Philosophical Foundations of International Criminal Law: Legally-Protected Interests

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Front cover: *View of internal courtyard of the orphanage Ospedale degli Innocenti in Florence. Established in 1419 by the local silk workers guild, it is an early example of secular resolve to elevate concern for the survival and security of vulnerable children, a value shared with the authorities of Florence and religious institutions. Facing serious environmental threats six centuries later, this anthology argues that the equally-fundamental values of humankind's survival and unity should be given elevated recognition also by international criminal law.*

Back cover: *Binding ancient steps on the flight of stairs leading up to the enclosed landing of the fifteenth century Convent of St. Francis in Fiesole outside Florence. By metaphor, this book discusses how we can bind a fractured humankind also with the hands of international criminal justice. All volumes in this Publication Series display a picture of publicly accessible ground on the back cover.*

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Protected Interests in International Criminal Law

Morten Bergsmo, Emiliano J. Buis and SONG Tianying*

quod omnes similiter tangit ab omnibus comprobetur
"What concerns all equally, must be approved by all"
JUSTINIAN, Codex 5, 59, 5

1.1. Scope of Inquiry

As a general framework, law is intended to provide institutional protection of important interests in most societies. In many ways, law reflects the value system of a society, since interests or values inform the creation, interpretation, application and evaluation of legal norms. This is why, when examining legal rules and standards, it is important to explore the relationship between those norms and their aggregated moral or value content. With this idea in mind, our effort to reconstruct central interests or values embodied in international criminal law[1] is both analytical and normative. It is analytical because it must be rooted in positive criminal law as a "particular kind of human practice";[2] it is normative because it seeks to discern coherent values and ends that criminal law pursues or should pursue. A 'turn to values' therefore links rational theorizing of the law to moral and political phi-

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1 We will sometimes use the abbreviation 'ICL' for international criminal law in this chapter.

2 R.A. Duff and Stuart Green, "Introduction: Searching for Foundations", in R.A. Duff and Stuart Green (eds.), *Philosophical Foundations of Criminal Law*, Oxford University Press, 2011, p. 5.

losophy, in a pursuit to comprehend the basis on which legal efforts are (and should be) built.[3]

Embedded in a moral landscape which defines its purposes, international criminal law is largely a self-contained regime of international law created to increase compliance with its proscriptions, primarily by implying reduced impunity for violations through the imposition of punishment. Its international enforcement comes into play when national jurisdictions are generally unable or unwilling to prosecute individuals who are accused of having committed the most serious and heinous crimes. As a result of its reactive history as a legal discipline emerging in response to the excesses of World War II, and the diplomatic nature of the negotiations leading to the statute for the creation of a first permanent international criminal tribunal, focus has been placed on the identification of the *conduct* that can amount to crimes. During almost 80 years of international criminal law-making, there has been considerable awareness of the potential harm of excessively violent conduct during armed conflict, attacks directed against civilian populations or similar situations of mass-use of force. However, it is fair to say that less attention has been paid to the specific *values* or *interests* that the proscriptions of the harmful conduct – the core international crimes: war crimes, crimes against humanity, genocide and aggression – seek to protect.

We have reached a stage in the evolution of international criminal law that seems to be characterised by (a) will to consolidate the normative and institutional gains made, (b) attempts by a growing variety of actors to apply international criminal law standards in different conflict situations, (c) polarisation of positions on some frontline issues (such as the use of universal jurisdiction and the crime of aggression), (d) a rich critical discourse that increasingly challenges complacency regarding risks of selective justice and inadequate respect for integrity and quality-control within international criminal justice institutions, and (e) signs of growing interest in further development of international criminal law to protect our planet's natural environment and atmosphere. Problems such as man-made degradation of the environment may be convenient catalysts to international criminal law-making. The threat to our common atmosphere and seas is obvious for all to see, and the 'global North' (China included) cause the greatest harm (so criminalization initiatives may not easily be rebuffed as post-colonial).

[3] *Ibid.,* p. 7.

In the past, we have faced situations where the main perpetrator group has inadvertently set the agenda for international criminalization efforts insofar as the latter have been reactive, responding to the blameworthy conduct. For example, the ways the Nazis used force with horrendous excess largely determined the subject-matter jurisdiction of the International Military Tribunal at Nuremberg. Ideally, common sense, not war criminals, should guide efforts to refine international criminal law.

Obviously, forward-looking international law-making is also susceptible to the risk of instrumentalisation by powerful states and transgovernmental networks, but perhaps less so than by victorious allies in the immediate aftermath of a war. Proactive deliberation both poses risks and offers opportunities. It should encourage more careful reflection and analysis, and also facilitate broader participation in law-making, in particular from populous non-Western countries such as China, India, Indonesia and Nigeria. Their influence on international law-making may not yet be commensurate with the size of their populations. This is ultimately a question of democratic representation that can hardly be sacrificed on the altar of 'great-power' rivalry – it will tend to come back until it is recognized and addressed. International criminal law should evolve further in response to real and contemporary common problems. This recognition provides an opportunity to draw genuinely on representative concerns and aspirations, and thus to depolarise. Normally, a deliberative, prospective approach offers more time and opportunity to raise systemic questions that may sometimes benefit from theoretical reflection.

As a matter of fact, the present anthology is the third in a series produced by the research project 'Philosophical Foundations of International Criminal Law'.[4] The first volume – *Philosophical Foundations of Interna-*

[4] See the online symposium 'Philosophical Foundations of International Criminal Law' (https://www.cilrap.org/philosophical-foundations/) for detailed information on the project and its work products. The project has been led by the Centre for International Law Research and Policy (CILRAP), the Indian Law Institute, University of Delhi Campus Law Centre, the Indian Society of International Law, National Law University, Delhi, O.P. Jindal Global University, Asian-African Legal Consultative Organization, Peking University International Law Institute, Waseda University Law School, the Grotius Centre for International Legal Studies, the University of Nottingham, and the Institute for International Peace and Security Law, with funding from the Norwegian Ministry of Foreign Affairs and the International Nuremberg Principles Academy.

tional Criminal Law: Correlating Thinkers (2018)[5] – invites us to revisit some well-recognized political and other thinkers, exploring and correlating their main thoughts with the foundations of contemporary international criminal law. More than a mere history of ideas, such cross-fertilisation holds the promise of broadening the discourse and may offer fresh perspectives in an emerging sub-discipline of philosophy of international criminal law. The second volume – *Philosophical Foundations of International Criminal Law: Foundational Concepts* (2019)[6] – identifies and discusses some doctrinal building blocks that may be considered as foundational to the discipline of international criminal law. Not nearly exhaustive, we would like to expand both volumes with more thinkers and concepts, respectively, in future editions. The present, third volume in the series supplements the earlier correlational and doctrinal analyses with discussions of fundamental interests or values protected by international criminal law, inseparable from its specific aims.

One of our motivations in pursuing such a multi-year project has been our belief that theoretical approaches can sometimes create constructive common ground where actors from different, increasingly polarised, backgrounds can unite in a common concern to strengthen and develop further international criminal law, transcending rivalries and contestation between governments. Accordingly, among the contributors to the present volume you find experts from the Anglosphere and Europe as well as China, India and Nigeria, and the regions of Latin America and the Middle East. We could probably have done better, but readers will note that this anthology only has nine chapters by thirteen authors selected pursuant to a public call for papers and through the proceedings of a project-conference in New Delhi (25-26 August 2017).

This Chapter 1 will, in Section 1.2., focus on the importance of 'community interests' in international law, in order to explain to what extent the existence of shared interests can contribute to the efficacy of international justice. Section 1.3. discusses the notion of 'legally-protected interests' or goods and related domestic terms such as '*Rechtsgut*' or '*retts-*

[5] Morten Bergsmo and Emiliano J. Buis (eds.), *Philosophical Foundations of International Criminal Law: Correlating Thinkers*, Torkel Opsahl Academic EPublisher ('TOAEP'), Brussels, 2018, 804 pp. (http://www.toaep.org/ps-pdf/34-bergsmo-buis).

[6] Morten Bergsmo and Emiliano J. Buis (eds.), *Philosophical Foundations of International Criminal Law: Foundational Concepts*, TOAEP, Brussels, 2019, 333 pp. (http://www.toaep.org/ps-pdf/35-bergsmo-buis).

gode' as an analytical tool for principled criminalization. In light of the importance of collective values, Section 1.4. identifies community interests that are (and should be) underlying contemporary international criminal law. These interests include 'international peace and security' (1.4.1.), 'humanity' (1.4.2.), and other values and interests that are mentioned in this volume, such as 'solidarity', 'unity' or 'harmony' (1.4.3.). This allows us to think further about the need to identify universally shared values and ideals that could contribute to a stronger foundation of international justice (1.5.).

1.2. Community Interests and International Law

The concept of 'legally-protected interests' is used in international law generally.[7] There have been extensive efforts to map community interests in positive international law.[8] Terms such as 'community interests',[9] 'common interests',[10] 'collective interests'[11] and 'interests of humanity'[12]

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7 See, for example, International Court of Justice ('ICJ'), *"Barcelona Traction, Light and Power Company, Limited" (Belgium v. Spain)*, Judgment, 5 February 1970, ICJ Reports 3, para. 33 (https://www.legal-tools.org/doc/75e8c5/).

8 See, for example, Bruno Simma, *From Bilateralism to Community Interest in International Law*, Collected Courses of the Hague Academy of International Law, vol. 250, Martinus Nijhoff, The Hague, 1994; Giorgio Gaja, *The Protection of General Interests in the International Community*, Collected Courses of the Hague Academy of International Law, vol. 364, Brill, The Hague, 2011; Ulrich Fastenrath, Daniel-Erasmus Khan, Sabine von Schorlemer and Andreas Paulus (eds.), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma*, Oxford University Press, 2011; Cedric Ryngaert, *Unilateral Jurisdiction and Global Values*, Eleven International Publishing, The Hague, 2015; Wolfgang Benedek, Koen De Feyter, Matthias C. Kettemann and Christina Voigt (eds.), *The Common Interest in International Law*, Intersentia, Antwerp, 2014; Eyal Benvenisti and Georg Nolte (eds.), *Community Interests Across International Law*, Oxford University Press, 2018; Vera Gowland-Debbas, "Judicial Insights into Fundamental Values and Interests of the International Community", in A.S. Muller, David Raič and J.M. Thuránszky (eds.), *The International Court of Justice: Its Future Role After Fifty Years*, Martinus Nijhoff, The Hague, 1997, pp. 327-366; Pierre-Marie Dupuy, "Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi", in *European Journal of International Law*, 2005, vol. 16, no. 1, pp. 131-137; Erika de Wet, "The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order", in *Leiden Journal of International Law*, 2006, vol. 19, no. 3, pp. 611-632; Santiago Villalpando, "The Legal Dimension of the International Community: How Community Interests Are Protected in International Law", in *European Journal of International Law*, 2010, vol. 21, no. 2, pp. 387-419.

9 Isabel Feichtner, "Community Interest", in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of International Law*, Oxford University Press, 2008, p. 2.

10 Benedek, De Feyter, Kettemann and Voigt (eds.), 2014, see *supra* note 8.

11 Feichtner, 2008, see *supra* note 9.

have been used. Community interests are important for both the identification and understanding of international legal norms. They are intrinsic to concepts such as *jus cogens*, general principles, and obligations *erga omnes*.[13] At the same time, we see that community interests are also invoked in discussions on aims and purposes of particular rules.[14] Notions of community interests can be used to both describe positive law and assess the legitimacy of law.

The idea that some common interests exist can be helpful to rethink international law beyond its traditional state-centrism, which has tried to place at the centre of international order the idea of 'sovereignty' as the key characteristic regulating normativity among nations. The idea that there are interests that go well beyond the realm of a modern state's particular domain is relevant and has been infused by the emergence of human rights law, contributing to states no longer being seen as the exclusive subjects of a global normative system.

As we have seen, 'community interests' are frequently invoked, but not precisely defined. This would seem to be deliberate, as the concept has not been created out of "scientific abstraction", but emerges in the "recognition of concrete problems".[15] Conceptions of 'community interests' are derived from observations of positive international law and practice as well as from discussions of widely-recognized problems that we face, more so

[12] ICJ, *"Gabčíkovo-Nagymaros Project" (Hungary v. Slovakia)*, Judgment, 25 September 1997, ICJ Reports 7, p. 118 (separate opinion of Vice-President Weeramantry) (https://www.legal-tools.org/doc/e45b69/).

[13] See, for example, Gaja, 2011, see *supra* note 8, in his Chapter III ("Identifying the protection of general interests through principles and rules of general international law"); Samantha Besson, "Community Interests in the Identification of International Law: With a Special Emphasis on Treaty Interpretation and Customary Law Identification", in Benvenisti and Nolte (eds.), 2018, see *supra* note 8, pp. 36-49; James Crawford, "Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts", in Fastenrath, Khan, von Schorlemer and Paulus (eds.), 2011, see *supra* note 8, pp. 224-240.

[14] Samantha Besson, "Community Interests in International Law: Whose Interests Are They and How Should We Best Identify Them?", in Benvenisti and Nolte (eds.), 2018, see *supra* note 8, pp. 50-69.

[15] See Simma, 1994, see *supra* note 8, p. 235. See also Jean-François Marchi, "Bien commun et droit international", in *Les Cahiers Portalis*, 2017/1, no. 4, pp. 53-67, on pp. 57-62. Sarah Thin examines approaches to concepts of community interest and international community in legal practice in "In Search of Community: Towards a Definition of Community Interest", in Gentian Zyberi (ed.), *Protecting Community Interests Through International Law*, Intersentia, Antwerp, 2021.

than from *a priori* principles. Relatedly, the term 'international community' holds "an ideological function"[16] in international law and practice. It can be used to connote different subjects.[17] It is commonly appropriated by state actors to mean the community of states. It is frequently used to denote states, non-state actors and individuals combined, especially by civil society actors. But 'international community' could in principle also mean the wider collective of 'mankind' or 'humankind'. Most authors, however, would not limit 'community interests' to interests held by the international community of states.[18] Habermas, for example, proposes a world community of states and citizens, where the former remain the prominent actors in the global legal order, while individuals are "actual bearers of the status of world citizen".[19]

Opinions are divided as to whether the scope of 'community interests' in international law should be limited to universal interests. Bruno Simma, for example, has expressed the view that 'community interests' should be reduced to fundamental values which concern all states.[20] To him, 'community interests' express and support "universally held moral beliefs" ,[21] and "correspond to the needs, hopes and fears of all human beings, and attempt to cope with problems the solution of which may be decisive for the survival of entire humankind".[22] Isabel Feichtner, on the other hand, includes non-universal interests which transcend national interests, in

16 Simma, 1994, see *supra* note 8, p. 248.

17 See, for example, Andreas Paulus, "International community", in *Max Planck Encyclopedia of International Law,* online, 2013; William E. Conklin, "The Peremptory Norms of the International Community", in *European Journal of International Law*, vol. 23, no. 3, pp. 837-861; Simma, 1994, see *supra* note 8, pp. 243-248; de Wet, 2006, see *supra* note 8. Steven Roach reviews international lawyers' approaches to this concept in Steven R. Ratner, "Conceptual Groundwork for a Standard of Global Justice", in Steven R. Ratner (ed.), *The Thin Justice of International Law; A Moral Reckoning of the Law of Nations*, Oxford University Press, 2015, pp. 42-63.

18 Simma, 1994, see *supra* note 8, p. 233; Feichtner, 2008, *idem* n. 5; Wolfgang Benedek, Wolfgang Benedek, Koen De Feyter, Matthias C. Kettemann and Christina Voigt, "Conclusions: The Common Interest in International Law – Perspectives for an Undervalued Concept", in Benedek, De Feyter, Kettemann and Voigt (eds.), 2014, see *supra* note 8, pp. 219-226, on p. 219; Gaja, 2011, see *supra* note 8, pp. 20–22.

19 Jürgen Habermas, *The Divided West*, Polity Press, London, 2006, p. 135.

20 Simma, 1994, see *supra* note 8, p. 233.

21 *Ibid*., p. 249.

22 *Ibid*., p. 244.

which case 'community' only comprises those concerned.[23] While Simma and Feichtner rely on different scopes of 'community interests', their illustrations of the category overlap significantly.[24] Feichtner divides community interests into four types: those in (a) the protection and creation of common goods;[25] (b) the protection of common values;[26] (c) the internationalisation of common spaces; and (d) redistributive and inter-generational justice. Her examples of 'community interests', as noticeable from the categories that have been suggested, are universal in their nature. The table below summarises examples given by her for each category:[27]

[23] Feichtner, 2008, see *supra* note 9; Besson, 2018, see *supra* note 13, pp. 39-40.

