Entrepreneurial justice

Citation for published version:

Digital Object Identifier (DOI):
10.1093/ejil/chz065

Link:
Link to publication record in Edinburgh Research Explorer

Document Version:
Peer reviewed version

Published In:
European Journal of International Law

Publisher Rights Statement:
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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 characterises CIJA’s work as exemplifying ‘entrepreneurial justice’, not only in Syria, but 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 privatised 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 realising 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.

… so 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 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 (CIJA), 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 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; the rhetoric of international criminal accountability is 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), the central normative and institutional locus of ICL since the 21st century. 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, authorising both the use of force and ICC action. 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. Yet the particular geopolitical interests at stake produced a rare UNSC double veto by China and Russia in 2014.

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3 SC Draft Res. 348, 22 May 2014.
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 because of governance gaps emerging from the Syrian conflict. In a society once almost devoid of civil society activity as well as ICL expertise, today Syria is home to a vast array of governance projects including emergency humanitarian relief efforts, human rights advocacy and the documentation of alleged crimes. This article engages in depth with one such actor, 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, this 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 7 million Euros. CIJA’s central concern is to amass, store and analyse documentation of alleged crimes like a ‘proto-OTP [office of the prosecutor]’. 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

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4 Interview with CIJA’s Syrian Chief Investigator, 5 May 2017.
6 Interview with Bill Wiley, 8 February 2017.
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 privatised 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 thirty 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 United States as well as in 2018 at one of CIJA’s training sessions for its Syrian investigators in late 2018.\(^7\) 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 organisational 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 three, part two considers the emergence of international criminal justice as a form of Third World (post)conflict governance after the Cold War. Section two ends by developing the concept of ‘entrepreneurial justice’ for CIJA specifically and as a general counterpoint to earlier practices centred in public institutions. Section three’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.

\(^7\) All but three of these interviews were recorded and transcribed. Most 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.
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: ‘the social imaginary is that common understanding that makes possible common practices and a widely shared sense of legitimacy.’

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 rather than amnesty, thus generating a groundswell of support for robust, legalized responses in the 1990s – especially in the face of large-scale atrocities. A general neoliberal suspicion of the state could revamp earlier notions of the un-developed 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.

Where once most civil conflicts could be relegated to hegemonic silos, from the 1990s onwards, 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 capitalise on *opportunities* arising from a functioning UNSC 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’, requiring a range of interventions of expertise, including through the particular regulatory register of

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12. UNCIO XV, 335; amendments by General Assembly Resolution in UNTS 557, 143/638, 308/892, 119, Art 39.
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 UN Charter, to the establishment of a Commission of Experts through the UN Secretary General that could then hand over evidence to a specially created Tribunal. The 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. 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’ of international criminal justice acknowledges the cognitive and geopolitical transformations that took place in the 1990s, which were not only supportive of the criminalization and judicialization of conflict, but also more sustained interventions in so-called ‘societies in transition’. One way of framing such developments is through Dezalay and Garth’s seminal 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 Bourdieu’s national-based field theory by considering the nature of legal fields at the transnational level. 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

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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.’\textsuperscript{21} 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 legalised 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’.\textsuperscript{22} 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…’\textsuperscript{23} In a legal field, it is best to possess a diversified portfolio and so, 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’\textsuperscript{24} such that its approach to dispute resolution – the resort to ICTs, for example - becomes naturalised and unquestioned.\textsuperscript{25}

While Dezalay and Garth recognise 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’.\textsuperscript{26} 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.\textsuperscript{27}

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

\textsuperscript{22} \textit{Ibid.}, at 16.
\textsuperscript{23} \textit{Ibid.}, at 19.
\textsuperscript{24} \textit{Ibid.}
\textsuperscript{25} \textit{Ibid.}, at 317.
\textsuperscript{26} \textit{Ibid.}, at 17.
\textsuperscript{27} \textit{Ibid.}, at 17
a sensibility also informed my own CIJA interviews for the way they provided vital details unavailable elsewhere, but also in 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 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, 28 which could not rely on a cadre of available ‘international criminal lawyers’. 29 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 we’re going to charge, and prosecute and prove these cases… 30

Scholarship on this period like Dezalay and Garth’s study of international commercial arbitration early grandees emphasises the expertise and contributions of key individuals – or ‘Grand Old Men’ 31 - such as Georges Abi-Saab, Cherif Bassiouni, Carla Del Ponte, Antonio Cassese and Richard Goldstone. 32 For Alex Whiting, one of CIJA’s Commissioners and an


