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

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# 5

# Criminal Law Theory in Extremis

### OVERVIEW

In the last two chapters, I established that deontic principles do matter in ICL contexts, and outlined a coherentist method to help us formulate those principles. In this chapter, I outline how the framework introduced in Chapters 3 and 4 can raise new questions, both for ICL and for general criminal law theory. My primary goal in this thesis is to develop a framework capable of tackling questions of criminal law theory and justice in the unusual contexts of ICL. However, as an interesting by-product, the account may also generate insights for mainstream criminal law theory.

The study of extreme cases can challenge our understandings of the principles developed in everyday experience. I will show that a theoretical framework equipped to study ICL may require a 'cosmopolitan' perspective, which can actually lead us to question even the central role of the state itself in criminal law. I will show how studying ICL problems may require us to unpack the roles traditionally played by 'the State' in criminal law thinking, and to re-examine many familiar tools of criminal law thought.

I also note some 'promising problems' that are worthy of investigation, and indicate how this framework might approach them. These include: legality without a legislature; a humanistic account of duress and social roles; and superior orders and state authority.

## 5.1. QUESTIONS FOR CRIMINAL LAW THEORY

A central aim of this thesis is to bring criminal law theory to bear on ICL problems. It turns out, however, that doing so is not simply a matter of applying the accumulated wisdom of general criminal law theory to ICL issues. Instead, the process provides

insights in two directions. ICL raises new problems and new questions that were not necessarily considered in criminal law theory. The study of ICL problems leads us into some new and largely unexplored territory, in which we lose the familiar backdrop for most criminal law thinking. ICL invites us to imagine a much more general account of criminal justice, which contemplates some very different conditions.

### 5.1.1 The Normal Case and the Special Case

With the benefit of long experience and debate, criminal law scholars and practitioners have been developing a fairly elaborate set of propositions about the requirements of criminal justice, with many points of broad agreement and many points of dispute. These debates have generally taken place in one particular context, the 'normal' context: the practice of criminal law as known in the modern state. In the normal context, criminal law is applied by authorities of a single modern state to human individuals within that state's jurisdiction. The state has the familiar Westphalian features, which include, for example, a claim to paramount authority within a territory, and branches of government playing different roles (legislature, judiciary and executive). Generally, the model assumes a functioning state and relative stability, so that criminal activity is usually deviant from social norms.

These assumptions are entirely understandable and appropriate given the historic experience with criminal law in recent centuries. Of course it was correct for jurists and scholars to assume these common and given features, in order to try to systematize and make fair the apparatuses of criminal law actually affecting the lives of human persons.

However, the study of 'special' cases can lead us to reconsider our theories built on the 'normal' cases, requiring us to notice subtleties and underpinnings. In doing so, we can build a more 'general' theory. To draw an analogy with physics, we may have a workable understanding of 'mass' or 'time' in our common everyday life on Earth, and yet observations near a black hole, or at relativistic speeds, may lead us to realize that these concepts contain subtleties that we had not detected in our everyday experience. It is not that the deeper concepts of 'mass' or 'time' are *different* on the Earth or near a black hole.

It is just that inherent conditions, limitations, or parameters that we had not needed to think about in 'normal' conditions become more noticeable in a different context.

In a similar manner, the study of special cases from ICL may enrich general criminal law theory. Unusual contexts (e.g. law applied by international tribunals, possibly in situations of state collapse or involving multiple state actors) may help us to notice broader assumptions made in criminal law theory that we had not previously confronted. Issues that are marginal or peripheral in a 'normal' context , and that which can be set aside or ignored in mainstream theory, might become central in an unusual case, demanding clarification.

I have already touched on examples of ICL's special challenges (Chapter 3). Crimes of mass coordination can require us to consider the outer limits of culpability. In ICL, we more frequently encounter crimes that seem to be causally over-determined, which can help us more precisely confront causation and culpability in such circumstances.[1] Criminal governments overturn the normal role of the state as law-provider. The alternative means of law creation used in ICL call for reflection on the parameters of fair warning and the requirements of the legality principle. These and other special problems can lead us to learn more about the principles used in everyday experience.

As I hope I have made clear, I am not suggesting that ICL requires a different concept of 'justice' simply because it is international. Nor have I suggested that national criminal law never encounters extreme cases, or that ICL is entirely different from national criminal law, or that ICL theory is entirely different from national criminal law theory. I am saying that *salient* differences in context can help us reconsider underlying suppositions and clarify ideas in ways that we would not have considered if we think only about the normal context. My proposal is akin to Scanlon's conception of 'parametric universalism': sometimes the same underlying principle might generate different rules where there are salient differences in context.[2]

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

[2] TM Scanlon, *What We Owe To Each Other* (Harvard University Press, 998) at 329. For example, a society in a cold climate might have a rule about always helping a driver whose car has broken down, and a society in a warm climate might not have such a rule, and yet the two different rules may both actually be consistent with an underlying principle about helping others who are in great danger when it is safe to do so.

### 5.1.2 The Cosmopolitan Challenge to the State-Centric Account

In Chapter 3, I suggested a 'humanistic' account, and in Chapter 4, I added that the approach should also be 'coherentist'. I now add the proposal that an account should also be 'cosmopolitan', which is a partial challenge to state-centric thinking. This is potentially perplexing for criminal law theory, at least initially, because it demands a much more general theory of the practice of criminal law, which is not necessarily centered on the state.

