Herzegovina, Argentina, Colombia, Croatia, Indonesia, Serbia and the United States of America. The paper reviewed all these different criteria, analysed them and selected some common elements, especially those related to the Syrian context.

The criteria described in this paper are more detailed criteria than those used by different courts. This paper has compiled, arranged and explained the selected criteria in a simplified and clearer manner. The objective of this paper is to assist Syrian organizations in the process of selecting and prioritising issues and the crimes that Syrian organizations prefer they apply to the IIIM while finding, collecting, preserving and analysing evidence and preparing files related to violations of international law. The paper also reviewed other sources cited in the paper.

1- Syria is not part in the Rome Statute, the treaty that established the International Criminal Court. If the Syrian government do not sign this treaty or issue a statement accepting the jurisdiction of the court, the United Nations Security Council would still need to refer the Syrian file to the ICC. The Security Council can, through what is known as "referring the file to the ICC", give the court jurisdiction to look into matters that go back to the date the ICC came into force (1 July 2002).

Part 3: Defining criteria for selecting war crimes cases adopted by different international courts which can be reviewed when trying to identify the cases on which the IIM should be based when preparing files and evidence of crimes committed in the Syrian Arab Republic.

Various international courts have adopted different and varied criteria in the process of selecting cases, where perpetrators have been prosecuted. There are two main pillars for international courts in setting the criteria for selecting war crimes cases:

The seriousness and gravity of the crimes committed and the degree of responsibility of the accused person. There are two different approaches that can be followed when selecting cases and initiating investigations.

The first approach looks first into the crime itself (crime-driven investigations); in this case, the choice of criminal events is in accordance with the criteria set below and is the primary factor guiding the investigation. The accused are selected at a later stage of the investigations.

The second approach looks into the suspects (suspect-led investigations); in this case the suspect is chosen from the beginning according to the criteria set out below, and this choice determines the evolution of the of the whole investigation.²

It should be noted that the suspect-led investigations are fairly common when dealing with international crimes and are often preferred by investigative authority because they are considered to be faster and easier. The choice of a suspect-led investigation approach would be entirely legitimate if evidence and information that would justify the choice of such an approach were available in the first phase of investigations (for example, in the case of Adolf Eichmann). However, this approach involves the risk of losing the broader picture or what is scientifically known as “assertion of prejudice” i.e. selective collection and interpretation of evidence to confirm a hypothesis ³ (in this case, the problem is the assumption that the accused is guilty before the investigations are completed and the trial begins).

Certainly, “assertion of prejudice” is a common problem in criminal investigations that follow this approach and may affect the quality of results and may be considered by some judges to be detrimental to the fairness of the judicial process. Experience shows that the best way to control the risk of the suspect-led investigations are:

A) First, the investigation outlines should be defined by conducting an analysis based primarily on the suspect and by considering him as the gateway to t other details of the crime. When the information about the suspect in particular and the

² <http://www.toaep.org/ps-pdf/4-bergsmo-second> , page 233.

³ <http://www.toaep.org/ps-pdf/4-bergsmo-second> , page 233.

crime in general are available, further analysis of other merits of the crime in general is expanded rather than relying solely on the suspect.

B) Focusing on organizational structures will help assessing the role played by the suspect in a more objective manner.

C) Results must be subject to internal review by a separate team of officials who did not participate in the investigation and therefore do not have the "assertion of prejudice" problem.⁴

This section of the paper will identify the elements that can be reviewed if either approach is selected:

A) Elements of determining the seriousness and gravity of the crimes (in case of crime-driven investigations)

B) Elements relating to the suspected person (accused) and the degree of his / her liability (in case of suspect-led investigations) as well as clarifying other elements that must be taken into account when selecting and prioritizing prosecutions

C) Elements related to victims and witnesses

D) Policy considerations

E) Practical considerations

Note: Section 4 of this paper will explain and clarify these elements in more detail. These elements will be referred to in Section 4 of the paper by using the same numerical sequence of elements used in the tables below.

