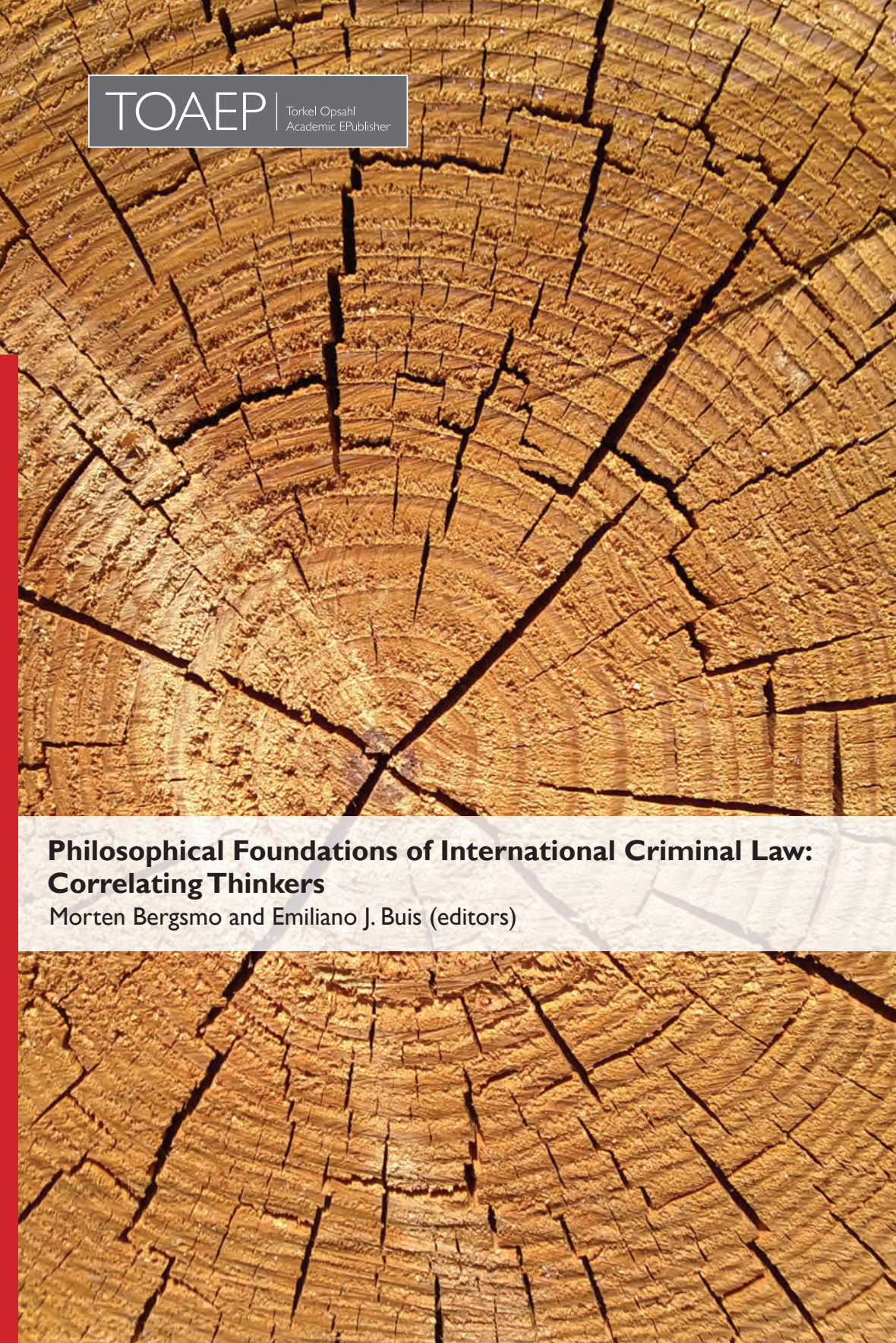

Philosophical Foundations of International Criminal Law: Correlating Thinkers

Morten Bergsmo and Emiliano J. Buis (editors)

E-Offprint:

Morten Bergsmo, Emiliano J. Buis and Nora Helene Bergsmo, "Setting a Discourse Space: Correlational Analysis, Foundational Concepts, and Legally Protected Interests in International Criminal Law", in Morten Bergsmo and Emiliano J. Buis (editors), *Philosophical Foundations of International Criminal Law: Correlating Thinkers*, Torkel Opsahl Academic EPublisher, Brussels, 2018 (ISBNs: 978-82-8348-117-4 (print) and 978-82-8348-118-1 (e-book)). This publication was first published on 30 November 2018. This e-offprint was released with a new copyright page on 16 December 2022.

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.*

1

Setting a Discourse Space: Correlational Analysis, Foundational Concepts, and Legally Protected Interests in International Criminal Law

Morten Bergsmo, Emiliano J. Buis and Nora Helene Bergsmo*

1.1. The Philosophical Foundations of International Criminal Law Project and its Purpose

The title of this volume is *Philosophical Foundations of International Criminal Law: Correlating Thinkers*. It is neither as pretentious nor unclear as it may first sound. It is the first of three books in the series *Philosophical Foundations of International Criminal Law*, based on a research project undertaken in 2017 and 2018 by the Centre for International Law Research and Policy (CILRAP) in co-operation with international partners,[1] including a conference in New Delhi on 25 and 26 August 2017.[2] The sub-title *Correlating Thinkers* signifies that this volume correlates the writings and ideas of leading philosophers and thinkers with the contemporary discipline of international criminal law. Such writings or ideas may at the time of origin have addressed domestic criminal law, public international law more broadly, or philosophy or religion. Although not straight-

* **Morten Bergsmo** is Director of the Centre for International Law Research and Policy; **Emiliano J. Buis** is a Professor at the Facultad de Derecho and the Facultad de Filosofía y Letras, Universidad de Buenos Aires, and holds several teaching and research positions at other academic institutions in Argentina; and **Nora Helene Bergsmo** is with the Department of Philosophy, Stockholm University. Nora Helene Bergsmo has written Section 1.4.

1 The project partners included the Indian Law Institute, University of Delhi Campus Law Centre, the Indian Society of International Law, National Law University, Delhi, O.P. Jindal Global University, Asian-African Legal Consultative Organization, Peking University International Law Institute, Waseda University Law School, the Grotius Centre for International Legal Studies, the University of Nottingham, and the Institute for International Peace and Security Law.

2 This project has been undertaken with financial support from the Norwegian Ministry of Foreign Affairs and the International Nuremberg Principles Academy.

forward, correlational analysis may nevertheless have value. The rules and tests that make up legal doctrines, and are subjected to doctrinal writing, are usually built over long periods of time, with contributions from law-makers, judges, prosecutors, counsel, and publicists. The concepts on which rules, tests and principles are based are older yet, and have been given meaning also by philosophical, religious and other inputs, from across the globe. This volume seeks to look more closely at such philosophers and thinkers, and to view the discipline of international criminal law from their intellectual perspective.

