Crisis and International Law

A Third World Approaches to International Law Perspective

B.S. Chimni

The crisis consists precisely in the fact that the old is dying and the new cannot be born; in this interregnum a great variety of morbid symptoms appear.¹

1 Introduction

This essay offers some reflections on the theme of ‘crisis and international law’ from a third world approaches to international law (TWAIL) perspective. It departs from the standpoint of mainstream international law scholarship (MILS) which uses the term “crisis” primarily for events or episodes that expose gaps and inadequacies in particular domains of international law. In so far as TWAIL is concerned the crisis of modern international law is originary, deep and enduring and can be traced to its roots in colonialism. Indeed, in as much as the phenomenon of imperialism has played a central role in the evolution and development of modern international law the narrative of crisis has been written into the very being of contemporary international law. The different perspectives on crisis is also at the root of an epistemic crisis which has seen the emergence of several critical approaches to international law (CAIL). Given the different standpoints on “crisis” the first section of this essay is devoted to offering a typology of crisis and underscoring the significance of framing a crisis. The next section discusses the impending structural crisis of international law and institutions in the post pandemic era and its consequences for addressing the growing poverty and alienation of the peoples of the Global South and the global ecological crisis. The section also touches on the role of

1 Antonio Gramsci, *Selections from the Prison Notebooks* (International Publishers 1971) 276.

resistance at times of crisis in bringing about change in the international legal order. The essay concludes with some final remarks.

2 A Typology of Crisis

In order to understand different kinds of crisis that have characterized modern international law it is useful to make a distinction between material and epistemic crisis, the former a reference to objective real world developments and the latter to the sphere of knowledge production pertaining to the condition of international law.

2.1 *Material Crisis*

In so far as material crisis of international law is concerned it is possible to speak of at least four kinds of crisis: episodic, regional, structural, and originary crisis. An *episodic* crisis is a result of a serious violation of international law (e.g., Russian occupation of Crimea or China's rejection of South China Sea arbitral award) or a flawed response to particular developments (e.g., to migration and refugee flows to Europe). A *regional* crisis occurs when an entire area of international law such as international investment law (IIL) comes to be contested. IIL is in crisis today because of the sustained and effective questioning of its normative basis and the contested outcomes of inter-State dispute settlement (ISDS) mechanisms. A *structural* crisis indicates a simultaneous crisis in many fields of international law or what may be called a generalized crisis. For instance, the two world wars, and the accompanying failure of the "Peace through Law" project, caused a structural or generalized crisis in international law.² A structural crisis in the international legal system was also brought about by the October Revolution as there came to exist two radically different understandings of the evolution, doctrines, rules and the role of

2 The Preamble to the Charter of United Nations, which states the reasons for its adoption, testifies to the crises of international law and institutions in the first half of the 20th century: Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16, preamble:

- to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and
- to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and
- to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and
- to promote social progress and better standards of life in larger freedom.

international law. A contemporary instance of a structural crisis is that caused by climate change and COVID-19 pandemic which simultaneously impact international health law, international economic and trade law, and international human rights law. An *originary* crisis relates to conditions that are foundational to modern international law. It refers both to the anarchic character of international society and to the inextricable relationship of modern international law with imperialism.

Every crisis can act as a catalyst for change in international law with the scope and extent of changes depending on the type of crisis. The word “crisis” is generally confined by MILS to episodic and regional crisis, which are seen as an opportunity for the positive development of international law; the crises are viewed as moments that lends dynamism to the legal order. In order to deal with episodic or regional crisis MILS identifies and recommends an “arsenal of devices”.³ These include techniques such as identifying gaps, weighing and balancing interests, advancing innovative interpretations, proposing new concepts and rules, and promoting institutionalization. These devices do not address the relationship of the crises with deep structures viz., global capitalism, global patriarchy and global racism. Therefore, the proposed responses may further the interests of the very social forces that have caused the crisis. In the event there could even be, as Crawford notes, ‘a reversal of rules’.⁴ This is what is happening in the instance of ongoing deglobalization. However, generally speaking, MILS is sanguine about the role of international law in an episodic or regional crisis. In its view, such crises lead to progressive efforts to fill normative and institutional gaps.

