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The matrix reloaded: Reconstructing the boundaries between (international) law and politics

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ORIGINAL ARTICLE

1 INTERNATIONAL LEGAL THEORY

2 The matrix reloaded: Reconstructing the boundaries
3 between (international) law and politics

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AQ1

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9 Abstract

10 Interdisciplinary scholarship at the intersection of international law (IL) and international relations
11 (IR) has illuminated the roles of politics in law, of law in politics, and of the shifting boundary between
12 the two in various areas of international affairs. The boundary itself, however, has proven resilient.
13 While critical approaches investigating the politics of international law have come to insist on the
14 lasting significance of legality proper, IR approaches to legalization have returned to politics.
15 Although the apparent limits to challenging the boundary between legality and politics are not
16 new, we suggest that they are intimately related to another great divide, i.e., that between the state
17 and the international. Together, these two cross-cutting lines have shaped the possibilities and con-
18 straints of articulating substantive positions 'in' (international) law and politics at least since the inter-
19 war period. Reading these distinctions as intertwined 'nested oppositions', this article reconstructs the
20 stylized but paradigmatic debates between Max Weber and Hans Kelsen over the nature of the state
21 and between Hans Morgenthau and Hersch Lauterpacht over the nature of the international. We fur-
22 ther illustrate how the same conceptual oppositions still enable and constrain current debates in IL and
23 IR, discussing as examples the creation of states and the justiciability of international crimes. Crossing
24 and contesting the boundaries ultimately reaffirms them as the matrix in which conflicts over states
25 and the international are articulated as legal and political.

26 **Keywords:** conceptual history; interdisciplinary boundaries; justiciability; law and politics; state creation

27 1. Introduction

28 As is widely acknowledged, IL and IR make for a rather complicated couple, with their 'tainted
29 love' alternating between phases of attraction and rejection.¹ While liberal IR scholars in the 1990s
30 and 2000s studied 'legalization' (and 'judicialization') as a feature of global governance beyond

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¹A. Leander and W. Werner, 'Tainted Love: The Struggle over Legality in International Relations and International Law', in N. M. Rajkovic, T. Aalberts and T. Gammeltoft-Hansen (eds.), *The Power of Legality: Practices of International Law and Their Politics* (2016), 75.

31 realist power politics,² critical IL scholars endorsed ‘politics’ as the real game behind the formal-
 32 ized circuits of legal arguments.³ Or so it seemed. As Leander and Werner suggest, the boundaries
 33 have been recently re-drawn from both sides, affirming separate disciplinary identities anew.⁴
 34 Indeed, while critical IL scholars have come to warn of the dangers of interdisciplinary research
 35 and the detrimental influence of IR,⁵ the former IR champions of ‘legalization’ have embarked on
 36 a search for the space left for politics in legitimizing an otherwise technical legalization.⁶
 37 Explorations across disciplinary boundaries seem to have come full circle. For advocates of an
 38 interdisciplinary research agenda, the re-imposition of disciplinary boundaries risks to ‘conserva-
 39 tively repeat and reinstate well-established scripts about politics and law’, whereas it is only ‘at the
 40 interstices of international relations and international law’ that ‘the struggle over legality . . . can
 41 best be re-enacted and therefore also transformed’.⁷

42 Such hopes and frustrations about interdisciplinary relations are not new, to be sure. In fact, the
 43 history of IL as a discipline, from the New Haven School through Marxism to legal pluralism and
 44 global governance and law, is marked by encounters with ‘politics’.⁸ Conversely, different shades
 45 of liberal, institutionalist, and constructivist IR approaches routinely ‘(re-)discovered’ interna-
 46 tional law as a valuable field to engage with.⁹ Thus, perhaps we ‘have been here before’,¹⁰ as
 47 Koskenniemi puts it when comparing interdisciplinary dead ends today to the interwar period.
 48 If so, however, how can we account for the resilience of the boundary between law and politics
 49 despite its fluidity and, conversely, for the repeated failure of attempts to neatly separate legality
 50 and politics, in both research and everyday practice?

51 This is a question not so much *for* the two disciplines, as *about* them, as well as about the
 52 practices of law and politics they seek to grasp, explore, and order. More particularly, we suggest,
 53 it is a question about the *conceptual* relationship between law and politics, their constitutive oppo-
 54 sition and interdependence. As ‘basic concepts’,¹¹ legality and politics are as foundational to the
 55 modern disciplines of law and political science as their relationship is ambiguous within these
 56 fields. However, we argue that they are also conditioned and constrained by their intimate con-
 57 nection with another great divide, i.e., that between ‘the state’ and ‘the international’, with the

²K. W. Abbott et al., ‘The Concept of Legalization’, (2000) 54 *International Organization* 401; K. J. Alter, E. M. Hafner-Burton and L. R. Helfer, ‘Theorizing the Judicialization of International Relations’, (2019) 63 *International Studies Quarterly* 44; M. Finnemore and S. J. Toope, ‘Alternatives to “Legalization”: Richer Views of Law and Politics’, (2001) 55 *International Organization* 743; M. Zürn, M. Binder and M. Ecker-Ehrhardt, ‘International Authority and Its Politicization’, (2012) 4 *International Theory* 69.

³D. Kennedy, *International Legal Structures* (1987); M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005).

⁴See Leander and Werner, *supra* note 1.

⁵J. Klabbers, ‘Counter-Disciplinarity’, (2010) 4 *International Political Sociology* 308; M. Koskenniemi, ‘Law, Teleology and International Relations: An Essay in Counterdisciplinarity’, (2012) 26 *International Relations* 3. For further discussion and criticism see N. M. Rajkovic, ‘The Space between Us: Law, Teleology and the New Orientalism of Counterdisciplinarity’, in W. Werner, M. de Hoon and A. Galan (eds.), *The Law of International Lawyers* (2017), 167.

⁶D. Abebe and T. Ginsburg, ‘The Dejudicialization of International Politics?’, (2019) 63 *International Studies Quarterly* 521; Zürn, Binder and Ecker-Ehrhardt, *supra* note 2.

⁷See Leander and Werner, *supra* note 1, at 97–8.

⁸A. Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (2016); A. Orford and F. Hoffmann (eds.), *The Oxford Handbook of the Theory of International Law* (2016).

⁹J. L. Dunoff and M. A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (2013); N. M. Rajkovic, T. Aalberts and T. Gammeltoft-Hansen (eds.), *The Power of Legality: Practices of International Law and Their Politics* (2016). For different streams of constructivism and their encounters with international legal theory see F. dos Reis and O. Kessler, ‘Constructivism and the Politics of International Law’, in Orford and Hoffmann, *ibid.*, at 344.

¹⁰M. Koskenniemi, ‘Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations’, in M. Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (2000), 17.

¹¹R. Koselleck, ‘Basic Concepts in History: A Historical Dictionary of Political and Social Language in Germany’, (2011) 6 *Contributions to the History of Concepts* 1.

58 latter understood as the realm between and above states.¹² In fact, as we shall discuss, disciplinary
 59 perspectives on law and politics were differentiated in debates over the nature of the state, while IR
 60 and IL became more clearly distinguished in debates over the nature of the international. It is thus
 61 crucial to move beyond studying the two already well-known divides of politics/legality and the
 62 state/international in isolation and, instead, scrutinize them together in order to shed new light on
 63 how these divides are tenaciously maintained. This matrix, we suggest, is self-referential and self-
 64 stabilizing since it enables and limits the articulation of substantive claims about statehood and
 65 international affairs as essentially political and legal, all the while reifying the boundary between
 66 the state and the international as condition of modern politics and law.

67 We develop our argument in four steps. In Section 2, we outline our framework for the recon-
 68 struction of the conceptual matrix in two paradigmatic debates, i.e., the debate between Max
 69 Weber and Hans Kelsen over the nature of the state, and the debate between Hans
 70 Morgenthau and Hersch Lauterpacht over the nature of the international. In Section 3, we turn
 71 to the respective attempts by Weber and Kelsen to define the state as a sociological or legal phe-
 72 nomenon. While the opposed views fail to ground the state either on social facts or legal validity,
 73 and indeed reveal how one depends on the other, they furnish separate disciplinary perspectives all
 74 the while reifying the state and the international as distinct realms. In Section 4, we discuss how
 75 Morgenthau and Lauterpacht sought to bring the international under the purview of politics or
 76 law, again highlighting how neither of the contrasting perspectives prevails over the other,
 77 although their very opposition presupposes and reaffirms the international as a separate sphere
 78 in which politics and legality play out differently than ‘within’ the state. In Section 5, we explore
 79 two areas of contemporary debate in which the distinctions between legality and politics and
 80 between the state and the international are both challenged and reaffirmed: state creation and
 81 the international justiciability of international crimes in (non-)international armed conflicts.
 82 As both examples illustrate, the boundaries between (international) law and politics are indeed
 83 constantly challenged and re-drawn in concrete instances, but *within* the matrix of (international)
 84 politics and law, which is thus affirmed as the very condition of possibility for any boundary
 85 stretching, blurring, and re-imposition. In the conclusion, we reflect upon the (im)possibility
 86 to transcend the matrix, as discussed in recent critical scholarship.

87 2. Reconstructing a conceptual matrix of two lines

88 In both IL and IR, scholars have recently paid heightened attention to the specific role of *concepts*
 89 in academic research as well as in everyday political and legal practice.¹³ As many of these inter-
 90 ventions emphasize, taking concepts seriously means going beyond a merely instrumental under-
 91 standing of more or less complex definitions serving as ‘building blocks’ for further assessments, a
 92 view commonly held in both (neo-)positivist social science and traditional legal approaches.¹⁴
 93 Instead, concepts should be regarded as deep-seated presuppositions guiding practice and analysis
 94 alike by rendering experiences and statements intelligible and meaningful in the first place, but
 95 thereby also shaping how we understand the world, perceive its ‘problems’, and find appropriate
 96 ‘solutions’. To analyse concepts in such a way also means to reconstruct the use and performative

¹²On the specificity of ‘the international’ see, for instance, R. B. J. Walker, *After the Globe, before the World* (2010).

¹³For IR see S. Guzzini, ‘The Ends of International Relations Theory: Stages of Reflexivity and Modes of Theorizing’, (2013) 19 *European Journal of International Relations* 521; F. Berenskoetter (ed.), *Concepts in World Politics* (2016); for IL see M. Clark, ‘Ambivalence, Anxieties/Adaptations, Advances: Conceptual History and International Law’, (2018) 31 *LJIL* 747; J. d’Aspremont and S. Singh (eds.), *Concepts for International Law: Contributions to Disciplinary Thought* (2019).

¹⁴See G. King, R. O. Keohane and S. Verba, *Designing Social Inquiry: Scientific Inference in Qualitative Research* (1994); G. Sartori, ‘Concept Misformation in Comparative Politics’, (1970) 64 *American Political Science Review* 1033. For traditional legal approaches in general see the discussion in Bianchi, *supra* note 8, at 21. For international legal positivism’s understanding of language see I. Venzke, ‘Post-Modern Perspectives on Orthodox Positivism’, in J. Kammerhofer and J. d’Aspremont (eds.), *International Legal Positivism in a Post-Modern World* (2014), 182.

97 effects of concepts over time, i.e., historically. This has been expressed, if in arguably different
 98 ways, by a number of scholars often invoked in the renewed calls for the (re-)turn to concepts
 99 in IR and IL, including Reinhart Koselleck, Quentin Skinner, Michel Foucault, Jacques
 100 Derrida, and Ian Hacking.¹⁵ Without pretending to embark on a full-scale discourse analysis
 101 or conceptual history of the notions of legality and politics in IR and IL, or to rigorously follow
 102 one particular approach in reconstructing these concepts, we take three major cues from these
 103 approaches for our sketch of the constitutive matrix of (international) law and politics.