Such correlational analysis maps existing philosophical thought relevant to international criminal law. This is, we submit, a prerequisite to any serious attempt to construct a sub-discipline or discourse space of philosophy of international criminal law. The alternative – relying only on the more theoretical texts by international criminal law scholars, combined with philosophy of criminal law generally, and works on theory of international law – would narrow the basis from which we construct, with several risks such as losing important perspectives as well as extent of representation, re-invention of past thought, and attachment to trend-sensitive theoretical approaches that may not enjoy long lives. Like the concentric rings formed in the trunk of a tree by the annual growth of wood – the front-cover image of this book – thought expands layer by layer through the writings and other recorded ideas of thinkers. By mapping the concentric layers or paradigms more widely, we can see the evolution of thought, the extent of commonality and interdependence, and the intellectual lines that cut through multiple layers or periods.

This is no small undertaking. As you see, the first edition of this volume contains 20 chapters, on thinkers such as Hugo Grotius, Thomas Hobbes, Emmerich de Vattel, Immanuel Kant, Georg W.F. Hegel, Jeremy Bentham, Raphael Lemkin, and Hannah Arendt. Obviously, more chapters are required to meet the broader ambition of *Correlating Thinkers.* We are committed to increasing this number, to cover more thinkers and traditions, and the Torkel Opsahl Academic EPublisher has fortunately agreed to releasing several new and expanded editions of the three initial books in the series in the coming years, to make the work as complete and representative as possible. The series is in other words an ongoing commitment of the co-editors and publisher.

The other two volumes in the *Philosophical Foundations of International Criminal Law* series are subtitled *Foundational Concepts* and

Legally Protected Interests. Neither volume is correlational as such. Rather, *Foundational Concepts* focuses on the main conceptual building blocks of the discipline of international criminal law. There is no generally recognised list of such concepts, and we are not proposing one. Nor is there a clear demarcation line between doctrinal (or dogmatic) and philosophical approaches to international criminal law. The latter needs to include an atomist or analytical focus on foundational concepts or categories. In its first edition, *Foundational Concepts* contains chapters on the notions of 'sovereignty', 'global criminal justice', 'international criminal responsibility', 'punishment', 'impunity' and 'truth'. Future editions will also include chapters on notions such as 'accountability', 'retribution', 'intent', 'territoriality' and perhaps '*ius puniendi*', and possibly on discretionary markers such as 'reasonable', 'proportional' and 'necessity' in the context of international criminal law. We have no intention of creating a rigid theoretical framework as a superstructure on top of the individual chapters. Rather, in *Foundational Concepts* our role is more akin to surveyors assessing the conceptual geography of the discipline of international criminal law, in the borderland between doctrinal and theoretical approaches. We would, however, welcome future supplementary chapters that analyse the relations between the foundational concepts, attempt classifications and hierarchies, and draw lines to *Correlating Thinkers*. The more comprehensive these two volumes become through future editions, the more intellectual exploration they may support, serving as an open knowledge-base in the public commons which anyone can draw on or interact with.

The third volume – *Legally Protected Interests* – maps the fundamental legal interests or values currently protected by international criminal law (such as 'humanity' and 'international peace and security'), and discusses 'reconciliation', 'solidarity' and 'unity' as interests that should perhaps be more firmly recognised by international criminal law or international law more widely. The volume seeks to increase our awareness of the values and interests which international criminal law currently protects. What is the relationship between them? Is there a hierarchy or are other classifications than ranking more intuitive? Was there systematic thought behind the original protection of these values by international criminal law, or were they articulated and promoted more randomly or reactively in a politically-led process to establish a jurisdiction quickly, before a window of opportunity would close?

Developing higher awareness of the values protected by international criminal law will not necessarily affect its interpretation and application in different criminal jurisdictions. The point is not the outcome of cases. But it helps us to explore the limits and further potential of international criminal law. It invites a future-oriented rationalisation of the discipline, assessing whether international criminal law in its present, rudimentary form fails to protect interests that reflect common contemporary or emerging values that people care about. Should the discipline extend beyond wrongdoing in armed conflict and similar exceptional situations, to mainstream problems such as serious harm to the environment, public health or financial markets? *Legally Protected Interests* seeks to inform proactive consideration of how international criminal law should evolve in the coming decades. We are of the view that such considerations should commence in ear-nest, and that contemporary thinkers should engage in proactive analy-sis, with a particular emphasis on contributions from experts familiar with Chinese, Indian and other non-Anglosphere or -Western perspec-tives.

The wider context may help us understand why these questions are important. There has been an apparent flourishing of international criminal law since the early 1990s. States have led the way by establishing and sustaining special war crimes jurisdictions – international, internationalised and national – and by negotiating the legal infrastructure of the permanent International Criminal Court ('ICC'), setting it up, funding it, and being patient with it. Non-governmental organisations have cheered States along, advocating certain benchmarks when States designed the jurisdictions, and subsequently offering assistance to the courts and tribunals, in particular their prosecution services. Practicing judges and lawyers within the war crimes jurisdictions commenced detailed analysis, interpretation and writing about the applicable international criminal law. It took several years for academics to catch up with what had become a rapidly expanding, State- and practice-led field. But they have since made their contributions in considerable numbers, generating a dense literature of articles, monographs, commentaries and blogs.

This body of doctrinal or dogmatic literature – texts on doctrines, rules, offences, elements or other norms and provisions of international criminal law – has not only accumulated and matured, but started to saturate in some areas of the discipline. We see early signs of a will to dogmatise that could soon go beyond the actual needs of the practice of criminal

justice for core international crimes – this would reflect a well-known lawyerly inclination towards '*Über-dogmatisierung*'. Similarly, the literature on the relational or socio-political role of the practice of international criminal law (that is, criminal justice for core international crimes) has become abundant, in particular in the context of so-called transitional justice. We may well be approaching a point where the international community in general has adequate access to expertise on international criminal law and its possible application during transitions towards peace and stability, away from armed conflict. Needless to say, such adequacy of expertise does not equate to a stronger will by governments to actually use criminal justice to deal with core international crimes. But it does indicate that inquiry needs to move forward and open itself to new challenges, and not become stale.

Whereas the discipline of international criminal law could soon be partially over-dogmatised, it concurrently lacks a crystallised sub-discipline or discourse space of philosophy of international criminal law. As such, the *Philosophical Foundations of International Criminal Law* project seeks to clarify and deepen the intellectual roots of the discipline of international criminal law. Such anchoring in older and more diverse schools and traditions of thought should contribute towards maturing international criminal law as a discipline, and cement the consensus around its basic building blocks. That is important. The project also aims to offer reflections on how the discipline of international criminal law should evolve further, what its perceivable outer limits may be, and which gentle civilisers other than international criminal law should begin where its reach necessarily ends.

