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Multiple legalities and international criminal tribunals: juridical versus political legality

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This chapter looks at practices of legality in the context of international criminal tribunals from the perspective of an archetypical form of legality claim, namely juridical legality. In doing so it seeks to distinguish between multiple types of legality claims; in particular it contrasts *juridical* legality with *political* legality.

The present chapter is triggered by the editors' suggestion that claims about legality constitute the nexus between politics and law in the international realm.[1] Furthermore, this chapter follows the editors' attempt to understand legality from the bottom up, i.e., from the perspective of various international practices where legality is claimed. Also, we acknowledge that, increasingly, matters that were previously outside the realm of legal discourse are expressed in legality terms. By the same token, legality claims are made outside the traditional juridical fora. The upshot of all this is that we are confronted with a diverging multiplicity of legality practices. The aim of this chapter is precisely to account for this multiplicity of legality practices.

A multiplicity of diverging legality practices presents a serious challenge for the descriptive, explanatory and ultimately normative distinctiveness of law; any activity in the international realm can be construed as a legality practice. In effect, even without explicitly invoking the legality of their actions, international actors will claim that their actions are in conformity with international law. In a way, the claim to 'conformity with international law' is rhetorically implicit in all public statements by international actors. Drawing on Johnstone's interpretative communities, the editors seek to create some clarity in the myriad of practices that

[1] Nicholas M. Rajkovic, Tanja E. Aalberts and Thomas Gammeltoft-Hansen, *The Power of Legality: Practices of International Law and Their Politics* (Cambridge: Cambridge University Press, 2016).

could be understood as legality practices.[2] They propose a heuristic model that allows to identify various fields of practice of legality contestations (policy, institutional and scholarly) operating at various interpretative levels (sources of law, epistemologies of law and teleologies). Taking cue from these approaches this chapter seeks to probe further into the distinctness of legality claims by asking the following questions

i. *How* are the legality claims framed?
ii. *What* is claimed in the name of legality?
iii. In what *time* frame are the claims situated?
iv. To *whom* is the legality claim addressed?

It is from these questions when applied to Western legal history that an archetypical form of legality claim emerges, namely juridical legality (i. *How?*). According to the juridical legality perspective the distinctive character of law resides in its artificial concepts and arrangements that have been developed and practiced by jurists over centuries for example, contract, property, competence, person, corporation, marriage, consent, prescription, causation (ii. *What?*). These concepts, categories and arrangements are invoked in legal statements that seek the authorization of particular factual actions (or inactions). The most spectacular form of factual actions being violence (iii. *When?*). The practice of making legal statements is normative and predominantly backward looking, as it is about authorizing actions following a wrongful act in the past (iv. *From whom?*). Finally, the legal statements are not so much directed at an opponent or counterparty. Rather, a proponent makes legal statements in order to mobilize his allies to enforce his claim against the opponent, and to de-mobilize the allies of the opponent who might otherwise assist him in fending off the enforcement by the proponent and his helpers. Directly relevant for the international sphere, juridical law does not depend on the existence of centralized or official enforcement agencies. Neither does the binding force or normativity of norms depend on effective enforcement. From the juridical law perspective, it is the other way around; because the norms are binding one seeks the ways in which the law may authorize enforcement of those norms.

Rather than disqualifying non-juridical claims as being non-legal, the whole point of the chapter is to better grasp various legality practices by

[2] Ian Johnstone, *The Power of Deliberation: International Law, Politics and Organizations* (Oxford: Oxford University Press, 2011), at 44 for a summary description of an interpretative community.

identifying the distinctness of each form. To illustrate how we may distinguish between juridical legality claims and non-juridical legality claims we will look at how in the context of international criminal tribunals actors make legality claims referring to notions that have both strong legal and political connotations: enemy/friend of mankind, terrorist/terrorism, peace and justice. Precisely by highlighting how the mobilization of these notions contain or lack elements of juridical legality, the interplay between political and juridical legality can be fleshed out, showing how legality operates at/as the nexus between law and politics.

I Multiple legalities

The background for this chapter are the scholarly insights about the intrinsic and complex relationship between politics and law in the international sphere. Firstly, international law is increasingly understood as the site of what counts as legitimate international action.[3] Today, international law is invoked in the context of international conflicts where the law was previously simply irrelevant.[4] Secondly, there is a growing awareness that choices that are seemingly *purely juridical* may constitute the quintessential political aspect of international law, for example, the decision to use the law as well as a particular branch of the law. So, the political of the law is located largely in a politics of re-definition.[5] Thirdly, while international action may seek to find its legitimacy by moving into the legal arena of international law, at the same time legal claims are being made outside the traditional juridical *fora*.[6] Finally, and more generally, law is not so much something that adapts itself to political struggles and social change, 'law *is* the language of social change'.[7] These insights tie into

[3] Christian Reus-Smit, 'The Politics of International Law', in Christian Reus-Smit (ed.), *The Politics of International Law* (Cambridge: Cambridge University Press, 2004), at 36–37.

[4] Sarah Nouwen, 'The ICC's Intervention in Uganda: Which Rule of Law Does It Promote?', Cambridge University Legal Studies Research paper Series no. 22/2012, (2012) at www.law.cam.uk/ssrn.

[5] Martti Koskenniemi, 'The Politics of International Law – 20 Years Later' (2009) 20 *EJIL*, at 8–12.

[6] Cf. 'international law achieves its impact through *authoritative* invocation, application and enforcement, which can take place *outside* judgments'. S. Nouwen and W. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan: A Rejoinder to Bas Schotel' (2011) 22 *EJIL*, at 1163 (emphasis added).

[7] Laurent de Sutter, 'How to Get Rid of Legal Theory' in Z. Bankowski (ed.), *Epistomology and Ontology* IVR-Symposium Lund 2003, *Archiv für Rechts- und Sozialphilosophie* special issue (Stuttgart: Franz Steiner Verlag, 2005), at 47.

the suggestion by the editors of this book that the nexus between politics and law is located in legality.[8]

But if legality is the nexus between law and politics, it means that law and politics come to the international playground hand in hand while being separated. Thus to make sense of legality as a nexus, we must see law and politics as being both connected and separated. If so, we must also say something about how we understand legality, law and politics. And typically, it is here that most critical scholars of international law and relations shy away: out of fear of being labelled essentialist or objectivist, critical scholars seem to have a general reluctance to provide even a working definition or description of the object of their study. Yet, if we want to examine legality as a nexus of law and politics we must at least give some idea of what we mean by law and politics. In effect, as often, it is precisely one's working definition – explicit or implicit – that informs an inquiry.

