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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.*

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## Buddhist Philosophy and International Criminal Law: Towards a Buddhist Approach to Reckoning with Mass Atrocity

Tallyn Gray\*

### 6.1. Introduction

International criminal law is a relatively new field, having emerged in the wake of European atrocities of the last century. Hence it is to be expected that the philosophical fundamentals of contemporary international criminal law emerge out of Greco-Roman and Judaeo-Christian tradition. The presence of a vast index of Western thinkers – Plato, Augustine, Aquinas, Grotius, Hobbes, Kant and so on – is detectable within its nucleus; they are the formative intellectual tradition from which international criminal law emerged. The teachings of Plato’s near-contemporary Siddhatta Gotama,<sup>1</sup> better known as the Buddha, the ancient Indian prince on whose teachings Buddhism was founded, are not a part of these philosophical origins. This chapter outlines a speculative framework for a specifically Buddhist jurisprudence for dealing with mass atrocity crimes.

In an increasingly globalised world, humankind has no choice but to respond to atrocities across the globe. Hence international criminal law needs to reflect on its ability to respond across cultural difference and to become aware of its own limitations. International criminal law is a product of the European Enlightenment, as the Enlightenment is itself a product of Western classical texts. International criminal law in the globalised world has to move away from insular preoccupation with its own foundational European texts to remain relevant. As Werner Menski argues, uni-

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<sup>1</sup> Gill Farrer-Halls, *The Illustrated Encyclopedia of Buddhist Wisdom*, Godsfield Press, New Alresford, 2000, p. 12.

versalised outlooks of law and of justice must be conscious of their positivistic and Eurocentric preconceptions and the necessity to understand law in a pluralistic world:

With the Eurocentric, positivistic and modernistic blinkers removed, we are free to explore the legal world in its complexity and richness and we need not worry about politicking over the nature of law.<sup>2</sup>

International criminal law at the very least needs to be aware of other, extra-legal, disciplines; as Gideon Boas argues, “while as international lawyers we have raised important questions about legitimacy and coherence, we do not always open ourselves to a genuinely multidisciplinary approach to international criminal justice”.<sup>3</sup>

Hence, this chapter is embedded in Yasuaki’s call for “inter-civilisational discourse” to achieve the widest possible global consensus on human rights,<sup>4</sup> through an open-ended discourse on core ideas. As such it is not attempting to demonstrate universality across philosophical traditions, or even synergy between value systems, although such an endeavour would certainly be possible and perhaps even successful: obviously, the fact that two intellectual traditions are unconnected does not preclude them from reaching similar conclusions. But the goal here is to take core concepts explicitly tackled by international criminal law and understand how those issues can be addressed in Buddhist thought.

International criminal law is a way to systematically examine, and reckon with, mass atrocities. This chapter explores how such events are conceptualised in Buddhist thought and scrutinises what prescriptions could be imagined within that philosophical framework. Common ground may be apparent between different traditions; however, it is important to avoid ventriloquising international criminal law principles through a Buddhist framework; instead, it is necessary to seek out Buddhist perceptions and conceptions of, as well as responses to, mass violence. The chapter

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<sup>2</sup> Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, 2nd edition, Cambridge University Press, Cambridge, 2006, p. 613.

<sup>3</sup> Gideon Boas, “What is International Criminal Justice”, in William A. Schabas *et al.* (eds.), *International Criminal Justice: Legitimacy and Coherence*, Edward Elgar Publishing, Cheltenham, 2012, p. 1.

<sup>4</sup> Onuma Yasuaki, “Toward A More Inclusive Human Rights Regime”, in Joanne R. Bauer and Daniel A. Bell (eds.), *The East Asian Challenge for Human Rights*, Cambridge University Press, Cambridge, 2010, pp. 118–23.

moves to go beyond the letter of international criminal law to seek an affirmation of the spirit of the ideas that drive the desire for post atrocity justice.

This is not an easy task, not least because, as Huxley has shown, European intellectual history makes a clear demarcation between religious knowledge (church fathers) and classical knowledge (pagan philosophers); in the Buddhist world, this segregation has not occurred along such strict lines.<sup>5</sup> This means that a discussion of Buddhist jurisprudence may move across some unfamiliar disciplinary boundaries. In particular, I would adduce Gotama's assertion that the prohibitions against violence, theft, drunkenness, lying and sexual misconduct – enforceable under the law – must be balanced by their positive counterparts; enjoining loving-kindness is given equal weight rather than being placed in a religious rather than a legal context.<sup>6</sup>

I would also contend that, in Buddhist terms this is 'the moment' to establish such a discussion. I will go on later to consider 'engaged' Buddhism more fully; however, it is worth noting at this stage that Buddhism in the mid-twentieth century began explicitly to open up intellectually to new paradigms, which have tended to be the preserve of non-religious disciplines and discourses – human rights, development economics, environmental protection, and nuclear weapons disarmament amongst others.

In some ways this will be a very basic chapter – a 'beginner's guide' to those within Western legal studies (and especially international criminal law) who may be unfamiliar with the foundational concepts of Buddhism. The chapter paints a picture with broad strokes.<sup>7</sup> However, I also hope that it may animate other students of Buddhist philosophy to consider how Buddhist principles can be used to contemplate human-kind's response to atrocity. It is worth noting here that a majority of the

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<sup>5</sup> Andrew Huxley, "Buddhist Law as a Religious System?", in Andrew Huxley (ed.), *Religion, Law and Tradition: Comparative Studies in Religious Law*, Routledge, London, 2002, p. 144.

<sup>6</sup> Karen Armstrong, *The Great Transformation: The World in the Time of Buddha, Socrates, Confucius and Jeremiah*, Atlantic Books, London, 2006, p. 277.

<sup>7</sup> At this stage, it is important to state that indeed there is no such thing as 'Buddhism' any more than there is a single 'Christianity'; there is Buddhism in its historical, cultural and intellectual contexts. There are three major schools of Buddhism – Theravada, Mahayana and Vajrayana. This chapter addresses Buddhist thought in a very general sense rather than exploring a specific school in specific terms and, for the purposes of this chapter, this is all that a general reader need know.

world's Buddhists do not live in nations that are States Parties to the Rome Statute.<sup>8</sup> The countries with the largest Buddhist populations are in the Asia-Pacific region; these collectively are home to 95 percent of all Buddhists. Half of the world's Buddhists live in one country, China. The largest Buddhist populations outside China are in Thailand (13 percent), Japan (9 percent), Burma (Myanmar) (8 percent), Sri Lanka (3 percent), Vietnam (3 percent), Cambodia (3 percent), South Korea (2 percent), India (2 percent) and Malaysia (1 percent). Seven countries have Buddhist majorities: Cambodia, Thailand, Burma (Myanmar), Bhutan, Sri Lanka, Laos and Mongolia. Therefore, for many in Buddhist countries – including some current zones of conflict – there is no automatic ‘go to’ institutional framework in which to discuss the issues that the International Criminal Court (‘ICC’) is mandated to handle.

## 6.2. Existing Work

Almost nothing has been written on a philosophical level about Buddhism's relationship with international criminal law.<sup>9</sup> There are several explanations for this.

Until comparatively recently, Buddhism could have been said to lack a philosophical framework adaptive to modernist political concepts. Buddhism's focus in terms of governance, insofar as it had one, was primarily concerned with the personal qualities that make good and moral monarch, rather than with establishing a philosophical framework of State governance.<sup>10</sup> This is not to say that Buddhism has made no impact on law. However, Western scholarship has tended to assert that Buddhist philosophy (and indeed many non-Western cultures) lacks a legal tradition equivalent to that in societies where legal frameworks have emerged out of the

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<sup>8</sup> Pew Research Centre, “Global Religious Landscape: Buddhists 2012”, available on the web site of the Pew Research Centre.

