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

Morten Bergsmo and Emiliano J. Buis (editors)

## E-Offprint:

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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.*



## FOREWORD BY GREGORY S. GORDON

The three volumes of *Philosophical Foundations of International Criminal Law – Correlating Thinkers, Foundational Concepts and Legally Protected Interests* – flow from the conference organised by the Centre for International Law Research and Policy ('CILRAP') with Indian and other partners in New Delhi on 25–26 August 2018. I had the pleasure of speaking at that conference, and my paper appears as Chapter 20 in the first edition of the present volume. I thoroughly enjoyed the intellectual structure and organization of the conference, which flowed seamlessly and is reflected in the sequence of these three volumes: first we considered philosophers, then foundational concepts, and finally legally protected interests or values.

In the previous Foreword, Justice Lokur of the Indian Supreme Court observes that the foundations of international criminal law are found in the *Ramayana* and the *Mahabharata* (of which the *Bhagavad Gita* is a part). We shall not forget either that the philosophy of Gandhi – whose life and teachings seemed to play such a large role during our conference deliberations, and who is discussed in Chapter 15 below – was informed by the *Gita*. We were reminded that Gandhi in many ways echoed the conduct and philosophy of the great Indian emperor Ashoka, who created one of the largest empires in ancient India and then gave it all up to become a Buddhist monk. Along the way, he renounced violence and introduced a policy that established welfare as a right for all citizens; he promoted religious tolerance and core universal values including respect for all life and the importance of spiritual awareness. We ended the conference with Surabhi Sharma's reflections on Indian thought on the collective goods protected by international criminal law, in particular 'unity' (see her chapter in *Legally Protected Interests*). This is a deep, rich, ancient but still vital vein of thought. These discussions took place in a particularly appropriate place, New Delhi.

What did those discussions centre on? During his introductory lecture at the conference, Morten Bergsmo talked about the emergency-response creation and growth of international criminal law, and that we should take a more systematic approach as we look towards its further

development. We need a holistic approach to reformulating international criminal law in general. At the conference, we had a very special opportunity to think deeply and reflectively about potential theoretical grounds for expanding international criminal law's subject-matter jurisdiction to include crimes against the environment, aggression and perhaps terrorism, among other possible offenses. We could step back and explore the foundations of international criminal law – indeed, its *philosophical* foundations – in the kind of depth that is necessary for the international community to consider its essential qualities, potential problems, and most pressing needs. The global community can now benefit from the fruits of those New Delhi colloquies thanks to these three volumes published by the Torkel Opsahl Academic EPublisher ('TOAEP').

The volumes engage in a number of important philosophical inquiries. For example: What is the foundational legitimacy of international criminal law? This first volume contains insights into this based on the works of philosophers throughout history, from Hobbes to Kant to de Vattel to Arendt to Foucault. Some have found legitimacy and some have questioned it. We can perhaps see international criminal law through the lens of Machiavelli – a Prince nakedly arrogating power to himself – or perhaps through the lens of a new interpretation of Foucault, where power is about security for vulnerable populations and is beneficent on a macro-level. Or we can even see it through an updated view of Hobbes, where a new social contract might be negotiated in the community of nations.

To those who have expressed a dim view of international criminal law – who see that it is not applied evenly or efficaciously – let me pose a question. Why does it have to be a zero-sum game? Why not acknowledge *Realpolitik* and say: “Yes, we did what was politically feasible. That was all we could do. We admit that. And even if we did that consciously, we did what we could for salutary purposes. And we know we are building for a better future when *Realpolitik* may be less of an obstacle. We have a foundation here. So it is better to do what we are doing than do nothing at all”? That is a reasonable narrative. For many of us who work in this area, it allows us to see an importance in what we are doing, despite the many obstacles.

As for international criminal law being ‘a new form of colonialism’, another critique we heard during the conference, let us consider the Latin logical fallacy ‘*post hoc, ergo propter hoc*’ (‘after this, therefore because of this’). Because it so happens that Africa had been the main focus of the International Criminal Court by the time of the 2017 conference in New

Delhi, it does not mean that we are confronting a new kind of colonialism. International criminal law's space for operation is limited. Again, we are confronted with *Realpolitik* and the phenomenon of self-referrals, as has been discussed. Perhaps there are unfortunate power plays behind the scenes. That is the subject of another anthology – *Power in International Criminal Justice* – forthcoming by TOAEP at the time of writing. That should indeed be another discussion. What is being done in international criminal law today may be crucial for future generations. The reflections of this conference and anthology have made that much clear. At the same time, we need to improve international criminal law. That much has also been clear.

These volumes ask other questions as well: What are the aims of international criminal law? Here we will begin with Plato and a Platonic theory of punishment advising that we minimize emotional bias in punishment (Chapter 2 below). More modernly, we explore utilitarianism, through Bentham (Chapter 12). We look at retributivism and expressivism as well. Are international criminal law's aims legitimate? Is its remit too broad? We have been asked to think of post-conflict justice more granularly. Perhaps, in reference to certain norm-violators, we need to be more aware of other institutions, including non-punitive ones, that can contribute more effectively to the legal goods of unity and reconciliation that were highlighted in the last conference panels, as elaborated in *Legally Protected Interests*.

We also consider issues of epistemology with reflections on Wittgenstein (Chapter 17) in relation to proving, among other things, *dolus specialis*; and truth and testimony in relation to epistemic injustice in international criminal law. We even consider the notion of normative pluralism and fragmentation in international criminal law (the last two topics, in *Foundational Concepts*). Here, and elsewhere in these volumes, we study Habermas and his theory of communicative rationality and the public sphere. We have seen different theories treated in different contexts in different parts of these three volumes. That is another reminder of how rich the discourse was during the conference, as now presented in these volumes.

Finally, we should think of this project on philosophical foundations in the context of others that have been led by CILRAP and TOAEP. The multi-volume *Historical Origins of International Criminal Law*, the second conference for which was also held in New Delhi in 2014, stands out. We have seen the connections between that great project and this one.

There have been many explicit and implicit references. In the course of 2017, CILRAP also organised a conference at the Peace Palace in The Hague on preliminary examinations, which led to the publication in September 2018 of *Quality Control in Preliminary Examination: Volumes 1 and 2*. They deal with how the machinery of international criminal law works. Here, we consider, if you will, the ‘ghost in the machine’. In the forthcoming volume *Power in International Criminal Justice*, CILRAP seeks to shed light on who operates the machine. This is such an amazing opportunity to understand and develop this discipline of international criminal law through what CILRAP refers to as ‘communitarian scholarship’. It is a great honour to have my work featured in these pages and to share these thoughts with readers about to embark on a great philosophical journey.

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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).

Among the authors in this book are Madan B. Lokur, Gregory S. Gordon, Pedro Lopez Barja de Quiroga, Kaius Tuori, Hanne Sophie Greve, Tallyn Gray, Pablo Kalmanovitz, Juan Paulo Branco Lopez, Daniel N. Clay, Elisabetta Fiocchi Malaspina, Alexander Heinze, Gunnar Ekeløve-Slydal, Sergio Dellavalle, Carlos Augusto Canedo Gonçalves da Silva, Aléxia Alvim Machado Faria, Abraham Joseph, Jochen von Bernstorff, Jaroslav Větrovský, Mark Drumbl, Djordje Djordjević, Nora Helene Bergsmo and the editors.

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