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International Criminal Law—A Counter-Hegemonic Project?

Florian Jeßberger
Leonie Steinl
Kalika Mehta *Editors*

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Preface

This volume brings together various perspectives on the counter-hegemonic potential of international criminal justice. It is in part based on a conference which was hosted by Humboldt-Universität zu Berlin's Franz von Liszt Institute for International Criminal Justice and took place online in June 2021.

The contributions to the conference were chosen from an open call for papers. Several of the papers presented at the conference were selected for publication in this edited volume which also contains a number of additional contributions solicited in order to complement the issues addressed in this book. The call for papers particularly encouraged scholars and practitioners from the Global South[1] as well as early career scholars to submit an abstract.

The collection attempts to highlight these perspectives as well as themes that have thus far received little to no attention in the scholarship on (critical approaches to) international criminal justice. This includes *inter alia* the engagement with international criminal justice in Ukraine or minorities in South Asia but also the hegemonic tendencies built into the institutional structure of the International Criminal Court. To this extent, this volume also mirrors what scholars, in particular younger scholars as well as practitioners from the Global South, deem topical issues of a critical scholarship in international criminal justice.

We express our gratitude to those who have made this volume and the earlier held conference possible. *Claudia Cardenas Aravena* (Santiago de Chile), *Valeria Vegh Weis* (Buenos Aires, Konstanz), *Stefan Gosepath* (Berlin), *John-Mark Iyi* (Cape

[1] We acknowledge that the term Global South in so far as it suggests a geographical North–South binary is problematic. In the call for papers, we, therefore, highlighted that we understood it to also include "spaces in the North that are characterized by exploitation, oppression and neocolonial relations, such as indigenous and black communities (and immigrant communities) in Western societies", see Sajed A 2020, E-International Relations, From the Third World to the Global South, https://www.e-ir.info/2020/07/27/from-the-third-world-to-the-global-south/. Accessed May 18, 2022. Our selection criteria considered the place of contributor's first university degree, instead of exclusively relying on their current affiliation, as a key indicator among other factors. However, we do recognize the inherent limitations of such a process and that it is not our place to ascribe the label of "Global South scholar or practitioner" to others.

Town), *Miles Jackson* (Oxford) and *Wolfgang Kaleck* (Berlin) formed part of a working group which advised us on the shaping of our research agenda and the selection of papers. *Claudia* and *Miles* also chaired a session while *Valeria* and *John-Mark* contributed chapters to this volume.

We are indebted to *Luca Hauffe* who provided invaluable support in the compilation of this volume and was instrumental in the coordination and organization of the conference. *Sarah Imani* advised us on issues of Islamic law. *Antonia Gillhaus* and *Antonia Vehrkamp* helped with the copy editing of the manuscript.

We are also grateful to the Berlin Center for Global Engagement in the Berlin University Alliance, for funding a larger research project, led by *Stefan Gosepath* and *Florian Jeßberger*, of which this volume and the aforementioned conference form part.

Berlin, Germany
January 2022

Florian Jeßberger
Leonie Steinl
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Chapter 1
Hegemony and International Criminal Law—An Introduction

Florian Jeßberger, Leonie Steinl and Kalika Mehta

Abstract The chapter introduces the concept of the book and the various perspectives presented therein. While situating the notion of hegemony in the context of international criminal law, the chapter lays down the central question that runs as a common thread through all of the contributions and establishes the importance of addressing plural perspectives on hegemonic tendencies and counter-hegemonic capacities of international criminal law and its institutions.

Keywords Hegemony · Counter-hegemony · International Criminal Law · ICC · Global Justice · International Criminal Justice

'International Criminal Law—A Counter-Hegemonic Project?' The question mark in the title of this book serves a dual function: It is not only the primary research question that each of the individual contributions in this book seeks to address but it also, in many ways, conveys the conclusion this collection seeks to present.

The book takes stock of the plurality of claims around the institutions and practice of international criminal law in an attempt to nuance its perception and role in the existing scholarship. The research project that resulted in this collection began with this intentionally vague question: Can international criminal law be viewed as a 'counter-hegemonic' project? And if so, under what conditions?

The concept of counter-hegemony was deliberately left open to facilitate engagement with multiple, diverging, perhaps even contradictory understandings of (counter-) hegemony and different critiques of international criminal law. 'To counter' in its most basic form is to challenge or to oppose. The act of countering,

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however, is fundamentally determined by that what is being challenged. While asking the question of the potential of international criminal law in countering hegemony, the primary subject of challenge is 'hegemony'. Thus, the question of counter-hegemony essentially requires identifying 'the hegemon' and situating 'hegemony'.

