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## **Philosophical Foundations of International Criminal Law: Correlating Thinkers**

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**Front cover:** *The cut stem of a fir tree in the forest around Vallombrosa Abbey in Reggello, in the Apennines east of Florence. The monastery was founded in 1038, and is surrounded by deep forests tended over several centuries. The concentric rings show the accumulating age of the tree, here symbolising how thought expands and accumulates over time, and how lines or schools of thought are interconnected and cut through periods.*

**Back cover:** *The forest floor covered by a deep blanket of leaves from past seasons, in the protected forests around Camaldoli Monastery in the Apennines east of Florence. Old leaves nourish new sprouts and growth: the new grows out of the old. We may see this as a metaphor for how thinkers of the past offer an attractive terrain to explore and may nourish contemporary foundational analysis.*

## Gandhism and International Criminal Law

Abraham Joseph\*

*Ahimsa* (non-violence) is the highest ideal. It is meant for the brave, never for the cowardly. To benefit by others; killing, and delude oneself into the belief that one is being very religious and non-violent is sheer self-deception.<sup>1</sup>

### 15.1. Introduction

International criminal law has been the response of the international community to acts of impunity. Holding individuals accountable for war crimes, crimes against humanity and genocide is the most effective way to ensure justice for the victims of the worst violations of human rights. Reading the mandate and philosophy of international criminal justice in the works of leading thinkers requires a deep understanding of both the subject and the works of the thinker concerned. Reading Gandhism and its influence in international criminal law is no exception.

Gandhi is widely regarded as the moral initiator of the global peace and justice movement. Many movements that seek to uphold these virtues imbibe the spirit of Gandhism in them. It is therefore natural that formal criminal codes of a country, theories of criminology and all measures in the field of criminal justice will benefit from an evaluation on the touchstone of Gandhism if their real philosophical breadth is to be measured. However, Gandhi never directly addressed the subject of international law,

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<sup>1</sup> Mohandas Karamchand Gandhi, in *The Harijan*, 9 June 1946, para. 172. (Gandhi's work have been documented by a variety of credible Indian sources over the years. While it is believed that the *Collected Works of Mahatma Gandhi* ('*Collected Works*') comprise the most authentic record of his writings, other records of his writings exist. In this chapter, the authentic online version of *Collected Works* is cited. Note that citations on actual dates may vary given that they pertain to voluminous matters compiled over a 40-year period where no systematic technological tools to document material existed. It is also possible that multiple variants of *Collected Works* exist which may not be entirely consistent on certain aspects.)

much less international criminal law. International law during Gandhi's time was a rudimentary system with First World moorings. Its emphasis was on a limited range of concerns and its failure to clearly address the causes of the two World Wars has left it considerably weakened. In any case, there is hardly any evidence of an impact of international law on Gandhi during his lifetime, except perhaps on limited dimensions of aggression in the context of imperialism.

While it is often assumed that Gandhi's sole or at least primary concern was the fight for India's independence from British rule, his emphasis on specific values of individual propriety, including the quest for *Satyagraha* and truth, among other values, helps us link his philosophy with any other normative system that is open for evaluation. It is in this context that there exists the possibility of comparing the values of international criminal law with Gandhism, despite the absence of direct relevance.

Gandhi's concept of peace and non-violence, I argue, remains the intellectual and practical basis for the functioning of the International Criminal Court ('ICC') and the broader field of international criminal law. Both the ICC and international criminal law function as 'philosophical *satyagrahis*' (truth seekers) that seek to eliminate impunity through the use of judicial and prosecutorial means to fight impunity. International criminal tribunals as 'non-violent' actors have come to play a significant role in making the world a safer place through their jurisprudence. As tribunals of justice striving for accountability through the judicial route, these courts have come to highlight the global efforts in striving for a world order that is rooted in Gandhi's notion of truth, peace and non-violence. The ICC best represents these judicial institutions. Using judgments and legal reasoning, the Court is contributing to transitional justice by advancing the Gandhian values of peace, justice and non-violence by resorting to the moral conscience of the parties involved. By emphasizing 'truth' through either conviction or acquittal, the Court ensures a process of closure through the Gandhian mode of personal introspection, employing personal morality and private conscience. Thus, Gandhi and his ideas continue to resonate through the discipline of international criminal law.<sup>2</sup>

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<sup>2</sup> Mohandas Karamchand Gandhi, in *Young India*, 10 October 1928, para. 342:

I know only one way-the way of *ahimsa*. The way of *himsa* goes against my grain. I do not want to cultivate the power to cultivate *hamsa* [...] The faith sustains me that He is the help of the helpless, that He comes to one's succor only when one throws himself

Despite the close philosophical link between Gandhism and international criminal law there has been no serious attempt to link Gandhian philosophy with the subject. This is surprising given that peace making and transitional justice through the judicial route are the primary objectives of the discipline and Gandhi has remained the principal moral, intellectual and practical proponent of these values, albeit in highly different context. Whereas existing works have focused on the apparent contradictions between the Court's judicial mandate in prosecuting individuals and its resultant impact on the peace process from the perspective of public policy, this work is an attempt in fulfilling this void in literature. It is an attempt in bringing Gandhi alive in one of the most significant debates facing the global community. The challenges facing international criminal law are in many ways, the challenges facing the *satyagrahis*.<sup>3</sup> The critical attacks directed against the ICC by its opponents are to be viewed as threats faced by an institutional *satyagrahi* who is on the eternal quest for truth and non-violence. In this sense, critical attacks against the philosophy of international justice in general and the international criminal court in particular should not be surprising given the premise that the quest for peace and non-violence is fraught with opposition. The ICC thus is reflective of a 'Gandhism in action' when it holds individuals accountable for mass crimes.

