1

Introduction: probing the boundaries of humanity

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The rise of humanity in legal discourse

In the past few decades, concepts such as "humanity" and "mankind" gained renewed popularity in legal discourse around the globe, giving rise to novel applications of these concepts in unexpected contexts. This book focuses specifically on two fields where the concept of humanity has recently been frequently invoked: international law and biolaw. In the field of international law, the concepts of humanity and mankind have spread in areas including international criminal law, the law of the sea, environmental law, space law, conflict and security law and human rights law. What is more, legal theorists and international institutions have speculated about the rise of "humanity," "mankind" or simply "the interests of the human being" as possible alternative foundational concepts that could supplement – or even supplant – state sovereignty and state consent. In the *Tadic* case, for instance, the International Criminal Tribunal for the former Yugoslavia argued that international human rights law has moved the international legal order beyond its state-centric foundations towards a "human-being-oriented approach." Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well.[1] Several legal scholars followed suit, declaring "humanity" to be the alpha and omega, the foundation and *telos* of state sovereignty,[2] or identifying the emergence of "humanity's law" that would fundamentally transform the state-centric order of international relations.[3] However, the recent turn to humanity has spurred much controversy and leaves many questions

[1] *Prosecutor* v. *Dusko Tadic* aka "*Dule*," Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, para. 97.
[2] A. Peters, "Humanity as the α and Ω of Sovereignty," *European Journal of International Law* 20 (2009): 513–544.
[3] R. Teitel, *Humanity's Law* (Oxford University Press, 2011).

unanswered. Humanity, after all, does not come with a clearly identifiable meaning – thus constantly raising the question of *auctoritas*. Who is in concrete situations empowered – and powerful enough – to determine the meaning and force of "humanity" and its counterparts, such as the inhumane, the a-humane or the inhuman?

In the relatively new field of biomedical law, often called "biolaw," lawyers also turned to concepts like "humanity," "mankind" and "human dignity" to deal with the challenges posed by recent developments in medicine and biotechnology. Since the 1990s, national and international legal instruments started to emerge to regulate the use and development of new biomedical technologies. Right from the very beginning the human rights framework left its mark on the development of this new body of law, as is illustrated by the declarations and conventions of the Council of Europe and UNESCO in this field.[4] The main concern that pervades biomedical regulation is that the development and use of this technology should take place with respect for the dignity and humanity of human beings.

Although the recitals of these international documents explicitly refer to humanity – as both the foundation of human rights and the central value to be upheld in biomedical regulation – the adoption of this concept in this new legal context brought about a shift in its scope and meaning. The invocation of humanity in biolaw can be primarily understood as part of the legal effort to come to grips with the human body, and to represent the biological aspects of human life in law. After all, the core questions with which medical biotechnology confronts contemporary society go back to the far-reaching possibilities that these technologies offer to analyze, modify and reemploy the biological and genetic characteristics of human beings. As a consequence, biolawyers have enlarged certain aspects of the conventional legal and philosophical understanding of the concept of humanity, and neglected others.

As was noted above, attempts to ground international law and biolaw in concepts such as "humanity" have provoked skepticism and resistance. In the still decentralized world of international relations (or, for that matter, in the world of global capitalism), concepts of humanity and mankind would at best be powerless and irrelevant and at worst uphold ideologies that sustain existing power relations. At the end of the day,

[4] Prime examples are the Council of Europe's Convention on Human Rights and Biomedicine (1997) and UNESCO's Universal Declaration on the Human Genome and Human Rights (1997).

what matters are military or economic power structures, not petty bourgeois concepts like humanity.[5] Similarly, the dominance of the principle of human dignity within bioethical and biolegal discourse has been heavily criticized. Skeptics claim that human dignity is "a squishy, subjective notion,"[6] that is open to a wide variety of conflicting political, ethical and even religious interpretations. Since the concept of human dignity can be easily manipulated to fit one's personal convictions, these authors claim that it should be discarded in its entirety as a "useless concept."[7]