A structural crisis can lead to more far reaching changes. Over the past centuries each structural crisis has been the basis for a range of normative and institutional developments with the aim of stabilizing and legitimizing the international legal order. The rapid development of international human rights law (IHRL) in the aftermath of the second world war, or international environmental law (IENL) in the last quarter of the last century may be cited as evidence in this regard. Even in the instance of structural crisis MILS does not tend to draw attention to its links with deep structures. In contrast TWAIL points out that the two world wars can be traced to the workings of global capitalism, more specifically to inter-imperialist competition. The ensuing institutionalization of international life in the form of League of Nations and

3 James Crawford, ‘Reflections on Crises and International Law’ in George Ulrich, Ineta Ziemele (eds), *How International Law Works in Times of Crisis* (OUP 2019) 10, 17.

4 *ibid* 15.

the United Nations was meant to prevent these in the future, albeit without undermining the imperialist project.⁵

Turning to originary crises MILS recognizes one dimension that flows from the anarchic nature of international society. For instance, Crawford writes that crises occur in international law because of 'the absence of any constitutional order, other than constitutional order of States'.⁶ As a result national interest and nationalism trump international law (Morgenthau's "iron law of politics that international law gives way to national interest").⁷ This form of originary crisis explains why the issue of compliance is seen as central to the integrity and effectiveness of international law.

But MILS does not take cognizance of the originary crisis flowing from the crisis of capitalist accumulation necessitating its universalization which has historically translated into imperialism assuming different forms in different eras. In the TWAIL view the phases of development of international law and institutions reflect the different phases of imperialism from the 17th century to the present. In other words, the story of crisis in international law is indissolubly bound to the history of imperialism.⁸ It may only be added that imperialism is not simply about the exploitation and oppression of weak nations but also the rapacious exploitation of Nature with which capitalism is at war.

The TWAIL understanding of crisis is thus rooted in *deep history and deep structures*. In its view the crisis of and in modern international law will be with us as long as the phenomenon of imperialism is not addressed. The combination of anarchic nature of international society and imperialism greatly diminishes the possibility of bringing about change in the international legal system to meet the concerns of weak nations. This does not mean that international law merely advances the imperialist project. It manifests in the postcolonial era a degree of relative independence from deep structures and can tolerate reforms at times of crisis depending on the correlation of global social and political forces.

2.2 *Epistemic Crisis*

A material crisis can concurrently manifest an epistemic crisis as the two domains are intimately connected. But the dominance of positivist method in international law scholarship since the 19th century, averse as it is to

5 B.S. Chimni, 'Peace through Law: Lessons from 1914' (2015) 3 *Lond Rev Int Law* 245.

6 Crawford (n 3) 14.

7 B.S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (2nd edn, CUP 2017) ch 2.

8 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005).

inter-disciplinary analysis, has impeded the emergence of alternative legal epistemologies with distinct understanding of crisis. This has had serious implications for the progressive development of international law as scholarship plays a crucial role in both diagnosing the nature of the crisis and proposing, shaping and embedding suitable responses. Indeed, the writings of eminent scholars are treated as a subsidiary source of international law and in the absence of a global legislature help fill at times of crisis normative or institutional gaps in the international legal order.

It was the October Revolution which first introduced a rupture in the epistemic domain by speaking of international law as class law i.e., underscoring the role of classes, as against merely States, in the making of international law. The breach caused by the October revolution called forth, in the wake of the Cold War, its liberal counterpart in the form of the New Haven Approach to International Law (NHAIL) which was also critical of the positivist approach. But the latter rather than take an independent view of material and epistemological developments became too caught up in the Cold War. It therefore ended up collating social science materials to justify US foreign policies. What is more it did not seriously engage with the concerns and interests of decolonized nations.⁹

But in the post-Cold War era there have emerged, in response to the epistemic crises caused by the end of “actually existing socialism” and the absence of MILS focus on deep structures, a range of CAIL with different methodological standpoints (viz., deconstruction, feminism, historical materialism). These approaches are elaborated using varying categories (class, gender, race, caste, indigenous peoples) with implications for both identifying a crisis in international law and how it is to be addressed. But as Alvin Gouldner wrote in the *Coming Crisis of Western Sociology* the “central implication” of an epistemic crisis is not that mainstream scholarship “will die”.¹⁰ It only ‘points to the possibility of change that may be more permanent, producing a basic metamorphosis in the total character ...’¹¹ His expectation was that ‘a part of sociology will become increasingly radicalized ... [and] will grow in influence, particularly among the younger, rising generation.’¹² This is an incremental process for as Gouldner pointed out with respect to western sociology ‘... those who supply the greatest resources for the institutional development of sociology are

9 For a detailed critique of the New Haven approach see Chimni (n 7) ch 3.

10 Alvin Gouldner, *The Coming Crisis of Western Sociology* (Basic Books, 1970) 341.

11 ibid 341.

