

RESEARCH ARTICLE

# After states, before humanity? The meta-politics of legality and the International Criminal Court in Iraq, Afghanistan, and Palestine

Janis Grzybowski<sup>1</sup>  and Filipe dos Reis<sup>2</sup> 

<sup>1</sup>ESPOL, Lille Catholic University, Lille, France and <sup>2</sup>Department of International Relations and International Organization, University of Groningen, Groningen, The Netherlands

**Corresponding author:** Filipe dos Reis; Email: [f.r.dos.reis@rug.nl](mailto:f.r.dos.reis@rug.nl)

(Received 28 September 2022; revised 07 May 2023; accepted 10 May 2023)

## Abstract

In the debate on the (de-)judicialisation of international affairs and the International Criminal Court (ICC) specifically, the distinctions between legality and politics and between state sovereignty and the international remain contested. While realist and legalist approaches discuss the transformation of international politics by international criminal law, sociological and critical-legal perspectives instead highlight the politics of international criminal law. In this contribution, we focus on how the distinctions between (international) law and politics matter, not as substantively opposed spheres, but as boundaries that the ICC itself contingently and flexibly draws when considering particular situations. These meta-politics of invoking and reproducing key boundaries in seemingly technical elaborations of the *interest of justice*, the scope of its *jurisdiction*, or the application of *complementarity* reflect the Court's particular authority but also its predicament of pushing for an international criminal law serving humanity, rather than states, while reproducing the distinctions between (international) law and politics. We illustrate the Court's meta-politics by revisiting three recent decisions of the ICC to (not) investigate alleged international crimes committed by British forces in Iraq, by the Taliban, governmental, and US forces in Afghanistan, and by Israeli authorities and Palestinian groups in the West Bank, East Jerusalem, and Gaza.

**Keywords:** expertise; international courts; international crimes; judicialisation; politicisation; technicalities

## Introduction

Ever since its inception, the International Criminal Court (ICC or Court) has been in the spotlight of public debates about the increasing role of international jurisprudence in world politics. It has been hailed as an important step forward in bringing an end to impunity for international crimes, but it has also met with persistent criticism from different sides, whether for being too legalistic or too political. States that reject the Court's mandate to investigate and try individual citizens have rebuffed and at times even threatened the Court – for example, in 2020, the Trump administration imposed sanctions against ICC Prosecutor Fatou Bensouda – while critics who are in principle sympathetic to its mandate often see it falling short of its ambitious goals<sup>1</sup> and

<sup>1</sup>Kirsten Ainley, 'The International Criminal Court on trial', *Cambridge Review of International Affairs*, 24:3 (2011), pp. 309–33.

contest the Court's focus on suspects from weaker and especially African states.<sup>2</sup> The decision of 17 March 2023 by the Office of the Prosecutor (OTP) to issue an arrest warrant for Russian President Vladimir Putin and another Russian official has also been both warmly welcomed and fiercely condemned. Focusing on more advanced instances, the Court has spurred controversy in recent years notably for not opening an investigation into alleged crimes committed by British armed forces in Iraq, for opening up such investigations into the conduct of US forces – alongside Taliban and former government forces – in Afghanistan, and for confirming its own jurisdiction to investigate potential crimes perpetrated by Israeli authorities – as well as Palestinian groups – in the West Bank, East Jerusalem, and the Gaza strip.<sup>3</sup> Going beyond the 'usual suspects', but again provoking endorsement, outrage, and rejection, these three decisions shed new light on the old question of the Court's difficult position at the contested intersection of (international) law and politics.

The ICC has often been interpreted through the prism of the complex relationship between 'law' and 'politics' as distinct spheres that compete with and yet cannot let go of each other. To be sure, this dichotomy has haunted debates about international courts in both international law and International Relations (IR) more generally, and it underpins the great hope of the last century or longer for a 'judicialisation' of world politics, which is also linked to the move from the domestic to the international or global sphere,<sup>4</sup> from the perceived parochialism of state sovereignty to the horizon of a shared humanity.<sup>5</sup> This move towards *international* law and its setbacks have been discussed in various domains, from security to trade to environmental law,<sup>6</sup> but it is arguably in international criminal law, and human rights law, that the moral impulse of moving beyond 'realist' power politics – by ending the impunity for perpetrators of international crimes – captures the 'legalist' imagination of the judicialisation of world politics most vividly.<sup>7</sup> Following the ad-hoc tribunals of the 1990s on crimes committed in Rwanda and on the territory of the former Yugoslavia, the establishment of a permanent international criminal court appeared as a pivotal step in this direction.<sup>8</sup> The problem is only that the relationships between both politics and law and between state sovereignty and the international sphere are more complicated than a progressive story from one to the other would suggest.<sup>9</sup> For one, as the recent discussion of 'dejudicialisation'<sup>10</sup> illustrates,

<sup>2</sup>Peter Brett and Line Engbo Gissel, *Africa and the Backlash against International Courts* (London: Zed Books, 2020); Lucrecia García Iommi, 'Whose justice? The ICC "Africa Problem"', *International Relations*, 34:1 (2020), pp. 105–29; Sarah M. H. Nouwen, 'The International Criminal Court: A peacebuilder in Africa?', in Devon Curtis and Gwinyayi A. Dzinesa (eds), *Peacebuilding, Power, and Politics in Africa* (Athens, OH: Ohio University Press, 2012), pp. 171–92.

<sup>3</sup>Additional to these activities, the ICC is currently (May 2023) carrying out preliminary examinations in Nigeria and Venezuela and advanced investigations in Bangladesh/Myanmar, Burundi, Côte d'Ivoire, Georgia, Kenya, Libya, Mali, Uganda, Darfur (Sudan), Central African Republic, Democratic Republic of Congo, the Philippines, and Ukraine.

<sup>4</sup>See already David Kennedy, 'The move to institutions', *Cardozo Law Review*, 8:5 (1987), pp. 841–988.

<sup>5</sup>Ruti G. Teitel, *Humanity's Law* (Oxford: Oxford University Press, 2011).

<sup>6</sup>Karen J. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton, NJ: Princeton University Press, 2014); Mikael Rask Madsen, 'The international judiciary as transnational power elite', *International Political Sociology*, 8:3 (2014), pp. 332–4; Karen J. Alter, Emilie M. Hafner-Burton, and Laurence R. Helfer, 'Theorizing the judicialization of international relations', *International Studies Quarterly*, 63:3 (2019), pp. 449–63.

<sup>7</sup>Immi Tallgren, 'The sensibility and sense of international criminal law', *European Journal of International Law*, 13:3 (2002), pp. 561–95; Gerry Simpson, *Law, War and Crime: War Crimes Trials and the Reinvention of International Law* (Cambridge: Polity, 2007).

<sup>8</sup>Philippe Sands (ed.), *From Nuremberg to the Hague: The Future of International Criminal Justice* (Cambridge: Cambridge University Press, 2003); Teitel, *Humanity's Law*.

<sup>9</sup>Sarah Nouwen and Wouter Werner, 'Doing justice to the political: The International Criminal Court in Uganda and Sudan', *European Journal of International Law*, 21:4 (2011), pp. 941–65; Marieke de Hoon, 'The future of the International Criminal Court: On critique, legalism and strengthening the ICC's legitimacy', *International Criminal Law Review*, 17 (2017), pp. 591–614; Nicole Deitelhoff, 'What's in a name? Contestation and backlash against international norms and institutions', *The British Journal of Politics and International Relations*, 22:4 (2020), pp. 715–27.

<sup>10</sup>Daniel Abebe and Tom Ginsburg, 'The dejudicialization of international politics?', *International Studies Quarterly*, 63:3 (2019), pp. 521–30.

the trend is no longer so clear. Apparent episodes of ‘backlash’<sup>11</sup> against international courts are on the rise, and renewed ‘politicisation’<sup>12</sup> appears as a reaction to the increasing role of technical expertise in international affairs more generally.

More fundamentally, however, sociological and critical-legal inquiries into international courts, including the ICC, have shown that the line between legality and politics itself is blurred, constantly shifting, and time and again sharply redrawn.<sup>13</sup> If legal arguments are in principle indeterminate, contingent, and malleable,<sup>14</sup> and if in practice they coalesce around particular preferences, rationalities, and habits,<sup>15</sup> then *politics* is routinely involved in *legal* inquiries, proceedings, and decisions, without the law losing its specificity as a particular arena of professional reasoning, style, and conduct. Similarly, if the emergent field of international criminal lawyers, activists, and scholars is transnational in its origins, scope, and concerns,<sup>16</sup> and if domestic courts invoke international law while international courts resort to state discretion or responsibility, then it becomes difficult to sketch a linear development from a world of sovereign states to one of an international law of humanity.<sup>17</sup>

Yet the sharp distinction between international law and politics does not need to be thought of as either a substantive opposition or entirely enmeshed in the everyday politics of international courts. As we argue in this article, there is a third way to conceptualise and study the distinction, which is perfectly compatible with the sociological and critical view but also takes the seemingly sharp opposition of traditional legal and realist – and more recent (de-)judicialisation – perspectives seriously. Taking our cue from an interdisciplinary body of critical and constructivist literature highlighting the performative effects of boundary-drawing through technical expertise,<sup>18</sup> we draw attention to the *meta-political* use of the divisions between international law and politics by the Court itself. That is, we maintain that the Court itself invokes sharp distinctions between politics and law, states and the international, but does so flexibly, contingently, and with important consequences for the arguments it advances in any particular situation. This happens when the Court constructs ‘legal’ cases, excludes ‘politics’, defers to or relies on states and ‘domestic’ institutions, or applies ‘international’ rules. Politics then has two faces: it is, on the one hand, the seemingly substantial sphere that is designated as being opposed to law, much as in realist and legalist views and perspectives on (de-)judicialisation; but it is also, on the other hand, the particular interpretation by the Court of where these boundaries lie, a decision that is itself an instance of the politics of

<sup>11</sup>Mikael Rask Madsen, Pola Cebulak, and Micha Wiebusch, ‘Backlash against international courts: Explaining the forms and patterns of resistance to international courts’, *International Journal of Law in Context*, 14:2 (2018), pp. 197–220; Deitelhoff, ‘What’s in a name?’, Brett and Gissel, *Africa*.