<sup>9</sup> Although there are a number of works around transitional justice in Buddhist nations, and in particular Cambodia, a Buddhist nation that has been the first to use international criminal law in the modern sense to prosecute senior leaders of the ‘Khmer Rouge’ regime. There is a level of interaction between international criminal law, transitional justice and Buddhist discourses in Cambodia. A discussion on this would be rooted more in legal anthropology and sociology of law than philosophy. See my own work from this perspective: Tallyn Gray, “Research on Justice and the Khmer Rouge”, available on the personal site of Tallyn Gray.

<sup>10</sup> Karma Lekshe Tsomo, “Buddhist Perspectives on Human Rights”, in Steven M. Emmanuel (ed.), *A Companion to Buddhist Philosophy*, John Wiley & Sons, 2015, p. 651.

Abrahamic civilisations.<sup>11</sup> This is a product of Western ‘legal orientalism’ described by Teemu Ruskola as “a set of interlocking narratives about what is and what is not law and who are and are not its proper subjects”; he sees these narratives as “enjoy[ing] global circulation”.<sup>12</sup> This orientalism explains the gap in Western legal literature detected by Rebecca French, what she terms ‘The Case of the Missing Discipline’.<sup>13</sup>

Only recently has Western legal scholarship begun to address that gap and look seriously at one of Asia’s most significant philosophical traditions and its impact on the political and legal conscience of Asian societies, addressing Buddhist jurisprudence as a ‘legal family’ and demonstrating how Buddhist societies order themselves in a distinct Buddhist legal tradition in both State codification and in the Ehrlichian sense of ‘living law’.<sup>14</sup> The emerging body of literature on ‘Buddhist jurisprudence’ is exhibiting how systems rooted in Buddhist philosophy, discourse and semiotics answer questions of law and justice. These scholars assert the huge impact of Buddhism on the philosophical ancestries of legal systems in Asia at a variety of levels. Rebecca French, for example, has worked on the ontologies, epistemologies, cosmologies and day-to-day operations of law in Tibet.<sup>15</sup> Andrew Huxley carried out historical analysis of pre-colonial legal systems of Buddhist law in Myanmar;<sup>16</sup> in his work he has identified the Buddhist origins of Thai law emergent from the *Vinaya* (that is, the canonical law code that governs the community of Monks (*Sagha*), stories of the Buddha’s earlier life (*Jatakas*) and the

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<sup>11</sup> Rebecca Redwood French and Mark A. Nathan, “Introducing Buddhism and Law”, in Rebecca Redwood French and Mark A. Nathan (eds.), *Buddhism and Law: An Introduction*, Cambridge University Press, Cambridge, pp. 14–15.

<sup>12</sup> Teemu Ruskola, *Legal Orientalism: China, the United States, and Modern Law*, Harvard University Press, 2013, p. 5.

<sup>13</sup> Rebecca R. French, “The Case of the Missing Discipline: Finding Buddhist Legal Studies”, in *Buffalo Law Review*, 2004, vol. 52, no. 3, pp. 679–99.

<sup>14</sup> Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, Walter Lewis Moll trans., Routledge, 2017.

<sup>15</sup> Rebecca Redwood French, *The Golden Yoke: The Legal Cosmology of Buddhist Tibet*, 2nd edition, Snow Lion Publications, Ithaca, 2002.

<sup>16</sup> Andrew Huxley, “The Importance of the Dhammathats in Burmese Law and Culture”, in *The Journal of Burma Studies*, 1997, vol. 1, no. 1; Andrew Huxley, “Is Burmese Law Buddhist?”, in Melissa Crouch and Tim Lindsey (eds.), *Law, Society and Transition in Myanmar*, Hart Publishing, Oxford, 2014.

Buddha's discourses (*Suttas*).<sup>17</sup> David and Jaruwan Engel's work focuses on the legal consciousness of ordinary people in Thailand, and how Buddhist-influenced mediation processes are often chosen in preference to the legal structures of the State, for instance in cases of personal injury.<sup>18</sup>

An additional reason for the lack of encounter between Buddhism and international criminal law is that Buddhism has historically lacked a 'social gospel' comparable to other religious philosophical structures.<sup>19</sup> Over the course of the twentieth century, however, 'engaged Buddhism' (a term coined by the Vietnamese monk, scholar, and peace activist Thích Nhất Hạnh)<sup>20</sup> has emerged as a way to apply Buddhist teaching to the social, political, environmental and economic spheres. Emerging from this major intellectual development in modern Buddhism has been a growing body of work around Buddhism and human rights; indeed, there are powerful Buddhist human rights movements.<sup>21</sup> Perhaps the best known in the West is the 'Saffron Revolution', which took place between 2007–2008 in Myanmar. The notion of Buddhism working in the sphere of international legal regimes and institutions dealing with the aftermath of mass human rights abuses is thus a fairly new concept for international criminal law to absorb.

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<sup>17</sup> Andrew Huxley, "Introduction", in Andrew Huxley (ed.), *Thai Law: Buddhist Law: Essays on the Legal History of Thailand, Laos and Burma*, White Orchid Press, Bangkok, 1996, pp. 1–31.

<sup>18</sup> David M. Engel and Jaruwan Engel, *Tort, Custom, and Karma: Globalization and Legal Consciousness in Thailand*, Stanford Law Books, Stanford, 2010.

<sup>19</sup> Damien Keown, "Buddhism and Human Rights", in Damien Keown (ed.), *Contemporary Buddhist Ethics (Routledge Critical Studies in Buddhism)*, Routledge, London, 2000, pp. 57–58.

<sup>20</sup> Thích Nhất Hạnh, *Vietnam: Lotus in a Sea of Fire – A Buddhist Proposal for Peace*, Hill and Wang, New York, 1967.

<sup>21</sup> L.P.N. Perera, *Buddhism and Human Rights: A Buddhist Commentary on the Universal Declaration of Human Rights*, Karunaratne and Sons, Colombo, 1991; Christopher S. Queen and Sallie B. King (eds.), *Engaged Buddhism: Buddhist Liberation Movements in Asia*, State University of New York Press, Albany, 1996; Tenzin Gyatso, His Holiness the 14th Dalai Lama, "Human Rights, Democracy and Freedom", 2008, available on the web site of His Holiness the 14th Dalai Lama of Tibet; Damien Keown, "A Bibliography on Buddhism and Human Rights", in Wayne R. Husted, Damien Keown and Charles S. Prebish (eds.), *Buddhism and Human Rights (Routledge Critical Studies in Buddhism)*, Routledge, London, 2015, pp. 223–37.



### 6.3. Points of Comparison

This chapter builds on the works discussed above to explore how concepts within international criminal law can be thought about in a Buddhist frame. This is clearly a huge task, but this chapter will try to lay a few general foundations. I will focus on broad themes of international criminal law rather than specific concepts; hence the most useful intellectual touchstone for a comparative analysis is probably the list of core crimes set out in the Rome Statute of the ICC. This list expresses what international criminal law sets out to tackle: genocide, war crimes, crimes against humanity, and crimes of aggression. These are crimes so massive in scale as to be called crimes against the essence and meaning of what it is to be part of our species.<sup>22</sup>

International criminal law provides a prescription for working through the consequences of mass violence; it does so by establishing a record, holding those responsible to account and punishing them. International criminal law also acknowledges that the extremities of violence are ultimately so enormous that to deny a process of reckoning or accountability is, to repurpose the words of Robert Jackson in his final summation at the Nuremberg Military Tribunal in 1946, to “*say that there has been no war; there are no slain, there has been no crime*”.<sup>23</sup> Not to account for mass violence is to ignore it or to hold the view that it does not matter.

Exploring how the Buddhist intellectual tradition can conceive extremities of violence, what its goal in reckoning with mass bloodshed might be, and what processes it may or may not find useful, requires that I set out Buddhism’s primary ontological foundations.