Situating hegemony in a particular state, institution, race, class, or structure came with the risk of prompting and foretelling the discourse of an engagement that was intended to be all-inclusive (to the extent possible). From Antonio Gramsci[1] to Balakrishnan Rajagopal,[2] the scholarship on the question of hegemony across decades and centuries is marked by the situation of the hegemon predetermining the discourse.[3] In trying to account for the success of fascism, Antonio Gramsci situated the hegemon in the Italian bourgeoisie, a social class which according to him could be confronted by an alternative class alliance which challenges the hegemonic class.[4] In the more contemporary discourse around hegemony, scholars often locate the hegemon in the economic or political dominance of the United States of America.[5] Such framing then leads to a search for another geographical centre to counter the hegemony of a sovereign state. Therefore, the decision of not identifying and situating the hegemon for the purpose of the present edited collection was an act of acknowledgment of the control that comes with the initiation of a dialogue while potentially marking its boundaries before it begins.

The fundamental purpose of leaving the question of hegemony in the context of international criminal law unanswered was to highlight that within international criminal justice as a system, there are multiple forms that the hegemon may assume. As the existing scholarship suggests, the subject of criticism may range from 'the law' itself to a specified set of actors who yield influence on its practice.[6] In that vein, the project remained open to claims of hegemony inherently stemming from the law, the penal elements of it, or the international aspects of the discipline. Alternatively, hegemony could have been situated in the form and language of substantive provisions of the law or the International Criminal Court (ICC) as an institution. Yet another possibility remained to confront the hegemon in economic, racial or gender-based structures that inform the logics of law-making as well as its practice and implementation.

None of these questions are novel, in any sense of the word, particularly as it concerns international criminal law. Since its origins, international criminal law has been subject to challenge and critique inter alia on account of its understanding as

[1] Gramsci's fragmented prison notes are considered as the conception of the notion of hegemony. According to him, hegemony is an active process involving the production, reproduction, and mobilization of popular consent, which can be constructed by any 'dominant group' that takes hold of it and uses it. See Gramsci 1971.

[2] Rajagopal 2003, 2006.

[3] Vagts 2001; Alvarez 2003; Koskenniemi 2004.

[4] Rajagopal 2006.

[5] Byers and Nolte 2003; Cox 2001; Krisch 2005.

[6] Schwöbel 2014; Baars 2016; Anghie 2005; Asaala 2017; Chimni 2018; Gathii 1998; Rajagopal 2000; Koskenniemi 2002, 2005; Dugard 2013.

victor's justice[7] as well as its colonial legacy.[8] In recent times, some governments, particularly from the African continent, have challenged international criminal law and in particular the ICC on the grounds of racialised selectivity and the perpetuation of double standards.[9]

This parallel development of the discipline and its critique can be explained by the manner in which the beginning of this century transformed the application and perception of public international law in general. On the one hand, the adoption of the ICC Statute signalled a reaffirmation of faith in international institutions and international law. On the other hand, the first decade of the century was marked by unilateral military interventions in the wake of the "war on terror" gesturing a defiance of the promises and obligations drawing from international law. Around the same time, some of the most critical schools of thought regarding international law also gained ground. For instance, Third World Approaches to International Law (TWAIL) scholars were locating the power in the hands of former colonial states and viewed international law with scepticism as a new tool in the exercise of imperial power.[10] Moreover, Marxist traditions insist on viewing international law as deeply intertwined with the world economic order. They contend that the law is in constant mutual interaction with the economic interests of states and, thus, reflects the economic hierarchy and subordination.[11] In both of these cases, it is the international, inter-state aspect of the international criminal justice system which is subject to challenge. A substantial critique also stems from the criminal justice aspect of the discipline, which engages with the shortcomings of the individualistic mode of criminal law when it comes to macro-criminality or the narrow conception of international criminal justice as retributive in nature.[12] In addition, traditions of feminist theory and critical race theory highlight the concentration of power in the hands of certain sections of society whose influence within the international criminal justice system merits critique and confrontation.

Each of these critiques stands on valid claims and offers crucial insights into international criminal law as a discipline—but what are their implications on international criminal law, its institutions and practice? Does that mean that international criminal justice lacks legitimacy[13] and is, hence, pointless?[14] Or is there a possibility of considering all these critiques and moving forward in the quest of a comprehensively informed new common ground? These questions form the common thread in the contributions of this collection. The chapters respectively deal with the potential of international criminal law in countering the hegemony of inter alia class, structure, the west, the post-colonial state, or the language.

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[7] Steinke 2012, pp. 8–37; see also Jeßberger 2022.

[8] Pal 1948.

[9] Jalloh and Bantekas 2017.

[10] Anghie 2005; Chimni 2018; Gathii 2011.

[11] Gathii 2006; Marks 2008; Knox 2016.

[12] Drumbl 2007, 123 et seq., Drumbl 2010; Nouwen and Werner 2015.