The term 'cosmopolitanism' has been used in literature on international relations and international legal theory,[3] and in ICL literature,[4] with differing connotations, but there are three main recurring features. First, cosmopolitanism does not assume the centrality of states to the extent that many other theories do. Instead, cosmopolitanism focuses on *human agents* rather than on states per se. Cosmopolitanism regards states as one historically contingent coordination device created by humans to advance human ends. Cosmopolitans are prepared to see states supplemented by other governance structures as needed.[5] This outlook is particularly salient for the study of ICL norms, since ICL embraces alternative governance structures to supplement state structures, and enables them to apply law directly.[6]

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[3] K Appiah, *Cosmopolitanism: Ethics in a World of Strangers* (WW Norton & Company, 2006); D Archibugi, D Held and M Köhler, *Re-imagining Political Community: Studies in Cosmopolitan Democracy* (Stanford University Press, 1998); D Archibugi, 'Immanuel Kant, Cosmopolitan Law and Peace' (1995) 1 *European Journal of International Relations* 429; S Benhabib, *Another Cosmopolitanism* (OUP, 2006); C R Beitz, *Political Theory and International Relations* (Princeton University Press, 1999); J Bohman and M Lutz-Bachmann (eds), *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal* (The MIT Press, 1997); D Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Polity, 1995); S van Hooft, *Cosmopolitanism: A Philosophy for Global Ethics* (CUP, 2009); T W Pogge, 'Cosmopolitanism and Sovereignty' (1992) 103 *Ethics* 48; R Vernon, *Cosmopolitan Regard: Political Membership and Global Justice* (CUP, 2010).

[4] G Simpson, *Law, War and Crime: War Crimes Trials and the Reinvention of International Law* (Polity, 2007), 12, 24, 30-36 and 44-46; M Drumbl, *Atrocity, Punishment, and International Law* (CUP, 2007), at 19-20, 185-186; D Hirsh, *Law Against Genocide: Cosmopolitan Trials* (Routledge, 2003); P Hayden, 'Cosmopolitanism and the Need for Transnational Criminal Justice: The Case of the International Criminal Court' (2004) 104 *Theoria* 69.

[5] See e.g., *Political Theory*, above, at 6, 53, 182; Held, *Democracy,* above, at 233-35; J Habermas, 'Kant's Idea of Perpetual Peace, With the Benefit of Two Hundred Year's Hindsight', in Bohman and Lutz-Bachmann, above, 113 at 128-129.

[6] On ICL and cosmopolitan de-emphasis of the state, see D Koller, 'The Faith of the International Criminal Lawyer', (2008) 40 *NYU Journal of International Law & Politics* 1019, at 1052; Simpson, *Law,* above, at 46; D Luban, 'State Criminality and the Ambition of International Criminal Law', in T Isaacs and R Vernon (eds), *Accountability for Collective Wrongdoing* (CUP, 2011) at 64.

Second, cosmopolitan regard for others does not stop at the boundaries of one's state.[7] This is not to say that borders do not matter at all, or that cosmopolitanism is a utopic fantasy. Cosmopolitanism acknowledges the contemporary socio-political constructs of states. Hence borders do matter, and we may be more involved with members of our own polity, but we also have concern and regard for all human beings. Cosmopolitan regard is also salient for an account of ICL norms, since ICL delineates violations that are not just of domestic concern, but that can also be transnationally prosecuted.

Third, cosmopolitanism searches for commonalities between cultures, but it also recognizes and respects differences, thus embracing pluralism and the building of a *modus vivendi*.[8] Cosmopolitanism is sometimes incorrectly conflated with universalism, but such conflation misses the key nuances of cosmopolitanism. Cosmopolitanism is a deliberate contrast with universalism: it does not assume that we share all the same values. Instead it assumes we have *enough common ground* to at least carry out a conversation between those with different outlooks.[9] Similarly, some warn that cosmopolitanism might be invoked as a mask for hegemony, but this is an objection to failed or false cosmopolitanism; it is not an objection to the prescription of genuine conversation.[10] Interestingly, the cosmopolitan prescription of a genuine conversation is very much in the same spirit as the coherentist approach I outlined in Chapter 4.[11]

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[7] Pogge, 'Cosmopolitanism' above, at 49.

[8] See e.g. Appiah, *Cosmopolitanism,* above, at xv, 96-99, 144, 151; van Hooft, *Cosmopolitanism,* above, at 164-69.

[9] On a universalist account, I would be trying to discover the deep, 'true', universal answers for the 'correct' formulation of fundamental principles. I am talking instead about a conversation, in which the participants may have different viewpoints, and in which there may be multiple plausible formulations. See Chapter 4.

[10] See e.g. M Koskenniemi, '*Humanity's Law,* Ruti G. Teitel', (2012) 26 *Ethics & International Affairs* 395 (book review); R Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Wiley, 2002) at 47-48. Such objections are not a reason to decline to *attempt* a genuine cosmopolitan conversation; they are reminders that we must act with humility, caution about our assumptions, and open-mindedness to other views. See Chapters 4 and 5.

[11] For example, as K Appiah writes, cosmopolitans suppose that persons from different cultures have enough overlap in their vocabulary to begin a conversation. They do not suppose, like some universalists, that we could all come to an agreement if only we had the same vocabulary. See Appiah, *Cosmopolitanism*, above, at 57. Appiah also notes that we might agree on a practice even if we do not agree on the underlying justification. Ibid at 67. There are clear parallels with coherentist ideas discussed in Chapter 4 (sufficient vocabulary for conversation, incompletely theorized agreements).