104 First, the meanings and referents of ‘basic concepts’ are not sharply circumscribed, as if they
 105 were ‘mirroring’ a world outside of language, but contingent upon the relations with other con-
 106 cepts and their contexts of use. This is why attempts to define such similarly central and ambigu-
 107 ous notions as ‘sovereignty’, ‘the state’, ‘justice’, and ‘equity’ regularly lead to frustration,¹⁶ and
 108 why their meaning in use seems indeterminate.¹⁷ Rather than trying to define and delineate legal-
 109 ity and politics or the state and the international, and then studying something else on that basis,
 110 we seek to reconstruct how these concepts have shaped the very articulation of substantive claims
 111 and conflicts. In other words, the differentiated legal and political notions of the state and the
 112 international are not the starting point of our inquiry, but its object.

113 Second, and related, we understand the distinctions between (international) law and politics as
 114 two overlapping ‘nested oppositions’¹⁸ that form a matrix. Nested oppositions involve entangled
 115 concepts that not only contradict each other in some respects, but also rely on and co-constitute
 116 each other in various other respects.¹⁹ As we shall discuss, law not only opposes but also extends,
 117 enables, and structures politics, and *vice versa*, so that what is legal and what political differs not
 118 only with changing contexts but also with any particular perspective. In this article, we therefore
 119 revisit debates over the legal or political nature of the state and the international not to ‘settle’
 120 them, but to sketch how they have paradigmatically expressed the nested and thus instable oppo-
 121 sitions of (international) law and politics.

122 Third, to the extent to which current academic debates and discourses in practice invoke or
 123 imply these interlocking oppositions, we argue that they entail a ‘looping effect’ that reifies the
 124 matrix, because the more we seek to come to grips with any phenomenon in terms of legality
 125 or politics, or as international or domestic, the more we enact these distinctions themselves.²⁰
 126 The conceptual matrix thus generates or structures the very reality we experience, so that even
 127 when we question the boundaries of (international) politics and law, we notice that ‘we have been
 128 here before’²¹ and that ‘renewal repeats’.²² Our analysis thus also aims to reconstruct how the
 129 conceptual relations between (international) politics and law still shape and constrain analyses
 130 and arguments today, as we illustrate with reference to debates about state creation and the inter-
 131 national justiciability of international crimes.

¹⁵See, for example, R. Koselleck, *The Practice of Conceptual History: Timing History, Spacing Concepts* (2002); Q. Skinner, *Visions of Politics: Regarding Method* (2002); J. Derrida, *Of Grammatology* (1967); M. Foucault, *Archaeology of Knowledge* (1969); I. Hacking, *Historical Ontology* (2002). For an overview of different approaches see Berenskoetter, *supra* note 13.

¹⁶See J. Bartelson, *The Critique of the State* (2001); Koskenniemi, *supra* note 3.

¹⁷See Kennedy, *supra* note 3; Koskenniemi, *ibid.* For an overview see C. A. Miles, ‘Indeterminacy’, in J. d’Aspremont and S. Singh (eds.), *Concepts for International Law: Contributions to Disciplinary Thought* (2019), 447.

¹⁸J. M. Balkin, ‘Nested Oppositions’, (1990) 99 *Yale Law Journal* 1669. The notion of ‘nested oppositions’ is mainly based on a simplified reading of Derrida’s deconstruction, but Balkin also invokes Wittgenstein’s notion of ‘family resemblance’ as an approach to nested oppositions; *ibid.*, at 1676.

¹⁹*Ibid.*, at 1674.

²⁰I. Hacking, ‘The Looping Effects of Human Kinds’, in D. Sperber, D. Premack and A. J. Premack (eds.), *Causal Cognition: A Multi-Disciplinary Approach* (1995), 351; for the analysis of looping effects of phenomena, rather than people see, e.g., J. Bartelson, *War in International Thought* (2018), 23.

²¹See Koskenniemi, *supra* note 10.

²²D. Kennedy, ‘When Renewal Repeats: Thinking Against the Box’, (1999) 32 *NYUJ Int’l L. & Pol.* 335. See also A. Anghie, *Imperialism, Sovereignty, and the Making of International Law* (2005), for the renewal of (post)colonial hierarchies throughout the history of international law.

Table 1. The Matrix of (International) Law and Politics

	Politics (power/effectiveness)	Law (validity)
The State (the domestic)	Power/effectiveness as essence of the state (Max Weber)	Legal validity as essence of the state (Hans Kelsen)
The International	Power/effectiveness as essence of the international (Hans Morgenthau)	Legal validity as essence of the international (Hersch Lauterpacht)

132 Following these insights into the role and analysis of ‘basic concepts’ as ‘nested oppositions’, we
 133 aim to sketch the matrix of four fields by reconstructing two stylized but paradigmatic confron-
 134 tations over the nature of the state and the international. We locate these ‘debates’ in the interwar
 135 period, taking our cue from the often-reiterated view that ‘despite substantial common interests,
 136 international law and international relations, and their parent disciplines of law and political sci-
 137 ence, diverged and became largely estranged after the shock of the Second World War’.²³ We do
 138 not, however, adopt a rigid periodization, nor are we interested in any ‘origins’ of the distinctions
 139 between law and politics or between the state and the international; rather, we are interested in
 140 how these distinctions, which are indeed older, were tightly interwoven and thus became consti-
 141 tutive for the respective disciplines.²⁴ Weber, Kelsen, Morgenthau, and Lauterpacht achieved
 142 canonical status and are routinely invoked as authorities in their respective fields precisely because
 143 they sought to ground the state and the international in legality and politics, respectively, thus
 144 providing the conceptual basis for all further inquiries in IR and IL. Even though in their own
 145 work all four of them moved from one corner to another with relative ease, they all took distinct
 146 positions on the essence of the state or the international that appear, at least retroactively, as par-
 147 adigmatic (see Table 1).

148 We thereby follow scholarship in IR and IL that has problematized the boundaries of the mod-
 149 ern international, emphasizing the productive force of blind spots and paradoxes within and
 150 between disciplines, and that has explored the silences, ‘bounds of sense’, and respective ‘horizons’
 151 of international legal and political argumentation.²⁵

152 This exercise in conceptual reconstruction comes with necessary qualifications. First, we locate
 153 the articulation of boundaries between law and politics within *interdisciplinary* debates, thus fol-
 154 lowing the call of Andrew Abbott to focus on *interprofessional competition*, rather than recounting
 155 the ‘internal’ (de-)professionalization of particular disciplines.²⁶ This imposes limits on the atten-
 156 tion we can pay to other disciplinary discussions. Second, in associating the four scholars with
 157 opposed positions in distinct corners, we deliberately simplify to sharpen the view for the basic
 158 ‘nested oppositions’. Although we, thus, cannot do justice to the complexity of their respective
 159 intellectual trajectories, we do show how the position of any particular corner is inherently unstable
 160 and acknowledge that there were important moves from one field to another, such as Kelsen’s

²³M. A. Pollack, ‘Is International Relations Corrosive of International Law: A Reply to M. Koskenniemi’, (2013) 27 *Temple International and Comparative Law Journal* 339, at 339. See also M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (2001), Ch. 6.

²⁴Periodizations, such as interwar or Cold War, are not neutral facts but ‘interpretations of facts’. Importantly, ‘[e]very periodization is inherently problematic as any period is an abstraction from the historical fact’, O. Diggelmann, ‘The Periodization of International Law’, in B. Fassbender and A. Peters (eds.), *The Oxford Handbook of the History of International Law* (2012), 997, at 999, 1003; for a critique of Eurocentric periodization in IL and IR see, respectively, J. d’Aspremont, ‘Turntablism in the History of International Law’, (2020) 22 *Journal of the History of International Law/Revue d’histoire du droit international* 472; T. Barkawi, ‘Decolonising War’, (2016) 1 *European Journal of International Security* 199.

²⁵Some foundational texts include Kennedy, *supra* note 3; Koskenniemi, *supra* note 3; F. V. Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (1989); N. G. Onuf, *World of Our Making: Rules and Rule in Social Theory and International Relations* (1989).

²⁶A. Abbott, *The System of Professions: An Essay on the Division of Expert Labor* (1988).

161 increasing appeal to the international to anchor the legality of the state or Morgenthau's growing
 162 confidence in the state and diplomacy to tame international power politics. Third, we do not trace
 163 the emergence, diffusion, and significance of these fundamental conceptual oppositions in any
 164 comprehensive way, which would go beyond the scope of this article.²⁷ In particular, we do
 165 not tell an 'origins' story but see the Interwar period as an important focal point to sketch the
 166 articulation of (international) law and politics in their fundamental conceptual oppositions that,
 167 as we illustrate by way of examples in Section 5, structurally link and separate these fields until
 168 today.²⁸ Fourth, as a part of an interdisciplinary canon, the oppositions articulated by Weber,
 169 Kelsen, Morgenthau, and Lauterpacht have ensured connectivity, compatibility, and accessibility,
 170 but they at the same time excluded alternatives and (re)produced established hierarchies.²⁹ Rather
 171 than exploring such alternatives, we scrutinize the emergence of the matrix and reconstruct how
 172 the canon is actively, but not necessarily intentionally, reproduced in scholarship and interna-
 173 tional legal practice. However, as we discuss in the conclusion, a critical understanding of the
 174 politics of canon formation is also essential to appreciate the possibilities, as well as the limits,
 175 of potential alternatives.

176 3. Weber, Kelsen, and the state between sociology and law

177 While both IL and IR are committed to the notion that states are the building blocks of the inter-
 178 national system, opinions within and across the two disciplines diverge on whether states are ulti-
 179 mately a matter of fact or of law, and identified by sociological or legal methods. In this section, we
 180 reconstruct the division between the sociological and the legal understanding of the state in the
 181 influential attempts by Max Weber and Hans Kelsen to overcome a unified and – they both agreed
 182 – 'metaphysical' notion of the state by developing rigorous disciplinary approaches to disclose its
 183 true nature. As we suggest, however, Weber and Kelsen ultimately had to base their legal and
 184 sociological concepts of the state on the respective other concept, thus fundamentally entangling
 185 them. By pushing reductions of the state to either empirical effectiveness or legal validity to the
 186 extreme, they nevertheless defined the boundaries and typical circuits of arguments about the
 187 political or legal nature of the state. Unable to solve the question at the 'domestic' level,
 188 Kelsen ultimately appealed to the international, as the sphere where law could be anchored, thus
 189 also setting the stage for the debate over the nature of the international by Morgenthau and
 190 Lauterpacht.

191 The functional differentiation of disciplinary perspectives on the state has arguably a long and
 192 complex history that begins well before Weber and Kelsen came to think about the state in their
 193 respective disciplinary terms.³⁰ Within the German context alone, the juridical perspective on the
 194 state had become increasingly autonomous already in the work of Carl Friedrich Gerber and Paul
 195 Laband, although it remained tied to preceding notions of the nation or the state as unified will,
 196 person, or organism.³¹ Georg Jellinek's *Allgemeine Staatslehre* is the, perhaps, last great attempt to
 197 provide an encompassing synthesis of all dimensions of the state, although he precisely distin-
 198 guished the legal and the sociological dimensions as its two sides, leading critics to argue that

²⁷For such wider sketches of disciplinary histories see, for example, Koskeniemi, *supra* note 23; B. C. Schmidt, *The Political Discourse of Anarchy: A Disciplinary History of International Relations* (1998).

²⁸For a critique of the search for monocausal 'origins' stories see E. W. Said, *Beginnings: Intention and Method* (1975); see also P. Bilgin, 'On the "Does Theory Travel?" Question: Traveling with Edward Said', in Z. G. Çapan, F. dos Reis and M. Grasten (eds.), *The Politics of Translation in International Relations* (2021), 245.

²⁹See, for example, W. D. Mignolo, 'Canons A(nd)Cross-Cultural Boundaries (Or Whose Canon Are We Talking About)', (1991) 12 *Poetics Today* 1.

³⁰M. Stolleis, *Geschichte des Öffentlichen Rechts in Deutschland. Band 2. Staatsrechtslehre und Verwaltungswissenschaft, 1800-1914* (1992). See also Bartelson, *supra* note 16.

