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Introduction: The Emergence of International Criminal Biolaw

The Vehicle and Web of Interdisciplinary Norm-Synergies

Caroline Fournet and Anja Matwijkiw

Biolaw is a large area,¹ which is legally still in its embryonic stage. Certainly, this is true if globalization is used as the criterion for development. The explanation may be simple and straightforward – that biolaw's emergence takes time and that legal evolution does not necessarily conform to scientific and prognostic models. Then again, the explanation may be more complex and involve a need for targeted and selective reflection in order to be able to concentrate on fewer tasks and topics that deserve attention. This is exactly the idea behind *Biolaw and International Criminal Law: Towards Interdisciplinary Synergies*.

As a book, *Biolaw and International Criminal Law: Towards Interdisciplinary Synergies* addresses a number of topics in an attempt to investigate the interdisciplinary, foundational and conceptual aspects of a new discipline: International Criminal Biolaw. These aspects are both legal and ethical in nature, thereby making the link between biolaw, international criminal law, and bioethics *broadly construed* one of the *foci* of analysis and assessment.²

In the modern era, a lack of bioethics is neither desirable nor acceptable. To pave an appropriate path, biolaw instruments (should) require respect for

1 In 2009, a petition at the annual meeting of the American Association of Law Schools (AALS) proposed the following definition to have biolaw recognized as a 'Section': 'Biolaw encompasses both the law of biology and the biology of law. Advances in the biological sciences, such as genetics, biochemistry, cell biology, reproductive biology, evolutionary biology, ecology, and the behavioural sciences, continually challenge both society and the laws that attempt to order, regulate, and protect it. Biolaw combines the use of biological science to describe, analyse, and improve the law with legal analysis of biological science, its institutions, and its implications. Biolaw integrates insights from such biologically-informed research areas as law and genetics, law and neuroscience, reproductive law, behavioural economics, cognitive psychology, law and biotechnology, biotechnology patent law, bioethics, neuroethics, food and drug law, and biodiversity law'. See also AALS https://memberaccess.aals.org/eWeb/dynamicpage.aspx?webcode=ChpDetail&chp_cst_key=b833b73b-07ff-40d2-b5dd-685c2ef2d150, accessed 12 June 2020; Yechiel Michael Barilan, *Human Dignity, Human Rights, and Responsibility: The New Language of Global Bioethics and Biolaw* (MIT Press, Cambridge, MA, 2012) (for an emphasis on biolaw-bioethics integration).

2 All views expressed in this volume are solely the responsibility of the author/s.

principles of scientific and medical ethics, and especially the basic principles of bioethics that are anchored in ethics as opposed to positive or customary morality.³ Preexisting perceptions and practices may not capture or express the values and principles that (should) function as direction-posts. Ethically founded values and principles, on the other hand, fulfil that purpose. Furthermore, by virtue of deriving from a notion of singular ethics, these values and principles operate as universal standards. To establish a link between ethics and law *compels* stakeholders to secure global law-making.

Disconnections may lead to 'distorted and perverse' outcomes that despite their serious criminality would secure impunity as opposed to accountability on behalf of the perpetrators *unless* legal norms and procedures were mixed with notions of ethical intrinsicness, as also illustrated by the post-World War II recognition and prosecution/punishment of medical experiments as crimes against humanity (CAH) – which partly were secured on the basis of the Principle of Justice.⁴ The leap from the 'failed precedent' situation for the International Military Tribunal at Nuremberg (IMT) to today's reality of a missing specialized international convention on CAH has caused international criminal law experts to lament the lack of legal certainty, but this may be an overly legalist or positivist reaction in circumstances where international criminal biolaw's emergence is through bioethics.⁵ The need to acknowledge the link between humanistic values and international criminal justice has been emphasized by, *inter alia*, M. Cherif Bassiouni:

3 Roberto Andorno, *Principles of International Biolaw* (Bruylant, Brussels, 2013); Stefania Negri, 'Transplant Ethics and the International Crime of Organ Trafficking', 16(2) *International Criminal Law Review* (2016) 287–303; Anja Matwijkiw and Bronik Matwijkiw, 'The Value Question and Legal Doctrine: The Inescapability of Ethics', 16(2) *International Criminal Law Review* 323–345 (2016).

4 Daniel S. Nadav, *Medicine and Nazism* (The Hebrew University Magnes Press, Jerusalem, 2009), p. 137; Anja Matwijkiw, 'The No Impunity Policy in International Criminal Law: Justice versus Revenge', 9(1) *International Criminal Law Review* (2009) 1–37 (for derivative *jus cogens* norm-recognition); M. Cherif Bassiouni, 'Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights', 1 *Global Community Yearbook of International Law and Jurisprudence* (2001) 19 (for idealism and the two implied requirements for *jus cogens* norms, namely that violations (1) '[adversely] affect the interests of the world community as a whole because they threaten the peace and security' and (2) 'shock the conscience of humanity'); M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press, New York, 2011) xxxi (for the inclusion of 'an element of substantiality of harm').

5 Bassiouni, *ibid.*, pp. xxxiii, 733; M. Cherif Bassiouni, 'Perspectives on International Criminal Justice', 50(2) *Virginia Journal of International Law* (2010) 269–323, 304.

International criminal law is a reflection of certain humanistic values, which I think are here to remain. So, these values are going to have to find a way of expressing themselves.⁶

Admittedly, the expression bioethics *broadly construed* is the result of careful deliberation. A concession that experts on the intersection of international criminal biolaw and bioethics have to make is that the integrative trend may draw on comprehensive value-theoretical considerations, ones that extend beyond ethics *per se*. In particular, there is often a connection between ethically substantiated (new legal) norm-prescriptions/proscriptions and/or critical approaches to international criminal biolaw and certain political, ideological, social or cultural outlooks. It is difficult, if not impossible, at least so the implicit reasoning is, to advance arguments about 'what should be' without at the same time advancing these in a context that scrutinizes a real-world arrangement at the national or international level or, alternatively, aims to define an ideal community. In the first case (*cf.* a real-world arrangement), the additional political and other aspects co-direct the ethical endeavours, be they presented as calls for change or comparatively more modest invitations to engage in further reflection as regards the topic or issue under discussion.⁷ In the second case (*cf.* an ideal community), experts are concerned citizens whose analysis and assessment extend beyond the law *per se*, to the relationship between different community stakeholders. In turn, this means that the topic or issue introduces premises or implications having to do with governance *broadly construed*. While this typically revolves around the goals, responses and strategies that characterize democracy, the goals, *etc.* may affect domestic, inter-state, or global affairs, or all of these; just as they may incorporate public opinion and public policy. However, governance may also refer to a more business-oriented

6 The Grotius Centre for International Legal Studies, 'Honouring Prof. M. Cherif Bassiouni – On the Future of International Criminal Justice' (interview), September 2015, The Hague, <https://www.facebook.com/GrotiusCentreLeidenUniversity/videos/10155918105168938/>, accessed 12 June 2020.