Similarly, Monica Hakimi, while not explicitly adopting the label 'cosmopolitan', advances cosmopolitan ideas when she argues that a community (including the international community) does not require consensus on all values, and is not necessarily diminished by discord; instead a community is partially constituted by its conflicts and disagreements and its efforts to manage disagreements. M Hakimi, 'Constructing International Community' (2017) 111 *AJIL* 317.

Cosmopolitanism's departure from a state-centric approach is both very challenging and very promising for criminal law theory. Cosmopolitanism recognizes states as important and prominent centres of authority in the contemporary arrangement of social and political life. However, states are not the *only* possible centre of authority. Cosmopolitanism understands individuals not only as citizens of a given state, but also as members of overlapping networks. A cosmopolitan imagination can easily envisage a 'neo-medieval' landscape, featuring overlapping and diverse governance structures.[12]

By contrast, criminal law theory traditionally – and entirely understandably, given the normal historic experience – assumes the modern state as its centerpiece. Most thinking about criminal law regards each country as a separate and more-or-less closed microcosm, apart from peripheral cases of overlapping jurisdiction. Thus, criminal law problems are discussed as if the relevant players are that one state and the individual inhabitants. In this picture, one can readily rely on concepts such as citizenship or community to help explain aspects of criminal law.

ICL, which contemplates the unmediated application of law to individuals by international governance mechanisms,[13] provides many examples that do not readily fit this familiar picture. ICL can help us see that the familiar picture (normal criminal law in a functioning state) is only an *example* of the more general possibilities of criminal law. Although many regard the state as a strictly essential requirement for criminal law, we might find on inspection that what is really required is not the entire package of the modern Westphalian state, but rather certain *features* of the state. We might also see how those features could be allocated differently or vested in other institutions. The emergence of new institutions, such as international courts, can help us separate out different threads that might be bundled together in the context of a state, giving us a more thorough understanding of what is needed.[14]

A more general theory of criminal law requires a bigger imagination about the potential configurations of criminal law. We may find that criminal law does not

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[12] Held, *Democracy,* above, at 224-234; Habermas, 'Kant's Idea', above, at 128-129.

[13] See generally J K Cogan, 'The Regulatory Turn in International Law', (2011) 52 *Harvard International Law Journal* 322.

[14] For articles adding new nuances to the concept of 'authority', drawing from international courts, see eg. A von Bogdandy and I Venzke, 'On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority' 26 *Leiden J Int L* (2013) 49; L Vinjamuri, 'The International Criminal Court and the Paradox of Authority', 79 *Law and Contemporary Problems* (2016) 275.

necessarily require a 'state' per se; perhaps what is needed can be stated in even more general terms (e.g. public authority).

### 5.1.3 Unpacking 'the State', As Well As Common Tools of Thought

I am suggesting, contrary to typical thinking about criminal law, that 'the State' is not necessarily always a central and indispensable character. Of course, as a matter of positive law, ICL institutions exercise authority delegated by states. Furthermore, states are obviously ubiquitous in ICL: they may bestow jurisdiction, they carry out arrests, they shape ICL doctrines and policies, and they order crimes or try to halt crimes.

What I am saying is that ICL presents criminal law without the familiar conceptual framework of 'the State': a single Westphalian state sitting in judgment of the humans within its jurisdiction for criminal law thinking. This central character in criminal law thinking is a single entity, claiming a monopoly of force in a territory and uniquely empowered to sit in judgment of all the other actors.[15] It is the law-maker, law-interpreter, and law-enforcer; it is the keeper of the peace, custodian of public right, embodiment of the community, and beneficiary of duties of allegiance.

In the normal case, criminal law theory can assume that all of these roles and attributes are merged in one posited entity, which is also the entity creating and enforcing criminal law in the case under question. However, this package – this unity – may not be present in ICL contexts. These functions may be disaggregated over different entities, or they may be duplicated in more than one entity purporting to exercise them in different ways.

When we lose the single (comparatively) tidy package, we also bring into question many of the tools of thought that have been used in analyzing criminal law. I will give three examples: citizenship, community, and authority. First, criminal law theorists often invoke the relations between '*citizens*' in a polity.[16] However, the idea of 'citizenship' may not be an appropriate explanatory tool if bonds of citizenship are not present between accused, victims, and other states asserting authority or international tribunals.[17]

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[15] L Green, *The Authority of the State* (Clarendon Press, 1988).

[16] See e.g. R A Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart, 2007) at 49-54.

[17] Of course, as a matter of positive law, nationality remains a clear ground of jurisdiction. I am speaking here of citizenship as a theoretical tool for analysis of doctrines.

Perhaps 'citizenship' will prove to be a place-holder for a deeper concept (perhaps there are relations and duties between persons just as fellow persons). Second, criminal law theorists sometimes invoke the idea of '*community*', which is not too obviously problematic in normal criminal law, because we have some sense of what the community is.[18] However, in ICL, what was formerly a peripheral issue becomes a core problem. If we want to use 'community' as a tool of thought in ICL, we have to think more carefully about how a 'community' is constituted and why that tool is relevant.[19] Third, criminal law theorists have invoked '*State authority'*, which is comparatively straightforward in a normal context, where the State authorizing the act and the State applying criminal law are the same entity. In ICL, however, the entity applying the law (e.g. a tribunal) will often not be the entity that authorized the act (e.g. a state). Thus, new questions would arise about why criminal law accommodates state authority, whether ICL should accommodate the authority of other states, to what extent, and why. In short, when these various roles and attributes, normally bundled in a single entity, are disaggregated, we find ourselves with both the burden and the opportunity of isolating the significance of those different roles and attributes for criminal law.