On this last point, a November 2017-publication by four independent directors reminded us that the "aspirations of individuals and communities *made* the [International Criminal] Court and continue to provide its foundation. If the leaders of the Court cannot retain their trust, their aspirations will move on to other instruments for the betterment of humankind".[3] The authors were concerned with challenges of integrity in international criminal justice. It is readily apparent that philosophy can contribute to the clarification of 'integrity' or other ethics standards, and as-

[3] Morten Bergsmo, Wolfgang Kaleck, Sam Muller and William H. Wiley, "A Prosecutor Falls, Time for the Court to Rise", FICHL Policy Brief Series No. 86 (2017), Torkel Opsahl Academic EPublisher, Brussels, 2017, p. 4 (italics added) (www.legal-tools.org/doc/41b41a/).

sociated analysis of awareness, motivation and cultures of 'integrity'. As regards other "instruments for the betterment of humankind" *within* international law, practicing international lawyers and diplomats may not always be best-placed to proactively analyse the needs in a systematic and open manner, as opposed to identifying and reacting to opportunities in practice. But the reference of the four directors to "instruments for the betterment of humankind" – or gentle civilizers – is not restricted to international law, and thus recognizes the openness of the impending discourse, also to philosophical reasoning.

In his 2016-policy brief "How to Make a Better World: Human Power and Human Weakness", the Cambridge law professor Philip Allott argues that the "high social function of philosophy must be restored",[4] a sentiment that also permeates former Yale Law Dean Anthony T. Kronman's monograph *Confessions*.[5] Allott writes: "Law cannot be better than the society that it serves. But lawyers have a duty to try to make the law as good as it can be. Nowhere is this more necessary than in international society. We have inherited an international legal system that was rationalised in the eighteenth century as a system for the piece-meal reconciling of the self-interest of States, as represented by their governments".[6] This largely reflects the state of the discipline of international criminal law as well.

We hope the *Philosophical Foundations of International Criminal Law* series may help us approach the future of international criminal law in a more systematic and representative manner. That is our objective – not to develop a particular theory or philosophy of international criminal law which, we fear, would tend to be the fool's errand. A sub-discipline of philosophy of international criminal law can hardly be the equivalent of a specific theory or philosophy of a discipline of domestic law, as we know it from, for example, German criminal law. That would not take properly

4 Philip Allott, "How to Make a Better World: Human Power and Human Weakness", FICHL Policy Brief Series No. 75 (2016), Torkel Opsahl Academic EPublisher, Brussels, 2016, para. 33 (www.legal-tools.org/doc/a35654/). The policy brief – which is published in English, Chinese and Arabic – builds on his 2016 study *Eutopia: New Philosophy and New Law for a Troubled World*, Edward Elgar Publishing, Cheltenham, 2016, p. 368.

5 Anthony T. Kronman, *Confessions of a Born-Again Pagan*, Yale University Press, New Haven, 2016, pp. 161 ff.

6 Allott, 2016, see *supra* note 4, para. 31.

into account the contemporary global reality nor the rapidly changing nature of international legal research.

In 1922 Wittgenstein wrote that "[p]hilosophy is not a body of doctrine but an activity".[7] At the time of writing in 2018, the Internet has developed to such an extent that a new sub-discipline of philosophy of international criminal law should not be a mere "activity", but a 'communitarian activity'. It should be a *discourse space*, open to all, unconstrained by proprietary or national interests, and continuously evolving. The texts of recognised philosophers and thinkers of the past obviously belong in this space. But so do those who write about and analyse the writings of past leaders of thought (such as the chapter-authors in this volume), those who write on specific foundational concepts and legally protected values, as well as others who contribute to the space.

To function well, such a discourse space requires commitment to rigorous quality control on the part of its editors or conveners, and a common-sense structure or taxonomy. Our initial taxonomy is the division into correlation, foundational concepts, and legally protected interests – corresponding to the three volumes in the *Philosophical Foundations of International Criminal Law* series, of which this book is the first. These volumes are books in their own right and in the traditional library sense, but when you combine the three e-book versions, the notion of knowledge-base should also become tangible.

1.2. International Law and Philosophy: Why and How?

Our conceptualisation of a sub-discipline of philosophy of international criminal law as primarily a discourse space cannot be completely detached from the wider engagement of philosophy with international law. This is an engagement that has a long and varied history. Many international lawyers see little value in bringing philosophy to bear on international law. The relative maturity of international law methodology and the degree of definitional precision, make us sympathize with their scepticism. Be that as it may. The approach of this volume – and the wider *Philosophical Foundations of International Criminal Law* series – does not depend on any particular view on the wider consideration of philosophy and in-

[7] Ludwig Wittgenstein, *Tractatus Logico-Philosophicus*, 1922, para. 4.112 ("Die Philosophie ist keine Lehre, sondern eine Tätigkeit.").

ternational law. We should nevertheless briefly revisit key phases in this engagement.

The Vienna Convention on the Law of Treaties ('VCLT'), adopted on 23 May 1969, entered into force on 27 January 1980.[8] It codifies a number of customary provisions dealing with the legal regime of treaties between States. Articles 31 and 32 of the VCLT contain basic norms related to interpretation. As far as Article 31 is concerned, it is said that treaties shall be interpreted in good faith "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". A literal reading of the provisions should be therefore enhanced by the contextual dimension, including previous or subsequent agreements or other connected instruments. In Article 32, supplementary means of interpretation are included, since understanding a treaty may require examining the causes and origins of the text (as in the preparatory works) or its purpose and end, especially when a literal reading might leave the meaning ambiguous or obscure or lead to a result which is manifestly absurd or unreasonable.

These conventional provisions have inspired philosophers of international law, insofar as the rationale behind the articles in the VCLT is useful to describe the importance of a philosophical dimension in international legal thought. If the wording, the context and the purpose should come together for a more suitable interpretation of a specific rule, it could be stated similarly that the entire discipline of international law can only be fully grasped if those three aspects are jointly considered. The text of the legal instruments that configure the legal body of international rules should be examined in order to get a better perception of its scope, but at the same time it is relevant to think of the causes that motivate the agreements on those rules and of the intention behind those agreements. That is the general purpose of a philosophical approach, which can provide us with broad views on the scope of rights and obligations foreseen in their legal norms, both by permitting a linguistic examination of its provisions (literal interpretation) and a more abstract contextual analysis of the intent and aims. It looks at the international legal rules in their content and narrative, but it also encompasses a wider assessment in light of the surrounding social, political and cultural environment.

