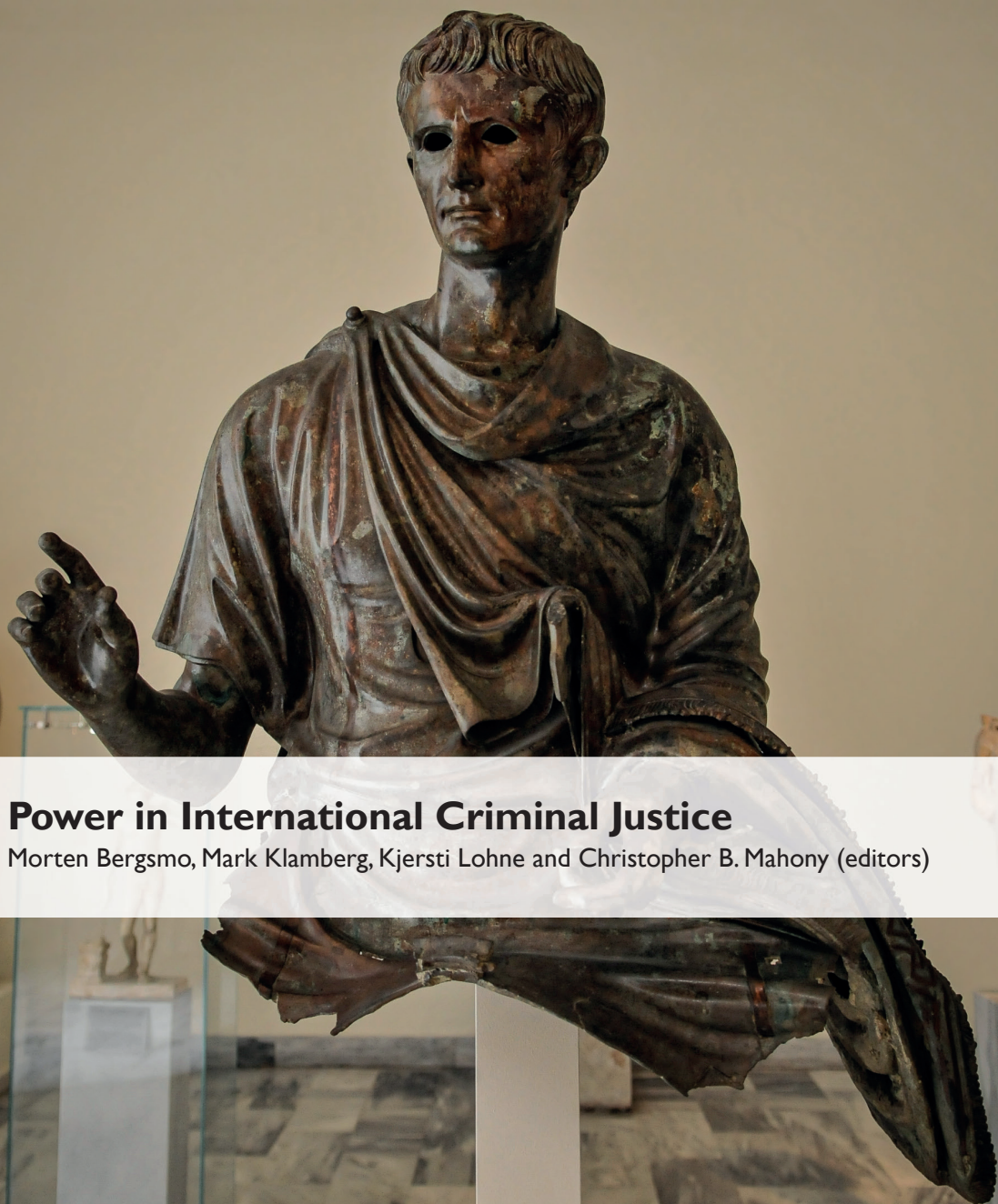


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Power in International Criminal Justice

Morten Bergsmo, Mark Klamberg, Kjersti Lohne and Christopher B. Mahony (editors)

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***Front cover:** Octavian, known as Caesar Augustus (63 BC–AD 14), the first Roman emperor, who enjoys a 2000-year old legacy as one of the most effective leaders in human history. He is a symbol of power. But this famous fragment of a bronze equestrian statue in the National Archaeological Museum of Athens is also a hollow mask. This book is about unmasking power.*

***Back cover:** Excerpt from Independent Expert Review of the International Criminal Court and the Rome Statute System: Final Report, 30 September 2020. The experts showed courage and incision by challenging power in the International Criminal Court system in their report.*

Rebels, the Vanquished, Rogue States and Scapegoats in the Crosshairs: Hegemony in International Criminal Justice

Mark Klamberg*

14.1. Introduction

At the foundation of the mainstream, the international criminal justice programme is of the view that there should be no ‘outside-of-law’: everyone, regardless of nationality or position, should be held accountable for his or her atrocities committed.¹ The establishment of the International Criminal Court (‘ICC’) is often portrayed as a march toward the rule of law, away from politics and expediency.² This perspective holds that international criminal justice – and international law in general – embodies a common good which in turn presumes a harmony of interests between States. Conflicts between States emanate under this assumption from problems of knowledge and, with techniques of social engineering, these conflicts can be solved. This may be true in certain cases.

However, the clash of interests or values is not always about knowledge, they may also involve radically incompatible preferences on

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¹ Martti Koskeniemi, “Between Impunity and Show Trials”, in *Max Planck Yearbook of United Nations Law*, 2002, vol. 6, p. 2.

² David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics*, Oxford University Press, Oxford, 2015, p. 3.

distribution of goods and methods on how to resolve conflicts.³ The idealistic description of international criminal justice may be challenged when considering the actual situations and cases investigated and prosecuted: only rebels, the vanquished and defeated, rogue States and scapegoats appear to be in the crosshairs of international criminal justice.

Uganda and the Democratic Republic of the Congo triggered the jurisdiction of the ICC in relation to their own territory, taking aim at rebels. At the end of conflicts or changes in power, the defeated have been brought to justice, as illustrated by the International Military Tribunals in Nuremberg, Tokyo and subsequent trials concerning Libya, Côte d'Ivoire, Rwanda and Georgia. The victors' – sometimes lesser but still – crimes tend to be ignored or forgotten.⁴ The pursuit of international criminal justice sometimes clashes with convenience: at the end of the 1940s, the Allies' concern of prosecuting Nazis was reduced. Fear of communism and the interest to establish normal relations with the Federal Republic of Germany made the Western powers less interested in further purges.⁵ The perceived impunity of several Balkan war criminals and failure to prosecute NATO bombings of Serbia add to the perception that international criminal justice is one-sided.⁶ Exceptions for the powerful are carved out, as illustrated by the use of Article 16 of the Rome Statute in Security Council resolutions 1422 (2002), 1487 (2003), 1597 (2005) and 1970 (2011). Allies of powerful States are protected.⁷ Rogue States such as Sudan are targeted. When defendants from powerful States face justice, they may be perceived as scapegoats taking heat from superiors, as illustrated by the trials following the Abu Ghraib prison scandal. Is this the result of conscious decision by international criminal justice bodies – in the mod-

³ Martti Koskenniemi, "Hegemonic Regime", in Margaret A. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation*, Cambridge University Press, 2012, pp. 306–308.

⁴ Koskenniemi, 2002, see above note 1, p. 8; David P. Forsythe, "'Political Trials?': The UN Security Council and the Development of International Criminal Law", in William A. Schabas, Yvonne McDermott and Niamh Hayes (eds.), *The Ashgate Research Companion to International Criminal Law*, Ashgate, Farnham/Burlington, 2013, p. 487

⁵ Koskenniemi, 2002, see above note 1, p. 8.

