

The United Nations Mechanism on Syria: Will the Syrian Crimes Evidence be Admissible in European Courts?

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This Note explores potential admissibility challenges that may arise when European courts use evidence of Syrian crimes collected by the newly-established International, Impartial and Independent Mechanism for Syria (“the IIIM”). The Note examines the evidentiary rules of four European countries—France, Germany, the Netherlands, and Sweden—where Syrian cases are currently being investigated or prosecuted. Specifically, it focuses on evidence that was improperly or illegally obtained, including evidence procured by private actors. This Note also looks at the European Convention on Human Rights (“ECHR”) Article 8 and relevant case law from the European Court of Human Rights concerning illegal searches and seizures. Finally, this Note highlights the importance of avoiding admissibility issues that may arise as a result of the IIIM’s close cooperation with both private groups who gather the evidence on the ground and the European authorities that will ultimately be using such evidence in court.

Introduction	1102
Part I The IIIM and Evidence Collected by Non-State Actors in Syria	1104
Part II European Courts’ Role in Prosecuting Syrian Crimes.....	1107
Part III Exclusionary Evidence Rules in European Courts	1109
A. National Jurisdictions	1110
1. France	1111
2. Germany	1111

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3. The Netherlands.....	1112
4. Sweden.....	1113
B. The European Court of Human Rights	1114
C. The Potential Impact of European Laws on Evidence Collected by the IIIM.....	1116
Conclusion.....	1118

INTRODUCTION

It has been eight years since the beginning of the Syrian war, which has left at least 400,000 people dead and over half of the population displaced.¹ Despite abundant documentation of widespread human rights and international humanitarian law violations committed in the conflict, attempts to establish accountability have repeatedly failed. Russia and China have consistently vetoed key United Nations Security Council resolutions on Syria, including one referring the conflict to the International Criminal Court (“the ICC”).² On December 21, 2016, due to increasing frustration with the Security Council’s inaction, the General Assembly established the “International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011.”³

The creation of the IIIM⁴ was an unprecedented move by the General Assembly to side-step the Security Council and create a subsidiary body which could pave the way for accountability in Syria. The IIIM’s mission is to collect, consolidate, preserve, and analyze evidence of violations of international humanitarian law and human rights law. Another part of its mandate is to prepare files for future criminal proceedings in national, regional, or international courts or tribunals.⁵ With this power to collect evidence and build criminal cases, the IIIM has the potential to ensure that the people most responsible for the atrocities committed during the Syrian conflict will not escape justice in a court of law.

1. *About OCHA Syria*, U.N. OFF. FOR THE COORDINATION OF HUMANITARIAN AFF., <http://www.unocha.org/syrian-arab-republic/about-ocha-syria> [https://perma.cc/XZK5-8QQV]; Anne Barnard, *Death Toll from War in Syria Now 470,000, Group Finds*, N.Y. TIMES (Feb. 11, 2016), <https://www.nytimes.com/2016/02/12/world/middleeast/death-toll-from-war-in-syria-now-470000-group-finds.html> [https://perma.cc/L2AQ-TU8C].

2. *See Russia, China Block Security Council Referral of Syria to International Criminal Court*, U.N. NEWS (May 22, 2014), <http://www.un.org/apps/news/story.asp?NewsID=47860#.WQ5x-uXythe> [https://perma.cc/UQ6L-BHVG]; *Security Council—Veto List*, U.N. DAG HAMMARSKJÖLD LIBRARY, <http://research.un.org/en/docs/sc/quick> [https://perma.cc/QRJ9-NVGY].

3. G.A. Res. 71/248 (Jan. 11, 2017); *General Assembly Takes Action on Second Committee Reports by Adopting 37 Texts*, U.N. MEETINGS COVERAGE AND PRESS RELEASES (Dec. 21, 2016), <https://www.un.org/press/en/2016/gal1880.doc.htm> [https://perma.cc/R639-S4QX] [hereinafter U.N. MEETINGS COVERAGE].

4. G.A. Res. 71/248, *supra* note 3.

5. U.N. MEETINGS COVERAGE, *supra* note 3.

The IIIM, however, will likely encounter a number of challenges in fulfilling its mandate because it was created by a General Assembly resolution. One challenge stems from the fact that without the Security Council's authorization under the United Nations Chapter VII mandate,⁶ the IIIM will have no power to coerce Syria or other states to cooperate with its investigations. Therefore, it will have to rely on voluntary cooperation of states, non-governmental organizations ("NGOs"), and individuals to collect and provide the necessary evidence.

The IIIM is also facing another major challenge. Since the Security Council is unlikely to refer the Syrian conflict to the ICC or create a special tribunal, domestic courts in European countries operating under the doctrine of universal jurisdiction will be the only courts that will utilize the evidence gathered by the IIIM in the immediate future. In fact, there have already been a number of Syrian cases investigated or prosecuted by domestic authorities in Austria, France, Finland, Germany, Norway, the Netherlands, Spain, Sweden, and Switzerland.⁷ While it would be beneficial for these jurisdictions to work together with the IIIM to investigate Syrian crimes, questions arise about how these courts will treat evidence obtained by the IIIM. Such evidence is likely to be collected through third parties with no valid court order, without permission from Syrian government officials, or from other suspects in the Syrian crimes. Moreover, some private groups that collect evidence in Syria employ potentially

6. Chapter VII of the United Nations Charter provides the framework within which the United Nations, through the Security Council, may take enforcement action binding on all Member States. U.N. Charter arts. 39–51.