We understand legality as something that is claimed in statements. So we will speak of legality claims or statements. It refers to statements whereby actors claim that something (situation, action, object, etc.) is permitted, authorized, prohibited or required by law. The reference to law is either made by explicitly mentioning the word 'law', 'legal', 'illegal' or its derivatives and synonyms. Or, the claim derives its law-like character by reference to a source that is generally understood as a legal source or instrument (a right mentioned in an international treaty, resolution of a UN body, etc.). This description of legality claims is extremely broad on purpose. It suffices that some kind of normative position (permission, authorization, prohibition, requirement) is presented with reference to law. The statement does not have to be legally correct or valid. It need not be made by an official or legal professional. It can be done in any context and outside standard legal fora. Moreover, the definition is extremely inclusive as to what counts as a reference to law: it is self-acclaimed. The simple fact that the one making the legality statement claims his reference to be legal suffices. So for now we will call law *what people who invoke law call law*. The over-inclusive definition precisely tries to accommodate this book's inquiry into the ongoing struggle for what counts as law. If we would discard certain statements as simply not legal because they are legally incorrect (e.g., an invocation of a fundamental right that does not come close to interpretations in

[8] Rajkovic, Aalberts, and Gammeltoft-Hansen, *The Power of Legality*.

well-established case law of international courts), we would miss out on the idea that legality claims situate at the nexus between law and politics. To be sure, we will distinguish between the types of legality claims. That is the whole point of this chapter. But we will do so not by disqualifying certain claims as non-legal. Rather we will distinguish between forms of legality claims.

For purposes of this chapter we understand the political in the two ways it is mostly used explicitly and more often implicitly in the literature. Firstly, the political refers to the practice of making collectively binding decisions that are not based on or cannot be derived from shared or objective rules or standards. In other words, the collectively binding decision cannot be understood as the product of mere – practical – reasoning. Secondly, the political may refer to any practice where decisions and actions are taken that are not – fully – guided by shared or objective rules and standards. Both ways of understanding the political concentrate on decisions and actions that are not and cannot be guided fully by rules and standards. The difference is the scope. The former looks at what we would traditionally see as the decisions concerning the community at large (e.g., national legislation, treaty making), while the latter comprises all kind of practices including those at a more local and micro level. In fact, conceptually the distinction relies on a divide between public/private and collective/individual that in itself is politically contested.[9]

When looking at our working definitions of legality and politics – including our understanding for now of law as *what people who invoke law call law* – it becomes clear how much legality operates as a nexus at the point that law and politics fully overlap. For as jurists have always known – though not always openly admitted – law is obviously political in the sense that its application cannot be fully derived from a rule, let alone *the* rule. Furthermore, law operates always both at the individual and collective level. Even when the law 'settles' matters vis-à-vis particular private actors it necessarily involves a wider public. Moreover, today virtually all public statements by international actors can be construed as legality claims. For even if the statement does not make explicit reference to law, no international actor would argue that his position is not in compliance with international law. In other words, one could add after

[9] See for an excellent critical overview of the critiques on this distinction, Juan Amaya-Castro, *Human Rights and the Critiques of the Public-Private Distinction*, (Ph.D. Vrije Universiteit Amsterdam/Migration law series 7: Amsterdam, 2010).

any public statement by international actors 'and we are in compliance with international law'.[10] So both law and politics are everywhere in the international sphere. But if they overlap to such an extent, we must ask ourselves what is the point of distinguishing between them. For instance, it would make little sense to distinguish between an International Criminal Court (ICC) decision and UN General Assembly resolution as if the former is legal and the latter political.

Anticipating our discussion of juridical law, maybe we should take a different starting point. We should start by the simple observation that people claim some things to be law. And the simple fact that something is claimed to be law makes it a matter of concern and interest to citizens and scholars. For it is through law that people seek to authorize coercion. Furthermore, since all of what we do has politics in it in the sense that our decisions and actions are not fully guided by norms, we cannot 'reason our way out'. It means that there is a risk of coercion that cannot be fully understood, justified and curtailed by practical reasoning. In other words, the benefit of the two categories, legal and political, is first of all to explain and trigger our interest in and concern for the matter. Now, to turn our interest and concern into something knowledge-like we have to do what disciplines do, namely make distinctions between and within disciplines.[11] Politics is everywhere, but not everything is only political, and the political is not everywhere the same. The same goes for the law. And it is up to the discipline of jurists to distinguish between those multiple manifestations of legality. To be sure, the distinctions are not out there; they are obviously constructed by the discipline. But that does not make the distinctions meaningless or irrelevant. In fact, that is precisely the point and test for any distinction, category, criterion, element or concept: is it meaningful? And this ultimately depends on the particular underlying purpose for making a particular distinction in the first place. One identifies a characteristic in function of what one finds important. This is the reason why scholars should be upfront and transparent about their normative concerns. They should reveal their political agenda not as a matter of integrity or make public their ideological affiliations in order to disclose possible biases. The reason is more

[10] States, and more generally public actors, 'almost always try to claim that their actions are consistent with the law. It is extremely rare to hear a leader say: "we don't care about international law"'. Johnstone, *The Power of Deliberation*, at 34.

