

Book Review

Philosophical Foundations of International Criminal Law: Legally Protected Interests

Morten Bergsmo, Emiliano J. Buis and SONG Tianying (eds) (Torkel Opsahl Academic EPublisher, Florence, 2022) 387 pp. free e-book ISBN 978-82-8348-122-8

Most leading treatises on international criminal law and procedure discuss the history of the subject and then focus on substantive and procedural rules. The volume under review is fundamentally different. It is the third in a series produced by the editors' research project 'Philosophical Foundations of International Criminal Law'¹ and, together with the previous two volumes,² it offers a wealth of insights into the ontology, gnoseology and axiology of international criminal law. The editors are to be commended for their massive effort and the variety of scholarly insights offered in the research project.

This third volume deals with selected interests protected by international criminal law. In nine chapters, it discusses the value of legal interests as an analytical tool, explores the interests protected by war crimes and crimes against humanity, highlights the particular importance of 'reconciliation' and 'unity' among the relevant legal interests, and offers illuminating insights into African and Indian legal thought.

In Chapter 1, the key question is asked in Section 1.4: what are (or should be) the legal interests under international criminal law?³ In answering the question, Bergsmo focuses on international peace and security (as a fundamental interest of the international community),⁴ humanity and collectivity (as 'human interests')⁵ and solidarity, unity, and harmony (as interests that 'should receive a greater measure of recognition as common and distinct to international criminal law').⁶ He emphasizes further that '[b]roadening the range of interests or values that are recognized by international criminal law is not just a task of governments,

¹ M. Bergsmo, E.J. Buis and SONG T. (eds), *Philosophical Foundations of International Criminal Law: Legally-Protected Interests* (Torkel Opsahl Academic EPublisher, 2022), at 3.

² See M. Bergsmo and E.J. Buis (eds), *Philosophical Foundations of International Criminal Law: Correlating Thinkers* (Torkel Opsahl Academic EPublisher, 2018); M. Bergsmo and E.J. Buis (eds), *Philosophical Foundations of International Criminal Law: Foundational Concepts* (Torkel Opsahl Academic EPublisher, 2019).

³ Bergsmo, Buis and SONG, *supra* note 1, at 13–17.

⁴ *Ibid.*, at 17–20.

⁵ *Ibid.*, at 21–27.

⁶ *Ibid.*, at 27–40, emphasis in the original (at 27).

but all stakeholders in international law-making, including civil society and individuals,⁷ and encourages 'future work on how values inform—or should inform—a coherent and productive development of international criminal law ...'.⁸ These conceptual views are complemented in Chapter 4, written by Ioanna N. Anastasopoulou, which addresses legal goods in international criminal law. After a brief exposition of the Germanic theory of *Rechtsgut*,⁹ she classifies legal goods into real and abstract,¹⁰ individual and collective ones,¹¹ and makes a persuasive case for global solidarity as a collective legal good protected by international criminal law.¹²

In Chapter 2, SONG Tianying discusses the legal interests protected by war crimes. She traces the development of the concept since the beginnings of international humanitarian law in the middle of the 19th century¹³ and notes, helpfully, that the term 'war crimes' was rather seldom used before and during the First World War.¹⁴ She observes that the term was first defined by Lassa Oppenheim in 1906,¹⁵ and entered the academic discourse in the subsequent decades.¹⁶ Among the legal interests protected in armed conflict, SONG singles out common humanity and interests of individuals and groups of the adverse party,¹⁷ collective interests of parties to the conflict and non-escalation,¹⁸ vulnerability of victims due to increased destructive potential¹⁹ and additional interests violated by war crimes of policy or large-scale war crimes.²⁰ In conclusion, SONG suggests that the evolution of the concept of war crimes shows 'a shift of focus from the State to individuals and groups'.²¹

Chapter 3 by Susan R. Lamb explores 'humanity' as the legal good protected by crimes against humanity. She traditionally traces the concept back to the 1915 Declaration by the Governments of Great Britain, France and Russia²² and considers it in the context of all relevant texts of international criminal law.²³ In philosophical terms, Lamb highlights that crimes against humanity create externalities beyond borders,²⁴ involve conduct that is inhumane,²⁵ are particularly grave crimes,²⁶ harm all humankind,²⁷ 'diminish the human race'²⁸ and 'shock the conscience' of humankind.²⁹ Another important suggestion is that crimes against humanity represent a corruption of politics and an abuse of sovereignty.³⁰ In conclusion,

⁷ *Ibid.*, at 46.