⁶ *Ibid.*, p. 8; Wolfgang Kaleck, "Double Standards: International Criminal Law and the West", FICHL Publication Series No. 26, Torkel Opsahl Academic EPublisher, Brussels, 2015, pp. 47–50. (<http://www.legal-tools.org/doc/971c3c/>).

⁷ Forsythe, 2013, see above note 4, p. 488.

ern form, the Rome Statute – or the greater context of the international system?

Although the Prosecutor and the judges of the ICC are formally independent, the Court is still entirely dependent on State resources to succeed. It does not have any enforcement tools of its own.⁸ A select number of States constitute major powers which are represented in the distribution of resources, membership of alliances and global institutions such as the UN and its Security Council. The International Criminal Tribunal for the former Yugoslavia (‘ICTY’) was successful in the sense that all indicted persons were brought before the Tribunal. A key explanation was, arguably, the result of pressure by the US, the EU and the desire of the concerned States to become members or at least have good relations with the EU and, to a lesser extent, for isolated idealistic reasons.⁹ This is a potential problem for the ICC since the same tools of incentivizing States to cooperate are lacking. Bosco has examined the ICC as an instrument of global governance and the extent to which it accommodates the world’s major powers. He argues that the ICC has a weak connection to the major powers whose support it needs; those major powers who are States Parties – the United Kingdom, France, Germany, Japan and Brazil – are accorded no special powers or privileged place in the institution.¹⁰ Scholars have generally assumed that international organizations are the product of major-power interests.¹¹ Morgenthau has stated the following:

International law owes its existence to identical or complementary interests of states, backed by power as a last resort, or, where such identical interests do not exist, to a mere balance of power which prevents a state from breaking these rules of international law. Where there is neither community

⁸ Bosco, 2015, see above note 2, p. 4.

⁹ Jacob Katz Cogan, “International Criminal Courts and Fair Trials: Difficulties and Prospects”, in *Yale Journal of International Law*, 2002, vol. 27, pp. 123–124; Mark Klamburg, *Power and Law in International Society: International relations as The Sociology of International Law*, Routledge, 2015, p. 113.

¹⁰ Bosco, 2015, see above note 2, pp. 4–5. Sarah Nouwen, “International Criminal Law: Theory All Over The Place”, in Anne Orford, Florian Hoffmann and Martin Clark (eds.), *The Oxford Handbook of the Theory of International Law*, Oxford University Press, Oxford, 2016, p. 755.

¹¹ Kenneth W. Abbott and Duncan Snidal, “Why States Act through Formal International Organizations”, in *Journal of Conflict Resolution*, 1998, vol. 42, no. 1, p. 24; Bosco, 2015, see above note 2, p. 5.

of interests nor balance of power, there is no international law.¹²

This quote may be found in Morgenthau's early writings when he still tried to develop a functional theory of international law.¹³ The reference to balance of power is an embryo to his later writings which in turn provide part of the foundation of realist theory, according to which international law and organizations lack any intrinsic significance. International law, morality, ethics and ideology are mere components in the power equation, devoid of non-instrumental significance or prescriptive worth, subject to compulsory service as tools of power when deemed necessary for the vital interests of States.¹⁴ This may be contrasted with competing approaches such as liberal institutionalism,¹⁵ constructivism,¹⁶ and the English school¹⁷ which have greater faith in the relevance of international institutions and rules.¹⁸ Independence from State influence is important for all international organizations, arguably even more central to interna-

¹² Hans J. Morgenthau, "Positivism, Functionalism, and International Law", in *American Journal of International Law*, 1940, vol. 34, no. 2, pp. 274, 275; repeated in Hans J. Morgenthau, *Politics Among Nations*, Second Edition, Alfred A. Knopf, New York, 1954, p. 252 (First Edition published 1948).

¹³ Morgenthau, 1940, see above note 12, p. 280.

¹⁴ Francis Anthony Boyle, *World Politics and International Law*, Duke University Press, Durham, 1985, p. 7; Anthony C. Arend, *Legal Rules and International Society*, Oxford University Press, Oxford, 1999, p. 116; Tom Ginsburg and Gregory Shaffer, "How Does International Law Work: What Empirical Research Shows", in Peter Cane and Herbert Kritzer (eds.), *Oxford Handbook of Empirical Legal Studies*, Oxford University Press, Oxford, 2010, p. 754; Klamberg, 2015, see above note 9, p. 38.

¹⁵ Robert O. Keohane, "The demand for international regimes", in Stephen D. Krasner (ed.), *International Regimes*, Cornell University Press, Ithaca and London, 1983; Robert O. Keohane and Lisa L. Martin, "The Promise of Institutional Theory", in *International Security*, 1995, vol. 20, no. 1, pp. 39–51; Harold Hongju Koh, "Why Do Nations Obey International Law?", in *The Yale Law Journal*, 1997, vol. 106, no. 8, pp. 2599–2659;

¹⁶ Alexander Wendt, "Anarchy is what States Make of it: The Social Construction of Power Politics", in *International Organization*, 1992, vol. 46, no. 2, pp. 391–425; Alexander Wendt, "Constructing International Politics", in *International Security*, 1995, vol. 20, no. 1, pp. 71–81; John Gerard Ruggie, *Constructing the World Policy: Essays on International Institutionalism*, Routledge, London and New York, 1998.

¹⁷ Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, Macmillan, London, 1977; Barry Buzan, "From International System to International Society: Structural Realism and Regime Theory Meet the English School", in *International Organization*, 1993, vol. 47, no. 3, pp. 327–352.

¹⁸ Klamberg, 2015, see above note 9, pp. 39–45.

tional courts.¹⁹ Koskenniemi emphasizes how the normative framework interacts with the concrete power underlying it.²⁰ He challenges political realism as well as multilateralism which are both based on “a state-centric universe for which international law is exclusively an instrument of public diplomacy”. He adopts what appears to be a Marxist view, that the international system is less about State-to-State relations and more about the expansion of capitalist relationships over the globe.²¹

At the beginning of this millennium, some scholars described international society in a period of transition from a system of sovereign equality under universal legal rules to the imperial dominance of the United States.²² Habermas has described the United States as a self-appointed hegemon.²³ However, imperialism should not be conflated with colonialism. Whilst ‘colonization’ refers to the practice of ‘settling territories’ and ‘annexation’, ‘imperialism’ describes the process of the metropole ‘maintaining an empire’ over other States. Imperialism does not necessarily involve economic or territorial dominance, it could also be understood of a means for the metropole to establish a hierarchy of power which constricts the sovereign decision-making capacity of other States.²⁴ Imperialism can be analysed on the macro-level as done hitherto; it can also occur at the micro-level. Indeterminacy in legal provisions can contribute to the perpetuation of hierarchical power relationships,²⁵ there will always be a structural bias in favour of a certain interest within the regime, even though it is implicit.²⁶

¹⁹ Bosco, 2015, see above note 2, p. 6.

²⁰ Martti Koskenniemi, “The Empire(s) of International Law: System Change and Legal Transformation”, in *Austrian Review of International and European Law*, 2003, vol. 8, no. 1, p. 63.

²¹ *Ibid.*, pp. 63, 65.

²² Karl Zemanek, “Is the Nature of the International Legal System Changing? ”, in *Austrian Review of International and European Law*, 2005, vol. 8, no. 1, p. 3.

²³ Jürgen Habermas, “Interpreting the Fall of a Monument”, in *German Law Journal*, 2003, vol. 4, p. 706.