<sup>12</sup>Michael Zürn, Martin Binder, and Matthias Ecker-Ehrhardt, ‘International authority and its politicization’, *International Theory*, 4:1 (2012), pp. 69–106.

<sup>13</sup>Frédéric Mégret, ‘The politics of international criminal justice’, *European Journal of International Law*, 13:5 (2002), pp. 1261–84; Frédéric Mégret, ‘International criminal justice as a juridical field’, *Champ Pénal*, 13 (2016), available at <http://journals.openedition.org/champpenal/9284>; Nouwen and Werner, ‘Doing justice’; De Hoon, ‘Future’.

<sup>14</sup>Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument*, reissue with a new epilogue (Cambridge: Cambridge University Press, 2005); Darryl Robinson, ‘Inescapable dyads: Why the International Criminal Court cannot win’, *Leiden Journal of International Law*, 28:2 (2015), pp. 323–47.

<sup>15</sup>Ron Levi, John Hagan, and Sara Dezalay, ‘International courts in atypical political environments: The interplay of prosecutorial strategy, evidence, and court authority in international criminal law’, *Law and Contemporary Problems*, 79:1 (2016), pp. 289–314.

<sup>16</sup>Mikkel Jarle Christensen, ‘The emerging sociology of international criminal courts: Between global restructurings and scientific innovations’, *Current Sociology*, 63:6 (2015), pp. 825–49; Madsen, ‘International judiciary’; Mégret, ‘Juridical field’.

<sup>17</sup>Nesam McMillan, *Imagining the International: Crime, Justice, and the Promise of Community* (Stanford, CA: Stanford University Press, 2020); Ukri Soirila, *The Law of Humanity Project: A Story of International Law Reform and State-Making* (Oxford: Hart, 2021); Teitel, *Humanity’s Law*.

<sup>18</sup>David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton, NJ: Princeton University Press, 2016); Martti Koskeniemi, ‘The politics of international law – 20 years later’, *European Journal of International Law*, 20:1 (2009), pp. 7–19; Friedrich Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law* (Cambridge: Cambridge University Press, 2014); Anna Leander and Tanja Aalberts, ‘Introduction: The co-constitution of legal expertise and international security’, *Leiden Journal of International Law*, 26:4 (2013), pp. 783–92.

international law. The Court, in this analysis, refers to the institution as a whole and includes its different organs, such as the OTP as well as pre-trial, trial, and appeals chambers. In fact, as some of the cases show, these different bodies of the Court might well disagree, but they all routinely presume, invoke, and shift the lines between international law and politics – while speaking and proliferating the vernacular of international criminal law.

This change in perspective has three important implications. First, it clarifies and orders competing notions of ‘politics’ and ‘legality’ on two levels that can then be reintegrated for the critical analysis of the ICC and other international courts. Second, it advances an explanation for the apparent paradox that an expanding international court based on a *legal* approach is haunted by charges of *politics*, by showing that the Court is structurally compelled to meta-politically draw the line between international law and politics. This can only be (meta-)political, even if it proceeds through legal technicalities, because the ICC cannot defer the determination of politics and legality to any other institution. Third, it sheds light on a dilemma of the ICC, namely that it both expands international criminal law *and* entangles it with the old opposites of politics and law, sovereign states and the international sphere.<sup>19</sup> The result is a Court that is condemned to perpetually reproduce divisions of international law and politics that are both its condition of possibility and its limitation, thus illuminating the sources for a key tension in the development of international criminal law and the ICC.

This contribution is subdivided into five main sections. The following section revisits the literature on the ICC to discuss how different theoretical approaches conceptualise the intersection of (international) politics and legality as substantially opposed or enmeshed. In the subsequent section, we emphasise the contingent meta-politics of legality that lie in redrawing the boundaries between international law and politics through technical expertise in international – criminal – law. To probe the merits of this approach empirically, we then briefly analyse in the three following sections the recent decisions to (not) open investigations in the situations of Iraq, Afghanistan, and Palestine. As these vignettes illustrate, it is through the meta-politics of legality that the Court exercises its role at the crossroads of international law and politics. Rather than an anomaly or analytical difficulty, the blurred boundaries of legality and politics, states and the international, appear thus as the very source of the ICC’s evolving position in international affairs. A brief conclusion summarises the article and suggests inroads for future research on the ICC and international courts.

### **From judicialisation to boundary-drawing: Perspectives on the ICC’s politics of legality**

The promise of international criminal justice in general and of the ICC specifically to incrementally supplant the traditional prerogatives of sovereign states by ending impunity for international crimes has been much discussed in international law and IR alike. This debate also reflects the larger question of how (international) law and politics relate to each other. While some literatures, including traditional realist and legalist accounts, have emphasised the opposition between international law and politics, others, such as sociologies of law and critical-legal approaches, have instead drawn attention to the inherent *politics of law* itself.

In this section, we briefly revisit these traditional and critical perspectives in the literature on international law and politics – and on international criminal law and the ICC specifically – to highlight how the former affirm the binaries between international law and politics, whereas the latter tend to entangle them. This short review prepares our own argument for paying particular attention to how the binaries between law and politics, and the international and states or the domestic, are both contingently constructed and yet constantly reaffirmed.

<sup>19</sup>For a general reconstruction of these boundaries, see Filipe dos Reis and Janis Grzybowski, ‘The matrix reloaded: Reconstructing the boundaries between (international) law and politics’, *Leiden Journal of International Law*, 34:3 (2021), pp. 547–70.

*Law versus politics? Realism, legalism, and (de-)judicialisation*

Supporters of the project of international criminal justice, both in academia and civil society, as well as the ICC itself regularly conceptualise law and politics as two autonomous and competing spheres. Nouwen and Werner summarise this position for the ICC as seeking:

to stay clear from politics, to subordinate politics to law, and speak law to power. Politics, in other words, is portrayed as external to law, as something that needs to be overcome [...]. In this understanding, the Court's fight against impunity is also a struggle with, or even against, politics.<sup>20</sup>

As Simpson observes, war crime tribunals were regularly framed as 'trials of the "political", or, at least, indictments of the political'.<sup>21</sup> This understanding not only separates law and politics but also draws a clear line between states and the international. It establishes a hierarchy between these two spheres where the international sphere is seen as better equipped to deal with the adjudication of international crimes than states. For instance, Cassese argued that the proliferation of international criminal bodies during the 1990s set in motion a 'seismic shift', as 'for the first time international bodies penetrated that powerful and historically impervious fortress – state sovereignty – to reach out to all who live within this fortress'.<sup>22</sup> International criminal law thus 'domesticates' the international and transforms it into a sphere pursuing justice for humanity.<sup>23</sup>

Others, however, have regarded this move as politics by other means or claimed that 'political questions' cannot be adjudicated by international (criminal) bodies, or only in a way that is itself political in disguise.<sup>24</sup> Recent critics, such as Zolo, have argued that war crimes tribunals, as well as the ICC, established a 'dual-standard system' of international criminal justice,<sup>25</sup> where 'major powers and their political and military authorities ... enjoy total impunity' while 'victor's justice [is] applied to vanquished, weak and oppressed peoples'.<sup>26</sup>

Both positions, namely that taming world politics through international (criminal) law is either possible (the legalistic view) or impossible (the realist view), seem to stand in clear opposition. Yet, as Krever observes:

beyond their apparent antagonism, both positions share an idealized notion of an apolitical trial – both insist that war crimes trials *should* and *can* be apolitical. Politics enters in the *misuse* of the legal form for political ends – to eliminate political opponents, as in claims of victor's justice – or in the deformation of procedures and rules or absence altogether of legal process.<sup>27</sup>

<sup>20</sup>Nouwen and Werner, 'Doing justice', p. 942.

<sup>21</sup>Simpson, *Law, War and Crime*, p. 13.

<sup>22</sup>Antonio Cassese, 'Reflections on international criminal justice', *Journal of International Criminal Justice*, 9:1 (2011), pp. 271–5 (pp. 272, 273).

<sup>23</sup>Simpson, *Law, War and Crime*, p. 36; McMillan, *Imagining*. The ICC itself seeks to integrate the international and the domestic through the notion of complementarity. See also our discussion in the section on Iraq and the United Kingdom.

<sup>24</sup>For a recent contribution to the long-standing issue of 'political questions', see Jed Odermatt, 'Patterns of avoidance: Political questions before international courts', *International Journal of Law in Context*, 14:2 (2018), pp. 221–36. For a classical account of adjudication in general, see Hans J. Morgenthau, *Die internationale Rechtspflege, ihr Wesen und ihre Grenzen* (Leipzig: Universitätsverlag von Robert Noske, 1929); and for international criminal law, see Georg Schwarzenberger, 'The problem of an international criminal law', *Current Legal Problems*, 3 (1950), pp. 263–96.

<sup>25</sup>Danilo Zolo, *Victors' Justice: From Nuremberg to Baghdad* (London: Verso, 2009), pp. 27–30.

<sup>26</sup>*Ibid.*, p. xii.