More generally, it has been argued that invoking concepts such as "humanity" is far from an innocent, naive political move. Invoking humanity, after all, necessarily comes with acts of exclusion; if humanity means something, it also excludes, creates its opposite in the form of the inhuman, the inhumane, those outside the world community. Political struggles in the name of humanity thereby turn into struggles between humanity and its enemies. In similar vein some authors in the field of biomedical law contend that appeals to our humanity are often in fact a guise for Christian and conservative agendas to block scientific progress.[8]

The recent turn to "humanity" has thus spurred quite strong reactions, from enthusiastic support to skepticism and outright rejections. However, none of the positions identified above is fully able to do justice to the rise of humanity in legal discourse. The skeptic's denouncement of "humanity" as an irrelevant factor in legal and political discourse fails to see the importance of symbolic power. Invoking concepts like "humanity" is not an innocent act; it empowers, legitimizes, includes and excludes, creates possibilities for doing law and politics. In the context of international criminal law, for instance, relying on the concept of humanity has proven useful for governments engaged in

[5] C. Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (New York: Routledge-Cavendish, 2007).

[6] S. Pinker, "The Stupidity of Dignity," *New Republic*, May 28, 2008. See http://pinker.wjh.harvard.edu/articles/media/The%20Stupidity%20of%20Dignity.htm (accessed February 12, 2013).

[7] See, for instance, R. Macklin, "Dignity Is a Useless Concept," *British Medical Journal* 327 (2003): 1419–1420; H. Kuhse, "Is There a Tension between Autonomy and Dignity?," in P. Kemp, J. Rendtorff and N. Mattson Johansen (eds.), *Bioethics and Biolaw* (Copenhagen: Rhodos International Science and Art Publishers, 2000), vol. 2, 61–74; D. Birnbacher, "Human Cloning and Human Dignity," *Reproductive BioMedicine Online* 10 (2005): 50–55.

[8] Macklin, "Dignity Is a Useless Concept."

civil conflicts; a successful invocation of the term has helped to form new alliances, label enemies and reinvent domestic legal structures.[9] In biomedical regulation the concepts of humanity and human dignity enable certain representations of the biological and genetic dimensions of life. These concepts have proven to be pivotal in the process of legal qualification and regulation of the radically new and hitherto unthinkable hybrid entities that biomedical technologies have so far produced, such as human embryonic stem cells, tissue engineered products, transplant organs, human–animal hybrids and frozen embryos. Rather than dismissing the concept outright as utopian, it is better to study the invocation of humanity in concrete situations: who is empowered and who is silenced when actors rely on humanity, how are legal and political problems framed if someone successfully claims that they regard "humanity" or "mankind"?

A more contextual study of the use of "humanity" would also undermine the rather strong claims made by some advocates of the concept who have held that it can function as an alternative foundation for international law and biolaw. Humanity (or human dignity, or mankind) could only fulfill such a function if its meaning would be clear and uncontroversial enough to transcend the plurality of world views currently existing. Whatever the differences in opinion on issues of political organization, agency and identity, "humanity" would then be the value that holds the world together. However, already a brief overview of the history of the concepts shows that this is not the case. Throughout history, such concepts have been embedded in divergent world views, taken different meanings and functions, and been used for manifold purposes.[10] This is not to say that concepts such as humanity and mankind are devoid of any concrete meaning, as some critics would have it. It is to say, however, that these concepts acquire their meaning in specific contexts; and that even within these contexts the meaning and force of "humanity," "mankind" or "human dignity" are often contested. Rather than embracing or denouncing the concept outright, it is necessary to study the usages of the concepts in different contexts and legal fields. Below, we will start off with a brief overview to elucidate the many faces of humanity in international legal discourse and the newly emerging field of biolaw.

[9] S. Nouwen and W. Werner, "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan," *European Journal of International Law* 21 (2010): 941–965.

[10] For an overview, see section below: "Humanity, mankind and dignity in international law."