7 According to Nadav, the Nuremberg Doctors' Trial known as the 'Medical case' and the 1947 Nuremberg Code secured success for democracy over tyranny (*cf.* Nazism) as a negation of humanity and, more broadly, civilization. It appears that the latter (*cf.* civilization) introduces a responsibility to respond to violations of *jus cogens* norms (*cf.* crimes against humanity) in a way that essentially overrides the 'threat to peace and security' by virtue of making the humanity-community constellation and synthesis the foundation for civilization. The humanity-community constellation and synthesis has been adopted by American Legal Process Theory (ALPT) and the Integrative Approach. See Nuremberg Tribunal, *United States of America v. Karl Brandt and others*, Judgment of 20 August 1947; Nadav, *supra* note 4, p. 134.

phenomenon. If so, it translates into best practices in terms of corporate moral responsibility and its legal and negative analogy, corporate criminal liability.⁸

Biolaw and International Criminal Law: Towards Interdisciplinary Synergies contains an essay on corporate criminal liability, entitled 'Bioethics, Complementarity, and Corporate Criminal Liability'.⁹ It is written by Ryan Long, and his contribution homes in on a subset of contemporary challenges pertaining to genetic privacy (*cf.* biobanks and forensic DNA databases), organ trafficking, human reproductive genetic engineering, and human cloning. Asking whether corporations should be held criminally liable for violations that belong under international criminal law rather than transnational criminal law if they imply activities that threaten shared national interests and if positive law *stricto sensu* (*cf.* conventions or treaties) projects substantive criminal norms beyond national boundaries, Long points to the need for a new typology of harms (that should be recognized) to deter and prevent, *inter alia*, hypothetical crimes like human cloning. The nature of the harms is such as to make it more plausible than not that especially multinational corporations would be implicated in the relevant crimes that create a mismatch to post-World War II paradigms like the prohibition of human experimentation. The strategies and measures that Long recommends consist first and foremost in an application of the principle of complementarity, thereby securing norm-harmonization and, as a consequence of having implemented the new proscriptions at the domestic level, a right to enforce *aut dedere aut judicare*. Furthermore, by invoking recent doctrinal and judicial interpretations from international case law, an extension of the scope of law as well as corporate criminal liability may be established. The general reasoning is that new wrongs 'demand new laws' – and bioethics (should) pave the path for law-making and law-enforcement that address the increased economic and political power of corporations.

To effectively speak law to power, Long takes a consequentialist stance pertaining to corporate criminal liability while appealing to the community to *not tolerate* an unprincipled corporate culture that (unless constrained)

8 For a study that links capitalist corporate governance and the globalization phenomenon with an increase in 'the gulf between rich and poor countries' and furthermore with an increase in 'economic and structural inequalities within countries' at the domestic or national level, see Tarnue Johnson, *Globalization and the Ethical Responsibilities of Multinational Corporations: Emerging Research and Opportunities* (IGI Global, Hershey, PA, 2017), p. 3; Andrew Crane, Abigail McWilliams, Dirk Matten *et al.* (eds.), *The Oxford Handbook of Corporate Social Responsibility* (Oxford University Press, New York, 2008).

9 An earlier version of this contribution was published in Anja Matwijkiw (ed.), Special Issue 'Paving the Biolaw Path in International Criminal Law', 17(6) *International Criminal Law Review* (2017) 997–1021.

predictably will cause setbacks rather than progress in international criminal biolaw. Long responds to objections that ascribing responsibility to corporations is incoherent, unwarranted, and ineffective. He employs a Strawsonian conception of responsibility to explain corporate responsibility and argues that holding corporations responsible might be required to respond to the contemporary challenges previously mentioned.

The topic of corporate criminal liability is a good illustration of the interdisciplinary skillset that is needed to enter the field of biolaw. As a holistic domain, there seems to be no disciplinary limits to the cross-fertilization, meaning that biolaw's demarcation may pose challenges in the future. Then again, its 'wide wings' may give rise to unprecedented types of collaboration which, in turn, could launch or usher in entirely new legal outlooks and indeed outcomes. Certainly, *Biolaw and International Criminal Law: Towards Interdisciplinary Synergies* is an attempt to explore some of the main topics of international criminal biolaw and, hopefully, contribute to the experimental excitement and engagement in the process. Thematically, the book spans human experimentation, non-consensual medical interventions, the dangers of new technologies, transplant-related crimes, the denial of access to essential medicine and medical care, and the buying and selling of human body parts. In its holistic and interdisciplinary effort, the book offers legal, philosophical and policy-oriented reflections on free market theory and justice while examining the integration of biolaw within the existing realms of international criminal law and justice.

Each of the above-mentioned topics *cum* projects makes one important conclusion stand: as a branch of public international law, ethically inspired inquiries into international criminal biolaw have a tendency to spill over into international humanitarian law (IHL) and international human rights law (IHRL).

As it happens, Long's essay is one illustration of such a link. However, his reliance on 'transcendent moral values' is not a strategy that all pro-human rights advocates adopt.