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<sup>22</sup> David Luban, “A Theory of Crimes Against Humanity”, in *The Yale Journal of International Law*, 2004, vol. 29, no .1, pp. 85–167; M Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution And Contemporary Application*, Cambridge University Press, Cambridge, 2011, p. 42.

<sup>23</sup> Robert Jackson, quoted in Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir*, Alfred Knopf, New York, 1992, p. 4.

#### 6.4. Some Basics of Buddhism<sup>24</sup>

To do this requires the shedding of some initial linguistic preconceptions. Words central to the international criminal law lexicon – ‘punishment’, ‘responsibility’, ‘accountability’, ‘mental state’ – are understood very differently in the Buddhist ontologies and epistemologies.

It is also important to point out the highly figurative nature of much of the terminology I am introducing here. Concepts of time, eternity, *nirvana*, and existence are framed in narratological and/or metaphorical terms in order to facilitate understanding, rather than being literal descriptions. The use of narratological devices occurs frequently in Buddhist philosophy. Indeed, as French argues, in Buddhist jurisprudence narratives “encode social concepts, meanings and structures in the legal cosmology”.<sup>25</sup> Nor are the stories I discuss later in this chapter to be taken literally. They are parables, and are subject to reinterpretation and what may seem like radical re-writing in order to accommodate for specific messages, issues and/or points in time and context.

Buddha is a title meaning ‘enlightened one’.<sup>26</sup> Gotama, however, actively eschewed a focus on himself; his person was not the key to personal salvation or redemption, nor did he prescribe religious doctrine; he revealed no creation stories and no prophecies of end times, but rather taught what he had discovered about the nature of the *dharma*,<sup>27</sup> that is, the ‘law’ of the universe, the nature of reality applicable to all planes of existence – to Gods, humans and animals. *Dharma* also refers to the teachings of Gotama on practice towards attaining *nirvana*.<sup>28</sup>

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<sup>24</sup> Aspects of these basic descriptions have appeared in Tallyn Gray, *Justice and the Khmer Rouge: Concepts of a Just Response to the Crimes of the Democratic Kampuchean Regime in Buddhism and the Extraordinary Chambers in the Courts of Cambodia at the Time of the Khmer Rouge Tribunal*, Working Paper No. 36, Centre for East and South-East Asian Studies, Lund University, Lund, 2012.

<sup>25</sup> French, 2002, p. 85, see *supra* note 15.

<sup>26</sup> Karen Armstrong, *Buddha*, Phoenix, London, 2000, p. xi; There are also other Buddhas. The *Buddhavamsa* describes the lives of the twenty-four other Buddhas who preceded Siddhatta Gotama.

<sup>27</sup> *Dharma* is a complex term with multiple meanings across Hinduism, Buddhism, Sikhism and Jainism.

<sup>28</sup> Peter Harvey, *An Introduction to Buddhism: Teachings, History and Practices*, 2nd edition, Cambridge University Press, Cambridge, 2013, p. 2; Christmas Humphreys, *A Popular Dictionary of Buddhism*, 3rd edition, Curzon Press, London, 1994, pp. 65–66.

*Karma* is one of the laws of the universe. *Karma* is the law of cause and effect – any action (good or bad), will produce a karmic response. *Karma* is linked to the concept of ‘re-birth’; when an individual comes into life (human or animal), their character and situation (poverty/wealth, stupidity/brilliance) will be a result of their actions of the past; the individual’s destiny is self-created. One constructs one’s future destiny by reacting to present circumstances. If one were poor in the present existence, but charitable, this would make for good merit (good *karma*) that will be received in kind at some point, in one’s present or future existences. *Karma* is not something that one is bound to forever. *Karma* is also linked to the process of transmigration and rebirth; indeed, *karma* is its cause. *Karmic* justice does satisfy those who believe that people who have committed great acts of wickedness and seemingly escaped justice will receive back what they have done in kind. Being reborn in a miserable existence, as a hungry ghost or an animal, or suffering in one of the hells until rebirth occurs after a long time, is in itself a retribution for one’s crimes, and in this sense may satisfy the desire to see one who has caused misery receive the just reward for their actions. *Karma* is the process of receiving like-for-like, a cause (an action) and effect (*karmic* wages) relationship; performing a good action cannot expunge the effects of a bad one (and vice-versa); rather, *karma* is a process of receiving the ‘fruits’ of one’s actions, good or bad, at some point, in some existence.<sup>29</sup> This can be usefully summed up as the ‘three recompenses’: in the present life for deeds already done, in the *next rebirth* for deeds now done, and in subsequent lives.<sup>30</sup>

The Four Noble Truths are key to understanding the nature of *dharma*. They are effectively a diagnosis of the problems of humankind and a pathway out of those problems.<sup>31</sup>

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<sup>29</sup> Peter Harvey, *An Introduction to Buddhist Ethics: Foundations, Values, and Issues*, Cambridge University Press, Cambridge, 2000, pp. 15–18.

<sup>30</sup> For the modern reader (especially one working in relation to law) unfamiliar with how this principle can be understood, Yukio Mishima’s tetralogy of novels *The Sea of Fertility* (*Spring Snow* (1969), *Runaway Horses* (1969), *The Temple of Dawn* (1970), and *The Decay of the Angel* (1971)) would be a helpful insight. The novel series follows the career of Shigekuni Honda, a jurist, between 1912 and 1975. Throughout the novels, Honda believes he is encountering successive reincarnations of a school friend. See Yukio Mishima, *The Sea of Fertility*, Michael Gallagher *et al.* trans., Penguin Modern Classics Edition, London, 1986.

<sup>31</sup> Armstrong, 2000, pp. 94–95, see *supra* note 26.

1. Life is suffering. Buddhism defines life in terms of *dukkha*, roughly translated from Pali as unsatisfactoriness/suffering. Birth is *dukkha*, as it begins the cycle of pain and suffering characterising human life, followed by illness, sickness, and death; these are compounded by the sorrow, pain, grief, and despair that accompany the cycle of life and the pain inherent in human existence in its five aspects (body, feeling, memory, thoughts, and consciousness).<sup>32</sup> Suffering here is not just the horrific occurrence of disease and warfare, but also mundane minor disappointments. By contrast, joy and happiness are also in the moment and will also inevitably fade.
2. Suffering (*dukkha*) is caused by craving: desires leave one unsatisfied. This is attachment to impermanent factors such as wealth, power, and pleasure. Human beings chase these things throughout their existences despite the impermanent nature of these things. Similarly, humankind maintains anger, resentment and regret – also attachments to fleeting states. Attachments to delusory desires in the political realm can result in what the Nuremberg Principles encode as crimes. War and killing are linked to attachment to political power, wealth, territory, or even to ‘views’.<sup>33</sup> The core attachment is the attachment to the illusion of the self: myself, my identity, my religion, my nation, my race. Mass killings are products of this egocentric way of thinking. “My racial superiority, the primacy of my political ideology, the liberation of my class.” Genocidal regimes can be interpreted as illusory attachments to the idea of racial and national identity, sentiments which are the products of what can be described as a wrong understanding of the nature of the world. Loy argues that war against an external enemy or group is a means to affirm identity and counter humankind’s “most problematic anxiety [...] the sense of lack that shadows a deluded sense-of-self”.<sup>34</sup> War becomes an appealing option in context of a mistaken sense of existential lack, as it offers something to which the ego can attach itself; or, rather, a sense of self

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<sup>32</sup> Laurence-Khantipalo Mills, *Buddhism Explained*, Silkworm Books, Chiang Mai, 1999, pp. 20–26.

<sup>33</sup> Harvey, 2000, p. 240, see *supra* note 29.