Humanity, mankind and dignity in international law

The concepts of humanity and mankind have a long history in international law. For centuries, international law has known the concept of the enemy of mankind, the *hostis humani generis*; a notion initially applied to pirates and slave traders and subsequently to individuals guilty of genocide, war crimes, crimes against humanity and, albeit more controversially, to crimes against peace.[11] In these rather well-known examples, the notion "mankind" helps to identify both the victims of international crimes and those who are empowered to take action against such acts. This is most clearly visible in the case of piracy, which was portrayed as a nuisance to the maritime activities of all nations as well as international trade in general. The victims of piracy, in other words, were not just those who suffered directly from an attack at sea; it was "mankind" as such whose legal interests were at stake. By the same token, the notion of "mankind" helped solving a jurisdictional problem. Pirates had no allegiance to a state and committed their crimes on territories beyond the jurisdictional control of states. However, because "mankind" as such suffered from piracy, all nations had a right to take action against pirates and to exercise an exceptional form of jurisdiction: "universal" jurisdiction. Yet, the notion of "enemies of mankind" does more than identify victims and possible law-enforcers. It is also tied up to a notion of "humanity" in the sense of *humaneness*. Pirates, after all, were not just a nuisance because they operated outside normal zones of jurisdiction or because they disturbed global trade and empire. They also lacked respect for basic considerations of humanity, as laid down in the laws and customs of war as well as in the etiquettes of maritime civility.[12]

As the example of piracy illustrates, the notions of "mankind" and "humanity" in relation to international crimes serve different purposes at the same time: they help to identify victims and law-enforcers, while underlining what in a particular time counts as humane and civilized behavior. The exercise of these multiple functions yields paradoxical results: "humanity" and "mankind" transcend state sovereignty, yet

[11] See, for example, the famous formulation in *Filartiga* v. *Pena-Irala*: "Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him hostis humani generis, an enemy of all mankind." *Filartiga* v. *Pena-Irala*, Court of Appeals (2nd Circuit), 30 June 1980.

[12] G. Simpson, *Law, War and Crime: War Crime Trials and the Reinvention of International Law* (Cambridge: Polity Press, 2007), 161.

empower sovereign states to exercise extraordinary jurisdiction; both help to place individuals outside the boundaries of normalcy, yet require recognition of the legal personality of the very same individuals;[13] both claim to embody universality, yet depend on particular cultural and political understandings. In addition, the concepts of "mankind" and, in particular, "humanity" show a fundamental ambivalence regarding the referent-object of the term: is it the totality of human beings, a world polity, a society of sovereigns, standards of humane behavior, or the human dignity of either the perpetrator, the victim or the bystander – or maybe an uneasy combination of them all?[14]

The paradoxical and ambiguous nature of the concepts of humanity and mankind has not affected their popularity in international legal parlance. On the contrary: the notion of "humanity" gained further prominence from the nineteenth century on with the inclusion of "humanity" in several declarations and treaties in the laws of war. In the second half of the twentieth century, humanity further affected the laws of war through what Neff has called the "humanitarian revolution" in the regulation of warfare: "a seismic shift . . . away from a focus on fairness and mutuality as between warring states, to a primary concern with relieving the suffering of victims of war."[15] In similar fashion, the rise of international criminal law went hand in hand with an increasing emphasis on the need to protect "humanity," as epitomized by the concept of the "crimes against humanity," a concept that was broadened by the jurisprudence of the international criminal tribunals to cover any systematic and widespread attack on civilians, even when committed outside the context of an armed conflict. Or, in the formulation of the Explanatory Memorandum of the International Criminal Court (ICC), all "particularly odious offenses in that they constitute a serious attack on human dignity."[16] In this context, international law seeks to preserve not only the interests of mankind or even basic notions of humaneness; it also sets out to guard "humanity" in the sense of human dignity.

[13] Ibid., chapter 7.

[14] For an analysis of the different meanings of "humanity" in the concept of crimes against humanity, see C. Macleod, "Towards a Philosophical Account of Crimes against Humanity," *European Journal of International Law* 21 (2010): 281–302 and the chapters by Van der Wilt and Corrias in this volume.

[15] S. Neff, *War and the Law of Nations: A General History* (Cambridge University Press, 2004), 315.

[16] Explanatory Memorandum Accompanying the International Criminal Court (Consequential Amendments) Bill 2002.