In 'Human Experimentation at the Intersections of Biolaw and International Criminal Law: The Case of Unethical Clinical Trials in Developing Countries', Stefania Negri partly bases her argument on human rights to, *inter alia*, autonomy, consent, and confidentiality¹⁰ and incorporates IHL-related

10 An earlier version of this contribution, entitled 'Unethical Human Experimentation in Developing Countries and International Criminal Law: Old Wine in New Bottles?', was published in Special Issue 'Paving the Biolaw Path in International Criminal Law', *supra* note 9, 1022–1048.

considerations. Like Long, Negri is concerned about the profit/humanity contradiction, although she focuses her attention on Western corporations and vulnerable populations, *i.e.*, the less privileged in developing countries. For example, the combination of poverty and illiteracy in places like Nigeria and India has resulted in new and, according to Negri, intolerable transnational practices, such as exploiting 'volunteers' in clinical trials. But, unlike Long's approach, Negri's defence of *their equal* rights is predicated on 'imperatives' such as respect for voluntary and informed consent and the protection of the health and safety of research subjects, as provided for in the Nuremberg Code and in an additional thirteen soft and hard law instruments that were drafted after this. Negri emphasizes that by virtue of the fact that the foundation of international criminal biolaw encompasses 'deontological rules' (*cf.* imperatives), consequentialist arguments are precluded, at least at the level where bioethical principles regulate the response to humanity as a rights-conferring *meta*-norm. The dignity of the human being should never be sacrificed. No 'geographical morality' of research is permissible, *as if* certain people in certain places are not owed equal respect and protection. Negri refers to public interests in shared standards on behalf of the global community, but these impose no utilitarian tension. To the contrary, they serve to guarantee humanity and dignity as intrinsic values *as opposed to* instrumental values. In the case of governments in developing countries, incentives for foreign investment are unfortunately too often supplemented with *realpolitik* policies. There is either no interest or no resources to monitor corporate behaviour or, *per* Long, corporate culture. Consequently, multinational corporations enjoy *de facto* control over vulnerable populations who, according to Negri's argument, are stakeholders to the extent that their human rights are adversely affected in externally sponsored research. Negri's point is that there is no escape from human rights-recognition and -protection through the business aspects of the problem. According to one 'foundational principle', states must and, *mutatis mutandis*, should protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. Notwithstanding, 'the international criminal responsibility of organizations and other non-state actors (legal persons, groups, corporations) is still not well-established' and, therefore, corporations typically reap the full benefit of *realpolitik* as a practice, namely impunity. However, by applying the so-called state-corporate crime paradigm, Negri shows how to accommodate all the harms that follow in the wake of state failure and while incorporating Bassiouni's advocacy of a prohibition of 'unlawful human experimentation' regardless of wartime. In this manner, an argument for consistency, *i.e.* a strategy that can put an end to double standards,

becomes an argument for subsuming medical experimentation that violates non-derogable human rights *qua jus cogens* crimes against humanity under article 7 of the Rome Statute, thereby triggering the jurisdiction of the International Criminal Court (ICC). That said, the ideal solution, based on Negri's analysis of the current and inadequate biolaw framework, consists in an international criminal law convention. Thinking ahead on behalf of biolaw, Negri takes consistency seriously and, for the same reason, the progressiveness of her argument is optimized for the specific purpose of capturing the new reality of medical experimentation and international criminal responsibility in the post-Nuremberg Code era, which is more than ripe for Negri's law-making and law-enforcement initiatives.

Despite the challenges and complexities that characterize the evolutionary pattern of biolaw, the majority of experts agree that the Nuremberg Doctors' Trial and the Nuremberg Code together with the soft and hard law legacy from these constitute the most important contributions to the emerging field of international criminal biolaw. As a historical milestone, the Nuremberg Doctors' Trial reached its 70th year mark in August 2017. In 'From the Martens Clause to Consent to Human Experimentations, the Legal Journey of the Judges during the Nuremberg Doctors' Trial', Xavier Aurey offers a new interpretative perspective on the ten legal and ethical principles from the Nuremberg Code.¹¹ More precisely, Aurey follows in the footsteps of the American judges to re-examine the 'journey' towards the drafting of the instrument. One of his main objectives is a critical appraisal of this.

Aurey's comprehensive, nuanced and in-depth research is a scholarly contribution in its own right. While undertaking his reexamination project, Aurey makes a number of discoveries. One of these consists in the necessity of acknowledging the way in which military, scientific, and ideological aspects or, *per* Aurey's own terminology, 'issues' intersect.

The ideological aspect or issue, so it should be noted, refers to the clash between, on the one hand, the kind of relativistic totalitarianism that accompanies organic state theory and its emphasis on 'the social body' (*cf.* Nazism) and, on the other hand, the universalist and pro-liberal vision whereby the rights of the individual should be ascribed priority. The priority is value-mediated by autonomy that, in turn, is logically linked with consent. The pro-liberal vision may also clear self-regarding commissions or omissions that

11 An earlier version of this contribution, entitled 'The Nuremberg Doctors' Trial: Looking Back 70 Years Later?', was published in Special Issue 'Paving the Biolaw Path in International Criminal Law', *supra* note 9, 1049–1059.

are otherwise instances of harm-infliction.¹² That said, the nature of the medical experimentation that the Trial and Code address concerns (here borrowing John Stuart Mill's term) 'other-regarding' commissions or omissions.¹³

Another fact-finding exercise takes Aurey back to the very beginning of the path towards international medical ethics, *viz.*, to the Martens Clause. This stipulates a minimum standard for humanity in war or armed conflict as well as in peace, thereby giving rise to a legal *conditio sine qua non* resulting in a general law and custom founded concept of condemnation (and correlative right to seek justice as opposed to retroactive penal legislation). However, by outlining some of the crucial arguments from both the defence and the prosecution, Aurey discusses and problematizes the applicability of the Hippocratic Oath and of consent. By extension, the ten principles of the Nuremberg Code can be said to repeat an implied flawed logic: the 'ethical frontier' between consented clinical trials and human experimentation conducted in a context of coercion and exploitation is sometimes blurred.¹⁴ As Aurey observes, in '[r]eaching the verdict, the judges made a clear choice to pinpoint consent as the first principle for any experiment on human beings, even though it might not have been as clear as that in the international medical doctrine'. And indeed, how much integrity can be expected? Perhaps more fundamentally, is consent ever what it should be?