8 See www.legal-tools.org/doc/6bfcd4/.

For many decades, legal philosophy and international law seem to have walked different paths. This is not surprising; most authors who decided to think about the theory of law were absorbed by the centrality of the State as the centrepiece of a legal system. The authority of State organs over their subjects, related to the hierarchical nature of a centralized regime, needed to be explained. Legal philosophy became a useful tool to discuss the supremacy of the role of the State and its monopoly concerning the use of force against its people on its own territory. International law, on the other side, was far away from these discussions, since it was perceived as a quasi-legal order which lacked the main characteristics of its more 'developed' domestic counterpart. The absence of a centralized legislative power and the voluntary jurisdiction of international tribunals were the landmarks of an international legal network created by the common will of sovereign States, where no hierarchy could be established. This 'Westphalian' myth of origin, based upon the emergence of the sovereign equality of States, created a horizontal *corpus iuris* in which no superior force could be identified.[9]

At the same time, the birth of modern international law was traditionally seen as a practical necessity rather than an intellectual enterprise. Since there is no formal mechanism that could eventually ensure States' compliance with its provisions, it was argued that international law was missing the rational enforcement strategies which are common in domestic normative systems. This pragmatic view – which identified international law as a moral, political or social set of rules considered to be an efficient instrument in the hands of the most powerful nations – did not exactly nourish a consistent philosophical approach to its substance. More related to international politics than to law, international law required higher degrees of normativity in order to 'improve' its reach, increase its utility, and endorse its long-standing purpose of regulating the international community. A higher 'normative' character would be accompanied by an *in crescendo* philosophical inquiry into its existence, validity and legality.

[9] On the creation of a modern fiction of international law based on a Westphalian model and the political hiding of the realist paradigm, see Emiliano J. Buis, "El Derecho Internacional Público: Conceptos, características y evolución histórica", in Silvina S. Gonz lez Napolitano (co-ordinator), *Lecciones de Derecho Internacional Público*, 2015, Errepar, Buenos Aires, pp. 1–21.

These and other reasons may explain why international law was overlooked by legal philosophers for so long. Only recently may this tendency have been overturned, by a number of contributions that have started to provide a conceptual basis to conduct philosophical inquiries into international law.[10] It is true that international law has become more like municipal legal systems, and that domestic law and international law have become more integrated.[11]

In the beginning, the philosophical interest focused for the most part on issues concerning the existence and validity of international law. It is undeniable now that international law has its own rules determining its authority, and that consequently it is an autonomous legal order. Nevertheless, the problem of law-making has still promoted intense debate from a theoretical standpoint, and both the category of 'subjects' and 'sources' – typical to domestic regimes – do not seem to fall easily within the logic of international law and have therefore fostered strong discussions. The role of States as main subjects has been heavily criticized by positions claiming for a more democratic foundation of the system. The limits of the consent theory have been acknowledged in order to identify the need for a moral background in the birth of international custom and treaties.[12]

In any case, for many years the question had been whether international law was *law*, and therefore considered the basis of its 'legal' nature. More recently, theoretical approaches have sought to shift the question to whether international law is truly *international*.[13] This seems to have been an unasked question in some countries, perhaps primarily in some powerful English-speaking countries, whereas it can hardly be perceived as novel in places such as China, India, Latin America or the Nordic countries. The question could potentially re-open the ground to analyse the universal background of its principles, especially in the light of relativist approaches that condemn its historical Eurocentrism and focus on other

[10] A significant exception is Edward Dumbauld, "The Place of Philosophy in International Law", in *University of Pennsylvania Law Review*, 1935, vol. 83, no. 5, pp. 590–606, who already identified some of the key issues now under discussion.

[11] Samantha Besson and John Tasioulas, "Introduction", in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law*, Oxford University Press, Oxford, p. 13.

[12] Ronald Dworkin, "A New Philosophy for International Law", in *Philosophy and Public Affairs*, 2013, vol. 41, no. 1, pp. 2–30.

[13] Anthea Roberts, *Is International Law International?*, 2017, Oxford University Press, Oxford.

(traditionally neglected) normative traditions. This could give the philosophical approach a new dimension, which is associated with its relative nature. It can be argued that engaged theoretical thinking of international law should be cognizant of historical biases in its origins, to give space for other traditions that were largely ignored and which might lead to questions about some of its long-standing principles.[14]

As we will discuss in the next section, the self-contained normative regime of international criminal law shares these aspects, but at the same time includes some other theoretical challenges because of the specific philosophical debate surrounding its penal nature.

1.3. From Plato to Foucault: A Sample of Philosophical Dialogues

A comprehensive survey of the philosophical foundations of international criminal law is both necessary and timely. The modern evolution of the discipline, since the creation of the post-World War II military tribunals in Nuremberg and Tokyo, has reached a level of relative maturation where many of its discourse participants may benefit from a more theoretical exploration of its roots, main landmarks, and values protected. Two decades ago, in 1998, the Rome Statute was signed and the ICC, a permanent international criminal tribunal with universal scope, was created for the very first time. This has raised the discourse circumstances to another level. With the time that has passed since the Nuremberg and Tokyo trials, and the establishment of the ICC, there is a healthy distance to the use of international criminal justice in the aftermath of World War II and the innovations that facilitated that. We now have the opportunity to look forward in time and consider how international criminal law should develop in the coming decades, in light of the path walked so far and the new threats to fundamental interests of humankind. As expressed in the research programme that fostered this publication, a philosophical approach can contribute towards critical questioning of fundamental concepts and reasoning about values protected. It can provide a higher level of abstraction that helps us see more clearly where international criminal law falls short of the future.

[14] This cultural bias was noted by the well-known monography of Wolfgang Preiser, *Frühe völkerrechtliche Ordnungen der ausseneuropäischen Welt*, 1976, Franz Steiner Verlag, Wiesbaden. An updated version in French was published as Robert Kolb, *Esquisse d'un droit international public des anciennes cultures extra européennes*, 2010, Pedone, Paris.

The task of offering an ample vision of international criminal law through the lens of a philosophical approach is, however, not an easy one. The convergence of philosophy and international criminal law has not been a mainstream approach, and it has only recently produced some texts which in fact only account so far for partial reflections.[15] This lack of confluence in the literature reflects that criminal law is still the subject of philosophical interest mainly at the domestic level. National penal systems, in spite of transnational traditions, have been perceived as an arm of sovereignty, and criminalisation has traditionally been viewed as a local phenomenon that could only be explained on a national scale. This explains why criminal law has been analysed in the last centuries by tools from a State-centred system of normative values. The recent projection to the international level – and the appearance of new trends and characteristics – has come with new challenges and questions.