Outside the sphere of war, enmity and crime the concepts of humanity and mankind also gained increasing significance. In the area of human rights, the concept of human dignity was adopted as the ultimate foundation of a multitude of treaties, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.[17] The Preamble of the Universal Declaration of Human Rights combines recognition of the foundational value of human dignity with a recollection of the danger inherent in the recently committed "barbarous acts which have outraged the conscience of mankind." Here, then, mankind is endowed with a "conscience" that can be "outraged" by violations of the foundation of human rights, the dignity of all "members of the human family."

In the late twentieth century, the concept of "mankind" was also rediscovered in areas such as international environmental law, the law of the sea or space law. The 1967 Outer Space Treaty, for example, posits that the exploration and use of outer space is "the province of mankind," whereas the 1979 Moon Treaty declares the moon and its natural resources are to be regarded as the common heritage of mankind. Similar concepts proliferated in conventions seeking to protect the environment and/or specific territories outside the sovereignty of states. The revisiting of the concept of "mankind" in these contexts builds on a long tradition in international law, which sets certain spaces apart from sovereignty and property, since they belong to "mankind." This point was made in, for example, Vitoria's invocation of the *ius communicationis*, Grotius' *Mare Liberum* or Vattel's recognition of the public nature of the open sea. At the same time, recent invocations of "mankind" in relation to territory have come with some interesting shifts in its meaning and purpose. For one, "mankind" was now portrayed as having a "common heritage"; a move that included future generations and their interests in international law.[18] Moreover, "mankind" was now used not only to bar claims to jurisdiction and property but also actively to bring states together for the protection and nurturing of certain goods and areas and

[17] For a more inclusive overview, see the chapter by Rene Urueña in this volume.

[18] The link was most clearly expressed in the 1997 UNESCO Declaration on the Responsibilities of the Present Generations towards Future Generations. For a discussion on the normative status of obligations towards future generations, including the critics of endowing future generations with rights and interests, see S. Caney, "Cosmopolitan Justice, Responsibility and Global Climate Change," *Leiden Journal of International Law* 18 (2005): 747–775.

for the realization of solidarity among nations.[19] The role of "mankind" in the field of protected areas is thus quite different from the role it plays in international criminal law. Whereas in international criminal law the concept of the "enemies of mankind" has been used to empower states to exercise jurisdiction over international criminals, the concept of mankind in relation to territory first and foremost seeks to limit and redirect the exercise of jurisdiction of (powerful) states. In most contexts, the principle bars claims to exclusive jurisdiction by states[20] and obligates states to use their powers for the benefit of mankind.

As a final note in this brief and far from complete overview it is worth pointing out that recent attempts to ground the entire international order on humanity or human dignity are hardly original. As Koskenniemi has set out, the founding fathers of international law as a separate discipline were strongly committed to a cosmopolitan agenda, with concepts such as "civilization" and "humanity" taking precedence over state sovereignty.[21] In this context, the development of international law was tied to a project of "humanization" that fitted the self-image of the progressive liberal legal elite in the Victorian age. During the Cold War, to name just another example, a rather different project of humanization was proposed by the advocates of the so called "policy school." As one of the founding father Myres McDougal would put it, the aim was to set out the prospects for an "international law of human dignity."[22] The invocation of "humanity" by McDougal must be viewed in the geo-political context of the Cold War, with its proposals for a law of peaceful coexistence, or a legal order based on a strict reading of the principles of sovereignty and non-intervention. The notion of human dignity here serves as an antidote to such accommodative understandings of international order; as a pointer to what the ultimate aim of the process of "world authoritative decision-making" should be. As the

[19] See also the chapter by Ellen Hey in this volume.

[20] This is particularly the case for territories not under the sovereignty of a state (Antarctica, the high seas, outer space, etc.). For issues relating to, for example, cultural world heritage, there may still be exclusive jurisdiction of a particular state, but the exercise of this jurisdiction is regulated in the name of "mankind."

[21] M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (Cambridge University Press, 2002).

[22] M. S. McDougal, "Perspectives for an International Law of Human Dignity," Yale Law School Legal Scholarship Repository, 1959. Available at http://digitalcommons.law.yale.edu/fss_papers/2612 (accessed 13 February 2013). For an overview of the policy school, see also M. S. McDougal, H. Lasswell and M. Reisman, "The World Constitutive Process of Authoritative Decision Making," *Journal of Legal Education* 19 (1967): 243–300.

comparison between the Victorian lawyers and the policy school illustrates, concepts of "humanity" or "human dignity" take a completely different color, depending on the political project of those invoking the terms.