As co-authors of 'Biolaw Stakes, Activist Jurisprudence, and (Presumed) Limits for Protected Interests', Anja Matwijkiw and Bronik Matwijkiw try to explicate the *meta*-theoretical aspects of biolaw stakes, first and foremost, basic human rights, in the context of stakeholder jurisprudence.¹⁵ On the premises of this, Matwijkiw and Matwijkiw propose the 'Ethics Pillar' as a general antidote to all kinds of *de facto* and *de jure* outcomes that are not principled in the required sense. For example, their discussion of American Legal Process Theory (ALPT) demonstrates how theorists who misconstrue basic rights (that otherwise supplement *jus cogens* norms) end up defending the type of case law that overrules ethics. The stakeholder principles that Matwijkiw and

12 On the premises of John Stuart Mill, this is permissible in the case of people who are capable of self-government, *i.e.*, rational people. See John Stuart Mill, *On Liberty and Other Essays* (John Gray, ed., Oxford University Press, New York, 1991) (1859), pp. 104–128.

13 Again, on Mill's premises, it holds that 'the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others'. *Ibid.*, p. 14.

14 Article 2 of the Nuremberg Code mentions, *expressis verbis*, 'the good of society' as a desirable and indeed required (social utility) outcome of medical experimentation.

15 An earlier version of this contribution was published in Special Issue 'Paving the Biolaw Path in International Criminal Law', *supra* note 9, 1070–1101.

Matwijkiw advance cut across criteria and standards for rights-conferment and rights-enforcement. *E.g.*, the Principle of Stakeholder Harm, the Principle of Stakeholder Consideration and the Fair Opportunity Principle are ethically-legally constitutive of human rights *per se* whereas the Principle of the Right to React *Uti Universi*, the Principle of Respect for *Jus Cogens*, and the Principle of Complementarity regulate protective measures. According to Guiliana Ziccardi Capaldo, (emerging) collective guarantees that subordinate the state to the will of the community on account of the priority ascribed to general interests qualify as obligations *erga omnes* which therefore can be said to descend from constitutional principles. While Matwijkiw and Matwijkiw agree with the idea of alternative enforcement-strategies, the two authors note that stakeholder jurisprudence does not assume any necessary link between evolutionary and ethical processes. Without the Ethics Pillar, global constitutionalism would not comply with the modern rule of law interpretation, thereby defeating legal as well as political outcomes in favour of (a UN Charter transcendent Principle of) justice at the national and international levels.

However, *even if* international criminal law is supposed to function as a framework for conceptualization and realization (through norm-conferment, -implementation and -enforcement), the implied biolaw-and-bioethics integration may be interpreted both narrowly and broadly. In the context of transplant-related crimes like organ trafficking and transplant tourism, ideas about the (presumed) limits for protected interests may support a radical pro-market response, whereas an account that is not primarily ideological offers no preapproved prescriptive-proscriptive transition from ethics to law, nor does it render law immune from legal evolution just because the bio-relevant stakes involve market freedoms and forces. In the opinion of the two authors, direction-posts for the path of biolaw as an emerging international criminal law phenomenon have to incorporate marketplace considerations as co-elements. This is particularly true in the light of the fact, as pointed out by Negri, that it is primarily Western organ recipients who benefit from primarily non-Western exploitation of poor people *cum* organ sellers in poor countries. Thus, in a context of a global shortage of transplantable organs, '*their rights*' are disproportionately jeopardized. Nevertheless, no strategy that addresses the root causes (*cf.* poverty and prior deprivations) is offered in spite of its consistency with the distinction between altruism (*cf.* donation) and capitalism (*cf.* selling).

The paradox that follows is two-fold. First, 'doing good' for poor people in poor places is synonymous with a policy of abandonment because it holds that 'You should leave vulnerable stakeholders alone'. Second, rendering the distinction between altruism/donation and capitalism/selling morally sharp and

significant in all cases has the (presumed) extra effect of creating agreement with the ALPT's rejection of basic economic and social human rights. Contrary to advocates of a narrow *jus cogens* mandate, Matwijkiw and Matwijkiw broaden this beyond basic rights to survival (so as to avoid the arbitrary loss of life), negative freedoms (from torture, from coercion, *etc.*) and harm-omissions (to not be deprived of physical/psychological integrity and safety) to subsistence and even quality of life stakes. Needless to say, the more redistributive measures are ignored, the more impossible it is *not to wonder* if ideology, *i.e.*, socialism 'is not the elephant in the room?'

Michael Davis is another contributor to *Biolaw and International Criminal Law: Towards Interdisciplinary Synergies* who engages in market-based discussion.¹⁶ Like Matwijkiw and Matwijkiw, Davis rejects too rigid assumptions, in his case the distinction between self-interested market exchanges (*cf.* capitalism), and altruistic non-market donation. Unlike Matwijkiw and Matwijkiw, Davis does not use a comparative analysis of legal doctrine as a platform for his discussion. Instead, he engages in philosophical thought experiments involving organ-sellers and organ-buyers. In Davis' chapter, 'Marketing Body Parts: Morality, Law, and Public Opinion', the focus is on 'perfect' market arrangements. A perfect market arrangement is exactly that: one which secures efficiency and which is free from fraud, coercion, irrationality, exploitation and monopolies, just as no exchange affects third parties without their informed consent (there are no externalities). 'Hence, in a perfect market, there is no reason to talk about morality, law, or other constraints ...' Davis remarks, before he enquires into the actual market and society which is not perfect. After this, it appears that social injustice can be interpreted as a reverse analogy to market regulation because actual imperfections function as victimization strategies, and as deprivations of equality. Economists, so Davis stresses, may justify regulation on condition that it is instrumental for a correction *cum* perfect market approximation. This justification model may pull in one of two directions, utilitarianism or Kantianism. One of the decisive differences consists in the general commodification *limit* that comes with Kantianism, which is the philosophical and historical precursor for the respect-dignity-humanity constellation and requirement in IHRL.¹⁷

16 An earlier version of this contribution was published in Special Issue 'Paving the Biolaw Path in International Criminal Law', *supra* note 9, 1102–1115.

17 Although Immanuel Kant's philosophy is not compatible with speciesism, it is correct to describe human rights as an essentially Kantian project. See Jürgen Habermas, 'The Kantian Project of the Constitutionalization of International Law: Does it Still Have a Chance?', in Manuel Escamilla Castillo (ed.), *Law and Justice in a Global Society* (University of Granada Press, Granada, 2005) 115.