³¹See Stolleis, *supra* note 30, at 330–80; see also A. Koschorke et al., *Der fiktive Staat: Konstruktionen des politischen Körpers in der Geschichte Europas* (2007), 338–76.

199 he could not plausibly reunite them.³² Indeed, soon thereafter the attempt to reconcile philosophi-
 200 cal idealism, historiography, natural law, positivism, and emerging sociology and psychology in a
 201 single account of the state appeared to be thoroughly anachronistic, as dealing with ‘a mass of
 202 problems . . . thrown together under the somewhat vague description of *Staatslehre*’.³³ Instead
 203 of assuming the state as the starting point of their inquiries, the new advocates of properly disci-
 204 plinary approaches sought to ground the state in their respective spheres of study, assuming the
 205 primacy of sociological facts or legal norms of which the state was but an expression. Weber’s
 206 sociological and Kelsen’s ‘purely’ legal perspectives illustrate this paradigmatically, and both
 207 had a lasting impact on conceptualizations of the state also in IR and IL.

208 **3.1 Weber: The sociological reduction of the state**

209 In his *Economy and Society*,³⁴ Weber famously begins his inquiry with a set of definitions, includ-
 210 ing of power, domination, legitimacy – and the state. In contrast to his fine-grained analysis of
 211 actual forms of political domination emerging and transforming in history discussed in the main
 212 parts of the book, Weber’s concepts, including that of the modern state, are elegantly simplistic. As
 213 an ideal type, the concept of the state was to be freed from its legal and philosophical roots and
 214 opened up to ‘scientific’ sociological inquiry. To Weber, sociology differs as an ‘empirical science
 215 of behaviour’ from ‘dogmatic’ sciences, among which he counts law, in that it does not seek to
 216 establish, and indeed excludes, ‘metaphysical’ meaning.³⁵ As such, as Weber already explained in
 217 his lecture on *Politics as a Vocation*, the state cannot be defined by its ‘purposes’ but only by its
 218 specific ‘means’.³⁶ The normative is thus shut out so as to rigorously approach the state as an
 219 empirical phenomenon, rather than presupposing it as a vague metaphysical entity. Although
 220 the passage is well-known, it is worthwhile quoting it at length here:

221 . . . in the final analysis the modern state can be defined only sociologically by the specific
 222 *means* that are peculiar to it, as to every political organization: namely, physical violence . . .
 223 Violence is, of course, not the normal or the only means available to the state . . . But it is the
 224 means specific to the state . . . [T]he state is the form of human community that (success-
 225 fully) lays claim to the *monopoly of legitimate physical violence* within a particular territory –
 226 and this idea of ‘territory’ is an essential defining feature . . . [W]hat “politics” means for us is
 227 to strive for a share of power or to influence the distribution of power, whether between states
 228 or between the groups of people contained within a state.³⁷

229 This set of definitions illustrates the close conceptual connections between statehood, politics,
 230 power, and violence, between community, territory, and authority. Politics are tightly packaged,
 231 they take place *within* or *between* states which emerge as largely pacified and delineated spaces of
 232 order, ‘bordered power-containers’ as Giddens would later put it.³⁸ Historically, Weber explains,

233 [t]he modern state begins to develop wherever the monarch sets in train the process of dis-
 234 possessing the autonomous, “private” agents of administrative power who exist in parallel to

³²G. Jellinek, *Allgemeine Staatslehre* (1928 [1900]). See also E. Voegelin, ‘Kelsen’s pure theory of law’, (1927) 42 *Political Science Quarterly* 268; Koskeniemi, *supra* note 23, at 198–208; M. García-Salmones Rovira, *The Project of Positivism in International Law* (2013), 181–3.

³³See Voegelin, *ibid.*, at 269. See more generally Stolleis, *supra* note 30, at 447–59; Koskeniemi, *supra* note 23, at 177–83.

³⁴M. Weber, *Economy and Society: A New Translation* (2019).

³⁵*Ibid.*, at 4.

³⁶M. Weber, *The Vocation Lectures* (2004), 33.

³⁷*Ibid.*

³⁸A. Giddens, *The Nation-State and Violence: Volume Two of a Contemporary Critique of Historical Materialism* (1985), 120.

235 . . . [the state], that is to say, all the independent owners of the materials of war and the
236 administration, financial resources, and politically useful goods of every kind.³⁹

237 In this conceptual framework, the state is domestically structured by an ‘organization’ or a ‘ruling
238 apparatus that calls for continued administration’ which ‘should have at . . . [its] disposal the
239 material resources necessary to make use of physical force’.⁴⁰ In tracing state formation from
240 the perspective of this ideal-typical endpoint and benchmark, the Weberian state concept acquired
241 a ‘double status as both empirical and transcendental’.⁴¹ While the space *within* which state for-
242 mation took place was analytically presupposed, the politics within and between states were sub-
243 jected to the empirical analysis of bounded historical change.

244 The long-term impact of this notion of the state on sociology, political science, and IR can
245 hardly be overestimated. Major works of state formation have been influenced by Weber’s under-
246 standing of it – although alongside others, such as Marx’s – and notably by his emphasis on the
247 acquisition of the coercive and fiscal means of power, processes of bureaucratization, and the
248 establishment of effective territorial rule.⁴² Despite various attempts to escape, widen, or comple-
249 ment the Weberian state concept in the past 100 years, it casts a long shadow on our notions of the
250 ‘modern’ state and politics.⁴³

251 Indeed, while the IR realist notion of the international system as characterized by the eternally
252 repeating dynamics of power politics has a long pedigree in political thought, Weber has been
253 assigned a particular place in it.⁴⁴ Modernity had disenchanted the world and imposed its ‘iron
254 cage’⁴⁵ of instrumental reason, but ‘within’ and ‘between’ states there was *politics*,⁴⁶ and thus *con-*
255 *tingency*, if within the limits of this particular spatio-temporal order.⁴⁷ Although it also invites for
256 reflections about an ethics of responsibility and prudent statesmanship, ‘politics’ is ultimately
257 about struggles for ‘power’, and absent any universally valid truths or ethics, the struggle for power
258 between states is hardwired into the modern international itself. Thus, for Walker, ‘[t]he analysis
259 of ethics and international relations . . . returns, with Weber, to a radical scepticism in which geo-
260 politics meets nihilism in the glorification of the state’.⁴⁸ As we discuss below, Morgenthau’s
261 conceptualization of international politics continued this line of thought, as would much of ‘real-
262 ist’ IR theory.⁴⁹

263 Back in the 1920s, Weber’s influential reduction of the state to a successful claim to a monopoly
264 of legitimate physical violence led a prominent critic in the neighbouring discipline of law to argue
265 that Weber’s notion was actually based on a *juridical* concept of the state, despite all rhetoric of a
266 genuine *sociological* view. This prominent critic was Hans Kelsen.

267 **3.2 Kelsen: The state as legal order – and the turn to international law**

268 In a wide-sweeping analysis of prevailing sociological and juridical notions of the state, Kelsen
269 maintained that, by postulating that the state would hold the *monopoly* of violence, Weber

³⁹See Weber, *supra* note 36, at 37.

⁴⁰*Ibid.*, at 35.

⁴¹See Bartelson, *supra* note 16, at 34.

⁴²See, for instance, Giddens, *supra* note 38; M. Mann, *The Sources of Social Power*, vol. I, II, III, IV (2012); C. Tilly, *Coercion, Capital, and European States, AD 990-1992* (1992). For an overview see T. Vu, ‘Studying the State through State Formation’, (2010) 62 *World Politics* 148.

⁴³See Vu, *ibid.* On failed attempts to overcome the state concept see also Bartelson, *supra* note 16.

⁴⁴R. B. J. Walker, *Inside/Outside: International Relations as Political Theory* (1993).

⁴⁵M. Weber, *The Protestant Ethic and the Spirit of Capitalism* (1930), 123.

⁴⁶Weber, *supra* note 36, at 33.

⁴⁷K. Palonen, *Das ‘Webersche Moment’: Zur Kontingenz des Politischen* (1998); Walker, *supra* note 44, at 72.

⁴⁸See Walker, *ibid.*

⁴⁹Cf. T. Barkawi, ‘Strategy as a Vocation: Weber, Morgenthau and Modern Strategic Studies’, (1998) 24 *Review of International Studies* 159.

270 had essentially employed a normative or legal concept of order because a monopoly could never
 271 exist empirically, as material reality.⁵⁰ To Kelsen, much like Weber, the most important difference
 272 between sociology and law as disciplines was that sociologists were interested in empirical facts
 273 whereas lawyers thought in terms of legal validity. However, in his view, it was impossible to
 274 reduce the *state* sociologically because the state as a frame of reference, as a unity, was per defini-
 275 tion normative and thus juridical.⁵¹ For Kelsen, only Weber's ideal-types actually ordered social
 276 reality and invested empirical behaviour with meaning; and these ideal-types preceded the empiri-
 277 cal analysis.⁵²

278 This is illustrated, for instance, by the revolutionary overhaul of a state's constitution. The same
 279 empirical events can be either seen as founding act of a new constitutional order or as high treason
 280 against the old one. To Kelsen, the real difference between the former and the latter depends on
 281 which 'basic norm' (*Grundnorm*) is presupposed.⁵³ The legitimacy of the 'state' does not derive
 282 from its factual power but from the presupposition that any norms and rules within it are valid
 283 because they are subject to the system's *Grundnorm*. In this sense, the *Grundnorm* is a 'transcen-
 284 dental-logical presupposition'.⁵⁴ Kelsen thus contends that the sociological concept of the state
 285 was essentially dependent on a normative concept to give the empirical features of the state their
 286 coherent form, locality, and significance.⁵⁵

287 Accordingly, for Kelsen, the state criteria of government, population, and territory *can only be*
 288 *juridical concepts* because in sociological terms there is no complete cohesion of a people, no nat-
 289 ural homogeneity of a territory, and no proper monopoly over the legitimate use of force.⁵⁶ Force
 290 is no independent sub-category of statehood because it is already implied by the normative under-
 291 standing of the state.⁵⁷ All concepts of the state that regard the state as distinct from law, i.e., as a
 292 material correlate to the ideational character of the law, commit to an illusion because the state is
 293 nothing but the law.⁵⁸

294 The "power" of the state can show itself only in the specific means of power which are at the
 295 disposal of a government; in the fortresses and prisons, the guns and gallows, the individuals
 296 uniformed as policemen or soldiers. But these fortresses and prisons, these guns and gallows,
 297 are dead objects; they become tools of state power only so far as they are used by a state
 298 government or by individuals according to orders directed to them by the government, only
 299 so far as the policemen and soldiers obey the norms that regulate their behavior. The power
 300 of the state is no mystical force concealed behind the state or its law; it is only the effective-
 301 ness of the national legal order.⁵⁹

302 For Kelsen, Weber actually fell back on metaphysics – unless the identity of the state which he
 303 presupposed in his sociological reduction was understood *legally*, i.e., as emanating from a nor-
 304 mative order composed of internal legal references.

305 Having died before this critique was published, Weber had no opportunity to respond. The
 306 critique by Kelsen can be reversed from the sociological viewpoint, however. If the validity of
 307 any legal order depends itself in the last instance on the validity of a *Grundnorm*, there is no legally

⁵⁰H. Kelsen, *Der Soziologische und der Juristische Staatsbegriff* (1928), 170.

⁵¹*Ibid.*, at 8–9.

⁵²*Ibid.*, at 4–11, 156–70. This does not mean that Kelsen did not have a sociological concept of social reality of his own, which in turn influenced his view on legality; see García-Salmones Rovira, *supra* note 32.

⁵³H. Kelsen, *Pure Theory of Law* (2005), 205–14.

⁵⁴*Ibid.*, at 201. See also S. L. Paulson, 'Kelsen's Legal Theory: The Final Round', (1992) 12 *Oxford Journal of Legal Studies* 265.