Another upshot is that we should not assume that tribunals must be 'like' states insofar as they apply criminal law, and then find fault if they are different from states.[20] Some features of a state may be needed for criminal law, others may not, and others may require modification of our thinking. For example, ICL does not feature a legislature per se, which differentiates it from a typical national criminal legal system. However, that particular feature of a state may not be essential for a system to do *justice*. We must distinguish (i) the rules that have grown around particular contingent features of the

[18] See e.g. Duff, *Answering for Crime,* above*,* at 44-46 and 52-56.

[19] See preliminary discussions in Duff, ibid at 55-56. Some scholars insist that there is no 'international community', because of divergences in values and interests. Such claims appear to over-estimate the level of agreement needed to constitute a 'community' (for example, the people of Toronto have diverse social and political views, with many born in different cultures, and yet they constitute a 'community'). Alternatively, such claims may underestimate how much we human beings, with nearly identical DNA, stuck to the surface of a single planet, have in common. For thoughts on community, see also Appiah, *Cosmopolitanism*, above, at 57 (on the minimal convergence needed) and Hakimi, 'Constructing' above (community is partially constituted by conflict and disagreement). In any case, these questions would have to be unpacked in order for a criminal law theory drawing on 'community' to be extended to ICL.

[20] One could insist that an international tribunal acts '*like a state'* insofar as it applies criminal law. But this may be too simplistic (a cow is 'like' a horse, in that both are four legged mammals, but it is not a horse). Perhaps what matters is not similitude to a state, but rather some broader underlying characteristics, like public authority.

modern state from (ii) what requirements are actually essential for criminal law practices to be justified.

An even more challenging question is whether it is really ultimately true that only 'states' can apply criminal law. Jurists commonly say that only states have authority to do criminal law. This proposition is largely true, as a statement of currently-accepted social and legal conventions within the 'normal' case of an orderly modern state. But it is not an absolute truth: it is not something essential, eternal, or inherent to the idea of criminal law or the state. Criminal law is in reality carried out by human beings; it is only relatively recently in human history that human beings have carried out criminal law primarily through the social institution of the Westphalian state. There have been other configurations of human governance in history, with criminal sanctions applied for example by religious institutions, communities, and other organizations.[21] More recently, armed groups carrying out criminal law has raised new questions about legitimacy, legality, and the appropriate standards by which to assess such practices given the different capacities of armed groups.[22] Thus, on a deeper normative level, it is at least conceivable that authorities other than states could legitimately apply criminal law. Perhaps the state is only one possible configuration of governance. Perhaps what is really

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[21] For articles discussing the relatively recent predominance of law through modern states, and prior alternatives such as religious institutions and local communities, see eg: F Schechter, "Popular Law and Common Law in Medieval England" (1928) 28 *Colum. L. Rev*. 269; R T Ford, "Law's Territory (A History of Jurisdiction)" (1998-1999) 97 *Mich L Rev* 843; Ann Orford, "Jurisdiction Without Territory: From the Holy Roman Empire to the Responsibility to Protect" (2008-2009) 30 *Mich. J. Int'l L*. 981; J Greenberg & MJ Sechler, "Constitutionalism Ancient and Early Modern: The Contributions of Roman Law, Cannon Law, and English Common Law" (2013) 34 *Cardozo Law Review* 1021; S Dorsett & S McVeigh, "Jurisprudences of jurisdiction: matters of public authority" (2014) 23 *Griffith Law Review* 569. Early corporations acted as polities and political communities, including applying criminal law to employees and others: see eg. R Smandych & R Linden, "Administering Justice Without the State: A Study of the Private Justice System of the Hudson's Bay Company to 1800" (1996) 11 *Can. J. L. & Soc*. 21;
P J Stern, '"A Politie of Civill & Military Power": Political Thought and the Late Seventeenth-Century Foundations of the East India Company-State' (2008) 47 *Journal of British Studies* 253; E Cavanagh, 'A Company with Sovereignty and Subjects of Its Own? The Case of the Hudson's Bay Company, 1670-1763' (2011) 26 *Can. J. L. & Soc*. 25; N Yahaya, 'Legal Pluralism and the English East India Company in the Straits of Malacca during the Early Nineteenth Century' (2015) *33 Law & Hist. Rev*. 945. And see also David J. Bederman, "The Pirate Code" (2008) 22 *Emory Int'l L. Rev*. 707.

[22] See eg. S Sivakumaran, 'Courts of Armed Opposition Groups: Fair Trials or Summary Justice?' (2009) 7 *Journal of International Criminal Justice* 489; J Somer, 'Jungle Justice: Passing Sentence on the Equality of Belligerents in Non-International Armed Conflict' (2007) 89 *International Review of the Red Cross* 655; and see also S Sivakumaran, 'Ownership of International Humanitarian Law: Non-state Armed Groups and the Formation and Enforcement of IHL Rules' in B Perrin, ed, *Modern Warfare: Armed Groups, Private Militaries, Humanitarian Organizations, and the Law* (UBC Press, 2012) 87 esp at 95-96.; H Krieger, 'International Law and Governance by Armed Groups: Caught in the Legitimacy Trap?' (2018) 12 *Journal of Intervention and Statebuilding* 563 esp at 571.

needed for criminal law is something broader, such as 'governance' or 'public authority', and the institution of the Westphalian state is actually just the most familiar species of that broader genus. ICL may provide a doorway into such questions, as it is routinely carried out not by states but by international tribunals, directly applying criminal law to persons.[23] ICL provides an opportunity to explore criminal law under alternative forms of governance, and in so doing, to learn more about the more truly general case of criminal law.[24]

Of course, we can still certainly turn to the rich and well-developed thinking in the context of states as a 'reservoir' of ideas about governance under international institutions.[25] But my point of caution is that we draw from that reservoir of ideas with care, so that our net does not include the accumulated detritus that is particular to states but not necessarily essential to criminal law under other mechanisms of governance.

