Exploring justice in extreme cases: Criminal law theory and international criminal law

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List of Abbreviations

Institutions

ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
SCSL	Special Court for Sierra Leone
UN	United Nations

Concepts

HRTK	'had reason to know' standard
MLP	mid-level principle
ICL	International criminal law
JCE	Joint criminal enterprise
SHK	'should have known' standard

Citation References

A.Ch	Appeals Chamber
CUP	Cambridge University Press
EJIL	European Journal of International Law
JICJ	Journal of International Criminal Justice
LJIL	Leiden Journal of International Law
OUP	Oxford University Press
PTC	Pre-Trial Chamber
T.Ch	Trial Chamber
VCLT	Vienna Convention on the Law of Treaties

PART I

INTRODUCTION AND PROBLEM

1

Introduction

1.1 CONTEXT: WHY PRINCIPLES MATTER

1.1.1. Rapid Construction of a New Body of Criminal Law

Domestic criminal law has existed for many centuries in most regions,[1] and yet the practices and principles of domestic criminal are still contested. In comparison, international criminal law (ICL)[2] is a new and nascent innovation. After some sporadic historic forerunners and a brief surge after World War II, ICL really burst onto the scene only in the last two decades.[3] Despite initial skepticism in the 1990s, the system has demonstrated its feasibility, secured arrests and trials of major figures, and has become relatively established far more quickly than was widely expected.

The field has also seen major stumbles and setbacks, and currently ICL is awash in controversies and criticisms from every direction. Projecting criminal law onto the international plane, in order to respond to the worst crimes, is still very much a recent experiment in human history.

This thesis focuses on one specific set of issues and controversies: the constraining principles of justice in ICL, such as the principles of culpability and legality. This topic is more philosophical and fine-grained than many of the controversies currently raging

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[1] See eg G MacCormack, *Traditional Chinese Penal Law* (Edinburgh University Press, 1990); P Olivelle. (trans and ed), *Dharmasutras: The Law Codes of Apastamba, Gautama, Baudhayana, and Vasistha* (Motilal Banarsidass Publishers, 2003); J Tyldesley, *Judgement of the Pharaoh: Crime and Punishment in Ancient Egypt* (Weidenfeld & Nicolson, 2000).

[2] In this thesis, **'international criminal law'** refers to the law for the investigation and prosecution of persons responsible for genocide, crimes against humanity and war crimes, along with attendant principles such as command responsibility, superior orders and so on. This law was developed primarily by international criminal tribunals and courts, but it has also been developed and applied by domestic courts.

[3] D Robinson and G MacNeil, 'The Tribunals and the Renaissance of International Criminal Law: Three Themes' (2016) 110 AJIL 191.

about ICL, but it is an important and potentially illuminating subject. The system must comply with a credible understanding of fundamental principles in order to treaty persons fairly and to maintain legitimacy.[4] Headway on these issues can also assist with some of the broader controversies.[5]

It is an opportune moment for sophisticated study of the normative underpinnings and systemic coherence of ICL. Contemporary ICL was produced through a rapid transnational conversation involving thousands of jurists, drawing on diverse sources and legal systems. The elaboration of ICL began in earnest in the mid-1990s, with the creation of international criminal tribunals. While there were some important international and national precedents, those precedents were often sparse and inconsistent. As a result, jurists had to make significant choices in shaping the doctrines. They made those choices under relatively severe time pressures; there was not time to ponder on rarified points. Later choices in turn built on those initial choices, at increasingly fine levels of granularity. Thus, many hands have hastily woven together the elaborate tapestry of definitions and principles that we recognize today.

While it is an achievement that a body of criminal law was fashioned so quickly, it is inevitable that there will be some oversights, contradictions or incoherencies in the resulting patchwork of doctrines. Now, as the urgency of articulating a common set of rules has receded, the time is ripe for a more systematic examination of the fabric of rules that have been stitched together.

1.1.2. The Liberal Critique, and Possible Over-Correction

Early ICL scholarship, very understandably, tended to focus on basic legal analysis in order to identify the relevant rules, drawing on canons of statutory interpretation, precedents, and basic teleological arguments. More recently, ICL scholarship has

[4] In Chapter 3, I discuss some of the reasons to comply with fundamental principles.

[5] Ensuring that doctrines are just may help blunt some of the criticisms that the Court will be an unfair institution. The clarification of deontic constraints can improve not only the Court's fairness but also its productivity, by avoiding improperly excessive standards flowing from over-stated conceptions of the constraints. Furthermore, the cosmopolitan, cross-cultural, open-minded approach advocated here can also address a small part of the concern of critical scholars; ie. the replication of 'Western' approaches.

flourished and diversified, with scholars scrutinizing ICL from a multiplicity of perspectives, including inter-disciplinary, critical and theoretical approaches.[6]

One prominent strand of this new scholarship was the liberal critique of ICL, which brings criminal law theory to bear on ICL problems, with particular emphasis on the fundamental constraints of a liberal justice system. Some scholars pointed out that ICL often seems to contravene fundamental principles, even though it declares its adherence to such principles.[7] Concerns initially tended to focus on 'joint criminal enterprise', but critical attention quickly spread to other doctrines, such as command responsibility and duress. Many scholars are now doing thoughtful work in this vein.

But things move quickly in ICL. In the last decade, ICL has already demonstrated its adaptability by acknowledging the liberal critique. Scholarly literature and judicial reasoning has already evinced much more careful grappling with fundamental principles. Recent judicial decisions are particularly mindful of personal culpability and conversant with concepts from criminal law theory.[8]

Indeed, there is a very real danger that the system may even over-correct. It is entirely understandable that judges, after sustained academic criticism for being too expansive, might swing to the opposite extreme, adopting approaches that are excessively conservative, demanding, and rarified, all in the name of rigour. It has become arguable that judges, particularly at the ICC, may be falling at times into the opposite pitfall of *'Überdogmatisierung'* – excessively rigid over-theorizing that loses sight of the purposes and practicalities of criminal law adjudication in non-ideal earthly

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[6] For impressive canvassing of the literature, see S Vasiliev, 'On Trajectories and Destinations of International Criminal Law Scholarship' (2015) 28 Leiden J Int L 701; S Nouwen, 'International Criminal Law: Theory All Over the Place' in A Orford & F Hoffman, eds, *Oxford Handbook of the Theory of International Law* (OUP, 2016); and C Stahn*, A Critical Introduction to International Criminal Law* (CUP, 2018).

[7] Among the first pioneers in this respect were G P Fletcher and J D Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case', (2005) 3 *JICJ* 539; A M Danner and J S Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law', (2005) 93 *Calif L Rev* 75; K Ambos, 'Remarks on the General Part of International Criminal Law', (2006) 4 *JICJ* 660; M Damaška, 'The Shadow Side of Command Responsibility', (2001) 49 *American Journal of Comparative Law* 455.

[8] As just two examples, see *Prosecutor v Lubanga Dyilo,* Judgment pursuant to Article 74 of the Statute, ICC TCh, ICC-01/04-01/06, 14 March 2012 paras 917-1018 (co-perpetration and culpability); *Prosecutor v Bemba Gomba*, Judgment Pursuant to Article 74 of the Statute, ICC-01/05-01/08, 21 March 2016 (command responsibility and culpability). Other examples are discussed below, especially at §2.5. This laudable trend in judicial reasoning is noted in JD Ohlin, 'Co-Perpetration: German Dogmatik or German Invasion?' in C Stahn, ed, *The Law and Practice of the International Criminal Court: A Critical Account of Challenges and Achievements* (OUP, 2015) 517.

conditions.[9] Taking the broadest interpretation at every turn is over-simplistic, but so is taking the narrowest interpretation at every turn. 'Just Convict Everyone' was rightly criticized as the problematic extension of one tendency, [10] but 'Just Acquit Everyone' is the problematic over-extension of the opposite tendency.[11]

Whereas the Tribunals were at times (unfairly) criticized by some commentators as 'conviction machines', the ICC is if anything in danger of emerging as an 'acquittal machine', given that most cases so far have ended in acquittals, collapses at trial, and even failures at the charge confirmation stage. This trend has culminated in the controversial acquittals of Jean-Pierre Bemba in 2018 and then Charles Gbagbo in 2019.[12] A reflex narrative among many commentators is to ascribe every failed case at the ICC to faulty investigations by the Office of the Prosecutor. While investigative shortcomings are undoubtedly part of the problem, observers appear to be waking to the fact that judicial standards are also part of the equation, and that some ICC judges may be applying unprecedented and problematic evidentiary expectations, standards of review, narrow definitions, and conceptions of the culpability principle.[13]

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[9] M Bergsmo, E J Buis and N H Bergsmo, 'Setting a Discourse Space: Correlational Analysis, Foundational Concepts, and Legally Protected Interests in International Criminal Law', in M Bergsmo and EJ Buis, eds, Philosophical Foundations of International Criminal Law: Correlating Thinkers (Torkel Opshal Academic EPublisher, 2018) 1 at 3-5; E van Sliedregt, 'International Criminal Law: Over-Studied and Underachieving?' (2016) 29 *LJIL* 1; and see also §2.5.

[10] M E Badar, 'Just Convict Everyone!: Joint Perpetration from *Tadić* to *Stakić* and Back Again' , (2006) 6 *Int'l Crim L Rev* 293.

[11] § 2.5.

[12] *Prosecutor v Jean-Pierre Bemba Gombo*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute', ICC A.Ch, ICC-01/05-01/08 A, 8 June 2018. At the time of this writing, ICC Trial Chamber I has yet to provide reasons for its decision to acquit Laurent Gbagbo and Blé Goudé; the failure to provide reasons is one of the many controversies surrounding that decision. See the dissenting opinion, *Prosecutor v. Gbagbo and Goudé*, Dissenting Opinion to the Chamber's Oral Decision of 15 January 2019, ICC T.Ch I, ICC-02/11-01/15-1234, 15 January 2019 (Judge Carbuccia).

[13] D M Amann, 'In Bemba and Beyond, Crimes Adjudged to Commit Themselves', 13 June 2018, EJIL Talk (blog); L N Sadat, 'Fiddling While Rome Burns? The Appeals Chamber's Curious Decision in Prosecutor v Jean-Pierre Bemba Gombo', (12 June 2018) *EJIL Talk* (blog), M Jackson, 'Commanders' Motivations in Bemba', (15 June 2018) *EJIL Talk* (blog), S SáCouto, 'The Impact of the Appeals Chamber Decision in Bemba: Impunity for Sexual and Gender-Based Crimes?', (22 June 2018) *IJ Monitor* (blog), J Powderly and N Hayes, 'The Bemba Appeal: A Fragmented Appeals Chamber Destablises the Law and Practice of the ICC', (26 June 2018), *Human Rights Doctorate* (blog), B Kahombo, 'Bemba's acquittal by the Appeals Chamber of the International Criminal Court: Why is it so controversial?' (9 July 2018), ICJ Africa (blog); F Foka Taffo, 'Analysis of Jean-Pierre Bemba's Acquittal by the International Criminal Court', (13 Dec 2018), *Conflict Trends* (blog), B Hyland, 'The Impact of the Bemba Appellate Judgment on Future Prosecution of Crimes of Sexual and Gender-Based Violence at the ICC (25 May 2019), *ICC Forum* (blog).

The inclination toward higher standards is commendable; however, if barriers to conviction are increased out of misguided enthusiasm and beyond what is required by deontic principles, then one sacrifices the system's impact and purpose for no deontic or consequentialist reason. A convergence of inappropriately rigid standards will at best increase the time and resources for each investigation and prosecution, or at worst contribute to the continued collapsing of cases. Either outcome entails unnecessary expenditure of social resources and a diminishment of the Court's impact and expressive message. Thus, it is all the more important to delineate soundly the fundamental principles appropriate to the system.

1.1.3 Two Reasons to Clarify Principles

Scholars sometimes suggest that the way out of this quandary is to 'balance' utilitarian and deontological considerations.[14] But 'balance', while sound as an aspiration, is still a bit too vague. It does not provide us with a conceptual framework of how and why these considerations would be 'balanced', nor does it provide a methodology to do so.

A helpful first step was famously suggested by HLA Hart, who helped clarify the interplay of consequentialist and deontological considerations.[15] Purely deontological accounts of criminal law are generally unconvincing, because the objective of 'righting the cosmic balance' by meting out deserved punishment does not seem to justify the expense and hardships flowing from criminal law. Conversely, purely consequentialist accounts of criminal law are also inadequate, because they fail to capture our abhorrence at punishing the innocent. If punishment of an individual could be decided solely on utilitarian grounds, there would be no inherent limits precluding punishing the innocent.

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[14] To give just one example, see B Womack, 'The Development and Recent Applications of the Doctrine of Command Responsibility: With Particular Reference to the *Mens Rea* Requirement', in S Yee, ed, *International Crime and Punishment: Selected Issues, Volume One*, (University Press of America, 2003) 101. The aspiration is correct, but I will elaborate in this thesis on the roles of deontic and consequentialist reasoning.

[15] HLA Hart, *Punishment and Responsibility,* (OUP, 2008) 3-12 and 74-82. See also J Rawls, 'Two Concepts of Rules', (1955) 64 *Philosophical Review* 3. The proposal that the general justifying aim may be entirely utilitarian has been questioned by other scholars; for example John Gardner notes that retributive considerations may be not only a constraint on punishment but rather a part of the aim and indeed the essence of punishment. J Gardner, 'Introduction' to HLA Hart, *Punishment and Responsibility*, *ibid* at xii-xxxi. The point for now is that *even if* the justification for the system is consequentialist (reducing crime), deontological considerations at least constrain the pursuit of those aims.

Presumably we object to punishing the innocent not only because it is inefficient, or because it erodes long-term confidence in the system, but more importantly because it is unjust.[16] Hart helpfully distinguished between the justification of the *system* as a whole and the justification of the *punishment of a particular individual*. Thus, it may be that the system as a whole is justified by its social benefits, but punishment of a particular person still requires individual desert. There have been many discussions and developments since then, questioning whether the justifications are quite so separate.[17] Nonetheless, this basic model is sufficient for now to illuminate the importance of constraints. The point is that, regardless of the basis of justification of the system as a whole, it is important to respect constraints of justice. In this thesis, I will use the term 'deontic' to refer to these constraints, which arise from respect for the individual. I will set aside until Chapter 4 the question of the more precise philosophical underpinnings of those constraints.[18]

Hart's clarification helps us see what is at stake in formulating and respecting fundamental principles. Where we breach a deontic commitment to the individual, by understating or neglecting a fundamental principle, we are treating him or her *unjustly*. Conversely, where we *overstate* a fundamental principle – where we are too conservative in our criminal doctrines out of deference to a principle that was incorrectly construed too broadly, we are sacrificing utility for no reason. It is 'bad policy'. We are failing to fulfill the aim of the system, for no countervailing reason.

Thus, clarifying the fundamental principles of justice that constrain the system will assist ICL in two ways. Most obviously, it delineates what we must not do because it would be unjust. Less obviously, it also conversely delineates the zone of permission,

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[16] Utilitarian arguments could be advanced to respond to this challenge; for example, by highlighting the disutility if society learned that innocents were liable to punishment. However, such counter-arguments are unsatisfactory because they are contingent on empirical facts and thus still leave open the possibility of punishing innocents if doings so benefits society. Hart, *Punishment and Responsibility,* above, at 77.

[17] It is possible, for example, that there are both consequentialist and deontological considerations at play in the justification of the system and in the justification of the application of punishment, and there could be connections between the aims of the system and its constraints, rather than a system of purely consequentialist aims and deontological 'side constraints'. See eg. J Gardner, 'Introduction', above, at xii-xxxi; K Ambos and C Steiner, 'On the rationale of punishment at the domestic and international level', in M Henzelin & R Roth, *Le Droit Pénale à l'Éprouve de l'Internationalisation* (LGDJ, 2002) 305; M Dubber, 'Theories of Crime and Punishment in German Criminal Law' (2005) 53 *Am J Comp L* 679.

[18] In Chapter 4, I will argue that concern for deontic principles does not necessarily commit one to any single deontological theory; on the contrary, there are multiple philosophical accounts that could converge in agreeing on these constraints.

where there is no deontic constraint limiting the pursuit of sound policy (for example, promoting general welfare or human flourishing).

In this thesis, when I refer to 'deontic principles', or 'fundamental principles', I am referring provisionally[19] to the following principles. The first is the principle of **personal culpability**, namely that persons are held responsible only for their own conduct. ICL recognizes as 'the foundation of criminal responsibility' that 'nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated'.[20] The principle also requires sufficient knowledge and intent in relation to the conduct[21] that we may find the person 'personally reproachable'.[22] The second is the principle of l**egality** (*nullum crimen sine lege*), which requires that definitions not be applied retroactively and that they be strictly construed (*in dubio pro reo,* rule of lenity), in order to provide fair notice to individual actors and to constrain arbitrary exercise of coercive power.[23] This principle is a 'solid pillar' without which 'no criminalization process can be accomplished and recognized'.[24] At times I will refer to a possible third principle, of **'fair labelling'**, which requires that the label of the offence should fairly express and signal the wrongdoing of the accused, so that the stigma of conviction corresponds to the wrongfulness of the act.[25]

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[19] See Chapter 4.

[20] *Tadić,* Appeal Judgement, above, at para. 186; see also *Nuremberg* Judgement, above, at 251: 'criminal guilt is personal'.

[21] See, e.g., *Čelebići*, Trial Judgement, above, at para 424; A Cassese, *International Criminal Law* (OUP, 2003), at 136-7; ICC Statute, Arts. 30-33; G Werle and F Jessberger, ''Unless Otherwise Provided': Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law', (2005) 3 *JICJ* 35.

[22] H-H Jescheck, 'The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute', (2004) 2 *JICJ* 38, at 44. As will be discussed *infra* (section 4), ICL jurisprudence has also required blameworthy moral choice: see, e.g., *United States v Otto Ohlendorf et al* (*Einsatzgruppen case*), 4 *Trials of War Criminals before the Nuremberg Military Tribunals Under Control Council Law No. 10,* Case No. 9.

[23] *ICC Statute*, above, Art. 22; *Čelebići* Trial Judgement, above, at paras. 415-418; B Broomhall, 'Article 22, *Nullum Crimen Sine Lege*', in O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article,* 2nd ed (Beck, 2008), at 450-1.

[24] *Čelebići* Trial Judgement, above, at para. 402. The principle has also been described by the Sierra Leone Special Court as an 'essential element of all legal systems': *RUF Trial,* above, at para 48.

[25] See, e.g., *Prosecutor v Kvočka,* Judgement, ICTY A.Ch, IT-98-30/1-A, 28 February 2005 ('*Kvočka* Appeal Judgement'), para. 92, emphasizing the difference between two forms of participation (commission versus accessory), 'both to accurately describe the crime and to fix an appropriate sentence'. See also *R v Finta* [1994] 1 SCR 701, at para. 188: 'there are certain crimes where, because of the special nature of the

1.2 RESEARCH GAP AND QUESTION: HOW TO FORMULATE FUNDAMENTAL PRINCIPLES OF ICL?

This thesis aims to fill a gap in existing literature by providing a more careful framework on how to articulate the relevant fundamental principles. As much as we need to clarify the fundamental principles of justice in ICL, it is profoundly elusive to say which are the 'correct' or 'best' formulations of those principles. Scholars in the liberal tradition in ICL sometimes tend to speak of the requirements of justice in rather confident terms, but the groundwork is not often shown. Most frequently, such arguments draw on principles from national systems. However, that approach is vulnerable to the question of whether national legal principles are applicable in the extraordinary contexts of ICL.[26] To avoid that vulnerability, one might turn to philosophical arguments in order to ground the principles. However, the foundations of those arguments are also open to extensive dispute and disagreement.[27]

Numerous thoughtful criticisms have highlighted the difficulty of identifying the relevant principles. Do familiar formulations of fundamental principles, which were developed for national criminal law, even apply in extraordinary contexts of mass criminality? Can we simply copy formulations from national law or might they need re-evaluation in the new context? Are fundamental principles simply 'Western' constructs that should not be imposed in other settings?

Even if we had provisional answers to those questions, what method would we use to discuss the parameters of fundamental principles, especially in the new contexts of ICL? The legality principle is often said to require prior legislation, but what does this principle entail in a system that does not have a legislature? What are the parameters or

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available penalties or of the stigma attached to a conviction, the principles of fundamental justice require a mental blameworthiness or a mens rea reflecting the particular nature of that crime. It follows that the question which must be answered is not simply whether the accused is morally innocent, but rather, whether the conduct is sufficiently blameworthy to merit the punishment and stigma that will ensue upon conviction for that particular offence.' See generally A Ashworth, 'The Elasticity of Mens Rea', in C F H Tapper (ed), *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (Butterworths, 1981); G Williams, 'Conviction and Fair Labelling', (1983) 42 *Cambridge Law Journal* 85.

[26] M Drumbl, *Atrocity, Punishment, and International Law* (CUP, 2007) at 8, 24, 38, 123-124.

[27] Chapter 4.

preconditions of that principle? The culpability principle requires a degree of 'fault' (mental element) and a degree of involvement in a crime (material element) for liability, but how much fault and how much involvement? When we reach liminal cases, especially in the extreme cases faced by ICL, we have to explore the parameters of the principles.

This thesis attempts to provide some provisional answers to such questions, suggesting a framework to enable discussion of fundamental principles in ICL. Thus, it provides the groundwork for doing criminal law theory work in ICL.

1.3 CONTRIBUTION

My central research question in this thesis is whether and how we can identify and refine the constraining principles of justice in ICL. The contribution is structured in the following way: (1) identifying the *problem*, i.e. the need for more careful deontic reasoning, (2) outlining a *solution* - a framework for deontic analysis especially in new contexts such as ICL, and (3) demonstrating the *application* of the methodology to specific problems, thereby illustrating themes of the thesis.

1.3.1 The Problem: The Need for More Careful Deontic Analysis

My first, and most modest, objective is to highlight a particular problem: namely, the need for more careful deontic analysis in ICL. One of the recurring themes in this thesis is the importance of attending to *reasoning*. While most scholarship understandably focuses on the soundness of the *outcomes* reached by an analysis (for example, the rule adopted in a judgment), I suggest that we must attend carefully to the reasoning employed. Law is a reasoning enterprise, and if there are systematic distortions in reasoning, then sooner or later that reasoning will lead to errors and problems.

To better isolate what I mean by 'deontic' reasoning, I can contrast it with two other types of reasoning: source-based reasoning and teleological reasoning. *Source-based* reasoning involves parsing statutes and instruments, and applying or distinguishing precedents, to determine what the legal authorities permit or require. *Teleological* reasoning examines purposes and consequences. I argue that criminal law also requires a third kind of reasoning: *deontic* reasoning. Deontic reasoning focuses on

our duties to respect other individuals. Deontic reasoning focuses not on what texts or precedents allow, or how to maximize social benefits, but on principled moral constraints on our license to punish others. This type of reasoning requires us to consider the limits of personal fault and punishability.

I propose the term 'deontic' as a valuable addition to the lexicon of ICL jurisprudence and literature. Even in criminal law theory literature, we have struggled with various wordy or imperfect terms (eg. 'mindful of constraints of justice', 'justice-oriented', 'desert-based', 'culpability-based', 'tracking moral responsibility', 'principled', 'liberal') to convey this type of reasoning. The term 'deontic' succinctly and elegantly captures this distinct and necessary form of reasoning, and handily distinguishes it from other types of reasoning. I will explain this type of reasoning in much more detail in Chapters 3 and 4. As I will explain in Chapter 4, what I call 'deontic' reasoning does not necessarily have to be grounded in the leading deontological ethical theories; there are multiple ethical theories that could support principled constraints like the legality and culpability principles.[28]

I will argue that ICL jurisprudence and scholarship have always been proficient in source-based and teleological reasoning, but often trailed in the deontic dimension, at least in the earlier days.[29] Of course, ICL has always declared its compliance with fundamental principles of justice. However, the early tendency was often to engage with those principles as if they were mere 'legal' or 'doctrinal' rules. As a result, the principles were often downplayed or circumvented using the familiar doctrinal legal arguments that one would use to evade any inconvenient rule.[30] In early ICL jurisprudence and scholarship, the word 'justice' was often used in an over-simplistic way, in which 'justice' was simply the antonym of 'impunity'. 'Impunity' is the failure to punish persons for serious atrocities; 'justice' by contrast, meant punishment. Early literature often fretted

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[28] See especially §3.3 and 4.3.

[29] See Chapter 2 and see further illustrations in Chapter 7.

[30] One such technique is to question whether a principle is formally legally applicable. For example, the Nuremberg judgment said that the legality principle is merely a 'principle of justice' and not a 'limitation of sovereignty', ie. a legally binding rule in international law. That argument may be credible in a source-based, legalistic analysis. However, if a system aspires to be a system of justice, it should not lightly dismiss a principle on the ground that it is 'merely' a principle of justice.

Similarly, in Chapter 7, I examine the Tribunal's early attempts to respond to a fundamental culpability objection by invoking fairly superficial source-based arguments, such as textual interpretation or invoking lack of precedent. Those arguments did not even attempt to engage with the deontic problem of lack of personal culpability.

about interpretations that might allow accused persons to 'escape justice', without first establishing that it would even be fair to consider the accused culpable in the circumstances.[31] A richer conception of 'justice' includes facilitating prosecutions, but only where the deontic question of fairness of punishment has been answered affirmatively.

Because reasoning matters, I believe it is also important to be on the lookout for possible distortions in our reasoning. Accordingly, in Chapter 2, I provide some illustrations of how some additional challenges arise in ICL may affect reasoning in a way that undermines compliance with deontic principles. ICL discourse has at times drawn on the interpretive, structural, and ideological assumptions of human rights law, without adequately bearing in mind the context shift to criminal law. In a coherentist account, one wishes to be auto-critical and vigilant for possible distortions in reasoning.

As noted above, mainstream ICL thought has evolved rapidly in the last ten years, and we now see thoughtful engagement with deontic constraints. It is even arguable that in some instances, judgments may have over-corrected. An excessively formalistic, punctilious, and ultimately ungrounded approach to principles is also problematic; it will produce doctrines that work only in ideal theory and not in actual earthly cases. Thus, it is all the more urgent to refine the tools for a new invigorated conversation about the appropriate deontic constraints of ICL.

1.3.2 Proposed Solution: A Coherentist Approach

The second, more ambitious, and central objective of this thesis is to develop some of the methodological and conceptual groundwork for exploring principles of justice in ICL. The main prescription of the foregoing section was that we need thoughtful deontic analysis that engages with fundamental principles. But that prescription is not easy to implement in any system, and in ICL in particular raises numerous additional uncertainties and difficulties (see §1.2). I will highlight five central points of my framework:

(a) **Liberal:** Some thoughtful scholars have raised important questions about whether fundamental principles from national systems should even apply at all in the

[31] See examples, Chapter 2.

extraordinary contexts in which ICL operates. I argue that fundamental principles do and must apply, because they are not just artifacts of positive law; they reflect important commitments to the individual. The term 'liberal' is used to mean many different things, and is often used perjoratively. I use the term here in the minimal sense in which it is often used in criminal law theory: it means that one recognizes at least some deontic constraints on punishment.[32]

(b) Open-minded and reconstructivist: However, we do not necessarily have to transplant the formulations from national systems. Instead, we can examine what to the underlying deontic commitment to the individual entails in the new context. In doing so, we may discern that familiar formulations are actually contingent expressions of deeper principles, which have previously unnoticed preconditions or limits.[33]

(c) **Humanistic and cosmopolitan:** I argue that many of the best insights of both the liberal critique and the critique of the liberal critique can be absorbed and reconciled in a humanistic and cosmopolitan account of fundamental principles. The account is *humanistic*, in that is rooted in compassion and respect for a person's humanity, and thus it regards even perpetrators of horrible crimes as moral subjects, not as objects for an object lesson to others. Such an account need not entail the unsound individualistic views that are sometimes ascribed to liberal theories. For example, a sensible account of human behaviour can consider group dynamics, community, social construction, and social roles.[34] The account is *cosmopolitan* in that it is not simply a matter of parochial replication but rather an open-minded cross-cultural conversation. Furthermore, the account is not necessarily fixated on states: it is prepared to contemplate other structures of governance, including international courts and tribunals.[35]

(d) **Coherentist:** I advance a 'coherentist' approach to fundamental principles. A common academic instinct is that, in order to be rigorous and grounded, all of our propositions must be supported by more basic propositions, until we can trace down to some basic foundation. The problem with the 'foundationalist' approach is that it would mean we cannot have a discussion about culpability and legality issues in ICL until we first determine the ultimately correct comprehensive moral theory. The main rival to the

[32] This is developed further in Chapter 3.
[33] Chapter 3.
[34] Chapter 3.
[35] Chapter 3.

foundationalist approach is coherentism. Coherentism accepts that we can work on problems of the middle range, trying to develop models that best reconcile all available clues, without having to solve all of the ultimate questions about underpinnings. I will discuss the features of coherentism in more detail in §1.4 (methodology). Coherentism acknowledges that its hypotheses are revisable and fallible, and that it works with contingent human constructs, but argues that we can nonetheless do valuable analytical, normative and critical work.

(e) A two-way exchange: In this thesis, I will highlight that the application of general criminal law theory to ICL is not necessarily a one-way process. Criminal law theory has much to offer ICL, but conversely ICL has much to offer general criminal law theory. Contemporary criminal law theory developed around what is the 'normal' case in today's world: people in a relatively orderly society in a Westphalian state. Accordingly, many of the commonplaces of criminal law theory may implicitly assume preconditions that do not always apply. The extreme cases and novel problems of ICL can reveal that seemingly elementary principles contain unnoticed conditions and parameters. As discussed in Chapter 5, ICL cases can raise new questions about legality without a legislature, about culpability in collective contexts, about duress and social rules, and about why state authority matters in criminal law thinking. The special case of command responsibility may show an innovative but justified role for criminal negligence in a mode of accessory liability in specific circumstances.[36]

1.3.3 Illustration: Exploring Culpability in Command Responsibility

In order to demonstrate my framework and illustrate the themes of this thesis, I will apply the framework to some specific controversies. I will dissect two major controversies in command responsibility. The command responsibility doctrine emerged in international law, and therefore has not had the centuries of scrutiny that other modes of liability have had in national deliberations. Thus, command responsibility offers relatively new and fertile territory for careful theoretical and deontic investigation. The doctrine also warrants study because it is important in ICL and it has become intensely controversial. The debate has become so convoluted that even the very nature

[36] Chapter 7.

of command responsibility (whether it is a mode of liability, a separate offence, or something *sui generis*) is now shrouded in uncertainty. I will look at two controversies: causal contribution and the special fault element.

My first illustration looks at Tribunal jurisprudence on the question of causal contribution. I show that early Tribunal jurisprudence approached the question responsibility with somewhat hasty source-based and consequentialist reasoning. As a result, early cases rejected a requirement of causal contribution, even though it is a recognized requirement for personal culpability. In doing so, the jurisprudence created a latent contradiction between the doctrine and the culpability principle as expressly recognized by the system. I seek to show how subsequent efforts to deny, evade or resolve that basic contradiction that led the doctrine to become incredibly convoluted and shrouded in ambiguity.[37]

My proposed solution is to recognize command responsibility as a mode of accessory liability, as it was in World War II jurisprudence, in early Tribunal jurisprudence, and in the ICC Statute.[38] Accordingly, I argue that the commander's dereliction must at least encourage, facilitate, or have an effect on subordinate crimes. This approach reconciles World War II jurisprudence, national jurisprudence, instruments such as the ICC Statute, and the culpability principle. However, even if one disagrees with this particular proposed solution, I hope to establish convincingly my main point: that better sensitivity to deontic analysis, and more attentiveness to tools of criminal law theory, can help avoid contradictions and convolutions, and can clarify the viable paths forward.

As a second illustration, I examine the controversy over the modified fault standards, such as the 'should have known' test. Many cases and commentators have raised concerns about a criminal negligence standard, and that caution is commendable because it shows concern for personal culpability. However, I argue that, on a more careful account, the 'should have known' standard is justified and in fact it is the unique insight and value-added of the command responsibility doctrine. Early Tribunal cases incorrectly conflated criminal negligence with strict liability. I show that criminal negligence, properly understood, reflects significant personal culpability. I also argue

[37] Chapter 6.

[38] I will deal with a host of counter-arguments, including the 'separate offence' characterization or 'sui generis' characterization, in Chapter 6.

that many criticisms of command responsibility have overlooked the important distinction between principal and accessory liability: an accessory need not have the same mens rea required of a principal. Finally, I argue that given the notorious and ever-present danger of overseeing armed forces and the vigilance demanded by this extraordinary dangerous activity, criminal negligent disregard is sufficiently equivalent to subjective foresight, and is a deontically justified and valuable standard in that context. Indeed the 'should have known' standard is the 'genius' of command responsibility: it reflects an astute insight into the culpability of the commander. As a result, whereas the ICC 'should have known standard is often condemned for departing from Tribunal jurisprudence, I would defend and rehabilitate it as the more appropriate and justifiable standard.[39]

1.4 METHODOLOGY

This thesis falls within the field of criminal law theory, a field that applies *moral philosophical inquiry* to criminal law. Within that field, this thesis falls within a tradition that is concerned with the moral justification of doctrines and the deontic constraints appropriate in a system of justice.[40]

My central aim in this thesis is actually the *development* of a methodology, one that provides the groundwork enabling criminal law theory that is responsive to the novel contexts of ICL. In developing this methodology, I draw not only from criminal law theory and moral philosophy; I also draw from critical scholarship. Critical scholarship raises valuable criticisms of liberal principles and their application in the novel contexts encountered by ICL (such as mass criminality). I embrace that scholarship in order to develop a more open-minded and humanistic account. The aim is not just to replicate

[39] Chapter 7.

[40] As a few exemplars, see Fletcher and Ohlin, 'Reclaiming', above; Danner and Martinez, 'Guilty Associations', above; G Fletcher, *The Grammar of Criminal Law: American, Comparative and International* (OUP, 2007). J D Ohlin, 'Second-Order Linking Principles: Combining Vertical and Horizontal Modes of Liability', (2012) 25 *LJIL* 771; E van Sliedregt, *Individual Criminal Responsibility in International Law* (OUP, 2012); J G Stewart, 'Overdetermined Atrocities' (2012) 10 *JICJ* 1189; N Jain, *Principals and Accessories in International Criminal Law* (Hart, 2014); AKA Greenawalt, 'International Criminal Law for Retributivists' (2014) 35 *U Pa J Intl L* 969; M Jackson, *Complicity in International Law* (OUP, 2015); C Steer, *Translating Guilt: Identifying Leadership Liability for Mass Atrocity Crimes* (TMC Asser Press, 2017).

familiar formulations of principles but to re-evaluate the implications of the underlying deontic commitment in the given set of circumstances.

More specifically, the methodology I adopt is coherentist. 'Coherentism' is the second important term I must introduce, because it describes the proposed methodology, which is a valuable and necessary alternative to the normal 'foundationalist' instinct common among academics. We can do meaningful work on current human problems without first determining what the ultimately correct moral foundational theory is. As humans in an uncertain world, all we can do is work with the clues that are available to us.

The most common misunderstanding of coherentism is that it merely aims at internal consistency, and hence that it cannot be very radical or profound. However, coherentism is far more ambitious. We draw not only on patterns of practice, but also on the entire range of clues available to us: normative arguments, practical reason, and casuistic testing of our considered judgments. We can use all of our critical reasoning tools to test past understandings for bias and inapt assumptions. On a coherentist approach, we can take common formulations of fundamental principles as starting hypotheses, and then continue to test and refine them. We can develop constructs ('mid-level principles') and then test whether those constructs are analytically useful and normatively convincing, and use them to reform our practice.[41]

A coherentist account is anti-Cartesian: it openly acknowledges that it does not offer certainty, that all of the inputs and sources may be biased or flawed, and that our hypotheses are revisable and fallible. The account is well familiar with post-modern critique; it acknowledges the historic contingency of familiar formulations, and that they can be deconstructed. Nonetheless, it is willing to work with them as a starting point, while examining them for possible biases and assumptions and being ready to replace them with better formulations. The account lets us do valuable analytical, normative and critical work, including calling for reform of doctrines to comply with better understandings of the underlying principles.

I apply my approach in two case studies, in order to illustrate the operation of this approach. The case studies concern two controversies in relation to command responsibility. Those two case studies were selected for the reasons given in § 1.4.3: the

[41] J Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (OUP, 2003).

command responsibility is an example of how ICL provides new doctrines and new questions for criminal theory, and it is an important, hotly-contested doctrine that can benefit from careful deontic analysis and new prescriptions.

In both case studies, my analysis focuses particularly on jurisprudence from the Tribunals. I also heartily acknowledge the centrality of Article 31 of the Vienna Convention on the Law of Treaties for interpretation of treaties; that is however a matter of source-based interpretation, whereas this thesis is focused on questions of criminal law theory and most particularly on deontic analysis. Hence the discussion will of course focus on criminal law theory and deontic analysis. At a few points, I will eschew long analyses of pre-Tribunal precedents, in order to stay focused on the themes of this thesis.

1.5 THE LIMITED SCOPE OF THIS THESIS

1.5.1. Important Questions Outside the Scope of the Thesis

One of my central messages is that criminal law theory and ICL can illuminate each other. My specific focus is on providing a framework for articulating the deontic constraints appropriate for ICL. There are numerous other important questions that could be asked by criminal law theory about ICL, and for which I believe a coherentist method would be fruitful, even though they are beyond the topic selected for this particular thesis.

Justification of Criminal Law - A lot of interesting criminal law theory now focuses not on the deontic justification of specific doctrines, but rather the *political* theory of criminal law,[42] and the justification of the system as a whole. One cluster of issues examines the purpose of criminal law and whether and how criminal law in general is justified. ICL might illuminate such inquiry by requiring us to think outside the normally-assumed state context: In what conditions does an organization – state or otherwise – have the normative authority and legitimacy to punish on behalf of a community or group

[42] See eg. M Thorburn, 'The Criminal Law as Public Law' in R.A. Duff & S Green, eds, *The Philosophical Foundations of Criminal Law* (Oxford University Press, 2011) 21; V Chiao, 'What is the Criminal Law For?' (2016) 35 *Law and Philosophy* 137.

of persons? How would such accounts influence the practices of criminal law? Beyond the basis for criminal law in general, ICL in particular requires additional explanation. Given the current configuration of human society into states, under what conditions are other states or international tribunals justified in exercising jurisdiction over crimes on another state's territory? Candidate theories refer inter alia the harm principle, breach of social contract by the state, or the *jus puniendi* of the international community.[43] To some extent, those questions of general justification are logically prior to the issues I address here. After all, if the system as a whole is not justified and should not exist, then we need not worry about the appropriate constraints.[44] I believe a coherentist methodology would be appropriate and helpful for these general questions. However, the topic is so distinct and massive that I must set it aside for a future work.[45] To manage the scope of this thesis, I focus on investigating deontic constraints, which is by itself an enormous and important topic.[46]

Selectivity, Equality and Distribution of Justice: At present, the loudest, most prominent, and most urgent controversies concern selectivity and how ICL distributes its attention. As I write these words, the ICL project is under intense criticism from opposing directions. For example, ICL is accused of being a hegemonic tool of powerful states designed to unfairly target perpetrators in less powerful countries. At the same time, ICL is attacked by others as a misguided effort by NGOs and weaker countries to harass

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[43] See eg L May, *Crimes Against Humanity: A Normative Account* (CUP, 2005);; K Ambos, 'Punishment Without a Sovereign? The Ius Puniendi Issue of International Criminal Law: A First Contribution Towards a Consistent Theory of International Criminal Law' (2013) 33 *Oxford Journal of Legal Studies* 293; R Liss, 'Crimes Against the Sovereign Order: Rethinking International Criminal Justice' (2019) *American Journal of International Law* (forthcoming); C Stahn, *Justice as Message: Expressivist Foundations of International Criminal Justice* (forthcoming). These questions matter not only because they address whether the system is justified but also because they have different prescriptive implications for the doctrines and practices of ICL.

[44] Furthermore, identifying the justification of a system also sheds light on its constraints. For example, if a system is justified in accordance with consequentialist desiderata, then a particular practice contradicting those desiderata should be avoided.

[45] In particular, I hope to address criticisms, particularly voiced in transitional justice literature, that portray criminal law as simply about vengeance, or about replicating domestic practices out of habit; I believe that such portrayals understate the pro-social purposes of criminal law. The 'sense of justice' appears to be widely shared among human beings, and measured responses to violators appear to have benefits in building social trust. For some foreshadowing, see §3.1.2 and §3.3.3, and see A Walsh, 'Evolutionary Psychology and the Origins of Justice' (200) 17 *Justice Quarterly* 841; P S Churchland, *Braintrust: What Neuroscience Tells Us About Morality* (Princeton University Press, 2011); P H Robinson, *Intuitions of Justice and the Utility of Deser*t (Oxford University Press, 2013) at 35-62.

[46] In this thesis, I treat deontic constraints as 'side constraints', meaning that irrespective of the justification of the system as a whole (ie. even if the justification is consequentialist), the deontic constraints should be respected out of regard for the affected individuals. See §1.2, §3.2.1, and see eg Hart, *Punishment and Responsibility*, above.

powerful actors. Each line of attack is selective in what it highlights and ignores.[47] These are all crucial and urgent issues for ICL, and they are also certainly questions about 'justice' (which presumably requires even-handed application within a system's jurisdiction). These questions are outside my current inquiry (deontic constraints), but I can note some questions that would benefit from critical and coherentist analysis. First, while popular caricatures that present ICL as a pernicious plot are overstated, there are questions to investigate about implicit biases and about the difficulties of prosecuting the powerful. Second, assuming that the ICC is applying reasonable interpretations of the posited selection criteria, there may be plausible argument to add diverse geographic distribution as a legitimate criterion. Third, one could tap into thinking on distributive justice, but what does the ICC 'distribute'?[48] Does it distribute something negative (condemnation) as most criticisms assume or something positive (backstopping rule of law for security and vindication of victims) as supporters assume, or both?

Other Constraints: To further clarify the focus of my field of inquiry, my topic is not about *all* constraints on criminal law. For example, ICL should likely also be sensitive to consequentialist constraints,[49] and constraints reflecting the optimal division of labour between national systems and ICL. However, this thesis explores only those constraints rooted in the fair treatment of persons (such as the principles of legality, culpability, and fair labeling), which I will call 'deontic' constraints.

Sociology of Knowledge and Critical Discourse Analysis: In this thesis, I advocate a coherentist method, which accepts that current understandings are a product of human conversations, and seeks to improve those understandings through further inspection and debate. As a result, one could take a more sociological angle, taking ICL as a 'field' and looking critically at *who* is speaking and the ideologies and power imbalances underlying the discourse.[50] A coherentist approach welcomes sound insights from

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[47] Critics tend to dismiss ICC explanations without addressing factual and legal arguments. For an effort to independently assess situation selection, see Smeulers, A, M Weerdesteijn & B Hola,' The Selection of Situations by the ICC - An Empirically Based Evaluation of the OTP's Performance' (2015) *15 International Criminal Law Review* 1.

[49] If a particular practice (e.g. prohibiting a particular activity) appears to do more harm than good in the long run, then that at least furnishes a significant reason for not continuing that practice.

[50] P Bourdieu (trans R Terdiman) 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 *Hastings Law Journal* 814; P Dixon and C Tenove, 'International Criminal Justice as a Transnational Field: Rules, Authority and Victims' (2013) 7 *International Journal of Transnational Justice* 393; F Mégret,

critical discourse analysis,[51] because coherentism requires vigilance for distortions, biases and assumptions embedded in available understandings.[52] Thus, this type of critical discourse analysis can be a valuable part of a coherentist analysis of a given problem.[53] This thesis simply outlines a coherentist framework for criminal law theory in ICL, and does not delve into any particular problem with a granularity that warrants a critical discourse analysis. However, in Chapters 3 and 4, I discuss the need for a critical alertness to problems of power, culture, and bias in current understandings of principles, as well as the heavy colonial footprint.

1.5.2 A Preliminary Sketch of a Vast and Intricate Topic

The remaining topic – a general framework for exploring deontic constraints in ICL - is nonetheless enormous, and has significant implications. In many respects, I have developed the groundwork with more detail and care than was the case in the existing

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'International Criminal Justice as a Juridical Field (2016) 13 *Champ Pénal.* We could also look at how a community is partially *constituted,* rather than undermined, by its conflicts and disagreements and its efforts to manage such disagreements. See eg. M Hakimi, 'Constructing International Community' (2017) 111 AJIL 317.

[51] Critical discourse analysis analyzes discourse as a social practice, using social, political and cultural theory, with particular interest in power and ideology underlying the discourse: see eg. A Luke, 'Beyond Science and Ideology Critique: Developments in Critical Discourse Analysis' (2002) 22 Annual Review of Applied Linguistics 96; and see also S Ainsworth & C Hardy 'Critical discourse analysis and identity: why bother?' (2004) 1 Critical Discourse Studies 225; Lilie Chouliaraki, 'Discourse analysis' in T Bennett, & J Frow, eds, *The SAGE handbook of cultural analysis* (SAGE Publications, 2008) 674.

[52] Ruth Wodak highlights several features of discourse analysis that are shared by coherentism: alertness to reductionism, assumptions, dogmas, false dichotomies; identifying ideological underpinnings; and being self reflective and open to alternative accounts. See eg R Wodak, 'Pragmatics and Critical Discourse Analysis: A Cross-Disciplinary Inquiry' (2007) 15 Pragmatics & Cognition 203; R Wodak (in conversation with G Kendall), 'What Is Critical Discourse Analysis?' (2007) 8 *Forum: Qualitative Social Research*.

[53] Despite the above-mentioned affinities, coherentism and critical discourse analysis have some differences in preoccupation, vocabulary and valence. As for *preoccupations*, critical discourse analysis is primarily sociological, whereas my inquiry is primarily normative and philosophical: setting up the framework for normative inquiry. My framework *draws* on sociological and critical inquiry where it illuminates a problem. As for *vocabulary*, critical discourse analysis draws on different and distinctive vocabularies (eg Bourdieu's), often with a strong postmodern flavour. Coherentism falls within an analytical philosophical tradition, which prizes clarity and avoids the obscurantism seen in some critical works. As for *valence*, many critical works bog down in deconstruction, unveiling that every practice and understanding flows from power, which can ultimately lead to nihilism and despair. By contrast, a coherentist method tends to be melioristic (believing that understandings and practices can be improved), and hence tends to feature less ironic detachment, and tends to follow deconstruction with prescriptive reconstruction. For further discussion see §4.3.2.

literature. And yet I am acutely aware that, in the interests of conciseness and accessibility, I am at many points skimming the surface of many intricate debates. To offer this framework, the thesis brings together ICL jurisprudence, ICL scholarship, criminal law theory scholarship, moral philosophy, coherentism, and cosmopolitanism. It cannot do justice to each of those components. There are many points that I have dealt with in a few pages that could easily warrant treatment in vastly greater granularity.[54] Furthermore, this initial foray draws heavily on works written in English, and the conversation will have to be broadened and diversified with a far greater range of perspectives and arguments. This thesis is not intended to be a final word, but rather an early contribution in an ongoing broader conversation.

I illustrate my framework with two case studies in command responsibility. There are numerous other controversies that could be fruitfully investigated. In Chapter 5, I outline some the other issues ripe for inquiry: the legality principle and the role of customary law; the parameters of the duress defence in extreme situations; and the possible normative foundations of the superior orders defence.

Even my command responsibility illustrations, which I believe offer a more careful and detailed deontic analysis than currently exists, are each only the tip of an iceberg. Readers immersed in those controversies may wish that one or another legal position or normative debate was developed even further, whereas readers without a particular interest in command responsibility may find those chapters more than amply detailed. I have sought to strike a balance between these readers. Accordingly, I have certainly not exhaustively addressed all of the cases, perspectives, or philosophical debates.[55] My aim was to demonstrate the operation and merits of the proposed framework and to illustrate some themes about deontic analysis in legal reasoning.

Criminal law theory of ICL is a relatively new field. We are still in the pioneering stages of a new area of law that raises novel problems, and of a new discipline of trying

[54] Some examples of topics that one could easily expand upon include: developing the humanistic and cosmopolitan dimensions of the account; exploring the historical and cultural context of familiar principles and the extent to which they are empirically 'Western'; exploring the implications of criminal law outside the construct of the modern 'state'; and exploring ways that ICL problems might illuminate criminal law theory.

[55] Further work could certainly expand upon: causation and omissions; the outer limits of culpability and the extent of causal contribution; alternatives to causal contribution for culpability; and a more cosmopolitan account of criminal negligence drawing on a broader range of legal systems; the proper scope of liability of civilian superiors; and how my account of command responsibility would inform the 'effective control' test.

to understand, systematize, evaluate, and critique that law. I hope that my efforts here will be understood not as an exhaustive statement but as a first introduction to a method. We are still making the first broad brush strokes on a canvas. I hope and expect that there will be many corrections and refinements from other hands yet to come.

2

The Identity Crisis of International Criminal Law

OVERVIEW

In this chapter, I demonstrate the problem to which the rest of this thesis proposes a solution: the need for more careful deontic reasoning. I will focus on certain recurring habits of reasoning that are relatively distinctive to ICL, but which will tend to distort legal analysis away from compliance with liberal principles.

Of course, all legal systems often generate doctrines that appear to conflict with stated principles. However, in national systems, the clash tends to be openly between liberal principles and 'law and order' considerations. I seek to point out that ICL discourse often features an additional dynamic. In ICL, the distortions often result from habits of reasoning that are progressive and appropriate in human rights law and humanitarian law, but which become problematic when transplanted without adequate reflection to a criminal law system. I highlight three kinds of such reasoning: interpretive assumptions, substantive and structural assumptions, and ideological assumptions. These habits of reasoning were more prevalent in the early days of the renaissance of ICL than they are today. It is still valuable to reveal and dissect these habits of reasoning, because they still sometimes recur today.

2.1. CONTEXT AND ARGUMENT

2.1.1 Context: Internal Contradictions with Proclaimed Principles

ICL has always proclaimed its commitment to fundamental principles of justice, both in earlier stages after World War II and again with the renaissance of ICL, when Tribunals were created in the mid-1990s.[1] (By 'fundamental principles' I refer to principles such as the culpability and legality principles.[2]) Such principles distinguish a *liberal* system of criminal justice from an *authoritarian* system.[3] A liberal system embraces at least some restraints on its pursuit of societal aims, out of respect for the autonomy of the individuals who may be subject to the system. Thus, while the purpose of the criminal law system as a whole may be to protect society, some further deontic justification is still required for punishment to be justly applied to a particular individual.[4] Treating individuals as subjects rather than objects for an object lesson, or as 'ends' rather than solely as 'means', imposes principled restraints on the infliction of punishment.[5]

In the mid-2000s, thoughtful scholarship began to question ICL's compliance with those principles. Early literature focused particularly on the doctrine of 'joint criminal enterprise',[6] but scholars also raised concerns about many other doctrines, including sweeping modes of liability, expanding definitions of crimes, and reticence towards defences. How did a liberal system of criminal justice - one that strives to serve as a model for liberal systems - come to embrace apparently illiberal doctrines?

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[1] See, e.g., 'Judgement of the International Military Tribunal (Nuremberg)' (*Nuremberg* judgement), reproduced in (1947) 41 *AJIL* (supplement) 172, at 251; *Prosecutor v Tadić,* Judgement, ICTY A.Ch, IT-94-1-A, 15 July 1999 ('*Tadić* Appeal Judgement'), at para. 186; *Prosecutor v Delalić et al. (Čelebići)*, Judgement, ICTY T.Ch, IT-96-21-T, 16 November 1998 ('*Čelebići* Trial Judgement') at 424; *Prosecutor v Sesay, Kallon and Gbao,* Judgement, SCSL T.Ch, SCSL-04-15-T, 2 March 2009 ('RUF Trial') para 48; ICC Statute, Arts 22-24 & 30-32; United Nations Press Office, 'Rome Statute of the International Criminal Court: Some Questions and Answers' (no longer available online, on file with author); T Meron, 'Revival of Customary Humanitarian Law', (2005) 99 *AJIL* 817, at 821-9.

[2] Chapter 1.

[3] I refer to 'liberal' and 'authoritarian' only as conceptual archetypes; in chapter 3 I will explain the minimalist sense in which I use the term 'liberal'.

[4] See, e.g., HLA Hart, *Punishment and Responsibility* (OUP, 1968), esp. at 3-12 and 74-82.

[5] See, e.g., G Fletcher, *Basic Concepts of Criminal Law* (OUP, 1998), at 43.

[6] See § 2.2.3.

Faced with evidence of frequent departures, one might be tempted to conclude that ICL is indifferent to liberal principles and is simply more harsh than many national criminal law systems.[7] While that is one possible conclusion, I propose that we first try taking seriously ICL's proclamations. After all, mainstream ICL does not *reject* fundamental principles, but rather sees itself as fully compliant. I propose that we first look for more subtle causes of distortion. I do so in the hopes that we can become aware of and guard against such distortions in our reasoning, thereby fostering more sophisticated and principled analyses.

2.1.2 The Identity Crisis Theory

I suggest that *part* of the problem lies in habits of reasoning and argumentation that were transplanted from human rights and humanitarian law, without adequate recognition that the new context – criminal law – requires different thinking. In creating ICL, jurists drew on criminal law as well as international human rights and humanitarian law. Human rights and humanitarian law provided substantive content as well as a familiar framework for internationalized oversight. I argue that, in bringing together criminal law and human rights/humanitarian law, ICL initially absorbed some contradictory assumptions and methods of reasoning. Insightful glimpses into some specific elements of this phenomenon have previously been offered by George Fletcher and Jens David Ohlin[8] and by Allison Marston Danner and Jenny Martinez;[9] I build upon

[7] See, e.g., A T O'Reilly, 'Command Responsibility: A Call to Realign the Doctrine with Principles of Individual Accountability and Retributive Justice', (2004-5) 40 *Gonzaga Law Review* 127, at 154; and see M Dubber, 'Common Civility: The Culture of Alegality in International Criminal Law' (2011) 24 *LJIL* 923.

[8] G Fletcher and J D Ohlin, 'Reclaiming Fundamental Principles in the Darfur Case', (2005) 3 *JICJ* 539, at 541, have convincingly suggested that ICL's weaknesses in respecting legality and culpability are a product of 'an under-theorized shift' from public international law (which focuses on states or groups) to criminal law (which focuses on the individual). I suggest that the shift in focus from *systems* to *individuals* is only one example of the different approaches, consequences, and philosophical underpinnings of these areas of law. Moreover, by considering the transition not only from general international law but more specifically from international human rights and humanitarian law, one discerns an additional range of interpretive, structural, and ideological assumptions in play.

[9] A M Danner and J S Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law', (2005) 93 *Cal L Rev* 75, at 81-9, have suggested that a human rights approach to interpretation, favouring large and liberal constructions, is inapposite to ICL.

those insights to offer a more holistic account of some observable tendencies in ICL discourse.

The explosive growth of ICL in the mid-1990s – a boom in institution-building and norm-articulation – led to a sudden need for international criminal lawyers. As few such creatures existed, the vacuum was filled, at least at the outset, primarily by international lawyers with training in the fields of human rights and humanitarian law.[10] Indeed, ICL was perceived and heralded as a major advance in human rights and humanitarian law, offering a valuable remedy and means of enforcement by punishing violators. ICL professionals eagerly adopted and sought to respect the forms and principles of criminal law; however, they also brought the habits of reasoning of their native domains of expertise.

These early influences have left a continuing heritage, shaping the areas of myopia in ICL. ICL jurists affirmed principles like culpability and legality, but often engaged with them as if they were mere 'doctrinal' constraints, and thus narrowed or circumvented them with standard interpretive moves. I agree that criminal justice required an additional type of reasoning – deontic reasoning – that directly and normatively explores the principled limitations on blame and punishment. Even more interestingly, the problem is not just inadequate engagement with these special moral constraints, but that assumptions of human rights and humanitarian law reasoning can actively work at *cross-purposes* to fundamental principles, when those assumptions are uncritically transplanted into a penal system.

In this chapter, I present three of the 'modes' by which this distortion occurs. One mode is the influence of *interpretive approaches* from human rights and humanitarian law, such as victim-focused teleological reasoning. Such reasoning not only undermines strict construction but also fosters sweeping interpretations that may run afoul of culpability and fair labelling. The second mode is *substantive and structural conflation* - that is, the assumption that criminal norms must be coextensive with similar norms in

I agree with that observation, and I supplement it by pointing out other modes—including substantive, structural, and ideological assumptions – by which habits of thought in human rights law, with liberal aims, can actually undermine liberal principles, if applied in a criminal law context without considering the context shift.

[10] J Wessel, 'Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication', (2006) 44 *Columbia Journal of Transnational Law* 377, esp. at 449; M Damaška, 'The Shadow Side of Command Responsibility', (2001) 49 *American Journal of Comparative Law* 455, at 495.

human rights or humanitarian law. Such assumptions overlooking the different structure and consequences of these areas of law, and thus neglecting the additional deontic principles that constrain punishment of individual human beings. A third mode is *ideological assumptions,* for example, about 'progress' and 'sovereignty'. These assumptions can lead to overly hasty embrace of expansive doctrines and rejection of narrower but principled doctrines. Each of these assumptions can distort analysis against fundamental principles when applied without sensitivity to the context shift in criminal law.

I do not suggest that human rights and humanitarian law assumptions are the sole *cause* of departures from fundamental principles. They are not. Other influences are undoubtedly in play. For example, ICL deals with violations of exceptional magnitude and severity, and studies indicate that the more severe the crime, the greater the perceived pressure to convict and the greater the likelihood of perceiving an accused person as responsible for the crime.[11] Another possible influence could be the incentive of judges and professionals in an emerging field to demonstrate the efficacy of their field and to increase their influence and prestige by expanding the scope and role of ICL.[12] Reputational incentives may also have a subtle impact; for example, at least in the early days of the renaissance of ICL, the judge or jurist who espoused conviction-friendly interpretations could reliably expect to be applauded as progressive and compassionate by esteem-granting communities.[13] Moreover, consequentialist 'law and order' aspirations emerge in any system and can lead to tension with principles. Current efforts

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[11] J K Robbennolt, 'Outcome Severity and Judgments of "Responsibility": A Meta-Analytical Review', (2000) 30 *Journal of Applied Social Psychology* 2575; J Lucas, C Graif, and M Lovaglia, 'Misconduct in the Prosecution of Severe Crimes: Theory and Experimental Test', (2006) 69 *Social Psychology Quarterly* 97.

[12] S Estreicher and P B Stephan, 'Foreword: Taking International Law Seriously', (2003) 44 *Virginia Journal of International Law* 1, at 1; M Osiel, 'The Banality of Good: Aligning Incentives Against Mass Atrocity', (2005) 105 *Columbia Law Review* 1751, at 1823; K Rittich, 'Enchantments of Reason/Coercions of Law', (2003) 57 *University of Miami Law Review* 727, at 729; Wessel, 'Judicial Policy Making', above, at 420-1.

[13] See, e.g., F Schauer, 'Incentives, Reputation and the Inglorious Determinants of Judicial Behavior', (1999-2000) 68 *University of Cincinnati Law Review* 615; R Posner, 'What Do Judges and Justices Maximize? (The Same Thing Everyone Else Does)', (1993) 3 *Supreme Court Economic Review* 1; D Kennedy, 'Strategizing Legal Behaviour in Legal Interpretation', (1996) 3 *Utah Law Review* 785; R Graham, 'Politics and Prices: Judicial Utility Maximalization and Construction', (2007) 1 *Indian Journal of Constitutional Law* 57. Conversely, there is very little incentive within the profession to disagree with expansionist arguments (at least during the early resurgence of ICL), in the light of what H Kissinger has described as the 'intimidating passion of [ICL] advocates': H Kissinger, 'The Pitfalls of Universal Jurisdiction', (2001) 80 *Foreign Affairs* 86, at 86. As I will note below, some of these tendencies have now subsided.

to respond to terrorism and organized crime, for example, have led national systems to adopt laws that appear to contravene fundamental principles.

However, my topic here is the *reasoning*, and what is important for present purposes is that the reasoning in ICL is often different, in interesting ways, from the national law discourse. Particularly in the first decade of the renaissance of ICL (roughly 1995-2005), there was relatively little awareness of any incongruity with fundamental principles; indeed, the system prided itself as an exemplary liberal system. The interesting and distinctive feature of these distortions in ICL reasoning is that the participants are often applying what they believe to be sound legal methods *with appropriately liberal aims.*

Thus, even if other factors may be in play, the impact of human rights and humanitarian assumptions remains of particular interest because it offers not only a 'why' but also a '*how*'. Reliance on these assumptions and methods of argumentation furnishes the *analytical steps* by which such departures are effected and provides the plausibility that allows the departures to pass unnoticed. Our favoured reasoning methods may contain distortions, and hence we need to *think about the way that we think.*

The identity crisis theory helps to explain why an overwhelmingly liberal-minded profession may have endorsed illiberal doctrines and developments. In a typical criminal law context, liberal sensitivities focus on protecting individuals from inappropriate coercive power of the state. In ICL, however, prosecution and conviction are often conceptualized as the fulfilment of the victims' human right to a remedy.[14] Such a conceptualization subtly encourages reliance on human rights methodology and norms, and also shifts the preoccupation of participants.[15] Many traditionally liberal actors (such as non-governmental organizations or academics), who in a national system would vigilantly protect defendants and potential defendants, have often been among the most

[14] See, e.g., *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res. 60/147, UNGAOR, 60th Sess, UN Doc A/RES/60/147 (2005); J M van Dyke, 'The Fundamental Human Right to Prosecution and Compensation', (2001) 29 *Denver Journal of International Law and Policy* 77.

[15] Even in a national system, the rhetoric of justice for victims can increase pressure within the system to overlook fairness to the accused: K Roach, 'Four Models of the Criminal Process', (1999) 89 *Journal of Criminal Law and Criminology* 671. What is distinct about ICL is that there is not just an increased sensitivity to victims, but that we import an entire set of argumentive assumptions from international human rights and humanitarian law.

strident pro-prosecution voices, arguing for broader crimes and modes of liability and against defences, in order to secure convictions and thereby fulfil the victim's right to justice.[16] In a national system one may hear that it is preferable to let ten guilty persons go free rather than to convict one innocent person. The ICL literature, especially in earlier days, was instead replete with fears that defendants might 'escape conviction' or 'escape accountability' unless inculpating principles are broadened further and exculpatory principles narrowed.[17]

Thus, a distinctive feature of ICL reasoning is that illiberal doctrines often arrive in a *liberal* garb, rather than in a classical authoritarian garb.[18] In both human rights law and criminal law, liberal principles aim to protect human beings from the state. But if we are operating a criminal law institution, then liberal principles engage to protect persons from the criminal law machinery, i.e. the principles now restrain *us*. Thus advocates accustomed to championing the rights of the individual against the state may have to reverse some habits of thought when applying ICL. For example, confidently maximizing the protection of victims may culminate in punishing human beings without fair warning, culpability, or fair labelling. Furthermore, human rights law and humanitarian law are addressed to collective entities (eg. states), and thus are not directly constrained by

[16] W Schabas, 'Sentencing by International Tribunals: A Human Rights Approach', (1997) 7 *Duke Journal of Comparative and International Law* 461, at 515, observes this shift with respect to human rights nongovernmental organizations (NGOs). More subtly, human rights NGOs generally retain their affinity for procedural rights, but on substantive principles they tend to favour broad inculpatory principles and to resist exculpatory principles. On NGO hostility to defences, see R J Wilson, 'Defences in Contemporary International Criminal Law', (2002) 96 *AJIL* 517, at 518. M Boot, *Genocide, Crimes against Humanity and War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Intersentia Publishing, 2002), at 614, reports on NGO proposals 'to give several definitions of crimes an open-ended character or to broaden existing definitions' in order to avoid rigid formulations 'that could lead to acquitting an accused'.

[17] See, e.g., C Bassiouni, 'The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities', (1998) 8 *Transnational Law and Contemporary Problems* 199, at 200 ('escape accountability'); G Vetter, 'Command Responsibility of Non-military Superiors in the International Criminal Court', (2000) 25 *Yale Journal of International Law* 89, at 95 ('escape conviction'); B Womack, 'The Development and Recent Application of the Doctrine of Command Responsibility, with Particular Reference to the Mens Rea Requirement', in S Yee (ed), *International Criminal Law and Punishment* (University Press of America, 2003), at 168 ('escape justice'); S L Russell-Brown, 'The Last Line of Defense: The Doctrine of Command Responsibility and Gender Crimes in Armed Conflict', (2004) 22 *Wisconsin International Law Journal* 125, at 158 ('escape criminal responsibility'); C T Fox, 'Closing a Loophole in Accountability for War Crimes: Successor Commanders' Duty to Punish Known Past Offenses', (2004) 55 *Case Western Reserve Law Review* 443, at 444 ('gap will allow certain atrocities to go unpunished').

[18] By 'arriving in a liberal garb', I mean they are rooted in assumptions (interpretative, structural and ideological) that are appropriate and liberal (human-oriented) in a human rights context.

principles like culpability or fair labeling. Thus, copying rules and assumptions from human rights law can corrode liberal protective principles, if one fails to fully consider the context shift to criminal law.

The following sections will look at three modes by which assumptions that are appropriate in human rights can distort ICL discourse: interpretive assumptions (§ 2.2), substantive and structural assumptions (§ 2.3), and ideological assumptions (§ 2.4). I will use the doctrine of command responsibility as a recurring example under all three modes.

My examples in this chapter draw heavily from the early days of the renaissance of ICL, i.e. following the creation of the Tribunals and their jurisprudence (roughly 1995-2005). After that period, there was an interesting shift in ICL discourse – the 'deontic turn'. In the final section of this chapter (§2.5), I will discuss that shift and how it intensifies the need for a thoughtful method for deontic inquiry.

2.1.3 Clarifications

As the following analysis may at times seem rather critical, some important qualifications are in order. First, I by no means suggest that ICL jurisprudence is uniformly flawed. In this chapter, I provide examples to demonstrate some *tendencies* that are common in ICL discourse. I do not suggest that the tendencies amount to an iron rule. They definitely do not.[19] The observations are offered in the spirit of improving a discipline that is still relatively new.

Second, the contradictions identified here are a contingent phenomenon and not an immutable fatal flaw in the ICL project. Tensions in reasoning habits can be addressed by exposing them to scrutiny and developing ICL's distinct philosophical underpinnings. The doctrinal contradictions can be unearthed and resolved by reforms that align doctrines and principles. Indeed, that process is already well underway, and later chapters of this thesis will explore how to carry out that alignment. The reasoning

[19] Even in early Tribunal jurisdiction, there were examples of judges taking a stance in favour of liberal principles; see, e.g., *Prosecutor v Vasiljević,* Judgement, ICTY T.Ch, IT-98-32-T, 29 November 2002 ('*Vasiljević* Trial Judgement'), paras. 193-204 (a rather strict stand on the requirement of precision); *Prosecutor v Simić,* Judgement, ICTY T.Ch, IT-95-9-T, 17 October 2003, ('*Simić* Trial Judgement'), paras. 1-5, Dissenting Opinion of Judge Lindholm (dissenting judge distancing and disassociating from JCE doctrine).

techniques described here were particularly prevalent in the first decade of the re-emergence of ICL, but they have been diminishing significantly.[20] As I will discuss in the final section ('After the Identity Crisis' §2.5), ICL jurisprudence is already far more sophisticated and attentive to culpability and legality than it initially was. Nonetheless, it is useful to be aware of the reasoning techniques discussed here, as they do still frequently crop up in ICL argumentation. Given that ICL draws content from human rights law and humanitarian law, it is understandable and predictable that inapposite assumptions may still be absorbed along with that content.

Third, and most crucially, where I highlight a problematic structure of argumentation in a case, it does not mean I disagree with the *outcome* reached in that case.[21] A court or scholar might employ a problematic argument and yet the outcome might be defensible on more thoughtful grounds. Furthermore, where I discuss an internal contradiction, it should not be assumed that I believe that the doctrine is wrong and the articulation of the principle is necessarily correct. To evaluate how best to resolve any given contradiction would require a careful philosophical analysis of the merits of particular principles and doctrines. That is a very complex task, and chapters 3-5 aim at developing a method for that task.

I am order to maintain focus on reasoning habits, I am working for now with the principles as articulated by ICL itself,[22] and looking at internal contradictions, and thus setting aside for now substantive normative evaluation of the principles. That substantive evaluation will be the focus of the remaining chapters of this work. My goal here is simply to demonstrate some pitfalls in reasoning, to show the need for more attentive and sophisticated deontic analysis.

[20] Indeed, my earliest writings on this topic noted that the 'identity crisis' phenomenon already seemed to be diminishing. I speculated that this might be the result of a changing composition of the ICL profession (an increasing emphasis on criminal law expertise), as well as a maturation of the field. D Robinson, 'The Identity Crisis of International Criminal Law' (2008) 21 *LJIL* 925 at 932.

[21] A case could for example engage in faulty reasoning but still reach a result that is justified under more careful reasoning.

[22] In chapter 4, I will discuss the 'internal account' of principles, as well as other possible approaches (comparative, normative, and the proposed coherentist approach).

2.2. INTERPRETIVE ASSUMPTIONS

2.2.1. Victim-Focused Teleological Reasoning

ICL jurisprudence proclaims that it follows particularly stringent standards in interpreting definitions of crimes and inculpatory rules, applying only norms that are 'clearly' and 'beyond doubt' customary law.[23] ICL emphas262

izes its faithful adherence to the principle of strict construction, which provides that ambiguities are to be resolved in favour of the accused.[24] As the ICTY has held,

> penal statutes must be strictly construed, this being a general rule which has stood the test of time… A criminal statute is one in which the legislature intends to have the final result of inflicting suffering upon, or encroaching upon the liberty of, the individual … [T]he intention to do so shall be clearly expressed and without ambiguity. The legislature will not allow such intention to be gathered from doubtful inferences from the words used … [I]f the legislature has not used words sufficiently comprehensive to include within its prohibition all the cases which should naturally fall within the mischief intended to be prevented, the interpreter is not competent to extend them.[25]

Similarly, Article 22(2) of the ICC Statute affirms that 'the definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.'

Notwithstanding these proclamations of principle, ICL thinking has frequently been influenced by the distinctively 'liberal', 'broad', 'progressive', and 'dynamic' approach to interpretation that is a hallmark of human rights law.[26] Purposive

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[23] See, e.g. *Tadić* Appeal Judgement, *above,* at para. 662; *Prosecutor v Blaškić,* Judgement, ICTY A.Ch, IT-95-14-A, 29 July 2004 ('*Blaškić,* Appeal Judgement'), para. 114; *Čelebići,* Trial Judgement, above, paras. 415-18.

[24] ICC Statute, Art. 22(2).

[25] *Čelebići* Trial Judgement, above, paras. 408-10.

