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

Robinson, D.E.

3
The Humanity of Criminal Justice

OVERVIEW

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

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

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

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

3.1. CONTEXT AND ARGUMENT

3.1.1 Context: The Critique of the Liberal Critique

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

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

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

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

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

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

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

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

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

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

3.1.2. My Argument: The Humanity of Justice

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

3.1.3. Outline and Terminology

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

[9] §1.5.1.

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

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

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

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

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

3.2. WHY ENGAGE WITH CONSTRAINTS: A HUMAN COMMITMENT

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

3.2.1 The Doctrinal Challenge to Principles, and the Normative Response

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

3.2.2 The Humanity of the 'Enemy of Humanity'

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

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

[27] See Fuller, ibid.

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

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

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

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

---

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

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

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

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

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

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

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

---

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

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

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

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

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

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

---

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

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

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

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

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

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

3.2.3 Toward A More General Theory of Criminal Law

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

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

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

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

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

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

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

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

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

---

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

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

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

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

3.2.4 Combining Liberal and Critical Insights

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

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

---

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

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

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

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

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

---

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

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

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

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

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

[56] *Ibid*, at 21.

[57] *Ibid.*, at 21.

[58] *Ibid.*, at 199.

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

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

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

---

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

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

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

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

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

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

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

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

3.3. ABSORBING COMMON CRITICISMS: A HUMANISTIC ACCOUNT

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

3.3.1. Grappling with Collective Action

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

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

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

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

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

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

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

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

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

[71] *Ibid.*

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

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

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

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

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

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

3.3.2. Acknowledging Social Context

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

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

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

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

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

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

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

---

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

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

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

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

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

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

3.3.3. Western Constructs or Shared Concerns?

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

---

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

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

3.4 IMPLICATIONS

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

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

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

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

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