<sup>34</sup> David R. Loy, *Money, Sex, War, Karma: Notes for a Buddhist Revolution*, Wisdom Publications, Somerville, 2008, p. 137.

can be obtained by defining oneself and one's immediate community in opposition to another group, country or race.<sup>35</sup>

3. Desire is the cause of attachment, hate and illusion, and can be transcended. Letting go of attachments and ending the cycle of suffering is achieved through the attainment of *nirvana*.
4. The path out of *dukkha* is achieved through following the Noble Eightfold Path (right understanding, intention, speech, action, livelihood, effort, mindfulness, and concentration.) It is the 'goal' of Buddhism to escape from the cycle of *dukkha* and attain *nirvana* by following the Noble Eightfold Path. This is a guide for living as a practical way of lessening individual attachments.<sup>36</sup> The aim in Buddhism is the abandonment of self/the ego – the ultimate attachment; once someone is not attached to him/herself as an individual, they can be liberated from *dukkha* and the woes of being attached to something impermanent (for instance, a human body).

Meditation moves one along the path towards enlightenment (*Bodhi*) – the state of awakening to full knowledge of the *dharma* in process of attaining *nirvana*, in which all attachment and delusion and ego are extinguished as in a fire. *Nirvana* is where the *dukkha* cycle is broken and liberation is attained.

### 6.5. Cyclic Time and Timelessness

It is therefore important to understand the way time is conceived in Buddhist thought. The universe, time and *karma* are narratological constructs through which timelessness is made accessible.

Modernist epistemologies, and in no small part the very notion of international criminal law, are rooted in a progressive vision of linear time. The enduring Liberal/Marxist/Abrahamic faith that society will emerge from a bad state (sin, slavery, class oppression) to a better one (salvation, Passover, socialism) is, in Buddhist terms, a delusion. Some sections of Western philosophy would come to similar conclusions, but for different reasons. To assist readers in evaluating the ontological 'distance' between modern international criminal law and Buddhism, I present two contrasting images.

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<sup>35</sup> *Ibid.*, pp. 137–38.

<sup>36</sup> Harvey, 2000, pp. 33–37, see *supra* note 29.

Walter Benjamin's description of 'the angel of history' sums up both the Western notion of linear time in history and the failings of faith in progressive Whiggish historiography.

His eyes are opened wide, his mouth stands open and his wings are outstretched. The Angel of History must look just so. His face is turned towards the past. Where we see the appearance of a chain of events, he sees one single catastrophe, which unceasingly piles rubble on top of rubble and hurls it before his feet. He would like to pause for a moment so far to awaken the dead and to piece together what has been smashed. But a storm is blowing from Paradise, it has caught itself up in his wings and is so strong that the Angel can no longer close them. The storm drives him irresistibly into the future, to which his back is turned, while the rubble-heap before him grows sky-high. That which we call progress, is this storm.<sup>37</sup>

Benjamin's angel exists in linear time, disasters of the past "piling up at his feet". Benjamin was writing in context of the encroachment of total war and genocide enveloping history. He is describing the collapse of the Enlightenment values of reason and narratives of liberal progress held with such great certainty in the pre-Holocaust period.<sup>38</sup> Fundamentally, international criminal law is an exercise in dealing with some of the bodies at the feet of the Angel of History – an attempt to deal with humankind's violent irrationality in a rational way. International criminal law trials reflect the Angel's desire to "pause for a moment [...] to awaken the dead and to piece together what has been smashed".

In contrast to this philosophy of history, Buddhism is rooted in the idea of *samsāra* – the beginningless, repetitious cycle of birth, death and rebirth.<sup>39</sup> This is frequently illustrated as a wheel, in which the planes of existence (Heaven, the Demonic Realm, the Realm of Hungry Ghosts, Hell, the Animal Realm and Human Realm) are placed between the 'spokes'. The linear narratives of time of liberal institutions are difficult to

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<sup>37</sup> Walter Benjamin, "On the Concept of History", in Howard Eiland and Michael W. Jennings (eds.), *Walter Benjamin: Selected Writings Volume 4, 1938-1940*, Edmund Jephcott et al. trans., Harvard University Press, Cambridge, 2003, p. 392.

<sup>38</sup> Karen Armstrong, quoted in Loy, 2008, p. 134, see *supra* note 34.

<sup>39</sup> Graham Coleman and Thupten Jinpa (eds.), *The Tibetan Book of the Dead*, Gyurme Dorje trans., Penguin Books, London, 2006, p. 457.



place in dialogue with Buddhism's ultimate aim to attain *nirvana* and leave *samsāra* altogether.

Buddhists see time as going through cycles. *Karma* narrative is cognisant of being a device to comprehend unreality and impermanence. Transmigration/reincarnation is not the goal in Buddhism: *nirvana* is. *Karma* is a concept by which people are able to situate themselves in time, unreality and impermanence, and the eventual attainment of *nirvana*. In this frame, they can develop the ability to see the past as past and not to dwell in it attached to an unreal notion of existence.

Within Buddhist thought, the universe, time and *karma* are narratological constructs through which timelessness is made accessible. *Nirvana* does not depend on the existence of the universe: the universe, time, existence, are all narrative frameworks which contain the idea of *nirvana*. Attaining *nirvana* is an individual experience. Thus, time is configured in the 'Pali *imaginaire*' as a device to enable understanding. In Buddhism, there can be no 'end of history', since there is no beginning to it; time in Buddhism is simultaneously non-repetitive (linear and unfolding like the passage from birth to death) and repetitive (like a pulse or the ticking of a clock across eons). Steven Collins stresses that these similes must be seen as complementary.<sup>40</sup> The universe, time and *karma* are narratological constructs through which timelessness is made accessible – a difficult concept for Westerners who perceive the linear but not the cyclic.

## 6.6. Buddhism and War

I now move to discuss how the extremities of violence are perceived in Buddhism.

The Buddhist religion is popularly seen (especially in the West) as an entirely pacifist one. Even a superficial glance at the history of Buddhist societies demonstrates the incongruity of this assertion. Wars and, more importantly for this chapter, wars justified in Buddhist terms, have been a permanent feature of Asian societies, as much as wars with religious justifications in Christian Europe or the Islamic world.<sup>41</sup> Buddhism

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<sup>40</sup> Steven Collins, *Nirvana: Concept, Imagery, Narrative*, Cambridge University Press, Cambridge, 2010, pp. 106–08.

<sup>41</sup> Michael K. Jerryson, "Introduction", in Michael K. Jerryson and Mark Juergensmeyer (eds.), *Buddhist Warfare*, Oxford University Press, Oxford, 2010, p. 3. In the appendix to the same volume, there is a short list of examples of Buddhist warfare in China, Korea, Tibet, Japan, Sri Lanka and Thailand ranging from 402 CE to the present.

as a philosophical framework preaches against violence; however, this ‘absolute’ is not so closely observed in practice. Buddhist states have advanced arguments that war and violence are ultimately justifiable in specific contexts. Where there is justification, it follows that there are limits to what is and is not acceptable within the context of that justification—that is, “war is only acceptable in circumstances ‘X’ and ‘Y’, but not ‘Z’”. The logical outcome, once that justification is made, is that if rules of engagement are agreed upon, there must be consequences for any transgression of those rules. While many Buddhists would contend that a Buddhist justification of war is of itself a heresy and a perversion of Buddhist teaching (as indeed would many peoples of all faiths), a strain has existed that provided for, if not a just war, then at least war in which the consequences to one’s own *karma* are acceptable and justifiable in a situation of fighting a great evil.<sup>42</sup>

What emerges here, at least in some cases, is a set of regulations that have resonance with the concepts of *jus ad bellum* and *jus in bello*. If even in a philosophy that holds non-violence as its highest principle there are areas of justification for war, then, by extension, the next logical step is that there is reasonable and unreasonable conduct in such a situation and an idea of appropriate redress in the wake of unjustifiable war or transgressive wartime conduct.