[13] Kiyani 2015.

[14] Damaska 2008.

These contributions, when read collectively, foreground the dual nature of international criminal law as a double-edged sword, which can be a tool of the hegemon as well as a means to resist power. Given the nature of international criminal law and its purported goals of global justice and peace, those most affected by massive violations of human rights end up placing faith in its emancipatory potential.[15] Despite acknowledging the critiques, the potential of the vocabulary of international criminal law in challenging power that enjoys impunity remains an important factor.[16] The notions of *jus cogens* or universal jurisdiction over crimes against humanity are contested for their universalist claims and yet currently, arguments are made for adding new provisions on ecocide[17] and colonial crimes[18] to capture the nature of violence otherwise ignored or unaddressed.

For scholars and practitioners across the geographical and political boundaries of North and South, this duality continues to pose a dilemma. On the one hand, the discipline is viewed as the product of a hegemonic exercise which in direct and indirect ways continues to perpetuate the inegalitarian structures of the legal order. On the other hand, the strategic importance it holds in today's politics and the additional avenues of redress it offers to those directly affected are seen as evidence of its counter-hegemonic capacities.

The diverse perspectives that form this book exemplify this as the central dilemma. The overlapping themes highlight the fact that contradictory claims on the hegemonic structures and counter-hegemonic potential of international criminal law as a project can co-exist without necessarily displacing each other. In that vein, the book intends to serve as a starting point for a discussion on the consequences of such complex critiques of the discipline: on its theory, substance, method, and practice.

The selection of contributions was informed by the idea to include voices which remain largely absent from the "mainstream" international criminal law discourse and even the critical discourse. This guided the selection of authors as well as the themes and perspectives included in the book. As a result, the majority of the contributors are scholars and practitioners from the Global South. Further, the collection attempts to highlight themes that have thus far received little to no attention in the scholarship on international criminal justice, such as the engagement with international criminal justice in Ukraine or minorities in South-Asia but also the hegemonic tendencies built into the institutional structure of the ICC.

The book is divided into three parts. Part I covers theoretical engagements with (counter-) hegemonic perspectives on international criminal law.

In the first contribution (Chap. 2), entitled 'Is International Criminal Justice the Handmaiden of the Contemporary Imperial Project? A TWAIL Perspective on Some Arenas of Contestations', *John-Mark Iyi* further enunciates the claim that international criminal justice remains an essentially imperial ideal intolerant of a plurality

[15] See the contributions in Part II of this book.

[16] Anghie 2005, p. 318.

[17] Higgins et al. 2012.

[18] Bergsmo et al. 2020.

of visions of justice. He identifies four arenas of contestations—the supposed universality of the legal norms of international criminal justice; the alleged inherent selectivity of international criminal justice in the prosecution of perpetrators; the categories of crimes; and the establishment of its foremost institutions for the enforcement of its norms—to demonstrate that international criminal justice has not shed its historical antecedents. By adopting TWAIL as an analytic framework to expose the manifest contradictions in the construction of international criminal justice, *Iyi* argues that it remains a tool in the service of hegemonic international law.

In Chap. 3, *Anastasiya Kotova* examines 'Violence in International Criminal Law and Beyond'. She argues that while violence is a central concept in international criminal law, it is constructed too narrowly when it covers only the direct physical violence. By building on a Gramscian understanding of hegemony and the role of law therein, *Kotova* suggests that international criminal law advances a certain understanding of violence, that simultaneously obscures and normalises types of violence that are beyond its gaze. The contribution thus examines the role of international criminal law in producing a hegemonic understanding of violence and the consequences of such an understanding.

In Chap. 4 on 'A Marxist Analysis of International Criminal Law and Its Potential as a Counter-Hegemonic Project', *Valeria Vegh Weis* employs Marx and Engels' theoretical and methodological contributions on the evolution of the legal frameworks on international criminal law. She reflects on the debate over its nature as a potential (counter-) hegemonic project by connecting the historical context, dominated by the bourgeois revolutions at the end of the 18th century, with the current status of international criminal law. She unpacks the tension between formal equality and material inequality existing in three layers, being the foundations, the drafting, and the enforcement of the law. The contribution also looks at possible paths to overcome the triple material inequality through a historical materialistic conception that would render the counter-hegemonic project a more plausible goal.

Part II analyses what (counter-) hegemonic international criminal law looks like in practice by means of case studies.