⁸ *Ibid.*, at 54.

⁹ *Ibid.*, at 117–121.

¹⁰ *Ibid.*, at 123–124.

¹¹ *Ibid.*, at 121–123.

¹² *Ibid.*, at 136–138.

¹³ *Ibid.*, at 60–75.

¹⁴ *Ibid.*, at 76.

¹⁵ *Ibid.*

¹⁶ *Ibid.*, at 77–78.

¹⁷ *Ibid.*, at 79–80.

¹⁸ *Ibid.*, at 81.

¹⁹ *Ibid.*, at 81–82.

²⁰ *Ibid.*, at 82–83.

²¹ *Ibid.*, at 83.

²² *Ibid.*, at 86.

²³ *Ibid.*, at 98–114.

²⁴ *Ibid.*, at 91.

²⁵ *Ibid.*, at 91–92.

²⁶ *Ibid.*, at 92–93.

²⁷ *Ibid.*, at 93–94.

²⁸ *Ibid.*, at 94.

²⁹ *Ibid.*, at 94–96.

³⁰ *Ibid.*, at 97–98.

Lamb expresses hope that the overarching idea of 'our common humanity' will be reflected 'in a possible future convention on crimes against humanity'.³¹

Chapter 5 by David Baragwanath is devoted to 'reconciliation' as 'an insufficiently appreciated truth' about international criminal law.³² Baragwanath recalls that '[r]econciliation is a term familiar to, among other disciplines, theology, history, philosophy, literature and social science',³³ and, after discussing a few pertinent examples from those areas, asks emphatically why reconciliation has 'not already been expressly accepted as fundamental to international criminal law'.³⁴ According to Baragwanath, reconciliation is of paramount importance in the context of war,³⁵ as a legal term of art,³⁶ in the area of transitional justice,³⁷ in the practice of international and 'hybrid' tribunals,³⁸ the International Criminal Court³⁹ and the International Court of Justice.⁴⁰ In conclusion, he suggests that '[r]econciliation is to be seen in both the creation, as well as in the application, of international criminal law',⁴¹ and that 'the result most likely to do both justice and right to the parties, to their community and to the rule of law' will be to 'recognise and promote the decency that achieves human dignity'.⁴²

Chapters 6 (by Salim A. Nakhjavani and Melody Mirzaagha) and 9 (by Rod Rastan) deal with 'unity' as a legal interest protected by international criminal law. Nakhjavani and Mirzaagha note, usefully, that '[t]he most common use of the term "unity" in international criminal law—and indeed in public international law—is a narrow one, in reference to the unity of the State'.⁴³ Subsequently, they recall references to unity in the constitutive documents of international institutions such as the International Criminal Court,⁴⁴ the Council of Europe,⁴⁵ the African Union,⁴⁶ and the United Nations,⁴⁷ and discuss the social value of unity.⁴⁸ They highlight the foundational value of unity in sentencing and reparations decisions,⁴⁹ as well as in threshold decisions on aggression.⁵⁰ In turn, Rastan offers a profound analysis of unity as rationale for the establishment of the International Criminal Court,⁵¹ and discusses its role in maintaining social order⁵² and as an organizing principle for enforcement.⁵³ The chapter concludes with a critical discussion of disunity as a current fact in international criminal justice.⁵⁴

Chapter 7 (by Kafayat Motilewa Quadri, Vahyala Kwaga and Tosin Osasona) discusses modern African perspectives on unity. This chapter partly recalls the notions discussed in

³¹ *Ibid.*, at 115.

³² *Ibid.*, at 140.

³³ *Ibid.*, at 150 (footnotes omitted).

³⁴ *Ibid.*, at 159.

³⁵ *Ibid.*, at 168–175.

³⁶ *Ibid.*, at 176–178.

³⁷ *Ibid.*, at 178–185.

³⁸ *Ibid.*, at 185–195.

³⁹ *Ibid.*, at 196–197.

⁴⁰ *Ibid.*, at 197–199.

⁴¹ *Ibid.*, at 216.