A) Elements of determining the seriousness and gravity of the crimes	
1	Number of direct and indirect victims
2	The geographical and temporal spread of the crimes
3	abusing and increasing vulnerability of victims
4	Cruelty/ extreme brutality
5	Discrimination against a particular group
6	The possibility of linking to other crimes
7	Injustice
8	Social, economic and environmental damage to communities affected by these crimes
9	Broad or long-term effects of crimes

⁴ <http://www.toaep.org/ps-pdf/4-bergsmo-second> , page233.

B) Elements related to the suspect (accused) and the degree of his / her responsibility	
10	The nature of the crimes committed by the accused
11	Repetition or the insistence of the accused to commit the crime
12	The degree of the accused's direct participation in the crime and his intentions
13	Whether the motives of the accused involve discrimination
14	Abuse of authority, official position or capacity
15	The tenure of the accused on the municipal, regional and national levels
16	The authority and control exercised by the accused and his role in policy and strategy decisions
17	The extent of the accused's knowledge and awareness of the crimes committed by his followers
18	The likelihood of the arresting the accused
19	Availability of evidence/ witnesses against the accused
20	The accused is unresponsive to a specific notice
21	Bad reputation of the accused/ committing of particular crimes
22	Potential suspect testimony/ Potential to lead to evidence related to other crimes

There are other important pillars that international courts have adopted when developing criteria for selecting war crimes cases:

- Elements related to victims and witnesses
- Policy considerations
- Practical considerations

C) Elements related to victims and witnesses	
23	The nature of the crimes committed by the accused
24	Repetition or the insistence of the accused to commit the crime
25	The degree of the accused's direct participation in the crime and his intentions
26	Whether the motives of the accused involve discrimination
27	Abuse of authority, official position or capacity
28	The tenure of the accused on the municipal, regional and national levels

D) Policy Considerations

29	Advancing international legal jurisprudence
30	The selection of crimes that have not been prosecuted or focused on in the past
31	Selection of crimes that represent all affected groups and communities
32	The willingness of national courts and their ability to prosecute perpetrators
33	The symbolic value or deterrent effect of judicial prosecution
34	Public perception of the performance, impartiality and balance of the Court

E) Practical Considerations

35	Available investigation resources
36	The impact of the new investigation on the ongoing investigations and the preparation of existing indictments
37	Estimated time to complete investigations
38	Time of investigation
39	The completeness of evidences
40	Availability of information or evidence that acquits the accused
41	Possible legal impediments
42	To what extent the success of the investigation/ prosecution in this case will enhance the strategic objectives of the mechanism
43	To what extent the case is relevant to the larger pattern of ongoing or future investigations or prosecutions

Part 4: explain the implications of these criteria and the various international courts reviewed during the process of selecting cases and determining the priority of prosecution in relation to international crimes.

The aforementioned criteria will be explained in details and the various international courts studied will be mentioned.

A) Elements of determining the seriousness and gravity of the crimes

1- Number of direct and indirect victims: The number of victims is a basic quantitative indicator that helps to determine the seriousness and magnitude of the crime and is used by all international courts.

The judges of the United Nations international courts have consistently used this key element when referring to the gravity and seriousness of the crime (especially during sentencing). Accurate estimation of large numbers of victims in the context of war or mass violence requires a complex methodology, and these estimations often raise controversy in both courts and public opinion. There are two main approaches used to estimate the number of victims: count the total number of victims reported or try to estimate them by sampling and extrapolation.