²⁴ Michael W. Doyle, *Empires*, Cornell University Press, Ithaca and London, 1986, pp. 31–37; Frederick Cowell, “Inherent Imperialism: Understanding the Legal Roots of Anti-imperialist Criticism of the International Criminal Court”, in *Journal of International Criminal Justice*, 2017, vol. 15, no. 4, pp. 670–671.

²⁵ Martti Koskenniemi, “The Politics of International Law – 20 Years Later”, in *European Journal of International Law*, 2009, vol. 20, no. 1, p. 13.

²⁶ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, Reissue, Cambridge University Press, New York, 2005, pp. 607–610; Mark Klam-

The question whether international criminal justice performs as an independent system or is subject to power politics – or even a tool for hegemonic States – will be discussed in this study through different lenses. The next section will analyse the matter in terms of structural constraints and the room of agency. Subsequently, international criminal justice will be portrayed as a regime where hegemonic tendencies will be highlighted and evaluated. Finally, the study will set out alternative narratives or scenarios on the state of international criminal justice.

14.2. Structure versus Agency in the International Criminal Justice System

In the introduction of this volume, Lohne makes the call for the need for a sociology of international criminal justice. A key part is to understand the social conditions that underpin the power in and of international criminal justice.²⁷ International criminal justice is, like other fields of law, a response to social needs, which reinforces the case for a sociological study of international criminal justice.²⁸ A key question across social sciences is to what extent explanation should be couched in terms of autonomous actions of individuals who have agency or seen as a product of context or structure in which the individuals operate, and over which they have no control.²⁹ This structure – agency debate may be nuanced. Hay argues that “structure and agency logically entail one another – a social or political structure only exists by virtue of the constraints on, or opportunities for, agency that it effects. Thus it makes no sense to conceive of structure without at least hypothetically positing some notion of agency which

berg, “What are the Objectives of International Criminal Procedure? – Reflections on the Fragmentation of a Legal Regime”, in *Nordic Journal of International Law*, 2010, vol. 79, no. 2, p. 295; compare with Mark Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Martinus Nijhoff Publishers, Leiden, 2013, p. 15 where the term “structural tendency” is used.

²⁷ Kjersti Lohne, “Towards a Sociology of International Criminal Justice”, in Morten Bergsmo, and others (eds.), *Power in International Criminal Justice: Towards a Sociology of International Justice*, TOAEP, 2020.

²⁸ Klamberg, 2013, see above note 26, pp. 5, 48–65; Klamberg, 2015, see above note 9, pp. 46–48, 57–59, 107–109.

²⁹ Gerry Stoker, “Introduction”, in David Marsh and Gerry Stoker (eds.), *Theory and Method in Political Science*, Macmillan Press, 1995, p. 16; Michael Barnett and Raymond Duvall, “Power in International Politics”, in *International Organization*, 2005, vol. 59, no. 1, pp. 41, 44, 49: “thinking about power in terms of both agency and structure”. See also Lohne, 2020, see above note 27.

might be effected (constrained or enabled)".³⁰ Lohne notes that "whereas international criminal accountability presumes an autonomous – and thus accountable – legal subject, the development of international criminal justice is driven by a strong faith in the ability of law in general – and criminal law in particular – to transform people and societies".³¹ Kratochwil and Ruggie state that "actors not only reproduce normative structures, they also change them by their very practice, as underlying conditions change, as new constraints or possibilities emerge, or as new claimants make their presence felt".³² Similarly, Barnett and Duvall note that human agency is "essential in producing, reproducing and possibly transforming" structures.³³ Lawyers sometimes call this 'judicial law-making' while sociologists call it 'structuration'.³⁴

Ideas of structure and agency are arguably central to any notion of power. Structure may impose constraints both overtly through compulsory and institutional power or covertly to the extent it entails social powers, values and interpretations. World-systems theorists draw on this conception of power when they distinguish between different kinds of States, identified as core, semi-periphery, and periphery.³⁵

Studies of structure and agency are primarily empirical in nature, viewing the internal processes of law in conjunction with the external structures of the legal field.³⁶ Power ultimately concerns the victory of the

³⁰ Colin Hay, "Structure and Agency", in David Marsh and Gerry Stoker (eds.), *Theory and Method in Political Science*, Macmillan Press, 1995, p. 189.

³¹ Lohne, 2020, see above note 27.

³² Friedrich Kratochwil and John Gerard Ruggie, "International Organization: A State of the Art on an Art of the State", in *International Organization*, 1986, vol. 40, no. 4, p. 770.

³³ Barnett and Duvall, 2005, see above note 29, p. 49.

³⁴ On judicial law-making: Hersch Lauterpacht, *The Function of Law in the International Community*, Clarendon Press, 1933. The Lawbook Exchange, New Jersey, 2000, pp. 79–82; Klamberg, 2013, see above note 26, p. 67; Anthony Giddens, *A Contemporary Critique of Historical Materialism*, University of California Press, Berkeley, 1981, p. 19: "According to the theory of structuration, all social action consists of social practices, situated in time-space, and organized in a skilled and knowledgeable". As quoted by Kratochwil and Ruggie, 1986, see above note 32, p. 770.

³⁵ Immanuel Wallerstein, "The Interstate Structure of the Modern World-System", in Steve Smith, Ken Booth, and Marysia Zalewski (eds.), *International Theory: Positivism and Beyond*, pp. 171–85; Barnett and Duvall, 2005, see above note 29, p. 54.

³⁶ Jakob V.H. Holtermann and Mikael Rask Madsen, "What is Empirical in Empirical Studies of Law? A European New Legal Realist Conception", in *Retfærd*, 2016, vol. 39, no. 4, p. 19.

agent or *subject* over its other – *structure* or *object*.³⁷ This relationship between *agency* and *structure* raises at least two issues. We have to contextualize agency and when we choose to describe structures, we choose to describe them either as resources (enabling action) or constraints (limiting opportunities for action).³⁸

The structure – agency dichotomy may be applied in different ways when analysing the international criminal justice system. For the purpose of this study, the structure is understood as the international system and laws within which the actors of international criminal tribunals – judges, prosecutors, defence counsel and other actors – operate. International law – and international criminal justice – is not necessarily ‘good’ in the sense that it may reinforce asymmetries of power. As Kennedy puts it: “law consolidates winnings, translating victory into right”.³⁹ The States will in this model have a dual role. As a community, the States act as lawmakers and provide resources which create the structure. Structures and discourses are not possessed or controlled by any single State.⁴⁰ Individual States may also be perceived as actors, as illustrated by situations where they are asked or ordered to co-operate with an international criminal tribunal by providing documents or surrendering persons. More layers can be added to what has been portrayed above as a duality; when States as a community create law and provide resources, they are also subject to greater structural restraints, both material and in ideas. States, the global legal order, ideas and knowledge as power are entangled with one another.⁴¹ Below the surface of law and States, there may be deeper structures of the system,⁴² also reproduced and developed by experts, including legal scholars.⁴³ Kennedy argues that “[I]legal norms, institutions, and profes-

³⁷ Hay, 1995, see above note 30, p. 191.

³⁸ *Ibid.*, p. 205.

³⁹ David Kennedy, *A World of Struggle*, Princeton University Press, 2016, pp. 10–11, 257. See also David Kennedy, “Disciplines of international law and policy”, in *Leiden Journal of International Law*, 1999, vol. 12, pp. 39–40, 42.

⁴⁰ Barnett and Duvall, 2005, see above note 29, p. 44.

⁴¹ Kennedy, 2016, see above note 39, pp. 6–8.

⁴² Touri distinguishes between i) the surface level of law, ii) the legal culture, and iii) the deep structure of law which interact with each other, Kaarlo Tuori, “Towards a Multi-Layered View of Modern Law”, in Aulis Aarnio, Robert Alexy and Gunnar Bergholtz (eds.), *Justice, Morality and Society A Tribute to Aleksander Peczenik on the Occasion of his Birthday 16 November 1997*, Juristförlaget, Lund, 1997, pp. 432–434.

