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

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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.