12 Gouldner (n 10) 437.

precisely those who most distort its quest for knowledge'.¹³ His observations are apposite to the present state of the discipline of international law.

Meanwhile, CAIL have begun to question the mainstream narrative of crises. In an important essay on the subject Hilary Charlesworth criticizes MILS for its episodic approach to crisis. She begins by pointing out that while for MILS 'crises are not ... the only catalyst for the development of international law [...] they dominate the imagination of international lawyers'.¹⁴ Further, in approaching a crisis there is either the lack of acknowledgment that the facts assumed 'may be inaccurate or partial', or the absence of recognition of the need to build 'on past scholarship', and above all 'concentrate(s) on a single event or series of events ... to miss the larger picture'.¹⁵ She goes on to observe that '... international lawyers tend to hone in on isolated aspects of selected crises' which '... promotes a narrow agenda for international law'.¹⁶ Charlesworth concludes that in this way 'international law steers clear of analysis of longer-term trends and structural problems'.¹⁷ At this point she draws on the feminist standpoint and points out that:

One major silence is the position of women in the representation of crises. The players in international law crises are almost exclusively male. Men are the protagonists, men are at the negotiating table, men are making threats, retaliating, intervening. The lives of women are considered part of a crisis only when they are harmed in a way that is seen to demean the whole of their social group.¹⁸

She rightly concludes that 'forms of systemic violence, or structural discrimination against women, do not constitute a crisis for international lawyers'.¹⁹ With the result that '... international law becomes simply a source of justification for the status quo'.²⁰

But while Charlesworth is entirely right about the neglect of the "big picture" its ambit cannot be confined to the position of women. While at one point Charlesworth does speak of "non-elite groups" these are not identified

13 Gouldner (n 10) 498.

14 Hilary Charlesworth, 'International Law: A Discipline of Crisis' (2002) 65 MLR 377, 382.

15 *ibid* 384.

16 Charlesworth (n 14) 385–386.

17 Charlesworth (n 14) 389.

18 Charlesworth (n 14) 389.

19 Charlesworth (n 14) 389.

20 Charlesworth (n 14) 391.

or their concerns articulated.²¹ This omission flows from a mainstream liberal rendering of feminist international law scholarship (MFILS) with the central objective of promoting the equality of sexes.²² A TWAIL perspective would instead recommend a *class centred intersectional analyses* as it is more productive in pointing to the limits of the MILS approach to crisis. The intersectional analysis has to be explored along two axes: the history of global capitalism and imperialism on the one hand and the history of class, gender, and race on the other.

2.3 *More on Framing a Crisis*

It has been seen that the manner in which a crisis is framed often determines the nature of response. In this regard Bob Jessop helpfully suggests that a distinction be made 'between crises in a given social configuration and crises of that configuration. Crises 'in' occur within the parameters of a given set of natural and social arrangements'.²³ If for instance a structural crisis is framed as an episodic crisis it may divert attention from a deeper crisis, pre-empting a more effective response. In other words, '... crises are complex moments of indeterminacy' and the course of action taken on the basis of particular understandings 'can make a major difference to future developments'.²⁴

If the interpretation of a crisis by dominant social forces, States, and scholarship is accepted it can lead to troubling consequences. Thus, for example, the episodic crisis caused by September 11 terror attack was depicted as a structural crisis which legitimized a discourse of national security that undermined democracy and human rights the world over. To be sure, the scourge of terrorism has to be fought, calling for an effective response from States. But the portrayal of terrorism as a central global issue has been used to diminish the substance and significance of the most basic rights. The COVID-19 pandemic, certainly a structural crisis, has been framed in a manner that instead of the focus being on health infrastructure or health workers or the welfare of those who have been devastated by the consequences of lockdowns the stress is on the control of the everyday life of citizens, raising concern that States have used the pandemic to avoid observing human rights obligations.

21 Charlesworth (n 14) 391.

22 For a detailed critique see Chimni (n 7) ch 6.

23 Bob Jessop, 'Narratives of Crisis and Crisis Response: Perspectives from North and South' in Peter Utting, Shahra Razavi, and Rebecca Varghese Buchholz (eds), *The Global Crisis and Transformative Change* (Palgrave Macmillan 2012) 3.