[26] *A v Australia,* Communication No. 560/1993, Views 3 April 1997, A/52/40 (Vol. II), Annex VI, sect. L (at 125-46) ('broadly and expansively'). In the inter-American system, see, e.g., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (1985), Advisory Opinion OC-5/85 Inter Am Ct HR 2, Judge Rodolfo Piza, paras. 6 and 12 ('necessity of a broad interpretation of the norms that it guarantees and a restrictive interpretation of those that allow them to be limited'); *Bámaca Velásquez Case* - Series C No. 70 [2000] IACHR 7, separate Judgment of Judge Sergio Garcia Marquez, para. 3 ('progressive interpretation', 'guiding momentum of international human rights law, which strives to take the real protection of human rights increasingly further'). Similarly, the European Convention on Human Rights is not to be narrowly interpreted having regard to the sovereignty of states, but rather given a broad interpretation to protect rights effectively: *Golder v the United Kingdom,* [1973] Report of the Commission, ECHR Series B, No. 16 (1 June 1973), at 9; *East African Asians v. the United Kingdom* [1973] ECHR 2, 3 EHRR 76, paras. 192-195.

interpretation may be found in any area of law, but human rights law features a distinctively progressive brand, on the grounds that it aims at increasing the protection of human dignity rather than reciprocal obligations undertaken by states.[27] As ICL norms are often drawn from human rights or humanitarian law, it is entirely understandable for practitioners to draw not only on the norms but also on these familiar interpretive approaches. ICL discourse has frequently borne the fingerprints of the distinct interpretive approach from human rights law. As just one example, the Darfur Commission, in interpreting genocide, invoked the principle of effectiveness and giving maximal effect.[28] That approach is familiar from general international law and human rights in particular. Without getting into the merits of the two approaches here, I am simply pointing out that a practice of maximal construction is the diametric opposite of the announced principle of strict construction.

A reasoning technique commonly used in ICL is (i) to adopt a purposive interpretive approach; (ii) to assume that the exclusive object and purpose of an ICL enactment is to maximize victim protection; and (iii) to allow this presumed object and purpose to dominate over other considerations, including if necessary the text itself. The principle of strict construction fails to constrain this technique because, as in many national systems, this principle is applied only as a final resort, *after* other canons of construction have failed to solve the question.[29] If we apply, at a prior stage, a single-value teleological approach that simply maximizes victim protection, then there is never an ambiguity left for strict construction to resolve.[30] All ambiguities will have already been

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[27] '[S]ince the primary beneficiaries of human rights treaties are not States or governments but human beings, the protection of human rights calls for a more liberal approach than that normally applicable in the case of ambiguous provisions of multilateral treaties': *Keith Cox v Canada,* Communication No. 539/1993, Views 31 October 1994, A/50/40, Vol. II, Annex X, sect. M, at 105-29, reproduced in (1994) *Human Rights Law Journal* 410; CCPR/C/57/1, at 117-47; see also the European and inter-American authorities, above.

[28] See, e.g., *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004,* 25 January 2005, paras 494: 'the principle of interpretation of international rules whereby one should give such rules their maximum effect (principle of effectiveness, also expressed by the Latin maxim *ut res magis valeat quam pereat*) suggests that the rules on genocide should be construed in such a manner as to give them their maximum legal effects'.s

[29] *Čelebići,* Trial Judgement, above, para. 413. For examples from the common law system see G Williams, *Textbook of Criminal Law* (1983), 12; Note, 'The New Rule of Lenity', (2006) 119 *Harvard Law Review* 2420, at 2435-41; A P Simester and W J Brookbanks, *Principles of Criminal Law* (2002), at 35-6; *United States v RLC*, 503 US 291 (1992) at 305-6; *R v Hasselwander*, [1993] 2 SCR 398 (Canada).

[30] W Schabas, 'Interpreting the Statutes of the Ad Hoc Tribunals', in L C Vohrah et al (eds), *Man's Inhumanity to Man* (2003), at 886, finds that the principle has found 'virtually no place' in tribunal jurisprudence.

resolved *against* the accused. As a result, the promise of *in dubio pro reo,* which ICL holds out to accused, and which bolsters ICL's legitimacy, is easily inverted, and the rule faced by the accused is closer to *in dubio contra reum*.

Notice carefully that I do not object to teleological reasoning or consideration of object and purpose per se. These considerations are standard canons of construction, noted for example in Article 31 of the VCLT. My concern is the *reductive* and *aggressive* form of teleological reasoning that has all too often driven ICL analyses, at least in earlier stages. It is 'reductive' because it assumes a *single* purpose (maximizing victim protection), ignoring that every enactment delineates a boundary between multiple competing purposes. It is 'aggressive' because it uses that (presumed) single purpose to override other tools of construction, such as the text and context.

Here is an example of the 'reductive' (or 'blinkered') approach, i.e. presuming a single purpose. ICTY jurisprudence has often asserted that the purpose of the Geneva Conventions is to 'ensure the protection of civilians to the maximum extent possible',[31] using this proposition to prefer a 'less rigorous standard' in interpretation of its provisions.[32] However, it is doubtful that the Geneva Conventions can credibly be said to reflect a singular purpose.[33] If the Geneva Conventions really had one sole purpose of '*maximizing*' the protection of civilians, then they would contain only a single article, forbidding any use of force or violence that could affect civilians. Instead, the Geneva Conventions contain complex provisions, evincing a much more nuanced matrix of purposes: improving civilian protection while also balancing military effectiveness and state security.[34] Thus, interpretations that focus only on one purpose will systematically distort the balances struck in the law. An intelligent teleological analysis would note that the purpose of creating those conventions was to improve (not maximize) protection for human beings, and would also consider the *multiple* competing goals and purposes underlying the various provisions.

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[31] See, e.g., *Prosecutor v Aleksovski,* Judgement, ICTY A.Ch, IT-95-14/1-A, 24 March 2000 ('*Aleksovski* Appeal Judgement') para. 146; *Tadić* Appeal Judgement, above, para. 168.

[32] *Aleksovski* Appeal Judgement, ibid, at para. 146.

[33] See A M Danner, 'When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War', (2006) 59 *Vanderbilt Law Review* 1, at 32: 'The records of the 1949 Diplomatic Conference, however, reveal that most states did not, in fact, seek to protect civilians 'to the maximum extent possible' … [T]hose guarantees are relatively weak… Geneva Convention IV balances the needs of individual and state security.'

[34] Ibid, at 32; L C Green, *The Contemporary Law of Armed Conflict* (Manchester University Press, 2000), at 348.

Here is an example of the 'aggressive' version of such reasoning; i.e. allowing that one presumed purpose to eclipse all other interpretive considerations. In *Čelebići* the Appeals Chamber held that

> to maintain a distinction between the two legal regimes [international and internal armed conflicts] and their criminal consequences in respect of similarly egregious acts because of the difference in nature of the conflicts would ignore the very purpose of the Geneva Conventions, which is to protect the dignity of the human person.[35]

Even if we welcome the regulation of internal conflicts (as I do), this particular *argument* warrants scepticism. The Geneva Conventions contain over 300 articles regulating international armed conflict and only one short article on internal conflicts, which was adopted only after acrimonious debate.[36] The Conventions criminalize some violations in international conflicts but, pointedly, do not do so in internal conflicts. It strains credibility to suggest that the 'very purpose' of the Conventions logically compels an outcome so deeply contradicted by the actual terms of the Conventions.[37]

My previous works have been at times understood, even in ICC jurisprudence,[38] as suggesting that teleological reasoning is per se inappropriate in criminal law, despite my attempts to explicitly affirm the contrary.[39] Accordingly, I re-iterate: teleological reasoning is an appropriate part of legal reasoning. Law is a purpose-laden endeavour. My objection is to the recurring reductive and aggressive form of teleological reasoning,

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[35] *Prosecutor v Delalić et al. (Čelebići),* Judgement, ICTY A.Ch, IT-96-21-A, 20 February 2001 ('*Čelebići* Appeal Judgement'), para. 172.

[36] O Uhler and H Coursier, *Commentary on the Geneva Conventions of 12 August 1949, Volume IV* (1958), at 26-34.

[37] In a similar vein, Joseph Powderly discusses examples of judges invoking drafters intent to advance propositions contrary to the discernable drafters intent: Powderly J C, 'Judicial Interpretation at the Ad Hoc Tribunals: Method from Chaos?. In: Powderly J C, Darcy, S, eds, *Judicial Creativity at the International Criminal Tribunals* (Oxford University Press, 2010) 17 at 41.

[38] See eg. *Prosecutor v Ruto and Sang*, Decision on Defence Applications for Judgments of Acquittal, ICC T.Ch, ICC-01/09-01-11, 5 April 2016, para 328 (Judge Chile Eboe-Osuji), citing 'Identity Crisis' for this narrow proposition. Judge Eboe-Osuji responds that teleological interpretation can be accompanied by insistence on the procedural rights of the accused. I agree – and I assume he meant to include not just procedural rights but also of course fundamental principles. My objection however was to the reductive and aggressive form of teleological interpretation, seen in cases and literature as cited for example this section, which reduces analysis to a one-dimensional question and can lead to contradictions with fundamental principles.

I think that the discussion in *Prosecutor v Katanga*, Jugement rendu en application de l'article 74 du Statut, ICC T.Ch, ICC-01/04-01-07, 7 March 2014 ('*Katanga* Judgment'), para 54 conveys my concern accurately, since the passage referred the use of teleological reasoning in a 'determinative' way (this would accurately reflect my concern with 'aggressive' and reductive teleological reasoning). I agree entirely with the interpretive approach in the judgment: teleological analysis matters but should not be used reductively or aggressively.

[39] Robinson, 'Identity Crisis', above, esp at 935 and 938.

because is over-simplistic and problematic.[40]

The problem with reductive victim-focused teleological reasoning is that it conflates the 'general justifying aim' of the criminal law system as a whole—which may indeed be a consequentialist aim of protecting society—with the question of whether it is justified to punish a particular individual for a particular crime.[41] George Fletcher has drawn an analogy to a tax regime to demonstrate the problem: while the primary function of an income tax regime is to raise revenue, it does not follow that each decision to allow or disallow a given deduction should be resolved by reference to this overriding goal.[42] In a criminal justice system adhering to liberal principles, 'society has no warrant to treat persons unjustly in its pursuit of utilitarian gains'.[43] Thus the aim of criminal law may be to protect society from individuals, but the pursuit of that goal is qualified by principled restraints to protect the individual from society.[44]

2.2.2 Illustration: Command Responsibility

In this chapter, I will use command responsibility as a recurring example for all three types of distortion in reasoning. Reductive victim-focused teleological reasoning is prominent in the discourse on command responsibility. Even the origins of the doctrine lie in such reasoning. The doctrine was judicially created and applied in war crimes trials after the Second World War, despite the absence of a provision in the Nuremberg and Tokyo Charters, after the *Yamashita* decision deduced the doctrine from the need to curb

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[40] It is also sometimes thought that, in objecting to maximal construction, I must be supporting strict construction. However, my point is simply that there is a contradiction between declaring strict construction and applying maximal construction. I am exploring the habits of reasoning that make this lapse seem natural, so that the contradiction goes unnoticed. To engage in substantive evaluation first requires the methodology that I develop in the remainder of this book. For tentative discussion of strict construction §5.2.1.

[41] Hart, *Punishment*, above, at 77-8. The latter question cannot be determined by utilitarian concerns alone, as otherwise there would be no principled limitations on liability. As Hart has shown, utilitarian responses to this objection - for example the disutility if it were learned that the innocent were punished - are contingent on outcomes and fail to capture our abhorrence.

[42] G Fletcher, *Rethinking Criminal Law,* 3rd ed (OUP, 2000), at 419.

[43] D Husak, *Philosophy of Criminal Law: Selected Essays* (OUP, 1987), at 51; Fletcher, *Rethinking*, above, at 511.

[44] Hart, *Punishment*, above, at 81.

violations of the laws of war.[45] Their consequentialist observations make a compelling case for the *desirability* of command responsibility liability), but they did not necessarily demonstrate that such a rule was in fact established in ICL.[46]

An example of such reasoning in Tribunal jurisprudence appears in the partially dissenting opinion of Judge Shahabuddeen in *Hadžihasanović*.[47] He argued that strict construction is applied only at the final stage, after other methods have been applied;[48] that the provision must first be interpreted by reference to object and purpose;[49] and that the purpose is to ensure that crimes do not go unpunished.[50] The third step of this argument is an example of reductive ('single-issue') of teleological reasoning. Moreover, he also applied the 'aggressive' version, because he noted even if the actual textual provisions did not support his conclusion, then 'they do not prevail'.[51] This is an example of how conflicting purposes and conflicting interpretive clues can be overridden by the single presumed purpose. As I will argue in Chapter 6, the interpretive clues suggested a restriction that would have brought the provision into compliance with the culpability principle.

To offer examples from ICL scholarship (and this example is representative rather than intended to single out any author), an argument by Greg Vetter illustrates a

[45] In *Re Yamashita,* 327 US 1 (US SC, 1946), the majority derived the doctrine from the purpose of the laws of war, namely to protect civilians: 'It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection' (at 15).

[46] The dissents of Justices Murphy and Rutledge argued that the majority, in its pursuit of its teleological aims, had contravened the principles of legality and culpability: 'In all this needless and unseemly haste there was no serious attempt to charge or to prove that he committed a recognized violation of the laws of war. He was not charged with personally participating in the acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him…The recorded annals of warfare and the established principles of international law afford not the slightest precedent for such a charge' (at 28).

[47] *Prosecutor v Hadžihasanović*, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ICTY A.Ch, IT-01-47-AR72, 16 July 2003 ('*Hadžihasanović,* Command Responsibility Decision').

[48] Partially Dissenting Opinion of Judge Shahabuddeen *in Hadžihasanović,* Command Responsibility Decision, above, at para 12.

[49] Ibid paras 11, 13, 23.

[50] Ibid para 24.

[51] Ibid para 18.

syllogism that is often seen in ICL discourse:[52]

> 1. To deter human rights abuses, potential perpetrators must perceive prosecution as a possible consequence of their actions.[53]
> 2. Some features of the command responsibility doctrine in the Rome Statute are 'less strict' than other instruments,[54] because they set 'an easier standard for the accused to exonerate himself or herself'.[55]
> 3. Therefore, the weaker standard is plainly 'undesirable' because it will not deter to the same extent;[56] it reduces the efficacy of the ICC because superiors will 'not be as fearful' of being convicted.[57]

As you may see from this syllogism, if we look exclusively at maximizing protection of victims, then analysis of doctrines becomes a simple, one-dimensional task. The broadest articulation is the best. But our analysis should not be one-dimensional; we also have to consider important constraints, such as legality and culpability. It is not enough to show that conviction would be more difficult; we also have to ask whether conviction would be appropriate. For instance, in this example, Vetter demonstrated his concerns with the ICC Statute provisions by showing that persons who were convicted in the Tokyo tribunals might get acquitted under the ICC standard. He showed that a superior might get acquitted if crimes were committed by persons not under her authority and control,[58] or that a civilian manager might be acquitted for crimes committed by civilian employees while off duty and without her knowledge.[59] However, what he does not show is that persons *ought* to be convicted in such circumstances. In the two examples given, conviction would seem contrary to the principle of personal culpability.[60] If so, then the ICC formulation is actually preferable. It is this deontic dimension that was frequently

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[52] Vetter, 'Command Responsibility' above. His article examined the bifurcation in the Rome Statute, which applies a stricter constructive knowledge standard for military commanders and a more generous standard for civilian superiors. The article concluded that the more generous standard leaves more room for exoneration of the accused and is therefore undesirable.

[53] Ibid, at 92.

[54] Ibid, at 93 and 103. Similarly, Womack, 'Development' above, at 167-8, concluded that a restrained provision is 'undesirable' because commanders 'would not need to be as fearful of prosecution' and hence would monitor subordinates less closely, increasing the likelihood of crimes and thereby 'removing the utility' of the doctrine. This may be true, but leaves unanswered whether such a departure complies with fundamental principles.

[55] Vetter, 'Command Responsibility', above, at 120.

[56] Ibid, at 94.

[57] Ibid, at 103.

[58] Ibid, at 126.

[59] Ibid, at 127.

[60] See § 2.3.2 and Chapter 6.

missing in early ICL discourse, and is still often missing in arguments today.

A common type of argument in the literature is that 'the scope of liability is formally over-inclusive, but only in order to make up for severe practical dangers of under-inclusiveness'.[61] Thus 'the hope is that the threat of serious criminal liability for 'mere' negligence will lead even the most reluctant commander (in order to protect himself) to take all reasonable measures to prevent war crimes by subordinates'.[62] The problem with such arguments is that they consider only the consequentialist aim (maximizing deterrence), without considering the deontic constraints of justice.[63]

2.2.3. Illustration: Joint Criminal Enterprise

Another illustration is the emergence of the 'joint criminal enterprise' (JCE) doctrine in Tribunal jurisprudence. JCE doctrine, developed by Tribunal judges, came to amalgamate the most sweeping inculpatory features of various national doctrines into a single doctrine of unusual breadth. Under JCE, a relatively minor contribution to a criminal enterprise, including a reluctant contribution, can render a person liable as a *principal* for *every* crime committed in the criminal enterprise, which can involve thousands of crimes, nationwide, structurally and geographically remote from the accused.[64] As a result of these features, the doctrine has been wryly referred to as 'Just Convict Everybody'.[65]

My interest here is not to assess the doctrine (many others have meticulously

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[61] M Osiel, *Obeying Orders: Atrocity, Military Discipline and the Law of War* (Routledge, 2002), at 193.

[62] Ibid.

[63] I emphasize again that my objection here is to these specific *forms of arguments*, and not necessarily to the outcome advocated. Indeed, it may be the advocated outcome can be justified, but first we have to give a careful deontic analysis addressing the culpability principle, as I discuss below in Chapter 7.

[64] See, e.g., Danner and Martinez, 'Guilty Associations' above; Osiel, 'Banality of Good', above; V Haan, 'The Development of the Concept of Joint Criminal Enterprise at the International Criminal Tribunal for the Former Yugoslavia', (2005) 5 *International Criminal Law Review* 167; D Nersessian, 'Whoops, I Committed Genocide! The Anomaly of Constructive Liability for Serious International Crimes', (2006) 30 *Fletcher Forum of World Affairs* 81; J D Ohlin, 'Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise', (2006) 5 *JICJ* 69; K Ambos, 'Joint Criminal Enterprise and Command Responsibility', (2007) 5 *JICJ* 159; N Jain, *Perpetrators and Accessories in International Criminal Law* (Hart, 2014) at 29-65. For jurisprudence outlining these features see eg *Prosecutor v Vasiljević,* Judgement, ICTY A.Ch, IT-98-32-A, 25 February 2004, at para. 99-102; *Prosecutor v Brđanin,* Judgement, ICTY A.Ch, IT-99-36-A, 3 April 2007 (*Brđanin* Appeal Judgement) at para. 422-27; *Tadić* Appeal Judgement, above, at paras. 202-228; *Prosecutor v Karemera,* Decision on Jurisdictional Appeals, ICTR A.Ch, ICTR-98-44-AR72.5, 12 April 2006 at paras 11-18; and see Annex 1.

[65] See, e.g., M E Badar, 'Just Convict Everyone! Joint Perpetration from *Tadić* to *Stakić* and Back Again', (2006) 6 *International Criminal Law Review* 293.

done so),[66] but to look at the *reasoning* that engendered it. The doctrine emerged in the *Tadić* decision. The judges were confronted with a fact pattern that would not allow a conviction under the modes of liability listed in the Tribunal Statute (Article 7). The judges filled that gap, and enabled conviction, by reasoning teleologically:

> An interpretation of the Statute based on its object and purpose leads to the conclusion that the Statute intends to extend the jurisdiction of the International Tribunal to *all* those 'responsible for serious violations of international humanitarian law' committed in the former Yugoslavia (Article 1) … If this is so, it is fair to conclude that the Statute does not confine itself to providing for jurisdiction over those persons who plan, instigate, order, physically perpetrate a crime or otherwise aid and abet in its planning, preparation or execution. The Statute does not stop there.[67]

The reasoning employed in this passage is single-issue teleological reasoning (it focuses on maximizing reach and does not consider other possible aims, such as restricting jurisdiction to persons with significant responsibility for crimes). The reasoning was employed to the exclusion of other interpretive considerations, including the text itself ('the Statute does not stop there'). As a result, the judges read in a mode of liability far broader than any of the listed modes (which *inter alia* conflicts with the *esjudem generis* principle). The applied approach contrasts sharply with the declared approach of strict construction, reliance on unambiguous terms, and rejection of doubtful inferences.[68]

The same victim-focused teleological reasoning was pursued in subsequent cases as, issue by issue, chambers opted for the more progressive option. Thus later decisions held that no agreement between participants is needed,[69] that the physical perpetrators need not be part of the JCE,[70] that *dolus eventualis* suffices for JCE-III,[71] that the doctrine

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[66] For a more thorough review of deontic concerns with JCE, see works cited in the previous two footnotes.

[67] *Tadić* Appeal Judgement, above, at paras. 189-90 (emphasis in original).

[68] §2.2.1.

[69] *Prosecutor v Krnojelać,* Judgement, ICTY A.Ch, IT-97-25-A, 17 September 2003 ('*Krnojelać* Appeal Judgement'), para. 97; *Kvočka,* Appeal Judgement, above, para. 415.

[70] Although the language in *Tadić* suggested that physical perpetrators must be part of the JCE, it was held that they need not be in *Brđanin,* Appeal Judgement, above, para. 410.

[71] *Kvočka* Appeal Judgement, above, paras. 105-106. More recently, see *Prosecutor v Đordevic,* Judgement, ICTY A.Ch, IT-05-87/1-A, 27 January 2014, para 906-907 ('the *mens rea* standard for the third category of joint criminal enterprise liability does not require awareness of a 'probability' that a crime would be committed. Rather, liability under the third category of joint criminal enterprise may attach where an accused is aware that the perpetration of a crime is a *possible* consequence of the implementation of the common purpose.') See also to the same effect, *Prosecutor v Mladić,* Judgement, ICTY T.Ch, IT-09-92-T, 22 November 2017, para 1360 ('*Mladić* Trial Judgement').

is not limited in scale and may include participants remote from each other,[72] and that JCE-III can be used to circumvent the special intent required for conviction for 'committing' genocide.[73] Through reliance on such reasoning techniques, a system that prided itself on its compliance with fundamental principles wound up amalgamating the most sweeping features of various national laws into a single all-encompassing doctrine that appears to strain culpability and fair labelling in various ways.

2.2.4. Victim-Focused Teleological Reasoning Aggravated by Utopian Aspirations

The problem of victim-focused teleological reasoning is aggravated where ICL also becomes imbued with utopian aspirations.[74] For example, whereas national criminal law seeks to *manage* crime - by reducing or at least visibly responding to crimes - ICL at times appears to aim, more ambitiously, to *end* the crimes. For example, the UN Security Council resolutions creating the ICTY and ICTR refer to the determination 'to put an end to such crimes' and express confidence that the creation of tribunals 'would enable this aim to be achieved'.[75] This more urgent aspiration arguably creates greater pressure to be aggressive in the articulation of norms.

The problem may be compounded further still by the grave disparity between the utopian aspirations and the dystopian realities faced by ICL. In other words, the severity and scale of the crimes and the extreme difficulty of securing arrests means that, once an accused is at trial, the desire may be stronger to make a clear object lesson, and to serve the didactic function of ICL, in the desperate hope of trying to have a preventive impact in such chaotic situations. At times it seems that ICL seeks to offset its weakness on the ground through more draconian rules, or in other words, to overcompensate for *material*

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[72] *Brđanin,* Appeal Judgement, above paras. 422-423.

[73] *Brđanin,* Decision on Interlocutory Appeal, above, paras. 5-10.

[74] See, e.g., J R Morss, 'Saving Human Rights from Its Friends: A Critique of the Imaginary Justice of Costas Douzinas', (2003) 27 *Melbourne University Law Review* 889, at 899 ('the future-oriented and utopian character of human rights aspirations'); see also e.g. J W Nickel, 'Are Human Rights Utopian?' (1982) 11 *Philosophy and Public Affairs* 246; C Douzinas, 'Human Rights and Postmodern Utopia', (2000) 11 *Law and Critique* 219.

[75] See, e.g., UN Security Council Resolution 827 (1993), preamble, paras. 5 and 6; UN Security Council Resolution 955 (1994), paras. 6 and 7.

weakness through *normative harshness*.[76]

To give an example from the literature, Professor Sherrie Russell-Brown starts from the 'foundational precept … that the continuing commission of gender crimes in war must end'.[77] It is perhaps unsurprising that from a foundational precept of *ending* such crimes, she concludes that the already problematic doctrine of command responsibility must be rendered harsher still: 'it is unacceptable to allow commanders to escape criminal responsibility for their subordinates' gender crimes on the basis that the commanders lacked "knowledge"'.[78] Her proposal is to deem the knowledge requirement to be satisfied automatically by virtue of the historic frequency of sexual offences by troops. Such an approach would certainly facilitate convictions, but it would create vicarious absolute liability for serious international crimes, which may conflict with the culpability principle.[79] Thus, admirable but utopian objectives such as eliminating crimes, which no criminal law system can achieve, are likely to generate calls for harsher and harsher rules, and thus promote a tendency away from principled restraints.

For an example from the case law, consider the *Erdemović* case.[80] In *Erdemović,* a young solider in a non-combat unit was ordered to participate in a firing squad. He objected to the order, and was given the alternative of being shot along with the victims. Faced with the alternative of losing his life for no gain in lives saved, and concerned for his wife and infant child, he complied. The majority concluded that duress may never be raised as a defence in relation to killing of civilians.[81] The decision has been criticized by

[76] In a similar vein, Immi Tallgren has argued that, given the enormity of crimes and the improbability of punishment, a purely utilitarian theory would require punishment so severe that the system would face difficulties in making the treatment compatible with its generally enlightened ideas: I Tallgren, 'The Sensibility and Sense of International Criminal Law', (2002) 13 *EJIL* 561, at 576. Wessel argues that, when confronted with such severe crimes, 'the 'imperious immediacy of interest' in conviction can exclude considerations of more systemic consequences'. Wessel, 'Judicial Policy Making', above, at 441.

[77] Russell-Brown, 'Last Line of Defence' above, at 158.

[78] Ibid.

[79] In Chapter 7, I provide a justification for a more moderate account that does take into account the historic context of crimes – not to eliminate a fault element, but rather as part of the deontic justification for a 'should have known' standard. In other words, the historic context of crimes by armed forces at least puts commanders on notice of the need for vigilance. But my proposal does not dispense with personal fault.

[80] *Prosecutor v Erdemović,* Judgement, ICTY A.Ch, IT-96-22-A, 7 October 1997 ('*Erdemović* Appeals Judgement')..

[81] Ibid, at para. 19. Judges Cassese and Stephens dissented.

some commentators for lacking sensitivity to fundamental principles,[82] for departing from previous ICL pronouncements on the role of moral choice,[83] and for disregarding the fact that the only way for Erdemović to be innocent was to be dead.[84] What is of interest for present purposes, however, is not whether the decision was correct or incorrect, but rather the reasoning: how the majority framed the issue and hence sidestepped the deontic dimension.

The majority decision reasoned teleologically from the mandate granted by the Security Council, which was to ''halt and effectively redress' the widespread and flagrant violations of international humanitarian law occurring in the territory of the former Yugoslavia and to contribute thereby to the restoration and maintenance of peace'.[85] By focusing on this onerous responsibility of 'halting' violations, the majority could only favour sending a strong message:

> We would assert an absolute moral postulate which is clear and unmistakable for the implementation of international humanitarian law ...[86]We do so having regard to our mandated obligation under the Statute to ensure that international humanitarian law, which is concerned with the protection of humankind, is not in any way undermined.[87]

The adopted aim of 'halting' crime was one which only the harshest measures could hope to satisfy. The majority dismissed deontic concerns about personal culpability as 'intellectual hair-splitting' and 'metaphysics',[88] and instead emphasized the 'normative purposes' of law, highlighting the scale of crimes, the protection of the weak and

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[82] R E Brooks, 'Law in the Heart of Darkness: Atrocity and Duress', (2003) *Virginia Journal of International Law* 861; I R Wall, 'Duress, International Criminal Law and Literature', (2006) 4 *JICJ* 724; A Fichtelberg, 'Liberal Values in International Criminal Law: A Critique of *Erdemović*, (2008) 6 *JICJ* 3; V Epps, 'The Soldier's Obligation to Die when Ordered to Shoot Civilians or Face Death Himself', (2003) 37 *New England L Rev* 987.

[83] See, e.g., *Einsatzgruppen* case, above, at 470: 'there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns'. See also *Nuremberg* Judgment, above, at 251 (moral choice test).

[84] Brooks, 'Law in the Heart' above, at 868.

[85] *Erdemović* Appeals Judgement, Separate Opinion of Judges McDonald and Vohrah, para. 75. The majority held that where there is ambiguity or uncertainty, a policy-directed choice can be made (para. 78), to serve the 'broader normative purposes' of ICL, which means 'the protection of the weak and vulnerable' (para. 75).

[86] Ibid., at 84. Similarly, Judge Li, concurring on this point, held that (i) the aim of humanitarian law is to protect innocent civilians; (ii) admitting duress would encourage subordinates to kill instead of deterring them; (iii) therefore, such an 'anti-human policy' cannot be adopted. *Prosecutor v Erdemović,* Appeals Judgement, Separate and Partially Dissenting Opinion of Judge Li, para. 8.

[87] *Erdemović* Appeals Judgement, above, at 88.

[88] *Erdemović* Appeals Judgement, above, at para 74 & 75.

vulnerable, and the need to ensure the effectiveness of humanitarian law and to deter crimes.[89] Hence the chamber focused on the need to send a clear message, but did not consider whether the system's principles allowed it to use Dražen Erdemović to send that message. Ironically, although the majority purported to reject 'utilitarian logic',[90] its reasoning was entirely utilitarian and focused on future deterrence.[91] It was through this process of reasoning that a system that aims to deal only the persons *most responsible* for the most serious crimes, was instead transformed into a 'criminal law that could be obeyed only by exceptional individuals'.[92] (Again, my concern here is with the reasoning, and not assessing the outcome, I outline a more nuanced deontic assessment below at §5.2.2.)

2.2.5 Conclusion on Interpretive Assumptions

In conclusion, ICL – at least in its early resurgence – showed a contradictory allegiance to interpretive assumptions from two different regimes. For example, at the same time that the ICTY insisted that it scrupulously applies only rules that are 'beyond any doubt customary international law',[93] it also took credit for having 'expanded the boundaries of international humanitarian and international criminal law'.[94] This is an overt contradiction: the Tribunal cannot both apply the law strictly as it was *and* expand it. Such contradictions are the products of the conflicting normative assumptions simultaneously permeating ICL. While criminal law principles forbid the judicial expansion of norms, human rights and humanitarian law assumptions lead us to embrace and to celebrate that very expansion. Contradictorily, we both *laud* and *deny* the expansions - a product of incompatible allegiances in the mixed heritage of ICL. A more careful and coherent ICL would parse out those commitments with more care.

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[89] *Erdemović* Appeals Judgement, above, at para 75.

[90] *Erdemović* Appeals Judgement, above, at para 80.

[91] Fichtelberg, 'Liberal Values' above, at 4.

[92] Tallgren, 'Sensibility and Sense', above at 573.

[93] See, e.g., *Tadić* Appeal Judgement, above, para. 662; *Blaškić* Appeal Judgement, above, at para. 114; *Čelebići* Trial Judgement, above, at paras. 415-418.

[94] 'Bringing Justice to the Former Yugoslavia: The Tribunal's Core Achievements', www.un.org/icty/glancee/index.htm.

2.3. SUBSTANTIVE AND STRUCTURAL CONFLATION

2.3.1. Substantive and Structural Conflation in ICL Discourse

Another way in which the assumptions of human rights and humanitarian lawyers may distort ICL reasoning is through substantive and structural conflation. Many of the prohibitions of ICL are drawn from prohibitions in human rights and humanitarian law. Faced with familiar-looking provisions, ICL practitioners often assume that the ICL prohibitions are, or ought to be, coextensive with their human rights or humanitarian law counterparts. The problem arises when one assumes co-extensiveness of content without considering that these bodies of law have different purposes and different consequences, and thus entail different constraints.

Human rights law and humanitarian law apply to *collective entities* - states or parties to conflict. They focus on *systems*, seeking to improve the practices of collective entities (states or parties to conflict) in order to advance protection of and respect for identified beneficiaries. The *remedies* are civil remedies, such as a cessation of the conduct, an apology, an undertaking of non-repetition, and possibly compensation or other efforts to restore the status quo ante.[95]

The primary focus of ICL, on the other hand, is on the culpability of *individuals.* Furthermore, the scope of ICL is rightly narrower: it addresses only the *most serious crimes* of concern to the international community as a whole.[96] Moreover, ICL is enforced through the arrest, stigmatization, punishment, and imprisonment of individual human beings found responsible for crimes. As a result, ICL features several additional restraining principles.

By 'substantive conflation', I mean the assumption that the norms must have the same substantive content when transplanting them from other domains. By 'structural conflation', I mean reliance on structural assumptions of human rights and humanitarian law when reasoning about the norms: for example, focusing on improving systems rather

[95] Moreover, as has previously been observed by Danner and Martinez, human rights law uses comparatively gentle methods of enforcement or persuasion, addresses broad social phenomena, and includes aspirational norms; Danner and Martinez, 'Guilty Associations' above at 86-9.

[96] ICC Statute, Art. 1.

than on the culpability of accused individuals.

A simple form of substantive conflation is the assumption that, because a prohibition is recognized in human rights or humanitarian law, it therefore must be (or ought to be) criminalized in ICL as well. An example of this is the frequently-voiced view that 'there is widespread recognition that every violation of the law of war is a war crime'.[97] Given that the laws of war contain detailed regulations concerning, for example, waterproofing of identity cards, it is implausible to claim that every violation of the law of war constitutes a war crime. Other examples of conflation assume that conduct violating human rights law is also a crime against humanity, without considering the additional constraints relevant to ICL.[98] The additional constraints include not only fundamental principles (such as legality and personal culpability), but also the questions of whether criminal law (and indeed ICL) is the appropriate tool to deal with the problem.[99]

A more interesting, and more subtle, form of conflation arises with respect to those norms that are indeed criminalized in ICL. Where an ICL prohibition is drawn from another area of law, it is understandable to assume that the norms have the same scope as they have in their original domain. As a result, jurists may transplant surrounding rules from human rights or humanitarian law into criminal law, without pausing to reflect that those rules are not originally criminal law rules, and hence that they need to be scrutinized for compliance with the principles peculiar to criminal law.

As an illustration, consider Common Article 3 to the Geneva Conventions. Common Article 3 requires that, before any sentencing of protected persons, a party must

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[97] J J Paust, 'Content and Contours of Genocide, Crimes against Humanity, and War Crimes', in S Yee and W Tieya, *International Law in the Post-Cold War World: Essays in Memory of Li Haopei* (Routledge, 2001).

[98] See, e.g., E Davidsson, 'Economic Oppression as an International Wrong and a Crime against Humanity', (2005) 23 *Netherlands Quarterly of Human Rights* 173, arguing for the use of crimes against humanity to punish those responsible for IMF structural adjustment programmes, UN-mandated economic sanctions, failure to offer humanitarian assistance, and for 'gross negligence in eradicating extreme poverty'. Similarly M Møllmann, 'Who Can Be Held Responsible for the Consequences of Aid and Loan Conditionalities: The Global Gag Rule in Peru and Its Criminal Consequences', Michigan State University's Women and International Development Program, Working Paper #29, 2004, at 12 (available at www.isp.msu.edu/wid), describes the hardships imposed by the US policy of not contributing to organizations that condone abortion and argues for criminalization. Møllmann persuasively demonstrates that the US policy is unwise and deplorable, and probably a violation of health and autonomy rights, but it does not necessarily follow, however, that one can criminalize the choices of the US as to whom it gives its money, nor is it clear how to localize personal guilt.

[99] See discussion, ibid.

provide a trial affording 'all indispensable judicial guarantees'.[100] A significant number of guarantees have been identified as 'indispensable'.[101] Assume that a judge has made a ruling that an accused was too disruptive to remain in the courtroom, but in hindsight the judge is found to have applied the standard erroneously. It would follow that (i) the error breached the guarantee of the right to be present; (ii) the breach, although it may be minor and inadvertent, is nonetheless a breach; (iii) a breach of even one guarantee constitutes a failure to provide 'all' guarantees; and therefore (iv) the error would violate Common Article 3. Thus it would, quite rightly, require an appropriate *humanitarian law* remedy, which might include a new trial, a reform, an apology, and compensation.[102]

Now notice the problem that arises if we follow the same type of reasoning in the corresponding war crime. It is well-established that Common Article 3 also gives rise to individual criminal responsibility for war crimes.[103] However, if an identical standard were applied in ICL, as authorities assume,[104] then by the same chain of reasoning as above it would follow that the breach of *even one* guarantee not only requires a civil remedy but also constitutes a war crime. On a literal application of the provision, the *actus reus* and *mens rea* would easily be established. (You might be thinking that the judge would not have *mens rea* if the legal error was inadvertent, but recall that in general a mistake of law is no excuse).[105] Thus the judge would be liable to imprisonment as a

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[100] Common Art. 3 to the Geneva Conventions (International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, 12 August 1949, 75 UNTS 31.)

[101] See, e.g., W Fenrick, 'Article 8, War Crimes', in O Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article,* 2nd ed (Beck, 2008) at 184; Y Sandoz et al (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross, 1987), at 861-90.

[102] See, e.g., Additional Protocol I to the Geneva Conventions of 12 August 1949 ("AP I"), Arts. 89-91 on remedies.

[103] ICC Statute, Art. 8(2)(c); ICTR Statute Art. 4; Special Court for Sierra Leone Statute, Art. 3; *Tadić,* Decision on Jurisdiction, above at para. 134.

[104] Common Art. 3 is recognized as so fundamental that 'violations of … Common Article 3 are by definition serious violations of international humanitarian law within the meaning of the Statute': see, e.g., *Prosecutor v Blaškić,* Judgement, ICTY T.Ch, IT-95-14-T, 3 March 2000 ('*Blaškić* Trial Judgement'), para. 176.

[105] ICC Statute, Art. 30. The judge's failure to realize that he was depriving a person of a right would arguably provide no excuse, since 'a mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility': ICC Statute, Art. 32(2). There are different ways to solve this problem; one option would be to find that mistake of law can preclude mens rea for this particular offence.

war criminal, based on that single error, because he or she sentenced a protected person without a trial respecting *all* guarantees.

That outcome would be unjust and over-reaching. In all systems of the world, trial judges make errors and breach trial rights. As a result, new trials are granted; we do not automatically imprison the erring judge. Thus, although Common Article 3 has been incorporated directly into ICL, it surely requires some thoughtful *translation,* so that it is correctly focused on criminally blameworthy conduct rather than capturing all judicial errors. The criminal law provision surely has to work differently from the humanitarian law provision: the latter is violated by even one minor error, but the former surely requires something more egregious.

ICL discourse furnishes many examples of the 'assumption of co-extensiveness'. For an example from literature, a thoughtful scholar in a leading commentary on the ICC Statute has voiced concern about a *mens rea* requirement inserted into the ICC Elements of Crimes for the crime of enforced disappearance.[106] The Elements indicate that a person denying the fact of detentions also commits enforced disappearance, but require that the person have awareness of such detentions.[107] The criticism was that this the Elements were too restrictive, because human rights law does not require that personal mens rea. However, this criticism overlooks the *structural* difference. In human rights law, the knowledge of the individual denying the detention is irrelevant, because the focus is on the system and its impact on the victim. In ICL, however, the focus is on the criminal culpability of the accused individual, and thus personal fault matters. When we assume that norms from other domains should be replicated exactly as found, we may overlook the necessary adaptations to convert rules for civil responsibility of collective systems into rules appropriate for criminal punishment of individual human beings.

2.3.2. Illustration: Command Responsibility

Many examples of substantive and structural conflation appear in legal reasoning on command responsibility. Jurists have copied command responsibility provisions from humanitarian law into ICL, without adequately reflecting on the context shift (civil

[106] L N Sadat, *The ICC and the Transformation of International Law: Justice for the New Millennium* (Transnational Press, 2002), at 140-1.
[107] Elements of Crimes (ICC-ASP/1/3 (2002)), Art. 7(1)(i).

liability to criminal punishment). Confident that they were simply following 'precedents', jurists did not always adequately ponder the additional moral constraints, such as personal culpability, that are necessary when a provision is converted into a criminal prohibition.

In order to show why the conflation was problematic, I must briefly outline a contradiction with the culpability principle. Tribunal jurisprudence recognizes the principle of culpability as the 'foundation of criminal responsibility'.[108] Tribunal jurisprudence declares it 'firmly established' that 'for the accused to be criminally culpable his conduct must have … contributed to, or have had an effect on, the commission of the crime'.[109] Nonetheless, Tribunal jurisprudence allows a commander to be held liable as a party to offences of subordinates[110] even when there was no possible contribution to or effect on the crimes.[111] This is a stark contradiction, and it initially went unnoticed. I demonstrate this contradiction, and its origins and consequences, with more care in Chapter 6.

For now, I point out that the contradiction was produced in part by substantive conflation. Interestingly, the *Čelebići* case acknowledged the 'central place assumed by the principle of causation in criminal law', but then neglected it without qualms on the grounds that past cases and instruments seemed not to require it.[112] However, those past cases and instruments concerned the (civil) humanitarian law duty, not personal criminal liability as party to the underlying crimes. Humanitarian law quite reasonably imposes a duty to punish past violations, but this is not the same as saying that the commander can share in criminal liability for the past crimes if she fails to punish them.

Additional Protocol I to the Geneva Conventions (AP I) rightly distinguished between the commander's civil duty under humanitarian law and the commander's

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[108] *Tadić* Appeal Decision, above.

[109] *Prosecutor v Kayishema,* Judgement, ICTR T.Ch, ICTR-95-1T, 21 May 1999 ('*Kayishema* Trial Judgement') at para. 199. See also *Prosecutor v Orić,* Judgement, ICTY T.Ch, IT-03-68-T, 30 June 2006, at para. 280 ('*Orić* Trial Judgement'): 'Rendering a substantial contribution to the commission of a crime is a feature which is common to all forms of participation.' The contribution can be simply making the crime more likely or at least easier: *Orić* Trial Judgement, above, para. 282.

[110] Some suggest that command responsibility is a 'separate offence', but this characterization has been *explicitly* rejected by the Appeals Chamber, and is contrary to the actual charges and convictions issued by the Tribunals. See §6.6.

[111] *Prosecutor v Delalić et al. (Čelebići),* Judgement, ICTY T.Ch, IT-96-21-T, 16 November 1998 ('*Čelebići* Trial Judgement'), at para 396-400; *Prosecutor v Blaškić,* Judgement, ICTY A.Ch, IT-95-14-A, 29 July 2004, para.

[112] *Čelebići* Trial Judgement' at para 398.

personal criminal liability.[113] Article 87 of AP I recognizes, as a matter of humanitarian law, a duty on commanders to prevent breaches by their subordinates, to report breaches to competent authorities and to initiate disciplinary or penal actions against violations.[114] This civil duty is enforceable by international law remedies (for example, reparations from that party to the conflict).[115] Article 86(2) then supplements that general civil duty with a narrower, *criminal* law provision:

> The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was about to commit such a breach and if they did not take all feasible measures with in their power to prevent or repress the breach.

The penal provision of Article 86(2) refers only to *ongoing or imminent* crimes ('was committing or about to commit'). Thus, the penal provision requires contemporaneity, meaning that there is a possibility of the commander's acts or omissions influencing the subordinate's behaviour.

These differences rightly reflect *structural differences* between criminal law and humanitarian law. The humanitarian law duty quite reasonably does not require any causal contribution by the commander to the crimes. The purpose of the humanitarian law provision is to create better *systems* and thus to improve compliance – in this case, to promote compliance of subordinates with humanitarian law by requiring a system of prevention and repression.[116] But before copying and pasting humanitarian law provisions into criminal law, we have to pause to consider the different focus and consequences of criminal law, and hence the additional moral constraints.

Nonetheless, ICL discourse - both jurisprudence and literature – has frequently assumed the co-extensiveness of the humanitarian law norm and the criminal law norm, without reflecting on the different structures and consequences and hence the different

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[113] I will argue in the next section (§2.4) that instruments negotiated by parties, not knowing if the rules will be invoked *by* them or *against* them, may be more sensitive to principles of justice than instruments that are unilaterally imposed on others.

[114] AP I, Art. 87. Art. 87(3) provides, 'The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.'

[115] Such remedies are applied against the state or the party to the conflict, and include the payment of reparations (Art. 91), and exposure to fact-finding (Art. 90) and to Security Council action (Art. 89). States are internationally liable for breaches by their commanders (Art. 91).

[116] Sandoz et al., *Commentary,* above, at 1018.

principles in play.[117] For example, the drafters of the ICTY and ICTR Statutes – declaring rules to be applied to *others*[118]– blithely combined Article 86(2) and Article 87(3) into a single criminal provision, encompassing both pending crimes and past crimes, and both failure to prevent and failure to punish.[119] In doing so, they overlooked the differences between the criminal and non-criminal provisions of the Additional Protocols, and wiped out the causal contribution requirement entailed in the culpability principle.

Rather than detecting the problem, Tribunal jurisprudence followed the same pattern of blurring the humanitarian law duty and personal criminal liability. In *Blaškić,* defence counsel argued, pursuant to the culpability principle, that some contribution to the crimes is necessary in any mode of liability. Hence, a commander's failure to punish should create liability only if that failure encouraged or facilitated later crimes.[120] In rejecting the defence argument, the Appeals Chamber relied on Article 87(3) of the Protocol, noting that it imposes a duty to punish persons responsible for past crimes.[121] However, the Chamber's argument overlooks that Article 87(3) deals with a duty in *humanitarian* law (collective civil responsibility), not the assignment of personal *criminal* liability. Had the Chamber studied the precedents with more attention to the structural differences between IHL and ICL, it might have noticed that Additional Protocol I specifically separated the broader humanitarian law duty from the narrower criminal law provision in Article 86(2), and that the separation tracked the limits of personal culpability.

Substantive conflation allows judges and jurists to proceed in complacent confidence that they are simply following 'precedents', missing the fact that the 'precedents' are actually from non-criminal areas of law. As a result, broader norms are absorbed into ICL, without first triggering alarms as to the need to scrutinize the

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[117] Such conflation also appeared in the *Yamashita* decision (aboveThe majority decision converted a humanitarian law duty into a criminal law norm, and because of its assertion that it was simply applying existing law, it did not engage in reflection on compliance with fundamental principles. As Justice Murphy argued in dissent, the majority approach overlooked the difference between civil claims and 'charging an individual with a crime against the laws of war' (*Yamashita*, above, at 36-7).

[118] See §2.4 on the tendency of drafters to favour more sweeping rules when the rules are applied to others.

[119] ICTY Statute, Art. 7(3); ICTR Statute, Art. 6(3). The report of the drafters indicates no intention to change the law: Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 (1993), at para. 56; the premise was to apply only rules 'rules … which are beyond any doubt part of customary law' (para. 34).

[120] *Blaškić* Appeal Judgement, above, paras. 73 and 78.

[121] *Blaškić* Appeal Judgement, above, para. 83.

proposed norm for compliance with fundamental principles.

This tendency of substantive conflation may also be seen in literature, where it is frequently assumed that any differences in scope between the humanitarian civil duty and the imposition of criminal liability are obviously 'gaps', 'lacunae', or 'steps backward' which will 'allow atrocities to go unpunished'.[122] But actually there may be sound reasons of principle for the criminal prohibition to be narrower, in order to be make sure that we treat justly the human beings to whom the rule is applied.

2.4. IDEOLOGICAL ASSUMPTIONS (SOVEREIGNTY AND PROGRESS)

2.4.1 The 'Sovereignty-Versus-Progress' Dichotomy

The third set of transplanted assumptions is what I will call 'ideological' assumptions. These include common narratives and heuristics around concepts like 'progress' or 'sovereignty'. I will show how such assumptions, familiar in human rights and humanitarian law discourse, also appear in ICL reasoning. Uncritical recourse to such assumptions can lead to an embrace of illiberal doctrines.

In a human rights instrument, there is a fairly straightforward inverse relationship between the obligations undertaken and the freedom of action retained by the state. The more sovereign freedom of action retained, the narrower the human rights obligations. As a result, human rights and humanitarian law discourse routinely casts 'sovereignty' in elemental opposition to 'progress'. Sovereignty is the 'traditional enemy',[123] the 'stumbling block in the advance of civil rights',[124] the irksome vestige of 'divine right'

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[122] See, e.g., Fox, 'Closing a Loophole' above at 443, arguing that an interpretation not encompassing all of Art. 87(3) would be 'erroneous', 'illogical', and 'contradicted by the plain language of the Protocol' (at 466), and would mean a 'gap [that will] allow certain atrocities to go unpunished' (at 444) and 'a troubling drift toward allowing impunity' (at 494). See also G Mettraux, *International Crimes and the Ad Hoc Tribunals* (OUP, 2005) at 301 ('gaping hole', 'highly questionable from a legal and practical point of view'). Similarly, van Schaack argues that the causal requirement in the ICC Statute (which as argued in section 2.2 is essential for compliance with the principle of culpability) is a 'step backward' that 'significantly truncates' the doctrine, and the resulting 'lacuna' or 'loophole' 'sends a message' that it is acceptable not to punish: B van Schaack, 'Command Responsibility: A Step Backwards', *On the Record - International Criminal Court,* Issue 13 (Part 2), 17 July 1998, available at www.advocacynet.org/resource/369#Command_Responsibility:_A_Step_Backwards. Paust, 'Content and Contours' above, at 305, sees the causal contribution requirement as a 'problem' and hopes that a creative interpretation, in the light of 'customary international law' can fill in such 'needless limitations'.

[123] G Robertson, *Crimes against Humanity: The Struggle for Global Justice* (The New Press, 2006), at 624.

[124] Ibid, at 176 (emphasis omitted).

'which human rights law is still in the process of extirpating'.[125] Sovereignty is often portrayed as the obstacle raised by short-sighted lawyers, diplomats, and bureaucrats,[126] and a constant threat to the project of international law.[127] This inverse relationship underlies the progress narrative of human rights, wherein a darker age of 'sacrosanct and unassailable' sovereignty has recently 'suffered progressive erosion at the hands of the more liberal forces at work in the democratic societies, particularly in the field of human rights'.[128]

These assumptions about sovereignty and progress are often carried over into ICL discourse. Sovereignty is a 'contradiction' to human rights and justice[129] and an 'enduring obstacle' in advancing ICL;[130] the 'movement for global justice has been a struggle against sovereignty',[131] such that human rights and justice must 'trump' state sovereignty,[132] since for sovereignty to prevail would be a 'travesty of law and a betrayal of the human need for justice'.[133] As Robert Cryer wryly observes, '[w]hen sovereignty appears in [ICL] scholarship, it commonly comes clothed in hat and cape. A whiff of sulphur permeates the air.'[134]

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[125] Ibid, at 2.

[126] 'Sovereignty appears in the arguments of lawyers, the commitments of diplomats and the reassurances of international bureaucrats as a barrier to the over-ambitious extension of ICL'. G Simpson, 'Politics, Sovereignty, Remembrance', in D McGoldrick, P Rowe, and E Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Hart Publishing, 2004), at 53.

[127] '[W]henever state sovereignty explodes onto the scene, it may demolish the very bricks and mortar on which the Law of Nations Is Built': A Cassese, 'Current Trends towards Criminal Prosecution', in N Passas (ed), *International Crimes* (Ashgate/Dartmouth, 2003), at 587.

[128] See, e.g. *Tadić,* Decision on Jurisdiction, above, at para. 55.

[129] 'The contradiction between the principle of national sovereignty and the universal nature of human rights reaches its apogee faced with crimes against humanity. Humanitarian law - and universal conscience - dictate that these crimes must not go unpunished. But State sovereignty subjects this demand for justice to the contingencies of political choices': R Badinter, 'International Criminal Justice: From Darkness to Light', in A Cassese, P Gaeta, and J R W D Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP, 2002), at 1932.

[130] 'Throughout the twentieth century, state sovereignty has provided one of the most enduring obstacles for advancing ICL': S C Roach, *Politicizing the ICC: The Convergence of Ethics, Politics and Law* (Rowman & Littlefield Publishing, 2006), at 19.

[131] Robertson, *Crimes against Humanity,* above, at xxx.

[132] '[The ICC is] the primary reference for those who believe that borders, state sovereignty and political expediency cannot shield the perpetrators of massive human rights violations from prosecution….It is widely acknowledged that the moral commitment to protect the most fundamental human rights at a global scale trumps state sovereignty and the legal pillars that sustained classic international law'. P C Diaz, 'The ICC in Northern Uganda: Peace First, Justice Later', (2005) 2 *Eyes on the ICC* 17.

[133] 'It would be a travesty of law and a betrayal of the human need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights': *Tadić,* Decision on Jurisdiction, above, at para. 58.

[134] R Cryer, 'International Criminal Law vs. State Sovereignty: Another Round?' (2005) 16 *EJIL* 979, at 980; see also F Mégret, 'Politics of International Criminal Justice', (2002) 13 *EJIL* 1261, at 1261.

The common narrative about sovereignty in human rights is probably in large part correct, and at least in some part overstated. (The demonization of sovereignty is at least somewhat overstated, because 'sovereignty' may often reflect other legitimate pro-human objectives, and is not always a matter of elites 'jealously clinging' to their prerogatives.[135]) The crucial point here is that that the importation of these assumptions into ICL discourse routinely overlooks a significant difference between ICL and those other fields. In human rights or humanitarian law, it is usually accurate to ascribe limitations in instruments to states' wishes to preserve governmental freedom of action (sovereignty), since the treaties limit state behaviour.

In ICL, however, there is a *third variable* in play: the instruments not only circumscribe state freedom of action, they also allow *punishment of human individuals*. Thus, restrictive provisions in ICL might not just be about protecting sovereignty; they may respect principled constraints of justice. In ICL discourse it is common to overlook this important shift, and to make the same assumption as in human rights discourse: to ascribe limitations to 'sovereignty' or 'compromise', i.e. the usual business of short-sighted states failing to reflect the full potential of human rights because they cling to outdated prerogatives.[136]

Such reasoning can foster an uncritical reception of expansive interpretations as a victory of humanity over sovereignty, as well as a knee-jerk rejection of provisions that

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[135] See, e.g., Mégret, 'Politics' above, at 1261 and 1279-80, referring to these 'clichés' about sovereignty that may overlook sovereignty's 'emancipatory potential' and its role in self-determination. I would add that 'safeguarding sovereignty' is not always short-sighted and problematic. When we further parse the underlying purpose, we might see that it is to protect other social goods (national security), or to recognize that states diverge in their views (the conduct is not generally condemned, so latitude is left for variations), or to delineate the proper boundaries between ICL and matters for domestic jurisdiction.

[136] For examples see Fox, 'Closing a Loophole', above, at 480 (requirement of causal contribution is one of the 'weaknesses and limitations' of the Rome Statute), overlooking the possible significance of the culpability principle. Boot, *Genocide,* above, at 606 and 640 (interpretation of war crimes narrower than *Tadić* and not including political groups in genocide 'manifestly show to what extent States have sought to protect their sovereignty, which prevailed over human rights concerns'), overlooking the possibility that states felt constrained by the current state of the law (principle of legality). For further examples drawing from a variety of authors and issues, see G Mettraux, 'Crimes against Humanity in the Jurisprudence of the ICTY and ICTR', (2002) 43 *Harvard International Law Journal* 237, at 279 (dismissing a codification of crimes against humanity on the grounds that it was a 'highly political affair'); A Pellet, 'Applicable Law', in Cassese, Gaeta and Jones, eds, *The Rome Statute*, above, at 1056 ('pretext'); D Hunt, 'High Hopes, "Creative Ambiguity" and an Unfortunate Mistrust in International Judges', (2004) 2 *JICJ* 56, at 57-8, 68 and 70 ('compromise and expediency'; 'powers of judges were strongly curtailed to assuage the fears … that the court could infringe upon sovereignty'); Sadat, *ICC and Transformation,* above, at 152 and 267 ('compromises'); Bassiouni, 'Normative Framework' above, at 202 ('mostly for political reasons'), each of which fails to contemplate fundamental principles (such as the principle of legality) as a possible consideration.

respect fundamental principles.[137]

Scholars such as Robert Cryer have convincingly demonstrated the double standards of states: namely, states tend to take a wider view of definitions of crimes and principles when they are imposing them on others than when their own officials and nationals may be scrutinized.[138] While such double standards certainly warrant reproach, we are still left with the question of whether the broader or narrower version of the doctrine is the more appropriate one. Confronted with such discrepancies, ICL jurists routinely adopt the same assumption as would human rights practitioners: that the broader version is the truer, better articulation, and that the narrower is just a retrenchment caused by compromise and self-interest.[139]

Before reaching such conclusions in ICL, however, we have to take the additional step of considering deontic constraints that respect individuals as persons. Doubtlessly, many conservative aspects of codification efforts may indeed be traced to unprincipled self-interest. However, it is also possible that a deliberative codification process involving diverse participants, such as the Rome Conference to adopt the ICC Statute, may identify legitimate issues of principle. Self-interest may even play a *productive* role: participants have more incentive to engage in thoughtful examination of principles than if they were applying rules only to others. Potential exposure seems to have a marvellous effect in sharpening many people's sensitivity to fairness. Conversely, drafters or judges articulating rules for 'others' do not have the same direct incentive to scrutinize compliance with fundamental principles.[140]

Thus, the simplistic 'progress-versus-sovereignty' dichotomy can lead jurists to dismiss more principled formulations too quickly. Ironically, ICL practitioners can embrace the more illiberal doctrines as the more 'progressive', and reflexively reject more principled formulations as a betrayal of the Nuremberg standard,[141] without

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[137] See, e.g., Boot, *Genocide,* above*,* at 434: 'By expanding the protection of specifically mentioned groups to all permanent and stable groups in the definition of genocide, as well as expanding the boundaries of 'racial groups', the Tribunals also tend to let humanitarian gains prevail over arguments of State sovereignty.' This assumes that humanitarian gains versus sovereignty are the only factors in play.

[138] R Cryer, *Prosecuting International Crimes* (Cambridge, 2005).

[139] See examples at note 183.

[140] Such incentives may include the wish to send a deterrent message, to demonstrate righteousness, or to gain reputational esteem mentioned above, § 2.1.3.

[141] Damaška, 'Shadow Side', above, at 489 observes that 'the builders of current [ICL] take a rather uncritical stance' toward Nuremberg and related jurisprudence, as 'they stop deferentially before each decision as if it were a station in a pilgrimage'.

considering the latter's origins in punitive victors' justice. As one example, Jordan Paust has argued that definitions of crimes against humanity subsequent to the Nuremberg definition 'are severely limited in their reach, and do not reflect customary international law as evidenced in earlier instruments'.[142] However, the definition of crimes against humanity in Nuremberg was vague, open-ended and did not delineate its thresholds at all, so it is not necessarily a principled model that we should be lauding.

To provide additional examples, the Nuremberg and Tokyo Charters and the ICTY and ICTR Statutes – which were uni-directionally applied to 'others' – included broad, open-ended definitions of crimes, with formulas such as 'shall include but not be limited to', leaving extensive room for judges to expand the definitions of crimes.[143] Conversely, the creators of the Rome Statute, who could not know whether the provisions would be applied to their foes, to strangers, to friends, or to themselves, opted for a more careful codification with a closed list of defined crimes. As a matter of fundamental principle, codification is generally welcomed as valuable or even essential in a modern liberal system of criminal justice in order to provide fair warning to individuals.[144] However, respected scholars and jurists in ICL, such as Alain Pellet and David Hunt, have reacted with concern that states have 'sought to codify the law' to be applied by the judges, which in their view demonstrates a 'deep suspicion' and 'unfortunate mistrust for the judges'.[145] Their analyses adopt 'progress versus sovereignty' assumption, focusing only on the benefits of expansive norms, benefits which they perceived to be frustrated by the unfortunate myopia of governmental officials. Hunt's concern is that codification will 'preclude significantly the necessary judicial development of the law', and he attributes such provisions to 'fear', 'political compromise', and 'diplomatic expediency'.[146] Pellet assumes that the cause was 'ceding to American pressure' and 'not trusting the judges'

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[142] See, e.g., Paust, 'Content and Contours', above, at 240, arguing that definitions of crimes against humanity subsequent to the Nuremberg definition 'are severely limited in their reach, and do not reflect customary international law as evidenced in earlier instruments'. However, as the definition of crimes against humanity in Nuremberg was excessively vague and open-ended and delineated no thresholds at all - indeed almost any domestic crime could potentially constitute a crime against humanity under that 'definition' - the principle of legality cries out for clarification of the concept.

[143] For example, the Nuremberg Charter in Art. 6 included an illustrative list of war crimes, with an open-ended 'shall include, but not be limited to' introduction; the Tokyo Charter in Art. 5 did away with the illustrative list and left it entirely to the judges; the ICTY Statute in Art. 3 included a 'shall include, but not be limited to' illustrative list, as did the ICTR Statute in Art. 4.

[144] See, e.g., P Robinson, 'Fair Notice and Fair Adjudication: Two Kinds of Legality', (2005) 154 *University of Pennsylvania Law Review* 335, at 340, 344.

[145] See Hunt, 'High Hopes' above, esp. at 56-9; see Pellet, 'Applicable Law', above, esp. at 1056.

[146] Hunt, 'High Hopes' above, at 56-9.

and the result is that 'the authors of the State have limited the chances of making the Court an efficient instrument in the struggle against the crimes it is supposed to repress'.[147]

These illustrations show how even the leading minds in the field can assume that the broadest approach is automatically the best approach, and that narrower approaches must be due to myopic sovereignty-driven concerns. Such analyses neglect that open-ended criminal norms originated in victors' justice, and fail to ask whether that is a pattern we wish to replicate. Is an illustrative, open-ended list of crimes really the benchmark to which ICL should aspire? The 'progress-versus-sovereignty' assumption can short-circuit adequate reflection on the third variable: deontic constraints owed to the individual. In this way, ideological assumptions that are liberal and appropriate in a human rights context can assumptions can lead to hasty preference for expansive doctrines which were unilaterally imposed but which may depart from fundamental principles.

2.4.2 Illustration: Command Responsibility

For another example, I return to my recurring example of command responsibility. If we review the legal history of command responsibility, a clear pattern emerges: states tend to adopt a broad approach when announcing rules for others, and a narrower approach when it might apply to themselves. (1) In the Nuremberg and Tokyo trials, where rules were being applied to vanquished foes, command responsibility was loosely defined and did not expressly require a causal contribution.[148] (2) Conversely, when a US court applied command responsibility to its own forces in Vietnam, the doctrine was tightly defined, requiring (inter alia) a causal contribution for personal liability.[149] (3) In the negotiation of Additional Protocol I, states were in a position more akin to a 'veil of ignorance', as they did not know whether they would be the beneficiaries or the accused; in this more neutral situation they required causal contribution.[150] (4)

[147] Pellet, 'Applicable Law', above at 1058.
[148] See *Yamashita,* above, and *Trial of Wilhelm List and Others (The Hostages Case),* (1949) 8 *Law Reports of Trials of War Crimes* 1.
[149] *United States v Medina,* CM 427162 (ACMR, 1971) 8.
[150] AP I, Art. 86(2); compare AP I, Art. 87.

The drafters of the ICTY and ICTR Statutes, applying rules uni-directionally to others, wiped out the requirement of causal contribution, perhaps inadvertently, by blending the criminal and non-criminal provisions of AP I.[151] (5) The drafters of the ICC Statute, once again in a position somewhat akin to the 'veil of ignorance', reinstated causal contribution.[152]

The double standard is objectionable, but we are still left with question of whether the narrower or broader approach is the more appropriate. I argued above (and will argue in much more detail below in Chapter 6) that fundamental principles require that a person causally contributed to crimes if he or she is to be convicted for those crimes.[153] If so, then this appears to be one of the examples where potential exposure enhanced the sensitivity of rule-articulators to justice and fairness.

Nonetheless, the assumptions about progress and sovereignty have often fostered a simplistic heuristic whereby ICL participants consider only the 'unprincipled self-protection' possibility, and thus they condemn the narrower provision without analysis. For example, Judge Hunt, in a partially dissenting opinion, was confronted with the Rome Statute's requirement of causal contribution for command responsibility and the fact that Tribunal jurisprudence accords the Rome Statute 'significant legal value'.[154] The reinstatement of causal contribution in the Rome Statute could have served as a clue that fundamental principles are at stake, and an opportunity to discover contradictions between Tribunal jurisprudence and fundamental principles. Instead, Judge Hunt simply observed that the Statute provision was the result of 'negotiation and compromise', as was 'patent … from the vast differences between … those provisions and existing instruments such as the Statutes of the ad hoc Tribunals', and hence he dismissed the Statute provision as 'of very limited value'.[155] Among the suppressed premises in such arguments are that 'negotiation and compromise' invalidate an outcome, and that departure from the broader (unilaterally-imposed) instrument shows that the narrower

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[151] ICTY Statute, Art. 7(3); ICTR Statute, Art. 6(3).

[152] ICC Statute, Art. 28.

[153] See above, § 2.3.2.

[154] Separate and Partially Dissenting Opinion of Judge David Hunt, in *Hadžihasanović,* Command Responsibility Decision, above, at paras. 29-30. As a simultaneous statement by 120 states, the Rome Statute offers significant evidence of customary law: *Prosecutor v Furundžija,* Judgement, ICTY T.Ch, IT-95-17/1-T, 10 December 1998, at para. 227.

[155] Separate and Partially Dissenting Opinion of Judge David Hunt, in *Hadžihasanović,* Command Responsibility Decision, above, at paras. 30-32.

(multilaterally negotiated) instrument is incorrect. This analysis overlooks the deontic dimension and overlooks the possibility that an inclusive process might have been more sensitive to principles. Similarly, several scholars have not hesitated to dismiss the causal requirement in the Rome Statute provision as a tragic concession to self-interest and, satisfied with this as a complete explanation, have not explored the possibility that it has a principled basis.[156]

Thus, assumptions about progress and sovereignty can lead ICL participants to look with suspicion upon the processes most likely to generate liberal doctrines, and to favour broad but illiberal doctrines born in selective justice. Moreover, these easy conclusions lead ICL participants to miss opportunities to detect contradictions between ICL jurisprudence and fundamental principles.

2.5. AFTER THE IDENTITY CRISIS: THE DEONTIC TURN

The deontic turn in ICL

As noted above, the reasoning habits I have just described were relatively commonplace in the early days of the renaissance of ICL. In recent years, mainstream ICL analysis has become far more attentive to deontic constraints of criminal liability.

Of course, ICL jurists have always been generally *familiar* with the fundamental principles like culpability and legality. The problem was that the engagement was often superficial, as was shown above.

By contrast, the most recent jurisprudence engages much more carefully with the deontic dimension: the limits of personal culpability and justice to the accused.[157] We can only speculate as to *why* ICL has shifted in this way. Part of the reason could be that practitioners have heeded the liberal critique, including the works of scholars such as Kai Ambos, Mirjan Damaška, George Fletcher, Sasha Greenawalt, Neha Jain, Guénaël

[156] See, e.g., Vetter, 'Command Responsibility' above ('weakness'); Paust, 'Content and Contours' above ('needless limitation'); Fox, 'Closing a Loophole' above ('gap', 'troubling drift toward allowing impunity').
[157] See for example *Prosecutor v Lubanga Dyilo*, Decision on Confirmation of Charges, ICC PTC, ICC-01/04-01/06, 29 January 2007 (dissecting co-perpetration and culpability); *Prosecutor v Bemba Gomba,* Judgment pursuant to Article 74 of the Statute, ICC T.Ch, ICC-01/05-01/08, 21 March 2016 (carefully discussing mental and physical aspects of culpability in command responsibility); *Prosecutor v Perišić,* Judgement, ICTY A.Ch, IT-04-81-A, IT-05-87-A, 28 February 2013; *Prosecutor v Šainović*, Judgement, ICTY A.Ch, IT-05-87-A, 23 January 2016 (debating outer limits of culpability in aiding and abetting). These cases are in contrast to earlier cases that emphasized consequentialist and precedentialist analysis.

Mettraux, Jens Ohlin, Elies van Sliedregt, and James Stewart, among many, many others. Other possible factors include the changing composition of the field (greater criminal law experience), the increased conversation between legal systems (e.g. civil law and common law), and the ongoing maturation of the field of ICL. Whatever their underlying causes, these developments are welcome and consistent with my stated hope that distortions can be addressed through critical awareness of reasoning techniques and more attention to reasoning.[158]

The pendulum swing

After sustained academic criticism for being too loose and liberal, it is entirely understandable that judges might swing to the opposite extreme, by adopting approaches that are extremely demanding and rarified, in the name of rigour. It has become arguable that judges, particularly at the ICC, may be falling at times into this opposite pitfall of *'Überdogmatisierung' or* 'hypergarantismo': overdoing the criminal law theorizing and overstating the deontic constraints.[159] There is a danger that judges, aiming to show that they are setting the highest standards, may adopt incorrectly rarified conceptions of deontic constraints, as well as evidentiary and procedural requirements, which are beyond what transnational practice and underlying principles require. Such over-corrections may contribute (and may have already contributed) to the collapses of cases that cost millions of euros to investigate and prosecute, dashing the hopes of victims, witnesses, and affected communities.

I mentioned two potential[160] examples in Chapter 1, noting widespread criticisms of the reasoning in the acquittals in *Bemba* (overturning a unanimous Trial Chamber conviction) and *Gbagbo.*[161] A less-discussed possible additional example is the

[158] See e.g. § 2.1.4.

[159] See e.g. E van Sliedregt, 'International Criminal Law: Over-Studied and Underachieving?' (2016) 29 *LJIL* 1; see also *Prosecutor v Lubanga Dyilo*, Judgment Pursuant to Article 74 of the Statute, ICC T.Ch, ICC-01/04-01/06-2842, 14 March 2012, Separate Opinion of Judge Adrian Fulford at paras 10-17; and see D M Amann, 'In Bemba and Beyond, Crimes Adjudged to Commit Themselves', 13 June 2018, www.ejiltalk.org/author/dianemarieamann.

[160] I say 'potential' examples because, in order to conclude that any of these decisions were indeed problematic examples of this tendency, I would first need to analyze each one more closely. The aim of this thesis is to develop the methodology for such analyses. I reference these potential examples to show how serious the stakes may be.

[161] §1.1.2.

Mbarushima case at the ICC. In that case, a majority of the Pre-Trial Chamber declined to confirm charges, inter alia on the grounds that the requirements for personal culpability were not met.[162] I take no position on the case here, as it first requires development of a method (Chapters 3-5) and a careful study; but I note that Judge Monageng in dissent makes a convincing case that the majority misapplied the standard given the evidence.[163]

The stakes are high. If we contravene fundamental principles (properly understood) then we treat persons unjustly. However, if we are unnecessarily conservative because of an unsupported and inflated understanding of the principles, then we undermine the beneficial impact of the system without good reason. Thus, it is all the more important to delineate as best we can[164] the fundamental principles appropriate to the system.

2.6 IMPLICATIONS

The importance of attentiveness to reasoning

All criminal justice systems at least occasionally adopt doctrines that arguably depart from fundamental principles. There are many possible reasons for such departures: preoccupation with law and order, revulsion at particular crimes, hasty analyses, authoritarian systems unmindful of principled constraints, or legitimate differences of understanding about the principles. In this chapter, I have sought to reveal some additional dynamics distinctive to ICL. I have given numerous examples to demonstrate how the interpretive, substantive, structural and ideological assumptions and reflexes of human rights and humanitarian lawyers have often been absorbed into ICL discourse. I have sought to show, with concrete examples, how the transposition of

[162] *Prosecutor v Callixte Mbarushima*, Decision on Confirmation of Charges, ICC PTC, ICC-01/04-01/10-465-Red, 16 December 2011.

[163] Unfortunately, the question did not get addressed on appeal: *Prosecutor v Callixte Mbarushima*, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the Confirmation of Charges', ICC AC, ICC-01/04-01/10-514, 30 May 2012, paras 50-69.