## 5.2 PROMISING PROBLEMS

In this section, I provide illustrations of how this framework might assist with concrete problems in ICL. I am not attempting to stake out a conclusion on any of these issues. I am simply outlining some of the potential questions and insights both for ICL and possibly for criminal law theory in general.

### 5.2.1. Legality Without a Legislature

In a normal criminal law context (i.e. within a modern state), it is comparatively easy to say how the principle of legality is satisfied: through the adoption of legislation

[23] Obviously, as a matter of positive law, tribunals exercise legal authority delegated from states. But I am speaking here not of the black-letter doctrinal basis for jurisdiction, but rather a deeper normative question about the possibilities of criminal law.

[24] Another non-statal example worthy of exploration is the context of structured non-state armed groups. Wherever penal sanctions are formally applied, our intuitions of justice might call for certain minimum deontic constraints to be respected. However, in fleshing out the specific requirements, we cannot not necessarily draw on all thinking from criminal law theory, which assumes the context of a modern state. Thus, we would be led to develop a more general theory of criminal law.

[25] K Knop, 'Statehood: Territory, People, Government' in J Crawford and M Koskenniemi (eds), *The Cambridge Companion to International Law* (CUP, 2012), 95, at 96-97 & 112-114 (discussing abstracting from the state rather than mapping it directly onto international institutions).

prior to the crime.[26] However, ICL raises two challenges. First, ICL has no legislature and ascertains law through a variety of means, including treaties and customary international law. Second, ICL periodically confronts horrific and massive crimes, for which domestic positive law is lacking, and where the parameters of international criminalization are unclear. These features of ICL require us – and enable us – to explore more precisely what the underpinnings and contours of the legality principle really are.

Consider for example the principle *nullum crimen sine lege scripta*: no crime without written law. In the context of the modern state, which features a separation of powers (and thus a legislature), and diverse societies subject to voluminous regulation, it is very plausible to regard the *lex scripta* requirement as a fundamental principle. Accordingly, scholars have understandably argued that ICL also must comply with *lex scripta* to satisfy fundamental precepts of justice. For example, George Fletcher argues that the reliance on customary international law as a source of prohibitions is an error introduced by international lawyers and reflects a failure to understand the full implications of legality in criminal cases.[27] I certainly agree that some problems in ICL flow from habits and thought patterns of international lawyers (see Chapter 2). This may however be an instance where the seeming departure is one that, on further inspection, proves to be deontically justifiable.

In almost all of contemporary human experience with the criminal sanction, it seems quite plausible to regard *lex scripta* as a precondition for just punishment. However, it is studying the exception that may teach us the most about the rule. *Lex scripta* may simply be a *technique* to satisfy a more elementary requirement. If so, it may emerge as a requirement of justice only under certain conditions.

Through a few thought experiments, we can readily imagine examples in which just treatment would not require written law. For example, we could imagine a small society trapped on an island developing a system to enforce a few basic prohibitions. Our concept of fair warning would likely not require written prohibitions in that situation, if

[26] The principle of legality requires that persons be punished only for transgressing existing law, so that persons have fair notice of prohibitions and can order their affairs accordingly. For a careful discussion see K Gallant, *The Principle of Legality in International and Comparative Criminal Law* (CUP, 2009).

[27] G Fletcher, *The Grammar of Criminal Law: American, Comparative and International* (OUP, 2007), Vol. 1 at 164 (at note 41) and at 222.

prohibitions were otherwise known or ascertainable.[28] I am not suggesting that ICL is analogous to the island situation: I am using the island situation to demonstrate that the *lex scripta* requirement is not universally applicable and therefore is contextually contingent. Such examples can show that written law is not a truly basic requirement, but rather a manifestation of a deeper requirement, which generates principles like *lex scripta* when certain conditions are satisfied.

ICL, a legal system without a legislature, which largely relied on customary law for its basic rules, and which has recently and rapidly transited from an embryonic to a relatively mature system, provides a wonderful setting to try to explore the parameters of the *lex scripta* requirement.[29] Under what circumstances does our concept of justice require written law and why? Can it justifiably be connected to the maturity of the system, and if so, how?[30] If writing is required, does it have to be in one place (e.g. a code) or can the writings be scattered in multiple places, as it is in common law jurisprudence or customary international law? What might we learn from studying common law traditions and customary law traditions?

ICL also provides an opportunity to explore legality in another way. As mentioned above, ICL frequently confronts massive evils in situations where positive law is lacking. The stakes in such cases are often higher than in ordinary criminal law, because (1) the atrocities are usually far more horrific and (2) positing new law to remedy any gaps (for example by multilateral treaty) is considerably more difficult than passing domestic legislation. ICL jurists have developed various strategies of argument to justify

[28] We could also consider the practice of a great many societies, which have not required written penal law and have relied on custom, to investigate the circumstances in which sanction without codification may be justifiable. As just one example of a relevant consideration, it seems unlikely that written law can truly be an absolute prerequisite for penal sanction in a society without written language.

[29] These issues do not arise before the ICC specifically, because its crimes are defined in the Rome Statute, and hence it accords with the *lex scripta* requirement. The issue is however pertinent (1) before tribunals authorized to apply customary law, (2) before national systems authorized to apply customary international law, and (3) as a principled normative inquiry. For an example of a tribunal grappling with the outer limits of legality, see the *Norman* case on whether the prohibition on recruiting child soldiers was criminalized at the time: *Prosecutor v Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction, SCSL A.Ch, SCSL-2004-14-AR72(E), 31 May 2004, (*Norman,* Child Recruitment Decision') at para. 14.