24 *ibid* 2, 3.

Further, despite impacting different fields of international law such as IHL, IIL, and ITL, the COVID-19 pandemic is not viewed by the MILS as a structural crisis in the international legal order. IHL is in crisis as the International Health Regulations, 2005 do not allow a timely and successful response to COVID-19. IIL is in crisis because foreign investors find the value of their investment and assets devalued, and host nations deprived of due benefit, without adequate remedies in sight. ITL is in crisis as WTO has been unable to effectively respond to the need of poor nations for timely access to the vaccine. The pandemic also has drawn attention to the inadequacies in the doctrines of international law. For instance, there is no easy answer to the question whether the rules of State responsibility cover the case of China omitting to inform the international community in time about COVID-19 or the case of vaccine nationalism. In short, the pandemic has exposed a structural crisis in international law. By treating it as an episodic or regional crisis MILS has avoided addressing its deep roots in the extant world order. This is a point that critics are making; that the pandemic has deepened the crisis of neoliberal capitalism caused by the 2008 financial crisis and unless structural reforms are undertaken it will not be possible to address the impending post pandemic crisis.²⁵

3 International Law and the Post Pandemic Era

3.1 *Deepening Crisis of Poverty*

In his Nelson Mandela lecture in July 2020 the UN Secretary General (UNSG) noted that the world was facing 'the deepest global recession since World War II, and the broadest collapse in incomes since 1870'.²⁶ Already, as he went on to observe, 'inequality defines our time ... The 26 richest people in the world hold as much wealth as half the global population'. Indeed, 'between 1980 and 2016, the world's richest 1 per cent captured 27 per cent of the total cumulative growth in income'. He traced this outcome among other things to the fact that 'the legacy of colonialism still reverberates'. He gave the example of the

25 Monty Neill, 'COVID-19, Capitalist Crises, Class resistance' (*Counterpunch*, 12 June 2020) <<https://www.counterpunch.org/2020/06/12/covid-19-capitalist-crises-class-resistance/>> accessed 6 July 2020.

26 Antonio Guterres, 'Tackling the Inequality Pandemic: A New Social Contract for a New Era' (United Nations Secretary-General's Nelson Mandela Lecture, 18 July 2020) <<https://www.un.org/sg/en/content/sg/statement/2020-07-18/secretary-generals-nelson-mandela-lecture-%E2%80%99Tackling-the-inequality-pandemic-new-social-contract-for-new-era%E2%80%9D-delivered>> accessed 25 July 2020.

global trading system pointing out that ‘economies that were colonized are at greater risk of getting locked into the production of raw materials and low-tech goods – a new form of colonialism’. Matters were compounded by ‘another great source of inequality in our world: millennia of patriarchy’ and continuing racial inequalities. The problems of climate change and digital inequalities did not escape him. The pandemic was only going to exacerbate these negative trends. In fact ‘entire regions that were making progress on eradicating poverty and narrowing inequality’ have already been ‘set back years, in a matter of months’. The future looks dark for the poor as the spectre of unemployment and hunger begins to haunt them. In the view of UNSG what we need is ‘a New Social Contract and a New Global Deal that create equal opportunities for all and respect the rights and freedoms of all’.

A New Global Deal, based on a fair globalization, on the rights and dignity of every human being, on living in balance with nature, on taking account of the rights of future generations, and on success measured in human rather than economic terms, is the best way to change this.

If the new global social contract and global deal is to become a reality the developing world must have, he emphasized, ‘a far stronger voice in global decision-making’.

The UNSG is not alone in pointing to the economic and social crisis that is visiting the world. The World Social Report, 2020 also reported the growth of global inequalities:

Despite progress in some countries, income and wealth are increasingly concentrated at the top. The share of income going to the richest 1 per cent of the population increased in 59 out of 100 countries with data from 1990 to 2015. Meanwhile, the poorest 40 per cent earned less than 25 per cent of income in all 92 countries with data.²⁷

A report of the Special Rapporteur on extreme poverty and human rights also portrays a dismal picture.²⁸ In short, the post pandemic world will see the current crisis of poverty and inequality exacerbated impacting nearly 75

²⁷ United Nations Department of Economic and Social Affairs, *Inequality in a Rapidly Changing World* (World Social Order Report, 2020) 3.

