

PhD Research Project Proposal by Hugh Macleod

Title: ICJ 2.0: Syria, the New Language of International Criminal Law, and Ensuring Principled Accountability in an Era of Entrepreneurial Justice.

1. Abstract

A generation on from what its architects hoped would mark a new era of accountability, International Criminal Justice (ICJ) faces a critical juncture. Diplomatic deadlock at the UN Security Council and the jurisdictional limits of the International Criminal Court (ICC) have, to date, guaranteed impunity for state actors in Syria responsible for massive international crimes. Observers fear the ‘justice cascade’ of the first generation of ICJ, marked by special tribunals for Rwanda and the former Yugoslavia, and capped by the establishment of the ICC in 1998, has today faded to a trickle as the world enters the ‘Age of Impunity’.

Stepping into the accountability gap on Syria are a new set of actors and a new set of legal, political, and social relationships, competing and complementing each other in their efforts to end the impunity. This new practice of so-called ‘entrepreneurial justice’ is radically different from the first generation of ICJ: in place of UN-approved investigators are private NGOs training defectors to smuggle out vast troves of evidence; in place of eyewitness accounts are endless hours of video footage live streamed to the internet; and in place of the ICC’s Chief Prosecutor, an array of lawyers across Europe are now filing charges, invigorating the once forgotten application of universal jurisdiction. This paper identifies and analyses this new language of ‘ICJ 2.0’, evaluating its possibilities and pitfalls, and its implications for the goal of bringing principled accountability to the world’s worst crimes.

2. Objectives of the Research

The three principle objectives of the research are:

1. To describe and analyse a new practice of International Criminal Justice (ICJ) that is emerging in the ‘entrepreneurial justice’¹ of networks of European NGOs training and partnering with activists inside Syria and exiled Syrian human rights defenders, who have exploited new digital technologies and old-fashioned smuggling, to produce unprecedented levels of evidence of international crimes by state actors in Syria, and the use of that evidence in European national courts to bring prosecutions against those responsible under a revived application of universal jurisdiction.²
2. To attempt a synthesis of this new field by combining the analysis of entrepreneurial justice with a critical examination of the use of such evidence gathering in prosecuting and defending Syrian state actors for international crimes under the application of universal jurisdiction in European courts³, and to define this second generation of international criminal justice as ‘ICJ 2.0’, identifying its radical

¹ Burgis-Kasthala M, ‘Entrepreneurial Justice: Syria, the Commission for International Justice and Accountability and the Renewal of International Criminal Justice’ (2019) 30(4) *European Journal of International Law* 1165

² Van Schaack B, ‘National Courts Step Up: Syrian Cases Proceeding in Domestic Courts’ from *Imagining Justice for Syria* (OUP 2020)

³ Trial International, *Evidentiary Challenges in Universal Jurisdiction Cases*, *Universal Jurisdiction Annual Review 2019*

differences with the practices of the first generation of ICJ, and thereby rendering it visible to academic scholarship for the first time.

3. To evaluate ICJ 2.0 against the field's key aim, the prosecution of international crimes and rendering justice to victims. The research will examine if the new processes identified as ICJ 2.0 satisfy the standards of criminal investigations, while meeting the demands of 'principled accountability'⁴, the Rule of Law (understood as both a legal and societal imperative⁵). The research will aim to answer the critical question of whether Syria has turned the 'Justice Cascade'⁶ into a mere trickle; in other words, whether, a generation on from the dawning of what its architects hoped marked a 'new era of accountability'⁷, ICJ has entered the 'Age of Impunity'⁸, or not.

3. Major Research Questions

This paper will examine five major questions:

1. What are the legal, political and social features of the emerging field of 'entrepreneurial justice' as it relates to the international crimes perpetrated by state actors in Syria? This section will be the first in-depth, academic exposition of the series of new 'justice sites' that have arisen in response to the accountability gap on Syria, an exercise in understanding the new practice through first uncovering its new features, its new 'vocabulary'.
2. What are the balances of authority and power that affect relations between the new 'justice sites' elucidated in Part 1, and how do they compete with and complement each other to define the direction of ICJ on Syria? This section applies the understanding of Part 1 to an analysis of the relationships between its stakeholders, the rules of 'grammar' that govern the new vocabulary.
3. What is ICJ 2.0? This section brings together the new understanding gleaned from Parts 1 and 2 and attempts to synthesise the new vocabulary with its rules of grammar to describe what the paper argues is a new 'language' of international criminal justice; a language of entrepreneurship and return on investment spoken by NGOs gathering unprecedented troves of evidence of atrocity crimes in Syria; a language of legal innovation through universal jurisdiction spoken now by courts in France, the Netherlands, Spain, Sweden and Switzerland, as they prosecute or prepare cases against dozens of Syrian regime officials. This new language can be branded 'ICJ 2.0'.
4. When ICJ 2.0 speaks, who is listening, who wants to learn, and how seriously is the message taken? This section evaluates the strengths and weaknesses of ICJ 2.0 against

⁴ Meron T, 'Closing the Accountability Gap: Concrete Steps Toward Ending Impunity for Atrocity Crimes' (2018) 112(3) *The American Journal of International Law* 433

⁵ Bingham T, *The Rule of Law* (Penguin 2011); Dworkin R, *Law's Empire* (Bloomsbury 2003); Cassese A, (ed.) *Realizing Utopia* (OUP 2012); May C and Winchester A (eds.), *Handbook on the Rule of Law* (Edward Elgar 2018)

⁶ Sikkink K and Kim HJ, 'The Justice Cascade: The Origins and Effectiveness of Prosecutions of Human Rights Violations' (2013) 9 *Annual Review of Law and Social Science* 269

⁷ Meron (n2) 433

⁸ Miliband D, 'The New Arrogance of Power: Global Politics in the Age of Impunity', 2019 Fulbright Lecture

the core aim of the field, the battle to end impunity for international crimes. Can ICJ 2.0 transform the current trickle of prosecutions for atrocity crimes in Syria back into what Sikkink first termed the ‘Justice Cascade’?⁹ Does the evidence gathered by those ‘entrepreneurs of justice’ serve the goal of ‘principled accountability’ in the era of ICJ 2.0, or is the introduction of private, market-driven investigators accountable to their investors a dangerous development for this most public exercise of power?