Judges accepted both approaches, and the best results were derived from both of them.⁵

2- The geographical and temporal spread of crimes: The temporal spread element considers whether a large number of crimes have been committed over a short period of time or whether a small number of crimes have been committed over a long period of time. The geographical spread element helps assessing the geographical area affected by major international crimes, and their wider and longer-term impact, which may go beyond victims or direct damage, to determine the seriousness of the crimes and facilitating the choice of top-priority cases. Crime mapping techniques can help identify “hot spots” or areas with a higher crime rate. Such analyses, for example, were conducted by the Office of the Prosecutor of the International Criminal Court at an early stage of the investigation in Darfur and were presented as an annex to the request for an arrest warrant in the second Darfur case and also used in public communications in 2008⁶. According to the current Prosecutor of the International Criminal Tribunal for Rwanda (ICTR), his office used the criterion of geographical distribution to choose or prioritised cases. The ICTR Prosecutor justified the inclusion of the geographical spread element by because it helps avoid any possible impressions of prejudice, favouritism or discrimination and is also important as a tool of promoting prospects for national reconciliation in Rwanda.⁷

3- Abusing and increasing the vulnerability of victims: choose or prioritise crimes that took advantage of the vulnerability of victims.⁸ This indicator applies in particular to crimes against children, women or indigenous groups such as murder, rape and other sexual or racial offenses, crimes committed against children, crimes of persecution, or imposition certain conditions of life on a group (ethnic, religious, etc.) to destroy it. The nature of crimes that should be prioritised according to the particular circumstances of each armed conflict can be determined through the use of this criteria. For example, the strategy of the Prosecutor of the International Criminal Tribunal for Rwanda was to concentrate primarily

5 <http://www.toaep.org/ps-pdf/4-bergsmo-second> , page 211

6 <http://www.toaep.org/ps-pdf/4-bergsmo-second> , page 215

7 <http://www.toaep.org/ps-pdf/4-bergsmo-second> , page 215

8 <https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf>

on the prosecution of persons who had committed the crime of genocide and since rape and other forms of sexual violence have been used as a tool of genocide, a special attention had been given to sexual crimes.

4- Cruelty/ extreme brutality: choose or prioritise crimes that caused unnecessary pain or suffering for victims⁹, for example, rape¹⁰ and torture¹¹ can be considered among these crimes. The prohibition of international humanitarian law on the use of methods of war that “causes excessive harm or unnecessary suffering” is a rule of the customary international humanitarian law applicable in all armed conflicts.¹² For example, it is possible to select and prioritise crimes related to the prohibited chemical weapons that cause excessive harm and unnecessary suffering to victims.

5- Discrimination against a particular group: choose or prioritise crimes that have disproportionately harmed certain racial, ethnic, national, religious or political groups. It is important to take into account the relative magnitude of the crimes committed against specific groups of the population.¹³ If these crimes are tantamount to ethnic cleansing¹⁴ or genocide¹⁵, the seriousness and gravity of the crimes increases largely. Genocide is one of the worst crimes at all (crime of all crimes). The difference between ethnic cleansing and genocide is that ethnic cleansing is more closely related to geography and forced exclusion of ethnic or related groups from certain regions than genocide.¹⁶

6- The possibility of linking to other crimes: choose or prioritise crimes that may be related to other crimes or crimes that, if investigated, may lead to the discovery of new evidence that might help in the prosecution of other international crimes.

7- Injustice: choose or prioritise crimes that may be of a particular nature, of a long-term or sophisticated scheme, which may indicate a particular evil or brutality.¹⁷ The most famous example of such crimes is genocide.

9 <https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf> & https://www.icc-cpi.int/iccdocs/otp/29.02.16_Draft_Policy-Paper-on-Case-Selection-and-Prioritisation_ENG.pdf page 13

10 time.com/4377708/congo-bemba-rape-war-crimes-icc/

11 <https://www.theguardian.com/law/2016/nov/15/us-army-and-cia-may-be-guilty-of-war-crimes-afghanistan-says-icc>

12 Rule 70, ICRC Customary IHL database, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule70

13 www.toaep.org/ps-pdf/4-bergsmo-second_ page 115

14 The term “ethnic cleansing” has been used in several Security Council and the General Assembly resolution on the conflict in Bosnia and Herzegovina, and has been recognized in the judgments and indictments of the International Criminal Tribunal for the Former Yugoslavia and the International Court of Justice. An interim report prepared by the UN Committee of Experts defined ethnic cleansing as “making a region ethnically homogeneous by using force or intimidation to remove people from certain groups from that region.” The Commission defined ethnic cleansing as “a systematic policy developed by a specific ethnic or religious group aimed at removing the civilian population from another ethnic or religious group from certain geographic areas through violence and terrorism.” This term has not been recognized as a separate crime in international law itself, but processes similar to those described in the term “ethnic cleansing” may amount to war crimes, crimes against humanity or genocide.