Gunnar Myrdal, a Swedish economist, famously remarked that states seek to maintain their monopoly on the process of peacekeeping, thereby implying that non-state actors and institutions are normally kept at bay during such initiative. If this statement is true, all peacekeeping initiatives can operate only at the behest of states with non-state actors getting eclipsed in the process. However, that is not true. This 'statist' mindset is sought to be challenged in this chapter, whose fundamental premise is 'judicialism' with its peacemaking potential. While Gandhism was co-opted in South Africa and the United States of America by Nelson Mandela and Rev. Martin Luther King to fight against apartheid and seg-

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on His Mercy. It is because of that faith that I cherish the hope that God will one day show me a path which I may confidently commend to the people.

<sup>3</sup> Mohandas Karamchand Gandhi, in *Young India*, 20 February 1930, para. 61:

I have been a 'gambler' all my life. In my passion for finding truth and in relentlessly following out my faith in non-violence, I have counted no stake too great. In doing so I have erred, if at all, in the company of the most distinguished scientist of any age and any clime.

regation respectively, it leads to an impression that Gandhism can only be employed directly in the face of objective and identifiable injustice alone. Here again the thrust was on the creation of a 'non-violent force' that resists (passively) the onslaught of violence. This chapter seeks to advance the thesis that the international criminal tribunals, despite their judicial character, embody an international peacekeeping mission advancing the concept of *Satyagraha* as propounded by Mahatma Gandhi. This is a constructive understanding of *Satyagraha*. Peacekeeping as conventionally understood needs to be given a re-look with a thorough examination of judicial bodies that engage in this function. The chapter seeks to re-orient the narrative surrounding international criminal institutions not merely as institutions engaged in holding individuals accountable for 'core crimes', namely genocide, crimes against humanity and war crimes, but as institutional actors actively engaged in the process of promoting and advancing the values of peace and non-violence in the moral spirit of Gandhism. Convicting individuals for genocide, war crimes and crimes against humanity is merely a means to achieve the broader goal of peace and non-violence. These attempts ultimately lead to 'truth', the final destination of Gandhi's spiritual quest.

However, this is not to suggest that international criminal law is perfect. The shortcomings in the normative framework of the discipline can only be addressed by a deeper embrace of the subject. In short, international criminal law is the intellectual and applied realization of Gandhian truth and non-violence at the global level, a moral exercise far more significant than the mere holding of individuals accountable for mass crimes. It is a moral mission to be strengthened and bolstered by a deeper embrace of the apostle of peace and non-violence. As Martin Luther King mentioned, if humanity is to develop and progress, Gandhi is inescapable. He lived, thought and acted, inspired and motivated by the vision of a humanity evolving towards a world of peace, justice, non-violence and harmony. One may ignore or discard him only at his own risk. This rings true in the case of international criminal law as well, as in most other dimensions of human relations.

## **15.2. Mahatma Gandhi: The Man and his Ideas**

### **15.2.1. Formative Years**

Born in 1869, in the town of Porbandar, located in the State of Gujarat, scholars tend to view Gandhi's initial upbringing as anything but uncon-

ventional. He belonged to the traditional business caste and his family, like most others of the time, was steeped in social conservatism. Growing up under the watchful eyes of his deeply religious mother and disciplinarian father, Gandhi was strongly ensconced in the virtues of moral and ethical behaviour. Notions of right and wrong, ethical and unethical were a defining feature of Gandhi's formative learning and educative mores. His autobiography, *My Experiments with Truth*, contains numerous illustrations, where he was placed in difficult moral conundrums during his childhood years, requiring him to take decisions based on competing moral and ethical dilemmas. The instructions of a teacher to cheat in an exam, curbing the biological needs of the body for other necessities, among other instances, are replete in the autobiography.

### **15.2.2. Gandhi during the Boer War: Gandhi's Tryst with Humanitarian Law**

The Boer War, by all accounts, seems to have had a defining influence on the life of Gandhi. The bloodshed, killing and merciless warmongering that followed had a deep impact on the young Gandhi. Gandhi, who was a lawyer working for Muslim Indian traders in Natal, formed a volunteer Ambulance Corps for the British Army.<sup>4</sup> The Natal Indian Ambulance Corps, led by Gandhi, comprised of 300 free and 800 indentured labourers working for their employers. Its task was to take the wounded from the battlefield and carry them to safety. The task of this force was fundamentally humanitarian in nature. The importance of caring and providing for the sick during conflict was a salutary effort by the early Gandhi in the applied philosophy of peacekeeping.<sup>5</sup>

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<sup>4</sup> He was a Warrant Officer since Indians could not be commissioned unless they were Rajas or Maharajas.

<sup>5</sup> Mohandas Karamchand Gandhi, in *Young India*, 5 November 1925, para. 379, as quoted in Nirmal Kumar Bose, *Selections from Gandhi*, Navajivan Publishing House, 2nd ed., 1957, p. 212: "By enlisting men for ambulance work in South Africa and in England, and recruits for field service in India, I helped not the cause of war, but I helped the institution called the British Empire in whose ultimate beneficial character I then believed. My repugnance to war was as strong then as it is today; and I could not then have and would not have shouldered a rifle. But one's life is not a single line; it is a bundle of duties very often conflicting. And one is called upon continually to make one's between one duty and another. As a citizen not then, and not even now, are former leading an agitation against the institution of war, I had to advise and lead men who believed in war but who from cowardice or from base motives, or from anger against the British Government refrained from enlisting.