7. Agence France-Presse, *Dutch Find 30 Suspected War Criminals Among Last Year's Refugee Wave*, THE GUARDIAN (Feb. 29, 2016), <https://www.theguardian.com/world/2016/feb/29/refugees-europe-dutch-war-criminals-migration> [https://perma.cc/W6M6-PB4D] [hereinafter *Dutch Find 30 Suspects*]; Paul Day, *Spain Court Drops Complaint Against Syrian Security Forces*, REUTERS (July 21, 2017), <https://www.reuters.com/article/us-mideast-crisis-syria-spain/spain-court-drops-complaint-against-syrian-security-forces-idUSKBN1A61J1> [https://perma.cc/CP3D-AE6L]; Laurence Frost, *France Investigates Syria's Assad for Crimes Against Humanity*, REUTERS (Sept. 30, 2015), <https://www.reuters.com/article/us-france-syria-assad/france-investigates-syrias-assad-for-crimes-against-humanity-idUSKCN0RU11320150930> [https://perma.cc/3SPK-6Y63]; HUMAN RIGHTS WATCH, JUSTICE FOR SYRIA IN SWEDISH AND GERMAN COURTS, 67–74 (2017), https://www.hrw.org/sites/default/files/report_pdf/ijisyrria1017_web.pdf [https://perma.cc/T595-MCPU]; Stine Jacobsen, *Norway Police Search for Syrian War Criminals Among Asylum Seekers*, REUTERS (Jan. 15, 2016), <https://uk.reuters.com/article/uk-europe-migrants-warcrimes-norway/norway-police-search-for-syrian-war-criminals-among-asylum-seekers-idUKKCN0UT1FG> [https://perma.cc/SB9E-PSW2]; Martin Scheinin, *Is Travel to Syrian Warfare a Terrorist Crime? The Finnish Case*, VERFASSUNGSBLOG ON MATTERS CONSTITUTIONAL (May 8, 2018), <https://verfassungsblog.de/is-travel-to-syrian-warfare-a-terrorist-crime-the-finnish-case> [https://perma.cc/8VDW-RNXD]; *Schweizer Justiz Ermittelt Wegen Kriegsverbrechen in Syrien* [Swiss Justice Investigates War Crimes in Syria], TAGES ANZEIGER (Oct. 2, 2016, 15:32), <https://www.tagesanzeiger.ch/schweiz/standard/schweizer-justiz-ermittelt-wegen-kriegsverbrechen-in-syrien/story/21007826> [https://perma.cc/U294-2LGR] [hereinafter *Swiss Justice*]; *Three Finns Charged with Plotting Terrorist Activities in Syria*, YLE UUTISSET (Oct. 18, 2017), https://yle.fi/uutiset/osasto/news/three_finns_charged_with_plotting_terrorist_activities_in_syria/9889930 [https://perma.cc/M3LL-7VSH] [hereinafter *Three Finns Charged*].

problematic methods, like breaking into buildings and taking documents without authorization.⁸ There are serious concerns that this evidence may be inadmissible in domestic European jurisdictions. This Note explores these concerns.

Part I presents a brief overview of the IIIM's structure and mandate, and discusses why the IIIM will inevitably have to rely on evidence collected by non-governmental actors to fulfill its mandate. It also explains how the methods used by some of these actors might create admissibility issues in courts. Part II provides an overview of the publicly-disclosed Syrian investigations and prosecutions taking place in multiple European jurisdictions, and explains why those jurisdictions' cooperation with the IIIM is essential.

Part III examines evidentiary rules and laws in four European countries—France, Germany, the Netherlands, and Sweden—where Syrian cases are currently being investigated or prosecuted, and how those laws might apply to improperly or illegally obtained evidence, especially evidence collected by private actors. It also considers how European prosecutions might be impacted by Article 8 of the ECHR, which guarantees a right to privacy, and related European Court of Human Rights jurisprudence on illegal searches and seizures.

Part IV highlights the risk that critical Syrian evidence collected by private actors using improper or illegal collection methods could be excluded from European domestic prosecutions if the private actors' actions are imputed to the public authorities they work closely with. The IIIM and European authorities should consider limiting the scope of their cooperation with each other and private actors to ensure that some of their most valuable sources of evidence can be used to bring justice to Syria.

PART I

THE IIIM AND EVIDENCE COLLECTED BY NON-STATE ACTORS IN SYRIA

In 2016, frustrated by the lack of action in response to the crimes in Syria, Liechtenstein and Qatar introduced a General Assembly resolution establishing the International, Impartial and Independent Mechanism for Syria under the auspices of the United Nations (“UN”).⁹ One hundred and five UN Member States voted in favor of the resolution, with a number of them citing preservation of already collected evidence as one of the key considerations.¹⁰

The IIIM has begun its preliminary work in Geneva, led by Catherine Marchi-Uhel, a retired French judge who also served at the UN Interim Administration Mission in Kosovo, the Extraordinary Chambers in the Courts of

8. Ben Taub, *The Assad Files*, THE NEW YORKER (Apr. 18, 2016), <https://www.newyorker.com/magazine/2016/04/18/bashar-al-assads-war-crimes-exposed> [<https://perma.cc/JNK8-LNZH>].

9. G.A. Res. 71/248, *supra* note 3; U.N. MEETINGS COVERAGE, *supra* note 3.

10. U.N. MEETINGS COVERAGE, *supra* note 3.

Cambodia, and the International Tribunal for the former Yugoslavia.¹¹ Between 2018 and 2019, the IIIM has also been hiring a number of other specialists trained in criminal investigations and prosecutions.¹² The IIIM's initial funding comes from voluntary contributions, with the hope that the General Assembly will revisit this issue soon and commit to a dedicated source of funding.¹³

According to the IIIM's Terms of Reference ("TORs"), its mandate consists of collecting, consolidating, and analyzing the evidence of international crimes and human rights violations committed in Syria, and preparing files to facilitate and expedite criminal proceedings in national, regional, and international courts or tribunals that have or may have jurisdiction over these crimes.¹⁴ Once fully operational, the IIIM will assist such courts or tribunals in investigations and prosecutions of the most serious crimes under international law, including genocide, crimes against humanity, and war crimes.¹⁵

The TORs put a special emphasis on the fact that the IIIM will primarily rely on information collected by others, including other UN bodies, Syrian and international civil society actors, NGOs, international and regional organizations, and individuals.¹⁶ It will collect a wide array of evidence, including interviews, witness testimonies, documentation, and forensic materials focusing in particular on linkage evidence, which helps establish the connection between crime-based evidence and the persons responsible for such alleged crimes.¹⁷

It is not surprising that the IIIM's TORs pay special attention to linkage evidence. Linkage evidence is especially important in international criminal cases where there is a need to connect crimes—such as mass killings, rapes, or torture—ordinarily committed by lower-level fighters to the higher-level military and political leaders responsible for planning and ordering those atrocities.¹⁸ While linkage evidence can be presented in the form of witness

11. *Secretary-General Appoints Catherine Marchi-Uhel of France to Head International Impartial and Independent Mechanism Investigating Serious Crimes in Syria*, U.N. MEETING COVERAGE AND PRESS RELEASES (July 3, 2017), <https://www.un.org/press/en/2017/sga1744.doc.htm> [<https://perma.cc/GN3J-HTPQ>].