It begins with *Ishita Chakrabarty* and *Guneet Kaur*'s analysis in Chap. 5 entitled 'Double Whammy: Targeted Minorities in South-Asian States'. They argue that international criminal law and TWAIL fail to address the needs for accountability and remedy of violently targeted minorities in South-Asia. The authors reflect on the selective, political manner of the institutionalization of international criminal law by examining prevalent power dynamics of the global political economy that shields powerful perpetrators in South-Asia. They further argue that second-generation TWAIL scholarship continues to be constricted by the inapt binary of first world versus third world, restricting its lens to interests of third world nation-states rather than the needs of their people, especially minorities. According to *Chakrabarty* and *Kaur*, TWAIL's foundational goals therefore block effective engagement and articulation of minorities' pleas for accountability and remedy in South-Asian countries, creating its own hegemonic narrative.

Chapter 6 is co-authored by *Michelle Burgis-Kasthala*, *Nahed Samour* and *Christine Schwöbel-Patel*, who examine 'States of Criminality: International (Criminal)

Law, Palestine, and the Sovereignty Trap'. The authors ask how, and in which form, international law can serve as a tool for realising Palestine's decolonial equality. They engage with international criminal law as well as public law to highlight the experiences of (denied) statehood in the respective legal frameworks, adopting a methodology of feminist praxis to explore the crucial role of historical factors that persist in shaping Palestine's limited legal possibilities. While flagging the limits of liberal legalist projects, this contribution seeks to explore potential benefits for Palestinian liberation by adopting the framework of decolonial equality.

Chapter 7, authored by *Karolina Aksamitowska*, is entitled 'The Counter-Hegemonic Turn to 'Entrepreneurial Justice' in International Criminal Investigations and Prosecutions Relating to the Crimes Committed in Syria and Eastern Ukraine'. *Aksamitowska* argues that although the closure of the ad hoc tribunals and the inaction of the United Nations Security Council (UNSC) in the context of the atrocities committed in Syria and Eastern Ukraine might suggest an imminent decline of international criminal justice, criminal accountability is actually on the rise. Her contribution seeks to interpret the counter-hegemonic turn in international criminal law through the lens of the hegemony of the UNSC members, particularly Russia. She builds on the idea of 'entrepreneurial justice' in private criminal investigations and argues that the inaction of the UNSC has paved the way for new bottom-up accountability initiatives, such as the Commission for International Justice and Accountability (CIJA) and the Coalition for Justice for Peace in Donbas. This has paradoxically led to counter-hegemonic 'justice ownership' perceptions in communities in Syria, Ukraine and beyond.

In Chap. 8, the last contribution to Part II, *Tonny Raymond Kirabira* explores whether domestic and international non-governmental organizations (NGOs) contribute to the legitimacy of international criminal justice processes. His chapter, entitled 'NGOs and the Legitimacy of International Criminal Justice: The Case of Uganda', centralizes the role of NGOs in Uganda's contested international criminal justice processes and illustrates how NGOs can perpetuate hegemonic structures of international criminal justice, thereby asserting a form of sociological legitimacy of the courts in the eyes of the affected communities. At the same time, *Kirabira* also highlights a limited counter-hegemonic role of some domestic NGOs that prioritize domestic accountability mechanisms. His empirical findings point to the increasing role of NGOs as key stakeholders in the future of the international criminal justice project.

Part III of the book finally turns towards the International Criminal Court and examines what (counter-) hegemony could imply in this arena.

In Chap. 9, *Taxiarchis Fiskatoris* takes a closer look at 'The Global South and the Drafting of the Subject-Matter Jurisdiction of the ICC'. He argues that the time between the Nuremberg and Tokyo Trials and the establishment of the ad hoc tribunals, while often considered as an unfortunate discontinuation of the international criminal justice project, actually marked a significant progression by incorporating the views of the enlarged international community that emerged from the decolonization process. The vast majority of states and scholars from the Global South

fervently promoted the international criminal justice project, believing in the counter-hegemonic potential of its subject-matter jurisdiction. The contribution contends that that the limited subject-matter jurisdiction failed to address the concerns of a substantial part of the international community, thereby subverting the counter-hegemonic capacity of the institution and opening the door to potentially competing regional projects.

Chapter 10 is entitled 'The ICC and Traditional Islamic Legal Scholarship: Analysing the War Crimes Against Civilians'. In this chapter, *Fajri Matahati Muhammadin* and *Ahmad Sadzali* analyse the congruence between Islamic law and the ICC Statute in light of the critique of eurocentrism in international law generally and international criminal law specifically. Using the *fiqh* literature of the traditionalist Islamic law scholars, the authors explore the war crimes against civilians in Article 8 of the ICC Statute, highlighting that there is congruence in some rules but not others, posing a challenge for both international and Islamic law scholars.

Subsequently, *Angie K. García Atehortúa* examines 'The ICC's Role in Countering Patriarchal Claims in Reproductive Justice' in Chap. 11. She discusses the impact of the Ongwen case in challenging the patriarchal fear of criminalizing forced pregnancy as means of achieving reproductive autonomy. The author argues that the ICC has a prominent role to address states' attempts to limit the right to reproductive self-determination as explicitly depicted in its drafting history. The contribution introduces the feminist strategy of norm transfer in order to explore how legal standards created at the level of international criminal law make their way into domestic contexts.