<sup>27</sup>Tor Krever, 'Unveiling (and veiling) politics in international criminal trials', in Christine Schwöbel (ed.), *Critical Approaches to International Criminal Law: An Introduction* (London: Routledge, 2014), pp. 117–37 (p. 132; emphasis in the original). There have been more nuanced positions, too. For example, Bosco investigated the 'process of mutual accommodation' when the ICC is confronted with major powers (David L. Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* [Oxford: Oxford University Press, 2014], p. 21), and Tiemessen has conceptualised various degrees of politicisation of the ICC when it comes to the opening of investigations (Alana Tiemessen, 'The International Criminal Court and the politics of prosecutions', *The International Journal of Human Rights*, 18:4–5 [2014], pp. 444–61).

This debate has recently been updated by approaches to judicialisation that aim to conceptualise and empirically explore the role of courts and tribunals in world politics, including the ICC. Despite the particular attention the ICC has attracted in the public debate, its inception and development are also seen as part of a larger trend of ‘judicialisation’.<sup>28</sup> In IR, this research programme follows in the footsteps of earlier studies of ‘legalisation’<sup>29</sup> but focuses more particularly on the proliferation and increasing role of courts and tribunals. The literature on judicialisation and legalisation speaks to a liberal tradition in IR, which has long argued that international organisations and institutions would contribute to a rules-based international order that could tame or overcome the primacy of power politics.<sup>30</sup> Judicialisation therefore suggests not only a quantitative accumulation of ‘more law’, but also a qualitative transformation of international affairs through judicial institutions.

Yet while the general focus of the judicialisation literature indicates a twofold movement from politics to legality and from the domestic to the international level,<sup>31</sup> the literature is at the same time wary of any teleology.<sup>32</sup> State elites, as well as constituencies, have not disappeared from the picture. The growing role of courts has been met with an apparent ‘backlash’,<sup>33</sup> ‘de-judicialisation’,<sup>34</sup> and renewed ‘politicisation’.<sup>35</sup> In other words, whether, when, and how (de-)judicialisation takes place is an open question and must be empirically explored rather than presumed. Yet irrespective of the complex intricacies of judicialisation and de-judicialisation, at least conceptually the literature still pits the *judicial* authority of international courts against various *political* actors, whether they support, undermine, or use them for their own – political – purposes.<sup>36</sup> Ultimately, then, international law and politics are treated as substantively distinct spheres, despite their complex empirical entanglements.

### *The politics of law: Sociology of the judicial field and critical-legal studies*

Within critically inclined sociological and legal perspectives, legality as a social field and practice is not the opposite of politics but is itself imbued with a particular form of politics. Pierre Bourdieu, for instance, rejected both legalistic or ‘formalist’ and realist or ‘instrumentalist’ approaches because ‘these two antagonistic perspectives, one from within, the other from outside the law, together simply ignore the existence of an entire social universe’, which is the ‘judicial field’.<sup>37</sup> The ‘judicial field’, Bourdieu explains, is ‘the site of competition for monopoly of the right to determine what the law is’.<sup>38</sup> While Bourdieu focused on the (French) domestic judicial field, which is traditionally structured by the monopoly of the state,<sup>39</sup> his approach has been adapted to analyse the

<sup>28</sup>For the ICC, see Alter, Hafner-Burton, and Helfer, ‘Theorizing’, p. 452. In general, see Alter, *New Terrain*.

<sup>29</sup>Judith Goldstein, Miles Kahler, Robert O. Keohane, and Anne-Marie Slaughter, ‘Introduction: Legalization and world politics’, *International Organization*, 54:3 (2000), pp. 385–99; Nicole Deitelhoff, ‘The discursive process of legalization: Charting islands of persuasion in the ICC case’, *International Organization*, 63:1 (2009), pp. 33–65.

<sup>30</sup>Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton, NJ: Princeton University Press, 1984); Michael Zürn, *A Theory of Global Governance: Authority, Legitimacy, and Contestation* (Oxford: Oxford University Press, 2018).

<sup>31</sup>Alter, Hafner-Burton, and Helfer, ‘Theorizing’, p. 450; Jeffrey K. Staton and Will H. Moore, ‘Judicial power in domestic and international politics’, *International Organization*, 65:3 (2011), pp. 553–87.

<sup>32</sup>Alter, Hafner-Burton, and Helfer, ‘Theorizing’.

<sup>33</sup>Madsen, Cebulak, and Wiebusch, ‘Backlash’.

<sup>34</sup>Abebe and Ginsburg, ‘Dejudicialization’.

<sup>35</sup>Zürn, Binder, and Ecker-Ehrhardt, ‘International authority’.

<sup>36</sup>Parvathi Menon, ‘Self-referring to the International Criminal Court: A continuation of war by other means’, *AJIL Unbound*, 109 (2015), pp. 260–5.

<sup>37</sup>Pierre Bourdieu, ‘The force of law: Toward a sociology of the juridical field’, *Hastings Law Journal*, 38:5 (1986), pp. 814–53 (p. 816).

<sup>38</sup>*Ibid.*, p. 817. We focus here mainly on Bourdieusian approaches exploring the international criminal field. For a broader overview of sociological approaches in the study of international courts, see Mikael Rask Madsen, ‘Sociological approaches to international courts’, in Cesare Romano, Karen Alter, and Yuval Shany (eds), *Oxford Handbook of International Adjudication* (Oxford: Oxford University Press, 2014), pp. 388–412.

<sup>39</sup>Bourdieu, ‘Force of law’.

emergence, stabilisation, and ordering of a trans- and international legal field.<sup>40</sup> From this perspective, the process of judicialisation must be understood as the growth and increasing role of the 'ever expanding international judiciary in terms of a transnational power elite', which is not defined by its 'institutional affiliation but by its collective transnational power'.<sup>41</sup> Politics is thus largely defined as struggle for status and power playing out between different groups or types of actors within this particular emergent field, and can be 'mapped'<sup>42</sup> in terms of court staffing, biographic trajectories of judges, and patterns of reasonings and rulings.<sup>43</sup>

To better understand how the 'field of international criminal justice'<sup>44</sup> or 'transnational field of criminal justice'<sup>45</sup> demarcates itself from and competes with other fields, its differentiation from inter-state diplomacy has been highlighted,<sup>46</sup> as well as the attempt within this emerging field to become independent from domestic bodies adjudicating international crimes.<sup>47</sup> Others have traced the struggles within this specific field as a competition between different forms of expertise provided, for instance, by human rights advocacy groups,<sup>48</sup> international law scholars,<sup>49</sup> and the judiciary at the ICC.<sup>50</sup> As Mégret points out, the field of international criminal law, as international law in general, is not simply yet another field of technocratic expertise but is characterised by its 'specifically legal dimension'.<sup>51</sup> In other words, the legal field is imbued with politics, but politics articulated in terms of law and the legal profession.

In contrast to these sociological explanations of court politics, critical-legal perspectives rather highlight, and keep open, their contingency.<sup>52</sup> Instead of seeking to explain why or how particular decisions have come about or form larger patterns, critical law scholars analyse their conditions of possibility within legal discourse, and their creative use. From this angle, international law is composed of fundamental tensions and oppositions between core principles. It operates in practice by entangling such opposites to craft persuasive legal arguments that could have been made differently. In other words, international law is, logically speaking, indeterminate.<sup>53</sup> Within this apparent predicament for judicial decision-making lies the 'politics of international law',<sup>54</sup> which is not an accident, a derivation, or a perversion, but the necessary underpinning of proper jurisprudence.

<sup>40</sup>For an overview, see Yves Dezalay and Mikael Rask Madsen, 'The force of law and lawyers: Pierre Bourdieu and the reflexive sociology of law', *Annual Review of Law and Social Science*, 8 (2012), pp. 433–52.

<sup>41</sup>Madsen, 'International judiciary', p. 333.

<sup>42</sup>Cesare Romano, Karen Alter, and Yuval Shany, 'Mapping international adjudicative bodies, the issues, and players', in Cesare Romano, Karen Alter, and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford: Oxford University Press, 2014), pp. 3–26.

<sup>43</sup>For example, Dezalay and Madsen, 'Force of law and lawyers'.

<sup>44</sup>Mégret, 'Juridical field'; Christensen, 'Emerging sociology'.

<sup>45</sup>Peter Dixon and Chris Tenove, 'International criminal justice as a transnational field: Rules, authority and victims', *International Journal of Transitional Justice*, 7:3 (2013), pp. 393–412.

<sup>46</sup>John Hagan and Ron Levi, 'Crimes of war and the force of law', *Social Forces*, 83:4 (2005), pp. 1499–534.

<sup>47</sup>Levi, Hagan, and Dezalay, 'International courts in atypical political environments', p. 290.

<sup>48</sup>Kjersti Lohne, *Advocates for Humanity: Human Rights NGOs in International Criminal Justice* (Oxford: Oxford University Press, 2019).

<sup>49</sup>Mikkel Jarle Christensen, 'Academics for international criminal justice: The role of legal scholars in creating and sustaining a new legal field', *iCourts Working Paper* 14 (2014), pp. 1–32.

<sup>50</sup>Mikkel Jarle Christensen, 'The judiciary of international criminal law: Double decline and practical turn', *Journal of International Criminal Justice*, 17:3 (2019), pp. 537–55 (p. 538).

<sup>51</sup>Mégret, 'Juridical field' (emphasis in the original).

<sup>52</sup>For a debate on contingency and necessity in (international) law, see Ingo Venzke and Kevin Jon Heller (eds), *Contingency in International Law: On the Possibility of Different Legal Histories* (New York: Oxford University Press, 2021). For a discussion of different notions of contingency in international thought, see Oliver Kessler, 'The contingency of constructivism: On norms, the social, and the third', *Millennium*, 45:1 (2016), pp. 43–63.