⁵⁵See Kelsen, *supra* note 50, at 75, 82, 92.

⁵⁶*Ibid.*, at 4–19.

⁵⁷*Ibid.*, at 82.

⁵⁸See Kelsen, *supra* note 53, at 318–20.

⁵⁹*Ibid.*, at 290.

308 compelling reason to accept one or another basic legal norm – and in case of conflict, there would
 309 be no impartial position from which to judge which one was actually ‘in force’. Kelsen’s assump-
 310 tion that factual power would necessarily be identical with legal normativity is, as his contempo-
 311 rary Hermann Heller acidly put it, a ‘logically incomprehensible answer’.⁶⁰ More specifically, it is
 312 ultimately unclear whether Kelsen’s notion of a coherent legal order is anchored in an ideal
 313 hypothesis in neo-Kantian fashion or in a state of reality that enters the analysis externally. If
 314 it is merely an ideal hypothesis independent of the phenomenon it describes, then it appears
 315 indeed that ‘[t]he problems of the pure theory do not lie in its internal coherence but in its rela-
 316 tionship to the surrounding world’.⁶¹

317 If, on the other hand, social reality does enter as a criterion for identifying the proper basic
 318 norm, then Kelsen’s approach takes a radical turn because he invokes *effectiveness* as the decisive
 319 criterion and, thereby, as ultimate ground for any concrete state. As he contends:

320 if . . . [a] relatively centralized coercive order, subordinated only to international law, is by
 321 and large effective . . . the community constituted by such a coercive order is a “state” . . . [a]
 322 valid legal order in the sense of international law.⁶²

323 A state – or national legal order – is effective ‘if the norms created in conformity with it are by and
 324 large applied and obeyed’.⁶³ Thus, behind the legal order lurks power as ‘effectiveness’.⁶⁴ This
 325 appears to be a concession to Weber. Legal scholars who read Kelsen in this way have remarked
 326 that it seems ‘indeed paradoxical’ that the ‘perhaps . . . most influential normative theory that was
 327 ever launched . . . rests on the “principle” of effectiveness’.⁶⁵ It would appear that Weber’s socio-
 328 logical state concept returns by the back door.

329 However, Kelsen maintains that it is not effectiveness as such which makes states, but its status
 330 as legal principle under *international law*:

331 A norm of general international law authorizes an individual or a group of individuals, on the
 332 basis of an effective constitution, to create and apply as a legitimate government a normative
 333 coercive order. That norm, thus, legitimizes this coercive order . . . as a “state” in the sense of
 334 international law – regardless of whether the government came to power in a “legitimate”
 335 way . . . or by revolution.⁶⁶

336 Although states are thus defined by the effectiveness of their ‘internal’ legal order,⁶⁷ this is so only
 337 because it is a norm of international law, presuming the primacy of international law *above*
 338 states.⁶⁸ Moreover, since facts do not speak for themselves, they become only legally relevant upon
 339 interpretation. In the ‘primitive’ and ‘decentralized’ international legal order, its organs are the
 340 existing states and their *legal recognition* thus constitutes new states for the purposes of

⁶⁰H. Heller, *Die Souveränität. Ein Beitrag zur Theorie des Staats- und Völkerrechts* (1927), 53.

⁶¹See Koskenniemi, *supra* note 3, at 249.

⁶²See Kelsen, *supra* note 53, at 337 (emphasis added).

⁶³*Ibid.*, at 210; see also Kelsen, *supra* note 50, at 98–9; Kelsen, *supra* note 53, at 208–14; G. Kreijen, *State Failure, Sovereignty, and Effectiveness* (2004), 211–30.

⁶⁴See Kelsen, *supra* note 53, at 290, 214–16. As Voegelin notices, ‘at this point the theory of state sovereignty clashes with the problems of international law’ (*supra* note 32, at 273), more specifically with the problem of recognition of individual states in international law as the necessarily prior legal order.

⁶⁵See Kreijen, *supra* note 63, at 212.

⁶⁶See Kelsen, *supra* note 53, at 215. See also H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (1920), 224–41.

⁶⁷H. Kelsen, ‘Recognition in International Law. Theoretical Observations’, (1941) 35 AJIL 605, at 608.

⁶⁸See Kelsen, *supra* note 66. See also J. von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (2015).

341 international law.⁶⁹ While acknowledging the relevance of the sociological notion of the state for
 342 establishing the effectiveness of states, Kelsen thus ultimately preserves his view on the primacy of
 343 law by anchoring it in the international realm. Here, after all, one can ostensibly assume an
 344 encompassing and sufficiently coherent legal order which designates individual states by recog-
 345 nition, understood as properly legal ‘co-gnition’.⁷⁰

346 Alas, in attempting to banish the spectre of state sovereignty domestically, Kelsen ultimately
 347 invites it back in through the international.⁷¹ Although he maintains that there is a difference
 348 between mere ‘political’ and proper ‘legal recognition’, and that only the latter actually establishes
 349 states, critics have found his attempt to have it both ways implausible.⁷² For all intents and pur-
 350 poses, Kelsen ultimately accepts the constitutive doctrine of recognition, according to which states
 351 achieve international status only upon recognition, rather than by virtue of having achieved a
 352 particular degree of factual effectiveness on the ground.⁷³ Yet this essentially leaves it to existing
 353 states to decide whether or not new states had emerged, and – absent any oversight over *their*
 354 interpretation of the facts – to international *politics*.⁷⁴

355 Kelsen’s student Lauterpacht would try to move beyond the apparent limits of positive law,
 356 argue for a ‘duty to recognize’⁷⁵ new states, and hope for the ‘collectivization of the process of
 357 recognition’⁷⁶ by an organized international community. The alternative was that states were
 358 either evident facts after all or else determined by Weber’s ‘politics between states’ that
 359 Morgenthau would argue was the essence of the international at any rate.

360 The reconstructed opposition between Weber’s sociological and Kelsen’s legal concept of the
 361 state paradigmatically illustrates not only their differences but also their co-constitution, since the
 362 sociological notion is revealed to depend on the legal one, and *vice versa*. This nested opposition
 363 renders substantive arguments about the legal or political nature of states inherently unstable and
 364 flexible, as we shall discuss further below. Moreover, the despised ‘metaphysics’ of the state
 365 remains firmly in place, since ‘the state’ is neither reduced to legal validity nor to effective power.
 366 The assumption that there *are* states at all is meanwhile reinforced by what both Weber and
 367 Kelsen assume is the counterpart of individual states, i.e., the international composed of a multi-
 368 plicity of states. Thus, while the entangled distinction between a legal and a political view of the
 369 state amplifies the difficulty to identify individual states, the need to identify individual states as
 370 part of the international animates debates over their legal or political nature in the first place.
 371 Whether law could at all be anchored in the international realm, as Kelsen hoped, or would
 372 encounter power politics yet again, as Weber thought, would be the bone of contention in another
 373 paradigmatic debate.

374 4. Morgenthau, Lauterpacht, and the international between politics and law

375 Although both IR and IL specifically engage with the *international* realm, they are traditionally
 376 anchored in opposite views on its ‘true’ nature. In this section, we reconstruct this nested oppo-
 377 sition by revisiting the diverging positions of Hans Morgenthau and Hersch Lauterpacht in the

⁶⁹See Kelsen, *supra* note 67, at 607.

⁷⁰*Ibid.*, at 606.

⁷¹H. Kelsen, ‘Sovereignty and International Law’, (1960) 48 *Georgetown Law Journal* 627.

⁷²See J. Crawford, *The Creation of States in International Law* (2006), 21; T.-C. Chen, *The International Law of Recognition. With Special Reference to Practice in Great Britain and the United States* (1951), 47.

⁷³For instance, Chen argues that with this argument ‘Kelsen abandons his former declaratory view and declares himself in favour of the constitutive theory’ of recognition; Chen, *ibid.*, at 41.

⁷⁴See Kelsen, *supra* note 67, at 606.

⁷⁵H. Lauterpacht, *Recognition in International Law* (1947), at 7–12, 73; for a critical discussion by another Kelsen student who upheld the restriction to ‘positive international law’ see J. L. Kunz, ‘Critical Remarks on Lauterpacht’s “Recognition in International Law”’, (1950) 44 *AJIL* 713.

⁷⁶See Lauterpacht, *ibid.*, at 67–8.

378 debate over the doctrine of the (non)justiciability of international disputes. Marginal though it
 379 might seem, this debate has not only a long history from Vattel to the Kellogg-Briand Pact,⁷⁷
 380 but it also represents an important focal point in the separation of IR and IL as it centres around
 381 the question of whether the international is ultimately a realm of politics, in which law only plays a
 382 minor role, or instead an essentially legal order able to tame power politics. While Morgenthau
 383 came to argue that vital conflicts on the international level were political and thus non-justiciable,
 384 Lauterpacht maintained that all conflicts were in principle justiciable and that it was precisely the
 385 judicial function to find the applicable (international) law, and thereby also constitute an inter-
 386 national community based on law. The boundary between law and politics is in flux, however.
 387 Lauterpacht's proactive stance on the development of international law could also be construed
 388 as a political project in its own right, while Morgenthau's insistence on the role of state diplomacy
 389 seems to sustain a traditionally restricted notion of international law as law between states.
 390 Moreover, in delineating seemingly opposed views on the international, both Morgenthau and
 391 Lauterpacht also presume and reaffirm individual states as correlate of the international, invoking
 392 them either as political powers or domestic realms of law.

393 **4.1 Morgenthau: The limits of international law**

394 Looking back in 1974 to influences on the formation of his approach to international law,
 395 Morgenthau considers that it was the debate on the non-justiciability of international disputes
 396 that profoundly shaped his thought and set the foundation for his general scepticism concerning
 397 the effectiveness of international law.⁷⁸ More precisely, it was in his doctoral dissertation in law,
 398 which he completed in 1927 and published as a revised version two years later as *Die internationale*
 399 *Rechtspflege, ihr Wesen und ihre Grenzen* [*The International Judiciary, its Nature and its Limits*],
 400 where Morgenthau first developed the outline of his image of the relationship between interna-
 401 tional law and politics.⁷⁹ The thesis examines the question of whether states feel obliged to sub-
 402 ordinate their conflicts to organs of the international judiciary (meaning bodies of arbitration or
 403 courts) and, if they do so, to what extent this is the case. The topic of the thesis was, as
 404 Koskenniemi notes, 'a rather standard object of scholarly interest in the 1920s'.⁸⁰ Morgenthau
 405 was mainly puzzled by the fact that, on the one hand, the scope of the international judiciary
 406 is – in 'objective' terms – unlimited as every international conflict can be subsumed under general
 407 norms while, on the other hand, *in reality* not all international conflicts are addressed before the
 408 international judiciary.⁸¹ Morgenthau explains this gap by arguing that the 'subjective' limits of
 409 the political determine how law and politics are related. As Morgenthau famously remarks:

410 The concept of the "legal" and the "political" do not constitute an adequate pair of concepts that
 411 could enter into a contradictory distinction. The conceptual distinction of the concept of political
 412 questions is formed by the concept of non-political questions and not by the concept of legal
 413 questions which, for its part, can be just as much of political as of non-political nature.⁸²

414 As law and politics are not conceptualized as directly opposed, we can distinguish political con-
 415 flicts or, as Morgenthau calls them, *tensions* (*Spannungen*), from non-political conflicts, in
 416 Morgenthau's words, *differences* (*Streitigkeiten*). While differences can be tamed by delegating

⁷⁷A. Nussbaum, *A Concise History of the Law of Nations* (1947), Ch. 6; O. Jütersonke, *Morgenthau, Law and Realism* (2010), 45–7.

⁷⁸H. J. Morgenthau, 'International Law and International Politics: An Uneasy Partnership', (1974) 68 *Proceedings of the Annual ASIL Meeting* 323, at 332.