While Davis agrees with the idea of prohibiting the sale of human body parts 'except when taken from the dead', he pursues a third line of reasoning, one that investigates the implications of various (hypothetical) perfect and non-perfect market/society scenarios with a view to using law, morality or public opinion as non-paternalist measures of rights-protection. By making an 'argument from pollution' (an argument showing harm to someone not consenting to the exchange), Davis's position is not (value-)consistent with the Declaration of Istanbul on Organ Trafficking and Transplant Tourism (Declaration of Istanbul).¹⁸ The relevant instrument bans pollution in terms of *de jure* criminality but not donation of quasi-replaceable body parts by the living. According to Davis, this is highly objectionable because all living donors are equal in one fundamental sense – in need of protection against pressures from being 'heroic'; and this should inform and guide law and public opinion.

Davis's contribution is written as a succinct and critical thinking exercise for international criminal law theorists and practitioners who take an interest in market-based arguments pertaining to human body parts. As a philosopher of law and professional ethicist, he encourages everybody to think things through, especially since the integration of bioethics and biolaw constitutes a premise for the emerging field of biolaw.

The Declaration of Istanbul on Organ Trafficking and Transplant Tourism paved the path for other initiatives and instruments, including the World Health Assembly's Resolution on Human Organ and Tissue Transplantation that mentions the 'utility' concern in connection with 'low-resource' and 'high-resource' countries.¹⁹ In this way, the broad scope of the concern coincides with the Programme of Action for the Least Developed Countries for the Decade 2011–2020. The United Nations adopted this – in 2011 – along with the Istanbul Declaration on Renewed and Strengthened Global Partnership for the Development of Least Developed Countries.²⁰ Furthermore, in May 2016, the United Nations had its Midterm Review of the Programme in question,²¹

18 Istanbul Summit on Organ Trafficking and Transplant Tourism, *Declaration of Istanbul on Organ Trafficking and Transplant Tourism* (30 April–2 May 2008), www.declarationofistanbul.org/, accessed 12 June 2020.

19 World Health Assembly, Resolution on Human Organ and Tissue Transplantation, WHA63.22 (21 May 2010), p. 45.

20 United Nations, Fourth United Nations Conference on the Least Developed Countries, The Istanbul Declaration (13 May 2011) and Programme of Action for the Least Developed Countries for the Decade 2011–2020 (23 May 2011), www.unohrrls.org/UserFiles/File/IPoA.pdf, accessed 12 June 2020 (hereinafter, Istanbul Programme of Action).

21 United Nations Office of the High Representative of the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (UN-OHRLS), *Comprehensive High-Level Midterm Review of the Implementation of the Istanbul*

and one criterion for this was that ‘solidarity, cooperation and partnership with the least developed countries, the poorest, most vulnerable and weakest countries and their people are not only moral imperatives, they are also economic and political ones’.²² Post-2016 events include, *inter alia*, a summary Asia-Pacific report, a 2017 Expert Group Meeting (in Thailand) on Regional Implementation, a 2018 ‘special needs’ developmental report, and the 2018 Entrepreneurship for structural transformation: Beyond Business as Usual – all of which reinforce the message of a shared accountability approach, as well as a link between development and peace.²³

A holistic approach that mixes economic and social aspects with legal ones can be seen in Sunčana Roksandić Vidlička’s chapter ‘Systemic deprivation of access to essential medicine and medical care – a crime against humanity?’ Vidlička’s project is twofold – for she not only addresses ‘the need to consider the systematic deprivation of access to essential medicine and medical care, freed from all conflict nexus, as crimes against humanity as defined in article 7 of the ICC Statute’ but she also searches for a way of substantiating this as a matter of requirement. Countries like Syria, Myanmar, Yemen and Nigeria exemplify the necessity for a broad definition that can capture a variety of failed health (rights) scenarios – from armed conflict to structurally determined causalities, thereby presenting the implied systematic and serious deprivations as ‘a method of war’ in peacetime. The problem is that while IHL contains protective provisions (*e.g.*, articles 3, 23, and 55–65 of Geneva Convention IV) and while the ICTY recognized CAH ‘based on living conditions’ (*cf.* the *Krnojelac* judgment), the consideration of CAH as a legal ‘safety net’ – notably via the residual category of ‘other inhumane acts’ (article 7(1)(k) of the ICC Statute) – may not clearly and unambiguously

Programme of Action (27–29 May 2016), www.unohrrls.org/midterm-review-ipoa/, accessed 12 June 2020.

22 Istanbul Programme of Action, *supra* note 20, Article 8. See also Article 5 for ‘structural transformation’ in the context of market strategies.

23 See UN-OHRLS, Summary Report on the Regional Meeting of the Asia-Pacific Least Developed Countries on Sustainable Energy, 22–23 March 2017, http://unohrrls.org/custom-content/uploads/2017/05/Summary-Report-Nepal-Word_FINAL.pdf, accessed 12 June 2020; Expert Group Meeting on the Regional Implementation of the Istanbul Declaration and Programme of Action for the Least Developed Countries, 6–8 December 2017, <https://www.unescap.org/events/egm-csn-2017>, accessed 12 June 2020. The Economic and Social Commission for Asia and the Pacific, Asia-Pacific Countries with Special Needs Development Report 2018: Sustainable Development and Sustainable Peace, <https://www.unescap.org/sites/default/files/publications/CSNDR2018.pdf>, accessed 12 June 2020; United Nations Conference on Trade and Development, The Least Developed Countries Report 2018, https://unctad.org/en/PublicationsLibrary/lcdr2018_en.pdf, accessed 12 June 2020.

allow for the inclusion of violations of socio-economic rights. This depends on the interpretation of the sources of law and this, in turn, takes the author to legal doctrine. In the opinion of Vidlička, both regional and international IHRL instruments provide support for a pro-recognition trend although the implied dynamic development also testifies to an emergence (of norm-components) that is sporadic and rudimentary. Notwithstanding, an ‘interconnectivity between violations of ESCR and core crimes exists’ (and the typology includes genocide), and this is sufficient to pave an international criminal biolaw path to the three (traditional) crimes’ elements. However small the path may be here and now, Vidlička conclusion’s whereby ‘article 7(1)(k) in line with article 21(3) of the ICCSt allows this possibility without breaching the *nullum crimen sine lege* principle’ may also be the door opener to a future transcendence of the longstanding bias in favour of civil and political rights. Systematic deprivation of access to medical care and medicine adversely affects rights that qualify as global public interests. Human dignity is at stake; and so is the global legal web the *nucleus* of which is comprised of fundamental principles – like justice.