<sup>53</sup>David Kennedy, *International Legal Structures* (Baden-Baden: Nomos, 1987); Koskenniemi, *From Apology*.

<sup>54</sup>Martti Koskenniemi, 'The politics of international law', *European Journal of International Law*, 1:1 (1990), pp. 4–32; Koskenniemi, '20 years later'.

Without preconceptions, dilemmas, and difficult choices, there is no genuine interpretation; and without interpretation, no genuine jurisprudence.<sup>55</sup>

The critical perspective also helps understand why the ICC is so often accused, and from opposing sides, of being *political*. As Robinson highlights, when an investigation by the ICC is triggered by a referral from a State Party or the UN Security Council (UNSC), the Court appears to do the bidding of states, while if the Prosecutor's Office launches an investigation by *proprio motu* initiation, the Court is charged for its utopian, political agenda.<sup>56</sup> Similarly, the Court can appear to pick too easy or too difficult cases, collaborate too closely with states or not enough, and to speak too ambitiously in the name of humanity or to defer too timidly to states and conservative principles of international law. In trying to escape these dichotomies, Robinson shows that the Court balances different considerations – crafts legal arguments – that convince and can be defended but remain nevertheless vulnerable to counter-arguments.<sup>57</sup> The politics of international law are thus inherent to international legal jurisprudence, including that of the ICC.

This does not mean that 'anything goes'. Indeed, much as sociological perspectives, critical-legal studies emphasise the expertise of international lawyers to use and re-enact the fundamental binaries of international law. As this expertise constitutes their professional competence,<sup>58</sup> international lawyers must take care not to transgress the occasionally thin line between judicial lawmaking and judicial activism.<sup>59</sup> In other words, the politics of international law remains distinctly tied to the logic of legality and operates within flexible but professionally limited 'bounds of sense'.<sup>60</sup>

In line with the interest in the politics of decision-making and technicalities, critical-legal and constructivist perspectives have also increasingly looked into the role of expertise and specific regimes of knowledge in shaping international institutions and thereby participating in 'world making and world ordering',<sup>61</sup> that is, actively shaping the reality of international affairs by interpreting and adjudicating over it from specific vantage points.<sup>62</sup> The politics of international law lies not only in the principal indeterminacy of legal arguments, assessments, and decisions, but also in the way specific regimes and institutional perspectives frame questions of international law, which differs between environmental, trade, and human rights law, for instance. This adds another dimension of contingency and further emphasises the creative dimension and 'productive power of legal arguments'.<sup>63</sup> International law, courts, and legal decisions not only operate within given constraints but also 'produce ... realities, symbolic orders, and power'<sup>64</sup> by reflecting particular commitments and techniques and inscribing them through the associated reconstructions of cases onto the world.

Despite the differences between sociological and critical-legal approaches, both enmesh politics and legality so that their distinction no longer substantively demarcates international law. Instead, the practice of international law is defined by the specific type of politics that operates by means of legality.

<sup>55</sup>Jacques Derrida, 'Force of law: The "mystical foundation of authority"', in Drucilla Cornell, Michel Rosenfeld, and David Gray Carlson (eds), *Deconstruction and the Possibility of Justice* (London: Routledge, 1992), pp. 3–67.

<sup>56</sup>Robinson, 'Inescapable dyads', p. 328.

<sup>57</sup>Robinson, 'Inescapable dyads'.

<sup>58</sup>Kennedy, *World of Struggle*; Koskeniemi, '20 years later'.

<sup>59</sup>Fuad Zarbiyev, 'Judicial activism in international law – a conceptual framework for analysis', *Journal of International Dispute Settlement*, 3:2 (2012), pp. 247–78.

<sup>60</sup>Kratochwil, *Status of Law*, chap. 9.

<sup>61</sup>Helen M. Kinsella and Giovanni Mantilla, 'Contestation before compliance: History, politics, and power in international humanitarian law', *International Studies Quarterly*, 64:3 (2020), pp. 649–56 (p. 649).

<sup>62</sup>Nikolas M. Rajkovic, Tanja Aalberts, and Thomas Gammeltoft-Hansen (eds), *The Power of Legality: Practices of International Law and Their Politics* (Cambridge: Cambridge University Press, 2016); Kennedy, *World of Struggle*.

<sup>63</sup>Wouter Werner, 'The use of law in international political sociology', *International Political Sociology*, 4:3 (2010), pp. 304–7 (p. 307).

<sup>64</sup>*Ibid.*, p. 307.



### Drawing boundaries, crafting authority: The meta-politics of legality

Sociological and critical-legal approaches question the substantive dichotomy between international law and politics and instead point to the politics of legality and the legal field itself. Yet this does not mean that the distinction itself would no longer play any role. In fact, as we highlight in this section, it is a constitutive boundary that international courts, including the ICC, employ themselves to demarcate their competence and authority. Here, we focus on these meta-politics of drawing the boundaries by which the ICC both expands the project of international criminal law, framed in the language of a shared ‘humanity’, and at the same time falls back on the old dichotomies of (international) law and politics.

We refer to the ‘re-entry’ of the key distinctions between law and politics, as well as states and the international, as *meta-politics of legality*. It is a particular dimension of the court politics discussed above, and specifically highlights the re-inscription of the key distinctions between (international) law and politics that are invoked in, and bear on, the more technical legal assessments made by various bodies of the Court in concrete instances. These distinctions, while contingent and flexible in principle, have an effect when they are rhetorically invoked as fixed and substantive by the Court. As such, their use is itself political, by virtue of deciding whether a particular matter, or parts of it, should be included as legal or excluded as political, whether it falls under the jurisdiction of the Court or is left with or pushed back to the jurisdiction of states. In practice, this boundary-drawing is made possible by the competent use of legal ‘technicalities’<sup>65</sup> and fine-grained interpretations and reinterpretations.<sup>66</sup> The devil is in the detail, and only close textual analysis of the arguments, decisions, and revisions by the prosecutor and different chambers of the Court reveals the (meta-)politics of crafting professional, technical legal arguments by which the dichotomies of (international) law and politics are redrawn.<sup>67</sup> As such, the meta-politics of legality are entangled with the politics of legality more generally but differ from other forms of it.<sup>68</sup>

The meta-politics of the ICC, more specifically, is conditioned by what Mégret calls the ‘founding paradox’ of international criminal law, i.e. ‘that it is criminal law without the state.’<sup>69</sup> This does not mean that the state is absent, but that there are multiple states, and no monopoly of force or legislation. International criminal law ‘operates at the intersection of the domestic and the international: from the former it borrows the characteristic penal form, whilst the latter gives it its scope, ambition, and environment.’<sup>70</sup> As such, the Court’s authority in international (criminal) law is entangled with its authority to decide what an international (criminal) legal matter is in the first place, which means arguing both that it is a *legal* matter, and not a *political* one, and that it specifically calls for *international* attention and authority, and not first and foremost for *domestic*.<sup>71</sup> Yet the Court’s *meta-politics* is also premised on ‘re-imagining the international’ as a sphere of ‘humanity’ beyond sovereign states,<sup>72</sup> extending the specific logic of international criminal law as part of a larger project of ‘humanity’s law.’<sup>73</sup> Importantly, the concept of humanity is, as Graf writes in a discussion of universal crimes, ‘politically productiv[e]’ as it gives new meaning to

<sup>65</sup>Annelise Riles, ‘A new agenda for the cultural study of law: Taking on the technicalities’, *Buffalo Law Review*, 53 (2005), pp. 973–1033.

<sup>66</sup>Kennedy, *World of Struggle*.

<sup>67</sup>The ‘technicalities’ of international law are not limited to the production of texts and the decisions of courts but also encompass other actors, institutions, and objects, including material objects, but for our analysis of ICC decisions we understand technicalities as argumentative practices that operate legal concepts and interpretations in specific circumstances. Cf. Riles, ‘New agenda’.

<sup>68</sup>One such other form that we do not discuss here is ‘juridified diplomacy’; see Simpson, *Law, War and Crime*.

<sup>69</sup>Mégret, ‘Juridical field’, p. 12. See also Tallgren, ‘Sensibility and sense’, p. 561; Leslie Vinjamuri, ‘The International Criminal Court and the paradox of authority’, *Law and Contemporary Problems*, 79:1 (2016), pp. 275–87.

<sup>70</sup>Mégret, ‘Juridical field’, p. 11.

<sup>71</sup>As such, the position of international courts is located at the constitutive intersection of politics and legality, and of states and the international. Dos Reis and Grzybowski, ‘Matrix reloaded’.

<sup>72</sup>McMillan, *Imagining*.

<sup>73</sup>Teitel, *Humanity’s Law*; Soirila, *Law of Humanity Project*.

the international.<sup>74</sup> In this constellation, international criminal tribunals, such as the ICC, seek to function as representatives of humanity in their decisions. Yet, as Corrias and Gordon point out, by their attempt to ‘represent ... humanity as a whole, international criminal tribunals engage in a constitutive act by which they establish that which they purport to represent.’<sup>75</sup> Moreover, as bodies of international *criminal law*, they attribute responsibility to individual perpetrators. As has been repeatedly argued by these bodies, not states but individuals are on trial. By turning to individual perpetrators and victims, and by placing humanity at the horizon of the international beyond sovereign states, the ICC promotes a particular project of the transformation of international law, one that differs in its world-making from other projects.