[164] As I will argue in Chapter 4, there is no formula to articulate the parameters of fundamental principles with confident precision, and thus I do not argue that judges and jurists need to identify the single 'correct' articulation. The method I advocate merely allows us to narrow in on a set of the most defensible articulations and to dismiss the most incongruous and problematic understandings. In my view, this is the best that humans operating a system of justice can be expected to do.

such assumptions without adequate reflection on the context shift can create subtle distortions, in favour of broad provisions that may not comply with fundamental principles.

My purpose in highlighting these problems is to encourage and pave the way for more sophisticated and careful reasoning. Law is an enterprise of reasoning, and thus I believe that it is valuable to pay careful attention not only to the legal conclusions reached but also the structure of arguments employed. A judgement might employ problematic reasoning and still reach a defensible result. Nonetheless, the reasoning matters, because replication of faulty structure of arguments will eventually produce faulty outcomes. Our reasoning is our 'math', and systemic distortions in our math will eventually throw off our calculations in significant ways.

The resulting project

The research project that emerges is not only to unearth contradictions and to identify the pathologies that engender them, but also most importantly to develop a more refined account of the fundamental principles appropriate for ICL.

In order to keep a spotlight on the topic of reasoning, I used an 'internal' account in this chapter, working with the principles as recognized by ICL itself. Hence, as I said above, where I identify a seeming conflict between a doctrine and a principle, it should not be assumed that I necessarily believe that the formulation of the principle is correct. From a purely internal perspective, contradictions between a doctrine and principle could be resolved by correcting the doctrine or by refining the principle. In order to decide on the correct resolution, we would need considerable groundwork, to help us discuss the appropriate formulations of principles. This is what I attempt in the remainder of this thesis.

In Chapter 3, I put forward the moral case for compliance with fundamental principles. However, this does not necessarily consign ICL to mimicking the principles exactly as they are known in national law.[165] Although in this chapter I have emphasized

[165] Some scholars have suggested steps in such a direction, noting for example that the paradigm of individual culpability may be altered in contexts where atrocities are not a product of individual deviance but rather of compliance with deviant societal norms. However, even these revised theories do not absolve the need to grapple with principled limits on the punishment of autonomous individuals. See, e.g., M Reisman, 'Legal Responses to Genocide and Other Massive Violations of Human Rights', (1996) 59 *Law and Contemporary Problems* 75, at 77. Special challenges of organizational behaviour and diffusion of

the need to be critical of ICL's human rights/humanitarian law inheritance, there is also scope to reconsider the criminal law inheritance as well, namely the specific articulations of those fundamental principles as found in national law.[166] The special contexts of ICL may pose philosophical questions not previously considered in mainstream criminal theory, and hence help us to unearth new insights into the fundamental principles. Thus the project is to discover not only how criminal theory may illuminate ICL, but how ICL may illuminate criminal theory.

responsibility, the meaning of 'fair warning' in a decentralized criminalization system, or the need to tap into non-Western cultural traditions could conceivably be elements of a revamped and tailored theoretical justification. See, e.g., D Luban, A Strudler, and D Wasserman, 'Moral Responsibility in the Age of Bureaucracy', (1992) 90 *Michigan Law Review* 2348, on diffusion of responsibility in organizational structures; M Drumbl, 'Toward a Criminology of International Crime', (2003) 19 *Ohio State Journal on Dispute Resolution* 263; M Drumbl, *Atrocity, Punishment and International Law* (2007); M Damaška, 'Shadow Side', above, at 457 and 475-8; Osiel, 'Banality of Good', above; G Fletcher, 'Collective Guilt and Collective Punishment', (2004) 5 *Theoretical Inquiries in Law*, esp. at 168-9 and 173-4; L Fletcher, 'From Indifference to Engagement: Bystanders and International Criminal Justice', (2005) 26 *Michigan Journal of International Law* 1013.

[166] See Chapters 3-6.

PART II

PROPOSED FRAMEWORK:

A HUMANIST, COHERENTIST, DEONTIC ACCOUNT

Chapter 2 highlighted the *problem* that motivates this thesis: i.e. reasoning that fails to engage adequately with the deontic[1] constraints of criminal law. The next three chapters develop a *solution.* The following chapters address the various methodological hurdles in ascertaining and refining the fundamental principles appropriate in the special contexts of ICL, and provide a framework for deontic analysis in ICL..

In Chapter 3, I advance two main points. First, I respond to arguments questioning whether fundamental principles are even appropriate in the extraordinary contexts encountered by ICL. I argue that, even in extreme contexts of collective action and peer pressure, we must still consider moral constraints like culpability. Second, I argue that this does not necessarily mean replicating formulations of principles as known in national systems. We can re-examine what the underlying commitment to the individual entails in the given context.

In Chapter 4, I consider how we might go about such a discussion of principles. I argue for a 'coherentist' method, which means that we do not have to trace our views down to an ultimately 'correct' moral theory. Instead we work with all available clues, including patterns of practice and normative arguments, to build the most coherent and convincing picture that we can. This process accepts that we will never have 'certainty' about principles of justice. It is a human conversation about human ideas. Nonetheless the conversation is valuable: we must try to ensure that our institutions and practices are justified, and the justice conversation is our best and only method to advance that goal.

Chapter 5 gives some examples of new criminal law problems that arise given the special challenges of ICL. Thus, the solution is not simply a matter of applying general criminal law theory to ICL problems: ICL problems can raise new questions for criminal law theory. Thus, exploring these problems might provide new insights for both ICL and mainstream criminal law theory.

[1] By 'deontic' I mean constraints rooted in respect for the individual; these are constraints such as the legality principle and the culpability principle that allow the system to be described as a system of 'justice'. I leave aside until Chapter 4 the question of the precise underpinnings of those principles. In that chapter, I will argue that they might be rooted in classical deontological theories or various other normative theories. The common kernel is simply that there are some constraints on how we treat individuals even in pursuit of good consequentialist aims.

3
The Humanity of Criminal Justice

OVERVIEW

In this chapter, I address important preliminary challenges to any discussion of deontic principles in ICL. Addressing those challenges produces a more nuanced framework.

Thoughtful scholars have argued that familiar liberal principles may be entirely out of place in ICL. Are the principles simply being transplanted out of a reflexive legalistic habit? Are principles rooted in individual agency unsuited to mass atrocity? Do principles entail unsound individualistic ideologies? Are such principles simply Western constructs being imposed in other settings?

In this chapter I will argue: (1) Any system that punishes individuals must respect deontic principles. (2) This does not necessarily mean replicating formulations of fundamental principles familiar from national systems; instead we can return to our underlying deontic commitments and see what they entail in these new contexts. (3) We can learn from criticisms of liberal accounts, to build a sensitive and humanistic account of fundamental principles.

In response to various criticisms of criminal justice and liberal principles, I emphasize the 'humanity' of criminal justice. Criminal justice and its restraining principles are sometimes portrayed as abstract, metaphysical, retributive, vengeful, Western, or ideologically unmoored from experience. But criminal law serves pro-social aims. Its constraints are rooted in compassion, empathy, and regard for humanity. An intelligent liberal account considers all facets of human experience, including social context, social roles, and collective endeavours. Principles reflect broadly shared human concerns, and can be refined through human conversation.

3.1. CONTEXT AND ARGUMENT

3.1.1 Context: The Critique of the Liberal Critique

In this chapter, I introduce a framework for thinking about fundamental principles. The simplest way to introduce this framework is to outline three significant ways of approaching ICL doctrines so far. (I am not saying that any particular scholars are committed to any one of these ways of thinking, nor am I saying that these approaches emerged in a perfectly sequential chronological way. I am highlighting them as discernible movements in a dialectic. It is helpful to notice and label these ways of thinking, in order to see the options and illuminate a way forward.)

The first approach was the *doctrinal* approach. The doctrinal approach primarily focuses on interpreting *sources* (authorities, precedents),[1] and also often includes *teleological* reasoning. I am using the word 'doctrinal' as it used by common lawyers, to refer to relatively standard legal reasoning (unfortunately the word has a near-opposite meaning in other legal traditions, but there is a dearth of alternative words to describe this basic legal reasoning).[2] The doctrinal approach was particularly dominant during the first decade of rapid construction of the field of ICL (see Chapter 2). It is not a criticism when I say that reasoning in this phase often had a necessarily rushed character. Jurists were rightly preoccupied with the urgent task of constructing a new legal system; there was not time for prolonged rumination upon every subtle question.

[1] 'Source-based' analysis applies basic tools of interpretation to determine what the enactments, precedents and authorities allow. For succinctness I will at times call this 'precedential' or 'formalist' analysis.

[2] The common law usage therefore seems to be nearly the opposite of the German usage, where 'doctrine' refers to deep systematization and working with underlying unifying concepts. The doctrinal approach, as I use the term here, works in a relatively piecemeal way, determining what the legal sources permit, without deep conceptualization or deontic considerations. To reduce confusion with the opposite German usage, I will refer to 'source-based', 'black-letter', 'formalist' or 'precedential' analysis where those terms apply.

The second movement was the *liberal critique* of ICL, which was introduced in Chapter 2.[3] Under a liberal approach, formalist and teleological reasoning is not sufficient: one must also consider deontic constraints such as the limits of personal culpability. Sophisticated engagement with fundamental principles led to a revitalized genre of scholarship. It has also entered mainstream judicial thinking, which today is much more mindful of deontic constraints and rights of the accused (see §2.5).

The third movement is the *critique of the liberal critique*. Scholars such as Mark Drumbl, Mark Osiel and others have pointed out that the assumptions and principles of ordinary criminal law may not even be applicable or appropriate in the context of international crimes and thus should not be extended automatically to the international plane.[4] For example, ICL crimes involve extraordinary collective dimensions and extensive communal engagement, in which participation is not so self-evidently 'deviant', frustrating classic assumptions about 'moral choice' and individual agency.[5] Western principles should not be imposed on others, particularly principles which assume the individual as the central unit of action and attempt to shoehorn collective activities into

[3] Among the first pioneers in this respect were George Fletcher, Jens Ohlin, Allison Danner, Jenny Martinez, Kai Ambos and Mirjan Damaška. As the corpus of ICL took shape, scholars began to point out that, although contemporary ICL proclaims its exemplary compliance with fundamental liberal principles, it often seems to contravene these principles, at times rather dramatically. Concerns initially tended to focus on the doctrine of 'joint criminal enterprise', but critical attention quickly spread to other doctrines, such as the Tribunals' approach to command responsibility and duress. See e.g. G P Fletcher and J D Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case', (2005) 3 *JICJ* 539; A M Danner and J S Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law', (2005) 93 *Calif L Rev* 75-169 ; K Ambos, 'Remarks on the General Part of International Criminal Law', (2006) 4 *JICJ* 660; M Damaška, 'The Shadow Side of Command Responsibility', (2001) 49 *American Journal of Comparative Law* 455.

[4] M Drumbl, *Atrocity, Punishment, and International Law* (CUP, 2007) (*'Atrocity'*), 8, 24, 38, 123-124; M Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity', (2005) 99 *Northwestern University Law Review* 539 ('Collective Violence'), at 545; M Osiel, 'The Banality of Good: Aligning Incentives Against Mass Atrocity', (2005) 105 *Columbia L Rev* 1751 ('Banality'), at 1753; M Osiel, *Making Sense of Mass Atrocity* (CUP, 2009)(*'Making Sense')*, 8.

[5] Drumbl, *Atrocity,* above at 24-32; Osiel, 'Banality of Good', above at 1752-55; Osiel, *Making Sense,* above at x-xi; L Fletcher and H Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation' (2002) 24 *Human Rights Quarterly* 573, at 604-605; L Fletcher, 'From Indifference to Engagement: Bystanders and International Criminal Justice', (2005) 26 *Michigan Journal of International Law* 1013, at 1076; W M Reisman, 'Legal Responses to Genocide and Other Massive Violations of Human Rights', (1996) 4 *Law & Contemporary Problems* 75, at 77; M J Aukerman, 'Extraordinary Evil, Extraordinary Crime: A Framework for Understanding Transitional Justice' (2002) 15 *Harvard Human Rights Journal* 39, at 41 and 59; A Sepinwall, 'Citizen Responsibility and the Reactive Attitudes: Blaming Americans for War Crimes in Iraq', in T Isaacs and R Vernon (eds), *Accountability for Collective Wrongdoing* (CUP, 2011), 231, at 233.

individualist paradigms.[6] Thus, it is argued that objections to departures from orthodox principles are 'exaggeratedly heated', that departures from principles of individual responsibility may be necessary to deal with collective violence, and that it is possible that the principle of culpability may need to be modified or abandoned.[7]

3.1.2. My Argument: The Humanity of Justice

My objective in this chapter is to show the possibility of a fourth step in this dialectic. Although the liberal critique and the critique of the liberal critique appear to be in opposition, my aim is to show that they can be reconciled in a new account that overcomes the most plausible objections to each of the two prior approaches. One can coherently agree with both strands of thought, provided that some important clarifications and refinements are made to each.

The result is a more careful liberal account. I embrace the critique that we cannot simply project familiar national principles onto ICL. We must inspect and re-articulate those principles to take into account the special contexts encountered by ICL, which include massively collective action, state criminality and non-legislative forms of law-creation. However – and this is the crucial caveat – the special contexts do not mean that we are free to discard our underlying deontic commitment to our fellow human beings. Thus, my account remains a liberal account, in that it still respects principled constraints rooted in respect for the moral agency of individuals. I suggest that we have a responsibility and an opportunity to explore how our deontic commitment may manifest differently in different circumstances.

My reflections on criticisms of liberal accounts in ICL have led me to a set of intertwined ideas, all of which emphasize the 'humanity' of justice. Several diverse concerns can be answered by highlighting that justice is 'human', in these diverse senses:

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[6] Osiel, *Making Sense*, at 8 (extending Western doctrines); Aukerman, 'Extraordinary Evil', above, at 41 (Western); M Drumbl, 'Collective Responsibility and Postconflict Justice', in Isaacs and Vernon, *Accountability,* above, 23, at 29 (central unit of action); Drumbl, 'Collective Violence', above at 542 (central unit); Drumbl, *Atrocity*, above at 39 (shoehorn collective agency into individual guilt); Sepinwall, 'Citizen Responsibility' above at 233 (Western individualist paradigm versus collective nature).

[7] Drumbl, *Atrocity*, above at 38-39 (criticisms exaggeratedly heated; departures may be necessary); Osiel, 'Banality of Good', above at 1765 and 1768.

(i) **Human aims (not retribution):** While criminal law looks back at past events, the purpose of the system is forward-looking, meliorative and pro-social; it seeks to advance valuable human aims. It is not just about vengeance, nor is it a symptom of a 'liberal legal disorder' that mindlessly reproduces a familiar system out of habit. Assessing those aims helps us assess how criminal law can work productively with other social mechanisms.

(ii) **Human constraints (not artifacts of positive law):** A common criticism of fundamental principles is that they are arbitrary artifacts of national positive law being unreflectingly transplanted into ICL. I will argue that the constraints of criminal law are also recognized for humanistic reasons: they are rooted in empathy and respect for the personhood of affected individuals.

(iii) **Human experience (not individualist ideology):** A criticism of liberal principles it that they assume an unrealistic worldview that treats humans as isolated individuals abstracted from their social environment. However, a sound account of principles is sensible and grounded, and can consider the full richness of human experience, including its social and collective dimensions.

(iv) **Human concerns (not Western):** Another common criticism is that familiar liberal principles reflect Western pre-occupations. A brief survey of different histories of legal traditions, as well as cross-cultural empirical surveys, give strong reason to doubt those claims. Indeed, those criticisms themselves may have Eurocentric premises. The best understandings of principles will reflect widely-shared human concerns, articulated in a cosmopolitan conversation.

(v) **Human constructs (not metaphysical):** Another criticism rightly questions any claims that deontic principles are timeless and abstract laws deduced from a priori metaphysical premises. However, I argue instead for a 'coherentist' conception (see Chapter 4), which acknowledges that principles of justice are human constructs that can be explored through human debates.

(vii) **Human activity (not Westphalian states):** It is sometimes thought that criminal law can only be carried out by states, which makes ICL a problematic anomaly. I argue, however, that criminal law is an activity carried about by human beings. A more general theory can contemplate criminal law not only states but also under other

structures of human governance. Doing so may expose assumptions in mainstream criminal law theory and raise new questions.

In the above brief summaries, I am deliberately using the term 'humanity' in different senses; each usage has to be understood within the context of the debate to which it responds. Thus, for example, when I emphasize the human aims of criminal law, I am not excluding protecting the environment or preventing cruelty to animals (on the contrary, those should certainly be human aims). The context for that point is that it responds to objections that criminal law is merely about vengeance or about restoring abstract cosmic scales of justice; I am pointing out that criminal law serves concrete, valuable, prospective, human aims. Exploring criminal law's pro-social purposes can help us to understand its constraints and to assess how criminal law should fit alongside other projects.[8]

This chapter will elaborate on the second, third, and fourth of the above ideas (deontic constraints respect humanity, are intelligently informed by human experience, and reflect widely-shared human concerns). Chapter 5 will explain the fifth idea (human constructs, not metaphysical essences) and Chapter 6 will touch on the sixth (criminal law is a human activity, and not necessarily only a 'State' activity). The first topic – the purpose and justification of criminal law – is an enormous topic in its own right. Thus, as explained in Chapter 1, I set it aside for a future work, in order to focus on the topic of this thesis: the deontic constraints of ICL.[9]

3.1.3. Outline and Terminology

[8] Furthermore, under the second point, when I suggest we adopt constraints out of respect for the humanity of the accused, I am using 'humanity' as a placeholder for now, as I will explain in Chapter 5. We respect deontic constraints to individuals because of some quality of individuals (eg. 'autonomy'), but it has not generally been necessary to specify what that quality is, or what qualities trigger which deontic duties. This would have to be clarified further if a problem arose that required disambiguation; fortunately, we can tackle existing problems in criminal law without going into that level of granularity. If we were, for example, to start interacting with another intelligent, language-speaking species, it would be necessary to specify the quality and clarify common usages of the term 'humanity'. See eg T M Scanlon, *What We Owe to Each Other* (Harvard University Press, 1998) at 179.

[9] §1.5.1.

In § 3.2, I look at why constraints matter, rooting them in respect for humanity. We can however engage in a deontic analysis to see what the underlying commitment to individuals requires in new and unusual contexts. In § 3.3, I argue that a thoughtful account can absorb common criticisms of liberal accounts. I show how a humanistic account can be subtle, taking into account collectivity, community, and culture.

In this chapter, and in this thesis, I use the following terms in the following ways. A '**doctrine**' is a rule, posited in the legal system, stating for example the elements of crimes against humanity or the requirements of command responsibility. A '**fundamental principle'** presumably includes (for now, and subject to further work in Chapter 4) principles of culpability, legality, and possibly fair labeling. A '**formulation of a fundamental principle**' is a certain understanding of the concrete features of a fundamental principle; for example, the proposition that the principle of legality requires prior published legislation. Finally, the '**underlying deontic commitment**' refers to the basic commitment from which these fundamental principles are derived. I leave aside the question of the philosophical underpinnings of that commitment until Chapter 4, where we will see that there are different possible understandings and underpinnings. For now, we can simply say that it is the commitment to treat persons as moral agents, possessed of dignity and capable of directing their behavior by reason.

I am using the term '**liberal'** in a specific and minimalist sense. The term 'liberal' is prone to be misunderstood, because it is used by different people in different contexts to mean very different things.[10] Here, I am using the term as it is often used in criminal law theory: to convey that the system is constrained by respect for the autonomy, dignity or agency of the individual. A 'liberal' system is one that entails some principled (non-consequentialist) constraints on the pursuit of societal protection. As I will explain in Chapter 4, the minimalist sense in which I am using the term here is compatible with more

[10] As has been noted previously, inter alia by G Fletcher, *The Grammar of Criminal Law: American, Comparative and International,* Vol 1 (OUP, 2007), at 167.

than one political philosophy, moral philosophy, economic outlook, or vision of society or of individuals.[11]

3.2. WHY ENGAGE WITH CONSTRAINTS: A HUMAN COMMITMENT

In this section, I address why constraints matter. First, in response to doctrinal arguments that treat principles as black letter rules that might be sidestepped or downplayed, I lay out the deeper normative basis for compliance. Second, I address arguments asserting that persons accused of serious atrocities have 'forfeited' on principles. Third, I deal with the best of the arguments, which is that familiar principles may be inapposite in the special contexts of ICL. I offer an account which combines the strengths of previous accounts, and which can raise new questions for ICL and criminal law theory.

3.2.1 The Doctrinal Challenge to Principles, and the Normative Response

In ICL literature and jurisprudence, fundamental principles such as the principles of legality and culpability have often been treated as mere doctrinal rules – i.e. as 'artifacts of legal positivism') and 'inconvenient obstacles to be circumvented'.[12] Indeed, if one sees the principles as simply black letter rules in national systems, then the obvious initial positivist question is whether those rules *legally* apply in ICL at all.[13] For example, in the

[11] As long as one agrees to constraints in criminal law to preclude treatment that is not fair to the individual, that is a 'liberal' account in the minimalist sense here. Thus, a person could agree to these constraints even if one is not a 'liberal' in other senses of the word. For example, as shown in Chapter 4, one could be a 'communitarian' and still recognize some constraints on how individual members of the community can be treated. Of course, that leaves enormous room to debate what the constraints are; that is discussed in Chapter 4.

[12] B Roth, 'Coming to Terms with Ruthlessness: Sovereign Equality, Global Pluralism, and the Limits of International Criminal Justice', (2010) 8 *Santa Clara Journal of International Law* 231 at 252 and 287, discussing this tendency. This tendency was more commonplace in earlier days of ICL, but with the emergence of the liberal critique, ICL jurisprudence has come to show more thoughtful, deontic engagement with fundamental principles.

[13] Below in § 3.2, I examine a more subtle *normative* question of whether adjustments to familiar formulations can be deontically justified.

post-World War II era, it was common to sidestep the principle of legality with the positivistic argument that legal sources did not formally recognize the principle in ICL.[14] Furthermore, even where the principles were recognized as legally applicable, doctrinal arguments were often made to minimize or sidestep them.[15] If one sees the principles as mere stipulations of positive law, and one observes them hindering successful prosecutions, it is entirely understandable that one would employ the same clever doctrinal techniques that are used to avoid or minimize any problematic rule.

Accordingly, it is worth highlighting some of the reasons why ICL should comply with fundamental principles. There are at least four reasons; I will note two less important ones and proceed to the two more important ones. The first reason is to maintain the *internal coherence* of ICL: ICL should conform to fundamental principles because it proclaims that it does. This reason is less important, because coherence could be achieved by disavowing the principles; nonetheless, for as long as the principles are proclaimed, violations should be unearthed and resolved.[16]

A second reason – possibly a counter-intuitive reason – is *consequentialist*. As Paul Robinson and John Darley have sought to demonstrate, 'desert' may have 'utility':[17] conforming to broadly shared notions of justice strengthens law's influence on norm-internalization (which may be more important to prevention than rational calculations of deterrence), and may also strengthen the legal system's legitimacy and support (and hence its effectiveness).[18] These consequentialist considerations are not a central basis

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[14] A Cassese, *International Criminal Law,* 2nd ed (OUP, 2008), 38-41; H Kelsen, 'Will the Judgement in the Nuremberg Trial Constitute a Precedent in International Law?, (1947) 1 *International Law Quarterly* 153, at 164; *United States of America et al v Hermann Göring et al*, 1 Trial of the Major War Criminals Before the International Military Tribunal, 14 November 1945 – 1 October 1946 (Nuremberg: International Military Tribunal, 1947) 171 at 219; and see argument of Judge Röling in *United States of America et al v Araki et al*, in Neil Boister and Robert Cryer, eds, *Documents on the Tokyo International Military Tribunal; Charter, Indictment and Judgments* (OUP, 2008) at 700.

[15] Some illustrations are discussed below in Chapter 6 (command responsibility).

[16] Of course, in a dynamic legal system, some internal contradictions may be inevitable as doctrines and principles evolve. Nonetheless coherence is an aspiration of the system.

[17] P Robinson & J M Darley, 'The Utility of Desert' (1997) 91 *Nw U L Rev* 453, cite research showing (i) that the impact of criminal law depends more on the internalization of norms by individuals and social groups than on the rational calculations of deterrent threats (at 468-471), and (ii) that criminal law's influence on norm-internalization depends on its moral credibility and conformity to broadly shared conceptions of justice (at 471-488).

[18] It can also be argued that a criminal law system will only produce the desired benefits if it complies with rules (constraints) matching those of a deontic account. See J Rawls, 'Two Concepts of Rules', (1955) 64 *Philosophical Review* 3.

for a liberal account, because a liberal account would respect principled constraints even if it entailed some disutility,[19] but the consequentialist support is worth noting.

The third and most important reason to comply with principles is *deontic,* i.e. if we accept that there is something about people (personhood, dignity, moral agency) that warrants respect and recognition. As a result, we can only punish persons in accordance with what they *deserve*. A system that neglects the constraint of desert is arguably not a system of 'justice',[20] and in some sense, might not even be a system of 'criminal law' but rather an exercise of 'police' power.[21] Thus, even if the aim of criminal law is to protect society from individuals, the pursuit of that goal is qualified by principled restraints to protect individuals from society.[22]

The fourth reason is the deeper *conceptual* coherence of the system.[23] ICL is a project aimed at upholding human dignity and autonomy. If ICL, in its eagerness to protect human dignity and autonomy, abandons principles that are themselves based on respect for human dignity and autonomy, then the system may contradict its own values.[24] It is true that fundamental principles may at times seem to inhibit the pursuit of maximal victim protection. However, the alternative – to create a punitive system for the

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[19] Otherwise it would be a utilitarian account, upholding certain principles only as long as they had long-term consequentialist value.

[20] H L A Hart, *Punishment and Responsibility,* 2nd ed (OUP, 2008) at 22; D N Husak, *The Philosophy of Criminal Law* (Rowman and Littlefield, 1987) at 30.

[21] Markus Dubber contrasts 'criminal law' with the exercise of 'police'. The former involves top-down 'management of the household' by a *pater familias* figure. Criminal law applies in a political community of free and equal persons, and thus the governor and the governed stand in a relationship of equality. It requires not just prudential considerations by the punisher (i.e. effectiveness) but also consistency with a moral ideal of the punished; it is a power to do justice rather than just a power to regulate. Dubber M D, 'A Political Theory of Criminal Law: Autonomy and the Legitimacy of State Punishment' online: (2004) available at papers.ssrn.com/sol3/papers.cfm?abstract_id=529522, esp. at 6-7, 13, 19. See also M Dubber, 'Common Civility: The Culture of Alegality in International Criminal Law', (2011) 24 *LJIL* 923 ('Common Civility').

[22] Hart, *Punishment and Responsibility* at 81; Husak, *Philosophy of Criminal Law* at 51.

[23] Here I am talking not simply about the simple formal coherence mentioned in the first reason (complying because the principles are declared). I am talking about a deeper coherence with the values of the system. In Chapter 4, I will expand upon deontic constraints and coherence: I will argue that coherentism in its broadest sense is the only guide we have to debating and articulating the deontic constraints.

[24] Similarly, Damaška, 'Shadow Side' at 456 asks whether it is appropriate for ICL, with its humanitarian orientation, to disregard culpability principles which are rooted in humanitarian concerns.

'administrative elimination of wrongdoers'[25] in the name of advancing human rights – seems philosophically incoherent.[26]

To sum up, if ICL wishes to instill the value that human beings must be treated as moral agents possessed of dignity, it must in turn treat persons as moral agents possessed of dignity. [27] To treat persons as objects in order to send a message that persons may not be used as objects is to embark on a project riven with self-contradiction.

I wish to emphasize a point that may seen counter-intuitive: compassion, empathy and humanity are important in criminal justice. This seems counter-intuitive because criminal law is obviously punitive. Moreover, criminal law theory can often be very cerebral and analytical. Nonetheless, I think that the kernel of justice is empathy. As Markus Dubber notes, the 'sense of justice' requires imaginative role-taking, or an empathetic thought experiment, to identify with the adjudged person at least as a fellow moral person.[28] As I reflect on instances in national and international criminal law where legal reasoning has lost sight of deontic constraints, it usually is accompanied by a fixation on societal protection and a failure to truly consider the situation of the accused or potential accused, often because the accused is looked down up as a criminal, an outsider, or as the 'other'. Deontic reasoning requires us to at least briefly imagine inhabiting the situation of an accused person, to better appreciate the fairness of what is expected. Of course, we also cerebrally apply our analytical constructs, but this modicum of empathy is part of the deontic reasoning process and part of our reasoning about justice.

3.2.2 The Humanity of the 'Enemy of Humanity'

[25] Dissenting opinion of Justice Robertson in *Prosecutor v Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction, SCSL A.Ch, SCSL-2004-14-AR72(E), 31 May 2004, (*Norman,* Child Recruitment Decision') at para 14.

[26] To give one example, see L L Fuller, *The Morality of Law*, 2nd ed (Yale University Press, 1969) at 162, arguing that a concept of persons as responsible agents is inherent in the enterprise of law, so that every 'departure from the principles of law's inner morality is an affront to man's dignity as a responsible agent.' See also R A Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart, 2007) at 45-46.

[27] See Fuller, ibid.

[28] M D Dubber, *The Sense of Justice: Empathy in Law and Punishment* (Universal Law Publishing, 2006) esp at 7-8, 24, 52, 71, 75 and 83.

In addition to the doctrinal arguments to sidestep principles, normative arguments are also made to sweep away fundamental principles in ICL. I will deal relatively quickly with two major normative arguments here: the consequentialist argument and the forfeiture argument.

The first argument is consequentialist. It is sometimes argued that fundamental principles must be set aside because of the scale of the crimes, the severity of crimes, the weakness of the system and/or the urgent need for deterrence.[29] In such situations, fundamental principles like culpability and legality may seem like 'unaffordable luxuries.'[30] The problem with most such arguments is that they rather simply 'shrug off' fundamental principles. Making a broad gesture at the circumstances does not *per se* provide a deontic basis to cease to respect the autonomy of the individual. A principled account needs a more careful grappling with the deontic commitment. (The account I will outline below does consider circumstances, but the difference is that my account *examines* deontic questions within the given circumstances, rather than simply *dismissing* them by invoking the context. [31])

The second argument is that complicity in major atrocities leads the accused to *forfeit* some of the protection of fundamental principles. This sentiment arguably underlies some older legal practices. For example, it may underlie the historic claim that that legal rules may be relaxed in relation to atrocious crimes (*in delictis atrocissimis jura transgredi liceat)*. [32] It has affinities with some historic conceptions of an 'outlaw', which

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[29] To give one example, see A Cassese, 'The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise', (2007) 5 *JICJ* 109 at 110 and 123; and see discussion in Damaška, 'Shadow Side' above at 456, and examples cited in Chapter 2.

[30] Danner & Martinez, 'Guilty Associations', above at 166, discussing but rejecting that point of view.

[31] There is an even more subtle difference that could arise between the 'unacceptable luxuries' argument and my general framework. As I will explain in this chapter and in Chapter 4, I am at this point only outlining a very general framework that could accommodate within it some very different accounts. I am referring for now to 'deontic commitments' (to be clarified in Chapter 4), but it is at least possible that a future plausible account might be based on 'moderate deontology'. A 'moderate' deontological account conceives that duties to individuals might include implicit 'thresholds' or 'limitations' where they could be overridden, based on extreme social needs. See below, § 4.4. None of the issues canvassed in this thesis require me to take any position on such accounts. The importance difference, for now, is that even a moderate deontological account would still differ from the 'unaffordable luxuries' argument. The latter shrugs off principles with a very broad invocation of urgency, whereas the former *grapples* with the underlying principles, and contemplates departures only in accordance with an explicit higher order theory.

[32] Some problems with the argument *in delictis atrocissimis jura transgredi liceat* are discussed by Damaška, 'Shadow Side' at 482 and M Bohlander, 'Commentary' in A Klip, ed, *The International Criminal Tribunal for the former Yugoslavia* 2001-2001 (2002) 898 at 909.

held that certain persons had flouted the law to the point where they were outside the law and no longer protected it.[33] It also might draw support from international legal doctrines that describe the transgressor as *hostis humanis generis* – the enemy of humanity.[34] That label – which, in my view, arose only as an explanation of universal jurisdiction – could instead be used to more dramatic effect, implying that the enemy of humanity is in some way opposed to and outside of the human family.[35] The argument would be that by acting inhumanely to others, the accused loses some of the protections of humanity.

The 'forfeiture' argument may have initial appeal, because it refers to the individual's own actions and choices. Nonetheless, it should be rejected, for at least two reasons. The first is that the argument is circular. The argument invokes the person's responsibility for core crimes to allow harsher principles, and then uses those harsher principles to allow a finding of responsibility. Such an argument is either unnecessary (if the person already was responsible under normal principles) or else it is invalid (*petitio principii,* boot-strapping).

Second, the argument would contradict values that are probably central to the enterprise of criminal law and ICL. ICL aims to affirm and protect dignity of persons even in circumstances of great social pressures. Critics of criminal law (and ICL) sometimes suggest that criminal law (and ICL) seeks to portray violators as the 'other', dehumanizing them.[36] That claim may be partially true of criminal law *done badly* – i.e. criminal law in which privileged authorities punish others, possibly from very different and disempowered backgrounds, without adequately pondering the accused person's

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[33] For discussion of *hostis humani generis*, outlaw and outsider, and the 'trend toward the moralizing clarity of good and evil' see G Simpson, *Law, War and Crime: War Crimes Trials and the Reinvention of International Law* (Polity, 2007) at 159-177. See also Duff, *Answering,* above at 212-213; L May, 'Collective Punishment and Mass Confinement' in Isaacs and Vernon, eds *Accountability,* above, 167 at 179.

[34] See Simpson, ibid; Duff, ibid; May, ibid.

[35] C Schmitt, *The Concept of the Political* (Duncker and Humblot, 1932, trans and reprinted University of Chicago Press, 2006), albeit writing about war, raises a pertinent concern: 'The concept of humanity is an especially useful ideological instrument' because 'denying the enemy the quality of being human and declaring him to be an outlaw of humanity' allows the most extreme inhumanity.

[36] See discussion in Simpson, *Law, War and Crime*, above, at 159-177

circumstances and available choices.[37] The forms of criminal law can indeed be misemployed as a tool of repression and stigmatization.

But criminal law as a system of *justice* requires a recognition of accused persons as persons, including an empathetic assessment of their circumstances and choices. As Markus Dubber notes, it may be tempting to deny our sense of justice to those who have denied justice to others, but justice still requires some identification with person judged; one must see them as a fellow moral person.[38] Criminal law is unlike other responses, such as war, which treats persons as adversaries. Criminal law recognizes that we are in some sense part of the same community or polity, such that one can be called to answer for one's actions.[39] Moreover, criminal law differs from our responses to harms not caused by responsible agents, and it also differs from other legal responses, such as quarantine, which acts for public safety without regard to 'fault'. Criminal law recognizes and honours the accused as *persons:* as agents responsible and answerable for their actions.[40] Criminal law is predicated precisely on that personhood and responsibility; its task is assessing the extent of accused persons' criminal responsibility based on their actions. Criminal law is not employed against sharks, or bears, or rocks, or machines; it is premised on the acknowledgement of the accused as a responsible human agent who could have chosen others. Thus, criminal law does the *opposite* of portraying persons as outside the human family. The essence of criminal law is that it recognizes the accused as a fellow member of a community of accountable moral agents.

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[37] For an example from my country (Canada) and the treatment of Indigenous accused and the need to better consider systemic background conditions, see *R v Gladue,* [1999] 1 SCR 688 (Supreme Court of Canada). Early ICL cases often seem to have lacked adequate empathetic recognition of the situation of the accused, leading to harsh reasoning focused on sending a strident deterrent message; see examples above in Chapter 2 (such as the *Yamashita* case).

[38] M D Dubber, *The Sense of Justice: Empathy in Law and Punishment* (Universal Law Publishing, 2006), esp at 2, 6 and 52.

[39] The ICC, for example, applies its criminal law within a community of States Parties (and other states accepting jurisdiction of the Court).

[40] See e.g. G H W Hegel, *Elements of the Philosophy of Right,* A Wood, ed, (CUP, 1991) at 125-127 (§99-100), that criminal law is not just threats and coercion to alter behaviour (as when one punishes a dog or renders a dangerous animal harmless); it recognizes the accused as a rational being.

Thus, there are many reasons why ICL must recognize the humanity even of the so-called *hostis humanis generis*.[41] (Indeed, the label *hostis humanis generis* is no longer often invoked and should likely be abandoned, as it focuses on the actor rather than the act.)

Respect for the humanity of perpetrators does not necessarily imply gentle treatment. It may be that through their choices they warrant harsh treatment. The point is simply that we have to justify the treatment in a manner that recognizes their humanity. We cannot simply skip the justification with a broad gesture to the need to stop these crimes. Nor can we skip justification on grounds that all persons accused of ICL crimes are, as a class, persons for whom no compassion or respect is warranted.

3.2.3 Toward A More General Theory of Criminal Law

Finally, we arrive at the best argument for skepticism about fundamental principles. The most important challenge is the normative argument that familiar principles are simply not appropriate in the unusual contexts of ICL crimes. Mark Drumbl, Mark Osiel and others have convincingly argued against the automatic replication of the assumptions, methods and principles of national doctrinal frameworks in ICL.[42] Drumbl argues, for example, that the paradigm of individual culpability, created for deviant isolated crimes, is not suited for mass crimes, which involve organic group dimensions.[43] Many scholars rightly emphasize that, whereas ordinary crime involves 'deviance' from societal expectations, ICL faces situations of 'inverted morality' in which there is strong social pressure to participate in crimes.[44] In ICL contexts, it is often *abstention* from crime

[41] Reasons to adhere to principles include: an other-regarding (deontic) reason that the accused, as a person, is inherently entitled to this minimum degree of respect; a systemic reason that the coherence (inner morality) of law entails treating persons as agents; a didactic reason of encouraging respect for dignity; and a self-constituting reason that the law-applying community chooses not to violate certain principles.

[42] Drumbl, *Atrocity*, above, at 5-9, 23, 38-39; Osiel, *Making Sense*, above, at 8; Osiel, 'Banality', above, at 1753, 1768; Drumbl, 'Collective Violence', above, at 545.

[43] Drumbl, *Atrocity*, above, at 24; see also Sepinwall, 'Citizen Responsibility' above, at 233: 'the collective nature of crimes of war escapes the bounds of the individualist paradigm of Western criminal law'.

[44] Reisman, 'Legal Responses' above, at 77 (inverted morality); Drumbl, *Atrocity*, above, at 24-35; L Fletcher and Weinstein, 'Violence' above, *at* 605; D Luban, 'State Criminality and the Ambition of International Criminal Law', in Isaacs and Vernon, *Accountability,* above, 61 at 62-63; Aukerman, 'Extraordinary Evil', above, at 59.

that would be 'deviant'. Scholars also warn against extending 'Western doctrines onto the transnational plane without considering the implications for societies not sharing similar assumptions'.[45] For these and other reasons (see also §3.3), it is argued that principles such as culpability may have to be adapted, modified, or even abandoned.[46]

I agree that ICL need not replicate familiar formulations of fundamental principles merely because they appear in national systems.[47] We may and must critically inspect formulations of fundamental principles to assess their relevance and soundness in new contexts. However, I would add a crucial caveat to these observations. Namely, this latitude for re-inspection does not entail that we are free to abandon the underlying deontic commitment to treat humans justly as moral agents. Thus, we must still grapple with the question of desert. Common formulations of principles may be re-evaluated and re-articulated, but the revised formulations require a plausible deontic justification.

What are some of the ways in which we may have to reconsider familiar national formulations? Mainstream criminal law theory is understandably predicated on the 'normal' case: a generally orderly society, in which a single overarching state is the law-giver, law-adjudicator and law-enforcer. A host of implicit assumptions about that context are unproblematic for the normal case. However, examining desert in the abnormal contexts of ICL leads us to into some new and largely unexplored territory. These abnormal features compel us to explore a more general account of criminal justice that includes very different conditions.

For example, it is understandable to say in the normal context of criminal law theory that the legality principle requires prior written legislation. But ICL has often encountered violent atrocities for which there was no national prohibition, requiring more complex queries into other forms of 'fair warning'. ICL, a system with no formal 'legislature' per se, challenges us to consider the outer parameters of the legality principle more carefully. ICL can also help us explore the limits of personal culpability. ICL addresses collective

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[45] Osiel, *Making Sense*, above, at 8; see also Aukerman, 'Extraordinary Evil', above, at 59; Sepinwall, 'Citizen Responsibilty', above, at 233.

[46] M Drumbl, 'Pluralizing International Criminal Justice', (2005) 103 *Michigan Law Review* 1295, at 1309; Osiel, 'Banality', above, at 1765 and 1768; Osiel, *Making Sense*, above, at 25.

[47] A position foreshadowed in D Robinson, 'The Identity Crisis of International Criminal Law', (2008) 21 *LJIL* 925 above, at 932, 933, and 962-963; D Robinson 'The Two Liberalisms of International Criminal Law', in C Stahn and L van den Herik (eds), *Future Perspectives on International Criminal Justice* (TMC Asser, 2010), 115, at 118 (n. 9) and 160.

criminal enterprises involving thousands of perpetrators playing very different roles, which invites us to clarify individual culpability in complex mass endeavours. Causally over-determined crimes raise questions about causation and blame.[48] Crimes of obedience challenge some normal thinking about deviance, conformity and wrongdoing. Criminal governments overturn the normal role of state as law-provider. Competing authority structures invite us to reflect on the significance of legal 'authorization' of acts. As I will discuss in Chapter 5, the tools of thought that help us in criminal law theory, including community, citizenship or authority, may require further reflection in a more general theory of criminal law.

3.2.4 Combining Liberal and Critical Insights

My aspiration is that this modified account will be convincing both to 'liberal' theorists and to those who have critiqued liberal accounts. I expect that most scholars adopting a 'liberal' approach to ICL would agree with the proposed approach, as their preoccupation is presumably not with replicating national formulations of principles, but rather with respecting the underlying deontic commitment.[49] Similarly, it is my hope that those scholars who emphasize the distinctiveness of ICL would agree that any refashioned rules must still comport with a credible account of just treatment of individuals.

Insofar as scholars such as Drumbl and Osiel are simply calling for thoughtful inspection of liberal principles,[50] the position I outline is compatible with theirs. There are only a few passages in Drumbl's work which seem to suggest a fundamentally different approach, in which case my caveat would be significant. For example, Drumbl

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[48] J Stewart, 'Overdetermined Atrocities' (2012) 10 *JICL* 1189.

[49] Indeed, leading criminal law theorists, bringing liberal principles to bear on ICL problems, have made some very compatible suggestions. For example, George Fletcher calls for comparative study, a thoughtful inquiry into individual culpability in collective contexts, and systematic philosophical reflection on concepts: Fletcher, *Grammar,* above, at vii-xi, 94, 265, 340. Similarly, Kai Ambos advocates an approach that is comparative rather than rooted in any one tradition, gives philosophical consideration to individual responsibility in collective contexts, avoids 'flat legal thinking', and adheres to deontological restraints. K Ambos, 'Toward a Universal System of Crime: Comments on George Fletcher's *Grammar of Criminal Law*' (2010) 28 *Cardozo Law Review* 2647. The framework I suggest in this chapter and the next is in line with such calls; I develop in more detail a humanistic, coherentist and cosmopolitan approach to address such challenges (Chapters 3-5).

[50] Drumbl, 'Pluralizing', above, at 1310; Drumbl, 'Collective Violence', above at 567; Osiel, 'Banality', above at 1765.

observes that the Tribunals' 'recourse to generous – and at times somewhat vicarious – liability theories become eminently understandable' in light of the collective and organic sources of violence.[51] I agree that the pressure to expand liability doctrines is *understandable* in a psychological sense. My caveat is that, if vicarious liability refers to liability without culpability, it does not seem *justifiable* in a system of criminal law. Responsibility short of personal culpability should be addressed through other mechanisms. I suspect, based on other passages of Drumbl's work, that he would likely agree with this caveat.[52]

I believe my proposed approach is also reconcilable with that of Mark Osiel.[53] Osiel seems to express slightly different ideas at different points on the need to comply with the culpability principle. (1) At times he emphasizes the need to comply with fundamental principles,[54] while arguing that there is scope to adapt those principles.[55] (2) At times he contemplates some degree of non-compliance, suggesting that ICL should '*ideally*' comply,[56] that it should not '*unduly*' depart,[57] and that incompatibility should be kept to a 'morally acceptable minimum'.[58] (3) At other times he seems more skeptical, lamenting the prevalence of deontological thinking in criminal theory and the 'reverential status accorded to the culpability principle in current criminal theory'.[59] The first suggestion is entirely compatible with the approach I advance here. The second suggestion *could* be compatible with my general framework, if a 'moderate' deontological approach is

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[51] Drumbl, 'Pluralizing', above, at 1309.

[52] Drumbl, *Atrocity*, above, at 40, noting that availability of other mechanisms may reduce the pressures for an expansive doctrine of joint criminal enterprise.

[53] Some readers of Osiel's thoughtful work, *Making Sense of Mass Atrocity*, may find this optimism surprising, because in that work he presents my approach as being in opposition to his own. However, the approach he ascribes to me appears to miss the nuances of the program that I foreshadowed in early works (see e.g. Robinson, 'Identity Crisis' especially at 932 and 962-63). I hope that this thesis explains my approach and illuminates the brief clarifications and foreshadowing that I tried to provide in previous works.

[54] Osiel, *Making Sense*, above, at 129 and at 202 and 245 (noting consistency with personal culpability).

[55] *Ibid*, at xi-xiii and 245 (liberal approach, but can adapt to novel changes). There is some ambiguity here, as Osiel includes utilitarianism within liberalism, which is perfectly sound, but it is quite different from its typical use in criminal law theory. In criminal law theory, the term 'liberal' is used for a system that embraces deontic constraints, and thus the term is in deliberate contrast to a purely utilitarian approach.

[56] *Ibid*, at 21.

[57] *Ibid.*, at 21.

[58] *Ibid.*, at 199.

[59] Osiel, 'Banality', above, at 1845.

developed and proves convincing.[60] The third position is likely incompatible, unless its skepticism is directed toward historically contingent *formulations* of the culpability principle, or to the 'punctilious'[61] manner in which it is sometimes applied. I would argue that criminal law should carefully respect the culpability and legality principles, once they are properly delineated.[62] Thus I could agree with 'modification', but not 'abandonment',[63] of the culpability principle. For reasons outlined in § 3.2.1, if we punish without culpability, we are arguably no longer engaged in criminal law, but rather – to use Markus Dubber's term – an 'ethical-administrative enterprise'.[64]

Osiel raises a valuable point when he argues that public policy decisions cannot be based on 'philosophical 'principle' or metaphysics', because 'normative questions are…at stake here, not metaphysical ones'.[65] I agree that the questions are normative, but that still leaves the crucial question: are we speaking of a normativity of the *good* or of the *right*? In other words, are we simply maximizing general public welfare (the good)[66] or are we also respecting the autonomy, rights, and agency of others (the right)? Consequentialist considerations can play an important role in criminal law analysis, but we also have to respect deontic constraints of justice.[67] The question of culpability *is* a normative question, an urgent one, delineating some important limits of a system of justice.

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[60] See above § 3.2.2 and below §4.4 for brief discussions of 'moderate' deontology. A moderate deontological account would recognize some 'thresholds' or limitations, by which duties to individuals could be overridden by extreme necessity. None of the issues in this thesis require me to take a position on the feasibility or desirability of such an account. Such an account, if adopted, could provide an explicit higher order theory allowing assessment of 'morally acceptable' departures.

[61] Osiel, *Making Sense*, above, at 8.

[62] For examples of exploring the parameters of the culpability principle, see §6.8.3 and Chapter 7.

[63] Osiel, 'Banality, above at 1768.

[64] Dubber, 'Common Civility', above, at 923.

[65] Osiel, *Making Sense*, above, at 127-128, 129.

[66] Or any other desideratum that one argues should be maximized, such as human flourishing.

[67] Osiel, 'Banality', above, at 1845 describes the 'unfortunate equation of liberal morality with its Kantian variant, banishing its consequentialist cousin to undeserved obscurity'. As I will explain in Chapter 4, in my view, the deontic constraints do not necessarily have to be Kantian. However, they cannot be simple consequentialism. The point of the constraints is that they restrain untrammelled consequentialist reasoning. Consequentialist considerations have not been 'banished' in criminal law doctrine or theory (far from it). However, something non-consequentialist is also needed. For example, as HLA Hart has shown, a consequentialist theory would condone punishing the innocent if it were shown to have optimal consequences; to describe punishing the innocent as 'inefficient' fails to capture our repugnance of it: Hart, *Punishment and Responsibility,* above, at 77.

3.3. ABSORBING COMMON CRITICISMS: A HUMANISTIC ACCOUNT

In this part, I discuss some specific objections to liberal approaches. I argue that a sensitive, humanistic liberal account can embrace these critiques and be strengthened by them. The most common objections to liberal accounts include: (1) that they are fixated on the individual and cannot cope with the collective dimensions of atrocity; (2) that they conceive of persons as socially unencumbered individuals and fail to account for communitarian values and social meaning; and (3) that they impose Western constructs. On each issue, my answer emphasizes the 'humanity' of justice. We can develop a humanistic account that takes in the full richness of human life, including its social dimensions, and seek principles that reflect widely-shared human concerns.

3.3.1. Grappling with Collective Action

As was discussed in §3.2, many scholars have emphasized that the collective dimensions of mass atrocity and the attendant social pressures create severe challenges for orthodox ideas about crime and 'conformity', 'deviance', 'agency' and 'moral choice'.[68] I agree that these collective and societal dimensions call for a fresh inquiry. We may find that familiar conceptions are no longer convincing in these new contexts, and thus we may need to reflect more about what the deeper underlying commitments entail. Nonetheless, I would insist we must still inquire into individual agency, choice and desert, even where crimes have a collective context. The reason is that, once one chooses to employ criminal law and thereby to blame, punish and stigmatize *individuals* for crimes, one has no choice but to grapple with *individual* agency, choice and desert.

[68] See examples cited in § 3.2, and see also Drumbl, *Atrocity*, above, at 21 (drained collective nature to fit comforting frameworks) and 23-35 (conformity and deviance); Drumbl, 'Collective Responsibility', above, at 24; Osiel, 'Banality of Good', above, at 1752-1755; Osiel, *Making Sense*, above, at 2-3 and 187-189; Simpson, above, at 73-74; G Fletcher, 'Liberals and Romantics at War: The Problem of Collective Guilt', (2002) 111 *Yale Law Journal* 1499, at 1513 and 1541; A Sepinwall, 'Citizen Responsibility and the Reactive Attitudes: Blaming Americans for War Crimes in Iraq', in T Isaacs and R Vernon, eds, *Accountability for Collective Wrongdoing* (Cambridge University Press, 2011) 231.

A common criticism of liberal criminal theory is that it fixates on the individual as the central 'unit of action'.[69] This is often portrayed as a myopia or distortion of liberal thought. However, I think this criticism slightly misses the reason for the focus on the individual. I think that the focus on the individual arises because, once criminal law is employed, the individual is the *unit of punishment.* Once we decide to punish and stigmatize individuals for crimes, we are obliged to determine what we are punishing them *for*. This inevitably brings questions of individual agency – to identify the actions and contributions for which that individual is to be held responsible.

The 'unit of action' criticism sometimes claims that the choice to employ criminal law (i.e. to punish individuals) arises because of a liberal myopia that sees a world of isolated individual actors. But that is not how ICL (or criminal law) came about. There are numerous other legal and social mechanisms that respond in diverse ways to harms, wrongdoings and systemic failures. These mechanisms include legal responses such as state responsibility, human rights law, civil liability, administrative law, and constitutional law, as well as an enormous array of social and political mechanisms (commissions of inquiry, reforms, etc). What ICL does is add a mechanism *in addition to* those other existing mechanisms, which have historically proven inadequate in preventing mass atrocities. Criminal law focuses on individual wrongdoing, not because of some myopic defect, but because that is the distinctive lens it is asked to bring, to supplement other mechanisms. The hope is that assessment, stigmatization, and punishment of individual wrongdoing might eventually create additional disincentives and help instantiate new norms of behaviour. But other mechanisms continue to examine other dynamics (such as the collective liability of a state, or civil responsibility of individual or collective actors, or to examine roots of conflict and to make reform recommendations), and efforts to improve and strengthen those mechanisms are also ongoing. Thus, ICL's focus on individual crimes is not because of an ideological blind spot, but because that is the facet of the problem it is tasked to address, as part of a holistic social response.

Furthermore, contrary to common claims, a liberal account is not so obsessively individualistic that we have to parcel out each contribution so that each harm is attributed

[69] Drumbl, 'Collective Responsibility', above, at 29 (central unit of action); G Fletcher, 'Liberals and Romantics', above, at 1504 (ultimate unit of action); Drumbl, 'Collective Violence', above, at 539 and 542.

to one and only one individual.[70] A liberal account can easily recognize that when individuals pool their efforts together, they can share in various forms of responsibility for their collective doings.[71] On a careful liberal account of mass crimes, we would contend with the challenge that collective action can both *expand* agency, by allowing attainment of aims that could not be attained alone, and also *diminish* agency and moral choice in situations of social pressure, propaganda or demands of authority.[72]

We must also avoid the tendency to overstate the myopias of criminal law. The argument is often made that 'criminal law sees a world of separate persons, whereas mass atrocity entails collective behavior',[73] or that 'the collective nature of crimes of war escapes the bounds of the individualist paradigm of Western criminal law'.[74] It would be a mistake to suggest that criminal law or liberal criminal law theory is so fixated on individuals that it is completely unequipped to cope with collective action. Collective action may be more prominent in ICL, and may often involve larger scales, but it is not a new phenomenon. Individuals have been working together to commit crime since 'crime' was first conceived. Criminal law doctrine and theory draws on centuries of thought and experience concerning individuals pooling their efforts to produce crimes. This has generated tools such as joint commission, commission through an organization, complicity, and the distinction between principals and accessories. In the context of macro-criminality, much interesting thought has been given, for example, to how to

[70] Objecting to such a finely individuated approach, see L May, 'Collective Punishment and mass confinement', in Isaacs and Vernon, *Accountability,* above, 169, at 170; T Erskine, 'Kicking Bodies and Damning Souls: The Danger of Harming Innocent Individuals While Punishing Delinquent States', in Isaacs and Vernon, *Accountability,* above, 261, at 265.

[71] *Ibid.*

[72] K J Fisher, *Moral Accountability and International Criminal Law: Holding the Agents of Atrocity Accountable to the World* (Routledge, 2012), 68-82; and see generally T Isaacs, 'Individual Responsibility for Collective Wrongs', in J Harrington, M Milde and R Vernon (eds), *Bringing Power to Justice?: The Prospects of the International Criminal Court* (McGill-Queen's University, 2006), 167.

[73] Osiel, *Making Sense*, above, at x eloquently articulates such positions, without necessarily endorsing them. And see, ibid at 2: 'With its focus on discrete deeds and isolated intentions, legal analysis risks missing the collaborative character of genocidal massacre, the vast extent of unintended consequences, and the ways in which 'the whole' conflagration is often quite different from the sum of its parts' (ibid at 2).

[74] A Sepinwall, 'Citizen Responsibility', above, at 233.

address the *Hintermann* – the 'man in the background'—who is not present at the crime scene but who masterminds the crime.[75]

It is true that there may be *more* collective action in ICL cases, making it even more of a central problem, so we may need more nuanced and tailored doctrines. Furthermore, ICL can involve much larger groups of perpetrators, coordinating in diverse ways, so we may need to more carefully gauge the outer limits of complicity doctrines. But it is premature to say that criminal law is unable to do so.

Moreover, problems of diminished agency are not unique to ICL. National legal systems also confront puzzles of diminished agency, such as children raised in contexts of organized crime, gang violence, fetal alcohol syndrome, and communities in states of anomie where criminality is normalized. The agency issues faced by ICL may be different in some respects, but they are not exclusive to ICL.

3.3.2. Acknowledging Social Context

A related critique is that liberal accounts are so individualistic and abstract that they miss out on the social significance and context of actions.[76] The concern is that liberal theory misconceives of the individual as completely separate from society, and must disaggregate complex events into 'socially unencumbered individuals independently interacting', producing distorted understandings.[77] Certainly, some political theories, such as classical liberal contractarian theories, might be vulnerable to such critique. However, we can advance a liberal criminal law theory without necessarily subscribing to an empirically untenable worldview in which we were all atomistic, self-created individuals who entered into a social contract to advance our personal aims. As Alan Brudner notes, '[c]ontrary to a common belief, a liberal theory of penal justice is not necessarily one that conceives the individual as an abstract subject or person uprooted

[75] See e.g. Ambos, 'Remarks', above, esp. at 663-664; J Stewart, 'The End of 'Modes of Liability' for International Crimes', (2012) 25 *LJIL* 165; J D Ohlin, 'Second Order Linking Principles' (2012) 25 *LJIL* 771; A Nollkaemper and H van der Wilt (eds), *System Criminality in International Law* (CUP, 2009).

[76] For helpful review of communitarian critiques of liberal, individualistic accounts, see N Lacey, *State Punishment: Political Principles and Community Values* (Routledge, 1988), 143-168; P W Kahn, *Putting Liberalism in Its Place* (Princeton University Press, 2005), 38-50; L Green, *The Authority of the State* (Clarendon Press, 1988), 188-206.

[77] Osiel, 'Banality of Good', above, at 1837, articulating without endorsing the viewpoint.

from its social and ethical environment.'[78] A humanistic, intelligent liberal theory can acknowledge that we are social and political animals, that we were born in society, and that our identities and our realities are richly socially constructed.

Indeed, in a careful liberal theory, social context and social roles may play a powerful role.[79] The acknowledgement of community and of social roles may bear fruit (as we will see in Chapter 5 in the discussion on duress) by bringing into question some easy conclusions of more atomistic theories.

An intelligent, humanistic approach to criminal law theory also draws from empirical studies, and in particular from criminology, in order to refine its understandings. After all, normative arguments often entail empirical suppositions (for example, about the extent to which capacity for choice is undermined in particular social contexts). Intriguing criminological and socio-legal literature is exploring the ways in which the commission of ICL crimes differs from crimes in a normal domestic context.[80] For example, atrocities in ICL are most often not committed by psychopaths or sadists, as casual observers might suppose; the crimes seem to largely be committed by 'ordinary' people in extraordinary contexts.[81] Criminological inquiry can inform our understanding of the conditions in which ICL crimes occur, and the resulting constraints on capacity and culpability. Thus, empirical inquiry can shape normative prescriptions on many topics,

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[78] A Brudner, *Punishment and Freedom: A Liberal Theory of Penal Justice* (OUP, 2009), ix. See also Fletcher, *Grammar*, above, at 169 (challenging the 'oft-repeated charge' that liberals regard individuals as abstracted from history and culture).

[79] See e.g. Duff, above, at 23-30.

[80] P Roberts and N MacMillan 'For Criminology in International Criminal Justice' (2003) 1 JICJ 315; A Smeulers, "What Transforms Ordinary People into Gross Human Rights Violators?" in SC Carey & SC Poe, eds, *Understanding Human Rights Violations: New Systematic Studies* (Ashgate, 2004); P Zimbardo, *The Lucifer Effect Understanding How Good People Turn Evil* (Random House, 2007); A Smeulers and R Haveman, eds, *Supranational Criminology: Towards a Criminology of International Crimes* (Intersentia, 2008); DL Rothe and CW Mullins, 'Toward a Criminology of International Criminal Law: An Integrated Theory of International Criminal Violations' (2009) 33 *International Journal of Comparative and Applied Criminal Justice* 97; D Maier-Katkin, DP Mears & TJ Bernard, "Towards a criminology of crimes against humanity" (2009) 13 *Theoretical Criminology* 227; Albert Bandura, *Moral Disengagement: How People Do Harm and Live with Themselves* (Worth Publishers, 2016);A Smeulers, M Weerdesteijn, and B Hola, *Perpetrators of International Crimes: Theories, Methods, and Evidence* (OUP, 2019); M Aksenova, E van Sliedregt & S Parmentier, eds, *Breaking the Cycle of Mass Atrocities: Criminological and Socio-Legal Approaches in International Criminal Law* (Hart, 2019).

[81] Saira Mohamed, 'Of Monsters and Men: Perpetrator Trauma and Mass Atrocity' (2015) 115 *Columbia Law Review* 1157; A. Smeulers & F. Grünfeld, *International Crimes and Other Gross Human Rights Violations – A Multi- and-interdisciplinary Textbook* (Martinus Nijhoff, 2011).

such as how we delineate between principals and accessories,[82] or how we assessing culpability in contexts of superior orders.[83]

In conclusion, a liberal criminal law theory in no way entails ignoring the importance of society and social dynamics. It merely requires that we *justify* our actions against the individual on behalf of society. We may indeed be social animals, but we are not drones in a hive, to be used without concern as instruments for the collective good. A liberal account recognizes that there is some attribute of persons (whether it be labeled autonomy or dignity or capacity for reason[84]) that requires us to justify our punishment and treatment of them.

3.3.3. Western Constructs or Shared Concerns?

Finally, I come to the most difficult challenge for a broadly humanistic liberal account. A frequently-advanced objection to liberal principles is that they are a 'Western' construct.[85] Such warnings rightly alert us to the historical and cultural contingency of familiar formulations of principles. They alert us to the inappropriateness or even neo-colonialism of extending such principles in other contexts.

In a humanistic account, we want to do the best we can to identify principles reflecting broadly shared human concerns. In Chapter 4, I discuss how we can attempt to do this by drawing on all possible clues, which includes practices and perspectives from diverse regions and traditions. This aspiration dovetails with the 'cosmopolitan' approach I discuss in Chapter 5. A cosmopolitan account draws inspiration from diverse

[82] A Smeulers, 'A Criminological Approach to the ICC's Control Theory' in KJ Heller, F Megret, S Nouwen, JD Ohlin and D Robinson, *Oxford Handbook on International Criminal Law* (OUP, 2020), noting the special responsibility of those persons who create the conditions in which ordinary law-abiding persons commit mass atrocities.

[83] A Smeulers, 'Why International Crimes Might Not Seem "Manifestly Unlawful" to Low-Level Perpetrators' (2019) 17 JICJ 1.

[84] In Chapter 4 I discuss the multiple possible underpinnings of principles.

[85] Drumbl, *Atrocity*, above, at 5, 19, 23, 123, 198; Osiel, *Making Sense*, above, at 8; Aukerman, 'Extraordinary Evil', above, at 41; Sepinwall, 'Citizen Responsibility' above, at 233.

legal systems and traditions, and seeks to identify widely-shared principles rather than a regional conception.[86]

There is a potentially powerful objection to this aspiration. Some will argue that fundamental principles (liberal principles, deontic constraints) are irreducibly 'Western', and hence that a cosmopolitan account based on widely shared human concerns is impossible. This issue is too enormous to address adequately here. Many entire volumes have been written on the 'universalism versus relativism' debate in the human rights context; I cannot purport to resolve the similar question around fundamental principles here. I aim merely to sketch out what I believe would be the two main lines of response to this challenge.[87]

The first line of response is empirical: it would question the premise of the 'provenance' argument. Is it really true that concerns about fair warning and personal culpability are preoccupations only of the West? Or are such concerns sufficiently basic and plausible as to be widely shared? For example, in the negotiation of the Rome Statute, delegates from all regions and legal traditions exhibited a shared commitment to principles such as legality and personal culpability.[88] The standard counter-argument is that the delegates may have reflected a Westernized elite. The response in turn is to point to a survey of domestic systems, which indicates that the principles seem to have recognition and support across traditions. The counter-argument is that liberal principles of criminal justice are still Western in origin and were imposed and exported during

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[86] K Appiah, *Cosmopolitanism: Ethics in a World of Strangers* (WW Norton & Company, 2006) at 151 and see also 57-71 (cosmopolitanism is not universalism; it merely requires sufficient overlaps in vocabularies for a conversation; it is possible to agree on a practice even if not agreeing on justifications). In the same inclusive spirit, see K Ambos, 'Toward a Universal System of Crime: Comments on George Fletcher's *Grammar of Criminal Law*' 28 *Cardozo Law Review* 2647, at 2653-2654.

[87] In particular, I am not attempting to prove that fundamental principles are 'universal'. Proving an empirical universal is in any event impossible. I am advancing two lines of thought that should be considered in further conversation on these issues.

[88] See e.g. P Saland, 'International Criminal Law Principles', in R S Lee (ed), *The International Criminal Court: The Making of the Rome Statute* (Kluwer, 1999), 189 at 194-195 ('never a contentious issue'); B Broomhall, 'Article 22, *Nullum Crimen Sine Lege*', in O Trifterrer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article,* 2nd ed (Beck, 2008), 713, at 715 ('widespread agreement' on need for clarity, precision and specificity in accordance with principle of legality and that fundamental principles of criminal law should be clearly set out in the Statute); D Piragoff and D Robinson, 'Article 30' in O Triferrer, *ibid.*, 849, at 850 (general view that no criminal responsibility without *mens rea*); S Lamb, 'Nullum Crimen, Nullum Poena Sine Lege' in A Cassese et al (eds), *Rome Statute of the International Criminal Court: A Commentary* (OUP, 2002), 733, at 734 (viewed by most delegates as self-evident) and 735 (relatively little controversy).

waves of colonization. It is normally around here that the debate bogs down into an unresolved stalemate.

What I wish to point out is that the provenance objection is on shakier ground than is commonly assumed. Historical evidence indicates that the institution of criminal law generally, as well as restraining deontic principles, developed in multiple regions and cultures long before they emerged in Europe. Thus, these practices and principles may reflect more widely-shared human ideas about justice than is commonly assumed.

For example, Egypt had a system of criminal law as early as 3000 B.C., which featured written prohibitions and an act requirement and a fault requirement for personal culpability.[89] The Egyptian system also had procedural safeguards presaging those we would recognize today (a high standard of proof, due process, right to be heard, right to reasons for decision, and public trials).[90]

Similarly, Islamic law has also long featured criminal law, including the principle of legality (non-retroactivity)[91] and the principle of personal culpability.[92] Taymor Kamel debunks the view that the legality principle is a Western invention as a factually incorrect and Eurocentric view. Kamel shows the principle's long prior roots in Islamic criminal law.[93] Similarly, in Islamic law the requirement of personal culpability is considered 'as old as the law itself'', and includes familiar facets such as intent, fault, exculpating conditions, and an age of discretion (capacity).[94] Under Islamic law, a person cannot be

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[89] R VerSteeg. 'The Machinery of Law in Pharaonic Egypt: Organization, Courts, and Judges on the Ancient Nile' (2001) 9 *Cardozo J of Intl & Comp Law* 105; J.G. Manning, "The Representation of Justice in Ancient Egypt" (2012) 24 *Yale J. L. & Human Rts*. 111 esp at 112; David Lorton, "The Treatment of Criminals in Ancient Egypt: Through the New Kingdom" (1977) 20 *Journal of the Economic and Social History of the Orient* 2 esp at 5 and 13-14. The *content* of the principles was certainly not identical to those that are familiar today. For example, the ancient Egyptian system at times allowed for punishment of the convicted person's family. See eg Lorton, 'Ancient Egypt' at 14. At this point, I am simply demonstrating that constraining principles were a concern in more than one region; in Chapter 4, I will deal with the more granular topic of different approaches to the precise content of the principles.

[90] VerSteeg, 'Pharaonic Egypt' at 109-124; Manning, 'Ancient Egypt' at 113; Aristide Théodoridès, "The Concept of Law in Ancient Egypt" in J.R. Harris, *The Legacy of Egypt* , 2d ed. (Clarendon Press, 1971) 291-322.

[91] S Tellenbach, 'Aspects of the Iranian Code of Islamic Punishment: The Principle of Legality' (2009) 9 *Intl Crim L R* 691; F Malekian 'The Homogeneity of the International Criminal Court with Islamic Jurisprudence' (2009) 9 *Intl Crim L R* 607; M. Cherif Bassiouni, *The Shari'a and Islamic Criminal Justice in Time of War and Peace* (OUP, 2013) esp at 123-130.

[92] Malekian, "Islamic' above, 608-611; Bassiouni, *Shari'a,* above at 130-132.

[93] Taymor Kamel, 'The Principle of Legality and Its Application in Islamic Criminal Justice', in M.C. Bassiouni, ed, *The Islamic Criminal Justice System* (Oceana Publications, 1982) esp at 150.

[94] Malekian, "Islamic' above, at 608-611.

held vicariously responsible for acts of family members, but only for his or her own conduct; 'criminal responsibility is individual, nontransferable, and based on the conscious intentional conduct of a person in full possession of his/her mental faculties and who is not acting under … exonerating conditions'.[95]

China also had criminal law as early as the 11th to 8th century BC, with royal instructions requiring local rulers to make accessible the laws on offences and punishments and 'to ensure that officials apply the existing law and not on their own initiative introduce innovations'.[96] There followed in China a considerable legacy of codification and publication,[97] including placing descriptions of penal laws outside of the palace for the information of the public.[98] Ancient laws reflected not only the principle of legality but also the principle of culpability, including distinguishing intentional from accidental acts and mitigating punishment for the young.[99]

Such developments, millennia before Europe saw its 'enlightenment', cast critical doubt on claims that principles such as the legality or culpability principles can be credited to and ascribed to a single culture or region. On the contrary, the principles seem to have much deeper roots and broader appeal. The popular view that criminal law and these restraining principles are creations of the West seems to be not only uninformed, but also (ironically) an example of Eurocentrism. Indeed, the direction of influence may have been the opposite: European interest in written criminal law and personal culpability may have been inspired by the Egyptian legal system.[100]

Contemporary empirical evidence also casts serious doubt on claims that concern with personal culpability is a peculiarly Western preoccupation. Studies indicate that

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[95] Bassiouni, *Shari'a,* above, at 131.

[96] G MacCormack, *Traditional Chinese Penal Law* (Edinburgh University Press, 1990), 1-2.

[97] MacCormack, *Chinese Penal Law, ibid*, at 2-22.

[98] MacCormack, *Chinese Penal Law, ibid*, at 4.

[99] MacCormack, *ibid*, at 3, 10, 120, 128. Historical documents also show concern with due process (*ibid.*, at 2), equality before the law (*ibid.*, at 5) and that only those properly found guilty should be punished (*ibid.*, at 8). Of course, as in any system, actual practice often diverged from these aspirations (*ibid.*, at 8), but the point here is that the *principles* were articulated and valued. The most striking departure from personal culpability concerns the punishment of *relatives* of persons convicted for certain crimes (see e.g. *Ibid.*, at 9-10, 120-125). Interestingly, jurists of past centuries were concerned with this departure from personal fault; some sought to justify the practice with utilitarian arguments, and others used fault-based arguments (e.g. that the relatives knew of the planning of the crime). Commentators in the Ch'ing dynasty grounded punishment of family members in personal fault, by requiring proof of knowledge of the plotting. *Ibid*, at 124-125.

[100] Lorton, 'Ancient Egypt', above, at 2, Manning, 'Ancient Egypt', above, at 111.

widely-shared intuitions of justice across cultures reflect the principle of culpability. Popular intuitions of justice include quite subtle distinctions that track criminal law and (deontological) moral theory.[101] Cross-cultural studies show a remarkable confluence of intuitions in subjects from the USA, China, Puerto Rico, India, Indonesia, Iran, Italy and Yugoslavia.[102] Similarly, anthropological work suggests that very basic concepts of responsibility are quite widely shared.[103] Such findings provide further reason to at least hesitate about the claim that fundamental principles are merely 'Western' artifacts. They might instead be rooted in common sense and widely-shared moral reasoning.