### 15.2.3. Gandhi on Law

Mahatma Gandhi is widely acknowledged as the leading political and spiritual figure of the Indian freedom movement. Known as ‘Mahatma’ (Great Soul), Gandhi’s spiritual aura, without prejudice to other strands of ideological thought, was the defining point of Indian nationalism in the struggle against colonial exploitation. While his principal political objective was the liberation of India from the clutches of British imperial rule, his practice and ideas had an appeal that extended much beyond that objective. In his numerous writings penned over a lifetime, Gandhi discussed a diverse range of subjects that covered numerous dimensions of human existence. Given the range and breadth of this scholarship, any attempt to analyse his concepts must be delicately undertaken, giving primacy to his fundamental ideas, on which there appears to be little, if any, controversy. As such, this chapter proceeds with the hypothesis that international criminal law is an ideological embrace of Gandhism and shortcomings in its functioning, if any, can be addressed by a deeper embrace of Gandhism.

This may sound surprising to those who regard Gandhi as a bitter critique of law, judicial institutions and lawyers. His most seminal text, the *Hind Swaraj*, published in 1909, may be considered a vitriolic attack on law and lawyers. In addition, it denounces, in most trenchant terms, the evils posed by modernism. However, I argue that Gandhi’s critique of law should not be interpreted as a criticism of the values represented by global

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I did not hesitate to advise them that so long as they believed in war and professed loyalty to the British constitution they were in duty bound to support it by enlistment. Though I do not believe in the use of arms, and though it is contrary to the religion of ahimsa which I profess, I should not hesitate to join an agitation for a repeal of the debasing Arms Act which I have considered amongst the blackest crimes of the British Government against India. I do not believe in retaliation, but I did not hesitate to tell the villagers near Bettie four years ago that they who knew nothing of ahimsa were guilty of cowardice in failing to defend the honour of their womenfolk and their property by force of arms. And I have not hesitated, as the correspondent should know, only recently to tell the Hindus that if they do not believe in out-and-out ahimsa and cannot practiced it they will be guilty of a crime against their religion and humanity if they failed to defend by force of arms the honour of their women against any kidnapper who chooses to take away their women. And all this advice and my previous practice I hold to be not only consistent with my profession of the religion of ahimsa out-and-out, but a direct result of it. To state that noble doctrine is simple enough; to know it and to practise it in the midst of a world full of strife, turmoil and passions is a task whose difficulty I realize more and more day by day. And yet the conviction too that without it life is not worth living is growing daily deeper”.



justice. His aversion towards the legal profession, its goals, motives and objectives, of which he himself was an integral part, is not to be interpreted as a standing denouncement of institutional judicial endeavours of peace-making, more so at the international level.

Gandhi saw the British legal system as a colonial tool to morally corrupt the Indian people. The devices and tools of the common law legal system, given their origins in private law, did not have necessary roots in *dharmic* moral justice. Settlement of private disputes was the principal objective of common law. The lawyer was merely a hired agent to argue that case on behalf of the parties. While the common law exalts the role of the lawyer and the judge, especially as independent arbiters who champion the cause of justice, Gandhi disagrees. The quest for truth should be ultimate objective of legal proceedings, in Gandhi's understanding of the aims and ends of law. Common law, it is said, is not keen on truth. Truth through the common law courts is not necessarily the quest for justice. It is, some may say, merely a showmanship of power and wealth. The victim may win and secure the delivery of justice, but it is not usually the principal objective of the British legal system, which seeks to preserve the values of truth, solely through the judicial route. The edifice of justice must be willing to evolve and if required give way to other alternatives if truth is the casualty. This may be unimaginable in the British legal system, which, to take a simplistic view, is more concerned with the ends than the means. For Gandhi, the means adopted to pursue a stated goal are more important than the end in itself, which meant that the latter could never be justified by the former.<sup>6</sup>

### **15.2.4. Gandhi's Key Concepts**

#### **15.2.4.1. Non-Violence**

Of all the ideas of Gandhi, the concept of non-violence is the most significant. In fact, it can be said with certainty that there is no other concept of Gandhi which has received as much attention as his concept of *ahimsa* or

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<sup>6</sup> Mohandas Karamchand Gandhi, as quoted in Krishna Kripalani (ed.), *All Men Are Brothers: Life and Thoughts of Mahatma Gandhi as Told in His Own Words*, 2nd edition, UNESCO, 1969, p. 81: "They say 'means are after all means'. I would say 'means are after all everything'. As the means so the end. There is no wall of separation between means and end. Indeed the Creator has given us control (and that too very limited) over means, none over the end. Realization of the goal is in exact proportion to that of the means. This is a proposition that admits of no exception".

non-violence.<sup>7</sup> While Gandhi acknowledges the progressive decline in the belief in non-violence, according to him, this is the cause of human misery and intolerance.<sup>8</sup> Non-violence should never be confused with being meek or submissive.<sup>9</sup> It is the highest spiritual power which a person can

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<sup>7</sup> Mohandas Karamchand Gandhi, in *The Harijan*, 5 September 1936, para. 236, as quoted in Bose, 1957, pp. 186–87, see *supra* note 7: “Non-violence is the law of the human race and is infinitely greater than and superior to brute force. In the last resort it does not avail to those who do not possess a living faith in the God of Love. Non-violence affords the fullest protection to one’s self-respect and sense of honour, but not always to possession of land or movable property, though its habitual practice does prove a better bulwark than the possession of armed men to defend them. Non-violence, in the very nature of things, is of no assistance in the defence of ill-gotten gains and immoral acts. Individuals or nations who would practice non-violence must be prepared to sacrifice (nations to last man) their all except honour. It is, therefore, inconsistent with the possession of other people’s countries, i.e., modern imperialism, which is frankly based on force for its defence. Non-violence is a power which can be wielded equally by all-children, young men and women or grown-up people, provided they have a living faith in the God of Love and have therefore equal love for all mankind. When non-violence is accepted as the law of life, it must pervade the whole being and not be applied to isolated acts. It is a profound error to suppose that, whilst the law is good enough for individuals, it is not for masses of mankind”.