The ‘founding paradox’ both conditions and perpetuates the meta-politics of the ICC: while the Court derives legitimacy from a promise of advancing an agenda of transforming international law, it also actively uses the distinctions between states and the international and between politics and law for its own purposes as a court of international criminal law. That is, since the Court derives its authority from the crossroads of (international) law and politics, which constitute an ‘interface in flux,’<sup>76</sup> it ironically also re-enacts these traditional boundaries, all the while using them to advance the project of international criminal justice. Between transformation and reproduction, the Court has considerable leeway – or authority – to draw the boundaries between (international) law and politics in specific instances.

In the remainder of the article, we focus on three recent ICC decisions regarding potential international crimes committed in – and beyond – Iraq, Afghanistan, and Palestine to illustrate the Court’s meta-politics of legality in practice. The analytical purpose is neither to provide a comprehensive legal or sociological review of these decisions nor to ‘test’ our approach in competition with others, but rather to showcase the added value of a perspective on meta-politics by highlighting how the Court uses its technical expertise to contingently draw the distinctions between (international) politics and law in different contexts. Other examples could have been chosen, but apart from presenting recent decisions made between 2019 and 2021, these three instances stand out because they qualify the realist narrative of the Court’s restraint vis-à-vis Western or powerful states, as they include, *inter alia*, the armed forces of the UK, the US, and Israel. They seem thereby also at odds with the criticism of the ICC as a ‘European Court of African Affairs,’<sup>77</sup> reflecting the project of then-Prosecutor Fatou Bensouda to react to these criticisms by turning the ICC into a ‘global’ court, with a concern for cases beyond Africa.<sup>78</sup> While we do not study cases where the ICC ‘avoids’ investigating at all,<sup>79</sup> our three examples concern attempts by the Court to expand and stretch its mandate into areas where it had been previously inactive. The three cases can thus be understood as particularly challenging instances for the ICC, as they put the Court’s need to (re)draw the boundaries of (international) law and politics in the spotlight. Moreover, all three decisions concern the crucial question of whether a preliminary examination would turn into a proper investigation, in which case the ICC ‘owns’ the case and the OTP can use the Court’s full resources and eventually bring the case to trial. At the same time, they offer variety, since they differ in their outcome and reflect three different mechanisms for considering a particular situation within the Court. The Iraq situation was opened by the OTP by its own initiative (*proprio motu*) but then closed again after six years of examination due to the application of complementarity.

<sup>74</sup>Sinja Graf, *The Humanity of Universal Crime: Inclusion, Inequality, and Intervention in International Political Thought* (Oxford: Oxford University Press, 2021), p. 7.

<sup>75</sup>Luigi D. A. Corrias and Geoffrey M. Gordon, ‘Judging in the name of humanity: International criminal tribunals and the representation of a global public,’ *Journal of International Criminal Justice*, 13:1 (2015), pp. 97–112 (p. 98).

<sup>76</sup>Esmé Shirlow, *Judging at the Interface: Deference to State Decision-Making Authority in International Adjudication* (Cambridge: Cambridge University Press, 2021), p. 8.

<sup>77</sup>Nouwen, ‘Peacebuilder’, p. 172.

<sup>78</sup>This has been particularly criticised by Third World of International Law (TWAIL) scholars. See Antony Anghie and B. S. Chimni, ‘Third World approaches to international law and individual responsibility in internal conflicts,’ *Chinese Journal of International Law*, 2:1 (2003), pp. 77–103.

<sup>79</sup>On this, see Odermatt, ‘Patterns’, pp. 227–33.

The Afghanistan situation was also opened by the OTP *proprio motu* but not closed and instead turned into a full investigation – which was initially denied by a Pre-Trial Chamber (PTC) but then granted by the Appeals Chamber. Finally, after Palestine’s self-referral, the OTP asked a PTC whether it is possible to open an investigation in the territory of Palestine, and the PTC decided in favour. In all three instances, the mobilisation of technical legal concepts such as ‘complementarity’, ‘genuineness’, ‘interest of justice’, and ‘jurisdiction’ plays a decisive role. The Court’s ‘ability to assess ... whether a state is “able or willing” to prosecute those individuals brought before it, or the prosecutor’s ability to take into account “the interests of justice” in determining whether to investigate or prosecute, provides important openings to contextual and extra-legal considerations.’<sup>80</sup> Most prominently, the principle of complementarity is rather ambiguous as it ‘by definition lack[s] a definition’<sup>81</sup> but serves as a powerful tool occasionally used to (re)draw the line between the international and the state in practice. Finally, questions of jurisdiction compel the Court to engage with and invoke again the territoriality of states.

### Complementarity, ‘genuineness’, and domestic legality: The Iraq/UK preliminary examination

On 9 December 2020, the OTP, under Bensouda, announced that it would close its preliminary examination related to the UK involvement in the Iraq War and thus not seek authorisation from one of the Court’s PTCs to open any further investigations. The OTP justified the decision by stating that the principle of complementarity would apply.<sup>82</sup> Complementarity is a technical notion crucial in delineating the jurisdiction between national courts and the ICC. While previous international criminal tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), exercised primacy over any national courts, a case before the ICC is only admissible if a state is ‘unwilling or unable genuinely to carry out the investigation or prosecution.’<sup>83</sup> Complementarity thereby marked a compromise in the negotiation process of the Rome Statute between maintaining state sovereignty in a traditional sense and transferring sovereign rights to the international level, aiming at increasing the number of states joining the Statute.<sup>84</sup> Importantly, however, the Statute did not settle the matter, as complementarity quickly became an issue of interpretation and judicial politics – and not an automatic ‘mechanism’ or ‘trigger’ as often framed. First, different notions of complementarity emerged. For instance, a ‘classical’ notion of complementarity, where complementarity ‘preserve[s] and protect[s] domestic jurisdiction’ and works as a ‘threat-based concept’ of ‘carrots and sticks’, has been contrasted with a ‘positive’ version of complementarity, understanding it as a ‘forum of managerial interaction between the Court and States.’<sup>85</sup> This latter interpretation, which enhances the power of the ICC, has been advocated by the OTP, while the former has been regarded as being more in line with the legal text.<sup>86</sup> Second, concepts closely linked to complementarity have become sites of reinterpretation, including the notion of ‘unable’ and ‘unwilling’<sup>87</sup> and, as we will see in the decision on the Iraq/UK situation, ‘genuineness’. Thus, in the Iraq/UK situation, the meta-politics

<sup>80</sup> Christian M. De Vos, Sara Kendall, and Carsten Stahn, ‘Introduction’, in Christian M. De Vos, Sara Kendall, and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge: Cambridge University Press, 2015), pp. 1–20 (p. 4).

<sup>81</sup> Sarah M. H. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge: Cambridge University Press, 2013), p. 21.

<sup>82</sup> ICC, Office of the Prosecutor, ‘Situation in Iraq/UK: Final Report’ (2020), available at: [www.icc-cpi.int/itemsDocuments/201209-otp-final-report-iraq-uk-eng.pdf](http://www.icc-cpi.int/itemsDocuments/201209-otp-final-report-iraq-uk-eng.pdf).

<sup>83</sup> Rome Statute, Art 17(1)(a).

<sup>84</sup> Nouwen, *Complementarity*, p. xv.

<sup>85</sup> Carsten Stahn, ‘Complementarity: A tale of two notions’, *Criminal Law Forum*, 19:1 (2008), pp. 87–113 (pp. 96, 88).

<sup>86</sup> Nouwen, *Complementarity*, chap. 2.

<sup>87</sup> Antonio Cassese, Paola Gaeta, Laurel Baig, Mary Fan, Christopher Gosnell, and Alex Whiting, *Cassese’s International Criminal Law*, 3rd ed. (Oxford: Oxford University Press, 2013), p. 297.

of legality was embedded in the (re)interpretation of the technical notion of complementarity and the related concepts of 'unable', 'unwilling', and, in particular, 'genuine'. To zoom into the Iraq/UK decision allows us thus to interrogate the reasoning process of the ICC, especially the OTP, thereby reconstructing its rationale in meta-politically drawing the boundary between the domestic and the international.

In 2014, the OTP decided to reopen the preliminary examination into the situation in Iraq. A previous examination had been closed by then-Prosecutor Luis Moreno Ocampo in 2006. Based on the information available to the Prosecutor at the time, the required gravity threshold of the Rome Statute was not met.<sup>88</sup> However, new communication brought forward by the legal activist networks European Center for Constitutional and Human Rights (ECCHR) and Public Interest Lawyers led to a reversal of the initial decision and the reopening of the examination. The new examination focused on alleged war crimes, in particular the abuse of detainees, in Iraq between 2003 and 2006 in the context of Operation Telic, which was the military codename for all UK military operations between the invasion of 2003 and its withdrawal in 2011. As Iraq is not a State Party to the Rome Statute, the OTP could not examine potential international crimes on Iraqi territory (under jurisdiction *ratione loci*) but was restricted to the wrongdoings of UK nationals, which it could investigate because the UK is a State Party (under jurisdiction *ratione personae*) (paras. 69–74).<sup>89</sup> However, after more than six years of preliminary examinations, the OTP decided in December 2020 to not open a full investigation.

As the OTP states in this decision, the reason for not seeking authorisation to open an investigation lies in 'the nature of the ICC's admissibility regime' (para. 9). According to the OTP, the 'ICC is not a human rights body called upon to decide whether in domestic proceedings the requirements of human rights law or domestic law have been violated' (para. 9). The ICC, as an international criminal court, can only investigate international crimes. Thus, the OTP had to evaluate whether acts had taken place that constituted one of the international crimes included in the Rome Statute. As the OTP concluded, this had been the case, as members of British forces committed war crimes against Iraqi civilians in detention (para. 9). In a second step, however, the OTP had to decide whether the principle of complementarity would apply. According to Article 17 of the Rome Statute, the ICC can only act if a state is inactive – 'unable' or 'unwilling' – to conduct a 'genuine' criminal investigation and prosecution.

