
Entrepreneurial Justice: Syria, the Commission for International Justice and Accountability and the Renewal of International Criminal Justice

Michelle Burgis-Kasthala*

Abstract

This article argues that the crisis of governance generated by the Syrian civil war presents both a challenge and an opportunity to practitioners of international criminal justice. The article also argues that, irrespective of the Syrian case, international criminal law (ICL) institutions are in need of innovation and that increasingly ICL discourses display a blurring between public and private idioms. Evaluating the contribution of the Commission of International Justice and Accountability (CIJA) is one way then of assessing how ICL might evolve. This article characterizes CIJA's work as exemplifying 'entrepreneurial justice', not only in Syria but also in a range of other (post-)conflict settings. We can define entrepreneurial justice as the identification of a gap or weakness in existing public accountability fora and the creation of a new private or privatized organization and/or approach that seeks to address (at least part of) this gap. Although questions remain about CIJA's own accountability, along with its potential contribution to realizing accountability, this article suggests that its presence within the ICL field is a necessary one and that it has already started to have effects within Syria and beyond.

[S]o the key is to move into new conflicts, we don't want to be called a foundation that starts to do what other NGOs do, we have our space ... but in terms of being more creative ... the stuff that promises the fundraising, it's constant, constant, constant, raising of money and even though it is a non-profit, one has to be quite savvy ... [and] people need to get excited about

* Lecturer in Public International Law, University of Edinburgh Law School, United Kingdom. Email: m.burgis-kasthala@ed.ac.uk. This research was only possible through the generosity of my interviewees currently and formerly based at the Commission of International Justice and Accountability (CIJA) and its network. This research was funded by the Australian Research Council. I gratefully acknowledge the research assistance of Anan AbuShanab and Maddison Godwin.

the CIJA model because this is as you know what I am trying to sell. ... It is ... not CIJA per se ... but this is ultimately about the grand strategic level, it is about the CIJA model changing the way cases are built and investigations are done, and so forth, to have more ICHL [international criminal and humanitarian law] ... because otherwise we are going to have less ... because of these problems with the cost at the international level. So, to try reverse that trend ... but I think to achieve that goal we need to think ... more ... entrepreneurially.

– Interview with William Wiley, Director of the Commission of International Justice and Accountability, 10 November 2017

1 Introduction

International lawyers navigate a post-Cold War world of increasing legalization that constantly falls short in – or even runs counter to – delivering a just cosmopolitan order. The failure of international law to contain the Syrian civil war constitutes the latest episode of soul searching. Disappointment is more pronounced in the face of a quarter of a century of international criminal law (ICL) institution building with its attendant promise of accountability. Not only can international lawyers turn to a rich and developing jurisprudence on individual criminal responsibility, but the rhetoric of international criminal accountability is also a familiar idiom in today's political vernacular. The Syrian conflict is both a challenge and an opportunity to think about how international lawyers can respond to catastrophes of global governance.

The failure of international law and specifically ICL is palpable in the case of the Syrian conflict that erupted in 2011. Although Syria signed the Rome Statute in 2000, it did not ratify the treaty, ensuring that the country is not a member of the International Criminal Court (ICC), which is the central normative and institutional locus of ICL since the 21st century.¹ Under Article 13(b) of the Rome Statute, the United Nations Security Council (UNSC) can step into the jurisdictional breach as it has done, for instance, in the case of Libya, authorizing both the use of force and ICC action.² Amidst a range of available regulatory tools available for ending or limiting the conflict, a variety of states, inter-governmental organizations and non-state actors have called for ICC action in the face of alleged regime, foreign state and non-state atrocities in both Syria and Iraq.³ Yet the particular geopolitical interests at stake produced a rare UNSC double veto by China and Russia in 2014.⁴

While it is easy to cite examples of obstacles to international law's efficacy in Syria, international legal innovations have persisted not in spite of, but, rather, because of,

¹ Rome Statute of the International Criminal Court 1998, 2187 UNTS 90.

² SC Res. 1973, 17 March 2011.

³ On Syria, see Kersten, 'Calls for Prosecuting War Crimes in Syria Are Growing: Is International Justice Possible?', *Washington Post*, 14 October 2016, available at www.washingtonpost.com/news/monkey-cage/wp/2016/10/14/calls-for-prosecuting-war-crimes-in-syria-are-growing-is-international-justice-possible/?utm_term=.c2d359b698a2. On Iraq, see Nebehay, 'Islamic State Committing Genocide against Yazidis: U.N.', *Reuters*, 16 June 2016, available at www.reuters.com/article/us-mideast-crisis-syria-yazidi/islamic-state-committing-genocide-against-yazidis-u-n-idUSKCN0Z20WR.

⁴ SC Draft Res. 348, 22 May 2014.

the governance gaps emerging from the Syrian conflict. In a society once almost devoid of civil society activity as well as ICL expertise,⁵ Syria is home today to a vast array of governance projects, including emergency humanitarian relief efforts, human rights advocacy and the documentation of alleged crimes.⁶ This article engages in depth with one such actor, the Commission of International Justice and Accountability (CIJA), for two reasons. First, given the absence of sustained scholarly considerations of CIJA itself, a detailed study of its workings as an organization is useful in its own right. Second, the article builds the CIJA case study to evaluate the trajectory of ICL accountability efforts in conflict settings more generally.

CIJA was created directly in response to the lack of public, international accountability action in the early days of the Syrian uprising. It is a private, non-profit organization registered in the Netherlands that employs around 140 staff across two undisclosed European cities, Syria, Iraq and beyond with an annual budget of seven million euros. CIJA's central concern is to amass, store and analyse documentation of alleged crimes like a 'proto-OTP [office of the prosecutor]'.⁷ Highly detailed legal briefs are the end product of coordination between European headquarters and field staff who have smuggled out a staggering 800,000 pages of largely Syrian regime-generated documents. While the prospect of international criminal trials seems unlikely, CIJA's resources have already informed a number of domestic universal jurisdiction cases across Europe.

Typically, when international lawyers learn of CIJA's work, they respond with a mixture of admiration and unease: admiration for those working in such an important, but dangerous, site, coupled with unease over how this is being achieved and questions about CIJA's own accountability and governance. For CIJA's founder and director, Dr William Wiley, a Canadian national, his organization's work is not Syria specific; instead, he and many of his colleagues speak of the 'CIJA model' as an alternative to the failings of an inefficient and ineffective (public) international criminal justice. What exactly is the 'CIJA model'? Does the 'CIJA model' constitute a viable alternative to extant public bodies? This article suggests that one way of interrogating CIJA and its possible contribution is through the lens of 'entrepreneurial justice', which I define as the identification of a gap or weakness in existing public accountability fora and the creation of a new private or privatized organization and/or approach that seeks to address (at least part of) this gap. This definition builds on my interviews as well as scholarship from a range of disciplines.

Methodologically, this article draws on around 30 in-depth interviews. These took place in 2017 at CIJA's European headquarters and remotely with serving and former personnel and affiliated advisors located in Australia, Syria, Germany and the USA,

⁵ Interview with CIJA's Syrian Chief Investigator, 5 May 2017.

⁶ UN Office for the Coordination of Humanitarian Affairs, *Syrian Humanitarian Response Plan 2017*, available at <https://fts.unocha.org/appeals/526/flows>; Syrian Observatory for Human Rights, available at <http://www.syriaahr.com/en/>; Violation Documentation Center in Syria, available at <https://vdc-sy.net/en/>.

⁷ Interview with Bill Wiley, 8 February 2017.

as well as in late 2018 at one of CIJA's training sessions for its Syrian investigators.⁸ I wanted to understand the nature of CIJA's *raison d'être* through a close study of its personnel, many of whose ICL credentials were forged during the development of international criminal tribunals (ICTs) in the 1990s. Although a full study of CIJA and the phenomenon of 'entrepreneurial justice' would benefit from interviews with other actors, such as CIJA's key public partners and donors, the focus of this article rests on CIJA and the worldview of its staff. This study therefore makes no attempt at providing an exhaustive account. Instead, it is a select organizational ethnography that enables us to reflect on a perennial theme of global governance – public-private partnerships – through a given case study.