In Chap. 12, entitled 'The Impacts of English-Language Hegemony on the ICC', *Leigh Swigart* explores the impact of the uneven status of the Court's working languages on those who work at and with the ICC, and on what the Court conveys to the world through the communication of its top officials, its judgments, and its outreach activities. *Swigart* demonstrates that the English language hegemony is not only entrenched but has detrimental effects for the ICC in both practical and symbolic spheres, rendering the Court less efficient while also undermining its mission as a global institution.

In the final contribution to this collection, *Angela Mudukuti* in Chap. 13 reflects on the 'Gender Imbalance at the ICC: The Continued Hegemonic Entrenchment of Male Privilege in International Criminal Law'. The chapter presents the findings of the Independent Expert Review, which was initiated by states parties and sought to improve the efficiency and effectiveness of the Court. The review revealed a number of concerning issues including sexual harassment which, she argues, is inextricably linked to the chronic staff-related gender imbalance at the ICC, perpetuated by many factors including hiring practices entrenching hegemonic ideas related to male privilege at the expense of women, women of colour, and women from the Global South. The contribution also looks at ways to change the imbalance including better recruitment practices and tenure policies.

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Part I
Theoretical Engagements with (Counter-) Hegemonic Perspectives on International Criminal Law

Chapter 2
Is International Criminal Justice the Handmaiden of the Contemporary Imperial Project? A TWAIL Perspective on Some Arenas of Contestations

John-Mark Iyi

Contents

Abstract The construction of contemporary international criminal justice seems to have followed a trajectory defined by the inescapable colonial origin, history and purpose of modern international law. Notwithstanding the professed successes and progress made towards the establishment of a universal standard or notion of justice, Post-World War II international criminal justice remains an essentially imperial ideal intolerant of a plurality of visions of justice and whose resistance and legitimacy in the Global South is often obfuscated by media representation. In this chapter, I identify four arenas of contestations in this regard and examine each of them to demonstrate that international criminal justice has not shed its historical antecedents that characterised its previous manifestations in previous eras. These arenas of contestations—the supposed universality of legal norms of international criminal justice; the alleged inherent selectivity of international criminal justice in the prosecution of perpetrators; the categories of crimes; and the establishment of its foremost institutions for its enforcement. The chapter will adopt TWAIL as an analytical framework

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to expose the manifest contradictions in the construction of international criminal justice and some of the legal problems thereby created. I argue that international criminal justice remains a tool in the service of hegemonic international law.

Keywords International criminal justice · TWAIL · Africa · Third World · ICC · International law

2.1 Introduction

It is evident that, from times past, international law has provided the powerful with a series of instruments by which to exploit and control the weak, and even provided legal cover for colonial rule. With this historical awareness, it is clear that there is no necessary linkage between international law and global justice; indeed, it is more convincing to claim that the historic experience, with some exceptions, most clearly expresses the reinforcing interconnections between law, power and injustice. International criminal law as a branch of public international law has witnessed one of the most significant development since the end of World War II even though much of that evolutionary processes only intensified in the last decade of the 20th century. At both normative and institutional levels, the demands for a mechanism of international criminal justice able to pierce the veil of state sovereignty to attach individual criminal responsibility to those most responsible for the most serious crimes of concern to the international community was elevated to new heights by the mass atrocities of the 1990s in Srebrenica, Rwanda, Liberia, Sierra Leone and so on. This resulted in the establishment of the first two ad hoc international criminal tribunals—the ICTY and the ICTR.[1] However, it was the establishment of the ICC on 1 July 2002, as the first permanent international criminal court that marked a watershed in this creation of international criminal justice system. Since then other tribunals have emerged to investigate and prosecute international crimes committed mainly in the Global South.

Amongst other concerns, the disproportionate representation of Africa and the Global South in the number of cases at the ICC has thrown the Court into controversies and raised doubts about the entire international criminal justice project.[2] Of course, it is also the case that if one takes the fight against impunity seriously, it is arguable that these cases could reflect the prevalence of intra-state conflicts and the concomitant atrocities on the African continent. However, this does not tell the whole story and the debates thus generated between the so-called 'anti-impunity' group on the one hand, and the critics of the international criminal justice project on the other hand, (sometimes dubbed 'anti-judicial imperialism') is not only far from settled, but has eroded the initial support base the ICC built in Africa in its early days, polarised its

[1] Werle and Jessberger 2014, p. 1.