As the UK government cooperated throughout the entire process with the OTP, the discussions centred around the question whether UK authorities 'have been unwilling to investigate and prosecute – namely whether they have engaged in shielding perpetrators from criminal justice' (para. 9). This issue emerged because the domestic criminal inquiry in the UK, which was conducted through the investigative units Iraq Historic Allegations Team and Service Policy Legal Investigations, remained inconclusive. Due to the absence of any convictions, the OTP evaluated whether the UK had investigated the allegations 'genuinely'. It was the first time an organ of the ICC checked the previously unspecified and uncontested concept of 'genuineness'. It is the technical competence of international lawyers to problematise such concepts and thereby open avenues for manoeuvring. As the OTP summarises, the 'outcome of the more than ten year long domestic process, involving the examinations of thousands of allegations, has resulted in not one single case being submitted for prosecution: a result that has deprived the victims of justice' (para. 6, see also para. 481). Despite this 'mixed picture' (para. 481), the OTP concluded that the domestic investigations fulfilled the criterion of 'genuineness', since the UK did not act in 'bad faith' (para. 484) and, therefore, the situation remains 'inadmissible in view of complementarity' (para. 489).

Within civil society circles, the decision to stop investigating the conduct of British forces in Iraq has been contested as a politics of 'double standards'. As one commentator wrote, the 'OTP's decision reinforces long-standing double standards in international justice and shows once again

<sup>88</sup> ICC, Office of the Prosecutor, 2006. *OTP Response to Communication Received Concerning Iraq*, available at: <https://www.icc-cpi.int/news/otp-response-communications-received-concerning-iraq>).

<sup>89</sup> OTP, 'Situation in Iraq/UK'.

that powerful actors can get away with systematic torture. It fails to close the impunity gap for which the ICC was created.<sup>90</sup> In this context, the ECCHR asked the OTP in July 2021 to review its decision.<sup>91</sup> Importantly, however, these discussions are entrapped in the normative paradox of the ICC,<sup>92</sup> which is most evident in the concept of complementarity: whereas the ICC gains its authority by showing itself to be independent of states, it must at the same time cooperate with states to be able to investigate and prosecute. While seeking to transcend the world of states, this world remains its condition of possibility.

### Contesting the ‘interest of justice’: The Afghanistan investigation

The ICC’s recent decision to open an investigation into the situation in the Islamic Republic of Afghanistan has created strong reactions. Yet it did so in completely different directions, as two judicial bodies within the ICC, one of the PTCs and the Appeals Chamber, issued two diametrically opposed decisions, based on conflicting reasonings. The two decisions show how various actors within the ICC continuously engage in the meta-politics of legality by (re)drawing the boundaries between law and politics and the domestic and the international.

In 2017, after over a decade of preparation, the OTP under Bensouda filed a Request to open an investigation against the Taliban, the Afghan National Security Forces, and the United States and its CIA. While the Prosecutor requested the investigation of war crimes for all three parties, it added crimes against humanity for the Taliban. According to the Request, the ICC exercises jurisdiction over this case even though it considers the conflict as a non-international armed conflict (para. 15).<sup>93</sup> The justification for extending the jurisdiction of international criminal justice into non-international armed conflicts had been established in the *Tadić* decision of the ICTY.<sup>94</sup> More controversial, however, was the attempt to extend the investigation beyond the territory of Afghanistan. As the Prosecutor requested, the ICC should consider acts outside the territory of Afghanistan as long as there is a ‘nexus to the armed conflict in Afghanistan’ (para. 1). Concretely, this was meant to include the CIA’s programme of secret detentions in the investigations. It would enable the OTP to investigate apprehensions made by US special forces outside of Afghanistan (in Pakistan’s border region with Afghanistan) and alleged acts of torture and other war crimes thousands of miles away (in Lithuania, Poland, and Romania) as long as they had occurred on the territory of one of the ICC’s State Parties (which Lithuania, Pakistan, Poland, and Romania are) and even if there are separate agreements to not transfer an investigation to the ICC (as exist between Afghanistan and the US).

As the OTP acted through its *proprio motu* powers, it was necessary that a PTC, in this case Pre-Trial Chamber II, reviewed the legal grounds of the investigation. While the PTC agreed with the OTP that a non-international conflict, as in Afghanistan, falls under the ICC’s jurisdiction, it took its ‘filtering role’ seriously and argued that wrongful acts which did not occur on Afghan territory and had only a ‘nexus’ to Afghanistan could not be investigated.<sup>95</sup> More importantly, the PTC argued that opening an investigation would not serve the ‘interest of justice’. It was the first time a Chamber had refused to grant authorisation to investigate a situation initiated *proprio motu*

<sup>90</sup> Andreas Schueller, ‘The ICC, British war crimes in Iraq and a very British tradition’, *Opinio Juris* (11 December 2020), available at: {<http://opiniojuris.org/2020/12/11/the-icc-british-war-crimes-in-iraq-and-a-very-british-tradition/>}.

<sup>91</sup> ECCHR, ‘Situation in Iraq/UK – request for review of the prosecutor’s decision not to open an investigation’, ECCHR (1 July 2021), available at: {[https://www.ecchr.eu/fileadmin/Juristische\\_Dokumente/20210701\\_Executive\\_Summary\\_-\\_ECCHR\\_Request\\_for\\_Reconsideration\\_ICC\\_Iraq-UK-FILED.pdf](https://www.ecchr.eu/fileadmin/Juristische_Dokumente/20210701_Executive_Summary_-_ECCHR_Request_for_Reconsideration_ICC_Iraq-UK-FILED.pdf)}.

<sup>92</sup> Nouwen, *Complementarity*; Vinjamuri, ‘Paradox’.

<sup>93</sup> ICC, Office of the Prosecutor, 2017. *Situation in Afghanistan: Report of the Prosecutor’s Request for Authorization of an Investigation Pursuant to Article 15*, available at: {[https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2017\\_06891.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2017_06891.PDF)}.

<sup>94</sup> ICTY, Appeals Chamber. 1995. *Prosecutor v Tadić, Decision on the Defence Interlocutory Appeal on Jurisdiction*. IT-94-1-AR72.

<sup>95</sup> ICC, Pre-Trial Chamber II, 2019. *Situation in the Islamic Republic of Afghanistan*. ICC-02/17.

by the OTP. According to the PTC, the OTP had failed to check whether such an investigation served the ‘interest of justice’, as stated in Article 53(1)(c) of the Rome Statute. The ‘interest of justice’ check serves, as the PTC argued, to ensure ‘the Court’s credibility ... its very function and legitimacy’ (para. 33) by avoiding a ‘[f]rivolous, ungrounded or otherwise predictably inconclusive investigations’ (para. 34) and thereby binding ‘a significant amount of resource’ (para. 96) of the Court. The PTC came to this assessment not only because it had taken the OTP an ‘eleven-year-long preliminary examination’ (para. 93), and a better supply of information was unlikely in the future, but also because ‘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 still gauge the prospects of securing meaningful cooperation from relevant authorities for the future’ and thereby make it likely that an investigation by the Court would remain inconclusive (para. 94). Although the PTC’s decision was unanimous, Presiding Judge Antoine Kesia-Mbe Mindua felt it necessary to further explain in a ‘concurrent and separate opinion,’ *inter alia*, the expression ‘interest of justice.’<sup>96</sup> As the Opinion states, ‘interest of justice’ is a way to ‘include legal and “non-legal” factors’ into the Court’s consideration (para. 39). This is important since the ‘ICC is a Court of last resort’ and its ‘mission is not to adjudicate each and every heinous atrocity committed all over the world; for which the ‘primary responsibility ... rests on States’ (para. 42). Moreover, while ‘[a]s an independent and impartial court of law, the ICC shall not be guided by politics,’ it is necessary to recognise that ‘because of the cases the ICC is handling, it is at the crossroads of law and politics, and its decisions impact the international community and international relations’ (para. 47).

The PTC’s ‘momentous decision ... immediately sparked significant critical discussion’<sup>97</sup> and was contested within the international criminal justice community, stating, for example, ‘the fear that [the PTC] acted on political considerations rather than legal ones.’<sup>98</sup> In response, the OTP impugned the decision before the ICC’s Appeals Chamber (AC), leading to a full turnaround. In March 2020, the AC decided unanimously that the PTC had ‘erred’ in its previous decision and reversed it.<sup>99</sup> On the one hand, the PTC’s decision to limit the investigations to wrongful acts committed within Afghan territory was ‘incorrect’ as ‘the Prosecutor must carry out an investigation into the situation as a whole’ and restricting the scope of the investigations ‘would erroneously inhibit the Prosecutor’s truth-seeking function’ (paras. 60, 61). Moreover, the AC decided that the PTC ‘did not properly assess the interest of justice’ (para. 50), as this is for the Prosecutor alone and independently to evaluate. Thereby, the PTC went *ultra vires* by deciding upon the ‘interest of justice’. Interestingly, both the PTC and the AC had problems filling the concept of the ‘interest of justice’, and the procedures around it, with ‘life’ and had to rely in part on the drafting history (*travaux préparatoires*) of the Rome Statute in their interpretation.