15 Prevention and Punishment of the Crime of Genocide <https://www.icrc.org/ara/resources/documents/misc/62s-grn.htm>

16 www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199232116.001.0001/oxford-hb-9780199232116-e-3

17 http://www.toaep.org/ps-pdf/4-bergsmo-second_ page 217

8- Social, economic and environmental damage to communities affected by these crimes: choose or prioritise crimes that led to the destruction of the environment, the illegal exploitation of natural resources, the illegal deprivation of land or destruction of cultural heritage or monuments. An example of these crimes is the case of Ahmed al-Faqi al-Mahdi who was tried before the International Criminal Court, for his involvement in the destruction of Timbuktu tombs in Mali. Al Mahdi was sentenced to nine years' imprisonment.

9- Broad or long-term effects of crimes: choose or prioritise criminal acts with a broad or long-term impact that may go beyond direct victims or harm. (This may include, for example, violence against United Nations peacekeeping, bombs, long-term shocks, economic deprivation and environmental damage).¹⁸ This element may also include the choice or prioritization of long-term crimes that have been committed over years or decades (such as systematic torture or enforced disappearances)

B) Elements related to the suspect (accused) and the degree of his / her responsibility

10- The nature of the crimes committed by the accused:¹⁹ choose or prioritise cases in which the accused committed serious crimes. The nature of crimes refers to the specific factual elements of each crime, such as killings, rape and other sexual or racial offenses against children, persecution, or imposition of certain conditions of life on a group (ethnic, religious, etc.) to destroy it. The greater the seriousness of the crime, the more emphasis should be placed on the case.

11- Repetition or the insistence of the accused to commit the crime: choose or prioritise cases where the accused insists on repeating the offense or when he has previously been convicted of a similar offense.²⁰

12- The degree of the accused's direct participation in the crime and his intentions: choose or prioritise cases in which the accused has directly participated in the crime intentionally and with prior knowledge, and where the moral element of the offense is realized (in this regard, article 30 of the Rome Statute may be invoked)

13- Whether the motives of the accused involve discrimination: choose or prioritise cases where the accused had the motivation to discriminate racially, ethnically, nationally, religiously, politically, sexually or discriminate based on social, economic, linguistic reasons or other type of discrimination harmful to the values of diversity, equality and peaceful coexistence.²¹

¹⁸ <http://www.toaep.org/ps-pdf/4-bergsmo-second> , page 217

¹⁹ <http://www.toaep.org/ps-pdf/4-bergsmo-second> , page 32

²⁰ <https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf>

²¹ <https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf>

14- Abuse of authority, official position or capacity: choose or prioritise cases in which state officials or other actors who have a position of authority abuse the trust given to them by national or international society and exploit it to commit a crime.²² This has been repeatedly demonstrated by international judges, who have often linked the position of the accused and his hierarchy in the authority to the degree of his responsibility for committing the crimes.²³

15- The tenure of the accused on the municipal, regional and national levels: It is preferable to take into consideration the criterion of choice or prioritisation of cases in which the accused occupies a leadership position at the municipal, regional or national level. Most international criminal courts jurisdictions focus on prosecuting “senior leaders”. The Security Council, for example, recognized that “the International Criminal Tribunal for the former Yugoslavia should focus its work on the trial of civilian, military and paramilitary leaders suspected of being responsible for serious violations of the international humanitarian law committed in the former Yugoslav since 1991 and not for simple actors”.²⁴ The Agreement on the establishment of extraordinary chambers in Cambodia (Khmer Rouge Tribunal) gave chambers jurisdiction²⁵ (see also) over “the senior Cambodian democratic leaders and those responsible” for the crimes committed between 1975 and 1979 based on “prioritisation criteria and the identification of international basic crimes cases” (p. 56 and 57 on the ICTR criteria in this regard).