<sup>8</sup> Mohandas Karamchand Gandhi, in *The Harijan*, 30 March 1947, para. 86: “The lesson of non-violence is present in every religion, but I fondly believe that, perhaps, it is here in India that its practice has been reduced to a science. Innumerable saints have laid down their lives in *tapashcharya* until poets had felt that the Himalayas became purified in their snowy whiteness by means of their sacrifice. But all this practice of non-violence is nearly dead today. It is necessary to revive the eternal law of answering anger by love and of violence by non-violence; and where can this be more readily done than in this land of Kind Janaka and Ramachandra?”.

<sup>9</sup> Rabindranath Tagore, in *Young India*, 11 August 1920, para. 713, as quoted in Bose, 1957, see *supra* note 7: “Non-violence in its dynamic condition means conscious suffering. It does not mean meek submission to the will of the evil-doer, but it means the putting of one’s whole soul against the will of the tyrant. Working under this law of our beings, it is possible for a single individual to defy the whole might of an unjust empire to save his honour, his religion, his soul and lay the foundation for that empire’s fall or its regeneration”. Cf. para. 516. See also Mohandas Karamchand Gandhi, in *The Harijan*, 30 March 1947, paras. 85–86: “[T]he true meaning of non-resistance has often been misunderstood or even distorted. It never implied that a nonviolent man should bend before the violence of an aggressor. While not returning the latter’s violence by violence, he should refuse to submit to the latter’s illegitimate demand even to the point of death. That is the true meaning of non-resistance. [...] He is not to return violence by violence, but neutralize it by withholding one’s hand and, at the same time, refusing to submit to the demand. This is the only civilized way of going on in the world. Any other course can only lead to a race for armaments interspersed by periods of peace which is by necessity and brought about by exhaustion, when preparations would be going on for violence of a superior order. Peace through superior violence inevitably leads to the atom bomb and all that it stands for. It is

possess on the road to truth which should have the capacity to conquer the heart of the opponent.<sup>10</sup>

#### 15.2.4.2. Satyagraha

*Satyagraha* or soul-force is the road or the path adopted to arrive at truth.<sup>11</sup> A *satyagrahi* is an individual who is on the quest of this journey, experimenting with methods and tactics which help him arrive at the truth. Soul-force remains one of Gandhi's most powerful ideas and can be termed as the 'philosophical equator' of Gandhian philosophy.<sup>12</sup>

#### 15.2.4.3. The Relationship between *Ahimsa* and Truth

*Ahimsa* and truth represent two sides of the same coin. One cannot exist without the other. A proper understanding of these two concepts is funda-

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the completes negation of nonviolence and of democracy which is not possible without the former”.

- <sup>10</sup> Mohandas Karamchand Gandhi, in *Young India*, 2 April 1931, para. 58, as quoted in Bose, 1957, p. 195, see *supra* note 7: “The mysterious effect of non-violence is not to be measured by its visible effect. But we dare not rest content so long as the poison of hatred is allowed to permeate society. This struggle is a stupendous effort at conversion. We aim at nothing less than the conversion of the English. It can never be done by harbouring ill-will and still pretending to follow nonviolence. Let those therefore who want to follow the path of nonviolence and yet Harbour ill-will retrace their steps and repent of the wrong they have done to themselves and the country”.
- <sup>11</sup> Mohandas Karamchand Gandhi, in *The Harijan*, 15 October 1938, paras. 290–91: “I present [...] a weapon not of the weak but of the brave. There is no bravery greater than a resolute refusal to bend the knee to an earthly power, no matter how great, and that without bitterness of spirit and in the fullness of faith that the spirit alone lives, nothing else does”.
- <sup>12</sup> Mohandas Karamchand Gandhi, *Hind Swaraj*, International Printing Press, Phoenix, 1910, as quoted in Bose, 1957, p. 43, see *supra* note 7: “Passive resistance is a method of securing rights by personal suffering; it is the reverse of resistance by arms. When I refuse to do a thing that is repugnant to my conscience, I use soul-force. For instance, the Government of the day has passed a law, which is applicable to me. I do not like it. If by using violence I force the Government to repeal the law, I am employing what may be termed body-force. If I do not obey the law and accept the penalty for its breach, I use soul-force. It involves sacrifice of self. Everybody admits that sacrifice self is infinitely superior to sacrifice of other. Moreover, if this kind of force is used in a cause that is just, only the person using it suffers. He does not make others suffers for his mistakes. Men have before now done many things which were subsequently found to have been wrong. No man can claim that he is absolutely in the right or that a particular thing is wrong because h thinks so, but it is wrong for him so long as that is his deliberate judgment. It is therefore meet that he should not do that which he knows to be wrong, and suffer the consequence whatever it may be. This is the key to the use of soul-force”.

mental to understanding Gandhism.<sup>13</sup> While it is not easy to achieve *ahimsa*, one should constantly try to strive for the same. Even a person who is weak and unable to achieve the goal of *ahimsa* should not stop trying.<sup>14</sup>

#### 15.2.4.4. *Advaita* (Non-Dualism)

Gandhi passionately advocated the concept of *advaita* or non-dualism. Essentially, this principle denotes the inherent harmony and unity between all forces existing in nature. One man's gain is everyone's gain, whereas his loss is everyone's loss. One cannot derive happiness at the cost of another person's sorrow and thus his success lies with the overall development and well-being of the human race.<sup>15</sup>

#### 15.2.4.5. Gandhi's Ultimate Objective

Gandhi's ultimate objective was the attainment of *moksha*. The closest English translation of the word is liberation from the cycle of birth and re-birth, the ultimate realisation in Hindu spiritual quest.<sup>16</sup>

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<sup>13</sup> Mohandas Karamchand Gandhi, as quoted in Kripalani (ed.), 1969, p. 81, see *supra* note 8: “*Ahimsa* and Truth are so intertwined that it is practically impossible to disentangle and separate them. They are like the two sides of a coin, or rather a smooth unstamped metallic disc. Who can say, which is the obverse, and which the reverse? Nevertheless, *ahimsa* is the means; Truth is the end. Means to be means must always be within our reach, and so *ahimsa* is our supreme duty. If we take care of the means, we are bound to reach the end sooner or later. When once we have grasped this point final victory is beyond question. Whatever difficulties we encounter, whatever apparent reverses we sustain, we may not give up the quest for Truth which alone is, being God Himself”.