#### 6.6.1. Leave It to *Karma*?

Given a core tenet of Buddhist philosophy is that life is characterised by suffering and that as such violence, misery and pain are features of being human, to think about how human beings can provide earthly redress for an act performed within an impermanent state of being, on a plane of existence itself characterised by such suffering, could be seen as a pointless exercise. The centrality of *karma* to the law of the universe invalidates the need for redress or the punishment of perpetrators – the existence of those who suffer and those who inflict suffering both operate in context of the “three recompenses [...] in the present life for deeds already done, in the next rebirth for deeds now done, and in subsequent lives”.<sup>43</sup>

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<sup>42</sup> Elizabeth J. Harris, quoted in Harvey, 2000, p. 252, see *supra* note 29.

<sup>43</sup> Lewis Hodous and William E. Soothill, *A Dictionary of Chinese Buddhist Terms: With Sanskrit and English Equivalents and a Sanskrit-Pali Index*, Motilal Banarsidass Publishing, 1937, p. 62.

One could question the value of any earthly process, as *karma* will resolve the imbalances that are a product of mass violence. Indeed, it could even be logically argued that any process attempted is tying people more tightly to the attachments that keep them in the *dukkha* cycle. Furthermore, it can be argued that individuals may feel that the abuses and calamities they have endured are their *karmic* fruits, perhaps not from this life but another. This is a sentiment which is sometimes deeply shocking to Westerners, and perhaps particularly to Western jurists; but it is one I have encountered in numerous conversations with victims of the Khmer Rouge ('KR') regime in Cambodia, for instance; so, I would argue that, from an anthropological or sociological perspective at least, it is a widely expressed feeling and one that can be seen as a logical conclusion within a popular understanding of the Buddhist framework.

Given that *karma* is part of the *dharma*, (the cosmic truth of the universe) then it is not, as Jackson says, "*that there has been no war; there are no slain, there has been no crime*",<sup>44</sup> but that the war, the crime, the slain are inevitable but ultimately irrelevant – they do not matter as they are only part of a cosmic cycle that is timeless.

One can see from this that Buddhist thought could be accused of allowing for total earthly impunity through a 'leave it to *karma*' approach. This would be a mistaken view. *Karma*, it can be argued, provides for redress; however, it is in the process of letting go of attachment that the obligation to deal with consequences of actions can be realised. Buddhism is not a philosophy that instructs its adherents that only the cosmos is able to deal with suffering and injustices; indeed, Gotama himself was constantly engaged with dealing with the suffering of life as doing so assisted in a process of letting go of attachment.

Gotama intervened in wartime in order to prevent violence. The Buddha set the example that intervention in human affairs to stop violence is an important duty. For example, the Buddha intervened in wars between King Kosala and King Ajatasatta, between Sakyas and Koliyas, between Vidudabha and the Sakya clan and between King Ajatasatta and Vajjis.<sup>45</sup>

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<sup>44</sup> Robert Jackson, quoted in Taylor, 1992, p. 4, see *supra* note 23.

<sup>45</sup> Ven. Karagaswewe Wajira, *Live and Let Others Live: Buddhist Aspects in regard to International Humanitarian Law for the Resolution of War and Conflict* (on file with the author).

What is significant here is that the Buddha used a process of dialogue to help people come to a realisation of the reality of the *dharma*.

Within the realms of international law, the Sri Lankan peace activist Ahangamage Tudor Ariyaratne has written of Buddhism and international humanitarian law ('IHL'). Ariyaratne explicitly rejects the idea of humanity's natural inclination towards cruelty, which powerful legal bodies must then control. Instead, Ariyaratne argues that emotional states of hatred or love are states of the mind that determine how people behave, and ultimately, it is in the minds of humankind that behaviour is regulated. Ariyaratne argues that as human minds have evolved this has "led to various customs and conventions regulating their conduct at times of conflicts and war. Today these have developed into a universally accepted system of laws we collectively call International Humanitarian Law [IHL]".<sup>46</sup> Even if conflict is already taking place, the way people respond to the outbreak of violence can be either with more violence or in keeping with the notion of the sanctity of life.<sup>47</sup> Ariyaratne is making the point that IHL is a concept synergetic with philosophies of peaceful and right behaviour that have evolved in peoples' minds for thousands of years before the codification of IHL.

So far, it might appear that many of the concepts discussed would be more appropriate to a discussion on Buddhism and the principles of international humanitarian law rather than international criminal law. However, this chapter is specifically highlighting the strong tradition of violence prevention and peace-making in Buddhism, which is grounded in the assumption that violence is always the source of further violence. Total victory is a fallacy; it is ultimately the laying down of arms that can end violence – a conscious acquiesce by those engaged in violence to the fact that violence itself cannot be stopped through violence.<sup>48</sup> The cyclic nature of the concepts of *dukkha* and *karma*, and Buddhism's ultimate goal of escape from this cycle, mean that the prevention of violence and reckoning with its consequences are the same process.

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<sup>46</sup> Ahangamage Tudor Ariyaratne, "Buddhism and International Humanitarian Law", in *Sri Lanka Journal of International Law*, 2003, vol. 15, no. 1, pp. 11–15.

<sup>47</sup> *Ibid.*

<sup>48</sup> Sallie B King, "War and Peace in Buddhist Philosophy", in Steven M. Emmanuel (ed.), *A Companion to Buddhist Philosophy*, John Wiley and Sons, 2015, p. 633.

I illustrate this point with a parable that deals with *karma*, transmigration, and breaking the *dukkha* cycle through a process of letting go of attachment.

#### 6.6.2. Breaking the Cycle: *The Lady and the Ogress* (The Story of Kalayakkhini)

A man greatly desired a baby, but his wife was barren. Fearing that he would leave her, the wife decided that her husband should have a child by another woman. However, she grew fearful of the consequence of this. So each time the husband's mistress became pregnant the wife would drug her food, so that the mistress would miscarry. After several times the mistress figured out what was happening; but by this point the wife had administered so much poison to her that the mistress died. On her deathbed, the mistress swore vengeance on the wife in another life. Throughout many incarnations as animals (a cat and a hen, a tiger and a deer etc.) the women perpetually sought out the other so as to kill each other's children.

Eventually they were reborn, one as an aristocratic lady, the other as an ogress. The ogress (the eponymous Kalayakkhini) went to eat the lady's baby. The lady ran to the Buddha and begged him to protect her child. The Buddha explained to both the lady and the ogress that they had been chasing each other for centuries, doing the same thing again and again. The suffering they inflicted on each other would continue unless they renounced this now, and forgave each other, thus breaking the cycle of perpetual vengeance and killing.

This story places the concept of transmigration and the cyclic nature of cosmological existence in Buddhist thought into narrative. It demonstrates that violence prevention and resolution are part of the same process. These two women were existing through various incarnations over various transmigrations in a cycle of revenge across eons, broken only by the intervention of the Buddha, which prevented further acts of violence. The moral of this story is: "Hatred in the world is indeed never appeased by hatred. It is appeased only by loving-kindness. This is an ancient law".<sup>49</sup>

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<sup>49</sup> The story of Kalayakkhini, Dhammapada Verse 5 in *The Dhammapada: Verses and Stories*, Daw Mya Tin trans., Burma Tipitaka Association, Rangoon, 1986.

This illustrates the central point of ‘Buddhist jurisprudence’ – that a case is never resolved until both parties are at peace with its decision. French argues that the true ‘end point’ of process in a Buddhist jurisprudence is the ultimate departure of both parties in a calm state of mind – not shutting down a case until there is no further avenue of appeal (such as a supreme court).<sup>50</sup> Rather, the process sees itself as part of a *karmic* cycle: letting go of anger releases the plaintiff from the cycle of revenge, which would otherwise continue.