[24] Simma, 1994, see *supra* note 8, pp. 236-244.

[25] On common goods, see also Fabrizio Cafaggio and David D. Caron, "Global Public Goods amidst a Plurality of Legal Orders: A Symposium", in *European Journal of International Law*, 2012, vol. 23, no. 3, pp. 643-649.

[26] See also, Daniel Bodansky, "What's in a Concept? Global Public Goods, International Law, and Legitimacy", in *European Journal of International Law*, 2012, vol. 23, no. 3, pp. 651-668, on p. 653: "human rights norms provide a private benefit to the individuals concerned, but they also provide public benefits to the international community"; Gregory Shaffer, "International Law and Global Public Goods in a Legal Pluralist World", in *European Journal of International Law*, 2012, vol. 23, no. 3, pp. 669–693, on p. 682: "The right to life and human dignity can be viewed as yet another affected public good to the extent that it affects our moral sensibilities".

[27] Feichtner, 2008, see *supra* note 9.

Type of community interests:	**Protection and creation of common goods**	**Protection of common values**	**Internationalisation of common spaces**	**Redistributive and inter-generational justice**
Examples:	International peace and security.	Protection of nature and living resources: biological diversity (common concern of humankind).	The moon and other celestial bodies (common heritage of mankind).	Redistributive justice in relations between developed and developing countries (international solidarity): the principle of *common but differentiated responsibility* or provisions on *financial assistance*, *economic assistance*, *technical assistance* and *technology transfer.*
	Protection of environment: the protection of the ozone layer; climate change ("common concern of humankind").	Conservation of national or indigenous culture: protection of world cultural and natural heritage (world heritage of mankind).	Deep seabed and its resources; Antarctica and the high seas.	Intergenerational justice: *sustainable development.*
	A functioning legal system which creates security and predictability in international trade relations.	Human rights: Genocide Convention.		
		International criminal law: ICC Statute (concern to the international community as a whole).		

Table 1: Feichtner's four categories of 'community interests'.

Feichtner's examples of universal 'community interests' cover very different areas, such as the protection of the environment, common spaces, human rights, and equity among states. Each interest has its own normative structure, which justifies its importance beyond state borders. The approach to community interests is inductive and descriptive. There is no overarching normative framework to which a particular branch of 'community interests' could refer.[28] Nor are there comparative studies of the diverse 'community interests', of their commonalities, differences or connections to each other. This reflects a lack of common action or structure for different 'community interests' protected under separate regimes. Nevertheless, we contend that the emergence and advocacy of 'community interests' in a variety of areas support the common-sense idea that there are some challenges that cannot meaningfully be freely disposed of by individual states.

The 'community interests' discourse provides an important background for this anthology's approach to international criminal law, for several reasons. First, we can see that only a fraction of the 'community interests' are protected by contemporary international criminal law. Obviously, the classification of certain values as 'community interests' does not necessarily entail that they should be protected by international criminal law. Sensible criminalization should not only distinguish between national (or ordinary crimes) and core international crimes, but also between 'community interests' that need criminal law protection and those that do not. Second and relatedly, future criminalization may consider 'community interests' that are not currently protected by international criminal law. Third, analysis of protected interests in this area of law should take into account the indeterminacy and plurality[29] of 'community interests'. They conflict with each other and with other types of interests. There should therefore be no assumption of automatic prioritisation of certain 'community interests' over other such interests, or of 'community interests' over other interests.[30] Finally, the development of ICL-protected interests enriches the communi-

[28] See, for example, Benedek, De Feyter, Kettemann and Voigt (eds.), 2014, see *supra* note 8, pp. 219-221.

[29] Besson, 2018, see *supra* note 13, p. 37.

[30] *Ibid*.

ty-interest discourse by providing new courses of action within the regime of criminal law.[31]

1.3. The Concept of Legal Interests as an Analytical Tool in International Criminal Law

Besides 'community interests', the discourse on 'legally-protected interests'[32] in international criminal law may also be informed by domestic criminal law concepts such as '*Rechtsgut*' or '*rettsgode*'. The so-called '*Rechtsgutstheorie*' is an influential criminalization theory in several continental law countries.[33] The notion of '*Rechtsgut*' was probably coined by Johann Birnbaum in 1834, and it was soon incorporated by German authors who argued that, in order to be criminal, conduct needs to violate a protected legal good.[34] Although there has to some extent been heated discussion on whether the notion of '*Rechtsgut*' is useful in order to legitimise criminalization,[35] it has been argued that it serves a "heuristic" function:[36] it

[31] More on mechanisms to protect community interests, see Zyberi (ed.), 2021, see *supra* note 15.

[32] In this chapter we use protected 'interests' and 'values' interchangeably. Besson, 2018, see *supra* note 13, p. 38, argues that 'interests' and 'values' are closely connected terms. These two terms can mean different things in other contexts, as 'interests' can mean self-interest in a realist sense, while 'values' may represent moral goods. See also Jean D'Aspremont, "The Foundations of the International Legal Order", in *Finnish Yearbook of International Law*, 2007, vol. 18, pp. 219–255, who argues for an international legal order based on individual and common interests rather than global values.

[33] Carl Constantin Lauterwein, *The Limits of Criminal Law: A Comparative Analysis of Approaches to Legal Theorizing*, Ashgate, Surrey, 2010, p. 5, who reviews the German *Rechtsgutstheorie*. It is stated that '*Rechtsgutstheorie*' is similar to other continental European theories, such as '*valeur légale*' in France and '*valore legale*' in Italy. Its common law counterpart is the principle of 'harm', where the objects harmed are legally-protected interests (Albin Eser, "The Principle of 'Harm' in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests", in *Duquesne University Law Review*, 1965, vol. 4, pp. 345-417). On '*Rechtsgutstheorie*' generally, see Markus Dubber, "Theories of Crime and Punishment in German Criminal Law", in *American Journal of Comparative Law*, 2006, vol. 53, pp. 679-707; Claus Roxin, "Crime Policy and the Criminal Law System", in Institute for Scientific Co-operation (ed.), *Law and State, A Biannual Collection of Recent German Contributions to the Fields*, vol. 6, 1972, pp. 32-59. Nina Peršak, *Criminalising Harmful Conduct: The Harm Principle, its Limits and Continental Counterparts,* Springer, New York, 2007, pp. 35-93, focuses on the harm principle, born in Anglo-American philosophy of criminal law, and its possible transplant to the continental legal debate on criminalization.

[34] Iwona Seredyńska, *Insider Dealing and Criminal Law: Dangerous Liaisons*, Springer, New York, 2011, pp. 192-195.

[35] The chapters in the anthology by Roland Hefendehl, Andrew von Hirsch and Wolfgang Wohlers (eds.), *Die Rechtsgutstheorie: Legitimationsbasis des Strafrechts oder dogmatisch-*

helps to answer the question "what kind of conduct should be declared criminal"[37] by identifying the legally-protected interests violated by the conduct. The identification of a legal good is a necessary – though not sufficient – condition for criminalization.[38] It has to be further established that criminalization serves the protection of the respective legal good.[39]

It is certainly not the intention of this chapter to promote transposition of a domestic '*Rechtsgut*'-debate onto international criminal law. The ordinary crime analogy is in many ways problematic for international criminal law.[40] Domestic criminal law theories may offer methodological and analytical assistance, so much is clear. But they should not be applied to international criminal law without imagination or pursuant to perceived rivalry between common and civil law actors. For example, in the domestic context collective legal goods usually protect the state and its institutions;[41] while for international criminal law, collective legal goods must be conceived of in a completely different way, for which the community-interest discourse becomes an important point of reference.

Several chapters in this anthology use the term 'legal interest' (a) to analyse criminalization criteria of existing core international crimes, or (b) to articulate additional interests, particularly 'community interests', that should in their view be recognized by international criminal law.

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es Glasperlenspiel?, Nomos, Baden-Baden, 2003, offer several views on the advantages and difficulties inherent in the need to identify proper 'legal goods' to build an efficient criminal legal system.

36 Tatjana Hörnle, "Theories of Criminalization", in Markus D. Dubber and Tatjana Hörnle (eds.), *The Oxford Handbook of Criminal Law*, Oxford University Press, 2014, pp. 679-701, on p. 686.

37 *Ibid*.

38 Mayeul Hiéramente, "The Myth of 'International Crimes': Dialectics and International Criminal Law", in *Goettingen Journal of International Law*, 2011, vol. 3, no. 2, pp. 551-588, on p. 563.

39 *Ibid*.

40 Miriam Aukerman, "Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice", in *Harvard Human Rights Journal*, 2002, vol. 15, pp. 39-98; Mark Osiel, "Why prosecute? Critics of punishment for mass atrocity", in *Human Rights Quarterly*, 2000, vol. 22, no. 1, pp. 118-141; M. Cherif Bassiouni, "The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities", in *Transnational Law and Contemporary Problems*, 1998, vol. 8, pp. 199-276.

41 See Ioanna Anastasopoulou, "Legal Goods in International Criminal Law", Chapter 4 below in this anthology.

If our concern is criminalization criteria, the history of international criminal law suggests that its creation and development are driven by contingent events.[42] Criminalization criteria can help to clarify justifications and limitations of the discipline. An analysis based on 'legal interests' distinguishes between crimes by tracing back to the interests or values they serve to protect.[43] To conceptually distinguish among international crimes, transnational and municipal crimes, international crimes are perceived to either (a) protect special legal interests which make them *international*; or (b) have special circumstances of violation of fundamental legal interests (for example, when the state cannot guarantee the protection of certain legal interests, the international community should intervene).[44]

1.4. What Are (Should Be) the Legal Interests Protected Under International Criminal Law?

The 'legal-interest approach' invites two questions. What are the distinct legal interests protected by the core international crimes? Why are they worthy of the protection granted by international criminal law? Several avenues could be followed in order to interpret and identify possible candidates of legal interests that either are or deserve to be considered for protection under international criminal law. From the very beginning of modern experiences of international trials, justifications have been contemplat-

42 See, for example, Morten Bergsmo, CHEAH Wui Ling and YI Ping (eds.), *Historical Origins of International Criminal Law: Volume 1*, TOAEP, Brussels, 2014 (http://www.toaep.org/ps-pdf/20-bergsmo-cheah-yi/); Morten Bergsmo, CHEAH Wui Ling and YI Ping (eds.), *Historical Origins of International Criminal Law: Volume 2*, TOAEP, Brussels, 2014 (http://www.toaep.org/ps-pdf/21-bergsmo-cheah-yi/); Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (eds.): *Historical Origins of International Criminal Law: Volume 3*, TOAEP, Brussels, 2015 (http://www.toaep.org/ps-pdf/22-bergsmo-cheah-song-yi/); and Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (eds.), *Historical Origins of International Criminal Law: Volume 4*, TOAEP, Brussels, 2015 (http://www.toaep.org/ps-pdf/23-bergsmo-cheah-song-yi/). See also Surabhi Sharma, "Humanity and Unity: Indian Thought and Legal Interests Protected by International Criminal Law", Chapter 8 in this anthology; Salim A. Nakhjavani and Melody Mirzaagha, "On 'Unity' as an Emerging Legal Interest in International Criminal Law", Chapter 6 below; and Ioanna Anastasopoulou, "Legal Goods in International Criminal Law", Chapter 4 below.

43 See Lauterwein, 2010, see *supra* note 33, p. 30.

44 Hiéramente, 2011, see *supra* note 38, p. 563, identifies similar types of legal good justifications. For a discussion on an integrative approach to core international crimes and transnational crimes, see Harmen van der Wilt and Christophe Paulussen (eds.), *Legal Responses to Transnational and International Crimes: Towards an Integrative Approach*, Edward Elgar Publishing, Cheltenham, 2017.

ed to support their extraordinary nature. These crimes were thought of as grave and serious enough to motivate external intervention by norm or jurisdiction, therefore responding to an illegal act committed against essential shared interests.

Thus, when Peter von Hagenbach was prosecuted in 1474 in what has been called the first international war crimes trial in history, the atrocities committed left no room for impunity.[45] Von Hagenbach was accused of several outrageous acts which he had performed while serving the Duke of Burgundy, in clear violation of imperial laws: murder without any prior judgment, perjury in relation to his previous oath to uphold the laws of Breisach, conspiracy to commit murder in relation to the supposed plot to expel and exterminate the local citizens, and rape.[46] The gravity of these crimes was immediately acknowledged, and a reference was made at the tribunal to the fact that (as indicated by the opening speech of the prosecutor Iselin), the defendant had "trampled under foot the laws of God and man".[47] Hagenbach's deeds had outraged all recognized notions of humanity and justice.

The attempted trial of Kaiser Wilhelm II at the end of World War I is also significant to understanding the underlying historical values involved in international penal prosecutions.[48] Despite the fact that the trial itself could not take place because the Kaiser was granted asylum in the Netherlands, the importance of this attempt as a first concrete step in the development of international criminal law should not be underestimated.[49] When

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45 Gregory S. Gordon, "The Trial of Peter von Hagenbach: Reconciling History, Historiography and International Criminal Law", in Kevin J. Heller and Gerry Simpson (eds.), *The Hidden Histories of War Crimes Trials*, Oxford University Press, 2013, pp. 13-49.

46 *Ibid*., p. 33.

47 Amable Guillaume Prosper Brugière de Barante, *Histoire des ducs de Bourgogne de la maison de Valois: 1364–1477*, Libraries Le Normant, Paris, 1854, vol. 9, p. 15; John Foster Kirk, *History of Charles the Bold, Duke of Burgundy*, J.P. Lippincott, Philadelphia, 1864, p. 435. See also Georg Schwarzenberger, *The Law of Armed Conflict,* Stevens and Sons, London, 1968, pp. 462–466, on p. 465. For an opposing view, see Hermann Heimpel, "Mittelalter und Nürnberger Prozeß", in *Festschrift Edmund E. Stengel: Zum 70. Geburtstag am 24. Dezember 1949 dargebracht von Freunden Fachgenossen und Schülern,* Böhlau, Münster, p. 450, n. 1, for whom such a statement was never pronounced by the prosecutor.

48 On this political and legal effort to try to take the Kaiser to justice, see the in-depth study by William A. Schabas, *The Trial of the Kaiser*, Oxford University Press, 2018.

49 Kirsten Sellars, "Trying the Kaiser: The Origins of International Criminal Law", in Bergsmo, CHEAH and YI (eds.), *Historical Origins of International Criminal Law: Volume 1*, 2014, see *supra* note 42, pp. 195-211. It should be noted that these efforts were part of a larger

the charges were discussed and decided among the victorious states, the United States President Woodrow Wilson, who had initially been against such a tribunal, agreed to include that the Kaiser would be taken to justice for the commission of a "supreme offense against international morality". This clause would then become the text of Article 227 of the Treaty of Versailles, which generated strong opposition by the Germans at the time. In its content, it seemed natural to include a reference to the common interest that had been affected by the actions of the German leader: "international morality" and the "sanctity of treaties". Once again, these first experiences of international criminal justice are heavily installed over a layer of extra-legal values which require protection when disturbed by particular actions. These values correspond both to the realm of ethics and to the order of religion, which inspire normative conduct even if well-recognized positive laws or statutes are absent.

The whole building of contemporary international law, as established after World War II, is organized pursuant to key concepts that provide the conceptual basis for its institutionalisation. The United Nations ('UN') Charter includes a number of collective values in the text of its Preamble and in the Purposes defined in Article 1. In the Preamble, for example, it seems clear that the main subject of rights are no longer the states, but the "Peoples of the United Nations": worried about the sorrowful effects of war on mankind, these "Peoples" are jointly determined to, among other ends, "reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small", and to "promote social progress and better standards of life in larger freedom". In order to achieve these objectives, reference is made to common values: tolerance, unity, international peace and security, and the promotion of advancement for everyone.

The Purposes, enshrined in Article 1, complement the general framework by acknowledging these same values that should endorse the activities of the UN:

chain of events that preceded the signing of the Treaty of Versailles; see Ziv Bohrer, "The (Failed) Attempt to Try the Kaiser and the Long (Forgotten) History of International Criminal Law: Thoughts Following the Trial of the Kaiser by William A Schabas", in *Israel Law Review*, 2020, vol. 53, no. 1, pp. 159-186.

> Article 1
>
> The Purposes of the United Nations are:
>
> 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
> 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
> 3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
> 4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

The insistence on the notions of "collective", "common" and "harmonizing" measures or ends reflects the reality that the international society needs some shared values in order to promote necessary dialogue with the aim of avoiding future war. The idea that the UN will only be able to consolidate a better world, safer and fairer, is governed by the recognition and identification of some fundamental interests, shared by all peoples, which need to be protected from every threat.