The more salient fault line in approaches to penal sanctions is arguably not between 'the West and the rest', but rather between small and large social groups. Smaller social units appear more likely to adopt 'traditional' or restorative justice (focusing on problem-solving and restoring communal harmony, with varying degrees of procedure and formality),[104] whereas larger social units (towns, cities, kingdoms) tend to adopt more formalized criminal justice. Importantly, this pattern of developing criminal law once a society reaches a certain size and complexity emerges in different regions and cultures.[105]

Thus, the historical, anthropological and sociological evidence gives considerable reason to doubt the empirical premise of the cultural 'ad hominem' argument. At minimum, in light of the evidence, some burden must fall on those who claim that the

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[101] P H Robinson and R Kurzban, 'Concordance and Conflict in Intuitions of Justice', (2006-7) 91 *Minnesota Law Review* 1829; P H Robinson, 'Natural Law & Lawlessness: Modern Lessons from Pirates, Lepers, Eskimos, and Survivors' (2013) *U Illinois L Rev* 433.

[102] P H Robinson and R Kurzban, 'Concordance', ibid, at 1863-64. Studies tracked, for example, assessment of relative seriousness of wrongdoing and deserved punishment. There was also cross-cultural convergence with respect to exculpatory principles: Ibid., at 1864-65.

[103] D E Brown, *Human Universals* (McGraw-Hill, 1991), an anthropological work, finds that humans in general seem to punish and sanction infractions (at 138), to recognize personal responsibility and intentionality (at 135 and 139), and to distinguish actions under control from those that are not (at 135).

[104] As Val Napolean and Hadley Friedland argue, writing on indigenous legal traditions is 'fraught with stereotypes, generalizations, oversimplifications and reductionism'; indigenous laws are often 'reduced to over-simplified, idealized foils to critique state criminal justice systems within academic literature.' Val Napoleon and Hadley Friedland, "Indigenous Legal Traditions: Roots to Renaissance" in Markus D. Dubber and Tatjana Hörnle, eds, The Oxford Handbook of Criminal Law (OUP, 2014). The supposed dichotomy between 'Western' and 'non-Western' justice is at least sometimes overstated: Fisher, *Moral Accountaibility,* above, at 144-164.

[105] See eg. Shaun Larcom, 'Accounting for Legal Pluralism: The Impact of Pre-Colonial Institutions on Crime' (2013) 6 *Law and Development Review* 25; Y Liu, *Origins of Chinese Law: Penal and Administrative Law in its Early Development* (OUP 1998) at 19. Other social conditions may also influence the adoption of formal criminal law; for example, written language is of course a precondition of codified criminal law. See eg. Ernest Caldwell, "Social Change and Written law in Early Chinese Legal Thought" 32 Law and History Review 2014) 1.

legality and culpability principles are merely Western constructs, to offer at least some substantiation of the claim.

The second line of response is normative. Rather than investigating the empirical *origins* of fundamental principles, one would shift to their *merits*, and ask whether there is any attractive alternative. Scholars have rightly raised the possibility that support for fundamental principles may be culturally conditioned, but such scholars seem to be generally flagging a hypothetical *possibility* of disagreement with the principles, as opposed to *actually disagreeing* with them. In other words, does anyone actually advocate a criminal law system that punishes human beings without regard for culpability?[106] If so, we should get the arguments on the table so that they can be discussed. Is that a normatively feasible proposition? Would such doctrines be coherent with the enterprise of ICL? Hopefully, as the conversation continues and broadens over time, we will see whether the disagreement is purely a hypothetical one, or whether there are actually substantive arguments for punishment without culpability. I suspect that the much stronger case will be for respecting the culpability principle, even if there are some disputes about the boundaries of the principle.

I do not know how these empirical and the normative debates will end. My point here is that the naked assertion that the principles are Western is not sufficient to close down the debate. There are strong reasons to doubt the claim, and further empirical and normative considerations would have to be addressed. At present, there is not enough of a reason that we should stop *trying* to figure out what the constraints of ICL should be.

The three most plausible objections to the proposed conversation are as follows. First, one could object that the shared recognition of these principles only sounds plausible because it is at a high level of generality, and that legal traditions diverge when they articulate the principles in more detail. However, my point is precisely to distinguish between these levels of generality. Here, I am addressing objections to the constraint of culpability as even an appropriate *general* concern. Once we agree that culpability matters, we *then* turn to the more precise task of formulating the content of the constraint.

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[106] One could also note, rightly, that there are traditions that do not employ 'criminal law' as it is now commonly understood. My topic in this book however is on the *constraints* of criminal law; i.e. once a decision is made to use criminal law, what are the constraining principles? So, the question here is whether people advocate criminal law that does not respect culpability or legality, and if so, what are the arguments for disregarding those principles (or replacing them with others).

At this more granular level, we consider the divergent formulations, as they show us solutions worked out through experience, and awaken us to different traditions of thought. This more granular analysis is discussed in Chapter 4. What I am establishing here is that culpability matters and is worth exploring.

Second, one could rightly warn that the language of cosmopolitanism has often been used, both advertently and inadvertently, as a mask for hegemony.[107] The point is sobering, but it is an objection to *failed* cosmopolitanism; it not a reason to decline to even *attempt* a genuine cross-cultural cosmopolitan conversation.

The third and weightiest difficulty is that much of the available academic and legal writing about fundamental principles does indeed come from a Western perspective. Given the structural inequality of the world today, this is unfortunately the case for most topics. As a result, it will be difficult to disentangle any biases rooted in a particularly Western philosophical outlook, particularly for those of us raised in a Western culture. That difficulty is daunting indeed: how do we contend with potential biases that may permeate our source materials and shape our own outlook and assumptions?[108] Unfortunately, this risk of undetected biases arises in almost all of our intellectual endeavours. The alternative to *trying* is to give up. If we say that a possibility of undetected bias should make us stop, then that policy would end almost all inquiries into almost all topics. Abandoning the effort to identify the constraining principles seems more ethically untenable than at least *trying*.

In almost all major undertakings, we have the unenviable problem that we have to be wary of our presuppositions and the almost impossible task of sorting our sound ideas from our cultural conditioning. In Chapter 4, I will discuss these problems. All we can do is work with the best evidence and best arguments that we have, with caution about our assumptions, and with open-mindedness to other perspectives. I will discuss this revisable, fallible, and human conversation as the best (and probably only) available way forward, given uncertain starting points.

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[107] See e.g. M. Koskenniemi, '*Humanity's Law,* Ruti G. Teitel', (2012) 26 *Ethics & International Affairs* 395 (book review); R Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Wiley, 2002) at 47-48.

[108] The problem is also touched upon in H. Christie, 'The Poisoned Chalice: Imperial Justice, Moral Relativism, and the Origins of International Criminal Law, (2010) 72 *University of Pittsburgh Law Review* 361 esp at 366 and 382-385 and in Mani, *Beyond Retribution,* above at 47-48. On the problem and opportunity of inevitably coming from some cultural context, see P Bourdieu, 'Participant Objectivation' (2003) 9 *Journal of the Royal Anthropology Institute* 281.

3.4 IMPLICATIONS

In this chapter, I argued that fundamental principles do matter in ICL, even though ICL deals with some extraordinary contexts. I also argue that we do not necessarily need to replicate the formulations of principles found in national law; we can examine what the deontic commitment to individuals entails in the new contexts of ICL.

Thus, one can agree with the best insights of the liberal critique and the critique of the liberal critique, provided that some caveats are made to each. A synthesis is possible that acknowledges the often-distinct contexts of ICL and yet still requires fidelity to an underlying deontic commitment. ICL should not uncritically replicate principles from national systems, nor should it uncritically abandon them.

Engaging with common critiques of liberal accounts helps light the way to a nuanced and humanistic liberal account. I have emphasized the 'humanity' of principles in multiple senses. First, principles are not just arbitrary stipulations of positive law; it is recognition and respect for the humanity of subjects of the system that requires us to uphold the underlying deontic commitment. Second, an account can engage with the subtleties of human experience, including collective action and social context. Third, an account can engage in genuine inquiry into widely shared human concerns.

In Chapter 4, I will explain the 'coherentist' methodology for discussing principles. I argue that we need a conversation that draws on the broadest range of clues for inspiration, including patterns of legal practice as well as normative arguments.

In Chapter 5, I outline some of the questions raised by ICL that may be explored by this approach. ICL presents some new and interesting problems, whose investigation might generate new and interesting answers. I argue that this approach might, in addition to shedding light on ICL, also have exciting implications for general criminal law theory. The study of abnormal situations can help us discern conditions and parameters embedded in what we thought, based on our everyday experience, to be elementary principles. Doing so helps us to develop a theory that is truly more 'general'. ICL problems may help us to discover that formulations of principles that seemed basic are actually contextually contingent manifestations of a deeper deontic commitment.

04

Fundamentals Without Foundations

OVERVIEW

In Chapter 3, I discussed why we may need to reconsider familiar formulations of fundamental principles when we apply them in new contexts. For example, what does the legality principle require in a system without a legislature? What does the culpability principle require in contexts of collective violence? In this chapter, I ask how we might even embark on such evaluations. How would we go about formulating and evaluating the principles themselves?

A typical and commendable scholarly reflex would be that we must 'ground' our analysis in a secure foundation. In other words, we should be able to show that each proposition is justified by deeper premises, and those premises if challenged should in turn be demonstrably justified, until we reach a bedrock that is certain and self-evident or agreed by all. In this way, we would know we have reached the 'correct' deductions.

In this chapter, I show the infeasibility of rooting fundamental principles in secure moral foundations. We do not have an uncontroversially 'correct' foundational moral theory, and furthermore the comprehensive moral theories tend to lack the precision to dictate answers to most granular problems. Happily, this absence of bedrock does not mean that we must abandon thoughtful, rigorous discussion of fundamental principles.

I suggest a non-foundational approach, using a coherentist method: we do the best we can do with the available clues and arguments. The clues include patterns of practice, normative arguments, and casuistically-tested considered judgments. We can work with 'mid-level principles' (principles intermediate between practice and foundational theories) to carry out fruitful analytical and normative work.

The coherentist approach accepts that our principles are human constructs, that our starting points are contingent, and that we have no guarantees of 'correctness'. Nonetheless, it is important to *try* to determine whether institutions are just, using the best available methods that we have. Discussion of fundamental principles is not a matter of ethical computations; it is a *conversation.* It is a *human* conversation, a *fallible* conversation, and nonetheless an *important* conversation. I also argue that coherentism offers the best explanation of the method of most criminal law theory: in other words, it is the best theory of criminal law theory.

4.1. TERMS: FUNDAMENTALS AND FOUNDATIONS

I should explain some terms. I use the term 'fundamental principles' in the same way it is used in criminal law scholarship and jurisprudence: principles such as legality or culpability that are found to be fundamental within the legal system. The principles are 'fundamental' in comparison with other rules and doctrines in the system. By 'foundations' I mean ultimate bedrock justifications for beliefs; in ethical discourse the term is also used to refer to general comprehensive moral theories. My point is that we can make meaningful progress in discussing and refining fundamental principles of a criminal justice system without resolving ultimate moral questions, without necessarily subscribing to one of the main comprehensive theories, and without having to decide which comprehensive theory is the 'right' one.

I also use the term 'mid-level principle', but in doing so I am not drawing a hierarchy between 'fundamental' and 'mid-level'. I am simply adopting terms used in two bodies of literature. In ethics literature, the term 'mid-level principles' refers to principles that are arguably immanent within a body of practice. Mid-level principles are analytically useful, because they help explain and systematize the practice, and also normatively convincing. They are 'mid-level' because they mediate between legal practice and the foundational moral theories; they are more general than the former and more concrete than the latter. My argument is that fundamental principles of criminal justice, and our specific formulations of those principles, can be fruitfully analyzed as 'mid-level principles' in this broader sense.

4.2. WHERE CAN WE FIND FUNDAMENTAL PRINCIPLES?

As I discussed in Chapter 1, there are two distinct reasons why it is valuable to formulate the constraining principles as best we can. First, if we neglect or *understate* a fundamental principle of justice, we breach a commitment of fair treatment owed to the individual: we are treating the person unjustly. Second, and conversely, if we *overstate* a fundamental principle, we are being unnecessarily conservative; we are sacrificing social desiderata when no deontic constraint requires us to do so. It is 'bad policy', because we are failing to fulfill the societal aims of the system for no reason. Thus, we have both deontological and consequentialist reasons to develop plausible accounts of fundamental principles: it can help avoid unjust treatment, and it also helps develop better policy.

But where do look to find those principles? The literature commonly refers to two principles – culpability and legality – but how do we know to accept those two principles? How would we determine if there might be others? Where do we turn to see how to formulate their specific requirements? By 'formulations', I mean the articulations of specific implications. For example, does the legality principle require written legislation or can other notice suffice?[1] Does the culpability principle require some causal contribution to a crime, and if so, how much contribution is enough?[2]

At present, when ICL literature invokes or articulates a principle, it draws on any of three sources of reference: (1) formulations in *ICL authorities*; (2) induction from *national legal systems*; and (3) deduction from *philosophical argument.* Each of these three sources of reference is routinely invoked in ICL scholarship and jurisprudence. The way that all three are freely invoked may at first seem haphazard, but I will suggest below that the recourse to these reference sources is justified and appropriate, and that coherentism is actually the best explanation for how these reference sources are employed.[3]

First, however, in order to show that there are no simple and certain sources or methodologies available to us, I will inspect each source in isolation to demonstrate that each has strengths and weaknesses. We are going to see two recurring problems. One problem is the tradeoff between positivity and normativity. By 'positivity', I mean

[1] Chapter 5.
[2] Chapter 6.
[3] See below § 4.4.

recognized legal applicability and ascertainability, and by 'normativity', I mean the degree of convincingness that we 'ought' to recognize the principle. The second problem is the lack of a reliable foundation even for a purely normative conversation.

For greater certainty, let me specify that the methodology I propose below does not purport to *escape* all of these problems. Rather, I am simply demonstrating need for a methodology that openly acknowledges and responds to these problems. I will advocate a method that embraces non-certainty and non-simplicity, that strives to identify and test the weaknesses inherent in each source of reference, and that gives us tools for helpful deliberation despite these challenges.

4.2.1. First Source of Reference: Internal Formulations

The first source of reference is to use the articulations of principles as recognized in ICL jurisprudence itself (i.e. in its legal instruments and judicial pronouncements). It is an internal and doctrinal approach. For example, if we were debating the culpability principle, we might turn to the articulation of the principle in Tribunal jurisprudence, i.e. 'a person can only be held responsible for a crime if he contributed to it or had an effect on it'.[4] Or, if we were debating the requirements of non-retroactivity and the legality principle in an ICC case, we might invoke the terms enshrined in the ICC Statute.[5]

The strength of this approach is its 'positivity'. The principles are clearly legally applicable in ICL, because ICL itself says so. They are also relatively concrete, because we use the articulations provided in the authoritative pronouncements of ICL sources.

The weakness of this source is its limited normativity. The approach does not help at all with the question of whether ICL has adopted flawed or problematic understandings, or whether it ought to recognize other principles. In other words, we cannot use ICL understandings as a yardstick to *critically evaluate* ICL understandings. A purely internal approach also does not help us in liminal cases, where we need to further

[4] *Prosecutor v Tadić,* Judgement, ICTY A.Ch, IT-94-1-A, 15 July 1999 ('*Tadić* Appeal Judgement') at para 186; *Prosecutor v Kayishema,* Judgement, ICTR T.Ch, ICTR-95-1, 21 May 1999, para 199.
[5] A person can only be held responsible for a crime that was, at the time of its commission, a crime within the jurisdiction of the ICC: Article 21-23, ICC Statute.

specify how a particular principle should be formulated. We need some external framework for these kinds of evaluations.[6]

Furthermore, a purely internal account cannot tell us how to resolve a conflict between a doctrine and a principle. From the standpoint of formal non-contradiction, a conflict between an ICL doctrine and an ICL principle can be resolved by reforming the doctrine, or by re-formulating or even rejecting the principle.[7] Internal non-contradiction does not tell us whether to reform the doctrine or to reconsider the current understanding of the principle.

The internal approach is nonetheless analytically valuable, because it can reveal *internal contradictions* between ICL doctrines and principles. Internal non-contradiction is an important value in its own right, and thus internal contradictions should be detected and corrected.[8] Nonetheless, we need some external benchmark in order to *specify* the recognized formulations, to *adapt* them, or to critically *evaluate* them.

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[6] To be more precise, the framework must be at least *partly* external, in order to be able to question critically the internally adopted formulations. The account I propose below draws on both internal and external inputs. Furthermore, while simple *consistency* does not tell us which way to redress a conflict, I argue below that broader *coherence* gives significantly more guidance.

[7] As an illustration, consider for example the culpability principle and the command responsibility doctrine. Early ICTY jurisprudence went from the following premises to the following conclusion:

1. *ICL respects the culpability principle, which requires that the accused must contribute to or have an effect on a crime to share in liability for it.*
2. *However, under the command responsibility doctrine, the accused need not contribute to or have an effect on a crime to share in liability for it.*
3. *Therefore, the culpability principle's requirement of causal contribution apparently does not apply to command responsibility.*

Whereas I would have reached a different conclusion:

3. *Therefore, we should re-examine the command responsibility doctrine to bring it into conformity with the culpability principle.*

There are of course many subtle details to the command responsibility debate, and you might disagree with how I characterize the ICTY analysis. I will unravel all of that with great care in Chapter 6 (including the 'separate offence' characterization that later emerged). The point I am making here is simply that, on a pure *internal consistency* account, the first solution is not 'wrong'. Cases like *Čelebići* assumed rather insouciantly that there must be an exception within the fundamental principle, but in doing so they removed the apparent conflict, at least from the formal logical perspective of internal consistency.

You may object that, even on an internal consistency account, there is still a formal problem with the Tribunal's chain of reasoning. Namely, it misunderstood the proper 'hierarchy' between fundamental principles and doctrines when it took the doctrine as the fixed point and assumed an exception in the principle. That could be a correct critique of the *reasoning* in this instance. But the *outcome* of re-interpreting the principle is not necessarily always wrong, if it is done after careful deontic analysis.

[8] Of course, any dynamic living legal system is a field of contestation, absorbing new values over time, and thus, contradictions will arise incidentally as components change. Nonetheless, contradiction cannot be a desideratum of any legal system, and coherence must be a systemic goal.

4.2.2. Second Source of Reference: Induction from National Systems

The second source is of reference to derive principles and their formulations by induction from the national legal systems of the world. ICL jurisprudence often canvasses national systems for guidance; for example, in the *Erdemović* case at the ICTY, the judges surveyed national systems to see if there was a common approach as to when duress is an excusing condition.[9] In the *Lubanga* case, chambers adopted the 'control theory' as a basis to distinguish principals and accessories, noting inter alia that the approach is applied in numerous legal systems.[10] Scholars and jurists frequently employ induction from national systems when articulating fundamental principles.[11]

This approach has *intermediate* levels of positivity and normativity. As for positivity, the 'general principles of law derived… from… legal systems of the world' have recognized legal applicability: they are a well-accepted subsidiary interpretive source of ICL.[12] This technique, adapted from general international law,[13] involves a survey of national systems to identify commonalities that can then guide the international system. General principles also offer some level of concreteness, since there is a broadly agreed methodology drawing on objectively ascertainable data.

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[9] *Prosecutor v Erdemović,* Judgement, ICTY A.Ch, IT-96-22-A, 7 October 1997 ('*Erdemović* Appeals Judgement') and see more detailed discussion below, §5.2.2. In that case, there was too much discrepancy between national approaches to extract a general principle on the issue in dispute (whether duress was available for murder).

[10] See eg. *Prosecutor v Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, ICC PTC, ICC-01/04-01/06, 29 January 2007, para 330.

[11] Examples of drawing on national systems for guidance are innumerable; as illustrations see S Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing' (2009) 99 Journal of Criminal Law and Criminology 857 esp at 879-881, canvassing national approaches to *nulla poena sine lege*; K Gallant, *The Principle of Legality in International and Comparative Criminal Law* (CUP, 2009); K Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part* (OUP, 2012) at 88 (legality) and 94 (culpability).

[12] See eg. ICC Statute, Art. 21(1)(c); '*Erdemović* Appeals Judgement', Opinion of Judges McDonald and Vohra, paras. 56-72. The ICC Appeals Chamber has held affirmed the value of drawing inspiration from national legal systems: '[T]he Appeals Chamber considers it appropriate to seek guidance from approaches developed in other jurisdictions in order to reach a coherent and persuasive interpretation of the Court's legal texts. This Court is not administrating justice in a vacuum, but, in applying the law, needs to be aware of and can relate to concepts and ideas found in domestic jurisdictions.' *Prosecutor v Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr Thomas Lubanga Dyilo against his Conviction, ICC ACh, ICC-01/04-01/06-3121-Red, 1 December 2014. In that particular case, the method was not a general survey of systems, but rather a reference to German legal thinking, on the grounds that it offered a convincing normative theory that fit well with the ICC Statute and with the nature of the crimes before the Court, as a basis to distinguish principals and accessories. This approach matches the coherentist method discussed below in this chapter.

[13] ICJ Statute, Article 38(1)(c).

However, the positivity is only 'intermediate', because there are also significant limits. The immense difficulty of collecting the necessary data reduces the accessibility of this source. More problematically, the process requires that one *generalize* from many differing approaches of national systems, which reduces the specificity of the general principles and thus their concreteness in resolving specific issues. This is particularly a problem if national systems diverge on the precise question one is trying to resolve.[14]

Induction from national systems also has an intermediate level of *normativity*. On the one hand, there are good reasons to accord some normative weight to principles derived from national systems. After all, principles recognized across regions, cultures and traditions, and worked out based on decades or centuries of experience, offer an excellent guide to widely-shared intuitions of justice. They are a valuable reference point in informing our understandings of the proper constraints of the criminal sanction.[15]

On the other hand, there are also limits to that normative weight. One problem is that some national traditions will get 'double-counted' insofar as they exported their legal systems through colonization.[16] Thus, we cannot automatically assume that national principles reflect local intuitions of justice; we must be ready to examine biases and impositions of power that may have led to the predominant formulations.[17] Another problem is that, as discussed in Chapter 3, ICL operates in contexts that are often profoundly different from the 'normal' societal context in which the familiar formulations of principles evolved. So, even if every system in the world concurred in a particular formulation of a principle, that would not necessarily be a conclusive case for its absorption into ICL, because there could be morally salient differences. For example, even if every legal system in the world said that all criminal law must be written law,[18]

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[14] In addition to the limits on positivity noted here, general principles are only a subsidiarity interpretive source, ranking below an institution's basic instrument as well as any relevant treaty and custom. See e.g. Art 21(1)(c) ICC Statute, and see *Erdemović* Appeals Judgement, above.

[15] G Fletcher, *The Grammar of Criminal Law: American, Comparative and International,* Vol 1 (OUP, 2007) at 66-67 and 94 (comparative study can inform our philosophical inquiry; attempt to formulate principles that cut across legal systems; avoid parochialism); K Ambos, 'Toward a Universal System of Crime: Comments on George Fletcher's *Grammar of Criminal Law*', 28 *Cardozo L Rev* (2006-7) 2647 at 2647, 2649 and 2672; P H Robinson and R Kurzban, 'Concordance and Conflict in Intuitions of Justice', (2006-7) 91 *Minnesota Law Review* 1829.

[16] J Stewart and A Kiyani, 'The Ahistoricism of Legal Pluralism in International Criminal Law' 65 *American Journal of Comparative Law* (2017) 393.

[17] Stewart and Kiyani, 'Ahistoricism', ibid.

[18] They do not. Consider for example the UK, which still allows common law offences, as well as the many local regimes of customary law in the world. See e.g. D D Ntanda Nsereko, *Criminal Law in Botswana* (Kluwer, 2011) eg at 46; D Isser, ed, *Customary Justice and the Rule of Law in War-Torn Societies* (USIP Press, 2011).

that would not necessarily support a maxim that all criminal law systems in all circumstances must be based on written law. We might conclude instead that *lex scripta* is merely a manifestation of a deeper underlying principle (perhaps concerning notice or ascertainability), and the specific requirement of written legislation applies only under certain societal conditions. ICL, at least in its early phases, provides an interesting context to explore the possible unstated preconditions of the *lex scripta* requirement.[19]

Thus, the second source, induction from national systems, offers intermediate positivity and normativity. National formulations provide some guidance to widely-shared understandings of justice, worked out over time in diverse settings. However, we must be alert to possible biases in existing practice and formulations of principles, as well as possible inapplicability outside the familiar societal contexts in which those formulations were developed.[20]

4.2.3. Third Source of Reference: Deduction from Moral Philosophy

The third source of reference is to deduce conclusions from normative argumentation; for example, by appealing to basic moral commitments as to how persons should be treated. This is also a frequently-employed method; for example, when one invokes philosophical thinkers or school of thought,[21] or when scholars or jurists engage directly with moral questions of justice for the individual.[22]

This approach has the highest level of normativity, since it is purely a discussion about what we *ought* to do. The obvious problem with the third approach is, of course,

[19] For further discussion, see Chapter 5.

[20] For discussion, see Chapter 3.

[21] Examples abound, but one illustration among many would be George Fletcher drawing on ideas from Kant, Hegel, Fuller, Rawls, and so on, in order to flesh out normative arguments: G Fletcher, *The Grammar of Criminal Law: American, Comparative and International, Vol 1* (OUP, 2007).

[22] Again, examples abound, but illustrations would include the direct engagement with what can fairly be expected of a person under duress in the *Erdemović* case, or reflection on fair notice to the individual in the Nuremberg Judgment, or debates about the limits of personal culpability in command responsibility in the *Bemba* case. See eg. *Erdemović* Appeals Judgement, above, Dissenting Opinion of Judge Cassese, para 47-48; Judgment of the International Military Tribunal (Nuremberg), reproduced in (1947) 41 AJIL (supplement) 172 (arguing inter alia that the injustice of prosecution would be outweighed by the injustice of non-prosecution, and that the accused did have a form of notice of the illegality of their acts); *Prosecutor v Jean-Pierre Bemba Gombo,* Judgment Pursuant to Article 74 of the Statute, ICC T.Ch, ICC-01/05-01/08, 21 March 2016, in which each judge gave subtle analyses of the requirements of culpability (see further discussion below, Chapter 7).

the lack of positivity.[23] It can be difficult to show that any particular moral theory or philosophical argument is legally germane. And, of course, the enormous problem with many discussions of moral principles is the lack of concreteness. Further reducing the concreteness, there are many different theories and sets of values, and a lack of guidance as to which is 'correct' or at least authoritative.

Here we encounter a problem that is greater than the positivity-normativity tension. Suppose that we decide not to worry about legal 'positivity' at all: we wish to have a *purely normative* discussion. In other words, we want to discuss what the principles *ought* to be. We might decide, for the reasons discussed in Chapter 3, that we want to avoid assumptions based on formulations of principles in national systems, because they might be inapposite.[24] In this hypothesized conversation, we presumably want to be 'rigorous', and we might understand rigour in the traditional Cartesian way: that we should ground our conclusions in solid foundations. There are two major problems with that conception of rigour.

The problem of insufficient specification

When ICL scholars speak of the moral underpinnings of fundamental principles, the most frequently invoked underlying moral theory is that of Immanuel Kant.[25] Thus, our first thought might be to adopt that as our foundation: we will apply a Kantian analysis to assess whether new articulations of principles are justifiable in abnormal contexts. An attraction of Kant's deontological theory is that it purports to offer an objective, formal, rational, framework which is not dependent on empirical social,

[23] I use the term 'source of reference' to avoid any misunderstanding that I am suggesting that philosophical works are a formal source of law. I am saying, rather, that jurists and scholars routinely (and rightly) engage directly in moral reasoning when making arguments about what is entailed by fundamental principles.

[24] Chapter 3.

[25] I Kant, *Groundwork of the Metaphysics of Morals,* trans M Gregor (CUP, 1998)('*Groundwork*'); I Kant, *The Metaphysics of Morals,* trans M Gregor (CUP, 1996)('*Metaphysics*'). Some features of Kantian thought are that: we must act in accordance with maxims that can be willed as universal law (Kant, *Groundwork* at 15, 31 4:402, 4:421); we must treat individuals as ends and not solely as means (Kant, *Groundwork* at 37-38, 41 4:428-429, 4:433); therefore we can only punish where there is desert (Kant, *Metaphysics* 105 6:331); lawful external coercion is right where it is a response to hindrances of freedom (Kant, *Metaphysics* at 25 6:232); the system is reciprocal coercion in accordance with the universal freedom of everyone (Kant, *Metaphysics* at 26 6:232).

anthropological or cultural inputs.[26] This would be wonderful, as it would sidestep concerns and objections about social contingency or cultural imposition[27]: principles would be derived by logic from a priori premises applicable to all rational beings.

Alas, however, as we look at the conclusions reached by Kant under his methodology of pure reason, we notice that he happens to deduce many of the social institutions familiar in Germany in the 1700s, some of which we would today consider unjust.[28] It seems improbable that those arrangements were dictated by pure reason alone. I am not engaging here in the easy sport of criticizing historical figures for holding views typical of their era. Rather, I am showing the problem with Kant's claim that his theory was not based on empirical inputs (anthropological, sociological, cultural), and hence its promise of neutral rational objectivity. The fact that Kant happened to deduce familiar features of his own society strongly suggests that the process is *not* one of logically-necessary deductions from a priori axioms. Instead, there seems to be considerable gap-filling in deciding what is or is not a 'contradiction', and that gap-filling repeatedly draws on empirical presuppositions and contemporary normative opinions.

Of course, there is nothing wrong with the fact that moral reasoning depends on empirical presuppositions and will be influenced by contemporary values. I am simply pointing out the implausibility of the promise of apolitical, objective, logical deductions from a priori premises. A neutral, objective, system based on rational deductions from universally applicable premises would be wonderful for ICL, because it would avoid criticisms about culture and politics; unfortunately such a system is not available. Even the most ostensibly formal methodology appears to leave a vast latitude as to how one colours in the details.

The general formulas in moral foundational theories usually will not be granular enough to answer the comparatively narrow questions we will be asking about criminal

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[26] Kant, *Groundwork* at 1-3 (4:388-89)('a pure moral philosophy, completely cleansed of anything that may be only empirical'; 'does not borrow the least thing from acquaintance with [human beings] (from anthropology)', 20-23 (4:408-4:411) (not dependent on 'contingent conditions of humanity'; 'rest only on pure reason independently of all experience'; 'principles are to be found altogether a priori, free from anything empirical, solely in pure rational concepts and nowhere else even to the slightest extent'; 'not based on what is peculiar to human nature but must be fixed a priori by themselves'; 'all moral concepts have their seat and origin completely a priori in reason'; 'they cannot be abstracted from any empirical and therefore merely contingent cognitions').

[27] See §3.3.

[28] For example, approval of second class citizens (*Metaphysics* at 92 6:314-15), no right to vote for women (*Metaphysics* at 92 6:314-15) no right to resist even 'unbearable' abuses by ruler (*Metaphysics* at 96-97 6:320), head of state cannot be punished (*Metaphysics* at 104-5 6:331), mandatory death penalty for murder (*Metaphysics* 106 6:333).

law doctrines. For example, even if we agree that the personal culpability principle requires some 'causal contribution' to a crime, we might see multiple plausible formulations for that requirement (e.g. discernible minor impacts versus risk aggravation).[29] Most comprehensive moral theories will not generate 'answers' to questions of that level of granularity.[30] At best, such theories provide us with helpful ways of thinking about issues and bases for debating them. But our problem is even bigger than the lack of granularity in the moral theories; we also have different moral theories.

The problem of pluralism

An even bigger problem is that there are actually multiple plausible moral theories that could conceivably underpin the fundamental principles. Earlier I referred to 'deontic' commitments. I use the term 'deontic' (i.e. relating to a duty) as a succinct contrast to the relatively simplistic consequentialist arguments often seen in ICL (and national criminal law) argumentation.[31] I use the term 'deontic' to refer to principled constraints rooted in duties to the individual, which we would respect even if doing so does not optimize social welfare.

Given this framing, it is entirely understandable that our first thought commonly goes to the most famous deontological theory, that of Kant. But there are many other moral theories that might underlie and explain the fundamental principles. Within the deontological school of thought, we could turn instead to Hegel. According to Hegel, the criminal law repudiates a person's claim to be entitled to coerce others. On his account, a person has a 'right' to be punished, because it recognizes him as a moral and rational

[29] See §6.8.3.

[30] Of course, consequentalist theories may in the abstract purport to offer determinate answers. In theory there would be, for any given question (e.g. how to formulate a principle in ICL), an answer that in fact maximizes the desiderata of that theory (e.g. utility). But in practice the desiderata will never be perfectly measurable, and hence the problem of insufficient specificity and granularity remains.

[31] Utilitarian arguments in criminal law jurisprudence are often fairly simplistic and incomplete, because they focus on only one variable, namely crime prevention. For example, it is often argued in ICL that we need a broader inculpatory rule for general deterrence, to send a strong message, or to close 'loopholes' that would let accused persons 'escape conviction' (see Chapter 2). Of course, a more sophisticated utilitarian account would grapple with other long-term consequences. These would include the negative consequences of over-criminalization, 'chilling effects' on desirable behaviour, other legitimate social ends (e.g. security or military efficacy), or the optimally efficient limits for the reach of ICL. A more sophisticated consequentialist approach would *reduce* many of the divergences from deontological approaches. However, it would not *eliminate* them, because a true utilitarian would still, for example, punish the innocent if it served the greatest good over the long term.

actor.[32] Or, instead of traditional deontological theories, we could turn to *contractualist* theories to generate the basic principles of culpability and legality. A contractualist theory might look for principles that persons would adopt if they were laying down general rules when negotiating in the 'original position', behind a veil of ignorance as to their actual identity and circumstances.[33] Or, we might look for principles that could not be reasonably rejected by persons moved to find principles for regulation of human conduct that others, similarly motivated, could not reasonably reject.[34] Alternatively, one might adopt a *communitarian* theory and yet still share a commitment to these fundamental principles, if one's theory values autonomy and responsibility.[35] It is even possible that one could construct duty-like limits working within a *consequentialist* model. For example, one could conclude that a criminal justice system can only optimize its benefits in the long run if it posits, as a stipulation within the system, that its officials must strictly respect deontic constraints.[36]

Any of these moral foundational theories might underlie the principles of culpability and legality as we know them. In a liminal case, where we need to further clarify a fundamental principle, each theory might generate a different method of analysis and possibly a different answer. Accordingly, our aspiration of being foundationally rigorous is challenged by two problems: the malleability and imprecision within each moral theory and the plurality of plausible moral theories.

4.2.4 We Have No Reliable Foundation

As the foregoing shows, each of the three commonly invoked sources of reference for fundamental principles is inadequate. First, each source lacks in either positivity or normativity or both. Second, even if we decide to set aside positivity and have a purely

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[32] By coercing others, the person has recognized for himself a law permitting violation of the freedom of another, and thus has authorized application of that law to himself. GWF Hegel, *Elements of the Philosophy of Right,* A Wood, ed, (CUP, 1991) at 126-27 (§ 100).
[33] J Rawls (edited by E Kelly), *Justice as Fairness: A Restatement* (Harvard University Press, 2001) at 14-18.
[34] T M Scanlon, *What We Owe to Each Other* (Harvard University Press, 1998).
[35] N Lacey, *State Punishment* (Routledge, 2002) e.g. at 188.
[36] J Rawls, 'Two Concepts of Rules' (1955) 64 *Philosophical Review* 3. Or, one could argue – given the difficulty of calculating utility in all cases, as well as problems of dangerous precedents and slippery slopes – that second-order 'rules', including 'maxims of justice', should be followed as they generally advance utility, even if they do not do so in a particular case. J S Mill, 'Utilitarianism', in M Lerner, ed, *Essential Works of John Stuart Mill* (Bantam Books, 1961) 189 at 226-248.

normative discussion about how we *ought* to understand the principles, we are still stuck without a reliable, uncontroverted normative foundation.

A common, even classic, scholarly expectation is that normative analyses and prescriptions should be grounded in some convincing ethical theory. This chapter is, in part, a reaction to the common attitude that there is something suspect or incomplete about a normative argument that is not rooted in a comprehensive theory. In academia, it is common for scholars to select and adhere to one or the other of the main traditions (e.g. Kantian, Hegelian, contractarian, rule utilitarian, etc.) and then offer analyses from that tradition. Such approaches can, of course, offer valuable contributions. However, the problem is that any analyses offered from one particular tradition can be rejected as unconvincing or unproven by any interlocutor who rejects that tradition. As a result, the quest for certain grounding (and of having to declare allegiance to a foundational theory) immediately bogs down in an endless preliminary quest to establish which is the 'correct' foundational moral theory.

If I may state explicitly what is implicit in the classic expectation of certain grounding, the resulting methodology would be:

(1) Figure out which moral theory is the correct one;

(2) Extrapolate from that theory to the best principles of justice;

(3) Evaluate ICL using those principles.

Once the implicit expectation is stated explicitly, it can be readily seen that this is not a feasible approach. After some millennia of trying, we have not determined the 'correct' moral theory, and there is good reason to be skeptical that the answer is coming any time soon (or ever).

Yet there must be a way for us to at least *talk* about more practical ethical questions of the middle range, such as the justifiability of ICL doctrines. Surely we do not have to postpone conversation about fundamental principles in ICL until we first identify the ultimately correct moral theory. There are many issues and controversies to discuss here and now, concerning command responsibility, superior orders, aiding and abetting, co-perpetration, and so on. If we want to make our best efforts to ensure that people are being treated fairly, what are we to do?

4.3 FUNDAMENTALS WITHOUT FOUNDATIONS: MID-LEVEL PRINCIPLES AND COHERENTISM

There is a defensible, thoughtful alternative to starting with foundations. A better approach is to 'start in the middle'. [37] I will outline an account here that works provisionally with 'mid-level principles'. That approach falls within a broader 'coherentist' tradition, which sets aside the quest for certainty and for comprehensive foundations, and instead builds models that promote 'coherence' between the available clues. This account can enable valuable normative and analytical inquiry. I will argue that this is the best means of advancing the conversation in fruitful ways.

4.3.1 Mid-Level Principles

The conceptual tool of 'mid-level principles' came to prominence in discussions of ethics,[38] and has been fruitfully applied in legal contexts, such as tort law and intellectual property.[39] Mid-level principles *mediate* between foundational moral theories and a specific body of practice (e.g. legal doctrines). They are 'mid-level', because they are more abstract and general than specific rules and doctrines, and they are more specific and concrete than comprehensive moral theories. They are relatively discrete and accessible

[37] J Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (OUP, 2003) esp at 5-6.

[38] T Beauchamp and J Childress, *Principles of Biomedical Ethics*, 7th edition (OUP, 2012) (the first edition, working with mid-level principles, was published in 1979); M Bayles, 'Mid-Level Principles and Justification' in J R Pennock & J W Chapman (eds), *Justification* (New York University Press, 1986); M Bayles, 'Moral Theory and Application' in J Howie, ed, *Ethical Principles and Practice* (SIU Press, 1987); B Brody, 'Quality of Scholarship in Bioethics' (1990) 15 *Journal of Medicine and Philosophy* 161; Coleman, Practice of Principle, above; S Diekmann, 'Moral Mid-Level Principles in Modeling' (2013) 226 *European Journal of Operational Research* 132.

Indeed, the idea of mid-level principles has even earlier forerunners; it was foreshadowed for example by J S Mill, who noted 'much greater unanimity among thinking persons than might be supposed from their diametric divergence on the great questions of moral metaphysics... [T]hey are more likely to agree in their intermediate principles... than in their first principles.': J S Mill, 'Bentham' in *Utilitarianism and Other Essays,* A Reid, ed (Penguin Random House, 1987) 132 at 170. Interestingly, Kant also noted the value of 'intermediate principles' in helping to enable judgments about what deeper principles require: Kant, 'On a Supposed Right to Lie from Philanthropy' in Kant, *Practical Philosophy*, at 8:430.

[39] K Henley, 'Abstract Principles, Mid-Level Principles and the Rule of Law' (1993)12 *Law and Philosophy* 121; Coleman, *Practice of Principle*, above; R Merges, *Justifying Intellectual Property* (Harvard University Press, 2011); R Merges, 'Foundations and Principles Redux: A Reply to Professor Blankfein-Tabachnik', (2013) 101 *Calif L Rev* 1361. In tort law, Jules Coleman proposes that the immanent mid-level principle is corrective justice (wrongful loss, responsibility, repair). In intellectual property, Merges proposes that the mid-level principles include proportionality, efficiency, public domain, and dignity.

propositions, applying within a field of practice.[40] Mid-level principles are propositions that are arguably embodied in a body of practice (ie. they *analytically* fit) and also *normatively* attractive.[41] Mid-level principles can be supported by multiple foundational theories: people may agree on the mid-level principles even if they have different underlying reasons to do so. I suggest that the culpability principle and the legality principle can fruitfully be analyzed as 'mid-level principles' in this broader sense.[42]

One virtue of mid-level principles is *convergence*.[43] Participants in a field may agree on certain mid-level principles, even if they differ in their deeper underlying philosophical outlooks.[44] Different moral theories may support the mid-level principles for different reasons, but nonetheless overlap in supporting the principles. This convergence is like Rawlsian 'overlapping consensus'[45] or Sunstein's 'incompletely theorized agreements'.[46] Where such convergence exists, one can fruitfully work with mid-level principles without having to isolate the ultimately soundest basis for them. Of course, there may be some difficult liminal cases, where a principle must be further clarified to resolve the case, and where different underlying moral theories may generate different answers, and thus a choice must be made when specifying the principle. Nonetheless, the mid-level principles provide a valuable *starting point.* Moreover, for many problems of the middle range, mid-level principles are sufficient tools for valuable work, without need for recourse to deeper theories.[47]

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[40] P Tremblay, 'The New Casuistry', (1999) 12 *Georgetown Journal of Legal Ethics* 489 at 503.
[41] Coleman, *Practice of Principle*, above, esp. at 29. This is the same process as Dworkin's search for analytical 'fit' and normative 'value', at least in his earlier works such as R Dworkin, *Law's Empire* (Harvard University Press, 1986). Dworkin's approach is also coherentist (see below § 4.3.3) and see discussion of coherentism and Dworkin in A Amaya, *The Tapestry of Reason: An Inquiry into the Nature of Coherence and its Role in Legal Argument* (Hart, 2015) at 38 & 46.
[42] As noted in the introduction to this chapter, I am not drawing a hierarchy between 'fundamental' and 'mid-level': I am simply adopting the terminology used in two bodies of literature. I use the term 'fundamental principles' because that is the common terminology within criminal law and criminal law theory: the principles are fundamental within the system of criminal law. I use the term 'mid-level principles' because that is the terminology in the relevant ethics literature; they are at a 'mid-level' between comprehensive moral theories and the legal practice. My argument is that fundamental principles can be fruitfully analyzed as an example of mid-level principles.
[43] Henley, 'Mid-Level Principles', above, at 123 uses the terms 'convergence virtues' and 'practical virtues' ('practical virtues' refers to the relative concreteness of mid-level principles).
[44] Merges, 'Foundations and Principles', above, at 1364-1366.
[45] Rawls, *Justice as Fairness*, above, at 32-38.
[46] C Sunstein, 'Incompletely Theorized Agreements' (1995) 108 Harvard Law Review 1733.
[47] Bayles, 'Moral Theory', above, at 112; Merges, *Justifying,* above, at 9. See for example §6.8.3 and Chapter 7, querying the requisite level of foresight and the requisite level of involvement for the culpability principle.

A second virtue of mid-level principles is that they are more *specific* and concrete than general moral theories, and thus offer more *practical guidance* in a particular context.[48] General moral theories may be too abstract to generate ready answers to many specific problems.[49] For example, if we are wondering precisely what degree of causal contribution is required by the culpability principle, we will likely find that foundational reference points, like the categorical imperative or imagining an ideal conversation, do not generate sufficiently specific answers. Mid-level principles enable us to identify morally or legally relevant characteristics and to note specific normative questions both 'more dependably and more quickly' than we could if directly applying a foundational theory.[50]

A third virtue is that mid-level principles enable an inclusive, pluralistic conversation.[51] Mid-level principles can enable us to debate and often resolve certain concrete problems without first having to agree on ultimate questions of morality. A central theme in my thesis is that discussion of principles is a type of *conversation*. Working with mid-level principles can help facilitate that conversation. As Paul Tremblay observes that mid-level principles 'permit conversation through common language and agreement about normative terms'.[52] Similarly, Robert Merges describes mid-level principles as providing 'a shared language consistent with diverse foundational commitments';[53] they allow us to 'play together even if we disagree about the deep wellspring'.[54]

The relationship between moral theories, mid-level principles, and practice is not just a one-directional deductive chain. In other words, it is not simply that the moral theories support the principles and then the principles dictate the correct rules and outcomes. The interplay is more complex. For example, new cases, or seemingly anomalous bodies of practice, might lead us to reconsider, specify or alter our principles. For example, 'consideration of particular cases and policies can lead one to see effects on

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[48] Henley, 'Mid-Level Principles' above at 123.
[49] Coleman, *Practice of Principle*, above at 5 and 54.
[50] Henley, 'Mid-Level Principles' at 23.
[51] Sunstein, 'Incompletely Theorized', above, at 1746. Sunstein does not use the term 'mid-level principles'; he refers to 'incompletely theorized agreements' and 'low-level principles', but the idea is very much the same as the mid-level principles discussed here: see ibid at 1740.
[52] Tremblay, 'New Casuistry', above, at 504.
[53] Merges, 'Foundations and Principles', above, at 1364-5
[54] Merges, *Justifying,* above, at 11. In this connection, it is interesting that both Kant and Mill recognize the value of 'intermediate' principles: see above.

moral values and principles not adequately taken into account in the [prior] formulations of mid-level principles.'[55] Or, as Jules Coleman notes, we can use the principles to assess and guide the practice, but conversely the practice also *specifies, concretizes and clarifies* the principles, by applying them to new problems.[56]

Earlier I drew a contrast between 'positivity' and 'normativity'. Often, we might find that 'normativity' can be revealed in the 'positive' (i.e. the practice). In other words, patterns of practice worked out by actors seeking to do justice may reveal plausible implicit underlying conceptions of justice.[57] Thus, practice is not purely subordinate; practice is not merely the object to be *evaluated* by normative tools. The practice may also provide a *clue* helping us to reflect upon and revise the principles as we have formulated them. Accordingly, where a doctrine departs from our current best theory of the principles, there are two possibilities. In most cases, the analytically elegant and normatively sound conclusion will be that the outlying doctrine is problematic and should be harmonized with the principle. But it is also possible that the outlying practice could provide a normative insight that leads us to revise our understanding of the principles.[58] We would strive to identify which solution provides 'coherence' in the deepest sense, which can be a subtle and difficult question, as I will explain further in § 4.3.2 and § 4.3.3.

As I will develop further in the remaining sections, if we take mid-level principles as a starting point, then we can do various tasks, working 'upwards' or 'downwards',[59] and working analytically or normatively. Analytically, we can strive to articulate principles that provide the best descriptive 'fit', and which may be seen as unifying the practice, or at least helping to systematize or guide the practice. This analytical approach can also be used to identify aberrant doctrines (i.e. doctrines that contradict the

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[55] Bayles, 'Moral Theory', above, at 111.
[56] Coleman, Practice of Principle, above at 54-58.
[57] Of particular interest would be patterns of practice by actors with different foundational moral beliefs; where those patterns are consistent with a unifying principle, then that principle may reflect an overlapping consensus.
[58] In chapter 7, I will argue that command responsibility is an example of a seemingly anomalous doctrine that, on more careful inspection, reveals a useful insight about justice.
[59] I should offer a terminological clarification on the metaphor of 'up' and 'down'. In much of the MLP literature, ethical theories are described as 'up' above, and particular practices and cases are 'down', with MLPs in between. However, in literature on foundationalism, the imagery is of course that 'foundations' are below us, we 'dig down' to the 'deeper' 'underlying' theories so that our arguments are 'grounded.' For consistency, I am adopting the latter metaphor: thus the 'deeper', 'foundational' and 'underlying' moral theories are linguistically and metaphorically 'downwards', and conversely the doctrine is 'above', on the surface.

principles that appear to be immanent within the system). We can also work normatively, asking whether a particular understanding of a mid-level principle is normatively justified, or which of two candidate formulations is normatively 'better'. In liminal cases, the normative task may require descending into competing underlying moral theories in order to flesh out the principles or to choose between formulations.

My argument is that fundamental principles of justice in ICL (and indeed in criminal law) are most fruitfully approached as 'mid-level principles' as the term is used in the ethics literature. Notice that I am not saying that the *only* mid-level principles in criminal law are fundamental principles of justice (such as the culpability or legality principles); on the contrary there are many other organizing ideas in criminal law that are also best understood as mid-level principles.[60] I focus here on fundamental principles of justice because the aim of this thesis is to explore those principles; however, I believe that coherentism and mid-level principles offer an appropriate method for criminal law theory much more broadly.

4.3.2 A Coherentist Account

The proposed approach, of working with fundamental principles as 'mid-level principles', employs a 'coherentist' method.[61] In this section, I will explain the broader method of coherentism. To prevent mis-reading, I should make clear: working with 'mid-level principles' falls within the broader tradition of coherentism, but that does not mean that all of coherentism works with mid-level principles. Thus, when I say that science uses a coherentist method, that does not mean that science works with 'mid-level principles'. Coherentism is the broader category.

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[60] For example, the 'control theory', or any other theory for delineating between principals and accessories is not a 'fundamental principle of justice' but it is an important postulated organizing concept in ICL. Mid-level principles can be postulated at different levels of granularity and scope. In my view, works exploring the organizing concepts of ICL (or criminal law) are best understood as working with mid-level principles and a coherentist approach. For an example of such a methodology see JD Ohlin 'Second-Order Linking Principles: Combining Vertical and Horizontal Modes of Liability' (2012) 25 LJIL 771.

[61] Beauchamp and Childress, early advocates of the MLP approach, describe their approach as 'coherentist' (pp. 13-25 and 383-385, or see pp. 20-28 in the 6th ed). Coleman, adopting the mid-level principles approach in law, adopts a Pragmatist method, which falls within the coherentist tradition. Coleman, *Practice of Principle,* above, at eg. 6-8.

Coherentism seeks to advance understanding by reconciling all of the available clues as best as one can, without demanding demonstration of ultimate bedrock justification or comprehensive first-order theory. Indeed, the expectation that every proposition should be 'grounded' in an even deeper theory is ultimately unattainable and hence unsound.[62]

Coherentism is the main rival to foundationalism. Foundationalism is the more traditional understanding of justification, in which each of our beliefs should be supported by a more basic belief below (eventually reaching down, ideally, to a reliable bedrock or at least to axioms that are unquestioned).[63] A common metaphor for foundationalism is that the structure of justification is like a building: each floor relies on the floor below for support, until one reaches the foundation.[64]

Coherentism accepts that 'foundations' are not available. Our beliefs do not have to be, and cannot be, rooted in secure or comprehensive foundations. Instead, all we can do is develop models that best reconcile our beliefs and observations; we are given no guarantees of correctness. As William James has written, our beliefs 'lean on each other, but the whole of them, if such whole there be, leans on nothing.'[65] Where a new, inconsistent experience or observation arises, we modify our beliefs to try to reconcile them in coherent schema. We work with all of the available clues, to make them fit as best we can in a coherent understanding.

The foundationalist objection is that such a process sounds problematically circular: belief A supports belief B, and belief B supports belief A. However, that objection

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[62] 'If anyone really believes that the worth of a theory is dependent on the worth of its philosophical grounding then they would be dubious about physics and many other things.' R Rorty, *Consequences of Pragmatism: Essays: 1972 – 1980* (University of Minnesota Press, 1982) at 168.

[63] The classical foundational would be Descartes' effort in his *Meditations* to derive a set of beliefs from self-evident axioms. Some more contemporary foundationalist accounts are more moderate in that they only require basic beliefs to be 'prima facie' justified but defeasible. However, if such accounts allow a network of considerations to defeat a prima facie assumption, then it seems to me that the method is in the end a coherentist one.

Similarly, some foundationalist accounts could assert that their foundations are simply stipulated as an axiom. The challenge then arises when that axiom is plausibly questioned. Again, I think that the resulting conversation (as we debate the axioms themselves) has to be a coherentist one.

Moreover, any theory that acknowledges that it is rooted in stipulated premises can then be helpfully seen as a simple exploration of what might flow from a certain way of looking at things. For example, what flows if we start from a premise of securing equal freedom? What flows if we start from a premise of maximizing human flourishing? Those are perfectly interesting questions, that a coherentist method can draw upon as valuable *tools*, without accepting any such approach as the ultimately correct and conclusive framework.

[64] See e.g. R Fanselow, 'Self-Evidence and Disagreement in Ethics' (2011) 5 *Journal of Ethics & Social Philosophy*; Amaya, *Tapestry of Reason,* above, at 138.

[65] W James, *Pragmatism* (originally published by Longman Green & Co, 1907) at 113.

itself assumes a linear chain of justification.[66] Instead of the metaphor of a building, the coherentist metaphor is of a web.[67] The coherentist approach is not linear but *holistic:* it aims to refine a *system* of beliefs, rooted in observations and experiences. Our confidence increases the more that our beliefs reconcile experiences and inputs. For many, this approach of reconciling available clues and simply accepting foundational uncertainty may sound disturbingly insecure or even flimsy. I address three main objections (conservatism, uncertainty, and untidiness) below in § 4.3.3.

Perhaps it will provide comfort to recall that the coherentist method matches the scientific method: we form models, we make new observations, and we revise models to better reconcile all the available clues. For example, we can collect diverse clues from fossils, carbon dating, DNA of descendants, and geology, in order to improve our theories about the histories of species and their migration. Each clue in isolation should be approached with caution and skepticism, but we formulate models that best bring the available evidence into coherence, and our confidence in each clue and supposition is bolstered by its coherence with other clues.

One might object that morality is different from science: in science, there can be observations that clearly contradict a model, whereas morality involves more subjective appreciations. However, the methodological similarity is that we still draw on all the *clues* we can. We draw on our analytical application of theories, our intuitive reactions to concrete applications, and even the views and arguments of others, in order to test our ideas and to formulate the best understanding that we can with the available inputs.

Coherentism underlies not only the scientific method but also some normative theories. Examples include the philosophical tradition of pragmatism,[68] the Rawlsian method of reflective equilibrium,[69] and Dworkin's 'law as integrity'.[70] I will therefore cite scholars in each of these traditions for their insights concerning coherentism in general.

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[66] L BonJour, 'The Coherence Theory of Empirical Knowledge' (1976) 30 *Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition* 281 at 282-286; Fanselow, 'Self-Evidence', above; Amaya, *Tapestry of Reason*, above, at 145 & 535.
[67] Fanselow, 'Self-Evidence', above.
[68] See e.g. James, *Pragmatism,* above*;* J Dewey, *The Quest for Certainty: A Study of the Relation of Knowledge and Action* (Putnam, 1929); Rorty, *Consequences,* above; M Dickstein, ed, *The Revival of Pragmatism: New Essays on Social Thought, Law, and Culture* (Duke University Press, 1998); C Misak, *The American Pragmatists* (OUP, 2013).
[69] Rawls, *Justice as Fairness* above, at 29-32. Rawls' approach is coherentist; for example, he writes: 'A conception of justice cannot be deduced from self-evident premises or conditions on principles: instead, its justification is a matter of the mutual support of many considerations, of everything fitting together into one coherent view'. J Rawls, *A Theory of Justice* (OUP, 1999) at 19.
[70] Dworkin, *Law's Empire*, above, esp. at 225-275.

The coherentist approach is *anti-Cartesian* and *fallibilist*, meaning that it does not promise 'certainty'; it openly acknowledges that its conclusions are fallible.[71] Propositions (e.g. mid-level principles) are continually revisable based on new experiences and new arguments. At each juncture, we are formulating the best hypotheses we can to reconcile the available clues. Coherentism is a form of p*ractical reasoning.* It does not strive to unearth the ultimate moral truths; it aims to address concrete human problems and questions as best we can.

My proposed account readily acknowledges that the fundamental principles of criminal justice are *human constructs.* As William James noted, 'you cannot weed out the human contribution';[72] 'the trail of the human serpent is thus over everything'.[73] My account is *post-post-modern*: we acknowledge that each of these principles can be endlessly deconstructed but, rather than falling into nihilism, we are willing to provisionally work with the constructs. We are prepared to question the concepts, but we do not simply discard them all at the outset. After all, if we want to engage in ethical deliberation, then we need to start *somewhere.* We might as well start with the products of the human conversation to date. As Ronald Dworkin acknowledges, 'justice…has a history', and each re-interpretation of it 'built on the rearrangements of practice and attitudes achieved by the last'.[74] Thus, we can take available formulations of principles (for example, that the culpability principle requires that the accused participated in or facilitated a crime in order to be a party to it) as starting hypotheses. From there, we proceed with appropriate skepticism, ready to examine our biases and the historic contingency of current formulations. Thus we are prepared to argue for alterations to existing principles and ideas based on the best available arguments.

A core theme of this chapter is that analysis of principles of justice is not a set of moral deductions, applying some 'ultimate ethical algorithm'.[75] The coherentist accepts that we will not develop a mechanical procedure that can generate correct ethical answers to complex questions; there will always be an element of judgment, and hence

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[71] Dewey, *Quest for Certainty*, above.
[72] James, *Pragmatism*, above, at 110. He continues, 'Our nouns and adjectives are all humanized heirlooms, and in the theories we build them into, the inner order and arrangement is wholly dictated by human considerations, intellectual consistency being chief among them.' (110).
[73] James, *Pragmatism*, above at 30.
[74] Dworkin, *Law's Empire*, above, at 73-74.
[75] Tremblay, 'New Casuistry', above, at 504 (the quest for the 'ultimate ethical algorithm').

we need deliberation and conversation.[76] We work with human-created, fallible ideas and we do so with human-created, fallible processes. But that is the best and only process to try to discuss the normative justifiability of practices, laws and institutions. Thus, we should embrace the contingency, fallibility and humanity of the conversation. As Richard Rorty has argued, 'to accept the contingency of starting points is to accept our inheritance from, and our conversation with, our fellow humans as our only source of guidance.'[77] Reflecting these themes of humanity and fallibility, Rorty argues:

> Since Kant, philosophers hope to find the a priori structure of any possible inquiry or language or form of social life. If we give up this hope, we shall lose what Nietzsche called 'metaphysical comfort', but we may gain a renewed sense of community. ... Our glory is in our participation in fallible and transitory human projects, not in our obedience to permanent nonhuman constraints. [78]

My account is 'non-foundational', by which I simply mean I am not *relying* on any particular foundation. The account could perhaps even be described as foundationally 'pluralist'[79]: participants in the conversation can draw plausible arguments from different moral theories where they appear to be illuminating, even if we do not yet have a meta-theory that explains how those theories are ultimately tied together. Science does precisely the same; employing models in contexts where they are helpful, even if there are conflicts with other models that work in other contexts, until such time as better models emerge.[80]

My account is melioristic, meaning that I believe that we can *improve* our institutions, practices, doctrines and even our formulations of principles through thought and effort. While the principles may be human constructs, we can still strive to develop *better* human constructs. 'Better' is, of course, neither a simple nor certain matter to assess. 'Better' formulations are ones that better reconcile all the available clues and

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[76] Rorty, Consequences of Pragmatism, above, at 164.
[77] Rorty, *Consequences of Pragmatism,* above, at 166.
[78] Rorty, *Consequences of Pragmatism,* above at 166.
[79] Merges, *Justifying,* above.
[80] For example, utilitarian and deontological theories both seem to offer valuable insights into particular problems. It is sometimes argued that, because they are seemingly contrasting theories, it is untenable to invoke them both, without at least providing a unifying meta-theory. However, I do not think this is necessarily a problem. For example, suppose science offers two seemingly rival theories: that electrons are waves and that electrons are particles. Each theory is good for handling some problems, but poor for handling others. No one would chide a scientist for invoking each model to handle the problems they are suited for, even if she did not yet have a unifying meta-theory. On a coherentist model, she can justifiably proceed on the grounds, based on all the available clues, that both models seem to be valuable, and that there probably is a good unifying meta-theory even if it has not yet been articulated.

inputs, for example, by more elegantly reflecting the best understanding of what appear to be the underlying values.

In the proposed method, we can take existing mid-level principles (e.g culpability, legality) as provisional starting points. We can then further specify, adjust, or even add or remove principles, based on the best available arguments and inputs. Those inputs include moral theories, patterns of practice, and considered judgments (casuistically testing our sense of justice of the outcomes in particular cases, including hypotheticals.[81]) We seek 'reflective equilibrium': we move back and forth among formulations of principles and our considered judgments of their outcomes in particular cases, adjusting our constructs or re-evaluating our judgments, to reconcile them as far as possible.[82] We look for *deductive* coherence (whether formulated principles match with judgments in particular cases) and *analogical* coherence (whether judgments fit with judgments in analogous cases). More profoundly, we look for *deliberative* coherence, i.e. whether formulated principles cohere with the plausible accounts of the underlying values and goals of the system.[83] Indeed, the enterprise of law itself may entail recognizing persons as agents, and thus we would seek coherence with 'the inner morality of law'.[84] The coherentist method also seeks *elegance* and consilience. For example, a simple principle that convincingly explains multiple features of legal practice offers more explanatory coherence than a series of ad hoc stipulations.[85]

4.3.3 Possible Objections and Clarifications

In this section, I discuss the most important objections to coherentism, namely: (a) conservativism, (b) fallibility, and (c) untidiness.[86]

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[81] See Tremblay, 'New Casuistry', above. Markus Dubber explores the 'sense of justice', arguing that it involves empathic role-taking with others as fellow moral persons: M D Dubber, *The Sense of Justice: Empathy in Law and Punishment* (Universal Law Publishing, 2006).

[82] Rawls, *Justice as Fairness*, above, at 29-32.

[83] Proposals that improve the coherence between the constraints of a system and its aims have an increased plausibility: see e.g. J Gardner, 'Introduction' to Hart, *Punishment and Responsibility,* 2nd ed (OUP, 2008) at xii-xxxi (constraints and aims of punishment).

[84] L Fuller, *The Morality of Law* (Yale University Press, 1964); K Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (OUP, 2012).

[85] Amaya, *Tapestry of Reason*, above, at 394-96.

[86] There are many other possible objections; in the interests of space I am canvassing the strongest and most salient ones. For much more detailed analysis see Amaya, *Tapestry of Reason*, above, at 57-73, 143-44, 178-87, 308-310, 370-72, 410-412 and 532 (including as to whether coherence is truth-conducive and circularity objections).

(a) Conservativism: The most common initial objection to this method is that it sounds like it cannot be radical. After all, if we work with practice then we are just going to replicate the practice. However, this reaction under-estimates the ambitiousness of coherentism. Coherence is not mere superficial consistency. As I mentioned above, in a coherentist method of identifying the deontic principles, we draw on *all available clues*. We look at patterns of practice for clues about underlying insights of justice, which can include comparative analysis (looking at other jurisdictions, other areas of law, or possibly even other social practices). We look at normative arguments and practical reason, as well as intuition and considered judgments in casuistic testing. We seek coherence in the deepest sense with what appear to be the best understandings of the underlying values.[87] Thus, the coherentist method does not just replicate existing practice.

As Rorty argues, the holistic process of reconciling clues 'often does require us to change radically our views on particular subjects.'[88] Similarly, Dworkin responds to the conservativism objection by arguing that once 'we grasp the difference between [coherence] and narrow consistency' we may come to see that coherence 'is a more dynamic and radical standard than it first seemed', as it encourages us to be wide-ranging and imaginative in the search for deep coherence.[89]

I submit that that the coherentist process of testing incompatible beliefs and practices has engendered the numerous radical changes in human history.[90] Consider for example the abolition of slavery. Slavery was not abolished because someone proved its unsoundness through analytical deduction from an abstract construct, such as the

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[87] As noted above, there may be values and constraints implicit in the enterprise of law itself; for example, if law is predicated on treating individuals as responsible agents then its doctrines and principles should reflect that L Fuller, *Morality of Law*, above; K Rundle, *Forms,* above.

[88] Rorty, *Consequences of Pragmatism*, above at 168. See also M Sullivan and D J Solove, 'Radical Pragmatism' in A Malachowski, ed, *The Cambridge Companion to Pragmatism* (CUP, 2013) arguing that, although the pragmatist method is often perceived as 'banal', it can be radical in critically assessing both means and ends.

[89] Dworkin, *Law's* Empire, above, at 220. (Dworkin uses the term 'integrity', rather than 'coherence', but the term 'integrity' refers to legal and moral coherence: ibid at 176.)

[90] In this argument, I posit that most people's moral reasoning *is* coherentist. I am making a descriptive claim about how I believe most people in fact engage in moral reasoning. Namely, I do not believe that most people start with a particular foundational theory and then deduce correct actions from it. I think people work with a mass of principles, articulated at different levels of generality or specificity, taking the readily available inputs (e.g. considered judgments), and working in a manner akin to reflective equilibrium.

Aristotlean conception of equality. (Indeed, Aristotle in his formal model carved out an exception for slaves, due to their 'slave nature'.[91]) Instead, people in slave-owning societies reached conclusions and changed their minds based on a wide range of clues and inputs, including diverse important ideas such as freedom, dignity, equality, happiness, as well as empathic responses to suffering. Arguments of the era came to realize that the attempted justifications of slavery entailed jarring inconsistencies with a great many moral beliefs, and hinged on fallacies and unconvincing rationalizations. Empathy assisted these conclusions, as people in slave-owning societies came to grasp that it was an abhorrent and cruel practice. Importantly, even people who had been initially conditioned to accept the practice as 'normal' came to change their mind through this process of reflection and argumentation.

Notice the difference here between (a) broad coherence and (b) superficial consistency amongst a limited set of propositions. Many slave-owning societies (such as in the USA) also espoused principles of equality. At the time, slave-owners argued that slavery was consistent with principles of equality, by arguing that the equality principle applied only between free people and not slaves. At a superficial level, *consistency* between the practice (slavery) and the principle (equality) might indeed be achieved either by abolishing the practice or by declaring a limitation to the principle. But which is the more normatively convincing answer, all things considered? Coherence is a more ambitious and deeper concept than mere consistency amongst a limited set of propositions: coherence requires us to draw widely on all available clues, including ethical arguments, casuistic testing of our judgments based on empathic role-taking, and noticing biases or argumentative fallacies that have previously led us astray.[92] There is

[91] Aristotle, *Politics* (Clarendon Press, 1910) at 1254b 16–21. This is precisely the problem with analytical deductions from abstract constructs: while they purport to be logically pure, they may actually be as distorted and unreliable as any other construct. The best we can do is to constantly test our deductions from any one theory using other theories and judgements (and, iteratively, constantly testing those theories and judgements with other theories and judgements).

[92] The slavery example also shows how 'intuition' can play different roles and how no source of clues is entirely reliable. Some people had the emotional and empathetic reaction that slavery and the cruelties attendant to slavery were clearly wrong. Others had been socialized to see the institution as 'natural', particularly those who directly or indirectly benefited from the institution. Thus, intuition is not necessarily a wellspring of wisdom; it is merely one of the clues taken into account in the search for coherence. Reflective equilibrium calls on us to critically assess even our own intuitive reactions. In the slavery example, we might notice that persons whose intuitions were not disturbed by slavery had all undergone particular social conditioning which was needed to produce that indifference. We might also discover, through analogical testing, that their indifference is severely inconsistent with their reactions to analogous cases. Testing for these types of biases and anomalies would give us reason to doubt those intuitions.

little question that the coherent reconciliation of the full spectrum of available clues is that slavery is wrong.

The example illustrates another merit of coherentism. A proponent of a comprehensive theory rooted in a single value (e.g. freedom, dignity, happiness) might argue that the real problem with slavery was its contradiction of the single value cherished by that theory. But there are many possible values that would entail a rejection of slavery, and many possible theories that could draw on those values with different emphases. Often, we will have vastly more confidence in a mid-level determination (e.g. slavery is wrong) than we have about which supportive theory is the correct one. Coherentism allows us to act on that mid-level determination, even if we do not know which underlying theory is the ultimately correct one.

The process of continually revising our body of beliefs to better reconcile ideas and experiences is even more ambitious than the foregoing suggests, because it is *iterative*: each revision of practices and beliefs in turn enables people to notice, analogically, other practices that conflict with better conceptions of equality. Over time, numerous practices that once seemed natural have gradually been recognized to be discriminatory in various ways. For example, the institution of marriage, which was until recent decades seen as 'inherently' between a man and a woman, has been revised in many societies to include same sex partners and thus to better reflect equality principles. This continual, iterative revision of beliefs and practices is coherentism at work.

My point is that coherentist methods can require radical changes in our beliefs and practices. The continual effort to reconcile our principles, theories, judgments, and practices can lead to the discovery of previously unnoticed latent conflicts. Coherence can therefore require dramatic revision of our beliefs or practices in particular areas.

There is another narrower version of the 'conservatism' objection: since coherentist theories start with pre-existing beliefs (or in this context, widely-recognized principles), they may have a tendency to perpetuate received beliefs.[93] There is merit to this objection. For example, the account I suggest here is willing to accept established formulations of principles as its working hypotheses. By accepting these historically-contingent starting points, there is a risk that one may perpetuate past thinking, and preclude radical thinking.

[93] See e.g. Amaya, *Tapestry of Reason*, above, at 58, 371 & 474.

My response to this narrower objection is that any account has to start *somewhere*. The coherentist account accepts, as a starting point, the conversation that is already underway. It does so because no other more compelling starting point has been identified. If a more compelling starting point were identified, then coherence would require us to start with the new more compelling starting point, and the conversation would shift accordingly.

Consulting formulations developed in national and international practice is valuable as a 'humility check' on our abstract theory-building. One could advance an entirely new normative theory and deduce from it a new set of principles for criminal law systems. However, if we look around the world and notice that no legal system on earth satisfies the proposed requirements, we could rightly take that observation as a clue that there *might* be a problem in the new theory. Patterns of practice, which reflect the understandings of justice of thousands of practitioners over a great many years, are at least a worthwhile checkpoint.[94] Nonetheless, if there are powerful arguments for the new theory, then the totality of available clues might lead us to adopt it. [95]

Earlier (§4.3), I spoke about 'starting in the middle' – meaning starting with mid-level principles rather than with doctrines or with foundations. But there is another way that we must always 'start in the middle': temporally. We start *in media res* – in the middle of the action. The story of criminal law, the story of ICL, and the story of criminal law theory are all already underway. Many doctrines and formulations of principles have already been developed, and certain conversations and debates are underway. So, we start from what has already gone before, we draw lessons and form theories, and we suggest modifications to what is there. Some starting assumptions may later turn out to be 'wrong', but we nonetheless must start somewhere. As in the famous metaphor of Neurath's boat:

> We are like sailors who on the open sea must reconstruct their ship but are never able to start afresh from the bottom. Where a beam is taken away a new one must at once be put there, and for

[94] Parenthetically, another possible objection is that reference to practice seems like a form of the naturalist fallacy – the leap from 'is' to 'ought'. However, as just noted, we consider patterns of practice not to mindlessly replicate them, but out of humility, as they offer clues to understandings of justice worked out by others through extensive practice. Patterns of practice are a helpful common reference point, a valuable check on the imagination of any given individual, and a body of propositions that have at least been tested in practice.