⁷⁹H. J. Morgenthau, *Die internationale Rechtspflege, ihr Wesen und ihre Grenzen* (1929).

⁸⁰See Koskenniemi, *supra* note 23, at 440.

⁸¹See Morgenthau, *supra* note 79, at 42.

⁸²*Ibid.*, at 79.

417 them to the various mechanisms of the international judiciary, tensions cannot be legally resolved.
 418 As a ‘particularity of international relations’ [‘Eigentümlichkeit der zwischenstaatlichen
 419 Beziehungen’], tensions emerge from states’ vital interests and concern for their national honour,
 420 and can thus only be addressed by political means.⁸³

421 Yet, it is not possible to decide *a priori* whether a conflict in the international sphere is political
 422 or not. There are no objective criteria, which would allow us to consider a conflict as either polit-
 423 ical or non-political.⁸⁴ Rather, the question of whether something is political or not depends on the
 424 subjective perception of states themselves. Moreover, this observation, which should also become
 425 the main topic of his second monograph on *The Concept of the Political* (published in 1933), has
 426 important consequences, as the:

427 distinction between political and non-political questions with regard to certain purposes is
 428 impossible as the concept of the political . . . has no substance, which is once and for all
 429 fixed, because it is rather a feature, a quality, a colouring, which can be attached to any kind
 430 of substance.⁸⁵

431 Whether an issue or conflict becomes political is in the end a question of its ‘intensity’.⁸⁶

432 According to Morgenthau, these insights about the ‘indeterminate, through judicio-technical
 433 fixation untameable concept of the political’ should help to create a more effective international
 434 legal order.⁸⁷ Such an order should consist of two features: firstly, it should be aware of its own
 435 (subjective) limitations and, secondly, it should be dynamic rather than static (as, e.g., in legal
 436 formalism) in order to be able to adapt quickly enough to the untameable nature of politics.⁸⁸
 437 Thus, while Morgenthau regards international law as dominated by international politics, his
 438 international politics is rather close to a traditional, ‘non-utopian’ understanding of international
 439 law itself. In this context law mainly exists within – but also maintains – the setting of a balance of
 440 power.⁸⁹

441 After being forced to emigrate to the United States and transitioning from IL to IR in the 1940s,
 442 these insights should still be at the heart of Morgenthau’s work. Although the focus in later pub-
 443 lications gradually shifts away from international law, they still operate within the confines of
 444 *examining the limits of international law* in search for alternative ways to deal with international
 445 politics. For one, Morgenthau started to address the failure of the Interwar period. In his view, this
 446 was very much due to the depoliticization effect of a ‘legalistic approach to foreign policy’, which
 447 emerged in the second half of the nineteenth century and which presents the ‘logical development’
 448 of a ‘utopian, non-political conception’ of foreign policy where it is assumed that international
 449 politics is ‘an undertaking by peace-loving nations’ and where legality is associated with the tech-
 450 nocratic rule of legal engineers lacking any capacity for practical judgement.⁹⁰ For another,
 451 Morgenthau further elaborated on his concept of politics by tying it closer to the question of
 452 power. For him, ‘[f]oreign policy like all politics, is in its essence a struggle for power, waged

⁸³*Ibid.*, at 72, 128.

⁸⁴*Ibid.*, at 71.

⁸⁵*Ibid.*, at 67; similarly, H. J. Morgenthau, *The Concept of the Political* (2012), 100–1.

⁸⁶See Morgenthau, *supra* note 79, at 69; see also Morgenthau, *supra* note 85.

⁸⁷See Morgenthau, *supra* note 79, at 145.

⁸⁸*Ibid.*, at Ch. 16.

⁸⁹H. J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (1948), 211. For example, this position resembles Lassa Oppenheim’s, who argued that the ‘Law of Nations can exist only if there is an equilibrium, a balance of power, between the members of the Family of Nations’, L. Oppenheim, *International Law* (1905), 73. Cf. B. Kingsburry, ‘Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim’s Positive International Law’, (2002) 13 EJIL 401.

⁹⁰H. J. Morgenthau, *In Defense of the National Interest: A Critical Examination of American Foreign Policy* (1951), 101.

453 by sovereign nations for national advantage'.⁹¹ This struggle for power is 'universal in time and
 454 space' as it is part of human nature – a 'desire to dominate, in particular, is a constitutive element
 455 of all human associations'.⁹² While the struggle for power can be tamed by law on the domestic
 456 level (except for revolutions), this is hardly possible in international politics. Morgenthau's con-
 457 cept of the political thus also presupposes a distinction between the state and the international. In
 458 fact, it is because the international is 'politics among nations', i.e., composed of a multiplicity of
 459 states, that politics reigns supreme.

460 As international law and international organizations have limited capacities in settling disputes,
 461 Morgenthau increasingly puts his hopes in the role of the prudent *statesman* and *diplomacy*, thus
 462 largely following Weber's claim that all that tames power politics is an ethics of responsibility. In
 463 the end, for Morgenthau, the 'choice is not between legality and illegality but between political wisdom
 464 and stupidity', and this choice cannot be made by 'the lawyer but only by the statesman'.⁹³ Thus, the
 465 state (represented by its leaders and diplomats) remains the main agent of international politics.
 466 Within international theory, this theme has been explored and reiterated by various generations of
 467 political realists in their conceptualization of the international as characterized by anarchy and the
 468 endless repetition of power politics. In such an environment, IL seems to play only a marginal role,
 469 although it is worthwhile to keep in mind that Morgenthau's notion of the international thereby also
 470 matched a conservative understanding of international law as bound by the will of states.

471 **4.2 Lauterpacht: Hercules was an international lawyer**

472 Hersch Lauterpacht ostensibly presents the opposite position, arguing that the nature of the inter-
 473 national is ultimately legal. More recently, his position has been characterized as the 'most com-
 474 prehensive treatment . . . to date' of the 'Grotian tradition' in international thought,⁹⁴ and it has
 475 been described elsewhere as seminal contribution of the neo-natural law tradition in international
 476 legal theory (together with, for example, Alfred Verdross' work).⁹⁵ The notion of 'neo-natural'
 477 refers here to two important aspects. Firstly, *neo-natural* alludes to the fact that Lauterpacht
 478 adopted the rigorous scientific method of Kelsen (of whom he was, like Verdross, a student);⁹⁶
 479 but secondly, *neo-natural* also refers to his refutation of central tenets of the European legal posi-
 480 tivist tradition of the time, which had its foundations in formalism, state-centrism, and volunta-
 481 rism. This goes so far that it appears that Lauterpacht 'wrote all of his work as critique of
 482 statehood' and a plea to regard an integrated international community as providing the solution
 483 to conflicts between states.⁹⁷ On this basis, Lauterpacht would maintain that the nature of inter-
 484 national affairs should be understood as essentially legal.

485 Lauterpacht refutes legal positivism and political realism basically in three steps, all of them
 486 linked to debates over the divides between (international) law and politics. First, in the debate
 487 on the non-justiciability of international disputes, Lauterpacht argues in a series of articles during

⁹¹*Ibid.*, at 92.

⁹²See Morgenthau, *supra* note 89, 17.

⁹³H. J. Morgenthau, 'Diplomacy', (1946) 55 *The Yale Law Journal* 1067, at 1080.

⁹⁴R. Jeffery, 'Hersch Lauterpacht, the Realist Challenge and the "Grotian Tradition" in 20th-Century International Relations', (2006) 12 *European Journal of International Relations* 223, at 225; see also Lauterpacht's own essay on this tradition, H. Lauterpacht, 'The Grotian Tradition of International Law', (1946) 23 *BYIL* 1. For recent reflection on this tradition see M. Koskeniemi, 'Imagining the Rule of Law: Rereading the Grotian "Tradition"', (2019) 30 *EJIL* 17.

⁹⁵For further discussion of the different streams of the natural law tradition in international legal theory see G. Gordon, 'Natural Law in International Legal Theory: Linear and Dialectic Presentations', in Orford and Hoffmann, *supra* note 8, 279, at 292–3. Or, as Scobbie puts it: 'A natural law thesis, albeit initially inarticulate, is the thread which runs through and unifies Lauterpacht's work', I. G. M. Scobbie, 'The Theorist as Judge: Hersch Lauterpacht's Concept of the International Judicial Function', (1997) 8 *EJIL* 264, at 266.

⁹⁶Similarly: 'Lauterpacht's theoretical construction of international law is rooted in Kelsenite legal epistemology', see Scobbie, *ibid.*, at 265.

⁹⁷See Koskeniemi, *supra* note 5, at 8.

488 the late 1920s and early 1930s, as well as in his most important monograph, *The Function of Law*
 489 *in the International Community* (published in 1933), that all disputes could ultimately be legally
 490 resolved.⁹⁸ Perhaps surprisingly, Lauterpacht agrees with Morgenthau that it is impossible to draw
 491 a line distinguishing between the legal and political nature of disputes on the international level.
 492 As he writes, the same ‘dispute may be purely legal and purely political, *i.e.*, it may be capable of
 493 legal decision so as to admit of a judicial settlement and it may be regarded as “important” so as to
 494 make arbitration appear dangerous’.⁹⁹ However, Lauterpacht comes to a completely different con-
 495 clusion, as for him ‘all international disputes are, despite of their gravity, disputes of *legal* character
 496 in the sense that, so long as the rule of law is recognized, they are capable of an answer by appli-
 497 cation of legal rules’.¹⁰⁰ For Lauterpacht, this premise of the legal nature of all international dis-
 498 putes has important consequences for it implies and invokes the *completeness* of international law,
 499 which ‘is an *a priori* assumption of every system of law, not a prescription of positive law’.¹⁰¹ Even
 500 if states refuse following international law as they see their ‘vital interest’ or ‘honour’ at stake, law
 501 is for Lauterpacht counterfactually valid and the last word remains with the international judge.
 502 As Lauterpacht writes in a generally positive review of Morgenthau’s second book on *The Concept*
 503 *of the Political*:

504 The reader will easily agree with Dr. Morgenthau’s emphasis on the sociological value of the
 505 distinction between juridical and political disputes. What is less clear is its legal value,
 506 namely, its usefulness in treaties of obligatory settlement of international disputes.¹⁰²

507 Second, it follows from the supposed completeness of international law that the task of the *inter-*
 508 *national lawyer as judge and arbitrator* – the *judicial function* – is to guarantee through the
 509 method of *progressive interpretation* the completeness of international law. Koskenniemi has sum-
 510 marized Lauterpacht’s position in the following terms:

511 Contrary to Kelsen, Lauterpacht does not postulate *formal* but *material* completeness of law,
 512 constructed by the lawyer as he proceeds to solve the case ... For Lauterpacht, legal
 513 problem-solution seeks to ensure the unity, consistency and effectiveness of international law
 514 as a whole. By using analogy and abstracting principles from individual rules the lawyer will
 515 be able to perceive the law as a coherent, meaningful whole which “is originally and ultimately
 516 not so much a body of legal rules as a body of legal principles”. These principles express the law’s
 517 autonomous, systemic “coherence” which ultimately justifies the solution of hard cases.¹⁰³

518 The claim of the completeness of international law signifies for Lauterpacht that the legal system
 519 has no gaps (*lacunae*) and that an international court cannot declare that there is no applicable law
 520 (*non liquet*) and that it has, consequently, no jurisdiction over a specific case.¹⁰⁴ It is up to the

⁹⁸H. Lauterpacht, ‘The Doctrine of Non-Justiciable Disputes in International Law’, (1928) 24 *Economica* 277; H. Lauterpacht, *The Function of Law in the International Community* (2011).

⁹⁹See Lauterpacht, *ibid.* (1928), at 299.

¹⁰⁰See Lauterpacht, *ibid.* (2011), at 166 (emphasis added); on differences and similarities between Lauterpacht and Morgenthau see M. Koskenniemi, ‘The Function of Law in the International Community: Introduction’, in *ibid.*, xxix, at xxxvi–xlii.

¹⁰¹See Lauterpacht, *ibid.*, at 72.