When the International Criminal Court ('ICC') Statute was adopted in 1998, a similar strategy was deployed. Its Preamble draws attention to existing values that are at the core of international justice: the unity of peoples by common bonds, the conscience of humanity, and the values of peace, security and well-being of the world are explicitly mentioned in the first paragraphs of the Statute. Although here the subject of the Preamble is described as the "States Parties" (not the "Peoples"), it is evident that the intention of creating a permanent International Criminal Court was to tackle the most serious crimes that are "of concern to the international community as a whole". Peace, security and the well-being of the world have been

identified as fundamental values of the international community.[50] There is a focus on the description of joint values that need to be ensured when the international society – not just sovereign states – assumes the challenge of administering worldwide justice in accordance with universal parameters.

1.4.1. International Peace and Security

As just described when quoting from the Preamble of the UN Charter and its Purposes statement in Article 1, 'international peace and security' are frequently invoked as fundamental community interests protected by the United Nations Organization and international law, including by core international crimes.[51] In the original architecture of the UN Charter, it is "the only common interest of the international community that could be guaranteed through the use of force".[52] This comes as no surprise as it is not the primary objective of the UN Charter alone: the Preamble of the 1919 Covenant of the League of Nations had listed achieving "international peace and security" as the Covenant's first objective of the high contracting parties.[53] The need to protect the value of 'international peace and security' may well be the primary reason why both the League of Nations and the United Nations Organization were created.

However, the law regulating use of armed force between states was not the same in 1919 and 1945. The International Court of Justice has referred

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50 Florian Jeßberger and Gerhard Werle, *Principles of International Criminal Law,* Oxford University Press, 2020, p. 38.

51 Kai Ambos, "The Overall Function of International Criminal Law: Striking the Right Balance Between the Rechtsgut and the Harm Principles: A Second Contribution Towards a Consistent Theory of ICL", in *Criminal Law and Philosophy*, 2015, vol. 9, no. 2, pp. 301-329, on p. 324. See Kai Ambos, Morten Bergsmo and Otto Triffterer, "Preamble", in Kai Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th ed., Beck/Hart/Nomos, Munich, 2022, para. 11; Enzo Cannizzaro, "Common Interests of Humankind and the International Regulation of the Use of Force", in Benvenisti and Nolte (eds.), 2018, see *supra* note 8, pp. 419-422. The Draft Code of Crimes against the Peace and Security of Mankind, for example, only includes crimes which amount to a threat to international peace and security, see Report of the International Law Commission on the Work of its Forty-Eighth Session, UN Doc. A/51/10, 26 July 1996, p. 20 (https://www.legal-tools.org/doc/f6ff65/).

52 Cannizzaro, 2018, see *supra* note 51, p. 420, continuing: "Every other legally protected interest, of an individual or collective nature, remained deprived of this special form of protection" (*ibid.*); "international peace and security are overarching collective values that prevail over other conflicting interests" (p. 421).

53 Preamble, The Covenant of the League of Nations, 28 June 1919 (https://www.legal-tools.org/doc/106a5f/).

to the prohibition against the use of force as "a cornerstone of the United Nations Charter",[54] but the "decisive step toward a *ius contra bellum* was made only in 1928 with the Briand-Kellogg Pact", as explained by Claus Kreß: "This treaty-based prohibition of war quickly grew into customary international law because of its almost immediate more or less worldwide acceptance".[55] During World War II, it became clear that the value of 'international peace and security' – its restoration and maintenance – would need to be crystallised in the main regulating document of the emerging UN. In 1945, we got the prohibition on the use of force in Article 2(4) of the UN Charter, the fundamentally-important principle of non-use of force in international relations which "is anchored in customary international law".[56] Interestingly, this principle gives effect to several preambular paragraphs of the Charter, including the determination of UN Member States to "ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, *save in the common interest*".[57] Against this background, it should not be problematic to identify 'peace' as a key value which is shared by members of the international community.[58]

An argument sometimes presented is that the nature and gravity of core international crimes harm peace and security in the international community. The problem with such a general consequentialist argument, however, is that the causal relationship cannot easily be established. For example, some war crimes of small scale may not have such an effect while still satisfying the definition of war crimes. In turn, crimes against humanity can have quite a limited geographical scope but grave impact on the lo-

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54 ICJ, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, ICJ Reports 2005, pp. 168, 223 (para. 148) (https://www.legal-tools.org/doc/8f7fa3/).

55 Claus Kreß, "The Ukraine War and the Prohibition of the Use of Force in International Law", Occasional Paper Series No. 13 (2022), TOAEP, Brussels, 2022, p. 2 (https://www.toaep.org/ops-pdf/13-kress/). He cites, *inter alia*, the Judgment of the International Military Tribunal at Nuremberg.

56 *Ibid*., p. 3.

57 Preamble, Charter of the United Nations, 26 June 1945, seventh preambular paragraph (italics added) (https://www.legal-tools.org/doc/6b3cd5/). It is in other words "in relation to the [value of] maintenance of international peace and security [that] the term 'common interest' has entered the Charter of the United Nations" (and become a Charter-term), see Christina Voigt, "Delineating the Common Interest in International Law", in Benedek, De Feyter, Kettemann and Voigt (eds.), 2014, see *supra* note 8, p. 16.

58 Cecilia M. Bailliet, "Peace is the Fundamental Value that International Law Exists to Serve", *Proceedings of the ASIL Annual Meeting,* 2017, vol. 111, pp. 308-312.

cal population. Where peace and security are not only international, but also include peace within a state, the threshold is lower.[59] If one follows this line of reasoning, it is not entirely clear how international peace is a value to be attributed to core international crimes in general, especially taking into account that criminalization and prosecution of such crimes do not always serve peace and can sometimes even destabilise the situation.[60]

We should therefore consider 'international peace and security' as interests protected by the crime of aggression specifically.[61] It may be the primary legal good protected by this core international crime, alongside the state interests of "territorial integrity or political independence of another State" as provided by Article 8*bis*(2) of the ICC Statute.[62] More so than these two interests, 'international peace and security', are arguably values held by the international community as a whole, not just the states.[63] Perhaps they are more than anything values of humankind and should come to

[59] See Ambos, 2015, see *supra* note 51, p. 324, on this "peaceful cohabitation of people".

[60] Hiéramente, 2011, see *supra* note 38, pp. 569-573.

[61] Mégret observes that "the overwhelming emphasis at Nuremberg was […] on the world order shattering potential of aggression. Peace is evidently a collective good and therefore fits well within the sense of aggression being criminalised largely as a result of *international community* values. Wars do not simply breach the peace between the states that participate in them as has already been suggested, they breach the peace of the world", see Frédéric Mégret, "What is the Specific Evil of Aggression?", in Claus Kreß and Stefan Barriga (eds.), *The Crime of Aggression: A Commentary*, Volume 2, Cambridge University Press, 2017, p. 1414.

[62] UNGA resolution 3314 (XXIX) also refers to "the sovereignty, territorial integrity or political independence of another State", see United Nations General Assembly, Resolution 3314 (XXIX), Annex: Definition of Aggression, Article 1, 14 December 1974 (https://www.legal-tools.org/doc/90261a/). Koskenniemi reminds us that "Law is a means to fulfil objectives. States joined the United Nations to fulfil objectives, among them the protection and preservation of their territorial integrity and political independence", see Martti Koskenniemi, "'A Trap for the Innocent …'", in Kreß and Barriga (eds.), 2017, see *supra* note 61, p. 1368; see also p. 1366. Mégret criticizes the notion that "aggression's evil can be computed primarily as a function of how it affects the state": "the currency of aggression as an international crime must be appraised in a context of systemic devaluation of sovereignty and the rise of human rights sensitivity in international relations", see Frédéric Mégret, "What is the Specific Evil of Aggression?", in *ibid*., pp. 1404-1405.

[63] Peace "takes as its cue to evaluate the gravity of aggression an implicit community of reference that might be described [as] *international society or the international community*", see Mégret, *ibid*., p. 1402 (italics added).

be viewed as such, rather than as a domain of national governments directly or through the 'international community'.[64]

The crime of aggression is directly linked to the prohibition against unlawful use of force in Article 2(4) of the UN Charter. The definition in Article 8*bis*(1) of the ICC Statute requires "an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations", thus tying the elements of the crime to the Charter principle on non-use of force in international relations. This is a good illustration of the relationship between legally-protected interests (here 'international peace and security'), Charter-based principles of general public international law, and prohibitions in international criminal law.

But rather than becoming enamoured by such conceptual convergence of value, interest, principle and crime, we should remind ourselves that the actual practice of the UN Security Council has not always brought clarity and predictability to the understanding of the expression 'international peace and security'. The political turmoil or paralysis within the Council has left us with a deficit of consistent deterrence.[65] It nevertheless seems radically true that the struggle against violence can only be meaningful if peace and security are key elements to be respected. That is why, when assessing whether there are threats to or breaches of international peace and security, the UN Security Council is constantly asked to act in defence of the essential values of the international society.[66]

64 Mégret develops "a fully-fledged critique of aggression based on human rights", using as the community of reference "the global community of mankind", see *ibid*., pp. 1429, 1402.

65 Rasool Soltani and Maryam Moradi, "The Evolution of the Concept of International Peace and Security in light of UN Security Council Practice (End of the Cold War-Until Now)", in *Open Journal of Political Science*, 2017, vol. 7, pp. 133-144.

66 Jure Vidmar, "Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?", in Erika De Wet and Jure Vidmar (eds.), *Hierarchy in International Law: The Place of Human Rights*, Oxford University Press, 2012, pp. 13-41, on p. 17. According to Vidmar, the UN Charter shows "a strong sense of an international community with shared values and interests", even over (and sometimes against) the desires of individual states (p. 22).

1.4.2. Humanity and Collectivity

Homo sum: humani nihil a me alienum puto
"I am a human being; I think that nothing human is strange to me"
TERENCE, Heauton Timoroumenos, v. 77.

Another type of interests protected by international criminal law can be described as 'human interests'. The argument is either that special human interests are violated by core international crimes or that fundamental human rights are threatened in a particular manner. It can also be a combination of both. The collective nature of both the perpetration (involving state or state-like entities) and victims figures prominently in the reconstruction of relevant criminalization rationales. For the arguments related to special protected interests, the key terms are 'humanity' and 'human dignity'.

It is not uncommon to go back to Pico della Mirandola's 1486 essay *On the Dignity of Man* to anchor the foundational term 'human dignity' in international law.[67] It is indeed a relevant text, but even before that the notion of 'humanity' as a legal interest finds important roots in ancient times. The concept of '*humanitas*' appeared already in the context of the Roman Republic to reflect "the quality of civilized and cultural behaviour that is inculcated in people by education and training".[68] It cannot be denied that the notion had a political scope. In fact, the idea of '*humanitas*', as such, was at the core of the identity of the Romans; when related to '*Romanitas*', it involved the values of the Roman élite which tried to identify some shared goals and values which others (non-Romans) had to abide by in order to be accepted by the civic community.[69] However, it is also the case that '*humanitas*' became a traditional Roman value based on the grounds of what the Greeks had previously called '*philantropía*' ('φιλανθρωπία'), a concept which contained a heavy moral sense related to the need to promote and encourage correct social conduct.

Therefore, at least since Cicero's time, '*humanitas*' meant for the Romans the identification of all those characteristics that defined human beings and that individuals shared in common.[70] In this sense, as part of

[67] Pico della Mirandola, *On the Dignity of Man*, translated by Charles Glenn Wallis, Hackett Publishing Company, Cambridge, 1965 (1486).

[68] Richard A. Bauman, *Human Rights in Ancient Rome,* Routledge, London, 2000, p. 2.

[69] Susanna Morton Braund, "Roman Assimilations of the Other: 'Humanitas' at Rome", in *Acta Classica,* 1997, vol. 40, pp. 15-32.

[70] François Prost, "Humanitas *: originalité d'un concept cicéronien*", in *L'art du comprendre*, 2016, vol. 15, 2e série, pp. 31-46.

what had to be educated, '*humanitas*' was an artificial term that reflected not on the nature of mankind, but on the concrete identification, in specific circumstances, of social agreements and understandings.[71] Together with '*philantropía*', the ancients coined an expression that could refer to societal processes based upon the education in the development of people's attitudes towards one another. As such, since classical times, it constitutes an element that was used to develop a consciousness of society as a result of spiritual and moral motivations.[72] This historical dimension related to the notion of '*humanitas*' can prove to be useful to identify a common set of values which mirror the universality of our condition. But to what extent can this concept be considered a legally-protected interest in contemporary international justice?

Although in current times, 'humanity' and 'human dignity' are general terms with wide application, they are interpreted to have very specific meaning, reflecting the existing structure and rules of international criminal law. David J. Luban, for example, takes state-involvement in crimes against their citizens as violating a special interest of 'humanity'. He argues that 'humanity' should be understood as our nature as 'political animals' as far as crimes against humanity are concerned.

Politics is an indispensable means to organise the society and advance interests of its individual members, since as individuals we have "no alternative to living in politically organized communities".[73] The health of politics is crucial to human survival, yet vulnerable to cancerous perversion.[74] Crimes against humanity are therefore "*political* crimes".[75] The health of politics as such would constitute a unique interest that the law of crimes against humanity seeks to protect: it is distinctly different from "the traditional taxonomy of legally protected values" such as property, persons or public order.[76]

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71 Pierre Vesperini, "Le sens d'humanitas à Rome", in *Mélanges de l'École française de Rome,* 2015, vol. 127-1.

72 See Leszek Aftyka, "Philanthropy in Ancient Times: Social and Educational Aspects", in *Journal of Vasyl Stefanyk Precarpathian National University*, 2019, vol. 6, no. 1, pp. 149-154.

73 David J. Luban, "A Theory of Crimes against Humanity", in *Yale Journal of International Law*, 2004, vol. 29, no. 1, pp. 85-167, on p. 138.

74 *Ibid*., p. 117.

75 *Ibid*.

76 *Ibid*., p. 87.

For Luban, it is not the gravity of the crimes, but the fact that they are "committed by governments and government-like organizations towards civilian groups under their jurisdiction and control" that distinguishes crimes against humanity from ordinary municipal crimes.[77] And because of the inescapability of politics, healthy politics is an interest important to all human beings.[78] Luban therefore considers that political entities' violations of human rights not only harm interests of direct victims, but also an additional interest of political health. His theory reveals a core feature of crimes against humanity as political crimes, thus excluding organised crimes committed, for example, for economic purposes. Yet, this protected interest does not exclude human rights violations committed by the state in general.[79]

On the other hand, Kai Ambos identifies the special protected interests of 'humanity' and 'human dignity' in the collective nature of the victims. He argues that certain collective goods – in that they are concrete manifestations of 'humanity' – are distinct for international crimes. The existence of certain "pre-characterised" groups for crimes of genocide, the existence of the people in their "contingent and contextual categorisation as 'enemy group'" for war crimes, and the idea of civilian population as the potential target of crimes against humanity, point to the existence and acknowledgment of common values. But Ambos does not clarify what the concrete collective interest is, except that there is a collective dimension of the attack directed against persons for group-related reasons.[80] These group interests are 'interests of humanity' because, according to Ambos, "[w]here a group is conceived as less-than-human in its nature […], its interests become, by this fact, instances of the interests of humanity".[81] In other words, 'humanity' has a certain independent value which is different from mere aggregation of individual interests.[82]

Similarly, SONG Tianying[83] and Susan R. Lamb[84] – in Chapters 2 and 3 of this volume focusing on war crimes and crimes against humanity,

77 *Ibid*., p. 120.

78 *Ibid*., p. 139.

79 See Hiéramente, 2011, see *supra* note 38, pp. 564-565, 575.

80 Ambos, 2015, see *supra* note 51, p. 321.

81 *Ibid*., p. 322.

82 *Ibid*., p. 320.

83 In Chapter 2, SONG Tianying identifies legal interests protected by war crimes. Although war crimes have long been regarded as 'classic' international crimes, their nature and scope

respectively – identify the protected interest of recognising basic human rights regardless of group identity, which they call "common humanity".[85] 'Common humanity' between communities or groups is a more concrete kind of 'humanity' than 'humanity' within a global community. This concretization of 'humanity' has both normative and practical implications, which are explored in-depth in both contributions. For instance, this 'inter-group humanity' can be particularly difficult to recognize and protect during inter-group conflicts.