This volume – complemented, as already explained, by two following volumes that take other angles – engages several of the current particularities of international criminal law by resorting to the works of relevant thinkers across time. Either explicitly or implicitly, in different moments of history and from various places, doctrinal contributions have established the basis of the principles and have given rise to the foundational notions that are constitutive today of what we understand as international criminal law.

Due to chronological reasons, the relevance of some authors is self-explanatory. At the origins of the discipline, the first experiences of international criminal tribunals were critically examined through (and sometimes against) the framework of contemporary legal positivism, such as the workings of Hans Kelsen.[16] In some ways, philosophical schools (and

[15] The more interesting studies have come in the last decade. They include two chapters by David Luban and Antony Duff in the volume by Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law*, Oxford University Press, Oxford, 2010; the volume by Larry May and Zachary Hoskins (eds.), *International Criminal Law and Philosophy*, Cambridge University Press, Cambridge, 2010; the book by Alejandro Chehtman, *The Philosophical Foundations of Extraterritorial Punishment*, Oxford University Press, Oxford, 2011; and a thematic focus in the *International Criminal Law Review*, Anna Matwijkiw (ed.), 2014, vol. 14, nos. 4–5.

[16] For the different views on the positivist basis of the Nuremberg trials, see the papers of Quincy Wright, "Legal Positivism and the Nuremberg Judgment", in *American Journal of International Law*, 1948, vol. 42, no. 2, pp. 405–14; Stanley L. Paulson, "Classical Legal Positivism at Nuremberg", in *Philosophy & Public Affairs*, 1975, vol. 4, no. 2, pp. 132–58.

their associated authors, as singular embodiments of ideas common to a group of thinkers) can be useful to address conceptual pillars that support the structure of international criminal law.

Other individual thinkers are included in the book because they have been instrumental in discovering concepts, even though they offered their views in contributions published or circulated long before the emergence of the discipline of international criminal law. The interaction between contemporary thought and ideas that predate the birth of the first international tribunals is, in our minds, one of the assets of this volume. It opens for a diachronic analysis of issues such as the value of justice or liberty, the nature and imposition of punishment, the respect for the rights of victims, the interplay between legality and legitimacy, or the importance of the moral scenery that shapes international criminal law.[17] If philosophy is a history of ideas over time, the influence and distance between different authors is not only extremely pertinent, but also the more correct approach. Philosophical thinking is built on dialogue. By putting together a truly international group of experts coming from law, philosophy, history, literature and political science, this project seeks to foster a dialogical methodology, hence our emphasis on discourse space in Section 1.1. above and CILRAP's general promotion of communitarian scholarship. From Plato to Foucault, from Cicero to Arendt, this book is an invitation to explore concepts and inter-textual influence.

In spite of their chronological presentation, an equally rewarding way of reading these contributions is to mingle the chapters and place them together, to see the interactions, explore similarities, and conclude that concepts are best understood when different ways of reasoning intertwine. Authors fuel uneven levels of magmatic accumulations, and international criminal law has evolved into a *sui generis* outcome drawing on a variety of sources. In other words, many of the complexities of international criminal law today are, in large part, a result of echoes and tensions that have emanated from a plurality of theoretical backgrounds. Recovering many of these inputs helps us understand intricacies present in international justice. Readers of this volume are invited to follow that track.

[17] For a chronological overview of the most important studies on the subject, see Robert Cryer, "The Philosophy of International Criminal Law", in Alexander Orakhelashvili (ed.), *Research Handbook of the History and Theory of International Law*, Edward Elgar, Cheltenham, 2011, pp. 232–67.

A second advantage of the communitarian endeavour behind this volume is that, apart from covering a large spectrum of epochs – from ancient Greece to the twentieth century – it offers a landscape that has attempted to go beyond Eurocentrism (or, more accurately in today's terms, Anglosphere-centrism). The modern attacks against international criminal law as a product which has been elaborated upon and fashioned exclusively from a Western logic, show that there is a wide range of influences that come from other cultural traditions. Non-Western insights are included in the presentation of the topics covered in this volume. A comprehensive discussion needs to consider traditionally excluded perceptions – a global discourse requires that all relevant voices are heard. Traditional philosophical approaches to law have generally failed to do that. Although future editions of this work will include additional thinkers, we hope to demonstrate in the following pages that the past focus on an Anglosphere-centric (and previously Eurocentric) bias has limited our understanding of the potential of international criminal law. By including the teachings of Buddha and Gandhi, we are opening the debate to streams of thinking which have not been present in the traditional discussion. Similarly, including early Christian Church Fathers expands the scope of the study. Much remains to be done to include more Asian and Middle Eastern perspectives, as well as Latin American and African philosophical contributions.

Needless to say, what we include here is far from an exhaustive list of relevant thinkers. In this first edition of the book, we could only offer an initial collection of relevant thinkers. It is, nevertheless, a rich assembly. Figures such as Plato, Cicero, Ulpian, Buddha, Ambrose, Augustine, Aquinas, Vitoria, Suárez, Grotius, Hobbes, Locke, De Vattel, Kant, Bentham, Hegel, Durkheim, Gandhi, Kelsen, Wittgenstein, Lemkin, Arendt and Foucault present a rich canvas of ideas that have moulded, from complementary viewpoints, our modern positions on international criminal law. Each chapter shows us that these thinkers had ideas relevant to concepts such as punishment, justice, international law or universal jurisdiction. Taken as a whole, they offer a sense of the nature of the dialogue that has helped construct what we believe today to be the ideological architecture of international criminal law.

What are some of the leading correlational themes and concepts that different thinkers and philosophical traditions have explored? Some of the authors have provided useful readings on the notion of sovereignty in

relation to criminal law. In Rome, while Cicero introduced his ideas on the domestic establishment of a penal law addressed to the punishment of foreign enemies, Ulpian settled the theoretical basis for the consolidation of national criminal jurisdictions from a legal criterion. The founding fathers of the discipline can say much on this: the notion of punishment in times of war can also be traced in the famous works of Grotius, whereas the idea of a common 'enemy' that could justify a legal system among sovereign States is present in those of Vattel, one of the creators of the modern concept of sovereignty.

Other chapters pay attention to the efficiency of sanctions and their function as such. From a sociological perspective, Durkheim thinks of crime and punishment as part of a collective moral process based on shared sentiments engraved in common conscience. Retribution is required to enforce group beliefs and social cohesion. From a different perspective, Bentham's principle of utility considers the overall well-being of societies affected by crimes: the aim of a criminal law should be to promote the largest happiness of the greatest number by educating people and deterring offences. A psychological viewpoint, such as the one promoted by Wittgenstein, focuses on the need to examine the *mens rea* of the perpetrator to take proper account of his or her state of mind by identifying both intent and knowledge.