⁴³ Kennedy, 2016, see above note 39, pp. 4–6.

sional practices are the building blocks for acting and being powerful, as well as for interpreting, communicating, celebrating, and criticizing power”.⁴⁴ Thus, when categorizing a certain observation, it will not always be obvious whether it belongs to structure or agency.

The starting point is that “social structures and processes generate differential social capacities for actors to define and pursue their interests and ideals”.⁴⁵ McCormack describes the dual selectivity of criminal law: the choice of what crimes are to be prosecuted, and the choice of which actors to prosecute.⁴⁶ Kiyani appears to use a similar, but not identical, dichotomy which distinguishes between design selectivity (compare with structure) and operational selectivity (compare with agency).⁴⁷ Kiyani’s typology is made dependent on whether the exercise of discretion is made before or after a court has been established.

Design selectivity is grounded in choices made in the establishment of various [international criminal tribunals] [...]

Design selectivity can be contrasted against *operational selectivity*: exercises of discretion that occur after a court is already running, when the law is to be enforced by a tribunal and its agents.⁴⁸

This typology does not prevent, but has slightly more difficulty in, describing the ongoing interaction between structure and agency. For example, Kiyani makes capacity selectivity, that is, the resources made available to investigate, prosecute and try potential offenders, a part of operational selectivity. If instead the structure – agency dichotomy is used, capacity selectivity is arguably more a question of structure than agency. One could certainly claim that capacity is not only a question of resources made available to an international criminal tribunal; the internal management and efficiency within an international criminal tribunal could have an impact on the capacity. It should be noted that Kiyani admits that “the distinction between design and operational selectivity is more fluid than

⁴⁴ *Ibid.*, p. 10.

⁴⁵ Barnett and Duvall, 2005, see above note 29, p. 42.

⁴⁶ Tim L.H. McCormack, “Selective Reaction to Atrocity”, in *Albany Law Review*, 1996–1997, vol. 60, p. 683; Asad G. Kiyani, “Group-Based Differentiation and Local Repression: The Custom and Curse of Selectivity”, in *Journal of International Criminal Justice*, 2016, vol. 14, no. 4, p. 942.

⁴⁷ *Ibid.*, pp. 942–951.

⁴⁸ *Ibid.*, pp. 942, 945.

binary”.⁴⁹ Regardless, for the purpose of this study, the capacity of an international criminal tribunal in terms of resources made available by the States is rather perceived as question of structure than agency.

14.2.1. Structural Constraints

Jackson has noted that “the inherent flexibility of international law and the authority of other institutions affect the application of international criminal law”.⁵⁰ Structural constraints may relate to limits in different dimensions: 1) material jurisdiction, 2) territorial jurisdiction, 3) personal jurisdiction, 4) temporal jurisdiction and 5) capacity in terms of economic resources.

Selectivity in the material jurisdiction of the ICC may be illustrated by that certain means and methods of warfare are outlawed, while others are not. Poisonous weapons, asphyxiating, poisonous or other gases and ‘dum-dum’ bullets are outlawed, there is a debate whether chemical and biological weapons are criminalized under the Statute,⁵¹ while nuclear weapons are not outlawed.⁵² This clearly favours richer States, which shows how power is reflected in the material jurisdiction of the ICC.

Asymmetries in power are also reflected in the territorial and personal jurisdictions of the Court. During the negotiations of the Rome Statute, some States – Germany, Sweden, Czech Republic, Latvia, Costa Rica, Albania, Ghana, Namibia, Italy, Hungary, Azerbaijan, Belgium, Ireland, Netherlands, Luxembourg, Bosnia and Herzegovina and Ecuador – advocated that the Court should have universal jurisdiction. At the other extreme was the United States that held that the State of nationality had to give its consent in all cases, except for Security Council referrals. India, Indonesia, Gabon, Russia, Jamaica, Nigeria, Vietnam, Algeria, Egypt, Israel, Sri Lanka, Pakistan, Afghanistan, Iran and China advanced similar positions in preference of a narrower jurisdiction. The adopted text of Ar-

⁴⁹ *Ibid.*, pp. 945.

⁵⁰ Miles Jackson, “Antonio Cassese Prize for International Criminal Law Studies 2015–2016: Political Discretion and International Criminal Justice”, in *Journal of International Criminal Justice*, 2017, vol. 15, no. 3, p. 616.

⁵¹ Mark Klamberg, “Article 8(2)(b)(xvii)”, in Mark Klamberg (ed.), *The Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic EPublisher, Brussels, 2017, p. 95.

⁵² Antony Anghie and B.S. Chimni, “Third World Approaches to International Law and Individual Responsibility in Internal Conflicts”, in *Chinese Journal of International Law*, 2003, vol. 2, no. 1, p. 95.

Article 12 demonstrates respect for the sovereignty of States, a narrower jurisdiction.⁵³ The UN Security Council power under Article 13(b) of the Rome Statute to refer situations relating to non-States Parties to the Court is also a reflection of power asymmetries.

Even though the temporal jurisdiction is already limited preventing retroactive application pursuant to Article 11 of the Rome Statute, further limitations were made following demands by France, allowing temporary concessions in relation to war crimes.⁵⁴

When the international criminal justice can only deal with a handful of cases over which the Court has jurisdiction and are admissible, questions about selection will arise. Thus, there must be a policy and in that sense prosecution is politicized. With *ad hoc* tribunals, a political body, the Security Council, gave a clear political tack to the tribunals. In that sense, there was a relative high transparency of the policy that underpins them.⁵⁵ At a glance, it would appear that the ICC has the discretion to use the funds as it finds appropriate. A closer scrutiny reveals several caveats. The Court has two major sources of funding, from the States Parties and the United Nations.⁵⁶ The States Parties could as a last resort withhold funds if they find that the Court is acting against their interests. Further, the United Nations was supposed to cover expenses incurred due to referrals by the Security Council.⁵⁷ Both of the Security Council referrals – in relation to Darfur (Sudan) and Libya – have explicitly ruled out

⁵³ Elizabeth Wilmshurst, “Jurisdiction of the Court”, in Roy S. Lee (ed.), *The International Criminal Court: the Making of the Rome Statute: Issues, Negotiations and Results*, Kluwer Law International, The Hague, 1999, pp. 132–139; William A. Schabas and Giulia Pecorella, “Article 12 - Preconditions to the exercise of jurisdiction”, in Otto Triffterer and Kai Ambos (eds.), *Commentary on the Rome Statute of the International Criminal Court*, Third Edition, C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 675–680; Dominik Zimmerman and Mark Klamberg, “Article 12”, in Mark Klamberg (ed.), *The Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic EPublisher, Brussels, 2017, pp. 169–170.

⁵⁴ Rome Statute of the International Criminal Court. 17 July 1998, Article 124 (‘ICC Statute’) (<https://www.legal-tools.org/doc/9c9fd2>); Forsythe, 2013, see above note 4, p. 485.

⁵⁵ William A. Schabas, “The Short Arm of International Criminal Law”, in William A. Schabas, Yvonne McDermott and Niamh Hayes (eds.), *The Ashgate Research Companion to International Criminal Law*, Ashgate, Farnham/Burlington, 2013, pp. 404–405.

⁵⁶ ICC Statute, Article 115, see above note 54.

⁵⁷ ICC Statute, Article 115(b), see above note 54.

provision of funds by the United Nations.⁵⁸ This shows how rich States and major powers through economic means can control the efficiency and work of the Court.