[30] See for example the argument advanced in *United States v Alstötter et al (the Justice Case)* 3 *Trials of War Criminals Before the Nuremberg Military Tribunal Under Control Council Law* No. 10 at 975 that applying the prohibition in a nascent legal system would strangle the law at birth. The argument is intriguing but a deontic justification will require a bit more development.

punishment in such cases. I expect that some such punishment can indeed be justified, but each of the major argumentative strategies employed to date has shortcomings.[31]

For example, it is often argued that the prohibition on retroactive law was not applicable in ICL, at least in its early stages.[32] That argument may indeed be correct as a matter of *positive law*, but it does not help us with our question of whether retroactivity is *normatively* acceptable, i.e. whether it is 'just'. One of the arguments raised in the Nuremberg judgment in response to the principle of legality was that it was merely a principle of justice and not a rule of international law. But in a system that seeks to do justice, surely we would not want to bat away principles on the grounds that they are merely about justice. A more promising argument is that the 'formal justice' enshrined in the principle of legality must give way to the 'substantive justice' of not letting persons escape punishment for heinous deeds.[33] That argument is appealing but incomplete, because it has a purely formal structure: it does not specify any *content* for its exception. How do we know that the prohibition we wish to impose falls within this concept of 'substantive justice'? There must be some ascertainable limits to the set of norms that could displace the requirement of 'formal justice'. It is tempting to fall back on natural law, or to assert that the acts are '*malum in se'*, but presumably we would want the rule-applier to be constrained in some ascertainable way so that we do not have arbitrary retroactive criminalization based purely on revulsion or intuition. Hence, we are thrown back into the search for some method or source to delineate the punishable prohibitions.

If we look at patterns of practice in ICL, we see that jurists have used multiple points of reference, such as criminalization in most legal systems of the world, prohibition in general international law, and appeal to a subset of values perceived as warranting penal response. A coherentist method could examine these and other points of reference, to try to identify a convincing account of when an offence can be recognized as giving rise to

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[31] Some such argumentative strategies are discussed in B van Schaack, '*Crimen Sine Lege*: Judicial Lawmaking at the Intersection of Law and Morals', (2008) 97 *Georgetown L Rev* 119; B Roth, 'Coming to Terms with Ruthlessness: Sovereign Equality, Global Pluralism, and the Limits of International Criminal Justice', (2010) 8 *Santa Clara Journal of International Law* 231.

[32] See e.g. H Kelsen, 'Will the Judgement in the Nuremberg Trial Constitute a Precedent in International Law?, (1947) 1 *International Law Quarterly* 153, at 164. The non-retroactivity principle is now formally recognized in Art. 22 of the ICC Statute.

[33] Kelsen, ibid at 165; A Cassese, *International Criminal Law*, 2nd ed (OUP, 2008) 38-41.

ICL liability. Such an account will almost inevitably embrace pluralistic sources.[34] More importantly, such an account will require a convincing deontic theory about the underpinnings and outer limits of the legality principle.

As may be seen, the account I propose would not transplant the familiar requirement of written legislation (or its international analogue, a treaty).[35] Nor would it indulge the arguments that simply circumvent legality and fair warning altogether. Instead, we use these hard cases to try to isolate what form of prohibition or warning is truly needed before we can prosecute a person. We would strive to develop a convincing understanding of the more general underlying rule.

### 5.2.2 Duress and Social Roles

The extreme contexts encountered in ICL can also generate new questions about the defence of duress. For example, in the *Erdemović* case, the accused had enlisted in a non-combat unit of the army.[36] One day his unit was sent to a farm, where they were informed that they were to shoot Muslim civilians. He protested the order, and was presented with a choice of either participating or joining the prisoners and being shot along with them. Faced with the unappealing alternative of sacrificing his life while saving no lives, Erdemović complied. The majority of the ICTY Appeals Chamber adopted a rule that duress is not a defence to the killing of civilians, following the lead of many common law jurisdictions.[37]

ICL scholars within the liberal tradition have widely and understandably criticized the majority decision for its insensitivity to fundamental principles and the importance of moral choice for culpability, given that the only way for Erdemović to be innocent was

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[34] By definition, recognition of new ICL crimes must draw from outside ICL. A pluralistic account may provide some anchoring in social facts, which is likely necessary to satisfy the underpinnings of the legality principle, while allowing recognition of offences for which there is sufficient notice. On pluralism in ICL see eg. E van Sliedregt, 'Pluralism in International Criminal Law' (2012) 25 Leiden J Int L 847; E van Sliedregt and S Vasiliev, eds, *Pluralism in International Criminal Law* (OUP, 2014); A K.A. Greenawalt, 'The Pluralism of International Criminal Law' (2011) 86 Indiana Law Journal 1063; and more generally see PS Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (CUP, 2012); C.H. Koch Jr, ' Judicial Dialogue for Legal Multiculturalism, (2004) 25 *Michigan J Int'l L* 879 esp at 897-902.

[35] Of course, for the ICC, the criminal prohibitions are codified in the Rome Statute, thus conforming with *lex scripta*.

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

[37] *Erdemović,* ibid, at para. 19.

to be dead.[38] In Chapter 2, I criticized the *reasoning* employed by the majority; however, as I emphasized, this did not necessarily exhaust my analysis of the *outcome*.[39] While I agree with the liberal critiques, there is at least room for further analysis if we take into account the social dimension of human experience (§3.3.2).