16- The authority and control exercised by the accused and his role in policy and strategy decisions: Most international criminal courts have determined that their jurisdiction is to prosecute the “most responsible” leaders for crimes. The authority and control exercised by the accused and his role in the decisions regarding the policies and strategies that led to the crimes should be taken into account when selecting and prioritising cases. It is not necessary that the accused should be the mastermind who established or drawn up a policy that caused the alleged crimes, but is it sufficient that he had exercised sufficient level of authority by virtue of his tenure or job in the related hierarchy to make him responsible for the crimes.²⁶

17- The extent of the accused’s knowledge and awareness of the crimes committed by his followers²⁷: choose or prioritise cases in which the accused is aware of the actions of his followers (in this regard, article 30 of the Rome Statute and rule 153 on the leadership responsibility for failing to prevent, punish or report war crimes from customary international law database to the International Committee of the Red Cross may be invoked)

18- The likelihood of the arresting the accused: choose or prioritise cases in which the probability of arresting the accused is high. Sometimes the probability of arresting the

22 <https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf>

23 <http://www.toaep.org/ps-pdf/4-bergsmo-second> , page 216

24 <http://www.toaep.org/ps-pdf/4-bergsmo-second> , page 38

25 <http://www.toaep.org/ps-pdf/4-bergsmo-second> , page 28

26 <https://bit.ly/2GwUCvm> , page 11

27 <http://www.toaep.org/ps-pdf/4-bergsmo-second> , page 94

accused may be very low for various reasons.²⁸ For example, one of the biggest problems facing the International Criminal Court is the arresting the accused²⁹, because the Court relies heavily on the cooperation of States with it, and this is often a problem for international criminal courts. There is no executive arm of the international courts to arrest the accused.

19- Availability of evidence/ witnesses against the accused: choose or prioritise cases in which irrefutable evidences against the accused are widely available and in which there is an abundance of witnesses ready to testify against him.

20- The accused is unresponsive to a specific notice: choose or prioritise cases in which the accused responds to a specific and detailed notice after committing a certain crime, especially after being informed of the damage resulting from the crime.³⁰

21- Bad reputation of the accused/ committing of particular crimes: choose or prioritise cases where the reputation of the accused is particularly bad. For example, although the International Criminal Court of Yugoslavia has chosen to focus on the trial of "senior leaders suspected of being more responsible for crimes within the jurisdiction of the International Criminal Tribunal for the former Yugoslavia"³¹, the Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia prosecuted the "less responsible", sometimes for several reasons, including their bad reputation for committing particularly high-profile crimes in areas that have suffered serious crimes (Jeliscic in Brcko).³²

22- Potential suspect testimony/ Potential to lead to evidence related to other crimes: choose or prioritise cases where the testimony of the accused is likely to lead to the conviction of other defendants or the discovery of new offenses³⁴

C) Elements related to victims and witnesses

23- Availability of victims/ witnesses: choose or prioritise cases where credible witnesses are available and ready to testify (see point 24 and 25).

24- Willingness of victims to testify: select or prioritize cases where sufficient witnesses are willing to testify. If the witness is unable or is unwilling to testify, the prosecution's position in the case will be weakened. If two or more prosecution witnesses are unwilling or unable to testify, the prosecution will have to reassess its strategy and fully consider the case³³

28 <http://www.toaep.org/ps-pdf/4-bergsmo-second> , page 31& 32&33

29 https://reliefweb.int/sites/reliefweb.int/files/resources/603D8E48589F6DD1C12577E70039FB54-Ae-gis_Jan2009.pdf. page 3.