14.2.2. Room for Agency

Within the structural constraints, there is room for agency. This will be illustrated by the selection of situations and cases that are investigated and prosecuted. Article 53 of the Rome Statute relies on complementarity, “gravity” and the “interests of justice” as factors for determining a “reasonable basis to proceed” with an investigation. Further, the purpose of the authorization procedure with a review of the Pre-Trial Chamber is to avoid, reduce or minimize politicization.⁵⁹ However, as the *Afghanistan* decision discussed below shows, the authorization procedure may also – counter to the traditional understanding of the process – be a stage for the judges to incorporate political considerations. The reference to complementarity creates agency for States concerned to investigate and prosecute cases and thus making cases inadmissible at the ICC.

The flexible approach to gravity allows the ICC to engage with a broader range of situations. It also grants the Prosecution discretion to focus on certain types of criminality. Stahn argues that the flexibility in the gravity assessment “allows investigation and prosecution of a wider spectrum of criminality and diversity of situations”.⁶⁰

The broader expression “the interests of justice” is not defined anywhere in the Statute.⁶¹ From the drafting history of Article 53, it appears that the provision was intended to allow for prosecutorial discretion.⁶² The

⁵⁸ Resolution 1593 (2005), UN Doc. S/RES/1593, 31 March 2005, para. 7 (<https://www.legal-tools.org/doc/4b208f>); Resolution 1970 (2011), UN Doc. S/RES/1970, para. 8, 26 February 2011 (<https://www.legal-tools.org/doc/00a45e>).

⁵⁹ Schabas, 2013, see above note 55, p. 396.

⁶⁰ Carsten Stahn, “Damned If You Do, Damned If You Don’t: Challenges and Critiques of ICC Preliminary Examinations”, in *Journal of International Criminal Justice*, 2017, vol. 15, no. 3, p. 427.

⁶¹ International Criminal Court (‘ICC’) Office of the Prosecutor, Policy Paper on the Interests of Justice, September 2007, ICC-OTP-2007, pp. 2–3 (<https://www.legal-tools.org/doc/bb02e5>).

⁶² William A. Schabas, *The International Criminal Court - A Commentary on the Rome Statute*, Second Edition, Oxford University Press, Oxford, 2016, pp. 836; Lovisa Bådagård and Mark Klamberg, “The Gatekeeper of the ICC - Prosecutorial Strategies for Selecting Situations and Cases at the International Criminal Court”, in *Georgetown Journal of International Law*, 2017, vol. 48, no. 3, p. 670; Maria Varaki, “Revisiting the ‘Interests of Justice’

“interests of justice” criterion was originally understood in doctrine and case law not to be a countervailing factor to be used by the Prosecutor to give reason not to proceed.⁶³ Bådagård and Klamberg note the following:

Scholars have proposed a variety of factors which could be considered under the “interests of justice” criterion. Some argue that the criterion could serve as a legal basis for considerations of a political or pragmatic nature, such as the practical feasibility of investigations or the prospects of state cooperation. Moreover, regarding the much debated issue of “justice vs. peace,” some argue that the OTP could use the “interests of justice” criterion in order to avoid disrupting peace processes or to defer to alternative mechanisms of transitional justice.⁶⁴

The OTP has held that the interests of justice criterion should only be applied under exceptional circumstances. There is a presumption in favour of investigating or prosecuting if other legal requirements are fulfilled.⁶⁵

The traditional understanding of “interests of justice” has come into question with the decision of the Pre-Trial Chamber II in the *Afghanistan* situation, opening the concept to take into consideration the feasibility of investigations and the prospects of State co-operation. The Pre-Trial Chamber stated the following:

An investigation can hardly be said to be in the interests of justice if the relevant circumstances are such as to make such investigation not feasible and inevitably doomed to failure. [...] subsequent changes within the relevant political landscape both in Afghanistan and in key States (both parties and non-parties to the Statute), coupled with the complexity and volatility of the political climate still surrounding the Afghan scenario, make it extremely difficult to gauge the prospects of securing meaningful cooperation from relevant authorities for the future, whether in respect of investigations or of surrender of suspects; suffice it to say that nothing in the present

Policy Paper”, 2017, p. 465: “unless the Prosecutor explicitly affirms that she has made a determination based solely on the interests of justice clause, the *proprio motu* judicial control cannot be activated”.

⁶³ Policy Paper on the Interests of Justice, p. 2, see above note 61.

⁶⁴ Bådagård and Klamberg, 2017, see above note 62, p. 67.

⁶⁵ Policy Paper on the Interests of Justice, p. 1–3, see above note 61.

conjuncture gives any reason to believe such cooperation can be taken for granted.⁶⁶

The *Afghanistan* decision not only changed the understanding and broadened the scope of the “interests of justice” criterion, it also changed the balance between the Prosecutor and the judges. Previously, the understanding had been that the criterion was a potential tool for prosecutorial discretion, now it has become an item of judicial review.⁶⁷ Heller has argued in favour of the Pre-Trial Chamber having such power.⁶⁸ The situations and cases selected for investigation and prosecution have frequently been criticized for “exhibiting political bias and seemingly replicate inter-State power imbalances through the different attention paid to Western States versus the Third World”.⁶⁹ One line of counterargument is that a number of the situations investigated are self-referrals. In addition, the Prosecutor has initiated investigations that implicate or thread against the interests of major powers such as Russia and the US. Pre-Trial Chamber I authorized the Prosecutor to open a *proprio motu* investigation in the situ-

⁶⁶ ICC, *Situation in the Islamic Republic of Afghanistan*, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, 12 April 2019, ICC-02/17-33, paras. 90, 94 (<https://www.legal-tools.org/doc/2fb1f4>).

⁶⁷ Compare with Morten Bergsmo, “The Theme of Selection and Prioritization Criteria and Why it Is Relevant”, in Morten Bergsmo (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, Torkel Opsahl Academic EPublisher, 2010), pp. 13-14: “Even when there is agreement in a given jurisdiction that it should have and use case selection and prioritisation criteria, there may be different opinions as to whether (a) these criteria should be binding and (b) the judges should have a role in making the criteria effective. Some prosecutors prefer that the criteria function merely as internal guidelines in the exercise of prosecutorial discretion, with no judicial supervision. The answer to both questions may depend on what type of jurisdiction it is. ... giving the judiciary a role in making criteria effective, may be more attractive in international, hybrid and territorial state jurisdictions than in foreign state jurisdictions”.

⁶⁸ Kevin Jon Heller, “Can the PTC Review the Interests of Justice?”, in *Opinio Juris*, 12 April 2019 (available on its web site). See also Dapo Akanda and Talita de Souza Dias, “The ICC Pre-Trial Chamber Decision on the Situation in Afghanistan: A Few Thoughts on the Interests of Justice”, in *EJIL: Talk*, 18 April 2019 (available on its web site). Compare with Dov Jacobs, “ICC Pre-Trial Chamber rejects OTP request to open an investigation in Afghanistan: some preliminary thoughts on an ultra vires decision”, in *Spreading the Jam*, 12 April 2019 (available on its web site).

⁶⁹ Kiyani, 2017, see above note 46, p. 948.

ation in Georgia.⁷⁰ The recent request by the Prosecutor for judicial authorization to commence an investigation into the Situation in the Islamic Republic of Afghanistan may represent an addition step ‘out of Africa’ and opens up for investigation and prosecution against US personnel.⁷¹ However, the *Afghanistan* decision by Pre-Trial Chamber II would seem to confirm some of the claims that the ICC is merely a replication of inter-State power imbalances, a tool against weak States and armed non-State actors.