Before exploring the CIJA case in detail in Part 3, Part 2 considers the emergence of international criminal justice as a form of Third World (post-)conflict governance after the Cold War. Part 2 ends by developing the concept of 'entrepreneurial justice' for CIJA specifically and as a general counterpoint to earlier practices centred in public institutions. Part 3's case study of CIJA is both a narrative account of the organization's genesis and development as well as an analytical appraisal of the 'CIJA model's' potential strengths and weaknesses in the pursuit of criminal accountability in Syria and beyond.

2 The Rise of the International Criminal Justice Field after the Cold War: Failing States, Mass Atrocities and the Promise of Redress through Legal Expertise

The end of the Cold War generated a heady mix of opportunities, challenges and social imaginaries that coalesced into a range of regulatory registers, including the recrudescence of international criminal justice. I draw on part of Charles Taylor's definition of 'social imaginary' to capture those widely held beliefs that were circulating in this period: '[T]he social imaginary is that common understanding that makes possible common practices and a widely shared sense of legitimacy.'⁹ In particular, the seeming triumph of the West and its values after 1989 ensured the continuing resonance of (neo-)liberalism as well as human rights. From the 1980s, human rights work in Latin America had become more aligned with accountability than amnesty, thus generating a groundswell of support for robust, legalized responses in the 1990s, especially in the face of large-scale atrocities.¹⁰ A general neo-liberal suspicion of the state could revamp earlier notions of the undeveloped Third World state, whether in its quotidian and developmental form or during and after emergencies as first humanitarian relief and peacekeeping, followed by state building.¹¹

⁸ All but three of these interviews were recorded and transcribed. Most of the interviews are classified by number and date. Individuals who consented to identification are named. I interviewed 12 staff based at CIJA's headquarters, one in Germany, four in Australia, five in Syria, along with three of its three commissioners and one member of its advisory board.

⁹ Taylor, 'Modern Social Imaginaries', 14 *Public Culture* (2002) 91, at 106.

¹⁰ K. Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (2011), at 162.

¹¹ A. Orford, *International Authority and Responsibility to Protect* (2011).

Where once most civil conflicts could be relegated to hegemonic silos, from the 1990s onwards,¹² the challenge of social unrest and violence increasingly called for containment through a growing web of international, transnational and global governance responses. Along with Third World development more broadly, such events came to be viewed as global challenges requiring global solutions through a highly complex and dense network of actors, institutions and practices. International lawyers could capitalize on opportunities arising from a functioning UNSC that was no longer hindered by superpower vetoes. It became easier to read much of what occurred – and occurs – in the global South as ‘threats to international peace and security’,¹³ requiring a range of interventions of expertise,¹⁴ including through the particular regulatory register of international criminal justice.

UNSC action *vis-à-vis* the Yugoslav conflict lay the groundwork for approaching various instances of large-scale, internal conflicts. Noteworthy is the trajectory of responses from initial pronouncements of concern to various sanctions under Chapter VII of the Charter of the United Nations,¹⁵ to the establishment of a Commission of Experts through the United Nations (UN) Secretary General that could then hand over evidence to a specially created tribunal.¹⁶ The International Criminal Tribunal for the former Yugoslavia (ICTY) was created under Chapter VII to ‘prosecute persons responsible for serious violations of international humanitarian law’ as the Council determined that such a tribunal would both ‘put an end to such crimes’ and ‘bring to justice’ those most responsible.¹⁷ Such institutional innovation required a cadre of personnel who became seminal in populating an emerging field of experts of international criminal justice as the governance of societies in crisis.

A The Nature of the International Criminal Justice Field

Recent scholarship on the ‘renaissance’¹⁸ of international criminal justice acknowledges the cognitive and geopolitical transformations that took place in the 1990s, which were supportive not only of the criminalization and judicialization of conflict¹⁹ but also of more sustained interventions in so-called ‘societies in transition’.²⁰ One way of framing such developments is through Yves Dezalay and Bryant Garth’s seminal

¹² Captured by Kaldor’s notion of ‘new wars’. Kaldor, ‘In Defence of New Wars’, 2 *Stability* (2013) 1.

¹³ UN Charter, Art. 39.

¹⁴ Eyal and Buchholz, ‘From the Sociology of Intellectuals to the Sociology of Interventions’, 36 *Annual Review of Sociology* (2010) 117.

¹⁵ SC Res. 713, 25 September 1991.

¹⁶ SC Res. 780, 6 October 1992.

¹⁷ SC Res. 827, 25 May 1993; see also SC Res. 808, 22 February 1993.

¹⁸ C. Kress, *Towards a Truly Invisible College of International Criminal Lawyers* (2014), at 5–7, available at www.toaep.org/ops-pdf/4-kress; Mégret, ‘International Criminal Justice as a Juridical Field’, 13 *Champ pénal* (2016) 5.

¹⁹ Dezalay, ‘Lawyering War or Talking Peace? On Militant Usages of the Law in the Resolution of Internal Armed Conflicts: A Case Study of International Alert’, in Y. Dezalay and B. Garth (eds), *Lawyers and the Construction of Transnational Justice* (2012) 60.

²⁰ R.G. Teitel, *Transitional Justice* (2000).

work mapping the emergence of international legal fields. In particular, their account of the emergence of international commercial arbitration is useful for the many analogies we can draw with international criminal justice. Their work builds explicitly on Pierre Bourdieu's national-based field theory by considering the nature of legal fields at the transnational level.²¹ They suggest that, in studying a given legal field, we must attend to its internal dynamics as well as to how external pressures and opportunities are transformed in the field itself. Thus, 'the internal competition on the field of law, in relation to events that take place outside of the legal field, allows the field to "keep up" with – and remain relevant to – political, social, and economic changes'.²² We see how this occurred for international criminal justice where international lawyers with a common social imaginary were able to contribute to, and benefit from, increasingly legalized and juridified global governance policies. While legal fields are 'partly an epistemic community or issue network organized around certain beliefs in an ideal international [criminal] justice, it is also an extremely competitive market'.²³ Actors in the field will bring with them symbolic capital usually gained at the national level, and contests will then occur over the relative value of different types of capital, such as 'academic standing, scholarly publication, particular kinds of practical experience ... connections to business, connections to political power'.²⁴ In a legal field, it is best to possess a diversified portfolio, and, thus, for international criminal lawyers, it is useful to straddle the spheres of both practice and academia. Ultimately, the success of a given legal field rests on the ability of its members to 'reinforce the universal claims of law',²⁵ such that its approach to dispute resolution – the resort to ICTs, for example – becomes naturalized and unquestioned.²⁶

While Dezalay and Garth recognize the importance of institutions in advancing and sustaining a field's legitimacy and credibility, they argue that it is better to focus on how individuals populate 'a social space or structure of positions'.²⁷ The methodological corollary to this is an emphasis on interviews, as they reveal:

in particular, the social capital and personal trajectories of individuals in the field, that is to say, what they bring concretely to international arbitration, as well as the principles and ideas underlying the field in the minds and strategies of the people who operate in and around it ... respondents tend to use us to present their own pictures of this legal field, but we encourage it.²⁸

²¹ On the transnational dimension of legal fields and careers, see Dezalay and Garth, 'From the Cold War to Kosovo: The Rise and Renewal of the Field of International Human Rights', 2 *Annual Review of Law and Social Science* (2006) 231; Kauppi and Madsen, 'Fields of Global Governance: How Transnational Power Elites Can Make Global Governance Intelligible', 8 *International Political Sociology* (2014) 324. On his notion of the legal field, see Bourdieu, 'The Force of Law: Towards a Sociology of the Juridical Field', 38 *Hastings Law Journal* 805; P. Bourdieu, *On the State: Lectures at the Collège de France 1989–1992* (2014).