*Karma* narratives encapsulate an awareness that they are devices to assist the comprehension of unreality and impermanence. Stories such as *The Lady and the Ogress* enable the listener to grasp Buddhist concepts through the use of chronological and classificatory systems, and to emplot existence in a comprehensible narrative frame.<sup>51</sup>

*The Lady and the Ogress* is not readable as a redemptive story with a single clear arc from suffering to joy. It is a story of *karma* manifesting itself in an extremely violent way. It is used to show how, in taking revenge, you become like the one inflicting it on you, and that by breaking the cycle of violence the individual releases both self and enemy from a perpetual cycle of destruction. Retaliation for violence is often sought through more violence; conflict goes in cycles. In Buddhism, the main purpose is always the break away from these vicious circles; rather than dealing with transgressions against the codified law which has been broken, it seeks to establish a harmony between “the offender and the offended”<sup>52</sup> that prevents future violence.

Like international criminal law, Buddhism considers discursive process to be important. But in Buddhism, process has a different focus. Buddhist legal process is not a tool to encourage people to forget the past, but a way to help survivors (and indeed perpetrators) not to dwell endlessly within that past. *Karma* is not a cosmological excuse for war criminals to enjoy earthly impunity. Buddhists do not abdicate the need to make perpetrators account for their actions to society by counselling that *karma* will catch up with perpetrators eventually. However, within Buddhist jurisprudence, punishment, accountability and the establishment of a histor-

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<sup>50</sup> French, 2004, p. 684, see *supra* note 13.

<sup>51</sup> Collins, 2010, pp. 16–20, see *supra* note 40.

<sup>52</sup> David R. Loy, “A Different ‘Enlightened’ Jurisprudence?”, in *Saint Louis University Law Journal*, vol. 54, no. 4, 2010, p. 1253.



ical record are not held in such high esteem as they are in the Western judicial tradition (although these concepts are by no means ignored). The priority of a Buddhist process is to deal with the aftermath of violence as a means of conflict prevention, thus ensuring that future atrocities do not take root in current wars or those of the immediate past.

Preventing further conflict is not achieved via the concept of deterrence (punishing someone who has broken the law as an example to other would-be offenders) but by demonstrating that violence has its roots in a wrong understanding of *dharma* and mistaken thinking about the nature of existence. Buddhism attempts to make people understand the nature of their false attachments and then to assist them to shed those attachments in order to prevent further crimes.

### 6.6.3. Angulimala

The story of Angulimala offers guidance within Buddhist thought for dealing with perpetrators of mass atrocity. The story of Angulimala and the Buddha featured in the *Theragatha* ('Verses of the Elder Monks')<sup>53</sup> and the Angulimala *Sutta* in the *Majjhimanikaya* ('Middle Length Discourses').<sup>54</sup> These early *Suttas* provide relatively little information about Angulimala; later commentaries by the scholar Buddhaghosa (b. approximately fifth century CE) and the group of scholars known as Dhamma ā, writing commentary in the eleventh and/or twelfth centuries,<sup>55</sup> build Angulimala into a more rounded character, ascribing motivations for his actions rather than depicting him as violent for the sake of being violent. I focus here on the most basic elements of the story.

Angulimala had killed 999 people; he was told that if he killed 1,000 people he would be the most prolific killer in history. His name – literally Finger (*anguli*) Necklace (*ma-la*) – came from his habit of wearing a necklace of the severed fingers of those he had slain. Angulimala decided to kill

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<sup>53</sup> Theragā, 16.8 on Aṅgulimāla: see *Elders' Verses*, vol. 1 (*Translation of Theragāthā and Therīgāthā*), 2nd edition, Kenneth Roy Norman trans., Pali Text Society, Oxford, 2007, verses 705–948.

<sup>54</sup> Majjhimanikaya, 86 (the Majjhimanikaya are 152 discourses attributed to the Buddha and his disciples): see *The Middle Length Discourses of The Buddha: A New Translation of The Majjhima Nikaya*, Bhikkhu Nanamoli and Bhikkhu Bodhi trans., Buddhist Publication Society, Sri Lanka, 1995, pp. 710–17.

<sup>55</sup> E. Hardy (ed.), *The Nettī-pakarana with extracts from Dhammapāla*, The Pali Text Society, London, 1902.

his mother as his thousandth victim, but upon coming across the Buddha, he changed his mind and decided to kill the Buddha instead. Angulimala frantically ran after the Buddha. Yet despite running as fast as he could, Angulimala was unable to catch up with the Buddha, who was walking at normal speed. The Buddha had willed a mental power over Angulimala. Angulimala called after the Buddha, demanding that he stop. Buddha explained that he had already stopped and told Angulimala to do the same. This statement confused Angulimala. The Buddha explained that by renouncing the killing of all living things he had stopped, unlike Angulimala who was obsessed with killing and thus would never be able to stop.

Angulimala became a monk and a good man, yet people were still afraid of him. Part of a monk's life is the collection of alms – in this way they get the food they need. Yet when Angulimala went out to collect alms, people fled in fear when they saw him approach, knowing his reputation as a killer. Angulimala acknowledged to the Buddha that this was inevitable given his past actions. The Buddha told Angulimala that he had created so much suffering, and that people shunning him was part of the fruits of his karma, which he was now reaping for his past actions. Every day, Angulimala went out to collect alms. Every day he was shunned and not given food; people attacked him, as they realised that in his present position as a monk he would not retaliate. Responding to the demands of his own subjects, King Pasenadi Kosala sought out Angulimala as a criminal and terroriser of innocent people. He came to the Buddha to seek his blessing to kill Angulimala. The Buddha asked the King, “Would you kill him if he were dressed as a monk? If he has renounced violence and has become a virtuous man?” The King said no. The Buddha then revealed that the man who was sitting next to him during their meeting was indeed Angulimala. The Buddha explained that the King had to see Angulimala in the present moment.<sup>56</sup>

The Angulimala story is one traditionally told for multiple reasons. It is meant to convey the message that even the most cruel, and violent of

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<sup>56</sup> This story has been told to me by Buddhist monks many times across the world. This is my own re-telling.

people can “change for the better”<sup>57</sup> and that positive *karma* can neutralise bad *karma*.<sup>58</sup> Another major lesson of the Angulimala story concerns the way someone reacts to the inevitable return of the bad *karma* to him or her. During his time as a monk Angulimala reaped the *karma* he generated through his career of violence – even after he had seen the error of his actions and changed his behaviour. People shunned him, refused to give him alms, and physically attacked him; however, he accepted that these actions were a product of his own actions returning to him.

Satish Kumar, former Jainist monk, thinker and peace activist, explicitly retells the Angulimala story giving him the modern label of ‘terrorist’;<sup>59</sup> he presents the story in light of this modern concept familiar to jurists working in and around transnational crime and the application of international criminal law towards non-State armed groups. In his version of the Angulimala narrative, Kumar concludes with a description of a trial. In the story King Pasenadi Kosala is the force of State law. The original Pali canons do not provide so much detail on these parables as the later commentaries and retellings. Kumar draws on these extensively. The King’s chosen process for upholding the law is not explicitly discussed in Kumar’s retelling; instead he re-imagines the legal process of Angulimala’s encounter with the rule of law. Kumar recounts the process of the King’s legal officer prosecuting the case against Angulimala:

If we set Angulimala free we will be guilty of damaging the social order [...] the affairs of state cannot be run according to religious rules. The state must impose the rule of law [...] Angulimala must be hanged, nothing less will do, sir. The enforcement of the Law is paramount.<sup>60</sup>

The case the prosecutor presents here is that despite Angulimala’s having renounced violence, his crimes have to be accounted for and punished in Law.

The acceptance of the Buddha that Angulimala is subjected to a process that could result in his execution is significant. The Buddha ac-

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<sup>57</sup> Harvey, 2013, p. 266, see *supra* note 28. It is interesting to note that a British prison chaplaincy is named after *Angulimala* for this very reason, see “Angulimala”, available on Angulimala, the Buddhist Prison Chaplaincy’s web site.