[95] Thus, this is not a Burkean conservative position warning against the unknown dangers of making any changes at all to established social institutions. It simply uses practice as a reference point or possible 'sanity check' in assessing one's own judgements and constructs. Where it is nonetheless clear that practice should be reformed, then it should be reformed.

this the rest of the ship is used as support. In this way, by using the old beams and driftwood the ship can be shaped entirely anew, but only by gradual reconstruction.[96]

(b) Fallibility: The second common objection to the coherentist method is that it does not provide *certainty*. It relies on a series of inputs each of which *might be wrong.* The objection is correct.

The coherentist account freely acknowledges that any of the inputs might be flawed. For example, familiar formulations of principles might replicate biases or blind spots of past legal practitioners. Patterns of practice may be similarly problematic. The major ethical theories are contested human creations and may be gravely flawed. Our sense of justice, or intuition, about particular outcomes might mislead us: it may reflect our prejudices and social conditioning. (There are many possible objections to considering intuition,[97] however, in my view the best argument in favour of consulting our intuition is the outright absurdity of ignoring it.[98]) A coherentist account attempts to reduce error in each of the available imperfect inputs in the only humanly available way: by testing them against all of the other inputs.

An even greater danger still lurks: it is entirely possible that *every one* of those inputs (principles, practice, theories, and judgments) is erroneous. For example, they might all very well be distorted by the same bias, arising perhaps in the human mind or in the human meta-culture. Thus, there is a possibility, not just of error, but of *massive* error.

The coherentist account acknowledges this as well. It acknowledges the fallibility of its inputs and its process, and hence the possibility of error, including potentially

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[96] O Neurath, 'Anti-Spengler' in M Neurath & R Cohen, eds, *Empiricism and Sociology* (D Reidel Publishing, 1973) 197 at 201.

[97] The strongest objection is that appeals to intuition might just reflect our subjective biases and conditioning and cannot be mistaken for infallible innate wisdom. The objection is of course correct. However, reflective equilibrium does not take intuition as infallible. Both our reasoning (analytical deductions from our constructed theories) or our intuition (reactions to concrete cases) can be wrong. That is why we use each to test the other as best we can. We search for deductive or analogical incoherence and try to inspect both our reasoning and our judgements. This process is obviously fallible, but no infallible process has been identified. The best we can do is test all available inputs against the other inputs.

[98] It seems unthinkable that we would apply cerebrally-constructed moral theories even when our instincts cry out that the results are monstrous. I think such reactions would be a clue that the moral theory might need re-examination. The coherentist approach sensibly uses all available clues. Markus Dubber convincingly argues that the sense of justice requires empathetic identification, and he rejects the dichotomy between emotion and rationality: Dubber, *Sense of Justice,* above at 7-8, 52, 71-72, 83, 146.

massive error. For many scholars and jurists, this acceptance of fallibility is a cause of considerable discomfort. But the response is: *there is no methodology* that furnishes moral certainty. There is no methodology that can guarantee freedom from error or even from massive error.

The expectation of certainty in relation to ethical questions is itself unsound; it is the Cartesian anxiety. The options actually available are either (a) a false pretense of certainty, or (b) a theory that openly acknowledges uncertainty, but which is committed to taking every possible measure for error-correction (maximum corrigibility). The coherentist would argue that the latter is the more mature and honest route. The coherentist abandons 'the neurotic Cartesian quest for certainty'.[99] Instead of seeking certainty, we simply seek to establish *better-justified* principles, drawing on all available arguments. We have uncertain information, uncertain starting points, and we have to make the best decisions that we can with the best evidence and best tools that we can produce. Science proceeds in the same way, often provisionally accepting uncertain hypotheses as starting points to see where they lead, and generating helpful insights as a result.[100]

(c) Untidiness and imprecision: A third set of objections is that the coherentist method is too untidy, imprecise, vague or complex.[101] In other words, coherentism does not provide a clear enough operator's manual on precisely to reconcile inconsistent clues to maximize coherence.

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[99] Rorty, *Consequences of Pragmatism*, above, at 161. See also JT Kloppenberg, 'Pragmatism: An Old Name For Some New Ways of Thinking?', in M Dickstein, ed, *The Revival of Pragmatism: New Essays on Social Thought, Law, and Culture* (Duke University Press, 1998) (discussing the debilitating 'Cartesian anxiety' that demands 'the grail of objective knowledge' and 'timeless principles'.)

[100] For example, sciences started with a provisional assumption that the reports of our senses map in some way to an external reality. Using the observations of those senses, humans developed theories, made deductions, and built tools that allowed them to learn more and more about the apparent world. We eventually learned that, for example, the world is not composed of 'solid objects' in the way that our senses report; instead 'matter' is overwhelmingly composed of empty space, with fields of energy generating what we perceive as 'solidity'. Similarly, our experience of 'colour' turns out to be a subjective translation of certain forms of radiation. Thus, science shows us some ways that our senses are indeed unreliable. But we got there by using our senses as one set of possibly useful inputs.

If instead, we had said that our senses are not reliable and thus declined to make any further investigations based on them, we would not have worked out that useful information, including about the limits of our senses. In the same manner, a provisional acceptance of familiar formulations, moral theories, and our intuitive responses, provides at least a starting point for deliberations, even if the deliberations may lead us to change our minds about some of those inputs.

[101] Amaya, *Tapestry of Reason*, above, at 57, 143, 181-82.

For example, where an outlying body of practice conflicts with a formulated principle, should we amend the practice, or is the practice a clue (reflecting the practitioners' sense of justice) that should lead to a reformulation or exception in the principle? When there is a conflict between national formulations, moral theories, or considered judgments, which should prevail? The coherentist account does not offer a fixed mechanical protocol for such decisions; there may be plausible arguments for different solutions. Some coherentist thinkers have tried to articulate more precisely what people do when they seek to maximize coherence in their models.[102] Nonetheless, as in science, there is still room to differ about how best to reconcile contradictory clues. For many people, the consideration of so many elements, without a more explicit instruction manual, is too untidy and vague, and thus leaves too much room for individual opinions.

The coherentist response is that it is an unrealistic expectation that a successful theory must provide a clear, mechanical formula that generates morally correct answers. The world is complex. To return to the science analogy, where observations arise that are inconsistent with currently favoured models, scientists often differ on how to reconcile the conflicting clues. Some may adhere to the existing models, with the provisional expectation that the anomalies will be explained away; others may provisionally revise their models, in different ways, to better fit the data. Yet science is not beleaguered with complaints that there should be clear, mechanical rules dictating precisely when a model must be revised and how. Science is not infected with the idea that figuring out really complicated things should be simple.

In a coherentist method, we abandon the 'quest for the ultimate ethical algorithm' that can deductively answer all of our moral queries.[103] Accordingly, reasonable people will at times disagree on how to prioritize and reconcile the clues, just as happens in every other field of inquiry. We can only keep striving to detect unsound arguments, to collect

[102] An illustrative and incomplete list includes: N MacCormack, 'Coherence in Legal Justification' in A Peczenik, L Lindahl, and B van Roermund, eds, *Theory of Legal Science* (Reidel Publishing, 1984); L BonJour, *The Structure of Empirical Knowledge* (CUP, 1985); S Hurley, *Natural Reasons: Personality and Polity* (OUP, 1989); R Alexy and A Peczenik, 'The Concept of Coherence and its Significance for Discursive Rationality' (1990) 3 *Ratio Iuris* 130; M DePaul, *Balance and Refinement: Beyond Coherence Methods of Moral Inquiry* (Routledge, 1993); H Richardson, *Practical Reasoning about Final Ends* (CUP, 1994); P Thagard and K Verbeugt, 'Coherence as Constraint Satisfaction' (1998) 22 *Cognitive Science* 1; K Lehrer, 'Justification, Coherence and Knowledge' 50 *Erkenntnis* 243 (1999); Amaya, *Tapestry of Reason,* above.
[103] Tremblay 'New Casuistry' at 504 (the quest for the 'ultimate ethical algorithm').

more inputs, and to develop better understandings. We cannot eliminate judgment and deliberation from moral reasoning.[104]

(d) Conclusion: In conclusion, all three objections are *correct*: the coherentist approach does not guarantee certainty, it does not provide a precise operator's manual, and it draws on past thought and therefore might perpetuate old assumptions. However, these objections can be made against *any* approach to articulating fundamental principles. There is no method that is certain, straightforward, is divorced from past thought.

These three objections (fallibility, untidiness, and contingency) are actually objections to the human condition. We have imperfect information and no definitive guidance, and the best we can do is to do the best we can do. Since we must build our structures on sand (i.e. fundamental non-certainty), we might as well acknowledge that we are doing so, and attempt to build structures that are as useful and reliable as possible, while also trying to learn more about the sand.[105]

4.4 JUSTICE: A COHERENTIST APPROACH

In this final section, I outline some features of the envisaged coherentist conversation about the principles of justice. (To re-iterate, by 'conversation' I do not mean any special or hidden meaning of the word.[106] I am simply emphasizing that

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[104] Rorty, *Consequences of Pragmatism*, above, at 164 argues against the Platonic idea that we can substitute 'method' for 'deliberation'.

[105] For those who remain uncomfortable with the coherentist method, regarding it as suspect, incomplete or unreliable, I can offer the following additional responses.

(a) For those who prize 'certainty', I agree that moral certainty would be *better,* but it is not available. If anyone demonstrates the 'correct' moral theory, then I for one would happily root my arguments in the proven-correct moral theory. Until that time, however, we need some other approach.

(b) For those who prize 'reliability', it is arguable that a foundationally pluralist account provides *more* reliability. Where multiple foundational theories could converge in supporting a mid-level principle, we should have *more* confidence in the principle than we would in any one theory. Because mid-level principles are formulated in particular contexts and with comparative precision, some people may support the principle even without knowing precisely which theory they favour in support. As Sunstein argues, for fallible human beings, caution and humility about theoretical claims are appropriate, at least when multiple theories can lead in the same direction. Sunstein, 'Incompletely Theorized Agreements', above, at 1769.

[106] I can say however that process – including inquiry and deliberation – is important in a coherentist account. The coherentist accepts that certain and ultimate truth may be unattainable, and hence I am attracted to the view that the 'best' understanding is that which would be arrived at in an ideal conversation with all attainable information on hand and with all arguments properly considered. This is

refining our understandings is not a matter of mechanically applying an ethical proof; instead it is a process we engage in as fallible humans, using fallible human processes, testing fallible human ideas, and building on the fallible human conversation that has gone before. Different participants with different experiences might draw on different inputs with different emphases; that interaction and debate can provide more clues and more inspiration about the best way forward. Conversations of this nature commonly feature disagreements, but they also feature points that become largely accepted, until such time as those accepted points become disrupted by new insights and better arguments.)

(1) Analytical and normative. First, we can use mid-level principles to work both *analytically* and *normatively*, and to work at different levels of abstraction or concreteness. Analytically, we can try to discern principles immanent within the practice and we can identify doctrines that contradict the best understandings of the principles. Normatively, we can evaluate the competing formulations of principles, we can criticize problematic practices or even criticize principles, and we can try to clarify the best justificatory bases for doctrines. We can work more at the concrete end of the spectrum (assessing doctrines in light of accepted principles) or more at the abstract end of the spectrum (re-examining the principles). The particular emphasis of any given work will depend on the type of contribution it seeks to make: for example, explanatory, justificatory, critical, or reconstructive.

(2) External and internal. Second, a conversation about fundamental principles of justice can adopt a perspective that is both *external* and *internal* to the field of ICL. What I mean is that fundamental principles are both an external normative yardstick by which to judge the system, but they are also internally recognized by the system as interpretive guides or even imperatives. Thus, if we identify a doctrine that conflicts with the best understanding of a fundamental principle, we can make external or internal kinds of claims, and indeed we can make both at the same time. We could say, from an

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of course only an in-principle aspiration, as we will never achieve an ideal conversation, but I think it correctly states what coherentism strives for (best possible understandings, not ultimate truths). See eg. J Habermas, *Moral Consciousness and Communicative Action* (MIT Press, 1990, trans C Lenhart and S Weber Nicholson) esp at. 43-115, or T Scanlon, *What We Owe to Each Other* (Harvard University Press, 1998); J Rawls (edited by E Kelly), *Justice as Fairness: A Restatement* (Harvard University Press, 2001) esp at xi; Rorty R, *Consequences of Pragmatism: Essays: 1972 – 1980* (University of Minnesota Press, 1982) esp at 160-166.

external perspective, that the system has failed to meet an important normative standard, and criticize it for this failing. But we could also say, from an internal perspective, that the apparent doctrine conflicts with fundamental principles and thus it is '*incorrect*' and needs to be re-interpreted to conform. Fundamental principles are both external tools for criticism and evaluation and also internal tools for clarification and reform.

(3) No fixed priority. Third, there is no single fixed priority among the three commonly-used sources of reference I mentioned above. Those sources were: articulations of principles in ICL itself, general principles derived from national systems, and normative argumentation. Each can properly be used in developing our views, but none of them are paramount.[107] Indeed, we use each source to better evaluate, specify, and understand the others.[108] Each source has different strengths and each is important for different purposes (analytical, comparative, normative). The emphasis appropriately accorded to each depends on the project. For example, a doctrinal project might accord internal formulations the highest priority, but even that project will be informed by induction from national systems and by normative reflection. For a normative project, the hierarchy might seem to be the reverse, with moral theories being the most important. But simple hierarchies still elude us: for example, scrutiny of national and international practice might reveal insights requiring us to revise our normative theories. Even in a normative account, it is valuable to start with mid-level principles and to consult practice. Doing so helps us stay tethered, with humble awareness that even the foundational moral theories are also human constructs.[109] Thus, the process is necessarily recursive and untidy. I think that the back-and-forth process, oscillating between practices, principles, theories and judgments, looking at analytical 'fit' and advancing normative justification or criticism, is an essential part of a grounded normative theory *about* international criminal law.

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[107] Similarly, Coleman, *Practice of Principle,* above, at 56 declines to assign fixed 'priority' among the practice, the principles and the theories.

[108] For example, a review of national and international practice might reveal plausible underlying intuitions of justice that lead us to revise our philosophical suppositions. Our philosophical reflections may lead us to discern new patterns in the commonalities of national systems that we had not previously discerned.

[109] Sunstein, 'Incompletely Theorized Agreements', above, at 1762: 'But we might think instead that there is no special magic in theories or abstractions, and that theories are simply the (humanly constructed) means by which people make sense of the judgements that constitute their ethical, legal, and political worlds. The abstract deserves no priority over the particular; neither should be treated as foundational. A (poor or crude) abstract theory may simply be a confused way of trying to make sense of our considered judgements about particular constitutional cases, which may be better than the theory. '

(4) A theory of criminal law theory. Fourth, I think that coherentism is also the best explanation of much of the scholarship and juridical practice that works with fundamental principles. I mentioned at the outset that scholarship and juridical argument tends to draw on the three different sources, even though each is flawed. They often do so without explaining why we can draw on those three sources in what might seem to be a hodge-podge. One might expect that I would go on to declare a more correct methodology, or or unveil a fourth alternative, or at least stipulate a priority among the sources. Instead, however, I have concluded that most criminal law theory, at least in this area, is best explained and best supported as an application of coherentist methods. Scholars are drawing on the available clues to construct the best understanding that they can of the principles. If so, my contribution here is largely to make explicit some of the implicit underpinnings of these efforts. I have articulated some of the groundwork underlying much of the scholarship and juridical discourse. If that is right, then we may continue to use all three sources, but simply do so with greater *consciousness* of the limitations of each source and the limitations of the entire enterprise.

(5) A framework for frameworks. Fifth, I am outlining the general framework for a conversation that can incorporate multiple plausible frameworks. I have tried to frame my remarks generally enough to leave space for different outlooks.[110] The justice conversation is inclusive and pluralist, and descends as needed into ethical theories. The method is non-foundational, but it is still receptive to foundational theories, as ways of framing a question and potentially generating helpful insights. A coherentist conversation can still draw on the main moral theories, not as ultimate truths but as '*models*' (i.e. they can show what the implications would be if one focuses on a given set of values or adopts a given set of premises).[111] Contributors to the conversation may bring insights drawing on very different foundational theories; a foundationally pluralist

[110] For example, when I speak of 'deontic' commitments, I speak in classic terms: a duty to the individual that will be honoured even when it does not maximize the social desiderata of typical consequentialist accounts. But it is also possible to advance arguments from 'moderate' or 'threshold' deontology, which permits overrides in the most extreme circumstances. It is possible that moderate deontology has something fruitful to add to the conversation. At the moment, however, we do not seem to have arrived at any conundrum that requires ICL to make a choice on that question. See e.g. discussion in M S Moore, *Placing Blame: A General Theory of Criminal Law* (OUP, 1997), 719-24; T Nagel, *Mortal Questions* (CUP, 1979), 62-63; S Kagan, *Normative Ethics* (Avalon, 1998), 78-94.

[111] Again, this is the same method as is used in science. The overall method is coherentist, which can entail use of one or more 'models'. Where a model has been successful, we can even use it to generate (provisional) deductions, and a highly successful model will be widely adopted. Nonetheless even the most successful model is still a provisional tool and can be discarded on coherentist grounds, such as when a model offering even better coherence emerges.

conversation is receptive to such arguments. Fortunately, a lot of work can be done with mid-level principles without having to descend into their underpinnings or decide between theories. However, there may be liminal cases where it is necessary to do so. For example, what is it about human beings that requires us to afford them respectful treatment? Scholars refer variously to attributes such as agency, autonomy, dignity, the capacity for reason-directed behavior, personhood, worth and so on. For most criminal law problems, we simply would not need to isolate precisely which attributes generate which obligations. However, it is at least conceivable that some criminal law problem may arise that requires us to specify the relevant attribute with more precision, or to decide between different foundational theories. The conversation descends as needed into ethical theories.

(6) Conversation versus contribution. Sixth, when I map out the numerous possible inputs for a coherentist analysis, that does not mean that any given contribution will have all of those features. For example, it is not feasible that any single contribution will canvass all national systems and all moral theories. I am simply aiming to outline some of the tools and moves that can be usefully employed. Different contributors will bring their different perspectives and expertise to bear on different topics of interest. For example, my own contributions will often draw on English-speaking theorists and common law ideas, because that is my experience and expertise and the best way for me to add value to to the conversation at this stage. But in doing so I will strive to engage with the ideas of others, who bring different literatures and legal traditions, in the hopes of building something together that is non-parochial. It will be important for the broader conversation to continue with diverse inputs from diverse contributors, in order to build more thoughtful, durable, and inclusive understandings of the principles.

(7) Hypotheses not answers. Seventh, and finally, the justice conversation will not produce definitive '*answers*'. At best, it provides *working hypotheses* about fundamental principles. The conversation is nonetheless valuable because it requires us to grapple with questions of justice. The discourse around mass atrocity is often dominated by revulsion and the wish that someone be punished; the justice conversation recalls that we must consider the constraints of justice. Of course, there are very different plausible views once we try to specify the principles. (Is criminal negligence

sufficient for culpability?[112] Is causal contribution required for culpability, and if so what does it mean?[113]) We will never arrive at conclusive 'answers' to these questions. In any human enterprise, the best we can do is to make our best efforts to work out the normative underpinnings and to comply with them.

In conclusion, the justice conversation is a fallible, human conversation working with fallible, human constructs. But that does not make it superficial or meaningless. Many readers will be tempted to reject an approach that does not guarantee that the constructs map on to 'true' justice. But we are faced with three alternatives. (1) The first is for someone to discover and demonstrate the guaranteed correct theory of justice. That has not happened yet, despite centuries of deliberation.[114] (2) The second alternative is to give up. Giving up seems far more bankrupt than *trying* to work with the best available evidence. If we care about morality and justice, then we have to try to discuss our practices and institutions – their aims and constraints and overall justifications and possible improvement. (3) The third, and remaining, alternative is to accept that working with the best available clues is the only practicable moral option we have. The best and only assurance we mortals can have that our constructs map on to something meaningful is that our analytical reasoning and intuitive responses tell us so. Thus, the justice conversation may be fallible, human, contingent, and provisional, but it is nonetheless a vital one.

[112] Chapter 7.
[113] Chapter 6.
[114] If someone does discover it, then the coherentist approach would immediately merge with the foundationalist approach in that area, because working with the best clues and models would obviously entail embracing a 'guaranteed correct' model.

5

Criminal Law Theory in Extremis

OVERVIEW

In the last two chapters, I established that deontic principles do matter in ICL contexts, and outlined a coherentist method to help us formulate those principles. In this chapter, I outline how the framework introduced in Chapters 3 and 4 can raise new questions, both for ICL and for general criminal law theory. My primary goal in this thesis is to develop a framework capable of tackling questions of criminal law theory and justice in the unusual contexts of ICL. However, as an interesting by-product, the account may also generate insights for mainstream criminal law theory.

The study of extreme cases can challenge our understandings of the principles developed in everyday experience. I will show that a theoretical framework equipped to study ICL may require a 'cosmopolitan' perspective, which can actually lead us to question even the central role of the state itself in criminal law. I will show how studying ICL problems may require us to unpack the roles traditionally played by 'the State' in criminal law thinking, and to re-examine many familiar tools of criminal law thought.

I also note some 'promising problems' that are worthy of investigation, and indicate how this framework might approach them. These include: legality without a legislature; a humanistic account of duress and social roles; and superior orders and state authority.

5.1. QUESTIONS FOR CRIMINAL LAW THEORY

A central aim of this thesis is to bring criminal law theory to bear on ICL problems. It turns out, however, that doing so is not simply a matter of applying the accumulated wisdom of general criminal law theory to ICL issues. Instead, the process provides

insights in two directions. ICL raises new problems and new questions that were not necessarily considered in criminal law theory. The study of ICL problems leads us into some new and largely unexplored territory, in which we lose the familiar backdrop for most criminal law thinking. ICL invites us to imagine a much more general account of criminal justice, which contemplates some very different conditions.

5.1.1 The Normal Case and the Special Case

With the benefit of long experience and debate, criminal law scholars and practitioners have been developing a fairly elaborate set of propositions about the requirements of criminal justice, with many points of broad agreement and many points of dispute. These debates have generally taken place in one particular context, the 'normal' context: the practice of criminal law as known in the modern state. In the normal context, criminal law is applied by authorities of a single modern state to human individuals within that state's jurisdiction. The state has the familiar Westphalian features, which include, for example, a claim to paramount authority within a territory, and branches of government playing different roles (legislature, judiciary and executive). Generally, the model assumes a functioning state and relative stability, so that criminal activity is usually deviant from social norms.

These assumptions are entirely understandable and appropriate given the historic experience with criminal law in recent centuries. Of course it was correct for jurists and scholars to assume these common and given features, in order to try to systematize and make fair the apparatuses of criminal law actually affecting the lives of human persons.

However, the study of 'special' cases can lead us to reconsider our theories built on the 'normal' cases, requiring us to notice subtleties and underpinnings. In doing so, we can build a more 'general' theory. To draw an analogy with physics, we may have a workable understanding of 'mass' or 'time' in our common everyday life on Earth, and yet observations near a black hole, or at relativistic speeds, may lead us to realize that these concepts contain subtleties that we had not detected in our everyday experience. It is not that the deeper concepts of 'mass' or 'time' are *different* on the Earth or near a black hole.

It is just that inherent conditions, limitations, or parameters that we had not needed to think about in 'normal' conditions become more noticeable in a different context.

In a similar manner, the study of special cases from ICL may enrich general criminal law theory. Unusual contexts (e.g. law applied by international tribunals, possibly in situations of state collapse or involving multiple state actors) may help us to notice broader assumptions made in criminal law theory that we had not previously confronted. Issues that are marginal or peripheral in a 'normal' context , and that which can be set aside or ignored in mainstream theory, might become central in an unusual case, demanding clarification.

I have already touched on examples of ICL's special challenges (Chapter 3). Crimes of mass coordination can require us to consider the outer limits of culpability. In ICL, we more frequently encounter crimes that seem to be causally over-determined, which can help us more precisely confront causation and culpability in such circumstances.[1] Criminal governments overturn the normal role of the state as law-provider. The alternative means of law creation used in ICL call for reflection on the parameters of fair warning and the requirements of the legality principle. These and other special problems can lead us to learn more about the principles used in everyday experience.

As I hope I have made clear, I am not suggesting that ICL requires a different concept of 'justice' simply because it is international. Nor have I suggested that national criminal law never encounters extreme cases, or that ICL is entirely different from national criminal law, or that ICL theory is entirely different from national criminal law theory. I am saying that *salient* differences in context can help us reconsider underlying suppositions and clarify ideas in ways that we would not have considered if we think only about the normal context. My proposal is akin to Scanlon's conception of 'parametric universalism': sometimes the same underlying principle might generate different rules where there are salient differences in context.[2]

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[1] J Stewart, 'Overdetermined Atrocities', (2012) 10 *JICL* 1189.

[2] TM Scanlon, *What We Owe To Each Other* (Harvard University Press, 998) at 329. For example, a society in a cold climate might have a rule about always helping a driver whose car has broken down, and a society in a warm climate might not have such a rule, and yet the two different rules may both actually be consistent with an underlying principle about helping others who are in great danger when it is safe to do so.

5.1.2 The Cosmopolitan Challenge to the State-Centric Account

In Chapter 3, I suggested a 'humanistic' account, and in Chapter 4, I added that the approach should also be 'coherentist'. I now add the proposal that an account should also be 'cosmopolitan', which is a partial challenge to state-centric thinking. This is potentially perplexing for criminal law theory, at least initially, because it demands a much more general theory of the practice of criminal law, which is not necessarily centered on the state.

The term 'cosmopolitanism' has been used in literature on international relations and international legal theory,[3] and in ICL literature,[4] with differing connotations, but there are three main recurring features. First, cosmopolitanism does not assume the centrality of states to the extent that many other theories do. Instead, cosmopolitanism focuses on *human agents* rather than on states per se. Cosmopolitanism regards states as one historically contingent coordination device created by humans to advance human ends. Cosmopolitans are prepared to see states supplemented by other governance structures as needed.[5] This outlook is particularly salient for the study of ICL norms, since ICL embraces alternative governance structures to supplement state structures, and enables them to apply law directly.[6]

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[3] K Appiah, *Cosmopolitanism: Ethics in a World of Strangers* (WW Norton & Company, 2006); D Archibugi, D Held and M Köhler, *Re-imagining Political Community: Studies in Cosmopolitan Democracy* (Stanford University Press, 1998); D Archibugi, 'Immanuel Kant, Cosmopolitan Law and Peace' (1995) 1 *European Journal of International Relations* 429; S Benhabib, *Another Cosmopolitanism* (OUP, 2006); C R Beitz, *Political Theory and International Relations* (Princeton University Press, 1999); J Bohman and M Lutz-Bachmann (eds), *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal* (The MIT Press, 1997); D Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Polity, 1995); S van Hooft, *Cosmopolitanism: A Philosophy for Global Ethics* (CUP, 2009); T W Pogge, 'Cosmopolitanism and Sovereignty' (1992) 103 *Ethics* 48; R Vernon, *Cosmopolitan Regard: Political Membership and Global Justice* (CUP, 2010).

[4] G Simpson, *Law, War and Crime: War Crimes Trials and the Reinvention of International Law* (Polity, 2007), 12, 24, 30-36 and 44-46; M Drumbl, *Atrocity, Punishment, and International Law* (CUP, 2007), at 19-20, 185-186; D Hirsh, *Law Against Genocide: Cosmopolitan Trials* (Routledge, 2003); P Hayden, 'Cosmopolitanism and the Need for Transnational Criminal Justice: The Case of the International Criminal Court' (2004) 104 *Theoria* 69.

[5] See e.g., *Political Theory*, above, at 6, 53, 182; Held, *Democracy,* above, at 233-35; J Habermas, 'Kant's Idea of Perpetual Peace, With the Benefit of Two Hundred Year's Hindsight', in Bohman and Lutz-Bachmann, above, 113 at 128-129.

[6] On ICL and cosmopolitan de-emphasis of the state, see D Koller, 'The Faith of the International Criminal Lawyer', (2008) 40 *NYU Journal of International Law & Politics* 1019, at 1052; Simpson, *Law,* above, at 46; D Luban, 'State Criminality and the Ambition of International Criminal Law', in T Isaacs and R Vernon (eds), *Accountability for Collective Wrongdoing* (CUP, 2011) at 64.

Second, cosmopolitan regard for others does not stop at the boundaries of one's state.[7] This is not to say that borders do not matter at all, or that cosmopolitanism is a utopic fantasy. Cosmopolitanism acknowledges the contemporary socio-political constructs of states. Hence borders do matter, and we may be more involved with members of our own polity, but we also have concern and regard for all human beings. Cosmopolitan regard is also salient for an account of ICL norms, since ICL delineates violations that are not just of domestic concern, but that can also be transnationally prosecuted.

Third, cosmopolitanism searches for commonalities between cultures, but it also recognizes and respects differences, thus embracing pluralism and the building of a *modus vivendi*.[8] Cosmopolitanism is sometimes incorrectly conflated with universalism, but such conflation misses the key nuances of cosmopolitanism. Cosmopolitanism is a deliberate contrast with universalism: it does not assume that we share all the same values. Instead it assumes we have *enough common ground* to at least carry out a conversation between those with different outlooks.[9] Similarly, some warn that cosmopolitanism might be invoked as a mask for hegemony, but this is an objection to failed or false cosmopolitanism; it is not an objection to the prescription of genuine conversation.[10] Interestingly, the cosmopolitan prescription of a genuine conversation is very much in the same spirit as the coherentist approach I outlined in Chapter 4.[11]

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[7] Pogge, 'Cosmopolitanism' above, at 49.

[8] See e.g. Appiah, *Cosmopolitanism,* above, at xv, 96-99, 144, 151; van Hooft, *Cosmopolitanism,* above, at 164-69.

[9] On a universalist account, I would be trying to discover the deep, 'true', universal answers for the 'correct' formulation of fundamental principles. I am talking instead about a conversation, in which the participants may have different viewpoints, and in which there may be multiple plausible formulations. See Chapter 4.

[10] See e.g. M Koskenniemi, '*Humanity's Law,* Ruti G. Teitel', (2012) 26 *Ethics & International Affairs* 395 (book review); R Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Wiley, 2002) at 47-48. Such objections are not a reason to decline to *attempt* a genuine cosmopolitan conversation; they are reminders that we must act with humility, caution about our assumptions, and open-mindedness to other views. See Chapters 4 and 5.

[11] For example, as K Appiah writes, cosmopolitans suppose that persons from different cultures have enough overlap in their vocabulary to begin a conversation. They do not suppose, like some universalists, that we could all come to an agreement if only we had the same vocabulary. See Appiah, *Cosmopolitanism*, above, at 57. Appiah also notes that we might agree on a practice even if we do not agree on the underlying justification. Ibid at 67. There are clear parallels with coherentist ideas discussed in Chapter 4 (sufficient vocabulary for conversation, incompletely theorized agreements).

Similarly, Monica Hakimi, while not explicitly adopting the label 'cosmopolitan', advances cosmopolitan ideas when she argues that a community (including the international community) does not require consensus on all values, and is not necessarily diminished by discord; instead a community is partially constituted by its conflicts and disagreements and its efforts to manage disagreements. M Hakimi, 'Constructing International Community' (2017) 111 *AJIL* 317.

Cosmopolitanism's departure from a state-centric approach is both very challenging and very promising for criminal law theory. Cosmopolitanism recognizes states as important and prominent centres of authority in the contemporary arrangement of social and political life. However, states are not the *only* possible centre of authority. Cosmopolitanism understands individuals not only as citizens of a given state, but also as members of overlapping networks. A cosmopolitan imagination can easily envisage a 'neo-medieval' landscape, featuring overlapping and diverse governance structures.[12]

By contrast, criminal law theory traditionally – and entirely understandably, given the normal historic experience – assumes the modern state as its centerpiece. Most thinking about criminal law regards each country as a separate and more-or-less closed microcosm, apart from peripheral cases of overlapping jurisdiction. Thus, criminal law problems are discussed as if the relevant players are that one state and the individual inhabitants. In this picture, one can readily rely on concepts such as citizenship or community to help explain aspects of criminal law.

ICL, which contemplates the unmediated application of law to individuals by international governance mechanisms,[13] provides many examples that do not readily fit this familiar picture. ICL can help us see that the familiar picture (normal criminal law in a functioning state) is only an *example* of the more general possibilities of criminal law. Although many regard the state as a strictly essential requirement for criminal law, we might find on inspection that what is really required is not the entire package of the modern Westphalian state, but rather certain *features* of the state. We might also see how those features could be allocated differently or vested in other institutions. The emergence of new institutions, such as international courts, can help us separate out different threads that might be bundled together in the context of a state, giving us a more thorough understanding of what is needed.[14]

A more general theory of criminal law requires a bigger imagination about the potential configurations of criminal law. We may find that criminal law does not

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[12] Held, *Democracy,* above, at 224-234; Habermas, 'Kant's Idea', above, at 128-129.

[13] See generally J K Cogan, 'The Regulatory Turn in International Law', (2011) 52 *Harvard International Law Journal* 322.

[14] For articles adding new nuances to the concept of 'authority', drawing from international courts, see eg. A von Bogdandy and I Venzke, 'On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority' 26 *Leiden J Int L* (2013) 49; L Vinjamuri, 'The International Criminal Court and the Paradox of Authority', 79 *Law and Contemporary Problems* (2016) 275.

necessarily require a 'state' per se; perhaps what is needed can be stated in even more general terms (e.g. public authority).

5.1.3 Unpacking 'the State', As Well As Common Tools of Thought

I am suggesting, contrary to typical thinking about criminal law, that 'the State' is not necessarily always a central and indispensable character. Of course, as a matter of positive law, ICL institutions exercise authority delegated by states. Furthermore, states are obviously ubiquitous in ICL: they may bestow jurisdiction, they carry out arrests, they shape ICL doctrines and policies, and they order crimes or try to halt crimes.

What I am saying is that ICL presents criminal law without the familiar conceptual framework of 'the State': a single Westphalian state sitting in judgment of the humans within its jurisdiction for criminal law thinking. This central character in criminal law thinking is a single entity, claiming a monopoly of force in a territory and uniquely empowered to sit in judgment of all the other actors.[15] It is the law-maker, law-interpreter, and law-enforcer; it is the keeper of the peace, custodian of public right, embodiment of the community, and beneficiary of duties of allegiance.

In the normal case, criminal law theory can assume that all of these roles and attributes are merged in one posited entity, which is also the entity creating and enforcing criminal law in the case under question. However, this package – this unity – may not be present in ICL contexts. These functions may be disaggregated over different entities, or they may be duplicated in more than one entity purporting to exercise them in different ways.

When we lose the single (comparatively) tidy package, we also bring into question many of the tools of thought that have been used in analyzing criminal law. I will give three examples: citizenship, community, and authority. First, criminal law theorists often invoke the relations between '*citizens*' in a polity.[16] However, the idea of 'citizenship' may not be an appropriate explanatory tool if bonds of citizenship are not present between accused, victims, and other states asserting authority or international tribunals.[17]

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[15] L Green, *The Authority of the State* (Clarendon Press, 1988).

[16] See e.g. R A Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart, 2007) at 49-54.

[17] Of course, as a matter of positive law, nationality remains a clear ground of jurisdiction. I am speaking here of citizenship as a theoretical tool for analysis of doctrines.

Perhaps 'citizenship' will prove to be a place-holder for a deeper concept (perhaps there are relations and duties between persons just as fellow persons). Second, criminal law theorists sometimes invoke the idea of '*community*', which is not too obviously problematic in normal criminal law, because we have some sense of what the community is.[18] However, in ICL, what was formerly a peripheral issue becomes a core problem. If we want to use 'community' as a tool of thought in ICL, we have to think more carefully about how a 'community' is constituted and why that tool is relevant.[19] Third, criminal law theorists have invoked '*State authority'*, which is comparatively straightforward in a normal context, where the State authorizing the act and the State applying criminal law are the same entity. In ICL, however, the entity applying the law (e.g. a tribunal) will often not be the entity that authorized the act (e.g. a state). Thus, new questions would arise about why criminal law accommodates state authority, whether ICL should accommodate the authority of other states, to what extent, and why. In short, when these various roles and attributes, normally bundled in a single entity, are disaggregated, we find ourselves with both the burden and the opportunity of isolating the significance of those different roles and attributes for criminal law.

Another upshot is that we should not assume that tribunals must be 'like' states insofar as they apply criminal law, and then find fault if they are different from states.[20] Some features of a state may be needed for criminal law, others may not, and others may require modification of our thinking. For example, ICL does not feature a legislature per se, which differentiates it from a typical national criminal legal system. However, that particular feature of a state may not be essential for a system to do *justice*. We must distinguish (i) the rules that have grown around particular contingent features of the

[18] See e.g. Duff, *Answering for Crime,* above*,* at 44-46 and 52-56.

[19] See preliminary discussions in Duff, ibid at 55-56. Some scholars insist that there is no 'international community', because of divergences in values and interests. Such claims appear to over-estimate the level of agreement needed to constitute a 'community' (for example, the people of Toronto have diverse social and political views, with many born in different cultures, and yet they constitute a 'community'). Alternatively, such claims may underestimate how much we human beings, with nearly identical DNA, stuck to the surface of a single planet, have in common. For thoughts on community, see also Appiah, *Cosmopolitanism*, above, at 57 (on the minimal convergence needed) and Hakimi, 'Constructing' above (community is partially constituted by conflict and disagreement). In any case, these questions would have to be unpacked in order for a criminal law theory drawing on 'community' to be extended to ICL.

[20] One could insist that an international tribunal acts '*like a state'* insofar as it applies criminal law. But this may be too simplistic (a cow is 'like' a horse, in that both are four legged mammals, but it is not a horse). Perhaps what matters is not similitude to a state, but rather some broader underlying characteristics, like public authority.

modern state from (ii) what requirements are actually essential for criminal law practices to be justified.

An even more challenging question is whether it is really ultimately true that only 'states' can apply criminal law. Jurists commonly say that only states have authority to do criminal law. This proposition is largely true, as a statement of currently-accepted social and legal conventions within the 'normal' case of an orderly modern state. But it is not an absolute truth: it is not something essential, eternal, or inherent to the idea of criminal law or the state. Criminal law is in reality carried out by human beings; it is only relatively recently in human history that human beings have carried out criminal law primarily through the social institution of the Westphalian state. There have been other configurations of human governance in history, with criminal sanctions applied for example by religious institutions, communities, and other organizations.[21] More recently, armed groups carrying out criminal law has raised new questions about legitimacy, legality, and the appropriate standards by which to assess such practices given the different capacities of armed groups.[22] Thus, on a deeper normative level, it is at least conceivable that authorities other than states could legitimately apply criminal law. Perhaps the state is only one possible configuration of governance. Perhaps what is really

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[21] For articles discussing the relatively recent predominance of law through modern states, and prior alternatives such as religious institutions and local communities, see eg: F Schechter, "Popular Law and Common Law in Medieval England" (1928) 28 *Colum. L. Rev*. 269; R T Ford, "Law's Territory (A History of Jurisdiction)" (1998-1999) 97 *Mich L Rev* 843; Ann Orford, "Jurisdiction Without Territory: From the Holy Roman Empire to the Responsibility to Protect" (2008-2009) 30 *Mich. J. Int'l L*. 981; J Greenberg & MJ Sechler, "Constitutionalism Ancient and Early Modern: The Contributions of Roman Law, Cannon Law, and English Common Law" (2013) 34 *Cardozo Law Review* 1021; S Dorsett & S McVeigh, "Jurisprudences of jurisdiction: matters of public authority" (2014) 23 *Griffith Law Review* 569. Early corporations acted as polities and political communities, including applying criminal law to employees and others: see eg. R Smandych & R Linden, "Administering Justice Without the State: A Study of the Private Justice System of the Hudson's Bay Company to 1800" (1996) 11 *Can. J. L. & Soc*. 21;
P J Stern, '"A Politie of Civill & Military Power": Political Thought and the Late Seventeenth-Century Foundations of the East India Company-State' (2008) 47 *Journal of British Studies* 253; E Cavanagh, 'A Company with Sovereignty and Subjects of Its Own? The Case of the Hudson's Bay Company, 1670-1763' (2011) 26 *Can. J. L. & Soc*. 25; N Yahaya, 'Legal Pluralism and the English East India Company in the Straits of Malacca during the Early Nineteenth Century' (2015) *33 Law & Hist. Rev*. 945. And see also David J. Bederman, "The Pirate Code" (2008) 22 *Emory Int'l L. Rev*. 707.

[22] See eg. S Sivakumaran, 'Courts of Armed Opposition Groups: Fair Trials or Summary Justice?' (2009) 7 *Journal of International Criminal Justice* 489; J Somer, 'Jungle Justice: Passing Sentence on the Equality of Belligerents in Non-International Armed Conflict' (2007) 89 *International Review of the Red Cross* 655; and see also S Sivakumaran, 'Ownership of International Humanitarian Law: Non-state Armed Groups and the Formation and Enforcement of IHL Rules' in B Perrin, ed, *Modern Warfare: Armed Groups, Private Militaries, Humanitarian Organizations, and the Law* (UBC Press, 2012) 87 esp at 95-96.; H Krieger, 'International Law and Governance by Armed Groups: Caught in the Legitimacy Trap?' (2018) 12 *Journal of Intervention and Statebuilding* 563 esp at 571.

needed for criminal law is something broader, such as 'governance' or 'public authority', and the institution of the Westphalian state is actually just the most familiar species of that broader genus. ICL may provide a doorway into such questions, as it is routinely carried out not by states but by international tribunals, directly applying criminal law to persons.[23] ICL provides an opportunity to explore criminal law under alternative forms of governance, and in so doing, to learn more about the more truly general case of criminal law.[24]

Of course, we can still certainly turn to the rich and well-developed thinking in the context of states as a 'reservoir' of ideas about governance under international institutions.[25] But my point of caution is that we draw from that reservoir of ideas with care, so that our net does not include the accumulated detritus that is particular to states but not necessarily essential to criminal law under other mechanisms of governance.

5.2 PROMISING PROBLEMS

In this section, I provide illustrations of how this framework might assist with concrete problems in ICL. I am not attempting to stake out a conclusion on any of these issues. I am simply outlining some of the potential questions and insights both for ICL and possibly for criminal law theory in general.

5.2.1. Legality Without a Legislature

In a normal criminal law context (i.e. within a modern state), it is comparatively easy to say how the principle of legality is satisfied: through the adoption of legislation

[23] Obviously, as a matter of positive law, tribunals exercise legal authority delegated from states. But I am speaking here not of the black-letter doctrinal basis for jurisdiction, but rather a deeper normative question about the possibilities of criminal law.

[24] Another non-statal example worthy of exploration is the context of structured non-state armed groups. Wherever penal sanctions are formally applied, our intuitions of justice might call for certain minimum deontic constraints to be respected. However, in fleshing out the specific requirements, we cannot not necessarily draw on all thinking from criminal law theory, which assumes the context of a modern state. Thus, we would be led to develop a more general theory of criminal law.

[25] K Knop, 'Statehood: Territory, People, Government' in J Crawford and M Koskenniemi (eds), *The Cambridge Companion to International Law* (CUP, 2012), 95, at 96-97 & 112-114 (discussing abstracting from the state rather than mapping it directly onto international institutions).

prior to the crime.[26] However, ICL raises two challenges. First, ICL has no legislature and ascertains law through a variety of means, including treaties and customary international law. Second, ICL periodically confronts horrific and massive crimes, for which domestic positive law is lacking, and where the parameters of international criminalization are unclear. These features of ICL require us – and enable us – to explore more precisely what the underpinnings and contours of the legality principle really are.

Consider for example the principle *nullum crimen sine lege scripta*: no crime without written law. In the context of the modern state, which features a separation of powers (and thus a legislature), and diverse societies subject to voluminous regulation, it is very plausible to regard the *lex scripta* requirement as a fundamental principle. Accordingly, scholars have understandably argued that ICL also must comply with *lex scripta* to satisfy fundamental precepts of justice. For example, George Fletcher argues that the reliance on customary international law as a source of prohibitions is an error introduced by international lawyers and reflects a failure to understand the full implications of legality in criminal cases.[27] I certainly agree that some problems in ICL flow from habits and thought patterns of international lawyers (see Chapter 2). This may however be an instance where the seeming departure is one that, on further inspection, proves to be deontically justifiable.

In almost all of contemporary human experience with the criminal sanction, it seems quite plausible to regard *lex scripta* as a precondition for just punishment. However, it is studying the exception that may teach us the most about the rule. *Lex scripta* may simply be a *technique* to satisfy a more elementary requirement. If so, it may emerge as a requirement of justice only under certain conditions.

Through a few thought experiments, we can readily imagine examples in which just treatment would not require written law. For example, we could imagine a small society trapped on an island developing a system to enforce a few basic prohibitions. Our concept of fair warning would likely not require written prohibitions in that situation, if

[26] The principle of legality requires that persons be punished only for transgressing existing law, so that persons have fair notice of prohibitions and can order their affairs accordingly. For a careful discussion see K Gallant, *The Principle of Legality in International and Comparative Criminal Law* (CUP, 2009).

[27] G Fletcher, *The Grammar of Criminal Law: American, Comparative and International* (OUP, 2007), Vol. 1 at 164 (at note 41) and at 222.

prohibitions were otherwise known or ascertainable.[28] I am not suggesting that ICL is analogous to the island situation: I am using the island situation to demonstrate that the *lex scripta* requirement is not universally applicable and therefore is contextually contingent. Such examples can show that written law is not a truly basic requirement, but rather a manifestation of a deeper requirement, which generates principles like *lex scripta* when certain conditions are satisfied.

ICL, a legal system without a legislature, which largely relied on customary law for its basic rules, and which has recently and rapidly transited from an embryonic to a relatively mature system, provides a wonderful setting to try to explore the parameters of the *lex scripta* requirement.[29] Under what circumstances does our concept of justice require written law and why? Can it justifiably be connected to the maturity of the system, and if so, how?[30] If writing is required, does it have to be in one place (e.g. a code) or can the writings be scattered in multiple places, as it is in common law jurisprudence or customary international law? What might we learn from studying common law traditions and customary law traditions?

ICL also provides an opportunity to explore legality in another way. As mentioned above, ICL frequently confronts massive evils in situations where positive law is lacking. The stakes in such cases are often higher than in ordinary criminal law, because (1) the atrocities are usually far more horrific and (2) positing new law to remedy any gaps (for example by multilateral treaty) is considerably more difficult than passing domestic legislation. ICL jurists have developed various strategies of argument to justify

[28] We could also consider the practice of a great many societies, which have not required written penal law and have relied on custom, to investigate the circumstances in which sanction without codification may be justifiable. As just one example of a relevant consideration, it seems unlikely that written law can truly be an absolute prerequisite for penal sanction in a society without written language.

[29] These issues do not arise before the ICC specifically, because its crimes are defined in the Rome Statute, and hence it accords with the *lex scripta* requirement. The issue is however pertinent (1) before tribunals authorized to apply customary law, (2) before national systems authorized to apply customary international law, and (3) as a principled normative inquiry. For an example of a tribunal grappling with the outer limits of legality, see the *Norman* case on whether the prohibition on recruiting child soldiers was criminalized at the time: *Prosecutor v Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction, SCSL A.Ch, SCSL-2004-14-AR72(E), 31 May 2004, (*Norman,* Child Recruitment Decision') at para. 14.

[30] See for example the argument advanced in *United States v Alstötter et al (the Justice Case)* 3 *Trials of War Criminals Before the Nuremberg Military Tribunal Under Control Council Law* No. 10 at 975 that applying the prohibition in a nascent legal system would strangle the law at birth. The argument is intriguing but a deontic justification will require a bit more development.

punishment in such cases. I expect that some such punishment can indeed be justified, but each of the major argumentative strategies employed to date has shortcomings.[31]

For example, it is often argued that the prohibition on retroactive law was not applicable in ICL, at least in its early stages.[32] That argument may indeed be correct as a matter of *positive law*, but it does not help us with our question of whether retroactivity is *normatively* acceptable, i.e. whether it is 'just'. One of the arguments raised in the Nuremberg judgment in response to the principle of legality was that it was merely a principle of justice and not a rule of international law. But in a system that seeks to do justice, surely we would not want to bat away principles on the grounds that they are merely about justice. A more promising argument is that the 'formal justice' enshrined in the principle of legality must give way to the 'substantive justice' of not letting persons escape punishment for heinous deeds.[33] That argument is appealing but incomplete, because it has a purely formal structure: it does not specify any *content* for its exception. How do we know that the prohibition we wish to impose falls within this concept of 'substantive justice'? There must be some ascertainable limits to the set of norms that could displace the requirement of 'formal justice'. It is tempting to fall back on natural law, or to assert that the acts are '*malum in se'*, but presumably we would want the rule-applier to be constrained in some ascertainable way so that we do not have arbitrary retroactive criminalization based purely on revulsion or intuition. Hence, we are thrown back into the search for some method or source to delineate the punishable prohibitions.

If we look at patterns of practice in ICL, we see that jurists have used multiple points of reference, such as criminalization in most legal systems of the world, prohibition in general international law, and appeal to a subset of values perceived as warranting penal response. A coherentist method could examine these and other points of reference, to try to identify a convincing account of when an offence can be recognized as giving rise to

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[31] Some such argumentative strategies are discussed in B van Schaack, '*Crimen Sine Lege*: Judicial Lawmaking at the Intersection of Law and Morals', (2008) 97 *Georgetown L Rev* 119; B Roth, 'Coming to Terms with Ruthlessness: Sovereign Equality, Global Pluralism, and the Limits of International Criminal Justice', (2010) 8 *Santa Clara Journal of International Law* 231.

[32] See e.g. H Kelsen, 'Will the Judgement in the Nuremberg Trial Constitute a Precedent in International Law?, (1947) 1 *International Law Quarterly* 153, at 164. The non-retroactivity principle is now formally recognized in Art. 22 of the ICC Statute.

[33] Kelsen, ibid at 165; A Cassese, *International Criminal Law*, 2nd ed (OUP, 2008) 38-41.

ICL liability. Such an account will almost inevitably embrace pluralistic sources.[34] More importantly, such an account will require a convincing deontic theory about the underpinnings and outer limits of the legality principle.

As may be seen, the account I propose would not transplant the familiar requirement of written legislation (or its international analogue, a treaty).[35] Nor would it indulge the arguments that simply circumvent legality and fair warning altogether. Instead, we use these hard cases to try to isolate what form of prohibition or warning is truly needed before we can prosecute a person. We would strive to develop a convincing understanding of the more general underlying rule.

5.2.2 Duress and Social Roles

The extreme contexts encountered in ICL can also generate new questions about the defence of duress. For example, in the *Erdemović* case, the accused had enlisted in a non-combat unit of the army.[36] One day his unit was sent to a farm, where they were informed that they were to shoot Muslim civilians. He protested the order, and was presented with a choice of either participating or joining the prisoners and being shot along with them. Faced with the unappealing alternative of sacrificing his life while saving no lives, Erdemović complied. The majority of the ICTY Appeals Chamber adopted a rule that duress is not a defence to the killing of civilians, following the lead of many common law jurisdictions.[37]

ICL scholars within the liberal tradition have widely and understandably criticized the majority decision for its insensitivity to fundamental principles and the importance of moral choice for culpability, given that the only way for Erdemović to be innocent was

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[34] By definition, recognition of new ICL crimes must draw from outside ICL. A pluralistic account may provide some anchoring in social facts, which is likely necessary to satisfy the underpinnings of the legality principle, while allowing recognition of offences for which there is sufficient notice. On pluralism in ICL see eg. E van Sliedregt, 'Pluralism in International Criminal Law' (2012) 25 Leiden J Int L 847; E van Sliedregt and S Vasiliev, eds, *Pluralism in International Criminal Law* (OUP, 2014); A K.A. Greenawalt, 'The Pluralism of International Criminal Law' (2011) 86 Indiana Law Journal 1063; and more generally see PS Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (CUP, 2012); C.H. Koch Jr, ' Judicial Dialogue for Legal Multiculturalism, (2004) 25 *Michigan J Int'l L* 879 esp at 897-902.

[35] Of course, for the ICC, the criminal prohibitions are codified in the Rome Statute, thus conforming with *lex scripta*.

[36] *Prosecutor v Erdemović,* Judgement, ICTY A.Ch, IT-96-22-A, 7 October 1997 ('*Erdemović* Appeal Judgement').

[37] *Erdemović,* ibid, at para. 19.

to be dead.[38] In Chapter 2, I criticized the *reasoning* employed by the majority; however, as I emphasized, this did not necessarily exhaust my analysis of the *outcome*.[39] While I agree with the liberal critiques, there is at least room for further analysis if we take into account the social dimension of human experience (§3.3.2).

In classical liberal theories that conceive of individuals as atomistic entities entering into a notional social contract to better advance their personal aims, the freedom to preserve one's own life is the ultimate *domain reservé.*[40] To many, a law that requires one to die in order to avoid censure is futile.[41] As Paul Kahn has argued, traditional contractarian liberal theories have trouble grappling with sacrifice (both the willingness of individuals to sacrifice themselves and the state or community's claim to expect sacrifice).[42] However, if we acknowledge the richly social world of human beings, as suggested in § 3.3.2, our analysis might change. Social roles can change the expectations placed upon us. A person assuming the role of 'soldier' is expected to carry out dangerous and life-imperilling acts, including for example charging a machine gun nest if ordered to do so. Experience shows that many humans can conceive of fates worse than death (hence the phrase 'death before dishonour' or indeed, 'a fate worse than death'). Thus, punishment for a refusal to fulfil an almost certainly lethal duty is not necessarily an absurdity. Criminal laws may punish soldiers for desertion or insubordination or cowardice in the face of the enemy.

Perhaps duress is based on the expectations of firmness that we can fairly expect from members of society.[43] Normally criminal law would not and could not demand heroism, however, it is at least possible that we can justly impose higher expectations on persons assuming the role of soldier. Just as we hold soldiers liable for desertion in the face of the enemy, perhaps we could hold them to a similar standard concerning their

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[38] See e.g. R E Brooks, 'Law in the Heart of Darkness: Atrocity and Duress', (2003) 43 *Virginia Journal of International Law* 861; I. Wall, 'Duress, International Criminal Law and Literature', (2006) 4 *JICJ* 724; A Fichtelberg, 'Liberal Values in International Criminal Law: A Critique of *Erdemović',* (2007) 6 *JICJ* 3; V Epps, 'The Soldier's Obligation to Die When Ordered to Shoot Civilians or Face Death Himself', (2003) 37 *New England Law Review* 987.

[39] § 2.2.4.

[40] T Hobbes, *Leviathan,* C B MacPherson, ed (Penguin Books, 1985) at 192, 199 and 268-270.

[41] Kant, above, at 28 (6:235-236) argues that a drowning person pushing another from a plank in order to survive would be culpable but not punishable, because the punishment threatened by law could not be greater than the immediate loss of his own life.

[42] P W Kahn, *Putting Liberalism in Its Place* (Princeton University Press, 2005), at 10, 12, 25, 63, 164 and 228-240.

[43] G Fletcher, *Grammar*, above, at 117, 322 (discussing German concept of *Zumutbarkeit*).

duty not to fire on civilians. Although the *reasoning* of the majority decision in *Erdemović* may be faulted for inadequate engagement with deontological considerations,[44] it is at least conceivable that the *conclusion* reached might be justified, insofar as it was restricted to soldiers,[45] if we use an account that considers these social dimensions of human experience.

To be clear, I am not advancing a conclusion one way or another at this time. Many issues would have to be worked out in this analysis. For example, we should not build an exception for soldiers based on an archetypical impression of a soldier. The category of 'soldier' is not homogenous; we would have to think about very different contexts of armed groups around the world, as well as the situation of conscripts. [46] I am merely highlighting the type of *questions* that a careful and humanistic liberal account can raise.

5.2.3. Superior Orders and State Authority

Developing a normative theory of the defence of superior orders could be illuminating both for ICL and for general criminal law theory. The defence of superior orders is controversial doctrinally and normatively.[47] The defence precludes international criminal responsibility of persons who are obliged to carry out orders, which turn out to be unlawful, but at the time of commission were not known to be unlawful and were not 'manifestly' unlawful.[48] If we wish to assess whether the doctrine is normatively justified, we would have to start by trying to identify the best explanation of its underpinnings. An initial question is how to conceive of it: is it a justification or an excuse? In normal criminal law, authorization by the state is typically a 'justification'.

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[44] See Chapter 2.

[45] *Erdemović* Appeal Judgement, above, at para. 19.

[46] In liberal theory, it is often asserted that roles that are not assumed voluntarily cannot create duties, but this may or may not always be true. That question itself would require careful thought and discussion. See e.g. Green, *Authority,* above, at 211 and 238.

[47] Many would argue that there is no such defence, citing for example the Nuremberg Charter and the ICTY and ICTR Statutes. On the other hand, Nuremberg jurisprudence and the ICC Statute seem to permit the defence for orders that are not manifestly unlawful. For some leading examples of the discussion see P Gaeta, 'The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International law' (1999) 10 *EJIL* 172; R Cryer, 'Superior Orders and the International Criminal Court' in R Burchill, N White, & J Morris, eds, *International Conflict and Security Law: Essays in Memory of Hilaire McCoubrey* (CUP, 2005) 49; M Osiel, 'Obeying Orders' above.

[48] ICC Statute, Article 33.

However, for reasons I touch on below, it may be that in ICL such a defence is better conceived of as an 'excuse'.

What are the possible theoretical underpinnings of the doctrine? Given that the doctrine partially accommodates orders legally binding under national law, a possible starting point is the concept of 'state authority'. Malcolm Thorburn has helpfully highlighted state authority as an explanation in the context of justifications, with a model that looks into the role of the agent, the agent's reasons for acting and the relevant scope of discretion.[49] The concept of 'state authority' seems like part of the apparatus needed to explain the superior orders doctrine.[50]

Again, however, ICL confronts us with a more complex relationship between state authority and criminal law. In a 'normal' context, a single state is both the applier of criminal law and the authorizer of the act. Given that unity, it seems obvious why that state would build deference to its own authorized acts into its criminal law. By contrast, in ICL contexts, there may not be a unity of identity between the applier of criminal law and the authorizer of the act. Indeed, there may be multiple authority structures asserting authority in conflicting ways. For example, an official's state of nationality may authorize and order the conduct, the law of the territorial state may forbid it, and the law of an international tribunal with jurisdiction might also proscribe the conduct, but with a defence that accommodates assertions of state authority that are not 'manifestly unlawful'. In these messier contexts, we are compelled to ask additional questions: Why exactly should criminal law accommodate state authority? What is the proper scope for that accommodation?

There are other tools of thought that might be helpful. For example, Meir Dan-Cohen offers the idea of 'role distance' from official roles, which may also be of assistance.[51] The defence of superior orders may be rooted in an acknowledgement of the plight of the individual, who will be punished in domestic law for disobeying a lawful

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[49] M Thorburn, 'Justifications, Power and Authority', (2008) 117 *Yale Law Journal* 1070. See also J Gardner, 'Justifications Under Authority', (2010) 23 *Canadian Journal of Law and Jurisprudence* 71.

[50] The solution will likely not be a direct application of the approach laid out by Thorburn, because it may be that superior orders is not a justification per se. For example, justifications tend to relate to a particular valued end; the superior orders defence protects obedience to certain orders of the state, without regard to the aim or purpose of the order. Thus, a theory of superior orders may be more elaborate (excusing the individual for one form of mistake of law, but providing the excuse out of qualified deference to the authority of states).

[51] M Dan-Cohen, 'Responsibility and the Boundaries of the Self', (1992) 105 *Harvard Law Review* 959, at 999-1001.

order, and punished in ICL for obeying an unlawful order. It is often argued in response that there is no dilemma: the soldier needs simply to obey lawful orders and disobey unlawful orders. However, that response is too sanguine and does not empathetically engage with the actual dilemma where the order's legality is ambiguous. The response glibly requires soldiers to immediately and unerringly make perfect legal assessments of orders in rushed and chaotic circumstances, even though the laws of war often involve subtle and even perplexing distinctions, for which normal peacetime experience is not a reliable guide. For normal citizens, where conduct is arguably criminal, the 'thin ice principle' argues that they should stay clear of possibly criminal conduct and it is not unjust to punish them if the conduct is confirmed to be criminal.[52] However, for soldiers (or others obliged to obey), that option is not available: a refusal is a crime if the conduct turns out not to have been criminal. Thus, the defence of superior orders seems to excuse good faith errors in those ambiguous circumstances. There may be a good deontic basis to allow a soldier a margin for good faith error about truly ambiguous orders.

If we develop a convincing normative account of the defence, it may inform the interpretation of the defence,[53] it may answer some criticisms of the defence, and it may raise new criticisms of the defence (for example, perhaps it is not too broad but too narrow).[54]

5.3. CONCLUSION

The framework I have advanced over the last few chapters is liberal, humanistic, coherentist, and cosmopolitan. The term 'liberal' is often used to mean different things, but in this thesis, I simply mean that the framework accepts constraints on criminal law

[52] A Ashworth and J Horder, *Principles of the Criminal Law,* 7th Ed (OUP, 2013) at 62.

[53] Under Article 33 of the Rome Statute, the defence of superior orders is only available to state forces, and not necessarily to non-state armed forces. Whether judges should extend the defence (or a similar defence) to non-state groups depends on the underlying rationale: is it based in respect for state authority, or respect for the operation of armed groups?

[54] The most common criticism of the defence of superior orders comes from a pro-prosecution, victim-protection angle, arguing that the defence should not exist, because it allows officials to 'escape conviction' for acts that prove to be unlawful. However, if we develop a normative justification, we might wind up criticizing the current defence from a different direction. Article 33 of the Rome Statute precludes the defence in relation to crimes against humanity; however, there can also be borderline, ambiguous orders (e.g. to deport or detain) that are not 'manifestly' unlawful but which on closer examination constitute crimes against humanity. It may prove to be unjust to preclude the defence in such circumstances.

out of respect for individuals as moral agents with autonomy and dignity. By 'humanistic', I emphasize that the framework is not based on rarified stipulations; it is based on respect for the humanity of persons, and it reflects human ends, human concerns, and the nuances of human lives.[55] By 'coherentist', I mean that the framework does not purport to deduce propositions from abstract timeless premises, but rather accepts that we are in a human conversation about human constructs.[56] By 'cosmopolitan', I mean that we seek conversation between traditions, we are concerned with all human beings, and we regard the state as merely one useful human-created device to facilitate human governance.

Just as criminal law theory might generate new insights about ICL, ICL might generate new insights about general criminal law theory. Extreme contexts might create an opportunity to isolate with more specificity the significance of ideas like community, citizenship, authority, legislation, and even to unpack our thoughts on the role of the state itself.

I have tried to show how a thoughtful account can raise new questions and perhaps even lead us to rethink our understanding of fundamental principles. It may be that familiar formulations of principles (for example, that legality requires written law) might not in fact be elementary. They might be generated by deeper underlying commitments, and only become applicable and appropriate in particular contexts.

In Part III, I will provide a more detailed illustration of the framework in operation, by analyzing specific controversies about command responsibility and personal culpability. In doing so I will showcase the method, its questions, the themes that emerge, and the usefulness of such inquiry.

[55] For more specification of this term, see Chapter 3.
[56] For more specification of this term, see Chapter 4.

PART III

ILLUSTRATIONS

In Part III, I illustrate the themes of this thesis by applying the proposed methodology to specific problems in ICL. In doing so, I will:

(1) show that early legal reasoning in ICL often did not engage adequately with the deontic dimension, generating problems and contradictions;
(2) showcase deontic analysis and, in particular, the coherentist approach to such analysis;
(3) show that careful deontic analysis can help avoid unjust doctrines, and avoiding needlessly conservative doctrines that overstate the relevant constraints;
(4) generate new doctrinal prescriptions; and
(5) show how ICL can raise new questions for general criminal law theory.

Why focus on command responsibility?

I will illustrate these themes with two chapters, each focusing on a different controversy in the law of command responsibility. Why do I devote two chapters to this one doctrine, when we have all the myriad puzzles of ICL still awaiting our scrutiny? I could instead offer a broader but thinner survey of numerous current controversies in ICL. However, if we attend carefully to command responsibility, there is a lot to unravel, and a lot to learn. We can 'see a world in a grain of sand'.[57]

Command responsibility raises fascinating issues for criminal law theory. Whereas other modes of liability in ICL were transplanted from established domestic analogues, command responsibility developed in international law. Accordingly, command responsibility has not yet been scrutinized to the same extent as domestic modes of liability, which have been refined and debated by jurists and scholars in many countries over centuries of experience. Command responsibility is a valuable and intriguing doctrine. It addresses a particular pathology of human organization: dangerously inadequate supervision in contexts of power and vulnerability.

Outline of arguments

In Chapter 6, I look at the controversy as to whether command responsibility requires (or should require) some causal contribution to the subordinates' crimes. The culpability principle, as recognized by ICL, requires that a person in some way contribute

[57] W Blake, 'Auguries of Innocence' in Nicholson & Lee, eds, *The Oxford Book of English Mystical Verse* (Clarendon Press, 1917).

to a crime in order to be a party to it. I will show that early reasoning in Tribunal jurisprudence engaged inadequately with the deontic dimension, producing an internal contradiction with the culpability principle. I will also show command responsibility jurisprudence became increasingly convoluted following efforts to deny or avoid this root contradiction. The analysis will show that careful deontic analysis can help avoid some muddles and produce clearer, more justified law.

Chapter 7 considers another controversy, the mental fault requirement of command responsibility. Early Tribunal jurisprudence disavowed criminal negligence, which was a well-intentioned and commendable caution. I argue, however, that after more careful analysis, a criminal negligence standard actually maps *better* onto personal culpability than the tests devised by the Tribunals. I argue that the 'should have known' standard in the ICC Statute is deontically justified and should be openly embraced and supported. This chapter illustrates several of the themes of Part II. First, tools of criminal law theory can clarify and benefit ICL doctrine. Second, careful deontic analysis can sometimes help us avoid needlessly conservative doctrines which were based on unfounded overestimates of the relevant constraints. Third, novel doctrines and contexts of ICL can help us test and reconsider common assumptions in criminal law theory. Command responsibility reveals a special set of circumstances that overturns the standard assumption that criminal negligence is categorically less serious that subjective foresight.

Chapter 6

A Culpability Contradiction: How Command Responsibility Got So Complicated

OVERVIEW

In this chapter, I illustrate the themes of this thesis by exploring a particular contradiction in Tribunal jurisprudence, and the resulting controversy. The contradiction is that Tribunal jurisprudence: (*a*) recognizes the principle of personal culpability, pursuant to which a person must contribute to a crime to be party to it; and yet (*b*) uses command responsibility to declare persons party to international crimes without a causal contribution. Many readers will promptly protest against the claim I have just made, but I will examine each of the major counter-arguments to demonstrate the contradiction.

The contradiction first emerged due to surface-level doctrinal reasoning that did not adequately consider the deontic dimension. I will show how the subsequent twists and turns to deny, obscure, evade, or resolve this contradiction have led to increasingly convoluted claims about command responsibility. Jurists now disagree about basic requirements of the doctrine and even its very nature: is it a mode of liability, a separate offence, or a mysterious new category, or does it perhaps even vacillate between both?

The analysis will show the problems of inadequate attention to deontic limits, and the clarity that can be furnished by more careful deontic analysis. Sensitivity to deontic constraints can shed new light on ongoing debates and can generate prescriptions. I will argue that a relatively simple solution is available, that relies on established concepts of criminal law. Regardless of whether you agree with my specific solution, however, my examination here should help clear out the most fallacious arguments, map out the defensible options, and pave the way for a simpler, clearer debate that engages with personal culpability.

6.1 ARGUMENT AND OBJECTIVES

6.1.1. The Structure of the Argument (and the Trajectory of the Debate)

The syllogism which is at the core of my argument is essentially as follows:

(1) ICL claims to comply with the fundamental principles of justice, including the principle of personal culpability.

(2) The principle of personal culpability requires that persons can only be held liable as party to crimes to which they *contributed*.

(3) Under the doctrine of command responsibility, the Tribunals explicitly hold the commander liable as a party to the crimes of the subordinates.[1]

(4) Therefore, to comply with the system's principles, command responsibility as a mode of liability must require that commander's dereliction *contributed* to the crimes of subordinates.

This syllogism is quite straightforward and demonstrates a contradiction. However, that contradiction has been thoroughly obscured by several arguments and ambiguities in the jurisprudence. I will explore in turn each of the counter-arguments that have been advanced to resist this syllogism, in order to expose the problem more clearly. As a helpful byproduct, in discussing each of the counter-strategies, I will also trace for you the trajectory of the command responsibility debate, so that you can see how and why it became increasingly mystified and disputed.

Strategy 1 – Doctrinal Sidestep: The first strategy to avoid the contradiction has been to employ doctrinal arguments to side-step fundamental principles. I will show below (§6.5) that doctrinal arguments are the wrong *type* of arguments, as they do not even *attempt* to answer the culpability contradiction.

[1] This premise may be particularly controversial for many readers, but as I will elaborate in §6.6, the Tribunals explicitly charge, convict, and sentence the commander as party to the underlying crimes.

Strategy 2 – Separate Offence: The second strategy is to characterize command responsibility as a separate offence. However, the Appeals Chamber has explicitly rejected the separate offence characterization, and the Tribunals expressly charge, convict, and sentence the commanders as parties to the underlying offences (see §6.6). The Tribunals cannot answer culpability challenges by claiming that they do not hold the commander liable as party to the underlying crime, when they in fact do precisely that.

Strategy 3 – '*Sui Generis*': A third strategy has been to declare that command responsibility is a '*sui generis*' mode of liability, exempt from the contribution requirement. However, simply invoking the adjective 'sui generis' does not even attempt to provide a deontic justification for liability without contribution (§6.7).

Strategy 4 – Retreat to Obscurity: A fourth move in Tribunal jurisprudence is to offer muddled and contradictory claims about whether the commander is or is not liable in relation to the acts of the subordinates. I will show that such vagueness is not a suitable solution (§6.7).[2]

Proposed Solution – Respect the Contribution Requirement: I will argue that the best solution is the simplest: to go back and untie the first knot that led to all of the subsequent knots. If we undo the first mis-step, in which causal contribution was rejected for inadequate reasons, we immediately discover an elegant solution. Command responsibility in international courts remains a mode of accessory liability, as it has long been recognized. As such, it requires causal contribution. This requirement is not burdensome, because it can be satisfied by showing that the commander's dereliction aggravated the risk of subsequent crimes. The solution reconciles (a) the ICC Statute, (b) the early case law, and (c) fundamental principles of criminal justice.

6.1.2 Resulting Insights

[2] There are two other possible, more radical, counter-strategies. The first is to reject fundamental principles. For example, one could adopt a purely instrumentalist approach that is focused only on crime prevention. I address such arguments in Chapters 3 and 4. Here I proceed on the assumption that we agree that personal culpability matters.

Another strategy – the most ambitious and sophisticated strategy – is to construct a new account of culpability, in which causal contribution is not required. I examine that proposed solution with more care in another work (D Robinson, 'How Command Responsibility Got So Complicated: A Culpability Contradiction, Its Obfuscation, and a Simple Solution', (2012) 13 *Melbourne J Int Law* 1). I argue that even on an open-minded, coherentist account, such arguments are as yet too undeveloped to be relied on for punishment of human beings.

This dissection of a command responsibility controversy offers several rewards for our broader inquiry about criminal law theory and ICL.

