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

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PART I

INTRODUCTION AND PROBLEM

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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.