12. U.N. 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*, Annex, ¶ 32, U.N. Doc. A/71/755 (Jan. 19, 2017) [hereinafter *Implementation of the IIIM Resolution*]; U.N. Secretary-General, *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*, ¶ 31, Doc No. A/72/764 (Feb. 28, 2018).

13. *Implementation of the IIIM Resolution*, *supra* note 12, at ¶ 51.

14. *Id.* at Annex, ¶ 3.

15. *Id.* at Annex, ¶ 4.

16. *Id.* at Annex, ¶¶ 5–9. However, if appropriate, the IIIM shall also collect additional evidence on its own. *Id.* at Annex, ¶ 5.

17. *Id.* at Annex, ¶ 6.

18. See Nancy Amoury Combs, *Grave Crimes and Weak Evidence: A Fact-Finding Evolution in International Criminal Law*, 58 HARV. INT'L L.J. 47, 57

testimony, documentary evidence has been considered a preferred type of linkage evidence due to the issues with witness credibility and reliability.¹⁹ However, documentary linkage evidence, such as documents containing military orders, is also extremely challenging for any prosecutor to procure, even with relatively free access to the country, a valid court order, and a Security Council Chapter VII authorization backing her up.²⁰ For the IIIM, which has none of these advantages, this task may prove virtually impossible. Thus, it will be essential for the IIIM to cooperate with non-state groups and individuals who have been traveling to Syria to secretly gather those documents. Luckily, many of these groups have already expressed their willingness to cooperate with the IIIM.²¹

One such group is the Commission for International Justice and Accountability (“CIJA”), a private investigative organization headed by former international investigators and prosecutors²² and funded by several Western governments, including the United Kingdom, the European Union, Switzerland, Germany, Norway, Canada, and Denmark.²³ CIJA’s work primarily focuses on training Syrians to forge alliances with Syrian rebel groups, gain access to captured Assad regime facilities, extract valuable documents that link the regime to crimes, and covertly smuggle the documents out of the country.²⁴ These documents are then translated, analyzed, sealed, and stored at a secret location in Europe.²⁵ According to Bill Wiley, CIJA’s founder, the organization has collected over 600,000 documents, has created an extensive database with names of people associated with the Assad regime, and has built several criminal cases against Syrian officials based on international customary law and the Rome

(2017)”<https://scholarship.law.wm.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2905&context=facpubs>”
<https://scholarship.law.wm.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2905&context=f>.

19. See Nancy Amoury Combs, *Grave Crimes and Weak Evidence: A Fact-Finding Evolution in International Criminal Law*, 58 HARV. INT’L L.J. 47, 57 (2017); Jennifer Stanley, *From Nuremberg to Kenya: Compiling the Evidence for International Criminal Prosecutions*, 49 VAND. J. TRANSNAT’L L. 819, 819–20, 822–23 (2016).

20. See Stanley, *supra* note 19, at 823.

21. See, e.g., *Responding to Misconceptions Regarding the IIIM*, SYRIA JUSTICE & ACCOUNTABILITY CENTRE (Aug. 2, 2017), <https://syriaaccountability.org/updates/2017/08/02/responding-to-misconceptions-regarding-the-iiim> [<https://perma.cc/FL7X-AYKK>]; Cristina Roca, *Long Read: How the Syrian War Changed How War Crimes Are Documented*, NEWS DEEPLY (June 1, 2017), <https://www.newsdeeply.com/syria/articles/2017/06/01/long-read-how-the-syrian-war-changed-how-war-crimes-are-documented> [<https://perma.cc/SS68-PQLR>]; *Salvaging Online Videos As Proof of War Crimes in Syria*, THE OBSERVERS (Feb. 2, 2018), <http://observers.france24.com/en/20180202-videos-proof-war-syria-syrian-archive> [<https://perma.cc/248T-DMSG>].

22. Taub, *supra* note 8.

23. *Id.*; Julian Borger, *Syria’s Truth Smugglers*, THE GUARDIAN (May 12, 2015), <https://www.theguardian.com/world/2015/may/12/syria-truth-smugglers-bashar-al-assad-war-crimes> [<https://perma.cc/G3N5-5HYF>].

24. Taub, *supra* note 8.

25. *Id.*

Statute.²⁶ CIJA claims that its files contain meeting minutes and other original documents that link high-level officials to the crimes perpetrated on the ground.²⁷ There are also some indications that CIJA is collecting evidence against the Islamic State of Syria and the Levant (“ISIL”),²⁸ although the nature of that evidence and how it was obtained is less known.

While documents collected by CIJA and other private individuals and organizations operating in a similar fashion can greatly assist the IIIM with its mandate to establish the connection between crime-based evidence and the persons responsible,²⁹ they present some challenges because of how these documents may have been obtained. Actors such as CIJA are essentially stealing the documents from government offices and possibly even private dwellings. Aside from chain of custody questions, these documents may be inadmissible in courts because the organizations and individuals that seized them acted without any legal authorization and violated the suspects’ privacy. Under some countries’ laws, evidence obtained by police or other government actors in violation of individuals’ fundamental rights is often excluded or cannot be considered by the trier of fact to reach a verdict.³⁰ Likewise, the ECHR forbids government searches and seizures that interfere with a person’s right to privacy unless such interference is done in accordance with the law.³¹

Therefore, there is an apparent conflict between the IIIM’s inevitable reliance on private third parties, such as CIJA, to collect evidence and the danger that this evidence will not be admitted in courts that try Syrian cases. This conflict will be explored further in Parts III and IV. In order to understand the risk that illegally or improperly obtained IIIM evidence may face, it is necessary to understand what domestic and international standards bind European courts’ decisions about excluding such evidence.