²⁸ Phillip Alston, *The parlous state of poverty eradication* (Report of the Special Rapporteur on Extreme Poverty and Human Rights, 2 July 2020).

per cent of the world.²⁹ In the circumstances the poor and oppressed in the Global South are coming to feel a deep sense of alienation from international law and institutions as these cannot protect their dignity.³⁰ Yet the all affected and all subjected principles are rarely adhered to while taking decisions in international forums.³¹ There is something about modern international law that it facilitates and tolerates inhumane outcomes. Even the fate of asylum seekers and refugees does not move many; thousands of them can drown in the Mediterranean without necessitating a call for the structural reform of International refugee law (IRL). It would appear that the haunting realities of the contemporary world which tolerates endless violence on people is still not a sufficiently grave crisis for the mainstream practitioners of the discipline to call for the overhaul of international law and institutions.

3.2 *Accelerating Ecological Crisis*

A silver lining of the pandemic is that the precipitous decline in economic activity has meant a pause in the growing deterioration of the global environment. It implies that unless different production and distribution systems are adopted the restoration of economic activity will bring back the problem of environmental degradation, accentuating in particular climate change. But there is a lack of appreciation among segments of the powerful global elite that climate change can cause far greater disruption than a pandemic. As has been pointed out, 'the timescales of both the occurrence and the resolution of pandemics and climate hazards are different. The former are often measured in weeks, months, and years; the latter are measured in years, decades, and centuries'.³² What this means is that 'a global climate crisis, if and when ushered in, could prove far lengthier and far more disruptive than what we currently see with the coronavirus (if that

29 The Special Rapporteur on extreme poverty and human rights calls for a range of measures to address the problem of poverty: 'reconceiving the relationship between growth and poverty elimination; (ii) tackling inequality and embracing redistribution; (iii) promoting tax justice; (iv) implementing universal social protection; (v) centering the role of government; (vi) embracing participatory governance; and (vii) adapting international poverty measurement'; *ibid* 1.

30 B.S. Chimni, 'The Past, Present and Future of International Law: A Critical Third World Approach' (2007) 8(2) *Melbourne Journal of International Law* 499.

31 B.S. Chimni, 'The limits of the all affected principle: attending to deep structures' (2018) 3 *Third World Thematics: A Third World Quarterly Journal* 807.

32 Dickon Pinner, Matt Rogers, and Hamid Samandari 'Addressing climate change in a post-pandemic world' (2020) *McKinsey Quarterly* 1, 3 <<https://www.mckinsey.com/business-functions/sustainability/our-insights/addressing-climate-change-in-a-post-pandemic-world>> accessed 7 August 2020.

can be imagined).³³ The two together can cause, even in their milder incarnation, irrevocable harm to the world. To ensure this does not happen at least two moves have to be made. First, more attention has to be paid to 'the interactions between environmental change and infectious disease emergence' for there is 'growing evidence that causally links these two phenomena'.³⁴ Second, resources have to be found by governments to devote to climate action. But this is unlikely to happen in the face of ongoing recession in the global economy. Likewise, 'investors may delay their capital allocation to new lower-carbon solutions due to decreased wealth'.³⁵ In short both capitalist States and enterprises may avoid undertaking effective action to help fight climate change and pandemics. This brings the discussion back to deep structures of global order. Among other things, unless international law and institutions are able to promote appropriate reform of global capitalism that allows the global common good to be privileged over parochial interest environmental crises are likely to recur.

3.3 *Growing Crisis of Multilateralism, Law and Institutions*

But at the very moment that there is a need for active global cooperation to fight challenges posed by the pandemic and climate change, multilateralism is in retreat. The rise of populism and nationalism has made key States actively defer to narrow considerations at the expense of the global common good. It is the logic of anarchy that led the Trump administration to walk out of WHO diminishing its authority and depriving it of critical funding. While the Biden administration has returned to the organization it is far from clear what steps it will take to strengthen it.

The UN system which should have provided a lead in enhancing cooperation through generating ideas and resources is no longer in a position to do so. While the UNSG has taken the lead in diagnosing the state of the world, the initiative to respond to the looming global crises has moved to bodies like G-20 which has not responded with agility to either the pandemic or the global economic crises. The UN Security Council (UNSC), which could have issued binding guidelines to promote cooperation between nations to deal with the pandemic, is paralyzed by the differences between veto power States, especially US and China. While IMF has established a \$1 trillion loan program to

33 *ibid.*

34 Moreno Di Marco and others, 'Sustainable development must account for pandemic risk' (2020) 117 Proceedings of the National Academy of Sciences of the United States of America 3888, 3889 <<https://www.pnas.org/content/pnas/117/8/3888.full.pdf>> accessed 8 August 2020.