[11] Cf. Nikolas M. Rajkovic, 'Rules, Lawyering, and the Politics of Legality: Critical Sociology and International Law's Rule' (2014) 27 *Leiden Journal of International Law*, at 331–352.

profane: we simply talk past each other if we do not know for what purposes a scholar uses distinctions, categories, criteria, etc.[12]

For instance, how should we understand and locate legality in 'folk' legal claims voiced by global protesters such as 'No war without a Security Council mandate'?[13] Traditional spatial distinctions will not do, as law-like claims are made outside the juridical fora, and political claims are voiced in the traditional legal arena. In effect, innovative scholarship has been very successful in pointing out the political in institutions that – if anything – are supposed to be hard core international law, namely international criminal tribunals. This is precisely why this chapter wants to look into this scholarship on the workings of international criminal tribunals, to see how we can distinguish meaningfully between types of legality claims. Given the fact that all legal claims are political, and most political claims are at least implicitly legal, how can we meaningfully distinguish between types of legality claims?[14]

II Juridical law

i Normative and scholarly context

The development of the following perspective on law fits into my larger underlying research interest into the structure, logic and mechanics of legal protection, i.e., protection *through* law. Part of this overall project focuses on understanding the role of legal categories. Paradoxically, in contemporary theory of international law scholars pay little to no attention to the role of legal categories. Today, virtually all scholarship of international law with some interest in theory focuses primarily on the *normative quality* of international and transnational law. Either scholars try to understand whether or not (legal) norms guide, shape or otherwise impact action in the international sphere (cf. international

[12] Brian Bix makes a similar point in the context of conceptual analyses of law, but I believe it applies to any inquiry into law. Brian Bix, *Jurisprudence: Theory and Context* (London: Sweet & Maxwell, 2006), 9–30.

[13] For this example, Christian Reus-Smit, 'Obligation Through Practice' (2011) 3 *International Theory*, at 340.

[14] It may echo Koskenniemi's recent suggestion that our investigation should not be so much one of locating 'the politics' within practices of law – as if the political is a separate entity. Rather we should look at various forms and manifestations of politics as legal, economic, military, etc. M. Koskenniemi, 'International Law and Critique - Trends, Strategies, Myths', lecture delivered at Faculty of Law, VU – COST Program, 10 April 2014.

relations studies).[15] Or they critically analyze the normative quality of the instruments of international law (cf. theory of international law).[16] Though these analyses are extremely pertinent, what is missing is an account of the specifically distinctive role of legal categories.

By contrast, the point of the juridical law perspective is to show that on the basis of legal practices in the West from the inception of Roman law onwards we can identify elements that allow us to explain the specificity of legal statements. More precisely the elements are selected with a view to explaining why or how invoking legal categories matters. In a way, it may help us see how a particular form of legality claims works. By the same token and for purposes of this chapter, it enables us to distinguish between juridical legality and political legality claims. Elsewhere I discussed the elements of juridical law extensively with examples from contemporary law and legal history.[17] The following presentation of juridical law is a summarized version of this discussion. Many of the examples and most of the references will be omitted.

[15] For all their focus on enforcement, compliance and persuasion of international law, none of the contributions in the otherwise excellent volume Jeffrey Dunoff and Mark Pollack, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge University Press, 2013) probe into the specificity and distinctiveness of legal categories as have been developed by legal practice over centuries. At best the contributions come up with an account of argumentation and norms in normative practices *in general*. The focus on normativity (versus chaos) is nicely illustrated in a critical overview of the development of the IR debate up to now, N. Onuf, 'Rule and Rules in International Relations', 24 April 2014 available at www.helsinki.fi/eci/Events/Nicholas%20Onuf Rule%20and%20Rules%20%204-2-14.pdf (last consulted 6 June 2014).

[16] This applies not only to the dominant liberal-democratic themes of contemporary international law scholarship, especially constitutionalism, fragmentation, rule of law, cosmopolitanism and of course ultimately democracy. (cf. J. Klabbers, A. Peters and G. Ulfstein, *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009); G. Palombella and N. Walker (eds.), *Relocating the Rule of Law*. (Oxford/Portland: Hart, 2009); R. Pierik and W. Werner (eds.), *Cosmopolitanism in Context. Perspectives from International Law and Political Theory* (Cambridge: Cambridge University Press, 2010), A. von Bogdandy and I. Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification' (2012) 23 *EJIL*, 7–41). But also "Critical Legal Studies" approaches to international law primarily focus on the (lack of) normative quality of international law. Even when they recognize the relevance of how (e.g., through what branch of law) an issue is framed legally, they fail to account for the specificity of the category being a legal one as opposed to a category of morality, economics, medicine, etc. (cf. Koskenniemi, 'The Politics of International Law').

[17] Bas Schotel, 'Legislation, Empirical Research and Juridical Law' (2013) 1 *Journal of the Theory and Practice of Legislation*, 501–532. In that same article, I contrast juridical law with law as autopoiesis as proposed by Luhmann and Teubner.

For the sake of clarity and at the risk of being superfluous, I will briefly restate what the juridical law perspective is not about. It is not an inquiry into whether or not international law has normative force or guides behaviour of international actors. Neither does it look into whether and why international actors comply with international law. The juridical law perspective is not developed to establish what counts as a legal claim let alone a legally valid claim. It seeks to identify the elements of legal practice that can account for invoking legal categories. As such it does not capture all instances of legal practice. The analytical or descriptive point of the juridical law is precisely to distinguish in a meaningful way between forms of legality claims. As a result, some types of legality claims do not correspond with all elements of juridical law.

ii Central tenets of juridical law

(i) Autonomous and artificial (*how* are the legality claims framed?)

In a seemingly tautological way, Western law's distinctive quality is its juridical nature. What distinguishes law in the West from other practices and systems is the use of juridical concepts, i.e., arrangements and concepts that have been developed and practiced by jurists over centuries (e.g., contract, property, competence, person, corporation, marriage, consent, prescription, causality). These juridical concepts are openly artificial. It means that they are a creation of a particular social practice and do not coincide with the realities as constructed and construed by other practices and systems (morality, natural sciences, economics, neuro-sciences, applied sciences, common sense, logic, etc.) Juridical concepts not only fail to coincide with the views from other social spheres or systems, their truth or soundness also cannot be disproven by the other practices and systems. Juridical concepts and practices are artificial in a transparent and open fashion: the concepts openly acknowledge law's limited and artificial view of the realities of the world and how to respond to those realities. In effect, law in a way admits its own imperfections and shortcomings. Law openly fails to give an adequate account of reality. This is directly related to the observation that law's 'solutions' to the problems it addresses are always unsatisfactory from the perspective of other social spheres.