30 <http://www.toaep.org/ps-pdf/4-bergsmo-second> , page 217

31 <http://www.toaep.org/ps-pdf/4-bergsmo-second> , page 39

32 <http://www.toaep.org/ps-pdf/4-bergsmo-second> , page 226

33 <http://www.toaep.org/ps-pdf/4-bergsmo-second> , page 53

25- Credibility and reliability of witnesses: choose or prioritise cases where witnesses are credible and reliable. The efficiency and credibility of each summoned witness and the possible impression of all witnesses before the court should be taken into account. A witness may be a partner in the crime, a murderer or a drug addict and this will lead to some restrictions even if he witnessed or was present at the crime scene. Even if this witness in particular must be summoned, it must be taken into account whether other witnesses can prove this witness's testimony.³⁴ The doubts that the defense may have against the credibility of the witness must be considered. In this context, the Prosecutor must consider whether the witness is suffering from any disability that is likely to affect his/ her testimony and credibility. If the witness says he is an eyewitness, it is necessary to determine the relationship between the witness and the accused; the time, vision, and other relevant factors at the time the crime was committed.³⁵ Consideration should also be given to whether there is a conflict of interest between the witness and the accused, or if there are inconsistencies in the witness claims in case he made more than one statement to the investigators, or whether there are discrepancies between eyewitnesses or other witnesses on the same crimes which is allegedly committed by the accused at a particular place, date and time.³⁶

26- Potential risks to victims/ witnesses: In June 2000, Claude Jorda, President of the International Criminal Tribunal for the former Yugoslavia, submitted a report to the Security Council discussing the possibility of the ICTY to focus only on high-level perpetrators, as the lower-rank perpetrators were prosecuted before national courts in the Balkans. The report stated that judges did not support this option at this point in time because of the political climate in the countries concerned and the issues related to witness and victim safety.³⁷ This suggests that the choice or prioritization of issues should take into account potential risks to victims/ witnesses.

27- Possibility of compensating victims: Choosing or prioritising cases in which victims or their parents may be compensated physically or psychologically is very important in the transitional justice phase and may be an important means of promoting prospects for national reconciliation in Syria. (Katanga case:³⁸ trial chamber II in the International Criminal Court granted individual and collective compensation to victims of crimes committed by Germain Katanga for the first time in its history).

28- Availability and effectiveness of witness protection means and programs: consideration should be given to witness protection systems and programs available when cases are selected and whether key witnesses who do not wish or cannot testify for security, personal or other reasons can be included in the witness protection program. The outcome

³⁴ <http://www.toaep.org/ps-pdf/4-bergsmo-second> , page 53

³⁵ <http://www.toaep.org/ps-pdf/4-bergsmo-second> , page 53

³⁶ <http://www.toaep.org/ps-pdf/4-bergsmo-second> , page 53

³⁷ <http://www.toaep.org/ps-pdf/4-bergsmo-second> , page 54

³⁸ <http://www.toaep.org/ps-pdf/4-bergsmo-second> , page 54

of the Prosecutor's negotiations with witnesses who fall under this category will affect his final decisions as to whether the trial should be initiated or stopped.³⁹

E) Policy Considerations

29- Advancing international legal jurisprudence:⁴⁰ select or prioritise crimes that help clarify existing international criminal laws and help strengthen existing legal rules, clarify and strengthen the scope of current protection.⁴¹

30- The selection of crimes that have not been prosecuted or focused on in the past:⁴² select or prioritise crimes that was not prosecuted or previously focused on. The importance of this element is that it assists in the promotion of international legal jurisprudence, the development of the international criminal law concepts and the establishment of legal precedents. For example, the Bemba case in the International Criminal Court was important because it represented the first conviction of rape in the International Criminal Court and helped develop the concept of rape as a war crime in international criminal law. The case of Ahmed al-Faqi al-Mahdi before the International Criminal Court was also important because it was the first conviction for the destruction of the cultural monument. The court convicted al-Faqi for his involvement in the destruction of the Timbuktu tombs in Mali.