<sup>14</sup> Mohandas Karamchand Gandhi, as quoted *Ibid.*, p. 94, see *supra* note 8: “When two nations are fighting, the duty of a votary of *ahimsa* is to stop the war. He who is not equal to that duty, he who has no power of resisting war, he who is not qualified to resist war, may take part in war and yet whole-heartedly try to free himself, his nation and the world from war”.

<sup>15</sup> Mohandas Karamchand Gandhi, in *Young India*, 4 December 1924, para. 398, as quoted in Bose, 1957, p. 33, see *supra* note 7: “I do not believe that an individual may gain spiritually and those who surround him suffer. I believe in *advaita*, I believe in the essential unity of man and, for that matter, of all that lives. Therefore, I believe that if one man gains spiritually, the whole world gains with him and, if one man falls, the whole world falls to that extent”.

<sup>16</sup> Mohandas Karamchand Gandhi, *An Autobiography or the Story of My Experiments with Truth*, Navajivan Publishing House, Ahmedabad, 1948, pp. 4–5: “What I want to achieve – what I have been striving and pining to achieve these thirty years – is self-realization, to see God face to face, to attain *Moksha*. I live and move and have my being in pursuit of this goal. All that I do by way of speaking and writing, and all my ventures in the political

### 15.2.5. Gandhi's Ideas in Relation to International Criminal Justice

#### 15.2.5.1. International Criminal Justice as 'Peace Trusteeship'

One of the most celebrated of Gandhi's concepts is the idea of 'trusteeship'. Trusteeship refers to the socio-economic framework under which resources are held in 'trust' by an individual most capable of holding them for the benefit and welfare of society.<sup>17</sup> A trustee is not the perpetual owner of the resource in question but merely a holder of the resource. Since his proprietary interests in the property are limited, the elements of selfishness, avarice and greed all socially harmful traits can be best contained. While the idea of trusteeship has its roots in the desire to eliminate economic inequality by bringing about a change in the ownership and control of the means of production, the idea can application in diverse settings. Gandhi proceeded with the logic that expropriation and taxation to eliminate disparities in wealth and resources had their limitations. Since no one could be better off by harming or hurting another, Gandhi considered that all attempts to deprive the wealthy of their holdings are based in violence. Just as no one can become legitimately rich by robbing others of resources, the best moral path to secure equality was to permit the industrious to hold the resources for the good of the less fortunate man in society. In this process, we do not harm the rich or strike violence against them, but convince them of the moral necessity of egalitarianism.

This idea of refraining from 'violence against the other' can have application in international criminal justice. While focusing on holding individuals accountable for war crimes, crimes against humanity and genocide, the focus must not be on stigmatising individuals. Even the most deplorable war criminal or *genocidaire* must be treated with a sense of compassion and mercy. The abolition of the death sentence in international criminal law is a salutary adoption of 'peace trusteeship'.<sup>18</sup> Even long-

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field, are directed to this same end. But as I have all along believed that what is possible for one is possible for all, my experiments have not been conducted in the closet, but in the open; and I do not think that this fact detracts from their spiritual value. There are some things which are known only to oneself and one's Maker. These are clearly incommunicable. The experiments I am about to relate are not such. But they are spiritual, or rather moral; for the essence of religion is morality".

<sup>17</sup> Mohandas Karamchand Gandhi, in *The Harijan*, 1 June 1947, para. 174: "To answer brutality with brutality is to admit one's moral and intellectual bankruptcy and it can only start a vicious circle".

<sup>18</sup> Mohandas Karamchand Gandhi, in *Young India*, 26 March 1947, para. 49, as quoted in Bose, 1957, p. 111, see *supra* note 7: "[N]o human being is so bad as to be beyond re-

term imprisonment can have disastrous consequences on the health and well-being of a convict. In this context, it is argued that the sentences provided by the Rome Statute are excessive and amount to a form of ‘violence’ against the convict.<sup>19</sup> Regardless of how immoral a criminal may be, international criminal justice should be a step ahead of him. It should treat criminals with compassion in the Gandhian sense of the term, embracing mercy and empathy as its guiding philosophy. The focus of punishments should be making the convict realise the gravity of his offence and bringing him on the path to reform.<sup>20</sup> This idea of punishment is the defining feature of Gandhian philosophy and essential for the ultimate realisation of truth. No form of punishment or punitive theory will be successful if it does not create a sense of moral guilt in the offender. This cannot be

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demption, no human being is so perfect as to warrant his destroying him whom he wrongly considers to be wholly evil”.