Any legal arrangement could serve as an example. For instance, probably one of the primordial concepts of early law was peace. However, law and thus the concept of 'peace' were only relevant between different

families or tribes (thus not within the family). Law only kicked in in the context of the relationship with outsiders.[18] The relationship of peace was clearly of inferior quality compared to the relationship of kinship or brotherhood. To put it differently, law was not aimed at promoting bonds of kinship or brotherhood. It merely aimed at peace. Similarly, the archaic law of redress only knew compensation and not restoration or repair in the original state,[19] the latter of course corresponding more closely with the purpose of making wrongs whole again. Capital punishment was clearly an imperfect attempt to permit the victim's blood controlled by the slayer to flow back to God.[20] More technically, the concept of prescription (or statute of limitations) in criminal law recognizes beforehand that law cannot attain genuine justice and truth. Similarly, the typical juridical concept of the burden of proof defies the logic of finding the full 'truth'. It acknowledges the imperfections, limitations and constraints of making legal decisions. More generally, law's imperfect nature is captured in the distinction between promoting justice and addressing injustice. The juridical perspective highlights the fact that law's central preoccupation and *modus operandi* consist of addressing injustices rather promoting justice.[21] It means that a legal decision will at best correct a particular injustice, leaving many other injustices unaddressed and certainly not making society more just. So in a way, juridical law immediately fails on any progressive project.

(ii) Making statements to authorize factual actions (*what* is claimed in the name of legality?)

The artificial and autonomous concepts of juridical law are used when making (juridical) statements of law. The basic content of any legal statement is that a particular factual action or inaction is authorized by law.[22] So while juridical law itself is a matter of making statements,

[18] M. Weber, *Rechtssoziologie*, republished by H. Maus and F. Fuerstenberg, (Neuwied am Rhein: Hermann Luchterhand Verlag, 1960).

[19] Id.

[20] G. Fletcher, 'Punishment and Responsibility' in D. Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory* (Blackwell Publishing: Cambridge, Mass., 1996), at 518.

[21] For this distinction see inter alia F. Hayek, Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy', *Volume 2,* The Mirage of Social Justice (Routledge: London, 1982; first published 1976), Ch. 8.

[22] Authorized (in)action can be broken down into behaviour that is required, permitted or prohibited by law. To be sure there are many other legal statements that do not pertain

i.e., uttering words, its aim is to authorize (in)action. For the purpose of our discussion we can adopt a rather straightforward notion of factual action as performances that have an effect in tangible reality, physical violence being the most spectacular form of action in this sense. So, legal statements are made in order to have a particular factual action authorized. In this respect juridical law can be distinguished from many other normative claims. For other normative claims may assert that something is right, wrong, just or unjust and that something ought to be done, but these claims do not seek *authorization* of *particular factual actions*.

The juridical law perspective also puts less emphasis on the so-called epistemic and symbolic function of law. Rather it stresses the distinction and connection between making statements and factual actions.[23] To be sure it does not mean that legal norms necessarily guide behaviour or that there is a kind of given causality between norms and actions, or sanctions and normality.[24] It simply means that law makes a difference because it is used to authorize factual actions.

Neither does the fact that legality claims seek the authorization of coercion mean that law's normativity or validity depends on the possibility of coercion. The juridical law perspective should take off the pressure from debates in modern legal theory on the normativity of law, exemplified in discussions about the normativity or binding force of international law.[25] From the perspective of juridical law, the question is not so much which norms are binding or legally valid. Historically,

directly to actions, but rather to the legal *status and capabilities* of phenomena, objects, entities, etc. Yet the relevance of these legal statements depends ultimately on the fact that particular actions are permitted, prohibited or required because of these legal statuses. For example, a norm that grants the legal capacity to enter into a contract does not pertain to factual action and cannot be understood in term of a permission or liberty. It allows one to establish legal consequences. Yet the legal consequences are ultimately relevant because it will allow one to make legal statements to authorize factual action, e.g., forced execution on the assets of a defaulting contracting party.

[23] In this respect, Johnstone's distinction between epistemic and interpretative communities is relevant as the latter does not only produce knowledge and advice but also pass judgments (Johnstone, *The Power of Deliberation*, at 41). However, what is missing – but could be added – in his description of interpretative communities is 'to what end' and 'about what' judgments are made. Or, what is the point of passing judgments in the first place?

[24] Cf. Friedrich Kratochwil, 'How Do Norms Matter?' in Michael Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford University Press 2000), 35–68.

[25] For a recent attempt see J. Brunnée and S. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010).

it seems that the question of law was not whether a norm has binding force, since there was a multitude of sources for the binding force of norms (religion, family, village/land, crafts, commerce, war, morality, *fides*, etc.). Rather the question is that given the fact that a norm is binding what actions are authorized further to its violation?[26] What de facto capabilities can be mobilized or de-mobilized? Accordingly, the binding force of so-called primary obligations was often undisputed. Also the authority of the source of/for the obligation is often not at stake (religion, custom, law of the land, charter, etc.). What really matters for law are the remedies: what follow-up actions, ultimately de facto actions, are authorized? If sources or pedigree matter then they do primarily for the question, to what extent the authorization is authorized. This does not mean that law equals enforcement or that law is binding because and only to the extent it is enforced. Quite to the contrary: precisely because law is binding and because enforcement does not come by itself, can law make a difference? This is exactly why law signals coercion.

(iii) Mobilizing and de-mobilizing allies (to *whom* is the legality claim addressed?)

There is an archetypical communicative structure underlying the practice of making legal statements. The starting point is that someone – the proponent – claims his due from someone else – the opponent. Though the proponent may communicate his legal claim to the opponent, his real addressees are third parties. In effect, the point of making legal statements is not so much to persuade or dissuade the opponent. Rather, legal statements are directed at the allies or potential helpers. On the one hand, the legal statements are aimed at *mobilizing the allies of the proponent* to help him enforce his due from the opponent. On the other hand, the legal statements purport to *de-mobilize the allies of the opponent* so they will abstain from helping the opponent in fending off the proponent and his helpers. While prior to the modern state, allies were predominantly private actors, today the prominent allies are often public officials.