The various multi-dimensional tracks of international criminal biolaw must and, *mutatis mutandis*, should be integrated in order to appropriately define and direct outlooks and outcomes, goals and measures, and, of course, fair law-making and law-enforcement.

Together, Tyler Fagan, William Hirstein, and Katrina Sifferd wrote ‘Child Soldiers, Executive Functions, and Culpability’²⁴ as a hybrid model pertaining to law and morality. While a distinction exists at the descriptive level, the authors emphasize that ‘our argument applies to both’ legal and moral agency in the case of crimes like murder, torture, mutilation and rape – as committed by child soldiers. A central dilemma, which they try to resolve in the course of formulating the criteria for best practices as regards criminal responsibility-ascriptions, revolves around the question about how (best) to balance the need for post-conflict justice and fitness considerations on behalf of child soldiers. The implied tension between accountability and culpability as a necessary prerequisite for lawful and, *mutatis mutandis*, morally justifiable prosecution and punishment is particularly complex in the light of the fact that child soldiers are forcibly recruited and subjected to violent and coercive treatment. Child soldiers are victims as well as perpetrators. Fagan, Hirstein, and Sifferd do not excuse the behaviours child soldiers participate in; but they

24 This contribution was previously published in 16(2) *International Criminal Law Review* (2016) 258–286.

do believe that child soldiers may be excused from prosecution and punishment as a consequence of 'a nearly unique constellation of factors, each of which tends to reduce the sense in which they are operating with normal cognitive functions'. Neuropsychology, so they point out, is consistent with IHL in so far as child soldiers (under that branch of the law) 'merit privileged treatment compared to their adult counterparts'. Unlike the UN rules for the administration of juvenile justice, however, their dual recommendation consists in (1) a universal minimum age for criminal responsibility and (2) a graded structure for child soldiers which accommodates context-specific variables, *e.g.*, cultural notions of maturity. Whereas (1) translates into a scientific standard rooted in 'invariant facts' about the development of executive processes in the human brain's prefrontal cortex (attention, inhibition, *etc.*), the full pull of the positions that also operate as consensus views in law, *viz.*, compatibilism and capacitarianism, is explained under (2) while providing the prescriptively ideal continuum of irrebuttable and rebuttable presumptions of (diminished moral/legal agency *cum* (in)capacity of) culpability for, respectively, child soldiers below 15, from 15 through 17, and 18 years old.

Without exceptions, the authors of *BioLaw and International Criminal Law: Towards Interdisciplinary Synergies* adopt the integrative approach, albeit in different ways. Furthermore, they emphasize proper ethics. Even in a post-positivist era, this may be radical. A presumption in favour of 'claims that law and ethics should be separated' still prevails in many outlooks.²⁵ To argue the opposite is a case of activist jurisprudence. However, the goal of synthesizing biolaw and universally recognized general principles of bioethics can also be construed as an internal requirement.²⁶ Ethics or, more to the point, global bioethics should therefore be made to matter.

This premise permeates distinctions that otherwise accord with traditional classifications, such as the distinction between substantive and procedural aspects of biolaw. The search for humanist values that can cancel any *realpolitik* agenda and which informs the high (ethics) bar for Aurey's critical appraisal

25 Donald Earl Childress III, 'Introduction', in Donald Earl Childress III (ed.), *The Role of Ethics in International Law* (Cambridge University Press, New York, 2012) p. 1.

26 This can be traced back to the 2003 report of the United Nations Educational, Scientific and Cultural Organization (UNESCO). See UNESCO, Report of the International Bioethics Committee (IBC) on the Possibility of Elaborating a Universal Instrument on Bioethics (13 June 2003), *cf.* para. 13: 'States have a special responsibility not only with respect to bioethical reflection but also in the drafting of any legislation that may stem therefrom'. Note that the UNESCO Declaration 'never translated into a treaty'. See Salvador D. Bergel, 'Ten Years of the Universal Declaration on Bioethics and Human Rights', 23(3) *Revista Bioética* (2015) 447.

of historical and procedural precursors and paradigms is also a thematic and strong undercurrent in contributions that attempt to use CAH as the vehicle for (further) progress, in effect, by experimenting with the current body of norms, with preexisting case law, and with – so far – undiscovered linkages between the legally and morally substantive (*cf.* proper ethics). Héctor Olasolo, Nicolás Eduardo Buitrago-Rey and Vanessa Bonilla-Tovar, whose joint chapter ‘Are non-consensual medical interventions and therapies to change sexual orientation or gender identity a crime against humanity of persecution against the LGBTIQ population under the ICC Statute?’ does not (unlike Aurey’s) problematize consent *per se*, use the Rome Statute of the ICC to try to secure a democratic rights-distribution for the marginalized stakeholder constituencies in question. Empirically and legally, examples of serious mistreatment are unfortunately abundant, thereby also showing a systematic and biomedically unscrupulous connection between membership of sexual minorities and injustice through discrimination and persecution. Prescriptively and ethically, however, violations of global standards like the Fair Opportunity Principle (whereby it is unjust to discriminate against other people on the basis of characteristics that they have either little or no control over, meaning that they do not have subjectivist or relativist free choices to un-acquire the characteristics) explain the need to equalize, *i.e.*, to pave the path for practices that disallow non-consensual medical interventions and therapies whose objective or goal is to change the sexual orientation or gender identity of a member of the LGBTIQ population. Equipped with such an ethics rationale, Olasolo, Buitrago-Rey and Bonilla-Tovar point to the discrepancy between the following two legal facts: that the definition of gender, as provided for in article 7(3) of the ICC Statute, does not accommodate the LGBTIQ and that article 7(1)(h) of the same instrument arguably extends (equal) protection so as to, in effect, overcome the lack of case law as well as the lack of an international treaty of universal scope that would establish a binding obligation of non-discrimination. Perhaps surprisingly to some observers and commentators, ‘transnational corporations’ have played a role in the push for recognition of the humanity of the LGBTQ population, according to the findings of the three authors. If Milton Friedman was consulted on this matter, he would probably respond with his usual pro-capitalist logic: that the marketplace is a better equalizer than democracy because agents in the first-mention have a vested interest in merit.²⁷