Insights about reasoning

My main concern in this chapter is with reasoning and internal contradictions. I will show how better engagement with deontic constraints can clarify and improve the law. Attentiveness to reasoning also help us better understand the trajectory by which command responsibility discourse became so complicated. I argue that Tribunal jurisprudence took an early wrong turn when it rejected the fundamental requirement of causal contribution, due to hasty reasoning. Subsequent twists and turns to escape the contradiction led to further convolutions. Literature and jurisprudence have now fractured into claims that command responsibility is a separate offence, a new *sui generis* form of liability (whose nature is never explained), neither-mode-nor-offence, or sometimes-mode-sometimes-offence. Descriptions of command responsibility in Tribunal jurisprudence became vague and even contradictory[3] – necessarily so, because any clarity would immediately reveal the contradiction. Tools of criminal law theory can help us to notice such problems and to resolve them with more surgical care.

Insights about law

My analysis sheds light on ongoing debates. First, the mainstream Tribunal approach remains problematic and in need of justification. Second, whereas the ICTY majority decision in *Hadžihasanović* on successor commanders has been vehemently criticized, I place it in a more favourable light: it is best supported by a deontic analysis.[4] Third, many criticisms of a contribution requirement as an 'arbitrary' barrier to prosecution are too simplistic: the debate must recognize that if command responsibility is indeed a mode of liability, then causal contribution is an established requirement to prevent arbitrariness. Fourth, several of the complexities from Tribunal jurisprudence need not and should not be imported to other jurisdictions: clearer and more principled

[3] For example, Tribunal judgments describe it as responsibility for the act and also as *not* responsibility for the act: see §6.7.2.
[4] In that case, a majority of the ICTY Appeals Chamber declined to create 'successor commander liability'. That decision has been condemned as 'arbitrary', but it should instead be commended as reducing the culpability gap. See §6.4.2.

paths are available. Whatever solution one prefers, a better debate must integrate the culpability principle.

Terms

In these chapters, I use the term '**command responsibility'**, and I will focus on the situation of military commanders. Of course, the doctrine – more accurately and inclusively known as 'superior responsibility' – covers a broader set of relationships. In order not to further complicate an already intricate subject, I will focus specifically on command responsibility and military relationships. The arguments for requiring causal contribution apply with equal or indeed greater force in non-military relationships. I use terms such as **'doctrinal'**[5] and **'deontic'** in the manner explained earlier in this thesis. As a counterbalance to the widespread use of the masculine pronoun, these chapters will use the feminine pronoun, especially in relation to commanders.

Scope and Disclaimers

My inquiry here is not about possible legislative reforms, but rather the legal reasoning applied by the Tribunals and in surrounding discourse, with the aim of improving on such reasoning in future.

These chapters bring together ICL scholarship and criminal law theory scholarship. While this work is one of the most detailed examinations of the doctrine to date from a deontic and criminal law theory perspective, there are countless issues that could and should be explored in more detail. For reasons of space, it is simply impossible to provide a complete treatment of both bodies of work. I delve into the vast literature and jurisprudence only to the extent needed to illustrate the culpability issues; numerous other issues are untouched. This work is simply an initial foray, and it is my hope that a longer and broader conversation will continue.

My discussion of command responsibility and causal contribution is unavoidably lengthy. First, I am offering observations at quite different levels: about reasoning, about doctrine, and about criminal theory. Second, the collective understanding of command responsibility has splintered, so that there are now many conflicting conceptions of it. While my core points are fairly simple, it takes time to address them when so many points

[5] In particular, I use '**doctrinal**' in the common law sense (which is very different from for example the German usage) to refer to source-based and teleological legal arguments, as opposed to arguments engaging with deontic principles or deeper theoretical coherence.

of reference are disputed. Each reader will have different priorities that they would wish to see addressed first. When all is untangled, I hope to persuade you that there is a contradiction, that it has been obscured by the discourse, and that more elegant solutions are available.

6.2 THE NOVEL REACH OF COMMAND RESPONSIBILITY

The command responsibility doctrine, as articulated in the statutes and jurisprudence of the Tribunals, imposes liability where:

(1) there is a superior-subordinate relationship;

(2) the superior knew or had reason to know that a subordinate was about to commit crimes or had done so; and

(3) the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[6]

The ICC Statute takes a very similar approach,[7] with two notable differences. First, and most importantly for present purposes, the ICC Statute expressly requires that the commander's dereliction causally contributed to the crimes.[8] Second, the ICC Statute also handles the mental element differently; I will discuss the mental element in Chapter 7.

I refer here to command responsibility as a mode of accessory liability, because that is how it was generally been understood and applied over the history of ICL, with controversy arising only relatively recently. I will address below the contention that command responsibility might constitute an entirely separate offence (§6.6).

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[6] ICTY Statute, Article 7(3); ICTR Statute, Article 6(3); *Prosecutor v Kordić and Čerkez,* Judgement, ICTY A.Ch, IT-95-14/2-A, 17 December 2004 ('*Kordić and Čerkez,* Appeals Judgement') at para 839.

[7] Article 28(a) of the ICC Statute provides that 'A **military commander** or person effectively acting as a military commander shall be **criminally responsible for crimes** within the jurisdiction of the Court **committed by forces under his or her effective command** and control, or effective authority and control as the case may be, **as a result of his or her failure** to exercise control properly over such forces, where:

> (i) That military commander or person either **knew** or, owing to the circumstances at the time, **should have known** that the forces were committing or about to commit such crimes; and
> (ii) That military commander or person **failed to take all necessary and reasonable measures** within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution. (Emphasis added.)

[8] The ICC Statute requires that the crimes were 'a result of his or her failure to exercise control properly over such forces'. As I will discuss below,n the culpability principle does not require that this be interpreted as a 'but for' causation; the principle is satisfied by contributions that aggravated the risk of the resulting crimes.

In order to assess command responsibility, we must ask: what is distinctive about it? In what way does command responsibility reach *beyond* other modes of liability, doing something that other modes do not, thereby warranting its separate existence? First, if a commander actually *orders* or instigates a crime, then she is already liable by virtue of other modes of liability (such as ordering, instigating, or joint commission). Second, where a commander does not initiate the crimes, but she *knows* of the crimes and contributes to them, then she may still be liable through 'aiding and abetting' or other complicity doctrines.[9] Third, where the commander *knows* of the pending or ongoing crimes but nonetheless *omits to prevent* them, she can still be found complicit: for example, aiding and abetting by omission has been recognized where the person is under a duty to prevent crimes and is in a position to act yet fails to do so.[10]

Accordingly, the distinctive reach of command responsibility is that it captures the commander who 'had reason to know' or 'should have known' of the crimes and failed to prevent or punish them.[11] Other modes of liability in ICL, such as aiding and abetting by omission, require *knowledge* of the crimes. It is the modified mental element that gives command responsibility its additional substantive reach. As I will argue in Chapter 7, command responsibility signals that, given the seriousness of the commander's duties and the dangerousness of the activity of supervising troops, a deliberate or criminally negligent failure to fulfil the duty to control troops can be a basis for accessory liability in any crimes resulting from that failure.

Tribunal jurisprudence claims that there is an additional difference: that command responsibility is a special mode of liability that does not require any contribution to the charged core crimes. It is this claim (and the lack of any attempt at deontic justification) that I examine here.

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[9] Other complicity doctrines include 'joint criminal enterprise' before the Tribunals and contribution to a 'common purpose' before the ICC; see e.g. Article 25 ICC Statute.

[10] *Prosecutor v Orić,* Judgement, ICTY T.Ch, IT-03-68-T, 30 June 2006 ('*Orić* Trial Judgement') at para 283; *Prosecutor v Orić,* Judgement, ICTY A.Ch, IT-03-68-A, 3 July 2008 ('*Orić* Appeal Judgement') at para 43; *Prosecutor v Halilović,* Judgement, ICTY T.Ch, IT-01-48-T, 16 November 2005, at para 303-304 ('*Halilović* Trial Judgement'); *Prosecutor v Kvočka,* Judgement, ICTY A.Ch, IT-98-30/1-A, 28 February 2005 at para 187 ('*Kvočka* Appeals Judgement'). For a similar approach in the common law, see A P Simester & G R Sullivan, *Criminal Law: Theory and Doctrine*, 3d ed (Hart Publishing, 2007) at 204-207; A Ashworth, *Principles of Criminal Law*, 5th ed (OUP, 2006) at 410.

[11] Of course, beyond this additional *substantive* reach, command responsibility also has an *expressive* or pedagogic value. It helps reinforce the message that superiors must take steps to prevent and repress crimes by subordinates. Thus, cases where commanders had actual knowledge – which technically could be prosecuted as aiding and abetting by omission – can be prosecuted under command responsibility. My point in this section is simply that, in terms of substantive reach, command responsibility is distinct from other modes by virtue of its modified mental element.

6.3 THE CULPABILITY CONTRADICTION

In this section, I aim to demonstrate a contradiction between Tribunal jurisprudence and the fundamental principle of personal culpability, as recognized by the Tribunals.

6.3.1. Tribunal Jurisprudence Recognizes the Culpability Principle, including the Contribution Requirement

Tribunal jurisprudence declares its compliance with fundamental principles, including the culpability principle.[12] For example, in *Tadic* it was recognized that

> the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated...[13]

The principle means that we punish people only for deeds for which they are personally culpable. The principle of personal culpability has an objective aspect (a connection to the crime) and a subjective aspect (a blameworthy mental state). My focus in this chapter is the objective aspect, i.e. that we hold persons responsible only for their own conduct and the consequences thereof. Culpability is personal, hence we cannot punish a person for crimes in which she was not involved.

An individual may of course share liability relating to acts physically perpetrated by others, provided that the individual *contributed* to the acts and did so with a mental state sufficient for accessory liability. Criminality often involves multiple actors, each contributing to a crime in different ways and in differing degrees. As criminal law theorist John Gardner has noted,

> I am responsible for what I do and you are responsible for what you do. But... [t]he truism 'I am responsible for my actions' cannot mean that I am responsible for my

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[12] UN Secretary General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), UN Doc S/25704 (1993), at paras 34 & 106; *Prosecutor v Tadić,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY A.Ch, IT-94-1-A, 2 October 1995 at paras 42, 45 & 62 ('*Tadić*, Interlocutory Appeal'); J Pejic, 'The International Criminal Court Statute: An Appraisal of the Rome Package' (2000) 34 *Intl Lawyer* 65 at 69.

[13] *Prosecutor v Tadić,* Judgement, ICTY A.Ch, IT-94-1-A, 15 July 1999*,* para. 186 ('*Tadić* Appeal Judgement'); see also *Judgment of the International Military Tribunal (Nuremberg)*, *reproduced in* (1947) 41 *AJIL* (supplement) 172 at 251: 'criminal guilt is personal'.

> actions, never mind your actions. For my own actions inevitably include my actions of contributing to your actions.[14]

The commitment to punish persons only for their own wrongdoing means that the accused must contribute in some way to a crime to be liable for it. ICL scholars Guénaël Mettraux and Ilias Bantekas have respectively observed that the requirement that the accused be 'causally linked to the crime itself is a general and fundamental requirement of criminal law'[15] and that 'in all criminal justice systems, some form of causality is required.'[16]

ICL jurisprudence recognizes that, for personal culpability, accessory liability requires some contribution to the underlying crime. For example, the ICTR in *Kayishema* affirmed that it is 'firmly established that for the accused to be criminally culpable his conduct must…have contributed to, or have had an effect on, the commission of the crime.'[17]. Tribunal jurisprudence has also recognized that conduct *after* the completion of crime cannot be regarded as contributing to the commission of the crime.[18]

Those parties to a crime who are most directly responsible are liable as *principals*, and more indirect contributors are liable as *accessories*.[19] I will discuss the principal-accessory distinction at greater length in Chapter 7.[20] For the present purpose of demonstrating an internal contradiction, it suffices to work with the distinction on the terms recognized in ICL. [21]

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[14] J Gardner, 'Complicity and Causality' (2007) 1 *Crim Law & Philos* 127 at 132.
[15] G Mettraux, *The Law of Command Responsibility* (OUP, 2009) at 82. Mettraux suggests however that causal contribution can be satisfied by contributing to impunity for the crime (p. 43, p. 80). This position differs from the generally recognized conception of culpability, which requires a contribution to the crime itself, and is reminiscent of earlier doctrines such as 'accessory after the fact'.
[16] I Bantekas, 'On Stretching the Boundaries of Responsible Command' (2009) 7 *JICJ* 1197 at 1199.
[17] *Prosecutor v Kayishema,* Judgement, ICTR T.Ch, ICTR-95-1T, 21 May 1999 ('*Kayishema* Trial Judgement') at para 199. Similarly, ICTY jurisprudence has held that 'rendering a substantial contribution to the commission of a crime is indeed expressing a feature which is common to all forms of participation'. *Orić* Trial Judgement, above, at para 280.
[18] Tribunal jurisprudence indicates that the only 'exception', in which conduct after the crime can be regarded as contributing to the commission of the crime, is where there is a prior agreement to subsequently aid or abet: *Prosecutor v Blagojević and Jokić,* Judgement, ICT T.Ch, IT-02-60-T, 17 January 2005 ('*Blagojević* Trial Judgement'), at para 731. However, this is not really an exception, given that there is a *prior* agreement, and it is the agreement that can facilitate, encourage or have an effect on the crime.
[19] See e.g. H Olásolo, 'Developments in the distinction between principal and accessory liability in light of the first case law of the International Criminal Court' in C Stahn & G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill, 2009) at 339.
[20] For an argument for a unitary model, see J Stewart, 'The End of 'Modes of Liability' for International Crimes' (2011) 25 *LJIL* 165.
[21] This accords with the coherentist approach, as outlined in Chapter 4. Because the distinction is so well established in ICL and in most national systems, we can at least adopt it as a starting hypothesis or point

Whereas principals 'cause' the crime (or make an 'essential' contribution, often expressed as *sine qua non* or 'but for' causation of some aspect of the crime), accessories need only 'contribute' in a more peripheral way.[22] A principal brings about the *actus reus* through her own acts (direct perpetration) or otherwise makes an essential contribution, including by acting through others while still having 'control' over the crimes. By contrast, the contribution of an accessory may be more indirect: the accessory's actions either *influence* or *assist* the voluntary acts and choices of the principal(s).[23] Thus, principals cause the crime, whereas accessories influence or assist the principals.[24]

Importantly, to 'contribute' to a crime is a less demanding standard than to 'cause' the crime.[25] Merely contributing requires only that one's conduct was of a nature that would facilitate or encourage the crime. After all, accessories are liable for assisting and encouraging others, and 'causation' can rarely be traced through the voluntary and informed acts of other human beings. Accordingly, it is not required that an accessory 'cause' the crime in the sense of a *sine qua non* causal relation; all that is required is some 'contribution'.[26]

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of departure. As I will discuss in Chapter 8, some scholars do not support the distinction. However, in my view the arguments against do not displace the weight of extensive practice and normative argument in favour of the distinction.

[22] There are different possible ways to distinguish between accessories and principals; for present purposes I focus on the essential contribution, which has support in ICL jurisprudence and ICL literature. See for example *Prosecutor v Katanga and Chui,* Decision on Confirmation of Charges, ICC PTC, ICC-01/04-01/07, 30 September 2008 at para 480-486; *Prosecutor v Lubanga,* Decision on the Confirmation of Charges, ICC PTC, ICC-01/04-01/06, 29 January 2007 at paras 322-340. See also H Olásolo, above; M Dubber, 'Criminalizing Complicity: A Comparative Analysis' (2007) 5:4 *JICJ* 977. It also has support in scholarship on normative underpinnings of criminal law. To take some prominent examples from the English-language literature, Kadish, 'Complicity, Cause and Blame: A Study in the Interpretation of Doctrine' (1985) 73 *Calif L Rev* 323, explains in a seminal article how principals make a *sine qua non* (but for) contribution, whereas the accomplice aids or influences the principal; the consequence of her act is the influence on the choices and actions of others. See also M S Moore, 'Causing, Aiding, and the Superfluity of Accomplice Liability' (2007) 156 *U Pa L Rev* 395 at 401; J Dressler, 'Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem' (1985) 37 *Hastings L J* 91 at 99-102.

[23] Kadish, 'Complicity, Cause and Blame' above, at 328 and 343-346; Dressler, above, at 139.

[24] As Gardner, 'Complicity and Causality' above, at 128 explains, 'Both principals and accomplices make a difference, change the world, have an influence…. [A]ccomplices make their difference through principals, in other words, by making a difference to the difference that principals make'. See also I Bantekas, 'The Contemporary Law of Superior Responsibility' (1999) 93 *AJIL* 573 at 577; Kadish, 'Complicity, Cause and Blame' above, at 337-342; Simester & Sullivan, *Theory and Doctrine* above, at 193-196.

[25] See eg Gardner, 'Complicity and Causality' above, at 128; I Bantekas, 'The Contemporary Law of Superior Responsibility' (1999) 93 *AJIL* 573 at 577; Kadish, 'Complicity, Cause and Blame' above, at 337-342; Simester & Sullivan, *Theory and Doctrine* above, at 193-196.

[26] Elsewhere, I explore the outer limits of causal contribution, i.e. the minimum level of involvement entailed by the culpability principle for any form of accessory liability. Robinson, 'Complicated', above.

A typical and plausible elaboration on the contribution requirement in Tribunal jurisprudence is that it is 'enough to make the performance of the crime *possible or at least easier*'[27] and that the contribution can be any assistance or support, whether present or removed in place and time, *furthering or facilitating* the performance of the crime, provided that it is 'prior to the full completion of the crime'.[28] The requirement is not onerous: it can be satisfied by conduct of a nature that would encourage or facilitate the crime (elevating the risk).

Furthermore, the contribution may be in the form of an omission, if the accused was under an obligation to prevent the crime.[29] It is sometimes argued that omissions cannot make contributions. I omitted my analysis of several comparatively philosophical questions from this chapter in the interests of brevity; however, for readers who are interested, I make my analysis available in Annex 1, below. In short, ICL jurisprudence – like national jurisprudence - follows the 'normative conception' of causation, which recognizes that our failures can indeed have consequences. For example, failing to feed prisoners leads to their starvation; failure to lock a door facilitates escape through that door.[30]

I should address two possible points of confusion. First, a surprisingly common misperception in ICL jurisprudence and literature is that the accessory liability model entails 'pretending' or 'deeming' the accessory to have 'committed' the crime.[31] Accessory liability is not deemed commission; the accessory is held responsible for his or her own role in contributing to the crime with the requisite level of fault. Second, one might think of attempts, incitement, or 'accessory after the fact' as possible examples of non-contributory modes of liability. Those, however, are actually separate offences. The common law concept of 'accessory after the fact' was rejected in modern times as a form of accessory liability, specifically because it is considered unsound to hold someone as accessory to a crime on which they had no effect or contribution.[32]

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[27] *Orić* Trial Judgement, above, at para 282 (emphasis added).
[28] *Ibid* at para 282 (emphasis added). The *Orić* case also confirms that the contribution standard is not 'but for' causation; it simply requires a significant effect that furthers or facilitates the crime: *ibid* at para 338.
[29] *Ibid* at para 283.
[30] Tribunal jurisprudence has followed the mainstream position, that the 'substantial effect' requirement, when applied to omissions, requires that 'had the accused acted the commission of the crime would have been substantially less likely': *Prosecutor v Popović,* Judgement, ICTY A.Ch, IT-05-88-A, 30 January 2015 at para 1741.
[31] For examples of this misunderstanding, see discussion in §8.3.2.
[32] See §7.2.1.

6.3.2. Yet Tribunal Jurisprudence Rejects Contribution in Command Responsibility

Despite affirming the culpability principle and the contribution requirement entailed therein, Tribunal jurisprudence nonetheless goes on to assert that the requirement does not apply to command responsibility. For example, the Tribunal's decision in *Oric* acknowledges that modes of liability require a causal contribution, and thus that superior responsibility 'would require a causal contribution to the principal crime', yet asserts that causal contribution is not required, 'for good reasons'.[33] I will scrutinize the quality of those reasons below (§6.5). First, I will outline how the anti-contribution position emerged, and show the implications of that position.

The doctrine of command responsibility provides two distinct ways to prove the dereliction by the commander: (a) failure to *prevent* crimes and (b) failure to *punish* crimes.[34] The first branch is satisfied where that the commander 'failed to take the necessary and reasonable measures' to try to *prevent* the crimes.[35] The 'failure to *prevent*' branch does not pose culpability problems. Given that the commander has a duty to provide training and establish preventive systems, the failure to do so facilitates crimes, in comparison with the situation that would exist had she met her duty.[36]

It is the second branch, the 'failure to *punish*' crimes, that has caused confusion and difficulty. This branch refers to the failure of the commander to take the reasonable and necessary measures to investigate and punish or to refer the matter to competent authorities for investigation and prosecution.[37] Obviously, a commander's failure to punish in relation to a particular crime can only occur *after* that crime. Hence it cannot

[33] *Orić Trial Judgement* at para 338.
[34] The ICTY and ICTR Statutes refer to failures to prevent and failures to punish. The ICC Statute actually splits the possible derelictions into three categories: failures to prevent, to repress, and to submit the matter to other authorities for punishment. While the three-prong ICC approach may be useful for highlighting different obligations of commanders, I will, for simplicity, continue to refer to the two conceptually different stages: failures to prevent (referring to actions required prior to a particular crime) and failures to punish (referring to actions required after a particular crime). The three options in the ICC Statute ultimately collapse into these two conceptual categories.
[35] ICTY Statute, Art. 7(3); ICTR Statute, Art 6(3); a similar requirement appears in ICC Statute, Art. 28(a)(ii) and 28(b)(iii). The obligation is one means and not results; the mere fact that crimes nonetheless occurred does not mean that the commander failed to meet her duty to take reasonable preventive steps.
[36] Some may argue that a failure to prevent, being an omission, cannot be regarded as 'contributing' to any events; this argument is discussed in Annex 1.
[37] ICTY Statute, Art 7(3); ICTR Statute, Art 6(3); ICC Statute, Art 28(a)(ii) and 28(b)(iii).

causally contribute to that particular crime. For this reason, Tribunal jurisprudence has declared that it is 'illogical'[38] and 'would make no sense'[39] to require that the failure to punish the crime contribute to that same crime. From this observation, the Tribunal reasoned that 'the very existence' of the failure to punish branch in Article 7(3) 'demonstrates the absence of a requirement of causality'.[40] Accordingly, the ICTY rejected the contribution requirement.[41]

It is true that a failure to punish a crime cannot retroactively causally contribute to that same crime. However, this does not demonstrate that the 'failure to punish' branch is incompatible with the contribution requirement. It only seems incompatible if we fail to consider the possibility of a *series* of crimes.

Fig 1. If we conceive only of the one-crime scenario, there would seem to be a contradiction between the 'failure to *prevent*' branch and requiring causal contribution

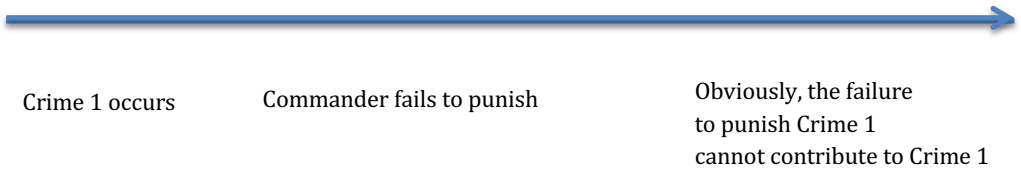

Fig 2. However, if we conceive of multiple crimes, the seeming paradox is solved

Consider the scenario where subordinates commit not one crime but a *series* of crimes, which is indeed the typical situation in ICL. The first crime or crimes are

[38] *Prosecutor v Blaškić,* Judgement, ICTY A.Ch, IT-95-14-A, 29 July 2004 ('*Blaškić* Appeal Judgement').
[39] *Orić* Trial Judgement, above at para 338.
[40] *Prosecutor v Delalić et al. (Čelebići),* Judgement, ICTY T.Ch, IT-96-21-T, 16 November 1998 ('*Čelebići* Trial Judgement'), at para 400. The Prosecution similarly rejected the possibility of causal nexus 'as a matter of logic' (ibid, para 397).
[41] *Čelebići* Trial Judgement *ibid* at paras 396-40; endorsed in *Blaškić* Appeal Judgement above at para 76.

committed. At some point the commander either learns of the crimes or has enough information that she 'should have known' or 'had reason to know' of the crimes. The commander fails to take reasonable steps to have the crimes investigated and prosecuted, and crimes continue to occur. Although this failure of the commander cannot retroactively contribute to the *initial* crimes, it can and does contribute to each *subsequent* crime. Her failure to punish the prior crimes facilitates the subsequent crimes, in comparison to the legally expected baseline of her diligent response to crimes of subordinates. If the subordinates know of the lack of punishment, they may perceive a reduced risk of punishment or a signal of punishment. But we do not even need a showing of such knowledge, because the commander has failed to deliver a deterrent and repudiative signal that she was obliged to give, and thus she has elevated the risk in comparison to the situation that would exist had she met her obligation. The commander can properly share in accessory liability for the subsequent crimes, because her failure to punish prior crimes is a culpable omission which facilitated the subsequent crimes.

Once we consider the scenario of multiple crimes, which is actually the most common scenario in ICL, we see that actually the 'failure to punish' branch can indeed be reconciled with a requirement of causal contribution. Hence, there was no incompatibility or contradiction that would require, or even permit, the Tribunal to reject a requirement of the fundamental principle of personal culpability.

I believe that the Tribunal's reasoning in those cases is an example of hurried doctrinal reasoning that did not engage adequately with deontic constraints. The Tribunal abandoned the culpability principle all too insouciantly, because of a relatively superficial doctrinal argument (textual construction). Indeed, the seeds of confusion can be traced even further back, to the drafters of the ICTY Statute, who blithely merged criminal and non-criminal provisions of Additional Protocol I, without considering the culpability principle.[42] Had the chambers approached the provision with the culpability principle more carefully in mind, the provision could readily have been interpreted compatibly with the requirement.

[42] See discussion above §2.3.2.

6.4 THE STAKES

To illuminate the implications of allowing convictions without contributions, I will outline two scenarios of 'non-contributory' failures to punish. (By 'non-contributory', I mean that the failures were not followed by any subsequent crimes and thus did not facilitate or encourage any crimes by subordinates). One scenario is the problem of the isolated crime and the other is the problem of the successor commander.

6.4.1 The Problem of the Isolated Crime

The first problem arises where a crime occurs, the commander fails to punish, and yet no other crimes occur. The problematic scenario only arises where the commander has adequately met her 'preventive' duties (otherwise, the failure to prevent could facilitate or encourage crimes, and there is no problem with causal contribution). On my account – i.e. on an account that respects the contribution requirement – she cannot be retroactively liable as party to the isolated crime, because she did not contribute to it. She could be held liable for subsequent crimes following that failure to punish, but not for the isolated crime to which she did not contribute.[43]

In the isolated crime scenario, the commander has clearly failed in her responsibilities, and she may face various consequences for her dereliction, including domestic criminal liability for dereliction of duty offences. But, I argue, we cannot convict her as a party to that core crime. She has done something wrong, but 'party to genocide' is not an accurate or just description of her wrong. By contrast, Tribunal jurisprudence would allow her conviction as a party to that initial crime by virtue of command responsibility, in the absence of any contribution, in violation of the culpability principle.

[43] A variation on this scenario is what we may call the "problem of the initial crime". In this variation, following the commander's failure to punish, further crimes do indeed occur. The commander may be properly liable for the subsequent crimes, because her failure to punish prior crimes facilitated or encouraged those crimes. However, she should not be liable for the initial crime or crimes (the crimes prior to the time at which she knew or had reason to know that crimes were occurring), because she made no culpable contribution, by act or omission, to those crimes.

6.4.2 The Problem of the Successor Commander

An even more glaring problem of non-contributory dereliction arises in the scenario of the 'successor commander'. This scenario arose in *Hadžihasanović*, in which a commander, Kubura, had taken up his command position *after* certain crimes were committed.[44] Kubura was nonetheless charged with crimes committed *prior to his assignment*, by virtue of command responsibility and his failure to punish those crimes once he took up the post.

The prosecution, the Trial Chamber, and the two dissenting judges in the Appeals Chamber took the proposition that causal contribution is not required and pushed it to its furthest extension. If no causal contribution is required, then it follows that the accused need not even have been in command or involved in the outfit at the time of the crimes. Indeed, it would equally follow that the accused need not even have been *born* at the time of the crimes. All that would matter is that the accused at some point assumed command, became aware of past crimes or had reason to know of them, and failed to punish the persons responsible. If we apply the doctrine mechanistically and without any concern for fundamental principles, this approach would meet all of the formal requirements of Article 7(3) of the ICTY Statute.

On appeal, a bare 3-2 majority of the Appeals Chamber recoiled from successor commander liability, over some strong dissents and with some heated judicial language on all sides.[45] The majority held that the commander must at least have been in command at the time of the crimes. The reasoning of the majority was not explicitly based on concern for the culpability principle, but rather on the doctrinal grounds that prior sources and authorities did not seem to support successor commander liability for past crimes.[46] Judges Shahabuddeen and Hunt, in dissent, would have allowed successor commander liability.

The *Hadžihasanović* decision generated major controversy and has spawned a large literature on successor commander liability. Rather than receiving applause for its restraint, the majority position has come under vehement criticism. Much of the

[44] *Hadžihasinović*, Interlocutory Appeal above. Appended to the decision are the dissenting opinions of Judge Shahabuddeen ('Shahabuddeen Opinion') and Judge Hunt ('Hunt Opinion').
[45] Ibid.
[46] Ibid at paras 37-56. See also T Meron, 'Revival of Customary Humanitarian Law' (2005) 99 *AJIL* 817 at 824-826. While the approach does not directly reference the culpability principle, it does reflect concern for the legality principle.

discourse illustrates the reasoning habits discussed above in Chapter 2, focusing on IHL sources and the goal of maximizing deterrence, but neglecting the deontic constraint of culpability. Many scholars argue that the majority position creates a 'loophole', an 'arbitrary limitation' and a 'gaping hole' through which perpetrators will 'escape liability'.[47] Within the ICTY, trial chambers have openly expressed their discontent and disapproval of the majority decision.[48] A trial chamber of the Sierra Leone Special Court declined to follow the majority approach and instead adopted the dissent approach.[49] The ICTY Appeals Chamber itself almost overturned the majority position in a later decision (*Orić*). Separate opinions in the *Orić* decision described the *Hadžihasanović* majority decision as an 'erroneous decision', 'highly questionable' and an 'arbitrary limitation'[50] and noted that there 'is a new majority of appellate thought'.[51] The Appeals Chamber narrowly declined to overturn *Hadžihasanović* on the grounds that the facts in *Orić* did not squarely require a determination on that issue.[52]

The judicial debate was largely framed in terms of precedents and teleological arguments. What is largely missing from the conversation is the deontic dimension: that convicting a person as party to crimes completed before she even joined the unit would be a startling departure from the culpability principle, at least as hitherto understood. If

[47] See e.g. C Fox, 'Closing a Loophole in Accountability for War Crimes: Successor Commanders' Duty to Punish Known Past Offences' (2004) 55 *Case W Res L Rev* 443; D Akerson & N Knowlton, 'President Obama and the International Criminal Law of Successor Liability' (2009) 37 *Denv J Intl L & Pol'y* 615; Mettraux, *Command Responsibility* above, and the declarations of Judges Shahabuddeen, Liu and Schomburg in *Orić* Appeal Judgement, above, as well as further examples in Chapter 6.

[48] *Orić* Trial Judgement, above at para 335 ('…it should be immaterial whether he or she had assumed control over the relevant subordinates prior to their committing the crime. Since the Appeals Chamber, however, has taken a different view for reasons which will not be questioned here, the Trial Chamber finds itself bound…'); *Halilović* Trial Judgement above at para 53.

[49] *Prosecutor v Sesay, Kallon and Gbao*, Judgement, SCSL T.Ch, SCSL-04-15-T, 2 March 2009 ('RUF Case') at para 306 ('…this Chamber is satisfied that the principle of superior responsibility as it exists in customary international law does include the situation in which a Commander can be held liable for a failure to punish subordinates for a crime that occurred before he assumed effective control.'). But see c*ontra Prosecutor v Brima, Kamara and Kanu,* Judgement, SCSL T.Ch, SCLC-04-16-T, 20 June 2007 ('AFRC Case') at para 799 ('…there is no support in customary international law for the proposition that a commander can be held responsible for crimes committed by a subordinate prior to the commander's assumption of command over that subordinate.'); *Prosecutor v Fofana and Kondewa,* Judgement, SCSL T.Ch, SCSL-04-14-T, 2 August 2007 ('CDF Case') at para 240 ('The Chamber further endorses the finding of the ICTY Appeals Chamber that an Accused could not be held liable under Article 6(3) of the Statute for crimes committed by a subordinate before the said Accused assumed command over that subordinate.')

[50] *Orić* Appeal Judgement above, Liu Declaration, paras 5 and 8; *Orić*, ibid, Schomberg Declaration at para 2.

[51] *Orić*, ibid, Shahabuddeen Declaration at para 3; see also ibid at para 12.

[52] *Orić*, ibid at para 167 ('The Appeals Chamber, Judge Liu and Judge Schomburg dissenting, declines to address the *ratio decidendi* of the *Hadžihasanović* Appeal Decision on Jurisdiction, which, in light of the conclusion in the previous paragraph, could not have an impact on the outcome of the present case.')

such a proposition is to be entertained at all, it would require a new understanding of culpability, backed by some meticulous deontological justification.[53]

The culpability problem was not entirely overlooked. Judge Shahabuddeen, dissenting in *Hadžihasanović,* acknowledged that modes of liability require causal contribution;[54] his solution to the impasse was that he 'prefers' to characterize command responsibility as a separate offence. This was the origin of the 'separate offence' versus 'mode of liability' controversy that still burns today. While that characterization would indeed solve the problem, I argue below (§6.6) that it is not available to the judges of the Tribunals and the ICC. . In any case, Tribunal jurisprudence is explicit that it is a mode of liability, and hence the unresolved contradiction persists.

The position taken by the Prosecution[55] and by most of the jurisprudence[56] is the greater puzzle, because it involves a stark contradiction. That position (*a*) regards command responsibility a mode of accessory liability, (*b*) rejects the contribution requirement, and yet (*c*) proclaims compliance with the culpability principle. Such a position could only be defended with a new deontic account of personal culpability, which the Tribunals have not offered or even attempted.

This culpability contradiction is not immediately evident, because several arguments have obscured it. The remaining sections (§6.5 to §6.7) examine the evolution of the legal argumentation, showing how the culpability contradiction was long obscured from view.

6.4.3 Common Objections to the Contribution Requirement

The most common objection to requiring contribution is that it would create a 'gap' that will allow commanders to 'escape justice' for the isolated or initial crimes.[57] Such arguments are an illustration of one of the problematic structures of argument that I discussed in Chapter 2. They adopt a purely utilitarian approach focussing on the single variable of maximizing deterrence, and they fail to engage with the deontic question of whether conviction in such circumstances would constitute '*justice*'. If the commander is

[53] Possible alternative understandings of culpability, including an intriguing argument advanced by Amy Sepinwall, are touched upon below §6.8.3.
[54] *Orić* Appeal Judgement, above, Shahabuddeen Declaration, para 17.
[55] As discussed e.g. in *Orić*, ibid Shahabudden Opinion, para 18.
[56] The ambiguities of the jurisprudence are discussed in §6.7.
[57] Examples of such arguments in the command responsibility debate are discussed in the next section.

not culpable for the core crime, then our inability to convict her does not mean she is 'escaping justice'. On the contrary, our inability to convict constitutes 'justice'.

The second most common objection is that that the scope of criminal liability would be narrower than the full scope of the humanitarian law duty.[58] This objection illustrates another of the problematic structures of argument that I discussed in Chapter 2. The objection assumes that ICL norms must be co-extensive with human rights or humanitarian law norms. The humanitarian law duty certainly does require the commander to punish all past crimes, regardless of whether she contributed to them.[59] Thus, any failure to punish would breach *humanitarian* law. It is however an entirely different question whether we can hold her retroactively *personally criminally liable* as an accessory to those crimes. Before transplanting the humanitarian law rules into ICL prohibitions, we must pause and reflect on limits of personal criminal culpability. The personal criminal liability of the individual may rightly be narrower than the civil obligation of her state or armed group; that is not necessarily a 'lacuna'.

Respecting the culpability principle does not mean that commanders will be free to ignore past crimes. First, a failure to punish would mean that the state or armed group has breached *humanitarian* law, triggering any relevant remedies under that law. Second, the commander may also personally face *criminal* law repercussions, if a lawmaker with jurisdiction has criminalized non-contributory derelictions of duty. But what it does preclude is holding the commander liable as an accessory, via command responsibility, for past crimes on which her derelictions had no influence.

6.5 FIRST STRATEGY: DOCTRINAL ARGUMENTS TO CIRCUMVENT THE CONTRIBUTION REQUIREMENT

The initial responses to complaints about the culpability contradiction were technical doctrinal arguments. I will argue that these doctrinal arguments are not only wrong on their own terms, but they are also wrong *type* of answer. They do not even

[58] See e.g. *Prosecutor v Hadžihasinović,* Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ICTY A.Ch, IT-01-47-AR72, 16 July 2003 and in particular the opinion of Judge Hunt at para 21-22 and the opinion of Judge Shahabuddeen at para 23, 25 and 38 ('*Hadžihasinović*, Interlocutory Appeal'). See also *Orić* Appeal Judgement, above, and in particular the declaration of Judge Liu at para 19-21 and 30-31 and the declaration of Judge Schomberg at paras 8 & 18-19.

[59] See e.g. Article 87(3), Additional Protocol I to the Geneva Conventions ("AP I").

attempt to address the concern that the system is contradicting its recognized fundamental principles.

My aim here is not to criticize the Tribunals. The Tribunals operated in a pioneering phase of ICL. They were engaged in a fast-paced, massive, and complex task of constructing doctrine from diverse authorities. They had to resolve countless legal questions, and they could not give detailed consideration to every fine point. My aim here is to take a step back and critically assess the reasoning and the law, in order to improve upon them in future.

6.5.1. The Perceived Incompatibility with 'Failure to Punish'

As explained in §6.3, the contribution requirement was initially waved away on the grounds that it cannot be reconciled with the 'failure to punish' branch of command responsibility. In *Čelebići*, the defence argued that a 'failure to punish' should give rise to accessory liability only if that failure is 'the cause of *future offences*'.[60] The Chamber appears to have missed the subtlety of the defence argument, and instead considered whether a failure to punish a crime can cause that *same crime*. The Chamber held that 'no such causal link can possibly exist' between a failure to punish an offence and 'that same offence'.[61] The Chamber opined that 'the very existence' of the failure to punish branch in Article 7(3) 'demonstrates the absence of a requirement of causality'.[62] The Prosecution similarly rejected the possibility of causal nexus 'as a matter of logic'.[63] In *Blaškić*, the defence again argued that a contribution to crimes must be shown even under the 'failure to punish' branch, and the Appeals Chamber found the defence argument to be 'illogical', because 'disciplinary and penal action can only be initiated after a violation is discovered'.[64]

The chambers' reasoning is sound as far as it goes, but it is too simplistic. The defence was not arguing that a failure to punish a crime could retroactively cause that same crime. Rather, the defence argument – consistent with the culpability principle – was that a failure to punish can create accessory liability only with respect to *subsequent*

[60] *Čelebići* Trial Judgement' above at para. 396.
[61] Ibid at 400.
[62] Ibid at 400.
[63] Ibid at 397.
[64] *Blaškić* Appeal Judgement above at para 83.

crimes encouraged or facilitated by that failure.[65] There is nothing 'illogical' about recognizing the 'failure to prevent' branch while also respecting the contribution requirement.

It is often argued that recognizing the contribution requirement would render the 'failure to punish' branch redundant.[66] However, the two branches ('failure to prevent' and 'failure to punish') offer two distinct ways to prove the failure of the commander. A prosecutor may prove *either* a failure to take adequate preventative measures *or* inadequate efforts to investigate and prosecute crimes. Either provides the dereliction that, if accompanied by a blameworthy state of mind and a contribution to crimes, can ground accomplice liability for resulting crimes.

6.5.2. The Claim that Precedents did not Require Contribution

The second doctrinal response is the claim past precedent did not require causal contribution for command responsibility. For example, in *Čelebići*, the defence argued that the commander's failure to punish must contribute to the commission of criminal acts.[67] The Trial Chamber acknowledged 'the central place assumed by the principle of causation in criminal law',[68] but nonetheless asserted that a causal contribution '*has not traditionally been postulated*' as a condition for liability under command responsibility.[69] In a one-sentence analysis, the Chamber asserted that it '*found no support*' for a requirement of causal contribution for command responsibility in the case law, treaty law or (with one exception) the literature.[70] Similar defence arguments were advanced in a later case, but the Appeals Chamber rejected them, citing with approval the analysis in *Čelebići.*[71]

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[65] *Čelebići* Trial Judgement above at 396.
[66] For this form of argument see e.g. *Orić* Trial Judgement above at para 335; *Orić* Appeal Judgement above, Liu Declaration at para 7; *Orić* Appeal Judgement, ibid, Schomberg Declaration at para 8, all in the context of successor commander liability.
[67] *Čelebići* Trial Judgement, above, para. 345 and 396
[68] Ibid para. 398.
[69] Ibid para 398 (emph added).
[70] Ibid para 398 (emph added). The exception which the Chamber noted was the work of Cherif Bassiouni, arguing that causal contribution was an essential element.
[71] *Blaškić* Appeal Judgement, above, paras. 73-85. Subsequent cases regard the matter as settled; see e.g. *Halilović* Trial Judgement, above; *Prosecutor v Brdjanin*, Judgement, ICTY T.Ch, IT-99-36-T, 1 September 2004, para. 280.

The problem with responses pointing to past authority is that they are the wrong *type* of answer. These responses give a technical, mechanical, 'source-based' analysis.[72] But a culpability challenge requires a deontic analysis: one must actually assess compatibility with the fundamental principles that limit our license to punish individuals. This deontic task requires an assessment of whether the rules are *just.*[73]

Interestingly, in addition to being the wrong *type* of response, the precedent argument was inaccurate even as a doctrinal argument. Numerous scholars have shown that past cases and authorities actually do provide ample authority for a contribution requirement.[74] My concern here is not with source-based doctrinal analysis but rather with the culpability principle and with reasoning, and hence I will not repeat those efforts by embarking here on a doctrinal review of the past authorities. We can however glean from this example a fantastic lesson about reasoning. What I find fascinating is that the *Čelebići* Chamber somehow managed to detect 'no support' for a contribution requirement, even though the *Čelebići* decision itself *directly quoted* passages from authorities that *explicitly* support the requirement. To give two examples, *Čelebići* cites the post-World War II *Toyoda* decision, which described the principle as covering the commander who 'by his failure to take any action to punish the perpetrators, permitted the atrocities to continue'.[75] *Čelebići* also cites legislation of the former Yugoslavia which states that 'a military commander is responsible as a participant or an instigator if, by not taking measures against subordinates who violate the law of war, he allows his subordinate units to continue to commit the acts'.[76] These and other authorities show the understanding on the part of other courts and lawmakers that, *even for failures to*

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[72] §1.3.1.

[73] Of course precedent would matter where there is a formally binding or discursively persuasive precedent that specifically considers and rules on compatibility with the culpability principle.

In fairness to the precedent-based reasoning in the *Čelebići* and *Blaškić* decisions, the defence lawyers in those cases primarily characterized their challenge as one based on the principle of legality (*nullum crimen sine lege*). Hence, reference to doctrine was an appropriate response to address that challenge. The problem is that subsequent chambers have regarded *Čelebići* and *Blaškić* as conclusively settling all debate on the issue, and hence they did not engage seriously with the distinct problem of culpability.

[74] O Triffterer, 'Causality, a Separate Element of the Doctrine of Superior Responsibility as Expressed in Article 28 Rome Statute?' (2002) 15 *LJIL* 179; Mettraux, *Command Responsibility* above, at 82-86 & 236; A Cassese, *International Criminal Law*, 2nd ed (OUP, 2008) at 236-242; C Greenwood 'Command Responsibility and the *Hadžihasanović* Decision' (2004) 2 *JICJ* 598; Bantekas 'Stretching the Boundaries' above; V Nerlich 'Superior Responsibility under Article 28 ICC Statute: For What Exactly is the Superior Held Responsible?' (2007) 5 *JICJ* 665 at 672-673.

[75] *Čelebići* Trial Judgement at para 339 (emphasis added).

[76] *Čelebići* Trial Judgement at para 341 (emphasis added).

punish, liability arises when the commander's failure *permitted other crimes* to continue. The clues were there, for those attuned to see them. The lesson I draw from this is that, even in source-based analysis, what we see – and what we overlook – is influenced by our sensitivities. If we are mindful of fundamental principles, we are more likely to see the patterns in authorities that are consistent with those principles; if we are not mindful, we may miss those patterns.

6.5.3. The Argument that Respecting the Contribution Requirement Would Render Command Responsibility Superfluous

The third major doctrinal argument against a contribution requirement is that it would render command responsibility 'redundant' with other modes of liability. The *Halilović* and *Oric* decisions argued that, if causal contribution were required, then the 'borderline between article 7(3) [command responsibility] and… 7(1) [the other modes]…would be transgressed and, thus, superior criminal responsibility would become superfluous'.[77]

This argument overlooks that command responsibility is already distinct from other modes of liability by virtue of the modified mental element. Command responsibility allows conviction based on a 'had reason to know' or 'should have known' standard.[78] Hence, it is not true that recognizing the contribution requirement – and hence respecting the culpability principle – would render command responsibility superfluous.

A related argument is that '[i]f a causal link were required this would change the basis of command responsibility' because 'it would practically require involvement on the part of the commander…thus altering the very nature of the liability imposed under Article 7(3).'[79] This argument is also incorrect: the essence of command responsibility remains the *failure to become involved* where there was a duty to do so. The failure to intervene facilitates the crime in comparison with the situation that would have existed if the commander had met her duty.[80]

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[77] *Orić* Trial Judgement, ibid, para 338. See also *Halilović* Trial Judgement above, para 78
[78] See Chapter 7.
[79] *Halilović* Trial Judgement above, para 79.
[80] This crime-facilitating effect of the commander's failure satisfies the contribution requirement. On omissions and causation, see Annex 1.

In conclusion, each of the doctrinal responses is problematic on two levels. First, they are incorrect even as doctrinal arguments, because their premises (alleged incompatibility with text, absence of precedent, or redundancy with other modes) are false. Second, and more fundamentally, these arguments engage at entirely the wrong *level*. They do not even *attempt* to engage with the deontic problem: the violation of the fundamental principle of culpability. ICL claims to respect the culpability principle as 'the foundation of criminal responsibility' and thus to only hold persons responsible for transactions in which they 'personally engaged or in some other way participated'.[81] Technical doctrinal arguments, such as reconciling one provision with another, are no answer to the challenge that one is contradicting one's stated fundamental principles. To answer such a challenge, one has to look up from the black-letter tools of textual construction, and consider conformity with the stated deontic principles.[82]

6.6 SECOND STRATEGY: CHARACTERIZATION AS A SEPARATE OFFENCE

Emergence of the 'separate offence' characterization

We now arrive at the next twist in the discourse on command responsibility. In *Hadžihasanović*, the Appeals Chamber confronted the scenario of the 'successor commander', which places the problems of not requiring causation in particularly stark relief. Faced with defence objections to liability in the absence of 'any involvement whatsoever in the *actus reus*',[83] Judge Shahabuddeen, one of the dissenting judges, advanced an innovative solution. He asserted that:

> I prefer to interpret the provision as making the commander guilty for failing in his supervisory capacity to take the necessary corrective action…. Reading the provision reasonably, it could not have been designed to make the commander a party to the particular crime committed by his subordinate.[84]

[81] *Tadić* Appeal Judgement above, at para 186.
[82] One might be able to uphold the no-contribution approach by re-conceptualizing the principle of culpability, but this would require careful deontological justification (see §6.8.3), not technical doctrinal arguments.
[83] *Hadžihasinović*, Interlocutory Appeal' above, Shahabuddeen Opinion, para 32.
[84] Ibid, para. 32.

Several subsequent trial-level decisions seized on this approach,[85] giving birth to a new and vigorous controversy over the very nature of command responsibility.[86]

The 'separate offence' approach would avoid the culpability problem

The 'separate offence' approach is preferable to the doctrinal arguments canvassed in the previous section, because it does not simply ignore the culpability

[85] *Orić* Trial Judgement, above, at para 335 ('…it should be immaterial whether he or she had assumed control over the relevant subordinates prior to their committing the crime. Since the Appeals Chamber, however, has taken a different view for reasons which will not be questioned here, the Trial Chamber finds itself bound…'); *Halilović* Trial Judgement, above, at para 53; RUF Case at para. 306 ('…this Chamber is satisfied that the principle of superior responsibility as it exists in customary international law does include the situation in which a Commander can be held liable for a failure to punish subordinates for a crime that occurred before he assumed effective control.'); *Prosecutor v Ndindiliyiman*, Judgement, ICTR T.Ch, ICTR-00-56-T, 17 May 2011, para 1960-1961.

But see c*ontra* AFRC Case at para 799 ('…there is no support in customary international law for the proposition that a commander can be held responsible for crimes committed by a subordinate prior to the commander's assumption of command over that subordinate.'); CDF Case at para 240 ('The Chamber further endorses the finding of the ICTY Appeals Chamber that an Accused could not be held liable under Article 6(3) of the Statute for crimes committed by a subordinate before the said Accused assumed command over that subordinate.')

[86] See, e.g. C Fox, 'Closing a Loophole in Accountability for War Crimes: Successor Commanders' Duty to Punish Known Past Offences' (2004) 55 *Case W Res L Rev* 443; Greenwood, 'Command Responsibility and the *Hadžihasanović* Decision' above; B B Jia, 'The Doctrine of Command Responsibility Revisited' (2004) 3 *Chinese J Intl L* 1; Mettraux, *Command Responsibility*, above, 190–2; Nerlich, 'Superior Responsibility under Article 28 ICC Statute' above; C Meloni, 'Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?' (2007) 5 *JICJ* 619; R Arnold and O Triffterer, 'Article 28: Responsibility of Commanders and Other Superiors' in O Triffterer (ed), *Commentary on the* Rome Statute of the International Criminal Court: *Observers' Notes, Article by Article*, 2nd ed (Beck, 2008) 795; Akerson & Knowlton, 'President Obama and the International Criminal Law of Successor Liability', above, at 627; A J Sepinwall, 'Failures to Punish: Command Responsibility in Domestic and International Law' (2009) 30 *Mich J Intl L* 251; E van Sliedregt, 'Article 28 of the ICC Statute: Mode of Liability and/or Separate Offence?' (2009) 12 *New Crim L Rev* 420; Bakone Justice Moloto, 'Command Responsibility in International Criminal Tribunals' (2009) 3 *Publicist* 12; S Trechsel, 'Command Responsibility as a Separate Offence' (2009) 3 *Publicist* 26; B Sander, 'Unravelling the Confusion concerning Successor Superior Responsibility in the ICTY Jurisprudence' (2010) 23 *LJIL* 105; R Cryer, 'The Ad Hoc Tribunals and the Law of Command Responsibility: A Quiet Earthquake' in S Darcy and J Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (OUP, 2010) 159; J Dungel and S Ghadiri, 'The Temporal Scope of Command Responsibility Revisited: Why Commanders Have a Duty to Prevent Crimes Committed after the Cessation of Effective Control' (2010) 17 *U C Davis J Intl L & Pol'y* 1; T Weigend, 'Superior Responsibility: Complicity, Omission or Over-Extension of the Criminal Law?' in C Burchard, O Triffterer and J Vogel, eds, *The Review Conference and the Future of International Criminal Law* (Kluwer, 2010); N Tsagourias, 'Command Responsibility and the Principle of Individual Criminal Responsibility: A Critical Analysis of International Jurisprudence', in C Eboe-Osuji, ed, *Essays in International Law and Policy in Honour of Navanethem Pillay* (Martinus Nijhoff, 2010); C Meloni, *Command Responsibility in International Criminal Law* (TMC Asser, 2010); E van Sliedregt, 'Command Responsibility at the ICTY - Three Generations of Case Law and Still Ambiguity' in A H Swart et al (eds), *The Legacy of the ICTY* (OUP, 2011); E van Sliedregt, *Individual Criminal Responsibility in International Law* (OUP, 2012); K Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part* (OUP, 2012) at 219-226; J Root, 'Some Other Mens Rea? The Nature of Command Responsibility in the Rome Statute', (2013) 23 *Transnat'l L & Policy* 119; M Jackson, *Complicity in International Law* (OUP, 2015).

principle. If breach of command responsibility were legally established as a separate offence, the concerns about culpability would be resolved. The commander would not be held liable as a party to crimes to which she in no way contributed. Instead, she would be held directly liable for her own dereliction.

However, I believe that the option of declaring a new offence of breach of command responsibility is not legally available to the Tribunals, for reasons I will explain in a moment. To be clear, in this case study I am looking at the plausible interpretive options for the Tribunals (and by extension the ICC); I am not engaged in the policy debate of which approach would be preferable for a national legislator or treaty drafter. I have no objection to 'separate offence' legislation.[87] Indeed, national legislation or a treaty amendment could even posit *both* concepts, recognizing command responsibility as a mode of liability and also establishing a separate offence for non-contributory derelictions. The German and Korean legislation are commendable models.[88] My case study here however focuses on deontic analysis in the interpretation of the existing ICL statutes.

The legality problem: departure from applicable law

In my view, the difficulty with the 'separate offence' approach is that it is an implausible departure from the applicable law of the Tribunals (and the ICC), and hence a change that should not be made by judicial fiat, but rather by law-makers (legislators or treaty drafters), if it must be made.

The Tribunal Statutes (and the ICC Statute) appear to recognize command responsibility as a mode of liability, not as a crime. For example, Article 28 of the ICC Statute is *explicit* that the commander is held 'criminally responsible *for crimes... committed by forces* under his or her effective command and control'.[89] The ICTY Statute is not as explicit. However, as noted by Robert Cryer, we should not lightly conclude that command responsibility has an entirely different nature in different Statutes, to avoid

[87] Indeed, I helped draft the Canadian legislation, which for domestic legal reasons was one of the first to establish 'breach of command responsibility' as a separate offence.Kimberly Prost & Darryl Robinson, "Canada" in Claus Kress et al, (eds.), *The Rome Statute and Domestic Legal Orders*, vol. 2 (Baden-Baden: Nomos; Ripa di Fagnano Alto [Italy]: Il sirente, 2000-2005), 52 at 54-55.
[88] Tae Hyun Choi & Sangkul Kim, "Nationalized International Criminal Law: Genocidal Intent, Command Responsibility, and an Overview of the South Korean Implementing Legislation of the ICC Statute" (2011) 19 Mich. St. J. Int'l L. 589 at 616-21.
[89] ICC Statute Article 28(1)(a), see similarly Article 28(1)(b).

unnecessary fragmentation between instruments that purport to reflect customary law.[90] Furthermore, command responsibility is listed among the general principles of liability,[91] and in the ICTY Statute, inchoate offences are not listed among the principles of liability; they are all listed in the definitions of crimes (attempt, conspiracy, and incitement are listed only in the definition of crimes, attached to the crime of genocide).[92]

More importantly, the ICTY Statute purports to reflect customary law, and customary law precedent was consistent that command responsibility is a mode of liability. The consistent understanding is seen in jurisprudence, from Nuremberg up to the Tribunals, in national legislation, and in State practice; for example, in the negotiation of the Rome Statute it was uncontroversial that command responsibility is a mode of liability.[93] I will not embark here on a lengthy review of the doctrinal precedents; to do so would require an additional chapter of this thesis, and my topic here is not to recount earlier precedents, but to explore the Tribunal's handling of the culpability principle. Other scholars have admirably canvassed the precedents showing that it was a mode of liability.[94]

Indeed, Tribunal jurisprudence itself acknowledges that previous customary law authorities regarded command responsibility as accessory liability.[95] Even the *Halilović* decision, in which an ICTY Trial Chamber creatively advocated for the separate offence interpretation, actually demonstrates the long consistency of the 'mode' approach. Although the *Halilović* decision attempted to characterize post-World War II jurisprudence as 'divergent', in fact every authority it cited adopted the 'mode' approach,

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[90] Cryer, 'A Quiet Earthquake' above at 182 (also warning against judicial adoption of a separate offence approach which would be a 'legislative move, fundamentally altering the basis of command responsibility'.)

[91] For example, in the ICTY Statute, the crimes are listed in Articles 2-5, whereas command responsibility appears in Article 7, which contains principles of 'individual criminal responsibility', including the other modes of liability, such as planning, instigating, ordering and aiding and abetting. Similarly, in the ICC Statute, definitions of crimes appear in Part II, whereas command responsibility appears in Part III, 'General Principles of Criminal Law'.

[92] Article 4(3) ICTY Statute; Article 2(3) ICTR Statute.

[93] See eg UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June – 17 July 1998, Official Records, A/CONF.183/13 (Vol.2) at 136-138 (responsibility for acts of subordinates).

[94] Sepinwall, 'Failures to Punish' above at 265-269; Sander, 'Unravelling the Confusion' above; Meloni, 'Command Responsibility' above; Cryer, 'A Quiet Earthquake' above; Sliedregt, *Individual Criminal Responsibility*, above at 192-96.

[95] For examples cited in Tribunal jurisprudence, see for example the *Čelebići* Trial Judgement above, citing French law ('accomplices') ibid at para 336; citing Chinese law ('accomplices') ibid at 337; citing Yugoslav law ('participant') ibid at 341; citing the *Hostages (List)* case ('held responsible for the acts of his subordinates') ibid at 338.

with the exception of only one passage from one case that only arguably supported a separate dereliction offence. The *Halilović* decision also acknowledged that national legislation treated command responsibility as a mode of accomplice liability, and that the jurisprudence of the Tribunal itself had consistently done so.[96] Thus, even the *Halilović* decision could not find contrary precedents. Prior to the *Hadžihasanović* controversy, academic literature had long 'overwhelmingly' recognized command responsibility as a mode of liability.[97] The mode-versus-offence controversy only arose out of an effort to square the Tribunals' refusal to recognize a contribution requirement with the culpability principle.

My position about the applicable law is not rooted in a rigid formalistic approach. I would allow judges latitude to reinterpret provisions of their respective Statutes, especially given that ICL is a nascent discipline which is being developed each day. But the starting point for the discussion of applicable law has to be that the precedents support a mode of liability approach. As Barrie Sander notes, we must have some wariness where the proposal is to judicially recognize a new crime, because of the implications for the principle of legality.[98] In any event, Appeal Chamber jurisprudence

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[96] *Halilović* Trial Judgement above, para 42-53.

[97] See e.g. Sepinwall, 'Failures to Punish' above at 267 (doctrinal history gives 'overwhelming support for the mode of liability view'); Nerlich, 'Command Responsibility and the *Hadžihasanović* Decision' above at 603-604 (punished for the subordinate's act); Cryer, 'A Quiet Earthquake' above at 171-182 (form of liability for the underlying offence); Bantekas 'Stretching the Boundaries' above at 577 (imputed liability); Cassese, *International Criminal Law* above at 206; Triffterer, 'Causality, a Separate Element' above at 229 (mode of participation); Arnold & Triffterer, 'Article 28' above at 843; D L Nersessian, 'Whoops, I Committed Genocide! The Anomaly of Constructive Liability for Serious International Crimes' (2006) 30 *Fletcher Forum of World Affairs* 81at 89; Meloni, 'Command Responsibility' above at 621-625; Darcy & Powderly (eds), *Judicial Creativity* above at 391; W J Fenrick, 'Some International Law Problems Related to Prosecutions Before the International Criminal Tribunal for the former Yugoslavia' (1995) 6 *Duke J Comp & Intl L* 103 at 111-12 (party to offence, not a separate offence); W H Parks, 'Command Responsibility for War Crime' (1973) 62 *Mil L Rev* 1 at 113-114; Y Shany & K R Michaeli, 'The Case Against Ariel Sharon: Revisiting the Doctrine of Command Responsibility' (2001-2002) 34 *NYU J Intl L & Pol* 797 at 803 & 829-831; A Zahar, 'Command Responsibility of Civilian Superiors for Genocide' (2001) 14 *LJIL* 591, 596 (mode of participation, not a crime); M Smidt, 'Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations' (2000) 164 *Mil L Rev* 155, 168-69; K J Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (OUP, 2011) 271. But see Jia, 'The Doctrine of Command Responsibility Revisited' above at 34; Trechsel, 'Command Responsibility' above; K Ambos, 'Superior Responsibility' in A Cassese, P Gaeta, J R W D Jones, eds, *The Rome Statute of the International Criminal Court: A Commentary,* vol 3 (OUP, 2002) at 823 (separate offence). Ambos suggests a separate offence approach not because of precedents, but on principled grounds that it is the only way to comply with deontic principles, given the 'should have known' standard. This argument is more convincing than other arguments, but in Chapter 9 I map out the argument that this route is not necessary, and thus precedent and principles can be reconciled.

[98] Sander, "Unravelling the Confusion" above note 29 at 122.

has expressly rejected the 'separate offence' characterization and affirmed that command responsibility is a mode of liability.[99]

Explicit contradiction with actual practice

There is another problem with the often-repeated claim that the Tribunals do not charge the commander with the underlying crimes: namely, that it is demonstrably untrue. When we look at the actual charges, convictions, and sentences entered by the Tribunal, we see that the commanders are *expressly* charged, convicted, and sentenced for the underlying offences of genocide, crimes against humanity, and war crimes.

Judges and scholars who argue that the commander is not charged with the underlying crime often cite an 'entirely unreasoned' and 'throwaway'[100] line in the *Krnojelac* case, which states that '[i]t cannot be overemphasized that, where superior responsibility is concerned, an accused is not charged with the crimes of his subordinates but with his failure to carry out his duty as a superior to exercise control.'[101] This passage is sound insofar as it emphasizes that the commander's liability is not vicarious but rather rooted in fault, or that she is not charged with *perpetrating* the crimes. However, if the passage is to be construed as meaning that the commander is literally not charged as a party to the underlying core crime, but rather is charged for a distinct crime of 'failure to exercise her duty to exercise control', then the passage is plainly factually untrue. For example, in that very case, Krnojelac was in fact charged with 'crimes against humanity and violations of the laws and customs of war', including torture, murder, persecution, unlawful confinement, and enslavement – i.e. the core crimes carried out by his subordinates.[102] He was also *convicted* for those crimes.[103] For example, he was found 'guilty of … murder as a crime against humanity and murder as a violation of the laws or customs of war)' pursuant to Article 7(3) (command responsibility), and 'guilty of … torture as a crime against humanity and a violation of the laws or customs of war' pursuant to Article 7(3). Other cases follow the same pattern: by virtue of command

[99] *Prosecutor v Ntabakuze,* Judgement, ICTR A.Ch, ICTR-98-4-A, May 8, 2012 ('*Ntabakuze* Appeal Judgement').
[100] Robert Cryer, "A Quiet Earthquake" above note 29 at 177-179.
[101] *Prosecutor v Krnojelac*, Judgement, ICTR A.Ch, IT-97-25-A, 17 September 2003, para. 171 ('*Krnojelac* Appeal Judgement').
[102] *Prosecutor v Krnojelac* Third Amended Indictment, ICTY T.Ch, IT-27-95-I, 25 June 2001.
[103] *Krnojelac,* Appeal Judgement, above, Part VI, Disposition.

responsibility, commanders are not charged with a separate dereliction offence, but with the underlying crimes of subordinates, and sentenced as parties to those crimes.[104]

One cannot deflect a culpability challenge by claiming that the commander is not held responsible as a party to the core crime, when in reality the charges and convictions do precisely that. In the actual command responsibility practice of the Tribunals, commanders are explicitly charged with the underlying crimes and sentenced as parties to the underlying crimes.

Principled revisionist arguments for separate offence interpretation

There are alternative and more sophisticated argument for a separate offence approach. Some scholars have argued for a separate offence interpretation, based not on disingenuous claims about applicable law, nor as an expedient device to enable convictions of successor commanders, but for the principled reason that it is the only way to comply with fundamental principles.[105] I would endorse such an approach, for example, if it were the only way to comply with fundamental principles: in that case, canons of construction could allow a strained textual reading and a departure from precedents to avoid violating fundamental principles.[106] A coherentist legal interpretation can endorse a creative re-reading, if it is the best way to make sense of all considerations. However, in my view, that route is not necessary, because the precedents and principles can be reconciled, and hence a creative judicial re-characterization (creating a new crime) is not warranted.[107]

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[104] Sander, 'Unravelling the Confusion' above at 116 provides additional examples. In one trial decision, *Orić* Trial Judgement, above, the trial chamber purported to convict the accused for a separate offence of 'failing to discharge his duty to prevent'. The Prosecution appealed on the grounds that this was a mischaracterization of command responsibility, which is a mode of liability, and that the sentence failed to reflect its gravity as a mode of liability. The Appeals Chamber found that the factual findings for a command responsibility conviction had not been made and thus that the issue was moot: *Orić* Appeal Judgement, above at para. 79.

[105] Ambos, 'Superior Responsibility' above at 825, 851-852, Meloni, 'Command Responsibility' above at 637.

[106] One could argue that the 'context' includes fundamental principles of justice, or that the object and purpose includes compliance with fundamental principles of justice.

[107] A remaining issue however will be to ensure that the 'should have known' standard is justified: see Chapter 7.

6.7 Other Responses (And the Mystification of Command Responsibility)

Subsequent efforts to deny or obscure the contradiction have led command responsibility discourse to become even more fractured and convoluted. Positions on the nature of command responsibility have proliferated: mode of liability; separate offence; neither-mode-nor-offence; sort-of-mode-sort-of-offence; sometimes-mode-sometimes offence. In the resulting climate of uncertainty, judgments began issuing very muddled and self-contradictory statements about the nature of command responsibility.

6.7.1 Invoking 'Sui Generis' Nature

One of the later lines of response in Tribunal jurisprudence was to assert that command responsibility is a '*sui generis*' mode of liability, to which the contribution requirement simply does not apply. For example, the *Halilović* decision declares, 'the nature of command responsibility itself, as a *sui generis* form of liability, which is distinct from the modes of individual responsibility set out in Article 7(1), does not require a causal link.' [108]

Simply invoking the label *sui generis,* and declaring *per definitionem* that this new mode does not require causal contribution, does not even attempt to address the culpability problem. It is a hand-waving gesture, not a deontic justification.[109]

6.7.2 The Retreat to Obscurity (Neither Mode Nor Offence)

Some scholars and some decisions appear to argue that command responsibility is *neither* a mode of liability *nor* a separate offence, and is instead some hitherto unknown

[108] *Halilović* Trial Judgement above at para 78.

[109] There is nothing wrong per se in describing command responsibility as '*sui generis',* in the sense that it has differences from other modes. Indeed any mode must be distinct from other modes in some way; otherwise it would not need to exist. However, each mode must still be justified in accordance with fundamental principles

category altogether.[110] Such arguments are intriguing. One of the themes of this thesis is that ICL might raise new problems that lead to new thinking for general criminal law theory. Certainly the discovery of a new category of liability, falling outside any known category (i.e. separate offence, principal liability, accessory liability), would be a remarkable example.

My concern however is that this particular claim simply creates a shroud of obscurity in order to evade the culpability problem. This vagueness about the nature of command responsibility enables a kind of 'shell game'. It allows jurists to downplay the 'mode' nature of command responsibility whenever the culpability problem is raised, and then shift back to treating it as a mode of liability at conviction and sentencing. James Stewart has aptly described such arguments as 'more of a smokescreen to ward off conceptual criticisms than a marked normative change'.[111]

Tribunal jurisprudence has tied itself into increasingly tortuous knots trying to deny the contradiction between a mode that does not require contribution and the accepted principle that modes require contribution. An illustration of this convolution is the equivocation and self-contradiction over whether responsibility 'for' the crimes means responsibility 'for' the crimes.[112] Some judgments seek to downplay the culpability problem by insisting that the commander is not held responsible 'for' the crimes committed by subordinates, but ironically those very same judgements slip and contradict themselves, acknowledging it as responsibility for the acts.[113]

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[110] See e.g. A M M Orie, 'Stare Decisis in the ICTY Appeal System: Successor Responsibility in the *Hadžihasanović* Case', (2012) 10 *JICJ* 635 at 636: 'Superior responsibility is increasingly considered to be of a *sui generis* character rather than a mode of liability'. See also Mettraux, *Command Responsibility* above at 37-47 & 80-8, which also appears to suggest this. Mettraux rejects accessory liability as the appropriate category, *inter alia* on the grounds that accessory liability requires knowledge. However, as I argue in Chapter 7, a subjective knowledge requirement does not appear to be a fundamental defining feature of accessory liability. Accordingly, command responsibility can be a mode of accessory liability.

[111] J Stewart, 'The End of 'Modes of Liability' for International Crimes' (2011) 25 *LJIL* 165 at 25.

[112] Early jurisprudence acknowledged that the commander is held responsible for the crimes of the subordinates. See e.g. *Celibici* Trial Judgement, above at para 333: that commanders are 'held criminally responsible for the unlawful conduct of their subordinates'. Later cases, seeking to downplay the culpability problem, struggle to clarify that responsibility 'for' the crimes does not actually mean responsibility 'for' the crimes, but rather 'because of' the crimes.

[113] See e.g. *Prosecutor v Aleksovski*, Judgement, ICTY T.Ch, IT-95-14/1-T, 25 June 1999, para. 72 ('*Aleksovski* Trial Judgement'): 'superior responsibility … must *not be seen as responsibility for the act of another person*'. Yet *ibid* at para 67: 'A superior is *held responsible for the acts of his subordinates* if he did not prevent the perpetration of the crimes of his subordinates or punish them for the crimes' (emphasis added). Similarly, *Halilović* Trial Judgement, above, para 54 emphasizes that the commander is not held liable '*for*' the crimes but 'because of' the crimes. Then at para 95 the same judgement asserts that failure to punish is so 'grave that international law imposes upon him *responsibility for those crimes*' (emphasis added).

Frequently, the judges struggle to describe an indirect liability that is neither personal commission nor a separate offence.[114] However, the indirect liability that these passages struggle to describe is already elegantly captured by an existing concept: *accessory liability*. This terminological and conceptual lack of clarity might be a sign that ICL is still a relatively young field. Criminal law theory has helpful tools to offer ICL.

If there is indeed a new category that is neither a mode nor an offence, its proponents should clarify what this new twilight category *is.* Once we are told what this purported new category signifies, we can try to discern the appropriate deontic requirements. Conceptually, however, the existing options – direct or indirect liability in the subordinate crimes, or a separate offence – appear to exhaust the logical universe of alternatives. If the claim is to be made that another category is possible, the gap should be explained. Applying Occam's razor, it is for now more parsimonious to work with the known categories, which appear to be mutually exclusive and jointly exhaustive.

6.7.3 The Variegated Approach (Sometimes Mode, Sometimes Offence)

The final alternative solution that I will review in this chapter is what I will call the 'variegated' approach. Some scholars suggest a variegated account, in which command responsibility operates sometimes as a mode and sometimes as a separate offence. Its nature in each case depends on variables such as failure to prevent versus failure to

[114] Consider the following attempt to square the circle in *Halilović*:

> 'For the acts of his subordinates' as generally referred to the in the jurisprudence of the Tribunal does not mean that the commander shares the same responsibility as the subordinates which committed the crimes, but rather that because of the crimes committed by his subordinates, the commander should bear responsibility for his failure to act... [A] commander is responsible not as though he committed the crime himself, but his responsibility is considered in proportion to the gravity of the offences committed.