While the reaction to the AC’s ruling from supporters of the ICC was, as expected, positive, others raised concerns about whether the ‘turf battle’ of the ‘Afghanistan saga’ impacted the judicial architecture of the ICC, as it ‘undermines the balance of power between Prosecutor and PTC.’<sup>100</sup> More problematic for the ICC was that the US administration criticised the decision heavily. Then US Secretary of State Pompeo stated that the ICC was ‘an unaccountable political institution, masquerading as a legal body.’<sup>101</sup> Such a position had been prepared earlier by National Security Adviser

<sup>96</sup>ICC, Pre-Trial Chamber II, 2019. *Concurring and Separate Opinion Judge Miuda*. ICC-02/17 Annex.

<sup>97</sup>Luca Poltronieri Rossetti, ‘The pre-trial chamber’s Afghanistan decision,’ *Journal of International Criminal Justice*, 17:3 (2019), pp. 585–608 (p. 586).

<sup>98</sup>Amnesty International, ‘Afghanistan: ICC refuses to authorize investigation, caving into USA threats,’ *Amnesty International* (12 April 2019), available at: {[www.amnesty.org/en/latest/press-release/2019/04/afghanistan-icc-refuses-to-authorize-investigation-caving-into-usa-threats/](https://www.amnesty.org/en/latest/press-release/2019/04/afghanistan-icc-refuses-to-authorize-investigation-caving-into-usa-threats/)}.

<sup>99</sup>ICC, Appeals Chamber. 2020. *Situation in the Islamic Republic of Afghanistan*. ICC-02/17 OA4.

<sup>100</sup>Lloyd T. Chigowe, ‘The ICC and the situation in Afghanistan: A critical examination of the role of the pre-trial chambers in the initiation of investigations *proprio motu*,’ *Leiden Journal of International Law*, 35:3 (2022), pp. 699–718 (pp. 707, 699).

<sup>101</sup>Cit. in Lori Allen, ‘The ICC in Palestine: Reasons to withhold hope,’ *Carnegie Endowment for International Peace* (17 February 2021), available at: {<https://carnegieendowment.org/sada/83895>}.

Bolton, who claimed in 2018 that the Rome Statute had ‘granted potentially enormous, essentially unaccountable powers’ to the ICC and its Prosecutor, who were aspiring to ‘universal jurisdiction’; moreover, the architecture of the ICC failed in terms of checks and balances, as it was both an ‘executive and judicial institution.’<sup>102</sup> In response to the decision to open an investigation, the US imposed economic sanctions and a travel ban on Prosecutor Bensouda and other ICC staff. As Krefß commented, this has been an ‘unprecedented decision’, as high-ranking members of the Court were put on a ‘black list’, ‘on a par with transnational terrorist organisations and associations dedicated to the proliferation of weapons of mass destruction.’<sup>103</sup> For Krefß, the more fundamental problem was, however, that ‘the legal view of the US Government’, namely that the ICC violates US sovereignty, was enacted politically by Presidential decree and not as ‘a matter of civilized legal argument, either in the course of the ongoing proceedings of the ICC or in suitable proceedings before another international court.’<sup>104</sup> Although the Biden administration lifted the sanctions in April 2021, new US Secretary of State Blinken confirmed that ‘[w]e continue to disagree strongly with the ICC’s actions relating to the Afghanistan and Palestinian situations. We maintain our long-standing objection to the Court’s efforts to assert jurisdiction over personnel of non-States Parties such as the United States and Israel.’<sup>105</sup> The ICC has also attempted to de-escalate. While the Afghan government requested in April 2021 to defer the case back to Afghan legal bodies as prosecution had been opened in Afghanistan – claiming that this invokes complementarity – the new Prosecutor Karim Khan decided after the fall of the government and the takeover by the Taliban to focus exclusively on crimes committed by the Taliban and the Islamic State, and thereby to ignore for the time being crimes committed by US forces.<sup>106</sup> However, the question is whether the OTP and the ICC recognise the Taliban as (de facto) government, which is why the Court has asked both its Assembly of State Parties (ASP) and the UN Secretary-General for further clarification.<sup>107</sup>

As this case demonstrates, the interpretation of ‘interest of justice’, as a technical yet open concept, played a significant role in justifying and reversing wide-ranging decisions about launching investigations. The interpretation of this concept allowed for drawing and re-drawing the boundaries between law and politics, and between the domestic and the international. It thereby operates as an interface in internal ICC discussions about importing ‘extra-legal’ factors into its considerations and decisions. Whereas *interest* of justice is interpreted by some, as Judge Mindua, as a means for bringing political factors into international criminal justice, others see in the interest of *justice* a possibility to consider different forms of justice, going beyond the ICC’s punitive approach.<sup>108</sup>

### ICC jurisdiction and self-authorisation: Delineating Palestinian statehood and territory

The contingent delineation of the boundaries between law and politics and between the domestic and the international by the ICC is well illustrated by the recent decision of Pre-Trial Chamber I confirming the ICC’s jurisdiction over the ‘territory’ of ‘Palestine’ for the purpose of investigating

<sup>102</sup> John Bolton, ‘National Security Adviser John Bolton remarks to Federalist Society’ (10 September 2018), available at: <https://www.lawfareblog.com/national-security-adviser-john-bolton-remarks-federalist-society/>.

<sup>103</sup> Claus Krefß, ‘An unusual and extraordinary assault on international justice’, *Journal of International Criminal Justice*, 18:4 (2021), pp. 791–2 (p. 791).

<sup>104</sup> *Ibid.*, p. 791.

<sup>105</sup> Antony J. Blinken, ‘Ending sanctions and visa restrictions against personnel of the International Criminal Court’ (2 April 2021), available at: <https://www.state.gov/ending-sanctions-and-visa-restrictions-against-personnel-of-the-international-criminal-court/>.

<sup>106</sup> ICC, Office of the Prosecutor, 2021. *Statement of the Prosecutor of the International Criminal Court*, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=2021-09-27-otp-statement-afghanistan>.

<sup>107</sup> ICC, Pre-Trial Chamber II, 2021. *Afghanistan: ICC Pre-Trial Chamber II Requests the UNSG and the Bureau of the ASP of the ICC to Submit Information on the Identification of the Authorities Currently Representing the Islamic Republic of Afghanistan*, available at: <https://www.icc-cpi.int/news/afghanistan-icc-pre-trial-chamber-ii-requests-ung-and-bureau-asp-icc-submit-information>.

<sup>108</sup> Darryl Robinson, ‘Serving the interests of justice: Amnesties, truth commissions and the International Criminal Court’, *European Journal of International Law*, 14:3 (2003), pp. 481–505.

alleged war crimes.<sup>109</sup> Indeed, a Court ruling on its own jurisdiction is a case of self-authorisation *par excellence*. The investigation by the Prosecutor of alleged crimes committed by Israeli authorities, Hamas, and other Palestinian groups shows how the Court depends on, and actively reaffirms, the existence and delineation of states and their territories, here Israel and Palestine, in order to operate as an international court of criminal law. An analysis into the reasoning of the Chamber suggests that these boundaries could have been drawn differently, but it also shows that the Court inevitably had to draw them once called upon.

In its decision from 5 February 2021, PTC I went to great lengths to insist that it did not aim to determine the status of Palestine or its territorial borders, and that its response to the Prosecutor's request to clarify the Court's 'territorial jurisdiction in Palestine' was of a purely legal nature distinct from the supposedly political question of state creation (paras. 53–8). Yet its assessment implies and projects Palestinian statehood in several ways, and its specification of what a legal analysis includes, and what it excludes, could have easily been reversed, with important consequences for its decision. As such, the majority decision and dissenting opinion reveal how the Chamber tailored a legal basis for confirming the Court's jurisdiction by invoking a Palestinian state, while at the same time excluding the determination of its existence from the scope of legal analysis.

The Chamber addressed two issues in its response to the Prosecutor's request, namely, first, whether Palestine can be regarded as "the State on the territory of which the conduct in question occurred" within the meaning of Article 12(2)(a) of the Statute' (para. 87) and, second, whether the alleged crimes were committed within its territorial borders (*ibid.*). As for the first question, the majority decision argued that since the 'State of Palestine' was a 'State Party' to the Rome Statute and had acceded to the Statute according to its proper procedures, it should be treated like any other state party and, thus, as a state. As such, Palestine was entitled to request the formal launching of investigations of alleged international crimes committed on its territory. Although the Chamber maintained that its answer to the question 'does not ... require a determination as to whether that entity fulfils the prerequisites of statehood under general international law' (para. 93), it nevertheless anchored its treatment of Palestine as a state in Palestine's status as a 'non-member observer state' accorded to it by the UN General Assembly (UNGA) (UNGA 2012). As Judge Péter Kovács points out in his dissenting opinion, apart from the fact that the legal authority of a UNGA resolution was doubtful under international law, the reasoning that Palestine was a state because it was considered a state party by the Statute was circular (Kovács, para. 17).<sup>110</sup> While the Chamber had thus bracketed the proper assessment of Palestine's statehood, it had at the same time affirmed it for the purpose of ICC investigations.

More significantly, when determining the territory of Palestine in order to delineate the scope of its own jurisdiction, the majority decision resorted to UNGA resolution 67/19 and its affirmation of 'the right of the Palestinian people to self-determination and to independence in their State of Palestine on the Palestinian territory occupied since 1967'<sup>111</sup> (paras. 116–17), as well as additional UNGA resolutions emphasising 'that the Palestinian people have the right to ... sovereignty over their territory' (GA/RES/58/292, para. 1, *cit.* in ICC-PTC I 2021, para. 117).<sup>112</sup> The Chamber concluded that 'the Court's territorial jurisdiction in the Situation in Palestine extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem' (para. 118).<sup>113</sup> By contrast, provisions of the Oslo Accords, which currently limit the jurisdiction of the

<sup>109</sup>ICC, Pre-Trial Chamber I, 2021. *Situation in the State of Palestine*. ICC-01/18.

