

TABLE OF CONTENTS

Preface by the Co-Editors i

PART I:
POWER IN INTERNATIONAL
CRIMINAL JUSTICE INSTITUTIONS

1. Unmasking Power in International Criminal Justice: Invisible College v. Visible Colleagues 1
By Morten Bergsmo

1.1. Holding Up a Mirror..... 1
1.2. The High Officials of International Criminal Jurisdictions 5
1.3. States and Their Representatives 10
1.4. Unmasking Power in International Criminal Justice 21
1.5. Social Network Analysis and International Criminal Justice 29
1.6. Invisible College, Visible Colleagues and the Golden Calf..... 40

2. Towards a Sociology of International Criminal Justice 47
By Kjersti Lohne

2.1. Introduction 47
2.2. The Need for a Sociology of International Criminal Justice 50
2.3. Conceptual Orientations in the Sociology of Law..... 56
2.3.1. Internal – External..... 57
2.3.2. Consensus – Conflict..... 58
2.3.3. Agency – Structure..... 60
2.3.4. Micro – Macro..... 61
2.4. Methodologies and Research Methods..... 62
2.5. The Sociology of International Criminal Justice 63
2.6. The Contributions of This Volume by Themes..... 67
2.6.1. Part I: Power in International Criminal Justice Institutions..... 67
2.6.2. Part II: Representational Power in International Criminal Justice..... 69
2.6.3. Part III: State Power and Autonomy in International Criminal Justice..... 72

2.6.4.	Part IV: Non-State Power and External Agents in International Criminal Justice	74
2.7.	Conclusion	78
3.	On the Early Release of the ‘Rwandan Goebbels’: American Free Speech Exceptionalism and the Ghost of the Nuremberg–Tokyo Commutations	79
	<i>By Gregory S. Gordon</i>	
3.1.	Introduction	79
3.2.	The Case of RTLM Founder Ferdinand Nahimana	81
3.2.1.	Background: Lead-Up to the Rwandan Genocide.....	81
3.2.2.	The Rise of Ferdinand Nahimana in Pre-Genocide Rwanda.....	82
3.2.3.	Nahimana and the Founding of RTLM	87
3.2.4.	RTLM During the Genocide and Nahimana’s Role	91
3.2.5.	Nahimana’s ICTR Arrest and Conviction	95
3.3.	Judge Theodor Meron and the Media Case	99
3.3.1.	Background: From Holocaust Survivor to International Judge	99
3.3.2.	The Media Case Appeals Chamber Judgment.....	102
3.3.3.	Judge Meron’s Partial Dissent and American Free Speech Exceptionalism	107
3.4.	Imprisonment, Controversy and An Early Release.....	117
3.4.1.	A Prison Transfer and Two High-Profile ICTY Acquittals	117
3.4.2.	Judge Meron and the WikiLeaks Controversy: Allegations of Being a US “Stooge”	125
3.4.3.	The US Nominates Judge Meron to the MICT and He Grants Nahimana Early Release	129
3.5.	The Ghost of the Nuremberg–Tokyo Commutations	144
3.5.1.	The Nuremberg Commutations	144
3.5.2.	The Tokyo Commutations	147
3.5.3.	The Nuremberg–Tokyo Commutations and Nahimana’s Early Release.....	150
3.6.	Conclusion	151
4.	Bend It Like Bentham: The Ambivalent ‘Civil Law’ vs. ‘Common Law’ Dichotomy Within International Criminal Adjudication	155
	<i>By Alexander Heinze</i>	
4.1.	Introduction	158
4.2.	Modelling the International Criminal Process	163

4.2.1.	‘Civil Law’ and ‘Common Law’: The Division into Legal Families.....	165
4.2.2.	‘Adversarial’ and ‘Inquisitorial’	172
4.3.	Misleading Taxonomies.....	193
4.3.1.	Domestic (Criminal) Procedure	194
4.3.2.	In International (Criminal) Procedure	202
4.4.	Procedural Modelling as an Interpretive Tool	208
4.4.1.	Some Brief General Remarks about Interpretation at the ICC	209
4.4.2.	Contextual Interpretation	212
4.4.3.	Contextual Interpretation at the ICC	214
4.4.4.	Modelling the Procedural Regime at the ICC	219
4.5.	Summary	239
4.5.1.	The Inquisitorial–Adversarial Dichotomy and Damaška’s Concept.....	242
4.5.2.	Predictability and Weberian Ideal-Types.....	244
4.5.3.	Finding or Justification	247
4.6.	Conclusion.....	252
5.	The Poles of Power in the Field of International Criminal Justice	257
	<i>By Mikkel Jarle Christensen</i>	
5.1.	Introduction	257
5.2.	Perspectives on Power in International Criminal Justice	259
5.3.	Professional Poles of Power in the Field of International Criminal Justice	265
5.3.1.	The Formalist and Activist Poles	266
5.3.2.	The International and Local Poles.....	270
5.3.3.	The Society and Science Poles.....	272
5.4.	Field Effects Across Different Power Poles	273
5.5.	Concluding Remarks	276