²² Y. Dezalay and B. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (1996), at 98.

²³ *Ibid.*, at 16.

²⁴ *Ibid.*, at 19.

²⁵ *Ibid.*

²⁶ *Ibid.*, at 317.

²⁷ *Ibid.*, at 17.

²⁸ *Ibid.*

Here, we see how interviews are a valuable approach to understanding the nature of social capital as well as the central social imaginaries – or worldviews – shaping a given field. Such a sensibility also informed my own CIJA interviews not only for the way they provided vital details unavailable elsewhere but also for how they generated a space of reflexivity on the nature of the field itself.

While the field of international criminal justice includes a range of actors, institutions and networks, we can see the academic discipline of ICL as a particular, but crucial, legitimating component of the wider field itself. Before the creation of the UNSC's ad hoc tribunals for Yugoslavia and Rwanda, it was hard to speak of a discipline of ICL as assessed by named professorial chairs, textbooks, journals or university courses. Expertise developed largely through the practice of these tribunals,²⁹ which could not rely on a cadre of available 'international criminal lawyers'.³⁰ Instead, national criminal lawyers or public international lawyers were called upon with their respective academic and practice-based capital from other legal fields to build up this nascent field. This is captured by Beth Van Schaack, a member of CIJA's Advisory Board, who:

was at the ICTY very early on when there was no such thing as an international criminal lawyer, right? [We w]ere a combination of human rights lawyers ... military lawyers, who really understood ballistics and order of battle ... but they wouldn't know a genocide if it hit them on the head, and then there were criminal law lawyers ... people who had been seconded from their national systems, who had been a DA [district attorney], and maybe had done complex corruption cases or trafficking cases, but didn't know anything about international law, and we all had to sort of work together to come up with a set of theories for how we were going to charge, and prosecute and prove these cases.³¹

Scholarship on this period, like Dezalay and Garth's study of international commercial arbitration's early grandees, emphasizes the expertise and contributions of key individuals – or 'Grand Old Men'³² – such as Georges Abi-Saab, Cherif Bassiouni, Carla Del Ponte, Antonio Cassese and Richard Goldstone.³³ For Alex Whiting, one of CIJA's commissioners and an ICL scholar who was a former practitioner at the ICTY and the ICC:

states have very little interest in these institutions and they are not very proactive in supporting them. They are often hostile to them ... It is a fight. This field it really depends on human creativity and the energy of individuals. The great person theory of history is obviously an out-dated way of thinking, but ... this field requires great people because nobody else is going to move the ball forward ... in some ways it is like the Wizard of Oz, all projection. ... I have often thought that the lead prosecutors of these institutions have to be a little bit crazy and a little bit egocentric and a little bit delusional because if you are not, you'd just get discouraged and weighed down by the impossibility of the task you have in front of you. And when you think

²⁹ For one CIJA interviewee who worked at the International Criminal Tribunal for Rwanda in its early years, 'no one was really an expert and we were all learning' on the job. Interview no. 4, 20 June 2017.

³⁰ Kreß, *supra* note 18.

³¹ Interview with Beth Van Schaack, CIJA Advisory Board member, 22 November 2017.

³² Dezalay and Garth, *supra* note 22, at 34.

³³ Hagan and Levi, 'Crime of War and the Force of Law', 83 *Social Forces* (2005) 1499, at 1504–1505; Mégret, *supra* note 18, at 12.

about some of the characters ... these are ... flawed characters, but they had a kind of energy, conviction, belief and drive, that was necessary.³⁴

Typically, the expertise possessed by these individuals was forged through successful national legal careers, which took on increasingly transnational qualities.³⁵ As Mikkel Christensen explains, '[a]gents capitalized upon early experience in the ICTY to circulate into higher positions in other institutions, taking with them the legal tools and practices created in the first ad hoc tribunals'.³⁶ This ICT bias has persisted as an unwritten expectation of entry into the field. Curriculum vitae of seasoned international criminal lawyers tend to track the field's institutional evolution: from the ad hocs (the ICTY and the International Criminal Tribunal for Rwanda [ICTR]), to the hybrids and then to the ICC, with more diverse experiences beyond The Hague tending to emerge more recently. As a 'tribunal animal',³⁷ or 'post-conflict justice junkie'³⁸ with very specialized expertise, the simplest choice for international criminal lawyers was to circulate within ICTs: '[T]here is a need to ... go to a new tribunal because you get frustrated at the other tribunals, so you are always hopeful that you are going to find a spot that is working a little better to rotate amongst the different tribunals'.³⁹ Yet the pool of available ICT positions is shrinking,⁴⁰ and it looks unlikely in this 'post-honeymoon' period of international criminal justice⁴¹ that states will support the creation of new and expensive ad hoc tribunals as in the past.⁴² As was the case for international commercial arbitration, such 'overproduction of specialists not only increases the competition in the specific market, but it also tends to modify the relations that are maintained between [international criminal justice] and the more general legal field'.⁴³ Competition will result in innovations in the field and accounts for the timing, the positioning and the career trajectories of CIJA's personnel as explored in Part 3.

Part of the reason for this is due to the creation of the ICC itself, which serves as a permanent forum of anti-impunity either by exercising its jurisdiction or in encouraging the initiation of domestic trials through the principle of complementarity. Although the ICC comprises 122 states parties and is the foremost ICL forum today,

³⁴ Interview with Alex Whiting, CIJA commissioner, 28 June 2017.

³⁵ Kauppi and Madsen, 'Fields of Global Governance: How Transnational Power Elites Can Make Global Governance Intelligible', 8 *International Political Sociology* (2014) 324.

³⁶ Christensen, 'From Symbolic Surge to Closing Courts: The Transformation of International Criminal Justice and Its Professional Practices', 43 *International Journal of Law, Crime and Justice* (2015) 609, at 614.

³⁷ Interview no. 4, 20 June 2017.

³⁸ Baylis, 'Tribunal-Hopping with the Post-Conflict Justice Junkies', 10 *Oregon Review of International Law* (2009) 361.

³⁹ Interview no. 4, 20 June 2017; cf. at 364–371.

⁴⁰ For Christensen, at international criminal law's (ICL) highpoint before the Syrian conflict, around 4,000 people were employed in international criminal tribunals (ICTs). Christensen, *supra* note 36, at 610.

⁴¹ Luban, 'After the Honeymoon: Reflections on the Current State of International Criminal Justice', 11 *Journal of International Criminal Justice (JICJ)* (2013) 505.

⁴² Cf. the creation of the Kosovo Specialist Chambers and Specialist Prosecutor's Office in 2017 as well as a short-term career option for ICL experts through fact-finding missions.

⁴³ Dezalay and Garth, *supra* note 22, at 308.

it remains constrained in a number of ways, including in relation to its partial jurisdiction, budgetary limitations, a slow and often unrepresentative caseload and persisting questions about the Court's Africa bias.⁴⁴ Although some of these criticisms originate within the field itself, external criticisms constitute more of a threat, as they highlight how the field must constantly declare the legitimacy and credibility of its 'anti-impunity product' in contradistinction to competitors within a broader market of competing forms of global governance expertise.

While the discipline of ICL is now far more comfortable in countenancing various criticisms, they also serve for most practitioners as a way of solidifying commitments to the field itself. Thus, most criticisms rest on a reconstructive reflex where the field's core values – including its universalization through a denial of the politics of ICL itself⁴⁵ – are rarely questioned. Although a variety of reconstructive criticisms serve to sustain both the discipline of ICL and the wider field of international criminal justice in its current form, this article argues that more radical reappraisals are required. A political economy of ICL highlights the competing agendas of donor states, which assess the competing logics of justice, development and security within a broad market of (post-)conflict governance.⁴⁶ Entities such as the ICC and CIJA must characterize themselves as worthy investments for donors. Ensuring sustainable funding for ICTs requires that actors can distinguish themselves through a particular 'brand architecture'.⁴⁷ This explains how responses to criticisms of ICC inefficiency and expenditure are couched in 'management language' about the ICC's 'bottom line'.⁴⁸ In a context of tightening purse strings, Prosecutors Carla Del Ponte and Fatou Bensouda have both characterized the 'dividends' of deterrence through investment in criminal prosecutions as 'cheap',⁴⁹ compared to other foreign policy options for donors.⁵⁰

The ICC's inability to respond to the Syrian crisis undermined not only the credibility and legitimacy of the Court but also the wider field of international criminal justice, thus explaining the urgency of innovative approaches that soon emerged. In particular, the nature and scale of the conflict that has spread into neighbouring states exposes the dissonance between the symbolism of deterrence and its likely realization. Does the degree of social collapse and suffering require nothing less than 'apex accountability'?