The *collective* dimension of the perpetration and victimisation can also justify international criminalization. Regarding the element of state or organisational involvement, jurisdictionally the function of international criminal law is to protect fundamental rights of individuals when the state is unwilling or unable to do so.[86] International and domestic criminal law

are not clearly established. SONG approaches criminalization of war crimes through their ordinary and unique protected interests. The ordinary interests are similar to those protected by domestic criminal law. SONG identifies two unique interests protected by war crimes: the interests of common humanity, that is, recognition of human rights independent of an individual's national, social affiliation; the collective interests of the parties to the conflict. She also attaches normative signification to the aggravated threat to the protected interests of war crimes: the destructive potential of armed conflict and vulnerability of victims both. With these interests and circumstances, SONG seeks to establish war crimes as a unique category of international crimes. The characterisation of war crimes as international crimes does not always require policy or magnitude, as is the case in other international crimes.

84 Susan R. Lamb's Chapter 3 focuses on the notion of 'humanity' as a core value protected by crimes against humanity. Her review of interpretations of 'humanity' in theory and the practice of international criminal law shows that the concept is multifaceted, contested and incoherent. Nevertheless, Lamb concludes from existing conceptions that 'humanity' reflects universal concerns and seeks to exert a humanising impact. According to Lamb, what distinguish crimes against humanity from ordinary crimes are: the interests of common humanity, understood as recognition of fundamental human rights regardless of one's identity; the collective interests of all persons; the extensive threat posed by the destructive potential of widespread or systematic criminality; and our collective vulnerability to these crimes. Lamb thinks crimes against humanity should not be restricted to crimes committed pursuant to state policy. Through her analysis, she points to the tension between crimes against humanity as being, on the one hand, crimes of a collective nature, and on the other having a central focus on the individual.

85 Relatedly, Larry May argues that harm to 'humanity' or the international community requires either that the victims are harmed based on "non-individualized characteristics" or that the perpetrator has state or other collective traits. See Larry May, *Crime Against Humanity: A Normative Account*, Cambridge University Press, 2005, p. 83.

86 Ambos, 2015, see *supra* note 51, p. 323; Steven R. Ratner, "The Schizophrenias of International Criminal Law", in *Texas International Law Journal*, 1998, vol. 33, pp. 237-256, on p. 256; Andrew Altman and Christopher Heath Wellman, "A Defense of International Criminal

both protect fundamental human rights, the difference being, in terms of elements, that core international crimes require a certain socio-political context (most frequently state involvement), while 'ordinary' or domestic crimes lack the contextual element (but are normally committed by private persons not acting on behalf of a state). Ratner argues that all violations of fundamental rights by the State – regardless of their scale or organisation – should be deemed international crimes.[87] Accordingly, his critique of positive law is the selective international criminalization of conduct in wartime and peacetime, in both international and non-international armed conflicts, and finally in peacetime among crimes of similar gravity.[88]

Others think that both a collective perpetrator (a state or an organisation) and collective victims are necessary for international crimes to be grave enough. International criminalization, then, should only be reserved for serious violations of basic rights.[89] Altman argues that there should be a fine balance between self-determination and protection of human rights.[90] But this is not the unanimous opinion. Several others rather believe that, in case of serious violations of basic rights, either the collective nature of the perpetration or of the victimisation would in itself justify the use of international criminal law.[91]

Apart from the collective characteristics of core international crimes, additional factors have been considered with regard to specific categories of crimes. In the case of war crimes, for example, SONG Tianying argues that the destructive potential of armed conflict and vulnerability of victims

Law", in *Ethics*, 2004, vol. 115, pp. 35-67. See also, Andrew Altman, "The persistent fiction of harm to humanity", in *Ethics and International Affairs*, 2006, vol. 20, pp. 367-372.

87 Ratner, 1998, see *supra* note 86, p. 252.

88 *Ibid*., pp. 238, 249, 253.

89 See Susan R. Lamb, "The Legal Good of 'Humanity' Protected by Crimes Against Humanity", Chapter 3 in this volume. Altman and Wellman, 2004, see *supra* note 86; Altman, 2006, see *supra* note 86.

90 Altman and Wellman, 2004, see *supra* note 86; Altman, 2006, see *supra* note 86.

91 May, 2005, see *supra* note 85, p. 83; Kirsten Fisher proposes a combined "severity" and "associative" threshold which has to be reached to justify the application of ICL. The former requires that the most basic human rights protecting the physical security of human beings, being a prerequisite for the enjoyment of other rights, are jeopardised by the respective conduct, that is, the gravity of the harm caused to physical security. The associative threshold represents the group or organisational element in international crimes in two ways: the political organisation or group as the aggressor or the victims as part of the group. See Kirsten J. Fisher, *Moral Accountability and International Criminal law*, 2012, Routledge, London, pp. 17–26, 30–31, 186.

constitute elevated threats to the protected interests, which make international criminalization of war crimes not always dependent on the multiplicity of victims.[92] For crimes against humanity, in turn, Susan R. Lamb invokes the extensive threat posed by the destructive potential of widespread or systematic criminality, and our collective vulnerability to these crimes.[93]

Table 2 summarizes the theoretical approaches presented in this section, with horizontal and vertical categorizations.

	Special protected interests ('humanity')	**Nature and extent of threat to protected interests**
Collectivity in perpetration (state or organisational involvement)	Health of politics (Luban for CAH)	State-sponsorship justifies intervention of ICL (Ratner, Ambos)
Collectivity in victimisation	The existence of certain 'pre-characterised' groups (Ambos for genocide)	Extensive threat and destructive potential (Lamb for CAH)
	The existence of the people in their "contingent and contextual categorisation as 'enemy group'" (Ambos for war crimes)	Widespread or systematic violations transcend right to self-determination vested in sovereignty (Altman and Wellman)
	Certain groups (Ambos for CAH)	
	Recognition of fundamental human rights regardless of collective identity (Lamb for CAH; SONG for war crimes)	
	Collective interests of all persons as part of humanity (Lamb for CAH)	

Table 2: Normative significance of collectivity in perpetration and victimisation.[94]

[92] See SONG Tianying, "The Legal Interests Protected by War Crimes", Chapter 2 in this volume.

[93] See Susan R. Lamb, "The Legal Good of 'Humanity' Protected by Crimes Against Humanity", Chapter 3 in this volume.

[94] Table 2 was elaborated by the authors of this chapter.

The theoretical approaches studied above attach different normative significance to factors such as state involvement and gravity or scale of the crime. When conceiving justifications, authors have different scenarios and crimes in mind. What is fitting for a prototype may not suit other crimes or scenarios.

Focusing on legally-protected interests, it becomes clear that special interests identified by the experts have both normative and functional limitations. As explained, state involvement can create a distinct legally-protected interest (Luban) or constitute a source of threat which justifies international concern (Ratner). Multiplicity of victims also contributes to explanatory clarity. Hiéramente and Ratner argue that neither state involvement nor gravity alone can justify the current scope of criminalization. In this sense, Ambos' understanding of collective interests seems to function better, although it does not quite distinguish state or state-like actors from private actors pursuing economic interests. Besides, although Ambos articulated the very useful structure of individual and collective interests, he does not elaborate on the three collective interests. This justifies a thorough examination of these interests in order to contribute towards a solid basis for the development of international criminal law and, by the same token, a clear understand of its limitations.

1.4.3. Solidarity, Unity and Harmony

The '*Rechtsgutstheorie*' has not really produced a list of legally-protected interests or goods that we may wish to rely upon for the purposes of this anthology. In the context of international criminal justice, it is important to discuss what other protected goods – apart from values such as 'international peace and security' and 'humanity' addressed above – are at stake when core international crimes are committed. We should be able to identify those common values which, as a result of their universal importance, justify international criminalization of conduct that violates them.

Several contributions to this book reflect on which interests *should* receive a greater measure of recognition as common and distinct to international criminal law. Such recognition can be general – for example, through a preambular paragraph or through the practice of international judges – or it can be in the form of articulation of the specific reach of subject-matter jurisdiction.

Ioanna Anastasopoulou's Chapter 4 below, for instance, proposes 'solidarity' as a collective interest common to all core international crimes.

Similarly, the concept of 'unity' is discussed extensively in other chapters as another common interest. The concepts of *solidarity* and *unity* import "society-oriented" [95] or "communitarian" [96] perspectives into our understanding of international criminal law. MacDonald rightly noted that the precondition of 'solidarity' is a "sense of community or commonality".[97] The two concepts are closely related to each other.[98] 'Solidarity' has been used extensively in the context of economic equity between the global North and South.[99] It is established to the extent that Benvenisti and Nolte refer to "the notion of human solidarity that is grounded in global fraternity".[100] It has a long political and ideological history.[101] Social scientists have made significant contributions towards our understanding of the con-

[95] See Surabhi Sharma "Humanity and Unity: Indian Thought and Legal Interests Protected by International Criminal Law", Chapter 8 in this volume.

[96] See Kafayat Motilewa Quadri, Vahyala Kwaga and Tosin Osasona, "Forging a Modern African Perspective on 'Unity' as a Collective Legal Interest in International Criminal Law", Chapter 7 below. See also Crawford, 2011, see *supra* note 13.

[97] Ronald St. John MacDonald, "Solidarity in the Practice and Discourse of Public International Law", in *Pace International Law Review*, 1996, vol. 8, no. 2, pp. 259-302.

[98] See, for example, Karel Wellens, "Solidarity as a Constitutional Principle: Its Expanding Role and Inherent Limitations", in Ronald MacDonald and Douglas Johnston (eds.), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*, Martinus Nijhoff, The Hague, 2005; Danio Campanelli, "Principle of Solidarity", in Wolfrum (ed.), 2008, see *supra* note 9, p. 2; Laurence Boisson de Chazournes, "Responsibility to Protect: Reflecting Solidarity?", in Rüdiger Wolfrum and Chie Kojima (eds.), *Solidarity: A Structural Principle of International Law*, Springer, New York, 2010, pp. 93-122. MacDonald, 1996, see *supra* note 97.

[99] Simma, 1994, see *supra* note 8, p. 237, uses solidarity between developed and developing countries as an illustration of community interests. See also MacDonald, 1996, see *supra* note 97.

[100] Eyal Benvenisti and Georg Nolte, "Introduction", in Benvenisti and Nolte (eds.), 2018, see *supra* note 8, p. 3. They observe that, in "more recent times, and particularly in the post-Cold-War era, political realities, technological changes, and the sense of growing interdependence have generated efforts to articulate what human solidarity means for international law as a framework to secure a sustainable future for all" (p. 4).

[101] The solidarity tradition has deep political anchoring in the movement for labour rights and its relations with socialist and social-democratic political parties. "As an ideological superstructure over a civilian sense of community, the labour movement and later the welfare state secured an hegemony, an exclusive right to associate solidarity with *their* policies", writes Håkon Lorentzen in his interesting monograph *Fellesskapets fundament: Sivilsamfunnet og individualismen* ([The Foundation of the Community: The Civil Society and Individualism], Pax Forlag, Oslo, 2004, p. 77). He explains how "the monopolization of solidarity" had lasting effects in the Nordic countries (p. 84).

cept of 'solidarity'.[102] There are different views on the preconditions for collective solidarity beyond nation states, extending to the imaginary 'other'. The emotional dimension of empathy is easily affected by long distance to 'the other', making 'collective solidarity', for Habermas, interest-based and dependent on reason and agreement on objectives and means; for Vetlesen, empathy based in emotions can be extended from the near to the remote, provided it can draw nourishment and experience from the near.[103] Stjernø's comprehensive study on the history of the idea of 'solidarity' emphasizes, however, the importance of the economic or material aspect of 'solidarity'.[104]

We will focus more on the term 'unity' in this and the next sections. 'Unity' is a relational value that has in our view not yet been fully appreciated in international law. 'Unity' can be seen as a social and psychological value which concerns inter-communal relationships.[105] While human interests discussed in Section 1.2. above represent efforts to interpret 'humanity' or human nature in the international criminal law context, the interest of

[102] We mention here the work of Stjernø, which covers social and political theory, Protestant and Catholic social ethics, the evolution of the notion of solidarity in eight European countries, comparing the treatment of 'solidarity' by a variety of political parties (see Steinar Stjernø, *Solidarity in Europe: The History of an Idea*, Cambridge University Press, 2004).

[103] See Lorentzen, *op. cit.*, pp. 73-75, and the detailed discussion in Chapter 6 ("Empathy and Solidarity in Habermas' Discourse Ethics") of Arne Johan Vetlesen, *Perception, Empathy and Judgment: An Inquiry into the Preconditions of Moral Performance*, The Pennsylvania State University Press, University Park, 1994, pp. 283-339. For Stjernø, to be effective, the "globalisation of solidarity presupposes the globalisation of law and must include the full development of the individual's rights and obligations in the context of global citizenship", see Stjernø, 2004, see *supra* note 102, p. 349.

[104] Stjernø concludes that "solidarity can most fruitfully be defined as the preparedness to share resources with others by personal contribution to those in struggle or in need and through taxation and redistribution organised by the state", *ibid*., p. 2. Such emphasis on the role of the state in economic redistribution exposes the idea of 'solidarity' to the extreme polarisation of the political debate on the role of the state, in particular in the United States, where authors such as Nisbet warns against "a sense of the absolute identity of State and society – nothing outside the State, everything in the State", a state in which "the basic needs for education, recreation, welfare, economic production, distribution, and consumption, health, spiritual and physical, and all other services of society are made aspects of the administrative structure of political government", contrasted with "a sense of cultural membership in the significant and meaningful relationships of kinship, religion, occupation, profession, and locality", see Robert Nisbet, *The Quest for Community*, ISI Books, Wilmington, 2010 (1953), pp. 261-262.

[105] By 'unity', we are not in this volume thinking of doctrinal coherence and unity – as opposed to fragmentation – of international law, cf. Mario Prost, *The Concept of Unity in Public International Law*, Hart Publishing, Oxford, 2012.

human 'unity' does not address simply persons or groups, but their social relations. 'Unity' is nevertheless a human interest albeit of a different kind than 'humanity'. Just as the interest of 'international peace and security' concerns relations between nation-states, this book considers 'unity' largely in the context of how to make the principles in the UN Charter on the maintenance and restoration of international peace and security more effective, but not at the expense of normal competition between states and their respective comparative advantages. Concern for the 'unity' of nation-states should temper short-sighted collective irrationality and help to bring global risks more under control. It ultimately concerns the survival of humankind, also long-term, and thus "qualifies as the common interest that public international law needs to protect".[106]

Unity of humankind is embodied in 'unity' among diverse communities.[107] 'Unity' has its sociological basis in the common human identity and radical interdependence of all human beings.[108] In its appreciation and consolidation of human fellowship, it is necessary for human survival and prosperity.

To better understand the modern notion of 'unity' as a legally-protected good, it should be recalled that the concept of '*unitas*' has a long tradition in human culture. As opposed to disunity, the idea of unity has always included a will to assess collectively shared elements into a group, in order to foster proximity and reciprocity.[109] As a political notion, 'unity'

[106] Benedek, De Feyter, Kettemann and Voigt, 2014, see *supra* note 18, p. 221. Voigt refers to "*the primary* common interest of collective survival", see Voigt, 2014, see *supra* note 57, p. 17.

[107] See Wim van Binsbergen, "Notes on the Fundamental Unity of Humankind", in *Culture and Dialogue,* 2020, vol. 8, no. 1, pp. 23-42.

[108] See, for example, Bhikhu Parekh, "Non-ethnocentric Universalism", in Tim Dunne and Nicholas Wheeler (eds.), *Human Rights in Global Politics*, Cambridge University Press, 1999.