The focus on (de-)mobilizing allies helps us see that law can only constrain and limit the exercise of de facto force or power as long as

[26] Cf. 'Law is not obligatory because it is enforced; it is enforced because it is obligatory', Reus-Smit, at 341 referring to G.G. Fitzmaurice, 'The Foundations of the Authority of International Law and the Problem of Enforcement' (1965) 19 *The Modern Law Review*, at 2 using the term 'binding' instead of 'obligatory'.

power is already de facto limited. For sure, centralized dominant de facto power may establish order. Yet it offers no place for juridical law. So contrary to modern and contemporary ideas of law as sovereign power and order, precisely the absence of a fully dominant centralized de facto power catered to the development of law in the West. The focus on mobilizing allies and de-mobilizing helpers from the opponent seems the narrative throughout legal history up to our days. For example, in classical Rome a sophisticated legal practice could develop while official enforcement agents were virtually absent. Apparently, it made sense to litigate and obtain legal authorizations from officials (e.g., praetor) although officials would not perform the actual enforcement. Enforcement depended on the capacity to mobilize (or de-mobilize) friends and allies (e.g., gangs) and even anonymous bystanders or crowds.[27] The authorization by law was an important vehicle for mobilizing helpers. This is also reflected in one of the most basic concepts of Roman legal practice: the invocation of Roman citizenship. It was primarily a call based on law directed to bystanders to help resist the arrest and punishment without trial.[28]

Not only private law but also international law or proto-international law reflects the basic communicative structure of juridical law as mobilizing allies. The practice of treaty law is a case in point. From the early history of treaty law onwards, it was clear that the commitment of the direct counterparty did not suffice. It was equally important to obtain the commitment of the allies of the counterparty. So before the sixteenth century, when entering into a treaty, princes not only required the undertaking of each other, but each prince had to make a separate promise that his subjects and allies would comply with the treaty.[29] As of the sixteenth century, treaties included third-party states as allies. Upon violation of the treaty the ally was supposed to come to aid to the party it supported. The communicative structure of the treaties was not only directed at mobilizing allies it was equally directed at

[27] Cf. J.M. Kelly, *Roman Litigation* (Oxford, 1966); A. Lintott, *Violence in Republican Rome* (Oxford: Oxford University Press, 1999).

[28] Id.

[29] The example is provided and analyzed by the legal historian Jacob Giltaij referring to R. Lesaffer, 'Peace Treaties and International Law from Lodi to Versailles (1454–1902)' in R. Lesaffer (ed.), *Peace Treaties and International law in European History: From the Late Middle Ages to World War One* (Cambridge University Press: Cambridge, 2004), at 17–20.

de-mobilizing help to opponents. The point of including third parties was also to ensure they abstained from helping each other's enemies.[30]

This communicative logic is still very much present in contemporary international law. Anticipating our forthcoming discussion, the discourses in the context of international criminal tribunals seem a case in point. Parties in international and regional conflicts use international criminal law to mobilize the international community in their favour. Even officials of the ICC seek to mobilize states in order to support and cooperate with the court.[31] We could ask the following question: who are the allies that the court will have to mobilize (in order to have the law enforced)? And who are the allies that need to be de-mobilized? Normally, in a *domestic* setting when a court seeks enforcement against a defendant there is little need for support from the victims and their allies. Conversely, it is more likely that the court will have to de-mobilize the counter-force or resistance of the allies of the defendant. Similarly, if the court wants to see an acquittal of a defendant respected and complied with, it may have to de-mobilize the counter-force and resistance of the victims and their allies. By contrast, in the context of *international* criminal tribunals most defendants are already in custody and often abroad from their home base. Consequently, resistance will not affect the enforcement of condemnation or compliance with an acquittal. This point is nicely illustrated by the fact that when international criminal courts seek actively and openly support from allies of (possible) defendants (or rather de-mobilize their resistance and obstruction), it was to apprehend suspects still at large and physically protected by their allies.

Today, the most prominent allies to be (de-)mobilized are officials and public institutions. This is especially the case in the domestic setting, but also in the international sphere. Yet, even in today's society private actors (e.g., ordinary citizens) are still playing the role of allies, for the help of officials only is not enough. Legal statements are also aimed at ensuring that citizens cooperate with and do not resist to or obstruct actions by officials. In this respect it is important to distinguish the normative and artificial legal arrangement of the state's monopoly of violence and the de facto existence of exclusive and dominant force (even authorities in modern states lack such de facto exclusive power).

[30] Example provided and analyzed by Giltaij referring to Lesaffer ibid. at 33–36.
[31] S. Nouwen and W. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2010) 21 *EJIL*, 941.

(iv) Backward looking and normative (in what *time* frame are the claims situated?)

Let me reiterate the starting point for the juridical law perspective: someone – the proponent – claims his due from someone else – the opponent. This 'due' is based on an alleged wrongful act by the opponent: he either directly wronged the proponent or failed to compensate the proponent for the wrong he did. It means that the starting point for making legal statements is that the proponent was wronged by the opponent. In seeking to obtain his due from the opponent, the proponent makes a claim in the name of the law to the effect that a particular action is authorized based on the law and further to the wrongful act, for example, the proponent may seize the assets of the opponent. In a way, the basic starting point for law is the violation of a norm in the past and the point of law is to seek redress. In short, the practice of law, triggered by the violation of a norm, is inherently normative and predominantly backward looking.[32]

III Political versus juridical legality and international criminal tribunals

Recent critical studies on the workings of international criminal tribunals have convincingly demonstrated that invoking international criminal law involves a multiplicity of actors, objectives, audiences, narratives, dynamics, etc. These studies suggest that a wide variety of legality practices is at play. However, many of these invocations of international law would not be captured by the standard textbooks on international criminal law as they may appear simply too 'political'. By the same token, the critical studies pay little attention to the specific and distinct juridical qualities of some legality claims. To fill this gap we will try to capture the various types of legality claims, precisely by distinguishing between them. We will try to distinguish between juridical legality and political legality

[32] Of course, effective law is also necessarily forward looking. However, I believe law is not necessarily forward looking for the traditional reasons associated with law's coordinative and deterrent functions. In my view, law is necessarily forward looking because legal statements ultimately aim at the authorization of factual actions (violence being the most spectacular). Meaningful authorization is ultimately about permitting factual actions (violence) in the (near) future. This partially explains the distinction between authorization, on the one hand, and justification and legitimacy, on the other hand.

claims by looking at invocations of notions such as friend/enemy, terrorism, legitimacy of courts, peace and justice.

i Friends, enemies, terrorists and judges

There is groundbreaking research by Nouwen and Werner showing how parties in international conflicts are using strategically the ICC to discredit their opponents by portraying them as 'enemies of mankind'. Simultaneously, parties try to portray themselves as friends of the court and thus the international community, read humanity. It suggests that the ICC, instead of playing a purely legal role, has become a political actor in a Schmittian sense, as it ultimately participates in making the quintessential political distinction between friend and enemy (of the international community).[33] So the discourse and institutions of international criminal law are mobilized in a 'political struggle'.