⁴⁴ International Criminal Court, *The States Parties to the Rome Statute*, available at https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx; Keppeler, 'Managing Setbacks for the International Criminal Court in Africa', 56 *Journal of African Law* (2012) 1.

⁴⁵ Kendall, 'Commodifying Global Justice: Economies of Accountability at the International Criminal Court', 13 *JICJ* (2015) 113, at 115.

⁴⁶ Kendall, 'Donors' Justice: Recasting International Criminal Accountability', 24 *Leiden Journal of International Law (LJIL)* (2011) 585, at 592.

⁴⁷ Taylor, 'Regulatory Rule of Law', in P. Drahoš (ed.), *Regulatory Theory: Foundations and Applications* (2017) 393, at 400.

⁴⁸ Kendall, *supra* note 46, at 132–133.

⁴⁹ On Del Ponte, see *ibid.*, at 585. On Bensouda, see Schwöbel-Patel, 'The Rule of Law as a Marketing Tool: The International Criminal Court and the Branding of Global Justice' in C. May and A. Winchester (eds), *Handbook on the Rule of Law* (2018) 434.

⁵⁰ Roper and Barria, 'Gatekeeping versus Allocating in Foreign Assistance: Donor Motivations and Contributions to War Crimes Tribunals', 51 *Journal of Conflict Resolution* (2007) 285.

for these crimes? Are existing institutions equipped for such a large and complex task? This article suggests that, in its current form and even in the unlikely event of an UNSC mandate, the ICC would face significant challenges in the Syrian setting. Part of this arises from its public nature, which is a double-edged sword: it is a source of legitimacy, but its high profile and risk aversion ensure that evidence collection is a challenge.⁵¹ A growing body of scholarship has described the reasons for the ICC's 'over-reliance' on intermediaries and the various problems arising from such partnerships, and has stressed the need for more robust standards in regulating this form of ICL outsourcing.⁵² This calculus of public and private risk is noted by CIJA's senior security analyst:

We have [physical] risk tolerance which for all sorts of very good reasons cannot be put upon government officials and quite often also, I mean let's not kid ourselves, the reason we can do what we do is we have a much lower profile than any government would have ... if you have a national flag over ... [an] operation, there are all sort of things coming in under that which can complicate matters.⁵³

Perhaps entrepreneurial justice meets some of these challenges of public investigations.

B Towards a Definition of Entrepreneurial Justice

Here, I suggest that 'entrepreneurial justice' is one way to account for 'alternative accountability actors' who arose in the crucible of ICL failures over Syria. Although the notion of 'entrepreneurial justice' emerged out of my interviews, I recognize the importance of grounding the concept within a rich and evolving body of entrepreneurship scholarship. Until the 21st century, the vast majority of scholarly debate on entrepreneurs and entrepreneurship took place within the disciplines of economics and management.⁵⁴ Although more recently, a variety of disciplines have started to study the phenomenon as well,⁵⁵ much of the time there is little interdisciplinary debate,⁵⁶ and such work remains within an economic, realist tradition.⁵⁷

⁵¹ De Vos, 'Investigating from Afar: The ICC's Evidence Problem', 26 *LJIL* (2013) 1009.

⁵² See, e.g., De Silva, 'Intermediary Complexity in Regulatory Governance: The International Criminal Court's Use of NGOs in Regulating International Crimes', *Annals* (2017) 170; Haslam and Edmunds, 'Managing a New "Partnership": "Professionalization", Intermediaries and the International Criminal Court', 24 *Criminal Law Forum* (2013) 49; Heinze, 'Private International Criminal Investigations', 2 *Zeitschrift für Internationale Strafrechtsdogmatik* (2019) 169, available at www.zis-online.com/dat/artikel/2019_2_1274.pdf.

⁵³ Interview no. 7, 21 June 2017.

⁵⁴ Notwithstanding scholarship on 'norm entrepreneurs' largely within the field of international relations. See, e.g., Finnemore and Sikkink, 'International Norm Dynamics and Political Change', 52 *International Organization* (1998) 887.

⁵⁵ For a sample of this work, see Steyaert and Hjorth, 'Introduction: What Is Social in Social Entrepreneurship?', in C. Steyaert and D. Hjorth (eds), *Entrepreneurship as Social Change: A Third Movements in Entrepreneurship Book* (2006) 1, at 4–5.

⁵⁶ Bull and Willard, 'Towards a Theory of Entrepreneurship', 8 *Journal of Business Venturing (JBV)* (1993) 183, at 184.

⁵⁷ Calás, Smircich and Bourne, 'Extending the Boundaries: Reframing "Entrepreneurship as Social Change" through Feminist Perspectives', 34 *Academy of Management Review (AMR)* (2009) 552.

Given the sheer volume of work to date, it is beyond the scope of this article to summarize the literature; here, I simply note some dominant definitions and thinkers. In fact, discussions about a definition of 'entrepreneur' and/or 'entrepreneurship' are central to this body of scholarship and underscore how this field still rests on a 'contested concept'.⁵⁸ Many authors rely on Joseph Schumpeter with his notion of the entrepreneur as a 'disequilibrating force'⁵⁹ through reforming or revolutionizing 'the pattern of production by exploiting an invention or, more generally, an untried technological possibility for producing a new commodity or producing an old one in a new way, by opening up a new source of supply of materials or a new outlet for products, by reorganizing an industry and so on'.⁶⁰

This emphasis on innovation within a market is common. Entrepreneurship then entails the identification or construction of a gap and an attempt to fill it. For William Gartner, this innovation will only constitute entrepreneurship with the creation of a new organization.⁶¹ Decisions taken to create such organizations occur with a high degree of uncertainty and, therefore, risk to the individuals involved.⁶² Although there has been a move away from studying the individuals themselves, Scott Shane and Sankaran Venkataraman stress that 'to recognise an opportunity, an entrepreneur has to have prior information that is complementary with the new information, which triggers an entrepreneurial conjecture'.⁶³

Typically, entrepreneurial success is evaluated through the (economic) value it generates, but scholars interested in non-profit sectors have either sought to widen the scope of existing literature or to suggest new approaches altogether. For example, Pascal Dey and Chris Manson develop the idea of 'activist entrepreneurship', which is 'an inherently disruptive activity with positive social change outcomes'.⁶⁴ Approaches that move beyond the economic sphere usually fall under the umbrella of 'social entrepreneurship' scholarship.⁶⁵ In building a definition that speaks to 'justice', though, Peter Klein and colleagues' notion of 'public entrepreneurship' is particularly helpful. Echoing a range of legal scholars who note the blurring between public and private governance,⁶⁶ Klein and colleagues argue that approaches from 'management and

⁵⁸ Choi and Majumdar, 'Social Entrepreneurship as an Essentially Contested Concept: Opening a New Avenue for Systemic Future Research', 29 *JBV* (2014) 363.

⁵⁹ Klein *et al.*, "Toward a Theory of Public Entrepreneurship", 7 *European Management Review* (2010) 1, at 3.

⁶⁰ J. Schumpeter, *Capitalism, Socialism and Democracy* (1942), at 132.

⁶¹ Gartner, "'Who Is an Entrepreneur?'" Is the Wrong Question', 13(4) *Entrepreneurship Theory and Practice* (1989) 47, at 62.