[109] These elements are important to us when we use the notion of 'unity of humankind'. We are therefore not thinking about an idea of unity as developed by, for instance, Plotinus, according to whom 'the One' (or, equivalently, 'the Good', *Ennead* 1.6.9), is the absolutely simple first principle of all. In his metaphysics, clearly rooted in pre-Socratic and Platonic thought, Plotinus' mystical idea of 'the One' ('*τὸ Ἕν*') is one of the three fundamental principles, together with the Intellect and the Soul. 'The One', as a supreme notion, knows no distinction, multiplicity or division, and cannot be reduced to anything. It is therefore indescribable, so it is impossible to consider it as a principle of oneness or goodness, for these are intelligible attributes to which '*τὸ Ἕν*' cannot be reduced. Plotinus' concept has been widely celebrated in Christianity in general (and in the Neo-Platonic tradition in particular) as a way to conceive the inscrutability of God. However, in our reading of 'unity' as a legal good, we are

became in antiquity an efficient tool to draw societies together, expelling threats that could compromise the social pact, and thus can be examined today under the rhetoric of amalgamation and merger which are typical to modern social paradigms.[110]

The element of unity is historically significant as a way of promoting a *background for identity consolidation*. The appeal to, for example, a mythical past or to common ancestors was a frequent strategy to endorse autochthony and national belonging.[111] The creation of a sense of unity was, of course, a means to avoid the permanent risk of fragmentation, an aspect which was very present in ancient society.[112] In ancient Greek thought, for instance, we find numerous references to the idea that there was *one* mankind and, therefore, that all humans shared identical grounds.[113]

This idea, which was depicted in interpersonal relations, was also expanded into the international arena, since the establishment of imperial endeavours heavily relied upon the ideal of a world unity. This has been the object of interesting approaches by historians who tried to investigate the origins of this idea of 'unity of mankind'. It seems that there is strong evidence suggesting that it was not until the Hellenistic era that the idea of

concerned with the social dimension of 'oneness' – more related to the origins of the human rights discourse – one that is born out of the conscious attitude of feeling part of a human community. On Plotinus' Henosis and its complexities, see Pao-Shen Ho, *Plotinus' Mystical Teaching of Henosis: An Interpretation in the Light of the Metaphysics of the One*, Ph.D. dissertation, Leopold-Franzens-Universität Innsbruck, Innsbruck, 2014. See also the traditional studies by John Bussanich, *The One and its Relation to Intellect in Plotinus*, Brill, Leiden, 1988, and Gary M. Gurtler, *Plotinus: The Experience of Unity*, Peter Lang, New York, 1988.

110 See Andreas N. Michalopoulos, Andreas Serafim, Alessandro Vatri and Flaminia Beneventano della Corte, "Unity and Division in Ancient Literature: Current Perspectives and Further Research", in Andreas N. Michalopoulos, Andreas Serafim, Flaminia Beneventano della Corte and Alessandro Vatri (eds.), *The Rhetoric of Unity and Division in Ancient Literature* (Trends in Classics – Supplementary Volumes, 108), De Gruyter, Berlin, 2021, pp. 1-18.

111 Andrew Erskine, "Unity and Identity: Shaping the Past in the Greek Mediterranean", in Erich S. Gruen (ed.), *Cultural Borrowings and Ethnic Appropriations in Antiquity*, Franz Steiner Verlag, Stuttgart, 2005, pp. 121-136.

112 See the recent contribution by Greg Stanton, *Unity and Disunity in Greek and Christian Thought under the Roman Peace*, Mohr Siebeck, Tübingen, 2021.

113 On this aspect, see most notably H.C. Baldry, *The Unity of Mankind in Greek Thought*, Cambridge University Press, 1965.

such a 'unity' was fully developed as an ideological umbrella.[114] It appears that under Alexander the Great, a notion related to the brotherhood of all men was born.[115] The problem, of course, was that to some extent this unity was the result of a political and cultural manipulation, aimed at centralising control and imposing an internal coherence at the cost of annihilating differences.

The emergence of the idea of 'unity of mankind' has, in other words, always faced the challenge of its manipulation. When we discuss the idea of 'unity' as a legally-protected interest, it is therefore necessary to clarify that we refer to the recognition of a universal human nature and not to an argument for oppression or tool of conformity, as frequently used in nation states. Simply put, national governments invoke 'unity' for domestic purposes within their state, while this book is concerned with the relationship between states when it discusses 'unity'. 'Unity' responds to the acknowledgment of large collectivities as a way of overcoming war and confrontation through the perception of others as equals. It is an idea that may help to give greater effect to the fundamental UN Charter value of 'international peace and security' which we discussed above.

The ancient Greek and Roman philosophers were well aware of the idea of commonality. When they discussed the idea of '*kosmos*' ('κόσμος') or '*orbis*' or '*mundus*', respectively, they pointed to the common nature involving all those who share the same living world. The Greeks, for example, coined the idea of the '*oikoumene*' ('οἰκουμένη', literally, a past participle related to a verb linked to the idea of the house, '*oikos*', 'that which is inhabited') to refer to the whole habitable space. The idea of 'unity' and '*kosmos*' gave rise to the consciousness of belonging to a community well beyond the limits of a specific city-state. Contrary to the famous Aristotelian idea that a man is a '*zoon politikon*' – 'ζῶον πολιτικόν', an animal that is social by nature and whose identity can only be found in the civic dimension of a '*polis*' – the Stoics developed the idea of cosmopoli-

[114] Rolf Strootman, "Hellenistic Imperialism and the Ideal of World Unity", in Claudia Rapp and H.A. Drake (eds.), *The City in the Classical and Post-Classical World. Changing Contexts of Power and Identity*, Cambridge University Press, 2014, pp. 38-61, on p. 54.

[115] This was the main thesis of the famous speech by William Woodthorpe Tarn, *Alexander the Great and the Unity of Mankind* (The Raleigh Lecture on History, British Academy, 1933), Humphrey Milford, London, 1933. His idea that Alexander was the father of the concept of the unity of all human beings was mainstream in ancient history until the harsh criticism launched against his argument by Ernst Badian, "Alexander the Great and the Unity of Mankind", in *Historia,* 1958, vol. 7, pp. 425-444.

tanism (literally, the fact of being a citizen of the '*kosmos*', of the world) in order to promote the identification of close connections between all people.[116]

In Hellenistic Greece and the Roman empire, the appearance of the cosmopolitan ideal was clearly reflected in a historical context in which growing connections among peoples paved the way to some visions of the world as a complex network, already identified by some others as a primitive globalization.[117] An interesting element of the cosmopolitan character of Hellenistic times is that it did not dissolve the presence of the individual or the importance of personal experiences. This is relevant to those who consider that cosmopolitanism tends to erase the particular features of singular involvements. Quite on the contrary, even in ancient times there were constant tensions between the private and the public, or between the local and the global, which was part of a larger identity crisis in times of radical structural changes in society.[118] If we follow the figure of Diogenes, the founding father of the Cynic school, a person can choose to be a citizen not only of his '*polis*', but at the same time of the whole world.[119] Ratzinger writes that this provided early Christianity "with some decisive points of departure".[120] Roman Stoics, such as Marcus Aurelius, shared the idea –

[116] Malcolm Schofield, *The Stoic Idea of the City*, Cambridge University Press, 1991; Eric Brown, "Hellenistic Cosmopolitanism", in Marie Louise Gill and Pierre Pellegrin (eds.), *A Companion to Ancient Philosophy*, Blackwell, Oxford, 2006, pp. 549–558; Katja Maria Vogt, *Law, Reason, and the Cosmic City: Political Philosophy in the Early Stoa*, Oxford University Press, 2008. A basic understanding of cosmopolitanism, reflecting the concept's ancient Greek etymology, is provided by Derek Benjamin Heater, *World Citizenship and Government*, Macmillan, London, 1996.

[117] On this debate, see David Inglis and Roland Robertson, "The Global *Animus*", in *Globalizations*, 2004, vol. 1, no. 1, pp. 38-49.

[118] Sheila Ager and Riemer Faber, "Introduction: Belonging and Isolation in the Hellenistic World: Themes and Questions", in Sheila Ager and Riemer Faber (eds.), *Belonging and Isolation in the Hellenistic World*, University of Toronto Press, 2016, pp. 3-16, on p. 3.

[119] Diogenes declared himself an '*a-polis*' (without a city), an '*a-oikos*' (homeless) and a '*kosmopolites*' (a citizen of the universe); see Diogenes Laertius VI.2.63. See Marie-Odile Goulet-Cazé, *A Guide to Greek Thought*, Belknap, Cambridge 2000, p. 329, and John L. Moles, "Cynic Cosmopolitanism", in R. Bracht Branham and Marie-Odile Goulet-Cazé (eds.), *The Cynics: The Cynic Movement in Antiquity and its Legacy*, University of California Press, Berkeley, 1996, pp. 105-120.

[120] Ratzinger describes how "Stoicism had discovered the unity of the being 'man,' the unvarying humanity of man, which exists throughout all times and places. It had discovered that the entire *cosmos* was nothing other than Zeus's immense body and that all of humankind was a single body. But the consequences that were drawn from this were actually quite different. Antisthenes and his disciple Diogenes saw in this the apolitical-individualistic ideal

justified in the context of a multi-cultural and multi-ethnic political entity – that all individuals should be deemed fellow-citizens, since the entire world is like a single city.[121]

Even though in every case the Greek and Roman idea was to treat all persons as quasi-siblings,[122] there are, of course, different traditions that dwell on the philosophical concept of cosmopolitanism.[123] However, in general terms the ancient concept has made its way to contemporary debates in liberal democracies, thanks in part to the work of Martha Nussbaum.[124] According to her, there is a universal humanism which can be

of the world-citizen, who puts himself above the laws of the state or in any event shows them little respect, because what he wants more than anything else is simply to be a 'man.' This stance of inner freedom vis-à-vis the state aimed not at a political but at an ethical revolution, at changing man rather than changing his relationships. There is no doubt that this provided the Christian opposition with some decisive points of departure and helped pave the way for that inner freedom which allowed Christian martyrs to set their faith-filled conviction over against the authority of the state, the internal strength of truth over against the external force of earthly powers", see Joseph Ratzinger (Pope Benedict XVI), *The Unity of the Nations: Vision of the Church Fathers*, translated by Boniface Ramsey, The Catholic University of America Press, Washington, DC, 2015 (1970), pp. 4-5 (footnotes omitted). Ratzinger discusses Origen Adamantius' interpretation of the story of the Tower of Babel (Genesis, 11:1-9), and uses terms such as the "Babylonian division of humanity", "fallen into the prison of national identity", the "falling away of the peoples from the spiritual unity of humankind", and "submitted himself to a national identity and, instead of thinking and living along human lines, thought and lived within the confines of national identity" (pp. 37-50, 67).

121 *Med*. 6.43. See Louise Revell, *Roman Imperialism and Local Identities,* Cambridge University Press, 2009.

122 Anthony A. Long "The Concept of the Cosmopolitan in Greek and Roman Thought", in *Daedalus*, 2008, vol. 137, no. 3, pp. 50-58, on p. 51.

123 David Inglis, "Cosmopolitanism: Roots and Diversities", in Gerard Delanty and Stephen P. Turner (eds*.)*, *Routledge International Handbook of Contemporary Social and Political Theory*, 2nd ed., Routledge, London, 2021, pp. 326-336. Even in Greek philosophy, differences were very noticeable: Stoics, for example, were openly supportive of a quietist cosmopolitanism, whereas Cynical cosmopolitanism seemed to be much more engaged in active social criticism; see Gilbert Leung, "A Critical History of Cosmopolitanism", in *Law, Culture, and the Humanities*, 2009, vol. 5, pp. 370-390. See also David Konstan, "Cosmopolitan Traditions", in Ryan K. Balot (ed.), *A Companion to Greek and Roman Political Thought*, Wiley-Blackwell, Chichester, 2009, pp. 473-484.

124 See, for instance, Martha Craven Nussbaum, "Kant and Stoic Cosmopolitanism", in *Journal of Political Philosophy*, 1997, vol. 5, n. 1, pp. 1-25; and "Patriotism and Cosmopolitanism", in Joshua Cohen (ed.), *For Love of Country? Debating the Limits of Patriotism*, Boston, Beacon Books, 2002, pp. 2–17. More recently, she wrote a monograph on her readings of the topic: Martha Craven Nussbaum, *The Cosmopolitan Tradition: A Noble but Flawed Ideal*, Harvard University Press, Cambridge, 2019.

translated as a positive orientation towards humankind. This is explained by the fact that every person lives and feels some sort of affiliation (that may be political, moral, ethical or of some other kind) with everyone else in the world, regardless of his or her specific membership in a particular group. In other words, cosmopolitanism is founded on the perception that all humans are of equal moral worth. Thus, in other words, a cosmopolitan action can be defined as an ethically-informed agency which is rooted in that idea, on the basis of the existence of universally-acknowledged human rights.[125]

The ancient sources teach us that, far from being a mere abstract notion, cosmopolitanism is translated into a real mode of being and of behaving.[126] Under these considerations, it is not surprising that Stoic cosmopolitanism became influential during the early Christian period, when a new emphasis was placed on the idea of 'unity' in order to justify the teachings of Jesus related to the understanding of human nature through a shared belief.[127] But this idea of world unity is not exclusive to Western thought. In ancient Chinese sources, for example, we find similar thoughts related to a broad concept, '*dàtóng*' (大同), according to which the world is a place in which everyone and everything are united in peace.[128] Similarly, the idea of

[125] See the two essays published in Seyla Benhabib, *Another Cosmopolitanism*, Oxford University Press, 2006, whose ideas are embedded in the perspectives of both Immanuel Kant and Jürgen Habermas. In classical antiquity, the sources of cosmopolitanism were rather related to the principles of natural justice, as discussed by Eric Brown, "The Emergence of Natural Law and the Cosmopolis", in Stephen Salkever (ed.), *The Cambridge Companion to Ancient Greek Political Thought*, Cambridge University Press, 2009, pp. 331-363.

[126] Ulf Hannerz, "Cosmopolitans and Locals in World Culture", in *Theory, Culture and Society*, 1990, vol. 7, no. 2-3, pp. 237-251.

[127] Klaus Göbbels, *Christliche Einheit aus der Sicht des Neuen Testamentes: Ein Beitrag zum ökumenischen Gespräch*, Lebendiges Wort, Augsburg, 1964; Robert Nelson (ed.), *No Man is Alien: Essays on the Unity of Mankind*, Brill, Leiden, 1971; Annemarie C. Mayer, *Sprache der Einheit im Epheserbrief und in der Ökumene* (Wissenschaftliche Untersuchungen zum Neuen Testament: 2. Reihe, Band 150), Mohr Siebeck, Tübingen, 2002. On the Biblical doctrine of 'unity', see also Benjamin Breckinridge Warfield, "On the Antiquity and the Unity of the Human Race", in *The Princeton Theological Review*, 1911, vol. 9, no. 1, pp. 1-25.

[128] On the classical sources for this idea, see Anastasia Blazhkina, "Concept of Great Unity (*datong*) in the Confucian Treatise 'Kong-zi jiayu'", in *Problemy Dalnego Vostoka*, 2021, vol. 4, pp. 177-189. See also Albert H.Y. Chen, *The Concept of 'Datong' in Chinese Philosophy as an Expression of the Idea of the Common Good*, University of Hong Kong Faculty of Law Research Paper No. 2011/020, 2011. In his biography on the Chinese utopian K'ang Yu-Wei, Kung-chuan Hsiao writes that the "fact appears to be that *Ta-t'ung* was a sufficiently appealing concept to attract persons of widely divergent persuasions – and with sufficient ambiguity and flexibility to allow diverse interpretations. Hence it had been used with equal

one world shared by all people finds fruitful expressions in Arab thought.[129]

Once again, the problem arising from the endorsement of cosmopolitanism as the basis for identifying legally-protected interest is that the term has been abused on many occasions. One could think of several instances when various political regimes made use of a 'global order' to endorse expansionism or colonialism. The Macedonian expansion under Alexander[130] or the frequent hypocritical references to unity and equality to strengthen positions of power during the Roman empire[131] may be quoted as examples of such real risks.[132] These challenges, nevertheless, do not necessarily put the notions of cosmopolitanism or 'unity of mankind' at stake. Rather, at-

facility in the T'ai-p'ing rebellion, the Chinese anarchist movement, the revolution led by Sun Yat-sen, and in K'ang's utopian thought, to convey vastly different social ideals". "K'ang's 'one-world' idea" reminds one of "such ancient Chinese conceptions as 'all-under-heaven for all alike' (*t'ien-hsia wei kung*) and 'all-under-heaven as one family' (*t'ien-hsia yu i-chia*), conceptions familiar to K'ang", see Kung-chuan Hsiao, *A Modern China and a New World: K'ang Yu-Wei*, *Reformer and Utopian, 1858-1927*, University of Washington Press, Seattle, 1975, pp. 501, 505, 457 (footnotes omitted). The Chinese philosopher Tingyang Zhao has proposed a theory for the contemporary application of the concept of 'Tianxia' based, *inter alia*, on an ontology of co-existence, relational rationality, and rational risk aversion, see Tingyang Zhao, *Redefining A Philosophy for World Governance*, Palgrave Macmillan, Singapore, 2019, pp. 58-65. Hu Shih, a contemporary of K'ang's, sought to introduce "Ibsenism" to China, giving "special notice to Ibsen's cosmopolitan outlook, quoting from a letter written in 1888, to the effect that intelligent men invariably felt dissatisfied with the 'old conception of the state' and that such conception would surely be replaced by the 'conception of humanity'", see Kung-chuan Hsiao, *op. cit.*, p. 484.