<sup>58</sup> Gunapala Piyasena Malalasekera, *Dictionary of Pāli Proper Names*, Pali Text Society, London, 1960.

<sup>59</sup> Satish Kumar, *The Buddha and the Terrorist*, Green Books, Dartington, 2004, p. 10–17.

<sup>60</sup> *Ibid.*, p. 77.

cedes to the earthly process. Process is not seen here as irrelevant; rather, the story makes clear that it can be viewed in a variety of ways. In Kumar's retelling, many of the citizens present at the trial call for amnesty, after witnessing how, despite his crimes, Angulimala has finally changed. This is agreed to by the King. However, not all are satisfied with this outcome. The dissatisfaction described here is, within the internal logic of the narrative, indicative that more process is required in order for the dissatisfied persons to further loosen their ties to the crimes of the past – a process that could take the rest of their lives. For others, the process is shown to offer a forum for airing the suffering of victims and helping them to be no longer attached to their pasts, breaking the cycle of punishment and revenge. Accepting that letting go of the past is necessary as further violence will generate neither peace or justice. Angulimala has to face up to the reality that the *karmic* consequence of his actions are unpleasant for him, but he must accept his *karma*. He has to face the fact that others still hate him and he is brought to trial facing the death penalty as a potential outcome. Rather than being exempt from consequences in his current incarnation, Angulimala is subject to two separate forms of Law – cosmic justice (the law of *karma*) and earthly justice, which takes the form of the King.

Law is a process that can help to break the cycle by revealing the nature of the *dharma*. Buddhism is at ease with legal process as part of breaking the cycle of *dukkha*. This is needed as much for the perpetrators of violence as it is for the victims and the restoration of social equilibrium.

A creative Buddhist author might at this point follow Satish Kumar's example and retell the Angulimala story as that of a war criminal. This would be an interesting exercise that could allow a narratological exploration of a key Buddhist text and be illustrative of Buddhist philosophy – but it is an exercise perhaps best done in a less traditional academic forum than this volume.

#### **6.6.4. Philosophy in Action: Breaking the Cycle in the Modern World**

I end here with an account of how a process of breaking the cycle can work, to bring the philosophy of trying to break the *dukkha* cycle into a modern post atrocity context. In 1992, very much in the spirit of 'engaged Buddhism', Ven. Maha Ghosananda (former Supreme Patriarch of Cambodia and four-time Nobel Peace Prize nominee) led the first of several

Dhammayatra Peace Walks during the repatriation of thousands of Cambodian refugees from Thailand. At this time, Cambodia was emerging from decades of civil war, atrocity and genocide; it seemed very unlikely that the KR leadership would be brought to any kind of international trial – nor was Ghosananda calling for one.<sup>61</sup> The civil war had not yet come to an end. Peace was the priority. Ghosananda, with 500 others, walked over 120 miles from the Thai border to the capital (Phnom Penh), through minefields and KR-controlled areas of Cambodia. Ghosananda himself, and his followers, had lost family and friends in the course of the genocidal KR regime and in the decades-long civil wars. Ghosananda's primary message to the millions of Cambodians who had suffered under the KR regime concerning the attitude they should hold towards their former persecutors was reminiscent of the Dhammapada Verse 5:<sup>62</sup>

Hatred can never overcome by hatred; only love can overcome hatred.<sup>63</sup>

Ghosananda employed (and deployed) the concept of *metta* (loving kindness): active goodwill, the radiation of love to all – friend, enemy or a person towards whom one feels ambivalent.<sup>64</sup> Meditation is a central aspect of Buddhist practice, and *metta* is a meditative state; it does not require one to be static – indeed one can meditatively walk in order to disseminate this active goodwill. *Metta* underpins all the positive prescriptions with which the Buddha balanced the traditional 'five prohibitions', demanding active love rather than the simple avoidance of aggressive acts. Employing this ambulant *metta* was an explicitly proactive process on Ghosananda's part that sought to destroy anger, revenge, and hatred, seeking to "shoot people with bullets of loving kindness".<sup>65</sup> Anger and the desire for revenge are both identified by Ghosananda's movement as a

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<sup>61</sup> Sallie B King, *Socially Engaged Buddhism*, University of Hawaii Press, Honolulu, 2009, p. 93–94.

<sup>62</sup> Dhammapada Verse 5, see *supra* note 49.

<sup>63</sup> Maha Ghosananda, quoted in Venerable Santi, "Somdech Preah Maha Ghosananda Ghandi of Cambodia: The Buddha of the Battlefields", available on Somdech Preah Maha Ghosananda's web site.

<sup>64</sup> Christmas Humphreys, *Buddhism: An Introduction and Guide*, Pelican Books, London, 1990, pp. 105–27.

<sup>65</sup> Maha Ghosananda, quoted in Kathryn Poethig, "Locating the Transnational in Cambodia's Dhammayatra", in John Marston and Elizabeth Guthrie (eds.), *History, Buddhism, and New Religious Movements in Cambodia*, University of Hawaii Press, Honolulu, 2004, p. 203.

source of conflict. Ghosananda used the metaphor of boiling water: “If we leave boiling water sitting for some time, it naturally begins to cool. Sometimes we boil with anger, but we can cool down gracefully by contemplating loving kindness, anger’s opposite”.<sup>66</sup> The ‘cooling’ is accomplished through the willingness of Ghosananda and his fellow walkers to make themselves vulnerable to the potential violence of the KR, just as the unarmed and unguarded Buddha chose to be vulnerable to Angulimala in search of his thousandth victim. It is an overt invitation to dialogue. The *metta* of the peace walks offers a clear instance of what Huxley identifies as Buddhism’s ability to blur boundaries between the law of the classical texts and religion, here achieving a new relationship between victim and perpetrator that law alone cannot accomplish.

In Buddhism, there are three universal factors: impermanence, suffering and non-self; if one can understand this and reconcile it with life’s experiences, one can understand how to be liberated from *dukkha*. This is ‘seeing things as they really are’. Seeing the world as other than impermanent and unsubstantial will only heighten the delusion of a false reality that in turn creates illusory desires and attachments which heighten *dukkha*. The Buddhist response to this is that acknowledging impermanence is the key to freedom from the past.<sup>67</sup>

Ghosananda’s Dhammayatra Peace Walks are one of the most potent examples of restorative action within a Buddhist framework, providing a way for people to deal with the past through Buddhist rooted philosophies on forgiveness, seeing things as they are, alleviating anger, and quelling the desire for revenge.<sup>68</sup> *Metta* is a way for the victim to let go of attachment to resentment in the present moment; it may leave that victim safe in the knowledge that *karma* will return; but it is also a vital strategy for reckoning with mass violence within a present crisis. The walk is also a process of stopping conflict; it is part of a process of reckoning in an ontological framework, rooted in circular time rather than linear time, breaking free from the *dukkha* cycle by letting go of attachment to the past. It is thus peace-building and justice combined.

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<sup>66</sup> Maha Ghosananda, *Meditations on Wisdom and Compassion: Step By Step*, Jane Sharada Mahoney and Philip Edmonds (eds.), Parallax Press, Berkeley, 1992, p. 58.

<sup>67</sup> *Ibid.*, p. 41.

<sup>68</sup> Alex Hinton, “Truth, Representation, and the Politics of Memory after Genocide”, in Alexandra Kent and David Chandler (eds.), *People of Virtue: Reconfiguring Religion and Moral Order in Cambodia Today*, NIAS Press, Copenhagen, 2008, pp. 62–64.