⁶² Shane and Venkataraman, 'The Promise of Entrepreneurship as a Field of Study', 25 *AMR* (2000) 217, at 220.

⁶³ *Ibid.*, at 222.

⁶⁴ Dey and Manson, 'Overcoming Constraints of Collective Imagination: An Inquiry into Activist Entrepreneurship, Disruptive Truth-Telling and the Creation of "Possible Worlds"', 33 *JBV* (2018) 84, at 85.

⁶⁵ See, e.g., Calás, Smircich and Bourne, *supra* note 57; C. Steyaert and D. Hjorth (eds), *Entrepreneurship as Social Change: A Third Movements in Entrepreneurship Book* (2006).

⁶⁶ See, e.g., Dickinson, 'Public Law Values in a Privatized World', 31 *Yale Journal of International Law* (2006) 383; T. Halliday and G. Shaffer (eds), *Transnational Legal Orders* (2015); Resnik, 'Globalization(s), Privatization(s), Constitutionalization, and Statization: Icons and Experiences of Sovereignty in the 21st Century', 11 *International Journal of Constitutional Law* (2013) 162.

economics are useful for understanding resource allocation and economic change in non-market settings'.⁶⁷ Yet where private entrepreneurship entails the pursuit of private gain, 'public entrepreneurs seek to marshal resources for fulfilling nominal public or social interests and to deploy them for better performance on public objectives'.⁶⁸

Entrepreneurial justice also entails a public objective, but this can be through private institutional forms and with little, if any, direct public accountability. Ultimately, it builds towards public action in the form of trials. Accordingly, I suggest that entrepreneurial justice entails the identification of a gap or weakness in existing public accountability fora and the creation of a new private or privatized organization and/or approach that seeks to address (at least part of) this gap. This innovation will marshal expertise relating to the gap and is concerned with enhancing existing (public) structures through (privatized) means rather than replacing them. Thus, entrepreneurial justice is about the quest to strengthen and improve public bodies by deploying methods and tools often unavailable to such bodies.

If we now return to some of the challenges currently confronting actors operating in the field of international criminal justice explored above and read these through the lens of entrepreneurial justice, then the words of one CIJA lawyer capture the reasons for CIJA's emergence as an instance of innovation with the field through entrepreneurial justice:

There is a massive pressure on anyone in the industry to ... adapt or innovate or to ... transition to other fields. I mean the ICC will obviously continue to recruit people, but I would say at a ... fairly flat rate. I think it's got its own ... donor and institutional restraints ... it's not going to grow exponentially ... you've got to make a decision, do you grab one of these declining number of positions and cling onto it for dear life or ... navigate some form of ongoing engagement, but you know accepting that it's not on a full-time basis. Or do you be like Bill Wiley and do what Bill Wiley does.⁶⁹

In the next part, I explore what 'doing' entrepreneurial justice in Syria through the 'CIJA model' entails.

3 An ICL 'Start-up'?⁷⁰ The 'CIJA Model' in Syria and Beyond

Accounting for CIJA's creation is a methodological challenge. In contrast to other accountability and human rights advocacy organizations focusing on Syria, the organization has no website and has published almost no publically available reports.⁷¹ CIJA

⁶⁷ Klein *et al.*, *supra* note 59, at 2.

⁶⁸ *Ibid.*, at 3.

⁶⁹ Interview no. 16, 19 September 2017.

⁷⁰ Interview with Alex Whiting, 28 June 2017.

⁷¹ Two exceptions are C. Engels, *Written Testimony before the Commission on Security and Cooperation in Europe by Chris Engels Deputy Director for Investigations and Operations in the Commission for International Justice and Accountability*, 22 September 2016, available at www.csce.gov/sites/helsinkicommission.house.gov/files/1_Chris%20Engels_Testimony.pdf; see also W. Wiley (*Executive Director, Commission for International Justice and Accountability*) at the Subcommittee on International Human Rights, available at <https://openparliament.ca/committees/international-human-rights/42-1/33/william-wiley-1/only/>.

actively avoids publicity due to concerns over employee safety and to ensure the integrity of its archive. According to its head of external relations:

as a transformative body we would rather not have a public profile, you know we are not a court, we are not even the office of the prosecutor, we are kind of a link of what the OTP would have, and that's the kind of stuff you do not advertise, because it is still too raw, you are working on collecting the data and the information and building the cases, when you start engaging in the public is when you already have built those cases and you issue indictments etc., and so it is difficult to find a balance of how much we can say publically, ... [but] keeping completely under the radar ... could lead to negative conclusions about CIJA by other organizations, so that is another reason why we decided to engage more in a public information, creating the public profile.⁷²

Its most significant public exposure is the result of strategically placed media 'exposés', including in the *New Yorker*,⁷³ *The Guardian*⁷⁴ and in a Channel 4 documentary film, which are the result of CIJA accepting a certain degree of journalistic interest.⁷⁵ Given the absence of scholarly literature on CIJA at the time of researching (which has only been partially addressed more recently),⁷⁶ interviews were my best way of gaining detailed information about CIJA, and they offer personal reflections about the field's evolution as noted above in relation to the methodology of Dezalay and Garth.

Once the Syrian conflict erupted in 2011, political cleavages sat alongside an ongoing international commitment to anti-impunity coupled with donor fatigue and scepticism. A large body of opinion agreed that criminal accountability was necessary, but, without ICC action, few other ideas were proffered publicly.⁷⁷ In the face of this paralysis, a variety of local and international actors started documenting increasingly violent events usually for advocacy purposes.⁷⁸ The United Kingdom's Foreign

⁷² Interview no. 2, 16 June 2017.

⁷³ B. Taub, 'The Assad Files', *The New Yorker*, 16 April 2016, available at www.newyorker.com/magazine/2016/04/18/bashar-al-assads-war-crimes-exposed.

⁷⁴ J. Borger, 'Syria's Truth Smugglers', *The Guardian*, 13 May 2015, available at www.theguardian.com/world/2015/may/12/syria-truth-smugglers-bashar-al-assad-war-crimes; J. Borger, 'Smuggled Syrian Documents Enough to Indict Bashar al-Assad, Say Investigators', *The Guardian*, 13 May 2015, available at www.theguardian.com/world/2015/may/12/smuggled-syrian-documents-indict-assad-investigators.

⁷⁵ 'Syria's Disappeared', *Channel Four*, 24 April 2017, available at www.channel4.com/news/syrias-disappeared.

⁷⁶ See, e.g., Elliott, "A Meaningful Step towards Accountability": A View from the Field on the United Nations International, Impartial and Independent Mechanism for Syria', 15(2) *JICJ* (2017) 239; Heinze, *supra* note 52; Owens, 'Improving the Odds: Strengthening the Prospects for Accountability in the Syrian Conflict by Regulating the Marketplace for Information on Atrocity Crimes', 26 *UNIVERSITY OF MIAMI INTERNATIONAL AND COMPARATIVE LAW REVIEW* (2019) 369; Rankin, 'Investigating Crimes against Humanity in Syria and Iraq: The Commission for International Justice and Accountability', 9 *Global Responsibility to Protect* (2017) 395; Rankin, 'The Future of International Criminal Evidence in New Wars? The Evolution of the Commission for International Justice and Accountability (CIJA)', 20 *Journal of Genocide Research* (2017) 392.

⁷⁷ United Nations, *Referral of Syria to international Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution*, 22 May 2014, available at www.un.org/press/en/2014/sc11407.doc.htm; Trahan, 'An Overview of Justice in the Former Yugoslavia and Reflections for Accountability in Syria', 23 *International Law Students Association Journal of International and Comparative Law* (2017) 303.

⁷⁸ Most significant has been the work of the Independent International Commission of Inquiry on the Syrian Arab Republic, created by the Human Rights Council through Resolution A/HRC/RES/S-17/1, 23 August 2011.

and Commonwealth Office (FCO) sought to ‘harness some of that energy’ by training local actors in human rights.⁷⁹ Through an intermediary, the FCO approached William Wiley in 2011 to provide training to local Syrian activists/lawyers.