¹⁰²H. Lauterpacht, ‘Review: Morgenthau, Hans, La Notion du “Politique” et la théorie des différends internationaux’, (1934) 3 *Zeitschrift Für Sozialforschung* 461, at 461.

¹⁰³See Koskenniemi, *supra* note 3, at 53; on Lauterpacht and the completeness of the legal system see Koskenniemi, *supra* note 23, at 361–9.

¹⁰⁴As Lauterpacht states, ‘the prohibition of non-*liquet* is one of the general principles of law recognised by civilised nations’, Lauterpacht, *supra* note 98 (2011), at 75. See also Lauterpacht’s later publication on this topic, H. Lauterpacht, ‘Some Observations on the Prohibition of “Non Liqueet” and the Completeness of the Legal Order’, in J. H. W. Verzijl (ed.), *Symbolae Verzijl: Présentées au Professeur J.H.W. Verzijl à l’occasion de son LXXX-Ième anniversaire* (1958), 196.

521 judicial function to fill gaps and to make every case justiciable by recourse to *analogies* from
 522 municipal and private law, *general principles* or the *moral purpose* of international law.¹⁰⁵ That
 523 a judge or arbitrator has to fulfil this function is, at first glance, nothing specific to international
 524 law. In every legal order abstract norms need to be applied to concrete cases as they cannot specify
 525 and anticipate all conditions of their application. However, the image of the international judge as
 526 “Herculean” gap-filler¹⁰⁶ in combination with the prohibition of *non liquet* has far-reaching con-
 527 sequences as it extends, at least potentially, the jurisdiction of international courts *ad infinitum*. It
 528 was, as Koskenniemi notes, also a ‘subtle (“hegemonic”) manoeuvre to embolden those (judicial)
 529 institutions whose biases he shared to declare them as universal preferences’.¹⁰⁷ Lauterpacht’s
 530 approach is also a hegemonic move with regard to the question of how international disputes
 531 should be solved – not through politics and diplomacy, as suggested by Morgenthau, but by
 532 law and courts. To put it differently, the final say, competence, and expertise in world politics
 533 would not lie with diplomats, but with judges.

534 Third, Lauterpacht rejects the view that international law is limited to the will of states.¹⁰⁸
 535 Instead, in *The Function of Law in the International Community* he argues that international law’s
 536 voluntarism is not *per se* limited to obligations between states, as states *could* – Lauterpacht delib-
 537 erately uses the conjunctive form – also be bound to the *will of the international community* (*vol-*
 538 *untas civitatis maximae est servanda*). As Lauterpacht stresses in an often-quoted passage:

539 There is no reason why the original hypothesis in international law should not be that the will
 540 of the international community must be obeyed . . . An initial hypothesis expressed in the
 541 terms of *voluntas civitatis maximae est servanda* would point, as the source of law, to the will
 542 of the international society expressing itself in contractual agreements between its constituent
 543 members, in their customs, and in the general principles of law which no civilized commu-
 544 nity can afford to ignore; it would refer to the *civitas maxima* as meaning that super-State of
 545 law which States, through the recognition of the binding force of international law *qua* law,
 546 have already recognized as existing over and above national sovereignties.¹⁰⁹

547 Thus, Lauterpacht ties international law to the principle of the ‘will of the international community’ and
 548 thereby seeks to leave behind an image of the international as dominated by states. In Lauterpacht’s later
 549 work, the ‘will of the international community’ as the foundation of the international legal order should
 550 become eventually substituted by the *individual*. Although Lauterpacht believes, in contrast to
 551 Morgenthau’s pessimistic anthropology, that the ‘nature of man’ is ‘intrinsically moved by a desire
 552 for social life, endowed with an ample measure of goodness, altruism, and morality’,¹¹⁰ he does not justify
 553 the central role of the individual purely anthropologically but also by arguing that:

554 behind the mystical, impersonal, and therefore necessarily irresponsible personality of the
 555 metaphysical state there are actual subjects of rights and duties, namely, individual human
 556 beings . . . The individual is the ultimate unit of all law, international and municipal, in the
 557 double sense that the obligations of international law are ultimately addressed to him and

¹⁰⁵That Lauterpacht highlights *inter alia* the role of analogies from private law is hardly surprising. His doctoral thesis was a treatment of private law analogies in international law. In this thesis, Lauterpacht refutes the prevailing positivist view that international law is a ‘form of general jurisprudence’ and argues, instead, that it resembles more private law as both international law and private law are governing the relations between equals, Hersch Lauterpacht, *Private Law Analogies in International Law with Special Reference to International Arbitration* (1926), at 69.

¹⁰⁶See Koskenniemi, *supra* note 100, at xliiii. For a discussion of the similarities between Lauterpacht and Ronald Dworkin’s image of the judge see Koskenniemi, *supra* note 3, at 53–8.

¹⁰⁷See Koskenniemi, *supra* note 3, at 609.

¹⁰⁸See Lauterpacht, *supra* note 98 (2011), at 427.

¹⁰⁹*Ibid.*, at 429–30.

¹¹⁰See Lauterpacht, *supra* note 94, at 24.

558 that the development, the well-being, and the dignity of the individual human being are a
559 matter of direct concern to international law.¹¹¹

560 Thus, Lauterpacht furnished a radical view of the international as an ultimately *legal* sphere. Yet,
561 by relying on such a far-reaching notion of the judicial function, he silently re-introduced a certain
562 form of politics. Politics, here, is not the kind of power politics between states, which is forged and
563 regulated by diplomats, as in Morgenthau, but it is the progressive extension of the legal sphere by
564 courts and judges operating as representatives of the international community and pursuing a
565 politics of universalism and humanity.

566 **5. Interdisciplinary circles and confines: State creation and the judicial function** 567 **today**

568 If the intellectual confrontations between Weber and Kelsen and between Morgenthau and
569 Lauterpacht help reconstructing historical differentiations and intimate connections between legality
570 and politics along the divide of the domestic and the international, this section illustrates their lasting
571 impact by way of discussing two areas of contention as examples. We first sketch current debates about
572 state creation and recognition between IL and IR, and the limits of legal and political reductions within
573 them, before turning to the legal and political evaluation of the judicial function – and its political side
574 – in current international jurisprudence and arbitration. We link in both instances particular chal-
575 lenges of international law and politics in practice with their (inter)disciplinary interpretation, thus
576 showing how the basic matrix of two lines shapes the apparent stakes and limits of (inter)disciplinary
577 discussions over important issues of contention in (international) law and politics today.

578 **5.1 The spectre of the other: Current debates over the state between IL and IR**

579 Kelsen's attempt to fend off both the notion that states emerged as a matter of fact alone and the
580 politics of discretionary recognition by third states points to a persistent tension in the interna-
581 tional law of state creation. This tension has classically been expressed before and beyond Kelsen
582 in the so-called 'great debate' between the constitutive and the declaratory doctrine of recogni-
583 tion.¹¹² Whereas for the former states become persons of international law upon formal recogni-
584 tion only,¹¹³ according to the latter recognition takes merely note of new states whose legal status
585 follows directly from their factual emergence.¹¹⁴ Both positions presented themselves as the
586 respective *legal* view, and rejected the other as *political*. For a proponent of the declarative posi-
587 tion, the constitutive view suits the interests of 'Machiavellian statesmen' because it 'provides them
588 with a justification for ignoring the existence of other entities and denying them rights under
589 international law'.¹¹⁵ By contrast, from the constitutive view of recognition, letting facts speak
590 for themselves violates basic principles of legal positivism and interpretation, and notably ignores
591 that in practice recognition determined new states as subjects of international law.¹¹⁶ Both views
592 are somewhat discredited today,¹¹⁷ neither seems to safeguard a genuinely legal assessment of state

¹¹¹*Ibid.*, at 27.

¹¹²See Crawford, *supra* note 72, at 19–28; T. D. Grant, *The Recognition of States: Law and Practice in Debate and Evolution* (1999).

¹¹³See Oppenheim, *supra* note 89, at 110.

¹¹⁴See Chen, *supra* note 72.

¹¹⁵*Ibid.*, at 4.

¹¹⁶See Crawford, *supra* note 72, at 5, 17; Kelsen, *supra* note 67.

¹¹⁷The classical constitutive position is now largely regarded as 'unacceptable' (Crawford, *ibid.*, at 27), while the declarative position is often endorsed in principle (*ibid.*, at 28). However, given both the role of recognition in practice and the consideration of other legal principles of statehood than 'effectiveness', it appears that 'neither theory of recognition satisfactorily explains modern practice' (*ibid.*, at 5).

593 creation. The double rejection of the reduction of states to either facts or political decisions – so
 594 crucial for Kelsen – is thus also apparent in the twentieth century development of the international
 595 law of state creation, which has sought to explicitly base evaluations of state creation on rights and
 596 rules, including the self-determination of peoples, territorial integrity, and the general prohibition
 597 of the use of force.¹¹⁸ Rather than taken to emerge before or outside of international law, state
 598 creation was firmly integrated into international law. This does not mean that the state itself lost
 599 significance or appeal, however. To the contrary, it was independent statehood which anticolonial
 600 liberation movements were struggling for. Decolonization promised emancipation not because it
 601 overcame statehood and sovereignty as attributes of an old international legal order, but because it
 602 delivered them to political communities in the global south.¹¹⁹ As the recent advisory opinion of
 603 the International Court of Justice (ICJ) in *Legal Consequences of the Separation of the Chagos*
 604 *Archipelago from Mauritius in 1965* illustrates, self-determination and – unfinished – decoloni-
 605 zation still play a central role in disputes over territories and the jurisdiction of states.¹²⁰

606 The spectre of power politics, it might seem, has thus been pushed to the very margins of IL
 607 since the resort to either effectiveness or recognition alone seems no longer acceptable. Cases of
 608 contested state creation suggest that this is not the case, however. In fact, since legal rights and
 609 prohibitions alone are insufficient to identify individual states, they are often invoked in various
 610 combinations with classical arguments about state recognition and effectiveness to bolster one
 611 position as legal while condemning another as political.¹²¹ For instance, some argue that
 612 Palestine is legally a state by virtue of its right to self-determination and history as Class ‘A’
 613 Mandate under the League of Nations, its declarations of independence, its recognition by many
 614 other states, and its status as ‘non-member observer state’ granted by the UN General Assembly.¹²²
 615 From this perspective, the neglect of its legal state status must appear as a political move to deny it
 616 particular rights, including its request that the International Criminal Court (ICC) investigates
 617 alleged crimes committed on Palestinian territory.¹²³ However, others argue that because of its
 618 lack of universal recognition, as well as its compromised effectiveness and independence,
 619 Palestine is not – yet – a state.¹²⁴ From this angle, assuming that Palestine is already a state should
 620 be regarded as a political rather than a proper legal position.

621 Similarly, both the decision of a number of states to recognize Kosovo upon the controversial
 622 2008 declaration of independence and the 2010 advisory opinion by the ICJ have led IL scholars to
 623 emphasize the apparent limits of law, and the role power politics play in cases of state creation.¹²⁵
 624 Indeed, the partial recognition of Kosovo was infamously followed by the Russian recognition of
 625 Abkhazia and South Ossetia, although this move has been widely rejected. Conversely, supposedly
 626 effective but unrecognized entities such as Somaliland led some legal scholars to argue that they

¹¹⁸See Crawford, *supra* note 72; see also M. G. Kohen (ed.), *Secession: International Law Perspectives* (2004); D. French (ed.), *Statehood and Self-Determination in International Law* (2013).

¹¹⁹S. Moyn, ‘The High Tide of Anticolonial Legalism’, *Journal of the History of International Law/Revue d’histoire du droit international* (forthcoming), 1.

¹²⁰*Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019, [2019] ICJ Rep. 95.

¹²¹See N. Berman, ‘Sovereignty in Abeyance: Self-determination and International Law’, (1988) 7 *Wis. Int’l LJ* 7, 51; Koskenniemi, *supra* note 3, at 272–82.