14.3. International Criminal Justice as a Regime

International criminal justice may be described as an international regime – a delineated area of rule-governed activity – in the international system.⁷² Krasner has defined regimes as “sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations”.⁷³

Regimes such as international human rights law, international humanitarian law and international criminal justice may in certain situations be in harmony, but may be in conflict with each other in different situations. They are neither fully integrated nor completely separated. The isolation of a regime may reflect a wish of States to protect their dominance.⁷⁴

⁷⁰ ICC, *Situation in Georgia*, Pre-Trial Chamber I, Decision on the Prosecutor’s request for authorization of an investigation, 27 January 2016, ICC-01/15-12 (<http://www.legal-tools.org/doc/a3d07e/>).

⁷¹ ICC, *Situation in the Islamic Republic of Afghanistan*, Pre-Trial Chamber III, Public redacted version of “Request for authorisation of an investigation pursuant to article 15”, 20 November 2017, ICC-02/17-7-Conf-Exp, 20 November 2017, ICC-02/17-7-Red (<http://www.legal-tools.org/doc/db23eb/>).

⁷² Klamberg, 2015, see above note 9, p. 2.

⁷³ Stephen D. Krasner, “Structural causes and regime consequences: regimes as intervening variables”, in Stephen D. Krasner (ed.), *International Regimes*, Cornell University Press, Ithaca and London, 1983, p. 2; see similar definition of international institutions in Judith L. Goldstein, Miles Kahler and Robert O. Keohane, “Introduction: Legalization and World Politics”, in Judith L. Goldstein and others (eds.), *Legalization and World Politics*, MIT Press, Cambridge and London, 2001, p. 3.

⁷⁴ Margaret A. Young, “Introduction: the Productive Friction between Regimes”, in Margaret A. Young (ed.), *Regime Interaction in International Law Facing Fragmentation*, Cambridge University Press, Cambridge, 2012, pp. 10–11; Margaret A. Young, “Regime Interaction in Creating, Implementing and Enforcing International Law”, in Margaret A. Young (ed.), *Regime Interaction in International Law Facing Fragmentation*, Cambridge Univer-

14.3.1. Competing Views on International Regimes and Institutions

Realist scholars such as Mearsheimer hold that international institutions are “arenas for acting out power relationships”.⁷⁵ International law exists and is complied with only when it is in the interests of a hegemon or a few powerful States, which coerce less powerful States into accepting the regime and complying with it.⁷⁶ States create rules for self-interested reasons and will feel no reluctance about violating rules when they cease to be in the States’ interest.⁷⁷ Legal scholars in the realist tradition argue that international courts not controlled by powerful States will usually be ineffective. States of major power will approach a court in two ways: marginalization and control.⁷⁸ Marginalization represents major-power scepticism and may include discouraging other States from joining, using political processes over judicial ones and avoiding deployment of political, economic and diplomatic resources. Control represents a will of major powers to direct and manage the court, including UNSC referrals and deferrals and deployment of resources when the State supports the court activity in question.⁷⁹ The ICC may react to such measures, primarily through its Prosecutor, with apolitical, pragmatic, strategic or captured behaviour.⁸⁰

Liberal institutionalists indicate that one of the main routes for regime formation is with a hegemonic power. The theory of hegemonic stability holds that concentration of power in one dominant State facilitates the development of strong regimes, and that fragmentation of power is associated with regime collapse. However, regimes may still persist when a hegemon declines. When States move away from a competitive sub-

sity Press, Cambridge, 2012, p. 85. As commented upon in Klamberg, 2015, see above note 9, p. 49–50.

⁷⁵ John J. Mearsheimer, “The False Promise of International Institutions”, in *International Security*, 1994, vol. 19, no. 3, p. 13.

⁷⁶ Oona A. Hathaway, “Do Human Rights Treaties Make a Difference?”, in *Yale Law Journal*, 2002, vol. 111, no. 8, p. 1945.

⁷⁷ Fiona B. Adamson and Chandra Lekha Sriram, “Perspectives in International Law in International Relations”, in Çali Başak (ed.), *International Law for International Relations*, Oxford University Press, Oxford, 2010, p. 29; as commented upon in Klamberg, 2015, see above note 9, p. 38.

⁷⁸ Eric A. Posner and John C. Yoo, “Judicial Independence in International Tribunals”, in *California Law Review*, 2005, vol. 93, no. 1.

⁷⁹ Bosco, 2015, see above note 2, pp. 11–14, 16.

⁸⁰ *Ibid.*, pp. 18–20.

optimal outcome, there is no incentive to defect from mutually collaborative strategies.⁸¹

Marginalization and control were mentioned above as two ways for major powers to approach international courts. A third alternative is that major States accept that they cannot control the court as a result of a ‘norm cascade’; States and the public to which they respond are influenced by the norms international courts embody. This assumes that the interest of States is somewhat variable and subject to reinterpretation.⁸² This constructivist view on international relations means that the interest of States cannot be taken for granted, but can change. However, the fact that structures are socially constructed is no guarantee that they can be changed.⁸³

The word hegemony has a negative connotation in the sense that is usually understood as a problem that needs to be countered. However, it can also represent an everyday phenomenon where an actor seeks to make its project, interest or pursuit appear as representative of the universal, a common good.⁸⁴

14.3.2. Hegemony in International Law

Hegemony is a way of describing the relationship between structure and agency, in the context of international relations it describes how one power – usually perceived as the United States – which has agency on its own also has major influence on the structure of the international system.

One could describe international law as distinct from power, meaning that international law is opposed to hegemony. This dichotomy may

⁸¹ Keohane, 1983, see above note 15, p. 142; Richard Little, “International regimes”, in John Baylis, Steve Smith and Patricia Oqzens (eds.), *The Globalization of World Politics*, Fifth Edition, Oxford University Press, Oxford, 2011, p. 303; as commented upon in Klamberg, 2015, see *supra* note 9, p. 41.

⁸² Thomas Risse and Kathryn Sikkink, “The Socialization of International Human Rights Norms into Domestic Practices: Introduction”, in Thomas Risse, Stephen C. Ropp and Kathryn Sikkink (eds.), *The Power of Human Rights International Norms and Domestic Change*, Cambridge University Press, Cambridge, 1999, pp. 21, 22; Bosco, 2015, see above note 2, p. 15; Klamberg, 2015, see above note 9, p. 100.

⁸³ Wendt, 1995, see above note 16, p. 80; Risse and Sikkink, 1999, see above note 82, pp. 8–9; Emilie M. Hafner-Burton, David G. Victor and Yonatan Lupu, “Political Science Research on International Law: The State of the Field”, in *American Journal of International Law*, 2012, vol. 106, no. 1, p. 54; Klamberg, 2015, see above note 9, pp. 42–43.

⁸⁴ Koskenniemi, 2012, see above note 3, p. 311.

be questioned. International law can also be used as a tool by States and thus be a technique of hegemony.⁸⁵ Hegemonic contestation is the process whereby States make their partial view of the meaning of a legal word appear as the total view, and their preference seem like the universal preference.⁸⁶ There is a basic ambivalence between unity and diversity.⁸⁷

The balancing point of interaction between international regimes is not necessarily permanent. Koskenniemi notes that much of the practice of international relations and international law is constituted by their efforts to develop rules, techniques and strategies to fortify the middle zone against collapse, and to make life there as good as possible. The concept of ‘hegemony’ involves an acceptance that there is no permanent ‘ultimate’ or ‘rational’ ground in which conflicts between regimes are to be resolved. ‘Hegemony’ should be understood as a universalization strategy or effort to appear as a representative of the universal. Koskenniemi argues that such strategies are commonplace in the international system (as well as in political life more generally).⁸⁸ Consensus is the terminus of a hegemonic process in which an actor succeeds in making its position seem the universal or ‘neutral position’. By the same reasoning, the purpose of law is to move subjective interests from the realm of the special to that of the general and objective “in which they lose their particular, political colouring and come to seem natural, necessary or even pragmatic”.⁸⁹ Even though a regime may appear as based on pragmatism and objectivity, there is still a structural bias in favour of a certain interest within the regime. The system prefers “some outcomes or distributive choices to other outcomes or choices”.⁹⁰

Regimes are developed through the informal expansion of their vocabulary in academia and in bureaucracies, creating dominant frameworks and templates for the identification of problems and broad principles for their resolution.⁹¹

⁸⁵ Martti Koskenniemi, “International Law and Hegemony: A Reconfiguration”, in *Cambridge Review of International Affairs*, 2004, vol. 17, no. 2, p. 198.