35 Pinner, Rogers and Samandari (n 32) 5.

fight the pandemic and its consequences it continues to prescribe conditionalities to borrowing nations that have in the past encouraged the dismantling of the public health infrastructure. To put it differently, unless bodies like the UN Economic and Social Council (ECOSOC) are revived, and become the centres of global decision making in the world economy, there is not much hope for most of the Global South nations.

Meanwhile, the international trading system presided over by WTO has been undermined by trade unilateralism. It is not as yet clear if the Biden administration will seek to reinvigorate WTO. For nations of the Global South the crisis afflicting WTO means the worst of all worlds. These are likely to encounter protectionism without being able to recover legal and policy space ceded in the days of hyper globalization. What is more, the proposals for WTO reform emanating from US target among other things the special and differential treatment principle which accentuates the impact of the loss of policy space. While the Biden administration may back the liberal international order (LIO) it may not reject all the proposals advanced by the Trump administration. The Global South nations will also have to deal with vaccine nationalism, and the consequences of a hard patent regime, that may lead to pricing that will deny the poor access to vaccine. South Africa and India have already sought a waiver on the application of relevant parts of the TRIPS text to the production and distribution of the vaccine but the proposal is still being debated.³⁶ In sum, the undermining of LIO is troubling for nations of the Global South not simply because of its erosion but rather its partial and prejudicial rejection.

3.4 *Crisis, Resistance and International Law*

In response to any international crisis groups, peoples and nations that bear its consequences use appropriate means such as protests, social movements, and multilateral diplomacy to bring about necessary changes in the international legal order. The different types of crisis evoke distinct forms and scales of resistance. In the instance of episodic and regional crisis there is social and political mobilization on the part of global civil society, supported by concerned States, to deal with their consequences. A structural crisis spawns social movements with a greater geographical spread involving separate and intersectional class, gender or race based movements. An originary crisis can call forth global scale collective resistance of oppressed peoples and nations. An example is the challenge to colonial international law by postcolonial nations in the era

36 'Members to continue discussion on proposal for temporary IP waiver in response to COVID-19' (WTO, 10 December 2020) <https://www.wto.org/english/news_e/news20_e/trip_10dec20_e.htm> accessed 24 December 2020.

of decolonization calling for its radical transformation. One manifestation of this effort at overhaul was the program and declaration of action on a New International Economic Order.

A central role of ongoing resistance movements lies in opposing and delegitimizing responses of international law and institutions that do not address the concerns of vulnerable and oppressed groups and weak nations. For instance, the Black Lives Matter (BLM) movement has successfully drawn attention to not only the racialization of internal and international relations but also to intersectional modes of oppression. Only collective resistance at the global level of the transnational poor and oppressed classes can hope to bring about meaningful change in the international legal order. But it would need to be backed by a coalition of nations of the Global South. Unfortunately, in the post-Cold War era the global coalitional strategy has been abandoned in favour of bilateral negotiations or issue based coalitions that bring together States with similar interests in particular domain areas. While this strategy may work in the instance of an episodic crisis it is unlikely to deliver where a regional or structural crisis of international law and institutions is concerned. From a disciplinary perspective, while critical approaches such as TWAIL make a strong argument in favour of the role of resistance in understanding a crisis and the reform of international law it has yet to find resonance in mainstream scholarship.

4 Conclusion

In moments of crisis new elements of disequilibrium are introduced in the international legal order threatening its effectiveness, stability, and legitimacy. But given its methodological weaknesses MILS is unable to assess the nature, extent and consequences of a crisis and recommend a suitable response to the international community. Its inability to explore the relationship of a crisis with deep structures of capitalism, imperialism, patriarchy, and racism means that the suggested responses can end up advancing the interests of the very social forces and States which are at the roots of a crises. In contrast critical approaches like TWAIL examine any crisis from an interdisciplinary and systemic standpoint and recommend changes that can help meet the concerns of the transnational poor, marginal and oppressed groups and realize the global common good. In the process TWAIL also exposes crises inside international law caused by static and incoherent doctrines that create hurdles in shaping just responses. In sum, TWAIL argues that MILS does not possess the

epistemological resources to identify, differentiate, understand, and address different kinds of crises in the international legal order. Only critical approaches can offer the therapies and techniques that can help restore the health of modern international law.