<sup>110</sup>ICC, Pre-Trial Chamber I, 2021. *Judge Péter Kovács' Partly Dissenting Opinion*. ICC-01/18 Annex.

<sup>111</sup>PTC I. *Situation in the State of Palestine*.

<sup>112</sup>Robert Heinsch and Giulia Pinzauti, 'To be (a state) or not to be? The relevance of the law of belligerent occupation with regard to Palestine's statehood before the ICC', *Journal of International Criminal Justice*, 18:4 (2020), pp. 927–45.

<sup>113</sup>See Marco Pertile, 'The borders of the occupied Palestinian territory are determined by customary law: A comment on the prosecutor's position on the territorial jurisdiction of the ICC in the situation concerning Palestine', *Journal of International Criminal Justice*, 18:4 (2020), pp. 967–83.



Palestinian Authority, were not regarded as having any implications for the territorial jurisdiction of the Court, essentially because state sovereignty is not contingent on the actual exercise of authority or international agreements limiting it. The Court also did not ask the ASP or the UN Secretary-General for further clarification, as it would later do in the Afghanistan situation. While apparently technical, the Court's reasoning and its consideration of some sources rather than others shows the politics of legal interpretation. While the PTC insists on not treating the question of Palestinian statehood as such, its invocation of Palestine's status in the General Assembly as well as of its territory in accordance with its right to self-determination nevertheless imply the existence of a Palestinian state, at least functionally and for the purpose of the ICC.<sup>114</sup>

In his dissenting opinion, Judge Kovačs disagreed with the majority decision regarding its attempt to bracket the determination of Palestine's statehood, the argument that the status as a State Party to the Rome Statute and as a 'non-member observer state' in the UNGA allowed for inferring functional state status, and the delineation of territory under Palestinian jurisdiction without regard for the specific provisions of the 1993 Oslo Accords.<sup>115</sup> For Kovačs, although a 'State Party' to the Rome Statute, Palestine is merely a 'state *in statu nascendi*' (para. 267), and any jurisdiction it could have delegated to the ICC would have been restricted to the designated areas for which Palestine had obtained jurisdiction in the Interim Agreement of the Oslo Accords (para. 282 ff.). By contrast, Kovačs did not see the right to self-determination either determining the state status of Palestine or the scope of its territory and jurisdiction.<sup>116</sup> While the majority decision and the dissenting opinion come to different conclusions regarding the Court's jurisdiction in the 'Situation of Palestine', they both rely on assumed state territories in one way or another in their legal arguments. The reasoning that belligerent occupation does not preclude statehood, including statehood developed on the basis of self-determination, has found both supporters<sup>117</sup> and opponents in international law scholarship.<sup>118</sup>

Unsurprisingly, the decision has been regarded as 'political', rather than properly 'legal', by different observers. While the Palestinian Authority celebrated the decision as 'a victory for rights, justice, freedom and moral values in the world',<sup>119</sup> the US and Israeli governments denounced it, and the Australian government rejected the ruling because, as it insisted, it did not recognise Palestine as a state or 'State Party' to the Rome Statute.<sup>120</sup> The German government, too, reiterated that in their 'legal view', 'the court has no jurisdiction because of the absence of the element of Palestinian statehood required by international law'.<sup>121</sup> Beyond these endorsements and criticisms, and from a perspective on the Court's meta-politics of legality, it is striking that to authorise its own authority to adjudicate, the Court not only had to actively interpret what in this case was legal and what political, but it also had to establish which states could actually be regarded as existing, and within which borders, if only for its own purposes. By deciding which entities possess state sovereignty and in which territory, in an effort to define its own jurisdiction over the 'state' of

<sup>114</sup>PTC I. *Situation in the State of Palestine*. See Pertile, 'Borders'.

<sup>115</sup>PTC I, Judge Péter Kovačs' *Partly Dissenting Opinion*.

<sup>116</sup>Cf. Kai Ambos, "'Solid jurisdictional basis'? The ICC's fragile jurisdiction for crimes allegedly committed in Palestine," *EJIL Talk! Blog of the European Journal of International Law* (2 March 2021), available at: <https://www.ejiltalk.org/solid-jurisdictional-basis-the-iccs-fragile-jurisdiction-for-crimes-allegedly-committed-in-palestine/>.

<sup>117</sup>Heinsch and Pinzauti, 'To be'.

<sup>118</sup>Yaël Ronen, 'Palestine in the ICC: Statehood and the right to self-determination in the absence of effective control', *Journal of International Criminal Justice*, 18:4 (2020), pp. 947–66.

<sup>119</sup>Cit. in Allen, 'ICC in Palestine'. Whether the turn to international criminal law serves the pursuit of Palestinian statehood is debatable. See Michelle Burgis-Kasthala, Nahed Samour, and Christine Schwöbel-Patel, 'States of criminality: International (criminal) law, Palestine, and the sovereignty trap', in Florian Jeßberger, Leonie Steinl, and Kalika Mehta (eds), *International Criminal Law – A Counter-Hegemonic Project?* (The Hague: T.M.C. Asser Press, 2023), pp. 111–33.

<sup>120</sup>Allen, 'ICC in Palestine'.

<sup>121</sup>Heiko Maas (@HeikoMaas), 'Our legal view on jurisdiction of the International Criminal Court regarding alleged crimes committed in the Palestine territories', Twitter, 9 February 2021, 7:58 pm, available at: [https://twitter.com/heikomaas/status/1359215215913623564?lang=en%22%20%5Ct%20%22\\_blank](https://twitter.com/heikomaas/status/1359215215913623564?lang=en%22%20%5Ct%20%22_blank).

Palestine, the Court performs the meta-politics of legality inherent in redrawing the boundaries of law and the international.

## Conclusion

The starting point of this contribution was the observation that the fundamental distinctions between law and politics, and between the domestic and the international, are neither substantively given nor irrelevant to the process of judicialisation and the ICC's operation in particular. Our contribution complements the existing literature by focusing on the Court's meta-politics of redrawing these distinctions, flexibly and contingently, but with significant implications. From this vantage point, the distinctions between politics and law, and between the international and sovereign states, are not already established, but are constantly reproduced in processes of stabilisation, contestation, and transformation, in particular by international courts. Meta-political boundary-drawing, we have argued, is made possible by technicalities of law and the employment of technical legal expertise in the interpretation and adjudication of particular cases. To illustrate this process empirically, we turned to the three recent decisions of the ICC to (not) investigate alleged international crimes committed by British forces in Iraq, by the Taliban, governmental, and US forces in Afghanistan, and by Israeli authorities and Palestinian groups in the West Bank, East Jerusalem, and Gaza. We were not interested in whether the ICC's decisions were political or legal, whether it was 'correct' to keep investigations on the international level or to refer them to states and the domestic judiciary. Instead, we have shown how the Court itself has actively established these distinctions within the different cases by crafting legal arguments, often reconfiguring the boundaries from one decision to another without any predetermined interpretation of where they lie.

This does not mean that the decisions of the Court are arbitrary or that 'anything goes'. On the contrary, the proceedings are highly technical and reflect, all apparent indeterminacy notwithstanding, a 'culture of formalism' by which courts distinguish themselves as legal bodies, restrict access, and define the scope of competent arguments.<sup>122</sup> Such arguments include, for instance, questions of jurisdiction, complementarity, and the interest of justice. However, the contingency of the Court's decision does reveal its particular meta-political authority that emerges from its position at the very intersection of legality and politics and of the domestic and the international. This also has implications for other globalising legal fields, beyond the ICC and international criminal law, as it suggests that the emerging power of international courts must be understood as enabled and constrained by the opposition and entanglement of distinct social logics in a simultaneously integrating and differentiating world society. The question here is not whether (international) law supplants politics, or whether politics maintains its role by successfully contesting the authority of international courts. We suggest that we should ask instead *how* particular courts engage in the meta-politics of legality, and thereby promote particular logics – such as that of international criminal law as part of a move towards the law of humanity – while participating in both the transformation and reproduction of our contemporary world society and its constitutive distinctions, including those between (international) law and politics.

**Acknowledgements.** Earlier versions of this article have been presented at EISA's 2021 Pan-European Conference (Section: Authority and the Making of International Facts: Symbolic Orders, Expertise and Imaginaries) and the WISC workshop 'Conceptualizing History/Historizing Concepts' in June 2022. We would like to thank the organizers and participants for their valuable feedback, especially Pinar Bilgin, Zeynep Gülşah Çapan, Benjamin Herboth, Monica Herz, Oliver Kessler, Ole Jacob Sending, and Karen Smith. We are also grateful to the editors and three anonymous reviewers for their comments and suggestions. All errors and omissions are our own. The authors of this article have contributed equally.

<sup>122</sup>Martti Koskeniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (Cambridge: Cambridge University Press, 2001).

**Janis Grzybowski** is Assistant Professor at the European School of Political and Social Sciences (ESPOL) at Lille Catholic University and research fellow at the Centre des recherches et études en politique internationale (REPI) at the Université libre de Bruxelles. His research focuses on state creation, international theory, and the politics of international law. He is co-editor of *Variations on Sovereignty: Contestations and Transformations from around the World* (2023) and has recently published articles in *Geopolitics*, *International Theory*, and the *European Journal of International Law*, among others.

**Filipe dos Reis** is Assistant Professor at the Department of International Relations and International Organization, University of Groningen. His current research focuses on the history, theory, and politics of international law, Imperial Germany, and maps. He is co-editor of two recent edited volumes: *The Politics of Translation in International Relations* (2021) and *Mapping, Connectivity and the Making of European Empires* (2021).