PART II

EUROPEAN COURTS’ ROLE IN PROSECUTING SYRIAN CRIMES

Despite the absence of prosecutions on the international level, at least nine European countries have initiated investigations and, in some cases, prosecuted

26. *Id.*; Bill Wiley, Exec. Dir., Comm’n for Internat’l Justice & Accountability, Panel Event: “Can Another Hague-Based International Court (The ICJ) Contribute to Accountability in Syria?” at Fourteenth Session of the Assembly of State Parties—ICC, PUB. INTERNAT’L L. & POL’Y GROUP (Nov. 23, 2015).

27. Taub, *supra* note 8.

28. Wiley, *supra* note 26.

29. *Implementation of the IIIM Resolution*, *supra* note 12, at Annex, ¶ 6.

30. *See, e.g.*, *Mapp v. Ohio*, 367 U.S. 643 (1961); Lorena Bachmaier, *Spain*, in 1 TOWARD A PROSECUTOR FOR THE EUROPEAN UNION: A COMPARATIVE ANALYSIS 702, 709–10 (Katalin Ligeti ed., 2013); Juliette Tricot, *France*, in 1 TOWARD A PROSECUTOR FOR THE EUROPEAN UNION: A COMPARATIVE ANALYSIS, *supra*, at 222, 253–54; Thomas Weigend, *Germany*, in 1 TOWARD A PROSECUTOR FOR THE EUROPEAN UNION: A COMPARATIVE ANALYSIS, *supra*, at 264, 295–96.

31. The Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, C.E.T.S. No. 194 (Nov. 4, 1950) [hereinafter The European Convention on Human Rights].

crimes committed in Syria. The principle of universal jurisdiction governs many of these investigations and prosecutions, allowing national prosecutors to pursue individuals suspected of committing certain grave international crimes, even though the crimes occurred outside the prosecuting country's territory and neither the accused nor the victims are nationals of that country.³² Other European countries rely on the active or passive personality principles to get jurisdiction over Syrian cases, where either the perpetrator (active personality) or the victim (passive personality) is a national of the prosecuting country.³³ Finally, some countries also apply domestic terrorism laws to prosecute their own citizens who travel to Syria as foreign fighters.³⁴

Based on news reports, since 2015, Austria, France, Norway, the Netherlands, Spain, and Switzerland have been investigating dozens of individuals for possible war crimes committed in Syria. Many of these individuals came to those countries as refugees or asylum seekers.³⁵ France has also charged three top Syrian security chiefs with collusion in torture, forced disappearances, crimes against humanity, and war crimes.³⁶ Other countries have already started prosecuting individuals for international crimes committed in Syria. For example, Sweden has prosecuted and sentenced three individuals for war crimes, two from non-state armed groups and one from the Syrian army.³⁷ Germany has completed two successful war crime prosecutions against two ISIL fighters and one against a Jabhat al-Nusra fighter, and has started a trial of a Free Syrian Army fighter in May 2017.³⁸ Germany has also filed crimes against humanity charges against Syria's Head of Air Force Intelligence, Jamil Hassan, as has France.³⁹ In addition, Austria, Germany, and Finland have prosecuted a number of individuals under their domestic terrorism laws.⁴⁰

While these examples of investigations and prosecutions in some European countries are positive developments, overall they are not representative of the

32. INTERNATIONAL COMMITTEE OF THE RED CROSS, UNIVERSAL JURISDICTION OVER WAR CRIMES (2014), <https://www.icrc.org/eng/assets/files/2014/universal-jurisdiction-icrc-eng.pdf> [<https://perma.cc/8WDN-UT8L>]; HUMAN RIGHTS WATCH, *supra* note 7, at 1.

33. HUMAN RIGHTS WATCH, *supra* note 7, at 34, 68–69, 71, 73.

34. *Id.* at 71; *Three Finns Charged*, *supra* note 7.

35. Day, *supra* note 7; *Dutch Find 30 Suspects*, *supra* note 7; *Frost*, *supra* note 7; Jacobsen, *supra* note 7; *Swiss Justice*, *supra* note 7.

36. Our Foreign Staff, *France Targets Three Top Syrian Security Chiefs with International Arrest Warrants*, THE TELEGRAPH (Nov. 5, 2018), <https://www.telegraph.co.uk/news/2018/11/05/france-targets-three-top-syrian-security-chiefs-international> [<https://perma.cc/V6JR-RYM4>].

37. HUMAN RIGHTS WATCH, *supra* note 7, at 74.

38. *Id.* at 73–74.

39. Jörg Diehl et al., *Germany Takes Aim at Assad's Torture Boss*, SPIEGEL ONLINE (June 8, 2018), <http://www.spiegel.de/international/world/senior-assad-aid-charged-with-war-crimes-a-1211923.html> [<https://perma.cc/3Z3E-HXR2>].

40. Kate Connolly & Owen Bowcott, *Austrian Court Jails Asylum Seeker for War Crimes in Syria*, THE GUARDIAN (May 11, 2017), <https://www.theguardian.com/world/2017/may/11/austria-jails-syrian-man-who-boasted-of-killings-in-homeland> [<https://perma.cc/VZN9-WUJW>]; HUMAN RIGHTS WATCH, *supra* note 7, at 69–70; *Three Finns Charged*, *supra* note 7.

crimes committed in Syria.⁴¹ First, most of these cases—with the exception of the recent indictments and investigations of Syrian officials by Austria, France, and Germany—involve low-level perpetrators from non-state government opposition groups, ISIL, and Jabhat al-Nusra. However, there are multiple reports indicating that Syrian and Russian government forces are responsible for committing most of the violations and inflicting the greatest number of civilian casualties in the conflict.⁴² Second, many Syria-related cases, particularly in Austria, Finland, and Germany, involve prosecution for domestic terrorism offenses. These domestic offenses are far from the most egregious crimes committed in the conflict, which include, among others, torture, enforced disappearances, sexual violence, indiscriminate bombing campaigns, and the use of chemical weapons.⁴³ This deficiency occurs because European countries lack access to the crime scenes and, thus, have difficulty finding evidence linking alleged high-level government perpetrators to criminal acts.⁴⁴ This highlights why the information obtained by private groups and individuals traveling to Syria (and collected and preserved by the IIIM) can be so valuable for those investigations and prosecutions to go forward. However, there is a danger that European courts may refuse to admit evidence from these sources.