<sup>19</sup> Statute of the International Criminal Court, 17 July 1998, in force 1 July 2002, Article 77 ([www.legal-tools.org/doc/7b9af9/](http://www.legal-tools.org/doc/7b9af9/)):

Applicable penalties

1. Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime under article 5 of this Statute:
  - (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
  - (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.
2. In addition to imprisonment, the Court may order:
  - (a) A fine under the criteria provided for in the Rules of Procedure and Evidence;
  - (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

<sup>20</sup> Gandhi, in *The Harijan*, 30 March 1947, paras. 85–86, see *supra* note 11: “The true meaning of non-resistance has often been misunderstood or even distorted. It never implies that a nonviolent man should bend before the violence of an aggressor. While not returning the latter’s violence by violence, he should refuse to submit to the latter’s illegitimate demand even to the point of death. That is the true meaning of non-resistance. [...] He is not to return violence by violence, but neutralize it by withholding one’s hand and, at the same time, refusing to submit to the demand. This is the only civilized way of going on in the world. Any other course can only lead to a race for armaments interspersed by periods of peace, which is by necessity, and brought about by exhaustion, when preparations would be going on for violence of a superior order. Peace through superior violence inevitably leads to the atom bomb and all that it stands for. It is the complete negation of nonviolence and of democracy which is not possible without the former”.



achieved by violence and can be addressed only by morally prevailing over the offender.<sup>21</sup>

### 15.2.5.2. The Crime of Aggression: A Gandhian Perspective

Aggression, as a crime and solutions to deal with the issue, has troubled the international community for long. With December 2017 witnessing a historic moment of its activation, the aggression debate has taken centre stage. The ICC now has jurisdiction over this crime, along with the other three core crimes. While the move is commendable, it appears it may take several years for the ICC to officially prosecute anyone for the crime of aggression, if at all. Nonetheless, the global justice community should leave no stone unturned in ensuring the progressive development of the crime of aggression. Interestingly, of all of Gandhi's views, the one bearing the closest connection to the discipline of international criminal law is his official position on the question of aggression. Since Gandhi viewed colonialism as an extension of aggression, his views on the subject naturally reflect a premise based on the realities of colonialism. Gandhi used the term 'gangsterism' to refer to the phenomena of aggression which he condemned.<sup>22</sup> Exploitation of nations also lies at the root of aggression.<sup>23</sup>

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<sup>21</sup> Mohandas Karamchand Gandhi, in *Young India*, 8 October 1925, para. 346: "The non-violence of my conception is a more active and more real fighting against wickedness than retaliation whose very nature is to increase wickedness. I contemplate a mental and, therefore, a moral opposition to immoralities. I seek entirely to blunt the edge of the tyrant's sword, not by putting up against it a sharper-edged weapon, but by disappointing his expectation that I would be offering physical resistance. The resistance of the should that I should offer instead would elude him. It would at first dazzle him, and at last compel recognition from him, which recognition would not humiliate him but would uplift him. It may be urged that this again is an ideal state. And so it is. The propositions from which I have drawn my arguments are as true as Euclid's definitions, which are none the less true because in practice we are unable to even draw Euclid's line on a blackboard. But even a geometrician finds it impossible to get on without bearing in mind Euclid's definitions. Nor may we dispense with the fundamental propositions on which the doctrine of Satyagraha is based".

<sup>22</sup> Mohandas Karamchand Gandhi, in *The Harijan*, 10 December 1938, para. 372: "What to do with 'gangster' nations, if I may the expression frequently used? There was individual gangsterism in America. It has been put down by strong police measures both local and national. Could not we do something similar for gangsterism between nations, as instanced in Manchuria-the nefarious use of the opium poison, in Abyssinia, in Spain, in the sudden seizure of Austria, and then, the case of Czechoslovakia? If the best minds of the world have not imbibed the spirit of non-violence, they would have to meet gangsterism in the orthodox way. But that would only show that we have not got far beyond the law of the jungle, that we have not yet learnt to appreciate the heritage that God has given us, that, in

### 15.2.5.3. Gandhi on the Use of Force

Did Gandhi ever justify the use of force for any purpose? As the apostle of peace and non-violence, it is widely believed that Gandhi rejected the use of force under all circumstances. However, on a closer reading, it becomes clear that he did support and perhaps even justify the use of force on certain occasions. When a comparative analysis is made on defending aggression and the use of force, it is clear that a weaker State or party may resort to the use of force only to the extent of protecting their interests. Morally, the weaker party deserves the support in such situations.<sup>24</sup> Also, all uses of force are not equally bad. According to Gandhi, there is a need to distinguish between an aggressor and a defender. While a defender may be compelled to use force, his employment of force may not always be a cause of concern, where it is undertaken for the right cause.<sup>25</sup> In all cases,

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spite of the teaching of Christianity which is 1900 years old and of Hinduism and Buddhism which are older, and even of Islam (if I have read it aright), we have not made much headway as human beings. But, whilst I would understand the use of force by those who have not the spirit of non-violence to throw their whole weight in demonstrating that even gangsterism has to be met by non-violence. For, ultimately, force, however justifiably used, will lead us into the same morass as the force of Hitler and Mussolini. There will be just a difference of degree. You and I who believe in non-violence must use it at the critical moment. We may not despair of touching the hearts even of gangsters, even if, for the moment, we may seem to be striking our heads against a blind wall”.

<sup>23</sup> R.K. Prabhu and U.R. Rao (eds.), *The Mind of Mahatma Gandhi*, 3rd edition, Greenleaf Books, 1968, p. 63, as quoted in Kripalani (ed.), 1969, p. 123, see *supra* note 8: “If there were no greed, there would be no occasion for armaments. The principle of non-violence necessitates complete abstention from exploitation in any form. [...] Immediately the spirit of exploitation is gone, armaments will be felt as a positive unbearable burden. Real disarmament cannot come unless the nations of the world cease to exploit one another”.

<sup>24</sup> Mohandas Karamchand Gandhi, in *The Harijan*, 18 August 1940, para. 250, as quoted in Bose, 1957, p. 215, see *supra* note 7: “If war is itself a wrong act, how can it be worthy of moral support or blessings? I believe all war to be wholly wrong. But, if we scrutinize the motives of two warring parties, we may find one to be in the right and the other in the wrong. For instance, if A wishes to seize B’s country, B is obviously the wronged one. Both fight with arms. I do not believe in violent warfare, but all the same, B, whose cause is just, deserves my moral help and blessings”.