The passage is sound in insisting that the commander is not deemed to be a perpetrator, nor even principal of the crimes ('not a direct responsibility'; not the 'same responsibility'). Often such passages emphasize the commander's dereliction and fault, rightly distinguishing command responsibility from vicarious liability (i.e. he is not liable by virtue of the relationship alone). These features – that the commander is not deemed a perpetrator, and that she is held responsible for her fault in relation to the crime – are already elegantly reflected in an existing concept: accessory liability. We do not need to fabricate an entire new category to capture these features of command responsibility.

punish, knowledge versus should have known, or contributory versus non-contributory.[115]

The variegated approach is preferable to the two previous approaches: it does not rely on obscurity. It recognizes the indirect liability of the commander where she contributed to crimes, it avoids the over-reach of a non-causal mode of liability, and it still responds to failure-to-punish derelictions. Lawmakers could certainly adopt the variegated approach, for example, by recognizing contributory derelictions as a mode of liability and non-contributory derelictions as a separate offence.

Nonetheless, I have two concerns with reading existing texts (eg Tribunal statutes) as supporting the variegated approach. First, such a reading injects a level of complexity that is textually implausible and unnecessarily complicated. The relevant texts do not suggest on their face that command responsibility operates completely differently in different instances, switching from mode to separate offence. Second, it is not *necessary* to impose such a facially implausible on the texts. As I will explain in the next section (§6.8) , non-contributory derelictions have consumed an inordinate amount of attention in the discourse. The contribution requirement is not onerous: a non-contributory dereliction arises only where the dereliction did not even increase the risk of any crimes that occurred.[116] International courts and tribunals should focus on persons bearing greater responsibility in relation to core crimes. The lacuna is not grave enough to warrant excessively creative departures from the text, and the resulting tension with the legality principle.

6.8 IMPLICATIONS

6.8.1 Toward A Better Debate with Deontic Engagement

[115] Some sophisticated examples of works that draw distinctions between different forms of command responsibility include Meloni, 'Command Responsibility' above and Nerlich, 'Superior Responsibility under Article 28 ICC Statute' above. Both plausibly distinguish between contributory and non-contributory derelictions and between those with and without subjective knowledge. These approaches are an advance over other approaches, because they grapple with culpability and acknowledge significant distinctions. My suggestion however is that simpler solutions can be found. Nerlich's solution does not refer expressly to a separate offence, but would distinguish between holding the commander responsible for the *crime* and holding the commander responsible for the *consequences of the crime* (see ibid at 680-682).

[116] I discuss the requisite extent of causal contribution elsewhere, see Robinson, 'Complicated', above.

My main objective in this chapter was to unpack the often-problematic reasoning on this topic and show how it triggered a cascade of problems, and to demonstrate more careful deontic engagement. Even if my prescription is not universally embraced, I hope I have established the following points about reasoning and the need for a better debate:

(1) The Tribunal's initial rejection of causal contribution, in what was then clearly understood to be a mode of liability, was based on hasty and inadequate doctrinal reasoning which did not adequately consider the culpability principle.

(2) A lot of the argumentation on this topic (in judicial decisions and surrounding literature) has featured the types of reasoning discussed in Chapter 2, such as simply maximizing crime control or attempted transplants from IHL without considering the context shift.[117]

(3) Several of the main responses (the doctrinal responses, or simply invoking the adjective 'sui generis' without any further attempt at justification) do not even *attempt* to address the violation of a stated fundamental principle.

(4) Many of the objections to the *Hadžihasanović* decision, or the contribution requirement in Article 28, as an 'arbitrary' barrier to prosecution[118] fail to consider that the contribution requirement is a principled requirement for accessory culpability, in order to prevent arbitrary punishment. Thus, arguments against causal contribution must either overcome the extensive authority that command responsibility is a mode of liability, or alternatively advance a new conception of retroactive culpability.

(5) The debate over the *Hadžihasanović* decision largely centered on doctrinal and teleological arguments; I argue that the *better* basis to support the majority decision is the deontic argument: the need to respect the culpability principle.

(6) The contradiction still persists unsolved in Tribunal jurisprudence, which recognizes command responsibility as a mode of liability, and yet rejects the contribution requirement.[119]

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[117] See eg at §6.4.3.

[118] See e.g. Akerson & Knowlton, 'President Obama and the International Criminal Law of Successor Liability', above, at 360 ('obvious flaw'); C Fox, 'Closing a Loophole in Accountability for War Crimes: Successor Commanders' Duty to Punish Known Past Offences' (2004) 55 *Case W Res L Rev* 443 at 480 ('weaknesses and limitations'); E Langston, 'The Superior Responsibility Doctrine in International Law' (2004) 4 *Int Crim L Rev* 141 at 161 ('retreat').

[119] The *Hadžihasanović* decision removes the problem of retroactively punishing successor commanders for crimes in which they were not involved, but it still allows retroactive culpability for 'isolated' or 'initial' crimes to which a commander in no way contributed. §6.4.1.

(7) Any legal systems that draw from Tribunal jurisprudence should carefully examine these particular aspects of the jurisprudence before importing them.[120]
(8) A better debate on these issues can at least set aside the most fallacious arguments (eg. those which fail to consider culpability at all), and focus on the deontically tenable options.

6.8.2. The Way(s) Forward

In this chapter, I also suggested a prescription to resolve these problems. The prescription has implications for other institutions with similar statutes or who consult Tribunal jurisprudence.

My prescription is to undo the first mis-step that triggered the entire cascade of complexities. By repairing the initial contradiction, we can restore command responsibility to relative simplicity. Command responsibility can remain, simply and elegantly, a mode of accessory liability. The proposed approach instantly reconciles the pre-Tribunal authorities and cases, the ICC Statute, and the culpability principle. The solution has the advantage of clarity, because it relies on an established concept of criminal law (accessory liability).

There are several possible legitimate concerns about this proposed solution. First, one might fear that proving the 'contribution' to a subsequent crime might be unacceptably difficult, posing a barrier to meritorious cases. I argue, however, that the contribution requirement, properly understood (§6.3.1), is satisfied by conduct of a nature that elevated the risk of the ensuing crimes – a standard which is generally obviously met by failures to prevent or punish.[121]

Another legitimate concern is that the solution partly restricts the utility of the 'failure to punish' branch, because such a failure must be followed by subsequent crimes. Erasmus Mayr rightly voices the concern that 'on Robinson's reading, responsibility from failure to punish begins to appear redundant, because it is reduced to one case of failure

[120] Many of the convoluted claims (eg. 'neither mode nor offence') were generated by a particular problem, which may not arise at other institutions. For example, the ICC Statute expressly requires causal contribution; hence the contradiction that necessitated those complex claims is entirely sidestepped.

[121] I unpack the extent of the requirement in more detail in another work: Robinson, 'Complicated', above.

to prevent'.[122] I must concede that the interpretation I advocate does restrict the role of the 'failure to punish' branch, because we cannot convict the commander for past crimes to which she did not contribute. However, this does not quite render the 'failure to punish' branch a dead letter; it still provides the prosecutor with an alternative route to prove a dereliction. The prosecutor can show a failure to establish preventive systems or a failure to punish (or both). Furthermore, there is no interpretation that perfectly reconciles the various puzzle pieces. In the ICC Statute, this partial limitation on one branch of one element is necessary not only to comply with the culpability principle, but also to comply with the *explicit* contribution requirement in Article 28. The alternatives are either to partly restrict the application of this one branch of one element, or else to ignore an explicit statutory requirement; I believe the former is the more plausible.

The remaining concern is that the proposed approach does not allow prosecution of non-contributory derelictions (eg the isolated crime or successor commander scenario). If one is adamant successor commanders must be punished before international courts and tribunals, even without any statute amendments, then one might well embrace a 'separate offence' interpretation. However, this approach means ignoring the explicit statement in Article 28 that the commander is held 'criminally responsible for crimes committed by' subordinates. It also means disregarding the explicit statutory requirement of causal contribution in Article 28. There are legality problems with ignoring explicit statutory conditions for liability. I am unconvinced that this limited problem (non-contributory derelictions) warrants that degree of creativity and straining, and the attendant credibility and legitimacy costs.

In my view, the inability to punish non-contributory derelictions before international courts is an acceptable price – and the only apparent way – to reconcile the applicable law (mode of liability) with fundamental principles (culpability). International courts and tribunals should devote their limited resources to persons most responsible for the most serious core crimes. In the debate over non-contributory derelictions, we are fixating on commanders who did not contribute to even one single

[122] E Mayr, 'International Criminal Law, Causation and Responsibility', (2014) 14 International Criminal Law Review 855. Similar, Miles Jackson has objected, 'Robinson's interpretation would render criminal responsibility based on the well-established customary law obligation of commanders to punish the crimes of their subordinates a dead letter.' M Jackson, *Complicity in International Law* (OUP, 2015) at p 119. I agree that the obligation is well-established *in humanitarian law*; the question here however is the proper role of that obligation in a criminal law mode of liability.

core crime.[123] If we want to add separate dereliction crimes to the ICC Statute, then it can be done through amendment. In the meanwhile, national systems can continue to prosecute non-contributory derelictions, just as they prosecute almost all serious crimes in the world.[124]

As for the ICC, it is too early to say whether the ICC will adopt the prescriptions advanced here. The early considerations of command responsibility were in the *Bemba* case.[125] At confirmation of charges and at trial, the chambers generally adopted the position advocated here. For example, these early decisions avoided opacity about the nature of command responsibility and forthrightly recognized it as a mode of liability.[126] They also affirmed the requirement of causal contribution, and did so not only for technical doctrinal reasons but also out of respect for the culpability principle.[127]

Matters were left less clear after the Appeals Chamber decision. Despite a unanimous conviction by the Trial Chamber, the Appeals Chamber substituted an acquittal, by a 3-2 majority. The Appeals Chamber majority decision did not address the specific controversies I am discussing in this thesis; instead the decision was based on the commander's duty to take measures.[128] However, if we count up the separate opinions, we see that three out of five judges expressly recognized command

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[123] I could conceive of prosecuting persons who contributed to no crime, if they committed an inchoate offence such as attempts or incitement, because for those crimes the person at least has the highest level of mental culpability: *purpose*. In attempt or incitement cases, the person is acting purposively with the *aim* of producing core crimes, so we at least have high moral culpability and deliberate risk-creation. But with mere non-contributory failures to punish, we have *neither* that highest standard of culpability (purpose) *nor* any material contribution.

[124] I would have less objection to a 'separate offence' interpretation if it were adopted transparently and applied consistently. My strongest objections in this chapter are to: (1) treating command responsibility as a mode of liability and simply ignoring the contradiction, (2) claiming it is not a mode of liability while in fact charging and convicting persons as party to the subordinates' core crimes, or (3) creating a 'smokescreen' category by which the 'mode' nature is downplayed whenever the culpability principle is raised, but then emphasized at the time of conviction and sentencing. My main concern is that the debate should better engage with deontic principles.

[125] ICC jurisprudence has considered command responsibility in the *Bemba* case, at confirmation of charges, at trial, and at appeal. *Prosecutor v Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(8)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC PTC, ICC-01/05-01/0815 June 2009 ('B*emba* Confirmation Decision'); *Prosecutor v Jean-Pierre Bemba Gombo*, Judgment Pursuant to Article 74, ICC T.Ch, ICC-01/05-01/08, 21 March 2016 ('*Bemba* Trial Judgment'); *Prosecutor v Jean-Pierre Bemba Gombo*, Judgement on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgement pursuant to Article 74 of the Statute', ICC A.Ch, ICC-01/05-01/08 A, 8 June 2018 ('*Bemba* Appeal Judgment').

[126] *Bemba* Trial Judgment at para 171, concurring with *Bemba* Confirmation Decision at para 341.

[127] See e.g. *Bemba* Trial Judgment above, para 211'[i]t is a core principle of criminal law that a person should not be found individually criminally responsible for a crime in the absence of some form of personal nexus to it.'

[128] *Bemba* Appeal Judgment, above.

responsibility as a mode of accessory liability, and expressly recognized the causal contribution requirement, again consistent with the analysis advanced here.[129] I should also add that, whether one agrees or disagrees with particular decisions,[130] ICC jurisprudence on command responsibility has been doing a commendable job in engaging with deontic analysis, which may be a sign of the maturation of ICL.

6.8.3 Future Questions about Causal Contribution

My analysis in this particular case study has been purely *analytical*: I have simply sought to prove the internal contradiction between rejecting the contribution requirement in a mode of liability, while declaring adherence to a culpability principle that requires contribution in modes of liability. To do that, I had to untangle numerous legal arguments and responses. Once that position is accepted, the next step in the analysis would be to proceed to the *normative* analysis of what the culpability principle entails. I engaged in the deontic analysis of the contribution requirement in earlier works,[131] and I will expand on it in more detail in the book-length continuation of this thesis. I have excised that analysis from this thesis in the interest of brevity, as my purpose in the current chapters is simply to provide a few manageable illustrations of the coherentist methodology at work.

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[129] The *Bemba* Appeal Judgment, ibid, took no view on the mode-versus-offence debate, but the 'mode of liability' understanding was supported by three of the five Appeal Chamber judges (separate opinion of Judge Eboe-Osuji at paras 194-215 and separate dissenting opinion of Judges Monageng and Hofmanski at para 333.) The *Bemba* Appeal Judgment took no view on the contribution requirement, but three of the five Appeal Chambers judges upheld the contribution requirement both for textual reasons and out of respect for the culpability principle (separate opinion of Judge Eboe-Osuji at para 202; separate dissenting opinion of Judges Monageng and Hofmanski at para 333.) But see contra separate opinion of Judges Van den Wyngaert and Morrison at para 51-56.

[130] The Appeals Chamber decision has been criticized as possibly being even *too* generous to commanders, and adopting interpretations on various issues (other than those canvassed in this case study) more restrictive than what deontic principles actually require. L N Sadat, 'Fiddling While Rome Burns? The Appeals Chamber's Curious Decision in Prosecutor v Jean-Pierre Bemba Gombo', (12 June 2018) *EJIL Talk* (blog), www.ejiltalk.org/author/leilansadat; D M Amann, 'Bemba', above. M Jackson, 'Commanders' Motivations in Bemba', (15 June 2018) *EJIL Talk* (blog), www.ejiltalk.org/author/mjackson; S SáCouto, 'The Impact of the Appeals Chamber Decision in Bemba: Impunity for Sexual and Gender-Based Crimes?', (22 June 2018) *IJ Monitor* (blog), www.ijmonitor.org/2018/06/the-impact-of-the-appeals-chamber-decision-in-bemba-impunity-for-sexual-and-gender-based-crimes; J Powderly and N Hayes, 'The Bemba Appeal: A Fragmented Appeals Chamber Destablises the Law and Practice of the ICC', (26 June 2018), *Human Rights Doctorate* (blog), humanrightsdoctorate.blogspot.com/2018/06/the-bemba-appeal-fragmented-appeals.html; F F Taffo, Analysis of Jean-Pierre Bemba's Acquittal by the International Criminal Court, (13 Dec 2018), *Conflict Trends* (blog), www.accord.org.za/conflict-trends/analysis-of-jean-pierre-bembas-acquittal-by-the-international-criminal-court.

[131] Robinson, 'Complicated', above.

Nonetheless, I outline the following very brief points about the subsequent deontic questions, because those questions must be faced in future jurisprudence, and because it will help the reader appreciate the prescription I have advanced. The questions in the next step of analysis would be:

- What is the nature and extent of the causal contribution required by the principle?
- What about the common objection that omissions cannot make causal contributions?[132]
- More radically, can we develop plausible new accounts of personal culpability that contemplate liability without causal contributions?

As for the extent of contribution, as I discuss elsewhere,[133] on a coherentist methodology, the best-supported standard is that the accused's conduct must encourage or facilitate the crimes, including by rendering them easier or more likely (risk aggravation). This inclusive standard is well supported in juridical practice as well as by the weight of normative arguments.[134] Early ICC jurisprudence has not yet been conclusive about the requisite extent of contribution, but most decisions have been indicating that it suffices if the dereliction increased the risk of the resulting crimes occurring,[135] which matches the prescription I advance. That conclusion is consistent with domestic patterns of juridical practice based on extensive experience with crimes, and is also supported by mainstream normative theories on the meaning of accessory liability.[136] It is therefore also consistent with a coherentist deontic methodology.

An additional ingredient is needed for my proposed solution: a deontic justification of the 'should have known' standard. I will address that question in the next chapter (Chapter 7).

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[132] For readers who are interested, I discuss this question in Annex 1.

[133] Robinson, 'Complicated', above.

[134] See e.g. Robinson, 'Complicated', above, and see K Ambos, 'The ICC and Common Purpose: What Contribution is Required?', in C Stahn (ed), *The Law and Practice of the ICC: A Critical Account of Challenges and Achievements* (OUP, 2015) 592 at 603.

[135] *Bemba* Confirmation Decision, above, at para 425; *Bemba* Trial Judgment, above, at paras 211-213. The Bemba Appeal Judgment above did not address the matter, but three of the five Appeals Chamber judges endorsed similar standards (separate opinion of Judge Eboe-Osuji at para 166, 184 and 212-13; separate dissenting opinion of Judges Monageng and Hofmanski at para 337-39).

[136] See also discussion in K Ambos, 'Critical Issues in the Bemba Confirmation Decision', (2009) 22 *LJIL* 715.

7
The Genius of Command Responsibility

OVERVIEW

This chapter provides a second illustration of my methodology in action. I examine another controversy in command responsibility: the mental element. Whereas the preceding chapter dealt with causal contribution (the *material* aspect of culpability), this chapter considers the modified fault element, for example the 'should have known' standard the *mental* aspect of culpability).

Scholars and jurists have raised powerful, principled objections to the modified fault standards in command responsibility, such as the 'should have known' standard in the ICC Statute. They are right to raise such questions, because a negligence standard in a mode of accessory liability seems to chafe against our normal analytical and normative constructs. However, I advance, in three steps, a culpability-based justification for command responsibility. I argue that the intuition of justice underlying the doctrine is sound.

I argue that the 'should have known' standard in the ICC Statute, rather than being shunned, should be embraced. While Tribunal jurisprudence shied away from criminal negligence due to culpability concerns, I argue that the 'should have known' standard actually maps better onto personal culpability than the rival formulations developed by the Tribunals. This is an instance in which ICL, by highlighting special contexts and problems, can lead us to reconsider some of our initial reactions and assumptions. Command responsibility responds to a set of circumstances in which our normal reflexes about the lesser culpability may be unsound.

7.1 PROBLEM, OBJECTIVE, AND THEMES

7.1.1 Principled Concerns About Fault in Command Responsibility

In Chapter 6, I argued that command responsibility can be greatly simplified. I argued that the Tribunals made an early mis-step when, based on hasty reasoning, they rejected the requirement of causal contribution. I argued that command responsibility can be greatly simplified: it remains a mode of accessory liability, and it accordingly requires that the commander at least elevated the risk of the crimes through her derelictions.

But there is a problem for my account. Or, at least, it seems to be a problem, but perhaps it is something more exciting – an opportunity for discovery. The apparent problem is the modified mental element. The fault element departs from normal subjective standards of awareness: the Tribunal test is 'had reason to know' ('HRTK'), whereas the ICC test for commanders[1] is 'should have known' ('SHK'). Are such standards justifiable in a mode of liability? Both scholarly literature and Tribunal jurisprudence assert that negligence would be problematic in command responsibility as a mode of liability. If the 'should have known' standard cannot be justified in a mode of liability, this would be a problem not only for my account, but also for the ICC Statute, which expressly creates a mode of liability relying on that standard.

A wealth of thoughtful, principled scholarship advances strong concerns about negligence in command responsibility. These scholars have rightly pressed beyond a discourse that tended to focus on precedential arguments (parsing authorities) and consequentialist arguments (maximizing impact). They helped usher in more sophisticated scholarship engaging with deeper principles and the *justice* of the doctrines. For example, Mirjan Damaška, in his ground-breaking work on the 'shadow side of command responsibility' warned that

> a negligent omission has been transformed into intentional criminality of the most serious nature: a superior who may not even have condoned the misdeeds of his subordinates is to be stigmatized in the same way as the intentional perpetrators

[1] For civilian superiors, the ICC Statute offers a more generous subjective test: 'consciously disregarded'. ICC Statute, Article 28. I discuss this briefly in Part 4 (Implications).

of those misdeeds.[2]

He argued that 'it appears inappropriate to associate an official superior with murderers, torturers, or rapists just because he negligently failed to realize that his subordinates are about to kill, torture or rape.'[3] Many scholars have carefully developed these principled concerns. Some scholars regard both the HRTK and the SHK tests as suspect; others regard only the SHK test as problematic.[4] The most forceful criticisms arise with respect to the crime of genocide, because it requires a special intent. Command responsibility liability for genocide without that special intent is widely and understandably considered to be contradictory, incoherent, illogical or unfair.[5] These features of command responsibility do indeed require either justification or revision.

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[2] M Damaška, 'The Shadow Side of Command Responsibility' (2001) 49 *Am J Comp L* 455 at 463.

[3] Ibid at 466.

[4] For the most careful development of the latter position, see G Mettraux, *The Law of Command Responsibility* (OUP, 2009), above at 73-79, 101, 210 ('The ICC Statute greatly dilutes the principle of personal culpability'), 211 (the fault element is 'emptied of its content'), 212 ('the injuries which the text of the Statute appears to have inflicted upon basic principles of personal guilt').

[5] W A Schabas, 'General Principles of Criminal Law in the International Criminal Court (Part III)' (1998) 6 *Eur J Crime, Crim L & Crim Just* 400 at 417-18; ('doubtful ... whether negligent behaviour... can be reconciled with a crime requiring the highest level of intent. Logically, it is impossible to commit a crime of intent by negligence'); K Ambos, 'Superior Responsibility' in A Cassese et al, eds, *The Rome Statute of the International Criminal Court: A Commentary, Vol 1* (OUP, 2002) 823 at 852 ('stunning contradiction'); D L Nersessian, 'Whoops, I Committed Genocide! The Anomaly of Constructive Liability for Serious International Crimes' (2006) 30 *Fletcher F World Aff* 81 at 92-96 ('far below what is required... for... genocide'; inconsistent with personal fault and fair labelling); M Osiel, *Making Sense of Mass Atrocity* (CUP, 2009) at 27 (n. 50) and at 113 (n. 80) (must prove commander's specific intent for genocide); M L Nybondas, *Command Responsibility and Its Applicability to Civilian Superiors* (TMC Asser Press, 2010) at 125-39; T Weigend, 'Superior Responsibility: Complicity, Omission or Over-Extension of the Criminal Law?' in C Burchard, O Triffterer, and J Vogel, eds, *The Review Conference and the Future of International Criminal Law* (Kluwer, 2010) at 80; E van Sliedregt, 'Command Responsibility at the ICTY - Three Generations of Case Law and Still Ambiguity' in A H Swart et al (eds), *The Legacy of the ICTY* (OUP, 2011) at 397 ('incoherence'); E van Sliedregt, *Individual Criminal Responsibility in International Law* (OUP, 2012) at 205-07 ('conceptually awkward', 'gap'); K Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part* (OUP, 2012) 220-221 and 231 ('logically only possible' if not a 'direct liability' but rather liable for his own dereliction); M G Karnavas, 'Forms of Perpetration' in P Behrens and R Henham, *Elements of Genocide* (Routledge, 2013) 97 at 137 'obvious tension between specific genocidal intent... and... 'knew or should have known''; J Root, 'Some Other Mens Rea? The Nature of Command Responsibility in the Rome Statute', (2013) 23 *Transnat'l L & Policy* 119 at 143 ('Negligence is anathema to specific intent, and it is not an appropriate level of culpability to convict a commander of a specific intent crime'), 125 ('offends basic notions of justice and fairness') and 127 ('objectivize[d]' mental state 'divorces it from... personal accountability'); Mettraux, *Command Responsibility*, above at 226-227 (commander must share in the special intent). C Meloni, *Command Responsibility in International Criminal Law* (TMC Asser, 2010) at 200-02 more cautiously describes it as 'theoretically possible although problematic'.

7.1.2 Summary of Argument: A Deontic Justification

My contribution in this chapter is to suggest that a culpability-based justification of the modified fault element is possible. A typical response to culpability concerns would be to argue, in a consequentialist tradition, that they are overridden by the urgent need to reduce mass atrocious crimes. That is not my argument. I am working within the same principled tradition as the scholars cited above. My contribution here is not in opposition to this body of scholarship; on the contrary I seek to build on it.

Accordingly, my goal is most similar to that of Jenny Martinez, who has lamented that 'sensitivity to criticism about the looseness of the mens rea requirement for command responsibility has been unfortunately coupled with reluctance to explore explicitly the theoretical justifications for the doctrine.'[6] Like her, I seek to help develop that theoretical justification.[7] Whereas Martinez considered precedential, consequentialist, and deontic dimensions, I will focus particularly on the deontic justification, developing it in more detail. Other scholars, such as David Luban and Thomas Weigend have also touched on the deontic justification of command responsibility.[8] In this chapter, I develop what I believe to be the most detailed normative account of command responsibility to date. The account will address the most frequently raised objections.

My argument has three planks. First, I address the unease expressed about negligence in ICL. I show that criminal negligence is a robust concept reflecting personal culpability (it is not concerned with minor slips by a harried commander). Furthermore,

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[6] J S Martinez, 'Understanding *Mens Rea* in Command Responsibility: From *Yamashita* to *Blaškić* and Beyond' (2007) 5 *JICJ* 638 at 641.

[7] The account here is very briefly foreshadowed in D Robinson, 'The Two Liberalisms of International Criminal Law' in C Stahn and L van den Herik, eds, *Future Perspectives on International Criminal Justice* (TMC Asser, 2010) 115 at note 76.

[8] Weigend, 'Superior Responsibility', above, at 73 succinctly outlines the deontic case for the commander's duty. My approach also resonates with more general suggestions of David Luban and others, who have argued that legal rules must be adapted to the special problems of bureaucracy and organized human action. D Luban, 'Contrived Ignorance' (1999) 87 *Geo L J* 957; D Luban, A Strudler and D Wasserman, 'Moral Responsibility in the Age of Bureaucracy' (1992) 90 *Mich L Rev* 2348. My prescription is also similar to that of Mark Osiel; he focuses on consequentialist arguments whereas I am focused on the deontic justification. M Osiel, 'The Banality of Good: Aligning Incentives against Mass Atrocity'' (2005) 105 *Columbia L Rev* 1751.

criminal negligence is not simply an 'absence' of a mental state; it reflects a degree of disregard for the lives and safety of others that is morally reprehensible, socially dangerous, and properly punishable.

Second, I address concerns about liability without the requisite mens rea for crimes such as genocide. Many of the criticisms of command responsibility overlook the distinction between principal and accessory liability; they condemn command responsibility for not satisfying the requirements for principal liability, but it is actually a mode of accessory liability.[9] Accessories need not share the mens rea for the principal's offence. Accessory and principal liability signify different things and have correspondingly different requirements.

Third, I argue that command responsibility is a justified extension of aiding and abetting by omission. Normally we would consider 'mere' negligence to be much less serious than subjective foresight, and perhaps inadequate for accessory liability. But we must look at the context. The activity of overseeing armed forces has repeatedly entailed horrific dangers for vulnerable civilians, giving rise to a duty of vigilance. The commander who criminally neglects such a duty, and such a danger, shows a staggering disregard for the lives and legal interests that she was entrusted to protect. The commander cannot evade responsibility by creating her own ignorance through defiance of this duty. I will try to show that culpability-based justifications of 'causation' and 'equivalence' furnish sufficient fault for accessory liability.

I argue that this is the 'genius' of command responsibility: that it recognizes that criminal negligence is sufficiently culpable for accessory liability in this context. (I use the term 'genius' in its older and less-used sense, such as in Frederick Pollock's lectures on the 'genius of the common law'.[10] It refers to an underlying, emergent character of a collective endeavour over time, which may be discerned in retrospect even if not consciously intended by its participants.) My point is that the many different practitioners who shaped the doctrine were actually reflecting a deontically sound

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[9] Importantly, I do not argue that the commander's dereliction is equivalent to '*committing*' war crimes. The idea that command responsibility 'deems' a commander to have 'committed' the crimes is one of the persistent misunderstandings in the command responsibility discourse; see §7.3.2.

[10] F Pollock, *The Genius of the Common Law* (Columbia University Press, 1912) esp at 4-5. This is similar to the usage that refers, for example, to the genius of an era. Interestingly, Pollock's proposed usage also includes looking for a 'clarified' image that brings forth the 'best possible' underlying values. This matches well with the coherentist method (see Chapter 4); and with Dworkin's coherentist approach in *Law's Empire* (looking for theory with analytical fit and values that put the practice in the best possible light: R Dworkin, *Law's Empire* (Harvard University Press, 1986)).

intuition of justice about culpability in a particular set of circumstances, even if the groundwork for that intuition was neither explicitly articulated nor analytically developed.

While our normally-reliable understandings tell us that criminal negligence is less culpable than subjective advertence, command responsibility delineates and responds to a special set of circumstances where that familiar prioritization breaks down. The negligently ignorant commander, who cares so little about the danger to civilians that she does not bother with *even the first step* of monitoring, actually shows *greater* contempt than the commander who monitors and learns of a risk but hopes it will not materialize. Contrary to our normal assumption that 'knowing' is ipso facto more culpable than 'not knowing', the relative culpability in these circumstances hinges on *why* the commander does not know.

Accordingly, even though a negligence-based mode of accessory liability may seem to challenge our normal analytical constructs, I think that on closer inspection, the intuition of justice underlying command responsibility is sound. While we should look at post-WWII rules with critical care (as they may reflect over-reaching 'victors justice'), command responsibility reveals a valuable insight and contribution to criminal law. It responds to a particular pathology of human organization. It recognizes that in some circumstances, criminal negligence supplies adequate fault for accessory liability. The criminally indifferent supervisor of dangerous forces does not merely commit her own separate dereliction offence; she is rightly held to account as a culpable facilitator (accessory) of the resulting crimes.

Among the implications of this account is that the SHK standard in the ICC Statute should be defended. The SHK standard has been wrongly equated with strict liability and has fallen under suspicion. The Tribunals shied away from a negligence standard for understandable reasons, and fashioned their own test. But I argue that the SHK standard is preferable, not only on precedential and consequentialist grounds, but also on deontic grounds. It is less arbitrary than the test developed by the Tribunals and reflects a more consistent, meaningful standard of criminal culpability.

7.1.3 Linkage to Themes

In this chapter, I demonstrate the application of the coherentist method. The coherentist method draws on all available clues, including patterns of juridical practice, normative argumentation, practical reason, and casuistic testing. These considerations are familiar in both legal and normative argument; I am simply parsing these techniques to lay bare that coherentism is the best explanation of the underlying methodology.

The inquiry will also illustrate some of the main themes of the thesis. First, ICL can benefit from careful application of the tools of criminal law theory. Second, ICL can in turn illuminate general criminal law theory by presenting new doctrines and problems.[11] Third, the study of deontic principles can be *enabling* as well as restraining, by helping to avoid unnecessarily conservative approaches that overstate the constaints.[12] Fourth, a seemingly anomalous area of practice can sometimes reveal a sound insight about justice.[13]

7.1.4 Scope and Terms

In this chapter, I focus on the traditional central case of military command relationships, and thus speak of 'commanders'. I will touch on implications for civilian superiors only at the end.[14] In this chapter, I merely *outline* the justificatory account. I am acutely aware that I am skimming the surface of many intricate debates. This chapter offers the most detailed deontic account of command responsibility to date (as far as I know), and yet it is also still just a preliminary sketch.

[11] A negligence-based mode of liability seems to depart from our principles, but if we return to the basic building blocks bearing in mind the specific context, we may make some discoveries.

[12] The study of deontic constraints reveals not only the zone of prohibition but also the zone of permission to pursue sound policy.

[13] Normally, where there is a conflict between a practice and our understanding of our principles, it is the practice that we will consider 'wrong' and in need of alignment. However, sometimes the anomaly may prove to be an appropriate adaptation to a distinct circumstance. In that case, we can articulate a new and better understanding of our principles. The improved understanding takes into account not just the familiar and normal cases, but also more diverse circumstances. In so doing, we learn about our principles and build a more general theory

[14] §7.4.

7.2 THE AVERSION TO NEGLIGENCE

7.2.1 The Tribunals Turn Away from Negligence

Under international humanitarian law, commanders have a duty to try to remain apprised of possible crimes by subordinates, by monitoring and requiring reports ('duty to inquire' or 'duty of vigilance').[15] Should command responsibility take into account the commander's proactive duty to inquire?[16]

Post-World War II jurisprudence, which developed the command responsibility doctrine, had 'almost universally' held that the commander cannot plead her lack of knowledge where it was created by her criminally negligent breach of her duty to inquire.[17] ICTY jurisprudence acknowledges this clear pattern in the prior case law.[18]

Nonetheless, the ad hoc Tribunals departed from those precedents and struck a different path. In an early case, *Čelebići*, the Prosecution argued, consistently with prior transnational jurisprudence, that the fault requirement is satisfied where the commander did not know of the crimes because of a 'serious dereliction' in her duty to obtain

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[15] J-M Hencaerts and L Doswald-Beck, *Customary International Law, Vol II – Practice* (CUP, 2005) at 3733-91.

[16] As discussed in Chapter 6, the bare bones of command responsibility are: (1) a superior-subordinate relationship; (2) the superior knew or 'had reason to know' (or 'should have known') of subordinate crimes; and (3) the superior failed to take reasonable measures to prevent such crimes or punish the subordinates.

[17] I will not embark here on a doctrinal review of those precedents here, as my focus here is normative justification not precedential support, but many other scholars have admirably demonstrated this pattern in the jurisprudence. For example, the massive survey by William Parks concludes, '[a]lmost universally' that post-World War II tribunals adopted the 'knew or should have known' standard: W H Parks, 'Command Responsibility for War Crimes' (1973) 62 *Mil L Rev* 1 at 95. See also Martinez, 'Understanding', above at 647-54; Meloni, *Command Responsibility*, above at 33-76; K Ambos, *Der Allgemeine Teil des Völkerstrafrechts* (Duncker & Humblot, 2002) at 97-101, 133-6 and 147-50; O Triffterer and R Arnold, 'Article 28' in O Triffterer and K Ambos, eds, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd ed (CH Beck, Hart, Nomos, 2016) at 1070-73 & 1089-91.

[18] For example, the *Blaškić* trial Judgement reviews authorities including the Tokyo Judgment, *Toyoda*, *Roechling*, the *Hostage* case, the *High Command* case, as well as the Commission of Experts (which noted the duty to remain informed and that 'such serious personal dereliction on the part of the commander as to constitute wilful and wanton disregard of the possible consequences' would satisfy the mens rea requirement). *Prosecutor v Blaškić,* Judgement, ICTY T.Ch, IT-95-14-T, 3 March 2000, paras 309-330 ('*Blaškić* Trial Judgement'). Similarly, *Prosecutor v Delalić et al. (Čelebići* Judgement), ICTY T.Ch, IT-96-21-T, 16 November 1998 ('*Čelebići* Trial Judgement') held 'from a study of these decisions, the principle can be obtained that the absence of knowledge should not be considered a defence if, in the words of the Tokyo judgement, the superior was 'at fault in having failed to acquire such knowledge'' (para 388).

information within her reasonable access.[19] The Appeals Chamber demurred. The Chamber held that failure to set up a reporting system 'may constitute a neglect of duty which results in liability within the military disciplinary framework', but the Chamber was unwilling to incorporate such failures into command responsibility.[20] The Chamber felt that the Prosecution position 'comes close to the imposition of criminal liability on a strict or negligence basis'.[21]

To avoid these perceived pitfalls, the Appeals Chamber required that the commander must have in her '*possession*' information sufficient to put her on notice that crimes were being committed ('alarming information').[22] Thus, a commander can generally remain passive. It is only once alarming information makes it into her 'possession' that she is required to take steps.

Other trial chambers in early cases – *Bagilishema* (ICTR) and *Blaškić* (ICTY) – attempted to adopt interpretations consistent with earlier jurisprudence (i.e. the SHK test).[23] Again, in both cases, the Appeals Chamber rejected those attempts. In *Bagilishema*, the Appeals Chamber warned that '[r]eferences to 'negligence' in the context of superior responsibility are likely to lead to confusion of thought'.[24] In *Blaškić*, the Chamber again 'rejected criminal negligence as a basis of liability in the context of command responsibility'.[25] The Appeals Chamber reconfirmed that the commander is liable 'only if information was available to him which would have put him on notice of offences committed by subordinates'.[26]

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[19] *Prosecutor v Delalić et al. (Čelebići),* Judgement, ICTY A.Ch, IT-96-21-A, 20 February 2001 ('*Čelebići* Appeals Judgement') para 224.

[20] Ibid para 226.

[21] Ibid para 226.

[22] Ibid para 231-33.

[23] *Prosecutor v Bagilishema,* Judgement, ICTR T.Ch, ICTR-95-1A-T, 7 June 2001, para 46 (*Bagilishema* Trial Judgement) held that the fault element is met where 'the absence of knowledge is the *result of negligence* in the discharge of the superior's duties, that is where the superior *failed to exercise the means available* to him or her to learn of the offences and, under the circumstances, he or she *should have known*.' *Blaškić* Trial Judgement, above, para 322: the fault element is satisfied if the commander '*failed to exercise the means available* to him to learn of the offence and, under the circumstances, he *should have known* and such failure to know constitutes *criminal dereliction*.' Notice that both of these formulations match the test reflected in the Rome Statute and the World War II jurisprudence, and would harmonize the HRTK and SHK standards.

[24] *Prosecutor v Bagilishema,* Judgement, ICTR A.Ch, ICTR-95-1A-A, 3 July 2002, at para 35 ('*Bagilishema* Appeal Judgement').

[25] *Prosecutor v Blaškić,* Judgement, ICTY A.Ch, IT-95-14-A, 29 July 2004 (*Blaškić* Appeal Judgement) para 63.

[26] *Blaškić* Appeal Judgement, above, para 62.

I have three points about the Chamber's reasoning. First, it was entirely appropriate and commendable that the Chambers showed concern for personal culpability. Their caution was preferable to the often-seen tendency (especially in early jurisprudence) to use reasoning techniques that maximized liability with inadequate attention to fundamental principles.[27] (As I noted in Chapter 2, these techniques reflect a 'tendency' but are not an 'iron rule', i.e. I in no way suggest that jurists always fall afoul of them.[28]) Working in the early days of ICL, and confronted with the unexplored implications of incorporating negligence and the duty to inquire, it was a prudent reflex for the judges to steer clear. Now, however, with the luxury of more time, and given that the Rome Statute expressly reaffirms the SHK standard, we can and must study with more care whether that standard may in fact be deontically justified.

Second, the Chamber seems to have misunderstood or misstated the Prosecution submission. Whereas the Prosecution was arguing for the SHK standard, the Chamber instead refuted a 'duty to know' about 'all' crimes.[29] For brevity, I will refer to this as the 'duty to know everything'. The Chamber vigorously rejected the 'duty to know everything' standard, and rightly so. A 'duty to know everything' would indeed pose an unfair 'Catch-22': the commander would either *know*, and be liable, or *not know*, and be liable. Such a standard would indeed be a strict liability standard, because its logically jointly exhaustive alternatives – knowing or not knowing – would always be met.

Crucially, however, the Prosecution was *not* arguing for a 'duty to know everything', nor was that the upshot of prior jurisprudence. Notice the following three nuances of the SHK test. First, it is a duty of conduct (effort), not a duty of *result*. In other words, it is not a duty to *know*, it simply is a duty to *inquire*.[30] One is exculpated if one exercises due diligence. Second, the SHK test requires not only that the commander failed to exercise due diligence to inquire, but also that the commander had the '*means* to obtain the

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[27] See Chapter 2.

[28] § 2.1.3.

[29] *Čelebići* Appeals Judgement, above, para 227-230. Similarly, the Chamber also overstated the question as whether failure in this duty will '*always*' (para 220) or '*necessarily*' (para 226) result in criminal liability. Obviously the answer must be 'no'. The failure would have to be due to criminal negligence, and all of the other requirements of command responsibility would also have to be met.

[30] See for example the *High Command* case, which rejected a 'duty to know everything' standard, recognizing that a 'commander cannot keep completely informed' of all details, and can assume that subordinates are executing orders legally. The commander's disregard must amount to 'criminal negligence'. *United States v Wilhelm von Leeb et al (High Command Trial)*, (1950) 11 TWC 462 at 543-44.

knowledge'.[31] In other words, the commander *would have found out* had she tried.[32] Third, the dereliction must be 'serious'.[33] In other words, it is a standard of criminal negligence, not simple civil negligence. Notice also that the commander is not instantly liable if she inherits a force with poor reporting mechanisms; the requirement is simply that she exercise diligence to stay apprised, to the extent that can be expected in the circumstances.

Thus, the liability standard in the prior law, and as advanced by the Prosecution, was not *strict liability*, but rather *criminal negligence*. These are not synonyms. Unfortunately, following the Appeals Chamber's analysis, jurists and scholars frequently equate the SHK standard with strict liability and a 'duty to know everything'. The SHK is often regarded as having been decisively discredited in *Čelebići*. But it was not: *Čelebići* actually discredited the 'duty to know everything', not the SHK standard. One of my aims here is to untangle these very different ideas so they can be seen afresh on their own merits.

Third, even though the Tribunals emphatically purported to reject a negligence standard, the HRTK test actually still entails constructive knowledge. The Chambers have held that 'possession' does not mean 'actual possession'[34] – which sounds contradictory, but presumably means that the commander does not need reports physically in hand. More importantly, the commander need not have '*actually acquainted* himself' with the information; the information only needs to '*have been provided or available*' to the commander.[35] Thus, it would suffice, for example, that reports made it to the commander's immediate office. Accordingly, the HRTK test is not actually subjective. The test purports to be subjective, but effectively fixes the commander with knowledge of all information that made it to her vicinity.

7.2.2. The 'Possession' Test is a Poor Fit with Actual Culpability

[31] *Čelebići* Appeals Judgement, para 226. See also the proposed requirement that the information be within her 'reasonable access' (para 224).

[32] Ibid para 226.

[33] Ibid para 224.

[34] Ibid para 238.

[35] *Čelebići* Appeal Judgement, above, para 239.

Here is a particularly stark example to illustrate the problem with the 'possession' requirement. Suppose a commander instructs her team at the outset, 'No one is to report to me any information about any crimes by our forces'. As a result, her subordinates manage to keep from her any information about the ongoing crimes. On the Tribunals' approach, she would be acquitted, because she does not have such information. Yet the *reason* should does not have the information is the egregiously inadequate reporting system she herself created.[36]

By contrast, the SHK test, in earlier jurisprudence and in the ICC Statute, is slightly broader.[37] The SHK test can be satisfied where the commander does *not* possess information about subordinate criminal activity, *if* that lack is due to a gross dereliction of her duty to try to stay apprised, showing a culpable indifference to the lives and interest she was entrusted to protect. [38]

In consequentialist terms, it is fairly evident that the Tribunal test creates a perverse incentive: to avoid receiving reports. This achieves the opposite of the purpose

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[36] However, one line in the *Blaškić* Appeals Judgement, above, para 62 seems to suggest otherwise. The line asserts that the commander can be liable if she '*deliberately refrains*' from obtaining information. This is a welcome suggestion, consistent with the normative position I recommend here. However, the assertion cannot be reconciled with the actual rule laid down by the Tribunals, since the central requirement is that alarming information must be in the commander's 'possession'. Everything I say in this article is based on taking the 'possession' test at face value.

Alternatively, however, if future interpreters were to breathe life into the 'deliberately refrains from obtaining' line, that would introduce a large and welcome exception to the 'possession' requirement. Creating that exception would reduce the gap between the ICC approach and the Tribunal approach. As I argue here, a 'deliberately refraining' test would be deontically justified. (Furthermore, while 'criminally negligent' failure and 'deliberate' failure sound like very different thresholds, they are not so different. Any criminal negligence requires a gross dereliction, which means there had to be available alternatives, and thus a choice not to inquire. In other words, the criminal negligence standard already requires a deliberate failure.) Thus, if the 'deliberately refrains' alternative is taken seriously, it leads to a test very much like the test I advocate here. However, it would also contradict the rest of the Tribunal's jurisprudence on the matter, such as its requirement of possession, the rejection of the proactive duty and the rejection of SHK.

[37] See *Čelebići* Trial Judgement, above, para 393; *Čelebići* Appeals Judgement, above, para 222-242 and *Prosecutor v Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(8)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC PTC, ICC-01/05-01/0815 June 2009 ('B*emba* Confirmation Decision'); para 433-434. For analysis see Meloni, *Command Responsibility* 182-186.

[38] *Bemba* Confirmation Decision, above, para 433: 'the 'should have known' standard requires more of an active duty on the part of the superior to take the necessary measures to secure knowledge of the conduct of his troops and to inquire, regardless of the availability of information at the time on the commission of the crime....'. The *Bemba* decision describes the 'should have known' standard as one of negligence: ibid para 427-434. On negligence see below Part 3.1.

of the command responsibility doctrine. The SHK test better advances the aims of the law, i.e. to incentivize diligent monitoring and supervision of troops and thereby reduce crimes.[39] However, my focus here is not on *consequentialist* arguments but on *deontic* ones. My aim here is to ask whether the SHK test is justified, in terms of the personal culpability of the commander. My conclusion is that the SHK test is not only *justified* (i.e. permissible): it is actually *preferable* on deontic grounds, because it actually corresponds better to personal culpability.

The HRTK test, as developed by the Tribunals, is actually both *under-inclusive* and *over-inclusive*. The test is under-inclusive because it acquits the commander who contrives her own ignorance, by creating a system that keeps her in the dark about subordinate crimes.[40] But the test is also over-inclusive, because it fixes the commander with knowledge of reports that made it to her desk, even if exigent demands of her work understandably delayed her from reading the reports.[41] In that case, she is fixed with knowledge even though she was not negligent in the circumstances. The Tribunal test hinges too dramatically on whether other actors or external events bring the alarming information into the nebulously -defined 'possession' of the passive commander. It lurches from *too little* of an expectation – indulging and even encouraging the commander to be passive – to *too much* of an expectation – deeming knowledge of all submitted reports, even where the commander was not negligent in not getting to the report.

A metaphor may illustrate the problem. Imagine that an airline pilot has a duty (1) to activate the warning light system and (2) to follow up on any warning lights. On this metaphor, the Tribunal approach rightly reaches pilots who ignore a warning light, but acquits pilots who choose not to turn the system on in the first place.[42] That narrowness

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[39] Osiel, 'Banality', above.

[40] Subject to one untested passage in the *Blaškić* Appeal Judgement, above, which in any event is difficult to reconcile with the overarching requirement that information must be in the commander's 'possession'. See above.

[41] I am referring here to the rule *as stated* by the Tribunals. It might be that, confronted with such a case, the judges would rein in the stated rule to avoid the possible injustice. In that eventuality, however, the test would collapse into simple 'knowledge' and thus the 'HRTK' alternative would become nugatory. Or, a more sensible alternative would be to embrace the criminal negligence standard advocated here.

[42] You might object that there is a difference between 'choosing' not to turn on the system and negligently 'forgetting'. In §7.3.3, we will look at the morality of 'forgetting' to monitor whether troops are killing and raping civilians.

is not required by deontic principles.[43] The duty to stay apprised logically entails requiring subordinates to report crimes; it is artificial to try to divide the two.

The SHK standard much more simply and faithfully tracks the proper contours of fault for this mode of liability. It recognizes the commander's basic duty of diligence in requiring reports and monitoring activity. Moreover, the SHK standard does not require heroic efforts; it simply requires *non-criminally-negligent* efforts. The SHK standard does not 'deem' the commander to have read reports she had no reasonable opportunity to read. It applies a single, consistent yardstick, which reflects both the purpose of command responsibility and a recognized criminal law fault standard. That yardstick is contextually sensitive to the circumstances faced by the commander.[44]

Both the Tribunals and the ICC now understand the SHK test and the HRTK test as differing.[45] Accordingly, I will use the labels as a descriptive shorthand. However, just to be clear, I do not think that the wording of these two extremely similar formulations ever required divergent interpretations.[46] I think that a national or international court applying the words 'had reason to know' in future could choose to incorporate post-WWII and ICC jurisprudence. Moreover, while the academic literature often portrays Tribunal jurisprudence as unquestioned customary law, and thus the ICC test as a departure, I argue that it is actually the Tribunal jurisprudence that departs from prior sources, whereas the ICC Statute returns to the previously-established standard of criminal negligence.

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[43] The Tribunal approach departed from precedent, and went against the consequentialist aims of the provisions, but it would have been right to do both of those things if it were necessary to comply with the culpability principle. However, the restriction is not required by the culpability principle; indeed the Tribunal creation is actually a *worse* match for culpability.

[44] See § 7.3.1 and §7.3.3. For example, it is not criminally negligent if a commander takes over a group in harried circumstances and does not yet have a realistic opportunity to set up reporting systems. A commander would also not be considered criminally negligent simply because she operates within a dysfunctional army; we would look at her diligence in its context to assess what measures could be expected of her (and thus which derelictions meet the criminal negligence threshold).

[45] See *Čelebići* Trial Judgement, above, para 393; *Čelebići* Appeals Judgement, above, para 222-242 (contrasting with the SHK test); *Bemba* Confirmation Decision, above, para 427-434.

[46] The Tribunal judges thought that the words 'had reason to know' in Additional Protocol I marked a movement away from criminal negligence and the SHK standard. But actually the delegates accepted criminal negligence and were debating its proper parameters. See ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers, 1987) at 1012 (ICRC, *Commentary*); I Bantekas, 'The Contemporary Law of Superior Responsibility' (1999) 93 *AJIL* 573 at 589-590; C Garraway, 'Command Responsibility: Victors' Justice or Just Deserts?' in R Burchill et al, eds, *International Conflict and Security Law: Essays in Memory of Hilaire McCoubrey* (CUP, 2005) at 81.

7.3. A PROPOSED JUSTIFICATION OF COMMAND RESPONSIBILITY

I will now offer a normative account of command responsibility as a mode of liability that includes a criminal negligence standard. My argument has three planks. First, I respond to unease about criminal negligence, showing that it can be an appropriate standard for criminal liability, reflecting personal culpability. Second, I address concerns that the commander may not share the mens rea for the offence by highlighting the different standards and implications of accessory and principal liability. Third, I will use Paul Robinson's helpful framework for assessing inculpatory doctrines[47] to show that culpability-based justifications can account for the novel doctrine of command responsibility.

7.3.1 The Personal Culpability of Criminal Negligence

As was seen above, Tribunal jurisprudence (and some ICL literature) expresses discomfort with negligence as a basis for liability.[48] Jenny Martinez rightly questions the tendency in ICL discourse to denigrate the command responsibility standard as 'simple negligence' and to conflate it with strict liability.[49] Indeed, to describe the standard as 'simple' negligence understates the rigour and nuance of criminal negligence. George Fletcher describes the common 'disdainful attitude toward negligence as a basis of liability' as a source of 'major distortion of criminal law'.[50]

This wariness toward negligence may reflect traces of the 'subjectivist bug' – the belief that subjective mental states are the only *proper* grounds for criminal culpability.[51] On the 'subjectivist' view, one needs, at minimum, conscious advertence to a risk in order

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[47] P Robinson, 'Imputed Criminal Liability' (1984) 93 *Yale LJ* 609.

[48] See Part 1 for concerns of scholars and Part 2 for Tribunal jurisprudence.

[49] Martinez, 'Understanding', above at 660.

[50] G Fletcher, *The Grammar of Criminal Law: American, Comparative and International,* Vol 1 (OUP, 2007) at 309.

[51] R Frost, 'Centenary Reflections on Prince's Case' (1975) 91 *LQR* 540 at 551; C Wells, 'Swatting the Subjectivist Bug' 1 *Criminal Law Review* 209.

to ground criminal liability. Thus, where a person did not advert at all to a risk, he or she cannot be held responsible. On this view, negligence is seen as non-awareness, a mere 'absence' of thought, a 'nullity', which does not correspond to any mental state deserving punishment.[52] It is also sometimes argued that negligence cannot be deterred, which seems to equate negligence with accidents or mindlessness.[53] Such arguments conclude that there is neither a consequentialist nor a deontic justification for punishing negligence.

To respond to such concerns, I offer a very rudimentary sketch[54] of criminal negligence, to distinguish criminal negligence from mere blunders or simple civil negligence. Criminal negligence requires two things. First, the accused must be engaged in an activity that presents an obvious risk to others – such as driving, performing surgery, or supervising factory workers. Second, the accused must not only fail to meet the requisite standard of care, but fail 'by a considerable margin'.[55] The requirement has been described as a 'marked' departure[56] or a 'gross' departure.[57] This standard excludes, inter alia, a 'momentary lapse of attention' consistent with a good faith effort to fulfill one's responsibilities.[58] Criminal law is only concerned with transgressions that warrant *penal* sanction.

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[52] J Hall, *General Principles of Criminal Law* (The Bobbs-Merrill Company,1947) 366-67; G Williams, *Criminal Law: The General Part*, 2nd ed (Stevens, 1961) at 122-23. More recently, careful arguments for the subjectivist approach are advanced in A Brudner, *Punishment and Freedom: A Liberal Theory of Penal Justice* (OUP, 2009) at 59-97 and in L Alexander and K Kessler Ferzan, *Crime and Culpability: A Theory of Criminal Law* (CUP, 2011) at 69-85. See also the counter-arguments advanced by Fletcher, *Grammar*, above at 313.

[53] Hall, *General Principles*, above; Williams, *General Part*, above. This thinking is echoed in command responsibility literature. For example, Root, 'Mens Rea', above at 152 argues 'deterrence... will not deter individuals from inaction when they were not aware there was a need to act'.

[54] For this quick sketch, I draw heavily on my own tradition – the common law. If I were attempting to advance a definitive doctrinal interpretation of 'should have known' in ICL, I would need a much more detailed survey of different legal traditions. But that is not my aim; I am simply providing enough of a sketch to address the preliminary normative objections noted above.

[55] A P Simester and G R Sullivan, *Criminal Law: Theory and Doctrine*, 3rd ed (Hart, 2007) at 146.

[56] See e.g. *R v Creighton*, [1993] 3 SCR 3 (Supreme Court of Canada).

[57] J Horder, *Ashworth's Principles of Criminal Law*, 8thh ed (Oxford, 2016) at 196; The American Law Institute, *Model Penal Code: Official Draft and Explanatory Notes: Complete Text of Model Penal Code as Adopted at the 1962 Annual Meeting of the American Law Institute at Washington, D.C.*, May 24, 1962. (Philadelphia, PA: The Institute, 1985). s. 2.02(2)(d) ('gross deviation'); Ambos, *Treatise*, above at 225 ('gross deviation').

[58] K Simons, 'Culpability and Retributive Theory: The Problem of Criminal Negligence' (1994) 5 *J Contemp Legal Issues* 365 at 365. For a helpful illustration see *R v Beatty*, [2008] 1 SCR 49 (Supreme Court of Canada).

The argument that criminal negligence does not correspond to any personal mental state seems initially to be convincing. After all, a negligence analysis seems to simply compare the accused's conduct to an objective standard. However, as many scholars have shown, criminal negligence does indeed display a particular blameworthy mental state, for which personal culpability is rightly assigned. A gross departure from the standard of care, in the course of an activity bearing obvious risks for others, demonstrates a '*culpable indifference*'[59] or '*culpable disregard*'[60] for the lives and safety of others. HLA Hart's careful discussion is still illuminating today. He reminds us that failure to advert to a risk can indeed be blameworthy. Sometimes 'I just didn't think' is no excuse, when we have a responsibility to *exert our faculties*, to be mindful and to take precautions.[61] Thus, where a driver pays absolutely no attention to the road, or a railway switch operator plays cards and completely forgets about the incoming train, we do not take these failures to advert as mere non-culpable 'absences' of a mental state. We punish the persons for *failing to exert their faculties* to advert to risks and control their conduct when their activity required them to exert their faculties.[62]

As Antony Duff points out, 'what I notice or attend to reflects what I care about; and my very failure to notice something can display my utter indifference to it.'[63] Kenneth Simons notes that the culpable indifference standard 'asks *why* the actor was unaware. If the reason for the actor's ignorance is itself blameworthy, then the actor might satisfy the

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[59] A Duff, *Intention, Agency and Criminal Liability* (Blackwell, 1990) at 162-163 ('practical indifference'); Simons, 'Culpability', above at 365 ('culpable indifference'); J Horder, 'Gross Negligence and Criminal Culpability' (1997) 47 *University of Toronto L J* 495 ('indifference').

[60] See e.g. s. 219 of the Canadian *Criminal Code*. See also *R v Bateman* (1925), 19 *Cr App Rep* 8 (UK): 'the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others, as to amount to a crime against the state and conduct deserving of punishment.'

[61] H L A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law,* 2nd Ed (OUP, 2008) at 136.

[62] Hart, ibid, at 150-157.

[63] Duff, *Intention*, above, at 162-163.

culpable indifference criterion.'[64] Criminal negligence shows a disregard for others that is morally reprehensible, socially dangerous, and properly punishable.[65]

These arguments also address the claim that negligence cannot be deterred, because they remind us that criminal negligence is confined to serious transgressions, and that it can be avoided through effort. Criminal sanctions can remind people that they have to *pay attention* when they engage in certain activities, and exert themselves to try to fulfill their duties. Hart, for example, gives the example of a man driving his car while gazing at his girlfriend's eyes rather than the road. It is not unrealistic that punishment could remind him and others in future that 'this time I must attend to my driving.'[66] The claim that criminal negligence cannot be deterred is simply untrue.

A recurring concern in the ICL literature about a 'mere' negligence standard is that minor slips, or ineptness, or falling behind in reading, or taking an ill-timed vacation, could lead the hapless commander to be held liable as party to serious crimes.[67] Scholars are quite right to consider such scenarios in order to test doctrines. I hope that the above clarifications address these concerns. Precedents on command responsibility rightly emphasize that the negligence must be of an extent showing a criminally blameworthy state (e.g. a culpable disregard for the lives and interests that the duty is intended to safeguard).[68]

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[64] Simons, 'Culpability', above, at 388 (emph added). See also G P Fletcher, 'The Fault of Not Knowing' (2002) 3 *Theoretical Inq L* 265, and Horder, *Ashworth's Principles,* above at 204-06.

[65] Some scholars and some systems (e.g. Germany, Spain) distinguish between 'advertent' versus 'inadvertent' (or 'conscious' versus 'unconscious') negligence, depending on whether the accused was aware of the risk to others. But as these arguments show, even with 'inadvertence', the legal and moral question is *why* the accused did not advert to the risk and whether this itself was rooted in culpable disregard.

[66] Hart, *Punishment and Responsibility*, above at 134.

[67] See e.g. Nersessian, 'Whoops', above at 93 ('getting drunk at the wrong time, taking an ill-advised holiday, or being woefully incompetent, careless, or distracted'); A B Ching, 'Evolution of the Command Responsibility Doctrine in light of the Čelebići Decision of the International Criminal Tribunal for the Former Yugoslavia' (1999) 25 *North Carolina Journal of International Law and Commercial Regulation* 167 at 204; Y Shany & K Michaeli, 'The Case Against Ariel Sharon: Revisiting the Doctrine of Command Responsibility' (2002) 34 *NYU JILP* 797 at 841.

[68] For example, the *High Command* case required 'criminal negligence', i.e. 'personal neglect amounting to a wanton, immoral disregard'. *High Command,* above at 543-44. The Commentary to Additional Protocol I required negligence 'so serious that it is tantamount to malicious intent': ICRC, *Commentary*, above at 1012. Many of these precedents use what we would today regard as clumsy terminology. This reflects, I believe, the relative nascence of ICL. Today, we would not equate criminal negligence with 'malicious intent' (*dolus specialis*). I think these and other passages were struggling to convey that the departure is so severe that it shows a culpable attitude worthy of criminal punishment.

Of course, the philosophical debate about criminal negligence is not conclusively settled; there are some theorists who argue against it, and insist on subjective advertence.[69] For present purposes, rather than digressing further into this debate, we can observe that most legal systems, and most of the scholarly literature, backed by convincing normative arguments as outlined above, supports the analysis and intuition that criminal negligence is a suitable basis for criminal liability.[70] On a coherentist account, we accept that we may not arrive at complete consensus or Cartesian certainty. Instead we make best judgments drawing on all available clues, and the clues overwhelmingly support criminal negligence as a basis for personal culpability.

7.3.2 Accessories Need Not Share the Paradigmatic Mens Rea of the Offence

The major concern in ICL literature is not with the appropriateness of criminal negligence liability per se. The major concern is with negligence linking the accused to serious crimes of subjective mens rea.[71] That objection is particularly acute for crimes with special intent such as genocide. As noted above, the mismatch between the commander's mental state and the mental state required for genocide is considered by many to be a contradiction or incoherence.[72]

This seeming mismatch is indeed striking, and scholars are right to raise principled concerns. However, many of the criticisms of command responsibility judge it by the standards expected for *principal* liability. Command responsibility is a mode of *accessory* liability and should be evaluated accordingly. I will point out in this section that it is not problematic, or even unusual, that an accessory does not satisfy the *dolus specialis* or special intent required for the principal's crime.

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[69] See e.g. Alexander and Ferzan, *Crime and Culpability*, above, at 69-85.

[70] M E Badar, *The Concept of Mens Rea in International Criminal Law: The Case for a Unified Approach* (Hart Publishing, 2013) at 66-68, 116-18, 145-46, 166, 186-88; K J Heller & M D Dubber, *The Handbook of Comparative Criminal Law* (Stanford Law Books, 2011) at 25-27, 59, 109, 148-49, 188, 216-19, 263, 294-95, 326-28, 365-66; Ambos, *Treatise* at 94-95 (esp n. 113).

[71] Most ICL scholars accept the appropriateness of criminal negligence, for example in a separate dereliction offence. See e.g. Ambos, *Treatise*, above at 231 (see esp n. 477); Root, 'Mens Rea', above at 136; Schabas, 'General Principles', above at 417.

[72] See citations above §7.1.1.

Like most criminal law systems, ICL distinguishes between principals and accessories.[73] Those parties who are most directly responsible are liable as *principals*. Other, more indirect, contributors may be liable as *accessories*. Systems have drawn the dividing line in different ways; each approach has different strengths and shortcomings.[74] ICL has avoided a purely mental or a purely material approach, and has instead emphasized 'control' over the crime as a distinguishing criterion. This approach was explicitly adopted in some ICC decisions drawing on German legal theory,[75] but it is also implicit in Tribunal jurisprudence,[76] and has support in other legal systems and traditions of criminal theory.[77]

There are two main differences between accessories and principals. One difference, as discussed in Chapter 6, is the *material* requirement. Principals make an 'essential' (*sine qua non,* integral) contribution to some aspect of the crime,[78] whereas accessories merely 'contribute' more indirectly, by influencing or assisting the acts and

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[73] ICL does not include fixed sentencing discounts; rather the difference is a factor reflected in sentencing. See e.g. H Olásolo, 'Developments in the distinction between principal and accessory liability in light of the first case law of the International Criminal Court' in C Stahn and G Sluiter, eds, *The Emerging Practice of the International Criminal Court* (Brill, 2009) at 339; Ambos, *Treatise*, above at 144-148 & 176-179; K Ambos, 'Article 25' in O Triffterer and K Ambos, eds, *The Rome Statute of the International Criminal Court: A Commentary,* 3rd ed (CH Beck, Hart, Nomos, 2016); van Sliedregt, *Individual Criminal Responsibility*, above at 65-81.

[74] See e.g. M Dubber, 'Criminalizing Complicity: A Comparative Analysis' (2007) 5 *JICJ* 977; G Werle and B Burghardt, 'Introductory Note' (2011) 9 *JICJ* 191.

[75] See e.g. *Prosecutor v Katanga and Chui*, Decision on Confirmation of Charges, ICC PTC, ICC-01/04-01/07, 30 September 2008 ('*Katanga* Confirmation Decision') at para 480-486; *Prosecutor v Lubanga,* Decision on Confirmation of Charges, ICC PTC, ICC-01/04-01/06, 29 January 2007 ('*Lubanga* Confirmation Decision') at paras 322-340. See also H Olásolo, 'Developments', above; Dubber, 'Criminalizing Complicity' above; T Weigend, 'Perpetration through an Organization: The Unexpected Career of a German Legal Concept' (2011) 9 *JICJ* 91; Ambos, *Treatise* at 145-160.

[76] For example, *Furundžija* explains that a principal must participate in an 'integral part' of the actus reus, whereas an accessory need only 'encourage or assist' (making a 'substantial contribution'). A principal must 'partake in the purpose' (i.e. the paradigmatic mens rea for torture) whereas the aider and abettor need only 'know' that torture is taking place. *Prosecutor v Furundžija,* Judgement, ICTY T.Ch, IT-95-17/1-T, 10 December 1998, para 257 ('*Furundžija* Trial Judgement').

[77] To take some prominent examples from the English-language literature, see S H Kadish, 'Complicity, Cause and Blame: A Study in the Interpretation of Doctrine' (1985) 73 *Calif L Rev* 323; M S Moore, 'Causing, Aiding, and the Superfluity of Accomplice Liability' (2007) 156 *U Pa L Rev* 395 at 401; J Dressler, 'Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem' (1985) 37 *Hastings LJ* 91 at 99-102

[78] *Lubanga* Confirmation Decision, above; *Katanga* Confirmation Decision, above; *Furundžija* Trial Judgement, above ('integral part'); Kadish, 'Complicity', above, Moore, 'Causing', above; Dressler, 'Reassessing', above; Dubber, 'Criminalizing Complicity', above.

choices of the principals.[79] The more important difference for this chapter is the *mental* requirement. Principals must satisfy all mental elements stipulated for the crime. In other words they satisfy the 'paradigm' of mens rea for the crime.[80] For accessories, the requisite mental state in relation to the crime is not stipulated by the definition of the crime; it is stipulated by the relevant mode of accessory liability.[81]

As a result, accessories need not share in the paradigmatic mens rea for a given offence.[82] As the ICTR noted in *Akayesu*, 'an accomplice to genocide need not necessarily possess the *dolus specialis* of genocide'.[83] In *Kayishema*, the ICTR held that aiders and abettors 'need not necessarily have the same mens rea as the principal offender'.[84] ICTY cases, including Appeals Chamber judgments, have repeatedly confirmed that an accessory need not share the mens rea for the crime itself. For example, an aider and abettor must know of the crime but need not personally satisfy the mental elements, such as special intent elements.[85] The ICTY Appeals Chamber has also shown the support of

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[79] As John Gardner explains, 'Both principals and accomplices make a difference, change the world, have an influence…. [A]ccomplices make their difference through principals, in other words, by making a difference to the difference that principals make'. J Gardner, 'Complicity and Causality' (2007) 1 *Criminal Law and Philosophy* 127 at 128. See also Kadish, 'Complicity', above at 328 and 343-346; Dressler, 'Reassessing', above at 139; Ambos, *Treatise*, above at 128-30 &164-66.

[80] Robinson, 'Imputed Criminal Liability', above.

[81] Of course, the mode of liability must itself be deontically justified, for liability to be just.

[82] G Werle and F Jessberger, *Principles of International Criminal Law,* 3rd Ed (OUP, 2014) at 219.

[83] *Prosecutor v Akayesu,* Judgement, ICTR T.Ch, ICTR-96-4-T, 2 September 1998 ('*Akayesu* Trial Judgement'), para 540. See discussion in H van der Wilt, 'Genocide, Complicity in Genocide and International v Domestic Jurisdiction: Reflections on the van Anraat Case' (2006) 4 *JICJ* 239 at 244-246.

[84] *Prosecutor v Kayishema,* Judgement, ICTR T.Ch, ICTR-95-1T, 21 May 1999 ('*Kayishema* Trial Judgement') para 205.

[85] *Prosecutor v Aleksovski,* Judgement, ICTY A.Ch, IT-95-14/1-A, 24 March 2000 ('*Aleksovski* Appeal Judgement') para 162; *Prosecutor v Krnojelac*, IT-97-25-A, Appeal Judgement (17 September 2003) para 52 (for aiding and abetting persecution, need not share the discriminatory intent, but must be aware of discriminatory context); *Prosecutor v Simić,* Judgement, ICTY A.Ch, IT-95-9-A, 28 November 2006, ('*Simić* Appeal Judgement') at para 86; *Prosecutor v Blagojević and Jokić,* Judgement, ICTY A.Ch, IT-02-60-A, 9 May 2007 ('*Blagojević* Appeal Judgement'); *Prosecutor v Seromba,* Judgement, ICTR A.Ch, ICTR-2001-66-A, 12 March 2008 ('*Seromba* Appeal Judgement') para 56. See also Werle and Jessberger, *Principles*, above at 220.

There is currently a lively debate now as to whether aiding and abetting requires 'knowledge', 'purpose', or something in between, such as 'specific direction'. That debate is not pertinent to this article; my point here is that, whatever the ultimately correct details for aiding and abetting may be, the accessory does not have to share the mens rea for the crime.

national systems for this approach.[86] National systems seem largely to converge in this respect,[87] with limited exceptions.[88]

You may be familiar with one of the criticisms commonly made against joint criminal enterprise (JCE), that JCE enables conviction without satisfaction of special mental elements. But that criticism cannot simply be transplanted to command responsibility. That criticism is sound in relation to JCE, because JCE is a form of *principal* liability.[89] The extended form (JCE-III) is rightly criticized for imposing principal liability without meeting the culpability requirements for principal liability. But command responsibility is accessory liability, and thus does not require paradigmatic mens rea. Modes of accessory liability must be evaluated under the respective standards.

Unfortunately, the accessory-principal distinction has been frequently overlooked in command responsibility debates. For example, Joshua Root objects that command

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[86] *Prosecutor v Krstić,* Judgement, ICTY A.Ch, IT-98-33-A, 19 April 2004 para 141 ('*Krstić* Appeals Judgement').

[87] van der Wilt, 'Genocide', above, notes that in 'both national criminal law systems and international criminal law', 'the intentions and purposes of accomplice and principal need not coincide' (246). For example, 'Dutch criminal law... explicitly allows the mens rea of accomplices and principals to differ' (249). See also Ambos, *Treatise* at 288-9 and 299-300.

[88] Some US states take a 'shared intent' approach, in which the aider and abettor must share in the mens rea for the crime itself. See A Ramasastry and R C Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law – A Survey of Sixteen Countries* (FAFO, 2006). The Model Penal Code (s. 2.06(4)) suggests that, for consequence elements, an aider and abetter must have the level of culpability required for a principal. If one is convinced that it is a bedrock principle that an accessory must have the same level of fault as a principal, then my account fails. Not only does my account fail, but any account of command responsibility as a mode of liability will fail.

Fortunately, there are reasons to doubt that 'shared intent' is a necessary requirement. Such a requirement would partially negate the point of distinguishing accessories from principals. It is not followed in most legal systems. Even US jurisdictions that declare a 'shared intent' approach do not actually adhere to 'shared intent' for all accessories. For example, under the Pinkerton doctrine, or 'intention in common' liability, one can become an accomplice to foreseeable ancillary crimes, without the fault required for a principal. Thus, even those jurisdictions do not uphold a fundamental principle that accessories must have the mens rea of a principal.

I think that the passage in the MPC commentary was made in the context of a particular debate (where a mode of liability requires subjective advertence, one would not include liability for result offences with more inclusive fault elements not satisfied by the accessory). I do not believe it was not intended contradict the more general proposition that the level of fault for an accessory is stipulated by the mode of liability. If that was the intent, it would contradict extensive juridical practice, and it would be normatively unconvincing, not least because it treats one type of material element differently from others.