PART III

EXCLUSIONARY EVIDENCE RULES IN EUROPEAN COURTS

IIIM evidence gathered by third parties only serves the UN's goal of bringing justice and accountability for Syrian crimes *if* it is admissible in court. Exclusion of improperly obtained evidence at trial is a feature generally associated with the American judicial system. In the United States, the so-called exclusionary rule is a judicially-created remedy designed to deter the government from violating individuals' Fourth Amendment right to be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."⁴⁵ Under the exclusionary rule, evidence obtained from a warrantless search is generally not admissible in federal or state court, and therefore the government cannot use this evidence in its case-in-chief against the defendant.⁴⁶ And since the Fourth Amendment only applies to government activity, the rule

41. HUMAN RIGHTS WATCH, *supra* note 7, at 74.

42. *See, e.g.*, AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL REPORT 2016/2017: THE STATE OF THE WORLD'S HUMAN RIGHTS, 349–51 (2017), <https://www.amnesty.org/en/documents/pol10/4800/2017/en/> [<https://perma.cc/B5FZ-8UFN>]; HUMAN RIGHTS WATCH, WORLD REPORT 2017: EVENTS OF 2016, 571–74 (2017), https://www.hrw.org/sites/default/files/world_report_download/wr2017-web.pdf [<https://perma.cc/FWW9-YM7L>].

43. HUMAN RIGHTS WATCH, *supra* note 7, at 4, 36.

44. *Id.* at 2, 4.

45. *See* U.S. CONST. amend. IV; *Mapp v. Ohio*, 367 U.S. 643, 651 (1961).

46. *Mapp*, 367 U.S. at 660. Since *Mapp*, the exclusionary rule has become more relaxed. *See, e.g.*, *United States v. Leon*, 468 U.S. 897 (1984)).

does not apply to private searches and seizures⁴⁷ unless the defendant can show that “in light of all the circumstances” the private party “acted as an instrument or agent of the Government.”⁴⁸

The United States is not unique in using the exclusionary rule. At least fifteen other countries, with both common law and civil law systems, also bar the use of improperly obtained evidence in court.⁴⁹ Moreover, countries that lack any exclusionary rules of evidence in their domestic law may nevertheless be required to invalidate convictions that are based on evidence obtained in violation of the defendant’s human rights.⁵⁰ However, like in the United States, these rules usually do not apply to evidence obtained by private parties.⁵¹

In Parts III.A and III.B, I examine the rules for exclusion of improperly or illegally obtained evidence in four countries—France, Germany, the Netherlands, and Sweden—as well as decisions of the European Court of Human Rights. Part III.C explores the potential impact of European domestic laws on the admissibility of evidence collected from Syria and compiled by the IIIM.⁵² It will particularly assess evidence obtained in violation of one’s right to privacy and evidence obtained by both state and private parties.

A. National Jurisdictions

Improperly or illegally obtained evidence is likely admissible in several European jurisdictions investigating or prosecuting Syrian cases. All four jurisdictions examined in this Note—France, Germany, the Netherlands, and Sweden—provide judges with significant discretion to consider all kinds of evidence. Even in jurisdictions where restrictions exist on the use of evidence obtained in violation of defendants’ rights, these restrictions do not apply to evidence obtained by private actors.

47. See *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

48. *Skinner v. Ry. Labor Exec.’s Ass’n*, 489 U.S. 602, 614 (1989).

49. The countries that have these exclusionary rules are Belgium, Canada, England, France, Germany, Greece, Israel, Italy, New Zealand, Scotland, Serbia, Spain, Taiwan, the Netherlands, and Turkey. See, e.g., 20 EXCLUSIONARY RULES IN COMPARATIVE LAW, *IUS GENTIUM: COMPARATIVE PERSPECTIVES ON LAW AND JUSTICE* (Stephen C. Thaman, ed., 2013); Michael Davies, *Alternative Approaches to the Exclusion of Evidence Under S. 24(2) of the Charter*, 46 CRIM. L.Q. 21 (2002).

50. Christoffer Wong, *Sweden*, in 1 TOWARD A PROSECUTOR FOR THE EUROPEAN UNION: A COMPARATIVE ANALYSIS, *supra* note 30, at 743, 772–73.

51. See *infra* Part III.A.1–4.

52. Since this Note concerns evidence obtained in Syria, another question arises as to whether courts in European jurisdictions that investigate or prosecute Syrian cases would apply domestic or Syrian evidence laws. The answer depends on the specific country and the circumstances of the case. In France, for example, French laws usually apply to evidence obtained in foreign legal systems unless an international convention or binding treaty applies. Tricot, *supra* note 30, at 255. In Germany, however, courts tend to admit evidence collected abroad in accordance with that country’s procedures, as long as the procedures do not violate the basic rules of German procedure law. Weigend, *supra* note 30, at 298. Further research is needed to explore this question more closely.

1. France

French law is generally governed by the principle of “free evaluation of evidence” in criminal matters.⁵³ Article 427 of the Code of Criminal Procedure provides that offenses can be proven by any means of proof.⁵⁴ However, the French Criminal Code includes provisions suggesting that illegally or improperly obtained evidence gathered by public authorities may be inadmissible in some cases.⁵⁵ Additionally, the French criminal justice system operates under the principle of *loyauté*, meaning that gathering evidence should “respect the rights of the individual and the integrity of justice.”⁵⁶

Nevertheless, these provisions and principles do not apply to evidence obtained by non-state or private parties.⁵⁷ Such parties may obtain evidence through illegal means, including secret surveillance, so long as the defendant has the opportunity to challenge the probative value of the evidence in court.⁵⁸ For example, according to the French Court of Cassation, judges should not discount evidence produced by private parties solely because it may have been illegally obtained.⁵⁹ The judge’s only task is to assess the probative value of such evidence.⁶⁰