I have argued elsewhere that international criminal law may be much more resistant to these attempts to turn the law into a vehicle of political struggle than the research suggests.[34] I will not restate my arguments here. But what matters for present discussion is that if parties in the international conflict invoke the notion of enemy in a truly Schmittian sense, then on Schmitt's own terms we are beyond the scope of law and legality claims. For what defines the political enemy in the Schmittian way is the fact it cannot be identified by reference to any normative system, such as morality or law. The point of Nouwen and Werner was precisely to show that the friend/enemy game is political but nevertheless part of a legal drama. In effect, the identification of the enemy is done partially through law: parties portray their opponent as an enemy of mankind because the opponent allegedly violated international – criminal – law (e.g., crimes against humanity, crimes against peace). Similarly, the attempts to become a friend translate into concrete legal manifestations. The alleged 'friend' can play an important role in the effectiveness of the workings of the court. The friend may bring the conflict situation to the court. He may produce evidence. Also, he may help with bringing the defendants – physically – to the court. So, we may understand the invocation of the friend/enemy distinction as a legality claim.

[33] Nouwen and Werner, 'Doing Justice to the Political', 941.
[34] B. Schotel, '"Doing Justice to the Political: The International Criminal Court in Uganda and Sudan": A Reply' (2011) 22 *EJIL*.

The question remains about the type of legality claim involved. The invocation of the friend/enemy distinction clearly fits an element of juridical legality, namely mobilizing allies and de-mobilizing allies of the opponent. Yet when it comes to the other elements of juridical law there is no match. Contrary to a juridical legality claim seeking for example arrest, detention, punishment, etc., the portrayal of an opponent as an enemy of mankind does not aim at the *authorization* of a particular factual action. Rather the objective is to create a *general attitude* of willingness vis-à-vis the 'friend' and animosity towards the 'enemy' among international and domestic actors.

Furthermore, since the claim is not so much oriented at the authorization of particular factual actions, there is no need to rely on the notion of enemy as developed by jurists.[35] So, the conflicting parties do not invoke the enemy of mankind associated with piracy, which has a very long legal tradition. Neither do they use the concept of enemy under the Rome Statute or the concept of enemy of humanitarian law. The same goes for the notion of friend that has not even a nominal counterpart in law. The concept that comes closest to 'friend' might be the victim. A case in point is the way in which the prosecutors to the Special Court for Sierra Leone 'befriend' the witnesses who are often themselves victims.[36] However, the parties to the conflict – namely state officials and political leaders – who invoke the friend/enemy distinction clearly do not correspond with the figure of the individual victim. Only in an ironic way does the alleged friend become a relevant legal actor and category: when a party to the conflict seeks to befriend the court by bringing a situation to the court's jurisdiction that same party may later on become a defendant in the trial that follows. Rather than in a juridical way, the notions are used much more in a moral and ethical sense. The notion of enemy simply refers to someone who is responsible for atrocities. The exact legal qualifications of those acts are irrelevant. And so are time, space and the community affected, for it concerns the whole world. Thus, a truly moral and universal category. And the notions are even ethical in the strict sense, since the capacity of enemy does not only refer to the conduct of the

[35] Id.

[36] Case No. SCSL-2003-01-T, *The Prosecutor of the Special Court* v. *Charles Ghankay Taylor*, Prosecution Final Submissions, 8 February 2011, at 49146, at www.sc-sl.org/LinkClick.aspx?fileticket=wZ%2fX0c%2fB1hs%3d&tabid=160, last consulted 15 April 2011. I thank Marlies Glasius for bringing this example to my attention.

person but equally pertains to his character. It seems that the person as much as her deeds are on trial.

Finally, a point closely related to the focus on the character of the enemy and not his deeds. Since the invocation of the friend/enemy distinction is not oriented at the authorization of particular factual actions on the basis of wrongs in the past, the friend/enemy distinction is primarily forward looking, as opposed to the mainly backward looking nature of juridical legality claims. So here we can see how law is used in a non-juridical way. Yet it is neither political in the Schmittian sense. Maybe the invocation of the friend/enemy distinction can be best understood as a political legality claim in the more conventional way of the "political" as presented in Section 1: an action that is not guided by shared or objective rules and standards.

The relevance of both the connection and distinction between the political and the juridical is also illustrated by the notion of terror and terrorism in the workings of international criminal tribunals. For example, in both the Karadjic[37] and Taylor[38] trials before the International Criminal Tribunal for the former Yugoslavia and Special Court for Sierra Leone respectively, the prosecutors make ample reference to the notion of terror and terrorism. In the latter case it is even part of the indictment.[39] How to understand this reference to terrorism in terms of legality? At first glance, terrorism can be understood as a juridical category. In other words, the use of terrorism reflects a practice of juridical legality. By the same token, the reference to terrorism cannot be understood from a purely juridical perspective. While an international crime, terrorism is not yet considered a crime under international criminal law, which means that it is not directly punishable under international law.[40] This explains why in the Taylor trial the acts of terrorism were rephrased in terms of separate elements that constitute crimes under international criminal law.[41] It seems then that

[37] T. Meijers and M. Glasius, 'Expression of Justice or Political Trial? Discursive Battles in the Karadzic Case' (2013) 35 *Human Rights Quarterly*, at 738.

[38] M. Glasius and T. Meijers, 'Construction of Legitimacy: The Charles Taylor Trial' (2012) 6 *The International Journal of Transitional Justice*, at 236.

[39] Id.

[40] Its criminalization is based on domestic law, the international law treaties require states to make terrorism punishable under their domestic laws: Gerhard Werle e.a., *Principles of International Criminal Law*, 2nd ed. (The Hague: TMC Asser Press, 2009) at no. 114, 42.

