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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.*

FOREWORD BY JUDGE MADAN B. LOKUR

At the outset, I congratulate the editors of this project on international criminal law for focusing on a subject of immense importance in today's violence-ridden world. For maintaining a just world order, the basic tenets of international law and adherence to its rules cannot be ignored or brushed aside. We can tackle the global problems of climate change, terrorism and armed conflict only by working together to find common approaches. In such times, it is important to strengthen existing norms and, wherever necessary, create new norms. International law is more relevant today than ever before and theoretical inquiries into its sub-disciplines such as international criminal law are necessary for its growth. Hence the congratulatory note.

International criminal law is a relatively young field and remains to some extent undeveloped. It did not grow out of existing practice and consensus, like most of international law, nor was it theorized and set in motion to address a growing need, like other niche areas such as space law. Instead, it was created, almost out of thin air, to deal with the aftermath of calamity – in that sense, most of what we see today as 'international criminal law', is law created for, and practiced by, the *ad hoc* tribunals stretching from Nuremberg to ex-Yugoslavia and Rwanda. This *ad hoc* approach was then generalized to form the backbone of the International Criminal Court ('ICC'), an ambitious project for such a young intellectual discipline.

Nevertheless, as far as India is concerned, this ambitious project was not actually a rabbit out of thin air – we have been familiar with its core principles for millennia. The laws of armed conflict were discussed, as early as in 2000 BC in the Hindu epics, the *Mahabharata* and the *Ramayana*. Here the use of weapons of mass destruction, which kill even unarmed civilians, were prohibited as being against the prevailing moral values of the time. Judge Nagendra Singh of the International Court of Justice discussed how these morals developed into norms in the later *Manusmṛiti*, from the fourth century BC, where a wide variety of weapons that could cause unnecessary suffering such as arrows with heated, poisoned or hooked ends were prohibited in battle. These norms required that

those who surrender, flee or are otherwise *hors de combat* were not to be attacked, foreshadowing protections for prisoners of war. Precursors of modern laws of warfare are found in the *Dharmashastras*, such as a differentiation between just and unjust war, and military and non-military targets. Drawing from these rules, Kautilya, an adviser to the Maurya ruler Chandragupta, advocated similar rules in his political treatise, the *Arthashastra*, written between the fourth and third centuries BC.

What is even more interesting is that it was not merely rules of warfare that were laid out – much like in the current international legal system – but also the fact that the violation of these rules entailed something similar to criminal, or at the very least, moral responsibility. The twelfth book of the *Mahabharata*, the *Santi Parva*, describes how “violators of the law of war were classed as outcasts and stripped of privileges”. Even later, in 256 BC, the Emperor Ashoka, after witnessing the unnecessary suffering caused by his military conquest of Kalinga, took the moral blame upon himself and renounced war, turning to Buddhism instead. He laid down his ‘dhammas’ or edicts, the thirteenth of which advocated that military conquests, if carried out at all, should be done with forbearance and light punishment.

There was thus a deep sense of moral recognition and familiarity in ancient India and across the world for these principles of international humanitarian and criminal law, as a precursor to the Geneva Conventions.

In its current form, ‘international criminal law’ draws from the philosophical underpinnings of both criminal and international law. In one sense, it can be seen as their logical extension: criminal law has, at its core, the idea that individuals should agree to certain minimum rules of conduct within a society, the violation of which could be classified as morally wrong. International law rests on an analogous basis – that nation States should agree on certain minimum rules of conduct to promote a peaceful world order. Increasingly, these minimum standards in international law tend towards upholding humanitarian values. Accordingly, it would seem natural for acts contravening both these standards – acts that are both criminal within a society, and acts in contravention of international humanitarian standards – to be prosecuted internationally, in addition to domestically.

However, alongside this fundamental consonance of values is also a dissonance – namely, that international law upholds State sovereignty, which would oppose any outside interference, including through criminal prosecutions. It was the Second World War which drove home the point

that certain atrocities were so grave, that it was not just *that* society, but the entire world that was invested in punishing and preventing such acts. Since acts of this magnitude were usually committed by those with access to the State machinery, it became doubly important that international accountability be established, since the likelihood of domestic prosecution was low. An international mechanism became a necessity.

It was in this attempt to reconcile the irreconcilable that modern international criminal law was born – it carved out treaty-bound exceptions to sovereignty, allowing international prosecutions in these limited circumstances. This was on the jurisprudential back of ‘universal criminal jurisdiction’ over such ‘serious crimes’, a concept earlier extended only to crimes such as piracy on the high seas, which were outside any nation’s purview, but which was expanded to fit these new needs. When this was first achieved at Nuremberg and Tokyo, it was seen – hopefully, perhaps at that time – as a legal exception for the extraordinary circumstances of the Second World War. It did not seem likely that the world, or the West at any rate, would see genocide and its likes, again.

The war in ex-Yugoslavia and the simultaneous genocide in Rwanda put an end to this view. New tribunals were created by Security Council resolutions but their *ad hoc* nature retreated to the idea of international criminal law as an exceptional measure. Hence naturally, it has been difficult to tie these individual, limited experiments in international criminal law, into a grand academic and philosophical theory. However, the recognition in the 1990s of the inevitability of conflict, alongside a lowering of the humanitarian standards for overruling State sovereignty, culminated in several attempts to do so.