27 Milton Friedman, *Capitalism and Freedom* (University of Chicago Press, Chicago, Illinois, 1962).

Irrespective of whether democracy may have an in-built element of complacency (which also explains the ICC Statute's conception of 'the two sexes, male and female, within the context of society'), paving the path in international criminal biolaw closely resembles an activist enterprise – driven by ongoing scrutiny. Certainly, this is a characterization that is suitable both for Edwin Bikundo and Inez Braber's works. In 'The Case for Decoupling Unlawful Experiments from the Nexus to Armed Conflict', Bikundo embarks on what amounts to a corrective project. Calling for 'remedial consideration', the author revisits unlawful biological, medical or scientific medical experiments in the context of the ICC Statute, relying in part on a legal-linguistic analysis and supporting insights from legal doctrine and opinion as well as legal philosophy (*e.g.*, Giorgio Agamben). Bikundo's main aspiration is to subsume the relevant category under CAH and, in the process of this, stress a non-teleological and non-utilitarian perception, meaning that the derivative rights-rationale reinvokes the Kantian status of people as ends in themselves *as opposed to* instruments or means for others. The implication, namely the decoupling of unlawful medical experiments from the armed conflict nexus, is one that Bikundo welcomes *qua* a measure that prevents any undesirable and unnecessary restrictions on (future) prosecution.

Braber too is a thinker and theorist who integrates law and ethics in her analysis of crimes against the species, with a specific view to assessing CRISPR/Cas9 genome editing technology. This 'holds great promise for advancing science', but since it can also be applied to 'stem cells, germ cells, and early embryos', the tension between good and bad developments is central – as also suggested by the very title of Braber's chapter, 'CRISPR/Cas9 technology: Ending Disease, Designer Babies, Eternal Youth, and 'Crimes Against the Species''. An in-depth account of the technology itself is supplemented with reflections on the various outcomes *cum* phenomena, albeit true to say that the controversial ones are more hypothetical than real. Braber devotes special attention to designer babies while noting that '[g]enetically engineered babies will ultimately change the whole human gene pool, transferring and spreading their genetic material through reproduction. Because of this, it will fundamentally change the meaning of humanity'. Although the good *versus* bad tension repeats itself in the relevant case, the 'dark side' admittedly consists in *potential* risks and dangers. For the same reason, Braber is inclined to think that certain types of ethicists are 'having too strong a hold' through their recommendations in favour of 'the precautionary principle'. More precisely, she wants to avoid the kind of 'ethics creep' that merely maximizes bureaucracy and, as a direct consequence, stifles research. Furthermore, treating *potentially* species-altering *cum* -endangering phenomena like designer babies as crimes

against the species, thereby also recognizing CRISPR/Cas9 technology applications in terms of ‘type II crimes against humanity’, is not a tenable approach in her opinion. Instead, Braber advocates a response that does *not* ignore one of the single most important facts about CRISPR/Cas9 technology applications, namely that these belong in the ‘uncharted territory’. Undoubtedly, CAH constitute a sort of legal favourite, meaning that experts often resort to the category as a platform for analogous substantive argument. Objectively, the reasons for this consists in CAH’s status as ‘core international crimes’ and in their inclusion of ‘other inhumane acts’ envisaged as a ‘catch-all’ category. The IMT effect probably also remains a factor: CAH were instrumental in paving the modern path in international criminal law; and the leap to international criminal biolaw thus became a tempting one.

Terry Adido is not taking anything for granted, though. To the contrary, he is careful not to jump to any conclusions in his study of transplant tourism as a form of medical tourism, which includes organ extraction. The chapter he contributes to *Biolaw and International Criminal Law: Towards Interdisciplinary Synergies*, ‘Transplant Tourism Prohibition under Transnational Criminal Law: A Look at the Human Trafficking Model’, encourages the reader to treat the ‘global phenomenon’ for what it is: an emerging prohibition. Despite the Istanbul Declaration’s 2018 modified definition of transplant tourism to include ‘trafficking in persons for the purpose of organ removal’ and, furthermore, recent attempts to link organ trafficking and notably the most cruel and violent forms of organ harvesting from unwilling living ‘donors’ with a sort of *trigger argument* on behalf of article 7 of the ICC Statute (as constituting torture or other inhumane acts intentionally causing serious injury to the body or to physical and mental health, whatever its purpose),²⁸ Adido investigates but dismisses the idea of subsuming transplant tourism under CAH because the relevant practice ‘does not pass the severity test’. A survey of existing provisions, which includes international human rights norms and various soft law instruments, convinces Adido to opt for the 2001 Protocol to Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime (Trafficking Protocol) as the most promising way forward although he also concedes that it ‘would have benefited from a paragraph in article 5 directing States to exercise criminal jurisdiction outside their territorial limits, *i.e.*, extraterritorial criminal jurisdiction’. Equipped with this transnational criminal law framework, protection is afforded on the basis of a definition that is broad enough

28 Negri, *supra* note 3.

'to cover cases of organ commercialization, which fall outside the traditional definition of trafficking'. Legal reform is still a necessity (indicating a process of incremental progress), but so is change in terms of social ethics, which may even have to go deep into the moral fabric of a given country's traditional way and ultimately with the goal of closing the supply-demand gap in human organs. As Adido sees things, best practices coincide with the Principle of Self-Sufficiency at the national level or 'by equitably sharing resources with other countries or jurisdictions', thereby agreeing with the Declaration of Istanbul's policymaking strategies. Ethically, equity does not necessarily imply equality and, consequently, the underpinning criteria for merit have to be geared towards basic needs notions in order to secure distributive fairness – as viewed from the perspective of global imperatives.