[2] For an assessment of the various perspectives to these contestations, see the collection of papers in De Vos et al. 2015; Roach 2009. See also generally Clarke 2009, Clarke 2019.

primary constituency and undermined its legitimacy.[3] It is therefore imperative to examine some of the contentious issues at stake particularly as it affects the perception of international criminal justice by the peoples of the Third World.[4] To be sure, it is important to clarify from the outset that Third World scholars' critique of international criminal justice is a systemic engagement broader than the often-narrow Africa-ICC confrontations.[5] This is because there is a growing awareness amongst an older and new generation of scholars in the Global South that the construction of contemporary international criminal justice has followed a trajectory defined by the inescapable colonial character of the origin, history and purpose of modern international law. Notwithstanding the oft-self-proclaimed successes and progress made towards the establishment of a universal standard of justice, Post-World War II international criminal justice remains an essentially imperial ideal intolerant of a plurality of visions of justice and whose resistance and legitimacy in the Global South is often obfuscated by media representation. As will be shown in this chapter, the liberal world order vision of international criminal justice is however presented as universal, rooted in universally shared values and common understandings and goals of what justice means and is supposed to symbolise in every society.[6] These and similar claims have been and are now being contested and the Third World Approaches to International Law have been quite persistent in highlighting some of these contestations.

In this chapter, I identify and examine four arenas of such contestations to demonstrate that international criminal justice has not shed the historical antecedents that characterised its manifestations as a branch of international law in previous eras. These arenas of contestations are the supposed universality of legal norms of international criminal justice; the alleged inherent selectivity of international criminal justice; the categories of international crimes; and the establishment of institutions for the enforcement of international criminal law. The chapter will adopt TWAIL as an analytical framework to expose the biases and injustices inherent in the construction of international criminal justice as currently applied. I intend to demonstrate that international criminal justice remains a tool in the service of hegemonic international law.

This chapter is divided into four sections. In Sect. 2.1, I provide a brief introductory background and set out the objectives of the chapter, the main arguments and the outline of the chapter. In Sect. 2.2, I sketch a brief theoretical framework of TWAIL within which the subsequent analysis is situated. In Sect. 2.3, I examine four arenas

[3] Hoile 2017, pp. 278–310.

[4] The term 'Third World' and the 'Global South' are used interchangeably in this chapter not in the geographical sense but to refer to peoples (once under colonial domination) wherever located but mostly in Africa, Asia and Latin America, and their continuous struggles in resistance to their oppression. For an explanation of the continued relevance of the term, see Chimni 2006, pp. 4–7. For an exposition of how the term is frequently used in TWAIL scholarship, see generally Rajagopal 1998–1999, pp. 1–20; Mickelson 1998, pp. 355–362; Baxi 2002, pp. 713–714; Falk 2016, pp. 1943–1945; Anghie 2004, p. xiii; Anghie et al. 2003, vii–viii; Ngugi 2002, pp. 73–106.

[5] Reynolds and Xavier 2016, p. 962.

[6] Early critics include Rubin 1994, pp. 7–11; Rubin 1997, p. 183; Mutua 1997, p. 167; Morris 2001, pp. 13–66.

of contestations of international criminal justice that arguably reflect a Third World perspective as alternative ways the issues may be understood. In Sect. 2.4, I offer my concluding remarks. The following analysis of TWAIL in reference to public international law more broadly applies to international criminal law as well in so far as it forms part of that broad field.

2.2 An Overview of TWAIL as an Analytical Framework

At one level, one can think of TWAIL as the intellectual response of Third World international lawyers and scholars to experiences of Third World peoples in three epochs—slavery and colonisation, decolonisation and the struggle for self-determination, neo-colonialism and the various modes of continuities of the colonial project that animate it.[7] At another level, one can regard TWAIL as both Third World resistance to Eurocentric narratives of international law—a movement committed to the redemption and transformation of international law's character and purpose through, among other things, providing alternative histories and visions of international law, and by centring and de-centring the *West* and the *rest*, to release the emancipatory potential of a *new* international law.[8] At both levels, TWAIL underscores the ineluctable confrontations between the countries of the Global South and the Global North over the domination and subordination of the latter by the former in legal, cultural, political and economic spheres through the creation and instrumentalization of Eurocentric international law.[9] To the extent that international law is partly responsible for creating the conditions for subordination and currently, an enabler of the continued exploitation of the peoples of the Third World, it is perceived as complicit and therefore illegitimate.[10]

Thus, international legal scholars in the TWAIL tradition have critiqued international law and international legal history from a variety of legal regimes and perspectives—development, economic law, human rights, trade and investment law, environmental law, post-colonial theory, refugee law, international humanitarian law

[7] Gathii 2020a, b. TWAIL has been described as consisting of two broad generational eras that are separable but not compartmentalised by a paradigmatic shift from TWAIL I to TWAIL II. The first represents a generation of post-independent international legal scholars and activists from the global South who sought to reform international law from within while the second represents scholars who read the failures of the reform efforts of their forebears as evidence and a call for a 'systematic process of resistance to the negative aspects of international law [which] must be accompanied with continuous claims for reform. Resistance, not abandonment, becomes a position that fuels their approach to international law and their tool to reform, to reconstruct, the international normative project and the world order.' See Eslava and Pahuja 2012, p. 209. For a critique of the 'periodization' of TWAIL, see Galindo 2016, pp. 39–56.