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28 For one CIJA interviewee who worked at the ICTR in its early years, ‘no one was really an expert and we were all learning’ on the job. Interview #4, 20 June 2017.
29 Kreß, supra note 17.
30 Interview with Beth Van Schaack, CIJA Advisory Board member, 22 November 2017.
31 Dezalay and Garth, supra note 21, at 34.
ICL scholar who was a former practitioner at the International Criminal Tribunal for the former Yugoslavia (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 about some of the characters…these are… flawed characters, but they had a kind of energy, conviction, belief and drive, that was necessary.33

Typically, the expertise possessed by these individuals was forged through successful national legal careers, which took on increasingly transnational qualities.34 ‘Agents 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.’35 This ICT bias has persisted as an unwritten expectation of entry into the field. CVs 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 onto the ICC, with more diverse experiences beyond The Hague tending to emerge more recently. As a ‘tribunal animal,’36 or ‘post-conflict justice junkie’37 with very specialised expertise, the simplest choice for international criminal lawyers was to circulate within ICTs: ‘there 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.’38 Yet the pool of available ICT

33 Interview with Alex Whiting, CIJA Commissioner, 28 June 2017.
36 Interview #4, 20 June 2017.
38 Interview #4, 20 June 2017. Cf. Ibid., at 364-371.
positions is shrinking\(^{39}\) and it looks unlikely in this ‘post-honeymoon’ period of international criminal justice,\(^{40}\) that states will support the creation of new and expensive ad hoc tribunals as in the past.\(^{41}\) As was the case for international commercial arbitration, such ‘overproduction of specialists not only increases the competition in the specific market, it tends also to modify the relations that are maintained between [international criminal justice] and the more general legal field.’\(^{42}\) 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 section three.

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, 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.\(^ {43}\) Although some of these criticisms originate within 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, for most practitioners they also serve 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 universalisation through a denial of the politics of ICL itself \(^ {44}\) are rarely questioned. Although a variety of reconstructive criticisms serve to sustain both the discipline of ICL and

\(^{39}\) For Christensen, at ICL’s highpoint before the Syrian conflict, around 4000 people were employed in ICTs. Christensen, supra note 35, at 610.


\(^{41}\) Cf. the creation of the Kosovo Specialist Chambers and Specialist Prosecutor’s Office 2017 in as well as a short-term career option for ICL experts through fact-finding missions.

\(^{42}\) Dezalay and Garth, supra note 21, at 308.


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. entities such 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’. This explains how responses to criticisms of ICC inefficiency and expenditure are couched in ‘management language’ about the ICC’s ‘bottom line’. In a context of tightening purse strings, Prosecutors Del Ponte and Bensouda have both characterized the ‘dividends’ of deterrence through investment in criminal prosecutions as ‘cheap’, compared to other foreign policy options for donors.

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 realisation. Does the degree of social collapse and suffering require nothing less than ‘apex accountability’ 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. A growing body of scholarship has described the reasons for the ICC’s ‘over-reliance’ on intermediaries, the various problems arising from such partnerships and has stressed the need for more robust standards in regulating this form

47 Kendall, Commodifying Global Justice, supra note 44, at 132-133.
of ICL outsourcing. 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.

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 recognise 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. Although more recently a variety of disciplines have started to study the phenomenon as well, much of the time, there is little interdisciplinary debate and such work remains within an economic, realist tradition.

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52 Interview #7, 21 June 2017.

53 Notwithstanding scholarship on ‘norm entrepreneurs’ largely within the field of International Relations. For example, Finnemore and Sikkink, 'International Norm Dynamics and Political Change’, 52 International Organization (1998) 887.


Given the sheer volume of work to date, it is beyond the scope of this article to summarise 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’. Many authors rely on Schumpeter with his notion of the entrepreneur as a ‘disequilibrating force’ 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.’

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 Gartner, this innovation will only constitute entrepreneurship with the creation a new organization. Decisions taken to create such organizations occur with a high degree of uncertainty and therefore risk to the individuals involved. Although there has been a move away from studying the individuals themselves, Shane and 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’.