Alternative responses to grave crimes have been suggested in other philosophical traditions more interested in the protection of victims and the peaceful settlement of traumatic experiences. Buddhism, for instance, has heavily relied on the value of reconciliation by resorting to religious principles. In contemporary Indian thought, moral considerations were also part of Gandhi's approach to the legal order and his spiritual standards to understand the logic of law. This draws on a large tradition of the importance of ethical and religious considerations, as documented over many centuries in the works of Christian thinkers with a strong background in natural law, such as Ambrose, Augustine, Aquinas, Vitoria and Suárez.

The convergence of national interests and universalism is also discussed in some chapters. Cosmopolitanism, already suggested by Ulpian in its archaic roots, re-flourished in the twentieth century together with the origins of a global and overarching human rights movement. When discussing the negative effects of totalitarian regimes, Arendt encouraged robust civic intervention in fighting against criminal wrongdoings. This is

also a key element in international criminal law. Societies, in her opinion, have to respect plural and inclusive conditions of the political community: citizens are in charge of establishment a system of prevention to the benefit of all.

This inclusiveness also relates to other ways of embracing a criminal legal endeavour in the international sphere. The complex nature of cosmopolitanism, seeded as we said by Ulpian, was developed by Kant as a global system of law in favour of humanity, founded on the aspiration of a perpetual peace. Similarly, to overcome the anarchy of a plurality of States, another 'internationalist' perspective would endorse the need to consolidate the fiction of universal institutions as a global social contract (as hinted by Hobbes).

The relationship between the local and the global cannot be absent in a philosophical dialogue on the foundations of international criminal law. Hegel, for example, provided novel ideas to examine the inherent plurality of legal and social orders, which is very useful to understand the parochial and, simultaneously, universalistic features of international justice.

The birth and development of international criminal tribunals can also be examined through philosophical lenses. Different positions can give us reasons to identify the role of the ICC as a common judge against impunity (as one could interpret from Locke), but also as a security-enforcing regime that has managed to generate close control through its social power (as a Foucauldian assessment could insinuate). The origins of specific offences, which are now part of the hard core of recognised international crimes, are also present in the debates, as suggested by Lemkin's definition of genocide and the original difficulties of including it in relevant legal instruments.

Clearly, previous to the existence of international criminal law as a discipline, thinkers contributed to its future development with theoretical ideas arising either from criminal law or international law. These interdisciplinary readings need to be revisited for a more general view of international criminal law to be grasped. Like the tree rings depicted on the cover of this book, our effort shows that analysing the philosophical foundations of international criminal law implies looking at overlapping layers from different moments, places, and fields of expertise. It shows the growth of a discipline that lived through cycles of experiences in a continuous historical sequence. Beyond the individualisation of relevant thinkers and

how they perceived this legal phenomenon, this is a claim about the need to study those interdependent layers and the voices that have come together to plant the trees and produce the wood in the fascinating landscape of international criminal law.

We expect that the *Philosophical Foundations of International Criminal Law* series will open a discussion on the future development of international criminal law. On the one hand, an examination of its normative framework will need serious efforts to strengthen the regime and protect it against political, economic and cultural critiques. At the same time, this criticism (which is frequently referred to in the different chapters of this book) deserves special attention to understand its function and the seriousness of the risks to the development of criminal justice at an international level. Rather than taking the debate to a detached, abstract level, endorsing a philosophical analysis paves the way to a better understanding of the most concrete efforts of international criminal tribunals, and of which fundamental values international criminal law should next protect. If born out of a plurality of readings and a multiplicity of voices as intended in these volumes, such an analysis can contribute to a global perspective.

1.4. The Contents of This Volume

The first chapters of this volume deal with antiquity. Focusing on classical Greece, Emiliano J. Buis revisits in Chapter 2 ("Restraint over Revenge: Emotional Bias, Reformative Punishment and Plato's Contribution to Modern International Criminal Law") several Platonic dialogues in order to examine the affective importance in the administration of Athenian justice. His approach to legal emotions becomes an efficient method to address the value of sentimental considerations in judging, which is of the utmost importance for the understanding of the development of international criminal tribunals (from the biased experience of Nuremberg to the discreet foundations of an 'aseptic' ICC). According to Buis, Plato's statements on *timoria* ('vengeance') and the citizen's instruction in prudent reasonableness, help to show that there has always been a need to rationally overcome the theoretical foundations of revenge in order to consolidate curative benevolence as an educational basis for punishing in criminal proceedings.

Chapter 3 ("Cicero: *Bellum Iustum* and the Enemy Criminal Law") by Pedro López Barja de Quiroga starts by reminding us that "Rome pun-

ished her enemies but did not take them to trial". How does the author then correlate Roman legal thought with the discipline of international criminal law? He begins with the relationship between 'just war' (*bellum iustum*) on the one hand, and 'enemy criminal law' (*Feindstrafrecht*), on the other. The author uses Cicero to explain the relationship between these concepts, discussing in detail his understanding of '*bellum iustum*' in the context of theory and practice in Rome at his time. The concept of 'states of exception' is also studied, taking Schmitt's thinking as a starting point. Barja de Quiroga concludes that Cicero's importance for contemporary international law relies both on his emphasis on '*ius post bellum*' and on his thoughts related to criminal law and sovereignty. The chapter also includes Günther Jakobs's notion of 'enemy criminal law' – closely related to Schmitt's thinking on 'states of exception' – in order to examine in some detail the Ciceronian influence; the Roman contribution to the notion of 'enemy criminal law' can then be expanded to the modern idea of 'enemy-combatant' used by the United States in its so-called "war on terror".

In Chapter 4 ("Roman Jurists and the Idea of International Criminal Responsibility: Ulpian and the Cosmopolis"), Kaius Tuori investigates the writings of Roman jurist Ulpian (170–223 AD), examining the Roman origins of 'international criminal responsibility'. The author looks at concepts such as sovereignty, responsibility, universal jurisdiction and authority. Commenting on the ideas of exclusive jurisdiction and national sovereignty, the author states that "approaching the pre-modern ideas and practices of jurisdiction and its limits enables us to see not only the origins of the modern conventions but also the limitations inherent in them". Furthermore, the Stoic doctrine of '*cosmopolis*' (the universal community of men), as presented in the thought of Ulpian, is analysed through the lens of the evolution of Roman legal thought.