⁴² *Ibid.*, at 222.

⁴³ *Ibid.*, at 227.

⁴⁴ *Ibid.*, at 229–231.

⁴⁵ *Ibid.*, at 231.

⁴⁶ *Ibid.*, at 232–233.

⁴⁷ *Ibid.*, at 233.

⁴⁸ *Ibid.*, at 235–239.

⁴⁹ *Ibid.*, at 239–243.

⁵⁰ *Ibid.*, at 243–245.

⁵¹ *Ibid.*, at 323–338.

⁵² *Ibid.*, at 338–347.

⁵³ *Ibid.*, at 347–354.

⁵⁴ *Ibid.*, at 354–368.

prior chapters, in that it outlines the nature of legal goods or interests,⁵⁵ as well as individual and collective legal goods in international criminal law,⁵⁶ and then discusses the relationship between personhood and community, specifically from African perspectives.⁵⁷ Section 7.24, which focuses on the Western and African divide, is key in this discussion.⁵⁸ One would expect a chapter on African perspectives on unity, as a value underlying international criminal law, to include a discussion of the 2014 Malabo Protocol, which however, somewhat surprisingly, does not feature in the chapter.

Last but not least, Chapter 8 by Surabhi Sharma explores humanity and unity in the context of Indian legal thought. She helpfully compares the notions of humanity in selected written sources of international humanitarian and criminal law⁵⁹ and in Indian philosophy,⁶⁰ and then repeats the exercise with respect to the concept of unity.⁶¹ She makes a strong case for the role of unity in the reunification of communities affected by crimes under international law⁶² and in the reparation of societies⁶³ and calls for broader recognition of foundational Indian notions in the doctrine of international criminal law.⁶⁴

It is a pity that the volume under review is the last one in the *Philosophical Foundations of International Criminal Law* series,⁶⁵ for with all its wealth of academic insights and analytical rigour, a few important topics were left beyond its scope. It would have been useful to include chapters dealing with further values underlying and protected by international criminal law — such as fundamental human rights, dignity of the human person or identity. The book's comprehensive scope also calls for separate chapters on the legal interests protected by the concepts of genocide and aggression as core crimes under international criminal law. Separate chapters on (international) terrorism and emerging crimes such as ecocide also would have been interesting.

Another observation pertains to the limited use of doctrinal sources from the Global South. Most chapters — except Chapter 8 on Indian perspectives — rely predominantly on academic doctrine originating in the Global North, whereas the book would have greatly benefitted from more extensive perspectives from Asia and the Pacific, Africa and Latin America. For example, insights from Atadjanov's book would have enriched the discussion on the centrality of 'humanity' to the discussion on crimes against humanity.⁶⁶ Likewise, a deeper analysis of State and non-governmental practices in recent conflicts would have constituted a useful addition to the discussion.⁶⁷ However, as noted by the editors, substantive lacunae like these should encourage 'further research on aspects which this limited volume could not fully consider',⁶⁸ and we could expect, in the future, more research on the legal

⁵⁵ *Ibid.*, at 258–260.

⁵⁶ *Ibid.*, at 260–262.

⁵⁷ *Ibid.*, at 264–271.

⁵⁸ *Ibid.*, at 273–274.

⁵⁹ *Ibid.*, at 288–290.

⁶⁰ *Ibid.*, at 290–294.

⁶¹ *Ibid.*, at 294–304.

⁶² *Ibid.*, at 306–308.

⁶³ *Ibid.*, at 309–310.

⁶⁴ *Ibid.*, at 311–312.

⁶⁵ *Ibid.*, at S4.

⁶⁶ See R. Atadjanov, *Humanness as a Protected Legal Interest of Crimes Against Humanity: Conceptual and Normative Aspects* (T.M.C. Asser Press/Springer, 2019).

⁶⁷ See, for example, S. Sayapin and E. Tsybulenko (eds), *The Use of Force against Ukraine and International Law: Jus Ad Bellum, Jus In Bello, Jus Post Bellum* (T.M.C. Asser Press/Springer, 2018).

⁶⁸ Bergsmo, Buis and SONG, *supra* note 1, at S4.

values protected by international criminal law to be produced by authors from the Global South, with due regard to their rich philosophical heritage.

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