129 Josh Hayes, "Cosmopolitanism in the Medieval Arabic and Islamic World", in Andrew LaZella and Richard A. Lee Jr. (eds.), *The Edinburgh Critical History of Middle Ages and Renaissance Philosophy*, Edinburgh University Press, 2022, pp. 217-233.

130 C.A. Robinson Jr., "Alexander the Great and the Oecumene", in *Hesperia Supplements*, 1949, vol. 8, no. 2, pp. 299-304; Hugh Liebert, "Alexander the Great and the History of Globalization", in *The Review of Politics,* 2011, vol. 73, no. 4, pp. 533-560.

131 Nussbaum, 2019, see *supra* note 124.

132 On these appropriations of the vocabulary of cosmopolitanism for national interests, see Tamara T. Chin, "What Is Imperial Cosmopolitanism? Revisiting *Kosmopolitēs* and *Mundanus*", in Myles Lavan, Richard E. Payne and John Weisweiler (eds.), *Cosmopolitanism and Empire: Universal Rulers, Local Elites, and Cultural Integration in the Ancient Near East and Mediterranean,* Oxford University Press, 2016, pp. 129-152. It should be reminded that the appeal to cosmopolitanism has paid a considerable role in allowing imperial elites to mesh within states defined by internal heterogeneity: these interactions facilitated imperial cohesion through assimilation or subordination; see Myles Lavan, Richard E. Payne and John Weisweiler, "Cosmopolitan Politics: The Assimilation and Subordination of Elite Cultures", in Lavan, Payne and Weisweiler (eds.), 2016, *ibid*., pp. 1-28.

tention should be paid to the motivations behind its mention as well as anticipated advantages of reinforcing a sense of 'unity' between peoples of different states.

This historical and philosophical excursus on aspects of the background of the notion of 'unity' has pointed to the controversial nature of its past use. The question now remains: why, then, should the value or interest of 'unity' be more expressly recognized by international criminal law or international law generally? As we have seen, the reference to 'unity' can be employed as an instrument of imposition, as an efficient tool to guarantee the power of authorities through the deletion of heterogeneity. As a community interest or socio-political condition, 'unity' between nations is easy to break, difficult to recover, and yet essential to human survival. The Preamble of the ICC Statute puts it beautifully: while "all peoples are united by common bonds […] this delicate mosaic may be shattered at any time". Considering this 'unity' between nations may reinforce efforts to give effect to core values in the ICC Statute and the UN Charter, including 'international peace and security'.

Realistically, 'unity' is not just an abstract cosmopolitan or other aspiration, but a sober precondition for the continued existence and prosperity of humankind. Mistrust, hatred and animosity feed disunity, the opposite of 'unity'. Violent communal clashes – be it at local or inter-state levels – poison human rationality and morality. The poisonous effect of identity-based violence is dangerous and long-lasting. A peace agreement may restore peace, but not necessarily 'unity'. Domestic crimes represent exceptional conduct that is suppressed and punished, but it usually does not put into question human or national unity. Core international crimes tend to be committed in a conformist manner along group lines, so they threaten unity between diverse communities. Deliberately creating communal violence, thus harming the hard-achieved and perennially fragile unity across communities, deserves criminal sanction at the international level. 'Unity' should be clearly recognized as a vital – even existential – interest that needs to be protected by existing core international crimes, and carefully considered when new international crimes are developed.

Beyond the Western importance of individual will and consent in liberal societies, there are patterns of communal interaction and cultural pluralist connections that require other mechanisms in order to resolve conflicts. 'Harmony', as a Chinese concept (*he,* 和) that has also some Platonic echoes in the West and which can be related to Roman '*concordia*' (as op-

posed to the hegemonic construction of '*pax*'),[133] becomes a threat to hegemonic governance because it fosters an inclusive, diverse, and caring society.[134]

Here again, a broader approach to these notions may prove to be useful in order to portray their characteristics as potential protected goods. The idea of 'harmony' was enshrined in classical antiquity as a key value to social order. In the Greek world, the concept was known as '*homonoia*' ('ὁμόνοια') and involved not only the avoidance of the evils of civil strife ('stasis', 'στάσις'), but at the same time the safeguarding of national solidarity in the face of any external menace.[135] The idea of '*homonoia*' is etymologically related to the idea of 'like-mindedness',[136] since it is grounded on the notion of union and equality ('*homoios*', 'ὁμοῖος') and rationality ('*nous*', 'νοῦς'). In that sense, it has been appropriately translated into Latin with the word '*concordia*', which similarly refers to the quality of having one heart, '*cors*' ('togetherness of heart'). Both in Greece and Rome the concept would become divinized in a goddess which would become the personification of reconciliation and harmony. In this sense, the notions of '*homonoia*' and '*concordia'* became deeply rooted in religious considerations and sacred principles.[137]

It is not surprising to see that the political interest in '*homonoia*' can be traced back to Hellenistic times as well, especially during the Macedo-

[133] Karl A. Kumpfmüller, "*Concordia* versus *pax*. The impact of Eastern governance for harmony on Western peace concepts", in Julia Tao, Anthony B.L. Cheung, Martin Painter and Chengyang Li (eds.), *Governance for Harmony in Asia and Beyond,* Routledge, London, 2010, pp. 329-347.

[134] Julia Tao, Anthony B.L. Cheung, Martin Painter and Chengyang Li, "Why governance for harmony?", in Tao, Cheung, Painter and Li (eds.), 2010, see *supra* note 133, pp. 3-11. On the ancient Chinese notion of harmony, see also Chenyang Li, "The Confucian Ideal of Harmony", in *Philosophy East and West, 2006, vol. 56, no. 4, pp.* 583-603.

[135] A.R.R. Sheppard, "'Homonoia' in the Greek Cities of The Roman Empire", in *Ancient Society*, 1984-1986, vols. 15/17, pp. 229-252, on p. 229.

[136] In literal terms, "being of one mind together", see Henry M. de Mauriac, "Alexander the Great and the Politics of 'Homonoia'", in *Journal of the History of Ideas*, 1949, vol. 10, no. 1, pp. 104–114, on p. 106.

[137] For this religious background in Roman antiquity, see Emmanuele Curti, "From Concordia to the Quirinal: notes on religion and politics in mid-republican/hellenistic Rome", in Edward Bispham and Christopher Smith (eds.), *Religion in Archaic and Republican Rome and Italy: Evidence and Experience*, Edinburgh University Press, 2000, pp. 77-91.

nian expansion under Alexander the Great,[138] although the nationalist implications of communal concord can already be seen in the sources related to the consolidation of a Greek identity against the domination of the Persians.[139] In Rome, the concept of '*concordia*' appears in the context of civil wars during the early Republic in order to show the need to overcome, through the implementation of solidarity, the consequences of factional dissention.[140] The idea of Concordia, then, would be politically efficient to fight against tyranny, oppression and imposition.[141] Together with '*pax*', '*concordia*' became a key instrument of stabilisation in situations of social turmoil or chaos.[142] This is why, for example, '*concordia*' was also considered a founding principle of Republican Rome,[143] as frequently stated by the orator Cicero.[144]

The idea of human 'harmony' is closely related, in classical sources, to the promotion of social and civic 'friendship'. Already Aristotle, in his *Nicomachean Ethics*, would consider that '*homonoia*' and '*philia*' ('φιλία') had the common purpose of removing the hostility of discord from the city, just as it did eradicate the pain from the soul of each person.[145] According to the philosopher, '*homonoia*' was a political 'friendship' ('*philia politike*', 'φιλία πολιτική'), therefore constituting a crucial value for the integrity of the entire '*polis*'.[146] Under the Stoics as well, '*homonoia*' would be consid-

[138] Sheppard, 1984-1986, see *supra* note 135, p. 230. See also Elias Thermos, "Alexander the Great and the concept of *homonoia*", in *The Greek Review of Social Search*, 1975, vol. 24, pp. 217-227.

[139] Sheppard, 1984-1986, see *supra* note 135, p. 238. For an examination of the uses of the word during the fifth and forth centuries B.C., see Hans Kramer, *Quid valeat Homonoia in litteris Graecis*, Ph.D. dissertation, University of Göttingen, 1915, pp. 14-45; Jacqueline de Romilly, "Vocabulaire et propagande ou les premiers emplois du mot ὁμόνοια", in *Mélanges de linguistique et de philologie grecques offerts á Pierre Chantraine*, Klincksieck, Paris, 1972, pp. 199-2009; Athanasios Moulakis, *Homonoia. Eintracht und Entwicklung eines politischen Bewußtseins*, P. List, Munich, 1973.

[140] John Alexander Lobur, *Consensus, Concordia, and the Formation of Roman Imperial Ideology*, Routledge, London, 2008, p. 40.

[141] *Ibid*., p. 13.

[142] Carlos F. Noreña, *Imperial Ideals in the Roman West: Representation, Circulation, Power*, Cambridge University Press, 2011, p. 132.

[143] Philippe Akar, *Concordia. Un idéal de la classe dirigeante romaine à la fin de la République*, Publications de la Sorbonne, Paris, 2013.

[144] See Mark A. Temelini, *Cicero's Concordia. The Promotion of a Political Concept in the Late Roman Republic*, Ph.D. dissertation in Classics, McGill University, Montreal, 2002.

[145] Arist. *EN* 1166b.

[146] Arist. *EN* 1167b.

ered to share the same basis as 'friendship', in the sense that both notions show a strong commitment to socialisation and civic understanding.[147]

It is visible, thus, that 'concord' and 'harmony', associated with civic 'friendship', were highly estimated in ancient times. These ideas have been recovered by modern authors, who have attempted to make solid relations between 'togetherness' and 'solidarity'.[148] They are accepted interests that have the same end: to foster, by legal and moral means, the collective 'harmony' of a shared citizenship.[149] Promoting global 'unity' through political 'friendship' can endorse the preservation of the integrity of the state, as Aristotle has also noted.[150] It is in the sense that 'harmony', 'friendship' and 'solidarity' could form together a set of complementary values of universal implications, that would allow for the consideration of a collective good that needs to be guaranteed and preserved.

1.5. Community Interests as Aims and Purposes of International Criminal Law: Status and Prospects

As we have seen in the previous sections, the concept of legal interests or goods is not self-substantiating. Rather, it expresses a structure of analysis into which value judgements are filled through the law-making process broadly speaking (including interpretation during application of the law).[151]

On the basis of what has been expressed so far in this chapter, when discussing different candidates for recognition as collective interest by international (criminal) law, an abstract debate on the nature or content of potential legally-protected interests of core international crimes would reveal ambiguity and disagreements. It is not easy to agree and decide on which fundamental values and principles should guide the *de novo* formation and interpretation of such legal interests.

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147 Barbara Caine, *Friendship: A History*, Routledge, London, 2014, pp. 34-35.

148 See, for instance, Hauke Brunkhorst, *Solidarität: Von der Bürgerfreundschaft zur globalen Rechtsgenossenschaft*, Suhrkamp Verlag, Frankfurt am Main, 2002.

149 The link between '*homonoia*' and 'solidarity' could already be identified in Aristotle, see Misung Jang, "Aristotle's Political Friendship (*politike philia*) as Solidarity", in Liesbeth Huppes-Cluysenaer and Nuno M.M.S. Coelho (eds.), *Aristotle on Emotions in Law and Politics* (Law and Philosophy Library, vol. 121), Springer, 2018, pp. 417-433.

150 Arist. *Pol*. 1262b7–8. On the projection of Aristotle's considerations on political 'friendship' to modern liberal democracies, see Murray Faure, "The lure of political friendship: aspects of Aristotle's *philia politike* in the search for a civic *vinculum*", in *Acta Academica*, 2010, vol. 42, n. 4, pp. 1-41, on p. 36.

151 See, for example, Ambos, 2015, see *supra* note 51, p. 306.

While in the domestic context, the guiding principles usually aim to constrain criminalization in order to protect individual freedom or protect society, it is more complex in the international community. For international criminal law, the balancing needs to take into account factors such as community and other interests, mechanisms of enforcement, individual accountability and structural bias.[152] Guidance on the formation of legal interests for protection by international criminal law is also relevant to justifications of international criminal law as an enforcement mechanism. That is to say, such guidance concerns both criminalization and punishment theories.[153]

This anthology dwells in particular on 'reconciliation', 'solidarity' and 'unity' as fundamental values that should find a greater measure of recognition in international criminal law. Justice David Baragwanath argues in Chapter 5 that 'reconciliation' should be a foundational principle that guides the criminalization and application of international criminal law.[154] It is intimately related to the interest of 'solidarity', as elaborated by Ioanna Anastasopoulou in Chapter 4.[155] Baragwanath explains that 'recon-

[152] See, for example, Antony Anghie and B.S. Chimni, "Third World Approaches to International Law and Individual Responsibility in Internal Conflict", in *Chinese Journal of International Law*, 2003, vol. 2, no. 1, p. 91: "a legal approach that addresses the conditions under which these broad societal conflicts take place may prove more effective in quelling violence against civilians over the long term than a regime of individual accountability alone enforced through national and international courts". In particular, both Anghie and Chimni link ethnic conflicts to the North-South socio-economic divide.

[153] More on punishment theory, see, for example, Aukerman, 2002; Osiel, 2000, both in *supra* note 40.

[154] According to Baragwanath, the application of the principle of 'Reconciliation' has "four distinct yet closely related themes: stating a general principle; giving guidance in its application in particular cases; applying the principle; and evaluating the practice against the principle". A policy of 'Reconciliation' is a principled and practical way to guide the development of international criminal law.

[155] Ioanna Anastasopoulou combines legal goods analysis of international criminal law with the particular German theory of *Rechtsgüter*. She maps the main issues in the debate on the theory of *Rechtsgüter* and responds to criticisms. She thinks it is the collective legal goods protected by international crimes that distinguish them from ordinary crimes. For international crimes, there is a collective element both in the perpetrators and victims in that they represent a collective political and cultural confrontation. This makes it difficult for the party involved, which is often the state, to punish the crimes. As such, it breaches what Anastasopoulou calls the collective legal good of 'global solidarity'. 'Global solidarity' is used instead of 'humanity', 'mankind', or 'human dignity' because it expresses real and concrete human, group and state relations, not merely abstract virtues. This means the breach of accepted minimal standards in a certain manner incurs the interest of 'global solidarity', and

ciliation' is often-times marginalised or even viewed as being in tension with prosecution of international crimes. To integrate the notion of 'reconciliation' more fully in international criminal justice would require a certain evolution of mindset.

'Unity' is discussed from a variety of diverse perspectives in Chapters 6 through 9 below.[156] 'Unity' is proposed not only as an interest to be

consequently the intervention of international criminal law. She calls for further elaboration of the collective good of 'global solidarity' which acknowledges our multiple interdependencies and the awareness of our common destiny.

[156] In Chapter 6, Salim A. Nakhjavani and Melody Mirzaagha explore the concept of 'unity' as a legally protected interest and as a foundational value. They examine scholarship and legal practice which support the recognition of 'unity' as a foundational value in international criminal law. They define 'unity' as "the capacity to pursue common goals in a purposeful and co-ordinated manner within a common framework". 'Unity' according to the authors is a relational or societal qualitative value, that is linked to the quality of the relationship between communities, thus completing 'humanity' which characterises individual conduct. The authors propose 'unity' as an interest protected by the crime of aggression. They also argue that the concept of 'unity' could shape the development of future law – such as a potential Convention on Crimes against Humanity.

In Chapter 7, Kafayat Motilewa Quadri, Vahyala Kwaga and Tosin Osasona from Nigeria introduce neo-communitarian thinking to the concept of 'unity'. They discuss communitarian thoughts of African philosophers such as Menkiti and Mbiti, who believe that the community is more important than the life of an individual. The authors seek to modify traditional communitarian theories by embracing differences among members, forming a new concept which they call "neo-communitarianism". Neo-communitarianism means that the community should be an embodiment of all persons, not to exclude certain groups. It seeks to resolve the African-Asian and Western divide on individualism and communitarianism. Rooted in neo-communitarianism, 'unity' means peaceful, harmonious relations among persons and communities. As mass atrocities not only harm individuals but also peaceful relations within and between communities, it is important to recognize the collective legal interest of 'unity'.

