

Philosophical Foundations of International Law: Legally-Protected Interests

by Morten Bergsmo, Emiliano J. Buis and SONG Tianying (eds) Torkel Opshal
2022, 402 pp, \$ 14,16 (hardback) and ebook free, ISBN-10 8283481215

Marina Aksenova

To cite this article: Marina Aksenova (07 Nov 2023): Philosophical Foundations of International Law: Legally-Protected Interests, Nordic Journal of Human Rights, DOI: [10.1080/18918131.2023.2272335](https://doi.org/10.1080/18918131.2023.2272335)

To link to this article: <https://doi.org/10.1080/18918131.2023.2272335>



Published online: 07 Nov 2023.



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BOOK REVIEW

Philosophical Foundations of International Law: Legally-Protected Interests by Morten Bergsmo, Emiliano J. Buis and SONG Tianying (eds) Torkel Opsahl 2022, 402 pp, \$ 14,16 (hardback) and ebook free, ISBN-10 8283481215

This edited collection focuses on the idea of ‘unity’ as the central protected legal interest in international (criminal) law. It offers perspectives by several leading scholars and practitioners in the field of international criminal justice. This discussion is very timely given the diverse and increasingly inter-related nature of threats to humanity. It is not a coincidence that the word ‘unity’ is an integral part of the word ‘humanity’.

Current challenges are truly global as they range from climate change to territorial conquests affecting the well-being of vast geographical regions, from an ever-increasing vulnerability of our shared cyberspace to worldwide economic inequality. Interestingly, the concept of unity already underlies the core logic of the discipline, but it is frequently taken for granted. For instance, Article 1 of the UN Charter mentions ideals such as co-operation of nations in attaining universal peace and harmonizing their actions with the aim of achieving shared objectives. The Rome Statute of the International Criminal Court (ICC) also makes it clear that the fight against impunity for the most serious crimes concerning humanity *as a whole* is a universally shared task (emphasis added). This meta-level thinking of the drafters of these documents is, however, often overshadowed by the logic of a zero-sum game with clear ‘winners’ and ‘losers’. The edited collection invites a U-turn in this line of argument by returning to the fundamentals. Unity is not treated as an abstract cosmopolitan idea, but rather as a pre-condition for the continued co-existence and prosperity of people around the world. Thus, the core assumption of the volume is that there exists one global community benefitting from the protection of international criminal law. Stoic philosophy inspires this foundational thought. This very same humankind, then, is also the bearer of risks and harms, if examined from the intergenerational point of view.

There are three distinct ways in which this book underscores the foundations of unity in international criminal law. Firstly, it highlights the importance of relational value within the discipline. Relationality stands less on the specific principles, which could be translated into outcomes, and more on the idea of deliberative processes, crucial to ensuring inter-communal relationships. In other words, unity is as much about fostering connections as it is about achieving peace and prosperity in practical terms.¹ Secondly, this work offers an insight into the limitations of the philosophy of individualism. It does so by asking questions pertaining to the nature of constructed identities.² Unity is historically significant in identity consolidation as it was used in ancient Greek thought to refer to one mankind and one source of common ancestry. Finally, the book offers perspectives that go beyond

¹See, for instance, chapter 7 dedicated to the exploration of communitarianism in the Western and African philosophical traditions. Kafayat Motilewa Quadri, Vahyala Kwaga and Tosin Osasona, ‘Forging a Modern African Perspective on ‘Unity’ as a Collective Legal Interest in International Criminal Law’ pp. 264 et sq.

²Rod Rastan argues in chapter 9 that countless international instruments reveal humanity’s struggle with multiple conflicting identities. The idea of ‘unity’ cannot be superimposed on these patterns. Rather, Rastan, invites enhanced self-perception to question the structures that have been normalized. See Rod Rastan, ‘Unity and Disunity in International Criminal Justice’, p. 361.

state-centrism by – implicitly – questioning the utility of ‘autocracy’ vs ‘democracy’ discussion, while developing the discipline of international criminal law.³

The first important point that the book makes is around implied relationality of the discipline of law. Chapter one stresses – in a very refreshing manner – the relational patterns and patterns of interaction, as opposed to merely focusing on individual actors, be it an individual or a state or an organization.⁴ There has been some examination of this phenomenon in the field of sociology of law, but less so in the field of legal philosophy of international law. For instance, a French sociologist Pierre Bourdieu famously described legal culture as consisting of inherent psychological and linguistic practices accepted in a circle of lawyers. While the formal rules of legislation, regulation and precedent structure the body of law, its application and evolution are largely predetermined by the values upheld and sustained in the professional circle.⁵ Similarly, an American sociologist Randall Collins developed a whole theory centered around ‘interaction ritual chains’, or collective rituals infused with emotional energy of its participants.⁶ Symbols serve as relational ‘signposts’ as they denote consensus over certain standards. Repetitive rituals make it possible to engrain these symbols in a collective psyche. Judicial trials and law-making, more generally, could be seen as a form of ritual activity, with ‘justice’ representing a strong relational symbol. This very same reasoning has utility for legal theory supporting the development of international (criminal) law. ‘Unity’ is not an abstract idea but rather a representation of a sum-total of collective interests essential for the survival of humanity.