<sup>25</sup> Mohandas Karamchand Gandhi, in *The Harijan*, 21 October 1939, para. 309, as quoted in Bose, 1957, pp. 215–16, see *supra* note 7: “Whilst all violence is bad and must be condemned in the abstract, it is permissible for, it is even the duty of, a believer in ahimsa to distinguish between the aggressor and the defender. Having done so, he will side with the defender in a non-violent manner, i.e., give his life in saving him. His intervention is likely to bring a speedier end to the duel, and may even result in bringing about peace between the combatants”.

an endeavour should be made to use the weapon of non-violence alone.<sup>26</sup> Saving one's honour, which is tantamount to protecting one's soul, is the ultimate victory in the moral battle man faces.<sup>27</sup>

#### 15.2.5.4. The Duty to Resist Aggression

According to Gandhi, those who believe in non-violence have a duty to resist aggression. This resistance should be guided by the inner voice of the person undertaking the resistance and may be imperative where one's nation is being attacked or invaded. This is also, ultimately, a great service to humanity.<sup>28</sup> However, wherever possible, recourse should be taken of pacifism.<sup>29</sup> This pacifism should not be confused with cowardice, which is to be avoided at all costs and is even subordinate to violence.

#### 15.2.5.5. Gandhi on Permanent Peace

Despite understanding the difficulty of following the path of non-violence in the ultimate quest for truth, Gandhi optimistically believed that permanent peace between nations and the international community is possible.<sup>30</sup>

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<sup>26</sup> Mohandas Karamchand Gandhi, in *The Harijan*, 1 June 1947, para. 174: "No power on earth can subjugate you when you are armed with the sword of Ahimsa. It ennoble both the victor and vanquished. [...] To answer brutality with brutality is to admit one's moral and intellectual bankruptcy and it can only start a vicious circle".

<sup>27</sup> Mohandas Karamchand Gandhi, in *The Harijan*, 15 October 1938, para. 290: "I must live. I would not be a vassal to any nation or body. I must have absolute independence or perish. To seek to win in a clash of arms would be pure bravado. Not so if, in defying the might of one who would deprive me of my independence, I refuse to obey his will and perish unarmed in the attempt. In so doing, though I lose the body, I save my soul, i.e., my honor".

<sup>28</sup> Mohandas Karamchand Gandhi, in *The Harijan*, 15 April 1939, para. 90: "The true democrat is he who with purely non-violent means defends his liberty and therefore, his country's and ultimately, that of the whole of mankind [...] But the duty of resistance accrues only to those who believe in non-violence as a creed-not to those who will calculate and will examine the merits of each case and decide whether to approve of or oppose a particular war. It follows that such resistance is a matter for each person to decide for himself and under the guidance of the inner voice, if he recognizes its existence".

<sup>29</sup> *Ibid.*: "A true pacifist is a true *satyagrahi*. The latter acts by faith and, therefore, is not concerned about the result, for he knows that it is assured when the action is true. [...] Pacifists have to prove their faith by resolutely refusing to do anything with war, whether of defense or offence".

<sup>30</sup> Prabhu and Rao (eds.), 1968, pp. 59–60, as quoted in Kripalani (ed.), 1969, pp. 122–23, see *supra* note 25: "Not to believe in the possibility of permanent peace is to disbelieve in the godliness of human nature. Methods hitherto adopted have failed because rock-bottom sincerity on the part of those who have striven has been lacking. Not that they have realized this lack. Peace is unattained by part performance of conditions, even as a chemical

This optimism has remained the guiding light of the philosophy and the promises success on the road to truth ahead.

#### **15.2.5.6. Gandhi and International Organisations**

Those arguing that Gandhi should be seen as a critic of modern international law and its organisations tend to overlook the fact that Gandhi was supportive of the functioning of the United Nations Educational, Scientific and Cultural Organization. While the *Hind Swaraj* was an attack against the institution of law, lawyers and the edifice surrounding the legal profession, Gandhi's views cannot be imported to imply a position against global peacekeeping and development agendas.<sup>31</sup> Thus, Gandhi would have supported the mandate of international criminal law and its most prominent institution, the ICC.

### **15.3. International Criminal Law:**

#### **Dealing with Criticism the Gandhian Way**

International criminal law has been a much-criticised discipline. From African States alleging institutional bias against the ICC, to allegations of Eurocentrism, international criminal law has faced constant attacks from diverse sources. With 124 States Parties to the Rome Statute, the ICC is going strong. With the court taking over jurisdiction for the crime of aggression, international criminal law is, much to the relief of the global community, getting stronger. Criticisms against the ICC must be countered using the route of *ahimsa*.<sup>32</sup> In addition, love towards the opponent,

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combination is impossible without complete fulfillment of the conditions of attainment thereof. If the recognized leaders of mankind who have control over the engines of destructions were wholly to renounce their use, with full knowledge of its implications, permanent peace can be obtained. This is clearly impossible without the Great Powers of the earth renouncing their imperialistic design. This again seems impossible without great nations ceasing to believe in soul-destroying competition and to desire to multiply wants and, therefore, increase their material possessions”.

<sup>31</sup> Mohandas Karamchand Gandhi, in *The Harijan*, 16 November 1947, paras. 412–13: “I am deeply interested in the efforts of the United Nations Economic, Social and Cultural Organization to secure peace through educational and cultural activities. I fully appreciate that real security and lasting peace cannot be secured so long as extreme inequalities in education and culture exist as they do among the nations of the world. Light must be carried even to the remotest homes in the less fortunate countries which are in comparative darkness and I think that, in this cause, the nations which are economically and educationally advanced have a special responsibility”.