[41] Glasius and Meijers, 'Construction of Legitimacy', at 236.

the use of terrorism served a function beyond the strictly juridical, while still being connected to the legal.

A similar borderline situation or rather conflict has to do with the legitimacy of the international criminal tribunals. Typically, at the initial stages of the trial, defendants challenge the legitimacy of the tribunal.[42] To the extent the claim is about lack of competence or jurisdiction to actually try the case at hand, it is a juridical claim *par excellence*. For competence and jurisdiction are probably quintessential juridical categories. By the same token the actual arguments for why the tribunals allegedly lack legitimacy are far from juridical, but rather political.[43] It is as if the claims are not really directed at the judges who have to assess the merits of this claim. This ambiguity is reinforced by the fact that defendants rarely challenge the legitimacy of the judges themselves.[44] Moreover, as the trial proceeds defendants seem to internalize the juridical attitude and start behaving almost like professional jurists.[45] So here we see how political logic and juridical reasoning play musical chairs: a claim of seemingly juridical nature turns out to be a political one, which in turn is domesticated by the normality of the juridical attitude.

In sum, it seems that the legality claims incorporating notions such as friends, enemies, terrorists and the legitimacy of international tribunals differ from juridical legality claims in mainly two ways. Firstly, though – apart from the notion friend – the concepts have strong juridical traditions, they are not used in their artificial meaning as developed by jurists. By contrast, the notions are used much more in their moral and ethical sense. Secondly, closely related to the more moral and ethical meaning of the notions friend, enemy, terrorist and legitimacy of the court, the aims of the claims are rather general and vague.[46] Contrary to a juridical legality claim seeking the authorization of a particular factual action, for example, arrest, detention, punishment, these political legality claims do not aim at the authorization of a particular factual action. To be sure,

[42] For Karadzic see Meijers and Glasius, 'Expression of Justice or Political Trial?', at 742–744; for Taylor see Glasius and Meijers, 'Construction of Legitimacy', at 246–247.
[43] Id. [44] Id.
[45] Meijers and Glasius, 'Expression of Justice or Political Trial?', at 743 and 748.
[46] In a way, law's so-called expressive function with, amongst others, its 'global audience', nicely illustrates the political or non-juridical character of many legality claims; see for a short overview, with references, of expressivism, Meijers and Glasius, 'Expression of Justice or Political Trial?', at 723–726.

it does not make political legality claims less a matter of mobilizing and de-mobilizing allies. Neither does it mean that the political legality claims do not result in factual actions. Maybe political legality claims produce much more tangible physical facts on the grounds than juridical legality claims. The point here is just that we should distinguish between their objectives, logic and structure.

ii Peace and justice

While as scholars we may acknowledge that all legality claims are political, the international actors, most prominently the international criminal tribunals, are emphatic about presenting their claims as non-political. Precisely its non-political and typical legal outlook is what 'makes international criminal law such a strong tool in political struggles'.[47] It is this seemingly non-political character that gives the struggle through the court its legitimacy bonus.[48] Still, at a higher level of abstraction the tribunals are openly committed to sociopolitical ambitions of international criminal law, for example, establishing peace and justice in regions struck by deep and chronic political and military conflict.[49] Accordingly, matters should be addressed by the law and the tribunals because it will serve the underlying values of justice and peace. These values have become so well integrated in the legal discourse that to many jurists this is precisely what law is all about. By the same token it is precisely these same sociopolitical ambitions that constitute the core of the criticism against international criminal tribunals. A standard objection against the tribunals is that by trying to bring justice to conflict regions the tribunals hamper peace processes.[50] And even if justice and peace are not mutually exclusive but mutually supporting values, the tribunals simply do not deliver on either of them. As to peace, conflicts rather continue or easily reignite.[51] As to justice, the affected communities and victims most often do not feel heard, let alone made whole. This tension between the sociopolitical ambitions and the achievements

[47] Nouwen and Werner, 'A Reply to Bas Schotel', at 1164.
[48] Kirchheimer cited in Nouwen and Werner, 'Doing Justice to the Political'.
[49] Meijers and Glasius, 'Expression of Justice or Political Trial?', at 721–722.
[50] M. Glasius, "Do international Criminal Courts Require Legitimacy?" 23 *EJIL* (2012).
[51] See Nouwen and Werner, 'Doing Justice to the Political' on the ICC role in prolonging the conflict. Similarly, Meijers and Glasius, 'Expression of Justice or Political Trial?', at 749.

of the tribunals corresponds with the distinction between political legality claims and juridical legality claims.[52]

Let me start with the value peace and briefly point to what is the cynical but inevitable aspect of criminal law, including international criminal law, from a juridical perspective. For all its preventive ambitions and logic, law and criminal law in particular are still backward looking. Surely, the prohibitions can be understood as norms giving guidance for future behaviour. But the peculiarity of law is that its primary preoccupation is with the question of what happens if someone allegedly violated the prohibition: when does a particular action constitute a violation, and who is authorized to do what further to such violation?[53] So law, especially criminal law, in a way defies its own preventive aspirations by explicitly concentrating on what happens if prevention did not work. This backward looking character directly associated with the juridical law perspective becomes especially painful in the context of the extremely serious crimes under international criminal law. Accordingly, it is law's juridical nature that defies the 'never again' of genocide. The cynical irony of the practice of juridical legality is its acknowledgment that law cannot keep the peace: genocide will happen again. That is precisely why it makes sense for jurists to record, systematize and analyse case law on genocide so they know how to deal with it – in a juridical way – the next time.

A similar discrepancy exists when it comes to legality as values in terms of justice. Let us consider the self-acclaimed achievement of international criminal law institutions: individual guilt.[54] It seems the pinnacle vehicle of justice as it gives to each his due. Actual perpetrators will be punished for their deeds and cannot hide behind a larger collective, while an entire community is liberated from carrying the guilt of some of its members. By the same token, both for the perpetrator and victims, individual guilt cannot do justice to the collective nature of many of the crimes under international law. Letting off the hook the rest of a community remains problematic for the victims as it seems to leave a remainder of collective guilt unpunished, and putting this remainder of collective guilt on particular individuals seems equally unjust.