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, Dey and Mason develop the idea of ‘activist entrepreneurship’, which is ‘an inherently disruptive activity with positive social change outcomes.’ Approaches that move beyond the economic sphere usually fall under the umbrella of ‘social entrepreneurship’ scholarship. In building a definition here that speaks to ‘justice’ though, Klein et al’s notion of ‘public entrepreneurship’ is particularly

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59 J. Schumpeter, Capitalism, Socialism and Democracy (1942) at 132.
60 Ibid., at 62.
62 Ibid., at 222.
63 Dey and Mason, ‘Overcoming constraints of collective imagination: An inquiry into activist entrepreneuring, disruptive truth-telling and the creation of “possible worlds”’, 33 JBV (2018) 84, at 85.
64 For example, see Calás, Smircich and Bourne, supra note 56; and C. Steyaert and D. Hjorth (eds), Entrepreneurship as Social Change: A Third Movements in Entrepreneurship Book (2006).
helpful. Echoing a range of legal scholars who note the blurring between public and private governance,\(^ {65}\) Klein et al argue that approaches from ‘management and economics are useful for understanding resource allocation and economic change in non-market settings’\(^ {66}\). 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’\(^ {67}\).

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 privatised 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…\(^ {68}\)


\(^{66}\) Klein et al., supra note 58, at 2.

\(^{67}\) Ibid., at 3.

\(^{68}\) Interview #16, 19 September 2017.
In the next section, I explore what ‘doing’ entrepreneurial justice in Syria through the ‘CIJA model’ entails.

3 An ICL ‘Start-up’? 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. CIJA actively avoids publicity due to concerns over employee safety and to ensure the integrity of its archive. According to its head of external relations,

[continues]

Its most significant public exposure is the result of strategically placed media ‘exposés’, including in the New Yorker, The Guardian and in a Channel 4 documentary film, which

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69 Interview with Alex Whiting, 28 June 2017.
71 Interview #2, 16 June 2017.
73 Borger, Syria’s truth smugglers, 13 May 2015, available online at https://www.theguardian.com/world/2015/may/12/syria-truth-smugglers-bashar-al-assad-war-crimes (last visited 10 April 2019); Borger, Smuggled Syrian documents enough to indict Bashar al-Assad, say
are the result of CIJA accepting a certain degree of journalistic interest.74 Given the absence of scholarly literature on CIJA at the time of researching (which has only been partially addressed more recently),75 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, publicly few other ideas were proffered.76 In the face is this paralysis, a variety of local and international actors started documenting increasingly violent events usually for advocacy purposes.77 The UK’s Foreign and Commonwealth Office (FCO) sought to ‘harness some of that energy’ by training local actors in human rights.78 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.79 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

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77 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.
78 Interview with Bill Wiley, 8 February 2017.
79 Ibid.
personnel who wanted to go to the OTP and the hybrid mechanism’. CIJA was established in May 2012 as an NGO listed in the Netherlands, which worked out of a different European country through public funding. Since 2011, CIJA’s donors include Canada, Denmark, European Union, Germany, Norway, Sweden, Switzerland and the NGO, International Research and Exchanges Board (IREX). 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. This then was an opening for international criminal ‘lawyer entrepreneurs’ to ‘play a key role in building and legitimating the market in their services and expertise.’ 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...

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 Arab World in the

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80 Ibid.
81 Initially, it was called the Syrian Commission for Justice and Accountability and changed to ‘CIJA’ in 2014.
82 For details on individual contributions, see Engels, supra note 70.
84 Dezaelay and Garth, ‘Marketing and Legitimating Two Sides of Transnational Justice’, in Ibid, 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.
85 Interview #3, 7 June 2017.
private sector through his rule of law consultancy firm, Tsamota Ltd., 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. 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’. 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 Islamic State.

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 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/s.

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 have also undertaken investigations into alleged war crimes in Syria. CIJA provided support to Amnesty International for its report on Saydnaya Prison. 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.

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86 Interview with Bill Wiley, 8 February 2017.
87 Interview #7, 21 June 2017.
88 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 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 conflicts two largest perpetrators are investigated as systematically as possible.
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.’

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.

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’. 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

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90 Interview #6, 21 June 2017.
92 Interview #13, 1 August 2017.
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…93

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 organisation 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…’94

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, CIJA ‘are clearly working for a public good… So, the narrative is fantastic and it suits my nature…’95 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

93 Interview #4, 20 June 2017.
94 Interview #5, 21 June 2017.
95 Interview #7, 21 June 2017.
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...96

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 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’, 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.