PART II:
REPRESENTATIONAL POWER IN
INTERNATIONAL CRIMINAL JUSTICE

6.	The Representational Power of International Criminal Courts.....	281
	<i>By Joachim J. Savelsberg</i>	
6.1.	Introduction	283
6.2.	Effectiveness of International Criminal Justice: Towards a Theory of Representational Power	284
6.3.	An Empirical Study: ICC Interventions in the Case of Darfur	290

6.3.1.	Methods and Data.....	291
6.3.2.	Finding 1: International Criminal Justice, Competitors, and Diverging Representations of Mass Violence	295
6.3.3.	Findings 2: Prevailing Representation and the Representational Power of International Criminal Justice	307
6.4.	Cautionary Notes: Constraints of Law’s Representational Power	315
6.4.1.	Internal Constraints and Institutional Logic	315
6.4.2.	Political Power and Substantive Rationales	316
6.4.3.	Dependency on Mass Media	319
6.5.	Conclusions	321
7.	The Anti-Impunity Mindset	325
	<i>By Barrie Sander</i>	
7.1.	Introduction	325
7.2.	The Anti-Impunity Mindset	327
7.3.	The <i>Reach</i> of the Anti-Impunity Mindset.....	334
7.3.1.	South Africa’s Truth and Reconciliation Commission.....	334
7.3.2.	Rwanda’s <i>Gacaca</i> Process	336
7.3.3.	US Alien Tort Statute Litigation.....	338
7.4.	The <i>Power</i> of the Anti-Impunity Mindset	341
7.4.1.	Underwriting the Balance of Power Between and Within States	342
7.4.2.	A Narrow Conception of Responsibility	344
7.4.3.	Occluding Structural Violence	347
7.5.	The <i>Limits</i> of the Anti-Impunity Mindset.....	350
7.6.	Conclusion.....	354
8.	The Power of Affective Aesthetics in International Criminal Justice.....	357
	<i>By Sarah-Jane Koulen</i>	
8.1.	‘Impunity’: A Private Showing and Reception	361
8.2.	Justice is Blind.....	365
8.3.	‘Through the Looking Glass’.....	367
8.4.	‘Warlord, Victim, Justice Practitioner’	370
8.5.	Making Iconic.....	372
8.6.	The ‘Spirit of Rome’ and the Affective Turn.....	375
8.7.	‘The Spirit of the Thing’	379

9.	Transformative Power of the International Criminal Tribunal for the Former Yugoslavia	381
	<i>By Marina Aksenova</i>	
9.1.	Introduction	381
9.2.	The Theory of Symbolic Ritual and the Importance of Rebounding Violence	385
9.3.	The ICTY: Transformational Power of a Legal Ritual	387
9.3.1.	Rebounding Violence and the Creation of the ICTY ...	388
9.3.2.	Rebounding Violence and the Operation of the ICTY	390
9.3.3.	Transformative Power by Virtue of Legal Rhetoric at the ICTY.....	393
9.4.	Possible Objections	398
9.5.	Conclusion.....	400

PART III:
STATE POWER AND AUTONOMY IN
INTERNATIONAL CRIMINAL JUSTICE

10.	International Law-Making on Terrorism: Structural and Other Powers of Resistance	405
	<i>By David Baragwanath</i>	
10.1.	Introduction	405
10.2.	The Process of International Law-Making and the Actual and Potential Participants	411
10.2.1.	Sources of International Law	412
10.2.2.	Law-Making Power of States, United Nations Institutions and Others	416
10.2.3.	Practicality of Greater Recourse to the ICJ?	427
10.3.	Current Problems in International Criminal Law and the Particular Case of Terrorism.....	437
10.4.	Reaching the Law Beyond Terrorism	442
10.5.	Conclusion.....	442
11.	Negotiating the Crime of Aggression: Between Legal Autonomy and State Power	445
	<i>By Marieke de Hoon</i>	
11.1.	Introduction	445
11.2.	Creating a United Nations Against Aggression	446
11.3.	Prosecuting World War II Aggressors in Nuremberg and Tokyo.....	448