To give a few examples: certain States took the idea to its farthest logical endpoint, by opening themselves up to unfettered ‘universal jurisdiction’, over any ‘serious crime’, committed by any person, in any part of the world. This led to a multiplicity of litigations and allegations of infringement of sovereignty by affected third-party States, as a consequence of which Belgium and Spain – two of the most notable examples – retreated from this stance.

On the other hand, general international law advanced more cautiously, by way of the Rome Statute of 1998 (in force since 2002), to extend a limited universal jurisdiction to a neutral, international court – the ICC. Limited, because jurisdiction did not extend retroactively, did not extend to cases already tried elsewhere, or which could potentially be tried domestically, and most importantly, did not extend to the territory or

nationals of States not party to the Rome Statute. Nevertheless, this has been the boldest experiment in international criminal law to date, pushing the practical boundaries of the field closer to its jurisprudential ends. Now, as the ICC reaches the end of its second decade, it is more important than ever that international criminal law turn its gaze inwards to strengthen its core theoretical foundations, in order to ensure that it remains efficacious.

This is especially true in light of the jolt the field received at the start of 2017, when, following on the heels of the withdrawal by Russia and three African States from the Rome Statute, the African Union itself threatened a mass withdrawal. This did not come to pass, with South Africa and The Gambia both retracting their statements, but it highlighted the need for introspection. Is international justice, through the ICC, a better solution than regionalized, or *ad hoc* justice? The spate of withdrawals was based on claims that deeper neo-imperialist biases were at play in the choice of cases prosecuted at the ICC.

It seems that regional international criminal law solutions, rather than a universal one, might be one answer. To give a few examples: Senegal's successful prosecution of the former Chadian dictator, Hissène Habré, offers a strong case for regional justice mechanisms. Extraordinary African Chambers constituted within the Senegalese court structure, staffed by Senegalese and African Union judges and prosecutors, provided a uniquely African solution to African crimes.

Hybrid courts such as the one in Cambodia, with a certain degree of international scrutiny and control, but with sufficient local representation as well, may also be a more acceptable negotiation of issues of sovereignty and local accountability. However, Sri Lanka's resistance to setting up of such a tribunal to prosecute alleged war crimes during the Liberation Tigers of Tamil Eelam conflict, shows that some States may be unwilling to admit even so much of an incursion into their sovereignty.

The last remaining solution is an entirely domestic one. Bangladesh, for instance, has constituted a domestic war crimes tribunal to deal with crimes committed by its own nationals, during an international armed conflict. This attempt has met with some criticism as regards its independence and impartiality. Further, its structural inability to prosecute foreign nationals for related crimes is another obstacle to this being a comprehensive solution.

In Sri Lanka's case as well, insistence on an entirely domestic tribunal, if at all, has been at the expense of the Tamil minority's concerns regarding the reliability of such prosecution. This is of course the inevita-

ble side-effect of hyper-localization of international criminal justice – by their very nature, crimes of such scale are often tied to the political apparatus of nations and their domestic prosecution will always be riddled with the victors' biases. Thus, localization may not be the automatic answer to the problems of international criminal law and the ICC.

Nevertheless, regional solutions do have their advantages. The International Criminal Tribunal for the former Yugoslavia ('ICTY'), for example, was distanced to some extent, from its own victims, witnesses and the society it seeks to serve, by language – a tribunal functioning in English and French was prosecuting crimes conceived in 'BCS' – shorthand for the dialectic variations of the Yugoslav language. Even today, outreach includes translations and publicity of proceedings in the region, in order to aid the rehabilitative process – something localized proceedings could achieve more organically.

In fact, one of the successes of the Habré prosecution was that victims of sexual crimes felt far more comfortable travelling to Senegal – being within their cultural and geographic comfort zone – than they would have been travelling to the cold, northern shores of The Hague, to the ICC. This easy access to witness and victim testimony made the prosecution that much easier.

Even after prosecutions are concluded and convictions are entered, international justice poses further quandaries – the same concerns that drive international, rather than domestic prosecutions would also militate against holding these criminals in their home countries. Questions of safety and impartiality would always remain. This then poses the problem of where to detain them. High security detention centres are expensive and cumbersome and third-party States may often be unwilling to take on this additional burden. For instance, in Charles Taylor's case, the Netherlands took on pre-conviction detention with the specific caveat that his final sentence would be enforced elsewhere. Even when willing countries are identified, the convicts themselves may raise concerns. One of the post-conviction issues in the ICTY is of detainees seeking transfers to different enforcement states from those chosen for them, claiming linguistic and cultural alienation and consequent exacerbation of their punishment.

These are all issues that might be resolved more easily through regional justice mechanisms.

Lastly, there is the question of the future: military technologies have progressed considerably and the ambit of modern warfare covers autonomous weapons systems, drones and cyber-warfare. While we must first

determine the permissibility of such technology under international humanitarian law, it will also soon be necessary to determine the legal framework within which, if permissible, they will operate. This will include the question of how we will assign moral culpability, under international criminal law, for the actions of such non-sentient systems. This is a jurisprudential challenge that must be tackled head-on before such situations play out, in order to ensure that the existing system of prevention and punishment remains relevant in the future as well.

There is thus no better time to review the foundations, consider the limits, and envisage the potential of international criminal law, a crucial field of law. It has contributed immensely in healing the wounds of the past, but for its future, one hopes that it can grow into an effective enough deterrent to forestall any tragedy.

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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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