In Chapter 5 ("*Inter Homines Esse*: The Foundations of International Criminal Law and the Writings of Ambrose, Augustine, Aquinas, Vitoria and Suárez"), Judge Hanne Sophie Greve elucidates the purpose of international criminal law in terms of questions regarding the value of individual human life and the purpose of the organisation of collective life. She explores the contribution of the thinkers Ambrose, Augustine, Aquinas, Vitoria and Suárez in relation to "first principles" shaping legal thought and practice. Natural law theory is discussed in addition to morality and civil law. The author states that there is a link between the trans-

cendent human dignity and the law of nature or the law of reason. Although this law neither settles all questions nor solves every problem, it shows that humankind endorses a common ground concerning the basics of human life – that of the *singular human being* and that of the *plurality*.

In Chapter 6 ("Buddhist Philosophy and International Criminal Law: Towards a Buddhist Approach to Reckoning with Mass Atrocity"), Tallyn Gray analyses core international crimes through a Buddhist framework. Employing texts such as the Dhammapada, Theragata and Majjhima Nikaya, Buddhist concepts like '*Dharma*', '*Karma*', '*Dukkha*' ('suffering') and '*Metta*' ('loving kindness') are considered in the context of mass violence. He initiates a discussion on Buddhist conceptions of the role of the victim, pre-emptive justice, retribution and reconciliation, and then uses the genocide by the Khmer Rouge in Cambodia as an example of Buddhist thought having an impact on the response to atrocities.

In Chapter 7 ("Hugo Grotius on War, Punishment, and the Difference Sovereignty Makes"), Pablo Kalmanovitz argues that the concept of 'solemn war' introduced by Grotius in his *De Jure Belli ac Pacis* better reflects Grotius's position on the requirements of wartime legislation (although one of ambivalence) than the concept of 'just war'. The concept of 'solemn war' cannot be fully reconciled with that of 'just war' due to, among others, the differences in punitive measures supported by them. Crimes committed in a 'solemn war' would not necessarily be punished, if they had been decreed by the sovereign and followed an official declaration of war. Customarily, exemptions would be made for such acts. Therefore, sovereignty is central to how the law and punishment are applied in 'solemn war'. The reasons why Grotius introduced the concept and the impunity supported by it are discussed in the chapter, in addition to how those reasons and the concept of 'solemn war' could be relevant today.

In Chapter 8 ("Hobbes and the International Criminal Court: the fantasy of a global social contract"), written in French, Juan Branco provides us with a Hobbesian insight on international criminal law, in general, and more particularly on the creation and functioning of the ICC. Far from being related to the universality promoted in times of the Enlightenment, the ICC is instead built on the political pressure exerted by the sovereign interests of States. Branco explains that, rather than being strictly Kantian in its constitution, the ICC remains very closed to the reality of the political balance at the moment of its origins. Hobbes' notions relating to the social contract and the Leviathan are therefore efficient tools to

discuss the nature of the tribunal, its inherent limitations and, eventually, its possibilities for the future.

Chapter 9 ("An Analysis of Lockean Philosophy in the Historical and Modern Context of the Development of, and the Jurisdictional Restraints Imposed by, the ICC Statute") by Daniel N. Clay deals with John Locke's contribution. According to the author, contrary to Hobbes, Locke's philosophy of justice does not require that the State have complete sovereignty, attributing greater authority to a 'common judge' than to the State. Locke's concept of a 'state of nature' grounded in natural law preceding the establishment of a society wherein positive law and a 'common judge' presides, is offered by Clay as a characterisation of the current order, in light of the state of the ICC. This Lockean basis of international criminal justice is contrasted with Hobbesian philosophical foundations, and the process leading to the establishment of the ICC is analysed in this light. Gustave Moynier's early contribution towards the establishment of an international court is discussed, as well as the limitations imposed on the ICC by the Rome Statute. The future of the court is presented as either going further in a Hobbesian direction due to the declining credibility of the Court, pushing States to reduce co-operation, or in a Lockean direction through the strengthening of the opinion that a 'common judge' in fact promotes justice.

Elisabetta Fiocchi Malaspina outlines in Chapter 10 (""The friend of all nations": Punishment and Universal Jurisdiction in Emer de Vattel's *Law of Nations*") the influence that Vattel's classical treatise has had on the development of international criminal law. She discusses the historical and intellectual contexts in which the treatise came about and was received, by whom it was influenced, as well as for whom it was primarily intended. She considers that Vattel's theories on punishment and universal jurisdiction – as well as his contribution to the formation of concepts – remain relevant to international criminal and humanitarian law; among those concepts, the author deals with "enemy of mankind", *jus cogens* and "crime against the law of Nations". Fiocchi Malaspina suggests that Vattel's ideas on the State, international relations and military intervention for humanitarian purposes are useful for a better understanding of contemporary international criminal law.

In Chapter 11 ("The Statute of the International Criminal Court as a Kantian Constitution"), Alexander Heinze provides a defence of the ICC based on Kantian moral and political philosophy. Throughout the chapter

the author interprets Kant's *The Metaphysics of Morals, Critique of Judgement,* and *Perpetual Peace: A Philosophical Sketch*, as well as other political writings. He deals with issues such as human rights violations at the national as well as the international level, punishment in relation to questions of freedom, the complementarity principle, and the organisation and role of the ICC within international criminal justice. He examines the Rome Statute in light of the notion of a constitution of the international community. The role and purpose of international law and politics are also discussed, not only through the lenses of the rights of nations, but also those of the individual human being.

Chapter 12 ("Jeremy Bentham's Legacy: A Vision of an International Law for the Greatest Happiness of All Nations") by Gunnar M. Ekeløve-Slydal focuses on Jeremy Bentham's contribution to the establishment of international law. The 'utility principle' being the guiding norm in his thought, Bentham manages to de-emphasise natural law and rights as a basis for the development of international law. In his primary legal works, *Introduction to the Principles of Morals and Legislation* and *Of Laws in General*, Bentham undertook the task of codifying international law, which made him take the view that a court was needed to arbitrate in international disputes. His well-known contributions include having coined the term 'international' to describe what we know today as 'international law', and having resorted to the idea of an international law as a means to avoid war and promote lasting peace.

Sergio Dellavalle's Chapter 13 ("Reconciliation v. Retribution, and Co-operation v. Substitution: Hegel's Suggestions for a Philosophy of International Criminal Law") suggests that, although Hegel's writings do not explicitly deal with international law, they are on a conceptual level relevant to the discipline and deal with several of its core issues. Hegel's political outlook differs from Enlightenment philosophers such as Kant in that the community – not the individual – takes precedence. A legal framework must serve community interests, the intrinsic value of which differ from those of individuals. This conception has shaped his view on crime and punishment: the effect crime has on the community as a whole is given added value, and reconciliation rather than retribution is seen as the crucial way forward in conflict. Interpreting Hegel's stance, Dellavalle suggests that the State cannot be underestimated among collectives, in its role of enacting and consolidating justice. However, due to his conception of 'reason', Hegel cannot be accused of favouring particularism over uni-

versalism; instead he supports a form of pluralism. The author concludes that international bodies such as the ICC are seen as complementary actors in strengthening peace and security in the international community.

