The Politics of International Criminal Law. Edited by Holly Cullen, Philipp Kastner, and Sean Richmond. Leiden, The Netherlands: Brill Nijhoff, 2021. Pp. xii, 389. Index.
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That law and politics are intertwined comes as a surprise only to the *naïf*. The nature and extent of their relationship, of course, is complicated and nuanced, especially at the international level. *The Politics of International Criminal Law* explores the "particularly charged" interaction between law and politics in the still young but rapidly growing field of international criminal law. It comprises eleven papers initially delivered at the 2016 Australian Criminal Law Workshop, several of which were published in the *International Criminal Law Review* in 2018.

As the editors, Holly Cullen, adjunct professor of law at the University of Western Australia, Philipp Kastner, senior lecturer at the Law School of the University of Western Australia, and Sean Richmond, instructor at Carleton University, note in their introductory chapter, international criminal law (ICL) remains a "nascent legal regime [that] aims to regulate the longstanding power of states to define and manage war and crime" (p. 1). Because it "seeks to create a vertical regime on a horizontal plane, a system of legal coercion among actors accustomed to a more consensual regime," ICL inescapably raises difficult issues about the relationship between law, power, and politics (*id.*).[1]

Accepting that "politics is 'omnipresent' in ICL" (p. 2), the volume seeks a deeper understanding of their interaction and its ultimate effect on the legitimacy of ICL as an emergent field. As a point of departure, the editors refer to Marti Koskenniemi's observation that "when international law seeks to depoliticize international relations, it risks becoming either an apology for state interests and power inequalities, or an irrelevant moralistic utopia" (*id.*).[2] This oscillation between law and politics provides the volume's conceptual framework.

The editors acknowledge, as they must, that the "law vs. politics" dichotomy is hardly an either/or proposition. While international criminal law and institutions are rooted in law, they have both political origins and political consequences far beyond their formal mandates. Moreover, the international criminal justice system can be (and on occasion has been) exploited for political purposes, so that it is at best difficult to maintain a clear separation between the admittedly political establishment of international criminal tribunals and their apolitical operation (p. 6). The editors concede that "there are both acceptable uses of law and unacceptable abuses of law to pursue political ends" (p. 16), although they understandably refrain from populating those categories.

The volume's eleven substantive chapters, divided into three parts, explore the balance (and tension) between law and politics in a variety of contexts. Part I addresses the politics of international criminal law in theory and practice, asking in particular why international criminal tribunals are created.

In Chapter 1, entitled "Bridge Over Troubled Water," Alexander Heinze, assistant professor of law at the University of Göttingen, offers "a semantic approach" for reconciling the numerous and sometimes contradictory purposes and goals of international criminal justice (broadly conceived). Noting that in many international situations the classical rationales for punishing criminal offenders (such as retribution, deterrence, and rehabilitation) may not in fact contribute to the broader and more political objectives of restoring peace, creating a record of historical record, promoting reconciliation, and strengthening international humanitarian law, Heinz distinguishes between international criminal law, on the one hand, and international criminal procedure on the other. Recognizing that international

[1] Quoting Darryl Robinson, *Inescapable Dyads: Why the International Criminal Court Cannot Win*, 28 Leiden J. Int'l L. 323, 332 (2015).

[2] Citing to Martti Koskenniemi, From Apology to Utopia: The Structure of Legal Argument (Reissued 2005).

human rights law, humanitarian law, and national criminal law are merged at the level of international adjudication, Heinz proposes using a broader concept of "international criminal justice" for classification of relevant goals and purposes.

The second chapter, by international and human rights lawyer Shannon Maree Torrens, addresses the "Politics of International Criminal Justice" by examining the interaction between law and politics in the context of the ad hoc International Criminal Tribunal for the former Yugoslavia (ICTY). The question is said to have both humanitarian and hegemonic aspects, which are "dichotomous" and often in conflict, since the one focuses on "internationalism and fairness" and the other on "Western interests and US dominance" (p. 56). The conflict between the two has resulted, in the author's view, in "significantly flawed outcomes that deviate from international expectations" (p. 60). Understanding the underlying tensions can help both to move the international community toward a better understanding of the limits of international criminal law and to implement "a more effective and democratic international criminal tribunal project" (p. 84).

Chapter 3, by Emma Lauren Palmer, lecturer at Griffith Law School, considers the diffusion of international legal norms across time and space, asking why some states and regions participate in ICL institutions and others do not, focusing in particular on the lack of engagement by states in Southeast Asia as parties to the Rome Statute. The chapter cautions against a broad presumption about "the progressive influence of international criminal justice" (p. 110) and suggests instead that the subject should be approached as "involving dynamic aspects of power and friction, rather than arising from 'local' actors accepting socialised 'international' ideas over time" (p. 112). In order to "imagine international criminal law as an atemporal (dynamic), non-located (yet cognisant of spatial structures) and multidirectional (plural) phenomenon," Palmer concludes, it will be necessary to embrace a "more nuanced appreciation for the multiple and dynamic ways that actors engage with each other and international law" (p. 113).