96 Interview #7, 21 June 2017.
This CIJA CVE work started first in the Balkans and negotiations over work across Iraq are taking place. Western states are keen to consolidate Iraqi government victories against Islamic State and CIJA has positioned itself well in the field by leading new investigative and documentation efforts under the auspices of UNSC Resolution 2379.\(^97\) Amassing this evidentiary arsenal brings a number of dividends including intelligence for ‘law-enforcement purposes in the West’.\(^98\) 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 realising this. 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.\(^99\) 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 time 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,\(^100\) 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

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\(^98\) Interview with Bill Wiley, 10 November 2017.

\(^99\) For example, Interview #12, 4 August 2017.

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.101

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 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. 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 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.102

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’103 tool in realising anti-impunity through criminal trials. ‘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’.104 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.

101 Interview #3, 7 June 2017.
102 Interview #5, 21 June 2017.
103 Interview #3, 7 June 2017.
104 Interview #2, 16 June 2017.
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 (UNGA) to ensure the creation of the International, Impartial and Independent Mechanism (IIIM) in late 2016.\(^{105}\) 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’.\(^{106}\) Given its limited and contingent budget from UN voluntary contributions\(^{107}\) and the ‘the challenging operating environment’ of evidence collection in Syria,\(^{108}\) civil society cooperation has been seen as vital since its inception.\(^{109}\) 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 organisations for evidence gathering and sharing, witness communications and assistance requests.\(^{110}\) The Platform lays the ground for individual organisations to sign memoranda of understanding (MoUs) with the Mechanism that can delineate more detailed arrangements to ensure the security of data transfers and confidentiality. Such initiatives have enabled the Mechanism to secure ‘more than one million records’, so that Syria’s war is ‘arguably the most extensively documented conflict in history.’\(^{111}\) CIJA itself signed an initial MoU with the IIIM in late 2017 providing access to almost all of its archive and case briefs. A new MoU is pending that regulates the transfer of materials to the IIIM in compliance with European data privacy laws.

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\(^{107}\) 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 Mechanism’s three biannual reports: General Assembly, 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, at [48].

\(^{108}\) A/73/295, at [5].

\(^{109}\) GA Res. 71/L.48, 21 December 2016, at [6].


\(^{111}\) UN Doc. A/73/741, 13 February 2019, at [10] and [3].
The Mechanism champions these ‘public-private partnerships’ as they garner ‘innovative methods’ and greater efficiencies. 112 Throughout its three reports to date, the Mechanism sustains a narrative of a ‘lean and efficient staffing structure’ 113 that is ‘committed to integrating the most efficient possible working methods to maximise the international community’s return on its accountability investment.’ 114 Part of this investment includes a commitment to Arabic language and region-specific expertise. 115 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. 116 The Mechanism’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.’ 117 A sense of innovation pervades these texts and at least as detailed here, it is innovation driven by private actors that it is one of the most crucial components of the field’s continued success.

Thus, for CIJA’s director, ‘I believe the future of international criminal justice whether it is applied domestically or internationally really depends on some kind of public civil society partnership…’ 118 While it is assuring for him that ‘there are existing consumers for CIJA product’, he also readily concedes that his organisation ‘only exists due to the public sector’. 119 Here then, we can discern entrepreneurial justice as a synergistic, dynamic

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112 UN Doc. A/73/741, 13 February 2019, at [18].
113 UN Doc. A/73/295, at [51].
115 A/73/741, at [47].
117 A/73/741, at [3].
118 Interview with Bill Wiley, 8 February 2017.
119 Interview with Bill Wiley, 20 December 2018.
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, sustaining such donor buy-in, nevertheless, requires constant marketing and an identifiable ‘brand architecture’. Although Wiley notes the absence of any ‘credible enemies’, questions about CIJA’s own accountability and ethics continue to be raised in by a variety of voices. 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 now. 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 organisational 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, it is now better to characterise 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, more formalised and perhaps publicised, 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. 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

120 Ibid.
121 Ibid.
122 For example, see Heinze, supra note 51.
123 Interview with Bill Wiley, 20 December 2018.
124 As also suggested by Heinze, supra note 51, at 181.
profile whether through targeted public lectures and workshops or plans for a website.¹²⁵
Thus, in a world now heavily invested in ICL, CIJA constitutes an entrepreneurial stop-gap to
some recent and highly damaging failings in the field.

¹²⁵ Interview with Bill Wiley, 20 December 2018.