31- Selection of crimes that represent all affected groups and communities: Select crimes that are not only a representative sample of the main crimes committed, but also take into consideration that this sample represents all groups and communities affected by the crimes committed.⁴³

32- The willingness of national courts and their ability to prosecute perpetrators:⁴⁴ choose or prioritise cases where national courts can prosecute at the present time. It is possible that competent national courts will prosecute some of the perpetrators of international crimes through the practice of the so-called universal jurisdiction until a court that has jurisdiction over international crimes committed in Syria is established or until the Security Council refers the Syrian case to the ICC.

33- The symbolic value or deterrent effect of judicial prosecution:⁴⁵

It is important to consider the symbolic value or the deterrent effect of prosecution when choosing or prioritising cases. The deterrent effect of judicial prosecution is frequently cited to justify the work of courts and international judicial bodies. In addition, international

39 <http://www.toaep.org/ps-pdf/4-bergsmo-second> , page 53

40 <http://www.toaep.org/ps-pdf/4-bergsmo-second> , page 32

41 <http://www.toaep.org/ps-pdf/4-bergsmo-second> , page 32

42 <http://www.toaep.org/ps-pdf/4-bergsmo-second> , page 32

43 https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf , page 15

44 <http://www.toaep.org/ps-pdf/4-bergsmo-second> , page 32

45 <http://www.toaep.org/ps-pdf/4-bergsmo-second> , page 32

prosecutors often justify their policies by citing the deterrent effect of prosecution, and the judges of international criminal law take the deterrent effect of prosecution into consideration when sentencing defendants.⁴⁶ The deterrent effect of prosecution can be divided into different types: general deterrence, specific deterrence, targeted deterrence, and partial or restrictive deterrence. Public deterrence is to the deterrence of criminal activity by spreading the fear of punishment among the general public. Specific deterrence is the deterrence of future criminal activity for those prosecuted. Targeted deterrence refers to deterring certain individuals or groups within society, while restrictive deterrence aims to reduce criminal activity rather than prevent it (when a potential offender avoids committing certain crimes out of fear of serious punishment).⁴⁷

34- Public perception of the performance, impartiality and balance of the Court:⁴⁸ these criteria should take into account the greater impact of war crimes prosecutions on the entire society, and to what extent the mechanism meets the expectations and needs of the largest number of victims.⁴⁹ For example, the efforts of officials at the Special Court for Sierra Leone provide an inspiring example of how to explain complex and difficult legal concepts to affected communities. The Office of the Prosecutor of the Special Court, together with other court officials, made considerable efforts at the beginning of the Court's mandate to explain to Sierra Leone the mandate of the Court how to prosecute the "most responsible" defendants and how this affected the selection of offenders prosecuted. This is undoubtedly a difficult issue to explain in the villages and cities of Sierra Leone, where many victims still live near those who believe they have committed horrific abuses against them.⁵⁰

E) Practical Considerations

35- Available investigation resources:⁵¹ The financial resources available for investigation when selecting cases and the practical difficulties that the mechanism may face when investigating certain cases should be taken into consideration.

36- The impact of the new investigation on the ongoing investigations and the preparation of existing indictments:⁵² prioritisation of cases where investigation is likely to lead to the discovery of new evidences related to other cases or where investigation may lead to the addition of new names to indictment list.

⁴⁶ <http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1030&context=mjil>, page 307.