5. Where now for ICJ 2.0? This section locates the new knowledge, synthesised and evaluated in Parts 3 and 4, back within the historical journey so far travelled by practitioners of ICJ. Standing now at a critical juncture, Part 5 imagines a future in which the Assad regime largely escapes accountability, entrenched in power for decades to come, a searing symbol for those arguing the 21st century has embarked on an ‘Age of Impunity’.¹⁰ Alternatively, could ICJ 2.0 serve to steer the field along the alternative route, using its new vocabulary and grammar to teach the language of international criminal justice to an ever-wider audience, ensuring the world speaks with one voice so that in the 21st century the words ‘never again’ are no longer the oxymoron they were in the 20th?

4. Review of the Relevant Literature

‘Entrepreneurial Justice’ was first defined in 2019 by Burgis-Kasthala as the ‘identification of a gap or weakness in existing public accountability fora and the creation of a new private or privatised organisation and / or approach that seeks to address (at least part of) this gap.’¹¹ The article restricts itself to a focus on the motivations and work practices of the Commission of International Justice and Accountability (CIJA) as the principle exemplar of Entrepreneurial Justice.

While being a useful contribution to highlighting this emerging field of ICJ, Burgis-Kasthala’s article does little to critically examine how the work of CIJA intersects with other important actors in the emerging field: the relationship between the CIJA and prosecutors in European courts trying Syrian state actors for atrocity crimes, for example. My project proposes that to understand ‘Entrepreneurial Justice’ requires much more comprehensive research into not only the standards of evidence gathering of organisations such as the CIJA, but also the motivations of their donors, the use of their evidence in disparate prosecutions, and the entrepreneurial aspects of applying universal jurisdiction in European courts. In building on and extending research into the new practice of entrepreneurial justice identified by Burgis-Kasthala my project will define a new object of study, ICJ 2.0.

In 2018, Theodor Meron, Judge and President of the UN International Residual Mechanism for Criminal Tribunals, noted the need to ‘transform the current ad hoc and piecemeal approach to accountability for atrocity crimes to a synergistic, multileveled, and increasingly comprehensive (if not wholly coordinated) global system.’¹² My PhD proposes to analyse to what extent ICJ 2.0 meets the tests outlined

⁹ Sikkink (n6)

¹⁰ Miliband (n8)

¹¹ Burgis-Kasthala (n1) 1165

¹² Meron (n2) 450

in Meron's article, including the imperative of 'principled accountability', the right to a fair trial.¹³

Human Rights Watch reported in 2014 on the practice of specialised war crimes units in France, Germany and the Netherlands,¹⁴ providing an invaluable source of information on which to further the goals of this project. Six years on from that report, using the additional information provided in annual reports published by Trial International on universal jurisdiction¹⁵, my research will provide the first academic, evidence-based application of that knowledge to the research questions outlined above.

Beth Van Schaack's forthcoming book, 'Imagining Justice for Syria'¹⁶, contains chapters on the innovations in ICL documentation methodology that will assist this project's aims, as well as a chapter on the role of national courts in Europe in prosecuting state actors for atrocity crimes in Syria. However, Van Schaack's work is necessarily broad and was completed before any atrocity crime trials of senior state actors in Syria commenced. My project will sharpen the focus of certain chapters of Van Schaack's book, establishing ICJ 2.0 as an academic object of study.

Finally, in attempting to describe what the project calls the new 'language' of ICJ 2.0, the research will also build on work by KU's own Professor Christensen and what he has identified as the 'emerging sociology of international criminal courts'.¹⁷ My PhD will contribute to understanding where ICJ 2.0 sits within the 'epistemological break' that predicated the original institutions of ICJ.

Framing the space of debate in which the project operates are two important marker posts. The identification, through a quantitative analysis of cases, of what she called 'The Justice Cascade' established Kathryn Sikkink's work as a leader in the field of ICJ. For Sikkink, the past three decades have marked 'a new global trend of holding political leaders criminally accountable for past human rights violations through domestic and international prosecutions.'¹⁸

At the other end of the frame is the 2019 Fulbright Lecture by former British foreign secretary David Miliband in which he identifies what he calls 'The Age of Impunity', 'a time when those engaged in conflicts around the world [...] believe they can get away with anything, including murder [...] you name it, we are seeing more of it, and seeing less outrage about it, and less accountability for it.'¹⁹ As the most egregious example of what Miliband identifies, my project on Syria will attempt to answer his charge, and examine whether the future of ICJ is to be Sikkink's 'cascade' or more of a trickle.

¹³ Bingham (n5)

¹⁴ Human Rights Watch, *The Long Arm of Justice: Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands* (2014)

¹⁵ Trial International, *Evidentiary Challenges in Universal Jurisdiction Cases, Universal Jurisdiction Annual Review 2019*

¹⁶ Van Schaack B, *Imagining Justice for Syria* (OUP 2020)

¹⁷ Christensen M J, 'The Emerging Sociology of International Criminal Courts: Between Global Restructurings and Scientific Innovations' (2015) 63(6) *Current Sociology Review* 825

¹⁸ Sikkink (n6) 269

¹⁹ Miliband (n8) para. 2