Yet, rather than accept the remit suggested by the FCO, Wiley countered with his own ‘entrepreneurial’ proposal of training Syrians on collecting evidence that would inform international criminal prosecutions.⁸⁰ According to Wiley, ‘the concept at the beginning was to set up ... a proto investigative division with a legal advisory section ... so ... that once a hybrid tribunal emerged, then we would simply hand over our evidence and case files and the personnel who wanted to go to the OTP and the hybrid mechanism’.⁸¹ CIJA was established in May 2012 as a non-governmental organization (NGO) listed in the Netherlands, which worked out of a different European country through public funding.⁸² Since 2011, CIJA’s donors include Canada, Denmark, the European Union (EU), Germany, Norway, Sweden, Switzerland and the International Research and Exchanges Board, an NGO.⁸³ In 2015, CIJA also established a separate, US 501(c)(3) non-profit organization, which focuses solely on countering violent extremism (CVE) and is explored below.

Early on, CIJA was a very small operation comprising a handful of individuals with significant ICL expertise. It offered an opening for international criminal ‘lawyer entrepreneurs’⁸⁴ to ‘play a key role in building and legitimating the market in their services and expertise’.⁸⁵ According to one of CIJA’s longest-serving staff:

it was lucky that it was him [Bill Wiley]. He has the entrepreneurial spirit to set-up and organization, and he went against odds, you know there was no one but the Brits who were funding this, he put in his own money in the beginning, he, me and J ... very few European governments understood also the value ... [but] he managed to convince them or to show them what a self-evident ... incredibly valuable resource ... [CIJA was], so eventually other European governments came in and funded this effort, for the lack of any other opportunity ... we were lucky in that respect, in all this tragedy that the ICC never got a mandate [for Syria], nobody else wanted it, so the European governments were desperate for it to be seen to do something, so we were there, but Bill has his integrity and his own approach and definitely ... there were many lessons learned from previous tribunals, I mean he has worked for the [ICTR,] ICTY, ICC and at the Special High Tribunal for Iraq.⁸⁶

While Wiley’s service in public ICL bodies was crucial in shaping his expertise and ability to identify an accountability gap, he also had experience working in the

⁷⁹ Interview with Bill Wiley, 8 February 2017.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² Initially, it was called the Syrian Commission for Justice and Accountability and changed to ‘CIJA’ in 2014.

⁸³ For details on individual contributions, see Engels, *supra* note 71.

⁸⁴ Dezalay and Garth, ‘Introduction: Constructing Transnational Justice’, in Dezalay and Garth, *supra* note 19, 3, at 6.

⁸⁵ Dezalay and Garth, ‘Marketing and Legitimizing Two Sides of Transnational Justice’, in Dezalay and Garth, *supra* note 19, 277, at 279. In CIJA’s case, Bill Wiley was the only legally trained individual comprising the initial group, but these efforts did enable other lawyers to enter the organization later.

⁸⁶ Interview no. 3, 7 June 2017.

Arab world in the private sector through his rule of law consultancy firm, Tsamota Limited, which he founded in 2008. He used his 'personal networks' and some of his own funds to underwrite CIJA's costs before large amounts of public funding were secured in 2013.⁸⁷ These larger sums underscore how this 'initiative has the support of otherwise normally sceptical nations on private initiatives in this field ... there is a niche there to be filled ... [and] that niche is being filled by professionally competent people until such a day ... when a more public body can take over'.⁸⁸ The vast bulk of these funds underwrite CIJA's general operational costs and its two Syria-related investigative teams, which work on regime and opposition crimes committed by the Islamic State.⁸⁹

Although public funding is substantial, its continuation requires constant attention from CIJA staff. As suggested above, CIJA and the international criminal justice field are situated in a larger post-conflict/conflict governance market. In this market, constituencies and accountability are far from clearly delineated. Is CIJA accountable to itself, to its donors, to 'the international community', to the Syrian people or to no one? Interviewees disagreed, but the majority tended to identify 'the Syrian community' and/or donors as their principle audience.

What was far easier to settle on for my interviewees was the requirement of a high quality CIJA 'product' clearly distinct from a range of actors working on evidence collection. For example, Human Rights Watch and Amnesty International are dedicated to advocacy, but they have also undertaken investigations into alleged war crimes in Syria. CIJA provided support to Amnesty International for its report on Saydnaya Prison.⁹⁰ In the face of such work that can gain a lot of traction and possible funding from its public presence, it is crucial for CIJA that donors remain aware of its unique input, which comprises a growing archive, a specified number of legal briefs, along with the provision of intelligence to a number of governments. CIJA staff spend a good deal of energy in 'marketing' their 'unique' approach to accountability within the confines of their fundraising discussions with donors: 'I've talked to government and ... that's what I stress: I stress the uniqueness of it and the uniqueness that we are a private, non-profit entity doing this. That's never been done before either.'⁹¹

⁸⁷ Interview with Bill Wiley, 8 February 2017.

⁸⁸ Interview no. 7, 21 June 2017.

⁸⁹ Early on, CIJA secured an agreement with the Free Syria Army (FSA) for it to hand over documents seized during the course of military operations. CIJA does not investigate the FSA or various other opposition groups. CIJA started working on the Islamic State due to the nature and scope of its crimes and at the request of donors. This lack of examination of all of the parties to the conflict is problematic, but some CIJA staff see it as a pragmatic and necessary arrangement that has ensured that two of the conflict's largest perpetrators are investigated as systematically as possible.

⁹⁰ Amnesty International, *Syria: Human Slaughterhouse: Mass Hangings and Extermination at Saydnaya Prison, Syria*, 7 February 2017, available at www.amnesty.org/en/documents/mde24/5415/2017/en/. For Alex Whiting, a 'lot of human rights organizations are beginning to adjust because of the ... existing tribunals and the birth of modern ICL'. Interview with Alex Whiting, 28 June 2017.

⁹¹ Interview no. 6, 21 June 2017.

Distinguishing CIJA's work from others is:

very important to ... cement the understanding that the CIJA is unique, is to understand that it is the only one that is doing this type of work in Syria, when there are claims that thousands of actors are ... collecting evidence for accountability, and then you have this kind of understanding that you know to be able to secure continuous support of those states for the work, for the investigations that CIJA is carrying out.⁹²

Here then, CIJA staff highlight how building a CIJA brand is crucial in securing their unique position in the market, especially in the minds of their donors.

What unites CIJA along with large public bodies such as the ICC in relation to donor funding is the need for sustaining institutional credibility and donor 'buy-in'.⁹³ Yet, in the case of public bodies, such campaigning is far more overt, whereas all of CIJA's lobbying occurs behind closed doors. This different donor relationship produces a number of effects, including the perceived negative requirement of constantly marketing the 'CIJA model':

We have a sales component ... because we have to raise money, so you have to keep the funders happy, so that's a totally different aspect of what we do here that, like at the Yugoslavia Tribunal, that money was coming, so you had to justify yourself in a report to ... the various UN bodies, but ... they were committed to the process, so it was more a justification for the amount of money they were getting, so here ... your ability to survive is based on how well you can sell yourself and the product meeting their expectations, and so the pressure at a tribunal is the political pressure to do what a tribunal does, to kind of feed the beast in New York, so like the UN is calling for a trial because they are spending all that money, and you have to do a trial whether you are ready or not, and here, you have funders who are paying money and all of a sudden now you have to justify how you are spending the money ... so it is a different kind of pressure but it has the same effect of ... producing a trial ... producing reports, where in a perfect world ... that would not be your choice to do it.⁹⁴

Although both CIJA as well as various ICTs compete in the same international criminal justice field, entrepreneurial justice requires a closer relationship between one's work as a legal practitioner and as a fundraiser.