2. Germany

In Germany, where finding the truth is the leading principle of the criminal process, judges are generally not bound by any rules or guidelines when deciding on admissibility of potentially relevant evidence.⁶¹ But, the German Code of Criminal Procedure contains a few exclusionary rules.⁶² For example, evidence obtained by illegal interrogation methods or in violation of the constitutional protection of the “intimate sphere” of privacy must be excluded.⁶³

53. Richard Vogler, *France*, in CRIMINAL PROCEDURE IN EUROPE 171, 190 (Richard Vogler & Barbara Huber eds., 2008).

54. CODE DE PROCÉDURE PÉNALE. [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] art. 427 (Fr.).

55. Tricot, *supra* note 30, at 253–54.

56. ANDREA RYAN, TOWARDS A SYSTEM OF EUROPEAN CRIMINAL JUSTICE: THE PROBLEM OF ADMISSIBILITY OF EVIDENCE 155 (2014).

57. *Id.*; Tricot, *supra* note 30, at 253–54.

58. RYAN, *supra* note 56, at 156. The Court of Cassation is France’s court of last resort. Like the US Supreme Court, its purpose is to state the law rather than make factual determinations in cases from the lower courts, and to harmonize the law across the French Republic. *About the Court*, COUR DE CASSATION, https://www.courdecassation.fr/about_the_court_9256.html [https://perma.cc/NA5P-4HD7].

59. RYAN, *supra* note 56, at 156; Tricot, *supra* note 30, at 253–54.

60. Tricot, *supra* note 30, at 254.

61. Barbara Huber, *Germany*, in CRIMINAL PROCEDURE IN EUROPE, *supra* note 53, at 269, 292; Weigend, *supra* note 30, at 295.

62. Weigend, *supra* note 30, at 295.

63. NIGEL FOSTER & SATISH SULE, GERMAN LEGAL SYSTEM AND LAWS 358 (3rd ed. 2002); *see also* Huber, *supra* note 61, at 292; Weigend, *supra* note 30, at 296. The German Federal Constitutional Court has developed three spheres of privacy: the social sphere (like business contacts), which is generally admissible; the private sphere (such as private talks in public spaces), which can be

Case law maps out other prohibitions on the use of improperly obtained evidence.⁶⁴ For example, courts have held that the exclusionary rule applies where suspects or witnesses were not given proper warnings about their rights before interrogations.⁶⁵ In other cases, however, judges decide on admissibility of evidence based on the circumstances of the individual case.⁶⁶ Judges usually balance the importance of the case and the evidence against the gravity of the charge, which usually results in the admission of the evidence.⁶⁷ German courts have held that evidence that was illegally or improperly obtained by private parties, including secret tape recordings or telephonic eavesdropping, can be used at trial to resolve crimes “of considerable importance” where “other corroborating methods of investigation would be considerable [sic] less successful or substantially more difficult.”⁶⁸

3. *The Netherlands*

In the Netherlands, judges may exclude evidence that was improperly or irregularly obtained during the pretrial investigative stage.⁶⁹ However, according to the Dutch Supreme Court, the Netherlands’s Rules of Criminal Procedure give judges significant discretionary power to decide how to respond to such irregularities.⁷⁰ For example, the judge may choose not to attach any consequence to an irregularity that occurred, to reduce the defendant’s sentence, to exclude the evidence, or to declare the entire prosecution’s case inadmissible if the harm to due process is irreparable.⁷¹ According to Article 359(a)(2), when deciding whether to attach any consequences to an irregularity, the judge should consider the interest or good which the breached provision protects, the severity of the breach, and the disadvantages that the breach has caused to the suspect.⁷²

Furthermore, in the Netherlands, Article 8 of the ECHR, which forbids improper interference with a person’s privacy by public authorities,⁷³ has direct effect.⁷⁴ Under Dutch law, acts where private individuals violate privacy are not

admissible, but must be balanced against other interests at stake; and the intimate sphere (such as bedroom conversations between spouses), which is not admissible. FOSTER, *supra*, at 358.

64. FOSTER, *supra* note 63, at 357; Weigend, *supra* note 30, at 296.

65. Weigend, *supra* note 30, at 296.

66. *Id.*

67. *Id.*

68. E.U. NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS, OPINION ON THE STATUS OF ILLEGALLY OBTAINED EVIDENCE IN CRIMINAL PROCEDURES IN THE MEMBER STATES OF THE EUROPEAN UNION 16 (2003), <https://sites.uclouvain.be/cridho/documents/Avis.CFR-CDF/Avis2003/CFR-CDF.opinion3-2003.pdf> [<https://perma.cc/FFY6-RVCE>] [hereinafter E.U. NETWORK].

69. Idir Peci, *The Netherlands*, in 1 TOWARD A PROSECUTOR FOR THE EUROPEAN UNION: A COMPARATIVE ANALYSIS, *supra* note 30, at 95, 121.

70. *Id.*

71. *Id.*

72. *Id.*

73. *See infra* Part III.B.

74. E.U. NETWORK, *supra* note 68, at 21.

attributed to public authorities and therefore do not fall within the scope of Article 8.⁷⁵ Thus, evidence obtained by private parties in violation of a defendant's privacy rights can generally be used in criminal proceedings.⁷⁶

4. Sweden

The principle of free admission and free evaluation of evidence governs Swedish criminal law, which in theory means that even illegally obtained evidence can be admitted in court.⁷⁷ According to the Swedish Code of Judicial Procedure, a court should rule on what has been proven in a case according to "the dictates of its conscience."⁷⁸ There is no formal prohibition against considering evidence that the offering party obtained illegally.⁷⁹ In fact, the court is free to give consequential weight to such evidence.⁸⁰

Even though the Swedish judicial system does not have a strong exclusionary rule, court decisions based on problematic evidence may nevertheless be invalidated when such evidence violates the ECHR. Though the Swedish Supreme Court previously admitted illegally obtained evidence despite the ECHR's Article 6 guarantee of the right to a fair trial, it ultimately decided that a violation of a fundamental right guaranteed by the Convention required that the accused be acquitted.⁸¹ Some authors suggest that Swedish courts can also apply this decision to exclude evidence under Article 8 by establishing that the violation of the defendant's right to privacy would "irremediably undermine the fairness of the trial."⁸² Nevertheless, as discussed below, Article 8 would not apply to cases where private parties obtained the evidence without significant assistance by public authorities.