¹²²J. Quigley ‘Palestine is a State: A Horse with Black and White Stripes is a Zebra’, (2010) 32 *Mich. J. Int’l L.* 749; J. Quigley, ‘Palestine Statehood and International Law’, *Global Policy Essay* (2013), 1.

¹²³*State of Palestine*, Preliminary examination, ICC, available at www.icc-cpi.int/palestine.

¹²⁴See Crawford, *supra* note 72, at 442–8; R. W. Ash, ‘Is Palestine a State: A Response to Professor John Quigley’s Article, “The Palestine Declaration to the International Criminal Court: The Statehood Issue”’, (2009) 36 *Rutgers L. Rec.* 186.

¹²⁵J. Almqvist, ‘The Politics of Recognition: The Question about the Final Status of Kosovo’, in D. French (ed.), *Statehood and Self-Determination in International Law* (2013), 165; A. X. M. Ntovas, ‘The Paradox of Kosovo’s Parallel Legal Orders in the Reasoning of the Court’s Advisory Opinion’, in D. French, *ibid.*, at 139.

627 were essentially states under international law, and should be recognized as such,¹²⁶ while others
 628 deny this.¹²⁷ Thus, the evolution of international law notwithstanding, attempts to grasp state crea-
 629 tion as a legal phenomenon regularly cross into politics, whether in terms of effective statehood
 630 on the ground or recognition by third states. Politics are invoked not only to reject an opposing
 631 position as non-legal, but also to simultaneously build on effectiveness and recognition as a factual
 632 basis for law.¹²⁸

633 Meanwhile, IR approaches to the emergence of states struggle as much to liberate themselves
 634 from recourse to legality as IL perspectives seek to banish the resort to politics. This can be illus-
 635 trated by a glance at two IR literatures that have gained traction in the last decade, one concerned
 636 with practices of recognition in international politics,¹²⁹ the other with the emergence and position
 637 of supposed *de facto* or unrecognized states.¹³⁰ In studies of state recognition, the analysis focuses
 638 on *practices* of recognition and their causes,¹³¹ and it is often accompanied by a rejection of dis-
 639 tinctly legal perspectives.¹³² Although the dynamics of recognition are complex, a particularly
 640 important role is accorded to the political interests of great powers, a nod towards
 641 Morgenthau's understanding of international politics. In this view, the recognition of separatists
 642 in the former Yugoslavia, such as Croatia, and the non-recognition of autonomous regions in
 643 Soviet republics, such as Chechnya, are a function of international politics, not law.¹³³
 644 However, the frequent resort to an international law definition of statehood, the very belief that
 645 formal recognition creates states, and the finding that normative considerations influence recog-
 646 nition point to the relevance of international law as the very vocabulary in which arguments about
 647 practices of recognition are nested.

648 Meanwhile, the literature on *de facto* states borrows from Weber's notion of the state and
 649 argues that despite the lack of legal recognition, entities such as Transnistria or Somaliland
 650 are effectively states.¹³⁴ However, in order to distinguish *de facto* states from potent rebel groups
 651 or warlords, scholars often seek to measure statehood according to the famous Montevideo crite-
 652 ria.¹³⁵ Although the concrete measurements are much debated,¹³⁶ they indicate that IR scholars
 653 curiously turn to international *law* in their search for proper criteria of state creation. Moreover,
 654 despite the claim that state creation is essentially a process of acquiring territorial control, the
 655 often dire and dangerous situation of *de facto* states also seems to suggest that recognition matters
 656 after all, since it evidently endows states with rights and obligations, and provides access to inter-
 657 national organizations.¹³⁷ Ultimately, then, legality re-enters the stage to help determine states
 658 beyond varying degrees of effectiveness.

659 Thus, although perspectives on state creation in IL and IR take opposite vantage points, they
 660 both struggle to identify individual states that seem to exceed their grasp. What determines states
 661 is constantly played back between politics and law, facts and norms. The underlying, shared

¹²⁶A. K. Eggers, 'When is a State a State-The Case for Recognition of Somaliland', (2007) 30 *BC Int'l & Comp. L. Rev.* 211; J. N. Maogoto, 'Somaliland: Scrambled by International Law?', in French, *ibid.*, at 208.

¹²⁷See Crawford, *supra* note 72, at 415, 417.

¹²⁸J. Grzybowski, 'To Be or Not to Be: The Ontological Predicament of State Creation in International Law', (2017) 28 *EJIL* 409.

¹²⁹M. Fabry, *Recognizing States: International Society and the Establishment of New States since 1776* (2010); B. Coggins, *Power Politics and State Formation in the Twentieth Century: The Dynamics of Recognition* (2014); R. D. Griffiths, *Age of Secession: The International and Domestic Determinants of State Birth* (2016).

¹³⁰S. Pegg, *International Society and the De Facto State* (1998); D. Geldenhuys, *Contested States in World Politics* (2009); N. Caspersen, *Unrecognized States. The Struggle for Sovereignty in the Modern International System* (2012).

¹³¹See Fabry, *supra* note 129; Coggins, *supra* note 129; Griffiths, *supra* note 129.

¹³²See Fabry, *ibid.*, at 5; Coggins, *ibid.*, at 28–32.

¹³³See Coggins, *ibid.*

¹³⁴See Pegg, *supra* note 130; Geldenhuys, *supra* note 130; Caspersen, *supra* note 130.

¹³⁵See Pegg, *ibid.*, at 27; Geldenhuys, *ibid.*, at 8; Caspersen, *ibid.*, at 17.

¹³⁶*Ibid.*

¹³⁷See Caspersen, *ibid.*

662 assumption animating this game is that individual states do exist and must be identified as com-
 663 ponents of the international realm.¹³⁸ The nested oppositions between (international) law and
 664 politics have thus set up a matrix within which the creation of new states can be justified and
 665 contested in various ways, but which beyond all concrete disputes has itself become invisible
 666 as their very condition of possibility.

667 **5.2 The judicial function today**

668 While both Morgenthau and Lauterpacht refuse a simplistic dichotomy between law and politics,
 669 they nevertheless develop opposing arguments about the nature of the international: Morgenthau
 670 emphasizes that in principle the international is a sphere of power politics with little room for
 671 international law, whereas Lauterpacht argues that international law is materially closed, due
 672 to objective normativity, and that every dispute can thus be subsumed under it. The debate over
 673 the relationship between international law and politics continued after the Second World War, in
 674 particular in the context of the judicial activity of the ICJ. For example, Rosalyn Higgins observed
 675 in 1968 that British and American international lawyers conceptualized the relationship between
 676 law and politics in entirely different ways.¹³⁹ While the former favoured a rule-based and static
 677 notion of international law, with a separation of law and politics and a ‘conservative’ approach by
 678 the Court to the judicial function, the American policy-oriented approach would conceive of
 679 international law as a dynamic process, in which a clear distinction between law and politics
 680 was not feasible and ‘judicial creativity’ appeared as positive and – on the international level –
 681 necessary feature of the legal process.¹⁴⁰ At the same time:

682 whilst [the Court] recogniz[ed] the distinction between legal and political aspects of a dis-
 683 pute, it has consistently rejected the claim that the intermixture of legal and political issues
 684 was a sufficient ground to refuse to consider the legal issues in themselves.¹⁴¹

685 However, by interpreting, for instance, the principles of *stare decisis* or *ex aequo et bono* in a reluc-
 686 tant way, the Court manifested a ‘tendency to choose judicial restraint over judicial activism’.¹⁴²

687 Recent decades have seen a renegotiation of the relationship between law and politics, with the
 688 proliferation of various courts and tribunals after the Cold War as a key driver. In academic
 689 circles, the development has been debated in terms of the legalization of world politics and, later,
 690 the politicization of international law. Within IR, for example, the role of the judicial function, and
 691 the question of the (non)justiciability of international disputes, have received a good deal of atten-
 692 tion in scholarship on the ‘judicialization’ of international politics understood as ‘the process by
 693 which courts and judges increasingly dominate politics and policy-making’ and which ‘at the
 694 international level . . . can diminish the sovereignty of states and the autonomy of leaders’.¹⁴³
 695 This literature seeks to leave behind the classical assumption that ‘legalized domestic politics must
 696 be fundamentally different from legalized international politics’.¹⁴⁴ Other voices, however, have

¹³⁸J. Grzybowski, ‘The Paradox of State Identification: *De Facto* States, Recognition, and the (Re-)Production of the International’, (2019) 11 *International Theory* 241.

¹³⁹R. Higgins, ‘Policy Considerations and the International Judicial Process’, (1968) 18 *ICLQ* 58; see also R. Higgins, ‘Diverging Anglo-American Attitudes to International Law’, (1972) 2 *Georgia Journal of International and Comparative Law* 1.

¹⁴⁰See Higgins, *ibid.* (1968), at 68, 69.

¹⁴¹G. I. Hernández, *The International Court of Justice and the Judicial Function* (2014), 70.

¹⁴²D. Mawar, ‘The Perils of Judicial Restraint: How Judicial Activism Can Help Evolve the International Court of Justice’, (2019) 9 *Goettingen Journal of International Law* 425, at 436.

¹⁴³See Alter, Hafner-Burton and Helfer, *supra* note 2, at 449; for further discussion see also G. I. Hernández, ‘The Judicialization of International Law: Reflections on the Empirical Turn’, (2014) 25 *EJIL* 919. This resembles earlier debates on the ‘legalization of world politics’, see Abbott et al., *supra* note 2.

¹⁴⁴See Alter, Hafner-Burton and Helfer, *ibid.*, at 450.

697 criticized the idea of an almost linear process of judicialization on the international level by point-
 698 ing to recent ‘backlashes’ for various courts, which might even lead to the reverse process of ‘deju-
 699 dicialization’ and the ‘reacquisition of power by executives and legislatures’.¹⁴⁵ Yet, what unites
 700 both camps is that Morgenthau’s paradigmatic tenet, i.e., that some conflicts in international poli-
 701 tics are not justiciable, has become a testing ground for empirically-oriented social sciences using
 702 the vocabulary of delegation, authority, legitimacy, and effectiveness.¹⁴⁶

703 Within international legal practice, the rise of international courts and tribunals equally
 704 touches upon the relationships between legality and politics and between the state and the inter-
 705 national, in particular in international criminal law. Here, the *Tadić* decision of the Appeals
 706 Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY), as the first
 707 decision by an international criminal body since the post-Second World War trials and tribunals,
 708 stands out as a particularly illustrative case in point.¹⁴⁷ The main task of the Chamber was to
 709 decide whether the ICTY actually has, as an *international* tribunal established by the UN
 710 Security Council, jurisdiction over international crimes that were committed during the
 711 Yugoslav Wars. The simplest and less contested strategy for the Chamber would have been to
 712 declare the conflict an international conflict with the consequence that crimes committed during
 713 the Yugoslav Wars fall under the jurisdiction of the ICTY. The Chamber, however, opted for
 714 another avenue: it determined that although the Yugoslav Wars were a non-international armed
 715 conflict, the ICTY still had jurisdiction over it, arguing that particular rules of international
 716 humanitarian law had become customary international law that is applicable to non-international
 717 conflicts too.¹⁴⁸

718 To substantiate this point, the Chamber distinguished between a traditional and a modern
 719 notion of international law. The former relied on a ‘dichotomy’ between the domestic and the
 720 international and ‘was clearly sovereignty-oriented and reflected the traditional configuration
 721 of the international community, based on the coexistence of sovereign States more inclined to
 722 look after their own interests than community concerns or humanitarian demands’.¹⁴⁹ In this set-
 723 ting, there were few international rules for internal conflicts. Not so in ‘modern’ international law.
 724 In a passage, which could have been drafted by Lauterpacht, the Chamber sketches the emergence
 725 of a modern notion of international law, where a ‘State-sovereignty-oriented approach have [sic]
 726 been gradually supplanted by a human-being-oriented approach’ and where ‘[g]radually the
 727 maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit
 728 of human beings) has gained a firm foothold in the international community as well’. As a con-
 729 sequence of this development:

730 the distinction between interstate wars and civil wars is losing its value . . . If international
 731 law, while of course duly safeguarding the legitimate interests of States, must gradually turn
 732 to the protection of human beings, it is only natural that the aforementioned dichotomy
 733 should gradually lose its weight.¹⁵⁰

734 The Tribunal came to this conclusion by a rather novel way of (progressively) interpreting cus-
 735 tomary international law, namely by, on the one hand, finding a precedent of modern interna-
 736 tional law since the Interwar period (in particular the Spanish Civil War)¹⁵¹ and, on the other

¹⁴⁵See Abebe and Ginsburg, *supra* note 6, at 521.