To accomplish distributive fairness for vulnerable stakeholders may be a challenge even when the community response tends to be mediated by a paternalist attitude, as is the case with children. In her chapter entitled 'Aspirational Justice: Achieving Equity for Children Using the Convention on the Rights of the Child and the International Criminal Court's Policy on Children', Susan E. Zinner agrees with Britta van Beers and others that 'the origins of biolaw lie in international criminal law'. However, to the extent that the bio-legal framework can be connected with IHRL, it is also true that the notion of humanity is tailored to the adult. Thematically, therefore, Zinner is hoping to bring children into the biolaw equation through, as it were, the back door. More precisely, she connects children's rights to their 'evolving cognitive capabilities' and their right to health. While Zinner laments the fact that the United States is 'the only nation which has refused to ratify' the United Nations Convention on the Rights of the Child (UNCRC), her idea of aspirational justice extends to the ICC Office of the Prosecutor's 2016 Policy on Children; and American (business-as-usual) exceptionalism for this forum cannot but reinforce the political signal to the global order – that there are values that trump human rights, however basic. Zinner dismisses the argument that the legitimacy of international treaties is negatively impacted by the participation of non-democratic states. Instead, her premise that children are the community's 'most valuable resource' is treated as the foundation for a universal commitment, legally and morally. While Zinner's strong advocacy for stakeholder-inclusive policies on behalf of children is not coupled with a general human rights theory, she nevertheless draws on theoretically progressive insights, whereby non-traditional *cum* emotional needs for, *inter alia*, 'love and understanding' function as developmentally necessary platforms for those rights that otherwise are perceived as paradigms for the species, *viz.*, autonomy-based civil and political rights. In particular, Neil MacCormick's interest-theory

account of children's rights springs to mind. In *Legal Right and Social Democracy*,²⁹ MacCormick's famous 'test-case' (of children's rights) shows that non-discrimination and equality are first and foremost a question of shifting the emphasis from making claims and exercising choices to treating future adult agents as ends in themselves. While Zinner's own test from domestic case law serves to reveal the recognition deficit in the area of justice, she still embraces the underpinning notion of Kantian respect while noting that the conceptualization of children as individuals is too modest. Prescriptively, children should 'have all the tools necessary to develop their potential and to do so as a matter of principle'. However, if 'best interest' clauses have to be revised in the light of updated fact-finding about children's evolving capacities, the transition from paternalism to liberalism may be expedited along relativized parameters, thereby also erasing the distinction between possessing legally enforceable rights and fighting for (one's) rights as group rights.

Another contribution that is prescriptively oriented towards human rights values like respect, dignity and humanity concerns religion. In 'Principles of Bioethics and International Criminal Law in the Light of Philosophy of Islamic Jurisprudence', Mehdi Zakerian and Farid Azadbakht explore so-called maximum and minimum Islamic jurisprudence in the context of bioethics and international criminal biolaw. Their elaborate project involves a comparison of Western notions, which the two authors construe as co-components of the maximum philosophy of Islamic jurisprudence. However, the latter goes far beyond these; and the same conclusion applies to law *per se*. The positive human rights-recognition effects of secular idealism, especially 'rationalism' and 'Kantian interpretation', should not be dismissed, but nor should they be over evaluated – in comparison to *Shari'a*-infused reason, which qualitatively elevates bioethics and biolaw. Zakerian and Azadbakht are cautious about making too strong claims in this regard. Nevertheless, it is obvious that an epistemological and ontological approach that essentially reduces core concepts like reason to instances of 'self-founded' norm-prescription has for immediate consequence a loss of the capacity to determine and discern the intrinsically superior status of virtues as opposed to vices. Humanism may link (hu)man with the sublime, but Islamic jurisprudence functions to correct the universal imbalance that this authority entails. In the opinion of Zakerian and Azadbakht, the constellation of *Shari'a*, metaphysics and jurisprudence may eventually emancipate bioethics and international criminal biolaw as narrowly defined

29 Neil MacCormick, *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (Clarendon Press, Oxford, 1984).

phenomena, albeit the prescriptive echo of that same humbling experience may not necessarily reach into all corners. In the authors' own words, '[a]n official statement based on the sovereignty of the political and theocratic tyranny leads to 'rational, cultural, moral and human tyranny'. Caution is warranted. To the extent that bioethics and international criminal biolaw are guided by humanist values, these disciplines are subservient to Islamic jurisprudence. That granted, Islamic jurisprudence opens up its own interpretative web; and there may be no analogy to a safety net along the lines of the one contained in the Rome Statute. God has bestowed dignity on human beings, but it is not 'intrinsic dignity' that should be made to matter as a First Priority Principle. If the social responsibility this translates into is set aside, modern biotechnology – such as CRISPR/Cas9 described by Braber – may cause humanity's own downfall. Destructive forces like 'people with genes of brutality' may obstruct the otherwise noble endeavour to pave the path for 'righteous' autonomy – unless humanity understands the reason for creation in the first instance.

Empirically, brutality is no stranger to humanity. In the context of international criminal biolaw, it is no exaggeration to state that a dialectics between brutality and sentimentality has played a role in legal regulation and policymaking. The post-World War II pledge 'Never Again!' has unfortunately remained unheard. Now in 2020, we have to admit that repetitions of conflicts that caused immense suffering and pain numerically exceed any other era in history. As a consequence, victims of political tyranny and structural violence can be found across the globe, and often in graves. Typically, these are virtual 'dumping places' for their corpses, which may also have been subjected to undignified treatment. However, victims may also be survivors, although their experiences may have scarred them for life.

Thus, perhaps taking a step back from international criminal biolaw *stricto sensu*, the last two contributions – by Diana Spencer and Caroline Fournet respectively – focus on where law and science meet in practice, namely, in the courtroom. This approach attempts at closing the circle opened in this volume with the above mentioned 'IMT effect' and the leap from CAH to international criminal biolaw. Completing the previous discussions on international criminal biolaw from a substantive perspective, these chapters explore procedural issues via a meticulous analysis of the case law. While Spencer discusses how psychiatric and neurological evidence have been relied upon in the international courtrooms, notably from a defence rights' standpoint, Fournet explores the use and limits of medical evidence as a tool for the Prosecution, notably – although not exclusively – in cases of crimes of sexual violence. Spencer's chapter 'Scope and Limits of Psychiatric Evidence in International Criminal Law' advocates a new typology, whereas Fournet's contribution on 'Medical

Evidence at the International Criminal Court – Dosage and Contraindications’ is more an *état des lieux* of the current practice before the ICC that highlights both the benefits and the limits of this particular type of evidence. However, their common connection point is the synthesis that *Biolaw and International Criminal Law: Towards Interdisciplinary Synergies* revolves around. Both show that the interdisciplinary dialogues that occur in court between legal practitioners and medical experts significantly inform and guide the path to international criminal biolaw. Both also complement the other contributions, which all demonstrate that the vehicle and web of interdisciplinary synergies is as dynamically inescapable as it is desirable.

Caroline Fournet and Anja Matwijkiw

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