Based on these examples, improperly obtained evidence obtained by private parties like CIJA and collected by the IIIM may be admissible under the laws of some European jurisdictions. In France, Germany, the Netherlands, and Sweden, judges have broad discretion to consider all kinds of evidence, regardless of how it was obtained. And while countries like France or the Netherlands put some constraints on the use of certain evidence obtained in violation of defendants' basic rights, these restrictions do not apply to evidence obtained by purely private actors. However, such evidence might still be excluded when it is obtained in violation of the ECHR.

75. *Id.* at 22.

76. *Id.*

77. Wong, *supra* note 50, at 771.

78. E.U. NETWORK, *supra* note 68, at 24.

79. *Id.*

80. *Id.*

81. Wong, *supra* note 50, at 772.

82. *Id.* at 772 n.146.

B. The European Court of Human Rights

Even if the laws of European countries do not exclude improperly obtained evidence, domestic courts may nevertheless decline to admit such evidence or invalidate convictions based on its use if such evidence was obtained using methods that violates the ECHR.⁸³ As noted above, Article 8 of the ECHR may lead to such a result.

Pursuant to Article 8, public authorities cannot interfere with people's right to private and family life, their home, and their correspondence unless such interference is done in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country; for the prevention of disorder or crime; or for the protection of health, morals, or the rights and freedoms of others.⁸⁴ The European Court of Human Rights is charged with interpreting the ECHR and uses a two-part test to determine whether a violation of Article 8 took place.

First, the court decides whether there was an actual interference.⁸⁵ Such interference can only be found if committed by a public authority.⁸⁶ According to the court, interference includes intruding on private houses and business premises, which encompasses state officials' offices.⁸⁷ Second, the court analyzes whether the interference was justified.⁸⁸ The court looks at whether the interference was done "in accordance with the law,"⁸⁹ pursued one of the legitimate aims listed in the Article, and was "necessary in a democratic society" to achieve those aims.⁹⁰ However, a finding that the interference was not in accordance with the law can be sufficient to conclude that the interference was unjustified.⁹¹ The phrase "in accordance with the law" requires not only compliance with domestic law, "but also relates to the quality of that [domestic] law, requiring it to be compatible with the rule of law."⁹² If the court determines that unjustified interference occurred, it will hold that the public authority violated Article 8.

83. The European Convention on Human Rights is an international treaty that protects human rights and fundamental freedoms of individuals under the jurisdiction of the Council of Europe countries, regardless of such individuals' nationality. *Austria v. Italy*, App. No. 788/60, Y.B. Eur. Conv. on H.R. 116, 140 (1961).

84. The European Convention on Human Rights, *supra* note 31, at art. 8.

85. *See A. v. France*, 277 Eur. Ct. H.R. (ser. A) 38, 48–49 (1993).

86. *See id.* at 49; *E.U. NETWORK*, *supra* note 68, at 8.

87. *See Akhlyustin v. Russia*, App. No. 21200/05, 333 Eur. Ct. H.R. ¶ 37 (2017); *Société Colas Est and Others v. France*, III Eur. Ct. H.R. 133, 148–49 (2002); *Niemietz v. Germany*, 251 Eur. Ct. H.R. (ser. A) 25, 34 (1992).

88. *See Akhlyustin*, 333 Eur. Ct. H.R., at ¶¶ 40–47; *A.*, 277 Eur. Ct. H.R. at 49–50.

89. *See A.*, 277 Eur. Ct. H.R. at 49.

90. *See Akhlyustin*, 333 Eur. Ct. H.R. at ¶ 40.

91. *See M.M. v. Netherlands*, App. No. 39339/98, Eur. Ct. H.R. ¶¶ 45–46 (2003); *A.*, 277 Eur. Ct. H.R. at 49–50 at 49–50.

92. *Bykov v. Russia*, App. No. 4378/02, Eur. Ct. H.R. ¶ 76 (2009).

Once the court finds that a domestic law or judicial decision is in violation of any of the Articles of the ECHR, the court then can order the relevant state to pay compensation to the injured party and to reopen the domestic proceeding in accordance with the court's decision.⁹³ If necessary, the court can order the state to amend the judgment in the case or the relevant domestic law.⁹⁴

In several cases, the court has been asked to rule whether interference by private parties acting in cooperation with state authorities violates Article 8. For example, in *A. v. France*, the court held that a police superintendent violated Article 8 by allowing a private party to make a phone call from police headquarters and recording the receiver's incriminating statement.⁹⁵ In that case, a police superintendent allowed a private party to use a telephone and a tape recorder in the superintendent's office to call a co-conspirator and gather evidence implicating their former confederate.⁹⁶ The court ruled that the police superintendent had "played a decisive role in conceiving and putting into effect the plan to make the recording" and "made a crucial contribution to executing the scheme," therefore implicating the state under the ECHR.⁹⁷ And since French law at the time prohibited intercepting a phone conversation without an investigative judge's order, the court ruled that the state's interference was unjustified.⁹⁸ Therefore, the court held that Article 8 had been violated.⁹⁹

Similarly, in *M.M. v. Netherlands*, the court held that the police violated Article 8 of the ECHR when it installed a device on a victim's phone to record incriminating conversations.¹⁰⁰ In that case, a woman alleged that her husband's attorney was harassing her.¹⁰¹ The police facilitated the recording of phone conversations between the woman and the attorney by providing the necessary equipment and advice.¹⁰² While the government argued that the victim had acted on her own and the police had merely provided technical assistance,¹⁰³ the court rejected this argument. Relying on its French *A. v. France* decision, the court held that the police "made a crucial contribution" to the inception and execution of the scheme by suggesting that the victim make the recording, by connecting the tape recorder to her phone, and by explaining how to get the attorney to

93. Council of Bars and Law Societies of Europe, *The European Court of Human Rights: Questions & Answers for Lawyers*, Question 38, (2014), https://www.echr.coe.int/Documents/Guide_ECHR_lawyers_ENG.pdf [<https://perma.cc/2VAY-W3LU>].