The biolegal reinvention of the concept of humanity

The relatively young field of biolaw derives its main vocabulary from different strands of international law. However, these concepts have been remolded and reconstructed to fit the purposes and values of biomedical regulation. In the following brief overview, both the resemblances and divergences between the international legal invocation of "humanity," such as previously described, and the biolegal references to "humanity" will be shortly elucidated.

It is often stated that the birth of biolaw coincides with the enunciation of the Nuremberg Code (1947).[23] This well-known post-war set of medical-ethical principles and guidelines for research on human subjects was developed during the Nuremberg trial of Nazi physicians and researchers. The war crimes and crimes against humanity of which these doctors were accused were related to the horrific experiments and wide-scale "euthanasia" practices committed under the guise of eugenic medical "science."[24] From this perspective the origins of biolaw lie in international criminal law.

The atrocities of the Nazi eugenic experiments do not only show that experimentation on human subjects involves risks of instrumentalization of people for scientific goals, but also how, in a sense, it is ultimately the human subjects' humanity that can thereby be compromised. When people are conceived as merely "human material" for experiments, this is widely considered a gross violation of their humanity. For this reason "the voluntary consent of the human subject is absolutely essential," as is stated in the first of the Code's ten points. Moreover, regardless of the obtained consent the researcher should protect the subject against physical and mental injuries and suffering (point 4), and come to a fair balance between the possible risks for the subject and the benefits for

[23] N. Lenoir and B. Mathieu, *Les normes internationales de la bioéthique* (Paris: Presses universitaires de France, 2004); J. Rendtorff and P. Kemp, *Basic Ethical Principles in European Bioethics and Biolaw* (Barcelona: Institut Borja de Bioètica, 2000), vol. 2.

[24] G. Annas and M. A. Grodin (eds.), *The Nazi Doctors and the Nuremberg Code: Human Rights in Human Experimentation* (Oxford University Press, 1995).

society. As is expressed in point 6 of the Code: "The degree of risk to be taken should never exceed that determined by the *humanitarian* importance of the problem to be solved by the experiment." Thus, in a way, not only is the subject's humanity at stake as he runs the risk of being used as merely an instrument in the quest for scientific progress but also (should the experiment benefit humanity, that is) society in general.

The Nuremberg Code's major significance can hardly be overstated and reaches beyond international criminal law. With it, the foundation was laid for the international regulation of human experimentation, such as the Declaration of Helsinki of the World Medical Association.[25] However, despite these historical roots, contemporary biolaw borrows its main concepts and categories from another branch of international law. In the 1990s, when biotechnological developments necessitated the further elaboration of a biolegal framework, international criminal law disappeared from the biolegal scene to be replaced by human rights vocabulary. Faced with the emerging possibilities of technologies such as genetic screening, embryonic stem cell therapy and regenerative medicine, both the national and international legal order relied primarily on the human rights framework to guide further developments in this field. International examples are the conventions of the Council of Europe in this field, such as the Convention on Human Rights and Biomedicine (1997), and its accompanying protocols on biomedical research (2005), cloning (1998) and other biomedical issues; the declarations of UNESCO, such as the Universal Declaration on the Human Genome and Human Rights (1997) and the Universal Declaration on Bioethics and Human Rights (2005), and the statements of the Human Genome Organisation (HUGO) Ethics Committee, such as its Statement on the Principled Conduct of Genetics Research (1995) and its Statement on Gene Therapy Research (2001).

The fact that the current biolegal framework is heavily influenced by human rights thinking rather than an international criminal law approach can be explained in the first place by the radical change of context. Whereas the Nuremberg Code was developed as a reaction to the wide-scale state-organized eugenics programs of the Third Reich, today's possibilities to intervene in our genetic constitution are used on a voluntary and individual basis to fulfill personal desires and ambitions. Therefore, contemporary biomedical developments are rather part of

[25] Originally adopted in 1964, and since then revised six times. The last revision was accepted in 2008.