11.4.	Defining Aggression in a Polarized World: Negotiating the 1974 Definition of Aggression.....	454
11.4.1.	Special Committee after Special Committee.....	455
11.4.2.	Producing Consensus on Whether to Define Aggression.....	457
11.4.3.	Agreeing to Disagree and the Role of the Security Council.....	460
11.4.4.	The Legal Consequences of Committing Aggression.....	463
11.4.5.	Consensus Reached.....	465
11.5.	Constructing the Crime of Aggression Within the Rome Statute.....	466
11.5.1.	From 1974 to 2018: Producing “An Emerging Consensus”.....	466
11.5.2.	The ‘Manifest Violation’ Criterion: Constructive Ambiguity 2.0.....	469
11.5.3.	Opting In and Out of Criminal Law’s Reach.....	474
11.6.	Conclusion: Power versus Legal Autonomy in the Aggression Negotiations.....	478
12.	Judicial Governance Entities as Power-Holders in International Criminal Justice: A Plea for a Socio-Legal Enquiry.....	483
	<i>By Sergey Vasiliev</i>	
12.1.	Introduction.....	484
12.2.	International Judicial Governance as Power.....	489
12.2.1.	Bringing <i>Injugovins</i> in the Picture.....	489
12.2.2.	Value of the Socio-Legal Approach.....	496
12.3.	Governance Arrangements in International Criminal Justice: An Overview.....	501
12.3.1.	Nuremberg International Military Tribunal.....	501
12.3.2.	UN <i>Ad Hoc</i> Tribunals.....	507
12.3.3.	International Criminal Court.....	515
12.3.4.	UN-assisted Hybrid and Special Tribunals.....	529
12.3.5.	Taking Stock: Main Governance Models.....	533
12.4.	Power and Governance at the ICC: Questioning the ‘Diplomatic’ Model.....	540
12.4.1.	Independence v. Governance: A (Pseudo-)Dilemma....	540
12.4.2.	Gaps: Acting Too Little, Too Late.....	542
12.4.3.	Excesses: Independence Threatened.....	546
12.4.4.	Optimising ICC Scheme.....	557
12.5.	Conclusion.....	564

13. Is the European Union an Unexpected Guest at the International Criminal Court?	569
<i>By Jacopo Governa and Sara Paiusco</i>	
13.1. Introduction	569
13.2. The European Union and Criminal Law.....	571
13.3. The European Union and International Criminal Justice	575
13.4. The Role of Eurojust	578
13.5. The European Union Common Foreign and Security Policy	582
13.6. The ‘International Criminal Court Clauses’	584
13.7. The EU–ICC Agreement	586
13.8. The European Union Policy Framework to Transitional Justice (Council Conclusions)	588
13.9. The European Union Missions	591
13.9.1. Somalia.....	592
13.9.2. Niger.....	593
13.9.3. Bosnia and Herzegovina	594
13.9.4. Central African Republic.....	597
13.9.5. Ukraine.....	598
13.9.6. Palestine	600
13.9.7. Georgia.....	601
13.9.8. Libya	602
13.9.9. Mali	604
13.9.10. Gabon.....	607
13.10. The European Union Rule of Law Mission in Kosovo, the Specialist Chambers and the Special Office of the Prosecutor for Kosovo.....	609
13.11. Conclusions	617
14. Rebels, the Vanquished, Rogue States and Scapegoats in the Crosshairs: Hegemony in International Criminal Justice	623
<i>By Mark Klamberg</i>	
14.1. Introduction	623
14.2. Structure versus Agency in the International Criminal Justice System	628
14.2.1. Structural Constraints.....	632
14.2.2. Room for Agency	634
14.3. International Criminal Justice as a Regime	637
14.3.1. Competing Views on International Regimes and Institutions.....	638
14.3.2. Hegemony in International Law.....	639
14.3.3. Hegemony in International Criminal Law	641
14.4. A Nuanced Defence for International Criminal Justice.....	644