Chapter 14 ("Understanding the International *Ius Puniendi* under Durkheim's Collective Conscience: An Anachronism or a Viable Path?") is co-authored by Carlos Augusto Canedo Gonçalves da Silva and Aléxia Alvim Machado Faria. They pay particular attention to questions regarding the purpose, function and justification of punishment by looking at Émile Durkheim's social theory. The chapter focuses in particular on the term 'collective conscience', which can be defined as the set of shared beliefs, ideas and moral attitudes which unify a society. The primary purpose of punishment – according to Durkheim – is thus symbolic, namely to uphold certain values or norms, or to confirm certain moral feelings in society, thereby strengthening social cohesion and solidarity. The problem, as shown by the authors, arises as to which values are dominant in the 'collective conscience' of the international community. It is concluded that 'collective conscience', although too abstract and problematic as a concept, can be claimed to stretch beyond borders and shape the understanding of the norms underlying the justification of punishment.

In Chapter 15 ("Gandhism and International Criminal Law"), Abraham Joseph studies a number of relevant Gandhian concepts and their relationship to international criminal law. The author suggests that in Gandhian terms international criminal justice can be seen as "peace trusteeship". Non-violence or '*Ahimsa*' is seen as a route to peace and the realisation of moral truth; therefore, criminal law – which deals with criminals responsible for acts of great violence – is perceived as serving the ends of non-violence and peace. However, law and judicial procedures must also conform to the teaching of non-violence, hence the death penalty and life imprisonment should not be used. According to Joseph's reading of Gandhi, the purpose of punishment should be to morally reform the perpetrator. Having said that, it is also stated that non-violence does not prohibit the use of violence in all situations, since Gandhi himself did permit the use of violence under particular circumstances (that is, for self-defence).

In Chapter 16 ("Hans Kelsen and the Move to Compulsory Criminal Jurisdiction in International Law"), Jochen von Bernstorff examines Kelsen's contribution to the idea of compulsory international criminal jurisdiction. The author discusses Kelsen's proposals *de lege ferenda,* as

well as his theory of the evolution of legal systems, which identifies international legal jurisdiction as an organic subsequent step after that of national law. Kelsen supported the formation of a strong world court and a peace organisation consisting of an assembly, a tribunal, a council and secretariat. Von Bernstorff's contribution discusses Kelsen's ideas on the structure of an international court and, more general, of international law. In spite of his advocacy for international criminal jurisdiction, Kelsen did not support the Nuremberg trials, primarily due to what he saw as a flawed legal basis for the institution of international criminal responsibility.

Chapter 17 ("*Mens Rea*, Intentionality, and Wittgenstein's Philosophy of Psychology") by Jaroslav Větrovský applies Wittgenstein's philosophy – in particular his concept of language play – to the notion of intention or *mens rea*. Intention, as perceived in international criminal law, is suggested to be compatible with Descartes' dualism of body and mind. The understanding that intentions are private (that is, that they cannot be known by others) is investigated, as well as how intentions are said to be known by ourselves. More specifically, Větrovský discusses the "grammar" or linguistic elements of the concept of intention. He suggests that there might be a lack of precision in the language describing criminal intent when the concept is analysed from Wittgenstein's point of view.

Chapter 18 ("Genocide: The Choppy Journey to Codification") by Mark A. Drumbl argues that the concept of genocide has been altered through the making of the 1948 Genocide Convention and has become narrower than its original meaning, as put forward by Raphael Lemkin. By looking at counterfactuals, Drumbl compares the processes of the codification of 'crimes against humanity' and 'genocide', and constructs a different path for the consolidation of Lemkin's definition of genocide before its resulting in codification. According to the text, a slower approach could have contributed to the retention of some of the concept's pre-treaty breadth. Notwithstanding the weaknesses of the treaty definition of genocide, the author argues that it fundamentally protects the rights and values intended by Lemkin, and considers that future case law may improve the definition in order to echo Lemkin's original notion.

In Chapter 19 ("Arendt on Prevention and Guarantees of Non-Recurrence"), Djordje Djordjević outlines the features of Hannah Arendt's writings dealing with the prevention of core international crimes and their recurrence. He introduces a set of conditions which, in his view, Arendt

deemed essential to prevent the commission of core international crimes. Arendt approaches the topic of prevention by identifying the social conditions leading to such crimes, critically examining political and legal responses to such atrocities, and underlining the importance of a normative approach in the form of civic action and responsibility. Djordjević relates Arendt's critique of legalism and her model of citizenship – analysing the importance of mental predispositions and political action – to current debates on how to develop civic resilience and strengthen prevention.

Finally, in Chapter 20 ("Transnational Governmentality Networking: A Neo-Foucaultian Account of International Criminal Law"), Gregory S. Gordon relates Foucault's theory of power to international criminal law and to the notion of 'transnational governmentality networking'. Previous scholarship on Foucault and international criminal law has largely been based on Foucault's book *Discipline and Punish: The Birth of the Prison*. According to Gordon, scholarship has often characterised the notion of 'power' as embracing institutional control of individuals on a larger scale. International criminal justice has not only been a way to end impunity for individuals, but also a means to maintain order in line with the interests of global actors and nation States. The interpretation of Foucault's notion of 'power' in this chapter draws more heavily on his later writings and does not characterise power as coercion and control, but rather as 'governmentality', which is a non-disciplinary form of power. The author argues that international criminal justice cannot be understood as a forum for the maintenance of supranational control, but rather as a set of 'lower-level transnational networks' having reached critical mass through the process of governmentality. International criminal justice, therefore, not only represents punishment and coercion, but also local-global capacity building. Power can thus be viewed as a normative and institutional bond.

As a whole, these chapters offer a rich canvas for those interested in tracing how the idea of an international criminal justice started to emerge and consolidated, and thus how it might evolve into the future. Read one after the other, these contributions by specialists from around the globe show that different lines of thought from a number of historical periods, representing a wide range of interests, had to come together to nurture the field of international criminal law. The philosophers or thinkers who are discussed in the following pages have had a fundamental role to play in this story, a story that attempts to explain the foundations of international criminal law as a practice and as a discipline, identify the nature of its

institutions, and understand with better tools the present and future scope of its rules. They set a discourse space which we hope readers of this volume might be interested in learning from, comparing, discussing and perhaps contributing to as it continues to evolve and become more global.

Publication Series No. 34 (2018):

Philosophical Foundations of International Criminal Law: Correlating Thinkers

Morten Bergsmo and Emiliano J. Buis (editors)

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.

ISBNs: 978-82-8348-117-4 (print) and 978-82-8348-118-1 (e-book).