⁸⁶ *Ibid.*, p. 199.

⁸⁷ *Ibid.*, p. 200.

⁸⁸ Koskenniemi, 2012, see above note 3, pp. 309–310.

⁸⁹ Koskenniemi, 2005, see above note 26, p. 597.

⁹⁰ *Ibid.*, pp. 607–610; Klamberg, 2010, see above note 26, p. 295.

⁹¹ Koskenniemi, 2012, see above note 3, pp. 317–319.

In the face of a hegemonic regime, States have the initial choice of either choosing integration or separation. International law needs either to be celebrated or discarded. Separation may in some cases be a better strategic choice for the functioning of the regime. On the other hand, that choice may lead to exclusion, marginalization, loss of influence, prestige and knowledge.⁹²

Regimes on international trade, environmental protection and the use of force are all engaged in universalization strategies, trying to make their body of law, special knowledge and interest appear as representative of the general knowledge and common interest.⁹³ An alternative to full integration or complete separation is the creation of regime hybrids, such as ‘sustainable development’, ‘human security’ or ‘corporate social responsibility’. The hegemonic nature of the struggle between regimes in this may be hidden in a vocabulary of technical co-operation in order to avoid an open politicization that would threaten the control of the process by the experts.⁹⁴

14.3.3. Hegemony in International Criminal Law

Is there a dominant State or hegemon that had or has particular influence over the emergence and design of international criminal justice? Despite its idealistic rhetoric, the US clearly chose separation during the initial years of the ICC and tried to shield its own officials from the Court’s reach.⁹⁵

Scholars that adopt Third World Approaches to International Law (‘TWAIL’) often focus on power relations among States with interest on how an international rule or institution actually affects the distribution of power between States and peoples.⁹⁶ Part of the TWAIL perspective on international criminal law is a concern about ‘selectivity’.⁹⁷ The portrayed ‘civilizing mission’ of non-European peoples has justified and legitimated

⁹² *Ibid.*, pp. 322–324; Koskenniemi, 2004, see above note 84, p. 198.

⁹³ Koskenniemi, 2012, see above note 3, p. 315.

⁹⁴ *Ibid.*, pp. 319–320

⁹⁵ Koskenniemi, 2004, see above note 85, p. 197; Claus Kreß, “Towards a Truly Universal Invisible College of International Criminal Lawyers”, FICHL Occasional Paper Series No. 4 (2014), Torkel Opsahl Academic Epublisher, Brussels, 2014, p. 21 (<https://www.legal-tools.org/doc/82bf10>).

⁹⁶ Anghie and Chimni, 2003, see above note 52, p. 78.

⁹⁷ Kiyani, 2017, see above note 46, p. 940.

the suppression of Third World peoples.⁹⁸ TWAIL critique may target material jurisdiction, procedural framework and case selection. For example, the nexus requirement for crimes against humanity with international armed conflict should be perceived as a way of excluding criminal responsibility for atrocities committed by Western powers against minorities and peoples under colonial domination.⁹⁹ Even though the ICTY “was presented with compelling evidence to the effect that NATO had violated international humanitarian law, it chose not to proceed with any further inquiries, stating dismissively that no inquiry was useful and that nothing would emerge”.¹⁰⁰ Finally, TWAIL scholars take aim at the creation of new law by the ICTY and the ICTR, and appear more in favour of the process undertaken through the ICC which to a larger extent is controlled by States.¹⁰¹

Kiyani has highlighted group-based selectivity, which focuses on differential prosecutions of similarly situated offenders within States and situations. This is not a variation on the theme of “international law is colonialism”, but a claim that critiques the post-colonial State and not just foreign powers or international institutions. Although decolonization and self-determination are essential elements in TWAIL, this approach does not necessarily perceive formal statehood as an unfettered good.¹⁰² Kiyani writes:

The concern is with group-based selectivity, a specific subset of selectivity that may result from either the design of the tribunal, or more likely the exercise of discretionary decision-making in the tribunal. Group-based selectivity turns not on the nature of the conduct of the individual, or the strength of evidence against them, but on the group identity of that person.¹⁰³

Cowell argues that the narrative that the ICC is an imperialist institution is due to a large extent to the provisions of the Rome Statute itself, rather than contingent choices made by court organs. The criticism of the Court as an imperialist organization began with the issuance of the arrest

⁹⁸ Anghie and Chimni, 2003, see above note 52, pp. 74–75.

⁹⁹ *Ibid.*, p. 88.

¹⁰⁰ *Ibid.*, p. 91.

¹⁰¹ *Ibid.*, p. 93.

¹⁰² Kiyani, 2017, see above note 46, pp. 939–941.

¹⁰³ *Ibid.*, p. 948.

warrant against Al-Bashir, then a sitting Head of State. Some leaders who signed up their countries as States Parties to the Rome Statute, for example the former President of the Ivory Coast, Laurent Gbagbo, were initially supportive but turned antagonistic when they became the subject of the investigations. Even though Cowell admits that some of ICC's critics may have cynical political motives, it might be possible that the ICC's legal structure is itself imperialist.¹⁰⁴ Kiyani makes a similar argument and describes this phenomenon as “design selectivity”, that is, the choices made in the establishment of various international criminal tribunals. This may involve material selectivity (the crimes within the material jurisdiction of the international criminal tribunal), procedural selectivity (the rules the procedure), geographical selectivity (restrictions in relation to territorial jurisdiction) and temporal selectivity.¹⁰⁵ One could add personal selectivity as illustrated by the IMT Charter which restricted the Tribunal's jurisdiction to the “major war criminals of the European Axis”¹⁰⁶ or the Rome Statute's partial restriction when jurisdiction is based on the nationality of the accused.¹⁰⁷

But the argument of structure and “design selectivity” arguably also applies to international law in general. Cowell focuses on three provisions and functions of the Rome Statute that are inherently imperialist: the complementarity regime under Article 17, the role of the Security Council under Article 13 and the prosecutorial powers under Article 15.¹⁰⁸ One could add the deferral power under Article 16.

Article 17 is inherently imperialist in the sense that it is premised on the existence and perpetuation of State failure and weakness. It ignores that historical culpability of the Global North for the role of State failure. Article 17 also underscores the weakness of States, they become victims. Cowell perceives the possibility of self-referrals as mitigating Article 17 inherent imperialism because it allows them to act tactically.¹⁰⁹ This is not entirely persuasive. A self-referral requires that a State, at least implicitly, admits that it is weak. However, this does not undermine Cowell's main

¹⁰⁴ Cowell, 2017, see above note 24, p. 668.

¹⁰⁵ Kiyani, 2017, see above note 46, pp. 942–945.

¹⁰⁶ Charter of the International Military Tribunal annexed to the London Agreement, 8 August 1945, Article 1 (<https://www.legal-tools.org/doc/64ffdd>).

¹⁰⁷ ICC Statute, Article 12(2)(b), see above note 54.

¹⁰⁸ Cowell, 2017, see above note 24, p. 670.