<sup>32</sup> Mohandas Karamchand Gandhi, in *The Harijan*, 17 November 1946, para. 404: “Assume that a fellow-passenger threatens my son with assault and I reason with the would-be-

understanding and empathising with its perspective should also inform the approach to international criminal justice.<sup>33</sup> A war criminal before an international criminal court should be viewed as an individual with a diseased soul and treated accordingly.<sup>34</sup> It is imperative for international criminal justice to factor in nationalistic considerations in the course of developing the normative framework on the subject. A Gandhian approach to the problem would essentially require factoring in nationalistic motivations of State actors in their relationship with international law organisations.<sup>35</sup> An attempt at self-purification must be made whenever in doubt as to the exact role that international criminal law need take in contemporary times.<sup>36</sup> Thus, the critical attacks launched against the ICC by its oppo-

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assailant who then turns upon me. If then I take his blow with grace and dignity, without harbouring any ill-will against him, I exhibit the ahimsa of the brave. Such instances are of every day occurrence and can be easily multiplied. If I succeed in curbing my temper every time and, though able to give blow for blow, I refrain, I shall develop the ahimsa of the brave which will never fail me and which will compel recognition from the most confirmed adversaries". See also Mohandas Karamchand Gandhi, in *Young India*, 25 February 1921, para. 164, as quoted in Bose, 1957, p. 265, see *supra* note 7: "Whilst we may attack measures and systems. We may not, must not, attack men. Imperfect ourselves, we must be tender towards others and be slow to impute motives".

<sup>33</sup> Mohandas Karamchand Gandhi, in *The Bombay Chronicle*, 9 September 1942: "I have no weapon but love to wield authority over anyone".

<sup>34</sup> D. G. Tendulkar, *Mahatma: Life of Mohandas Karamchand Gandhi*, vol. 2, 2nd ed., Publications Division, 1960, p. 20: "Terrorism and deception are weapons not of the strong but of the weak".

<sup>35</sup> Prabhu and Rao (eds.), 1968, p. 134, as quoted in Kripalani (ed.), 1969, p. 119, see *supra* note 25: "It is impossible for one to be an internationalist without being a nationalist. Internationalism is possible only when nationalism becomes a fact, i.e., when peoples belonging to different countries have organized themselves and are able to act as one man. It is not nationalism that is evil, it is the narrowness, selfishness, exclusiveness which is the bane of modern nations which is evil. Each wants to profit at the expense of, and rise on the ruin of, the other". See also Mahadev H. Desai, *The Diary of Mahadev Desai*, Navajivan Publishing House, Ahmedabad, 1953, p. 287: "Duties to self, to the family, to the country and to the world are not independent of one another. One cannot do good to the country by injuring himself or his family. Similarly, one cannot serve the country injuring the world at large. In the final analysis we must die that the family may live, the family must die that the country may live and the country must die that the world may live. But only pure things can be offered in sacrifice. Therefore, self-purification is the first step. When the heart is pure, we at once realize what is our duty at every moment".

<sup>36</sup> Mohandas Karamchand Gandhi, in *Young India*, 39 April 1925, para. 153, as quoted in Bose, 1957, p. 201, see *supra* note 7: "The spiritual weapon of self-purification, intangible as it seems, is the most potent means of revolutionizing one's environment and loosening external shackles. It works subtly and invisibly; it is an intense process though it might often seem a weary and long-drawn process, it is the straightest way to liberation, the surest

nents should be viewed as threats faced by an institutional *satyagrahi* who is on an eternal quest for the ultimate values of truth and non-violence.

#### 15.4. Conclusion

Gandhi's moral prescription was the defining moment of international conscience in the twentieth century. His ideas remain the philosophical touchstone to examine any global movement even close to 70 years after his death. This assumes significance given the fact that Gandhi never addressed the subject of international law directly, much less international criminal law (which never existed as a formal discipline when he lived). The prescription of *ahimsa*, which is fundamental to Gandhian philosophy as analysed in this chapter, finds application in the judicial attempts of international criminal tribunals to hold individuals accountable for mass crimes. Without resorting to violence or revenge, perpetrators are tried and punished. However, it is argued that there is a need to further embrace Gandhism by eliminating the concept of life imprisonment in international criminal law *in toto*. A person facing trial before an international criminal tribunal should be viewed as a 'moral patient' who needs a Gandhian judicial prescription. Love, compassion, mercy and empathy must flow from the judicial pens of international criminal judicial officers engaged in the noteworthy task of promoting global peace and justice. There is no doubt that Gandhi would have wholeheartedly supported the justice initiatives of international criminal law and launched a global *satyagraha* for the strengthening of this remarkable branch of international law.

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and quickest and no effort can be too great for it. What it requires is faith – an unshakable mountain-like faith that flinches from nothing”.

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## **Philosophical Foundations of International Criminal Law: Correlating Thinkers**

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This first volume in the series 'Philosophical Foundations of International Criminal Law' correlates the writings of leading philosophers with international criminal law. The chapters discuss thinkers such as Plato, Cicero, Ulpian, Aquinas, Grotius, Hobbes, Locke, Vattel, Kant, Bentham, Hegel, Durkheim, Gandhi, Kelsen, Wittgenstein, Lemkin, Arendt and Foucault. The book does not develop or promote a particular philosophy or theory of international criminal law. Rather, it sees philosophy of international criminal law as a discourse space, which includes a) correlational or historical, b) conceptual or analytical, and c) interest- or value-based approaches. The sister-volumes *Philosophical Foundations of International Criminal Law: Foundational Concepts* and *Philosophical Foundations of International Criminal Law: Legally Protected Interests* seek to address b) and c).

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