[89] The Tribunals assert that JCE is implicit within the term 'committed', and thus they maintain it is a form of *commission*, rendering one a principal and 'equally guilty' with all JCE members; *Prosecutor v Vasiljević,* Judgement, ICTY A.Ch, IT-98-32-A, 25 February 2004, ('*Vasiljević* Appeal Judgement') at para. 111 ('*equally guilty* of the crime regardless of the part played by each in its commission'). Notice that I am taking no position on whether JCE would be fine if it were a mode of accessory liability. I am simply pointing out that criticisms and standards appropriate for doctrines of principal liability cannot necessarily be transplanted to doctrines of accessory liability.

responsibility as a mode of liability involves 'pretending [the commander] committed the crime himself'.[90] Judge Shahabuddeen disparaged the plausibility of a commander 'committing' hundreds of rapes in a day.[91] Guénaël Mettraux argues that 'turning a commander into a murderer, a rapist or a *génocidaire* because he failed to keep properly informed seems excessive, inappropriate, and plainly unfair.'[92] Mirjan Damaška objects that the negligent commander is 'stigmatized in the same way as the intentional perpetrators of those misdeeds'.[93]

As for the first two objections (Root, Shahabuddeen), it is an error to equate all modes of liability with commission, and especially with personal commission.[94] Modes are much more varied and nuanced in what they signify. The latter two objections (Mettraux, Damaška) were valuable correctives in the debate at the time, as the debate sometimes overlooked deontic constraints. However, on reflection those objections are also slightly overstated. Command responsibility does not 'turn' a commander into a 'murderer' or 'rapist'. Interestingly, even ordinary language tracks the difference between principal and accessory. Nor does it apply a stigma equal to perpetrators. Command responsibility is a form of accessory liability, which signifies – accurately – that the commander facilitated crimes in a criminally blameworthy manner.

You might object that I am placing too much emphasis on the distinction between accessories and principals. For example, James Stewart has argued against the distinction, emphasizing that accessory and principal alike are still held criminally liable

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[90] Root, 'Mens Rea', above at 156 ('pretending he committed the crime himself'), 123 ('as if he had committed the crimes himself'), 146 ('Despite Robinson's assertion, there is nothing in this language to suggest that the commander is responsible as if he committed the crimes himself'). The objection overlooks the difference between accessory liability and commission; accessory liability does not entail 'pretending' that the accessory committed the offence.

[91] *Prosecutor v Hadžihasinović,* Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ICTY A.Ch, IT-01-47-AR72, 16 July 2003, Shahabuddeen Opinion, para 32 ('*Hadžihasinović* Interlocutory Appeal').

[92] Mettraux, *Command Responsibility* at 211.

[93] Damaška, 'Shadow Side', above at 463.

[94] Alas, contrary to the Shahabudden argument, ICL cases demonstrate all too often that it is in fact entirely possible for a person to be an accessory, or indeed even a joint principal, to hundreds of crimes in a day.

in relation to 'one and the same crime'.[95] My answer is that *roles matter.* It is the same crime, but one's *role* in the crime is also very important. The intuition that roles matter is reflected in ICL and in most national systems.[96] When Charles Taylor is convicted of 'aiding and abetting' crimes, or Jean-Pierre Bemba Gombo is convicted for command responsibility for sexual violence, that expresses something more indirect than ordering the crimes. There are many different roles a person might play in relation to a given crime. These different roles entail different censure and different legal consequences, and they have correspondingly different standards. Accessories are condemned, not for perpetrating or directing the crime, but for encouraging or facilitating the crime in a culpable manner. The requirements of accessory liability track that diminished level of blame.

7.3.3. Culpable Neglect is Sufficiently Blameworthy for Accessory Liability in the Command Context

That still leaves the hardest question. So far I have shown that (i) criminal negligence is an appropriate building block in criminal law and (ii) accessories need not share the paradigmatic mens rea for the principal's offence. But you may still ask: is it justified to use that particular building block – negligence - in a mode of liability for serious crimes?

An understandable initial reaction to that question would be to answer in the negative. A standard reflex in criminal law thinking is that that negligence is categorically less blameworthy than subjective foresight, and probably not blameworthy enough to use in a mode of liability. But our reflexes are likely conditioned and predicated on the 'normal' context of typical private citizens interacting in a polity. Before answering, we must give measured consideration to the command context.

In my discussion of the first two planks, I simply recalled familiar understandings from general criminal law thinking. Now we venture into new territory. Perhaps ICL, by

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[95] J G Stewart, 'The End of Modes of Liability for International Crimes' (2012) 25 *LJIL* 165 at 212; see also ibid at 168 and 179 (n. 59). James Stewart argues for an abolition of modes of liability. For a response see M Jackson, 'The Attribution of Responsibility and Modes of Liability in International Criminal Law' (2016) 29 *LJIL* 879, drawing a helpful illustrative analogy to being the *author* of a work versus *assisting* the author. See also, Ambos, 'Article 25' above at 985 (n. 11).

[96] Gardner, 'Complicity', above, at 136 argues that the distinction between principals and accessories reflects an important moral difference, 'embedded in the structure of rational agency'.

focusing on unusual contexts, can lead us to reconsider how building blocks may be put together in new ways that still respect underlying principles.

A framework to assess deontic justification of inculpatory doctrines

How do we even embark on this assessment? Criminal law theorist Paul Robinson has provided a useful framework for the principled analysis of inculpatory doctrines in his writings on 'imputed criminal liability'.[97] He notes that for any given offence, the 'paradigm of liability' – i.e. the satisfaction of every element of the offence – does not always determine criminal liability. Even where all of the elements of the paradigm are proven, there are exceptions that can *exculpate* the accused. These exceptions are commonly grouped together and analysed as 'defences'.[98] The key insight from Paul Robinson was to look at the *mirror image* of defences.

Paul Robinson pointed out that there is another type of exception to the 'paradigm of liability', namely *inculpatory* exceptions, whereby a person can be convicted even though he or she did not personally satisfy some elements of the offence. Examples include acting through an innocent agent or transferred intent. These inculpatory doctrines are not traditionally grouped together and analysed as a category. Robinson proposed a search for consistent principles underlying these established inculpatory exceptions, in order to assess the justifiability of the doctrines and to elaborate appropriate doctrinal details.[99]

Paul Robinson identified two deontic (culpability-based) justifications. The first is 'causation': the actor is held responsible despite the absence of an element because she is causally responsible or causally contributed to its commission by another.[100] The second is 'equivalence', arising, for example, where the accused had a mental state that is equally blameworthy to the requisite mental state.[101] Some doctrines may rely on an aggregation of rationales to cumulatively provide an adequate level of culpability.[102] For example, some doctrines inculpate the accused who creates the *absence* of an element in

[97] Robinson, 'Imputed Criminal Liability', above.

[98] Ibid at 611.

[99] Ibid at 676.

[100] Ibid at 619, 630 and 676.

[101] An example would be a mistake of fact, where the accused would still be guilty of a comparably serious crime if the facts were as supposed.

[102] Ibid at 644.

a blameworthy manner (for example, willful blindness, or deliberate self-intoxication in preparation for an offence).[103] This rationale will be particularly pertinent to the military commander who creates her own absence of knowledge through culpable disregard for lives and legal interests that she was obligated to protect.

An activity posing extraordinary dangers to others

Because the institution of armed forces is a familiar one to us, we might be tempted to fall back on our usual habits of thought about liability for 'mere' negligence. But those habits of thoughts emerged in a different context, of normal interactions between civilians. We should try to see with fresh eyes the extraordinary risks of this remarkable activity. The institution of military command is a socially created institution, not a natural 'given', and it grants licenses for activity that would otherwise be seriously criminal.

Contemporary international law tolerates armed conflict because there are instances where the use of force may be beneficial to society, such as in self-defence or for collective security.[104] However, armed conflict is rife with horrific social costs and dangers: it not only unleashes deliberate and collateral killing and destruction, but it also routinely entails serious crimes initiated by subordinates. Armed conflict creates a toxic mix of dehumanization, groupthink, vengeance, and habituation to violence. Accordingly, while international law gives a certain license to military leaders, it accompanies this license with duties to monitor and restrain the tragically-frequent criminal violence of subordinates who exploit their power. [105]

Many factors aggravate the grievous risks for society. First and most obviously, military leaders train men and women to make them proficient in the use of violence, and equip them with weapons that magnify their power. Second, military leaders indoctrinate soldiers to desensitize them to violence, in order to make them more effective fighters. As Martinez notes, military leaders are

> 'given licence to turn ordinary men into lethally destructive, and legally privileged, soldiers; indeed, military training and command structures are expressly designed to dissolve the social inhibitions that normally prevent people

[103] Ibid at 619 and 639-42.

[104] *Charter of the United Nations,* 26 June 1945, 1 UNTS XVI, Art. 2(4), 48, 51.

[105] Martinez, 'Understanding', above at 662; Parks, 'Command Responsibility', above at 102 ('massive responsibility').

> from committing acts of extreme violence, and to remove their sense of moral agency when committing such acts.'[106]

In warfare, many of the normal moral heuristics (don't kill, don't destroy) are displaced by more complicated rules that regulate the special contexts in which collective violence may be justified. Thus, military leaders break down normal inhibitions against violence and even instincts of self-preservation, replacing them with habits of obedience and loyalty to the group. The result is a more effective fighting force, but it also breeds pathological organizational behaviour.

The danger is never far away. Even the most well-trained armies, acting for humanitarian ends, have frequently committed serious international crimes. Even in peacetime, standing armed forces present a danger to the public, as their relative power, desensitization to violence, and cadre loyalty often fuel crimes against civilians. Thus, even if modern law has good reasons to accept the creation of armed forces, the law must recognize that the activity bristles with danger, and that engagement in it comes with serious responsibilities.

The culpability of not inquiring

Command responsibility is a justified extension of aiding and abetting by omission, to recognize the special duty of commanders. In normal contexts, 'I didn't know' would often exculpate. But it does not exculpate where the commander has created her own ignorance, through a criminal dereliction of the duty of vigilance entrusted to her to guard against precisely this danger. Culpability-based rationales of causation and equivalence apply to the commander who, contrary to this duty, buries her head in the sand.

You may still understandably object that there is a quantum difference between negligent ignorance and subjective foresight, so that the causation/substitution rationale requires too great a leap. But there are three reasons why, on closer inspection, the gulf is not as stark as it seems on first glance.

First, we must not overestimate what the subjective standard requires. As a matter of practical reason, accessory liability does not and cannot require knowledge of a *certainty* of a crime, because the crimes typically have not started (or finished) at the

[106] Martinez, 'Understanding', above at 662. See also Weigend, 'Superior Responsibility', above, at 73.

time of the accessory's contribution. Thus it must always be a matter of risk. Hence, juridical practice across legal systems contemplates different *degrees* of subjective awareness or foresight, such as recklessness, willful blindness, or dolus eventualis.[107] Not only is there leeway with respect to the degree of certainty, the accessory also need not anticipate the 'precise crime'; it is adequate if one is 'aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed'.[108] Thus even the subjective standard must deal in uncertainties about the *likelihood* and the *nature* of crimes.

Second, we must not underestimate the culpability of criminal negligence. Criminal negligence does not encompass modest lapses and imperfect choices. As discussed above, the fault standard requires a gross dereliction that shows a culpable disregard for the lives and legal interests of others.[109]

Third, in the aggravating context of command responsibility, that culpable disregard is especially wrongful. In the context of the exceptional dangerousness of the activity, the repeatedly-demonstrated risks of egregious crimes, and the imbalance of military power and civilian vulnerability, a culpable disregard for the dangers is simply staggering. In sum, the commander does not get exonerated by creating her own ignorance through defiance of a duty of vigilance which exists precisely because of the glaring danger.

When I first began this project, I accepted the standard prioritization that subjective fault is in principle worse than objective fault. However, command responsibility reveals a set of circumstances in which that prioritization does not hold. Consider two commanders. Commander A requires proper reporting. As a result, she learns of a strong risk that crimes will occur. She decides to run that risk and hopes it will not materialize. Commander B does not care at all about possible crimes. Thus she does not even bother to set up system of reporting. As a result, she does not even get the

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[107] International Commission of Jurists, *Corporate Complicity and Legal Accountability, Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes* (ICJ, 2008) p. 25; van der Wilt, 'Genocide', above at 247-49.

[108] *Blaškić* Appeal Judgement, above, para 50; *Simić* Appeal Judgement, above, para 86.

[109] See §7.3.1. As noted above, I am not attempting to advance a definitive doctrinal interpretation of the fault standard in ICL. In some legal systems, 'gross' dereliction may not be required for criminal negligence. If ICL were to follow that route, then deontic justification might be slightly more difficult, as this particular safeguard would be absent. As noted in §7.3.1, ICL precedents tend to emphasize that the negligence must be 'serious', conveying that the dereliction must be severe enough to show a criminally culpable disregard.

reports and she does not learn of the specific risk. Under the classical prioritization, Commander A is more culpable because she has 'subjective' foresight. But who is actually more culpable? Unlike Commander A, Commander B did not even bother to take the first steps. Contrary to the standard prioritization, it is Commander B who has shown even greater disdain for protected persons. She created her own lack of knowledge thanks to that disdain. On a subjective approach (and on the HRTK test), she would get exonerated for that lack of knowledge, but that outcome is the reverse of the actual disregard for legal interests shown by the two commanders.

The implication may be surprising. Normally, 'knowing' would be categorically worse than 'not knowing'. But there can be very grave criminal fault in not knowing.[110] To assess the actual degree of fault, we have to go back a step and ask *why* the commander does not know. '*Not knowing*' includes the commander who is too contemptuous to find out, or even the commander who sets up systems at the outset to frustrate reporting.[111] The 'knowing' commander includes the commander who runs a risk with the hope it will not materialize. We would be wrong to consider 'knowing' to be ipso facto worse than 'not knowing'. Any of these hypothetical commanders are rightly held accountable for the harms within the risk they culpably created.

My two main points are as follows: First, criminal negligence is *adequately* blameworthy, at least in this special context, to meet the culpability requirement for accessory liability. Second, criminal negligence is also *sufficiently equivalent* to subjective foresight to be included in the same doctrine; in other words they are close enough to address 'fair labeling' objections. When I embarked on this work, I initially thought that negligence would still be *generally somewhat less blameworthy* than subjective foresight, and that the differences should be teased out at sentencing. However, I am no longer certain that even this in-principle ranking applies in command responsibility. The negligently ignorant commander may often be *just as bad or worse* than the commander with subjective foresight of crimes. In the context of command responsibility, the two standards are more equivalent than I initially thought. The actual ranking may depend on the facts of any particular case, including *why* the commander does not know, and the

[110] Fletcher, 'Not Knowing', above.

[111] One line in the *Blaškić* Appeal Judgement, above, suggests that a deliberate system to frustrate reporting might qualify, but it is not explained how this is reconciled with the actual legal test, which still requires 'possession'. See note 33.

degree of disregard that produced that ignorance.

7.4. IMPLICATIONS

7.4.1. The resulting conception of command responsibility

The foregoing account of command responsibility has several implications for how we understand command responsibility.

1. Criminal negligence: First, rather than disavowing criminal negligence as an aspect of command responsibility, ICL should openly defend and embrace it. Tribunal jurisprudence has led people to shun criminal negligence as somehow inappropriate in command responsibility. However, the incorporation of criminal negligence is the core innovation of command responsibility, and it is a justified and valuable innovation.

2. Duty to inquire: Second, it is perfectly appropriate for command responsibility to encompass the commander's proactive duty to inquire. Early Tribunal jurisprudence shied away from this, which was understandable in those early days, given the unexplored normative implications. For example, one might imagine hectic circumstances in which it would be perfectly reasonable that the commander did not have time to set up reporting systems. Thus, incorporating the proactive duty might have seemed too harsh. But the response is: any scenario in which the conduct was reasonable is, by definition, not criminal negligence. By recalling the rigour of criminal negligence, we address plausible concerns. Moreover, the point of command responsibility is that it can address egregious breaches of the duty to inquire. It is deontically justified in doing so. Insofar as Tribunal jurisprudence has excised such cases from its ambit, that jurisprudence misses the point of the doctrine. Thus, it is not surprising that the HRTK test has not played a significant role in prosecutions.

3. The 'possession' test: Third, command responsibility need not and should not hinge on the requirement that information made it to the commander's 'possession'. The Tribunals invented the 'possession' requirement in their efforts to disavow negligence and to make the 'had reason to know' test appear subjective. While the caution was understandable, we can now say on reflection that the requirement of 'possession' is not required by the precedents, nor by deontic considerations (culpability), nor by consequentialist considerations. The 'possession' test is muddled, misleading, unfair, and

inadequate. It is *muddled* because 'possession' does not mean 'actual' possession.[112] It is *misleading*, because despite the vocal disavowals of negligence, the test is actually still constructive knowledge, since the commander need not actually be 'acquainted' with the information.[113] The test is *unfair (over-reaching)*, because the commander is deemed to have knowledge of all reports made available to her, even if exigent demands at the time meant that she was not negligent in not getting to the reports. The test is *inadequate (under-reaching)*, because where a commander arranges inadequate reporting so that no alarming information makes it to her 'possession', she gets an acquittal.[114] The test does not reflect individual desert, and it also creates perverse incentives to avoid receiving reports of criminal activity. We must be grateful for the many helpful contributions of Tribunal jurisprudence,[115] but I hope that in coming decades national and international courts will reconsider the ambiguous 'possession' test and its unnecessary indulgence of the passive commander.

4. The 'should have known' test: Fourth, the 'should have known' test – which overtly embraces criminal negligence and the duty to inquiry – should be openly defended. The SHK test is a better match with precedents, and has better consequences, but was rejected because it was thought to be unfair. However, on closer reflection, the SHK test is not only deontically *justifiable*: it actually maps *better* onto personal culpability.[116] Thus, ICL should return to the post-World War II jurisprudence: where the commander has created her own ignorance deliberately or through criminal negligence in her duty to inquire, that is adequate to establish the fault element for command responsibility.[117] The ICC seems to have returned to this path in its early jurisprudence.[118] Even for courts and tribunals whose statute uses the phrase 'had

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[112] *Blaškić* Appeal Judgement, para 58.

[113] *Čelebići* Appeal Judgement, para 239.

[114] A line in the *Blaškić* Appeals Judgement, above, para 62 asserts that the commander can be liable if she 'deliberately refrains' from obtaining information, which is a welcome suggestion, consistent with what I advance here, but difficult to square with the actual rule posited in that case. See note 33.

[115] Including the requisite degree of control and the measures expected of a commander.

[116] The HRTK test fixes the commander with knowledge of all reports submitted to her – which does not take into account that there may be circumstances where it was not criminally negligent that she did not have an opportunity to acquaint herself with the report.

[117] See §7.2.1 for pre-Tribunal jurisprudence.

[118] *Bemba* Confirmation Decision, above, paras 433-34.

reason to know', that phrase can be interpreted in better accordance with the World War II jurisprudence and the ICC Statute, as Tribunal prosecutors initially urged.[119]

5. Mode of liability: Fifth, and finally, command responsibility can indeed be recognized as a mode of liability. Thoughtful scholars, uncertain about whether negligence in a mode of liability can be justified, have suggested that it should be recast as a separate offence. I have attempted here to address the principled concerns, or at least to outline the path to do so. The account I have offered complies with personal culpability. It also maintains fidelity to the long line of precedents indicating that command responsibility is a mode of accessory liability, so that creative re-interpretation is not needed. Command responsibility, as a mode of liability, rightly expresses the commander's indirect responsibility for the crimes facilitated by her culpable dereliction.[120] A 'separate offence' approach understates the harm unleashed and the indirect liability for the crimes facilitated by one's dereliction.

7.4.2. Future Refinement

If the general account I have outlined is correct, then there are three additional implications for our interpretation and refinement of the doctrine. These pertain to (1) recognizing a capacity exception, (2) the scope of the doctrine (and which types of organizations it covers), and (3) civilian superiors. For each of these three implications, I am simply outlining an area for future study: in none of them am I attempting to provide an answer.

1. Capacity exception: First, because this account endorses a criminal negligence standard, it should also recognize a potential exception, where the commander lacks the *capacity* to meet the requisite standard. I have emphasized above that, with criminal negligence, we condemn persons for *failing to exert their faculties* as the activity obviously required, and thereby showing a culpable disregard for the lives and legal interests safeguarded by the duty.[121] However, if the person's gross dereliction was due not to a culpable disregard, but rather a lack of capacity (such as severe mental limitations), then

[119] See §7.2.1.

[120] The mode approach, I argue, also entails that the causal contribution requirement must be respected – see Chapter 6.

[121] Hart, *Punishment and Responsibility,* above at 150-57.

blame and punishment would not be appropriate.[122] In such a case, the problem is not that they failed to exert their faculties, but that their faculties were limited.

2. Scope of doctrine (what context)?: Second, the account provides additional guideposts for interpreting the scope of the doctrine, and particularly the types of organization within which it applies. I have argued that a mode of liability incorporating criminal negligence can be justified within the special context of a military command relationship. What are the outer parameters of that justifying context? After all, there are very diverse forms of armed groups, with different degrees of organization (professional armies, paramilitaries, loose armed groups). In determining the outer parameters of the doctrine, we must be sensitive not only to doctrinal and teleological considerations but also the *deontic justification*.[123] When consider what types of group or level of organization is needed, we have to consider at what point the rationale for the deontic justification for this mode of liability no longer pertains. Beyond that outer limit, one must fall back on the other remaining complicity doctrines that deal with collective action.

3. Civilian superiors: Third, the account here may not apply to civilian superiors. Accordingly, this account may cast a more positive light on the bifurcated approach of the ICC Statute. The ICC Statute distinguishes between military and non-military superiors, and gives non-military superiors a more generous test (that the superior 'consciously disregarded' information). The bifurcation in the Rome Statute has been strongly criticized.[124] The dominant criticism is that the more generous test for civilian superiors

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[122] Hart, ibid at 149-54; Horder, *Ashworth's Principles*, above at 186; *Creighton,* Supreme Court of Canada, above. Chinese criminal law reaches the same conclusion – 'should have' entails both a duty and capacity: Badar, *Mens Rea*, above, at 186-88. See also Parks, 'Command Responsibility' above at 90-93 suggesting some subjective factors pertinent in the command responsibility context.

[123] Some scholars have already started to helpfully explore these parameters. H van der Wilt, 'Command Responsibility in the Jungle: Some Reflections on the Elements of Effective Command and Control' in C C Jalloh, ed, *The Sierra Leone Special Court and Its Legacy; The Impact for Africa and International Criminal Law* (CUP, 2014) 144; R Provost, 'Authority, Responsibility, and Witchcraft: From Tintin to the SCSL' in Jalloh, ed, *The Sierra Leone Special Court,* ibid 159; I Bantekas, 'Legal Anthropology and the Construction of Complex Liabilities' in Jalloh, ed, *The Sierra Leone Special Court,* ibid 181; A Zahar, 'Command Responsibility of Civilian Superiors for Genocide' (2001)14 *LJIJ* 591 at 602-12; Nybondas, *Command Responsibility,* above, at 191-94.

[124] The *legal* criticism is that the Rome Statute differs from the Tribunal approach and therefore from customary law. Such arguments may underestimate the nuance of the broader body of transnational precedents. Early ICTY and ICTR jurisprudence acknowledged these uncertainties. Thus, the custom question may not be as conclusively settled as some suggest.

represents a tragic watering down of liability for the self-serving reasons of protecting political leaders.[125]

But perhaps the more generous treatment for civilian leaders should not be so quickly condemned. One of the tendencies I discussed in Chapter 2 is that ICL scholars often assume that harsher, unilaterally-imposed rules are the 'true' law, and that negotiated, more permissive, rules are mere political 'compromise'.[126] Where such an assumption is too hastily applied, it may lead us to favour rules rooted in victor's justice and to overlook fundamental constraining principles. I argued that we should pause to consider that the problematic rule might be the unilaterally-imposed one; perhaps potential exposure can have a salutary effect of sharpening drafters' sensitivity to unfairness.[127] Article 28 presents an illustration. An alternative explanation of Article 28 is that an issue of principle was raised and delegates were persuaded of its merits.[128] It could be that the deliberative process unearthed a plausible intuition of justice.

Further study may show that there is a principled case for the bifurcated approach. The considerations given above – extreme danger of the activity, training and equipping for violence, indoctrination and desensitization, extensive control, military discipline, explicit duties of active supervision – do not apply to most civilian superiors. Before purporting to extend the SHK standard to civilians, one would need very careful work on the precise parameters of the deontic justification. At this time, it seems to me quite plausible that the SHK test is justifiable for persons effectively acting as military commanders, whereas a subjective test may be appropriate for other superiors.[129]

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[125] See e.g. G Vetter, 'Command Responsibility of Non-military Superiors in the International Criminal Court' (2000) 25 *Yale Journal of International Law* 89; E Langston, 'The superior responsibility doctrine in international law: Historical continuities, innovation and criminality: Can East Timor's Special Panels bring militia leaders to justice?' (2004) 4 *International Criminal Law Review* 141 at 159-61.

[126] See § 2.4.

[127] Ibid.

[128] See e.g. P Saland, 'International Criminal Law Principles' in R Lee, ed, *The International Criminal Court: The Making of the Rome Statute* (Kluwer, 1999) 189 at 203.

[129] Also noting the different context and responsibilities, see Nybondas, *Command Responsibility*, above at 183-88; Meloni, *Command Responsibility*, above at 250; Martinez, 'Understanding' at 662; Weigend, 'Superior Responsibility', above at 73-74.

7.5 CONCLUSION

At first glance, command responsibility seems problematic, because it does not comport with our usual heuristics and constructs developed in typical criminal law settings. However, this an instance where ICL settings and doctrines can enable us to reconsider our normal reflexes in criminal law theory (as per a major theme of this thesis). The command responsibility doctrine was created in international law to deal with a specific set of circumstances that are not the usual context of citizens interacting. The doctrine takes account of specific responsibilities that are necessary to avert a special pathology of human organizations. This is the 'genius' of command responsibility: the practice reveals an underlying insight of justice, shared by the many jurists who helped create it, even if they did not articulate the deontic justification.

The mental element of command responsibility may differ from familiar national *doctrines*, but it is not a departure from the deeper underlying principles. The concept of complicity by omission, by those under a duty to prevent crimes, is already established. Command responsibility extends this concept with a modified fault element. That modified fault element is rooted in personal culpability, recognizing the responsibilities assumed by the commander and the dangerousness of the activity. Given the extraordinary danger of the activity, the historically demonstrated frequency of abuse, and the imbalance of power of vulnerability, the commander has a duty to try to monitor, prevent, and respond to crimes. The baseline expected of a commander is diligence in monitoring and repressing crimes, and a failure to meet that baseline effectively facilitates and encourages crimes.

Command responsibility rightly conveys that the commander defying this duty is indirectly responsible for the harms unleashed, just as a person criminally derelict in monitoring a dam may be responsible if the dam bursts on civilians below. This message of command responsibility is expressively valuable and deontically justified. Furthermore, the commander choosing not to try to require reports makes a choice every bit as dangerous and reprehensible as those who ignore warning signs, because that initial choice already subsumes and enables all the harms within the risk and removes

the possibility of responding properly.[130] The driver who dons a blindfold is inculpated, not exculpated, for the harms within the risk generated. Command responsibility may seem at first to chafe against our normal analytical constructs, but I believe that the many men and women who shaped the doctrine over the years were articulating an intuition of justice that is, on careful inspection, justifiable and valuable.

[130] One might object that criminal negligence does not entail a 'choice', but that line of thought looks at criminal negligence in the abstract rather than considering how concrete cases will unfold in command responsibility. A criminally negligent failure to require reports will always involve a choice; without a choice there can be no gross departure.

8

Horizons:

The Future of the Justice Conversation

OVERVIEW

I conclude this thesis with three final overarching sets of observations. First, I make explicit some aspects of the coherentist method, which I modelled in the last two chapters. Second, I highlight the major and minor themes emerging in the framework I propose. Third, I survey some additional issues in ICL and criminal law theory to which the proposed framework could be fruitfully applied in the future.

8.1 COHERENTISM IN ACTION

Coherentist moves in Chapters 6 and 7

In Chapters 6 and 7, I was not merely dissecting current controversies in ICL; I was also demonstrating the proposed method. The types of considerations I invoked in my analysis would have seemed quite familiar from most legal and normative analysis: i.e. patterns of practice, consistency with analytical constructs, normative argumentation, and casuistic testing. And indeed they are the same considerations. I suggest that coherentism is the best underlying theory to explain how we engage in both legal and normative analysis. We form the best understandings that we can by drawing on all available clues.

I think that this method (mid-level principles, coherentist reconciliation) implicitly underlies a lot of valuable criminal law theory. For example, in Chapter 7, I employed a Paul Robinson's framework on imputed criminal liability, in which he explored the theories that underpin inculpatory doctrines (eg causation, equivalence, and

so on).[1] Paul Robinson's work in formulating that framework was itself an exercise in mid-level principles. He noted that exculpatory doctrines (defences) are often studied as a class, but that inculpatory doctrines had not been studied as a class for unifying principles. He studied patterns of practice, he hypothesized some mid-level constructs to categorize and explain the practice, he assessed which of those constructs are normatively justifiable, and then he generated prescriptions for a more analytically consistent and normatively sound body of law. In the case of Paul Robinson's framework, this method enabled analytical systematization and normative evaluation of the underlying justifications for inculpatory doctrines.

In Chapters 6 and 7, I worked with propositions that were arguably immanent within ICL practice (for example, that culpability requires causal contribution, or that principals have paradigmatic mens rea). I took those propositions as starting hypotheses, but was prepared to abandon them if there were convincing reasons to do so. (Both propositions proved to be analytical useful and normatively convincing, so I did not reject them as guiding constructs.[2])

I showed how the method can provide *analytical* clarity: for example, by unearthing internal contradictions between doctrines and stated principles (Chapter 6). I also demonstrated the *normative* work of the method (Chapter 7). To make normative arguments, I drew on patterns of practice, normative arguments, and casuistic testing (comparing the fault of commanders in different hypothetical scenarios). In Chapter 7 I showed how we can put building blocks together in a new way. For example I argued that command responsibility reflects a sound insight, responding to a set of circumstances in which a special fault standard is deontically justified.

I also showed how the coherentist method copes with uncertainty. In Chapter 7, I noted that some scholars argue against criminal negligence as a standard of culpability, but that most legal systems, most practice, most scholars and indeed the weight of the arguments favour the standard.[3] Similarly, the distinction between principals and accessories has its doubters, but it is a construct that is adopted in ICL and that is well supported in national practice and by normative argumentation, even if the boundaries

[1] §7.3.3 and see P Robinson, 'Imputed Criminal Liability' (1984) 93 *Yale LJ* 609.
[2] All conclusions are provisional, however, and could be changed in light of better arguments. See e.g. §6.8.3 on academic proposals for non-causal accounts of culpability.
[3] §7.3.1.

between direct and indirect roles can sometimes be contested.[4] If we were seeking Cartesian certainty, we would be paralyzed by those doubts, since we cannot say for sure that these ideas are 'right'. We would also be paralyzed by the unreliability of each source (practice, moral theories, our intuitions). The coherentist method draws a wide range of inputs, while being mindful of the limitations of each input, and seeks to develop the best possible model to reconcile those inputs. The coherentist method accepts up front that philosophical certainty is unattainable; we seek a level of confidence sufficient for the decision at hand. For the punishment of individuals, a high level of confidence is appropriate. But the body of available clues provides more than enough support for these practices, unless and until more convincing arguments are developed against the practice.

Why does practice matter in normative analysis?

I should also underscore why it is appropriate to have regard to juridical practice in normative analysis. After all, you might wonder if recourse to practice reflects the 'naturalist fallacy': am I impermissibly conflating an 'is' (legal practice) with an 'ought' (deontic principles)? I refer to practice for two reasons. One, insofar as we are working analytically - trying to formulate mid-level principles that can categorize and explain practice – of course we must consider the practice that we seek to categorize and explain. More profoundly however, I think that practice can help inform us even on normative questions. Patterns of practice, worked out over time by jurists based on experience – and especially patterns of practice that re-occur in different legal traditions and cultures – may reflect broadly shared intuitions of justice.[5]

The obvious follow-up question is, 'yes, but what if all of those people's intuitions of justice were wrong?' That is absolutely a possibility, which the coherentist approach unflinchingly recognizes. There is no guidepost available to mortal human beings that is free from the risk of error.[6] Thus we approach each clue, including patterns of practice, with appropriate skepticism. We bear in mind that established patterns might reflect arbitrary traditions, or they may reflect biases and assumptions of a culture, or they even

[4] §7.3.2.
[5] See §4.3.1 on the 'normativity of the positive'.
[6] See §4.3.3(b).

may reflect quirks of the human mind. The coherentist method is aware of these risks and seeks to guard against them in the best and only way possible: by testing every clue against all of the other clues (eg normative arguments, considered judgments, casuistic testing). This method does not guarantee certainty or freedom from error. No method does. The strength of the coherentist method is precisely that it is constantly testing the components of our beliefs using all other available beliefs and experiences. Widespread juridical practice can assist us as one possible 'humility check' to test the moral theories and systems that we spin from our own minds.

Two levels of coherentism

A final clarification is that we apply coherentism on two levels: in legal reasoning and normative reasoning. I believe that legal reasoning involves seeking the best reconciliation of all of the types of considerations that are recognized in legal analysis: text, context, coherence with surrounding legal norms, objects and purposes, pertinent authorities and precedents, and general principles.[7] Often we cannot achieve perfect 'coherence' among all of the clues; some may outright conflict. An example of this is command responsibility: given the confused state of authorities, no possible solution perfectly reconciles every consideration. I believe that my proposed solution offers the highest level of coherence of any alternative.[8]

Much more importantly and unconventionally, I suggest that we use a coherentist methodology in our normative reasoning, including in our deontic analysis. As discussed in Chapter 4, no single comprehensive foundational ethical theory presents itself to all clear minds as the evident a priori starting point. Instead, we find ourselves alive in the world, and we have to draw on all available clues to try to make sense of things, including

[7] See e.g. ICC Statute, Article 21, which incorporates along with the Statute, the Rules and the Elements, as well as custom (state practice reflecting a sense of legal obligation) and general principles, and see the Vienna Convention on the Law of Treaties, Article 31, which includes Article 31(3)(c) (systemic integration with other relevant rules).

[8] Given the confused state of command responsibility, every possible interpretative solution requires rejection some authorities as inconsistent with the proposed solution. Furthermore, every possible interpretation of Article 28 entails downplaying some aspect of the text in favour of others. One must either disregard the express contribution requirement, or narrow the role of the 'failure to punish' branch, or strain against the express wording indicating that it is a mode of liability. My own proposed solution admittedly narrows the utility of the 'failure to punish' branch, but overall it offers the highest coherence between the text, the culpability principle, the purposes of command responsibility, and the broad body of precedents (beyond just the ICTY) since World War II.

making moral sense of things. We draw inter alia on normative arguments, moral theories, and our intuitive reactions, to try to form models that reconcile experiences and beliefs to the best extent possible.[9]

Starting in the middle as a valuable method

One of my main contributions in this thesis is to highlight that there is an alternative to the traditional scholarly Cartesian impulse that all propositions must be grounded in a deeper underlying theory, each supported by a level below until we reach some reliable foundation. Our traditional insecurity is that an account that is not grounded in solid foundations is flimsy. In my view, the classic Cartesian conception of rigour is not viable, because we could never discuss any of the current ethical questions before us until all foundational questions are settled.

It may seen particularly counter-intuitive to engage in debates about deontic principles without committing to a single underlying foundational theory. But the quest to identify the 'correct' theory or morality is endless, and our conclusions may actually be more reliable, not less reliable, if they are supported by multiple theories as well as a wider range of clues.

In my view, mid-level principles and coherentism offer the best theory of criminal law theory: it is the best account of how we generally do and should reason in this area. Many scholars I know assume a classical foundationalist model, and yet they apply coherentist methods, even without formal awareness of coherentism. As a result, they think they are foundationalists taking a shortcut or being incomplete. I draw attention to the coherentist 'web' alternative to the classical 'linear' model of justification. We can still be rigorous, but rigour requires a different structure of substantiation, tested by all-things-considered judgements and searing scrutiny of arguments. Awareness of the coherentist structure of justification helps us better see its demands, its strengths, and its limitations. We can be suitably humble about our opinions and conclusions, recognizing that they are in all cases provisional and revisable.

[9] One may even choose to adopt a comprehensive theory, such as a Kantian or contractarian theory, but I would suggest that the reasons leading one to do so are still coherentist: one adopts such theories insofar as they seem to be useful models in reconciling the clues. Similarly, in science, models are often provisionally adopted for as long they are helpful in reconciling the clues. But the models may still be set aside if they contradict too much experience, or if experience leads us to replace them with better models.

8.2 MAJOR AND MINOR THEMES

In this section, I will highlight the major themes of my proposed framework for assessing deontic principles in ICL. I will also highlight some recurring minor themes, which relate to reasoning in ICL.

8.2.1. Major Themes: Criminal Law Theory Meets ICL

(1) The deontic dimension. Legal analysis in criminal law, including ICL, requires not just the familiar source-based analysis and teleological analysis, but also a third type of reasoning, which I have called deontic analysis. Deontic analysis differs from source-based analysis, which parses texts and precedents, and teleological analysis, which assess purposes and consequences. I hope that this term can be added to the ICL lexicon, as it succinctly conveys this distinctive type of reasoning, focused on justice for the individual as opposed to broader social impact. Deontic analysis directly considers the *principled* limits of institutional punishment in light of the personhood, dignity and agency of human beings affected by the system.[10]

(2) Two reasons. The study of deontic principles is important for at least two reasons. First, it clarifies important normative constraints, in order to ensure that the system does not treat persons unjustly. Second, and less obviously, it can also help shape better policy. Where doctrines are needlessly conservative due to an ungrounded, fallaciously restrictive impression of the constraining principles, coherentist deontic analysis can pave the way to more effective laws.[11]

(3) Learning from criticisms. I examined the most important criticisms of 'liberal' accounts (accounts concerned with deontic constraints). I argued that a sophisticated and humanistic approach to deontic principles can learn from and avoid common criticisms of liberal accounts. A 'liberal' account need not entail unsound individualistic methodologies, nor invocation of timeless metaphysical axioms, nor

[10] §1.3.1.
[11] §1.1 and §2.5.

disregard for social context. A sophisticated and humanistic liberal account can draw on human experience and social context.[12] On the minimalist sense in which I use the term 'liberal' (and in which it is commonly used in criminal law theory), it simply requires respect for individuals and thus requires justification for the punishment of individuals.

(4) Open-minded and reconstructive. I examined thoughtful arguments that familiar (deontic) principles of justice from national systems may not be appropriate or applicable in ICL contexts. I concluded that deontic principles do matter in ICL, but the special contexts of ICL may lead us to refine our understanding of the principles. To ignore deontic principles would not only contravene moral duties owed to the individual, but would probably also contradict values inherent to the enterprise of ICL (eg the 'inner morality of law').[13] However, I advocate an open-minded approach that is prepared to re-evaluate familiar principles: salient differences in contexts may generate deontically-justified refinements of principles in order to recognize special cases.[14]

(5) A two-way conversation. Accordingly, the encounter between criminal law theory and ICL is not necessarily a one-way conversation, in which criminal law theory is deployed to clarify, critique, systematize and improve ICL. Instead, it can be a two-way conversation. ICL can raise new problems that put formerly peripheral questions into the center. Mainstream criminal law theory understandably assumes the 'normal' case, of an interaction between a modern state and the individuals within its jurisdiction, in a society that is relatively stable. ICL routinely confronts situations that fall outside of that paradigm. In doing so, ICL problems require us to clarify assumptions about law-making, fair notice, authority, citizenship, community, legitimacy, and many other concepts. The study of extreme or special cases may lead us to realize that there are implicit preconditions and limitations in propositions that we had thought to be elementary. Thus, the study of special cases can help foster a more truly general theory of criminal law.[15]

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[12] §3.3. For example, criminal law theory enquires about the responsibility of the individual not because of ideological or methodological blinders that leave it only able to perceive individuals, but rather because once we employ criminal law, and choose to punish individuals, we necessarily must enquire what the individuals are accountable for. Similarly, criminal law theory does not require imagining humans as socially unencumbered beings; it can look at actions in their social context and with their social meaning.

[13] See e.g. L L Fuller, *The Morality of Law,* 2nd ed (Yale University Press, 1969).

[14] §3.2.

[15] Chapter 5.

(7) The humanity of justice. I have also emphasized the 'humanity' of justice. I do so in response to criticisms that the constraints are doctrinal artifacts, or products of abstract philosophies, or concerns particular to Western culture. Criminal law is carried out for prospective human aims (it is not just pointlessly retributive). Its constraints reflect respect for humanity. The constraints are human-created concepts (as opposed to a priori Platonic forms), and they are clarified through human processes. There is reason to doubt the common claim that criminal law, or constraints like the culpability or legality principle, are purely Western preoccupations, given similarities emerging in practices in diverse regions (before colonization and before the emergence of criminal law in Europe), and empirical studies showing widely-shared commonalities in senses of justice. Because these principles are human constructs, shaped and refined through human processes, any discussion of the principles is of course fallible, but it is nonetheless a valuable endeavor. The best we can do is to do the best we can do to verify that practices and institutions are justifiable.

8.2.2 Minor Themes: Improving Reasoning

I have also argued that scholarship should be attentive not just to outcomes reached, but also to the *reasoning* employed. Problematic reasoning will eventually generate problematic outcomes. I believe that alertness to the following themes can help us spot problems and anomalies and help us foster more sophisticated and sound legal reasoning.

(1) Need for deontic analysis. As mentioned above (§8.2.1), early ICL discourse tended to rely heavily on source-based and teleological reasoning, with somewhat weaker deontic reasoning. Early ICL jurisprudence and literature often approached fundamental principles as if they were doctrinal rules, using doctrinal tools rather than deontic analysis.[16]

(2) Value of criminal law theory. Furthermore, early ICL discourse was not always conversant with helpful tools of criminal law theory. Thus, for example, early arguments wrongly equated all modes of liability with 'commission',[17] or made inelegant

[16] For examples of doctrinal reasoning that failed to engage with the deontic constraints, see §6.3.2 and §6.5.
[17] See e.g. §7.3.2.

statements about criminal negligence.[18] The organzing concepts of criminal law theory can help clarify ICL, and the use of such concepts in ICL has already improved tremendously.[19]

(3) Alertness to patterns. It is important to be alert to possible systematic distortions in reasoning. I have pointed out numerous illustrations of some problematic habits of reasoning, particularly in the earlier days of ICL, that would tend to distort reasoning away from fundamental principles.[20]

8.3 FURTHER QUESTIONS

The following are some topics that are ripe for coherentist deontic inquiry.

8.3.1. Further Questions in Command Responsibility

In this thesis, I have dissected two controversies in command responsibility in considerable detail. Nonetheless, those two chapters were are only toes in the water. As I noted, I skimmed over several debates in the interests of providing succinct illustrations. For example, how much causal contribution is required for accessory liability?[21] What about the arguments that omissions cannot make causal contributions?[22] Could successor commander liability be justified with a new alternative

[18] §7.2.1 and §7.3.1.

[19] See §2.5.

[20] Chapter 2. (4) Finally, even though I have distinguished between doctrinal and deontic reasoning, sensitivity to deontic considerations can influence our doctrinal analysis. For example, it can influence what we notice when we survey precedents. I gave examples in which Tribunal chambers failed to notice patterns in the precedents that, if followed, would have complied with the culpability principle. For example, the *Celebici* decision found 'no support' for a contribution requirement even after citing passages of authorities that expressly supported it. Had the judges examined those precedents with the culpability principle in mind, they might have at least detected that pattern in the precedent. Thus, what we are sensitive to may influence what we perceive.

[21] §6.8.3.

[22] §6.8.3 and Annex 1.

account of culpability that does not require causal contribution?[23] I have explored such questions in another work, using the framework and method outlined in this thesis.[24]

As I noted in §8.4.2, there other major issues in command responsibility that I have not yet touched on. For civilian superiors, is the special fault standard justified, or is the bifurcation in the Rome Statute appropriate? What precisely is required for 'effective control'? The law has generally approached the latter question using source-based and teleological analyses. However, there is a deontic dimension: if the 'should have known' test is deontically justified in specific circumstances, then the 'effective control' test should track the limits of those justifying circumstances.[25] Deontic analysis can also assist in the future interpretation of the third element, the 'failure to take all necessary and reasonable measures', which I have not touched upon here.[26]

8.3.2 Other Frontiers

Legality, superior orders, and duress. I noted several other questions in Chapter 5 that should be examined using this framework. First, ICL – a system without a legislature, which has often encountered mass atrocities that are not clearly criminalized in positive law – provides an excellent context to explore the parameters of the legality principle.[27] Second, the doctrine of superior orders has been hotly debated in doctrinal terms, but the normative grounding is surprisingly unexplored. Such an inquiry may provide lessons about state authority, role morality, and mistakes of law, that could

[23] §6.8.3. As the best example to date of an attempt in this direction, see A J Sepinwall, 'Failures to Punish: Command Responsibility in Domestic and International Law' (2009) 30 *Mich J Intl L* 251.

[24] D Robinson, 'How Command Responsibility Got So Complicated: A Culpability Contradiction, Its Obfuscation, and a Simple Solution', (2012) 13 *Melbourne J Int Law* 1.

[25] In this vein, see H van der Wilt, 'Command Responsibility in the Jungle: Some Reflections on the Elements of Effective Command and Control' in C C Jalloh, ed, *The Sierra Leone Special Court and Its Legacy; The Impact for Africa and International Criminal Law* (CUP, 2014) 144;

[26] . The *Bemba* Appeal Judgment hinged on the interpretation of that element; the Judgment has been criticized inter alia for an excessively narrow construal of command responsibility liability that is not supported by authorities or legal reasoning. Thus, it may be an example of the 'over-correction' discussed in Chapter 1. On an account mindful of deontic limits, we would of course avoid any criticisms rooted only in a pro-prosecution simplistic teleological approach. The *Bemba* Appeal Judgment can at least be commended for being empathetic to the position of a commander and for focusing on what can reasonably be expected of a commander. Other aspects have been criticized as too generous (for example with respect to 'remote commanders'); a coherentist deontic approach can help avoid excessively rigid approaches created by unsubstantiated impressions of the constraints. *Prosecutor v Jean-Pierre Bemba Gombo*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute', ICC A.Ch, ICC-01/05-01/08 A, 8 June 2018.

[27] §5.2.1

illuminate both this specific doctrine and also general criminal law theory.[28] Third, situations of extreme duress, such as in the *Erdemović* case, can help us better articulate the deontic underpinnings of the duress defences, such as 'expectations of firmness' from fellow humans; there has not yet been much discussion about how 'social roles' may influence those expectations.[29]

Tools of criminal theory. In Chapter 5, I also highlighted various tools of criminal law theory – such as 'community, 'citizenship', 'authority' and even the basic framework of 'the state' itself.[30] Scrutiny of ICL problems would likely reveal problematic cases for each of these tools, leading us to refine (or possibly even reject) some of the tools.

Aiding and abetting. Beyond the issues I have already listed, there are countless other issues to be examined with this method. For example, the ICL 'aiding and abetting' doctrine has engendered fierce controversy, particularly with the dispute in ICTY jurisprudence over whether the assistance must be 'specifically directed' toward the crimes.[31] The battlefield is drawn between two camps, one favouring a 'knowledge' test and one favouring a 'purpose' test, but it seems to me that both are flawed. The 'knowledge' test seems too broad, as it encompasses contributions that do not seem culpable, and the 'purpose' test seems to narrow, as it excludes contributions that do seem culpable. A coherentist account would search for more convincing accounts.[32] The problem is particularly fierce with respect to so-called 'neutral contributions', and ICL provides new fact patterns with which to explore that problem. For example, if a state is assisting a rebel group that is fighting for a legal and worthy cause, but the group is committing crimes, at what point should officials of the assisting state become personally criminally liable? These are ways in which ICL doctrine can still be refined, and in which ICL may help inform general criminal law theory.

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[28] §5.2.3.

[29] §5.2.2.

[30] §5.1.3.

[31] See e.g. L N Sadat, 'Can the ICTY Šainović and Perišić Cases Be Reconciled?' (2014) 108 *AJIL* 475; K Heller, 'Why the ICTY's 'Specifically Directed' Requirement Is Justified'', (2 June 2013) *Opinio Juris* (blog), opiniojuris.org/2013/06/02/why-the-ictys-specifically-directed-requirement-is-justified; J Stewart, 'Specific Direction' is Indefensible: A Response to Heller on Complicity', (12 June 2013) *Opinio Juris* (blog), opiniojuris.org/2013/06/12/specific-direction-is-indefensible-a-response-to-heller-on-complicity; J Ohlin, 'Specific Direction Again', (17 December 2015), *Opinio Juris* (blog), opiniojuris.org/2015/12/17/specific-direction-again.

[32] See e.g. A Sarch, 'Condoning the Crime: The Elusive Mens Rea for Complicity', 47 *Loy U Chi L L* 131 (2015-6) 131, suggesting an intermediate element of 'condoning'.

Co-perpetration in large-scale crimes. ICL also provides a rich context to examine individual responsibility in massive collective enterprises. ICL has adopted co-perpetration doctrines from national systems, but those doctrines were generally designed for much smaller groups of perpetrators. Contexts involving hundreds or thousands of contributors, with very different degrees of contribution, invite us to clarify the outer limits of culpability.

Control theory. The coherentist method is useful not just for studying fundamental principles but also for the other organizing constructs we use to refine criminal law. For example, the ICC has adopted the 'control theory' to delineate between principals and accessories.[33] The control theory is a construct that can be analyzed as a 'mid-level principle'.[34] It is is analytically helpful, because it helps understand and systematize the practice, and normatively attractive, because it provides a sufficiently grounded and convincing basis to distinguish principals from accessories. Of course, there are many controversies and disputes about the control theory,[35] but it is well-established enough to at least work with it as a starting hypothesis. On a coherentist method, we would then ask: is it useful? What are its implications? Are there better (more normatively convincing and analytically fitting) theories?

At the time of this writing, the resurgence of ICL has been underway for about twenty-five years, which seems like quite a while in the span of our human lifetimes. However, compared to the history of criminal law, it is still an extremely recent and nascent experimental development. ICL is a fast-moving field. When I started work on the project, my main concern was hasty reasoning that neglected deontic constraints. Now that deontic constraints are a mainstream preoccupation of ICL, the potential problems of an 'over-correction' are emerging. This, it is all the more urgent to have a

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[33] The control theory regards principals as having 'control' over an aspect of the crime, for example by making an essential contribution. *Prosecutor v Thomas Lubanga Dyilo*, Judgment Pursuant to Article 74 of the Statute, T.Ch, ICC-01/04-01/06, 14 March 2012 at para 918-33 and 976-1006.

[34] §4.3.1.

[35] N Jain, 'The Control Theory of Perpetration in International Criminal Law' (2011) 12 *Chicago J Intl L* 159; T Weigend, 'Perpetration Through an Organization: The Unexpected Career of a German Legal Concept' (2011) 9 *J Intl Criminal Justice* 91; J D Ohlin, E van Sliedregt & T Weigend, 'Assessing the Control-Theory' (2013) 26 *LJIL* 725; L N Sadat and J Jolly, 'Seven Canons of ICC Treaty Interpretation: Making Sense of Article 25's Rorschach Blot' (2014) 27 *LJIL* 755; J D Ohlin, 'Co-Perpetration: German Dogmatik or German Invasion?' C Stahn, ed, *The Law and Practice of the International Criminal Court: A Critical Account of Challenges and Achievements* (OUP, 2015) 517.

methodology to explore the best understandings of the constraints. It is not the case that the narrowest conception is ipso factor the best and most principled conception. A coherentist method draws on many points of reference and thus at least gives a common basis for debate. There remains a great deal to learn for both ICL and criminal law theory.

Annex

Omissions: Can Failures Have Consequences?

In Chapter 6, I did not delve into relatively philosophical questions about causal contribution; my topic was the Tribunal's failure to address the formal contradiction with the culpability principle as recognized by the Tribunal itself. However, an understandable question about my proposed solution is whether omissions can ever have causal contributions; if not then the solution is untenable. For any readers concerned about that question, I touch upon it here.

Some scholars argue that an omission merely *fails to avert* an outcome, and cannot 'cause' or 'contribute' to an outcome.[36] Such arguments rely on a 'naturalistic' conception of causation, which looks only at sufficient physical causes.

In contrast, legal practice and normative argumentation overwhelmingly support the 'normative' conception, which considers that humans have duties, and failures to meet those duties can have consequences. On the normative conception, we compare what happened to the situation that would have pertained if the person had met her duty.[37] If I am obliged to guard prisoners, and I do not, the normative conception has no difficulty recognizing that my failure to guard may facilitate their escape.

On the normative conception, the counterfactual analysis of an omission mirrors the counterfactual analysis of an act. Where there was a positive act by the accused, we imagine the world where she did not do the prohibited act, to assess the difference that her act likely made. In the case of an omission, we imagine a counterfactual world where she did what was legally required, and assess the likely difference.[38]

For example, if a pilot aboard an aircraft has a duty to operate and land the aircraft, and yet chooses instead to do nothing and allows the plane to crash, most jurists (and lay persons) would conclude that the pilot's omission contributed to the crash. A purely

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[36] Moore, *Causation and Responsibility,* above, at 446, argues that that an omission is a nothingness, or an absence, and an absence cannot produce effects; "nothing comes from nothing." While Moore concludes that counterfactual dependency does not warrant the label 'causation', he holds that counterfactual dependency can give rise to liability. In this respect he reaches a similar endpoint to other scholars, albeit with different labels. See ibid at 139-142 & 351-354.

[37] See g. K Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part* (OUP, 2012) at 215-17.

[38] See similarly K Ambos, 'Superior Responsibility', in A. Cassese, P. Gaeta, JRWD Jones, eds, *The Rome Statute of the International Criminal Court: A Commentary* (2002) 825 at 860.

'naturalistic' conception of causation, looking only at active physical forces, would insist that that the plane crashed on its own because of gravity and inertia, and that the pilot merely 'did nothing'. Legal practice and ordinary language reject this as a contrived and myopic way of describing events.[39] On a 'normative' conception of causation, we compare the result against what would have resulted if the pilot had met the baseline expectation of carrying out her legal duty. Under common notions of causation and responsibility, we would not hesitate to find that the pilot's omission to fulfil her duty was indeed a contributing factor, and that the crash was a result of her culpable inaction.

To give other examples, most people have no difficulty recognizing that a failure to feed prisoners, despite a duty to do so, contributes to their starvation. Or, as Miles Jackson notes, a cleaner who deliberate omits to lock a door in order to assist robbers thereby facilitates the robbery.[40] The naturalistic conception neglects morally salient features of causation, because it focuses incorrectly on only one aspect of causation ('causal energy') and neglects other aspects ('counterfactual dependence').[41] As Victor Tadros argues, any theory that ignores the fact that a lack of rain causes crops to fail is not a viable theory of causation.[42] Tribunal jurisprudence reflects the mainstream understanding; for example, the 'substantial effect' test, when applied to omissions, means that 'had the accused acted, the commission of the crime would have been

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[39] See eg, Hart & Honoré, *Causation*, above at 139 and other works cited in the previous two footnotes.

[40] M Jackson, *Complicity in International Law* (OUP, 2015) at 103.

[41] I believe that the debate arises because there are at least two major conceptions underlying causation. One conception looks at counterfactual dependence (the 'but for' test), examining what would have happened in an alternative universe without the variable in question. Another looks at the chain of events as they actually occurred, looking at the 'causal energy' or 'causal efficacy' of the forces sufficient to bring about the result. But causation is more subtle than either of these conceptions on its own.

For example, it is well-recognized that exclusive reliance on the counterfactual ('but for') test can at times generate absurd results. In 'over-determined' events, where there are multiple concurring sufficient causes, the 'but for' test would absurdly absolve all contributors, as each can accurately say that the event would have happened anyway. Thus, the 'but for' test cannot be the entirety of the test and we must resort to other tools. See eg. Dressler, 'Reassessing', above, at 99-102; Hart and Honoré, *Causation in the Law,* above, at 122-125.

Similarly, the difficulties with omissions arise only when one relies *exclusively* on concepts such as 'causal energy' or 'causal efficacy' and sets aside counterfactual analysis. That limited analysis can also generate counterintuitive results, such as not conceding that failures by humans to fulfil their duties can have consequences. Causation (and contribution) are more subtle than either 'counter-factual dependence' or looking for 'sufficient' causes. Both types of analysis are needed to capture the nuances of causation.

[42] V Tadros, *Criminal Responsibility* (OUP, 2010) at chapter 6.

substantially less likely'.[43] Similarly, ICC jurisprudence has generally supported the normative conception.[44]

On the normative conception, it is easy to see that a commander's omission to take appropriate steps to inculcate respect for humanitarian law, to establish a system of discipline, and to repudiate and punish crimes, thereby encourages or facilitates subsequent crimes, in comparison with the situation that would have pertained had she met her duty. Whether one prefers to use labels such as hypothetical causation, counterfactual causation, quasi-causation or negative causation is not of interest at this point. What matters is that there is ample ground to conclude that omissions can satisfy the causal contribution requirement. To deny this is to deny that failures by humans to fulfil their duties can ever have consequences.

It is sometimes thought that the assessment of the impact of omissions is more difficult or more speculative than the assessment of the impact of acts.[45] This view overestimates the clarity of the impact of acts. Assessing the impact of an act also entails a 'hypothetical' assessment. Whether for acts or omissions, the counterfactual analysis equally involves imagining a hypothetical alternative world. Furthermore, the daily practice of criminal law shows that the impact of acts can often be equally difficult to assess. For example, did one blow among many other blows hasten the death? Conversely, the impact of omissions can be quite clear, as in the case of the pilot choosing to slump passively during a routine landing and thus crashing the plane. The real difficulty is not the difference between acts and omissions, but rather the inherent challenges of assessing impacts on behaviour of other human beings. This is why accessory liability only requires 'contribution' as opposed to full 'causation'.

This thesis does not aim to delve into or add to the already extensive discussion on that philosophical debate; my aim is to explore other specific issues in command responsibility and culpability. The position that I adopt (the normative conception of causation) already accords with ICL doctrine, with the jurisprudence of national systems,

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[43] *Prosecutor v Popović,* Judgement, ICTY A.Ch, IT-05-88-A, 30 January 2015 at para 1741.

[44] *Prosecutor v Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(8)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC PTC, ICC-01/05-01/0815 June 2009 ('B*emba* Confirmation Decision') para 423-25; *Prosecutor v Jean-Pierre Bemba Gombo*, Judgment Pursuant to Article 74, ICC T.Ch, ICC-01/05-01/08, 21 March 2016 ('*Bemba* Trial Judgment') *Bemba* Trial Judgment, para 212 ('hypothetical' causation); the Steiner Opinion at para 18 explicitly discusses the 'naturalistic' versus the 'normative' conception; the Ozaki Opinion at para 19-23 engages with the normative considerations and juridical practice.

[45] See eg Bemba Confirmation Decision, at para 425; '*Bemba* Trial Judgment' at para 212.

and with the preponderance of arguments on normative theory. Thus, my arguments rely on the excellent responses already provided in the ample discourse on the issue.[46] My arguments build on the well-established normative conception of causation, to unpack the implications for command responsibility. This accords with the coherentist method: even if there might be philosophical doubts and we cannot achieve absolute certainty, we can still build on the best available understandings.

[46] See eg. G Fletcher, *Basic Concepts of Criminal Law* (1998) at 67-69; G Fletcher, *Rethinking Criminal Law* (1978, reprinted 2000) 585-625; A Ashworth, *Principles of Criminal Law* (5th ed, 2006) at at 418-420; Husak, 'Omissions', above at 160-165; Hart & Honoré, *Causation in the Law* at 30-31, 40 and 447-449; C Sartoria, 'Causation and Responsibility by Michael Moore', 119 *Mind* (2010) 475; J Schaffer, 'Contrastive Causation in the Law', 16 *Legal Theory* (2010) 259; RW Wright, ''Moore on Causation and Responsibility: Metaphysics or Intuition?' in K Ferzan & S Morse, eds, *Legal, Moral and Metaphysical Truths: The Philosophy of Michael Moore* (OUP, 2015).

Summary

This thesis is about the encounter between criminal law theory and international criminal law (ICL). This encounter can be illuminating both for ICL and for criminal law theory. To manage the scope of the inquiry, I focus on one subset of criminal law theory, which is concerned with fundamental moral constraining principles (culpability, legality). I refer to these as "deontic" constraints, because they respect the agency and dignity of the persons affected by the system. The main contribution of this thesis is to advance a method for identifying and clarifying the appropriate principles. It is surprisingly difficult to specify the principles appropriate to ICL and their parameters; this thesis suggests some solutions.

A first challenge, raised by many scholars, is that familiar principles from national law may not even be appropriate in ICL, because ICL deals with extraordinary circumstances and collective conduct. I argue that principled constraints of justice must be respected, but also that unusual circumstances may generate deontically-justified refinements of our understandings. I draw lessons from common criticisms of liberal accounts, to argue for a humanistic, cosmopolitan approach, which is prepared to re-examine its assumptions.

A second challenge is finding a *method* for this inquiry. How can we even attempt to evaluate what 'justice' requires in novel contexts? I will show that the most familiar sources of guidance are unreliable. Accordingly, I propose a 'coherentist' method as the best solution. 'Coherentism' stipulates that we do not need to identify a bedrock comprehensive ethical theory in order to discuss the justice of particular doctrines. Instead, we can work productively at a middle level, using all of the available clues – including patterns of practice, normative arguments, and considered judgments. We can test these clues against each other to form the best hypotheses we can. The coherentist account accepts that the currently prevailing understandings of the principles are contingent human constructs. Nonetheless, a human and fallible conversation can let us do valuable analytical, normative, and critical work.

Thus, the major contribution of this thesis is to lay the groundwork for even the *possibility* of doing criminal law theory in ICL. This topic is relatively philosophical and fine-grained in comparison to some of the larger controversies currently raging about

ICL. Nonetheless, the inquiry is important and potentially illuminating, for at least three reasons.

First, it is important to ensure that persons are not treated unjustly. Recent ICL jurisprudence and scholarship shows intensified interest in deontic constraints; this thesis will assist jurists and scholars engaging in such analyses. Second, clarifying the constraints can also help produce more effective criminal law, because it helps avoid excessively rigid conceptions of the constraints. The coherentist method provides reference points for a more grounded debate. Third, the inquiry can be illuminating for general criminal law theory. ICL presents novel doctrines and novel problems. The study of special cases can help us discern unnoticed variables, connections, and caveats, that we would not have noticed when we work in a 'normal' context. As an analogy, the study of physics near a black hole, or at velocities near the speed of light, may lead us to notice that concepts we used in everyday experience are actually more subtle than we thought.

In this thesis, I proceed in three steps. First, I set out the *problem*: the need for more careful deontic reasoning. Second, I outline a *solution*, a proposed framework which includes the coherentist approach to deontic reasoning. Third, I *demonstrate* the framework by applying it to a specific controversy: the doctrine of command responsibility.

I select command responsibility as a case study because it raises novel and important questions. Command responsibility originated in international law, and thus has not had the same scrutiny as other modes of liability, which were developed in national practice over centuries. Command responsibility is currently hotly contested and the discussion is now very tangled. I argue that this seemingly anomalous doctrine is valuable and deontically-justified. The 'should have known' fault standard seems, at first glance, to contradict familiar principles. I argue that command responsibility reveals a sound insight of justice; it delineates a set of circumstances in which a criminally negligent omission is just as blameworthy as a knowing omission. The analysis illustrates my theme that the novel doctrines and contexts of ICL can lead us to rethink assumptions rooted in the 'normal' contexts, and thereby furnish new insights.

Samenvatting

Onderzoek naar rechtvaardigheid in bijzondere rechtszaken: Strafrechtstheorie en internationaal strafrecht

Dit proefschrift beschrijft het raakpunt van de strafrechtstheorie en het internationaal strafrecht. Dit raakpunt kan verhelderend zijn voor zowel het internationaal strafrecht als voor de strafrechtstheorie. Om de omvang van dit onderzoek in te perken, focus ik op het onderdeel van de strafrechtstheorie dat van toepassing is op de fundamentele morele beperkende principes van schuld en het legaliteitsbeginsel. Ik verwijs naar deze principes als "deontische" beperkingen, aangezien zij de keuzevrijheid en waardigheid respecteren van degenen die door het systeem beïnvloed worden. De belangrijkste bijdrage van dit proefschrift is om een methode te presenteren om de toepasselijke principes te identificeren en te verhelderen.

Het is verbazingwekkend lastig om de toepasselijke internationaal strafrechtelijke principes en de daarbij behorende parameters te specificeren, maar dit proefschrift biedt een paar oplossingen.

Een eerste uitdaging die door veel rechtsgeleerden wordt geopperd is dat bekende nationaalrechtelijke principes niet toepasselijk zijn in het internationaal strafrecht, omdat dat betrekking heeft op buitengewone omstandigheden en collectief gedrag. Mijn stelling is dat principiële beperkingen gerespecteerd moeten worden, maar ook dat ongewone omstandigheden mogelijk deontisch gerechtvaardigde verfijningen van ons begrip kunnen voortbrengen. Ik haal lering uit veelvoorkomende kritieken van liberale verklaringen, door een humanistische en kosmopolitische benadering te bepleiten die bereid is om haar aannames te heroverwegen.

Een tweede uitdaging is om een onderzoeks*methode* te vinden. Hoe kunnen we zelfs maar proberen te toetsen wat vereist is voor 'rechtvaardigheid' binnen een nieuwe context? Ik zal aantonen dat de vertrouwde leidraden onbetrouwbaar zijn. Derhalve stel ik een 'coherentie' methode voor als de beste oplossing. De coherentietheorie stelt als voorwaarde dat we geen fundamenteel alomvattende ethische theorie nodig hebben om de rechtvaardigheid van specifieke doctrines te bespreken. In plaats daarvan kunnen

we op middenniveau productief te werk gaan door gebruik te maken van alomtegenwoordige aanwijzingen - inclusief praktijkvoorbeelden, normatieve argumenten en weloverwogen uitspraken. We kunnen deze aanwijzingen tegen elkaar opwegen om de best mogelijke hypotheses te vormen. De coherentiemethode aanvaardt dat de huidige leidende begrippen menselijke constructies zijn. Niettemin kan een menselijk en feilbaar discours ons waardevol analytisch, normatief en kritisch werk laten doen.

Zodoende is de grootste bijdrage van dit proefschrift het feit dat de basis wordt gelegd voor zelfs de *mogelijkheid om* strafrechtstheorie in het internationaal strafrecht toe te passen. Dit onderwerp is relatief filosofisch en gedetailleerd in vergelijking met een aantal grotere controverses die zich momenteel in het internationaal strafrecht afspeelt. Niettemin is het onderzoek belangrijk en mogelijk verhelderend om tenminste drie redenen.

Ten eerste is het belangrijk om te verzekeren dat mensen niet oneerlijk behandeld worden. Recente jurisprudentie en wetenschappelijk onderzoek op het gebied van het internationaal strafrecht tonen aan dat er een grotere interesse is in deontische beperkingen; dit proefschrift heeft als doel om juristen en academici in dergelijke analyses bij te staan.

Ten tweede kan het verduidelijken van deze beperkingen ook helpen om het strafrecht efficiënter te maken, omdat het helpt om overmatig strikte opvattingen van de beperkingen te vermijden. De coherentiemethode biedt referentiepunten voor een grondiger debat. Ten derde kan dit onderzoek verhelderend werken voor de algemene strafrechttheorieën. Het internationale strafrecht biedt nieuwe doctrines en nieuwe problemen. De studie van speciale rechtszaken kan ons helpen om niet eerder opgemerkte variabelen, verbindingen en waarschuwingen te onderscheiden, die we niet opgemerkt zouden hebben als we ze vanuit een 'normale' context zouden benaderen. Analoog hieraan maakt de natuurkunde met studies van zwarte gaten of naar snelheden die de lichtsnelheid benaderen ons ervan bewust dat alledaagse concepten eigenlijk meer subtiel zijn dan we dachten.

In dit proefschrift volg ik drie stappen. Allereerst definieer ik het probleem: De behoefte aan een meer voorzichtig deontische redenering. Ten tweede schets ik een oplossing, namelijk een kader dat de coherentiemethode van deontisch redeneren

omvat. Ten derde toon ik de werking van het kader aan door het toe te passen op een specifieke controverse: de doctrine van de *command responsibility*.

Ik heb *command responsibility* als casus gekozen omdat het nieuwe en belangrijke vragen oproept. *Command responsibility* komt voort uit internationaal recht, en is daardoor niet aan hetzelfde nauwkeurige onderzoek onderworpen als andere vormen van aansprakelijkheid die in de nationale rechtspraktijk over eeuwen heen ontwikkeld zijn.

De *command responsibility*-theorie wordt tegenwoordig alom betwist. Ik bepleit dat deze schijnbaar afwijkende doctrine waardevol en deontisch gezien gerechtvaardigd is. De "zou het geweten moeten hebben" standaard van schuld lijkt op het eerste gezicht tegenstrijdig te zijn met de welbekende principes. Ik beargumenteer dat command responsibility een helder inzicht van rechtsvaardigheidsprincipes onthult; het schetst een reeks omstandigheden waarin een strafrechtelijk nalatig verzuim evenveel blaam treft als een bewust verzuim. De analyse onderschrijft mijn stelling dat nieuwe doctrines en contexten uit het internationaal strafrecht ons ertoe kunnen brengen om aannames die geworteld zijn in een 'normale' context, te heroverwegen, en ons hierbij tot nieuwe inzichten te laten komen.

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Curriculum Vitae

Darryl Eric Robinson was born 17 May 1971, in Thompson, Manitoba Canada. He received his LLB in Law at the University of Western Ontario (1994), where he was President's Scholar and received the Gold Medal (top student in the program). Prior to that, he did two years' study of philosophy at the University of Western Ontario, where he had the top standing in the Faculty of Arts. He received his LL.M in Law New York University School of Law (2002), where he was a Hauser Global Scholar, and received the Jerome Lipper Award for outstanding achievement in the International Legal Studies Program.

Darryl clerked at the Supreme Court of Canada (1996). He then served as a Legal Officer at Foreign Affairs Canada (1997-2004), working in international human rights, humanitarian and criminal law. His work in the creation of the International Criminal Court and in the development of Canada's new crimes against humanity legislation earned him a Minister's Citation and a Minister's Award for Foreign Policy Excellence.

From 2004 to 2006, he joined the International Criminal Court as an adviser to the Chief Prosecutor. From 2006 to 2008, he was a Fellow, Adjunct Professor and Acting Director of the International Human Rights Clinic at the University of Toronto Faculty of Law. He joined Queen's University Faculty of Law in July 2008. He is currently an Associate Professor, teaching criminal law, international criminal law, and international human rights law.

Darryl was the 2013-14 recipient of the Antonio Cassese Prize for International Criminal Legal Studies. His writings on international criminal law focus on criminal law theory, crimes against humanity, and complementarity. His research seeks to develop a humanistic system of international justice, which is fair in its treatment of individuals, mindful of competing societal goals, and inclusive of diverse global perspectives.

In 2013, Darryl became an external PhD candidate of Leiden Law of Leiden University, under the supervision of Prof. Carsten Stahn, with co-supervisors Giulia Pinzauti and Joseph Powderly.