¹⁰⁹ *Ibid.*, pp. 675–677.

point that Article 17 establishes a dichotomy between ‘functioning States’ and ‘failed States’.

The power under Article 13(b) to refer situations to the Court institutionalizes the power of the UN Security Council. As it grants the Security Council direct juridical privileges, it also grants exclusive powers to a narrow group of States and as such it is an indicator of inherent imperialism. Article 13(b) also gives the Security Council the power to universalize the jurisdiction of the Court in relation to non-States Parties. As such, it is part of the cosmopolitan project to establish a global order of norms and laws. The effect of Article 13(b) is that it contributes to the ‘double standards’ attack. It allows powerful States to target less powerful States.¹¹⁰

Cowell admits that the inherent colonialism is not as clear in Article 15 as it is in Articles 13(b) and 17.¹¹¹ Practical restraints only permit the investigation and prosecution of a selection of all potential cases. This leads to difficult choices. Some commentators describe this as pragmatic process,¹¹² while Cowell argues that “pragmatism in this context reflects a world of unequal sovereigns and power imbalances” since it puts “a state’s domestic legal system on trial”.¹¹³

14.4. A Nuanced Defence for International Criminal Justice

Robinson offers a liberal defence for international criminal justice against the critique that it is body of law based on Western imperialism. He argues that, at the same time as we embrace the critique that national principles cannot be projected onto criminal law, we must still respect the assumption that law should be based on the moral agency of individuals. This is the basis for the principle of personal culpability.¹¹⁴ Even TWAIL scholars appear to share the basic assumption of Robinson on the moral agency of individuals and their accountability.¹¹⁵ Robinson argues that one needs to

¹¹⁰ *Ibid.*, pp. 679–681.

¹¹¹ *Ibid.*, p. 683.

¹¹² Bådagård and Klamberg, 2017, see above note 62, p. 730.

¹¹³ Cowell, 2017, see above note 24, p. 683

¹¹⁴ Darryl Robinson, “A Cosmopolitan Liberal Account of International Criminal Law”, in *Leiden Journal of International Law*, 2013, vol. 26, no. 1, pp. 129, 132–133; see similar argument made by Klamberg, 2013, see above note 26, p. 500: “To focus on individual responsibility, to separate the culpable from the non-culpable, and thus lessen the collective guilt is arguably an essential part of the rationale of international criminal trials”.

¹¹⁵ Anghie and Chimni, 2003, see above note 52, p. 89.

nuance the liberal approach to international criminal justice. Instead of adopting a parochial liberal approach “that simply replicates familiar principles from one’s legal system, or even from several legal systems”, he argues that a cosmopolitan liberal approach “searches for commonalities between cultures but it also recognizes and respects differences, thus embracing pluralism and the building of a *modus vivendi*”.¹¹⁶

Robinson argues that certain doctrines within international criminal law are particularly vulnerable to critiques based on communitarianism: in particular some forms of political liberalism and classical contractarian theories.¹¹⁷ The same argument can be made against the foundation of international law which is premised on the sovereign equality of States, that consent can bind States and that all States through their membership in the UN have accepted the existing world order. Robinson does not deny the affiliation between ‘liberalism’ and Western thought with the international criminal justice project; he questions whether basic principles such as fair warning or personal culpability are truly only values of the West. Empirical, anthropological studies may test and challenge the critique that certain basic assumptions underlying international criminal justice, such as the idea of individual responsibility, are ‘Western’ constructs.¹¹⁸

One line of critique is that Western principles are at fault when they impose individual criminal responsibility in relation to collective activities. Whereas ordinary crimes constitute deviance from social expectations, international criminal law is faced with ‘inverted morality’ where there is a strong social pressure to participate in the crimes, and instead it is abstention from crime that is deviant.¹¹⁹

The cosmopolitan ambition of the ICC, the pursuit of justice and the promotion of universal aims may be triggers for anti-imperialist critique. This line of critique tends to ignore that the ICC by itself is powerless without any enforcement powers of its own. Another potential explanation would be the relative exclusion of States from the Global South in the establishment of the Court. However, not all States from the Global South that are marginalized engage in anti-imperialist attacks against the ICC.¹²⁰

¹¹⁶ Robinson, 2013, see above note 114, p. 137.

¹¹⁷ *Ibid.*, p. 141.

¹¹⁸ *Ibid.*, pp. 143-144; Kreß, 2014, see above note 95, p. 24.

¹¹⁹ Robinson, 2013, see above note 114, pp. 128–129, 134.

¹²⁰ Cowell, 2017, see above note 24, p. 669.

The enforcement handicap of international criminal courts is overcome once the accused is in the dock.¹²¹

Nouwen argues that where an allegation of the ICC's selectivity is barely disguised apologetic rhetoric by those under judicial threat and their friends in power, the scholarship of international criminal law should deconstruct such rhetoric rather than repeat it. Even though there is legitimate critique against the ICC Prosecutor's selection of situations and cases, maybe the critique of 'judicial neo-colonialism' is a way of some African leaders to escape responsibility for their actions.¹²² Yet, the recent decision not to authorize an investigation in the *Afghanistan* situation could prove the critics right that the ICC replicates existing power asymmetries among States.

The alternative to combatting atrocities with international institutions is not necessarily anarchy and impunity. Domestic investigations and prosecutions have and will arguably continue to play a major role in repressing international crimes.

¹²¹ Sarah Nouwen, "Justifying Justice", in James Crawford and Martti Koskeniemi (eds.), *The Cambridge companion to international law*, Cambridge University Press, Cambridge, 2015, p. 329.

¹²² Kreß, 2014, see above note 95, p. 22.

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Power in International Criminal Justice

Morten Bergsmo, Mark Klamberg, Kjersti Lohne and Christopher B. Mahony (eds.)

This book comprehensively explores the role and manifestations of power in international criminal justice. Twenty chapters discuss this topic in four main parts: power in international criminal justice institutions (Part I), representational power in international criminal justice (Part II), state power and autonomy in international criminal justice (Part III), and non-state power and external agents in international criminal justice (Part IV). The book invites the crystallisation of a sociology of international criminal justice, and argues that among its focuses should be the wielding of power within and over international criminal justice institutions, just as this is a feature of sociology of law within several countries.

The contributors to this anthology are Marina Aksenova, Mayesha Alam, Helena Anne Anolak, David Baragwanath, Morten Bergsmo, Mikkel Jarle Christensen, Marieke de Hoon, Djordje Djordjević, Gregory S. Gordon, Jacopo Governa, Alexander Heinze, Emma Irving, Mark Klamberg, Sarah-Jane Koulen, Kjersti Lohne, Christopher B. Mahony, Jolana Makraiová, Jackson Nyamuya Maogoto, Benjamin Adesire Mugisho, Tosin Osasona, Sara Paiusco, Barrie Sander, Joachim J. Savelsberg, Jacob Sprang, Chris Tenove and Sergey Vasiliev. The chapters draw on papers presented at a conference held in Florence in October 2017 co-organized by the Centre for International Law Research and Policy (CILRAP) and the International Nuremberg Principles Academy.

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candidate for prosecutor at the end of their term.

252. The Experts recognise the difficulty of applying a new tenure system to staff already in the Court, so they suggest that the system be applied only to new recruitments for P-5 and Director-level positions as these come vacant. This would not preclude the Court from encouraging senior staff who have served in the Court for a long time to consider taking early retirement, including through offering financial packages.
253. Notwithstanding that this would not apply to existing staff, there is likely to be considerable resistance to the introduction of tenure in many parts of the Court (even if there is also some enthusiasm for this approach in other quarters). But it is

the TOAEP this is a measure essential to addressing effectively
a knesses of the Court. Not least it would bring fresh
appearance, which will as more dynamism into the Court across all its
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