In classical liberal theories that conceive of individuals as atomistic entities entering into a notional social contract to better advance their personal aims, the freedom to preserve one's own life is the ultimate *domain reservé.*[40] To many, a law that requires one to die in order to avoid censure is futile.[41] As Paul Kahn has argued, traditional contractarian liberal theories have trouble grappling with sacrifice (both the willingness of individuals to sacrifice themselves and the state or community's claim to expect sacrifice).[42] However, if we acknowledge the richly social world of human beings, as suggested in § 3.3.2, our analysis might change. Social roles can change the expectations placed upon us. A person assuming the role of 'soldier' is expected to carry out dangerous and life-imperilling acts, including for example charging a machine gun nest if ordered to do so. Experience shows that many humans can conceive of fates worse than death (hence the phrase 'death before dishonour' or indeed, 'a fate worse than death'). Thus, punishment for a refusal to fulfil an almost certainly lethal duty is not necessarily an absurdity. Criminal laws may punish soldiers for desertion or insubordination or cowardice in the face of the enemy.

Perhaps duress is based on the expectations of firmness that we can fairly expect from members of society.[43] Normally criminal law would not and could not demand heroism, however, it is at least possible that we can justly impose higher expectations on persons assuming the role of soldier. Just as we hold soldiers liable for desertion in the face of the enemy, perhaps we could hold them to a similar standard concerning their

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[38] See e.g. R E Brooks, 'Law in the Heart of Darkness: Atrocity and Duress', (2003) 43 *Virginia Journal of International Law* 861; I. Wall, 'Duress, International Criminal Law and Literature', (2006) 4 *JICJ* 724; A Fichtelberg, 'Liberal Values in International Criminal Law: A Critique of *Erdemović',* (2007) 6 *JICJ* 3; V Epps, 'The Soldier's Obligation to Die When Ordered to Shoot Civilians or Face Death Himself', (2003) 37 *New England Law Review* 987.

[39] § 2.2.4.

[40] T Hobbes, *Leviathan,* C B MacPherson, ed (Penguin Books, 1985) at 192, 199 and 268-270.

[41] Kant, above, at 28 (6:235-236) argues that a drowning person pushing another from a plank in order to survive would be culpable but not punishable, because the punishment threatened by law could not be greater than the immediate loss of his own life.

[42] P W Kahn, *Putting Liberalism in Its Place* (Princeton University Press, 2005), at 10, 12, 25, 63, 164 and 228-240.

[43] G Fletcher, *Grammar*, above, at 117, 322 (discussing German concept of *Zumutbarkeit*).

duty not to fire on civilians. Although the *reasoning* of the majority decision in *Erdemović* may be faulted for inadequate engagement with deontological considerations,[44] it is at least conceivable that the *conclusion* reached might be justified, insofar as it was restricted to soldiers,[45] if we use an account that considers these social dimensions of human experience.

To be clear, I am not advancing a conclusion one way or another at this time. Many issues would have to be worked out in this analysis. For example, we should not build an exception for soldiers based on an archetypical impression of a soldier. The category of 'soldier' is not homogenous; we would have to think about very different contexts of armed groups around the world, as well as the situation of conscripts. [46] I am merely highlighting the type of *questions* that a careful and humanistic liberal account can raise.

### 5.2.3. Superior Orders and State Authority

Developing a normative theory of the defence of superior orders could be illuminating both for ICL and for general criminal law theory. The defence of superior orders is controversial doctrinally and normatively.[47] The defence precludes international criminal responsibility of persons who are obliged to carry out orders, which turn out to be unlawful, but at the time of commission were not known to be unlawful and were not 'manifestly' unlawful.[48] If we wish to assess whether the doctrine is normatively justified, we would have to start by trying to identify the best explanation of its underpinnings. An initial question is how to conceive of it: is it a justification or an excuse? In normal criminal law, authorization by the state is typically a 'justification'.

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[44] See Chapter 2.

[45] *Erdemović* Appeal Judgement, above, at para. 19.

[46] In liberal theory, it is often asserted that roles that are not assumed voluntarily cannot create duties, but this may or may not always be true. That question itself would require careful thought and discussion. See e.g. Green, *Authority,* above, at 211 and 238.

[47] Many would argue that there is no such defence, citing for example the Nuremberg Charter and the ICTY and ICTR Statutes. On the other hand, Nuremberg jurisprudence and the ICC Statute seem to permit the defence for orders that are not manifestly unlawful. For some leading examples of the discussion see P Gaeta, 'The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International law' (1999) 10 *EJIL* 172; R Cryer, 'Superior Orders and the International Criminal Court' in R Burchill, N White, & J Morris, eds, *International Conflict and Security Law: Essays in Memory of Hilaire McCoubrey* (CUP, 2005) 49; M Osiel, 'Obeying Orders' above.

[48] ICC Statute, Article 33.

However, for reasons I touch on below, it may be that in ICL such a defence is better conceived of as an 'excuse'.