94. *Id.*

95. *A.*, 277 Eur. Ct. H.R. at 40, 50.

96. *Id.* at 40.

97. *Id.* at 49.

98. *Id.* at 49–50.

99. *Id.* at 50.

100. *M.M. v. Netherlands*, App. No. 39339/98, Eur. Ct. H.R. ¶¶ 9–14, 46 (2003).

101. *Id.* at ¶ 11.

102. *Id.* at ¶¶ 9–14.

103. *Id.* at ¶ 35.

acknowledge the alleged criminal behavior.¹⁰⁴ Therefore, since the electronic surveillance could be imputed to a public authority and was not conducted in accordance with the relevant Dutch law—which requires a preliminary judicial investigation and an order by an investigative judge—the court found a violation of Article 8.¹⁰⁵

Most recently, in *Bykov v. Russia*, the court similarly found a violation of Article 8 when a private individual used a hidden radio-transmitting device to record and transmit a conversation between the applicant and the police.¹⁰⁶ In that case, the applicant allegedly hired an assassin to kill a former business associate.¹⁰⁷ Acting on the police's instructions, the assassin went to the applicant's house and engaged in conversations about the assassination.¹⁰⁸ A radio-transmitting device transmitted the conversations to the police, which were used as evidence against the applicant in criminal proceedings.¹⁰⁹ While it was not in dispute that the activity amounted to an interference with the applicant's privacy rights under Article 8, the Russian government argued that the interference was justified because the relevant Russian law did not require a judicial authorization under the circumstances of the case.¹¹⁰ However, because the Russian law did not provide sufficient safeguards for electronic surveillance, the court held that the interference with the applicant's rights was not in accordance with the rule of law under Article 8 and, therefore, was unjustified.¹¹¹ Thus, the court found a violation of Article 8.¹¹²

Based on the examples above, evidence obtained by private parties in violation of an individual's rights might be admissible in certain jurisdictions where the exclusionary rule either does not exist or does not apply to violations committed by private parties. However, such evidence cannot be obtained with significant involvement by state authorities; this would be contrary to the ECHR. Moreover, even in cases where a government's warrantless interference with a person's privacy might be considered justifiable under domestic laws, it must still be done in accordance with the general rule of law under Article 8 of the ECHR.

C. *The Potential Impact of European Laws on Evidence Collected by the IIM*

As seen from the domestic European jurisdictions' laws, as well as the European Court of Human Rights case law, evidence obtained by third parties in

104. *Id.* at ¶¶ 37, 39.

105. *Id.* at ¶¶ 38–39, 44–46.

106. *Bykov v. Russia*, App. No. 4378/02, Eur. Ct. H.R. ¶¶ 13, 83 (2009).

107. *Id.* at ¶ 10.

108. *Id.* at ¶ 14.

109. *Id.* at ¶¶ 14, 29–48.

110. *Id.* at ¶¶ 72–75.

111. *Id.* at ¶¶ 77–83.

112. *Id.* at ¶ 83.

violation of suspects' rights to privacy can be admitted and successfully used in a number of European states as long as it is obtained by purely private parties. In addition, even if such evidence is obtained by state authorities, it may still be admitted in some jurisdictions, like Sweden or Germany, which either have no exclusionary rules or allow judges broad discretion in admitting evidence. However, interference with an individual's right in such cases still must be in accordance with the rule of law, pursue one of the legitimate aims listed in paragraph (2) of Article 8 of the ECHR, and be "necessary in a democratic society" to achieve those aims.¹¹³

The admissibility of evidence obtained by private actors, such as CIJA, and submitted to the IIIM will largely depend on how courts view the cooperation between the private actors and the IIIM, and the cooperation between the IIIM and the domestic criminal justice authorities. It is possible that because such organizations and individuals have been gathering evidence on their own initiative—even before the IIIM's establishment or the commencement of criminal investigations in European jurisdictions—European courts or the European Court of Human Rights may decide that such evidence is the product of a purely private action. However, if, like in *A. v. France* or *M.M. v. Netherlands*, the courts find that the state authorities were substantially involved in obtaining such evidence—for example by providing instructions or technical assistance—the courts may rule such evidence to be a product of state action. It, therefore, may exclude the evidence or invalidate convictions based on such evidence if it is improperly or illegally obtained. To avoid this result, the IIIM should carefully consider the nature of its relationship with both the private investigative groups and the state authorities that it is working with. The IIIM must also pay special attention to how much guidance and what types of assistance it provides to or receives from such actors.

Similarly, the domestic authorities investigating Syrian cases should take caution in the future to ensure that their cooperation with the IIIM is not attributed to state action. They need to avoid accidentally deputizing the IIIM or the private groups that are supplying the IIIM with evidence from Syria. For example, the domestic authorities and the IIIM should probably avoid telling such groups exactly what evidence to get and how to get it. Alternatively, if they do provide such specific directives, domestic authorities might also look carefully into existing laws governing evidence collection and the European Court of Human Rights' Article 8 jurisprudence to see whether they can make a valid argument that even warrantless collection of evidence might still be justifiable under the Article 8 of the ECHR. Thus, if European prosecutors can demonstrate the existence of other safeguards in their laws protecting the rights of the defendant, they can still potentially argue that even warrantless evidence

113. European Convention on Human Rights, *supra* note 31, at art. 8.

was obtained in accordance with the general rule of law, as Article 8 requires. Thus, that evidence will be admissible in court.

CONCLUSION

It is possible that European courts hearing Syrian criminal cases might decide that even warrantless interference with the suspects' privacy rights might nevertheless be justifiable because of the ongoing conflict and the collapse of the rule of law in Syria. However, the IIM and the domestic authorities investigating and prosecuting Syrian cases would be wise to steel themselves against all potential challenges. Successful admissibility of the evidence collected by the IIM will determine not only the legitimacy of the IIM model, but the UN's ability to deliver justice to the victims of the Syrian conflict and hold all perpetrators accountable.