According to my interviewees, donors regard their organization as fulfilling a number of distinct services that go beyond the remit of individual criminal responsibility. Since its beginnings, CIJA has run numerous training sessions initially for Syrians and later for Iraqis that focus on securing evidence as well as procuring witness statements. This extensive training constitutes a form of investment in the human resources of societies in transition: 'That's one thing CIJA is really good at, it is trying to reach and get the people on the ground trained up, trained up to be the next prosecutors, or to be the next defence councils, or victims' advocates or judges, whatever.'⁹⁵

⁹² Interview no. 2, 16 June 2017; see also Schwöbel-Patel, 'Spectacle in International Criminal Law: The Fundraising Image of Victimhood', 2 *London Review of International Law* (2016) 247, at 257.

⁹³ Interview no. 13, 1 August 2017.

⁹⁴ Interview no. 4, 20 June 2017.

⁹⁵ Interview no. 5, 21 June 2017.

Capacity building then is seminal to what CIJA does. Such work highlights the blurring between a range of regulatory registers as well as overlapping public and private actors and logics. This is embodied in the career of one of CIJA's security analysts. Initially trained in foreign intelligence of a European CIJA donor state, he then moved to work in various conflict zones with the UN and EU bodies. His government is a funder, and his work at CIJA is construed as sufficiently 'public' to warrant leave from the public service. In his opinion, the people at CIJA 'are clearly working for a public good. ... So, the narrative is fantastic and it suits my nature'.⁹⁶ He works closely with the government of northern Iraq where capacity building is a central part of CIJA's remit:

The donors, well, I have to say, what they really like the best of all ... is the capacity building that we do. ... That just warms their hearts, I also see the practicality of that ... there will be a time when CIJA is not there anymore [but] ... hopefully ... perhaps 40 or 50 investigators who have been trained for several years by CIJA who have this idea, 'oh yeah I can now investigate war crimes or other crimes, and I do have a concept of what accountability is, I do have a concept because I was taught this and I practiced it', it is much stronger than sitting down in a classroom being taught ... so, I feel very strongly about that, not only do the donors like that very much, but ... I can see that changing in people and the way they are taking it in.⁹⁷

This overlap between international criminal investigation and capacity building in conflict-affected societies underscores how CIJA's success arises from combining developmental and justice-related goals in the market of post-conflict/conflict governance.

CIJA's operations also exhibit a close relationship between the justice and security sectors in a variety of highly innovative ventures. As noted above, there are actually two CIJAs – one non-profit entity registered in the Netherlands, which is the main entity, along with 'Groundscout', a US incorporated non-profit entity. Groundscout has the same three directors as CIJA Europe as well as an additional US-based CVE expert. According to Bill Wiley, who is the director of both Groundscout and CIJA Europe:

We hold a lot of data on Islamic State ... and then the question which we faced ... is how do we get maximum utility from the materials we collect. So, obviously our focus, the CIJA [Netherlands] focus is on criminal prosecutions, criminal investigations ... but then that leaves a lot of the ... by-product, so in the medium and longer term we have always assumed that that by-product would feed transitional justice mechanisms, alternatives to criminal justice mechanisms, when Syria and Iraq are prepared to absorb that kind of thing. Not in the foreseeable future, I would think. But in any event, one looks ahead ... [in relation to CVE] there is a lot of theory chasing reality ... because it is relatively new and what we did, is we said well let's do CVE specific to Islamic State, based on empirical data – the CVE projects for the most part don't have empirical data on which to rely, for obvious reasons and we do. We have a lot.

This CIJA CVE work started first in the Balkans and now negotiations over work across Iraq are taking place. Western states are keen to consolidate Iraqi government victories against the Islamic State, and CIJA has positioned itself well in the field by leading new investigative and documentation efforts under the auspices of UNSC Resolution

⁹⁶ Interview no. 7, 21 June 2017.

⁹⁷ *Ibid.*

2379.⁹⁸ Amassing this evidentiary arsenal brings a number of dividends, including intelligence for ‘law-enforcement purposes in the West’.⁹⁹ CIJA then constitutes a vital cog in a highly complex network of foreign and intergovernmental governance responses to the ongoing ‘terrorist’ threat as well as European law enforcement efforts in the wake of the Syrian refugee crisis.

Interviewees were able to reflect on the field’s innovations in recounting how they began working as international criminal lawyers. ICT work experience, in particular, was seminal in forging a common mindset about what constitutes the essence of ICL work and what are the best ways of realizing this work. Often in juxtaposition to human rights advocacy with its emphasis on witness testimony, interviewees forcefully underlined the centrality of building a case through carefully documented linkage evidence.¹⁰⁰ Such skills were particularly nurtured through working at the ICTY. Yet, where there was respect for these practices of evidence gathering and analysis, there was also widespread disillusionment and frustration with ICL’s current institutional capacities, with the ICC, in particular, noted regularly for its inefficient and frustrating track record. Indeed, this narrative of ICT redemption through the ‘CIJA model’ filling the gaps of public bodies was perhaps the single most important theme to emerge from the interviews. According to one former ICTY analyst and senior CIJA employee:

This is private sector and ... [it] functions differently than the big bureaucratic United Nations, where you have a lot of deadwood. ... We are very flexible, our risk tolerance is higher,¹⁰¹ we can operate on short notice ... on the other hand we don’t have the resources, we are not government, we do not have access to intercepts, we do not have access to diplomatic passports, if we operate in Turkey, there is bloody nobody, we are there as tourists with all the downsides. But, on the other hand, we can fly on half a day’s notice, if I get a call now, that says go to the airport, I can do that, which bureaucratic organizations cannot do. Lessons learned for sure, all the advantages of less, we are also much, much cheaper, I mean just look at the numbers.¹⁰²

This reflection not only talks to the notion of CIJA ‘filling a gap’ in quantitative terms. The suggestion here is that public bodies are qualitatively incapable of fulfilling at least part of the essential war crimes investigation practices.

Yet such criticism of public bodies can paradoxically stem from a personal commitment to the field of international criminal justice in its public guise. The CIJA interviewees did not countenance the replacement of extant ICTs or future public initiatives; instead, they understand their work in classic public-private partnership terms:

Working with CIJA has really cheered me up in many ways, because you can see that these non-governmental, or this thing close to an NGO, but de facto, it is an investigative office. I’m working exactly with the military analyst we worked with in the ... [ICTY case]. ... We are

⁹⁸ SC Res. 2379, 21 September 2017; see also Van Schaack, ‘The Iraq Investigative Team and Prospects for Justice for the Yazidi Genocide’, 16 *JICJ* (2018) 113.

⁹⁹ Interview with Bill Wiley, 10 November 2017.

¹⁰⁰ For example, Interview no. 12, 4 August 2017.

¹⁰¹ On social entrepreneurs’ greater risk tolerance, see Kaufman, ‘Social Entrepreneurship in the Age of Atrocities: Introduction’, in Z.D. Kaufman (ed.), *Social Entrepreneurship in the Age of Atrocities: Changing Our World* (2012) 1, at 6–7.

¹⁰² Interview no. 3, 7 June 2017.

adhering to the same substantive law, we are using exactly the same substantive law as we did before and we are writing briefings in the same style, so again we are not sitting in ... the ICTY, but we did exactly what we did back then ... so yeah, it's made me more hopeful.¹⁰³

Thus, rather than see CIJA as a challenge to public ICL institutions such as the ICC, the majority of CIJA staff regard their individual efforts through the 'CIJA model' itself as a radical, 'complementary' tool in realizing anti-impunity through criminal trials.¹⁰⁴ Another interviewee continued: 'But it's not a copy paste model ... building cases in Syria does not mean you'll engage in the same way in Iraq as we are in Syria, so the model changes from conflict to conflict.'¹⁰⁵ Thus, although adaptable to different settings, the 'CIJA model' is premised on securing sophisticated linkage evidence that can be analysed for future international or domestic criminal trials.