[8] Mutua 2000, p. 32; Gathii 2011, p. 45; Eslava and Pahuja 2012, p. 199.

[9] TWAIL was both a response to (the) history of slavery and colonial subjugation and a proposition for the prevailing material conditions in the third world, see Mutua 2000, p. 32.

[10] Ibid., p. 31; Anghie 2004, p. 111; Eslava and Pahuja 2012, p. 197.

and international criminal law.[11] Nevertheless, one unifying feature of TWAIL scholarship is the recognition of the colonial character of international legal history and contemporary international law and the need for the historicization of international law from a perspective other than its Eurocentricity.[12] Another unifying characteristic is the appreciation of the role of international law as a tool originally designed to facilitate empire and colonial domination and exploitation.[13] For our purposes, TWAIL scholars have also focused on how contemporary international law carries forward the project of colonialism and imperialism in new forms including international criminal justice.[14] This should not come as a surprise because it is apparently impossible for international criminal law as a branch of international law to escape its colonial origins and its racialised hierarchy of legal norms and power relations that enabled the colonial subjugation of Third World peoples.[15] Some TWAIL scholars have examined the ways in which the ICC in particular exacerbates the domination of the peoples of the Third World by the Global North and perpetuate existing inequalities in this regard.[16] A recent detailed treatment of the subject is the 2015 Journal of International Criminal Justice *Symposium on Third World Approaches to International Criminal Law*,[17] and the 2016 American Journal of International Law *Symposium on TWAIL Perspectives of ICL, IHL, and Intervention*.[18] This is not only a recognition of the relevance of TWAIL perspectives in international criminal justice discourse but highlights the growing influence of TWAIL's contribution even by mainstream journals.[19] So, what exactly is TWAIL?

This question does not lend itself to an easy answer and has been the subject of many critiques and elaboration by TWAIL and mainstream international law scholars trying to describe rather than define TWAIL by identifying its unique intellectual contours and those characteristics that set it apart from other approaches to international law.[20] TWAIL has been described as constituting both a theory and methodology for studying international law.[21] TWAIL is not a theory in the ordinary sense of that word but it constitutes a theory to the extent though not completely 'self-consistent, systematic and formalised' (just as most theories are not), nonetheless

[11] See Mickelson 1998, pp. 353–419; Rajagopal 2002–2003, pp. 145–172; see generally Bedjaoui 1979; the collection of chapters in Anghie et al. 2003; Falk et al. 2008.

[12] See generally Anghie 2004.

[13] Ibid., p. 144. Chimni has boldly asserted that 'I believe that modern international law is the instrument of choice for imperialism to intervene in all aspects of local, national and international life', see Chimni 2012, p. 1168.

[14] Reynolds and Xavier 2016, pp. 959–983; Falk et al. 2006, p. 711.

[15] Clarke 2019, p. 180. See generally Kiyani 2015a, pp. 129–208.

[16] Gathii 2020a, b, p. 15.

[17] Kiyani et al. 2016a, b, pp. 915–920.

[18] See Journal of International Criminal Justice 2016, Symposium on Third World Approaches to International Criminal Law, pp. 915–1009; AJIL Unbound 2015, Symposium on TWAIL Perspectives on ICL, IHL and Intervention, pp. 252–276; Kiyani 2016a, b, pp. 255–259.

[19] Kiyani et al. 2016a, b, p. 920.

[20] Mutua 2000, pp. 31–40; Anghie and Chimni 2003, pp. 77–103; Okafor 2008, pp. 371–378.

[21] See Okafor 2008, pp. 372 et seqq.

describes social phenomenon and as a tool, is 'predictive, logical and testable'.[22] As an international law methodology, TWAIL is not a method in the ordinary sense in which we traditionally use that word, i.e. a way of ascertaining the law, TWAIL is however a method in the same way that we think of feminism, Critical Legal Studies and so on as methods of studying law, to the extent that it provides the organisational principles and framework to formulate and articulate concerns and the tools of analysis for thinking about, understanding and explaining international law.[23] As Obiora Okafor points out 'TWAIL is not so much a science of method, as it is a 'school of thought' offering a 'body of methods' employed in scientific international legal thought and analysis.[24] Okafor concludes that when properly understood in this sense, TWAIL qualifies as both a theory and methodology for undertaking the analysis of international law and institutions as well as revealing its hegemonic predispositions as it affects the Third World.[25]