¹⁴⁶See, for example, Abbott et al., *supra* note 2; Zürn, Binder and Ecker-Ehrhardt, *supra* note 2; Dunoff and Pollack, *supra* note 9.

¹⁴⁷*Prosecutor v. Tadić*, Decision on the Defence Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, Appeals Chamber, 2 October 1995.

¹⁴⁸*Ibid.*, para. 127; see in general, *ibid.*, paras. 96–127.

¹⁴⁹*Ibid.*, para. 96.

¹⁵⁰*Ibid.*, para. 97.

¹⁵¹*Ibid.*, para. 97.

737 hand, foregrounding the subjective element of *opinio juris* and not only relying on its objective
 738 element (state practice).¹⁵² Unsurprisingly, the *Tadić* decision did not remain uncontested. While
 739 supporters of the decision argued that it is the task of the judicial function to find the applicable
 740 law, its critics brought forward that the Tribunal might have engaged in judicial activism, i.e.,
 741 ‘overstretching’ the law and thereby using it for *political* purposes.¹⁵³

742 More recently, the question of the justiciability of international disputes has been brought up in the
 743 context of the ICC decision to open an investigation into international crimes committed in
 744 Afghanistan between 2003 and 2014. In 2017, the Prosecutor filed a request to open such an investi-
 745 gation against the Taliban, the Afghan National Security Forces and the United States and its CIA.¹⁵⁴
 746 Two years later, the Pre-Trial Chamber (PTC) rejected the request by concluding that ‘notwithstand-
 747 ing the fact that all the relevant requirements are met as regards both jurisdiction and admissibility, an
 748 investigation into the situation in Afghanistan would not serve the interests of justice’.¹⁵⁵ The PTC
 749 arrived at this decision by arguing, *inter alia*, that the justiciability of the conflict is not guaranteed
 750 due to political reasons as ‘changes within the political landscape both in Afghanistan and in key
 751 States (both parties and non-parties of the Statute), coupled with the complex volatility of the political
 752 climate still surrounding the Afghan scenario’ make it likely that the investigation would ultimately
 753 remain inconclusive and bind too many resources of the Court.¹⁵⁶ The decision was criticized by many
 754 observers who argued that the PTC went *ultra vires* by interpreting the notion of ‘interest of justice’ in
 755 such a way. In March 2020, the ICC Appeals Chamber reversed the decision of the lower chamber as
 756 the PTC ‘did not properly assess the interest of justice’ and therefore allowed investigations into the
 757 alleged international crimes in Afghanistan.¹⁵⁷

758 Both the *Tadić* decision and the controversy about the investigation in Afghanistan illustrate the
 759 contested nature of the boundary between the domestic and the international, and in both cases deci-
 760 sions were criticized as violating the boundary between law and politics. However, the respective
 761 criticisms aimed into opposite directions. While the *Tadić* decision of the ICTY was regarded as politi-
 762 cal because it assumed the justiciability of internal conflicts under international law, the PTC was criti-
 763 cized for refusing to open an investigation on grounds of considering it nonjusticiable. As such, both
 764 examples reflect the debate over whether the international is a political or a legal sphere, and illustrate
 765 that while the answers to this question fluctuate, the contested divide itself remains the basis for current
 766 arguments and counter-arguments about the judicial function.

767 6. Conclusion

768 The matrix of (international) politics and law has been established by fostering, probing, and
 769 renewing their conceptual boundaries and argumentative circuits, as in the two paradigmatic

¹⁵²*Ibid.*, para. 99.

¹⁵³Cf. J. E. Alvarez, ‘Nuremberg Revisited: The Tadic Case’, (1996) 7 EJIL 245; for a general discussion on ‘judicial activism’ see F. Zarbiyev, ‘Judicial Activism in International Law – A Conceptual Framework for Analysis’, (2012) 3 *Journal of International Dispute Settlement* 247.

¹⁵⁴The investigation’s opening can also be understood as a reaction of the ICC towards criticism that depicted the Court as a ‘European Court of African Affairs’ due to the selection of cases and as it reflects a European project – both in its intellectual and political origins. For further discussion see S. Nouwen, ‘The International Criminal Court: A Peacebuilder in Africa?’, in D. Curtis and G. A. Dzinesa (eds.), *Peacebuilding, Power, and Politics in Africa* (2012), 171. In this context, the Office of the Prosecutor (OPT) (re)opened investigations into alleged British war crimes during the Iraq War. However, on 9 December 2020, the OTP decided to not further investigate due to the principle of complementarity as it found that the United Kingdom had taken genuine action to investigate the crimes in the meantime.

¹⁵⁵*Situation in the Islamic Republic of Afghanistan*, Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, Case No. ICC-02/17, Pre-Trial Chamber II, 12 April 2019, para. 96

¹⁵⁶*Ibid.*, para 94.

¹⁵⁷*Situation in the Islamic Republic of Afghanistan*, Judgment on the Appeal against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, Case No. ICC-02/17 OA4, Appeals Chamber, 5 March 2020, para. 50.

770 debates reconstructed in this article. The reductions of the state and the international to politics
 771 and legality pursued by Weber and Kelsen and by Morgenthau and Lauterpacht have pushed the
 772 boundaries of their respective vantage points, but they thereby also entangled them. As we have
 773 further illustrated, *within* debates over state creation and international justiciability, the distinc-
 774 tions between legality and politics and between the domestic and the international continue to
 775 shift and blur. States appear variably as legal or political entities, as domestically or internationally
 776 constituted, while the justiciability of international crimes in armed conflicts is variably expanded
 777 through political projects and rejected as ‘political’. Yet, the distinctions themselves remain and
 778 thereby constrain the debates. Legality and politics cannot be entirely separated, but they cannot
 779 be fully merged either, providing important insights into the dynamics, effects, and blind spots of
 780 the differentiation between the disciplinary perspectives, and their shared relationship with the
 781 equally constitutive divide between states and the international. As the stability of the matrix
 782 is paradoxically achieved through the instability of its categories, this tension also creates space
 783 for projects of critique and emancipation within the matrix, while at the same time limiting
 784 their scope.

785 To be sure, our own reconstruction of ‘paradigmatic’ interdisciplinary debates has focused
 786 on what appears to be central, continuous, and necessary in the relationship between (inter-
 787 national) politics and legality beyond all contestations and blurring, thereby highlighting pro-
 788 cesses of reification. A different reconstruction could instead bring to the fore what was
 789 contingent in the emergence of these relationships themselves, what escaped the grip of their
 790 categories, and what promises radical change.¹⁵⁸ Indeed, it is no accident that both critical IL
 791 and IR have recently taken a ‘historical turn’, and that this turn has spawned stories of con-
 792 tingency and restriction alike. While some argue that only a ‘radical historical critique’ beyond
 793 dominant ‘markers, periodisation and causal sequencing’ can help us escape the conceptual
 794 circuits of the established disciplinary imagination,¹⁵⁹ others maintain that critical legal anal-
 795 ysis must be accompanied by ‘socio-historical structuralism’ to seriously consider the material
 796 conditions under which international law operates.¹⁶⁰ Both the call for appreciating the con-
 797 tingency of history and historiography and the turn to wider social structures can help illu-
 798 minate Eurocentric blind spots and hierarchies of international law, inject new lines of
 799 critique, and imagine alternatives. While it currently remains difficult to imagine that alter-
 800 native narratives would not have to grapple with the deeply entrenched boundaries of (inter-
 801 national) politics and legality as conceptual matrix, the contingency of these boundaries
 802 themselves might become readily apparent in the wake of significant events, developments,
 803 and changes of perspective that would encourage a different understanding of history, and
 804 as such ‘reveal’ that it has always already pointed elsewhere.¹⁶¹

805 However, this article also alludes to current limits to removing the boundaries of our inter-
 806 disciplinary imagination. International law in its dominant conceptualization is constituted by
 807 its difference to other social and intellectual spheres – including notably politics, but also econ-
 808 omy, religion, and others – and thus cannot be overturned without questioning those basic

¹⁵⁸On the possibility of alternative readings see R. K. Ashley, ‘Untying the Sovereign State: A Double Reading of the Anarchy Problematique’, (1988) 17 *Millennium – Journal of International Studies* 227.

¹⁵⁹J. d’Aspremont, ‘Critical Histories of International Law and the Repression of Disciplinary Imagination’, (2019) 7 *London Review of International Law* 87, at 92; see d’Aspremont, *supra* note 24. For IR see Z. G. Çapan, ‘Beyond Visible Entanglements: Connected Histories of the International’, (2020) 22 *International Studies Review* 289.

¹⁶⁰J. D. Haskell, ‘TRAIL-ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law’, (2014) 27 *Canadian Journal of Law and Jurisprudence* 383.

¹⁶¹On events see F. Johns, R. Joyce and S. Pahuya (eds.), *Events: The Force of International Law* (2011); see also J. Derrida, ‘A Certain Impossible Possibility of Saying the Event’, (2007) 33 *Critical Inquiry* 441.

809 boundaries of modern society as well.¹⁶² Indeed, the matrix of international law and politics pre-
810 cisely points to the resilience, if also the flexibility, of these boundaries.¹⁶³ Moreover, the basic
811 concepts and nested oppositions of (international) law and politics are also resilient because they
812 offer orientation and inspiration in practice, that is, for articulating positions and counter-
813 positions when making ‘legal’ cases, and rejecting ‘politics’, or, conversely, rejecting ‘legal’ tech-
814 nique in favour of authentic ‘politics’. As such, the matrix is constantly reloaded, not only in schol-
815 arship, but also in everyday international affairs. If it must be actively enacted, however, there is
816 also space for exploring the different ways in which it has fostered domination, enabled resistance,
817 and continues to generate possibilities for transformation within and across the boundaries of
818 international law and politics.

¹⁶²N. Luhmann, *Social Systems* (1995); for a problematization of public international law’s state-centrism by excluding categories from private law such as property see M. Koskenniemi, ‘Expanding Histories of International Law’, (2016) 56 *American Journal of Legal History* 104; on the concept of development see S. Pahuja, *Decolonising International Law: Development, Economic Growth and The Politics of Universality* (2011); on the consequences of excluding religion see M. Koskenniemi, M. Garia-Salmones Rovira and P. Amorosa (eds.), *International Law and Religion: Historical and Contemporary Perspectives* (2017).

¹⁶³For example, the debate over the appropriate use of context in international legal histories has recently led to a juxtaposition of a ‘historiographical’ and a ‘juridical’ notion of context. While ‘[t]he self-imposed task of today’s contextualist historians is to think about concepts in their proper time and place’, ‘the task of international lawyers is to think about how concepts move across time and space’; see A. Orford, ‘The Past as Law or History? The Relevance of Imperialism for Modern International Law’, (2012) *NYU IILJ Working Paper 2*, at 2; see also M. Arvidsson and M. Bak McKenna, ‘The turn to history in international law and the sources doctrine: Critical approaches and methodological imaginaries’, (2020) 33 *LJIL* 37, at 47–51. This resembles, to a certain degree, earlier attempts at disciplinary closure: see Klabbers, *supra* note 5; Koskenniemi, *supra* note 5; Rajkovic, *supra* note 5.