PART IV:
NON-STATE POWER AND EXTERNAL AGENTS IN
INTERNATIONAL CRIMINAL JUSTICE

15. Development and National Prosecutions: Addressing Power and Exclusion for Sustainable Peace and Development.....	649
<i>By Djordje Djordjević and Christopher B. Mahony</i>	
15.1. Complementarity and Entry Points for Development.....	652
15.2. Complementarity, Inclusion and Sustaining Peace.....	659
15.2.1. The Complementary Nature of Justice and Development	659
15.3. Criminal Justice, Political Ramifications and Public Reckoning with the Past	662
15.3.1. Impartiality and Proportionate Prosecution Inclusive of All Conflict Parties	662
15.4. Complementarity and Strengthening the Rule of Law	668
15.4.1. Bosnia and Herzegovina, Croatia, Kosovo and Serbia.....	670
15.4.2. Guatemala.....	676
15.4.3. The Democratic Republic of the Congo.....	680
15.5. Conclusions	682
16. The Power of Narratives: The African Union’s Bid to Develop an Alternative International Criminal Law Narrative.....	687
<i>By Jacob Sprang, Benjamin Adesire Mugisho, Jackson Nyamuya Maogoto and Helena Anne Anolak</i>	
16.1. Introduction	687
16.2. The Dawn of a New Error?.....	690
16.2.1. The Indictment of African Heads of State.....	690
16.3. Grapes of Legal Wrath: The North-South Divorce; Contestation; Whose Complementarity, Whose Narrative	698
16.4. If Not Complementarity, Then Co-ordination?.....	700
16.5. Another Arena for Political Manipulation?	701
16.6. Complementarity or No Complementarity, the Court is Coming	705
16.6.1. An Opportunity to Reconcile?.....	706
16.7. Conclusion.....	709

17. Agency, Authority, and Autonomy: The Role and Impact of Interactions with Transnational Civil Society on the International Criminal Court’s Operations	713
<i>By Mayesha Alam</i>	
17.1. Introduction	713
17.1.1. Why is This Important?	715
17.1.2. Methodology	717
17.2. Power and Transnational Civil Society: Clarifying Concepts to Set the Scope	718
17.3. Agency of Transnational Civil Society in Its Interactions with the ICC	723
17.4. Authority of Transnational Civil Society in Its Interactions with the ICC	726
17.4.1. Moral Authority	727
17.4.2. Credible Authority	728
17.4.3. Expert Authority	728
17.4.4. Delegated Authority	729
17.5. Autonomy of Transnational Civil Society in Its Interactions with the ICC	732
17.5.1. Monitoring the Court	732
17.5.2. Criticizing the Court	735
17.5.3. Funding	737
17.6. Conclusion	740
18. International Criminal Justice and the Empowerment or Disempowerment of Victims	743
<i>By Chris Tenove</i>	
18.1. Victim Powerlessness and Disempowerment: Three Critiques	746
18.1.1. Victims’ Vulnerability and Risks of Harm	747
18.1.2. Victims’ Powerlessness in International Criminal Justice Processes and Risks of Instrumentalization	748
18.1.3. The Displacement of Survivor’s Agency and the Cage of Victimhood	749
18.2. Context and Research Methods	751
18.2.1. Country Cases	752
18.3. Survivors’ Views of the International Criminal Court and Justice for Victims	755
18.3.1. The Significance of Victim Status	755
18.3.2. Interactions with the International Criminal Court	756
18.3.3. Multiple Forms of Justice for Victims	759
18.4. Selective, Channelled and Contextual Effects on Agency	768

18.4.1. Selective	768
18.4.2. Channelled.....	771
18.4.3. Context-Dependent.....	773
18.5. Conclusion.....	776
19. Capture, Tweet, Repeat: Social Media and Power in International Criminal Justice	779
<i>By Emma Irving and Jolana Makraiová</i>	
19.1. Introduction	779
19.2. Social Media in Global Politics and Conflict	782
19.2.1. An Introduction to Social Media.....	783
19.2.2. Social Media in Global Politics.....	784
19.2.3. Social Media in Conflict	787
19.3. Social Media in the Practice of the International Criminal Court.....	792
19.3.1. Social Media and International Criminal Justice: Civil Society Organisations.....	793
19.3.2. Social Media and International Criminal Justice: The International Criminal Court.....	800
19.4. Social Media and International Criminal Justice: Power Dynamics.....	807
19.5. Conclusion.....	814
20. The Role of the International Criminal Court System in Modulating Political Behaviour in Africa: The Nigerian Example.....	817
<i>By Tosin Osasona</i>	
20.1. Introduction	818
20.2. ICC Prosecutorial Policy and Africa.....	819
20.3. The ICC and Electoral Violence in Africa	822
20.4. Nigeria and Electoral Violence	826
20.5. The 2015 Presidential Election in Nigeria and the ICC.....	830
20.6. OTP Prosecutorial Policy and Regional Governance Stakeholders Response	834
20.7. Conclusion.....	839
<i>Index</i>	841
<i>TOAEP Team</i>	861
<i>Other Volumes in the Publication Series</i>	863