Part II takes up the challenges to the legitimacy of the International Criminal Court (ICC) that arise from its "African Interactions." The chapter by Shannon Fyfe, assistant professor at George Mason University, addresses the well-known concerns that decisions of the ICC's Office of the Prosecutor (OTP) have reflected a distinctly Western bias, raising the question whether they are best understood as seeking justice or serving "global imperialism." Accepting that "politics will continue to play some role in international criminal law," Fyfe notes that the "legitimate concern is that even narrow political considerations could play too large a role in judicial decisions" (p. 122). Focusing in particular on the OTP's role in selecting situations for investigation and cases for prosecution, Fyfe offers a "normative defence" of the Court, acknowledging that prosecutorial decisions to date reflect "distributive injustice" (p. 142) but rejecting the argument that the Court has inappropriately targeted the African region. She concludes that "[t]he ICC will not always be able to avoid political questions, but the structure of the ICC and the diligence of the OTP can help avoid injustice and perceptions thereof" (*id.*).

The well-known refusal of various African states to enforce the ICC's arrest warrant for Sudanese President Omar al-Bashir provides the focus of the fifth chapter, by Catherine Moore, a protection of civilians officer for the UN Multidimensional Integrated Stabilization Mission in the Central African Republic, on the "Law and Politics of Norm Conflict: Immunity Versus Accountability and the Case of al-Bashir." Moore notes that while the lack of consequences for states that refuse to enforce ICC arrest warrants weakens the Court's legitimacy, when they use conflicting norms of accountability and "head of state" immunity to justify noncompliance with those arrest warrants, they transform the victims of the underlying crimes into victims of "politics and power" (p. 163). In her view, "[u]ntil there is a change in the ICC itself, HoS immunity will continue to

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trump accountability for the time being" (p. 164).

The contribution by Daniel M. Mburu, legal officer at the UN Office of Legal Affairs, addresses "The Lost Kenyan Duel: The Role of Politics in the Collapse of the International Criminal Cases Against Ruto and Kenyatta." Those cases arose from post-election violence in Kenya in 2007–08, in which approximately 1,100 people died, 3,500 were injured, and 600,000 were forcibly displaced. When an ensuing domestic inquiry failed to assign responsibility, the ICC prosecutor obtained authority from the ICC Pre-Trial Chamber to open an investigation and eventually charged William Ruto (then minister of education) and Uhuru Kenyatta (deputy prime minister and minister of finance) with crimes against humanity. After several years, however, those charges were vacated on the ground that the prosecution had failed to provide sufficient evidence to require the accused even to mount a defense. Mburu's chapter, among the most interesting in the volume, describes how the accused effectively countered the investigations and in fact used the ICC prosecutions to their advantage in the 2013 election (in which Kenyatta became president and Ruto deputy president). While the prosecution collapsed for lack of evidence, Mburu contends, the underlying cause was "the Court's vulnerability to political winds" (p. 193). In his view, the result "shows that the ICC Prosecutor is no match for politically influential defendants with state machinery at their disposal" (p. 196).

Part III broadens the inquiry by exploring the "politics of culture, emotions and voice" in prosecutorial decisions. The chapter by Lara Pratt, senior lecturer and assistant dean at the School of Law University of Notre Dame Australia, entitled "Prosecution for the Destruction of Cultural Property: Significance of the al Mahdi Trial," focuses on one of several recent cases in this little-studied area. Ahmad Al Faqi Al Mahdi, an alleged member of Ansar Eddine (a movement associated with Al Qaeda in the Islamic Maghreb), was charged before the ICC as a co-perpetrator of the war crime of intentionally directing attacks against religious and historic buildings in Timbuktu, Mali, in 2012. Al Mahdi was convicted in 2015 and sentenced to nine years' imprisonment. On the one hand, Pratt applauds the conviction as reflecting the increased visibility of cultural property in contemporary conflicts as well as increased awareness of the loss of irreplaceable sites and artifacts of cultural and historical significance (p. 227). On the other hand, to the extent it may have been intended "to prompt complementary prosecutions within Mali," Pratt concludes that it seems to have had little impact (p. 228).