The second significant added value of the book is that it extends its analysis beyond the idea of individualism. Given current challenges, it is essential to move away from an individualistic focus of getting ahead or striving for advantage at the expense of another party, also known as zero-sum approach, to a broader relational paradigm that prioritizes mutually beneficial solutions, or the ‘win/win scenario’. For instance, the need to collectively tackle climate change naturally necessitates relational and deliberative practices in international (criminal) law. There is not much room for the zero-sum approach when it comes to the environment. Deliberative practices require trust. Trust is then of the essence for the forward-looking discipline. Trust can only be built by adopting the so-called ‘third person perspective’, namely by looking at any situation with the eyes of a neutral observer and investigating the most beneficial solution for all the stakeholders involved. This inquiry does not only concern various actors located in space (states and organizations), but it also expands – in a temporal manner – towards the future generations as intergenerational justice gains increased importance in our collective discourse

But, then, what does it take intellectually to explain the shift from individualism towards a different perspective in the field of international law? In answering this judicious question, the volume offers references to the ancient Greek and Roman philosophers, discussing the idea of ‘*kosmos*’ (κόσμος) and ‘*orbis*’ or ‘*mundis*’, respectively.⁷ These concepts point to the common nature of all those who share the same living world, and, in this manner, the terms create analytical tools for expressing what lies beyond individual identities and superficial distinctions. Chapter one makes it clear that these ideas are not unique to Stoic cosmopolitanism

³For instance, Morten Bergsmo, Emiliano J. Buis and SONG Tianying argue in chapter 1 that forward-looking international law should encourage deliberative participation in law-making of various populous non-Western states. The invitation is to go beyond labelling states and towards inclusion. See Morten Bergsmo, Emiliano J. Buis and SONG Tianying, ‘Protected Interests in International Criminal Law’, p. 3.

⁴For instance, David Baragwanath argues ‘[r]econciliation in the context of criminal law concerns principle and practicality in restoring human relations following discord’. See chapter 5 ‘Reconciliation’ as a Philosophical Foundational Concept in International Criminal Law’ p. 158.

⁵Pierre Bourdieu, ‘The Force of Law: Toward a Sociology of the Juridical Field’ (1987).38 *Hastings L.J.* 814

⁶Randall Collins, *Interaction Ritual Chains* (Princeton University Press, 2005).

⁷Morten Bergsmo, Emiliano J. Buis and SONG Tianying, ‘Protected Interests in International Criminal Law’, p. 32.

but can also be found in ancient Chinese sources, mentioning the concept of ‘*dàtóng*’ (大同), which stands for the world as a place where everyone and everything is united in peace. In some philosophical traditions such as, for instance, the Vedic sciences, there is a lot of discussion about minimizing oneself to see the bigger picture.⁸ The ability to become small is even considered, in Hindu folklore, as one variety of special powers (‘*siddhis*’) granted by the deities.⁹

Finally, the volume brings home the idea of humanity as the bearer of risks and harms. It explains through the concept of unity the limited value of drawing sharp distinctions between the concepts of ‘democratic’ and ‘authoritarian’ states. The volume reveals the difference between the conceptual and the phenomenological world in what pertains the field of international (criminal) law.¹⁰ This crucial dissimilarity often gets overlooked in the discussions regarding the future of humanity.¹¹ It is true that these labels play an important role in assessing individual country’s compliance with certain indicators, which are expressed as standards or values. At the same time, the rigidity of associating states, or any other entities, with abstract concepts, such as ‘democracy’, leads to ‘othering’ and exclusion, which may potentially block deliberative process necessary to tackle current threats. The idea of global citizenship can be helpful in elucidating this point.¹² There are multiple identities that any individual, organization, or state carry. Each identity corresponds to a certain way of showing up in the world, but it does not exclude or obfuscate all other identities. While someone may be a citizen of Syria, they may also carry an identity of a father, a scholar, and a municipal leader. The idea of a global citizenship, which is closely related to cosmopolitanism, fosters belonging at different levels and avoids reductionism. This openness to multiplicity then creates relational spaces for deliberations and finding solutions. The same logic can be applied to organizations and states.

In sum, this book is a welcome contribution to the library of a legal philosopher and a practitioner of international criminal law alike. As humanity awakens to the practical and philosophical implications of the ongoing shifts in geo-political and moral landscape, there is benefit in exploring the wisdom of core fundamental concepts already embedded in the preambles of many international legal instruments. Unity is one such powerful idea.

Marina Aksenova
Assistant Professor of International and Comparative Criminal Law at IE
University in Madrid;
 marina.aksenova@ie.edu

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<https://doi.org/10.1080/18918131.2023.2272335>



⁸Eg. Kavitha Chinnaiyan, *Glorious Alchemy: Living the Lalitā Sahasranāma* (New Sarum Press, 2020).

⁹See chapter 8 by Surabhi Sharma, ‘Humanity and Unity: Indian Thought and Legal Interests Protected by International Criminal Law’, p. 286 et sq.

¹⁰For more on the general topic of phenomenology see Maurice Merleau-Ponty, *Phenomenology of Perception* (Routledge, 2005; original work first published 1945).

¹¹See Rod Radstan’s chapter 9 for more on questioning established interpretative frameworks normalized through discourse, p. 361.

¹²Marina Aksenova, ‘Global Citizenship and the Right of Access to Justice: Adapting T.H. Marshall’s Ideas to the Interconnected World’ (2023) *Humanit.* Vol 14(2).