Apart from these formal characterisations, TWAIL has been cast as representing a 'dialectic of opposition', and a resistance and response to hegemonic international law.[26] In this sense, it constitutes attempts at both 'disruption and rupture' in order to achieve the transformation of international law and its promise of emancipation.[27] This call for resistance and reform of international law and its institutions is a defining feature of TWAIL theory and praxis. According to Luis Eslava and Sundhya Pahuja, 'TWAIL can more accurately be defined as being concerned with the impact of international law on 'the governed' no matter where they are spatially located….'[28] It is not circumscribed but is 'a virtual site from which scholars and activists, from the South and the North, can work both to resist and to reform international law.'[29] TWAIL scholars come from a wide variety of backgrounds—Marxism, critical race theory, feminist legal theory, post-colonial theory, critical legal studies etc. This plurality of voices and orientation creates room for dynamism and diversity and allows critical self-reflection all organised and made possible by a common purpose of resistance to hegemonic international law's subjugation and exploitation of the Third World. The TWAIL commitment is a broad intellectual enterprise that brings scholars together under the umbrella of Third World resistance. Bhupinder Chimni captures it succinctly when he states, TWAIL 'is simply a network of jurists whose works are influenced by their desire to experience a truly universal international law, sympathetic to developing countries' concerns.'[30]

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[22] Ibid., pp. 373, 375.

[23] See Anghie and Chimni 2003, p. 77.

[24] Okafor 2008, p. 337.

[25] Ibid., p. 377. See Hippolyte 2016, p. 39.

[26] Mutua 2000, p. 31.

[27] See Reynolds and Xavier 2016, p. 978.

[28] Eslava and Pahuja 2012, p. 97

[29] Ibid., p. 199.

[30] Chimni 2006, p. 18.

The question may be asked, what exactly does TWAIL want to achieve? According to Makau Mutua, one of TWAIL's leading figures, TWAIL scholars have set for themselves three broad agendas: first to

> […] understand, deconstruct and unpack the uses of international law as a medium for the creation and perpetuation of a racialized hierarchy of international norms and institutions that subordinate non-Europeans to Europeans. It seeks to construct and present an alternative edifice for international governance. Finally, TWAIL seeks through scholarship, policy and politics to eradicate the conditions of underdevelopment in the Third World.[31]

To achieve these objectives, TWAIL scholars have deployed a range of theoretical framework and methodological approaches as tools of analyses within an overarching commitment to a Third World emancipation intellectual orientation in international legal discourse without necessarily subscribing to one uniformed conceptual code or theorem *stricto sensu.* TWAIL scholars admit that they do not all subscribe to a single uniform theoretical approach binding them together but posit that they hold a common sensibility and political orientation.[32] This lack of disciplinary code coupled with its flexibility and diversity reflects the strength and weakness of TWAIL which sometimes opens it up to critique so much so that until very recently, many in mainstream international legal scholarship did not take TWAIL scholars seriously.[33] To them, at worst, TWAIL was more of a political ideology than a methodological approach to studying and understanding a social phenomenon; and at best, TWAIL was no different from other streams of the Critical Legal Studies movement.[34]

A second critique of TWAIL is its alleged nihilist inclinations in that it seeks to dismantle contemporary international law because of its of international law's biases and prejudices, but without proposing an alternative system to replace it.[35] A third critique sometimes levelled against TWAIL is its supposed overwhelming focus on binaries—'First Word' vs 'Third World', 'North vs South', 'Developed vs Developing', 'European vs Non-Europeans'.[36] This, it is argued has made TWAIL exclusively focused on the postcolonial State instead of its peoples and to the exclusion of the rights abuses perpetrated by those postcolonial states against minorities especially in Asia. One of the contributions in this volume echoes these sentiments, that TWAIL has turned a blind eye to the plight of minorities and the conditions of oppressions they face in postcolonial Third World States which has used violence against them as citizens in Third World Asian countries.[37] A fourth and perhaps, one of the harshest critique of TWAIL is its alleged lack of conceptual clarity and

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[31] Mutua 2000, p. 2.

[32] Eslava and Pahuja 2011, p. 104.

[33] Anghie and Chimni 2003, pp. 77, 87, citing an example of this initial exclusionary tendencies. See also Mutua 2019b; Eslava and Pahuja 2012, p. 200, describing it as a 'conceptual blackbox'.

[34] See Anghie and Chimni 2003, at footnote 22.

[35] Roth 2000, p. 2065.

[36] D'Souza 2012, p. 414.

[37] See Chap. 5 by Ishita Chakrabarty and Guneet Kaur in this volume.