In Chapter 8, on "Emotions in International Criminal Law: Reckoning with the Unknown," Josh Pallas, Masters of Laws student at the University of New South Wales, calls for more scholarship on the role of emotions in international prosecutions to gain both a richer understanding the underlying reasons (motivations) for the commission of crimes as well as the resultant damage to victims survivors and families. Pallas observes that "[w]hen there are decisions to be made within a political environment, emotions must necessarily play a role" (p. 231) but does not fully explain just how or why that fact may be relevant to the prosecution of such crimes.[3] The chapter surveys some of the existing literature on emotion in ICL, noting that it focuses on victims (p. 233) and often overlooks involving perpetrators in the "emotion sharing process" (p. 234). Pallas asserts that "[e]motions analysis adds a new dimension to understand what transpires in the courtroom" (p. 250) and that "[a]n emotions turn in international criminal law is long overdue as emotions are crucial to human functioning and interaction but still remain absent from our understandings of this important area of law" (p. 253).

The chapter by Marian Cohen, assistant professor at Université de Montréal, on "The Politics of Reparations at the International Criminal Court," notes that "international criminal law has begun to embrace the notion that pursuing 'justice for victims' of atrocities may be necessary to achieve justice" (p. 255) but asks whether,

[3] In this regard, Pallas cites to Gerry Simpson, *The Sentimental Life of International Criminal Law*, 3 London Rev. Int'l L. 3 (2015).

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given the current system's "structural limitations," justice and reparations can actually be dissociated from political rhetoric. Tracing the evolution in the use of reparation awards at the ICC reveals an emergent "hierarchy of victims" and "a tension between individual and collective types of reparation awards" (*id.*) that has resulted in failing to deliver justice for many victims. Cohen hopes that in the future "symbolic forms of reparations will be taken into account" (p. 265) along with "collective reparations" for mass atrocities (p. 266).

Part IV of the volume explores the "Limits of International Criminal Law: International and National Security." It includes two contributions that challenge the current conception and focus of ICL. University of Southern Queensland Professor Pauline Collins' particularly thoughtful chapter on "Private Military Security Companies: Addressing Accountability – A Suggested Model for Control" explores the issues created by the increased use of such companies at the global level, especially given the existing lack of any binding international rules or regulations. Collins traces the existing (but ineffective) efforts at both the national and global levels to address those issues and contends that that an innovative approach is required to ensure effective oversight and control of these non-state actors: a new, binding transnational agreement to regulate the operation of private military security companies outside their states of incorporation. The agreement would set forth enforceable standards for licensing, operation, and governance of private military security companies and provide for dispute resolution, victim compensation, and enforcement "in the form of an international organisation that operates as an independent arbitral and accreditation body" to oversee the standards and ensure accountability (p. 282).

In a lengthy and thought-provoking concluding chapter entitled "Counterterrorism and National Security: The Domestic/International Law Interface," Vincent Joël Proulx, associate professor at the National University of Singapore's Faculty of Law, notes that terrorism, as "the politico-legal topic *par excellence*," poses challenges that "require solutions lying at the intersection of law and politics" (p. 314). Proulx describes in considerable detail a developing approach to terrorism in which, despite some important developments at the international level, states have to date managed to retain substantial control over the investigation and prosecution of terrorist offenses, by, inter alia, adopting sectoral anti-terrorism conventions and excluding terrorism from the offenses within the ICC's jurisdiction. This has produced, in Proulx's view, "an international legal framework that corrals a patchwork of multilateral and regional anti-terrorism conventions, very sparse international case law or relevant practice, soft law standards, non-binding declarations from international organizations (including the UN General Assembly), and more impactful binding resolutions authored by the UNSC" (pp. 342–43).

The result is a two-track system in which the "duty and power to prosecute" most terrorism offenses lies with domestic courts (p. 343). Even if a crime of terrorism had been included in the Rome Statute, Proulx notes, the ICC's jurisdiction would have been limited by the principle of complementarity (p. 348). As a result of this approach, "ICL can only play a marginal role, at best, in repressing terrorism" (p. 368) and "the UNSC and sovereign States are ultimately the true drivers of effective counterterrorism law and policy" (p. 369). In consequence, "States must translate and implement international legal norms into enforceable domestic law" (p. 383). Proulx seems generally comfortable with that proposition, noting that "[i]n most cases, domestic courts and legal systems will be sufficiently equipped to handle domestic terrorism prosecutions, sometimes much better that the ICC or other international institutions . . ." (p. 387).

What is the overarching lesson to be drawn from this volume? In the view of the authors, it is that law and politics are not insulated from each other but operate in synergy. More precisely, that "[p]olitics lie at the very core of 'terrorism,' however defined, whether investigated through a legal or non-legal lens. It is precisely this reason that suggests why States are most

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comfortable with retaining control over the investigation and prosecution of terrorism offenses" (p. 388). Because it provides varied insights rather than concrete conclusions, specialists in the international criminal law field, as well as those who teach relevant courses, will likely find the volume interesting, useful, and provocative.

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Of the Board of Editors

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