Although a variety of states have continued to support CIJA and other accountability actors, the innovation has not stopped here. Lichtenstein and Qatar worked behind the scenes at the United Nations General Assembly to ensure the creation of the International, Impartial and Independent Mechanism (IIIM) in late 2016.¹⁰⁶ This public body has two main tasks: 'to collect, consolidate, preserve and analyse evidence of violations ... and to prepare files in order to facilitate and expedite fair and independent criminal proceedings.'¹⁰⁷ Given its limited and contingent budget from UN voluntary contributions¹⁰⁸ and the 'the challenging operating environment' of evidence collection in Syria,¹⁰⁹ civil society cooperation has been seen as vital since its inception.¹¹⁰ This is reflected in the Lausanne Platform of April 2018, which serves as a framework of 'collaborative engagement' between the mechanism and 28 Syrian civil society organizations for evidence gathering and sharing, witness communications and

¹⁰³ Interview no. 5, 21 June 2017.

¹⁰⁴ Interview no. 3, 7 June 2017.

¹⁰⁵ Interview no. 2, 16 June 2017.

¹⁰⁶ United Nations General Assembly (UNGA), 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, UN Doc. A/71/L.48, 19 December 2016. For some background on the International, Impartial and Independent Mechanism (IIIM), see Wenaweser and Cockayne, 'Justice for Syria? The International, Impartial and Independent Mechanism and the Emergence of the UN General Assembly in the Realm of International Criminal Justice', 15 *Journal of International Criminal Justice Stability* (2017) 211.

¹⁰⁷ UNGA, 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, UN Doc. A/71/755, 19 January 2017, para. 11.

¹⁰⁸ The challenge of securing constant funds for an increasing budget due to 'the exponential growth in the demands of its substantive work' is a central theme throughout the IIIM's three biannual reports: UNGA, Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, UN Doc. A/73/741, 13 February 2019, para. 48.

¹⁰⁹ UNGA, Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, Doc. A/73/295, 3 August 2019, para. 5.

¹¹⁰ GA Res. 71/L.48, 21 December 2016, para. 6.

assistance requests.¹¹¹ The platform lays the groundwork for individual organizations to sign memoranda of understanding (MoUs) with the IIM that can delineate more detailed arrangements to ensure the security of data transfers and confidentiality. Such initiatives have enabled the IIM to secure ‘more than one million records’ so that Syria’s war is ‘arguably the most extensively documented conflict in history’.¹¹² CIJA itself signed an initial MoU with the IIM in late 2017 providing access to almost all of its archive and case briefs. A new MoU was passed on 28 June 2019 that regulates the transfer of materials to the IIM in compliance with European data privacy laws.

The IIM champions these ‘public-private partnerships’ as they garner ‘innovative methods’ and greater efficiencies.¹¹³ Throughout its three reports to date, the mechanism sustains a narrative of a ‘lean and efficient staffing structure’¹¹⁴ that is ‘committed to integrating the most efficient possible working methods to maximise the international community’s return on its accountability investment’.¹¹⁵ Part of this investment includes a commitment to Arabic language and region-specific expertise.¹¹⁶ Such assurances must be read in their context of growing international frustrations in relation to perceived inefficiencies and delays of the ICC alongside an inability to develop case-specific expertise.¹¹⁷ The IIM’s constant resort to the managerial speak of ‘fast-tracking’, ‘innovative and cost-effective solutions’ and ‘maximiz[ing] its impact’ is redolent of the language used by many of CIJA’s personnel and points to the centrality of entrepreneurial idioms in sustaining ‘the development of criminal law ... for prosecution, now and in the future’.¹¹⁸ A sense of innovation pervades these texts, and, at least as detailed here, it is the fact that it is innovation driven by private actors that makes it one of the most crucial components of the field’s continued success.

Thus, as CIJA’s director explains, ‘I believe the future of international criminal justice whether it is applied domestically or internationally really depends on some kind of

¹¹¹ Protocol of Cooperation between the International, Independent and Impartial Mechanism and Syrian Civil Society Organisations participating in the Lausanne Platform, 3 April 2018, available at https://iiim.un.org/wp-content/uploads/2018/04/Protocol_IIIM_-_Syrian_NGOs_English.pdf.

¹¹² UN Doc. A/73/741, *supra* note 108, paras 3, 10.

¹¹³ *Ibid.*, para. 18.

¹¹⁴ UN Doc. A/73/295, *supra* note 109, para. 51.

¹¹⁵ UNGA, Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, UN Doc. A/72/764, 28 February 2018, para. 69.

¹¹⁶ UN Doc. A/73/741, *supra* note 108, para. 47.

¹¹⁷ Such innovation has extended to the creation of both the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da’esh/ISIL by the Security Council (SC Res. 2379, 21 September 2017) and the Independent Investigative Mechanism for Myanmar by the Human Rights Council (UN Doc. A/HRC/39/L.22, 25 September 2018) as well as recent discussions at side events to the Human Rights Council and the International Commission of Jurists on the possibility of establishing a Standing Independent Investigative Mechanism. Abbott and Zia-Zarifi, ‘Is It Time to Create a Standing Independent Investigative Mechanism (SIIM)? Part I’, *Opinio Juris blog*, 10 April 2019, available at http://opiniojuris.org/2019/04/10/is-it-time-to-create-a-standing-independent-investigative-mechanism-siim/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+opiniojurisfeed+%28Opinio+Juris%29.

¹¹⁸ UN Doc. A/73/741, *supra* note 108, para. 3.

public civil society partnership'.¹¹⁹ While it is reassuring for him that 'there are existing consumers for CIJA product', he also readily concedes that his organization 'only exists due to the public sector'.¹²⁰ Here, then, we can discern entrepreneurial justice as a synergistic, dynamic relationship between a range of public and private actors seeking to advance their respective positions within the field of international criminal justice.

4 Conclusion

Today, CIJA's operations span the intersecting global governance concerns of capacity building (or development), justice and security not only in Syria and Iraq but also in the western Balkans, the Central African Republic, Nigeria, Libya and another country in Asia. While its director suggests that 'we are too useful to the public authority to fail' and that demand for CIJA services is growing,¹²¹ sustaining such donor buy-in, nevertheless, requires constant marketing and an identifiable 'brand architecture'. Although Wiley notes the absence of any 'credible enemies',¹²² questions about CIJA's own accountability and ethics continue to be raised by a variety of voices.¹²³ Who is CIJA's constituency? Will the archive assembled be admissible in future trials? To what extent – if at all – can survivors access CIJA's material and expert personnel? Given the limited nature of my own access to CIJA's work, such questions are difficult to answer at this time. At the very least though, they suggest that the CIJA model, like its public ICL counterparts, is an imperfect, private beast that, in seeking criminal accountability, would do well through more sustained reflection about its own internal organizational accountability.

While CIJA continues to pursue innovative 'entrepreneurial justice' practices, it has moved beyond the 'start-up' phase of operations. As 'CIJA is getting to be extremely well-known',¹²⁴ it is now better to characterize this venture as an established and influential player in the field of international criminal justice. This calls not only for greater internal accountability as noted above but also for more formalized, and perhaps publicized, arrangements between CIJA and its various public partners. Bill Wiley concedes as much in calling for the creation of standards of best practice to structure future donor/recipient relationships.¹²⁵ Overwhelmed by constant private communications that seek details from its key personnel about the nature of its work, CIJA has gradually developed a more public profile whether through targeted public lectures and workshops or plans for a website.¹²⁶ Thus, in a world now heavily invested in ICL, CIJA constitutes an entrepreneurial stopgap to some recent and highly damaging failings in the field.

¹¹⁹ Interview with Bill Wiley, 8 February 2017.

¹²⁰ Interview with Bill Wiley, 20 December 2018.

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ See, e.g., Heinze, *supra* note 52.

¹²⁴ Interview with Bill Wiley, 20 December 2018.

¹²⁵ As also suggested by Heinze, *supra* note 52, at 181.

¹²⁶ Interview with Bill Wiley, 20 December 2018.