Surabhi Sharma's Chapter 8 explores the concept of 'unity' from the perspective of Indian Hindu thought. Sharma argues that like 'humanity', 'unity' should be recognized as a foundational legal interest in international criminal law. Sharma finds passages from the Upanishads and the Bhagavad Gita which hold 'humanity' and 'unity' as central values. These two values are different in that 'humanity' concerns a person's conduct towards others, while 'unity' emphasises the close relation among people. This points to the communal dimension in the concept of 'unity'. This collective perspective prompts Sharma to highlight the value of reuniting a society from within and promoting 'unity' among nation States. Sharma also makes suggestions for the role of 'unity' in legal practice and policy.

In the final Chapter 9, Rod Rastan discusses 'unity' as a fundamental value underpinning the project of international criminal justice. According to Rastan, notions of 'unity' can serve as rationales for the creation and operation of the International Criminal Court. Such notions of 'unity' include oneness of humanity, global social order, and consistent application of the law. Rastan emphasises the "at once explanatory, aspirational and transformative" powers of

accorded a greater measure of attention, but also as a foundational value that should, among others, guide the future development of international criminal law. The project of international criminal law should aim to promote 'unity of humankind' longer-term, and not to polarise collectives, especially when they are embedded in conflict. The authors think that the movement of international criminal law, in its focus on inter-communal conflicts, should look beyond individuals and also consider communal relations in its operation. If those acting on the basis of international criminal law ignore a basic feature or root cause of the conflict, its introduction can even be counter-productive in the short term or lose its relevancy over time.

International (criminal) lawyers cannot be blind to the value of 'unity of humankind'. It is not a value without recognition by international law. As explained above, it is contained in the first paragraph of the Preamble of the Statute of the International Criminal Court, which makes clear that States Parties are "[c]onscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time".[157] In their commentary on the Preamble, Ambos, Bergsmo and Triffterer observe that the "references to 'common bonds' and 'shared heritage' – which resonate in different cultures around the world – recognise that humankind is essentially one", despite various divides and considerations, and that the "enforcement of ICL through an international jurisdiction has the potential to contribute to the further unification of humankind by bringing peace through justice".[158] The preamble to a treaty "does not and should not have direct operative force", but "has effect as indicating the general purposes and spirit of the treaty, in the light of which the interpretation to be given to particular provisions may be considered"[159] – so "a preamble does have legal force and effect

social norms over social reality. Problems of international criminal justice reflect different conceptions of the international society and the values it seeks to uphold. The fundamental value of 'unity' should be consciously upheld by individuals and institutions practicing international criminal justice.

157 Preamble, Statute of the International Criminal Court, 17 July 1998 (https://www.legal-tools.org/doc/7b9af9/).

158 Ambos, Bergsmo and Triffterer, 2022, see *supra* note 51, p. 7.

159 Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Volume 1, Grotius Publications Ltd., Cambridge, 1986, p. 51 (based on a text published in *British Yearbook of International Law*, 1951, vol. 28, pp. 1-28). See also Leena Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court*, Cambridge University Press, 2014, p. 53.

from the *interpretative* standpoint".[160] Indeed, one element of the general rule of treaty interpretation provides that the ordinary meaning of a term is determined in light of the object and purpose of the treaty,[161] so judges in international courts often include "a reference to the purpose of the treaty".[162] "Especially with a treaty of a constitutional character", Oppenheim's observes, "it will often be appropriate to lay particular emphasis on the object and purpose of the treaty when interpreting its provisions".[163] The doctrine of effectiveness is also "relative to the object and purpose of the treaty".[164]

This level of recognition of 'unity of humankind' by international criminal law – as an overarching preambular value – may be adequate for some readers. As it stands, judges in international jurisdictions,[165] members of the UN International Law Commission,[166] international civil servants,[167]

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[160] *Ibid*., p. 66, where Fitzmaurice also refers to the Asylum case (ICJ, *'Asylum Case' (Colombia v. Peru)*, Judgment, 20 November 1950, ICJ Reports 1950 p. 282 (https://www.legal-tools.org/doc/cb94fc/)).

[161] Article 31(1), Vienna Convention on the Law of Treaties, 23 May 1969 (https://www.legal-tools.org/doc/6bfcd4/).

[162] Besson, 2018, see *supra* note 13, p. 63 (mentioning examples of relevant separate opinions of ICJ judges).

[163] Robert Jennings and Arthur Watts (eds.), *Oppenheim's International Law*, Volume I: Peace, Parts 2 to 4, 9th ed., Longman, Harlow, 1992, p. 1273. The text continues on the same page: "Such a teleological interpretation of a treaty may tend to by-pass any inquiry into the particular intentions of the parties when adopting a particular provision, by attributing to them simply the more general intention to secure the object and purpose of the treaty as effectively as possible in the light of circumstances as they develop over time".

[164] *Ibid*., p. 1281.

[165] Benvenisti has a positive view of the role of international judges in affirming community interests: "if properly insulated from partisan pressures or biases, and amply informed, international adjudicators are institutionally inclined and relatively well positioned to promote community interests, and therefore to act as trustees of humanity", see Eyal Benvenisti, "Community Interests in International Adjudication", in Benvenisti and Nolte (eds.), 2018, see *supra* note 8, p. 71 (observing further: "Being in such a privileged position to develop and stabilize global expectations imposes a heavy moral responsibility upon international adjudicators" (*ibid*.); "international courts are inherently attuned to take community interests into account and promote community interests where states fail" (p. 72)). Voigt discusses the "craftsmanship of concerned and serious judges" and how "[j]udges and arbitrators can – under certain circumstances – better defend long-term, common and global interests against the short-sighted sovereign interests often pursued by states in treaty negotiations", see Voigt, 2014, see *supra* note 57, p. 25.

[166] While Nolte recognizes that the Commission, "[s]ince its inception, […] has articulated community interests and formulated corresponding primary community obligations", it is "doing so in a way which reassures states that the traditional inter-state paradigm remains

diplomats, authors and civil society actors can already refer to the value as recognized by the Preamble to the ICC Statute. It can and should by this time be included as a relevant factor in the "decision-making processes"[168] of ICC States Parties, also when they are acting in the context of, for example, the UN Security Council. It is indeed among the interests that should 'influence' States Parties,[169] for whom the concern for 'unity' becomes integral to their sovereignty and state consent when accepting the ICC Statute.[170] Chapters in this book may gently encourage such a practice of affirmation to emerge in criminal justice for core international crimes and more widely.

Other readers may prefer to see further, reinforced expressions of the value of 'unity of humankind' in future declarations or treaties, insofar as it is perceived as "an infant concept [that] needs to be fostered and devel-

untouched", see Georg Nolte, "The International Law Commission and Community Interests", in Benvenisti and Nolte (eds.), 2018, see *supra* note 8, pp. 110, 116. By examining the Commission's failure to use the term "common concern of humankind" in its work on 'Protection of the Atmosphere' – only to be included "a few months later in the Paris Agreement on Climate Change to normatively articulate the most important collective interest at stake" – Nolte maintains that the Commission "is not necessarily 'ahead of' states, leading the way toward the recognition of more community interests and obligations" (footnote omitted) (pp. 113-115). He notes that the concepts 'common heritage' and 'common concern of humankind' used elsewhere have inspired "the international legal community, including the academic community" (p. 114). Quite apart from what the Commission does or fails to do, the present authors underline the importance of the language used by individual members in their Commission capacity.

167 Although Klabbers suggests that "it is no longer plausible to consider international organizations as embodying the community interest", he points out that they help "to shape the perception that something is, or is not, a community interest" as they "benefit from the circumstance that they are the *agorae* of the global community: The UN General Assembly in particular is the 'town meeting' of the world in a relevant, nonpejorative sense"; they "can contribute to the community interest in that they help to formulate how the community interest should be understood", see Jan Klabbers, "What Role for International Organizations in the Promotion of Community Interests? Reflections on the Ideology of Functionalism", in Benvenisti and Nolte (eds.), 2018, see *supra* note 8, pp. 89, 92, 93, 94. High officials of international organizations are often influential in legal discourse, sometimes recognized publicists.

168 Benvenisti and Nolte, 2018, see *supra* note 100, p. 7.

169 Wolfrum refers to how community interests can 'govern' or 'influence' the management of particular issues, see Rüdiger Wolfrum, "Identifying Community Interests in International Law", in Benvenisti and Nolte (eds.), 2018, see *supra* note 8, p. 19.

170 We are in other words not dealing with a situation of "top-down identification" of a new community interest without basis in existing treaty law, with its associated "risks of inequality, parochialism, and hegemony" which Besson mentions, see Besson, 2018, see *supra* note 14, p. 48.

oped".[171] Several authors in subsequent chapters mention the preamble of the draft convention on crimes against humanity in this connection. Yet more ambitious readers may wish to explore how the value of 'unity of humankind' relates to existing or future international crimes – how it may be constructed as a legally-protected interest in the narrower sense of international proscriptions.

Broadening the range of interests or values that are recognized by international criminal law is not just a task of governments, but all stakeholders in international law-making, including civil society and individuals. "A community interest is not something which exists objectively", writes Judge Nolte, "but needs to be socially established (constructed, recognized)".[172] As we have seen, such broadening is not only about introducing new international criminal *prohibitions*, however important such initiatives may be. It is also about highlighting dormant recognition of interests in existing treaties, preambles and declarations, and about proposals to add to such indirect acknowledgment of fundamental interests and values, including in language used in judgments and by eminent publicists.[173] Such language can express global common concerns, stabilise normative expectations, and "be used as effective advocacy tools by both state and non-state actors".[174] "[C]ommon interests are those that are backed by a communal legal spirit – the opinio iuris communis."[175]

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[171] To borrow Weeramantry's words about sustainable development, see C.G. Weeramantry and M.C. Cordonier Segger (eds.), *Sustainable Justice: Reconciling Economic, Social and Environmental Law*, Martinus Nijhoff, Leiden, 2005, p. 445.

[172] Nolte, 2018, see *supra* note 166, p. 103 ("The establishment of a community interest in international law usually begins with a claim by a certain actor which then becomes politically more widely accepted, by persuasion or by different forms of pressure. The process by which a community interest is established is usually fed by many informal (political or other) impulses whose legal relevance is determined by secondary rules of international law.").

[173] Nolte highlights the potential role of experts as catalysts: "Epistemic and expert communities may be able to successfully articulate and promote a community interest (as well as defend realms for the pursuit of self-interest), in particular under the benign acquiescence of formal institutions, but their competence may ultimately not go far beyond that of a catalyst", see Nolte, 2018, see *supra* note 166, p. 117.

[174] Benedek, De Feyter, Kettemann and Voigt, 2014, see *supra* note 18, pp. 223-224.

[175] *Ibid*., p. 220. Zyberi elaborates: the "formulation of international law itself constitutes a much wider process than the formulation and acknowledgment of its 'formal sources', seeking the legitimacy of international norms through the expression of the *opinio juris communis* (going well beyond the subjective element of custom), as well as the fulfilment of the public interest and the realization of the common good of the international community as a whole", see Gentian Zyberi, "The Protection of Community Interests in International Law:

Baragwanath describes in his Chapter 5 below how the making of international criminal law has traditionally been reactive.[176] It should probably become more proactive. We favour increased awareness of the potential dynamics of what we may call a '*Völkerstrafrechtspolitik*' broadly understood, with its promise of stimulating higher quality of initiatives (made possible by active reflection over years, sometimes decades) and broadening participation in international law-making beyond foreign ministries (to include other areas of domestic governance and professional expertise) and Western states that have tended to dominate international law-making, as discussed above. This is not about a naïve "ideology of legal cosmopolitanism",[177] but rather about the overdue need to hear what younger actors from populous countries such as China, India, Indonesia and Nigeria think the next generation of international criminal law-making should consider. Neither does it reflect a naïveté concerning the privileged role of *states* in the making and interpretation of international law. It is about the fact that humankind can do considerably better in serving the interests of the collective,[178] and that it can do so while being ever vigilant that actor-driven initiatives actually serve the global interest.[179] Governments – whether democratically elected or not – can ill afford to be seen as standing in the way of humankind's most basic aspirations to eat, drink water, breathe clean air

Some Reflections on Potential Research Agendas", in Zyberi (ed.), 2021, see *supra* note 15, p. 310.

176 David Baragwanath, "'Reconciliation' as a Philosophical Foundational Concept in International Criminal Law", Chapter 5 below.

177 Koskenniemi describes "the ideology of legal cosmopolitanism": "Throughout the twentieth century, international lawyers have put forward reform plans the central idea of which has been to bring institutions and practices familiar from domestic Western societies to the international level. The more recent pull towards an international 'rule of law' captures some of this idea", see Koskenniemi, 2017, see *supra* note 62, p. 1372.

178 Nolte discusses the movement of international lawyers for whom "classical international organizations and other traditional forms of international lawmaking are too slow, too inflexible, and they do not reach the necessary degree of orientation and substantive problem-solving capacity", see Nolte, 2018, see *supra* note 166, p. 106.

179 See the warning of Wolfgang Benedek, Koen De Feyter, Matthias C. Kettemann and Christina Voigt, "Introduction", in Benedek, De Feyter, Kettemann and Voigt (eds.), 2014, see *supra* note 8, p. 7. They acknowledge, however, that the "increasing participation of non-state actors in this process corresponds to the development from a community of states to a proper international community, which increasingly pursues common aims as a matter of common interest", see their concluding chapter in the same anthology, "Conclusions: The Common Interest in International Law – Perspectives for an Undervalued Concept", see *supra* note 18, p. 226.

and not suffer unintelligent wars,[180] unless they wish to see further mass-disenchantment and growing indifference. The list of aggravated harms people suffer on the watch of nation-state governments has grown precariously long and is probably yet to be called out by persuasive, less beholden voices.

Actors who seek to engage in prospective analysis should endeavour to understand existing legally-protected interests in international criminal law as well as closely related interests in domestic criminal jurisdictions. A functioning '*Völkerstrafrechtspolitik*' would be nourished by a strong commitment to justice and open minds capable of exploring and assessing how societies advance. This may become one of the significant challenges ahead for new generations of international criminal lawyers: to think out of the realm of existing positive legal instruments, and dive into more substantial consideration of the reasons behind the architecture of global justice. Younger specialists willing to serve the field should be able to perceive the dynamics of social interests, as universal interests are not static. Eyes should be open to see how values are enlarged, deepened and questioned, including how power is wielded in such processes. Recent exchanges on international criminalization of environmental harm represent an important aspect of this evolving landscape, including proposals on the notion of ecocide.[181] Given how arduous and long the process to raise spe-

[180] Ryngaert illustrates the impatience that may be building up. With reference to environmental challenges such as those alluded to, he proposes "a paradigm shift" whereby states can "act unilaterally to protect global values", arguing that such "authorization is needed for the proper enforcement of international law, as well as to tackle pressing global governance challenges"; a "state's sovereignty is relative: it comes with cosmopolitan responsibilities and objectives. When these objectives are not properly fulfilled, other states or actors may assume their own responsibility by exercising unilateral jurisdiction in the global interest", see Ryngaert, 2018, see *supra* note 8, pp. 145-146. Nolte describes a growing vision of international law whereby "informal channels" become more important, and "other actors (nongovernmental organizations (NGOs), transnational corporations, epistemic communities) would play an increased role and emancipate themselves (somewhat) from states, in particular by convening informally and solving their problems informally", see Nolte, 2018, see *supra* note 166, p. 105.

[181] For an overview of the discussion on ecocide, including numerous challenges, see Daryl Robinson, "Ecocide – Puzzles and Possibilities", in *Journal of International Criminal Justice*, 2022, vol. 20, pp. 313–347. Voigt, a significant contributor on international environment law the past two decades who participated in drafting one of the ecocide proposals discussed by Robinson, emphasizes the gravity of the environmental threats and says that sustainable development is "*the* common interest in the 21st century and beyond". She observed back in 2014: "The climate, the ozone layer, the oceans, biodiversity, indeed the entire physical world form an interdependent ecological system, much of which can only be

cific proposals is, practicing baptism by fire may not be required to ensure quality-control.

The authors of this volume have chosen to focus on the foundational values of 'unity' and 'reconciliation', suggesting that it is overdue to give them greater importance also in the international criminal law project. We are not pretending to be exhaustive, but rather hope that the present chapters – as well as the growing emphasis on harm to the 'environment' – will inspire younger generations of international criminal lawyers to conduct analyses on other goods that may be relevant candidates for protection by the international criminal law of tomorrow. They may be guided by the same recognition of the importance of addressing the historical, philosophical and theoretical dimensions of the abstract standards, ideas and beliefs which concern fundamental values to be recognized by international criminal law. They may also take into account two additional considerations that have informed our work with this volume.