It should be noted that Ghosananda's walk did not depend on how the KR reacted to it. Their reaction was their own affair. Some reacted positively, others did not. But at their core, the walks required a letting go of the past and an aspiration for the future; if the act of letting go of the past was possible for the victims, then peace could be accomplished. This was not an exercise to ignore the past, or forget it, but a way to deal with the past to prevent future conflict. This is the very core of Buddhist jurisprudence – breaking the cycle. The peace walk is an example of the central element in Buddhist thought when dealing with the aftermath of mass atrocity – that violence prevention and reckoning with its consequences are parts of the same process. Ghosananda argued:

It is a law of the universe that retaliation, hatred, and revenge only continue the cycle and never stop it. Reconciliation does not mean that we surrender rights and conditions, but rather that we use love in our negotiations. Our wisdom and our compassion must walk together. Having one without the other is like walking on one foot; you will fall. Balancing the two, you will walk very well, step by step.<sup>69</sup>

In both this example and the Angulimala story, what emerges is a Buddhist jurisprudence related to crimes of mass violence, a jurisprudence which has two sides to it. Atrocity is not forgotten, and indeed must be understood as a product of wrong thinking. Revenge must be avoided so that the whole cycle can be stopped. Criminals do not go unpunished but retributive justice is not a priority; however, *karma* is something with which the perpetrator must deal, on earth or in another life. Survivors should look on their former persecutors with some pity. Ghosananda said of the former KR:

We have great compassion for them, because they do not know the truth. They destroy Buddhism. They destroy themselves.<sup>70</sup>

Both victim and criminal are parties to a process here – one of shedding attachment from the past to ensure the prevention of future violence. Both parties can work together to enhance the result; or one party can work alone with the aspiration that this unilateral approach will radiate to the other party – as happened with those who did not accept the

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<sup>69</sup> Ghosananda, 1992, p. 69, see *supra* note 66.

<sup>70</sup> Maha Ghosananda, quoted in Venerable Santi, see *supra* note 63.

changed Angulimala, and those KR who did not appreciate Ghosananda's "bullets of loving kindness".<sup>71</sup>

### 6.7. Conclusion – A Beginning

This chapter has explored how a process of reckoning with mass atrocity crimes and war crimes might be conceived and enacted within the Buddhist philosophical tradition; it has established the basis for such a process using both the myths of the philosophy and the conscious performance of its key tenet *metta* as a foundation on which to build. Discussing concepts such as *dharma*, *karma* and *metta* places it somewhat out of the realm of the Western philosophical foundations of modern jurisprudence. However, many Buddhist thinkers, human rights activists and jurists would assertively argue that since there is no contradiction between Buddhist principles and international criminal law, there is no problem in term of acceptance of international criminal law as a universally applicable and useful tool. Others would perhaps contend that the practice of Buddhism is for the individual alone, and that legal processes dealing with the past are a waste of time, tying one to the attachments that inhibit enlightenment.

Some Western jurists may view the framework of this chapter with a great deal of scepticism, even perhaps a degree of shock. Robert Jackson's summation echoes when dealing with mass atrocity crime:

If you were to say of these men that they are not guilty, it would be as true to *say that there has been no war, there are no slain, there has been no crime.*<sup>72</sup>

However, the processes of establishing a clear account of what happened, and of reaching a verdict of guilty on those who have orchestrated atrocity, are in no way contradictory to Buddhist thought. Indeed, Angulimala had his guilt established in the story. In Western jurisprudence, the process concludes at the point when the legal procedure comes to its final decision. Buddhism sees the risk here: if a process leaves parties unsatisfied with the outcome, they will maintain attachment to past resentment and there will be a perpetuation of cycle of violence. For Western jurists, linear time creates a finite moment in history: there is little incentive to proceed further than the verdict. The arguments are made, guilt is or is not established, sentence is passed. The Buddhist understanding of time and

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<sup>71</sup> Maha Ghosananda, quoted in Kathryn Poethig, 2004, p. 203, see *supra* note 65.

<sup>72</sup> Robert Jackson, quoted in Telford Taylor, 1992, p. 4, see *supra* note 23.

history makes it highly conscious of the repetitious and cyclic nature of mass violence – in terms of its own logic, Buddhism cannot cease the process of justice until the events of the past are no longer predominant in the minds of society. The point is that discourse, which leaves both parties in a calm state of mind, is the true ‘end point’ of the process. In practical terms, the act of letting go of the past could take a victim of mass atrocity the rest of their natural life to achieve; indeed, they may never achieve it. This, however, is the main aim of Buddhist jurisprudence.

Retributive justice in the Buddhist sense is the prerogative of *karma*; however, this does not mean that *karma* is a concept that can simply be invoked to allow earthly impunity for international crimes. The Buddhist tradition very clearly understands violence prevention and reckoning with its consequences as being parts of the same process. Violence cannot be ended if attachment to anger about a crime committed remains. Cooling the boiling anger that follows upon mass atrocity or war is urgently needed so as to prevent revenge. Breaking the cycle is key. In the Buddhist tradition, there is a clear recognition that some sort of process is necessary to accomplish this. To understand the nature of *dharma* facilitates that process – whether it is meditative or procedural in form. But Buddhist philosophy does not assume that this kind of understanding and the act of de-linking from attachment are things that happen spontaneously; rather, they require work and thought. It is also important to aid the process through which a perpetrator comes to acknowledge that they will face karmic consequences for their actions.

Buddha taught the *dharma* in order to understand it; he did this through teaching and dialogue. The Angulimala story clearly demonstrates that this man, who was a perpetrator of mass atrocity, needed to understand the *dharma*, *karma* and a sense of justice. This understanding was reached partly through *Karma*, but also by being confronted by his victims in the context of a legal trial.

Angulimala was a mass murderer with a victim tally akin to that of a contemporary war criminal. In modern times, Ven. Maha Ghosananda lived out the philosophical idea of *metta* – as shown by the Buddha in the Angulimala story – in order to quell a recent decades-long period of war atrocity and genocide. In these two examples at least, there is a clear Buddhist approach to reckoning with mass atrocity crimes. I would argue that processes and dialogues are emphasised in the Buddhist framework as primarily a means of letting go of the past. Punishment, individual ac-

countability, a historical record and a time-bound expeditious proceeding are not given so much priority as dealing with the aftermath of violence as a means of conflict prevention – ensuring that the ‘next’ war does not take root in the present or recent war and the associated war crimes. One limitation of international criminal law (which it has just begun to recognise) is that its focus on accountability gives the victims of core crimes little stake in the justice process; witnesses are there solely to provide enough evidence for a conviction. The Buddhist emphasis on the need for both parties to reach a calm state of mind recognises the importance of testimony as an essential part of the process; victims need to speak and to be heard for their own well-being and in order to place their stories in the memory of their community, not simply to secure a conviction. It is impossible to ‘punish’ genocide – as a crime it is too great. But it is possible to offer a symbolic ‘reparation’ which properly acknowledges the victim and provides a language to frame a dialogue between victim and perpetrator.

This is the beginning of a discussion that should take place between legal cultures.

Benjamin’s ‘Angel of History’, looking to the past as a single catastrophe which unceasingly piles up, as the Angel watches, unable to redeem what is destroyed or to pause his relentless crossing into the future,<sup>73</sup> could be a description of the problems faced by the modern international criminal law practitioner. Ceaseless atrocities continue to pile up with each passing generation, faster than international criminal law processes can begin to reckon with them. Buddhism, by contrast, could offer a different way think about justice after atrocity. Justice could be defined as a mode of conflict prevention –not through deterrence in the Western sense, but through an attitude to dealing with the past which sees its major task as assisting the minds of survivors and perpetrators to unshackle themselves from a past in which they still dwell, from which they cannot escape or forgive and from which new horrors may spring. Certainly, this is a significant contribution to thinking on post atrocity justice that would bear further dialogue.

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<sup>73</sup> Benjamin, 2003, p. 392, see *supra* note 37.

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