



## Philosophical Foundations of International Criminal Law: Its Intellectual Roots, Related Limits and Potential

co-organised by

the Centre for International Law Research and Policy, the Indian Institute of Law,  
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### Call for papers.

This new research project a) analyses foundational concepts in international criminal law, b) correlates the teachings of leading philosophers of law and scholars with international criminal law, and c) explores, against this background, the potential and limits of international criminal law. By generating such knowledge and perspectives, the project i) 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. On the basis of a) and b) above, the project also ii) 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 civilizers other than international criminal law should begin where its reach necessarily ends. In his recent study,<sup>1</sup> Professor Anthony T. Kronman, long-time Dean of Yale Law School, offers a learned lawyer's reminder of the limits of the reach of law.

<sup>1</sup> Anthony T. Kronman, *Confessions of a Born-Again Pagan*, Yale University Press, 2016, 1,161 pp.

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, setting it up, funding it, and being patient with it. *Non-governmental organizations* 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 the 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 perhaps started to saturate in some areas of the discipline. We see early signs of a will to dogmatize 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 ‘Überdogmatisierung’. 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<sup>2</sup>) has become abundant, in particular in the context of so-called transitional justice. We may well be approaching a point where the world overall 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 would not equate with a stronger will by governments to actually use criminal justice for core international crimes.

Whereas the discipline of international criminal law could soon be partially over-dogmatised and it concurrently lacks a crystallized sub-discipline of philosophy of international criminal law, we will recognize and build on the work done by a few individual authors on more theoretical aspects of the discipline. As there is no clear line between doctrinal or dogmatic and philosophical approaches to international criminal law, our project invites contributions also on this exact question. As stated above, the latter should focus on foundational concepts or categories, including, but obviously not limited to, ‘punishment’, ‘responsibility’, ‘accountability’, ‘retribution’, ‘mental state’, ‘intent’, ‘harm’, ‘Rechtsgut’, ‘legally protected interest’, ‘humanity’, ‘humane’, ‘integrity’, ‘deterrence’, ‘prevention’, ‘sovereignty’, ‘territoriality’, and discretionary markers such as ‘reasonable’, ‘proportional’ and ‘necessity’. Emerging terms like ‘reconciliation’ and ‘unity’ are included in the project.

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 foundational concepts on which rules, tests and principles are based are older yet, and have been given meaning also by philosophical, religious and other actors, from across the globe. This project would like to correlate their relevant texts – which may at the time have addressed criminal law, public international law more broadly, or philosophy – with foundational concepts of contemporary international criminal law. Relevant thinkers include – but are not in any way restricted to – Hugo Grotius, Thomas Hobbes, Emmerich de Vattel, Immanuel Kant, Georg W.F. Hegel, Jeremy Bentham, John Stuart Mill, Raphael Lemkin, Hannah Arendt and Jürgen Habermas.

The announcement of this call for papers coincides not only with UNESCO’s World Philosophy Day, but it sees the publication of Cambridge Professor Philip Allott’s policy brief ‘How to Make a Better World: Human Power and Human Weakness’, in which he argues that the “high social function of philosophy must be restored”,<sup>3</sup> a sentiment that also permeates Professor Kronman’s *Confessions*. 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

<sup>2</sup> For the purposes of this project, the term ‘core international crimes’ refers to genocide, war crimes, crimes against humanity, and crimes of aggression.

<sup>3</sup> 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 (<https://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, 2016, 368 pp.

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”<sup>4</sup>. The third dimension of the present research project – exploring the further potential and limits of international criminal law – invites a future-oriented rationalisation of the discipline, assessing whether its foundational concepts impose clear limits for the further development of its content and ways of enforcement. Can and should international criminal law become a common criminal law of mankind, extending beyond wrongdoing in armed conflict and similar exceptional situations, to mainstream problems such as serious harm to the environment, public health or financial markets? Does international criminal law in its present, rudimentary form fail to protect *Rechtsgüter* or interests that reflect common contemporary or emerging values? Do the intellectual roots of international criminal law imply common enforcement or jurisdictional mechanisms that are even more binding than those already vested in the International Criminal Court?

### Call for papers

The ‘Philosophical Foundations of International Criminal Law’ project seeks to address these and related questions from the perspective of multiple disciplines and angles. Papers will be discussed in a project conference to be held in New Delhi on 25-26 August 2017, and considered for publication in an anthology to be edited by a team led by Professor Morten Bergsmo. All papers will be reviewed by an editorial committee. Interested speakers should send a draft title and abstract of their proposal (500 words), written in English, together with a *curriculum vitae* to [calls@cilrap.org](mailto:calls@cilrap.org). Proposals are reviewed on a rolling basis, and are due no later than 21 March 2017. Selected speakers will be notified as they are accepted, no later than 25 March 2017. Their travel to, and accommodation in, New Delhi will be covered by CILRAP. Guidance will be offered to authors during their preparation of papers, as may appropriate.

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<sup>4</sup> *Ibid.*, para. 31.