Firstly, values discussed for prospective protection of international criminal law should be conceived as being part of more general perceptions of universal goods that all people cherish, and which are interdependent. As Richard Bauman has pointed out when discussing the Latin concept of '*humanitas*', the most important values that structure societies operate together. Among the Romans, for example, over the ideas of 'humanity', 'harmony', 'solidarity', 'peace', 'friendship' and other related positive concepts, we gauge an umbrella under which several moral, religious and legal considerations are grouped, including '*clementia*', '*aequitas*', '*lenitas*', '*mansuetudo*', '*moderatio*, '*indulgentia*', '*iustitia*', '*fides*' and '*pietas*', to mention some central examples mentioned by Bauman.[182] Values to be protected by international criminal law do not walk alone.

Secondly, our research has shown that only through a perspective committed to an inclusive understanding of humankind and its common interests is it possible to overcome the state-centric dimension of international justice, especially the claim that international criminal law can only be understood provided we accept – in realist terms – that states are concerned only with their own national interests.[183] A study of common values

protected at the global level, making it a common concern of all humanity", see Voigt, 2014, see *supra* note 57, pp. 27, 19.

182 Bauman, 2000, see *supra* note 68, p. 6.

183 Ryngaert, 2015, see *supra* note 8, pp. 9-18.

can shed light on this view when examining jurisdictional claims: the political notions of legitimacy, democracy and public participation, based upon well-grounded positive interests that are globally shared and accepted, can justify going beyond the unilateral limits of state borders and endorsing a non-territorial, community-based concept of jurisdiction.[184] International criminal law is therefore not limited to being a way of shadowing the national authority of states, but rather an efficient instrument to translate, in valid terms, genuine expectations of the global civil community. Far from the vertical imposition of the administration of justice, we have been able to pinpoint the great importance of acknowledging that international criminal law should be built upon an inter-subjectively shared normativity,[185] but not as a community of hypocrisy.[186] As we go forward, the interests of humankind as a whole – not just the international community or the community of nations or states – should be kept in focus when we consider values to be recognized by international criminal law.

The way we talk about these things is important. Do we describe degradation of the atmosphere or oceans or spread of serious viral disease as 'shared challenges', 'cross-border challenges' or 'transnational challenges'? Each of these terms preserves the nation-state as the yardstick, while the challenges or threats cannot be resolved by any one national government or state. They are perhaps better referred to as 'global challenges' or 'shared global challenges', but the word 'global' often comes with associations of economic globalization and transfer of manufacturing jobs to locations with lower labour costs. These types of challenges may therefore more accurately be understood as 'common challenges of humankind', for reasons captured by Anne-Marie Slaughter: "Successfully addressing shared global challenges requires a planetary perspective, one focused on all human beings, regardless of the countries they live in, and their rela-

[184] *Ibid*., pp. 20, 77.

[185] *Ibid*., p. 146.

[186] Koskenniemi warns that "even a wonderful-sounding principle such as 'there shall be no more war' fails as a symbolic or community-affirming declaration; it can be accepted only with a mental reservation. And that reservation (hypocrisy) destroys its symbolic value. Instead of bringing the community together in a mutual ethos of non-violence, the community is joined by its shared acceptance that its words need not correspond to its deeds. Each member agrees to an ethics of peace while holding a dagger behind one's back. There are, of course, many such communities", see Koskenniemi, 2017, see *supra* note 62, p. 1364.

tionships to one another and to the planet".[187] Climate change and the Covid-19 pandemic represent threats to all humankind, not just to nation-states.[188] Recognizing *humankind* as the primary bearer of certain risks or harms[189] – far from a radical proposition[190] – adds sheer realism to the discourse. It may also encourage new perspectives and voices, even on the further evolution of principles of interpretation.[191] Indeed, Vattel – whose

[187] Anne-Marie Slaughter, "America must be serious about cross-border challenges", in *Financial Times*, 20 October 2022. She commends the 2022 United States National Security Strategy for "insist[ing] issues like climate change are as important as geopolitical threats", but argues that "a shift in money, *mindset* and metrics must follow suit" (italics added), see National Security Strategy, The White House, United States of America, October 2022 (https://www.legal-tools.org/doc/ujmc6y/).

[188] Slaughter criticizes national governments for not speaking about common challenges of humankind in adequate terms: "It is hard to avoid the conclusion that the administration's focus on shared transnational challenges is less about meeting and defeating them than about *leading the global response to them*", Slaughter, 20 October 2022, see *supra* note 187 (italics added).

[189] Simma points to "the evolution of international law from the State-centred system […] towards one that is more focused on, and accounts better for, the interests of peoples or humanity as a whole", see Bruno Simma, "Preface", in Zyberi (ed.), 2018, see *supra* note 15, p. l.

[190] Nolte even feels a need to point out that "community interests have never only been those of humanity as a whole", see Nolte, 2018, see *supra* note 166, p. 101 ("The protection against pirates on the high seas, or the protection against deleterious effects of climate change, lies in the self-interest of every single state, as well as in the self-interest of all individuals.").

[191] Oppenheim's considerable list of supplementary means of interpretation – which we approach cognizant of Schwarzenberg's warning that "[e]ach of the various techniques of interpretation is a valuable servant, but a dangerous master" (Georg Schwarzenberger, *International Law*, Volume 1, 3rd ed., Stevens & Sons Ltd., London, 1957, p. 532) – even includes a principle that had *not* made it into the Vienna Convention on the Law of Treaties: *in dubio mitius*, "in deference to the sovereignty of states", whereby that meaning is to be preferred "which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties" (Jennings and Watts (eds.), 1992, see *supra* note 163, p. 1278). Whereas an author such as Schwarzenberg expresses doubt whether it amounts to a general principle of law, and argues that it would automatically reinforce "the presumption against limitations of the independence of States" (*op. cit.*, p. 492) – and Brownlie says it is "question-begging" as a general principle of interpretation (Ian Brownlie, *Principles of Public International Law*, 7th ed., Oxford University Press, 2008, p. 635) – the Appellate Body of the World Trade Organization ('WTO') nevertheless invoked the principle in the *Hormones* case (WTO, *European Communities – Measures Concerning Meat and Meat Products – Report of the Appellate Body*, 16 January 1998, WT/DS26/AB/R, para. 165 (https://www.legal-tools.org/doc/zoy8jp/)). Support subsequently lent to this approach (Johannes Hendrik Fahner, "*In Dubio Mitius*: Advancing Clarity and Modesty in Treaty Interpretation", in *European Journal of International Law*, 2021, vol. 32, no. 3, pp. 835–861) illustrates that there may now be room for some further thinking on approaches to interpretation. Cognizant of Lauterpacht's cau-

writings on treaty interpretation Lauterpacht found "the most detailed discussion of the subject by any author of a general treatise"[192] – argued that we should be "giving the utmost extent to obligations that tend to the *common advantage of mankind*".[193] Jessup referred to "the general world interest" and "the interests of the world community";[194] Benvenisti and Nolte, to "the human community";[195] Wolfrum, to "the interest of the world community", "the interests of humankind", and to "mankind as a whole";[196]

tion that rules of interpretation "are not the determining cause of judicial decision, but the form in which the judge cloaks a result arrived at by other means" (Hersch Lauterpacht, "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties", in *British Year Book of International Law*, 1949, vol. 26, p. 53), perhaps the time has come to re-examine the basis of a principle of *in dubio humanitas*, as concerns for threats to the survival of mankind grow?

192 Hersch H. Lauterpacht, *ibid.*, p. 48. He observed: "It is doubtful whether any party to a dispute involving the interpretation of a treaty can fail to derive some advantage from the rich choice of weapons in Vattel's armoury of rules of interpretation" (*ibid*.).

193 Emer de Vattel, *The Law of Nations*, Liberty Fund, Indianapolis, 2008 (1758), Book II, Chapter XVII: Of the Interpretation of Treaties, §302, p. 435 (italics added). In contrast, he equates harm with that which "is, in its own nature, rather injurious than useful to mankind" (*ibid*.). Elsewhere he asks provocatively, as were he a contemporary: "Is it in the power of men, on dividing themselves into different political bodies, to break the ties of that universal society which nature has established amongst them?" (*ibid*., §12, p. 267). Voigt distinguishes between "human societies" and "human-made collectives, one of them being collectives of states" (see Voigt, 2014, see *supra* note 57, p. 12). For a stimulating discussion on the use of the term 'mankind' in the 1700s when Vattel wrote *The Law of Nations*, see, Jens Bartelson, *Visions of World Community*, Cambridge University Press, 2009, pp. 117 ff. Vattel's influence in the United States was considerable already in the late 1700s (see Cornelius F. Murphy, Jr., *The Search for World Order*, Martinus Nijhoff Publishers, Dordrecht, 1985, pp. 55 ff.). More than a century earlier, Suárez had written: "Mankind, though divided into numerous nations and states, constitutes a political and moral unity bound up by charity and compassion; wherefore, though every republic or monarchy seems to be autonomous and self-sufficing, yet none of them is, but each of them needs the support and brotherhood of others, both in a material and a moral sense. Therefore they also need some common law organizing their conduct in this kind of society.", see Francisco Suárez, *Tractatus de legibus, ac Deo legislatore*, 1612, Book II, Chapter 19, § 5. If it were to be true that "whoever invokes humanity, wants to cheat", as the frequently-quoted Nazi lawyer Schmitt asserted (Carl Schmitt, *The Concept of the Political*, University of Chicago Press, 2007, p. 54), it would seem to be a very old pastime indeed.

194 Philip C. Jessup, *A Modern Law of Nations*, 1968, pp. 105-106.

195 Benvenisti and Nolte, 2018, see *supra* note 100, p. 3.

196 Wolfrum, 2018, see *supra* note 169, pp. 20, 26, 28 ("the common heritage principle introduces a revolutionary new positive element into the law of the sea by indicating that the control and management of the deep seabed is vested in mankind as a whole"; "[…] states parties are meant to act as a kind of trustee on behalf of mankind as a whole."; and "The term

Voigt, to "obligations owed to an international community of states – and ultimately of all humankind".[197] Vattel's "obligations that tend to the common advantage of mankind" resonate in late Judge Cançado Trindade's work to recognize humankind as a subject of international law.[198]

New generations should be able to endorse the fundamental values on which international criminal prohibitions are based. These legally-protected values or interests define the nature of the international criminal law order – they reflect what Cannizzaro and others call the "legal conscience of the international community".[199] Through goodwill and accord, civil society can engage with various viewpoints and agendas in order to promote a reconnection of institutions that would benefit international criminal law and its unique features.

This is essentially an exercise of imagination that, in a recent volume, Gerry Simpson promotes among younger specialists in international law: in order to realise our aspirations and to channel our ever-existing longing for a decent international legal order, we should be ready to engage in original ways.[200] Only by means of innovative thinking, by recovering the human nature behind the very idea of international law, can we expect to materialise our expectations for peace, justice and human survival. Anderson has inspired discourses on 'imagined communities' for several decades;[201] Al-

'mankind' combined with the word 'heritage' indicates that the interests of future generations have to be respected in making use of the international commons." (p. 29)).

197 Voigt, 2014, see *supra* note 57, p. 16.

198 "*[H]umankind* has in my view also emerged as a subject of International Law": "We are here still in the first steps, and there remains of course a long way to go in order to attain a more perfected and improved system of legal representation of humankind in International Law, so that the rights recognized to it thus far can be properly vindicated on a widespread basis", see Antônio Cançado Trindade, *International Law for Humankind. Towards a New* Jus Gentium, 3rd revised ed. (The Hague Academy of International Law Monographs, vol. 10), Nijhoff, Leiden, 2020, pp. 281, 287. The idea that 'unity of humankind' should be properly recognized by international criminal law does not depend on the construct of humankind as a subject of international law.

199 Cannizzaro, 2018, see *supra* note 51, p. 420.

200 Gerry Simpson, *The Sentimental Life of International Law: Literature, Language, and Longing in World Politics*, Oxford University Press, 2021.

201 Communities are "*imagined* because the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion", see Benedict R.O. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, Verso, London, 2016 (1983), p. 6. Others have made important contributions on ethnic and religious 'visions of community':

lott acknowledges that the "human imagination plays a big part in forming our values, in the way that we *imagine* ourselves and our societies".[202] This resonates with us. At the same time, we remain cognizant that the concept of community interests is "often awarded too lightly by international lawyers to their favorite regime" and should thus be used cautiously.[203]

In sum, the chapters in this third and last volume on the *Philosophical Foundations of International Criminal Law* represent diverse examples of the work that can and should be done on the identification of relevant legal interests, thus feeding our comprehension of international penal justice and contributing to the progressive development of international criminal law.[204] Taken as a whole, these essays suggest that opening inquiries into legally-protected interests and foundational goods may add value, and motivate further research on aspects which this limited volume could not fully consider. May these reflections inspire future work on how values inform – or should inform – a coherent and productive development of international criminal law, so that it can play its role in protecting fundamental common interests of humankind. An international criminal law that is not "able to respond to common needs" risks becoming less relevant.[205] On

by seeking to understand "the complex mechanisms in which their identities were formed, we may be able to contribute to a better understanding of the delicate balances that have nourished their respective 'visions of community'" (Walter Pohl, "Ethnicity, Religion and Empire", in Walter Pohl, Clemens Gantner and Richard Payne (eds.), *Visions of Community in the Post-Roman World: The West, Byzantium and the Islamic World, 300-1100*, Routledge, Abingdon, 2016 (2012), pp. 22-23). The substantial contributions by political scientists and historians to our understanding of identity, belonging and othering should inspire international lawyers when they turn their minds to imagining harm to 'humankind' or that fundamental interests of 'humankind' should be afforded more express recognition by international law.

202 Philip Allott, *Eutopia: New Philosophy and New Law for a Troubled World*, Edward Elgar, Cheltenham, 2016, p. 221.

203 See Jochen von Bernstorff, "'Community Interests' and the Role of International Law in the Creation of a Global Market for Agricultural Land", in Benvenisti and Nolte (eds.), 2018, see *supra* note 8, p. 295.

204 "[T]he identification and protection of the common interest is by itself an important task in the progressive development of international law", see Benedek, De Feyter, Kettemann and Voigt, 2014, see *supra* note 18, p. 226.

205 *Ibid*. Benvenisti and Nolte soberly refer to "the capacity of international law to accommodate community interests in a system that contains strong structural elements for the protection of self-interest", see Benvenisti and Nolte, 2018, see *supra* note 100, p. 8. Føllesdal observes that "neither international law in general nor ICs [international courts] in particular are a universal panacea for the challenges of international cooperation: international bodies without adjudicatory authority may often be better placed to act", see Andreas Føllesdal,

the contrary, an international criminal law that properly recognizes the importance of values such as the 'unity of humankind' can contribute immensely towards the well-being of mankind, its peace and security.

"How International Courts Can Help Secure Global Public Goods Worth Having: Pure Public Goods and Beyond", in Zyberi (ed.), 2021, see *supra* note 15, p. 64.

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Philosophical Foundations of International Criminal Law: Legally-Protected Interests

Morten Bergsmo, Emiliano J. Buis and SONG Tianying (editors)

This book discusses notions such as 'community interest', 'legally-protected interest' and 'legal good' in the context of international criminal law. The authors assess main interests or values currently protected by international criminal law (including 'humanity' and 'international peace and security'), their characteristics and inter-relations. Chapters then zoom in on supplementary values or interests that should receive further recognition by international criminal law, among them 'reconciliation', 'solidarity' and 'unity of humankind'. A growing sense of environmental and security threats to our survival invites us to afford the value of 'unity of humankind' a greater measure of affirmation also through international criminal law.

The anthology offers nine chapters by thirteen authors from diverse backgrounds, including China, India, Latin America, the Middle East, Nigeria and Western European and Other States Group, in alphabetical order: Ioanna N. Anastasopoulou, David Baragwanath, Morten Bergsmo, Emiliano J. Buis, Vahyala Kwaga, Susan R. Lamb, Melody Mirzaagha, Salim A. Nakhjavani, Tosin Osasona, Kafayat Motilewa Quadri, Rod Rastan, Surabhi Sharma and SONG Tianying. The questions they discuss go beyond the growing polarisation between rival 'great powers' and have some capacity to unite actors in a common, forward-looking endeavour. The editors argue that new international criminal law-making should be genuinely representative of humankind.

This is the third volume in the series *Philosophical Foundations of International Criminal Law* published by TOAEP. The three volumes combined contribute 37 chapters organized in three thematic anthologies: *Correlating Thinkers* (2018), *Foundational Concepts* (2019), and now *Legally-Protected Interests* (2022).

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