[52] This tension is recognized – though with much hesitation – in the words of a prosecutor expressing the hope that international criminal tribunals may bring some form of justice though not divine and closure. Glasius and Meijers, 'Construction of Legitimacy', at 241.

[53] This is why authorization is probably more distinctive for law than the notion of obligation, though obviously very central to understanding law.

[54] Meijers and Glasius, 'Expression of Justice or Political Trial?', at 747.

Another recurring problem in international criminal law, like in domestic criminal law, is the status of the victims and affected communities. Often, law's incapacity to do justice to the victims and affected communities is ascribed to their lack of voice in criminal proceedings.[55] And though there are already existing and possible legal arrangements to accommodate this shortcoming,[56] the international criminal tribunals are likely to fall short fundamentally. For the way in which the elements of crimes are structured simply leaves no room for a voice other than the evidence that directly pertains to establishing a criminal act.

In short, though both peace and justice are notions with clear legal connotations, they do not belong to the artificial legal categories of juridical law. The concept of peace is not used in its juridical version practiced for centuries in the context of *jus ad bellum et in bello*. It is not perceived as a juridical conception describing the rights and duties established in a peace treaty following an official war. Rather it refers to a sociological and aspirational desirable state of affairs where peoples live in harmony. Moreover, peace in the aspirational sense is not only a desirable state of affairs. It is also pursued as a state of affairs that should be permanent and perpetual. By contrast, peace in the juridical meaning is never permanent. In fact, it is only in the context of possible and actual war that peace in the juridical sense is meaningful. For a peace arrangement in the juridical sense derives its content from the reasons for and the outcomes of the war that precedes it. There is no point in a peace treaty simply stating that there will be peace: some matters of the past must be settled. And like any source of law, the peace treaty cannot foresee or address all the future reasons and desires that may lead to a new war. In other words, a peace treaty cannot prevent a future war, it can only bring some closure to the previous one.

Like the quest for peace, the claim for justice is equally made in non-juridical terms. Though the ultimate objective of any Western legal culture, justice itself is not even a juridical term at all. Invoking justice simply begs the question. For juridical law, the question of what justice requires is far too large and general. First of all, the artificial conceptions and arrangements of juridical law openly admit their imperfection from the perspective of other normative disciplines (morality, religion, economics, etc.). Again, if anything, juridical law focuses on limiting and redressing some very specific forms of *past injustice*, rather than

[55] Glasius, 'Do international Criminal Courts Require Legitimacy?'.
[56] Id for suggestions.

promoting justice in the future. Second of all, since juridical law is about authorizing particular and specific factual actions its concrete scope of action is extremely limited compared to all the actions, arrangements, attitudes, virtues, etc. that are required by justice. Finally, justice is closely linked to a conception of truth. Arguably, juridical law is not agnostic about the truth. It implicitly recognizes that there may be truth out there. Yet, by the same token, juridical law openly admits it cannot bring such truth: hence the fiction *pro veritatem habetur*.

Conclusions

This chapter started with the suggestion that legality is the nexus between law and politics. We understood legality as making claims in the name of *law* or with reference to *law*. Of course, this begs the question as to what counts as a reference to law. In effect, this is precisely what makes legality the nexus between law and politics; it's a struggle over what counts as law and what counts as a legal argument. In order to capture this struggle, we have adopted an over-inclusive understanding of law, i.e., what people who invoke law call law. For sure this potentially turns any claim by any actor in the international sphere into a legality claim. But rather than discarding claims because they do not meet a particular standard of legal validity, we have proposed to distinguish between types of legality claims. But what distinction or categorization is adequate? We argued that inevitably each discipline (scholarly or otherwise) makes its own distinctions, and even within a discipline each school of thought may in turn use its own distinctions. And this ultimately depends on the normative concerns underlying the practice or practitioner. Our underlying concern is how protection through law is possible. In this respect we are interested in the distinct role of legal or juridical categories (as opposed to categories from morality, economics, etc.). To this effect we have asked ourselves under what conditions or circumstances it makes sense for actors to invoke legal categories.

Focusing on the role of legal categories we identified an archetypical form of legality claims, namely juridical legality, which can be distinguished from other types of legality claims. Juridical legality claims have four elements. Firstly, they make use of artificial concepts and arrangements developed and practiced by jurists over centuries. Secondly, these juridical categories are invoked with a view to authorizing factual actions, violence being the most spectacular. Thirdly, the claims are not so much aimed at convincing an opponent but rather at mobilizing his own allies

and de-mobilizing the allies of the opponent. Finally, the trigger for seeking the authorization of particular factual actions is an alleged wrongdoing by the opponent in the past: juridical legality claims are thus primarily backward looking.

The chapter applied this juridical law perspective to recent critical studies on the workings of international criminal tribunals. These studies have convincingly demonstrated that invoking international criminal law involves a wide variety of actors, objectives, audiences, narratives, dynamics, etc. that is rarely captured by the standard textbooks on international criminal law. It would be too easy to discard these studies as simply an external perspective on international criminal law, to be distinguished from doctrinal accounts. For the studies show that these actors are also invoking law, doing law and even acting out law. Rather we should distinguish between types of legalities. To this end, we looked at invocations of notions such as friend/enemy, terrorism, legitimacy of courts, peace and justice. Looking at the use of these notions through the lens of juridical law allowed us to distinguish between two types of legality: political and juridical legality. Their uses differ in terms of how, what, from whom and when legality claims are made. Though the notions have legal connotations, in their actual use they do not refer to the artificial concepts and arrangements typical for juridical legality. Rather they appeared to be more of a political legal nature. Neither were the notions invoked with a view to authorizing particular factual actions following a wrongdoing in the past. By the same token, the type of legality used is not fixed once and for all. In effect, the chapter showed how sometimes the two types of legality play musical chairs: a claim of a seemingly juridical nature turns out to be 'political', but ends up being domesticated by the juridical settings and practices of the tribunals.

In short, if we want to understand how legality operates as the nexus between law and politics, we must dare to come up with meaningful categories to distinguish between ways international law is invoked. This chapter proposed juridical law as one way to make a meaningful distinction between the multiple practices of legality in international law.