⁴⁷ <https://www.nurembergacademy.org/fileadmin/media/pdf/publications/DETERRENCEPUBLICATION.pdf>, page 2

⁴⁸ <http://www.toaep.org/ps-pdf/4-bergsmo-second>, page 32

⁴⁹ <http://www.toaep.org/ps-pdf/4-bergsmo-second>, page 199

⁵⁰ <http://www.toaep.org/ps-pdf/4-bergsmo-second>, page 269

⁵¹ <http://www.toaep.org/ps-pdf/4-bergsmo-second>, page 32

⁵² <http://www.toaep.org/ps-pdf/4-bergsmo-second>, page 32

37- Estimated time to complete investigations:⁵³ Priority may be given to cases that require shorter investigation time in order to have concrete results at a faster time. priority may also be given to cases that require more investigation time so that the mandate of the mechanism does not end before the investigation is completed or new evidence is discovered on other issues and more crimes are detected.

38- Time of investigation:⁵⁴ For example, when prioritising issues, how the commencement of a particular investigation will affect the ability to conduct future investigations in the country. The appropriateness of the timing of the investigation should also be taken into consideration where it may be better to investigate a particular case later because there is a risk to witnesses at the present time, or to investigate it immediately because there are concerns that the evidence on this case will deteriorate after a specified period of time.

39- The completeness of evidences:⁵⁵ When assessing evidences, it must be taken into account how the evidence was obtained and whether there are any possibilities for the court to exclude the evidence for any reason. If so, consideration should be given to whether the exclusion of such evidence could have a significant impact on the decision and to whether the proceeding should be instituted or continued.⁵⁶ The amount and quality of evidence proving the conviction or innocence collected by the Office of the Prosecutor must also be examined, as well as the availability of additional evidence.

40- Availability of information or evidence that acquits the accused:⁵⁷ The availability of information or evidence that acquits the accused and the defense arguments available against the accused must be taken into account as well as any other factors believed to affect the possibility of conviction or otherwise.⁵⁸

41- Possible legal impediments:⁵⁹ The potential legal impediments to particular cases should be considered, for example: whether the evidence was obtained illegally or whether the mechanism was unable to enter Syria to conduct the necessary investigations in the case, obtain evidence or was unable to comply by the standards of acceptability in various national courts.

42- To what extent the success of the investigation/ prosecution in this case will enhance the strategic objectives of the mechanism:⁶⁰ Strategic objective 248

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56 <http://www.toaep.org/ps-pdf/4-bergsmo-second> , page 54

57 <http://www.toaep.org/ps-pdf/4-bergsmo-second> , page 32

58 <http://www.toaep.org/ps-pdf/4-bergsmo-second> , page 55

59 <http://www.toaep.org/ps-pdf/4-bergsmo-second> , page 32

60 <http://www.toaep.org/ps-pdf/4-bergsmo-second> , page 32

is the need to ensure accountability for crimes involving violations of the international law in accordance with General Assembly resolution number 71 through investigations and appropriate, impartial and independent trials at the local or international level, to ensure that all victims are redressed, to contribute in preventing future violations and to achieve sustainable peace in Syria. These objectives should be taken into account when selecting cases and determining the priority of prosecution. It is also important to discuss to what extent the selected issues will promote these strategic objectives.

43- To what extent the case is relevant to the larger pattern of ongoing or future investigations or prosecutions:⁶¹ this should be taken into account in the near future when the mechanism opens different investigation files. That is when a new case, ongoing or future investigations of the mechanism are considered to be relevant to the larger pattern of or prosecution.

Conclusion

Rather than submitting individual recommendations to the IIM, Syrian organizations should preferably meet and discuss how to make well-informed collective recommendations on cases and crimes that they prefer to be the point of focus of the IIM when collecting, consolidating, preserving and analysing evidences and setting up files. The criteria mentioned in this paper can serve as a reference to help Syrian organizations justify the selection or prioritisation of certain cases on pre-defined and transparent grounds. It should be noted that the question of the choosing and classifying cases cannot be considered a science per se, but it involves at the same time more than just a technical intuition: it is a process described by some expert as a craft more than anything else. It is originally a process based on guidelines that are flexible enough to address an infinite array of actual scenarios that will present themselves. For example, rather than assigning a specific importance to each of the above elements, it would be preferable to look at all the facts and elements in aggregate, and then identify the cases on which the IIM would prefer to focus.



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