What are the possible theoretical underpinnings of the doctrine? Given that the doctrine partially accommodates orders legally binding under national law, a possible starting point is the concept of 'state authority'. Malcolm Thorburn has helpfully highlighted state authority as an explanation in the context of justifications, with a model that looks into the role of the agent, the agent's reasons for acting and the relevant scope of discretion.[49] The concept of 'state authority' seems like part of the apparatus needed to explain the superior orders doctrine.[50]

Again, however, ICL confronts us with a more complex relationship between state authority and criminal law. In a 'normal' context, a single state is both the applier of criminal law and the authorizer of the act. Given that unity, it seems obvious why that state would build deference to its own authorized acts into its criminal law. By contrast, in ICL contexts, there may not be a unity of identity between the applier of criminal law and the authorizer of the act. Indeed, there may be multiple authority structures asserting authority in conflicting ways. For example, an official's state of nationality may authorize and order the conduct, the law of the territorial state may forbid it, and the law of an international tribunal with jurisdiction might also proscribe the conduct, but with a defence that accommodates assertions of state authority that are not 'manifestly unlawful'. In these messier contexts, we are compelled to ask additional questions: Why exactly should criminal law accommodate state authority? What is the proper scope for that accommodation?

There are other tools of thought that might be helpful. For example, Meir Dan-Cohen offers the idea of 'role distance' from official roles, which may also be of assistance.[51] The defence of superior orders may be rooted in an acknowledgement of the plight of the individual, who will be punished in domestic law for disobeying a lawful

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[49] M Thorburn, 'Justifications, Power and Authority', (2008) 117 *Yale Law Journal* 1070. See also J Gardner, 'Justifications Under Authority', (2010) 23 *Canadian Journal of Law and Jurisprudence* 71.

[50] The solution will likely not be a direct application of the approach laid out by Thorburn, because it may be that superior orders is not a justification per se. For example, justifications tend to relate to a particular valued end; the superior orders defence protects obedience to certain orders of the state, without regard to the aim or purpose of the order. Thus, a theory of superior orders may be more elaborate (excusing the individual for one form of mistake of law, but providing the excuse out of qualified deference to the authority of states).

[51] M Dan-Cohen, 'Responsibility and the Boundaries of the Self', (1992) 105 *Harvard Law Review* 959, at 999-1001.

order, and punished in ICL for obeying an unlawful order. It is often argued in response that there is no dilemma: the soldier needs simply to obey lawful orders and disobey unlawful orders. However, that response is too sanguine and does not empathetically engage with the actual dilemma where the order's legality is ambiguous. The response glibly requires soldiers to immediately and unerringly make perfect legal assessments of orders in rushed and chaotic circumstances, even though the laws of war often involve subtle and even perplexing distinctions, for which normal peacetime experience is not a reliable guide. For normal citizens, where conduct is arguably criminal, the 'thin ice principle' argues that they should stay clear of possibly criminal conduct and it is not unjust to punish them if the conduct is confirmed to be criminal.[52] However, for soldiers (or others obliged to obey), that option is not available: a refusal is a crime if the conduct turns out not to have been criminal. Thus, the defence of superior orders seems to excuse good faith errors in those ambiguous circumstances. There may be a good deontic basis to allow a soldier a margin for good faith error about truly ambiguous orders.

If we develop a convincing normative account of the defence, it may inform the interpretation of the defence,[53] it may answer some criticisms of the defence, and it may raise new criticisms of the defence (for example, perhaps it is not too broad but too narrow).[54]

## 5.3. CONCLUSION

The framework I have advanced over the last few chapters is liberal, humanistic, coherentist, and cosmopolitan. The term 'liberal' is often used to mean different things, but in this thesis, I simply mean that the framework accepts constraints on criminal law

[52] A Ashworth and J Horder, *Principles of the Criminal Law,* 7th Ed (OUP, 2013) at 62.

[53] Under Article 33 of the Rome Statute, the defence of superior orders is only available to state forces, and not necessarily to non-state armed forces. Whether judges should extend the defence (or a similar defence) to non-state groups depends on the underlying rationale: is it based in respect for state authority, or respect for the operation of armed groups?

[54] The most common criticism of the defence of superior orders comes from a pro-prosecution, victim-protection angle, arguing that the defence should not exist, because it allows officials to 'escape conviction' for acts that prove to be unlawful. However, if we develop a normative justification, we might wind up criticizing the current defence from a different direction. Article 33 of the Rome Statute precludes the defence in relation to crimes against humanity; however, there can also be borderline, ambiguous orders (e.g. to deport or detain) that are not 'manifestly' unlawful but which on closer examination constitute crimes against humanity. It may prove to be unjust to preclude the defence in such circumstances.

out of respect for individuals as moral agents with autonomy and dignity. By 'humanistic', I emphasize that the framework is not based on rarified stipulations; it is based on respect for the humanity of persons, and it reflects human ends, human concerns, and the nuances of human lives.[55] By 'coherentist', I mean that the framework does not purport to deduce propositions from abstract timeless premises, but rather accepts that we are in a human conversation about human constructs.[56] By 'cosmopolitan', I mean that we seek conversation between traditions, we are concerned with all human beings, and we regard the state as merely one useful human-created device to facilitate human governance.

Just as criminal law theory might generate new insights about ICL, ICL might generate new insights about general criminal law theory. Extreme contexts might create an opportunity to isolate with more specificity the significance of ideas like community, citizenship, authority, legislation, and even to unpack our thoughts on the role of the state itself.

I have tried to show how a thoughtful account can raise new questions and perhaps even lead us to rethink our understanding of fundamental principles. It may be that familiar formulations of principles (for example, that legality requires written law) might not in fact be elementary. They might be generated by deeper underlying commitments, and only become applicable and appropriate in particular contexts.

In Part III, I will provide a more detailed illustration of the framework in operation, by analyzing specific controversies about command responsibility and personal culpability. In doing so I will showcase the method, its questions, the themes that emerge, and the usefulness of such inquiry.

[55] For more specification of this term, see Chapter 3.
[56] For more specification of this term, see Chapter 4.